APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 241 of 2016

Dated : 31st May, 2019

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

IN THE MATTER OF :

Adani Power Maharashtra Ltd.
9th Floor, Shikhar, Mithakhali Six Road,
Navrangpura, Ahmedabad - 386006

.... **APPELLANT**

Versus

1. **Maharashtra Electricity Regulatory Commission**
   World Trade Centre, Centre No.1,13th Floor,
   Cuffe Parade,
   Mumbai – 400 005

2. **Maharashtra State Electricity Distribution Company Ltd.,**
   Prakashgad, Bandra (East),
   Mumbai – 400 051

3. **Prayas Energy Group,**
   Athawale Corner, Karve Road,
   Deccan Gymkahan,
   Pune - 4111004

.... **RESPONDENTS**

Counsel for the Appellant(s) : Mr. Sanjay Sen, Sr. Adv.
Mr. Poonam Verma
Ms. Abiha Zaidi
Ms. Aparajita Upadhyay
Mr. Mehul Rupera

Mr. Puneet Upadhyay
Mr. Shashank Kumar

Counsel for the Respondent(s) : Mr. Buddy A. Ranganadhan
Ms. Stuti Krishn for R-1

Ms. Deepa Chawan
Ms. Ramani Taneja
Mr. Kiran Gandhi for R-2

Mr. M.G. Ramachandran
Ms. Anushree Bardhan
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Mr. Pulkit Agarwal for R-3

J U D G M E N T

PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON

1. This appeal is directed against the Order dated 21.08.2013 passed in Petition No. 68 of 2012 on the file of first Respondent/Commission. Following facts led to the filing of the present appeal:

i) The Appellant is a generating company within the meaning of Section 2(28) of the Electricity Act, 2003 (hereinafter referred to as "**the Act**"). It has set up a Thermal Power Station at Tiroda, District-Gondia, State of Maharashtra (hereinafter referred to as "**Tiroda TPS**").

ii) On 17.11.2006, Maharashtra State Electricity Distribution Company Ltd.(MSEDCL) initiated RFQ bidding process for procuring 2000 MW power in case I bidding process. In response to said RFQ, Appellant made application on 10.01.2007 for allotment of Lohara Coal Blocks to the Govt. of India followed by submission of RFQ on 03.07.2002.

iii) Since Appellant was shortlisted for Request for Proposal (RFP), MSEDCL issued first RFP on 03.04.2007.

iv) On 6.11.2007, Ministry of Coal issued letter of allocation to Adani Power Ltd. conveying allocation of Lohra (West) and Lohra Extension (E) Coal Blocks as source of fuel. On 23.11.2007, Appellant applied to the Standing Linkage Committee, MoC for grant of coal linkage for balance capacity to cover the coal requirement of 1980 MW project. Therefore, MERC approved revised bid document for power procurement of 2000 MW under Case I. This led to revised final RFP on 16.02.2008 by MSEDCL which envisaged price bids in different structures / tariff components whether power supply is based on captive coal, imported coal or domestic coal.

v) On 20.02.2008, APML/Appellant submitted its bid for supply of 1320 MW power to MSEDCL mentioning Lohra Captive Coal Blocks as fuel source and also attached copy of allocation letter from MOC

dated 06.11.2007. Subsequently, on 16.05.2008, Appellant received Terms of Reference (ToR) from Ministry of Environment & Forests (MoEF) for Lohara Coal Blocks.

vi) On 21.08.2008, reports on Environment Impact Assessment (EIA), and Environment Management Plan (EMP) were submitted. On 29.07.2008, MSEDCL issued letter of intent to Appellant for supply of 1320 MWs power from Unit II & III at levalised tariff of Rs.2.64/kwh. Appellant entered into Power Purchase Agreement (PPA) with MSEDCL for 1320 MWs power supply from Unit II & III of Thiroda TPS for a period of 25 years.

vii) On 21.10.2008, an application came to be applied for various clearances for Lohara Coal Blocks. Since various clearances were getting delayed, Appellant applied for tapering linkage of coal on 27.10.2008.

viii) On 12.11.2008, Standing Linkage Committee, authorised issuance of letter of assurance by Coal India Ltd. (CIL) for 1180 MW power of Appellant at Thiroda TPS after considering the fact that Lohara Coal Blocks cater to requirement of generation of 800 MW power.

ix) On 25.11.2009, Expert Appraisal Committee (EAC) of Ministry of Environment & Forest (MoEF) based on the reports of Govt. of Maharashtra as well as the National Tiger Conservation Authority decided to withdraw the terms of reference for Lohra Coal Blocks on the ground that the said blocks were falling within the buffer zone of Tadoba Andheri Tiger Reserve.

x) Aggrieved by the said withdrawal of coal blocks, Appellant once again applied for allocation of alternate coal block on 03.12.2009. Several efforts were made to approach MOC, MOP, MoEF, Hon'ble Prime Minister and Central Electricity Authority insisting for allocation of alternate coal blocks. However, neither allocation of alternate coal blocks was positive nor restoration of ToR by redefining the boundary of Lohara Coal Blocks came to be made.

xi) According to the Appellant, when the above fact was brought to the notice of MSEDCL, MSEDCL as well as Govt. of Maharashtra wrote to Govt. of India requesting for allocation of alternate coal block to Appellant under special dispensation.

xii) At this point of time, Appellant informed MSEDCL that it is impossible to supply power under PPA from Units II & III at the rate quoted in the bid due to cancellation of Lohara Coal blocks. It also

contended that this has led to impossibility of performance of terms of contract under PPA.

xiii) Since substantial changes due to post execution of PPA occurred, according to Appellant in terms of Section 86(1)(b), 61 and 63 of Electricity Act read with Clauses 4.7 and 5.17 of the Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees notified by Government of India under Section 63 of the Act, they can claim compensatory tariff in terms of Article 12 (Force Majeure) etc. of the PPA. They filed Petition No 68 of 2012 seeking the following reliefs:-

> *"a. Direct the Respondent to return the Performance Guarantee No.007GM07082270001 dated August 2008 to the Appellant.*
>
> *b. In the alternative, and without prejudice to prayer a), this Hon'ble Commission to:*
>
> *i. direct the Respondent to consider revision of tariff and execution of a new PPA, substantially based on terms of the PPA dated 08.09.2008, which PPA has since been terminated;*
>
> *ii, consider the revised fuel cost for generation and supply of power from the Appellant's power plant in order to enable revision of tariff;*

c. Without prejudice to prayers (a) and (b) above, pending hearing and final disposal of the present petition, this Hon'ble Commission be pleased to allow the Appellant to sell power, within or outside the State of Maharashtra;

d. Pass such and further orders, as the Hon'ble Commission may deem fit and appropriate keeping in view the facts and circumstances of the case...."

xiv) During the pendency of this petition , in case No.155 of 2012, filed by Adani Power Ltd., CERC passed orders on 02.04.2013 opining that compensation needs to be allowed for escalation of price of imported coal on account of Indonesian Regulation so also on account of non-availability of adequate fuel linkage from Coal India Ltd.. This was in the form of compensatory tariff over and above the quoted tariff in the PPA. By exercising regulatory powers, CERC rejected claims under 'Force Majeure' and Çhange in Law' events but granted certain benefits.

xv) This came to be challenged in Appeal No.100 of 2013 before full bench along with Appeal No.98 of 2014 so also Appeal No.116 of 2014 in the context of shortfall of domestic coal (availability), use of imported coal consequently impacting the price of imported coal on account of change in Indonesian Regulations.

xvi) The full bench judgment dated 07.04.2016 in Appeal No.100 of 2013 came to be challenged before the apex court. By judgment dated 11.04.2017 in Energy Watchdog case the full bench judgment of this Tribunal was set aside by opining that change in policy of the Govt. with respect to availability of domestic coal to the generating companies is allowed as an event in Change in Law in terms of Article 13 of the PPA between the parties.

xvii) This led to Ministry of Power seeking clarification / advice from CERC how the issue of fuel availability shortfall could be addressed. CERC issued statutory advice to MOC regarding Section 63 of the PPA and coal shortage and observed that each case of change in law will be decided for compensation of change in law event by the Commission. Meanwhile, on 21.06.2013, Cabinet Committee for Economic Affairs approved mechanism for coal supply to power plants having long term PPAs. Pursuant to this decision, MOC amended NCDP, 2007 and limited supply of coal from 100% to 65%, 67% & 75% of annual contracted quantity in the balance period of the Twelfth Five Year Plan to power plants having normal coal linkage. MOP issued advice to the CERC consequent to decision of CCEA and amendment to NCDP.

xviii) By order dated 21.08.2013, first Respondent-MERC passed impugned order in Petition No.68 of 2012 observing that it has powers to revise tariff in terms of regulatory powers but however denied Force Majeure claim.

xix) Aggrieved by the said judgment, Appellant approached this Tribunal contending that MERC was wrong not to consider the circumstances indicated by the Appellant for the Force Majeure event in terms of PPA. They contended that Article 3.3.3 which was essential, was not at all considered since intention of the parties at the time of entering into contract i.e. PPA has to be analysed in terms of Article 3.3.3. of the PPA.

xx) They also contend that Respondent Commission erroneously held that the entire burden of fuel was to be borne by the Appellant and totally ignored the guidelines for determination of tariff for bidding process issued by Central Govt. dated 19.01.2005. They also referred to background pertaining to 2005 guidelines how it distinguished Case I & Case II for procurement of electricity by distribution licensee on long term basis.

xxi) According to Appellants by amending the guidelines of 2005 in 2009, specific guidelines pertaining to fuel arrangement for Case I bidding came to be introduced. It significantly recognized that only an

arrangement for fuel tie up at the bidding stage has to be mentioned. They also contend that MERC erred in not appreciating nationalization of coal under coal mines (Nationalization Act, 1973) by which entire coal mines and distribution fall within the domain and control of Central Govt.. This fact of control by Central Govt. was also recognized by Supreme Court of India in ***Ashoka Smokeless Coal India (P) Ltd. vs. Union of India*** *reported in (2007) 2 SCC 640*.

xxii) They contend that after New Coal Distribution Policy came to be introduced in October 2007, various policy initiatives were issued under which private sector companies involved in generation of power were allocated coal blocks under a special dispensation. The coal blocks were allocated to various State Governments under the State Government dispensation route. Case 2 bidding at the State level was encouraged.

xxiii) They contend that the Commission failed to appreciate all these facts and totally ignored the risk faced by the Appellant on account of withdrawl of TOR. Cancellation of coal blocks in the present case which cannot be attributed to the Appellant in terms of PPA and according to the Appellant, Respondent Commission was wrong in opining that bidder has to assume the full responsibility to tie up the

fuel linkage and set up the infrastructure requirement of fuel transportation and its weightage. Similarly, it went wrong in opining that the entire risk in respect of fuel was to be borne by the Appellant.

xxiv) They further contend if the problem in relation to getting coal supply post tie up of the fuel linkage, the risk cannot be attached to the bidder since bidder has no say in relation to the terms of the fuel supply agreement under which fuel linkage is made operational; similarly, the bidder has no control on the terms of allocation of coal block or on the issues pertaining to environmental clearances, land acquisition, etc., which are within the domain of the Central Government and the Central Government owned coal companies. According to the Appellant, the opinion of MERC that the second Respondent-MSEDCL is not concerned with source of coal is wrong.

xxv) From the terms of various clauses of PPA, it is very clear that if fuel supply agreement is not executed for reasons of force majeure, the parties can elect to terminate PPA and consequently discharge themselves from their respective obligations. The PPA intrinsically recognises that at the time of the bid the bidder has indicated his source of coal which has been accepted by the procurer. If subsequently, the FSA is not executed within a defined timeline due

to reasons of Force Majeure then the agreement is capable of being terminated. Therefore, the PPA does not envisage a situation, which requires the bidder to procure coal from any other source.

xxvi) Force Majeure event, according to the Appellant, prevents or partly prevents performance of one's obligation under the contract and circumstance leading to that is not within 'reasonable' control of the Affected Party in spite of all efforts made by the Affected Party to avoid the same and it could not have been avoided in spite of prudent practices in terms of Article 12 of PPA.

xxvii) They further contend that in the meeting on 25.10.2009, the EAC of MoEF after deciding to withdraw the TOR dated 16.05.2008 issued by the MoEF observed that there is lack of coordination between MoEF and MOC. The Committee further observed that the MoEF and MOC must work in tandem in identifying go and no-go areas while considering allotment of coal blocks in the country so that similar problems do not arise in future. Appellant further contends, EAC also observed that the project proponents could meet the deficit coal requirement by importing coal or from other coal blocks, which could be allocated in their favour by MOC or through coal linkage by MOC. All these observations and events clearly demonstrate that the Appellant became victim of events and circumstances, which

were not within the reasonable control of the Appellant to avoid the same.

xxviii) In the Affidavit dated 29.10.2012, the Appellant clearly mentioned before the Respondent-Commission that as on that date, the Appellant did not have adequate supply of coal to discharge its obligation to supply 1320 MW of power under the PPA for a period of 25 years. This is not denied by Respondents.

xxix) The Appellant also tried to resolve the issue with Respondent No.2 by proposing that Respondent No. 2 should agree to change the identified units from Unit II and III to Units IV and V, which were scheduled to be commissioned in August 2012. This suggestion was made with the understanding that the Appellant will be in a position to secure an alternate coal block in the meantime. However, Respondent No. 2 did not accept the said proposal.

xxx) This was only a temporary arrangement suggested by the Appellant to mitigate the effects of a force majeure event that had occurred. Respondent No. 2 without accepting the proposal of the Appellant directed the Appellant to complete the activities mentioned in Article 3.1.2 of the PPA within the time prescribed which resulted in financial burden to Appellant is the stand of the Appellant.

xxxi) However, the Respondent No.2 has taken a stand at a very belated stage after the termination of the PPA on the opinion said to have expressed by Advocate General of Maharashtra.

xxxii) The Government of Maharashtra accepted the fact that the tapering linkage is a temporary solution and also stated that owing to shortfall in production of coal by CIL, it would be difficult to meet coal requirement under the long term linkages. Under these circumstances, the Government of Maharashtra requested the Government of India to grant an alternate coal block to Appellant under a special dispensation. This clearly demonstrates the acceptance of the factual aspects of the problems faced by the Appellant by the Government of Maharashtra, which owns and controls Respondent No. 2.

xxxiii) Article 19 of the PPA indicates that an agreement of supply from an alternate sources of fuel and sources other than the units identified by the seller in the RFP in competitive bidding process is possible and it helps appellant to invoke force majeure event.

xxxiv)The Respondent-Commission completely ignored this and opined that the Appellant necessarily has to supply power at the quoted tariff and the entire fuel risk vests with the Appellant. The Respondent-Commission also failed to take into account the

implications of Section 56 of the Indian Contract Act though there was human impossibility attached to the compliance of the terms of contract.

xxxv) The Appellant also contends that in terms of existing policy, if there is reduction in coal supply, the Coal India Companies have the option to import coal and load the differential price on the Appellant. The Appellant contends that the Respondent-Commission though accepted the following facts still proceeded to pass the impugned order, which compelled the Appellant to approach this Tribunal since Respondent-Commission wrongly interpreted the terms of PPA.

i. The Appellant would incur financial losses by supplying power at the quoted tariff.

ii. The financial losses may impact the ability of the Appellant to operate plant and meet its debt service obligation until the issues in respect of coal are resolved.

iii. That the Appellant would incur significant financial losses by supplying power from the Unit 2 and 3 as per the PPA, which may lead to the project becoming a stranded asset.

iv. An operational asset being stranded does not serve the purposes of the stake holders involved i.e. consumers, Respondent No. 2, lenders or the State Government.

v. The Respondent No. 1 Commission has noted that the Appellant had been allocated a coal block for meeting part of its fuel requirements, but the Terms of Reference (herein "TOR") for environmental clearance was withdrawn much

later after it signed the PPA. The Respondent No. 1 Commission has also noted that MOEF and EAC had recommended an alternate coal block, looking in to the circumstances under which the TOR for the Lohara coal blocks were withdrawn.

vi. *The Respondent No. 1 Commission has observed that under the Electricity Act, 2003, Tariff Policy and National Electricity Policy it is not only necessary to protect the interest of the consumers but also ensure recovery of cost of generation in a reasonable manner. The Respondent No. 1 Commission has held that it believes that recovery of cost of generation in a reasonable manner not only serves the interest of the generating companies and its stake holders including lenders, but also ensures that consumer interest is protected considering the long term goal of sustainable development.*

vii. *A stranded asset is neither in the interest of the generating company, the consumer or the lender or the State Government.*

xxxvi) If compensatory tariff passed by the Respondent-Commission continues, since PPA is in force for 25 years, it would cause severe prejudice to the Appellant so also all contracts having similar clauses. With these averments, the Appellant has approached this Tribunal questioning the impugned order.

2. Per-contra, Respondent No.2 filed reply with following contentions:

This Tribunal condoned the delay in filing the present appeal by Order dated 02.09.2016 considering the Full Bench judgment of this

Tribunal passed on 07.04.2016 and also the orders of the Hon'ble Supreme Court dated 31.03.2015 passed in Civil Appeal no. 10016 of 2014.

3. This Tribunal in the above said Order opined that the Appellant has filed present appeal as an abundant caution to support the relief granted by the State Commission in its favour but was challenging the findings only with regard to force majeure and change in law.

4. Respondent No. 3 filed Appeal No. 296 of 2013 challenging the impugned order dated 21.08.2013 passed by Respondent-Commission. On 11.05.2016, this Tribunal disposed of the said appeal by setting aside the impugned order dated 21.08.2013 except to the extent it holds that the plea of the Appellant that the withdrawal of TOR which led to the inaccessibility of the coal block by the Appellant and the subsequent de-allocation of the said coal block was not a force majeure event as per the terms of PPA. That means, this Tribunal kept open the question whether there was an event of force majeure or not?

5. The Supreme Court also in its order allowed the Appellant to argue any proposition of law, be it force majeure or change in law in support of quantifying the compensatory tariff subject to the Appellant not seeking relief of declaration of frustration of the contract. Therefore, the Appellant cannot raise the issue of Section 56 of the Contract Act. It is required to

establish that withdrawal of TOR qua Lohara coal blocks and subsequent de-allocation of said blocks continues to be force majeure event as per the PPA and entitlement of relief under the PPA.

6. Respondent No.2 contends that the Respondent-Commission while exercising regulatory power has given compensatory charges on the ground of shortage of power in the state of Maharashtra in order to prevent operation of generating assets from becoming stranded. By Full Bench judgment of this Tribunal dated 07.04.2016, it was held that regulatory powers cannot be exercised to grant compensatory tariff where tariff is arrived under Section 63 of the said Act. Therefore, the impugned order dated 21.08.2013 to the extent of granting compensatory tariff becomes null and void.

7. After narrating the consequence of events that led to filing of the appeal, Respondent No.2 contends that on 20.02.2013 Respondent-Commission permitted the Appellant to supply power to Respondent No.2. On 21.08.2013 the Respondent-Commission rejected the contention of the Appellant on the "Force Majeure" and appointed a Committee to determine the compensatory charges holding that the Commission has regulatory power to grant compensatory charges.

8. Meanwhile, the consumer representative - Prayas Energy filed Appeal No.296 of 2013 before this Tribunal. Respondent No.2 filed a

Review Petition before the Respondent-Commission for review of order dated 21.08.2013 and also filed the appeal before this Tribunal. Review Petition was dismissed after receiving the Committee report.

9. Compensatory charges were allowed by the Respondent-Commission in Case No. 63 of 2014. Being aggrieved by this, two appeals came to be filed viz.,, Appeals Nos. 166 and 218 of 2014 challenging fixation of compensatory charges. Only in October 2014, the Appellant filed the present Appeal challenging the Order of the Commission dated 21.08.2013 with the delay of 382 days.

10. In the light of the Full Bench judgment, this Tribunal partly allowed Appeal No. 296 of 2013 setting aside the impugned order except to the extent it holds that withdrawal of TOR is not a force majeure, and therefore this Tribunal has not expressed any opinion on force majeure aspect.

11. Respondent No.2 contends that cancellation/withdrawal of coal block is not a force majeure since the Appellant submitted its bid in response to the RFP issued by Respondent No.2 by quoting letter dated 06.11.2007 issued by the Ministry of Coal, which indicated that Lohara coal blocks had been allotted to the Appellant to meet its coal requirement of 1000 MW power from Tiroda plant.

12. This allotment was subject to the Appellant obtaining necessary permissions, clearances from Government authorities for the purpose of mining activities and related matters, which included permission from the Ministry of Environment and Forest.

13. TOR dated 16.05.2008 is subject to environmental clearance being granted to the Appellant. Environmental clearance was refused by MoEF as the proposed coal mine falls within the proposed buffer zone of the Tadoba – Andheri Tiger Zone.

14. The Appellant, at all material times prior to entering into PPA on 08.09.2008, was aware of the fact that it may not obtain necessary permission in the form of environmental clearance, therefore it cannot amount to force majeure event.

15. At the time of participating in the RFQ, Lohara coal blocks were not allotted. Since RFQ, RFP and PPA are all on 1 case type, it becomes irrelevant whether or not the Appellant made its bid based on Lohara coal mines. Now Appellant cannot make use of cancellation of Lohara coal blocks as an opportunity to cover some of its commercial risks.

16. Reference of source of fuel in the bid document is only for the purpose of establishing the bidders' capacity to fulfil the contractual obligation, therefore the bidder is always free to make its arrangement of

fuel source. Unless any of the occurrence of events referred to in clauses of PPA attract the force majeure event, the Appellant cannot seek any benefit based on force majeure clause. Hence, grounds now raised, however, does not attract force majeure event.

17. The Respondent in its response to the Appellant's termination letter clearly indicated that no force majeure event has occurred. The Appellant could not have unilaterally terminated the PPA, therefore the PPA continues to remain valid, subsisting and binding on the parties.

18. Respondent No.2 further submits that the last stage of TOR requires the Appellant to conduct a public process as per the EIA notifications dated 14.09.2006, which clearly specify that the appraisal stage of the project will involve detailed scrutiny by the EAC or the State Level Expert Appraisal Committee.

19. The environmental clearance envisages four stages i.e., Screening, Scoping, Public Consultation and Appraisal. Therefore, withdrawal of TOR by MoEF for the reasons stated by EAC does not establish force majeure event since the concerned clause specifically exclude the issues related to non-availability or change in price from force majeure considerations as bidding framework gives bidders complete flexibility in terms of choosing the fuel source and allowing them an option to partially or completely pass through the fuel cost.

20. The allocated captive coal blocks will only meet its coal requirement partially was well within its knowledge. It is also mentioned in the bid document that the balance requirement will be met through linkage coal or imported coal.

21. According to Respondent No.2 MERC has rightly held that there is no force majeure event under the PPA. It also clearly held that non-availability of coal from Lohara coal blocks cannot be said to have altered the original situation.

22. Respondent No.2 further contends that the Appellant was wrong in alleging that revision of bid document from Case 1 type to Case II without substantiating its claim for such relief. Clause 2.1.1 of the RFP clearly mentioned that source of fuel shall be decided by the bidder while submitting the bid document for Unit Nos. 2 and 3 to generate power and the same was approved as well. Respondents need not give any approval in view of the fact that such change was permitted in Article 19 of the PPA.

23. They also contend that the Appellant was not justified to raise the issue of frustration of contract on account of force majeure event. The plain interpretation of Clause 12.4 of PPA clearly indicates the term “force majeure” would not include any event or circumstances which are within the reasonable control of the parties.

24. Article 19 of the PPA expressly provides for supply from an alternate source other than the unit identified by the seller; therefore, it is open to the Appellant to source its fuel from alternate source. Therefore, risk of tie up of the fuel supply is entirely with the Appellant in the present case. PPA in question is not a cost plus contract. Now, the Appellant cannot pass the risk to the procurer and consequently to the consumers of power.

25. In the alternate without prejudice to their rights, they contend that even if the coal block was allocated, it would have met only a part of the coal requirement of 800 MW of Tiroda TPS and the Appellant would have to rely on purchase from CIL or import of coal for the rest. With these submissions, it has sought for dismissal of the Appeal.

Contentions of Respondent No. 3:

26. According to Respondent No. 3, the Appellant and Respondent No. 2 entered into PPA for generation and supply of 1320 MW of power from Tiroda TPS which was in pursuance of Case 1 competitive bid process as envisaged under Section 63 of the Electricity Act.

27. In the bidding process, neither the project site nor the coal block was identified by MSEDCL. Case 1 type bidding process was based on the guidelines issued by the Ministry of Power where the location, technology, or fuel is not specified by the procurer. Definitions of various terms were also mentioned in the draft PPA.

28. It has to have the full responsibility to tie up the fuel linkage and to set up the infrastructure requirement for fuel transportation and its storage.

29. Comfort letter from the fuel supplier for linkage at the time of bid submission had to be submitted by the bidder at the time of RFP. In RFQ, choice of fuel and its transportation was clearly mentioned as the choice/discretion of the bidder. In the bid submitted on 16.02.2008, it was mentioned that the project shall use indigenous coal as well as imported coal for balance requirement. The indigenous coal would be sourced from Lohara captive mine and CIL coal linkage.

30. Coming to Expert Appraisal Committee meeting wherein the Committee observed that TOR has to be withdrawn, it was clearly mentioned that the Ministry had in an earlier instance, rejected a mining project in the same proposed location which was allocated to the Appellant. They also refer to observation made in the meeting that a conservation plan had been received from M/s Adani Power Ltd. on Lohara Opencast Coal project. The DIG and Joint Director, NTCA had found the plan submitted by APL is flawed as the movement of tigers and their seasonality had not been reflected or adequately addressed in the plan. Even if the captive block was allocated, it would have met only partial coal requirement of the plant and the Appellant will have to rely on purchase from CIL or imports to meet the balance requirement.

31. They further contend that the Appellant was fully aware of the risk entailed in assuming that the block conditionally allocated may not be ultimately granted to it. In the draft Red Herring Prospectus, the Appellant's parent company submitted to the Securities and Exchange Board of India clearly highlighted the following risks:

> *"Our subsidiary, APML is developing the Tiroda Power Project, one of the Projects for which funds are being raised through this issue. The financial statements of APML, prepared in accordance with Indian GAAP, for the fiscal years 2009 and 2008 have also been included in this Red Herring Prospectus.*
>
> *... ... The risks and uncertainties described in this section are not the only risks that we currently fact....*
>
> *... ... If any of the following risks, or other risks that are not currently known or are now deemed immaterial, actually occur, our business, results of operations and financial condition could suffer, the price of our Equity Shares could decline, and you may lose all or part of your investment....*
>
> *... ... In particular, local communities, the forest authorities and other authorities may oppose mining operations due to the perceived negative impact mining may have on the environment. Significant opposition by local communities, non-governmental organizations and other parties to the construction of our power projects and mining operations may adversely affect our results of operations and financial condition. ...*
>
> *... ... Our Tiroda Power Project will source a significant portion of its coal requirements from captive mines....*
>
> *... ... In case AEL is unable to fulfil its obligations under the terms of the coal supply agreements, our ability to renegotiate*

the terms of such agreements or seek remedy may be limited as AEL will continue to be our largest shareholder after the issue. Further, our coal suppliers may default on their obligations to us under the coal supply agreements, which may adversely affect our business and results of operations. There can be no assurance that we will be able to obtain coal supplies either in sufficient quantities, acceptable qualities and on commercially acceptable terms, or at all. We may also have to purchase coal at a significantly higher spot price from the market for carrying out our operations, which could have an adverse effect on our business, financial condition and results of operations. ..."

32. The Appellant clearly informed its potential investors about the risk and then invited them to invest in initial public offer.

33. So far as Force Majeure event, according to Respondent No. 3, the cancellation of conditionally allocated coal blocks cannot be termed as force majeure event on account of various reasons in terms of PPA and especially the bidding process is competitive bidding. The decision of the State Commission (MERC) in relation to Case 2 bidding has no relevance to Case 1 where the company has not identified any fuel linkage for the project.

34. Since the Appellant quoted more than one source of fuel, now they cannot raise the issue of production and supply of domestic coal being nationalised. NCDP of 2007 was issued much prior to submission of bid

by the Appellant. Therefore, the Appellant was aware of the New Coal Distribution Policy. Hence, it cannot be a force majeure event.

35. Even if the coal cost would be a pass through, it does not mean that responsibility of arranging coal is not that of the Appellant. The Appellant was fully aware that the coal linkage from the coal mines of CIL was subject to allocation by Government of India.

36. The contention of the Appellant that consequences of non-fulfilment of conditions would subsequently result in termination of the PPA is wrong. The party who did not fulfil the terms of the Agreement cannot ask termination of PPA. The Appellant ought to have anticipated that the Lohara coal block may not be available if the environmental clearance is not granted. Therefore, it is not a force majeure event. It cannot constitute an event of frustration of PPA or otherwise the provisions of Section 56 of the Indian Contract Act have no application to the present case. There is no change of fundamental terms and conditions of contract affecting the performance of PPA falling within the principles of Section 56 of the Act. With these submissions, Respondent No. 3 sought for dismissal of the Appeal.

Rejoinder of Appellant:

37. The Appeal filed by Prayas Energy Group in Appeal No. 296 of 2016 was partly allowed and the Tribunal in its Order dated 11.05.2015 had

granted liberty to the Appellant to raise the plea that withdrawal of TOR for Lohara coal block is force majeure and it further directed the Registry to place the present Appeal before regular Bench since the issue regarding force majeure had been kept open.

38. Subsequent to signing the PPA, TOR for Lohara coal block was cancelled. This constitutes a force majeure event. Execution of fuel supply agreement is a condition subsequent and is not required at the time of submission of bid or execution of PPA. Appellant made all possible steps to obtain environmental clearance from MOEF. However, MOEF on 25.10.2009 almost after one and a half years, withdrew TOR granted on 16.05.2008 on the ground that Lohara coal block was within the proposed buffer zone of Tadoba Andheri Tiger Reserve. The same was not within reasonable control or contemplation of the parties and the same has resulted in unavailability of coal from Lohara coal block. Therefore, in the Appeal, the Appellant sought to declare withdrawal of TOR of Lohara coal block as force majeure event. They also sought to restore the Appellant to the same bargain as if the force majeure event had not occurred. There cannot be narrow and incorrect interpretation of terms of PPA.

39. The Appellant further reiterate that the change of circumstances which are fundamental has to be regarded by law as striking at the root of contract as a whole. The entire financials was placed on coal from Lohara

block. This was identified in the responsive bid which is accepted by the Respondent procurer; therefore, subsequent unavailability of identified supply of coal goes to the root of the contract.

40. The Appellant also contends that MSEDCL has completely ignored the recent development which has arisen due to the judgment in ***Manohar Lal Sharma*** v. ***The Principal Secretary and Ors.*** dated 24.09.2014 by the Hon'ble Supreme Court by which almost all allocations of coal blocks were set aside. This also amounts to force majeure event leading to frustration of contract.

41. The Appellant further contends that even in non-escalable tariff, force majeure event can occur. They reiterate their contention that at the time of bid, there were no specific guidelines relating to Case 1 procurement in the original competitive bidding guidelines. Ministry of Power on 09.05.2013 sought advice of Central Electricity Regulatory Commission on several issues. The advise dated 25.05.2013 by CERC to the Ministry of Power, appreciated the need for securing fuel supply for various projects in order to ensure optimum generation from the power plants in the country. Non-availability of adequate quantum of coal has resulted in serious challenge to power generation.

42. So far as allowing additional cost of imported coal under the existing provisions of PPA in terms of Article 10.1.1 of the Standard PPA for

procurement of power under Case 1 bidding procedure, it provides for change in law whereby the project developer would have to move the appropriate Commission and the decision of the appropriate Commission would be final.

43. Further they contend that on 21.06.2013, the Cabinet Committee for Economic Affairs (CCEA) forms basis for Appellant's case which was duly placed before Respondent No.1 Commission. The amendment to NCDP was made on 26.07.2013 pursuant to CCEA decision. Subsequently, the Ministry of Power issued an advice consequent to amendment to NCDP to allow additional cost of coal as a pass through in terms of the decision taken by CCEA.

44. The Revised Tariff Policy came to be issued on 28.01.2016 by Central Government wherein it clearly observed that some of the competitive bid projects as per the guidelines of 19.01.2005 have experienced difficulties in getting required quantity of coal from CIL. In case of reduced quantity of domestic coal supply, the assured quantity or quantity indicated in LOA/FSA the cost of imported/market based e-auction coal procured for making up of the shortfall shall be considered for being made a pass through by appropriate Commission on a case to case basis.

45. Therefore, they contend that in the present Appeal, the Tribunal has to take into consideration the application made by the Appellant for

allotment of Lohara coal block, RFP dated 03.04.2007 which was revised on 16.02.2008, NCDP dated 18.10.2007 which assured generating companies including IPPs that 100% of the quantity as per the normative requirement would be considered for supply of coal through FSA, and allocation of Lohara coal block on 06.11.2007.

46. Based on these, the bid was submitted mentioning the source of fuel from Lohara coal block which was specifically identified for the purpose. When the Appellant was left with no fuel supply arrangement for 800 MW, it issued seven days termination notice after several efforts to mitigate the force majeure event became unsuccessful.

Additional affidavit of Appellant:

47. The Appellant filed additional affidavit to bring on record certain facts which, according to the Appellant, throw light on the merits of the present Appeal.

- On 21.08.2013, MERC passed order thereby granting relief to *Adani, Maharashtra*. Appeal No. 296 came to be filed by *Prayas Energy Group*. The same came to be adjourned on 12 occasions till 15.01.2015 when parties made their submissions.
- On 21.10.2013, MSEDCL filed Review Petition No. 150 of 2013 before MERC on the ground that its submissions were not considered in the impugned order.

- On 24.10.2013, Maharashtra Discom filed an Appeal before this Tribunal challenging the impugned order which was withdrawn on 30.10.2013 since they chose to file Review Petition.
- The Committee set up by MERC in pursuance of the impugned order held meetings on several dates in which both the Appellant and Respondent Discoms participated.
- On 05.05.2014, MERC dismissed the Review Petition filed by Maharashtra Discom quantifying compensatory tariff to be paid to the Appellant – *Adani Maharashtra*. This order came to be communicated on 03.06.2014.
- On 01.08.2014, this Tribunal dismissed Cross Appeal filed by the Appellant – *Adani Maharashtra*.
- On 19.09.2014, notice was issued in Appeal No. 218 of 2014 filed by *Prayas Group* challenging Order dated 05.05.2014. Appeal No. 166 of 2014 was filed by Maharashtra Discom challenging the Order dated 05.05.2014 granting quantification of compensatory tariff by MERC.
- At this stage, the Appellant filed the present Appeal by way of abundant caution to support the relief already granted in its favour so far, and to challenge in respect of force majeure events which were disallowed by MERC.

- Subsequent to filing of the Appeal, this Tribunal dismissed the delay condonation application in filing the Appeal. Then Civil Appeal came to be filed before the Hon'ble Supreme Court which came to be disposed of on 31.03.2015 wherein the Appellant was given liberty to argue any proposition of law (be it force majeure or change in law) in support of the order quantifying compensatory tariff.
- Meanwhile, Appeal No. 100 of 2013 and batch appeals which were similar to the impugned order in the Appeal were listed before Full Bench and the matter was coming up from time to time. The above Appeals were also listed before Full Bench along with Appeal No. 100 and batch appeals. The Appellant was under the impression that it would be entitled to argue any proposition of law in terms of directions of the Hon'ble Supreme Court be it force majeure or change in law.
- On 07.04.2016, Appeal No. 100 of 2013 and batch appeals were disposed of by the Full Bench of this Tribunal after observing the Hon'ble Supreme Court's judgment dated 31.03.2015 that the Appellant could urge force majeure and change in law. By a separate order on 07.04.2016, the Full Bench of this Tribunal directed the present Appeal and other Appeals filed against the

impugned order and order dated 05.05.2014 be listed on 25.04.2016.

- A brief note was submitted in Appeal No. 296 of 2013, 166 of 2014, 218 of 2014, 81 of 2016 and DFR No. 2635 of 2014. The Appellant respectfully sought prayer that all Appeals may be remanded to MERC for grant of relief in terms of the provisions of PPA and based on the principles laid down in the Full Bench judgment.
- On 11.05.2016, when the present Appeal along with other Appeals came to be heard, the Appellant submitted that it is entitled to raise ground of force majeure in Appeal No. 296 of 2013 to defend the relief granted in the impugned order. It also pointed out the technical problem in Appeal No. 296 of 2013 if disposed of while the present Appeal along with delay application seeking condonation of delay is pending.

48. The issue of force majeure was specifically kept open by the above orders.

49. MERC dismissed the Review Petition filed by MSEDCL. The Appellant contends that by virtue of regulatory powers, compensatory tariff could be granted but the Full Bench judgment was under challenge before the Hon'ble Supreme Court in Civil Appeals.

50. They further contend that PPA provides necessary recourse in case of force majeure/change in law associated with the project. Therefore, it was identified source for bid and the same was accepted by MSEDCL; hence it will attract all provisions of PPA.

51. If arguments of Discom were to be accepted that reference of fuel source in the bid document was only for the purpose of establishing bidder capacity to fulfil its contractual obligation, then all bidders could show some random source thereby making some of the provisions of PPA redundant especially like Article 19.

52. They reiterate that the submission of bid was only based on allocation of letter for Lohara coal block. This bid was a customised Case 2 bidding. Once bid is offered and bid is accepted, all provisions of PPA would attract pertaining to force majeure/change in law.

Arguments advanced by counsel for the parties:

53. All the parties to the Appeal made substantial oral arguments based on written submissions and also relied upon several judgments of the Hon'ble Supreme Court and other Courts.

Appellant's stand

54. Appellant contend that MERC was wrong in opining that withdrawal of TOR cannot be termed as unlawful, unreasonable or discriminatory

revocation since TOR cannot be termed as consent because it was specially based on several steps to be complied with like environmental clearance etc.

55. They also contend that MERC was wrong in opining that the appropriate Court of Law must declare the refusal or revocation of consent as unlawful, unreasonable and discriminatory to constitute as a force majeure event.

56. MERC was wrong in opining that cancellation of TOR is not force majeure since coal from Lohara coal block was not unconditionally available to the Appellant - Adani Power at the time of signing of PPA. They were also not justified in opining that in terms of PPA, parties never agreed that the Appellant would supply power based on fuel at a fixed price from Lohara coal blocks.

57. Further, the Appellant rely upon the judgment of ***Energy Watchdog*** vs. ***CERC (2017) 14 SCC 80*** in Civil Appeal Nos. 5399-5400 of 2016 and Batch and summarise the observations of the Apex Court in the said judgment as under:

> *"(a) Any 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 is change in law.*

(b) Change in policies of the Government with respect to availability of domestic coal to the generating companies is allowed as an event of Change in Law in terms of Article 13 of the Power Purchase Agreement dated 07.08.2008 entered into between Adani Power and Haryana Utilities.

(c) Force majeure is governed by the Indian Contract Act, 1872. In so far as it is relatable to an express or implied clause in a contract, such as the PPAs, it is governed by Chapter III dealing with the contingent contracts, and more particularly, Section 32 thereof.

(d) In so far as a Force Majeure event occurs de hors the contract, it is dealt with by a rule of positive law under Section 56 of the Contract.

(e) If the fundamental basis of the contract is dislodged or there is any frustrating event, it leads to the contract, as a whole being frustrated.

(f) The party affected by the Change in Law event will be compensated (through monthly tariff payments) to restore the affected party to the same economic position as if the Change in Law event had not occurred.

(g) The compensation/relief under Article 13 will be determined by Ld. Central Commission."

58. They further contend that the ***Energy Watchdog*** judgment fully covers the present Appeal since it took all possible steps to obtain environment clearance and MOEF issued TOR on 16.05.2008. Only after one and a half years, it was withdrawn on 25.10.2009 without any default in fulfilment of the obligations or milestone by the Appellant.

59. This was not within reasonable control or contemplation of the Appellant and the said event has resulted in unavailability of coal from Lohara coal block. Because of this, obligation of the Appellant to supply at quoted tariff is hindered.

60. They also submitted arguments on change in law event without prejudice to the claim for force majeure on the following grounds:

> *"(a) Government of India allocated Captive Coal Block of Lohara under Government Dispensation Route/Screening Committee Route on 16.05.2008. Based on such allocations of Coal Block, Adani Power has entered into long term PPA for supply of power to Maharashtra Discom through Competitive Bidding Process.*
>
> *(b) Withdrawal/cancellation of consent i.e. ToR for Environment Clearance amounts to change in consent granted earlier on 16.05.2008. Such decision by the Government Instrumentality has to be essentially considered as Change in Law since it resulted in increase of cost to the Seller and*

squarely qualifies as Change in Law in terms of the PPA and as per the decision of Hon'ble Supreme Court.

(c) Further, the Lohara Coal blocks allocated to Adani Power which formed the basis for Long term PPAs, were subsequently de-allocated/cancelled in view of the Hon'ble Supreme Court's decision in ***Manohar Lal Sharma v. The Principal Secretary and Ors.*** *[**(2014) 9 SCC 516]** dated 25.08.2014 and subsequent order dated 24.09.2014, rendering the Power Developer to depend on alternate costlier coal sources.*

(d) Ministry of Power had issued Advice dated 16.04.2015 to Ld. Central Commission under Section 107 of the Electricity Act. Para 3.2 (d) of said Advice mandates that allocation of coal block for Case 1 projects be treated as Change in Law to enable revision of tariff. Similarly, de-allocation of coal block would also fall under Change in Law."

61. The Appellant further rely upon the judgment of ***M/s Ashoka Smikeless Coal India (P) Ltd vs. Union of India*** [(2007) SCC 640], paragraph 190, to contend that a Committee was constituted in pursuance of the above said judgment since MoC was to give recommendations on Coal Distribution Policy. They also placed several correspondences and the advice of Ministry of Power to Central Commission under Section 107 of the Electricity Act pertaining to allocation of coal block for Case 1 type

project to be treated as change in law to enable revision of tariff. Similarly de-allocation of coal block was said to fall under change in law event.

62. Then coming to Regulatory Power, the Appellant refers to ***Energy Watchdog*** judgment.

63. They contend that MERC must exercise its powers to regulate tariff since the Commission cannot be expected as a mere stamping authority for adoption of tariff. MERC is to regulate tariff to ensure viability of the project even in the case of projects under the competitive bidding scheme in terms of opinion expressed in ***Energy Watchdog*** case.

64. The Appellant further contend that MERC is bound by the guidelines and must exercise its regulatory functions under Section 79(1)(b). If situation does not attract guidelines then it should exercise general regulatory powers. If situation related to facts for which there are no guidelines framed, then also regulatory powers must be exercised since Regulatory Commissions have powers to increase/vary tariff even outside PPA.

65. They also place on record that the Appellant had commenced supply of power under PPAS from August 2012 with several difficulties being encountered in respect of coal supply arrangement and MERC after appreciating the said difficulties granted interim relief. But Maharashtra

Discom has not made payments towards the same. There has been time gap between cause of action till payment was received.

66. The Appellant was forced to procure imported coal/market coal by increasing additional fuel cost. This has caused the Appellant with additional burden which in turn has resulted in additional interest. On account of moisture content being more in imported coal when compared to domestic coal, substantial increase occur in Station Heat Rate. This also adds to financial burden.

67. The Appellant also seek direction on payment of carrying cost which was recognised in the judgment dated 11.04.2017 where the PPA contemplates that the affected party is to be restored to same economic position. Therefore, they claim for carrying cost from the date of cause of action till payment of compensation is made to them. Without any default, power is supplied and MERC is benefited from the continued power supply.

68. Therefore, they submit that in the light of the ***Energy Watchdog***, MERC may be directed to reconsider the matter and appropriately grant relief to the Appellant – Adani Power under force majeure and change in law provisions of PPA.

***Per contra*, Respondent No. 2's arguments are as under:**

69. Appeal is limited to the force majeure issue as held in the orders dated 11.05.2016 by Full Bench judgment in Appeal No. 296 of 2013, now the Appellant cannot raise the contention of change in law and it is only an after-thought. This is affirmed in IA No. 443 of 2014 in DFR No. 2635 of 2014. Therefore, ambit of the present Appeal cannot be enlarged. This is also clear from grounds raised in Memorandum of Appeal since it pertains to contention of force majeure/frustration and there was no ground of change in law.

70. Even pertaining to force majeure in terms of Article 12 force majeure event is an event or circumstance or combination of both. They also refer to ***Punjab Land Development and Reclamation Corpn. Ltd.*** vs. ***Presiding Officer* – 1990 (3) SCC 682** to emphasize the word "means" and how it should be interpreted when statute use the word "mean".

71. They contend that none of the events or circumstances raised by the Appellant for adjudication of claim of force majeure would attract and bring the case of the Appellant within the ambit of force majeure.

72. The cut-off date in the present case was 7 days prior to bid submission for consideration of force majeure i.e., 14.02.2008. RFP was submitted on 21.02.2008.

73. The Terms of Reference were issued post the cut-off date and do not in any manner alter the environment clearance as envisaged in the MOEF notification dated 14.09.2006 and the letter of allocation is dated 06.11.2007.

74. Appellant being bidder seems to have aggressively bid on the basis of allocation dated 06.11.2007 issued by MOC to emerge as L1 bidder. The contents of RFP are binding on the Appellant as the Appellant has been selected as successful bidder. The notification dated 14.09.2006 issued by MOEF prevails as the Appraisal Committee reviewed the case in terms of the said notification and thereafter withdrew TOR primarily on the ground of tiger corridor.

75. Further, according to Respondent No. 2, the allocation dated 06.11.2007 required environment clearance as per the above said notification, which circumstance was well within the knowledge of the Appellant; therefore, the said allocation did not create any rights whatsoever in favour of the Appellant.

76. They also contend that the Appellant has made business decision placing reliance or otherwise on coal allocation letter which is subject to environment clearance; therefore, the Appellant was well aware that environment clearance was required.

77. The bid came to be made on 21.02.2008 i.e., three months after the allocation letter dated 06.11.2007. It was a business risk taken by the Appellant on such conditional allocation letter. They further contend that Terms of Reference do not constitute a firm allocation as sought to be contended by the Appellant. They also contend that failure of the Appellant to submit requisite action plan as directed by MOEF was one of the reasons for withdrawal of TOR which reflects on the lack of reasonable care on the part of the Appellant.

78. Respondent No. 2 further contends that none of the events and circumstances referred to by the Appellant attract Article 12 of PPA and they place reliance on ***1962 (AC) Privy Council 93*** (Tsakiroglou & Co. Ltd Versus Noblee Thorl G.M.B.H.) and so also ***AIR 1960 SC 588*** (Alopi Prasad & Sons Versus Union of India).

79. According to Respondent No. 2, the contention of the Appellant relating to different scenarios as contemplated under the Table incorporated in Clause 2.8.1.4 is an instruction to bidders. The procurer has not evaluated the bids on the basis of the allocation letter dated 06.11.2007 issued by MOEF since fuel issue was the entire responsibility of the Appellant as a bidder.

80. Therefore, the scenarios incorporated in the RFP at Clause 2.8.1.4 were only instructions to quote tariff both escalable and non-escalable

ones. The Appellant has raised three grounds in Case No. 68 of 2012 as contended by the Appellant i.e, regulatory dispensation from the Commission, force majeure and change in law. The reference in the Petition to the term change in law is bereft of any details of the purported change in law. In contrast the detailed submissions relate only to force majeure.

81. They further contend that change in law is separately considered and contemplated under PPA executed between the parties. Article 13 contemplates occurrence of an event which results in change in the applicable law namely enactment, effect, adoption, promulgation, amendment, modification or repeal of any law or change in interpretation of any law by a Competent Court, Tribunal or Government Instrumentality.

82. The submission of the Appellant on change in law referring to Paragraph 24.2 to 24.4 of the impugned order in support of its contention, the pleadings and the case numbers was not in respect of change in law; but was only on the aspect of force majeure. The contention of the Appellant that change in law was raised as a ground but there was no ground with reference to Article 13 of PPA.

83. Further, Respondent No.2 contends that the contention of the Appellant seeking remand of the matter is an attempt to seek rehearing of the matter. This would amount to/prayer seeking Review of the

proceedings relating to the aspect of force majeure. Now the Appellant cannot raise untenable plea of some other ground like change in law contending that the same was not considered by MERC.

84. The argument of the Appellant to remand the matter to MERC to rehear is akin to a review on the issue of force majeure. The impugned order limited in its operation pursuant to being set aside with exception of the issue of force majeure cannot be heard on the ground of change in law in view of the decision of the Hon'ble Supreme Court in ***Energy Watchdog***.

85. On the other hand, the said decision supports the case of MERC since the Hon'ble Supreme Court at paragraphs 34 to 47 sets out the law relating to frustration of contract due to force majeure. Therefore, the argument of the Appellant that withdrawal of TOR amounts to force majeure cannot be accepted. Therefore, none of the contentions raised by the Appellant are tenable.

Per contra, the arguments of Respondent No.3, in short, are as under:

86. In the memorandum of appeal, the Appellant has challenged the order of the Commission only in respect of force majeure event and there

is no challenge with regard to claim under change in law. The relief sought in the appeal does not deal with such prayer.

87. So far as force majeure event is concerned, the State Commission after analysing all facts, circumstances and the law, has properly assessed material and passed reasoned order in the petition and rejected the claim of the Appellant. Hence, relief of remand cannot be entertained.

88. As far as exercise of general regulatory powers, the same is not sustainable since the said claim is not subject matter of the present appeal.

89. In the appeals filed by MSEDCL and Prayas Energy Group against the very same impugned order questioning the grant of relief under regulatory powers, this Tribunal allowed the said appeals and set aside the impugned order. Aggrieved by the same, no appeal came to be filed by the Appellant, therefore, the order of this Tribunal has become final.

90. Respondent No.3 submits that this Tribunal now cannot review or revise on the basis of subsequent decision of the Apex Court in Energy Watch Dog's case, even if the Hon'ble Apex Court had provided for exercise of regulatory power in such circumstances. To substantiate this contention, they relied upon Explanation to Order 47 Rule 1 so also the Judgments of the Supreme Court in **State of West Bengal vs. Hemant**

Kumar (AIR 1966 SC 1061 at Para 15); **State of West Bengal vs. Kamal Sen Gupta** (2008 (8) SCC 612); **Pradeep Kumar Maskara vs. State of West Bengal** (2015 (2) SCC 653 at Paras 26-27) and **Anandi Rubber Flour Mills vs. State of A.P.** decided on 02.08.2001 (2002 125 STC 355 (AP) at Para 14).

91. Issues came to be framed on available pleadings by the State Commission. Those issues were considered in the impugned order and the primary issue to be considered is whether the cancellation of terms of reference for Lohara coal block in view of EAC decision is a force majeure event within the scope and ambit of Article 12, since bid process was not a Case-2 bidding.

92. In terms of revised RFP, the bidding process allowed any bidder to participate in the bid subject to fulfilment of the conditions given in the RFP over the quantum of power from the power station located anywhere in India whether in the State of Maharashtra or outside.

93. So far as RFQ is concerned, it says at Article 1.2.5 “the bidder shall submit a comfort letter from the fuel supplier for fuel linkage at the time of bid submission in response to RFP”. It further states “the choice of fuel and its transportation would be left at the discretion of the bidder.”

94. The draft PPA along with RFP which dealt with Fuel and Fuel Supply Agreement. Article 3.1.2., 3.3. and 4 of the PPA provided as under:

"3.1.2 The Seller agrees and undertakes to duly perform and completer the following activities within 18 (eighteen) Months from the Effective date, unless such completion is affected due to any Force Majeure event or if any of the activities is specifically waived in writing by the Procure.

i. the Seller shall have received the Initial Consents as mentioned in Schedule 1, either unconditionally or subject to conditions which do not materially prejudice its rights or the performance of tis obligations under this Agreement;

ii. the Seller shall have executed Fuel Supply Agreement and provided the copies of the same to the Procurer;

iii. the Seller:

a) The Seller shall have appointed the Construction Contractors, if Seller itself is to the Construction Contractor, for the design, engineering, procurement, construction and Commissioning of the Project and shall have submitted a documentary proof along with the copy of the contract to the Procurer and shall have given to such contractor an irrevocable Notice to Procced, and

b) 1) in case the Project is proposed to be developed on the books of the Seller, he shall have completed the execution and delivery of the Financing Agreements for at least twenty five percent (25%) of the debt required for the Project as certified by the Lender/Lead Lender; or

2) in case the Seller develops the Project on a non recourse basis, Seller shall have achieved Financial Closure;

iv. the Seller shall have made available to the Procurer the data with respect to the Project for design of Interconnection Facilities and Transmission facilities, if required.

v. the seller shall finalised the specific delivery point for supply of power in consultation with the Procurer;

vi. the Seller shall have got vacant possession of the Sites and shall have obtained valid, enforceable, unencumbered and insurable freehold or leasehold title thereto and such other real property rights including wayleaves as may be required for the Project or the performance of its obligations under this Agreement.

vii. the Seller shall have sent a written notice to the Procurer indicating that (a) the Scheduled COD shall be as per the original Scheduled COD i.e. (i) for the second Unit, 14th August 2012; (ii) for the third Unit, 14th August 2012 or b) that it intends to prepone the Scheduled COD to be (i) for the second Unit, [Insert Date]; (ii) for the third Unit, [Insert Date] (hereinafter referred to as "Revised Scheduled COD")

3.3 Consequences of non-fulfilment of conditions under Article 3.1

3.3.1 If any of the conditions specified in Article 3.1.2 is not duly fulfilled by the Seller even within three (3) Months after the time specified under Article 3.1.2, , then on and from the expiry of such period and until the Seller has satisfied all the conditions specified in Article 3.1.2, the Seller shall be liable to furnish to the Procurer additional weekly Performance Guarantee of Rs 0.375 lakhs per MW of maximum capacity proposed to be procured within two (2) Business Days of expiry of every such

Week. Such additional Performance Guarantee shall be provided to the Procurer in the manner provided in Article 3.1.1 and shall become part of the Performance Guarantee and all the provisions of this Agreement shall be construed accordingly. The Procurer shall be entitled to hold and/or invoke the Performance Guarantee including such increased Performance Guarantee in accordance with the provisions of this Agreement.

4 *ARTICLE 4: DEVELOPMENT OF THE PROJECT*

4.1 The Seller's obligation to build, own and operate the Project

4.1.1 Subject to the terms and condition of this Agreement, the Seller undertakes to be responsible, at Seller's own cost and risk, for:

a) Obtaining and maintaining in full force and effect all Consents required by it pursuant to this Agreement and Indian Law;

....."

95. Respondent No.3 contends that all consents required for the project of whatsoever nature, were to be obtained by the successful bidder and the expenses incurred for such consents are the responsibility of the bidder. They also referred to details of the proposed power station in the bid in which, so far as fuel is concerned, it was stated as under:

Fuel	*Lohara (West) and Lohara (Extn) coal blocks have been allocated to the Project, which will meet the part coal requirement of the project. The balance*

	coal requirement of power projects shall be met from coal supply by CIL or its subsidiary and Imported coal. We have already submitted application to GoI for allocation of coal linkage. *The expected GCV of the coal is in the range of 3800 – 5000 Kcal/Kg, whereas expected Ash Content and Sulphur Content are in the range of 30-40% and 0.2% to 0.4% respectively.*

.....

2) Fuel

Type of fuel: The Project shall use indigenous coal as well as imported Coal for balance requirement. The indigenous coal will be sourced from Lohara captive mine and CIL coal linkage."

96. Respondent No.3 contends that since the Appellant was not solely relying on the captive blocks and also envisaged importing coal and applying for linkage to meet balance coal requirement, the Appellant in its wisdom chose to quote a fixed tariff for 25 years thereby willing to assume risk involved in the notified price of Indian Coal by CIL as well as price variations in the imported coal.

97. Vesting of mines in the Appellant was clearly subject to the clearance by Expert Appraisal Committee based on the terms of

reference. Therefore, they contend that it is wrong on the part of the Appellant to claim that the Appellant could proceed on the basis of the availability of coal from Lohara coal blocks.

98. They re-iterated the observations of DIG and Joint Director NTCA and the PCCF with regard to **deficit** reports said to have been made by the Appellant so far as the plan submitted by the Appellant in respect of movement of tigers and their seasonality. Therefore, according to Respondent No.3 since the proposed site for the mine fell under ecologically sensitive area, hence there was always a real possibility that the said blocks may be or may not be allocated to the Appellant subject to various conditions being satisfied. They also refer to Article 12 of the PPA, to contend what events or circumstances are excluded from force majeure events.

99. According to Respondent No.3 it was not a case where PPA was not impossible of performance on account of non-availability of Lohara coal blocks. In other words, sourcing of coal has not become impossible within the meaning of Article 12 of PPA or in terms of Section 56 of the Indian Contract Act, 1872. Similar clause of the PPA came up for consideration before the Apex Court with reference to PPAs involved in those cases in the Energy Watch Dog's case. Applying the same principle, the case of

the Appellant does not come within the purview of force majeure, is the stand of Respondent No.3.

100. Various sources of fuel options were given in the bid by the Appellant, and therefore it is not a case of impossibility in performing the contract.

101. They rely on the Judgment of this Tribunal in ***Adani Power Limited VS. Gujarat Urja Vikas Nigam Limited and Others*** (Appeal No. 184 of 2010 dated 07.09.2011). Once the power project has been established, the question of terminating the agreement would not come into picture. If the Appellant as a generator chooses not to proceed with the implementation of the project, he has to pay liquidated damages in terms of Article 3 of the PPA.

102. So far as Section 56 of the Indian Contract Act is concerned, according to Respondent No.3, the non-availability of Lohara coal block cannot constitute an event of frustration of PPA, since there was no unexpected event of change or circumstance beyond contemplation of the parties. There was no assurance, express or implied, that the environmental clearance would be granted to the Appellant.

103. They also relied upon the following decisions to contend that it is well settled legal principle that an event which can be foreseen or which could

be reasonably known and could be anticipated cannot be termed as an event of force majeure to avoid performance of the contract.

a. Sayabrata Ghose vs. Mugneeram Bangur & Co. (AIR 1954 SC44) Para 17;

b. Firm Rampratap Mahadeo Prasad vs. Sasansa Sugar Works Ltd., (1962 SCC Online at 123:AIR 1964 Pat 250 at Page 251) Para 4;

c. Union of India vs. Chanan Shah (AIR 1955 Pepsu 51 at page 55) para Nos. 24, 25, 26, 27, 28, 30, 31,32 & 33

d. Surpat Singh vs. Sheoprasad (AIR 1945 Pat 300)

104. In response to the argument of the Appellant that cancellation of coal blocks occurred in terms of decision of the Hon'ble Apex Court in **Manohar Lal Case**, according to Respondent No.3, the said case has no application to the present case. Much prior to this Judgment, MoEF had withdrawn TOR.

105. In the above circumstances, they contend that so far as force majeure event is concerned, none of the arguments advanced by the Appellant would come in aid of the Appellant, and therefore, the appeal has to be rejected.

106. To substantiate the contention of Respondent No.3 that the orders of the Tribunal dated 11.05.2016 cannot now be revised or reviewed based

on the subsequent decision of the Hon'ble Supreme Court in another matter, they relied upon the following decisions:

a) State of West Bengal vs. Hemant Kumar (AIR 1966 SC 1061);

b) State of West Bengal vs. Kamal Sen Gupta (2008 (8) SCC 612);

c) Pradeep Kumar Maskara vs. State of West Bengal (2015 2 SCC 653);

d) Anandi Rubber Flour Mills vs. State of A.P. (2002 125 STC 355)

107. Respondent No. 3 contends that this Tribunal on 11.05.2016 held that the present appeal is limited to the issue of force majeure. Therefore, in the absence of challenge by the Appellant till date against the said observation, it has become final and binding. Therefore, they contend that the Appellant cannot now raise the issue of change in law in the present appeal contrary to the above.

108. They further contend that since the Appellant did not raise either before the State Commission or in the appeal the issue of change in law, now the Appellant cannot be allowed to raise the said issue on account of subsequent law declared by the Apex Court in **Energy Watchdog's case.** The questions of law raised by the Appellant are also with reference to force majeure, and there is no reference to change in law.

Rejoinder argument of the Appellant:

109. In the rejoinder argument of the Appellant, the Appellant claims that on account of withdrawal of TOR of the Lohara coal block, it would not be in a position to supply power on the long term basis of 25 years at the levelized tariff in terms of bid. Appellant has sought revision of tariff either under change in law or by exercising regulatory power on the ground that the asset will become unviable if tariff was not revised. Appellant expressed fear of closure of the power plant since tariff was quoted substantially based on Lohara coal block.

110. According to the Appellant, before the MERC, they even raised apprehension of closure of the plant on account of erosion of net-worth which constitutes as a force majeure event. The withdrawal of TOR being the cause and there was no policy formulated by Government of India for allocation of alternate coal block as was recommended to the Ministry of Coal both by MOEF and Government of Maharashtra; Appellant had to plead in the alternate for revision of tariff to overcome consequences of force majeure/frustration.

111. The Appellant also submits since it had quoted a levelized tariff of Rs.2.64, its net-worth would get eroded and the same was explained by a table summarizing the evaluation of options available to the Appellant

under the circumstances at Para 24.9.1 (page 143 to 144 at Sl. No. 5 of the table).

112. The Commission also recorded its findings on these aspects. After referring to letter of allocation dated 06.11.2007 which provides on what grounds coal block could be cancelled, the Commission opined that the risk of submitting its bid by relying on source of coal which was at the stage of TOR was the risk taken by the Appellant since coal from Lohara was not available to Appellant on the date of signing PPA and the same was subject to clearance from MOEF.

113. According to the Appellant, above finding is wrong since Appellant was to demonstrate at the time of bid that that it has source of coal i.e., a letter of comfort, and further prior to the bid on 21.02.2008 allocation of coal block by letter dated 06.11.2007 was in existence. TOR was in its hand on 16.05.2008 and on 08.09.2008 when the Appellant signed the PPA.

114. According to the Appellant, MERC failed to apply the principle applicable to force majeure event argued by the Appellant which is similar to the principles referred in ***Energy Watchdog*** particularly at Paragraph 34 where reference is made to the case of *Tenants (Lancashire Ltd.)*. Reading of the said Judgment clearly indicate that increase in price alone cannot be a ground for force majeure; but if something more is

demonstrated, then the principle of force majeure need not be disregarded.

115. According to the Appellant, after referring to the said consequence of withdrawal of TOR at Para 119 of the Order, the Commission observes that it is necessary in the interest of consumers to exercise regulatory powers by the Commission to prevent an operational generating asset from being stranded. Compensatory tariff relief was granted exercising regulatory powers by the Commission.

116. According to the Appellant, MSEDCL took different stands, one stand before the Expert Committee and another stand in the affidavit filed in Appeal No. 296 of 2013 (by *Prayas Energy Group*). The Appeal filed by MSEDCL against the impugned judgment was also withdrawn by MSEDCL and participated in the deliberations before the Expert Committee to resolve the matter in terms of mandate given by the Commission. Because of change of stand in Appeal No. 296 of 2013 by MSEDCL, the Appellant had to file the present appeal.

117. Change in law was an issue urged before the Commission as is also raised as a ground in the Appeal. However, According to the Appellant, MERC in the impugned judgment did not refer to change in law event; therefore, the Appellant contends that the circumstances which led to filing

of the Appeal and subsequent events thereafter have to be kept in mind to appreciate the stand of the Appellant.

118. According to the Appellant, the contention of the Respondents that the relief sought by the Appellant now in the present Appeal is nothing but review of the order dated 11.05.2016 in Appeal No. 296 of 2013 is wrong. This Tribunal in the second Paragraph did refer to its judgment dated 07.04.2016 in Appeal No. 100 of 2013 and batch matters wherein it refers to opinion of the Tribunal that the Commission has no regulatory power to grant compensatory tariff. Tribunal proceeds to opine that incase force majeure or change in law is made out under PPA, relief in terms of PPA can be granted under the adjudicatory powers. This Tribunal also held that since Commission has come to a conclusion that the case of force majeure event is not made out, it could not have granted compensatory tariff to the Appellant. Therefore, according to the Appellant, the Tribunal while recording the applicability of the ratio of judgment passed in Appeal No. 100 of 2013 and batch matters held that the impugned judgment of the Commission dated 21.08.2013 in case No. 68 of 2012 is set aside except to the extent it holds that the plea of the Appellant that the withdrawal of TOR was not force majeure in terms of PPA.

119. The Appellant emphasizes that since there was no finding on change in law, this Tribunal could not have made any observation regarding

change in law event while disposing of the Appeal. Therefore, according to the Appellant, since the basis on which the Appeal of *Prayas Energy Group* (296 of 2013) was partly allowed (on the basis of opinion in judgment in Appeal No. 100 of 2013), now there is sea change by virtue of judgment in *Energy Watchdog*, the Tribunal or the Commission must proceed with the matter on the principles laid down in the judgment of *Energy Watchdog* and said the judgment on the subject matter in question is a finality. In the said case, issues of force majeure and change in event have been decided albeit for a different set of facts.

120. The Appellant further reiterate that this Tribunal on 11.05.2016 opined that issue of force majeure is not being decided at that stage and will be considered later; it does not mean the Appellant is not permitted to urge the ground of change in law event. Therefore, according to the Appellant provisions of Order 47 Rule 1 of CPC will not come in the way of exercising wide appellate jurisdiction. It would not amount to seeking review of order dated 11.05.2016. On the other hand, ends of justice would meet if the matter is remanded to the Commission for fresh decision on merits in terms of powers under Order 41 Rule 23 (A) read with Rule 25.

121. They further contend that none of the judgment refer to issue of review are applicable to the facts of the present case. According to the

Appellant, reference to judgment dated 07.09.2011 in Appeal No. 184 of 2010 by the Respondents is not applicable to the facts of the present case since the Article referred to in the PPA in the said Appeal is entirely different from the issue of termination of PPA in the present case. The Hon'ble Supreme Court cancelled allocation of all coal blocks by judgment in *Manohar Lal Sharma*. This significant event has impact in the present situation also is the stand of the Appellant.

122. According to the Appellant, comfort letter was the only requirement for bid. Based on this comfort letter, the Appellant's bid was accepted. Therefore, said comfort letter is the most relevant document, otherwise there was no reason why comfort letter was required to be mentioned for participation in the bid.

123. None of the steps required for environment clearance process were within the control of the Appellant. In other words, how the Ministry or the Department concerned would allow such steps etc.? This is very clear from the observation of EAC minutes that MOEF and MOC should work in tandem, so that none of the parties suffer on account of an omission by a Government Department.

124. They also contend that conservation plan was not the basis for de-allocation of coal block. Respondent Discom is not justified to take such plea; and contends that selectively Discom has referred to one observation

pertaining to conservation plan in respect of Lohara coal project, but it deliberately ignored the subsequent efforts made by the Appellant to modify the boundary line of the coal block in order to avoid tiger habitat issue.

125. They also refers to the conclusion arrived at by EAC contending that at the time of grant of TOR, EAC was not aware of the project being within the proposed buffer zone. They also stressed upon the observation of EAC that MOEF and MOC must work in tandem in identifying 'Go and No-Go' areas while considering the allotment of coal block in the country, so that such problems are not encountered in the future. This only shows severe lack of coordination between two Ministries.

126. The reliance placed by *Prayas* on Red Herring Prospectus dated 14.07.2009 issued by the Appellant is irrelevant since risk factors referred to in the prospectus are standard statements which are required to be made to SEBI. The Appellant also contends that worst scenario possible with reference to risk factors must be indicated, so that investors are aware of the consequences that may follow. They also contend that the said prospectus does not demonstrate the cancellation of Lohara coal blocks was within the control of the Appellant.

127. With these arguments, the Appellant contends that the matter deserves to be remanded back for fresh consideration.

128. They also bring on record the relevant Paragraphs pertaining to submissions of change in law and regulatory powers of the Commission apart from force majeure submissions before the Commission. According to Appellant, there was no finding on change in law event in the impugned order, but relief was granted by exercising regulatory power by MERC, therefore, there was no reason for APML to elaborate on the submission of change in law.

129. The Appellant has clearly explained in the rejoinder note at Para 11 on what grounds the allocation letter could be cancelled and the Appellant has clearly mentioned cancellation of Lohara coal block did not occur due to any of those conditions. Similarly, contention of the Discom that allocation was conditional and the Appellant took risk of cancellation since the Appellant has taken the risk only on the three grounds mentioned in the allocation letter and none of the grounds have come into existence. The same Government Instrumentality which granted allocation letter dated 06.11.2007 specified 3 grounds for cancellation, but the cancellation was altogether on some other ground. Apart from that, the Appellant faced the present situation on account of lack of coordination between various Ministries of Government of India as observed in EAC's minutes dated 25.11.2009.

130. Further, observation of this Tribunal in the Order dated 11.05.2016 in IA No. 443 of 2014 clearly indicate that this Tribunal had not opined that the Appellant will not be permitted to urge the ground of change in law since it does not say that the Appellant is only confined to the extent of force majeure. Therefore, the Appellant contends that there are several grounds to remand the matter.

131. They also rely upon the following judgments on the proposition of "construction/interpretation of a contractual document is a question of law":

(a) V.L.S. Finance Limited vs. Union of India (2013) 6 SCC 278 [2J]
(b) Rajah Makund Deb vs. Gopi Nath Sahu, 1914 SCC OnLine Cal 378
(c) Fateh Chand vs. Kishan Kunwar, 1912 SCC OnLine PC 26
(d) Energy Watchdog vs. CERC & Ors. (2017) 14 SCC 80

132. They also rely upon the following case law on the proposition of Appellate Tribunal having wide discretionary powers to mould relief, if not specifically prayed for:

(a) Bhagwati Prasad vs. Chandramaul, AIR 1966 SC 735
(b) Hindalco Industries Ltd. vs. Union of India, (1994) 2 SCC 594

133. They also rely upon the following judgment for the proposition of "appellate authority has all the powers which the original authority may have in deciding the question before it":

(a) Remco Industrial Workers House Building Cooperative Society vs. Lakshmeesha M. & Ors. (2003) 11 SCC 666

(b) PasupuletiVenkateswarlu vs. Motor and General Traders, (1975) 1 SCC 770 **[3J]**

(c) Shikharchand Jain vs. Digamber Jain PrabandKarini Sabha, (1974) 1 SCC 675 **[3J]**

(d) OTIS Elevator Co. (India) Ltd. vs. CCE, (2016) 16 SCC 461

(e) Jute of Corporation of India Ltd. Vs. Commissioner of Income Tax and Ors.: 1991 Supp(2)SCC744

134. They also rely upon *(1974) 2 SCC 363* ***Amarjit Kaur Vs. Pritam Singh*** to contend that the Appeal is in the nature of re-hearing, the court of appeal is entitled to take into account even facts and events which are coming into existence after the decree appealed against.

135. They also relied on (*1980) SCC 545* ***Bhai Dosabai vs. Mathuradas Govinddas*** to contend that in order to do complete justice between the parties, the Appellate court accordingly has to take into consideration events and changes in law occurring during the pendency of an appeal; it is also right and necessary that the decree should be moulded in accordance with the change of statutory situation:

136. With these submissions, the Appellant sought for allowing the Appeal.

137. The points that would arise for our consideration are –

(1) "Whether the relief sought by the Appellant in the present Appeal now amounts to relief of review of the order dated 11.05.2016 in Appeal No. 296 of 2013?"

(2) "Whether the Appellant had abandoned the ground of change in law both in the proceedings before MERC and so also in this Appeal?"

(3) "Whether the relief sought in the Appeal could be moulded based on the pleadings placed on record?"

(4) "Whether the ends of justice requires remand of the matter to the MERC for fresh consideration on merits in terms of Order 41 Rule 23 (A) read with Rule 25 CPC?"

138. MERC at Para 5.53 and 5.54 in the impugned order recorded submissions of the Appellant which read as under:

> *"5.53 APML submitted that the withdrawal of ToR of coal blocks is a force majeure event for the reason that the withdrawal of ToR for Lohara coal block and usage of imported or any other alternative coal will impact the cost of the generation to such an extent that its entire equity will be eroded. Apart from the above, any default in debt service obligations will result in recall of debt and default in performance by APML in respect of contracts executed by it apart from the PPA. In addition to the above, the failure of PPA will also adversely affect public at large, financial institutions, banks and investors. APML averred that while*

Maharashtra is currently facing an acute shortage of power, failure of operational power projects like the Tiroda TPS on account of such issues, will not only deprive the consumers of electricity but will also aggravate the present electricity shortage in the country.

5.54 APML submitted that it is willing to supply the power under the PPA, provided that it is suitably compensated by making the revision in Tariff, by which the situation of force majeure can be mitigated. Based on these arguments, it seeks the intervention of the Commission for review of or adjustment in Tariff to enable it to recover the price of coal and thereby ensure the sustenance of operations and to enable APML to continue with the supply of power to MSEDCL."

139. The Appellant argued before the Commission as noted at Para 24.2 to 24.4 of the impugned order which read as under:

"24.2. APML submitted that subsequent to the submission of its bid in the Case 1 Stage-I bid process, the following modifications have led to force majeure and/or change in law under the PPA:

a) Withdrawal of ToR for Lohara coal block; and

b) Provisions of latest Standard FSA being contrary to the provisions of NCDP

24.3. APML submitted that the above events apart from being force majeure events, also qualify under the provisions of "Change in Law" as per Article 13.1.1 of the PPA, as they have occurred after the submission of the bid on account of actions on part of the Indian Government Instrumentality.

24.4. APML submitted that these events have made APML more dependent on imported coal for supplying the power

committed under the PPA. APML requested the Commission to consider such deviations from extant policy as an unforeseeable risk which is beyond the APML's control. APML submitted that it has analysed the impact of such change in law on all the affected parties in the presentation submitted by it as an annexure."

140. Paras XXVII and XXVIII of the grounds of Appeal with due reference to change in law, as well as force majeure events, Appellant raised grounds in the Appeal which read as under:

"XXVII. For that the Respondent No. 1 Commission being a sector regulator cannot turn a blind eye to the developments that are taking place in relation to allocation of coal risks. It is now a well known fact that all Case I and Case II bids have been severely affected as a result of non-availability of coal. Both the Ministry of Power as well as the Ministry of Coal have intervened in the matter. The CCEA has also taken certain policy decisions. The NCDP 2007 has been amended in 2013. Further, the bidding documents for Case I and Case II have been substantially modified to allow coal cost as a pass through.

XXVIII. For that the sector regulator has an obligation to give a more meaningful and objective interpretation to the provisions of the PPA so as to ensure that the parties are in position to undertake obligations over a period of 25 years. The interpretation of a term of contract has to reflect the intention of the parties. A restrictive interpretation as has been given in the present case has put to risk the agreed venture, which is required to last for 25 years. While compensatory tariff addresses the present issue and is humbly accepted by

> *the Appellant, a clear interpretation of the contract terms particularly in relation to force majeure and change in law will be beneficial."*
>
> *[Emphasis supplied]*

At no point of time, the Appellant had given up the ground of change in law.

141. In the present case, in a nutshell, the dates and events till now which are relevant for consideration of the Appeal on merits are as under:

- On 17.11.2006, Respondent MSEDCL initiated bid process (RfQ) for procurement of 2000 MW power under Case 1 bidding.
- On 10.01.2007, the Appellant made application to the Government of India for allocation of Lohara coal blocks followed by submission of response to the RfQ on 03.02.2007.
- The Appellant was short listed for RfP stage on 03.04.2007 and Respondent – MSEDCL issued first RfP.
- National Coal Development Policy (NCDP) through Ministry of Coal came to be issued by Government of India on 18.10.2007.
- Ministry of Coal issued letter of allocation dated 06.11.2007 to Appellant conveying allocation of Lohara West and Lohara Extension coal blocks as an allocated source of fuel pursuant to its application dated 10.01.2007.

- On 23.11.2007, the Appellant applied to the Standing Linkage Committee (MOC) for grant of coal linkage for the balance capacity to cover the coal requirement of 1980 MW of the project.
- MERC approved revised bid document on 24.01.2008 for power procurement of 2000 MW under Case 1 bidding. This was followed by revised final RfP by MSEDCL on 16.02.2008 envisaging price bid in different structures/tariff components i.e., whether power supplied is based on captive coal, imported coal or domestic coal.
- The Appellant submitted its bid on 20.02.2008 for supply of 1320 MW power to MSEDCL mentioning Lohara captive coal block as fuel source.
- The Appellant received terms of reference from Ministry of Environment for Lohara Coal Blocks on 16.05.2008.
- Rapid Environment Impact Assessment/Environment Management Plan Report was submitted on 21.08.2008.
- MSEDCL issued Letter of Intent on 29.07.2008 to Appellant for supply of 1320 MW power from Unit 2 and Unit 3 at levelized tariff of Rs.2.642 per kWh.
- Appellant and MSEDCL entered into Power Purchase Agreement on 08.09.2008 for 1320 MW power from Unit 2 & 3 of Tiroda TPS.

- Appellant submitted application for forest clearance for Lohara coal block on 21.10.2008 and again the Appellant sought for tapering linkage on 27.10.2008 since forest clearance was getting delayed.
- The Standing Linkage Committee meeting was conducted on 12.11.2008 wherein SLC (LT) authorized issuance of letter of assurance by Coal India Ltd. for 1180 MW power of Appellant's Tiroda TPS after noting that Lohara coal block caters to requirement of 800 MW generation of power.
- The Expert Appraisal Committee of MOEF on 25.11.2009 decided to withdraw the Terms of Reference for Lohara coal blocks on the ground that these blocks fall within the buffer zone of Tadoba Andheri Tiger Reserve. The EAC also suggested for allocation of new coal block to Appellant.
- Accordingly, the Appellant on 03.12.2009 applied for allocation of alternate coal block in lieu of Lohara coal block.
- It also intimated MSEDCL on 02.01.2010 that TOR of Lohara coal block was cancelled.
- On 07.01.2010, MOEF informed the Appellant regarding its decision of not considering Lohara coal block for environment clearance and it had asked MOC to consider the allocation of alternate coal block.

- Between January 2010 and February 2011, the Appellant said to have made all possible efforts to avail alternate coal block for reinstating allocation of Lohara coal block by re-defining the boundary of Mining Line and the entire information was brought to the notice of MSEDCL from time to time.
- Ministry of Power requested MOC on 02.02.2010 to allocate alternate coal block to the Appellant as Minister of State for Environment and Forest decided not to reconsider granting environment clearance for Lohara coal block mining.
- Apparently, on 11.03.2010 even Government of Maharashtra wrote to Government of India requesting for allocation of alternate coal block to the Appellant under special dispensation to ensure availability of 2520 MW of power to Government of Maharashtra from Tiroda TPS.
- Appellant informed MSEDCL regarding its inability to supply power under the PPA from Unit 2 & 3 due to cancellation of Lohara coal block on 22.05.2010.
- Raising occurrence of force majeure in terms of Article 12 of PPA due to cancellation of Lohara coal block, the Appellant wrote letter to the Respondent Discom on 14.06.2010.
- On 16.02.2011, it issued seven days termination notice to MSEDCL under Article 3.3.3 of the PPA placing on record

cancellation of Lohara block and non-allocation of alternate coal block has compelled Appellant to terminate the PPA.

- On 17.07.2012, the Appellant filed the Petition in 68 of 2012 which led to the filing of this Appeal.
- Meanwhile in a Petition filed by *Adani Power Ltd.* before CERC in case No. 155/MP/2012, the Petitioner claimed compensation for escalation of price of coal due to importing the coal on account of Regulations of Indonesia and non-availability of adequate fuel linkage from CIL. They sought compensatory tariff over and above the tariff quoted in PPAs. CERC exercised its regulatory powers and rejected the claim of force majeure and did not express any opinion on change in law which came to be challenged before this Tribunal in Appeal No. 100 of 2013.
- On 07.04.2016, Full Bench of this Tribunal passed judgment in Appeal No. 100 of 2013 along with Appeal No. 98 of 2014 along with Appeal No. 116 of 2014 in the context of shortfall in the available domestic coal and impact of Indonesian Regulations on the price of coal which was procured by the generating companies by importing the same. The Full Bench of this Tribunal opined that appropriate Commission has no regulatory power to grant compensatory tariff to the generating companies where the tariff is arrived by a competitive bidding process under

Section 63 of the said Act. Full Bench also opined that if a case of force majeure or change in law is made out, relief can be granted under PPA by exercising adjudicatory powers of appropriate Commission.

- They also opined that powers conferred on the appropriate Commissions i.e. CERC so far as Section 79, and State Commission so far as Section 86 are almost similar.
- The impugned judgment in Case No. 68 of 2012 came to be passed on 21.08.2013 wherein MERC opined that it has powers to revise the tariff agreed under the terms of PPA by exercising regulatory powers. However, it denied the contention of force majeure. No opinion was expressed on the contention of change in law. The MERC under special circumstances in which the Appellant was placed, deemed it appropriate to look into the matter of providing a relief to prevent an operational asset becoming stranded.
- It is also noticed, in suo motu proceedings initiated by MERC Case No. 63 of 2014 based on the impact of withdrawal of TOR in respect of Lohara coal blocks and resulting effect on Unit 2 and 3 of Tiroda TPS proceeded to determine interim compensation of Rs.3.124 per kWh (1.01 per unit as compensatory tariff over and above 2.64 per kWh).

- Aggrieved by the impugned order dated 05.05.2014, both MSEDCL and Prayas Energy Group filed Appeals in 166 of 2014 and 218 of 2014 respectively. Aggrieved by the impugned order in Case no. 68 of 2012, Prayas Energy Group filed Appeal No. 296 of 2013 challenging orders dated 21.08.2013.
- On 11.05.2016, these three Appeals came to be disposed of by Full Bench by independent orders which read as under:

" ……

IA NO.443 OF 2014 IN DFR NO.2635 OF 2014 &
IA NO. 470 OF 2014

Dated : 11th May, 2016

… …

In the matter of:-

Adani Power Maharashtra Ltd. -Appellant(s)
Vs.
Maharashtra Electricity Regulatory Commission & Anr. -Respondent(s)

… …

ORDER

The present appeal is filed against Order dated 21/8/2013 passed by the Maharashtra Commission in Case No.68 of 2012 to the limited extent it rejects the plea of Adani Power Maharashtra that the withdrawal of the Terms of Reference, which led to the inaccessibility of the coal

block by the Adani Power Maharashtra and the subsequent de-allocation of the said block, was a Force Majeure event as per the terms of the PPA. However, by the impugned order, the Maharashtra Commission has constituted a Committee, inter alia, to look into the impact of non-availability of coal from Lohara coal blocks and submit a Report outlining principles and on the precise mechanism for calculation of compensatory charge to mitigate the hardship caused to Adani Power Maharashtra. By the impugned order, the Maharashtra Commission has, as an interim measure, granted compensatory tariff to Adani Power Maharashtra from the date of CoD.

In our Judgment dated 7/4/2016 in Appeal No.100 of 2013 and batch matters, we have held that the Appropriate Commission has no regulatory power to grant compensatory tariff to the generating companies where the tariff is discovered by a competitive bidding process under Section 63 of the said Act. We have also held that if a case of Force Majeure or Change in Law is made out, relief available under the PPA can be granted under the adjudicatory power of the Appropriate Commission.

In view of the above, today, we have partly allowed the connected Appeal No.296 of 2013 and set aside impugned order dated 21/8/2013 passed by the Maharashtra Commission in Case No.68 of 2012 except to the extent it holds that the plea of Adani Power Maharashtra that the withdrawal of the Terms of Reference, which led to the inaccessibility of the coal block by Adani Power Maharashtra and the subsequent de-allocation of the said

block, was not a Force Majeure event as per the terms of the PPA. We have made it clear in that order that we have not expressed any opinion on the aspect of Force Majeure.

Since the issue involved in this appeal, namely, whether the withdrawal of the Terms of Reference, which led to the inaccessibility of the coal block by Adani Power Maharashtra and the subsequent de-allocation of the said block was a Force Majeure event under the PPA is kept open by us, we direct the Registry to separate these matters and place them before the regular bench for appropriate orders."

" ……

Appeal No. 166 of 2014 &
IA No. 275 of 2014

Dated : 11th May, 2016

… …

In the matter of:-

Maharashtra State Electricity Distribution Co. Ltd. - Appellant(s)

Vs.

Adani Power Maharashtra Ltd. & Ors. - Respondent(s)

… …

ALONG WITH
APPEAL NO. 218 OF 2014 & IA-337 OF 2014

In the matter of:-

Prayas Energy Group - Appellant(s)

Vs.

Maharashtra Electricity Regulatory Commission & Ors. - Respondent(s)

… …

ORDER

Appeal No. 166 of 2014 is filed by Maharashtra State Electricity Distribution Co. Ltd. Appeal No.218 of 2014 is filed by Prayas. Both these appeals are directed against impugned Order dated 5/5/2014 in suo motu proceedings being Case No.63 of 2014 passed by the Maharashtra Commission, whereby the Maharashtra Commission has granted compensatory tariff of Rs.1.01 per unit to Adani Power Maharashtra over and above the tariff fixed under Section 63 of the said Act.

In our Judgment dated 7/4/2016 in Appeal No.100 of 2013 and batch matters, we have held that the Appropriate Commission has no regulatory power to grant compensatory tariff to the generating companies where the tariff is discovered by a competitive bidding process under Section 63 of the said Act. We have also held that if a case of Force Majeure or Change in Law is made out, relief available under the PPA can be granted under the adjudicatory power of the Appropriate Commission.

While Section 79 refers to powers of Central Commission, Section 86 refers to powers of the State Commission. The powers conferred to the Appropriate Commissions under these Sections are almost similar. Therefore, the ratio of our Judgment dated 7/4/2016 in Appeal No. 100 of 2013 and batch matters is squarely applicable to this case also.

Pertinently, today, we have set aside Interim Order dated 21/8/2013 passed by the Maharashtra Commission granting interim compensatory relief to Adani Power Maharashtra in

Case No.68 of 2012 except to the extent it holds that the plea of Adani Power Maharashtra that the withdrawal of the Terms of Reference, which led to the inaccessibility of the coal block by Adani Power Maharashtra and the subsequent de-allocation of the said block was not a Force Majeure event as per the terms of the PPA. We have also made clear in that order that we have not expressed any opinion on the aspect of Force Majeure. It is important to note that this suo motu proceeding being Case No.63 of 2014 is initiated by the Maharashtra Commission on the Report of the Committee constituted by it in Case No.68 of 2012.

In the circumstances, in view of judgment dated 7/4/2016 referred to hereinabove, the Appeals are allowed. Impugned Final Order dated 5/5/2014 passed by the Maharashtra Commission in Case No.63 of 2014 is set aside. Accordingly, all connected IAs are also disposed of."

" ……

Appeal No. 296 of 2013

Dated : 11th May, 2016

… …

In the matter of:-

Prayas Energy Group -Appellant(s)
Vs.
Maharashtra Electricity Regulatory Commission & Ors. - Respondent(s)

… …

ORDER

The present appeal is filed by Prayas against Order dated 21/8/2013 passed by the Maharashtra Commission is Case No.68 of 2012 whereby the Maharashtra Commission has rejected the plea of Adani Power Maharashtra that the withdrawal of the Terms of Reference, which led to the inaccessibility of the coal block by Adani Power Maharashtra and the subsequent de-allocation of the said block, is a Force Majeure event as per the terms of the PPA. However, by the impugned order, the Maharashtra Commission has constituted a Committee, inter alia, to look into the impact of non-availability of coal from Lohara coal blocks and submit a Report outlining principles and on the precise mechanism for calculation of compensatory charge to mitigate the hardship caused to Adani Power Maharashtra. By the impugned order, the Maharashtra Commission has also, as an interim measure, granted compensatory tariff to Adani Power Maharashtra from the date of CoD.

In our Judgment dated 7/4/2016 in Appeal No.100 of 2013 and batch matters, we have held that the Appropriate Commission has no regulatory power to grant compensatory tariff to the generating companies where the tariff is discovered by a competitive bidding process under Section 63 of the said Act. We have also held that if a case of Force Majeure or Change in Law is made out, relief available under the PPA can be granted under the adjudicatory power of the Appropriate Commission. Since the Maharashtra Commission has come to a conclusion that

the case of Force Majeure event is not made out, it could not have granted compensatory tariff to Adani Power Maharashtra.

While Section 79 refers to powers of Central Commission, Section 86 refers to powers of the State Commission. The powers conferred to the Appropriate Commissions under these Sections are almost similar. Therefore, the ratio of our Judgment dated 7/4/2016 in Appeal No.100 of 2013 and batch matters is squarely applicable to this case also.

In the circumstances, the Appeal is partly allowed. Impugned Order dated 21/8/2013 passed by the Maharashtra Commission in Case No.68 of 2012 is set aside except to the extent it holds that the plea of Adani Power Maharashtra that the withdrawal of the Terms of Reference, which led to the inaccessibility of the coal block by Adani Power Maharashtra and the subsequent de-allocation of the said block was not a Force Majeure event as per the terms of the PPA. We make it clear that we have not expressed any opinion on the aspect of Force Majeure. Accordingly, all connected IAs are also disposed of."

142. It is also relevant to place on record that in terms of Order dated 21.08.2013, a high level Expert Committee came to be constituted and the said Committee recommended grant of compensatory tariff to APML for 800 MW power which was entirely dependent on coal from Lohara coal locks.

143. On 18.10.2014, the present Appeal being No. 241 of 2016 came to be filed before this Tribunal against rejection of claim of force majeure.

144. Para XXIX of the Memo of Appeal, the Appellant has clearly mentioned the ground why it was compelled to file the Appeal. In the rejoinder dated 10.11.2016, the Appellant had submitted change in law as a ground. This was not objected by the Respondent specifically

145. The Full Bench judgment of this Tribunal dated 07.04.2016 came to be challenged in ***Energy Watchdog***, and the Hon'ble Supreme Court passed the judgment on 11.04.2017 in the ***Energy Watchdog*** opining that appropriate Commission has powers to exercise regulatory powers to grant compensation by setting aside the opinion of the Full Bench of this Tribunal that appropriate Commission have no regulatory power to grant compensatory tariff to the generating companies where the tariff is discovered by competitive bid process under Section 63 of the said Act.

146. Further, the Hon'ble Supreme Court opined that if an event of change in law occurs in terms of Article 13 of PPA on account of change in policies of the Government or its instrumentality or instrumentality of the Government in respect of availability of domestic coal to the generating companies, the parties to the PPA must be put to same economic position as if no change in policy has occurred resulting in disturbing economic position of Discom.

147. So far as delay in filing the Appeal No. 241 of 2016 (present Appeal), this Tribunal condoned the delay in filing the Appeal. MSEDCL filed reply to the amended Appeal to defy the stand taken by the Appellant in the present Appeal. Under these circumstances, the present Appeal came to be filed.

148. This Tribunal has to now examine whether by virtue of the three Orders of the Full Bench referred above dated 11.05.2016, there is finality in all respects except the ground of force majeure?

149. It is well settled law that the Court while interpreting the provisions of Statute should avoid rejection or addition of words. They should resort to such acts only in exceptional circumstances to achieve the purpose of act or to give purposeful meaning. When the language is clear and unambiguous, it must be interpreted in an ordinary sense without any alteration or addition of words. In a case where facts pleaded give rise to a pure question of law going to the root of matter, the Court has to look into those facts. Under such circumstances, there is need to relook into the changed circumstances, change in law and policies.

150. Construction with reference to meaning of the words mentioned in the document and their legal effect given to them. Meaning of the words is a question of facts in all cases, whether it were to be a legal document or otherwise. The effect of the words is question of law.

151. Even when right construction of documents comes up for consideration, it is a question of law and even in a case of second Appeal, such question of law can be considered. For this proposition, the following judgments are referred to:

(a) *V.L.S. Finance Ltd. vs. Union of India and Ors.* (2013) 6 SCC 278

(b) *Rajah Makund Deb. vs. Gopi Nath Sahu & Ors.* AIR 1914 Cal. 836

(c) *Fateh Chand & Ors. vs. Kishan Kunwar* (PC 1912 SCC Online PC 26)

152. With regard to discretionary powers of Appellate Tribunal for Electricity, there cannot be a doubt that this Tribunal is a Court of first Appeal to consider orders of various State Commissions as well as CERC. Whether this Tribunal has discretionary power to mould relief, if specifically not sought for is one of the arguments addressed before us. It is well settled by various judgments of the Hon'ble Apex Court that if a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that such plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon if it is satisfactorily proved by evidence. What Court has to consider for such situation is whether the parties knew that the matter in question involved in the trial and they

brought to the notice of the trial court about the same? Then it is purely a formality.

153. In order to grant relief on equities by keeping justice, equity and good conscience at the back of the mind, the Tribunal can shape the relief consistent with facts and circumstances established in a given cause of action. The Tribunal feels moulding of relief is necessary to meet ends of justice, after taking all facts and circumstances into consideration, can mould the relief by exercising discretionary power.

154. Order 41 Rule 25 empowers Appellate Court to frame an issue and remit it for trial which has been omitted to be framed and tried by the Trial Court which appears to the Appellate Court essential to the right decision of the case. For such circumstances, the Court should exercise powers of remand under Order 41 Rule 25 read with Rule 23(A) of CPC.

155. If new facts comes into existence after litigation has come to Court and the same has impact on the right to relief or the manner of moulding the relief and if it is diligently brought to the notice of the Tribunal, such fact has to be taken into consideration since equity justifies such action.

156. The exercise of Appellate jurisdiction includes not only to correct error in the judgment under challenge but also such disposition of the case as justice requires. Therefore, the Appellate Court is bound to consider

any change, either in fact or in law, which has come into existence after the impugned judgment.

157. The court of appeal has to take notice of events which have come into existence after the institution of the suit and afford relief to the parties by considering changed circumstances if such changed circumstances would do complete justice between the parties.

158. If there is an important question which needs to be determined having reasonably wide ramifications, in such circumstances the parties must be allowed to raise such points on a remand made to the trial court, so that both parties may take up all points for fresh hearing and dispose of the matter.

159. If new plea is raised and the Court is satisfied that such new plea deserves to be considered especially if it was raised in the trial court but not considered, the same has to be taken into account.

160. The above principles are narrated from the following judgments:

(a) *Bhagwati Prasad vs. Chandramaul (1966) 2 SCR 286*

(b) *Hindalco Industries Ltd. vs. Union of India and Ors. (1994) 2 SCC 594*

(c) *REMCO Industrial Workers House Building Cooperative Society vs. Lakshmeesha M. & Ors. (2003) 11 SCC 666*

(d) *Pasupuleti Venkateswarlu vs. The Motor & General Traders, (1975) 1 SCC 770*

(e) *Shikharchand Jain vs. Digamber Jain Praband Karini Sabha and Ors. (1974) 1 SCC 675*

(f) *Otis Elevator Company (India) Limited vs Commissioner of Central Excise (2016) 16 SCC 461*

(g) *Jute Corporation of India Limited v. Commissioner of Income Tax & Anr. 1991 Supp. (2) SCC 744.*

161. The present Appeal was pending when the judgment in *Energy Watchdog* came to be pronounced by the Hon'ble Apex Court. It is well settled that since the Appeal is continuation of the original proceedings, the Court of Appeal can take into consideration facts and events which have come into existence after the impugned order. This Appeal was pending when the judgement in *Energy Watchdog,* came to be pronounced. Therefore, now we have to consider what is the effect of observations of the Hon'ble Apex Court with regard to regulatory powers to be exercised by the appropriate Commission to grant compensatory tariff.

162. This Tribunal in the Full Bench judgment opined that appropriate Commissions have no regulatory powers to grant compensatory tariff. This is no more good law in the light of *Energy Watchdog* judgment. Therefore, said issue has to be disposed of in line with the final opinion on

the subject of Regulatory Powers of Commission as held in the judgment of ***Energy Watchdog***. It is relevant to refer to certain Paragraphs from the judgment of ***Energy Watchdog*** *[(2017) 14 SCC]* which read under.

> *"**20.** It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions dehors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to "regulate" tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various sections must be harmonised. Considering the fact that the non obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways — either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section*

> *79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff. Whereas "determining" tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to "regulate" tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used.*
>
> *..."*

163. Above Para clearly indicate that if Central Government's guidelines are not in existence or if the situation is not covered by the existing guidelines, the appropriate Commission can exercise regulatory power which is general in nature even in cases of Section 63 competitive bidding.

164. In the light of above subsequent development since this appeal was pending when *Energy Watchdog* judgment came, this Tribunal has to proceed on this point as held by Hon'ble Apex Court. Therefore, we opine that MERC was justified in exercising Regulatory Powers to grant compensatory tariff.

165. With reference to force majeure/change in law, we have to see under what circumstances the cancellation of coal block occurred and on what basis the bid was accepted. In terms of bid, the Appellant had to demonstrate there is firm source of coal by submitting a letter of comfort. Coal block came to be allocated and the said allocation letter dated 06.11.2007 from Ministry of Coal was much prior to the submission of bid on 21.02.2008. From the said letter, relevant Paragraphs are as under:

> *"I am directed to refer to the application of M/s. Adani Power Ltd. for allocation of coal block in the State of Maharashtra and to state that this has been considered by the Central Government and it has been decided to allot Lohara West & Lohara Extn. Coal block in the command area of WCL to M/s. Adani Power Ltd. to meet the coal requirement for their 1000 MW power plant at Tiroda, Distt. Gondia, Maharashtra. This allocation is in pursuance of the provisions contained in Section 3(3)(a)(iii) of the Coal Mines (Nationalization) Act, 1973 and subject to the following conditions:-*
>
> *i) The allocation of Lohara West & Lohara Extn. Coal block to M/s. Adani Power Ltd. has been made to meet the coal requirement of their 1000 MW power plant in Distt. Gondia, Maharashtra.*
>
> *ii) The block is meant for captive use in their own specified end use project i.e. power generation. The coal produced from the block shall not replace any coal linkages given to M/s. Adani Power Ltd. by the Coal India Ltd./its subsidiary and/or by the Singareni Collieries Company Ltd., without prior permission of this Ministry.*

... ...

iv) Coal production from the captive block shall commence within 36 months (42 months in case the area is in forest land) in case of open cast mine and in 48 months (54 months in case the area falls under forest land) case of UG mine, from the date of this letter. The end-use project schedule and the coal mine development schedule should be modified accordingly and submitted to the ministry within 3 months from the date of this letter. A copy of the indicative milestone chart is enclosed.

... ...

vii) The company shall submit a mining plan for approval by the competent authority under the Central Government within six months from the date of this letter.

... ...

ix) No coal shall be sold, delivered, transferred or disposed of except for the stated captive mining purposes, and except with the previous approval of the Central Government.

... ...

Allocation / mining lease of the coal block may be cancelled, inter-alia, on the following grounds:-

a. Unsatisfactory progress of implementation of their end use sponge iron plant / power plant/cement plant.

b. Unsatisfactory progress in the development of coal mining project

c. For breach of any of the conditions of allocation mentioned above.

166. In terms of the above letter, allocation/mining lease could be cancelled only on the three grounds mentioned above. None of the three conditions would envisage a situation of withdrawal of allocation of coal blocks. The three conditions clearly referred to are unsatisfactory progress of implementation of end use of the allottees or unsatisfactory progress in the development of coal mining or breach of any of the conditions in the allocation letter would lead to cancellation. Therefore, when Terms of Reference came to be issued on 16.05.2008, whether Appellant could envisage cancellation or withdrawal of coal block for any other reason other than conditions referred to in the allocation letter?

167. PPA came to be signed on 08.09.2008 and the cancellation or withdrawal of Lohara coal block was much later i.e., 25.11.2009 (almost 1½ years later). The legitimate expectation of the parties at the time of allocation, TOR and submission of bid would be that in the normal course of business, allocation of coal blocks would be in their favour. If they had any doubt about the same, probably, they would have quoted different tariff.

168. Was Commission justified in saying that the Appellant took the risk of submitting its bid on the allocation letter dated 06.11.2007 when it was still to receive TOR dated 16.05.2008? TOR was in the hands of the Appellant when it signed the PPA on 08.09.2008.

169. According to Respondent No. 3, once order is passed it cannot be reviewed or revised based on a subsequent decision of a Court. They rely upon the following judgments:

(a) *State of West Bengal –v- Hemant Kumar,* (AIR 1966 SC 1061)

(b)*State of West Bengal and Others v. Kamal Sengupta and Another,* [2008 8 SCC 612]

(c) *Pradeep Kumar Maskara –v- State of West Bengal* [2015 2 SCC 653]

(d) *Anandi Rubber Flour Mills –v- State of A.P.* decided on 02.08.2001 [2002 125 STC 355]

170. In the present case, Article 12 of the PPA deals with Force Majeure.

171. According to the Appellant, it is not a case of review or revision of the order already passed in the light of changed circumstances on account of subsequent events as stated in the arguments of Appellant. When Full Bench of this Tribunal disposed of the above three matters i.e., two Appeals filed by Prayas Energy Group and one by MSEDCL, it did not

have the benefit of judgment of the Hon'ble Apex Court in ***Energy Watchdog*****.** By virtue of the judgment in ***Energy Watchdog,*** appropriate Commission can grant compensatory tariff by exercising general regulatory powers. They also discussed change in law and force majeure issues with reference to PPA pertaining to the matter before them. Article 12 of PPA in question pertaining to force majeure issue and Article 12 of PPA before the Hon'ble Apex Court in *Energy Watchdog* are similar in nature.

172. This Tribunal while applying the ratio of the judgment passed in Appeal No. 100 of 2013 and batch disposed of the Appeals on 11.05.2016 referred to above held that since MERC has come to a conclusion that force majeure event was not made out, therefore, it could not have granted compensatory tariff to the Appellant. They opined so since they held in the Full Bench judgment that if a case of force majeure or change in law is made out, relief under PPA can be granted under adjudicatory powers. But in *Energy Watchdog*, the opinion of the Full Bench was reversed and there is sea change with regard to what amounts to force majeure and what amounts to change in law and when compensatory tariff could be granted by exercising regulatory powers. In the absence of *Energy Watchdog* judgment, on 11.05.2016, the Tribunal based on its Full Bench judgment held that impugned order of the Commission dated 21.08.2013 in case No. 68 of 2012 is set aside except to the extent it holds that the plea of the Appellant with regard to force majeure on account of

withdrawal of TOR in terms of PPA. Apparently, there was no positive restriction with regard to grounds of appeal pertaining to change in law.

173. Apparently, the present Appeal continued though Appeals filed by Prayas Energy Group and MSEDCL came to be disposed of. So far as the present Appeal, it was at the stage of DFR and IA No. 443 came to be disposed of in the above terms on 11.05.2016. In other words, force majeure issue was kept alive. The Full Bench did not restrict the Appellant urging any other ground like change in law. As a matter of fact, various Paragraphs in the impugned order refer to plea of the Appellant with regard to change in law. Since the Appellant got the relief under regulatory power of MERC, appellant is justified in saying there was no need for elaborate submissions pertaining to change in law in the Appeal. But change in law plea was raised by the Appellant before this Tribunal as well as before Commission.

174. At Para 24.2 to 24.4 in the impugned order, Commission did refer to submission of Appellant that subsequent to submission of its bid in the case 1 stage-1 bid process withdrawal of TOR provisions of latest Standard FSA being contrary to the provisions of NCDP have led to force majeure/change in law under PPA. They also referred to the contention of the Appellant that apart from being force majeure events it also qualified under provisions of change in law as per Article 13.1.1 of PPA. Therefore,

the Appellant submitted that the above events compelled the Appellant to depend on imported coal for supplying power undertaken under PPA. Hence, the Appellant requested Respondent Commission to consider such deviation from extant policy as an unforeseen risk which is beyond the control of the Appellant.

175. Several facts have to be considered as in impact of change in law on the affected party and then such party to contract must be put to same economic position in terms of PPA. In the present Appeal also in the grounds of Appeal, the Appellant contended that there cannot be a restrictive interpretation of terms of contract. They further contended that a clear interpretation of contract terms in relation to force majeure and change in law will be beneficial.

176. The rejoinder filed by the Appellant at Page 17 and 18, plea of change in law is clearly mentioned. Therefore, from the impugned order, it is seen that though there is discussion with regard to change in law plea raised by the Appellant, but no opinion came to be expressed by the Commission.

177. Similarly, there is no restriction so far as issue of change in law being raised by the Appellant before this Tribunal in the above Appeal by virtue of judgment of Tribunal in Appeal No. 296 of 2016. So far as change in law, Article 13 of PPA covers the entire circumstances how change in law

can occur. Similar Article came up for consideration before the Hon'ble Apex Court in ***Energy Watchdog***.

178. It is noticed from the pleadings and the documents placed before this Tribunal that the Appellant based on the allocation of coal letter dated 06.11.2007 made the bid.

179. With regard to change in law, Their Lordships from Paras 49 to 57 opined as under:

> ***49.*** *The respondents have argued before us that it is clear from the change made in Clause 4.7 of the guidelines read with Clause 5.17 that any change in law impacting cost or revenue from the business of selling electricity shall be adjusted separately. The learned counsel for the respondents have argued that "any change in law" is not qualified and, therefore, would include foreign law. According to them, the power purchase agreement is subservient to the guidelines and can never negate the terms of the guidelines. Under Clauses 4.7 and 5.1.7 of the guidelines, these guidelines are binding on all parties including the procurers and any deviation therefrom has to be approved by the appropriate Commission. Therefore, according to them, the PPA must be read as including foreign laws as well. On the other hand, our attention was invited to the definition of "electricity laws" and it was argued that Clause 13 would have to be read in the light of the PPA provisions and so read it would not include changes in Indonesian law, being foreign and not Indian law.*
>
> ***50.*** *Both the guidelines and the model PPA, of which Clause 13 is a part, have been drafted by the Central Government itself. It is, therefore, clear that the PPA only fleshes out what is mentioned in Clause 4.7 of the guidelines, and goes on to explain what the*

expression "any change in law" means. This being the case, it is clear that the definition of "law" speaks of all laws including electricity laws in force in India. Electricity laws, as has been seen from the definition, means the Electricity Act, rules and regulations made thereunder from time to time, and any other law pertaining to electricity. This being so, it is clear that the expression "in force in India" in the definition of "law" goes with "all laws". This is for the reason that otherwise the said expression would become tautologous, as electricity laws that are in force in India are already referred to in the definition of "electricity laws" as contained in the PPA. Once this is clear, at least textually it is clear that "all laws" would have to be read with "in force in India" and would, therefore, refer only to Indian laws. Even otherwise, from a reading of Clause 13, it is clear that Clause 13.1.1 is in four different parts. The first part speaks of enacted laws; the second speaks of interpretation of such laws by courts or other instrumentalities; the third speaks of changes in consents, approvals or licences which result in change in cost of the business of selling electricity; and the fourth refers to any change in the declared law of the land for the project, cost of implementation of resettlement and rehabilitation or cost of implementing the environmental management plan. "Competent court" in Clause 13.1.2 is defined as meaning only the judicial system of India.

***51.** First and foremost, the expression "any law" occurs in both sub-clause (i) and sub-clause (ii) of Clause 13.1.1, which expression must be given the same meaning in both sub-clauses. This being the case, as in sub-clause (ii), this expression would refer only to Indian law, the same meaning will have to be given to the very same expression in sub-clause (i). Even otherwise, sub-clauses (i) and (ii) form part of the same contractual scheme in that sub-clause (i) refers to the enactment of laws, whereas sub-clause (ii) relates to interpretation of those very laws by a competent court of law/tribunal or Indian*

government instrumentality. "Competent court", as we have seen above, speaks only of the Indian judicial system and, therefore, the enactments spoken of in sub-clause (i) would necessarily refer only to Indian enactments.

52. *However, we were referred to other clauses in the PPA, for example, Clauses 12.4(f)(ii), 4.1.1(a) and 17.1, all of which speak of Indian law. It was, therefore, argued that wherever the parties wanted to refer to Indian law, they did so explicitly, and from this it should be inferred that the expression "law" would otherwise include all laws whether Indian or otherwise.*

53. *This argument is based on the Latin maxim expression unius est exclusion alterius. This maxim has been referred to in a number of judgments of this Court in which it has been described as a "useful servant but a dangerous master". (See for example CCE v. National Tobacco Co. of India Ltd. [CCE v. National Tobacco Co. of India Ltd., (1972) 2 SCC 560] , SCC at para 30.)*

54. *From a reading of the above, it is clear that if otherwise the expression "any law" in Clause 13 when read with the definition of "law" and "electricity laws" leads unequivocally to the conclusion that it refers only to the law of India, it would be unsafe to rely upon the other clauses of the agreement where Indian law is specifically mentioned to negate this conclusion.*

55. *It was also argued, placing reliance upon the fact that a commercial contract is to be interpreted in a manner which gives business efficacy to such contract, that the subject-matter of the PPA being "imported coal", obviously the expression "any law" would refer to laws governing coal that is imported from other countries. We are afraid, we cannot agree with this argument. There are many PPAs entered into with different generators. Some generators may source*

fuel only from India. Others, as is the case in the Adani Haryana matter, would source fuel to the extent of 70% from India and 30% from abroad, whereas other generators, as in the case of Gujarat Adani and the Coastal case, would source coal wholly from abroad. The meaning of the expression "change in law" in Clause 13 cannot depend upon whether coal is sourced in a particular PPA from outside India or within India. The meaning will have to remain the same whether coal is sourced wholly in India, partly in India and partly from outside, or wholly from outside. This being the case, the meaning of the expression "any law" in Clause 13 cannot possibly be interpreted in the manner suggested by the respondents. English judgments and authorities were cited for the proposition that if performance of a contract is to be done in a foreign country, what would be relevant would be foreign law. This would be true as a general statement of law, but for the reason given above, would not apply to the PPAs in the present case.

56. *However, insofar 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.*

With regard to force majeure, from Para 30 to 42, Their Lordships in *Energy Watchdog* considered what amounts to force majeure, which read as under:

> ***30.*** *A large part of the argument turned on the finding of the Appellate Tribunal that the rise in price of coal consequent to change in Indonesian law would be a force majeure event which would entitle the respondents to claim compensatory tariff. Before embarking on the merits of this claim, we must first advert to the argument of the appellant that force majeure can only be argued for a very restricted purpose, as has been pointed out in the Supreme Court judgment dated 31-3-2015.*
>
> ***31.*** *In order to appreciate this contention, it is first necessary to set out the relevant portion of this judgment. By the judgment dated 31-3-2015 [Adani Power Ltd. v. CERC, (2015) 12 SCC 216] , this Court held: (Adani Power Ltd. case [Adani Power Ltd. v. CERC, (2015) 12 SCC 216] , SCC pp. 219-20, paras 13-19)*
>
> *"13. By order dated 1-8-2014 [Uttar Haryana Bijli Vitran Nigam Ltd. v. CERC, 2014 SCC OnLineAptel 170], the Appellate Tribunal dismissed the cross-objections of the appellant herein as not maintainable. On 16-9-2014, the appellant preferred Appeal No. DFR No. 2355 of 2014 before the Appellate Tribunal against that part of the order dated 2-4-2013 [Adani Power Ltd. v. Uttar Haryana Bijli Vitran Nigam Ltd., 2013 SCC OnLine CERC 180] which went against the appellant. Obviously, there was a delay in preferring that appeal. Therefore, the appellant filed an application bearing IA No. 380 of 2014 seeking condonation of delay in preferring the appeal which was rejected by the impugned order*

[Adani Power Ltd. v. CERC, 2014 SCC OnLineAptel 191] . Hence, the instant appeal.

14. The issue before this Court is limited. It is the correctness of the decision of the Appellate Tribunal in declining to condone the delay in preferring the appeal against the order dated 2-4-2013 [Adani Power Ltd. v. Uttar Haryana Bijli Vitran Nigam Ltd., 2013 SCC OnLine CERC 180] of the Central Commission.

15. However, elaborate submissions were made regarding the scope of Order 41 Rule 22 of the Code of Civil Procedure, 1908 (for short "CPC"), and its applicability to an appeal under Section 111 of the Act by the appellant relying upon earlier decisions of this Court. The respondents submitted that such an enquiry is wholly uncalled for as the cross-objections of the appellant in Appeal No. 100 of 2013 stood rejected and became final.

16. Lastly, the learned counsel for the appellant submitted that even if this Court comes to the conclusion that the appellant has not made out a case for condonation of delay in preferring an appeal against the order dated 2-4-2013 [Adani Power Ltd. v. Uttar Haryana Bijli Vitran Nigam Ltd., 2013 SCC OnLine CERC 180] of the Central Commission, the appellant is entitled to argue in the pending Appeals Nos. 98 and 116 of 2014 both the grounds of "force majeure" and "change of law" not for the purpose of seeking the relief of a declaration of the frustration of the contracts between the appellants and the respondents, thereby relieving the appellant of his obligations arising out of the contracts, but only for the purpose of seeking the alternative relief of compensatory tariff. In other words, the appellant's submission is that the facts which formed the basis of the submission of the frustration of contracts are also relevant for supporting the conclusion of the National Commission that the appellant is entitled for the relief of compensatory tariff.

17. We agree with the respondents that we are not required to go into the question of the applicability of Order 41 Rule 22 in the instant appeal as the decision of the Appellate Tribunal to reject the cross-objections of the appellant by its order dated 1-8-2014 [Uttar Haryana Bijli Vitran Nigam Ltd. v. CERC, 2014 SCC OnLineAptel 170] has become final and no appeal against the said order is pending before us.

18. We are also not required to go into the question whether the order of the Central Commission dated 2-4-2013 [Adani Power Ltd. v. Uttar Haryana Bijli Vitran Nigam Ltd., 2013 SCC OnLine CERC 180] by which it declined to grant a declaration of frustration of the contracts either on the ground of "force majeure" or on the ground of "change of law" is independently appealable, since no such appeal even if maintainable, is preferred by the appellant.

19. The question whether the appellant made out a case for condonation of delay in preferring the appeal before the Appellate Tribunal, in our opinion, need not also be examined by us in view of the last submission made by the appellant. If the appellant is not desirous of seeking a declaration that the appellant is relieved of the obligation to perform the contracts in question, the correctness of the decision of the Appellate Tribunal in rejecting the application to condone the delay in preferring the appeal would become purely academic. We are of the opinion that so long as the appellant does not seek a declaration, such as the one mentioned above, the appellant is entitled to argue any proposition of law, be it "force majeure" or "change of law" in support of the order dated 21-2-2014 [Adani Power Ltd. v. Uttar Haryana Bijli Vitran Nigam Ltd., 2014 SCC OnLine CERC 25] quantifying the compensatory tariff, the correctness of which is under challenge before the Appellate Tribunal in Appeal No. 98 of

2014 and Appeal No. 116 of 2014 preferred by the respondents, so long as such an argument is based on the facts which are already pleaded before the Central Commission."

(emphasis in original)

***32.** This Court dealt with an appeal arising out of an order of the Appellate Tribunal dated 31-10-2014 [Adani Power Ltd. v. CERC, 2014 SCC OnLineAptel 191] , in which the Appellate Tribunal declined to condone a delay of 481 days in preferring an appeal against an order dated 2-4-2013.*

***33.** As has been stated by this Court, the issue before the Court was limited. This Court held that the appellant is entitled to argue force majeure and change in law in pending Appeals Nos. 98 and 116 of 2014. This was because what was concluded by the Central Commission was force majeure and change of law for the purpose of seeking the relief of declaration of frustration of the contract between the appellant and the respondents, thereby relieving the appellant of its obligations arising out of the contract. Since the appellant was not desirous of seeking a declaration that the appellant is relieved of the obligation of performing the contract in question, the appellant is entitled to argue force majeure or change of law in support of the Commission's order of 21-2-2014, which quantified compensatory tariff, the correctness of which is under challenge in Appeals Nos. 98 and 116 of 2014. This being the case, it is clear that this Court did not give any truncated right to argue force majeure or change of law. This Court explicitly stated that both force majeure and change of law can be argued in all its plenitude to support an order quantifying compensatory tariff so long as the appellants do not claim that they are relieved of performance of the PPAs altogether. This being the case, we are of the view that the preliminary submission*

of the appellant before us is without any force. Accordingly, the Appellate Tribunal rightly went into force majeure and change of law.

34. *"Force majeure" is governed by the Contract Act, 1872. Insofar as it is relatable to an express or implied clause in a contract, such as the PPAs before us, it is governed by Chapter III dealing with the contingent contracts, and more particularly, Section 32 thereof. Insofar as a force majeure event occurs dehors the contract, it is dealt with by a rule of positive law under Section 56 of the Contract Act. Sections 32 and 56 are set out herein:*

*"**32. Enforcement of contracts contingent on an event happening**.—Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened.*

If the event becomes impossible, such contracts become void.

***

***56. Agreement to do impossible act**.—An agreement to do an act impossible in itself is void.*

***Contract to do act afterwards becoming impossible or unlawful**.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.*

***Compensation for loss through non-performance of act known to be impossible or unlawful**.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make*

compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

35. *Prior to the decision in Taylor v. Caldwell , the law in England was extremely rigid. A contract had to be performed, notwithstanding the fact that it had become impossible of performance, owing to some unforeseen event, after it was made, which was not the fault of either of the parties to the contract. This rigidity of the Common law in which the absolute sanctity of contract was upheld was loosened somewhat by the decision in Taylor v. Caldwell in which it was held that if some unforeseen event occurs during the performance of a contract which makes it impossible of performance, in the sense that the fundamental basis of the contract goes, it need not be further performed, as insisting upon such performance would be unjust.*

36. *The law in India has been laid down in the seminal decision of Satyabrata Ghose v. MugneeramBangur & Co. The second paragraph of Section 56 has been adverted to, and it was stated that this is exhaustive of the law as it stands in India. What was held was that the word "impossible" has not been used in the section in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose of the parties. If an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement, it can be said that the promisor finds it impossible to do the act which he had promised to do. It was further held that where the Court finds that the contract itself either impliedly or expressly contains a term, according to which performance would stand discharged under certain circumstances, the dissolution of the contract would take place*

under the terms of the contract itself and such cases would be dealt with under Section 32 of the Act. If, however, frustration is to take place dehors the contract, it will be governed by Section 56.

37. *In Alopi Parshad & Sons Ltd. v. Union of India, this Court, after setting out Section 56 of the Contract Act, held that the Act does not enable a party to a contract to ignore the express covenants thereof and to claim payment of consideration, for performance of the contract at rates different from the stipulated rates, on a vague plea of equity. Parties to an executable contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, for example, a wholly abnormal rise or fall in prices which is an unexpected obstacle to execution. This does not in itself get rid of the bargain they have made. It is only when a consideration of the terms of the contract, in the light of the circumstances existing when it was made, showed that they never agreed to be bound in a fundamentally different situation which had unexpectedly emerged, that the contract ceases to bind. It was further held that the performance of a contract is never discharged merely because it may become onerous to one of the parties.*

38. *Similarly, in Naihati Jute Mills Ltd. v. Khyaliram Jagannath, this Court went into the English law on frustration in some detail, and then cited the celebrated judgment of Satyabrata Ghose v. MugneeramBangur& Co. Ultimately, this Court concluded that a contract is not frustrated merely because the circumstances in which it was made are altered. The courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events.*

39. *It has also been held that applying the doctrine of frustration must always be within narrow limits. In an instructive English judgment, namely, Tsakiroglou& Co. Ltd.v. NobleeThorl GmbH , despite the closure of the Suez Canal, and despite the fact that the customary route for shipping the goods was only through the Suez Canal, it was held that the contract of sale of groundnuts in that case was not frustrated, even though it would have to be performed by an alternative mode of performance which was much more expensive, namely, that the ship would now have to go around the Cape of Good Hope, which is three times the distance from Hamburg to Port Sudan. The freight for such journey was also double. Despite this, the House of Lords held that even though the contract had become more onerous to perform, it was not fundamentally altered. Where performance is otherwise possible, it is clear that a mere rise in freight price would not allow one of the parties to say that the contract was discharged by impossibility of performance.*

40. *This view of the law has been echoed in Chitty on Contracts, 31st Edn. In Para 14-151 a rise in cost or expense has been stated not to frustrate a contract. Similarly, in Treitel on Frustration and Force Majeure, 3rd Edn., the learned author has opined, at Para 12-034, that the cases provide many illustrations of the principle that a force majeure clause will not normally be construed to apply where the contract provides for an alternative mode of performance. It is clear that a more onerous method of performance by itself would not amount to a frustrating event. The same learned author also states that a mere rise in price rendering the contract more expensive to perform does not constitute frustration. (See Para 15-158.)*

41. *Indeed, in England, in the celebrated Sea Angel case, the modern approach to frustration is well put, and the same reads as under:*

"111. In my judgment, the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. Since the subject-matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as "the contemplation of the parties", the application of the doctrine can often be a difficult one. In such circumstances, the test of "radically different" is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances."

(emphasis in original)

42. *It is clear from the above that the doctrine of frustration cannot apply to these cases as the fundamental basis of the PPAs remains unaltered. Nowhere do the PPAs state that coal is to be*

procured only from Indonesia at a particular price. In fact, it is clear on a reading of the PPA as a whole that the price payable for the supply of coal is entirely for the person who sets up the power plant to bear. The fact that the fuel supply agreement has to be appended to the PPA is only to indicate that the raw material for the working of the plant is there and is in order. It is clear that an unexpected rise in the price of coal will not absolve the generating companies from performing their part of the contract for the very good reason that when they submitted their bids, this was a risk they knowingly took. We are of the view that the mere fact that the bid may be non-escalable does not mean that the respondents are precluded from raising the plea of frustration, if otherwise it is available in law and can be pleaded by them. But the fact that a non-escalable tariff has been paid for, for example, in the Adani case, is a factor which may be taken into account only to show that the risk of supplying electricity at the tariff indicated was upon the generating company.

... ..."

180. They opined that if fundamental basis of the pleas remain unaltered doctrine of frustration cannot be applied to such cases. Their Lordships at Para 45 agreeing with the arguments of Respondents before the Hon'ble Apex Court that force majeure clause there under which is similar to the present case does not exhaust the possibility of unforeseen events occurring outside and/or non-natural events. Emphasis from the arguments of Respondents was that so long as their performance is hindered by an unforeseen event, the force majeure clause applies. In this

context, Their Lordships referred to various commentaries from *Chitty on Contracts* and *English Law* on the subject which reads as under:

> ***45.*** *First and foremost, the respondents are correct in stating that the force majeure clause does not exhaust the possibility of unforeseen events occurring outside natural and/or non-natural events. But the thrust of their argument was really that so long as their performance is hindered by an unforeseen event, the clause applies. Chitty on Contracts, 31st Edn. at Para 14-151 cites a number of judgments for the proposition that the expression "hindered" must be construed with regard to words which precede and follow it, and also with regard to the nature and general terms of the contract. Given the fact that the PPA must be read as a whole, and that Clauses 12.3 and 12.7(a) are a part of the same scheme of force majeure under the contract, it is clear that the expression "hindered" in Clause 12.7(a) really goes with the expression "partly prevents" in Clause 12.3. Force majeure clauses are to be narrowly construed, and obviously the expression "prevents" in Clause 12.3 is spoken of also in Clause 12.7(a). When "prevent" is preceded by the expression "wholly or partly", it is reasonable to assume that the expression "prevented" in Clause 12.7(a) goes with the expression "wholly" in Clause 12.3 and the expression "hindered" in Clause 12.7(a) goes with the expression "partly". This being so, it is clear that there must be something which partly prevents the performance of the obligation under the agreement. Also, Treitel on Frustration and Force Majeure, 3rd Edn., in Para 15-158 cites the English judgment of Tennants (Lancashire) Ltd. v. C.S. Wilson and Co. Ltd. for the proposition that a mere rise in price rendering the contract more expensive to perform will not constitute "hindrance". This is echoed in the celebrated judgment of Peter Dixon & Sons*

Ltd. v. Henderson, Craig & Co. Ltd. in which it was held that the expression "hinders the delivery" in a contract would only be attracted if there was not merely a question of rise in price, but a serious hindrance in performance of the contract as a whole. At the beginning of the First World War, British ships were no longer available, and although foreign shipping could be obtained at an increased freight, such foreign ships were liable to be captured by the enemy and destroyed through mines or submarines, and could be detained by British or allied warships. In the circumstances, the Tennants (Lancashire) Ltd. judgment was applied, and the Court of Appeals held: (Peter Dixon caseKB p. 784)

"… Under the circumstances, can it be said that the sellers were not "hindered or prevented" within the meaning of the contract? It is not a question of price, merely an increase of freight. Tonnage had to be obtained to bring the pulp in Scandinavian ships, and although the difficulty in obtaining tonnage may be reflected in the increase of freight, it was not a mere matter of increase of freight; if so, there were standing contracts that ought to have been fulfilled. Counsel for the respondents urged that certain shipowners, for reasons of their own, chose not to fulfil standing contracts. It was not only shipowners but pulp buyers and sellers. The whole trade was dislocated, by reason of the difficulty that had arisen in tonnage. It seems to me that the language of Lord Dunedin in Tennants (Lancashire) Ltd. v. C.S. Wilson & Co. Ltd. is applicable to the present case: (AC p. 516)

'… Where I think, with deference to the learned Judges, the majority of the court below have gone wrong is that they have seemingly assumed that price was the only drawback. I do not think that price as price has anything to do with it. Price may be

evidence, but it is only one of many kinds of evidence as to shortage. If the appellants had alleged nothing but advanced price they would have failed. But they have shown much more.'

That is exactly so here. Price, as price only, would not have affected it. They were all standing contracts, but the position has so changed by reason of the war that buyers and sellers and the whole trade were hindered or prevented from carrying out those contracts."

181. Therefore, it is clear that if it is a case of mere price increase, there cannot be ground of force majeure. If something more than increase in price is demonstrated, principle of force majeure cannot be disregarded or abandoned.

182. We are of the opinion that Red Herring Prospectus dated 14.07.2009 has no relevance to the controversy before us since it is a standard statement which are required to be made to the SEBI pertaining to risk factors, so that worst scenario possible is cautioned to the investors. In other words, it is an indication that such risk is possible. Whether this can come in the way of seeking compensatory tariff on the ground of force majeure?

183. It is pertinent to mention series of events happened subsequent to impugned order till date -

(a) Cancellation of coal blocks by the Hon'ble Supreme Court in *Manohar Lal Sharma's* case.

(b) Policy Direction dated 16.04.2015 issued by Ministry of Power under Section 107 to treat allocation of coal block under Coal Mines as change in law which was in lieu of cancellation of coal blocks by virtue of judgment of the Hon'ble Apex Court in *Manohar Lal Sharma*.

(c) The judgment of the Hon'ble Apex Court in the *Energy Watchdog* with regard to change in law event on account of supply from Coal India and other Indian sources is cut down pursuant to the executive and policy decisions.

(d) The judgment of this Tribunal in Appeal No. 193 of 2017 dated 21..12.2018 wherein the Tribunal opined that cancellation of coal block on account of the judgment of the Hon'ble Apex Court in *Manohar Lal Sharma*, an event subsequent to cut-off date, amounts to change in law.

(e) Lastly, MOP's direction dated 27.08.2018 for providing pass through of any change in domestic duties, levies, cess, taxes in expeditious manner.

184. In the pleadings of Respondent No. 2 and Appellant, opinion of Hon'ble Apex Court is referred. When Appellant approached Hon'ble Supreme Court for condonation of delay in Civil Appeal, on 31.03.2015 it was disposed of opining that the Appellant can raise issues of force majeure or change in law but it cannot ask for relief of declaration of frustration of the contract. Therefore, we need not direct ourselves to look into facts vis-à-vis Section 56 of Contract Act leading to termination of contract.

185. That apart, in order to consider the grievances of the Appellant, one has to consider Article 3.3.3 of the PPA to understand what was the *Consus-Adidem* to know what exactly was the understanding of the parties at the time of entering into contract, i.e. PPA. One has to remember that there was no guideline issued by the Central Government pertaining to Case 1 competitive bidding process. On the other hand, we note that specific guidelines came in 2009, how fuel arrangement for Case 1 bidding has to be made.

186. If argument of Discom were to be accepted that reference of source of fuel in the bid document was only for the purpose of establishing bidder's capacity to fulfil its contractual obligation, it is quite possible that bidder can even show some random source thereby making some of the provisions of PPA redundant especially like Article 19.

187. Clause 2.1.1 of RFP indicates that the bidder's obligation is to ensure tie up of linkage. Definitely execution of Fuel Supply Agreement is subsequent, i.e. condition subsequent. Bidder has no control on the terms of allocation of coal blocks or on the issues pertaining to environmental clearance, land acquisition etc. which are within the control of Central Government and the Central Government owned coal companies. Neither bid document nor PPA does envisage a situation indicating that there has to be absolute finality with regard to source of coal. Mere comfort letter was enough to participate in bidding process.

188. Para 5.19 of the impugned order refers to submission of the Appellant which reads as under:

> *"5.19 APML requested MSEDCL vide its letters dated 14 October, 2010 and 23 November, 2010, to impress upon GoM and GoI for early allocation of an alternate coal block or for restoring the ToR of Lohara coal blocks by redefining the boundary so as to enable APML to supply power to MSEDCL at the quoted Tariff as per the PPA."*

189. It is also noticed that on 21.10.2008 by abundant caution, the Appellant had sought for coal linkage pending forest clearance of the coal block. It is also noticed that the Appellant had sought for modifications to the boundary line of mining and also to take mining activities phase-wise so as to conserve the tiger zone, the apprehension expressed in the meeting held on 25.10.2009 which led to withdrawal of TOR. Many

attempts were made by the Appellant to secure alternate coal block allocation which was also recommended by Ministry of Power and so also Government of Maharashtra; but no such allocation came to the rescue of appellant. The Appellant offered to resolve the issue with Respondent No. 2 seeking to change identified Units 2 and 3 to Units 4 & 5 of Tiroda project. But Respondent No. 2 – MSEDCL did not respond.

190. Appellant cannot anticipate the movement of tiger in the project area. Once it has come to its knowledge, it had proposed to modify the wild life conservation plan as per the requirements of the State Government. The Appellant even proposed to surrender 176 hectors of area which falls under the proposed buffer of TATR. In the remaining area said to be the tiger corridor, the Appellant proposed to divide the Mining Line Area into 40 blocks and do mining only one block every year, so that it will have minimum impact on the wild life (this is seen from Page 94 of the compilation of documents submitted by MSEDCL on 21.09.2017).

191. Respondent No. 2 never denied but admitted that the performance of contract would lead severe losses which may result in closure of Appellant's power plant on account of withdrawal of Lohara coal block.

192. The Commission refers to the fact that in view of long term nature of the contract, withdrawal of TOR of Lohara coal block definitely affects the viability of Unit 2 and 3 of the power station which clearly indicate that

the non-availability of the coal from Lohara will impact the ability of the Appellant to operate the plant (Para 108 to 112 of the Impugned Order) but rejected ground of force majeure.

193. From Para 102 onwards in the impugned order, Commission makes a note that the Appellant had made adequate efforts to ensure fuel supply in lieu of Lohara coal block. It further observed that MOEF and MOC must work in tandem to avoid such situation. Para 104 of the order is relevant, which reads as under:

> *"104. The Commission notes that APML has made adequate efforts to restore the supply of domestic coal in lieu of Lohara coal blocks. However, the Commission observes that, remedial measure for such a situation do not exist in the current policy framework, leading to a situation where APML has not been able to restore adequate fuel supply arrangements for Unit 2 and 3 of Tiroda TPS."*

Therefore, according to the Appellant, it was not just increase in price of coal alone, but a case of non-availability of domestic coal which would eventually lead to closure of operating assets.

194. The Commission opined that the Appellant would incur financial losses by supplying power at quoted tariff. It also opined that ability of the Appellant to operate the plant may get affected on account of financial losses especially they may not be able to meet its debt service obligations. They also apprehended that the significant financial losses may lead to

project becoming a stranded asset, since the said two stake holders, i.e. consumers and State Govt., lenders, Respondent No. 2 – MSEDCL are not going to be benefited if operational asset gets stranded. They opine that regulatory powers to grant compensatory tariff has to be exercised.

195. If coal blocks were not withdrawn, still problem of Appellant would have continued as a consequence of judgment of Hon'ble Supreme Court in *Manoharlal Sharma* in 2014.

196. It is noticed from above discussion and reasoning that though appellant did raise change in law issue and argued and though Commission referred the plea and argument, it did not consider the same vis-a-vis the facts and circumstances.

197. On account of various subsequent events as specified above including judgment of Full Bench and reversal of the Full Bench judgment by Hon'ble Apex Court on certain issues and analysis and opinion on the points of force majeure and change in law in *Energy Watchdog* case, we are of the opinion that there has to be a holistic consideration of the matter afresh. In the circumstances referred to above, we are of the opinion there is necessity to relook into the matter afresh by the State Commission on the issues of force majeure and change in law.

198. We are of the opinion, in view of the opinion of the Hon'ble Apex Court on the issue of exercising regulatory powers by appropriate Commission, we hold that MERC can exercise regulatory powers to grant compensatory tariff. Therefore, MERC need not ponder over this issue afresh.

199. In the above circumstances, we are of the opinion, the relief sought in the present appeal does not amount to review of Order dated 11.05.2016 in Appeal No. 296 of 2013.

200. From the discussion above based on pleadings and arguments, it is crystal clear that appellant had not abandoned the plea of 'change in law' event.

201. For the reasons mentioned above, the reliefs deserve to be moulded in the above appeal. Accordingly, all points are answered in favour of appellant.

202. For the reasons mentioned above, the Appeal is allowed by setting aside the impugned order so far as it relates to issue of force majeure. The matter is remitted back to MERC for fresh consideration on the issues of force majeure and change in law.

203. MERC shall hear the parties on the above two issues afresh, so that all facts and law which came into existence subsequent to impugned order could be brought on record for the benefit of MERC.

204. MERC untrammelled by its earlier reasoning on the issue of force majeure shall proceed with the matter on the issues pertaining to force majeure as well as change in law and consequences thereof in the light of our observations and reasoning.

205. MERC shall complete the said exercise as expeditiously as possible, but not later than three months from the date of receipt of the copy of this Judgment and Order.

206. If any IAs are pending they shall stand disposed of.

207. No order as to costs.

208. Pronounced in the Open Court on this **31st day of May, 2019.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

ts/tpd