IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
(APPELLATE JURISDICTION)

[ADANI GROUP]
APPEAL NO.100 OF 2013 & I.A. No.116 OF 2013
APPEAL NO.98 OF 2014 & I.A. NO.343 & 402 OF 2014

Dated : 7th April, 2016

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. T. Munikrishnaiah, Technical Member.
Hon'ble Mr. I. J. Kapoor, Technical Member.

In the matter of:-

1. **UTTAR HARYANA BIJLI VITRAN NIGAM LIMITED,** Vidyut Sadan, Plot No. C-16, Sector 6, Panchkula, Haryana - 134 112.

2. **DAKSHIN HARYANA BIJLI VITRAN NIGAM LIMITED,** Vidyut Nagar, Vidyut Sadan, Hissar, Haryana - 125 005. **... Appellants**

AND

1. **CENTRAL ELECTRICITY REGULATORY COMMISSION**, 3rd & 4th Floor, Chanderlok Building, 36, Janpath, New Delhi- 110 001.

2. **ADANI POWER LIMITED**, 9th Floor, Shikhar, Mithakali Six Roads, Navrangpura, Ahmedabad, Gujarat - 380 009.

3. **GUJARAT URJA VIKAS NIGAM LIMITED**, Sardar Patel Bhawan, Race Course Circle, Vadodara, Gujarat – 390 007.) ... **Respondents**

Counsel for the Appellant(s)
Mr. Brijender Chahar, Sr. Adv.
Mr. Shashi Bhushan
Mr. Apoorva Karol
Mr. Vaibhav Tyagi
Mr. Vikrant Saini

Counsel for Respondent(s)
Mr. Nikhil Nayyar
Mr. Dhananjay Baijal
Mr. N. Sai Vinod for R-1

Mr. Harish Salve, Sr. Adv.
Mr. Amit Kapur
Ms. Poonam Verma
Mr. Gaurav Dudeja
Mr. Akshat Jain a/w
Mr. Malav Deliwala (Rep.) for Adani

ALONG WITH
APPEAL NO. 116 OF 2014

In the matter of:-

GUJARAT URJA VIKAS NIGAM LTD. Sardar Patel Bhawan, Race Course Circle, Vadodara, Gujarat – 390 007.) ... **Appellants**

AND

1. **CENTRAL ELECTRICITY REGULATORY COMMISSION**, 3rd & 4th Floor, Chanderlok Building, 36, Janpath, New Delhi- 110 001.

2. **ADANI POWER LIMITED**, 9th Floor, Shikhar, Mithakali Six Roads, Navrangpura, Ahmedabad, Gujarat - 380 009.

3. **UTTAR HARYANA BIJLI VITRAN NIGAM LIMITED,** Vidyut Sadan, Plot No. C-16, Sector 6, Panchkula, Haryana - 134 112.

4. **DAKSHIN HARYANA BIJLI VITRAN NIGAM LIMITED,** Vidyut Nagar, Vidyut Sadan, Hissar, Haryana - 125 005. **... Respondents**

Counsel for the Appellant(s) Mr. Aditya Dewan
Ms. Pooja Nuwal

Counsel for the Respondent(s) Mr. Harish Salve, Sr. Adv.
Mr. Amit Kapur
Ms. Poonam Verma
Mr. Gaurav Dudeja
Mr. Akshat Jain a/w
Mr.Malav Deliwala (Rep.) for Adani

ALONG WITH
APPEAL NO. 125 OF 2014 & I.A. NO.211 OF 2014

In the matter of:-

1. **ENERGY WATCHDOG,** (through Mr. Anil Kumar, Secretary), Regd. Office: 302, Lotus Chamber, 2079/38, Nalwa Street, Karol Bagh, New Delhi – 110 005. Correspondence Add: B-5/51, Paschim Vihar, New Delhi – 110 063.)

2. **MR. SURESH KHURANA,** S/o. Shri B.D. Khurana, R/o. 122/8, New Colony, Palwal, Haryana – 121 102.) **... Appellants**

AND

1. **CENTRAL ELECTRICITY REGULATORY COMMISSION**, 3rd & 4th Floor, Chanderlok Building, 36, Janpath, New Delhi- 110 001.)

2. **ADANI POWER LIMITED**, 9th Floor, Shikhar, Mithakali Six Roads, Navrangpura, Ahmedabad, Gujarat - 380 009.)

3. **GUJARAT URJA VIKAS NIGAM LIMITED**, Sardar Patel Bhawan, Race Course Circle, Vadodara, Gujarat – 390 007.)
4. **UTTAR HARYANA BIJLI VITRAN NIGAM LIMITED,** Vidyut Sadan, Plot No. C-16, Sector 6, Panchkula, Haryana - 134 112.)

5. **DAKSHIN HARYANA BIJLI VITRAN NIGAM LIMITED,** Vidyut Nagar, Vidyut Sadan, Hissar, Haryana - 125 005.) ... **Respondents**

Counsel for the Appellant(s) Mr. Prashant Bhushan, Sr. Adv.

Counsel for the Respondent(s) Mr. Nikhil Nayyar
Mr. Dhananjay Baijal
Mr. N. Sai Vinod for R-1

Mr. Harish Salve, Sr. Adv.
Mr. Amit Kapur
Ms. Poonam Verma
Mr. Gaurav Dudeja
Mr. Akshat Jain a/w
Mr.Malav Deliwala (Rep.) for Adani

ALONG WITH
APPEAL NO. 134 OF 2014

In the matter of:-

PRAYAS (ENERGY GROUP), Athawale Corner, Karve Road, Deccan Gymkhana, Pune – 411 004, Maharashtra.) ... **Appellants**

AND

1. **CENTRAL ELECTRICITY REGULATORY COMMISSION**, 3rd & 4th Floor, Chanderlok Building, 36, Janpath, New Delhi- 110 001.)

2. **ADANI POWER LIMITED**,)
9th Floor, Shikhar, Mithakali Six)
Roads, Navrangpura,)
Ahmedabad, Gujarat - 380 009.)
3. **UTTAR HARYANA BIJLI**)
VITRAN NIGAM LIMITED,)
Vidyut Sadan, Plot No. C-16,)
Sector 6, Panchkula, Haryana -)
134 112.)

4. **DAKSHIN HARYANA BIJLI**)
VITRAN NIGAM LIMITED,)
Vidyut Nagar, Vidyut Sadan,)
Hissar, Haryana - 125 005.)

5. **GUJARAT URJA VIKAS NIGAM**)
LIMITED,)
Sardar Patel Bhawan, Race)
Course Circle, Vadodara, Gujarat)
– 390 007.) **... Respondents**

Counsel for the Appellant(s) Mr. M.G. Ramachandran
Mr. Anand K. Ganesan
Ms. Ranjitha Ramachandran
Ms. Anushree Bardhan
Mr. Shubham Arya
Mr. Kumar Mihir
Mr. Avinesh Menon
Ms. Poorva Saigal
Mr. Ishaan Mukherjee

Counsel for the Respondent(s) Mr. Nikhil Nayyar
Mr. Dhananjay Baijal
Mr. N. Sai Vinod for R-1

Mr. Harish Salve, Sr. Adv.
Mr. Amit Kapur

Ms. Poonam Verma
Mr. Gaurav Dudeja
Mr. Akshat Jain a/w
Mr.Malav Deliwala (Rep.) for
Adani

ALONG WITH
[CGPL GROUP]

APPEAL NO.151 OF 2013 & I.A. NO.220 OF 2013 & I.A. NO.412 OF 2014 & APPEAL NO.97 OF 2014

In the matter of:-

1. **UTTAR HARYANA BIJLI VITRAN NIGAM LIMITED,** Vidyut Sadan, Plot No. C-16, Sector 6, Panchkula, Haryana - 134 112.

2. **DAKSHIN HARYANA BIJLI VITRAN NIGAM LIMITED,** Vidyut Nagar, Vidyut Sadan, Hissar, Haryana - 125 005.

Represented through:
HARYANA POWER PURCHASE CENTRE
Shakti Bhawan, Sector 6, Panchkula, Haryana – 134 109. **... Appellants**

AND

1. **CENTRAL ELECTRICITY REGULATORY COMMISSION**, 3rd & 4th Floor, Chanderlok Building, 36, Janpath, New Delhi- 110 001.

2. **COASTAL GUJARAT POWER LIMITED**, C/o. The Tata Power Company Limited, 34, Sant Tuka Ram Road, Carnac Bunder, Mumbai – 400 021.)

3. **GUJARAT URJA VIKAS NIGAM LIMITED**, Vadodara, Sardar Patel Vidyut Bhawan, Race Course, Vadodara, Gujarat – 390 007.)

4. **MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED** 'Prakashgad', Bandra (East), Mumbai – 400 051.)

5. **AJMER VIDYUT VITARAN NIGAM LIMITED,** Old Power House, Hathi Bhata, Jaipur Road, Ajmer – 305 001.)

6. **JAIPUR VIDYUT VITARAN NIGAM LIMITED,** Vidyut Bhawan, Janpath, Jaipur – 302 005.)

7. **JODHPUR VIDYUT VITARAN NIGAM LIMITED,** New Power House, Industrial Area, Jodhpur – 342 003.)

8. **PUNJAB STATE POWER CORPORATION LIMITED,** The Mall, Patiala – 147 001.)

9. **UNION OF INDIA**)
Through Secretary, Ministry of) Power, Shram Shakti Bhawan,)
New Delhi – 110 001.) **... Respondents**

Counsel for the Appellant(s) Mr. Brijender Chahar, Sr. Adv.
Mr. Shashi Bhushan
Mr. Apoorva Karol
Mr. Vaibhav Tyagi
Mr. Vikrant Saini

Counsel for the Respondent(s) Mr. Nikhil Nayyar
Mr. Dhananjay Baijal
Mr. N. Sai Vinod for R-1

Mr. Kapil Sibal, Sr. Adv.
Mr. C.S. Vaidyanathan, Sr. Adv.
Mr. Amit Kapur
Mr. Apoorva Misra
Mr. Abhishek Munot &
Mr. Kunal Kaul for CGPL

Mr. Anand K. Ganesan for PSPCL

ALONG WITH
APPEAL NO. 91 OF 2014

In the matter of:-

1. **AJMER VIDYUT VITRAN NIGAM LIMITED,**)
Old Power House, Hathi Bhata,) Jaipur Road, Ajmer – 305 001.)

2. **JAIPUR VIDYUT VITRAN NIGAM LIMITED,**)
Vidyut Bhawan, Janpath, Jaipur) – 302 005.)

3. **JODHPUR VIDYUT VITRAN NIGAM LIMITED,**)
New Power House, Industrial Area, Jodhpur – 342 003.) **... Appellants**

AND

1. **CENTRAL ELECTRICITY REGULATORY COMMISSION**,)
3rd & 4th Floor, Chanderlok Building, 36, Janpath, New Delhi- 110 001.)

2. **COASTAL GUJARAT POWER LIMITED**,)
C/o. The Tata Power Company Limited, 34, Sant Tuka Ram Road, Carnac Bunder, Mumbai – 400 021.)

3. **GUJARAT URJA VIKAS NIGAM LIMITED**,)
Vadodara, Sardar Patel Vidyut Bhawan, Race Course, Vadodara, Gujarat – 390 007.)

4. **MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED**)
'Prakashgad', Bandra (East), Mumbai – 400 051.)

5. **UTTAR HARYANA BIJLI VITRAN NIGAM LIMITED,**)
Vidyut Sadan, Plot No. C-16, Sector 6, Panchkula, Haryana - 134 112.)

6. **DAKSHIN HARYANA BIJLI VITRAN NIGAM LIMITED,**)
Vidyut Nagar, Vidyut Sadan,)
Hissar, Haryana - 125 005.)

7. **PUNJAB STATE POWER CORPORATION LIMITED,**)
The Mall, Patiala – 147 001.)

8. **UNION OF INDIA**)
Through Secretary, Ministry of)
Power, Shram Shakti Bhawan,)
New Delhi – 110 001.) **... Respondents**

Counsel for the Appellant(s) Mr. Sanjay Jain, ASG
Mr. Nitish Gupta
Mr. Soyaib Qurishi

Counsel for the Respondent(s) Mr. Nikhil Nayyar
Mr. Dhananjay Baijal
Mr. N. Sai Vinod for R-1

Mr. Kapil Sibal, Sr. Adv.
Mr. C.S. Vaidyanathan, Sr. Adv.
Mr. Amit Kapur
Mr. Apoorva Misra
Mr. Abhishek Munot &
Mr. Kunal Kaul for CGPL

ALONG WITH
APPEAL NO.100 OF 2014

In the matter of:-

PUNJAB STATE POWER CORPORATION LIMITED,)
The Mall, Patiala – 147 001.) **... Appellants**

AND

1. **CENTRAL ELECTRICITY REGULATORY COMMISSION**, 3rd & 4th Floor, Chanderlok Building, 36, Janpath, New Delhi- 110 001.)

2. **COASTAL GUJARAT POWER LIMITED**, C/o. The Tata Power Company Limited, 34, Sant Tuka Ram Road, Carnac Bunder, Mumbai – 400 021.)

3. **UTTAR HARYANA BIJLI VITRAN NIGAM LIMITED,** Vidyut Sadan, Plot No. C-16, Sector 6, Panchkula, Haryana - 134 112.)

   (Represented through: **Haryana Power Purchase Centre** Shakti Bhawan, Sector 6, Panchkula, Haryana – 134 109.))

4. **DAKSHIN HARYANA BIJLI VITRAN NIGAM LIMITED,** Vidyut Nagar, Vidyut Sadan, Hissar, Haryana - 125 005.)

   (Represented through: **Haryana Power Purchase Centre** Shakti Bhawan, Sector 6, Panchkula, Haryana – 134 109.))

5. **GUJARAT URJA VIKAS NIGAM LIMITED**,)

Vadodara, Sardar Patel Vidyut Bhawan, Race Course, Vadodara, Gujarat – 390 007.)

6. **MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED** 'Prakashgad', Bandra (East), Mumbai – 400 051.)

7. **AJMER VIDYUT VITARAN NIGAM LIMITED,** Old Power House, Hathi Bhata, Jaipur Road, Ajmer – 305 001.)

8. **JAIPUR VIDYUT VITARAN NIGAM LIMITED,** Vidyut Bhawan, Janpath, Jaipur – 302 005.)

9. **JODHPUR VIDYUT VITARAN NIGAM LIMITED,** New Power House, Industrial Area, Jodhpur – 342 003.)

10 **UNION OF INDIA** Through Secretary, Ministry of Power, Shram Shakti Bhawan, New Delhi – 110 001.) **... Respondents**

Counsel for the Appellant(s) Mr. Anand K. Ganesan
Mr. Ishaan Mukherjee a/w
Ms. Ashwani Chitnis (Rep.)

Counsel for the Respondent(s) Mr. Kapil Sibal, Sr. Adv.
Mr. C.S. Vaidyanathan, Sr. Adv.
Mr. Amit Kapur

Mr. Apoorva Misra
Mr. Abhishek Munot &
Mr. Kunal Kaul for CGPL

ALONG WITH
APPEAL NO.115 OF 2014

In the matter of:-

GUJARAT URJA VIKAS NIGAM LIMITED,
Vadodara, Sardar Patel Vidyut Bhawan, Race Course, Vadodara, Gujarat – 390 007. **... Appellants**

AND

1. **CENTRAL ELECTRICITY REGULATORY COMMISSION**, 3rd & 4th Floor, Chanderlok Building, 36, Janpath, New Delhi- 110 001.

2. **COASTAL GUJARAT POWER LIMITED**, C/o. The Tata Power Company Limited, 34, Sant Tuka Ram Road, Carnac Bunder, Mumbai – 400 021.

3. **MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED** 'Prakashgad', Bandra (East), Mumbai – 400 051.

4. **AJMER VIDYUT VITARAN NIGAM LIMITED,**

Old Power House, Hathi Bhata, Jaipur Road, Ajmer – 305 001.)

5. **JAIPUR VIDYUT VITARAN NIGAM LIMITED,** Vidyut Bhawan, Janpath, Jaipur – 302 005.)

6. **JODHPUR VIDYUT VITARAN NIGAM LIMITED,** New Power House, Industrial Area, Jodhpur – 342 003.)

7. **PUNJAB STATE POWER CORPORATION LIMITED,** The Mall, Patiala – 147 001.)

8. **HARYANA POWER GENERATION CORPORATION LIMITED,** Room No.329, Sector 6, Panchkula, Haryana – 134 109.)

(Represented through: **Uttar Haryana Bijli Vitaran Nigam Limited** and **Dakshin Haryana Bijli Vitaran Nigam Limited**.))

9. **Secretary, Ministry of Power**, Shram Shakti Bhawan, New Delhi – 110 001.) **... Respondents**

Counsel for the Appellant(s) Mr. Aditya Dewan
Ms. Pooja Nuwal

Counsel for the Respondent(s) Mr. Kapil Sibal, Sr. Adv.
Mr. C.S. Vaidyanathan, Sr. Adv.
Mr. Amit Kapur

Mr. Apoorva Misra
Mr. Abhishek Munot &
Mr. Kunal Kaul for CGPL

ALONG WITH
APPEAL NO.124 OF 2014

In the matter of:-

1. **ENERGY WATCHDOG,**)
(Through Mr. Anil Kumar,)
Secretary),)
Regd. Off: 302, Lotus Chamber,)
2079/38, Nalwa Street, Karol)
Bagh, New Delhi – 110 005.)

2. **MR. SURESH KHURANA,**)
S/o. Shri B.D. Khurana, R/o.)
122/8, New Colony, Palwal,)
Haryana – 121 102.) **... Appellants**

AND

1. **CENTRAL ELECTRICITY**)
REGULATORY COMMISSION,)
3rd & 4th Floor, Chanderlok)
Building, 36, Janpath, New)
Delhi- 110 001.)

2. **COASTAL GUJARAT POWER**)
LIMITED,)
C/o. The Tata Power Company)
Limited, 34, Sant Tuka Ram)
Road, Carnac Bunder, Mumbai –)
400 021.)

3. **GUJARAT URJA VIKAS NIGAM**)
LIMITED,)

Vadodara, Sardar Patel Vidyut Bhawan, Race Course, Vadodara, Gujarat – 390 007.)

4. **MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED,** 'Prakashgad', Bandra (East), Mumbai – 400 051.)

5. **AJMER VIDYUT VITARAN NIGAM LIMITED,** Old Power House, Hathi Bhata, Jaipur Road, Ajmer – 305 001.)

6. **JAIPUR VIDYUT VITARAN NIGAM LIMITED,** Vidyut Bhawan, Janpath, Jaipur – 302 005.)

7. **JODHPUR VIDYUT VITARAN NIGAM LIMITED,** New Power House, Industrial Area, Jodhpur – 342 003.)

8. **PUNJAB STATE POWER CORPORATION LIMITED,** The Mall, Patiala – 147 001.)

9. **HARYANA POWER GENERATION CORPORATION LIMITED,** Chief Engineer / PPM, Room No.329, Sector-6, Panchkula, Haryana - 134 109.)

10 **UNION OF INDIA,** Through Secretary, Ministry of Power, Shram Shakti Bhawan, New Delhi – 110 001.) **... Respondents**

Counsel for the Appellant(s)	Mr. Prashant Bhushan, Sr. Adv.
Counsel for the Respondent(s)	Mr. Nikhil Nayyar Mr. Dhananjay Baijal Mr. N. Sai Vinod for R-1
	Mr. C.S. Vaidyanathan, Sr. Adv. Mr. Amit Kapur Mr. Apoorva Misra, Mr. Abhishek Munot & Mr. Kunal Kaul for CGPL

ALONG WITH
APPEAL NO.133 OF 2014 & I.A. NO.234 OF 2014

In the matter of:-

PRAYAS (ENERGY GROUP),)
Athawale Corner, Karve Road Deccan)
Gymkhana, Pune – 411 004,)
Maharashtra, India.) **... Appellants**

AND

1. **CENTRAL ELECTRICITY REGULATORY COMMISSION**,)
3rd & 4th Floor, Chanderlok Building, 36, Janpath, New Delhi- 110 001.)

2. **COASTAL GUJARAT POWER LIMITED**,)
C/o. The Tata Power Company Limited, 34, Sant Tuka Ram Road, Carnac Bunder, Mumbai – 400 021.)

3. **GUJARAT URJA VIKAS NIGAM LIMITED**, Vadodara, Sardar Patel Vidyut Bhawan, Race Course, Vadodara, Gujarat – 390 007.)

4. **MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED,** 'Prakashgad', Bandra (East), Mumbai – 400 051.)

5. **AJMER VIDYUT VITARAN NIGAM LIMITED,** Old Power House, Hathi Bhata, Jaipur Road, Ajmer – 305 001.)

6. **JAIPUR VIDYUT VITARAN NIGAM LIMITED,** Vidyut Bhawan, Janpath, Jaipur – 302 005.)

7. **JODHPUR VIDYUT VITARAN NIGAM LIMITED,** New Power House, Industrial Area, Jodhpur – 342 003.)

8. **PUNJAB STATE POWER CORPORATION LIMITED,** The Mall, Patiala – 147 001.)

9(a) **UTTAR HARYANA BIJLI VITRAN NIGAM LIMITED,** Vidyut Sadan, Plot No. C-16, Sector 6, Panchkula, Haryana - 134 112.)

9(b) **DAKSHIN HARYANA BIJLI VITRAN NIGAM LIMITED,**)
Vidyut Nagar, Vidyut Sadan,)
Hissar, Haryana - 125 005.)

Represented through:)
Haryana Power Purchase Centre)
Shakti Bhawan, Sector 6,)
Panchkula, Haryana – 134 109.)

10 **UNION OF INDIA**)
Through Secretary, Ministry of)
Power, Shram Shakti Bhawan,)
New Delhi – 110 001.) **... Respondents**

Counsel for the Appellant(s)

Mr. M.G. Ramachandran
Mr. Anand K. Ganesan
Ms. Ranjitha Ramachandran
Ms. Anushree Bardhan
Mr. Shubham Arya
Mr. Kumar Mihir
Mr. Avinesh Menon
Ms. Poorva Saigal
Mr. Ishaan Mukherjee

Ms. Ashwini Chitnis (Rep.)

Counsel for the Respondent(s)

Mr. Nikhil Nayyar
Mr. Dhananjay Baijal
Mr. N. Sai Vinod for R-1

Mr. C.S. Vaidyanathan, Sr. Adv.
Mr. Amit Kapur
Mr. Apoorva Misra
Mr. Abhishek Munot &
Mr. Kunal Kaul for CGPL

ALONG WITH
APPEAL NO.139 OF 2014 & I.A. No. 238 OF 2014

In the matter of:-

MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED
'Prakashgad', Bandra (East), Mumbai – 400 051 **... Appellants**

AND

1. **CENTRAL ELECTRICITY REGULATORY COMMISSION**, 3rd & 4th Floor, Chanderlok Building, 36, Janpath, New Delhi- 110 001.

2. **COASTAL GUJARAT POWER LIMITED**, C/o. The Tata Power Company Limited, 34, Sant Tuka Ram Road, Carnac Bunder, Mumbai – 400 021.

3. **GUJARAT URJA VIKAS NIGAM LIMITED**, Vadodara, Sardar Patel Vidyut Bhawan, Race Course, Vadodara, Gujarat – 390 007.

4. **AJMER VIDYUT VITARAN NIGAM LIMITED,** Old Power House, Hathi Bhata, Jaipur Road, Ajmer – 305 001.

5. **JAIPUR VIDYUT VITARAN NIGAM LIMITED,**

Vidyut Bhawan, Janpath, Jaipur – 305 001.)

6. **JODHPUR VIDYUT VITARAN NIGAM LIMITED,** New Power House, Industrial Area, Jodhpur – 342 001.)

7. **PUNJAB STATE POWER CORPORATION LIMITED,** The Mall, Patiala – 147 001.)

8. **HARYANA POWER GENERATION CORPORATION LIMITED,** Room No.329, Sector 6, Panchkula, Haryana – 134 109.)

9. **Secretary, Ministry of Power**, Shram Shakti Bhawan, New Delhi – 110 001.) **... Respondents**

Counsel for the Appellant(s) Mr. Vikas Singh, Sr. Adv.
Mr. Varun Aggarwal

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Mr. Dhananjay Baijal
Mr. N. Sai Vinod for R-1

Mr. C.S. Vaidyanathan, Sr. Adv.
Mr. Kapil Sibal, Sr. Adv
Mr. Amit Kapur
Mr. Apoorva Misra
Mr. Abhishek Munot &
Mr. Kunal Kaul for CGPL

ALONG WITH
[GMR GROUP]
APPEAL NO.44 OF 2014 & I.A. NO.65 OF 2014

In the matter of:-

1. **DAKSHIN HARYANA BIJLI VITRAN NIGAM LIMITED,** Vidyut Nagar, Hissar, Haryana - 125 005.

2. **UTTAR HARYANA BIJLI VITRAN NIGAM LIMITED,** Vidyut Sadan, Plot No. C-16, Sector 6, Panchkula, Haryana - 134 109.

3. **HARYANA POWER GENERATION CORPORATION LIMITED,** Urja Bhawan, C-7, Sector 6, Panchkula, Haryana - 134 109.

... Appellants

AND

1. **GMR-KAMALANGA ENERGY LIMITED,** Skip House, 25/1, Museum Road, Bangalore – 560 025.

2. **GMR ENERGY LIMITED,** Skip House, 25/1, Museum Road, Bangalore – 560 025.

3. **PTC INDIA LIMITED,** 2nd Floor, NBCC Tower, 15, Bhikaji Cama Place, New Delhi – 110 066.

4. **BIHAR STATE POWER CORPORATION LIMITED,** 1st Floor, Vidyut Bhawan, Bailey Road, Patna – 800 001.)

5. **SECRETARY, CENTRAL ELECTRICITY REGULATORY COMMISSION,** Chanderlok Building, Janpath, New Delhi – 110 001.) **... Respondents**

Counsel for the Appellant(s) — Mr. G. Umapathy
Ms. R. Mekhala

Counsel for the Respondent(s) — Mr. Amit Kapur
Mr. Vishrov Mukherjee
Mr. Rohit Venkat for R-1

Mr. Rajiv Bhardwaj and
Mr. Ravi Kishore for R-3

Mr. K.S. Dhingra for R-5

ALONG WITH
APPEAL NO.74 OF 2014 & I.A. NO.143 OF 2014

In the matter of:-

GRIDCO LIMITED, Janpath, Bhubaneswar, Odisha – 751 022.) **... Appellants**

AND

1. **GMR-KAMALANGA ENERGY LIMITED,** Skip House, 25/1, Museum Road, Bangalore – 560 025.)

2. **WESTERN ELECTRICITY SUPPLY COMPANY OF ORISSA LIMITED,** Burla, Sambalpur, Odisha – 768 017.

3. **SOUTHERN ELECRICITY SUPPLY COMPANY OF ORISSA LIMITED,** Courtpeta, Berhampur (GM), Odisha – 760 004.

4. **NORTH EASTERN ELECTRICITY SUPPLY COMPANY OF ORISSA LIMITED** Januganj, Balasore, Odisha – 756 019.

5. **CENTRAL ELECTRICITY SUPPLY UTILITY OF ORISSA,** 2nd Floor, IDCO Tower, Janpath, Bhubaneswar, Odisha – 751 022.

6. **CENTRAL ELECTRICITY REGULATORY COMMISSION,** Chanderlok Building, Janpath, New Delhi – 110 001.

... Respondents

Counsel for the Appellant(s) — Mr. Raj Kumar Mehta
Mr. Abhishek Upadhyay
Ms. Himanshi Andley

Counsel for the Respondent(s) — Mr. Amit Kapur
Mr. Vishrov Mukherjee
Mr. Rohit Venkat for R-1

Mr. K.S. Dhingra for R-6

ALONG WITH
[SASAN GROUP]
APPEAL NO.99 OF 2014

In the matter of:-

HARYANA POWER PURCHASE CENTRE,
Room No.239, Shakti Bhawan, Sector -6, Panchkula – 134 109.
(Representing Uttar Haryana Bijli Vitaran Nigam Limited and Dakshin Haryana Bijli Vitaran Nigam Limited, the Distribution Licensees.) **... Appellants**

AND

1. **SECRETARY, CENTRAL ELECTRICITY REGULATORY COMMISSION,**
3rd and 4th Floors, handerlok Building, 36, Janpath, New Delhi – 110 001.

2. **SASAN POWER LIMITED**
3rd Floor, Reliance, Energy Centre, Santa Cruz (E), Mumbai – 400 055.

3. **M.P. POWER MANAGEMENT COMPANY LIMITED,**
Shakti Bhawan, Jabalpur, Madhya Pradesh – 462 008.

4. **PASCHMIANCHAL VIDYUT VITRAN NIGAM LIMITED,**
Victoria Park, Merrut, U.P.

5. **PURVANCHAL VIDYUT VITRAN NIGAM LIMITED,**)
Hydel Colony, Bhikaripur, Post-DLW, Varnasi, Uttar Pradesh – 221 004.)

6. **MADHYA VIDYUT VITRAN NIGAM LIMITED,**)
4-A, Gokhale Marg, Lucknow, Uttar Pradesh.)

7. **DAKSHINANCHAL VIDYUT VITRAN NIGAM LIMITED,**)
220 KV Vidyut Sub-Station, Mathura Agra By-Pass Road, Sikandra, Agra, Uttar Pradesh – 282 007.)

8. **AJMER VIDYUT VITRAN NIGAM LIMITED,**)
Hathi Bhata, City Power House, Ajmer, Rajasthan – 305 001.)

9. **JAIPUR VIDYUT VITRAN NIGAM LIMITED,**)
Vidyut Bhawan, Jaipur, Rajasthan – 302 005.)

10. **JODHPUR VIDYUT VITRAN NIGAM LIMITED,**)
New Power House, Industrial Area, Jodhpur, Rajasthan – 342 003.)

11. **TATA POWER DELHI DISTRIBUTION LIMITED,**)
Grid Sub-Station Building, Hudson Lines, Kisngsway Camp, New Delhi – 110 009.)

12. **BSES RAJDHANI POWER LIMITED,**)
BSES Bhawan, Nehru Place,)
New Delhi – 110 019.)

13. **BSES YAMUNA POWER LIMITED,**)
Shakti Kiran Building,)
Karkardooma, Delhi – 110 096.)

14. **PUNJAB STATE POWER CORPORATION LIMITED,**)
The Mall, Patiala, Punjab – 147)
001.)

15. **UTTARAKHAND POWER CORPORATION LIMITED,**)
Urja Bhawan, Kanwali Road,)
Dehradun – 248 001.) **... Respondents**

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Ms. Ranjitha Ramachandran
Ms. Anushree Bardhan
Mr. Shubham Arya
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Mr. Amit Kapur
Mr. Vishrov Mukherjee
Mr. Janmali Manikala for R-2

Mr. G. Umapathy and
Ms. R. Mekhala for R-3

Mr. Parinay D. Shah

Mr. Saransh Shaw for R-11

Mr. Rahul Dhawan
Mr. Shailabh Tiwari for R.12 & 13

Mr. Anand K. Ganesan
Mr. Ishaan Mukherjee for PSPCL

ALONG WITH
APPEAL NO.104 OF 2014

In the matter of:-

1. **AJMER VIDYUT VITRAN NIGAM LIMITED,**
   Hathi Bhata, City Power House, Ajmer, Rajasthan – 305 001.

2. **JAIPUR VIDYUT VITRAN NIGAM LIMITED,**
   Vidyut Bhawan, Jaipur, Rajasthan – 302 005.

3. **JODHPUR VIDYUT VITRAN NIGAM LIMITED,**
   New Power House, Industrial Area, Jodhpur, Rajasthan – 342 003. **... Appellants**

AND

1. **CENTRAL ELECTRICITY REGULATORY COMMISSION,**
   3rd and 4th Floors, Chanderlok Building, 36, Janpath, New Delhi – 110 001.

2. **SASAN POWER LIMITED,**

3rd Floor, Reliance, Energy Centre, Santa Cruz (E), Mumbai – 400 055.)

3. **M.P. POWER MANAGEMENT COMPANY LIMITED,** Shakti Bhawan, Jabalpur, Madhya Pradesh – 462 008.)

4. **PASCHMIANCHAL VIDYUT VITRAN NIGAM LIMITED,** Victoria Park, Merrut, U.P.)

5. **PURVANCHAL VIDYUT VITRAN NIGAM LIMITED,** Hydel Colony, Bhikaripur, Post-DLW, Varnasi, Uttar Pradesh – 221 004.)

6. **MADHYA VIDYUT VITRAN NIGAM LIMITED,** 4-A, Gokhale Marg, Lucknow, Uttar Pradesh.)

7. **DAKSHINANCHAL VIDYUT VITRAN NIGAM LIMITED,** 220 KV Vidyut Sub-Station, Mathura Agra By-Pass Road, Sikandra, Agra, Uttar Pradesh – 282 007.)

8. **TATA POWER DELHI DISTRIBUTION LIMITED,** Grid Sub-Station Building, Hudson Lines, Kingsway Camp, New Delhi – 110 009.)

9. **BSES RAJDHANI POWER LIMITED,**)

BSES Bhawan, Nehru Place,)
New Delhi – 110 019.)

10. **BSES YAMUNA POWER LIMITED,**)
Shakti Kiran Building,)
Karkardooma, Delhi – 110 096.)

11. **PUNJAB STATE POWER CORPORATION LIMITED,**)
The Mall, Patiala, Punjab – 147 001.)

12. **HARYANA POWER PURCHASE CENTRE,**)
Room No.239, Shakti Bhawan,)
Sector 6, Panchkula – 134 109.)

13. **UTTARAKHAND POWER CORPORATION LIMITED,**)
Urja Bhawan, Kanwali Road,)
Dehradun – 248 001.) **... Respondents**

Counsel for the Appellant(s) Mr. M.G. Ramachandran
Ms. Ranjitha Ramachandran
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Mr. Shubham Arya
Ms. Poorva Saigal

Counsel for the Respondent(s) Mr. Saurabh Mishra for R-1

Mr. Amit Kapur
Mr. Vishrov Mukherjee
Mr. Janmali Manikala for R-2

Mr. G. Umapathy
Ms. R. Mekhala for R-3

Mr. Parinay D. Shah
Mr. Saransh Shaw for R-8

Mr. Rahul Dhawan
Mr. Shailabh Tiwari for R.9 & 10

Mr. Anand K. Ganesan
Mr. Ishaan Mukherjee for PSPCL

J U D G M E N T

PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI – CHAIRPERSON

II. FACTS LEADING TO CONSTITUTION OF FULL BENCH:

1. The above appeals were heard, at length, by the Bench comprising Hon'ble Mr. Rakesh Nath, then Technical Member and Hon'ble Mr. Justice Surendra Kumar, the Judicial Member. On 29/4/2015, the judgment was reserved. It may be noted here that in some of these appeals, order dated 15/4/2013 passed by the Central Commission is under challenge and in some of them, orders dated 15/4/2013 and 21/2/2014 passed by the Central Commission are under challenge.

2. On 20/5/2015, Hon'ble Mr. Rakesh Nath, the then Technical Member and Hon'ble Mr. Justice Surendra Kumar, the Judicial Member submitted a joint note to the Chairperson of this Tribunal stating that there is a difference of opinion between them. However, judgments were not pronounced.

3. Hon'ble Mr. Rakesh Nath retired on the very same day i.e. on 20/5/2015. In view of the difference of opinion, as per Section 123 of the Electricity Act, 2003 (**"the said Act"**), the Chairperson of this Tribunal had to either hear the matter himself/herself or refer the matter for hearing by one or more of the other Members of this Tribunal. Since these matters involve numerous complicated technical issues, the Chairperson thought it necessary to have the assistance of the Hon'ble Technical Members. Hence, this Full Bench was constituted. Since the judgments were not pronounced, the entire matter had to be heard afresh. Learned counsel for the parties, also submitted a list of "Agreed Issues for Consideration" and requested this Full Bench to decide the same. In the circumstances, we have heard all the parties

afresh on all the issues, list of which was submitted to us by consent of all the parties. At the appropriate stage, we will reproduce the said issues.

4. These appeals can be broadly categorized into four Groups viz. Adani Group, CGPL Group, GMR Group and Sasan Group. Adani Group consists of: Appeal No.100 of 2013; Appeal No.98 of 2014; Appeal No.116 of 2014; Appeal No.134 of 2014 and Appeal No.125 of 2014. CGPL Group consists of: Appeal No.151 of 2013 and IA No.220 of 2013 and IA No.412 of 2014, Appeal No.91 of 2014, Appeal No.97 of 2014 and IA No.313 of 2014, Appeal No.100 of 2014 and Appeal No.115 of 2014, Appeal No.124 of 2014, Appeal No.133 of 2014 and IA No.234 of 2014, Appeal No.139 of 2014 and IA No.238 of 2014; GMR Group consists of: Appeal No.44 of 2014 and Appeal No.74 of 2014 and Sasan Group consists of: Appeal No.99 of 2014 and Appeal No.104 of 2014.

5. Learned counsel for the parties are agreed that Appeal No.100 of 2013 and Appeal No.98 of 2014 of Adani Group can

be treated as lead matters as all the issues which require determination arise in those appeals. Hence, we have treated Appeal No.100 of 2013 and Appeal No.98 of 2014 of Adani Group as lead matters. We shall first deal with the facts of Appeal No.100 of 2013 and Appeal No.98 of 2014.

6. We may note, however, that the issues raised in CGPL Group, GMR Group and Sasan Group are also raised in Adani Group. We have, therefore, heard counsel appearing in all those Groups. We shall, therefore, refer to the submissions made by counsel and deal with them.

III. FACTS LEADING TO APPEALS RELATING TO ADANI GROUP:

[A] Description of Parties in Appeal No.100 of 2013.

7. The appellants are companies owned and controlled by the Government of Haryana. The Appellants (**"Haryana Utilities"**) have succeeded to the functions of distribution and retail supply of electricity in Northern Haryana and Southern Haryana. The Haryana Utilities, at the relevant time, were

represented by Haryana Power Generation Corporation Limited (**"HPGCL"**) for the procurement of power. Respondent No.1 is the Central Electricity Regulatory Commission (**"Central Commission"**). Respondent No.2 - Adani Power Limited (**"Adani Power"**) is a generating company within the meaning of Section 2(30) of the said Act. Respondent No.3 – Gujarat Urja Vikas Nigam Limited (**"GUVNL"**) is the State Utility in Gujarat engaged in the business of bulk purchases of electricity for and on behalf of the distribution licensees in the State of Gujarat.

[B] <u>Brief facts of Appeal No.100 of 2013.</u>

8. Adani Power set up a power generating station in Gujarat viz. Mundra Power Project comprising 4 phases i.e. Unit Nos.1 to 4 in Phases-I and II (4x330 MW), Unit Nos.5 and 6 in Phase-III (2x660 MW) and Unit Nos.7, 8 and 9 in Phase-IV (3x660 MW). In the course of its business, Adani Power entered into two Power Purchase Agreements (**"PPA"**) dated 02/02/2007 and 06/02/2007 with GUVNL for supply of 1000 MW power under each PPA from Phase I and II and from Phase III

respectively. Adani Power also entered into two PPAs dated 07/08/2008 with Haryana Utilities for supply of 1424 MW power from Phase IV of its Mundra Power Project. Since these lead matters arise out of said PPA dated **02/02/2007** for sale of electricity to GUVNL and PPAs dated **07/08/2008** for sale of electricity to Haryana Utilities, we may summarise the events leading to execution of the said PPAs.

[C] ADANI POWER'S PPAs DATED 02/02/2007 AND 6/2/2007 WITH GUVNL FOR SUPPLY OF 1000 MW POWER EACH FROM PHASES I & II AND PHASE III RESPECTIVELY:

9. On 01/02/2006, GUVNL issued a public notice inviting proposals for supply of power on long-term basis under three different competitive bid processes described as Bid No.01, Bid No.02 and Bid No.03. On 13/03/2006, the Gujarat State Electricity Regulatory Commission (**"Gujarat Commission"**) approved the bidding documents. On 24/11/2006, GUVNL issued Request for Proposal (**"RfP"**). As per Clause 3.1.3 of the RfP for Bid No.2, the seller was required to assume full responsibility to tie up the fuel linkage and to set up the infrastructure requirement for fuel transport and its storage.

As per Clause 4.1.1 of the RfP, the bidder was required to indicate the progress/proof of fuel arrangements. On 21/12/2006, Vishal Exports Overseas Limited intimated to GUVNL about the Consortium formed between Vishal Exports and Adani Enterprises viz. "Adani Enterprises Consortium", which was proposing to set up a 1200 MW plant based on indigenous coal/washed coal/blended coal in the State of Chhatisgarh. On 04/01/2007, Adani Enterprises Consortium submitted its bid for 1000 MW quoting a levelised tariff of Rs.2.3495/kWh (Rs.1/kWh as the capacity charge and Rs.1.3495/kWh as non-escalable energy charge). In the bid, the Adani Enterprises Consortium had indicated that the lead member – Adani Enterprises Limited ("**AEL**") had an arrangement for indigenous coal requirement of the project with Gujarat Mineral Development Corporation (**"GMDC"**), which had been allotted Morga II coal block in the State of Chhattisgarh. The bid of Adani Enterprises Consortium also indicated that to ensure supply of fuel with optimum techno-commercial parameters, AEL had tied up for supply of imported coal with M/s. Coal Orbis Trading GMBH, Germany

and M/s. Kowa Company Ltd., Japan and executed separate Memorandum of Understandings ("**MoU**") dated 09/09/2006 and 21/12/2006 respectively. Adani Enterprises Consortium had also reserved its right to shift the supply of electricity from Chhatisgarh project to Mundra Power Project of Adani Power in the Coastal Gujarat with fuel to be used as imported/blended/indigenous. In respect of Bid No.2, out of the seven bids received, bid of Adani Enterprises Consortium was selected as the successful bid by GUVNL for supply of 1000 MW of power. On 11/01/2007, GUVNL issued a Letter of Intent (**"LoI"**) in favour of Adani Enterprises Consortium. Accordingly, PPA dated 02/02/2007 for supply of 1000 MW of power was entered into between GUVNL and the Adani Power as the Special Purpose Vehicle of the Adani Enterprises Consortium.

10. Though, the power was to be supplied from the power project which was being set up at Korba in the State of Chhattisgarh, Adani Power by its letters dated 12/02/2007 and 20/02/2007 made a proposal to GUVNL to supply power

from its Mundra Power Project. Accordingly, on 18/04/2007, a supplementary PPA was executed between Adani Power and GUVNL for supply of 1000 MW power from Units 5 and 6 of Phase-III of its Mundra Power Project instead of the power project at Korba in Chhattisgarh. On 20/12/2007, Gujarat State Commission adopted the tariff under Section 63 of the said Act for supply of power to GUVNL and also approved the PPA. As the Fuel Supply Agreements could not be executed within time, Adani Enterprises' MoU dated 21/12/2006 with Kowa Company Limited of Japan and MoU dated 09/09/2006 with Coal Orbis Trading GMBH, Germany were terminated on 05/02/2008 and 18/03/2008 respectively. On 24/03/2008, Adani Power executed a Coal Supply Agreement (**"CSA"**) with AEL for imported coal for the Mundra Power Plant.

11. The Fuel Supply Agreement (**"FSA"**) between Adani Power, GMDC and GUVNL could not be entered into due to persistent differences and disputes between Adani Power and GUVNL as regards the rate of supply of power. Due to non-

fulfilment of condition subsequent, based on failure of GMDC to execute FSA, on 28/12/2009, Adani Power issued a notice for termination of the PPA dated **02/02/2007**. On 16/02/2010, GUVNL filed a petition before the Gujarat Commission challenging the said termination. By order dated 31/08/2010, Gujarat Commission set aside the termination on the ground that the PPA dated **02/02/2007** is not dependent on the fuel supply by GMDC or any other particular source and also for the reason that Adani Power had a FSA with AEL for supply of imported coal for Phase III of the Mundra Power Plant. Adani Power challenged the said order dated 31/08/2010 before this Tribunal in Appeal No.184 of 2010. By order dated 07/09/2011, this Tribunal dismissed the said appeal and upheld the order of the Gujarat Commission. Adani Power carried the said order to the Supreme Court by way of Civil Appeal No.11133 of 2011, which is still pending. In compliance with the directions issued by this Tribunal, Adani Power is supplying power from its Phase-III of Mundra Power Plant to GUVNL from the Date of

Commercial Operation ("**COD**") of the plant i.e. 2/2/2012 by using imported coal from Indonesia purchased through AEL.

[D] ADANI POWER'S PPAs DATED 07/08/2008 WITH HARYANA UTILITIES FOR SUPPLY OF 1424 MW ELECTRICITY FROM PHASE IV:

12. On 25/05/2006, Haryana Utilities, represented through HPGCL, initiated a competitive bidding for purchase on long term basis 2000 MW of electricity required for maintaining the supply of electricity to consumers in the State of Haryana and issued Request for Qualification (**"RfQ"**). This procurement was under a tariff based competitive bid process as per Section 63 of the said Act and the Guidelines notified by the Central Government with Standard Bid Documents including draft PPA. In Clause 2.1.5 of the RfQ, it has been mentioned that "the bidder shall submit a comfort letter from a fuel supplier for fuel linkage for the entire term of the PPA (excluding the construction period) at the time of submission of proposal in respect of the RfP. On 22/6/2006, the Haryana State Electricity Regulatory Commission ("**Haryana Commission**") approved the bidding documents for Case-1

bidding as well as the procedure proposed by Haryana Utilities. On 04/06/2007, Haryana Utilities issued the RfP for purchase of 2000 MW of electricity on long term basis. In Clause 7 of the RfP, it has been provided that the bidders are required to indicate the progress/proof of fuel arrangement through submission of copies of one or more of the documents i.e. linkage letter from fuel supplier, FSA between bidder and fuel supplier, coal block allocation letter or in principle approval for allocation of captive block for mining of coal, etc. The bidding documents *inter alia* required the bidders to give the following details:-

"Format 4: Characteristics of the Representative Fuel

(This format not applicable for Hydel Plants)

Sl. Nos.	***Particulars***	***Details (to be furnished by the Bidder)***
1	*Representative Fuel*	*Coal/Gas*
2	*Fuel Type*	*Coal India Limited (CIL) Coal Linkage/Domestic Captive Coal Mine/Imported Coal/Gas* *(Strike out what is not applicable)*
3	*Fuel Grade*	*(Fill Only in case of CIL Linkage)*
4	*CIL Subsidiary from which coal is proposed to*	*Fill Only in case of CIL Linkage or Captive Coal*

	be sourced/Location of the Captive Coal Mine (as applicable)	*Mine allocation*
5	*Distance from source of the coal to the Power Station where railway network will be required for coal transportation (In Kilometers)*	*Fill only in case Representative Fuel is Coal*
6	*Is the representative fuel covered under Administered Price Mechanism ("APM") or is controlled and notified by an Independent Regulator or by the Government of India or Government of India Instrumentality ?*	*Yes/No* *(Strike out what is not applicable)* *(applicable only for Gas)*
7	*Is the Gas pipeline envisaged for transportation is HBJ pipeline?*	*Yes/No* *(Strike out what is not applicable)* *(applicable only for Gas)*

13. The participating bidders had an option to quote fixed tariff, escalable or non escalable tariff, or partly escalable and partly non-escalable tariff to cover their risk as per their perception. The best (lowest) levelised tariff was to be evaluated as per the disclosed criteria. On 24/11/2007, Adani Power submitted its bid to HPGCL for supply of 1424 MW of power from its Mundra Power Plant to Haryana Utilities at a levelised tariff of Rs.2.94/kWh from Units 7, 8 and 9 of

Phase IV. Adani Power quoted non-escalable levelized/uniform capacity charges of Rs.0.997 per kWh and quoted non-escalable levelized energy charges of Rs.1.963 per kWh, aggregating to Rs.2.940 per kWh. Adani Power did not opt for any escalation on the tariff for 25 years period either in the capacity charges or in the variable / energy charges. The bid of Adani Power was based on blend of domestic and imported coal in the ratio of 70:30. In format 4, Adani Power indicated the representative fuel as coal and the fuel type as 'Imported/indigenous coal'. In support of the fuel linkage, Adani Power submitted the copies of the MoUs dated 09/09/2006 and 21/12/2006 between AEL and M/s. Coal Orbis Trading GMBH and Kowa Company Limited of Japan respectively.

14. On 28/03/2008, Adani Power executed a CSA for imported coal with AEL for its Mundra Project of all phases including 1424 MW to be supplied to Haryana Utilities. On 17/07/2008, Adani Power was declared as successful bidder

in Haryana for supply of 1424 MW contracted capacity from its Mundra Power Project's Unit Nos.7, 8 and 9 and a LoI was issued. On 31/07/2008, Haryana Commission adopted the tariff of Rs.2.94 (levelized) quoted by Adani Power under Section 63 of the said Act. Adani Power entered into two separate PPAs, both dated 07/08/2008 with each of the Haryana Utilities for the generation and supply of 1424 MW electricity from Units 7, 8 and 9 (Phase-IV) on the tariff and terms and conditions contained in the PPAs and pursuant thereto Adani Power started supplying power.

[E] Events leading to institution of Petition No.155/ MP/2012 and Relief sought therein.

15. On 12/11/2008 the Government of India ("**GoI**") directed that on account of shortage of coal, the supply of domestic coal to projects set up in the coastal area such as Mundra Power Project of Adani Power shall be restricted to 70% of the capacity. On 23/09/2010 the Ministry of Energy and Mineral Resources, Indonesia notified the regulation being Government No.17 of 2010 dealing with Coal Benchmark Export Price

(**"Indonesian Regulation"**) to be effective from 01/09/2011. In terms of the Indonesian Regulation, the export price of coal mined in Indonesia was benchmarked to international market prices of coal. The exporters were generally prohibited from selling coal from Indonesia at a price less than the benchmark price. The increased price realisation of coal sale on account of the above benchmark prices was allowed to be retained by the Coal Exporting Company in Indonesia. The increased realisation was not to be paid to the Indonesian Government Authorities, except to the extent of higher percentage of royalty and taxes on the increased export price of coal.

16. On 09/06/2012, a CSA was signed between Adani Power and the Mahanadi Coal Fields Limited for supply of 64.05 lakh tonnes of coal i.e. to the extent of 70% of the installed capacity of 1980 MW of Unit Nos.7, 8 and 9 of the Mundra Power Project dedicated for the Haryana Utilities.

17. The promulgation of Indonesian Regulation specifying the benchmark price aligned to the international market price of coal had impacted the export price of coal from Indonesia. In view of this, Adani Power expressed its inability to perform its obligations under the PPAs. Adani Power claimed that such import constituted an event of *Force Majeure* under Article 12 of the PPA and also a Change in Law under Article 13 of the PPA. Adani Power also alleged that it was deprived of domestic coal availability to the full extent i.e. 100 per cent and it got only about 54 percent and, therefore, it was required to import coal for the balance which is affected by the Indonesian Regulation. Adani Power claimed that cost of production of electricity from Mundra Power Plant has increased tremendously which has rendered it commercially unviable to supply power to Haryana Utilities and GUVNL at the price quoted in the PPAs.

18. On 05/07/2012, Adani Power filed a petition being Petition No.155/MP/2012 before the Central Commission

under Sections 79(1)(b) and (f) of the said Act seeking following reliefs on account of the impact of the Indonesian Regulation.

"*a) to evolve a mechanism to restore the Applicant to the same economic condition prior to occurrence of Subsequent Events mentioned in respective Part I & II hereinabove by adjudicating the disputes between the Applicant and the Respondent(s) in relation to regulate including changing and/or revising the price/tariff under PPAs dated 07/08/2008 with UHBVNL and DHBVNL and 02/02/2007 with GUVNL;*

b) in the alternative, to declare that the Applicant is discharged from the performance of the PPAs on account of frustration of the PPAs due to Subsequent Events in respective Part I & II;

c) this Hon'ble Central Commission be pleased to declare that the revised tariff shall be applicable from the Scheduled Commercial Operation Date (SCoD) of the PPAs;

d) that during the pendency of the present Application Hon'ble Central Commission may direct the Respondent(s) to procure power on the cost plus basis, alternatively, the Hon'ble Central Commission may suspend the operation of the PPAs till the final disposal of the Application;

e) pass such further or other orders as the Hon'ble

Central Commission may deem just and proper in the circumstances of the case."

[F] Summary of Central Commission's Interim Order dated 16/10/2012 on the preliminary issue of jurisdiction.

19. By order dated 16/10/2012, the Central Commission decided the issue of jurisdiction as a preliminary issue and held, *inter-alia,* that the PPA dated 02/02/2007 entered into by Adani Power with GUVNL for generation and sale of power to Gujarat and the PPAs dated 07/08/2008 entered into by Adani Power with the Haryana Utilities for sale of power to Haryana constitute a Composite Scheme for generation and sale of electricity as envisaged under Section 79(1)(b) of the said Act and, therefore, the Central Commission has the jurisdiction to decide the said petition. Haryana Utilities filed Review Petition No.26 of 2012 seeking review of the said order dated 16/10/2012. On 16/01/2013, the Central Commission rejected the said review petition.

[G] Summary of Central Commission's Order dated 02/04/2013 rejecting the claim of *Force Majeure* and Change in Law and constituting an Expert Committee to

look into the alleged difficulties faced by Adani Power and find an acceptable solution.

20. By order dated 02/04/2013, the Central Commission unanimously decided that the claim of Adani Power for *Force Majeure* and Change in Law was not admissible. However, by majority of three with one member dissenting, it was inter alia, held that considering public interest, in exercise of regulatory powers provided under Section 79 of the said Act, the Central Commission can provide redressal to generating companies such as Adani Power and proceeded to constitute an Expert Committee to look into the alleged difficulties faced by Adani Power and find an acceptable solution.

[H] Institution of Appeal No.100 of 2013.

21. On 07/05/2013, the Haryana Utilities filed appeal being **Appeal No.100 of 2013** challenging the order dated 02/04/2013 before this Tribunal.

[I] Constitution of Expert Committee and its Report.

22. Pursuant to the order dated 02/04/2013, the GUVNL

and the Haryana Utilities nominated their representative to represent them in the Expert Committee by notification dated 03/05/2013 and 08/05/2013 respectively. The Expert Committee comprising (i) Chairman - Mr. Deepak Parekh, (ii) procurers / representative of State Governments, (iii) SBI Capital Markets Limited (SBICAP) as financial analyst and (iv) Adani Power. Dr. Devi Singh, Director IIM (Lucknow) was co-opted as member at the request of procurers. To enable the Expert Committee in fulfilling its mandate as set out in order dated 02/04/2013, it sought the assistance of three independent advisers, being (i) Mr. A.G. Karkhanis as legal consultant, (ii) Mr. C. P. Singh as technical consultant and (iii) M/s. KPMG as the financial consultant. The Expert Committee held five meetings dated 11/05/2013, 26/06/2013, 11/07/2013, 17/07/2013 and 30/07/2013. The consultants appointed by the Expert Committee viz. KPMG, Mr. C.P. Singh and Mr. Karkhanis submitted their reports to the Committee. On 16/08/2013, the Expert Committee submitted its Report before the Central Commission. The Report was signed by its Chairman Mr. Deepak Parekh and one Ms. Arundhati

Mukherjee of SBICAP. Since it was not signed by all the members, the Central Commission wrote a letter dated 05/09/2013 to the Chairman of the Committee asking him to submit the copy of the report duly signed by all the members. By letter dated 10/09/2013, Mr. Deepak Parekh replied to the Central Commission and informed that the issue of signing of report by all the members was deliberated in the last meeting, however, representatives of the procurer-States felt that they will not be able to sign the report without obtaining formal approval of the respective State Governments. By Affidavits dated 13/09/2013 and 14/10/2013, the GUVNL and by Affidavit dated 04/10/2013, the Haryana Utilities provided their in-principle consent to the Expert Committee Report for considering the compensatory tariff subject to certain suggestions mentioned in their affidavits.

[J] Summary of Central Commission's Final Order dated 21/02/2014 granting compensatory tariff to Adani Power.

23. After hearing all concerned including the consumer

organizations on the Report of the Expert Committee, the Central Commission passed the impugned order dated 21/02/2014 providing for a formula for granting compensatory tariff to Adani Power.

[K] Details of appeals filed by various Utilities and Consumer Organizations in Adani Group challenging the Final Order dated 21/02/2014.

24. Being aggrieved by the said order dated 21/02/2014, Haryana Utilities filed **Appeal No.98 of 2014**; GUVNL filed **Appeal No.116 of 2014**; Prayas Energy Group, a non-governmental organization actively participating in the public interest issues and consumer issues in the area of electricity filed **Appeal No.134 of 2014** and Energy Watchdog, a registered society working for the cause of electricity consumers filed **Appeal No.125 of 2014** before this Tribunal. These appeals are based on the same facts and, hence, it is not necessary to refer to the facts again. As already stated, we shall refer to the legal submissions made by the counsel in due course.

[L] Adani Power's Cross-Objections and its Rejection by this Tribunal.

25. Adani Power filed Cross-Objections in Appeal No.100 of 2013, which were rejected on 1/8/2014 by this Tribunal as not maintainable. It was observed that Adani Power could have appealed against the said order under Section 111 of the said Act. Pursuant thereto, on 16/09/2014, Adani Power preferred an appeal before this Tribunal with an application for condonation of delay of 481 days, which was rejected by this Tribunal on 31/10/2014 on the ground of delay. Being aggrieved, Adani Power preferred Civil Appeal No.10016 of 2014 before the Supreme Court. By order dated 31/03/2015, the Supreme Court disposed of the said appeal holding, *inter alia,* that *"the Appellant (Adani Power) is entitled to argue any proposition of law, be it "Force Majeure" or "Change in Law" in support of order dated 21/02/2014 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 argument is based on the facts which are already pleaded before the Central Commission".

IV. FACTS LEADING TO APPEALS RELATING TO CGPL GROUP:

[A] Description of Parties in Appeal No.151 of 2013.

26. The appellants in this appeal are Haryana Utilities. Respondent No.1 is the Central Commission. Respondent No.2 - Coastal Gujarat Power Limited, (**"CGPL"**), a subsidiary of Tata Power Company Limited is engaged in developing and implementing 4000 MW Ultra Mega Power Project at Mundra in the State of Gujarat based on imported coal. Respondent No.3 is GUVNL. Respondent No.4 - Maharashtra State Electricity Distribution Company Limited (**"MSEDCL"**) is a Distribution Company, engaged in distribution of electricity in the State of Maharashtra. Respondent Nos.5, 6 and 7 - Ajmer Vidyut Vitaran Nigam Limited, Jaipur Vidyut Vitaran Nigam Limited and Jodhpur Vidyut Vitaran Nigam Limited respectively are the State distribution licensees in Rajasthan

("**Rajasthan Utilities**"). Respondent No.8 – Punjab State Power Corporation Limited (**"Punjab Utility/PSPCL"**) is a distribution licensee in the State of Punjab and is an unbundled entity of the erstwhile Punjab State Electricity Board. Respondent No.9 is the Union of India.

[B] Brief facts of Appeal No.151 of 2013.

27. CGPL filed a petition being Petition No.159/MP/2012 before the Central Commission, inter alia, seeking to establish an appropriate mechanism to offset in tariff the adverse impact of: (i) the unforeseen, uncontrollable and unprecedented escalation in the imported coal price and (ii) the change in law by Government of Indonesia. The facts leading to the filing of the said petition are briefly summarized as under:

[C] Events leading to institution of Petition No.159/MP/2012 and the Relief sought.

(a) On 19/01/2005, the Ministry of Power, GoI issued "Guidelines for Determination of Tariff by Bidding Process

for Procurement of Power by distribution licensees" under Section 63 of the said Act ("**the said Guidelines**").

(b) GoI has been facilitating development of a number of Ultra Mega Power Projects to make available comparatively cheaper power to more than one State. One of such projects viz. Mundra Ultra Mega Power Project (4000 MW) (**"Mundra UMPP"**) in the State of Gujarat was conceived with the purpose of supplying power to the distribution licensees in the States of Gujarat, Maharashtra, Rajasthan, Punjab and Haryana ("**the procurers**"). In accordance with the said Guidelines, Power Finance Corporation ("**PFC**") was notified as the Bid Process Coordinator. CGPL was incorporated on 10/02/2006 as a wholly owned subsidiary of PFC to undertake the process of bidding under 'Case 2' on behalf of the procurers.

(c) On 31/03/2006, RfQ was issued by CGPL for selecting the successful bidder to build, own, operate and maintain Mundra UMPP to be located at Mundra in Gujarat for supply of contracted power to the procurers for 25 years based on imported coal.

(d) On 07/11/2006, 11 bidders including Tata Power Company Limited (**"Tata Power"**) who were qualified at RfQ stage, were issued with RfP documents. As per the RfP, the tariff to be quoted by the bidders consisted of two main components such as Energy charge and Capacity charge. As per the said Guidelines, the above two components were further split into escalable and non-escalable components and bidders were allowed to quote based on their respective assumptions. Six bidders responded to the RfP including Tata Power which submitted its bids on 07/12/2006. After evaluation of all the bids, Tata Power was declared as the successful bidder having quoted a levelized tariff of 2.26367/kWh.

Accordingly, on 28/12/2006, LoI was issued to the Tata Power.

(e) On 22/04/2007, Tata Power acquired 100% shareholdings of CGPL. On 22/04/2007, CGPL entered into PPAs with the procurers for supply of 3800 MW power from Mundra UMPP.

(f) By Order dated 19/09/2007 in Petition No. 18 of 2007, the Central Commission observing that the tariff discovery for the Mundra UMPP was the result of a transparent process of bidding in conformity with the said Guidelines, adopted the tariff as quoted by Tata Power for Mundra UMPP to supply power to the procurers as per their respective shares. The Central Commission clarified that the adopted tariff shall be charged in accordance with Schedule 7 of the PPA dated 22/04/2007.

(g) CGPL entered into a Supplemental PPA with the procurers on 31/07/2008 for advancement of the scheduled CODs in terms of Article 3.1.2(iv) of the PPA.

(h) Mundra UMPP is envisaged to be executed based on imported coal and has an estimated coal requirement of approximately 12 MMTPA. According to CGPL, it had made arrangement for imported coal from Indonesia by entering into CSA dated 31/10/2008 with IndoCoal Resources (Cayman) Limited, a corporation organised and existing under the laws of Republic of Indonesia, for supply of 5.85 MMTPA (+/-20 %). Tata Power had also entered into an agreement with CGPL on 09/09/2008 for meeting the balance coal requirement of 6.15 MTTPA on best effort basis. Subsequently, Tata Power assigned its agreement with IndoCoal Resources (Cayman) Limited for supply of 3.51 MMTPA (+/-20 %) (which was earlier meant for Coastal Maharashtra facility) in favour of CGPL vide Assignment and Restatement Agreement dated

28/03/2011. The coal requirement of Mundra UMPP is stated to be met by sourcing coal on the basis of these two agreements.

(i) The Government of Indonesia promulgated the Indonesian Regulation on 23/09/2010, which made all long term coal contracts for supply of coal from Indonesia to be adjusted with the Indonesian Regulation within a period of 12 months i.e. by 23/09/2011, which required holders of mining permits to sell coal in domestic and international markets by referring to the benchmark price and the spot price of coal in the international market.

(j) The promulgation of Indonesian Regulation resulted in escalation in international coal prices. CGPL is stated to be supplying power to the procurers by purchasing coal at a higher price than what was agreed in the CSA without any adjustment of tariff and is consequently

stated to suffer a loss of Rs.1873 crores per annum and Rs.47,500 crores over a period of 25 years. CGPL took up the matter with GUVNL, who is the lead procurer and the Ministry of Power, GoI vide its letter dated 04/08/2011. CGPL also took up the matters with the procurers in a Joint Monitoring Meeting dated 06/02/2012 for suitable adjustment in tariff. Ministry of Power, GoI in its reply dated 30/09/2011 responded to CGPL's representation by stating that "....PPA is a legally binding document exclusively between the procurers and the developer. Therefore, any issue arising therein is to be settled within the provisions of the PPA by the contracting parties for which Gujarat being the lead procurer may take necessary action.....". The procurers sought some further details which CGPL furnished by its letter dated 06/03/2012.

(k) CGPL approached the Indonesian Government vide its letter dated 16/02/2012 requesting to exempt the

existing coal supply contracts from the purview of Indonesian Regulation, without any success.

(l) IndoCoal Resources (Cayman) Limited, which supplies coal to CGPL under the CSAs issued a notice to CGPL on 09/03/2012 calling upon it to align the original CSAs with the Indonesian Regulation. CGPL is stated to have amended the CSAs on 23/05/2012 and 22/06/2012 to align them with the Indonesian Regulation and to ensure uninterrupted supply of coal under the provisions of the PPA.

(m) Under these circumstances, CGPL has filed the above petition before the Central Commission seeking relief under Article 12 (*Force Majeure*) and Article 13 (Change in Law) of the PPA and Section 79 read with Sections 61 and 63 of the said Act.

(n) The Central Commission directed CGPL to make a representation to the lead procurer with copy to other procurers regarding its claim for change in tariff in terms of Article 17.3 of the PPA and further directed the lead procurer, GUVNL to convene a meeting of the procurers to consider the proposal of CGPL to resolve the issues and convey the decision to CGPL. Pursuant to the said directions, on 27/07/2012, CGPL made a proposal to all procurers regarding revision of elements of tariff under the PPA to mitigate the impact of the unprecedented increase in the price of imported coal. On 03/08/2012, a procurers' meet was convened in which CGPL made a presentation on the revision of the Quoted Escalable Fuel Energy Charges in the PPA on account of increase in imported coal price. The procurers after considering the proposal subsequently conveyed their disapproval to the proposal of CGPL for revision of energy fuel charges. CGPL in its Affidavit dated 13/09/2012 submitted to the Central Commission that since its proposal has not been accepted by the procurers, a dispute had arisen which

the Central Commission should adjudicate in terms of Article 17.3.1 of the PPA. Thereafter, the matter was heard by the Central Commission.

[D] Summary of Central Commission's Interim Order dated 15/04/2013 rejecting the claim of *Force Majeure* and Change in Law and constituting an Expert Committee for suggesting the compensatory tariff which would be payable to CGPL by invoking Section 79(1)(b) of the said Act.

(o) On 15/04/2013, the Central Commission held that CGPL's claim based on *Force Majeure* or Change in Law is not admissible. However, the Central Commission invoked its regulatory power under Section 79 of the said Act and held that CGPL deserves to be compensated to offset the adverse impact of promulgation of Indonesian Regulation. The Central Commission directed appointment of a Committee for suggesting the compensatory tariff which would be payable to CGPL, over and above the tariff discovered through competitive bidding and agreed in the PPA. CGPL, States of Punjab, Rajasthan, Gujarat, Haryana and Maharashtra appointed

their nominees to represent them/their respective procurers in the Committee.

[E] Institution of Appeal No.151 of 2013.

(p). On 26/06/2013, the Haryana procurers filed the instant **Appeal No.151 of 2013** [along with IA No.220 of 2013 for Direction] against the Central Commission's Order dated 15/04/2013 before this Tribunal. Haryana procurers also filed an application seeking permission of this Tribunal to participate in the Committee proceedings without prejudice to their rights.

[F] Summary of Central Commission's Final Order dated 21/02/2014 granting compensatory tariff to CGPL.

(q) As stated above, on 16/08/2013, the Committee gave its recommendations to the Central Commission. All procurers except the procurers for State of Punjab filed their Affidavits recording their in-principle consent to the Committee Report subject to certain modifications / conditions. However, the procurers for State of Punjab

filed their Affidavit dated 30/09/2013, rejecting the Committee Report. On 14/10/2013, CGPL filed its affidavit accepting the Committee Report. On 21/02/2014, the Central Commission passed the impugned order determining compensatory tariff payable to CGPL.

[G] <u>Details of Appeals filed by various Utilities and Consumer Organizations in CGPL Group challenging the Final Order dated 21/02/2014</u>.

(r) Being aggrieved by the said order dated 21/02/2014, various procurers filed appeals before this Tribunal viz. Rajasthan procurers filed **Appeal No.91 of 2014** on 02/04/2014; Haryana procurers filed **Appeal No.97 of 2014** with **I.A. No.189 of 2014** on 04/04/2014; PSPCL filed **Appeal No.100 of 2014** on 04/04/2014; Maharashtra Discoms filed **Appeal No.139 of 2014** on 07/04/2014 and GUVNL filed **Appeal No.115 of 2014** with **I.A. No.207 of 2014** on 17/04/2014. Consumer organizations like Prayas and Energy Watchdog have also

filed **Appeal No.133 of 2014** and **Appeal No.124 of 2014** on 07/04/2014 and on 27/04/2014 respectively.

[H] CGPL's appeal challenging rejection of its claim of *Force Majeure* and Change in Law by this Tribunal due to delay in filing and subsequent events.

(s) On 26/06/2014, CGPL filed Appeal (DFR No.1579/2014) before this Tribunal challenging the findings of Central Commission in its Order dated 15/04/2013 rejecting its claim of *Force Majeure* and Change in Law, with I.A. No.276 of 2014 seeking condonation of delay of 374 days. On 15/09/2014, this Tribunal rejected CGPL's condonation application, and, hence, Appeal (DFR No.1579 of 2014) filed by the CGPL was dismissed.

(t) On 18/09/2014, CGPL filed Civil Appeal No.9035 of 2014 against this Tribunal's Order dated 15/09/2014, which is pending adjudication before the Supreme Court.

(u) On 18/10/2014, CGPL filed **I.A. No.412 of 2014** in this Tribunal placing on record the factual development

pursuant to the Order dated 15/09/2014 in I.A. No.276 of 2014 in DFR No.1579/2014, seeking liberty to make its submissions on Change in Law and *Force Majeure*. I.A. No.412 of 2014 is tagged to the present appeals. We have heard counsel appearing for the parties therein.

V. FACTS LEADING TO APPEALS RELATING TO GMR GROUP.

28. The common issue that arises in the GMR Group is regarding the jurisdiction of the Central Commission under Section 79(1)(b) of the said Act.

[A] Description of Parties in Appeal No.44 of 2014.

29. The Appellant Nos.1 and 2 are Haryana Utilities. Appellant No.3 – HPGCL with whom Respondent Nos.1 and 2 initiated the process of procurement of power. Respondent No.1 – GMR-Kamalanga Energy Limited is a power generating company set up by Respondent No.2 – GMR Energy Limited. Respondent No.3 - PTC India Limited (**"PTC India"**) is an inter-state power trading Company. Respondent No.4 is Bihar

State Power Corporation Limited (**"BSPCL"**). Respondent No.5 is the Central Commission.

[B] <u>Brief facts of Appeal No.44 of 2014</u>.

30. Respondent Nos.1 and 2 are hereinafter referred to as **"GMR Energy"**. Government of Odisha signed a MoU dated 9/6/2006 with GMR Energy for setting up a 1000 MW thermal power plant in the State. The capacity of the project was later on increased to 1400 MW. This was to be executed in two stages. Pursuant to the said MoU, GMR Energy executed PPA dated 28/9/2006 with Grid Corporation of Odisha (**"GRIDCO"**) for a period of 25 years from the date of execution for supply of 25% of the power generated from the project. Stage I of the project has been awarded the status of Mega Power Project by the Central Government. The PPA was approved by Odisha Commission under Clause (b) of sub-section (1) of Section 86 of the said Act by Order dated 20/8/2009. By the said Order dated 20/8/2009, Odisha Commission also approved the PPAs executed between

GRIDCO and other Independent Power Producers (**"IPPs"**). Subsequently, GMR Energy executed a revised PPA dated 4/1/2011 with GRIDCO whereby it was agreed that supply of power to GRIDCO would include supply from the additional capacity of 350 MW to be set up by GMR Energy in Stage II.

31. While approving the PPA dated 28/9/2006, the Odisha Commission by its order dated 20/8/2009 directed GRIDCO and the IPPs including GMR Energy to file the petitions under Section 62 read with Section 79(1)(b) of the said Act before the Central Commission for approval of tariff as in the opinion of the Odisha Commission, the power projects to be established by the GMR Energy and other IPPs were inter-State generating stations. Accordingly, GMR Energy filed Petition No.20/MP/2012 before the Central Commission on 14/10/2011 for approval of provisional tariff for supply of power to GRIDCO. During the proceedings, it emerged that in addition to execution of the PPA for supply of power to GRIDCO, GMR Energy had signed agreements for supply of power to the distribution companies in Haryana through PTC

and Bihar State Electricity Board ("**BSEB**") after selection through the competitive bidding process under Section 63 of the said Act. By order dated 16/5/2012, the Central Commission dismissed the said petition as not maintainable on the ground that supply of power to the distribution companies in the State of Haryana and Bihar through PTC India after selection through competitive bidding was outside the scope of determination of tariff. GMR Energy was, however, granted liberty to approach the Central Commission for approval of tariff after it entered into the Composite Scheme for generation and sale of power in more than one State. Thereafter, GMR Energy filed **Petition No.77/GT/2013** for approval of regular tariff for supply of electricity to GRIDCO in terms of the liberty granted by Order dated 16/5/2012. GMR Energy also filed **Petition No.79/MP/2013**, inter alia, claiming compensatory tariff due to Change in Law. GMR Energy has listed certain events like changes in Visa Policy by the Central Government restricting the number of foreign workers to be granted visas for execution of power projects in India, shifting of evacuation

point from Meramundali (through LILO) to Angul as per the inter-State transmission scheme approved by the Central Electricity Authority ("**CEA**"), Lift irrigation deposit of 18.60 crore paid to Odisha Lift Irrigation Corporation and deviation of the FSA from the New Coal Distribution Policy, 2007, which amount to "Change in Law" as defined under Article 13 of the PPA. GMR Energy has listed various other events like increase in the rate of royalty on coal by the Central Government, levy of Clean Energy Cess, imposition of Excise Duty on coal, change in coal pricing policy, deviations from the New Coal Distribution Policy, change in freight charges by the Railways, increase in Minimum Alternate Tax Rates, increase in VAT Rate and increase in water charges. According to GMR Energy, these events have either caused delay in construction or have adversely impacted GMR Energy by increasing the cost of construction and the same will increase the costs of supply of electricity by GMR Energy during the operating period of the PPA. GMR Energy also filed **Petition No.81/MP/2013**, inter alia, claiming compensatory tariff due to *Force Majeure* events. GMR Energy has stated that during construction period,

various events like devaluation of Indian Rupee vis-à-vis the US Dollar since November 2007, delay in acquisition of land by the State of Odisha and its agencies, stay order passed by High Court of Orissa on construction activities in relation to certain lands and changes in FSA by CIL had occurred. According to GMR Energy, these events are the *Force Majeure* events as defined in Article 12 of the PPA dated 7/8/2008. These events have not only adversely impacted the estimated cost of the project but also have delayed its execution thereby making the GMR Energy liable for liquidated damages.

32. It appears that when the Central Commission by its order dated 16/5/2012 held that the petition of GMR Energy was not maintainable under Section 79(1)(b) of the said Act, its attention was not drawn to the judgment of the Delhi High Court in ***PTC India Ltd. v. Jaiprakash Power Ventures Ltd***.[1] where the Delhi High Court had rejected the argument that where a trading licensee sells power to a distribution

[1] Judgment dated 15/5/2012 in OMP No.677 of 2011

licensee and not directly to a consumer, the tariff for such a supply by the generating company to the trading company would not be amenable to the regulatory jurisdiction of the Regulatory Commission at the Central and State levels under Section 62 of the said Act. The Delhi High Court's view was followed by the Central Commission in Petition No.184/2009 in its order dated 3/9/3012. Therefore, while dealing with Petition No.79/MP/2013 and Petition No.81/MP/2013, by Order dated 16/12/2013 impugned in this appeal, the Central Commission observed that the Delhi High Court judgment in ***Jaiprakash Power*** which is followed by it in Petition No.184 of 2009 leads to an inference that when the generating company other than that owned and controlled by the Central Government sells electricity to distribution licensees in more than one State, directly or through the electricity trader, the Central Commission had the jurisdiction to regulate the tariff of the said generating company and therefore, its decision in Order dated 16/5/2012 needs to be revisited particularly in view of the fact that it had granted liberty to GMR Energy to

approach it after a Composite Scheme for generation and supply of power emerges in GMR Energy's case.

[C] Summary of Central Commission's Interim Orders dated 16/12/2013 and 03/01/2014 deciding the preliminary issues of jurisdiction and maintainability.

33. The Central Commission in the circumstances by its interim Order dated 16/12/2013 decided the preliminary issue of jurisdiction in Petition Nos.79/MP/2013 and 81/MP/2013 and held that the supply of electricity by the GMR Energy to the States of Odisha, Haryana and Bihar is under the Composite Scheme for generation and sale of electricity in more than one State and, hence, the Central Commission has powers to regulate the tariff of the generating station of GMR Energy under Section 79(1)(b) of the said Act. It also held that the power of adjudication of the claims and disputes involving *Force Majeure* and Change in Law events under the PPAs is vested in the Central Commission. In view of the said interim Order dated 16/12/2013 in Petition No.79/MP/2013 and Petition No.81/MP/2013, the Central Commission by interim Order dated 3/01/2014 passed in

Petition No.77/GT/2013 decided that the said petition is maintainable.

[D] Details of appeals filed by various Utilities in GMR Group challenging the interim orders.

34. Being aggrieved by the interim Order dated 16/12/2013 passed by the Central Commission in Petition No.79/MP/2013 and Petition No.81/MP/2013, the Haryana Utilities filed the present **Appeal No.44 of 2014**. The **GRIDCO filed Appeal No.74 of 2014** being aggrieved by the interim Order dated 3/01/2014 passed in Petition No.77/GT/2013.

VI. FACTS LEADING TO APPEALS RELATING TO SASAN GROUP.

35. The common issue that arises in the SASAN Group is regarding the jurisdiction of the Central Commission under Section 79(1)(b) of the said Act.

[A] Description of Parties in Appeal No.99 of 2014.

36. The Appellants are Haryana Utilities. Respondent No.1 is the Central Commission. Respondent No.2 – Sasan Power

Limited (**"Sasan Power"**) is a wholly owned subsidiary of Reliance Power Limited (**"RPower"**) and is a generating company. Respondent Nos.3 to 15 are the designated procurers of the electricity to be generated and supplied by Sasan Power.

[B] <u>Brief facts of Appeal No.99 of 2014</u>.

37. Sasan Power is a Special Purpose Vehicle ("**SPV**") incorporated by PFC, the nodal agency of GoI for implementation of its Ultra Mega Power Project initiative on 10/02/2006 for the development and implementation of a coal fired, ultra mega power project based on linked captive coal mine using super-critical technology with an installed capacity of 4000 MW (plus/minus 10%) at Sasan, District Singrauli, Madhya Pradesh (**"Sasan UMPP"**). The project was to be implemented by a developer to be selected through tariff based international competitive bidding process.

38. Based on the competitive bidding carried out by PFC as the Bid Process Coordinator, RPower having quoted the lowest bid was declared as successful bidder for execution of the project. A LoI was issued to RPower on 01/08/2007 which was accepted. In terms of the provisions of the RfP, RPower acquired 100% shareholding of the SPV on 07/08/2007. A PPA dated 07/08/2007 was executed between Sasan Power and 14 procurers who are the distribution companies in the States of Madya Pradesh, Uttar Pradesh, Rajasthan, Punjab, Haryana, Uttarakhand and Delhi. On 17/10/2007, the Central Commission adopted the tariff quoted by RPower. On 15/10/2008 a supplemental PPA was entered into between Sasan Power and the procurers primarily to pre-pone the CODs of the various units of the project. In the Joint Monitoring Committee meeting held on 17/9/2010, the COD of the various units of the project was revised by mutual consent.

39. On 15/12/2012, Sasan Power wrote to the procurers claiming that the depreciation of the Indian Rupee had

adversely impacted the project. On 8/2/2013, Sasan Power filed Petition No.14 of 2013 before the Central Commission praying inter alia for a declaration that the unprecedented, unforeseen and uncontrollable depreciation in the Indian Rupee vis-a-vis US Dollar as a *Force Majeure* event under the PPA and to restitute Sasan Power to the same economic condition as if the *Force Majeure* event had never occurred.

[C] Summary of Central Commission's Interim Order dated 21/02/2014 which while holding that the claim of *Force Majeure* is not admissible, proceeded to grant relief in exercise of its regulatory power under Section 79 of the said Act.

40. By interim Order dated 21/02/2014, the Central Commission has, *inter alia*, decided that the claim of Sasan Power for *Force Majeure* is not admissible and has yet proceeded to hold that Sasan Power can be given relief in exercise of its regulatory power under Section 79 read with Section 61 of the said Act and observed that "*despite all points remaining against the petitioner (*Sasan Power*), we are of the view that the unprecedented and unforeseen foreign exchange*

rate variations beyond the control of the petitioner and beyond the normal expectations may need to be considered for quantification and compensation by the procurers appropriately". By the said order, the Central Commission also proceeded to exercise its power under Section 79(1)(b) of the said Act and sought for certain documents from Sasan Power.

[D] Details of appeals filed by various Utilities in SASAN Group.

41. Aggrieved by the said interim Order dated 21/02/2014, Haryana Utilities and Rajasthan Utilities have filed present **Appeal No.99 of 2014** and **Appeal No.104 of 2014** respectively.

VII. AGREED ISSUES FOR CONSIDERATION:

42. The following agreed issues arise in these appeals for consideration.

"1. What is the scope and extent of Order dated 31/3/2015 passed by the Supreme Court in

Civil Appeal No.10016 of 2014 in the case of Adani Power allowing the plea of *Force Majeure* and Change in Law to be raised?

2. Whether the CGPL is entitled to raise the plea of *Force Majeure* or Change in Law to support the compensatory tariff granted by Order dated 21/2/2014 in terms of the principles of Order XLI Rule 22 (First Part) of the CPC or otherwise, claiming parity with Order dated 31/03/2015 passed in Civil Appeal No.10016 of 2014 in the case of Adani Power?

3. Whether the supply of power to procurers in more than one State from the same generating station of a generating company, *ipso facto*, qualifies as 'Composite Scheme' to attract the jurisdiction of the Central Commission under Section 79 of the said Act?"

4. Whether in the facts and circumstances of each of the cases of –

   (a) Adani Power's generation and sale of electricity in Gujarat and Haryana under PPAs dated 2/2/2007 and 7/8/2008 and

(b) GMR Kamalamga's generation and sale of electricity to Odisha, Bihar and Haryana under PPAs dated 28/9/2006, 9/11/2011 and 31/10/2007 (with back-to-back PSAs between PTC and Haryana dated 7/8/2008),

there exists a Composite Scheme for generation and sale of electricity within the scope of Section 79(1)(b) of the said Act, for the Central Commission to exercise jurisdiction?"

5. Whether the Central Commission, de-hors the provisions of the PPAs, has the regulatory powers to vary or modify the tariff or otherwise grant compensatory tariff to the generating companies in the case of a tariff determined under a tariff based competitive bid process as per Section 63 of the said Act?

6. Whether the Appropriate Commission, independent of *Force Majeure* and Change in Law provisions of PPAs, has the power to vary or modify the tariff or otherwise grant compensatory tariff to the generating companies in pursuance of the powers under

Sections 61, 63 and 79 of the Act and/or Clause 4.7 and 5.17 of the said Guidelines issued by the Central Government and/or Article 17.3 of the PPA and/or under the adjudicatory powers as per Section 79(1)(f) of the said Act?

7. Whether, in the facts and circumstances of the case, the Central Commission having held that *Force Majeure* and Change in Law provisions of the PPAs have no application, is right in granting compensatory tariff under any other powers?

8. Whether in the facts and circumstances of the case, the Central Commission is right in construing the order dated 2/4/2013 in case of Adani Power and order dated 15/4/2013 in the case of CGPL as a decision of the Commission to grant compensatory tariff not being limited to a conciliatory process to explore an amicable agreed solution which would exhaust if no consensus emerges?

9. Whether, in the facts and circumstances of the case, the Central Commission is right in giving effect to the payment of compensatory tariff retrospectively from the respective Scheduled COD of the generating units instead of considering the same prospectively from Order dated 21/2/2014?

10. Whether the Change in Law provided under Article 13 of the PPA or under Clause 4.7 of the said Guidelines issued by the Central Government as per Section 63 of the said Act should be construed to include laws other than Indian Laws such as the Indonesian Law/Regulations prescribing the benchmark price for export of coal?

11. Whether in the facts and circumstances of the present case, the increase in price of coal on account of change in National Coal Distribution Policy linked to reduced availability of domestic coal and/or promulgation of Indonesian Regulation constitute an event of Change in Law

attracting Clause 4.7 of the said Guidelines read with Article 13 of the PPA?

12. Whether in the facts and circumstances of the case, the increase in price of coal on account of the intervention by the Indonesian Regulations as also the non-availability/short supply of domestic coal in case of Adani Power constitute a *Force Majeure* event in terms of the PPA?

13. Whether the bid for generation and sale of electricity by Adani Power to GUVNL was premised on the availability of coal from GMDC, and to what effect?

14. Whether the bid for generation and sale of electricity by Adani Power to Haryana Utilities was affected by non-availability of coal from Mahanadi Coalfields Limited and if so to what extent?

15. Whether the CGPL had fuel supply agreements for procurement of coal for Mundra Project at a

price less than market price and if so to what extent?

16. Whether, the Central Commission in computing the grant of compensatory tariff to Adani Power and in devising the mechanism/formulae for the said purpose is correct in considering deviation from other bid parameters/assumptions, namely, Exchange Rate Variation, Station Heat Rate, Auxiliary Consumption, Gross Calorific Value of Coal (GCV) and increases in transmission charges or losses?

17. Whether, the Central Commission has properly taken into consideration the mitigating factors in favour of the consumers and to the proper extent, namely, reduction in the Return on Equity, Sharing of Mining Profits in Indonesia, sale of quantum in excess of the target availability, residual value of the generating units at the end of 25 years, etc.?"

PART – II

PRELIMINARY ISSUES:

VIII. PRELIMINARY ISSUE REGARDING SCOPE AND EXTENT OF THE SUPREME COURT'S ORDER DATED 31/03/2015 IN CIVIL APPEAL NO.10016 OF 2014:

43. There are two preliminary issues which need to be answered first because they involve the issue of the competence of Adani Power and CGPL to raise pleas of *Force Majeure* and Change in Law. The first preliminary issue is as under:

> "(1) What is the scope and extent of the Order dated 31/3/2015 passed by the Supreme Court in Civil Appeal No.10016 of 2014 in the case of Adani Power allowing the plea of *Force Majeure* and Change in Law?"

IX. FACTS LEADING TO THE ISSUE REGARDING SCOPE AND EXTENT OF THE SUPREME COURT'S ORDER DATED 31/03/2015 IN CIVIL APPEAL NO.10016 OF 2014:

44. Before proceeding to answer this question, we shall refer to the factual background. As already noted Adani Power was declared successful bidder in competitive bidding held under

Section 63 of the said Act; it entered into PPAs with the procurer and tariff discovered through competitive bidding was adopted by the respective State Commissions. As already noted, after the Indonesian Government notified the regulation directing that the export price of the coal from the Indonesian coal mines should be bench-marked to international market price of coal, Adani Power filed O.P. No.155 of 2012 in the Central Commission stating *inter alia* that in view of the Indonesian Regulation export prices of coal have risen impacting Adani Power's projects adversely as Adani Power is importing coal from Indonesia. Adani Power sought relief on account of the said alleged adverse impact of Indonesian Regulation on its project. On 02/04/2013, the Central Commission rejected the claim of Adani Power based on *Force Majeure* and Change in Law, but in exercise of its power under Section 79 of the said Act the Central Commission appointed a committee to initiate a consultative process to find out an acceptable solution in the form of compensatory tariff. The said order was challenged by Haryana Utilities in Appeal No.100 of 2013 which was admitted on 17/5/2013. On

16/9/2013, the Committee submitted its report. The Central Commission then passed Order dated 21/2/2014 quantifying the compensatory tariff. Haryana Utilities have challenged the said order in Appeal No.98 of 2014 and GUVNL has challenged the said order in Appeal No.116 of 2014. Adani Power filed cross objections being DFR No.1077 of 2014 on 17/04/2014 in Appeal No.100 of 2013 challenging Order dated 02/04/2013 of the Central Commission to the extent it declined to accept the pleas of *Force Majeure* and Change in Law raised by Adani Power. Haryana Utilities raised objections to the maintainability of the said cross objections. Vide judgment dated 01/08/2014 this Tribunal dismissed the cross objections as being not maintainable. This Tribunal observed that Adani Power should have filed an appeal under Section 111 of the said Act instead of resorting to Order XLI, Rule 22 of the Civil Procedure Code, 1908 ("**CPC**"). Adani Power then preferred an appeal being DFR No.2355 of 2014 before this Tribunal challenging Order dated 02/04/2013 to the extent it declined its claim of *Force Majeure* and Change in Law. There was delay in preferring that appeal. Adani Power

filed an application being I.A. No.380 of 2014 seeking condonation of delay in preferring the appeal which was rejected by this Tribunal vide Order dated 31/10/2014.

45. Being aggrieved by the said order, Adani Power filed Civil Appeal No.10016 of 2014 in the Supreme Court. The Supreme Court disposed of the said appeal vide order dated 31/03/2015. The Supreme Court observed that the issue before it was limited to the correctness of this Tribunal's order declining to condone the delay in preferring an appeal against Order dated 02/04/2013 of the Central Commission. Arguments were advanced on the applicability of Order XLI, Rule 22 of the CPC to an appeal under Section 111 of the said Act. The Supreme Court declined to go into that question observing that the decision of this Tribunal to reject cross objections of Adani Power vide Order dated 01/08/2014 became final as no appeal against the said order was pending before it. The Supreme Court observed that it was not required to go into the question as to whether order of the Central Commission dated 02/04/2013 by which it declined to grant

declaration of frustration of the contracts either on the ground of *Force Majeure* or on the ground of *Change in Law* is independently appealable since no appeal was preferred by Adani Power. The Supreme Court further observed that the question whether Adani Power has made out a case for condonation of delay in preferring an appeal before this Tribunal need not also be examined in view of the submission made by the counsel for Adani Power that it was entitled to argue on the grounds of *Force Majeure* or Change in Law not for the purpose of seeking relief of declaration of frustration of contracts between Adani Power and Haryana Utilities thereby relieving Adani Power of its obligations arising out of the contracts but only for the purpose of seeking an alternative relief of compensatory tariff. The Supreme Court observed that if Adani Power is not desirous of seeking declaration that it is relieved of the obligations to perform the contracts in question, the correctness of the decision of this Tribunal in rejecting the application to condone delay would become purely academic. The Supreme Court further observed that so long as Adani Power does not seek declaration of frustration of

contracts resulting in relieving it of its obligations arising out of the contracts, it is entitled to argue any proposition of law, be it *Force Majeure* or Change in Law, in support of Order dated 02/04/2013 quantifying the compensatory tariff, the correctness of which is under challenge before this Tribunal in Appeal No.98 of 2014 and Appeal No.116 of 2014 preferred by the procurers.

[A] SUBMISSIONS OF PRAYAS ON THE ISSUE REGARDING SCOPE AND EXTENT OF THE SUPREME COURT'S ORDER DATED 31/03/2015 IN CIVIL APPEAL NO.10016 OF 2014:

46. Mr. Ramachandran, learned counsel for Prayas submitted that liberty granted to Adani Power to urge the grounds of *Force Majeure* and Change in Law has to be read in the context of the statement made by counsel for Adani Power because the Supreme Court has granted liberty only in view of the said statement. Counsel submitted that it was specifically submitted before the Supreme Court by counsel for Adani Power that Adani Power is entitled to urge *Force Majeure* and Change in Law as grounds not for seeking relief of declaration of frustration of the contracts thereby relieving Adani Power of

its obligation arising out of the contracts but only for the purpose of supporting alternative relief of compensatory tariff. Counsel submitted that the liberty was granted to Adani Power to urge these grounds in support of Order dated 21/02/2014 quantifying the compensatory tariff. The said grounds can, therefore, only be urged to support the quantification of compensatory tariff and not for any other purpose.

[B] ANALYSIS AND CONCLUSION OF THIS TRIBUNAL ON THE ISSUE REGARDING SCOPE AND EXTENT OF THE SUPREME COURT'S ORDER DATED 31/03/2015 IN CIVIL APPEAL NO.10016 OF 2014:

47. It is not possible for us to put a narrow interpretation on the Supreme Court's Order dated 31/03/2015. Apart from the fact that the Supreme Court's order, in our opinion, does not preclude Adani Power from raising *Force Majeure* and Change in Law grounds to support Order dated 21/2/2014 in entirety, as far as possible we would lean in favour of giving a party full opportunity of hearing.

48. From the background of the case, which we have narrated hereinabove, it is clear that Adani Power filed cross objections being aggrieved by the Central Commission's order holding against it on the pleas of *Force Majeure* and Change in Law raised by it. The cross objections were held not maintainable and, hence, Adani Power challenged the said findings by filing appeal in this Tribunal. There was delay in filing the appeal obviously because Adani Power had spent time in filing cross objections. Appeal was dismissed by this Tribunal on the ground of delay. Being aggrieved by this, Adani Power filed civil appeal in the Supreme Court where the Supreme Court granted the above-mentioned relief. Thus, Adani Power was desirous of challenging the findings recorded against it on *Force Majeure* and Change in Law and it did take steps in that behalf. Admittedly, counsel for Adani Power made a statement that Adani Power is not seeking a declaration on frustration of contract on the grounds of *Force Majeure* and Change in Law. The Supreme Court recorded that statement and made it clear that in Appeal Nos.98 of 2014 and in Appeal No.116 of 2014, Adani Power will not urge

these grounds to seek a declaration for frustration of contracts. In effect, the Supreme Court made it clear that Adani Power cannot evade its contractual obligations on the ground of frustration of contracts on account of *Force Majeure* and Change in Law. The Supreme Court, however, unambiguously stated that Adani Power can urge any proposition of law, be it *Force Majeure* or Change in Law, in support of the Central Commission's order dated 21/2/2014 quantifying the compensatory tariff.

49. Mr. Ramachandran wants us to hold that *Force Majeure* and Change in Law can now be urged only with respect to the quantification of the compensatory tariff done in Order dated 21/2/2014. We do not think so. The words "quantifying the compensatory tariff" merely describe Order dated 21/2/2014 as the one which quantifies the compensatory tariff. It is pertinent to note that counsel for Adani Power also made a statement that Adani Power wants to urge *Force Majeure* and Change in Law for the purpose of seeking alternative relief of compensatory tariff. The Supreme Court understood this

submission to mean that the facts which formed the basis of the submission of frustration of contracts are also relevant for supporting the conclusion of the Central Commission that Adani Power is entitled for the relief of compensatory tariff. Entitlement of compensatory tariff is not the same as quantification or computation of compensatory tariff. We, therefore, reject the submission that liberty granted by the Supreme Court in its Order dated 31/3/2015 is only limited to quantification of tariff. We hold that Adani Power can urge *Force Majeure* and Change in Law in support of Order dated 21/2/2014 with only one restriction that it cannot urge that on account of the said grounds, the contracts are frustrated and it must be relieved of its obligations under the contracts.

[C] ANSWER TO ISSUE NO.1 OF THE AGREED ISSUES.

50. In the circumstances, we answer Issue No.1 as follows:

Order dated 31/3/2015 passed by the Supreme Court in Civil Appeal No.10016 of 2014 in the case of Adani Power permits Adani Power to raise the plea of *Force Majeure* and

Change in Law in full measure only with one restriction that it cannot urge that on account of the said grounds, the contracts with the procurers are frustrated and it must be relieved of its obligations under the said contracts. In short, Adani Power can urge the plea of *Force Majeure* and Change in Law with restriction placed on it by the Supreme Court.

X. PRELIMINARY ISSUE ON CGPL'S CLAIM REGARDING ITS ENTITLEMENT TO RAISE *FORCE MAJEURE* OR CHANGE IN LAW GROUNDS TO SUPPORT THE COMPENSATORY TARIFF GRANTED BY ORDER DATED 21/2/2014 CLAIMING PARITY WITH THE SUPREME COURT'S ORDER DATED 31/3/2015:

51. We shall now turn to the second issue, which is as follows:

> "(2) Whether CGPL is entitled to raise the plea of *Force Majeure* or Change in Law to support the compensatory tariff granted by Order dated 21/2/2014 in terms of the principles of Order XLI Rule 22 (First Part) of the Code of Civil Procedure or otherwise, claiming parity with Order dated 31/3/2015 passed in Civil Appeal No.10016 of 2014 in the case of Adani Power?"

XI. FACTS LEADING TO CGPL'S CLAIM REGARDING ITS ENTITLEMENT TO RAISE *FORCE MAJEURE* OR CHANGE IN LAW GROUNDS TO SUPPORT THE COMPENSATORY TARIFF GRANTED BY ORDER DATED 21/2/2014 CLAIMING PARITY WITH THE SUPREME COURT'S ORDER DATED 31/3/2015.

52. Facts, which give rise to this question, need to be stated. It is also necessary to refer to the contents of I.A. No.412 of 2014 filed by CGPL for liberty to urge pleas of *Force Majeure* and Change in Law.

53. As already noted CGPL had filed Petition No.159/MP/2012 praying *inter alia* for establishment of an appropriate mechanism to offset in tariff the adverse impact of rise in price of coal imported from Indonesia. CGPL had urged *Force Majeure* and Change in Law grounds. The Central Commission by its Order dated 15/4/2013 came to a conclusion that CGPL is suffering on account of escalation of coal prices and needs to be compensated. A direction was given to constitute a committee to suggest a package of compensatory tariff. However, the Central Commission

rejected CGPL's pleas of *Force Majeure* and Change in Law. The appeal carried by CGPL was rejected by this Tribunal on the ground of delay. CGPL challenged this order in the Supreme Court vide Civil Appeal No.9035 of 2014. The said appeal is pending. It is stated in I.A. No.412 of 2014 by CGPL that the said appeal was listed before the Supreme Court on 9/10/2014. During the hearing, it was pointed out that in the event CGPL was only defending its submissions with regard to *Force Majeure* and Change in Law and seeking no relief beyond what was granted by the Central Commission by its Orders dated 15/4/2013 and 21/2/2014, CGPL could defend these submissions in the appeals filed by the procurers pending before this Tribunal to which the procurers did not object. However, it was stated by the procurers that by assailing the findings of *Force Majeure* and Change in Law, CGPL was seeking a relief of liquidated damages over and above the compensatory tariff granted by the Central Commission. In reply filed to this application, procurers have not denied this assertion. It may be stated here that CGPL has confirmed in this application that the apprehension of the procurers that

they would seek liquidated damages over and above what is granted by the Central Commission is unfounded as CGPL is not making any such prayer.

54. CGPL has further stated in this application that on the next date of hearing the matter could not be heard. CGPL's request for early hearing was rejected by the Supreme Court and, therefore, they have filed this application. In the application, it is further contended that it is settled legal principle that a respondent to an appeal while defending the decree can assail such findings which are not in its favour. In doing so, the respondent is not required to file a separate appeal or cross objections. CGPL has in the circumstances, prayed that it may be granted liberty to make its submission with regard to *Force Majeure* and Change in Law. This application is strenuously opposed by the procurers and Prayas. It is necessary, therefore, to give gist of rival contentions.

[A] SUBMISSIONS OF CGPL REGARDING ITS ENTITLEMENT TO RAISE *FORCE MAJEURE* OR

CHANGE IN LAW GROUNDS TO SUPPORT THE COMPENSATORY TARIFF GRANTED BY ORDER DATED 21/2/2014 CLAIMING PARITY WITH THE SUPREME COURT'S ORDER DATED 31/3/2015:

55. Mr. Vaidyanathan, learned senior counsel appearing for CGPL submitted that the present application is premised on a settled legal principle that a respondent to an appeal, while defending the decree can assail such findings which are not in its favour. He submitted that in doing so, the respondent is not required to file a separate appeal or a cross-objection. Counsel submitted that by this application CGPL is not seeking any additional remedy over and above the relief granted by the Central Commission. It merely seeks to rely on two legal contentions, i.e., grounds of *Force Majeure* and Change in Law, to support the relief granted by Central Commission in its Order dated 15/04/2013. Counsel submitted that on 01/08/2014, this Tribunal, in a similar matter (DFR No. 1077/2014 in Appeal No.100/2013) rejected the cross-objections filed by Adani Power against Central Commission's Order dated 02/04/2013. While rejecting the cross objections, this Tribunal, inter alia observed that

"*Section 111 does not refer to filing of Cross Objection like Order 41 Rule-22. If there is no right of Cross Objection given under the Act, it cannot be read into Section 111 of the Act. Therefore, the Respondents must have preferred an Appeal in time under Section 111 of the Electricity Act instead of resorting to Order 41 Rule-22 which is not applicable to Section either 111 of the Act or any of the provisions of the Electricity Act, 2003."* In view of the above findings of this Tribunal, Adani Power filed an Appeal (DFR No.2355 of 2014) against the Central Commission's Order dated 02/04/2013 relating to *Force Majeure* and Change in Law. Along with the said Appeal, Adani Power had also filed an interim application (I.A. No.380 of 2014) seeking condonation of delay of 481 days. On 31/10/2014, this Tribunal rejected the said delay condonation application and consequently its appeal was also dismissed. Against the said Order dated 31/10/2014 of this Tribunal, Adani Power filed Civil Appeal No.10016 of 2014 before the Supreme Court. On 31/03/2015, while disposing of the said civil appeal, the Supreme Court, inter alia, held that so long as Adani Power does not seek a declaration that it is relieved of

the obligation to perform the contract in question, Adani Power is entitled to argue any proposition of law, be it *Force Majeure* or Change in Law in support of the Order dated 21/02/2014, quantifying the compensatory tariff, the correctness of which is under challenge before this Tribunal, so long as such argument is based on the facts which are already pleaded before the Central Commission.

56. Counsel submitted that during one of the hearings of CGPL's civil appeal, on 09/10/2014, a similar view was expressed by the Supreme Court that, in the event CGPL was defending their submissions with regard to *Force Majeure* and Change in Law, and seeking no relief beyond what was granted to them by the Central Commission (by its Orders dated 15/04/2013 and 21/02/2014), CGPL could defend these orders by making its submission in the appeals filed by the procurers pending before this Tribunal, to which the procurers did not object. Counsel submitted that it is a settled position of law that the respondents to an appeal can support the decree or the decision under appeal by laying challenge to a

finding recorded or issue decided against him in the order, judgment or decree that was passed in its favour. It is not necessary for such respondent to file cross-objections / cross-appeal for this purpose. Cross-objections / cross-appeal can be filed if such respondent intends to assail any part of the order / decree. In support of his submission, counsel relied on the judgments of the Supreme Court in ***Ramanbhai Ashabhai Patel v. Dabhi Ajitkumar Fulsinji***[2]***; J.K. Cotton Spg. and Wvg. Mills Co. Ltd. v. CCE***[3]***; Balbir Kaur v. UP Secondary Education Services Selection Board***[4]***; Sundaram Industries Ltd. v. Employees Union***[5]***; Hardevinder Singh v. Paramjit Singh***[6]***; Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai***[7]***; Banarsi v. Ram Phal***[8] and ***Northern Rly. Co. op. Credit Society Ltd. v. Industrial Tribunal***[9]***.***

[2] AIR 1965 SC 669 (5-J)
[3] (1998) 3 SCC 540 (3-J)
[4] (2008) 12 SCC 1 (3-J)
[5] (2014) 2 SCC 600
[6] (2013) 9 SCC 261
[7] (2004) 3 SCC 214
[8] (2003) 9 SCC 606
[9] (1967) 2 SCR 476

57. Counsel submitted that CGPL is not seeking any additional remedy over and above the relief granted by the Central Commission. It merely seeks to rely on two legal contentions, i.e., reliefs for *Force Majeure* and Change in Law which were rejected by the Central Commission while grating substantive relief to CGPL. Counsel submitted that scrutiny of the correctness of the Central Commission's Order dated 15/04/2013 cannot be shut out on the basis that the CPC will not in any manner apply and hence Order XLI Rule 22 of CPC will not apply. In this regard, counsel submitted that :-

(a) Order XLI Rule 22 of CPC, textually, is clear and unequivocal and encapsulates the principle that a successful respondent in an Appellate Forum is entitled to support a judgment in its favour by rearguing an issue decided against him in the impugned order, even without filing cross-objections. This position is in fact clarified by Order XLI Rule 22 second paragraph that the respondent may support the findings of the

impugned judgment on grounds which are not in the judgment without filing cross-objections.

(b) a *fortiorari,* it is entitled to do so in cross-objections, which in law and in facts are entitled to in appeal.

(c) even under Order XLI Rule 33, in a first appeal, the Court is empowered to answer all questions which arise between the parties.

(d) wherever the CPC does not strictly apply it does not mean that the analogy of the principles also does not apply, if that view is taken there would be no power to do a simple thing, as for example: amending the pleadings – in respect of which those special provisions exist and which is specifically done by recourse to the analogy of Order VI Rule 17 of the CPC.

(e) Section 120 (1) of the said Act is similar to many other provisions (e.g. Section 19 of the Arbitration and Conciliation Act, 1996) and these provisions merely state that the Tribunal *"shall not be bound"* by the CPC. In other words, the technical and unjust rigours of the CPC are liable to be waived in the interest of justice by the Appellate Tribunal. This does not mean that the general principle will not be made applicable.

58. Counsel submitted that, no provision of the said Act, precludes, prevents or prohibits this Tribunal from invoking the provisions of the CPC. This Tribunal has the powers to regulate its own procedure, and can even travel beyond the provisions of the CPC to meet the ends of justice. In support of this, he relied on the judgments of this Tribunal in **New Bombay Ispat Udyog Ltd. v. Maharashtra State Electricity**

Distribution Co. Ltd & Anr.[10] *and* **M/s. DLF Utilities Limited v. Haryana Electricity Regulatory Commission**[11].

59. Counsel submitted that CGPL, unlike Adani Power, had never sought for discharge from its obligation to perform the contract in question, and therefore, owing to the similarity of the facts of the two cases, the Supreme Court's Order dated 31/03/2015 also be made applicable in CGPL's case. Counsel therefore, submitted that CGPL be permitted to make its submissions on *Force Majeure* and Change in Law in the present appeals.

[B] SUBMISSIONS OF PRAYAS ON CGPL'S CLAIM REGARDING ITS ENTITLEMENT TO RAISE *FORCE MAJEURE* OR CHANGE IN LAW GROUNDS TO SUPPORT THE COMPENSATORY TARIFF GRANTED BY ORDER DATED 21/2/2014 CLAIMING PARITY WITH THE SUPREME COURT'S ORDER DATED 31/3/2015:

[10] 2010 ELR (APTEL) 0653
[11] Judgment dated 3/10/2012 in Appeal No.193 of 2011

60. On the other hand, on this issue, Mr. M.G. Ramachandran, learned counsel appearing for Prayas submitted as under:

(a) The provisions of Order XLI Rule 22 and Order XLI Rule 33 of the CPC or any such power on the principles of law are not applicable to the proceedings before this Tribunal, in an appeal filed under Section 111 of the said Act.

(b) An appeal under the said Act, unlike the CPC is not against a decree or a final judgment but against any order passed by the Appropriate Commission.

(c) Cross-appeals are envisaged under Section 111 of the said Act, whereby one party may file an appeal against one part of the order while the

other party may challenge another part of the same order.

(d) There is significant difference between the proceedings before the Civil Court where the provisions of Order XLI Rule 22 of the CPC apply and the proceedings before this Tribunal under Section 111 of the said Act.

(e) CGPL had the right to challenge Order dated 15/04/2013 passed by the Central Commission, which was appealed by CGPL after a delay of 374 days. The said appeal was dismissed by this Tribunal because reasons provided for such delay are not justifiable. The findings of the Central Commission with regard to *Force Majeure* and Change in Law as set out in its Order dated 15/04/2013 have attained finality.

(f) The provisions of Order XLI Rule 22 of the CPC cannot be resorted to as a matter of right. It is the discretion of the court. This Tribunal has already held in its Order dated 01/08/2014 passed in Appeal No.100 of 2013 that cross-objections under Order XLI Rule 22 of the CPC are not maintainable. The discretion of the court is not to be exercised when there is a remedy by way of an appeal provided in the said Act to challenge the decision of the Central Commission. Once CGPL's appeal with regard to the Central Commission's Order dated 15/04/2013 has been dismissed, the same issues cannot be raised again by CGPL under the garb of Order XLI Rule 22 of the CPC.

[C] SUBMISSIONS OF RAJASTHAN, GUJARAT, PUNJAB, HARYANA AND MAHARASHTRA UTILITIES ON CGPL'S CLAIM REGARDING ITS ENTITLEMENT TO RAISE *FORCE MAJEURE* OR CHANGE IN LAW GROUNDS TO SUPPORT THE COMPENSATORY TARIFF GRANTED

BY ORDER DATED 21/2/2014 CLAIMING PARITY WITH THE SUPREME COURT'S ORDER DATED 31/3/2015:

61. Mr. Sanjay Jain, learned ASG for Rajasthan Utilities, Mr. Aditya Dewan, learned counsel appearing for Gujarat Utilities, Mr. Anand K. Ganesan, learned counsel for Punjab Utilities, Mr. Brijender Chahar, Senior counsel for Haryana Utilities and Mr. Vikas Singh, Senior counsel for Maharashtra Utilities adopted the submissions of Mr. Ramachandran and added as under:

(a) The provisions of CPC have no application to the proceedings before this Tribunal. In terms of Section 111 of the said Act, an appeal can be filed against an order passed by the Appropriate Commission.

(b) CGPL had filed an appeal, challenging the Central Commission's Order dated 15/04/2013 which was rejected by this Tribunal by its Order dated

15/09/2014. The said order has been challenged by CGPL before the Supreme Court and the same is pending adjudication before the Supreme Court. Issues of *Force Majeure* and Change in Law cannot be decided by this Tribunal and the Central Commission's finding regarding the same can be varied only by the Supreme Court.

(c) The nature of relief given to CGPL in case of issues relating to *Force Majeure* and Change in Law would be completely different than compensatory tariff given to CGPL.

(d) By the present application, CGPL is indirectly seeking to allow its appeal pending before the Supreme Court. If the said application is allowed, the civil appeal filed by CGPL would become infructuous.

[D] ANALYSIS AND CONCLUSION OF THIS TRIBUNAL ON CGPL'S CLAIM REGARDING ITS ENTITLEMENT TO RAISE *FORCE MAJEURE* OR CHANGE IN LAW GROUNDS TO SUPPORT THE COMPENSATORY TARIFF GRANTED BY ORDER DATED 21/2/2014 CLAIMING PARITY WITH THE SUPREME COURT'S ORDER DATED 31/3/2015:

62. In order to answer this question, we must first refer to Section 120 of the said Act. It delineates the procedure and powers of the Appellate Tribunal. Sub-section (1) thereof states that the Appellate Tribunal shall not be bound by the procedure laid down by the CPC but shall be guided by the principles of natural justice and, subject to other provisions of the said Act, it shall have powers to regulate its own procedure. Thus, the legislature has allowed this Tribunal to regulate its own procedure. It has made it clear that the Appellate Tribunal is not bound by the procedure laid down by the CPC. This Tribunal is to be guided by the principles of natural justice. In short, in a given case, it can devise its own procedure in the interest of natural justice. Sub-section (2) of Section 120 confers on this Tribunal for the purposes of discharging its functions, same powers as are vested in a civil

court under the CPC, while trying a suit such as summoning and enforcing the attendance of any person and examining him on oath, receiving evidence on affidavits, etc. Those powers are stated in sub-clauses (a) to (i) of Section 120(2) of the said Act. Sub-sections 3 and 4 thereof put this Tribunal on par with a civil court only for the purposes of execution of its order to ensure that its orders are executed like orders of a civil court. Strong reliance is placed by the procurers and Prayas on Order dated 01/08/2014 of this Tribunal passed in Appeal No.100 of 2013. In that appeal, this Tribunal has held that CPC applies to Section 120(2) of the said Act only for a limited aspect as set out in sub-clauses (a) to (i) therein and admittedly Order XLI Rule 22 of the CPC is not one of the aspects referred to in Section 120(2) of the said Act. This Tribunal has further observed that provisions of Order XLI, Rule 22 of the CPC cannot be held applicable to the appeals filed under Section 111 of the said Act. Mr. Ramachandran on the same analogy submitted that the provisions of Order XLI, Rule 33 of the CPC or any such provisions will not be applicable to the appeals before this Tribunal.

63. It is true that this Tribunal has held that the provisions of Order XLI Rule 22 of the CPC are not applicable to the proceedings before this Tribunal. In this case, we are not inclined to re-examine the larger question whether the CPC is applicable to the proceedings under the said Act. But, as earlier stated by us sub-section (1) of Section 120 says that this Tribunal shall not be bound by the procedure laid down by the CPC; it shall be guided by the principles of natural justice and can regulate its own procedure.

64. Section 120(1) of the said Act was noticed by this Tribunal in ***New Bombay Ispat Udyog Limited***. We may quote the relevant observations.

> *"Provisions of section 120(1) of the Electricity Act,2003 was not enacted with the intention to curtail the power of the Tribunal with reference to the applicability of the Code of Civil Procedure to the proceedings before the Tribunal. On the contrary, the Hon'ble Supreme Court has clearly held that the words 'shall not be bound by' do not imply that the Tribunal is precluded or prevented from invoking the*

procedure laid down by the CPC. It further says that the words " shall not be bound by the procedure laid down by the CPC" only imply that the Tribunal can travel beyond the CPC and the only restriction on its power is to observe the principles of natural justice."

65. Similar view has been taken by this Tribunal in ***M/s. DLF Utilities Limited***. Therefore, even if Order XLI Rule 22 is held not applicable to this Tribunal, in a given case it is possible for us to regulate this Tribunal's procedure guided by the principles of natural justice. If principles of natural justice require that a party should be heard on a particular issue, it would be open for us to give it a hearing. This Tribunal can in such a case go beyond the CPC.

66. We have already noted that this Tribunal in a similar matter (DFR No.1077 of 2014 in Appeal No.100 of 2013) rejected the cross-objections filed by Adani Power against Central Commission's Order dated 02/04/2013. While rejecting the cross-objections, this Tribunal observed that Adani Power should have preferred an appeal under Section 111 of the said Act. Adani Power filed appeal pursuant to the

said order. The said appeal was dismissed on the ground of delay. Adani Power carried an appeal to the Supreme Court. While disposing of the appeal, the Supreme Court by its Order dated 31/3/2015 observed that so long as Adani Power does not seek a declaration that it is relieved of the obligation to perform the contract in question, Adani Power is entitled to argue any proposition of law, be it *Force Majeure* or Change in Law, in support of Order dated 21/2/2014 quantifying the compensatory tariff. We have already discussed the scope of the Supreme Court's Order dated 31/3/2015 and held that Adani Power can urge *Force Majeure* and Change in Law but it cannot urge that on account of the said grounds contracts are frustrated and therefore it must be relieved of its obligations under the contracts. Counsel for CGPL has made a statement that CGPL is not seeking any relief beyond what was granted to them by the Central Commission by its Orders dated 15/4/2013 and 21/2/2014. In view of this statement, in our opinion, on grounds of parity CGPL can be allowed to assail findings on *Force Majeure* and Change in Law, which are against it while supporting rest of the order. CGPL can draw

support from the Supreme Court's above-mentioned order. Moreover by giving opportunity to CGPL to urge *Force Majeure* and Change in Law, we will be adopting a procedure which will be guided by the principles of natural justice and in tune with Section 120(1) of the said Act.

67. It is urged that CGPL's appeal against Order dated 15/4/2013 of the Central Commission constituting the Committee was rejected by this Tribunal on the ground of delay. Appeal against that order is pending in the Supreme Court. CGPL, therefore, cannot agitate pleas of *Force Majeure* and Change in Law in this appeal. Pendency of appeal in the Supreme Court does not bar CGPL from raising these pleas because there is no interim order passed by the Supreme Court restraining CGPL from urging these points before this Tribunal and in any case ultimately the Supreme Court's order will override the order passed by this Tribunal.

[E] ANSWER TO ISSUE NO.2 OF THE AGREED ISSUES.

68. In the circumstances, we answer issue No.2 as follows:

CGPL is entitled to raise the plea of *Force Majeure* or Change in Law to support the compensatory tariff granted by Order dated 21/2/2014, claiming parity with Order dated 31/3/2015 passed in Civil Appeal No.10016 of 2014 in the case of Adani Power. CGPL can be permitted to do so in light of Section 120 of the said Act and in light of the principles underlying the provisions of the CPC. **I.A. No.412 of 2014 is, therefore, allowed.**

XII. PRELIMINARY ISSUE AS TO WHETHER AN INTERIM ORDER CAN BE CHALLENGED ALONG WITH THE FINAL ORDER:

69. The procurers have raised another preliminary issue viz. whether if an interim order is not challenged, the challenge to it can be raised with the final order. This issue is not included in the agreed issues for consideration. However, since this issue arises in these matters and arguments were advanced on it, we deem it appropriate to answer it.

[A] ANALYSIS AND CONCLUSION OF THIS TRIBUNAL ON THE ISSUE AS TO WHETHER AN INTERIM ORDER CAN BE CHALLENGED ALONG WITH THE FINAL ORDER:

70. Our attention is drawn to three interim orders passed by the Central Commission. Interim Order dated 16/10/2012 passed in Petition No.155/MP of 2012 relates to the objection that the petition is not maintainable. The said objection was overruled and the petition was held maintainable. Interim Order dated 16/1/2013 is passed in Review Petition No.26 of 2012 in Petition No.155/MP of 2012 filed by Haryana Utilities for review of Order dated 16/10/2012. By the said order, it was held that Section 79(1)(b) of the said Act applies to the present case, and hence, the Central Commission has jurisdiction. By interim Order dated 02/04/2013 passed in Petition No.155/MP of 2012, the Central Commission held that the grounds of *Force Majeure* and Change in Law are not made out. By the same order, the Central Commission held that in order to meet the hardship caused to the generators, it is necessary to pay them compensatory tariff. A Committee was constituted for that purpose. After the report was submitted by the said Committee, the impugned final Order dated 21/02/2014 came to be passed whereby the Central

Commission granted compensatory tariff to the generators. It was urged that interim orders dated 16/10/2012, 16/1/2013 and 2/4/2013 were not challenged by Prayas and, hence, the same cannot be challenged now along with the final order dated 21/02/2014.

71. We find no substance in this contention. As rightly contended by Mr. Ramachandran, it is well settled that every interlocutory order passed by the court need not be challenged individually and all issues of such challenges to the interim order can be taken up with a challenge to such final order. In ***Achal Misra v. Rama Shankar Singh & Ors.***[12] to which our attention is drawn by Mr. Ramachandran, the Supreme Court was dealing with the provisions of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972. Section 12 thereof provides for order notifying vacancy of premises. The High Court allowed the writ petition filed by allottees on the ground that the landlord had not challenged the original order notifying the vacancy and hence was precluded from

[12] (2005) 5 SCC 531

challenging the notifying of vacancy in revision against the final order. The Supreme Court rejected this submission and held that an order notifying a vacancy which leads to the final order of allotment, can be challenged in a proceeding taken to challenge the final order, as being an order which is a preliminary step in the process of decision making in passing the final order. While coming to this conclusion, the Supreme Court relied on the judgment of the Privy Council in ***Sheonoth v. Ramnath***[13] where the Privy Council has held that a party is not bound to appeal from every interlocutory order which is a step in the procedure that leads to a final decree. It is open to question an interlocutory order in an appeal from a final decree. The Supreme Court also referred to its judgment in ***Satyadhyan Ghosal v. Deorajin Debi***[14] where it has held that an interlocutory order which had not been appealed from, either because no appeal lay or even though an appeal lay, an appeal was not taken, can be challenged in an appeal from a final decree or order. It is not necessary to multiply the

[13] (1865) 10 MIL 413
[14] (1960) SCR 590

authorities on this question. This objection, therefore, must be rejected.

72. The contention that the objection to the jurisdiction cannot be raised while assailing the final order because the interim order rejecting the said objection was not challenged, must be rejected without hesitation. Jurisdiction goes to the root of the matter. Parties cannot confer jurisdiction on a court which does not in law have jurisdiction. Ideally objection to the jurisdiction should be raised at the outset, but that does not preclude a party from raising it at a subsequent stage. In ***Balvant N. Viswamitra & Ors. v. Yadav Sadashiv Mule***[15], the main question which arose for consideration was whether the decree passed by the trial court can be said to be null and void. While dealing with this question, the Supreme Court observed as under:

> *"Where a court lacks inherent jurisdiction in passing a decree or making an order, a decree or order passed by such court would be without jurisdiction, non est and void ab initio. A defect of jurisdiction of the court goes to the root of the matter and strikes at the very*

[15] (2004) 8 SCC 706

authority of the court to pass a decree or make an order. Such defect has always been treated as basic and fundamental and a decree or order passed by a court or an authority having no jurisdiction is a nullity. Validity of such decree or order can be challenged at any stage, even in execution or collateral proceedings."

73. Similar view is taken by the Supreme Court in ***Cantonment Board & Anr. v. Church of North India***[16]. Accordingly, we hold that the challenge to an interim order can be raised along with challenge to the final order.

[B] ANSWER TO THE PRELIMINARY ISSUE AS TO WHETHER AN INTERIM ORDER CAN BE CHALLENGED ALONG WITH THE FINAL ORDER:

In view of the judgments of the Supreme Court in ***Achal Misra***, ***Sheonoth***, ***Satyadhyan Ghosal***, ***Balvant N. Viswamitra***, and ***Cantonment Board***, it is held that if an interim order is not challenged, the challenge to it can be raised with the final order.

[16] (2012) 12 SCC 573

PART – III

COMPOSITE SCHEME:

XIII. AGREED ISSUE SUBMITTED BY PARITES ON COMPOSITE SCHEME UNDER SECTION 79(1)(b) TO ATTRACT THE JURISDICTION OF THE CENTRAL COMMISSION.

74. The next important issue is related to the words 'Composite Scheme' appearing in Section 79(1)(b) of the said Act. The following issue is framed in that behalf.

> 3. Whether the supply of power to procurers in more than one State from the same generating station of a generating company, *ipso facto*, qualifies as 'Composite Scheme' to attract the jurisdiction of Central Commission under Section 79 of the said Act?"

75. The above issue arises because the procurers / consumer organizations had taken objection to the Central Commission's jurisdiction to entertain Adani Power's petition on the ground

that the jurisdiction to regulate tariff of generating companies other than those owned or controlled by the Central Government is available to the Central Commission under Section 79(1)(b) of the said Act only if such generating companies enter into or otherwise have a Composite Scheme for generation and sale of electricity in more than one State. It was submitted that Adani Power does not have a Composite Scheme for generation and sale of electricity in more than one State and, hence, the Central Commission has no jurisdiction. This objection was rejected by the Central Commission. It is the contention of the procurers and Prayas that this objection was wrongly rejected.

[A] SUMMARY OF CENTRAL COMMISSION'S ORDER DATED 16/10/2012 ON COMPOSITE SCHEME.

76. We may summarise the Central Commission's reasoning while rejecting the objection to its jurisdiction raised by the procurers. The gist of the first Order dated 16/10/2012 is as under:

The expression "Composite Scheme" means the scheme comprising more than one element. It is clear from clause (b) of sub-section (1) of Section 79 that two elements of Composite Scheme should be generation and sale of electricity. Adani Power generates electricity and sells the electricity generated at Mundra Power Project to more than one State, that is the States of Gujarat and Haryana. Hence, regulation of tariff of Adani Power is within the jurisdiction of the Central Commission. Tariff in the case of Adani Power has been arrived at pursuant to competitive bidding process undertaken under Section 63. Tariff has not been determined on the basis of application made under sub-section (1) of Section 62 of the said Act. Hence, this case is not covered by Section 64(5) of the said Act, which states that notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving territories of two States may, upon such application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined by the State Commission having jurisdiction in respect of the licensee who

intends to distribute electricity and make payment thereunder. The generating company can be said to have entered into the Composite Scheme for generation and sale of electricity in more than one State when it executes the PPAs in more than one State or enters into any other similar arrangement. Any other interpretation will impinge on the policy of common approach on the matters of tariff of the generating companies supplying electricity to more than one State enshrined in clause (b) of sub-section (1) of Section 79.

77. The procurers sought review of Order dated 16/10/2012 passed by the Central Commission. By Order dated 16/01/2013, the Central Commission dismissed the review petition. It was contended before the Central Commission that the Central Commission had not followed the judgment of this Tribunal in ***M/s. PTC India Limited v. Central Electricity Regulatory Commission & Ors***[17]. ***[PTC India (I)]*** The Central Commission held that the ratio of this Tribunal's judgment in ***PTC India (I)*** is that the Central Commission regulates the

[17] Judgment dated 23/11/2006 in Appeal No.228 of 2006 and 230 of 2006

tariff of the generating companies which sell power to the distribution companies, etc. at uniform rate. The Central Commission observed that it needs to be borne in mind that where the tariff has been discovered through competitive bidding process initiated by two or more States independently of each other and at different times, the possibility of sale at uniform rates cannot be a reality. Such a possibility is extremely remote. The Central Commission observed that what has been emphasized by this Tribunal in ***PTC India (I)*** is the uniformity of approach on the issues related to tariff common to more than one State. This appears to have been done to avoid conflicting opinion by different Commissions. The Central Commission observed that this Tribunal was of the view that Section 79(1)(b) requires uniform approach in keeping with the philosophy of the said Act. The Central Commission held that if the said judgment of this Tribunal is read as a whole, it is seen that there is no conflict between the said judgment and Order dated 16/10/2012. So far as its Order dated 29/3/2006 in ***Uttaranchal Jal Vidyut Nigam***

Ltd. v. Uttaranchal Power Corporation Ltd., Dehradun[18] is concerned, the Central Commission held that it was passed in the peculiar facts of that case and has no application to the present case.

78. Having given the gist of the Central Commission's orders, we shall turn to the rival contentions of the parties. We have heard Mr. M.G. Ramachandran, Mr. R.K. Mehta, Mr. Nikhil Nayyar, Mr. K.S. Dhingra, Mr. Harish Salve and Mr. Amit Kapur, learned counsel on this issue. We have also gone through the submissions filed by them.

[B] SUBMISSIONS OF PRAYAS ON COMPOSITE SCHEME.

79. Gist of submissions of Mr. Ramachandran, learned counsel appearing for Prayas is as under:–

(a) The Central Commission was wrong in holding that the generation and sale of electricity by Adani Power to the

[18] Order dated 29/3/3006 in Petition No.103 of 2005

procurers under the PPAs dated 02/02/2007, 06/02/2007 and 07/08/2008 constitute a Composite Scheme for generation and sale of electricity in more than two States viz. Haryana and Gujarat within the meaning of Section 79(1)(b) of the said Act to confer jurisdiction on the Central Commission.

(b) The exercise of jurisdiction by the Central Commission under Section 79(1)(b) of the said Act is wrong.

(c) The subject matter is outside the purview of Section 79(1)(b) of the said Act as there is no Composite Scheme for generation and sale of electricity in more than one State.

(d) There is no commonality between PPAs of Haryana Utilities and PPAs of GUVNL for the following reasons:

(i) PPAs dated 07/08/2008 entered into by Adani Power with the Haryana Utilities were pursuant to a tariff based competitive bidding process initiated by Haryana Utilities. The Gujarat Utilities had no say or involvement in the same.

(ii) PPA dated 02/02/2007 and PPA dated 06/02/2007 entered into by Adani Power with GUVNL were pursuant to a tariff based competitive bidding process initiated by GUVNL. The Haryana Utilities had no say or involvement in the same.

(iii) The Haryana Commission had approved the bidding process for Haryana Utilities and Gujarat Commission had approved the bidding process for GUVNL.

(iv) Haryana Commission had adopted the tariff for the PPA with Haryana Utilities. Gujarat Commission had adopted the tariff for the PPAs with the GUVNL.

(v) PPAs dated 07/08/2008 are only with Haryana Utilities and GUVNL has no involvement. There is no reference to the PPA or arrangement with GUVNL in PPAs dated 07/08/2008 with Haryana Utilities.

(vi) Similarly, PPAs dated 02/02/2007 and 06/02/2007 are only with GUVNL and with no involvement of Haryana Utilities. There is no reference to Haryana Utilities in the PPAs with GUVNL.

(vii) PPAs dated 07/08/2008 with Haryana Utilities and sale of power to Haryana are with reference to Unit Nos.7, 8 and 9 of the Mundra Power Plant of Adani Power. GUVNL has no share in the capacity of Unit Nos.7, 8 and 9.

(viii) PPAs dated 02/02/2007 and 06/02/2007 entered into with GUVNL and the power to be procured in Gujarat are with reference to Unit Nos.1 to 6 of the

said project. Haryana Utilities have no share in the capacities of Unit Nos.1 to 6.

(ix) The quoted tariff under Haryana PPAs dated 07/08/2008 is different from the quoted tariff for GUVNL.

(e) A plain simple and natural meaning of Section 79(1)(b) is that simpliciter sale of electricity from the generating stations to more than one state is not sufficient and there has to be something more than the above viz. a Composite Scheme. Since the legislature has used the words 'Composite Scheme', it is necessary to give it some meaning.

(f) Mere sale of electricity from a generating station to procurers in two or more States cannot be a Composite Scheme because otherwise the legislature would have used the expression sale of electricity in more than one State and that would have been sufficient. There was no

need to use the expression "Composite Scheme". Meanings of the words "composite" and "scheme" found in various dictionaries do not support Adani Power. ***Oxford Dictionary*** defines the word "composite" as "made up of various parts or elements" and ***Black's Law Dictionary, Seventh Edition*** defines the word "scheme" as "a systematic plan; a connected or orderly arrangement, esp. of legislative concepts. Reliance is placed on the judgment of the Supreme Court in ***Imagica Creative (P) Ltd. v. Commissioner of Commercial Taxes***[19]***.***

(g) Clause 2.4 of the said Guidelines notified by the Central Government under Section 63 of the said Act, *inter alia*, states that to ensure standardization in evaluation of bids, the payment security and other commercial terms offered to the bidders by the various procurers shall not vary. The price offered by the bidders shall also be the same for the distribution licensees inviting the bid. It

[19] (2008) 2 SCC 614

further says that in case of combined procurement where the distribution licensees are located in more than one State, the Appropriate Commission for the purpose of the said Guidelines shall be the Central Commission. The Central Commission's jurisdiction is, therefore, envisaged under Section 79(1)(b) for the combined procurement process by more than one State and not individual procurement by the States. In the present case, there was no combined procurement process by Haryana utilities and GUVNL.

(h) The interpretation given by the Central Commission to the scope of the Composite Scheme would lead to an anomalous situation. For instance, at the time when the tariff based competitive bidding process was adopted by the Haryana Utilities, it was not proposed by the Haryana Utilities as a combined procurement or a Composite Scheme in any manner with Gujarat Utilities. Haryana Utilities initiated the process as an independent power procurement. Similar was the case with GUVNL.

Subsequently, Adani Power filed a petition before the Central Commission calling it as a Composite Scheme merely because Adani Power is selling electricity from its project to two or more States. If GUVNL stops purchasing power from the project, it would cease to be a Composite Scheme. In a given case, at the time of filing the petition there may be generation and sale in two States but by the time the decision is made there will be one sale in one State. Thus, the jurisdiction will constantly change on account of short term, medium term, long term purchases from a generating station. The generating station may sell electricity outside the State through Power Exchange collective transaction on day ahead basis. This would mean the jurisdiction of the Central Commission will be there for all such days when the power is sold outside the State on selective dates with all other power sold within the State. Such roller coaster on the exercise of jurisdiction by the Central Commission and State Commissions depending on the vagaries of

purchase of power by two or more States could never have been intended by Parliament.

(i) A distinction between the expression "entering into" or "having" used in Section 79 of the said Act is that the Composite Scheme could be on account of a combined procurement of power under a common PPA or if PPA has already been entered into with a particular State and another State agrees to purchase the power on the same tariff terms and conditions as in the case of the first State, then it could be said that the generating company is having a Composite Scheme. The decision of the Central Commission is contrary to the decisions of this Tribunal in ***PTC India (I)*** and ***BSES Rajdhani Power Limited v. Delhi Electricity Regulatory Commission***[20].

(j) In order to satisfy the ingredients of a Composite Scheme, there has to be substantial commonality which

[20] In Appeal No.94 of 2012 decided on 04/09/2012

is essentially in the form of an uniform tariff, terms and conditions at least for injection of power at the bus bar of the station. There may, however, be some variation on account of additional charges considering the peculiar circumstances of each case for a State, which may not be there for other States.

(k) The Central Commission has also departed from its own decision in ***Uttaranchal Jal Vidyut Nigam Limited***.

[C] SUBMISSION OF GRIDCO ON COMPOSITE SCHEME.

80. Gist of the submissions of Mr. R.K. Mehta, who appears for GRIDCO, is as under:

(a) Interpretation placed by the Central Commission on the words "Composite Scheme" renders Section 79(1)(b) redundant and it is against the well established principle that the legislature is deemed not to waste it's words and effect must be given to every part of a statement. (See

Promoters & Builders Association v. Pune Municipal Corporation[21], ***Ram Phal v. Kamal Sharma***[22] and ***Mithilesh Singh***[23].

(b) Impugned order is contrary to this Tribunal's judgment in ***PTC India (I)*** and ***BSES Rajdhani***. The Central Commission has not even referred to its earlier judgments which is contrary to following decisions: (i) ***Safiya Bee v. Mohd. Rahmat Hussain***[24], (ii) ***Ratti Ram v. State of MP***[25] and (iii) ***A.R. Antulay v. R.S. Nayak & Anr.***[26].

(c) The contention that Composite Scheme is generation and sale of electricity is misconceived because sale of electricity is inherent in generation of electricity. Once electricity is generated, it is bound to be sold.

[21] (2007) 6 SCC 143
[22] (2004) 2 SCC 759
[23] (2003) 3 SCC 309
[24] (2011) 2 SCC 94
[25] (2012) 4 SCC 516
[26] (1988) 2 SCC 602

(d) The contention that where there is competitive bidding based on uniform competitive bidding guidelines, Composite Scheme could be said to exist, is wrong because tariff is the most important component of a scheme for generation and sale of electricity. Underlying object of Section 79(1)(b) of the said Act is that since tariff for sale of electricity pursuant to a Composite Scheme has to be uniform, such tariff may be determined by the Central Commission. In case, the tariff of different beneficiaries in a Composite Scheme is not required to be uniform there is no purpose in giving the jurisdiction to the Central Commission. In such a case, tariff can as well be determined by the respective Commissions of the States in which the beneficiaries are situated. Competitive bidding, based on uniform competitive bidding guidelines, even though such competitive bidding is separate, distinct and result in unequal tariff cannot be termed as Composite Scheme.

(e) Dictionary meaning of the word "scheme" denotes that a scheme is a carefully arranged and systematic programme of action.

(f) The contention that "Composite Scheme" is present where there is uniformity of approach, is too vague, unspecific and unworkable. Such a meaning will lead to uncertainty. A meaningful interpretation should be preferred to meaning which would make the statute unworkable (See: ***Pratap Singh v. State of Jharkand***[27], ***Andhra Bank v. B. Satyanarayana***[28]).

(g) If vague interpretation is placed, the question of jurisdiction will become a doubtful issue.

(h) Correct interpretation is given by the CERC in its judgment in ***Uttaranchal Jal Vidyut Nigam Ltd.*** and by this Tribunal in ***BSES Rajdhani*** and ***PTC India (I)***.

[27] (2005) 3 SCC 551
[28] (2004) 2 SCC 657

(i) The words "or otherwise" can only mean that the Composite Scheme need not be formally executed or entered into between the beneficiaries of more than one State but can be formed even otherwise, for example by the generating company entering into separate PPAs with beneficiaries in different States at the same time and on the same terms and conditions. It does not however mean that beneficiaries of other States can be included subsequently.

(j) In case it is held that even though initially the generating company sells power in one State, if subsequently the generating company starts selling power in other States, a Composite Scheme would come into being, it would result in shifting of jurisdiction. Such floating jurisdiction could not have been envisaged by the legislature.

(k) The objection that even in the same project tariff of different units may be different could be met by holding that tariff applicable to all beneficiaries of the same unit should be uniform.

(l) Even in the case of Mega Power Plant selling power in more than one State, there may not be a "Composite Scheme" within the meaning of Section 79(1)(b).

(m) In several cases, this Tribunal has upheld the determination of tariff by the State Commission in cases where generators had contracts for supply of power to two or more States.

(n) By order dated 16/10/2012, the Central Commission has bifurcated Section 79(1)(b) into two parts. Such bifurcation gives a go by to the concept of Composite Scheme as envisaged by the legislature and amounts to adding the words "for supply" before the words "of

electricity in more than one State" in Section 79(1)(b) which is not permissible. The interpretation placed by the Central Commission is self-defeating since it brings within the purview of Section 79(1)(b), generating companies supplying power to more than one State in which there is no commonality of tariff amongst the various beneficiaries. All subsequent judgments of the Central Commission are based on this judgment.

[D] SUBMISSIONS OF HARYANA UTILITIES IN GMR GROUP ON COMPOSITE SCHEME:

81. Gist of the submissions of Mr. Ganesan Umapathy, learned counsel appearing for Haryana Utilities in Appeal No.44 of 2014 is as under:

a) In ***PTC India (I)*** and ***BSES Rajdhani***, this Tribunal has interpreted the expression "Composite Scheme" and held that "uniform tariff" and "uniform terms and conditions"

are the only definite and clear interpretation of the said term as envisaged under Section 79(1)(b) of the said Act.

(b) The commonality in the applicability of the Central Government's said Guidelines alone would not result in generation and sale of electricity to be termed a "Composite Scheme" in the absence of uniformity of tariff and common terms and conditions of the PPA amongst the various beneficiaries.

(c) The argument that uniformity of tariff is not feasible is untenable as in cases of Sasan Power and Coastal Andhra, PPAs provide for uniform tariff and uniform terms and conditions of sale.

(d) Mere non-segregation of unit-wise supply of electricity to different State utilities will have no bearing on a scheme becoming "composite" when the PPAs entered into are separate. In fact, there are differences in the three PPAs

entered into by GMR-Kamalanga Energy Limited. While Haryana and Bihar PPAs have the provision of change in law, there is no such provision in Odisha PPA. Haryana and Bihar PPAs contain comprehensive provisions dealing with Change in Law, there is no such provision in the PPA with GRIDCO. The terms and conditions for dispute resolution provided for in the Odisha PPA are different from those provided for in the Haryana and Bihar PPAs. The terms and conditions for 'Force Majeure' of Odisha PPA are different from those of Haryana and Bihar PPAs.

(e) Where the tariff is different for these States and the PPAs are approved by the Bihar and Haryana are under Section 63 of the said Act, only the State Commission can have jurisdiction to deal with any claim arising out of the PPAs.

(f) Uniformity of approach in the competitive bidding is not sufficient.

(g) Conferment of jurisdiction has to be definite. There cannot be any floating jurisdiction.

(h) The Delhi High Court's judgment in ***PTC India v. Jaiprakash Power Ventures Ltd.***[29] ***[PTC India (II)]*** has made no change in the legal position. There the Delhi High Court only held that the Central Commission has jurisdiction to determine the tariff for power supplied by a generating company to a trading company. The issue regarding Composite Scheme was not raised before the Delhi High Court.

(i) Grant of Mega Power Plant status to a power plant cannot lead to a conclusion that there is a Composite Scheme.

[29] Judgment dated 15/05/2012 In OMP 677 of 2011 & IA 14336 of 2011

(j) Mere sale in more than one State would not amount to 'Composite Scheme'. There has to be uniform tariff and uniform terms and conditions.

[E] SUBMISSIONS OF HARYANA UTILITIES IN ADANI GROUP ON COMPOSITE SCHEME.

82. Gist of the submissions of Mr. Chahar, learned senior counsel, who appears for the Haryana Utilities in Adani Group, is as under:

(a) Section 79 (l)(b) of the said Act is attracted only if there is a Composite Scheme.

(b) Parliament has purposively used the words "Composite Scheme for generation and sale of electricity in two or more States". There is a need to give some meaning to the expression "Composite Scheme". Mere sale of electricity from a generating station to procurers in two or more States cannot be a Composite Scheme. There should be

something more than sale of electricity to two or more States. Otherwise, Parliament would have merely used the expression sale of electricity in more than one State and that would have been sufficient.

(c) Clause 2.4 of the said Guidelines notified by the Central Government under Section 63 of the said Act provides for combined procurement. The Central Commission's jurisdiction is envisaged under Section 79(1)(b) for combined procurement process by more than one State and not individual procurement by the States.

(d) The argument of Adani Power that Composite Scheme means 'some common elements' in the sale of electricity by different units of 'a generating station' to more than one State is without any merit. There will always be something common. For example, levy of custom duty or similar taxes may be under the same Act applicable to all. This will not confer jurisdiction on the Central Commission.

(e) The interpretation placed on the term “Composite Scheme” by the Central Commission would lead to an anomalous situation. There could be constant changes on account of short term, medium term, long term purchases from a generating station.

(f) Whether, there is a Composite Scheme for generation and sale of electricity in two or more States need to be decided upfront at the time when the PPA is entered into. The distinction between the expression "entering into" or "having" used in Section 79 of the said Act is that the Composite Scheme could be on account of a combined procurement of power under a common PPA or if a PPA has already been entered into with a particular State and another State agrees to purchase the power on the same tariff terms and conditions as in the case of the first State, then it could be said that the generating company is having a Composite Scheme.

(g) The decisions of this Tribunal in ***PTC India (I)*** and ***BSES Rajdhani*** are binding precedents and squarely apply to the present case.

(h) The Central Commission has re-written the provisions of Section 79(1)(b) rendering the use of the expression Composite Scheme redundant and meaningless. It is contrary to its earlier decision in ***Uttaranchal Jal Vidyut Nigam Limited***.

[F] SUBMISSIONS OF CENTRAL COMMISSION IN ADANI GROUP ON COMPOSITE SCHEME.

83. Gist of the submissions of Mr. Nikhil Nayyar, who appears for the Central Commission in Adani Group and CGPL Group, is as under:

(a) The Central Commission has correctly exercised its jurisdiction since all the elements of a "Composite

Scheme" under Section 79(1)(b) stood fulfilled when the dispute was brought before it. The terms "Composite Scheme", "enter into" or "otherwise have" have not been defined in the said Act. Therefore, as per the settled principles of interpretation of statutes, these terms need to be given the natural and practical meanings. ***Oxford Dictionary & Thesaurus (1st Indian Edition 2005)*** defines 'composite' as "*made up of various parts or elements*" and 'scheme' as "*systematic arrangement*" or "*plan of action or work*". Therefore, a Composite Scheme will mean a systematic arrangement made up of various parts or elements. The term "enter into" has been defined in ***Oxford Dictionary & Thesaurus (1st Indian Edition 2005)*** as "e*ngage in; bind oneself by; form part of; sympathise with*". The term "otherwise" means "*in different circumstances or in other respects or in a different way or as an alternative*". In the light of the dictionary meanings of the terms "Composite Scheme", "enter into" and "otherwise have" appearing in Section 79(1)(b) of the said Act, the tariff of a generating company

shall be regulated by the Central Commission if the following conditions are fulfilled: (a) The generating company has an arrangement to generate and sell electricity to more than one State; (b) The arrangement has emerged on account of entering into agreements or PPAs or MoUs with more than one State. The generating company may have the arrangement at the inception or at a subsequent stage by entering into PPAs or agreements or MoUs with more than one State; (c) Alternatively, the arrangement has emerged in a manner other than entering into agreement or PPA. This may include cases where on account of bifurcation of any State into two or more States by an Act of Parliament, the beneficiaries of the generating company are distributed among more than one State.

(b) Adani Power initially entered into PPAs dated 2/2/2007 and 6/2/2007 with GUVNL for supply of 2000 MW of power. Subsequently, Adani Power entered into PPA dated 7/8/2008 with Haryana Utilities for supply of 1424

MW of power. The supply of power to both the States is from the same generating station, though from different units developed at different timeframes keeping in view the requirement of the distribution companies from both States. Adani Power developed Units 1 to 9 of the Mundra Power Project and it entered into an arrangement to supply power to more than one State. This fact is also manifested from the express provisions of the PPAs with Gujarat and Haryana Utilities. The PPAs with GUVNL, which were prior in point of time, define "Appropriate Commission" as "Gujarat Electricity Regulatory Commission" exercising the functions to regulate the power purchase and procurement process of the procurer under the said Act". Later on, when it entered into a PPA with Haryana Utilities, in the PPA it defines Appropriate Commission as *"the Central Electricity Regulatory Commission or Haryana Electricity Regulatory Commission, or such other succeeding authority or Commission as may be notified by the Government of India or Government of Haryana from time*

to time, exercising the functions to regulate sale of electricity by a generating company and the power purchase and procurement process of the procurer under the said Act."

(c) From the definition of Appropriate Commission in case of Haryana PPA, it is abundantly clear that the parties to the PPA, namely Adani Power and Haryana Utilities were conscious of the fact that with the PPA being entered into, a Composite Scheme is emerging as a result of which the Central Commission would be called upon to exercise jurisdiction under Section 79(1)(b) of the said Act and regulate sale of electricity by the generating company.

(d) In terms of section 79(1)(b) of the said Act, the Central Commission can exercise jurisdiction to the extent of Composite Scheme for generation and sale of electricity in more than one State. Accordingly, to the extent the

parties seek to raise issues of composite nature affecting the generation and supply of power in more than one State, outside the PPAs, the Central Commission may entertain the said petition for resolving the issues raised therein. Such a proceeding before the Central Commission under Section 79(1)(f) in so far it does not affect the rights and obligations of the parties under the PPAs, can be considered as matters relating to Section 79(1)(b), namely, in regard to matters connected with the Composite Scheme for generation and sale of electricity in more than one State.

(e) The procurers and consumer organizations have canvassed a proposition that the meaning of 'Composite Scheme' is to have uniformity in the tariffs with respect to all PPAs of a generating station with Distribution Companies or State Utilities of more than one State. The said proposition is neither supported by statute nor is it even practically possible. It is settled law that Courts cannot supply the *casus omissus* and therefore if the

statute itself does not contain the word or words to the effect indicating uniformity of PPA's, the same cannot be supplied by a process of interpretation. The principle of *casus omissus* contemplates that a matter which should have been, but has not been provided for in a statute cannot be supplied by courts, as to do so will be legislation and not construction. In support of his submission, reliance is placed on the judgment of the Supreme Court in ***Sangeeta Singh v. Union of India***[30].

(f) Taking the dictionary meaning of "composite" to mean "made up of various parts or elements" into consideration and reading it along with the statutorily defined term 'generating company' it is apparent that the only construction that can be given to the Section, without doing violence to the scheme of the said Act is the one that has been applied by the Central Commission. The term "Composite Scheme" is used by the legislature to include in the ambit of jurisdiction of the Central

[30] (2005) 7 SCC 484

Commission only those private generating companies who own generating stations that generate and sell electricity to more than one State.

(g) The interpretation sought to be advanced by the procurers and consumer organizations is against all norms of statutory interpretation to substitute a defined term in an Act for another. To accept the said interpretation will be doing violence to the plain meaning of the said Act. The interpretation that has been adopted by the Central Commission is fully in consonance with the principles of statutory interpretation by giving 79(1)(b) of the said Act a construction, which makes the Statute effective and workable i.e. *ut res magis valeat quam pereat.*

(h) The argument that the words 'Composite Scheme' must have a meaning that is distinct from mere 'generation and sale', is itself contradictory to the plain words of the

statute and cannot be accepted. The plain meaning of the phrase "Composite Scheme" for generation and sale would clarify the legislative intent as it is abundantly clear that the legislature intended that the Central Commission should have jurisdiction when there existed a scheme of generation that spread across more than one State having two distinct elements i.e. 'generation and sale'.

(i) The term 'sale' makes it abundantly clear that only when electricity is generated from a generating station and thereafter sold, it would constitute a Composite Scheme for generation and sale. In contra-distinction, generation for captive consumption does not fall within the ambit of a 'Composite Scheme for generation and sale of electricity'.

(j) The plain language of the statue contemplates that Composite Scheme may be 'entered into' or manifest 'or

otherwise' at any time during the lifetime of a generating station. The submission that either a Composite Scheme must be in existence from inception or that during the 25-30 years of the lifecycle of a generating station, all tariffs entered into would be uniform, is not only commercially impractical but also legally impossible. Therefore the provision does not require that there must be a combined procurement process by all the inter-state purchasers. PPAs with different States can be executed at different points of time and subsequent PPAs may be entered into under different regulatory regimes and therefore their governing laws may be different, whether they be under Section 62 of the said Act or with different bidding parameters as specified under Section 63 of the said Act and therefore to apply this interpretation would reduce the section to an absurdity. It is a settled principle of statutory interpretation that interpretations leading to absurdity are required to be avoided.

(k) The term 'or otherwise' has been used by the legislature, fully knowing that circumstances may come into existence that would give rise to a Composite Scheme. The phrase 'or otherwise' are not words of limitation but rather expand the scope and applicability of the provision. Such a situation is created by bifurcation of the State of Andhra Pradesh.

(l) The division of regulatory control of a generating station owned by a generating company between two different State Commissions, is clearly impracticable and unsupported in law. If the PPAs of GUVNL and Haryana Utilities would be regulated by the Gujarat and Haryana State Commissions simultaneously, it would lead to anomalous and contradictory orders being passed which would not be implementable.

(m) The argument that there would not be any certainty or finality to the jurisdiction issue and there is a danger of

the jurisdiction changing hands whenever a PPA with one State is concluded or ended, have no merit since a change in jurisdictional facts will always lead to a change in the jurisdiction of the Central Commission. Even where a Composite Scheme exists from inception, there could be situations where the utilities or Discoms may for some reason decide to terminate a PPA. In such a circumstance, the Central Commission would cease to have jurisdiction over the generating station.

[G] SUBMISSIONS OF CENTRAL COMMISSION IN GMR GROUP ON COMPOSITE SCHEME:

84. Mr. Dhingra, learned counsel for the Central Commission has addressed us on Section 79(1)(b) of the said Act with particular reference to the term 'Composite Scheme'. He has taken us to the dictionary meaning of the words 'enter into', 'otherwise', 'composite' and 'scheme' and relevant judgments which throw light on these terms. Gist of his submission is as under:

(a) Components of Composite Scheme are (i) generation and (ii) sale of such electricity.

(b) Sale of electricity is not inherent in generation (example – captive power plant). Regulation of tariff in such cases does not arise.

(c) Sale of electricity in one State by a generating company is covered by Section 86(1)(a). Sale of electricity in more than one State comes within the meaning of Section 79(1)(b). It clothes the Central Commission with jurisdiction.

(d) On the principles of interpretation, reliance is placed on ***Pratap Singh***, ***Andhra Bank*** and ***Sangeeta Singh***.

(e) Composite Scheme may come into existence at any time, as no limitation of time is put by the statute.

(f) Section 79(1)(b) applies to all generating companies irrespective of whether sale is through MoU route or through the competitive bidding route.

(g) Once jurisdiction vests in Central Commission, it continues with the Central Commission and the question of floating jurisdiction does not arise.

(h) The argument that in order to constitute a Composite Scheme, the PPAs should be signed simultaneously with all States and there should be uniform tariff will frustrate Section 79(1)(b).

(i) A generating company may own more than one generating station at different points of time, in which case the question of simultaneously signing PPAs for all its generating stations cannot arise. Such generating companies cannot be outside the scope of clause (b) of sub-section (1) of section 79. Similarly, the sale of power from all the generating stations of a generating company at the uniform tariff also has to be ruled out as cost of

generation of each generating station would invariably vary depending upon various factors, such as technology used, location, time of establishment, etc.

(j) Judgments of this Tribunal in ***PTC India (I)*** and ***BSES Rajdhani*** are not attracted to this case because this Tribunal was not concerned in those cases with interpretation of Section 79(1)(b).

(k) Order dated 29/3/2006 in Petition No.103 of 2005 proceeds on the premise that the generating stations owned by the central generating companies are envisaged from the very beginning to have generation and sale of electricity in more than one State. The central generating companies have set up generating stations for supply of power only in one State. The Central Commission reviewed this order by its Order dated 16/1/2013 and observed that the very factual basis of the order dated 29/3/2006 is not beyond doubt.

[H] SUBMISSIONS OF ADANI POWER ON COMPOSITE SCHEME:

85. We have heard Mr. Amit Kapoor, learned counsel appearing for Adani Power. We have perused the written submissions filed by him. The gist of the written submissions is as under:

(a) Section 79(1)(b) of the said Act has to be interpreted in the context of the legislative intent and scheme of the law. The said Act envisages a federal regulatory structure wherein (i) the Central Commission must regulate inter-state and multi-state activities; and (ii) the State Commissions must regulate intra-state activities.

(b) The legislative intent is evident from Sections 2(25), 25, 30, 38, 39, 79 and 86 of the said Act. The said Act has continued the role of the Central Commission which was assigned to it by the Central Regulatory Commissions Act, 1998 to regulate the inter-state sale of power.

(c) In ***PTC India (II)***, the Delhi High Court has held that in case of inter-state supply, the Central Commission will have jurisdiction. In that behalf, Rule 8 of the Electricity Rules is also important.

(d) The intent of conferring jurisdiction on the Central Commission for supply of electricity to more than one State is to have commonality in approach in tariff related issues and to avoid conflicting orders being passed by different State Commissions on the same issue of a particular generating station.

(e) To attract Section 79(1)(b), the following conditions must be fulfilled:-

(a) The case must relate to a Generating Company - not owned or controlled by Central Government.

(b) Such Generating Company must:

(i) either "enter into" or "otherwise have";

(ii) "a Composite Scheme";

(iii) for generation and sale of electricity in more than one state.

(f) A generating company may have generating stations in two different States supplying power to their respective States. The said generating company will not qualify the condition of Composite Scheme. The qualification of Composite Scheme is fulfilled when a generating company sells power in two different states from one generating station.

(g) The Composite Scheme means more than one disparate elements put in systematic arrangement for attaining particular object. When a generating company sells electricity to more than one State through definitive PPA then it falls within the jurisdiction of the Central Commission.

(h) Assuming without conceding that "enters into" indicates formal documentary position at inception, the disjunctive category or "otherwise have" clearly contemplates a

timeline evolution in the project. The Statute itself conceives of a dynamic and not a static concept.

(i) The object of the said Act is to promote development of industry and investments.

(j) The submission of the procurers / consumer organizations that the Central Commission can have jurisdiction only where there is uniform tariff at which generating company supplies to two states is misconceived and extraneous to the express language of Section 79(1)(b). The statute does not restrict jurisdiction of Central Commission when supply by generating company is at uniform tariff. It is a settled position of law that judicial and quasi-judicial authorities should not supply words to statutes to fill in perceived vacuum. They must confine themselves to an interpretation of the explicit / unambiguous language of the statute. Courts must proceed on the assumption that the legislature did not make a mistake and that it did what it intended to do

and the Court could not add words to a statute or read words into it which are not there, especially when the literal reading produces an intelligible result. This position is supported by the Supreme Court in (a) ***Dadi Jagannadham v. Jammulu Ramulu & Ors.***[31], (b) ***A.R. Antulay v. Ramdas Sriniwas Nayak***[32] and (c) ***Cellular Operators Association of India & Ors. v. Union of India***[33].

(k) Without prejudice to above, "tariff" under the said Act relates to the complete terms and conditions at which the generating company supplies power including the rate. In this regard, following extract of the judgment of the Constitution Bench of the Supreme Court in ***PTC India Ltd. v. CERC***[34] [***PTC India (CB)***] is noteworthy:-

> "*7. The term "tariff" is not defined in the 2003 Act.* ***The term "tariff" includes within its ambit not only the fixation of rates but***

[31] (2001) 7 SCC 71 (para 13)
[32] (1984) 2 SCC 500 (paras 18 & 22)
[33] (2003) 3 SCC 186 (paras 29 & 37)
[34] (2010) 4 SCC 603

also the rules and regulations relating to it."

When a generating company enters into PPA with two different States for supply of electricity, from a particular generating station, on the basis of competitive bidding held under Section 63 of the said Act, there is substantial uniformity in tariff since the terms and conditions of tariff are same, i.e., clauses of said Guidelines and the standard form of PPA.

(l) The plea of the procurers / consumer organizations to limit the express language of Section 79(1)(b) and the said Guidelines to Clause 2.4 of the said Guidelines as determinative of Composite Scheme falls foul of doctrine of *ultra vires* as also basic rules of interpretation of statutes. Clause 2.4 is limited to a scenario where two states go for Combined Procurement. There is no co-relation between Combined Procurement and Composite Scheme. Every Combined Procurement will necessarily be

Composite Scheme but the converse shall not be a reality.

(m) The judgments of this Tribunal in ***PTC India (I)***, ***BSES Rajdhani*** and the judgment of the Central Commission in ***Uttaranchal Jal Vidyut Nigam Limited***, do not help the procurers / consumer organizations.

(n) Judgment of this Tribunal in ***PTC India (I)*** is not applicable to this case because the issue before this Tribunal in ***PTC India (I)*** was whether the Central Commission could have imposed the condition in paragraph 17 of the Central Commission's order upon a generating company obliging it to enter into the PPA with minimum off take of 85% capacity directly with Discoms and not a trader. Nowhere in the issues framed, submission made or in its decision/findings was there any discussion regarding the scope of Section 79(1)(b) or the existence or absence of a uniform price in a multi-state contract.

(o) ***BSES Rajdhani*** is also not applicable to the facts of this case because the issue before this Tribunal in ***BSES Rajdhani*** was related to a dispute between NTPC and Delhi DISCOMs regarding regulation of power supply by NTPC under CERC Regulations on non-payment of dues by the Delhi DISCOMs. The case did not consider or decide the question of applicability of Section 79(1)(b) of the Electricity Act or for that matter an interpretation of the term Composite Scheme in particular.

(p) The submission of learned counsel for the procurers / consumer organizations that the Central Commission's interpretation of Section 79(1)(b) will lead to floating jurisdiction is misconceived. The law as enacted requires the stipulated jurisdictional facts and tests to be fulfilled as per the facts of each case. The jurisdiction over a generating company has to be determined at the time of filing of the petition and not on some hypothetical basis. In this regard, judgment of the Supreme Court in

Mohannakumaran Nair v. Vijayakumaran Nair[35] is relevant.

(q) The Central Commission has rightly exercised its jurisdiction in the present case as Mundra Power Plant of the Adani Power supplies electricity to more than one State.

(r) Order dated 16/10/2012 and 16/1/2013 were not challenged and, hence, they attained finality and they cannot be challenged by Prayas.

[I] ANALYSIS AND CONCLUSION OF THIS TRIBUNAL ON COMPOSITE SCHEME:

86. In order to answer this issue, we will have to interpret Section 79(1)(b) of the said Act. All provisions of a statute have to be interpreted keeping the legislative intent in mind. To understand the legislative intent, we will have to peep into relevant legislative history.

[35] (2007) 14 SCC 426

87. The Electricity Regulatory Commission's Act, 1998 was enacted to address the problems created by the inability of the State Electricity Boards to take decisions on tariffs in a professional and independent manner. Therefore, the Electricity Regulatory Commission's Act, 1998 created the Central Electricity Commission. It had an enabling provision through which State Governments could create a State Electricity Regulatory Commission in their respective States. Paragraph 4 of the Statement of Reasons of the Electricity Regulatory Commission's Act, 1998 so far as it is relevant reads as under:

> *"4. ....*
>
> *(b) the main functions of the CERC are –*
>
> *(i) to regulate the tariff for generating companies owned or controlled by the Central Government.*
>
> *(ii) to regulate inter-state transmission including tariff of the transmission utilities.*
>
> *(iii) to regulate inter-state sale of power."*

88. Then came the said Act with the main intent of consolidating electricity laws for development of electricity industry. The Preamble to the said Act reads as under:

> *"An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto."*

89. To achieve this objective, various authorities are created. A closer scrutiny of the provisions of the said Act discloses the intention to continue with the role assigned to the Central Commission as a regulator of inter-State and multi-State activities. The State Commissions were designed to control intra-State activities.

90. A comparison between Section 79 of the said Act which delineates functions of the Central Commission and Section 86 of the said Act which delineates functions of the State Commissions shows that the Central Commission is concerned with inter-State transmission of electricity and State Commissions are concerned with intra-State transmission of electricity. Section 79(1)(a) of the said Act confers power on the Central Commission to regulate the tariff of generating companies owned or controlled by the Central Government. Section 79(1)(b) of the said Act confers power on the Central Commission to regulate tariff of generating companies other than those owned or controlled by the Central Government if such generating companies enter into or otherwise have a Composite Scheme for generation and sale of electricity in more than one State. Section 86(1)(b) of the said Act permits the State Commissions to regulate purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licencees or from other sources through agreement for purchase of power for distribution or

supply within the State. Rule 8 of the Electricity Rules, 2003, prevents any conflict between these two provisions qua the tariff of generating companies. Rule 8 says that the tariff determined by the Central Commission for generating companies under clause (a) or (b) of sub-section (1) of Section 79 of the said Act shall not be subject to redetermination by the State Commission in exercise of functions under clauses (a) or (b) of sub-section (1) of Section 86 of the said Act and subject to the above, the State Commission may determine whether a distribution licensee in the State should enter into PPA or procurement process with such generating companies based on the tariff determined by the Central Commission. Primacy of the Central Commission is, therefore, evident.

91. In this connection, it would be advantageous to read the following observations of the Delhi High Court in ***PTC India (II).***

> "*62. CERC has the power to regulate tariff of generating companies under Section 79(1)(b) of the EA. A generating company could sell in bulk to a consumer in one state, to a trading licencee in*

another and to one or more distribution licencees in other states. Sections 79(1)(a) and (b) enable the CERC to fix or approve the tariff for the sale of electricity by the generating company in any of the above situations by taking into account the capital expenditure incurred for setting up the generating plant and a fixed margin of profit. ….. Where it is an intra-State supply, the SERC would have the jurisdiction and where it is an inter-State supply, the CERC would have jurisdiction."

Thus, the Delhi High Court has clarified that where there is an inter-State supply, the Central Commission would have jurisdiction.

92. Since the entire controversy revolves around Section 79(1)(b) of the said Act, we shall turn to it. Parties have interpreted it differently. Before interpreting this provision, certain well settled principles of interpretation must be borne in mind. While interpreting a statute literal interpretation must be preferred to any other interpretation if the statute is clear and unambiguous. However, if there is any ambiguity, then the courts must place a purposive interpretation on the statute keeping in view the purport and object of the statute

with a view to achieving the same. Any interpretation which creates confusion and makes the statute unworkable or redundant must be avoided. It must be remembered that the legislature does not use words or phrases without purport. Therefore, the statute must be so construed as to give effect to every part of it by reading it as a whole. There is a long line of judgments of the Supreme Court stating and restating these principles. Suffice it to refer to only one of them. In ***Nathi Devi v. Radha Devi Gupta***[36], the Constitution Bench of the Supreme Court observed as under:

> *"The interpretative function of the court is to discover the true legislative intent. In interpreting a statute the court must, if the words are clear, plain, unambiguous and reasonably susceptible to only one meaning, give to the words that meaning, irrespective of the consequences. Those words must be expounded in their natural and ordinary sense. In such a case no question of construction of statute arises, for the Act speaks for itself. Literal interpretation should be given to a statute if the same does not lead to an absurdity. Even if there exists some ambiguity in the language or the same is capable of two interpretations, it is trite that the interpretation which serves the object and purport of the Act must be given effect to. In such a case the doctrine of purposive construction should be adopted. Courts are*

[36] (2005) 2 SCC 271

not concerned with the policy involved or that the results are injurious or otherwise, which may follow from giving effect to the language used. If the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In considering whether there is ambiguity, the court must look at the statute as a whole and consider the appropriateness of the meaning in a particular context avoiding absurdity and inconsistencies or unreasonableness, which may render the statute unconstitutional. Moreover, effort should be made to give effect to each and every word used by the legislature. The courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. A construction which attributes redundancy to the legislature will not be accepted, except for compelling reasons such as obvious drafting errors."

93. Keeping these principles in mind, we shall turn to Section 79(1)(b) of the said Act. We need to quote Section 79(1)(a) and (b) to understand the ambit of Section 79(1)(b). The said provision reads as under:

"79. Functions of Central Commission (1) The Central Commission shall discharge the following functions namely :

(a) to regulate the tariff of generating companies owned or controlled by the Central Government.

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a Composite Scheme for generation and sale of electricity in more than one State."

94. As already stated, while Section 79(1)(a) of the said Act refers to regulation of the tariff of generating companies owned or controlled by the Central Government, Section 79(1)(b) of the said Act refers to regulation of tariff of generating companies other than those owned or controlled by the Central Government. But not all such generating companies are covered by Section 79(1)(b). It covers generating companies other than those owned or controlled by the Central Government only <u>if such generating companies enter into or otherwise have a Composite Scheme for generation and sale of electricity in more than one State</u> (emphasis supplied). A careful reading of the underlined portion leads to the following three essential requirements –

(a) A generating company must 'enter into' or 'otherwise have' a Composite Scheme;

(b) The Composite Scheme must be for generation and sale of electricity

(c) sale of electricity must be in more than one State.

95. The words 'Composite Scheme' have not been defined in the said Act. It is also necessary to understand what is meant by the words "enter into" and "otherwise". In ***State of Orissa v. Titaghur Paper Mills Limited***[37], the Supreme Court has held that where the statute does not provide definition or interpretation of a word, the Court may take the aid of dictionaries to ascertain the meaning of the word in common parlance but in doing so, the court must bear in mind that the word is used in different senses according to its context and a dictionary gives all the meanings of a particular word. The court would, therefore, have to select the particular meaning which would be relevant to the context in which it has to interpret the word. We shall, therefore, go to the dictionary meaning of these words.

[37] AIR 1985 SC 1293

96. ***P. Ramanatha Aiyar's Advanced Law Lexicon*** explains the word "enter" as "to engage or bind itself by (an engagement, contract, treaty, etc.)". ***Concise Oxford Dictionary of Current English (Ninth Edition)*** defines the said word as "to bind oneself by (an agreement, etc.)". Therefore, the expression "enter into" in clause (b) of sub-Section (1) of Section 79 refers to execution or making of binding contracts by the generating companies for sale of electricity. Therefore, the first condition is that the generating company should execute binding contracts for sale of electricity.

97. We must now turn to the word "otherwise". ***Collins Cobuild English Dictionary*** explains the use of the word "otherwise". It says that you use "otherwise" to indicate that other ways of doing something are possible in addition to the way already mentioned. In ***S.R. Bommai v. Union of India***[38], the Supreme Court-considered the meaning of

[38] (1994) 3 SCC 1

"otherwise" as existing in Article 356(1) of the Constitution of India, which provides for exercise of emergency powers if the President of India is satisfied that a grave emergency exists threatening the security of India or any part thereof or the constitutional machinery has failed, but the power is to be exercised on receipt of a report from the Governor of the State concerned, or "otherwise". The Supreme Court observed that the expression "otherwise" literally means "in a different way" and is of a very wide import and cannot be restricted to material capable of being tested on principles relevant to admissibility of evidence in Court of Law and it would also be difficult to predicate as what should be the nature of such a material.

98. In ***Chander Prakash v. State of Rajasthan***[39], following ***S.R. Bommai***, the Rajasthan High Court has observed as under:

> *"10. The word "otherwise" is defined in Standard Dictionary to mean "in a different manner, in another*

[39] AIR 1999 Raj 349

way". In Webster's Dictionary, it is defined to mean' "in a different manner, in other respects."

99. Therefore, the expression "or otherwise have" conveys that the generating companies, in addition to, or without making or executing formal binding contracts can also have the Composite Scheme in any other manner. We are of the opinion that "any other manner" must also have binding nature.

100. We now go to the words "Composite Scheme". In order to understand this word, it is necessary to ascertain what is meant by the word "composite" and the word "scheme". ***Webster's Third New International Dictionary*** explains meaning of the word "composite" as "something that is made up of diverse elements". ***Concise Oxford Dictionary of Current English (Ninth Edition)*** explains the meaning of the said word as "*Made up of various parts, blended, a thing made up of several parts or elements*". ***Collins Cobuild English***

Dictionary defines it as "*an object or item made up of several things, parts or substances*".

101. The word "scheme" is defined in the ***Chambers Dictionary, Deluxe Edition*** as "a systematic plan of action for achieving an end". In ***State of West Bengal v. Swapan Kumar Guha***[40], the Supreme Court defined the term scheme as under:

> *"A scheme, according to the dictionary meaning of that word is a carefully arranged and systematic program of action", "a systematic plan for attaining some object", "a system of correlated things (see Webster's New Word Dictionary and Shorter Oxford English Dictionary, Vol.II)."*

102. Therefore, the term "Composite Scheme" as used in clause (b) of sub-section (1) of Section 79 means a systematic plan integrating two or more elements or parts or components.

103. Now the question is which are the diverse elements or parts which the word composite used in Section 79(1)(b) of the

[40] AIR 1982 SC 949

said Act denotes. These components obviously are (i) generation of electricity and (ii) sale of such electricity. A combination of generation and sale of electricity is a "Composite Scheme". Composite Scheme comes into existence when these two disparate elements are put in systematic arrangement of a binding nature for attaining the object of sale of electricity in more than one State. The submission that sale is inherent in generation of electricity and, therefore, these are not diverse elements of a Composite Scheme as required must be rejected. Generation of electricity by a generating company does not always result in sale. Captive generating plants are an example of this. Section 2(8) defines captive generating plants as power plants set up by any person to generate electricity primarily for his own use. Thus, captive generating plants generate electricity for self consumption. Sale of electricity, therefore, cannot be said to be inherent in generation.

104. Having discussed what is meant by the words "Composite Scheme", we must analyse the section further to see what

Section 79(1)(b) of the said Act expects the generating companies to do. Section 79(1)(b) of the said Act is attracted only if the generating companies enter into a Composite Scheme or otherwise have a Composite Scheme. As already noted by us the words "enter into" imply executing a contract or an agreement. Thus, the generating companies will have to enter into contracts or PPAs for sale of electricity in more than one State. Section 79(1)(b) also uses the words "otherwise have a Composite Scheme". The word "otherwise" as already discussed by us hereinabove means "in any other manner". Thus, the generating companies can instead of entering into PPA may have a Composite Scheme in any other binding manner. The generating company may enter into a Composite Scheme either at the initial stage of setting up a generating station or later on when it starts supplying power to more than one State. The legislature appears to have used the words "otherwise have a Composite Scheme" to keep some flexibility in the mode of achieving the object of generation and sale.

105. We appreciate the contention of Mr. Nayyar, who appears for the Central Commission that the term "or otherwise" expands the scope and applicability of the provision. A cogent example of this can be seen in the case of generating station belonging to GMR which was situated in erstwhile undivided State of Andhra Pradesh and had been supplying electricity throughout the State. As the State was bifurcated and the new State of Telengana was formed, the generating station of GMR was generating and supplying electricity in two States. Thus, by operation of law, a Composite Scheme for generation and sale of electricity in more than one State came into existence for the purposes of Section 79(1)(b) of the said Act.

106. A power plant initially might have one generating unit which might be supplying electricity to the home State but later on more generating units may be added to the said generating station. In that case, uniform tariff or uniform terms and conditions cannot always be ensured because capital cost of each generating unit of the generating station would differ. Similarly, same terms and conditions would also

not be always possible because different beneficiaries would have different terms and conditions. Mr. Ramachandran's submission that in case of Adani Power, PPAs dated 07/08/2008 with Haryana Utilities are with reference to Unit Nos.7, 8 and 9 of the Mundra power plant and PPAs dated 2/2/2007 and 6/2/2007 with GUVNL are with reference to Unit Nos.1 to 6 of the said project and, therefore, Adani Power's case does not satisfies the requirement of 'Composite Scheme' as per Section 79(1)(b) of the said Act is without any merit. In this connection, it must be noted that Section 79(1)(b) of the said Act does not talk about 'power generating units'. It talks about the 'generating company'. This submission is, therefore, rejected.

107. The Central Commission's jurisdiction under clause (b) of sub-section (1) of Section 79 of the said Act is attracted the moment the generating company executes PPAs to supply electricity to be generated by it to more than one State or it undertakes actual supply to more than one State under some other binding arrangement. The submission that the above

interpretation would lead to floating jurisdiction is misconceived. Once the jurisdiction vests in the Central Commission in the aforesaid manner, it generally continues with the Central Commission and the question of floating jurisdiction does not arise. The jurisdiction over a generating company is required to be considered at the time of filing of petition. It is the date of institution of proceedings which is material when jurisdictional condition precedents are evaluated. In this connection, reliance placed on the judgment of the Supreme Court judgment in ***Mohannakumaran Nair*** is apt. Following observations of the Supreme Court are material.

> *"11. Ordinarily, the rights and obligations of the parties are to be worked out with reference to the date of institution of the suit. (See* ***Jindal Vijayanagar Steel (JSW Steel Ltd.) v. Jindal Praxair Oxygen Co. Ltd. (2006) 11 SCC 521.****) Determination in regard to maintainability of the suit, it is trite, must be made with reference to the date of the institution of the suit. If a cause of action arises at a later date, a fresh suit may lie but that would not mean that the suit which was not maintainable on the date of its institution, unless an exceptional case*

is made out therefor can be held to have been validly instituted. Discretion, as is well known, cannot be exercised, arbitrarily or capriciously. It must be exercised in accordance with law. When there exists a statute, the question of exercise of jurisdiction which would be contrary to the provisions of the statute would not arise."

108. Needless to say that in a given case, there can always be change in jurisdiction from one Forum to another due to change in factual position. Even where a Composite Scheme exists from inception, there could be a situation where the utilities or Discoms may for some reasons decides to terminate a PPA. In such a situation, the Central Commission would cease to have jurisdiction over the generating company.

109. It must also be stated here that the Composite Scheme may come into existence at any time, whether in the beginning or at a later stage as Section 79(1)(b) of the said Act does not put any limitation of time. No such limitation can therefore be imposed by this Tribunal.

110. It is urged by the procurers that the Central Commission can regulate the tariff of generating companies under Section 79(1)(b) of the said Act only if there is uniformity of tariff and if there are common terms and conditions of generation and sale of electricity in more than one State beneficiaries. In this connection, reliance is placed on the judgments of this Tribunal in ***PTC India (I)*** and ***BSES Rajdhani***. We shall, therefore, first advert to ***PTC India (I).***

111. In ***PTC India (I)***, this Tribunal disposed of two appeals by a common order. The two appeals challenged the same order passed by the Central Commission. The issue involved in those appeals being the same, it is not necessary to separately refer to the facts of both the appeals. The Appellants therein – PTC India Limited was licensed by the Central Commission under Section 14(1) of the said Act to undertake trading in electricity as a electricity trader throughout India. The Appellants therein – Madhya Pradesh Power Trading Corporation Limited also claimed that it was entitled to trade in electricity by virtue of Section 14 read with Section 13 of the

said Act being an undertaking of Government of Madhya Pradesh. Respondent No.2 therein – Essar Power is a public limited company, which was executing the Combined Cycle Gas Based Thermal Power Plant at Hazira in the State of Gujarat. The Appellants – PTC India and Essar Power entered into MoU whereby Essar Power recorded its willingness to sell the entire power to PTC India for a full term of power purchase for 25 years. PTC India also recorded its willingness to buy its entire generation at levelized tariff for a term of 25 years. PTC India approached various State utilities offering to sell power on the commissioning of Essar Power's power project. Essar Power filed a petition before the Central Commission under Section 79(1)(b) of the said Act read with Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2004 seeking "in principle acceptance of the project, capital cost and financing plan" of its power project. During the relevant period, the Central Commission amended its regulations and examined Essar Power's application in the light of Regulation 17. In the application, Essar Power had specifically stated that power from its project will be sold to

PTC India through a PPA, who in turn may enter into contract for sale of power with various distribution utilities or consumers. It was the case of Essar Power that the term 'licensee' appearing in Regulation 17 also includes a trading licensee. The Central Commission accorded in principle approval subject to the condition that Essar Power shall file before the Central Commission PPA for off-take of at least 85% of the capacity with more than one State and PPA shall be entered directly by Essar Power with the distribution companies and not through the traders. The said condition was challenged in the appeals. The main issue involved in the appeals was whether the Central Commission could have imposed a condition compelling an IPP to enter into PPA directly with distribution utilities and not sell power to a licensed trader. This Tribunal came to a conclusion that Regulation 17 does not contemplate or confer power on the Central Commission to issue any direction that PPAs shall be entered into directly by Essar Power with distribution companies and not through the traders. This Tribunal held that the Central Commission had no jurisdiction or authority

to impose such a condition as it runs counter to statutory provisions of the said Act; legislative policy reflected in the object of the said Act. The jurisdiction which this Tribunal made reference to was not jurisdiction to regulate tariff of generating companies owned or controlled by the Central Government or of generating companies other than those owned or controlled by the Central Government. The Central Commission was considering jurisdiction of the Central Commission to impose condition that PPAs shall be entered directly by Essar Power with the distribution companies and not through the traders. While dealing with the abovementioned conditions imposed by the Central Commission and while holding that the Central Commission had no power to impose such condition, this Tribunal referred to Section 79(1)(b) and observed that the legislature has enabled the Central Commission by this provision to regulate tariff of such generating companies who sell power in more than one State with the utility or Discoms at uniform purchase price. This Tribunal further observed that the sales by a generating company take place at the bus bar of the

generating company and in some cases place of sale depends upon the terms of the contract entered into between the generator and the Discoms or traders. The procurers/consumer organizations contend that these observations make it clear that sale at the uniform price is the requirement of a Composite Scheme that is a Composite Scheme would be in place only if these requirements are fulfilled. We are unable to agree with these submissions. We are of the opinion that firstly, this Tribunal was not dealing with the issue as to what is a "Composite Scheme". The Appellant therein had not maintained letter of credit and that had given rise to a dispute. The case was therefore covered by Section 79(1)(a) and (f) of the said Act. Secondly, the observations of this Tribunal on which reliance is placed were not its final opinion on Section 79(1)(b) or on the meaning to be attached to the words "Composite Scheme". In fact, this Tribunal has concluded the discussion by observing that "there is time enough to examine the same as and when a contingency arises". This makes it clear that this Tribunal has not finally decided the issue as to what is "Composite Scheme"

as suggested by the procurers/consumer organizations. This is more so because, this Tribunal was not considering this issue at all.

112. We shall now refer to ***BSES Rajdhani***. In ***BSES Rajdhani***, the Appellants therein entered into separate PPAs with the NTPC, for taking supply of power from its various generating stations agreeing specifically to various terms including Letter of Credit and its enforceability, if the payment was not made within 30 days by the Appellants therein. The Appellants therein did not maintain the requisite Letter of Credit in terms of the PPA. There was non-compliance regarding payment to NTPC. NTPC issued notices to the Appellants therein. The Appellants therein filed petition in the Delhi Commission seeking injunction against NTPC restraining them from regulating supply. The Delhi Commission took suo motu notice of the letters sent by the Appellants therein complaining about NTPC's action. NTPC appeared before the Delhi Commission raising objection over the maintainability of the petition contending that Delhi

Commission has no jurisdiction in the matter. Delhi Commission by its Order dated 27/12/2011 held that it had no jurisdiction to adjudicate the dispute and the parties will have to go to the Central Commission. The Appellants therein being aggrieved by the said order filed the appeals before this Tribunal. It must be kept in mind that in that case, the Appellants therein did not maintain the requisite Letter of Credit in terms of the PPA and the Appellants therein failed to comply with the conditions regarding payment. Apart from Section 79(1)(a), this Tribunal also referred to Section 178 of the said Act under which regulations are made for terms and conditions of supply and for regulation of power supply. These regulations provide for regulation of power supply and its procedure in case of non-payment of money or non-establishment of Letter of Credit in favour of generating companies. This Tribunal while dismissing the appeal, held that the Delhi Commission's order that it had no jurisdiction and that the dispute between the Appellants therein and the NTPC has to be dealt with by the Central Commission is perfectly legal. This Tribunal in the facts of this case held that

in terms of Section 79(1)(a) of the said Act and Tariff Regulations, 2009 and the Regulation of Power Supply Regulations, 2010, NTPC is regulated and supervised by the Central Commission with regard to tariff, its terms and conditions including the regulations of power supply in case of default on the part of the beneficiaries and the Central Commission has got the powers to specify the terms and conditions of tariff. The State Commission cannot have any powers to nullify the impact of such regulations. While dealing with this question in paragraph 42, this Tribunal observed that the said Act carves out the regulatory control over the Central Sector Generating Companies like NTPC and the generating companies having composite arrangements of generation and sale of electricity in two or more States. This Tribunal further observed that by virtue of those powers, the Central Commission will have to ensure (a) uniformity in the tariff amongst more than one State beneficiary and (b) common terms and conditions of supply of electricity to more than one State beneficiary as well as supply from the Central

Sector Generating Companies. Again in paragraph 57, this Tribunal observed as under:

> *"57. There is a purpose in the way the provisions of Electricity Act, 2003 vests the jurisdiction in the Central Commission and in the State Commission. As mentioned above, the Act, 2003 carves out the regulatory control over the NTPC and other Central Sector Generating Companies for uniformity in the tariff among more than one State beneficiary and common terms and conditions of supply of electricity to more than one State beneficiary as well as the supply from the Central Sector Generating Companies. The Central Sector Generating Companies have an All India presence with each of the Generating Station supplying electricity to a number of States. Therefore, these utilities which are subjected to special treatment, are brought under the jurisdiction of the Central Commission."*

113. We are of the considered opinion that in ***BSES Rajdhani***, the issue before this Tribunal related to a dispute between NTPC and Delhi DISCOMs regarding regulation of power supply by NTPC under CERC Regulations on non-payment of dues by the Delhi DISCOMs. This Tribunal was not called upon to decide the question of applicability of Section 79(1)(b) of the said Act or interpret the term Composite Scheme in

particular. Hence, the observations on which reliance is placed by the procurers cannot be termed as the law declared by this Tribunal on interpretation of Section 79(1)(b). In any case, we are unable to concur with the said observations. We are in respectful disagreement with the said view for the reasons which we shall now state.

114. The plain language of Section 79(1)(b) persuades us not to accept the submission of the procurers based on ***PTC India (I)*** and ***BSES Rajdhani*** that Section 79(1)(b) is attracted only when there is uniformity of tariff and common terms and conditions of generation and sale. Section 79(1)(b) of the said Act enables the Central Commission to regulate tariff of generating companies other than those owned or controlled by the Central Government, if such generating companies enter into or otherwise have a Composite Scheme for generation and sale of electricity in more than one State. This provision does not even remotedly refer to uniform tariff or uniform terms and conditions of supply of electricity. It is, therefore, not possible to incorporate any words in this Section. The courts cannot

add any words to a statute. That would amount to usurping the function of the legislature. A court must read the section as it is and cannot rewrite it. In ***Dadi Jagannadham***, the Supreme Court explained the principles in the following manner:

> *"13. We have considered the submissions made by the parties. The settled principles of interpretation are that the court must proceed on the assumption that the legislature did not make a mistake and that it did what it intended to do. The court must, as far as possible, adopt a construction which will carry out the obvious intention of the legislature. Undoubtedly if there is a defect or an omission in the words used by the legislature, the court would not go to its aid to correct or make up the deficiency. The court could not add words to a statute or read words into it which are not there, especially when the literal reading produces an intelligible result. The court cannot aid the legislature's defective phrasing of an Act, or add and mend, and, by construction, make up deficiencies which are there."*

115. In view of the above, it is not possible for us to read 'common tariff' and 'common terms and conditions' in Section 79(1)(b) of the said Act.

116. Apart from this, we are of the considered opinion that it is not feasible or possible to have common tariff and common terms and conditions in all situations. In our opinion, where tariff is fixed under Section 62 of the said Act, uniform tariff and uniform terms and conditions may not be always a reality when there is sale of electricity in more than one State. When tariff is determined under Section 62 of the said Act, the components which are taken into consideration are Capital Cost of the Project, Operation and Maintenance Expenses, Return on Equity, Interest on Loan Capital, Depreciation, Interest on Working Capital, Non-Tariff Income, etc. Each State Commission makes its own regulations under Section 181 of the said Act. The regulations of all States may not be the same. Therefore, if a generating station of a generating company supplies power to more than one State, the tariff may not be always the same. A generating company may initially have one generating unit which might be supplying power to the home State but later on more generating units may be added to the said generating station. In that case, uniform tariff or uniform terms and conditions cannot be ensured

because Capital Cost of each generating unit of the generating station may differ. Uniform tariff and uniform terms and conditions will not always be possible even when tariff is discovered through competitive bidding under Section 63 of the said Act. As rightly stated by the Central Commission, where tariff has been discovered through competitive bidding process initiated by two or more States independently of each other and at different times, the possibility of sale at uniform rates cannot be a reality. Such possibility is extremely remote. We concur with this view. Tariff discovered through a competitive bidding process under Section 63 depends upon many factors including bidding strategy, the market scenario, risk perception, etc. Each tariff bid will have one tariff and as per the bids the tariff will vary according to the bidding parameters. Uniform tariff is perhaps possible in case of tariff determination by the State Commission under Section 62 provided the entire quantum of power is supplied to the same State at the same time under the same PPA but not in all cases where the tariff is discovered under Section 63 of the said Act. A generating company may participate in the bidding

at different times in different States. In such cases, the tariff and terms and conditions in the PPAs will not always be the same. Even the said Guidelines issued by the Central Government under Section 63 of the said Act are also amended from time to time and, therefore, the guiding principles will also change when the generating company participates in the bids at different times. When the electricity is sold through power exchanges or directly to the consumer through open access for short term, medium term and long term, the tariff will always vary. Clause 2.4 of the said Guidelines does not help the procurers. It relates to a scenario where two or more States go for combined procurement. There is no co-relation between combined procurement and Composite Scheme.

117. In the circumstances, we are of the view that ***PTC India (I)*** and ***BSES Rajdhani*** do not lay down the correct law so far as they hold that "uniform tariff amongst more than one State beneficiary" and "common terms and conditions" for supply of electricity in more than one State are the requisites of the

Composite Scheme as envisaged under Section 79(1)(b) of the said Act. This view of ours is also supported by the written submissions filed by Mr. Ramachandran, learned counsel appearing for Prayas. In his written submissions, Mr. Ramachandran has stated that in order to satisfy the ingredients of a Composite Scheme, there has to be substantial commonality which is essentially in the form of an uniform tariff, terms and conditions at least for injection of power at the bus bar of the station. There may, however, be some variation on account of additional charges considering the peculiar circumstances of each case for a State, which may not be there for other States. Thus, even the procurers have accepted that common tariff and common terms and conditions cannot be a reality in all cases.

[J] ANSWER TO ISSUE NO.3 OF THE AGREED ISSUES.

118. In view of the above discussion, we hold that the supply of power to more than one State from the same generating station of a generating company, *ipso facto*, qualifies as 'Composite Scheme' to attract the jurisdiction of the Central

Commission under Section 79 of the said Act. **Accordingly, Issue No.3 is answered in the affirmative**.

XIV. AGREED ISSUE SUBMITTED BY PARTIES ON COMPOSITE SCHEME UNDER SECTION 79(1)(b) TO ATTRACT THE JURISDICTION OF THE CENTRAL COMMISSION IN THE CASE OF ADANI POWER AND GMR.

119. We shall now turn to Issue No.4, which reads thus:

> "4. Whether in the facts and circumstances of each of the cases of –
>
> (a) Adani Power's generation and sale of electricity to Gujarat and Haryana under PPAs dated 2/2/2007 and 7/8/2008 and
>
> (b) GMR Kamalamga's generation and sale of electricity to Odisha, Bihar and Haryana under PPAs dated 28/9/2006, 9/11/2011 and 31/10/2007 (with back-to-back PSAs between PTC and Haryana dated 7/8/2008)

there exists a Composite Scheme for generation and sale of electricity within the scope of Section 79(1)(b) of the said Act, for the Central Commission to exercise jurisdiction?"

[A] ANSWER TO ISSUE NO.4 OF THE AGREED ISSUES.

120. We have already answered Issue No.3 in the affirmative and held that supply of power to more than one State from the same generating station of a generating company *ipso facto*, qualifies as a 'Composite Scheme' to attract the jurisdiction of the Central Commission under Section 79 of the said Act. It is an admitted position that both GMR Energy and Adani Power are selling electricity in more than one State from their respective generating stations. Hence, we hold that so far as Adani Power and GMR Energy are concerned, there exists a 'Composite Scheme' for generation and sale of electricity in more than one State by a generating station of a generating company within the meaning of Section 79(1)(b) of the said Act for the Central Commission to exercise jurisdiction. **Issue No.4 is accordingly answered in the affirmative**.

PART – IV

REGULATORY POWER & GRANT OF COMPENSATORY TARIFF.

XV. AGREED ISSUES SUBMITTED BY PARTIES ON REGULATORY POWER AND GRANT OF COMPENSATORY TARIFF.

121. We shall now turn to the most hotly contested issues relating to regulatory power to grant compensatory tariff. The said issues read as under:

> *"5. Whether the Central Commission, de-hors the provisions of the PPAs, has the regulatory powers to vary or modify the tariff or otherwise grant compensatory tariff to the generating companies in the case of a tariff determined under a tariff based competitive bid process as per Section 63 of the said Act?*
>
> *6. Whether the Appropriate Commission, independent of Force Majeure and Change in Law provisions of PPAs, has the power to vary or modify the tariff or otherwise grant compensatory tariff to the generating companies in pursuance of the powers under Sections 61, 63 and 79 of the said Act and/or Clause 4.7 and 5.17 of the Guidelines issued by the Central Government and/or Article 17.3 of the PPA and/or under the adjudicatory powers as per Section 79(1)(f) of the said Act?*

7. *Whether, in the facts and circumstances of the case, the Central Commission having held that Force Majeure and Change in Law provisions of the PPAs have no application, is right in granting compensatory tariff under any other powers?*

8. *Whether in the facts and circumstances of the case, the Central Commission is right in construing the order dated 2/4/2013 in case of Adani Power and order dated 15/4/2013 in the case of CGPL as a decision of the Commission to grant compensatory tariff not being limited to a conciliatory process to explore an amicable agreed solution which would exhaust if no consensus emerges?*

9. *Whether, in the facts and circumstances of the case, the Central Commission is right in giving effect to the payment of compensatory tariff retrospectively from the respective Scheduled COD of the generating units instead of considering the same prospectively from the order dated 21/2/2014?*

[A] Summary of Central Commission's view on Regulatory Power and grant of compensatory tariff:

122. Before we deal with these issues, we must state the view taken by the Central Commission on these issues. After holding that Adani Power and CGPL have not made out a case

of Force Majeure and Change in Law, the Central Commission has held that on account of escalation of coal prices subsequent to the Indonesian Regulation, Adani Power and CGPL have suffered losses. It is held that there is a perceptible difference between the prices which were prevalent in the Indonesian market prior to the promulgation of Indonesian Regulation and those prevalent subsequent to the promulgation of Indonesian Regulation and, since, Adani Power and CGPL are importing coal from Indonesia, the rise in coal prices has had an adverse impact on their projects. The Central Commission has in the circumstances held that Adani Power and CGPL deserve to be compensated to make their project commercially viable so as to operate and supply power to distribution licensees. The Central Commission has held that under Section 79(1)(b), it has been vested with the functions to regulate the tariff of the generating companies having a Composite Scheme of generation and sale of electricity in more than one State. In exercise of its power under Section 79(1)(b), the Central Commission has granted compensatory tariff to Adani Power and CGPL. The Central

Commission has observed that the twin objectives of consumers' interest and recovery of costs of services provided are complementary and as Apex Regulatory Body, it has the additional responsibility of meeting the objectives of law. In short, the Central Commission has invoked Section 79(1)(b) of the said Act.

[B] Submissions of Prayas on Regulatory Power and grant of compensatory tariff:

123. We shall now turn to the submissions of learned counsel. We have heard Mr. Ramachandran, learned counsel appearing for Prayas and perused the written submissions tendered by him. The gist of the submissions is as under:

(a) The said Act provides for two alternate modes of determination of tariff. Sections 61 and 62 of the said Act provide for tariff regulations and determination of tariff for generation, transmission, wheeling and retail sale of electricity by the Appropriate Commission. Section 63 of the said Act provides for determination of tariff through the transparent process of bidding in accordance

with the said Guidelines issued by the Central Government. The scheme of the said Act, the said Guidelines issued by the Central Government under Section 63 of the said Act and the Policies notified by the Central Government under Section 3 of the said Act is to treat the competitive procurement of power from the generating company as a separate course to be controlled by the Central Government and not subject to the tariff determination or re-determination by the Appropriate Commission. The bidding process under Section 63 of the said Act stands completed with the execution of the respective PPAs and adoption of tariff. The quoted tariff does not involve any specific component for various tariff elements such as Interest on Loan, Return on Equity, Depreciation, O & M Expenses, Station Heat Rate, Auxiliary Consumption, GCV, Working Capital, Taxes etc. The decision as to what value is to be attached to each tariff component was internal to the bidder and what is sacrosanct is the quoted tariff. With the conclusion of the above process, binding and concluded PPAs having

come into force nothing further is required to be done in regard to the determination or redetermination of tariff except to implement the PPAs on their terms.

(b) The said Act as well as regulations provided by the Central Commission under Section 178 of the said Act and also the rules notified by the Central Government under Section 176 of the said Act do not envisage exercise of the regulatory powers to vary, modify or amend the tariff determined under Section 63 of the said Act. Section 63 of the said Act has been incorporated with a *non-obstante* clause. Section 63 uses the expression `notwithstanding anything contained in Section 62'. This would also mean `notwithstanding sub-Section (4) of Section 62 providing for variation of tariff. These provisions also cannot be resorted to for any redetermination or amendment to the tariff adopted under Section 63 of the said Act. The whole of the provisions of Section 62 providing for determination of

tariff by the Appropriate Commission have been expressly excluded.

(c) Section 64 will also not have application to the tariff determined under Section 63 as Section 64 sets out the procedure only in respect of Section 62 determination. Section 64(6) is also confined to tariff determination under Section 62 and cannot extend to tariff under Section 63.

(d) Section 61 is a provision enabling regulations to be framed specifying the terms and conditions for the determination of tariff (Section 61 read with Section 2(62)). It is not a provision like Sections 62, 63, 64 dealing with the determination of the tariff by the Appropriate Commission. Section 61 is not relevant for the tariff determined under Section 63 for obvious reasons.

(e) Under Section 63 of the said Act, it is the Central Government which can issue guidelines. It is, therefore, not possible for the Central Commission to determine by regulation the terms and conditions for competitive bidding process to be followed under Section 63 of the said Act. Section 63 does not refer to Section 61 and Section 61 has been made subject to other provisions of the said Act which include Section 63.

(f) Section 79(1) of the said Act cannot be interpreted as an independent stand-alone provision giving plenary powers to the Central Commission to regulate the tariff and other aspects independent of what has been stated in the other provisions of the said Act. It is not open to the Central Commission to regulate tariff under Section 79(1)(b) and to give compensatory tariff to the generator without considering the scope, implication etc. of Part VII, particularly, the scheme, objective, purpose and implication of Section 63 of the said Act and the said Guidelines. The quoted tariff stands adopted in terms of

Section 63. In this connection, reliance is placed on the judgments of this Tribunal in ***Essar Power Limited v. Uttar Pradesh Electricity Regulatory Commission***[41], ***Gajendra Haldia v Central Electricity Regulatory Commission***[42] *and* ***India Bulls CSEB Bhaiyathan Power Limited v Chhattisgarh State Electricity Regulatory Commission and Others***[43].

(g) Sections 62 and 64 read with Section 79(1)(a) and (b) or 86(1)(a) and (b) of the said Act and regulations notified so far by the Central Commission constitute one scheme of things. These provisions apply where the tariff is determined on the basis of capital cost with the approval of each element of tariff by the Appropriate Commission (Cost plus Determination). In this, the Appropriate Commission applies prudent check for the capital cost and for each tariff element. The nature of such determination is provided in Section 62 and the process of determination is provided in Section 64 of the said Act.

[41] 2012 ELR (APTEL) 182
[42] 2008 ELR (APTEL) 203
[43] Order dated 18/2/2013 in Appeal No.64 of 2013

Section 61 provides for the Appropriate Commission to frame regulations for such determination of tariff under Section 62. Section 61 providing for the regulations to be framed is, therefore, in the context of Sections 62 and 64.

(h) The regulatory powers cannot be exercised as residual or general powers to bail out generators, when the specific legal provisions and scheme of the said Act is contrary particularly with regard to competitive bid process. In this regard, the reliance placed by the generators on the decision of this Tribunal in ***Gujarat Urja Vikas Nigam Limited v. Green Infra & Ors.***[44] is misplaced. In that case, this Tribunal had traced the powers to Section 62(4) and 64(6) of the said Act. As mentioned above, Sections 62 and 64 of the said Act have no application to the tariff determined under Section 63 of the said Act.

(i) Section 63 of the said Act provides for a totally independent scheme of things for tariff determination;

[44] Judgment dated 28/9/2015 in Appeal No.198 of 2014

namely tariff discovery through competitive bidding process. Section 63 does not envisage the Appropriate Commission to frame any regulations for the method and manner of determination of tariff by a competitive bidding process. The tariff based competitive bidding process is to be as per the said Guidelines to be issued by the Central Government and not by any regulation of the Appropriate Commission.

(j) The said Guidelines provide for objectives for Section 63. The Central Government while notifying the said Guidelines for Section 63 may adopt such of the principles as are contained in Section 61 of the said Act.

(k) In the tariff determination process under Section 63 of the said Act, the bidders are required to make appropriate decision on each of the cost elements including fuel cost and subjectively decide on the tariff to be quoted. Such determined tariff cannot be re-opened except as provided in the PPA, namely, by reason of Force

Majeure or Change in Law. There is no other avenue to open the tariff quoted / bid under Section 63.

(l) The Central Commission cannot re-open the tariff determined by a competitive bidding process for a long term PPA under Section 79(1)(b) as it would tantamount to converting a tariff based competitive bidding under Section 63 to a determination of tariff under Section 62. This would be contrary to the entire scheme of the competitive bidding process mentioned above.

(m) The tariff based competitive bid process held in the present case has been for long term procurement of power namely for 25 years. In addition to the selected bidder, there were other bidders who had given their bids. If compensatory tariff is to be given to the generating company selected, the same would affect the sanctity of the competitive bid process.

(n) Clause 4.7 of the said Guidelines deals with change in law. Clause 5.17 of the said Guidelines deals with arbitration.

(o) By its very scheme, the said Guidelines provide for the bidding process to lead to the execution of the PPA and adoption of the tariff by the Appropriate Commission based on the certification by the Evaluation Committee.

(p) Clauses 4.16, 5.4 (ii) and 5.6 (ii) and (v) of the said Guidelines provide for the Model PPA to be made available to the bidder at the RfQ/RfP stage as a part of the bidding documents. Clauses 6.1, 6.3 and 6.4 of the said Guidelines deal with the execution of the PPA.

(q) In terms of Article 18.4.1 and Article 18.4.2 of the PPA, the PPA is a controlling document setting out the rights and obligations of the respective parties for the generation and sale of electricity.

(r) The said Guidelines issued by the Central Government do not provide independent standalone and additional

stipulations in Clause 4.7 or 5.17 in regard to the 'Change in Law' or 'Arbitration'.

(s) The provisions of Clause 4.7 of the said Guidelines dealing with 'Change in Law' stand incorporated in Article 13 of the PPAs. Clause 5.17 of the said Guidelines dealing with Arbitration stands incorporated in Article 17.3 of the PPAs.

(t) It would be an absurdity on the part of the Respondents to contend that the 'Change in Law' provision contained in Clause 4.7 of the said Guidelines provides for an independent right and it is open to the Respondent to claim the implication of Change in Law under Clause 4.7 differently and in a wider manner as compared to Article 13 of the PPA. Similarly, Clause 5.17 cannot be construed to provide a separately enforceable dispute resolution (arbitration) provision de-hors Article 17.3 of the PPA. There is no rationale or purpose for the said Guidelines to provide any such standalone clauses independent of the PPA when the Model PPA with Articles

13 and 17.3 are to be given to the bidders, both at the RfQ and the RfP stage as per the said Guidelines.

(u) The correct way of construing the said Guidelines, particularly Clauses 4.7 and 5.17, is that the said Guidelines indicate what is to be considered as 'Change in Law' and the scope of Change in Law and Arbitration i.e. the detailed clauses as incorporated in Articles 13 and 17.3 of the PPAs.

(v) The said Guidelines do not provide for exercise of general regulatory powers to override the PPA terms or otherwise grant compensatory tariff. Accordingly, the Central Government has not delegated or otherwise prescribed any power in the Appropriate Commission to grant compensatory tariff in exercise of its powers under Section 79(1)(k) of the said Act. In any event, there can be no such delegation without a substantive provision allowing the Commission to grant Compensatory Tariff in matters of tariff determined under Section 63.

[C] Presentation on Key issues by Ms. Chitnis, representative of Prayas.

124. Ms. Chitnis, representative of Prayas made a presentation on Key issues and lacunae in the impugned orders. She submitted that the report of the Committee ought not to have been accepted because there is no consensus amongst the members. In fact, there was no mandate to come back with the consensus.

[D] Submissions of Energy Watchdog on Regulatory Power and grant of compensatory tariff.

125. We have also heard Mr. Prashant Bhushan, learned counsel appearing for Energy Watchdog. He adopted the arguments of Mr. Ramachandran. He has tendered written submissions. The gist of the submissions is as under:

(a) The generators are trying to convert determination of tariff through competitive bidding process under Section 63 of the said Act into determination of cost plus tariff under Section 62 of the said Act, which must not be allowed.

(b) Counsel submitted that the bid submitted by the generators must factor in fuel costs. Pertinently, in this case, the generators have quoted fuel costs as non-escalable. By quoting the non-escalable costs, they became the lowest bidders ousting the other bidders. In this connection, he relied on the judgment of the Supreme Court in ***Natural Resources Allocation In Re, Special Reference No.1 of 2012***[45] and submitted that this has resulted in violation of Article 14 of the Constitution of India.

(c) Counsel further submitted that the Central Commission could not have granted compensatory tariff to generators. Such a procedure is unknown to law.

(d) The Central Commission has by this way granted largesse to the generators.

(e) Counsel further submitted that the Central Commission ought not to have accepted the report of the Committee

[45] (2012) 10 SCC 1

appointed by it. The said report is signed by only two persons. There is also a conflict of interest.

(f) The Central Commission should not have therefore permitted Mr. Deepak Parekh, Chairman of HDFC and Ms. Arundhati Bhattacharya, MD & CEO of SBI Capital Markets Ltd. to be members of the Committee because they are the lenders of the generators. It is the case of Adani Power and CGPL that they would be wound up if they are not able to pay their bankers. So bankers have interest in these proceedings.

(g) Counsel submitted that the Central Commission has failed to follow the relevant regulations. There was no public participation in the proceedings. Prayas a non-Governmental Organization was not before the Committee. General public ought to have been given an opportunity to participate in the proceedings.

(h) Pointing out extracts from KPMG Report, counsel submitted that KPMG Report had made it clear that

certain invoices were not placed before it by the generators. Thus, KPMG Report cannot be accepted as it is based on insufficient data.

(i) Counsel also submitted that forged and fabricated agreements were placed before the Committee by the generators. In the circumstances, according to learned counsel, the impugned order needs to be set aside.

126. We may mention here that this submission is strenuously denied and opposed by counsel for Adani Power. The view that we propose to take does not require us to go into this aspect as will be soon apparent.

[E] <u>Submissions of Rajasthan Utilities on Regulatory Power and grant of compensatory tariff</u>:

127. We have heard Mr. Nitish Gupta, learned counsel appearing for Rajasthan Utilities. We have also perused the written submissions tendered by him. The gist of the submissions is as under:

(a) The tariff discovered pursuant to a competitive bidding under Section 63 of the said Act cannot be reopened/revised. Otherwise, sanctity of the competitive bidding process will be destroyed. Sections 62 and 63 are mutually exclusive.

(b) Jurisdiction cannot be conferred on Courts by concession. Hence, in principle consent of the Rajasthan Utilities to the Report of the Committee appointed by the Central Commission and Rajasthan Utilities' concession that Rajasthan State Electricity Regulatory Commission (**"Rajasthan Commission"**) can grant compensatory tariff to Adani Power (Rajasthan) Limited do not prevent them from challenging the orders impugned in these appeals.

(c) Assuming without admitting that the Central Commission had jurisdiction to grant compensatory tariff, Order dated 15/4/2013 impugned in Appeal No.91

of 2014 deserves to be interfered with because the Committee was to make efforts in a consultative process to find out an acceptable solution to mitigate the alleged hardship arising out of the need to import coal at benchmark price on account of the Indonesian Regulation.

(d) The Central Commission was, therefore, wrong in accepting the report signed by three members only and proceeding to decide the matter and in allowing compensatory tariff overriding the conditions and objections of the procurers including Rajasthan Utilities.

[F] <u>Submissions of Central Commission on Regulatory Power and grant of compensatory tariff:</u>

128. We have heard Mr. Nikhil Nayyar, learned counsel appearing for the Central Commission in Adani Group and CGPL Group. We have also perused the written submissions tendered by him. The gist of the submissions is as under:

(a) When the tariff of a project is determined through a Section 63 route, the Regulatory Commission has a

limited role at the stage of determination and it is required to adopt the tariff. However, during the lifespan of the project, it is still empowered to exercise regulatory powers as prescribed under Section 79(1)(b) of the said Act. It is not merely a dispute resolution body. It has been entrusted with multiple roles (See: ***PTC India (CB)***).

(b) There is no restriction on the power to regulate under Section 79(1)(b). Section 63 only excludes Section 62. It has a limited *non-obstante* clause. Section 79(1)(b) provides the Central Commission with the power and also the duty to regulate all tariffs and the said power cannot be extinguished on the sole ground that the manner of determination of tariff is different.

(c) The term 'regulate' has a broad impact. (See : ***U.P. Cooperative Cane Unions Federation v. West U.P. Sugar Mills Association***[46]).

[46] (2004) 5 SCC 430

(d) Section 63 of the said Act does not exist in isolation and would have to be read in tandem with Section 61 and Section 79(1)(b) of the said Act.

(e) In ***Essar Power Ltd.***, this Tribunal has held that tariff determination under Section 63 would not be independent of the principles enumerated under Section 61 of the said Act.

(f) In ***Transmission Corporation of Andhra Pradesh Ltd. v. Sai Renewable Power Private Ltd. & Ors.***[47], the Supreme Court has held that Central Commission is required to adopt a pragmatic approach to ensure the viability of units when they are faced with an existential threat.

(g) It is, therefore, clear that in the emergent situation, to secure the viability of the generators' project, it was within the power of the Central Commission to regulate

[47] (2011) 11 SCC 34

and grant compensatory tariff, which was incidental to its power to regulate under Section 79(1)(b).

(h) The power of the Central Commission does not get exhausted once the power is exercised under Section 63 (See : ***State of U.P. v. Maharaj Dharmander Prasad & Ors.***[48].)

(i) The Central Commission has at no point of time, reworked or for that matter re-determined the tariff and, therefore, there was no question of holding a public hearing under Section 64 of the said Act. The Central Commission has only devised a mechanism termed as compensatory tariff, to tide over an emergent situation.

(j) The Financial Consultant – KPMG was appointed by the Committee appointed by the Central Commission of which the procurers and the generators were the parties. KPMG submitted its final Report to the Committee. The Committee has relied on the said Report to some extent.

[48] (1989) 2 SCC 505

The final Report of the said Committee was uploaded by the Central Commission on its website on 28/9/2013. So, it is wrong to suggest that the said Report was suppressed by the Central Commission.

(k) Energy Watchdog had the opportunity to study the said Report and seek additional documents.

(l) Prayas sought time to submit documents and it was granted time. It was, therefore, open to the consumer group to seek access to the Report of the Financial Consultant - KPMG because the report submitted by the Committee contained reference to KPMG report. Consumer Group did not do so. It, therefore, cannot be allowed to make allegations of suppression against the Central Commission.

(m) Energy Watchdog, for the first time, after nearly two rounds of hearing in the matter, raised the issue of the KPMG report. Counsel for the Central Commission made a statement that all the documents, which were sent to it by the Committee would be produced in this Tribunal for

inspection. This Tribunal directed that the said documents be produced. Pursuant to the said order, the documents were filed in this Tribunal. Therefore, allegations of suppression are without basis.

(n) Allegations made by Prayas that it was not heard by the Committee are baseless. Prayas sent a written submission to the Committee. The recommendation of the Committee was evaluated by the Central Commission in the hearing in which Prayas participated and, therefore, no prejudice is caused to Prayas.

[G] Submissions of Adani Power on Regulatory Power and grant of compensatory tariff:

129. We have heard Mr. Amit Kapur, learned counsel appearing for Adani Power and perused the written submissions tendered by him. The gist of the submissions is as under:

(a) A PPA is a statutory contract encompassing the role of the regulator throughout the life of the PPA.

(b) The Statement of Objects and Reasons and Preamble of the said Act, Sections 61, 63, 79 thereof read with clauses 2.3, 3.2, 4.2, 4.7, 4.11(iii), 5.15, 5.16, 5.17, 6.11, 6.12, 6.14 of the said Guidelines, National Electricity Policy dated 12/02/2005 and Tariff Policy dated 06/01/2006 support the above proposition.

(c) PPA being a statutory contract, determination of tariff under the competitive bidding process is not left to the procurers and generators. The role of regulator is envisaged at all stages of the bidding process under Section 63 of the said Act including pre-bid, during bid, post bid and post approval of the PPA. The said Act was enacted to address problems of creditworthiness crisis in the power sector due to uneconomic tariffs. Part-VII and Part-X of the said Act must, therefore, be interpreted to fulfill the statutory objectives of safeguarding the interest of the consumer and at the same time protecting the

investment of stakeholders by providing for recovery of cost of electricity in a reasonable manner. Independent regulators have a pre-eminent role in taking measures conducive for development of the electricity industry.

(d) In the said Act, the only instances where the normal freedom to contract is found preserved, are in cases of a direct commercial relationship between a consumer and a generating company or a trader and in proviso to Section 62(1)(a) and proviso to Section 62(1)(d) of the said Act. All other purchases under the said Act, including the present transaction between Adani Power and its procurers is within the regulatory purview of the Appropriate Commission.

(e) PPA is a long term contract for a period of 25 years and the same cannot be equated to the normal purchase and sale contract as it may not be possible to envisage all possible material change / risks over such a long period of time. Since it is not possible to envisage all difficulties

which may arise during such long contractual term, clauses of Force Majeure, Change in Law and adjudication of tariff claims are statutorily provided for. In this connection, reliance is placed on ***Junagadh Power Projects Pvt. Ltd. v. GUVNL***[49] and ***Gujarat Urja Vikas Nigam Ltd. v. Green Infra Corporate Wind Power Ltd. & Ors.***[50]

(f) Legislature has made the tariff determined through the competitive bidding process subservient to Section 61 principles read with continued monitoring and intervention (where warranted) under Section 79 read with Clauses 4.7 and 5.17 of the said Guidelines. Thus, the role of the Appropriate Commission is envisaged at each and every stage. Reliance is placed on the Report of the High Power Committee led by Dr. Vijay Kelkar on 'Revisiting and Revitalising Public Private Partnership Model of Infrastructure', which reviews the experience of the PPP policy, including the difficulties experienced with

[49] 2014 ELR (APTEL) 0521
[50] 2015 ELR (APTEL) 1316

particular variations and conditions of contractual arrangements. The Report analyses the risks in PPP projects and existing framework for sharing such risks between the project developer and the Government.

(g) The Central Commission has been mandated to exercise its regulatory powers, to intervene in situations to maintain the sanctity of the principles, qua determination / regulation of tariff, as set out in the said Act more particularly in terms of Section 61. In order to do so, the legislature has empowered the Central Commission in terms of Sections 61, 63 and 79 of the said Act read with Clauses 4.7 and 5.17 of the said Guidelines further read with Articles 12, 13 and 17 of the PPA. The Central Commission has, therefore, jurisdiction to grant compensatory tariff / vary the terms of tariff determined under Section 63, in the facts of the present case, in order to achieve the objectives of the said Act. The word "regulate" appearing in Section 79(1)(b) is of widest import as held by the Supreme Court in ***V.S. Rice***

and Oil Mills v. State of A.P.[51]***, PTC India (CB)***; and by the Bombay High Court in ***Dabhol Power Company v. MERC & Ors.***[52]. Reliance is also placed on the judgments of the Supreme Court in ***Jiyajeerao Cotton Mills Ltd. v. M.P. Electricity Board***[53]***; Central Power Distribution Co & Ors. v. CERC & Anr.***[54]***; UP Power Corporation Limited v. NTPC***[55]***; BSES Ltd. v. Tata Power Co. Ltd.***[56]***; U.P. Co-op. Cane Unions Federations***.

(h) While interpreting the provisions of the statute, the 'intent' of the legislature and the 'purpose' of the statue has to be borne in mind. No part of a statute and no word of a statute can be construed in isolation or rendered otiose (See: ***Tata Power Company Ltd. v. Reliance Energy Ltd.***[57]**.**)

[51] AIR 1964 SC 1781
[52] Order dated 5/3/2002 in Writ Petition No.1205 of 2001
[53] 1989 Supp. (2) SCC 52
[54] (2007) 8 SCC 197
[55] (2009) 6 SCC 235
[56] (2004) 1 SCC 195
[57] (2009) 16 SCC 659

(i) The *non-obstante* clause in Section 63 of the said Act, which only excludes Section 62, cannot be interpreted to mean that it excludes or limits the application of any other provision - Section 61 or Section 79 of the said Act. The said Act has evolved a comprehensive mechanism to govern the electricity sector, being:-

(a) Sections 61, 62 and 63 of the said Act relate to facets of 'determination of tariff', where:-

(i) Section 61 provides for the principles that are to be kept in mind/ relied upon while determining the tariff.

(ii) Section 62 and Section 63 provide for the two alternate modes of determination of tariff.

In a Section 63 model, the Appropriate Commission adopts the tariff which is determined under a competitive bidding process. The Appropriate Commission is not required to blindly accept/ adopt the tariff. If this was the intention, Parliament

would not have given such role to a regulator. Further, the role of the regulator does not stop after the adoption of tariff but it continues throughout the term of the PPA.

(j) *Non-obstante* clause in Section 63 of the said Act has been deliberately limited to exclude the applicability of Section 62 alone. Therefore, in respect of tariff determination and revision adjustments, the legislature has clearly allowed operation of Section 79 of the said Act even for competitive bidding, except for the specified category of joint application by seller and purchaser under Section 64(5) of the said Act.

(k) If the procurer/consumer organization's interpretation of inferentially excluding applicability of Section 61 or 79 to a Section 63 determined tariff is accepted, it would violate the express language besides violating the "casus omisus" rule of interpretation of statute.

(l) Section 61 of the said Act governs both modes of tariff determination, viz. Sections 62 and 63 of the said Act. It is clear that, Section 61 of the said Act is not intended to be subordinate to Section 63 of the said Act. (*See:* ***Essar Power****).*

(m) In terms of Section 61, the Appropriate Commission is entitled to determine the criteria for determination of tariff by regulations guided by the parameters listed. These parameters govern determination of tariff under Sections 62 and 63 of the said Act. (**See*: PTC India (CB)*** and ***Bharat Sanchar Nigam Limited v. TRAI & Ors.***[58]).

(n) While Sections 62 and 63 of the said Act are alternate routes for tariff determination at a given point in time, powers of Central Commission under Section 79(1)(b) or (f) are on-going powers independent of Sections 62 and 63. Section 63 of the said Act does not restrict or whittle down the powers of the Central Commission under

[58] (2014) 3 SCC 222

Section 79(1)(b). It is only an exception to Section 62 and not to any other provisions of the said Act including Sections 61 or 79. (See: ***BSES Rajdhani Power Limited v. DERC & Ors.***[59])

(o) Section 63 is a one-time tariff determination by following the said Guidelines instead of Section 62 route. Re-determination or adjustment in tariff during the PPA life cycle is contemplated in the said Guidelines, in the PPA and in the said Act. As such, Section 63 of the said Act limits the role of the Appropriate Commission at the stage of tariff determination by bidding and does not impact later stages and role of the Appropriate Commission.

(p) The legal framework for determination of tariff under the said Guidelines was examined by this Tribunal in ***Essar Power Ltd v. UPERC & Ors.***[60].

[59] 2010 ELR (APTEL) 404
[60] 2012 ELR (APTEL) 182

(q) The observations of this Tribunal in ***Essar Power*** make it clear that the scope of Sections 61 and 79 of the said Act is not diluted or affected in case of tariff determined through competitive bidding process under Section 63 of the said Act. No fetters have been imposed on the powers of Central Commission under Section 79 of the said Act, to intervene in future, in case of tariff determined through competitive bidding process under Section 63 of the said Act. A perusal of the said Guidelines negates and belies the basic stand of the procurers that the tariff provided in the PPA can never be modified.

(r) PPA cannot restrict the scope / width of the powers of the Central Commission under the said Act and / or the said Guidelines. The provisions of the PPA are to be read as subservient to the provisions of the said Act and the said Guidelines. In this connection, it is necessary to read Clause 2.3, which makes the said Guidelines binding on the procurers with a caveat that a deviation from the guidelines / norms has to be approved by the

Appropriate Commission. Clause 4.7 of the said Guidelines (as amended on 18/08/2006) clearly contemplates adjustment of tariff impacting either cost or revenue arising from any Change in Law. Scope of Clause 4.7 has been consciously, significantly enlarged on 18/08/2006 to cover all scenarios which impact cost or revenue.

(s) Clause 5.17 of the said Guidelines contemplates adjudication upon claims / disputes by the Appropriate Commission. This clause was also amended on 18/08/2006, to significantly enlarge the scope of the said clause to cover (i) change in tariff; (ii) determination of tariff; (iii) any tariff related matter; (iv) any dispute which partly or wholly could result in change in tariff.

(t) Thus, Clauses 4.7 and 5.17 of the said Guidelines clearly encompass subsequent changes in tariff apart from initial fixation to be determined by the Appropriate Commission. Clause 17.3.1 of the PPA clearly envisages

the role of the Appropriate Commission to regulate / determine/ change tariff if and when the need so arises. Even otherwise, it is submitted that the said Guidelines cannot whittle down the regulatory power of the Central Commission as entrusted under the said Act.

(u) Any bidding which has been done in accordance with the said Guidelines empowers the Appropriate Commission to entertain the dispute pertaining to change and/or determination in tariff as enumerated in Clause 5.17 of the said Guidelines, besides adopting the same.

(v) The crucial objectives of balancing appropriate consumer friendly tariff with adequate / reasonable rates of return to encourage efficiency in the generation business has been repeatedly emphasised in the National Electricity Policy dated 12/02/2005 issued in compliance with Section 3 of the said Act.

(w) Tariff Policy dated 06/01/2006 is notified by the Central

Government under Section 3 of the said Act, with the stated objectives of ensuring availability of electricity to consumers at reasonable and competitive rates, while securing financial viability of the sector and attract investments. Tariff Policy, *inter-alia*, recognizes that to attract adequate investments in the power sector it is essential to provide appropriate return on investment as budgetary resources of the Central and State Governments are incapable of providing the requisite funds.

(x) The power to regulate can be exercised de-hors specified regulations. Plenary regulatory power is vested in the regulator to effectively deal with the problems which may arise on case to case basis. The said Act has vested discretion unto the regulatory bodies to choose either between promulgating general or specific rules or resolve the problem on case to case basis. The existence of a rule or regulation is not a pre-condition for an administrative body to exercise its power. (See: ***PTC India (CB)***)

(y) The Central Commission is an expert body having plenary jurisdiction over the subject matter entrusted to it. It is expected to decide all questions of law and fact. *(See:* ***Cellular Operators Association of India.***)

(z) Perusal of the Order dated 2/4/2013 passed by the Central Commission indicates that the Central Commission has rightly exercised its regulatory powers and granted compensatory tariff over and above the PPA tariff, limited to offset to an extent the hardship impacting the project for a limited duration subject to prudence check and regulatory oversight to restore the viability of the project in consumers' interest. The Central Commission has rightly exercised its powers to ensure that the installed capacity of 4620 MW does not become unworkable or a stranded asset but results in augmented power supply for the procurers by allowing suitable adjustments in tariff to restore the economic/ financial equilibrium.

(aa) If the Central Commission's order is not implemented, Adani Power will be prevented from supplying power to the Discoms as 84% of the networth has already eroded and the coal suppliers have threatened to stop supply of coal if their dues are not cleared. The outstanding payments to coal creditors are mounting.

(bb) The compensatory tariff is granted only towards loss incurred on account of energy charges and not towards loss incurred by Adani Power on account of capacity charges. Even actual under recovery of energy charges is higher than the compensatory tariff granted by Central Commission. Per month loss of Rs. 192 crores in FY 2013-14 and Rs.77 Crores in FY 2014-15:

(cc) Due to cash losses, Adani Power has gone into breach of covenants with the project lenders as it has not been able to meet certain financial ratios as per its financing arrangement with project lenders.

(dd) Due to continuous cash losses suffered by Adani Power since its commercial operation of Unit-5, Adani Power is unable to arrange its short term funding requirement/working capital requirement for its day to day operations.

(ee) Rating Agencies have degraded the rating of Adani Power due to huge losses incurred by it.

(ff) The compensatory tariff in Order dated 21/02/2014 balances the interest of all parties in terms of Section 61 of the said Act. The compensatory tariff granted by Central Commission varies from month to month depending upon the indexed prices of imported coal and the quantity of domestic coal available.

(gg) Adani Power is managing to continue operations of the Mundra Power plant and supply power under the PPAs because of the financial support taken from group

companies in addition to support from Financial Institutions; Adani Power is also procuring fuel on credit from the group companies and Project Lenders have continued their support in the form of Term Loan and Working Capital Loans, in anticipation of positive resolution of the difficulties faced by Adani Power. Adani Power continues to supply power despite incurring losses.

(hh) Exercise of power by the Appropriate Commission is warranted in exceptional situation where certain unforeseen events are beyond the knowledge of the parties; these events having wiped out the premise / substratum of the contract executed between the parties; they having altered / wiped out the balance between consumer interest and reasonable return on investment; where there is an imminent need to protect and salvage the investment made so that the assets do not get stranded, intervention is required to balance the interest

of all the stakeholders so that consumer interest is not compromised.

(ii) If this Tribunal refuses to confirm the impugned order, there would be a widespread adverse impact on Section 63 bids with enhanced risk being peeved in bids leading to high tariffs quoted by developers to mitigate unforeseen events since price adjustment claims will be seen as meaningless. The intent of competitive bids to discover competitive tariffs would be defeated. Therefore, it is in consumer interest that impact of such events are mitigated by regulatory intervention alone so that only the actual impact is passed on to the consumers rather than the consumers absorbing the high risk margins assumed by the developers.

(jj) The judgment of this Tribunal in ***Gajendra Haldia*** on which reliance is placed by the procurers/consumer

organizations has been set aside by the Supreme Court in ***CERC v. Gajendra Haldia***[61].

(kk) The judgments of the Supreme Court and of this Tribunal on which reliance is placed by the procurers are not applicable to the facts of this case. It is well settled that a line or observation cannot be picked up from a judgment. A decision often takes its colour from the question involved in the case in which it was rendered and no judgment can be read as if it is a statute.

(ll) The judgment of the Supreme Court in ***Natural Resources Allocation*** is not applicable because in this case, at the time of bid, all the bidders were aware of the statutory framework, Clauses 4.7 and 5.17 of the said Guidelines, Sections 61, 63 and 79(1)(b) of the said Act read with Articles 12, 13 and 17 of the PPA. Therefore, it is not open for the procurers to submit that allowing Compensatory Tariff to Adani Power would violate the

[61] (2009) 11 SCC 556

principles of Article 14 / Fundamental Rights / bid sanctity. In any case, no bidder has approached either this Tribunal or any other for challenging the grant of compensatory tariff to Adani Power/ violation of fundamental rights.

(mm) Reliance placed by the procurers on the contents of the Economic Survey of India is misplaced. The said Report is not binding on the Courts. Even otherwise, the Economic Survey provides that creative solutions are necessary and the guiding principle should be to restructure contracts on the project's revenues, differentiating between temporary illiquidity and insolvency.

(nn) The Central Commission has not granted relief on the basis of the studies conducted by the World Bank Consultants, being ***J. Luis Guasch and Jon Stern***. The relief is granted in exercise of its regulatory power under Section 79(1)(b) read with Sections 61 and 63 of the said Act. In fact, the Central Commission has refused the re-

negotiation of tariff discovered through competitive bidding.

(oo) By Order dated 2/4/2013, the Central Commission conclusively held that Adani Power needs to be compensated for hardship which it is suffering on account of unforeseen events leading to non-availability of coal linkage or increase in international coal price. The Central Commission directed the parties to constitute a Committee to find out a practical solution to negate the impact of the aforementioned events. The Committee was set up to aid and assist the Central Commission to fashion a relief, in the form of compensatory tariff, to be payable to Adani Power. Therefore, it is not right to say that the scope of reference vide Order dated 2/4/2013 was only to find out an acceptable solution.

(pp) It is a settled legal principle that a statutory authority can delegate its functions in accordance with the statute under which it is constituted. (**See *M. Chandru v.***

Member Secretary Chennai Metropolitan Development Authority and Ors.[62] and ***Marathwada University v. Seshrao Balwant Rao Chavan***[63].

(qq) The letter dated 10/9/2013 sent by Mr. Deepak Parekh, Chairperson of the Committee to the Central Commission clearly indicates that most of the issues were resolved and recommendations were framed. However, representatives of the procurer-states felt that they will not be able to sign the report without obtaining formal approval of respective State Governments, which might take some time. In view of this, the Report was submitted without signatures of the procurer-States and the developers. However, non-signing of the Report is irrelevant since pursuant to the submission of final Committee Report before the Central Commission on 16/08/2013, Gujarat Urja filed Affidavit dated 13/09/2013 recording its in-principle consent to the Committee Report subject to few suggestions; Adani

[62] (2009) 4 SCC 72
[63] (1989) 3 SCC 132

Power filed its Affidavit dated 30/09/2013 accepting the Committee Report in its entirety; Haryana Utilities by Affidavit dated 04/10/2013 submitted its in-principle consent to the Committee Report subject to certain suggestions.

(rr) The term acceptable solutions, as rightly held by Central Commission in its Order dated 21.02.2014, merely means a solution which is worthy of acceptance. In this regard, it is also noteworthy that Central Commission after hearing all the parties and considering the changes and modifications suggested by all the parties passed the Order dated 21/02/2014. In the Order dated 21/02/2014, Central Commission has not accepted the recommendations of the Committee in toto but has applied its mind and passed the Order dated 21/02/2014 after making changes as it deemed appropriate.

(ss) The Central Commission has rightly allowed

compensatory tariff from scheduled COD as cause of action arose when Adani Power was affected by the impact of Indonesian Regulation which was in knowledge of the procurers/consumer organizations. Also, the procurers have benefitted through supply of power generated by Adani Power by using imported coal from Indonesia at benchmark price.

(tt) As against actual under recovery / losses on account of energy charges of Rs.487 crores and Rs.511 crores in case of Gujarat and Haryana respectively, the Committee had recommended reduced recovery of Rs.451 crores and Rs.496 crores with a view to ensuring that operational inefficiencies are not burdened on the procurers. Central Commission has further reduced the compensatory tariff for past losses to Rs.409.51 crores and Rs.420.24 crores in case of Haryana and Gujarat receptively.

(uu) Even if amount of past losses on account of energy charges are paid as per Committee recommendations, it

will not be sufficient to meet the cumulative losses incurred by the company.

(vv) It is settled position of law that the compensation is to be paid from the date of cause of action. Following judgments are relied on in support of this proposition - (a) **N. Narasimhaiah & Ors. v. State of Karnataka & Ors.**[64]**,** (b) ***Asst. Collector of Customs v. Associated Forest Products Ltd.***[65] (c) ***Shriram Fertilizers & Chemicals v. UoI***[66] and (d) ***DCM Shriram Consolidated Ltd. v. UoI***[67]***.***

(ww) In view of above, it is submitted that Central Commission, being a regulator, retains power to modify/vary the tariff of PPA executed as per Section 63 under scheme of the said Act, if the situation so arises. It is submitted that in the present case, Central Commission has rightly exercised its regulatory power to

[64] (1996) 3 SCC 88
[65] (2000) 9 SCC 258
[66] IV (2005) BC 287
[67] II (2005) ACC 371

salvage 4620 MW capacity in the interest of all the stakeholders including consumers and procurers.

[H] Submissions of CGPL on Regulatory Power and grant of compensatory tariff:

130. We have also heard Mr. C.S. Vaidyanathan, learned senior counsel appearing for CGPL. We have perused the written submissions filed by CGPL. So far as the submissions of CGPL on the legal issue are concerned, they are identical to the submissions made by Adani Power. There are, however, a few submissions based on facts which are different. They are as under:

(a) The submission made by the procurers/consumer organization that the scope of reference made to the Committee under Order dated 15/4/2013 was to find out an acceptable solution and in the absence of such a solution, the Central Commission could not have granted any compensatory tariff to CGPL is concerned, it is an erroneous interpretation of Order dated 15/4/2013. The

direction to constitute the Committee to find out a practical solution while maintaining the sanctity of the PPA and the tariff agreed therein was issued because of the promulgation of Indonesian Regulation, which has completely wiped out the premise on which CGPL had submitted it's bid. It is in the interest of consumers/procurers and CGPL that CGPL is compensated for the losses incurred by it on account of subsequent events of promulgation of Indonesian Regulation and unprecedented increase in the prices of coal in the international market.

(b) CGPL had specifically sought for fixing a mechanism to offset the adverse impact, due to the promulgation of Indonesian Regulation and for the unprecedented increase in the price of coal. CGPL is adversely affected due to the promulgation of Indonesian Regulation from the COD of each unit of the project.

(c) Admittedly, as per the Indonesian Regulation all long term contracts for supply of coal from Indonesia were required to be amended/ to be aligned with the market prices within a period of 12 months from the date of promulgation of the Indonesian Regulation (i.e. by 23/09/2011). The CSA was therefore required to be amended, to be aligned with the Indonesian Regulation from 23/09/2011 and not from the Order dated 15/04/2013 of the Central Commission.

(d) The impact of the promulgation of the Indonesian Regulation and increase in the price of coal has adversely affected CGPL from the COD of Unit 1 (i.e. from 07/03/2012) by way of immediate cash losses, which were reflected in the audited financial statements of CGPL. Hence, the Central Commission has granted compensatory tariff from 01/04/2012, i.e. immediately after the COD of Unit 1.

(e) After considering all the circumstances, the Central

Commission has rightly held that the compensatory tariff payable to CGPL will be from the date on which the hardship was caused and not from the date on which the order was passed by the Central Commission. It is settled position of law that, any compensation is to be paid from the date of cause of action. Reliance is placed on the judgments of the Supreme Court in ***N. Narasimhaiah***, ***Asst. Collector of Customs***, ***Shriram Fertilizers & Chemicals***, and ***DCM Shriram Consolidated Ltd.***. The submission that the compensatory tariff if any must be payable for the future period and not from the date of COD of Unit 1 is, therefore, erroneous.

[I] Analysis and conclusion of this Tribunal on the issues relating to Regulatory Power and grant of compensatory tariff:

131. In order to examine whether de-hors the provisions of the PPA, the Central Commission has regulatory powers to vary or modify the tariff or otherwise grant the compensatory tariff to the generating companies in the case of a tariff determined

under a tariff based competitive bidding process as per Section 63 of the said Act, we must have a look at the relevant provisions of the said Act, Guidelines dated 19/1/2005 issued by the Central Government, National Electricity Policy and the Tariff Policy.

132. The provisions of the said Act, so far as they are relevant, could be quoted:

> "***61. Tariff regulations:-*** *The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-*
>
> *(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;*
>
> *(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;*
>
> *(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*
>
> *(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;*

(e) the principles rewarding efficiency in performance;

(f) multi year tariff principles;

(g) that the tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission;

(h) the promotion of co-generation and generation of electricity from renewable sources of energy;

(i) the National Electricity Policy and tariff policy:

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948, (54 of 1948), the Electricity Regulatory Commissions Act, 1998 (14 of 1998) and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier.

62. Determination of tariff :- *(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –*

(a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an

agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity ;

(c) wheeling of electricity;

(d) retail sale of electricity:

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) xxx xxx xxx

(3) xxx xxx xxx

(4) No tariff or part of any tariff may ordinarily be amended, more frequentlythan once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

63. Determination of tariff by bidding process:- *Notwithstanding anything contained in Section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.*

> ***64. Procedure for tariff order:-*** *(1) An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.*
>
> *(2) xxx xxx xxx*
>
> *(3) xxx xxx xxx*
>
> *(4) xxx xxx xxx*
>
> *(5) xxx xxx xxx*
>
> *(6) A tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order.*"

133. The National Electricity Policy, inter alia, aims at providing access to electricity to all households and protection of consumers' interests. One of the issues addressed by it is the issue regarding competition for consumers' benefits so as to strike an appropriate balance between their interest and need for investments. It states that the said Act creates a conducive environment for investments in all segments of the industry, both for public sector and private sector, by removing barrier to entry in different segments and Section 63 thereof provides for participation of suppliers on competitive

basis in different segments which will further encourage private sector investment.

134. The Tariff Policy notified by the Central Government on 6/1/2006 states that the objectives of the tariff policy inter alia are to ensure availability of electricity to consumers at reasonable and competitive rates; financial viability of the sector and to attract investments. While discussing what should be general approach towards tariff, it states that introducing competition in different segments of the electricity industry is one of the key features of the said Act. Competition will lead to significant benefits to consumers through reduction in capital costs and also efficiency of operations. Sub-clause 5.3 under the heading "General Approach to Tariff" is important. It reads thus:

> *"**5.3** Tariff policy lays down following framework for performance based cost of service regulation in respect of aspects common to generation, transmission as well as distribution. These shall not apply to competitively bid projects as referred to in para 6.1 and para 7.1(6). Sector specific aspects are dealt with in subsequent sections."*

135. Clause 5.3 makes it clear that the Tariff Policy contemplates two different frameworks, one for competitive bidding process under Section 63 of the said Act and the other for tariff determination on cost plus basis under Section 62 of the said Act.

136. Section 63 of the said Act refers to the Guidelines issued by the Central Government which the Appropriate Commission has to follow during the process of determination of tariff by bidding process. In compliance of this provision, the Central Government has issued the said Guidelines dated 19/1/2005. The Preamble to the said Guidelines reads thus:

> *"**1. <u>Preamble</u>***
>
> *Promotion of competition in the electricity industry in India is one of the key objectives of the Electricity Act, 2003 (the Act). Power purchase costs constitute the largest cost element for distribution licensees. Competitive procurement of electricity by the distribution licensees is expected to reduce the overall cost of procurement of power and facilitate development of power markets. Internationally, competition in wholesale electricity markets has led to reduction in prices of electricity and in significant benefits for consumers."*

137. The Preamble makes it clear that the determination of tariff by bidding process contemplated under Section 63 of the said Act is expected to promote competition and reduce overall cost of procurement of power.

138. A conjoint reading of the provisions of the said Act, the National Electricity Policy, the Tariff Policy and the said Guidelines clearly discloses the existence of two separate streams of tariff determination. One is provided under Sections 61, 62 and 64 of the said Act. Determination of tariff of that stream is done under Section 62 of the said Act. The other determination is done under Section 63 of the said Act. These two separate streams shall engage our attention in these matters as we shall soon see.

139. It is necessary to first go to the determination of tariff provided under Section 62 of the said Act. Section 62 provides for determination of tariff for supply of electricity by a generating company to a distribution licensee; for

transmission of electricity; for wheeling of electricity and for retail sale of electricity. Section 61 is an enabling provision. It enables the Appropriate Commission subject to the provisions of the said Act to specify the terms and conditions for the determination of tariff and lays down the principles which shall guide the Appropriate Commission in performance of its duty of determining tariff under Section 62 of the said Act. Section 64 provides for the procedure for determination of tariff under Section 62. Sub-Section (1) of Section 64 requires a generating company or a licensee to make an application in the prescribed format to the Appropriate Commission.

140. Under Section 62(2) of the said Act, the Appropriate Commission may require a licensee or a generating company to furnish details as may be specified in respect of generation, transmission and distribution for determination of tariff. In the process of determination of tariff under Section 62, the Appropriate Commission follows the tariff regulations specifying terms and conditions for determination of tariff made in light of guiding principles laid down in Section 61 of

the said Act. The tariff is determined by the Appropriate Commission on the basis of Capital Cost by considering individual tariff elements namely Project Cost, Debt-Equity Ratio, Servicing of Interest on Loans, O&M Expenses, Depreciation, Interest on Working Capital, Return on Equity and also Variable Cost on the basis of norms and allowed as pass through in terms of Landed Cost of Fuel, Calorific Value and after subjecting these elements to prudence check. This determination is, therefore, called cost plus determination. The tariff determined under Section 62 is reflected in bilateral/negotiated PPAs.

141. Section 63 on the other hand provides the other mode of determination of tariff namely determination of tariff by bidding process. It starts with a non-obstante clause and specifically excludes the operation of Section 62. It must be noted here that Section 62(4) provides for amendment of tariff, if necessary, once in a financial year in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified. Since Section 63 excludes

Section 62, this provision of amendment is not applicable to determination of tariff by bidding process under Section 63. At this stage, it would be appropriate to refer to Section 64(6) which also contemplates amendment or revocation of a tariff order as it says that a tariff order shall unless amended or revoked, continues to be in force for such period as may be specified in the tariff order. Section 64 as we have already noted, prescribes procedure for tariff determination under Section 62. Since Section 63 excludes application of Section 62, it is clear that Section 64(6) which relates to tariff determination under Section 62 has no application to determination of tariff by bidding process under Section 63. Thus, tariff determined by bidding process cannot be amended by invoking these provisions. In other words, tariff discovered through bidding process cannot be tinkered with by resorting to Section 62(4) and Section 64(6) of the said Act.

142. It bears repetition to state that Section 63 excludes the application of Section 62. It contemplates determination of tariff through a transparent process of bidding in accordance

with the said Guidelines issued by the Central Government. It makes it obligatory on the Appropriate Commission to adopt the tariff if it is determined through the transparent process of bidding in accordance with the said Guidelines issued by the Central Government. Tariff determination by bidding process is guided and controlled by the said Guidelines issued by the Central Government, which are accompanied by Standard Bid Documents i.e. RfQ, RfP and PPA. Tariff is quoted by the bidders. The quoted tariff does not involve any specific components of various tariff elements such as Interest on Loan, Return on Equity, Depreciation, O&M Expenses, Station Heat Rate, Auxiliary Consumption, GCV, Working Capital, etc. The decision as to what value is to be attached to each tariff component is internal to the bidder. The Bid Evaluation Committee as defined in the said Guidelines is vested with the responsibility of ensuring that the tariff discovered is in line with the market price. In this entire exercise, the Central Commission or the State Commission has no role except to ensure that the procedure laid down in the said Guidelines is duly followed and adopt the tariff discovered through bidding

process if the process of bidding is transparent. They can either reject the petition if they find that the bidding was not as per the statutory framework or adopt the tariff if it is discovered as per the transparent process conducted in accordance with the said Guidelines issued by the Central Government. It is not possible to accept the submission that the role of independent regulator is envisaged at all stages of the bidding process under Section 63 of the said Act.

143. In a competitive bidding process, tariff as per terms and conditions is quoted by the bidders. The tariff is discovered after following transparent process of bidding and the said Guidelines issued by the Central Government. This process and the discovered tariff have a sanctity which needs to be preserved. The tariff so determined cannot be reopened except on the grounds provided under the PPA such as *Force Majeure* or Change in Law.

144. There is another aspect which makes the distinction between these two streams apparent. The said Act contains

provisions enabling the Appropriate Commission to make regulations. Tariff under Section 62 is determined by the Appropriate Commission having regard to the regulations made in accordance with Section 61 of the said Act. However, so far as determination of tariff through bidding process is concerned, the legislature has consciously vested in the Central Government power to make Guidelines in accordance with which the tariff is discovered by following a transparent bidding process. The intention of the legislature is clear. The legislature wanted the Central Government to have a control over the bidding process and make Section 63, a Code by itself for the said process. Under Section 63, the Appropriate Commission has to merely follow the said Guidelines issued by the Central Government. In our opinion, from the scheme of the said Act, it is clear that the Central Commission or the State Commission cannot issue regulations covering the determination of tariff through bidding process as that would defeat the legislative intent. If the Central Commission or the State Commission cannot exercise the power to frame regulations, there cannot be any overreaching regulatory

power to vary or alter the tariff determined through competitive bidding process. This is also consistent with the Tariff Policy dated 6/1/2006 which envisages framing of Tariff Regulations under Section 61 for capital cost basis tariff determination namely other than the competitive bidding under Section 63. We have already quoted Clause 5.3 thereof hereinabove. Pertinently, the Central Commission has not framed any such regulations. It must also be noted here that while notifying the said Guidelines, the Central Government may adopt the principles contained in Section 61 but Section 61 is not applicable to the tariff determination under Section 63. The provisions of the said Act do not establish any connection between Sections 61, 62 and 64 on one hand and Section 63 on the other hand though while preparing guidelines under Section 63 the Central Government may draw light from the principles laid down in Section 61.

145. In this connection, it is necessary to refer to the judgment of this Tribunal in ***Essar Power***, which in our opinion succinctly discusses the nature of competitive bidding

process under Section 63 of the said Act. In ***Essar Power,*** in accordance with the said Guidelines framed by the Central Government under Section 63 of the said Act, Noida Power, a distribution licensee filed a petition before the Uttar Pradesh Electricity Regulatory Commission (**"U.P Commission"**) for approval of the bidding documents for procurement of 500 MW of power by competitive bidding under Section 63 of the said Act. On 8/10/2009, the U.P. Commission approved the bidding process proposed by Noida Power. On 11/11/2010, Noida Power initiated a competitive bid process and invited bids to procure 200 MW (+/- 20 per cent) on long term basis under Case 1 Tariff based on competitive bidding process. Accordingly, six bidders including Essar Power participated in the bid process and submitted their bids. The Evaluation Committee submitted its report recommending the bid of Essar Power stating that Essar Power's bid was in line with the prevailing market conditions. Noida Power accepted the recommendations of the Bid Evaluation Committee and filed a petition before the U.P. Commission under Section 63 of the said Act praying for adoption of tariff quoted by Essar Power

being the lowest bid. While the proceedings were pending, Noida Power received a letter from M/s. Athena Power Limited (APL), which did not participate in the bid process stating that their company was ready to offer power to Noida Power on long term basis at a rate lower than the tariff quoted by the lowest bidder. The Evaluation Committee refused to entertain the offer since it was made subsequent to the submissions of the bid evaluation report submitted by it recommending the tariff quoted by the Essar Power. Thereafter, Noida Power filed an interim application in the pending proceedings informing the U.P. Commission the above subsequent event and requesting the U.P. Commission to pass suitable orders. The U.P. Commission passed Order dated 30/5/2011 holding that Noida Power was fully authorized to take such measures as are open to it under the said Guidelines issued by the Central Government. On the strength of this order, Noida Power sent a letter to all the bidders including Essar Power and asked them to file their respective revised financial bids to match or offer a lower tariff than that offered by APL. Essar Power therefore challenged Order dated 30/5/2011 before this

Tribunal. It was *inter alia* the case of Essar Power that reopening of the concluded bid process in terms of the said Guidelines was beyond the jurisdiction of the U.P. Commission. It was contended that the competitive bidding process initiated in accordance with Section 63 of the said Act and the said Guidelines issued by the Central Government thereunder are statutory in character. Once this process under Section 63 of the said Act is initiated, it should be followed. It must either lead to adoption of tariff by the U.P. Commission or rejection of the same on the ground that none of the bids were aligned to prevailing market conditions. After discovery of lowest bidder and after seeking adoption under Section 63 of the said Act, a third party cannot be introduced in the process. While dealing with this question, this Tribunal considered the statutory framework provided for fixation of tariff under the said Act. This Tribunal noted that Section 63 starts with non-obstante clause and excludes the tariff determination powers of the State Commission under Section 62 of the said Act. The entire focus of the competitive bidding process under Section 63 of the said Act is to discover the

competitive tariff in accordance with the market conditions and to finalise the competitive bidding process with the said Guidelines, standard document for RfP and the PPA. This Tribunal observed that under Section 62 of the said Act, the State Commission is required to collect various relevant data and carry out prudence check on the data furnished for the purpose of fixing tariff. Hence, determination of tariff under Section 62 of the said Act is totally different from determination of tariff through competitive bidding process under Section 63 of the said Act. This Tribunal further observed that the procurer has the choice of process for procurement of power either through bilateral PPA with tariff determined by the Appropriate Commission under Section 62 of the said Act or tariff discovered through a transparent process of competitive bidding in accordance with the said Guidelines under Section 63 of the said Act. After selecting the second route, the procurer has to finalize the complete bidding process including finalization of necessary documents. The bidder who has quoted lowest tariff has to be declared as successful bidder. This should be followed by filing the

petition for adoption of tariff of the successful bidder by the Appropriate Commission under Section 63 of the said Act. This Tribunal clarified that the adoption of such tariff discovered by the competitive bidding governed by Section 63 of the said Act is the statutory duty of the Appropriate Commission with no discretion in the matter and that the bidding process has got sanctity. As regards the said Guidelines framed under Section 63 of the said Act, this Tribunal observed that they are framed to comply with the principles specified in Section 61 of the said Act and the bidding process must discover tariff in accordance with the market conditions from the successful bid consistent with the guiding principles under Section 61 of the said Act. While setting aside the impugned order, this Tribunal noted its findings. The relevant portion of the judgment of this Tribunal reads thus:

> *"The first question relates to the scope of power to be exercised and the method of procedure to be followed by the State Commission under section 63 of the Act. The powers of the State Commission are limited under Section 63 of the Act. The State Commission while dealing with the petition under Section 63 for*

adoption of tariff could either reject the petition if it finds that the bidding was not as per statutory framework or adopt the tariff if it is discovered by a transparent process conducted as per Government of India guidelines. Section 63 starts with non-obstante clause and excludes the tariff determination powers of the State Commission under Section 62 of the Act. The entire focus of the competitive bidding process under Section 63 is to discover the competitive tariff in accordance with the market conditions and to finalize the competitive bidding process in accordance with Central government's guidelines, standard document of Request for Proposal and the PPA. Under Section 62 of the Act, the State Commission is required to collect various relevant data and carryout prudence check on the data furnished by the licensee/generating company for the purpose of fixing tariff. Hence determination of tariff under Section 62 is totally different from determination of tariff through competitive bidding process under Section 63. Competitive bidding process under Section 63 must be consistent with the Government of India guidelines. Any deviation from the standard Request for Proposal (RFP) and model PPA notified by the Government of India must be approved by the State Commission. This process must discover competitive tariff in accordance with market conditions from the successful bid- consistent with the guiding principles under section 61 of the Act. If the deviations are permitted by failing to safeguard the consumer interests as well as to promote competition to ensure efficiency, it will destroy the basic structure of the guidelines."

We are of the opinion that this judgment squarely covers the issue in question.

146. It is the contention of the generators that Section 79(1) of the said Act is an independent standalone provision giving plenary powers to the Central Commission to regulate the tariff and other aspects independent of other provisions of the said Act. It is not possible for us to accept this submission. Sub-clauses of Section (1) of Section 79 relates to another Chapter of the said Act. To illustrate, Section 79(1)(a), (b) and (d) deal with tariff determination and regulation. These clauses have to be read with Part VII of the said Act. For instance, Section 79(1)(a) and (b) require regulation of tariff for generation. Section 62(1)(a) provides for determination of tariff by the Appropriate Commission for supply of electricity by generating company to a distribution licensee. Therefore, Section 79(1)(a) and (b) must be construed in the context of Section 62(1)(a). Section 79(1)(c) deals with the power to regulate the inter-State transmission of electricity. It has to be read with Part V of the said Act. The power to issue licences under Section 79(1)(e) has to be read with Part IV of the said Act which deals with the licences. All these powers can be

exercised along with the other provisions of the said Act to which they relate. Therefore, the contention that the Central Commission has overriding powers to regulate tariff under Section 79(1)(b) and to give compensatory tariff to the generator will have to be rejected. The Central Commission under Section 79(1)(b) cannot proceed to give compensatory tariff to the generator in view of scope and implication of Part VII of the said Act, particularly the scheme of Section 63 of the said Act, the said Guidelines and the quoted tariff adopted in terms of Section 63 of the said Act. We shall advert to Sections 79(1)(f) and (k) a little later.

147. Section 63 of the said Act is a complete Code on the aspect of the determination of tariff in pursuance of a competitive bidding process. We have already noted that tariff determination by the bidding process under Section 63 cannot be reopened. Relief available under the PPA could be granted if case of *Force Majeure* or Change in Law is made out. It is contended by the generators that Clauses 4.7 and 5.17 of the said Guidelines which relate to Change in Law, adjudication of

tariff related disputes by the Appropriate Commission and Article 17.3 of the PPA which relates to dispute resolution of tariff or any tariff related matters, which partly or wholly relate to change in tariff, shall enable the Appropriate Commission independent of Force Majeure and Change in Law provisions of the PPA to grant compensatory tariff. In order to examine this, we must first refer to the relevant clauses of the said Guidelines. Clause 4.7 of the said Guidelines reads as under:

> *"Any change in law impacting cost or revenue from the business of selling electricity to the procurer with respect to the law applicable on the date which is 7 days before the last date for RFP bid submission shall be adjusted separately. In case of any dispute regarding the impact of any change in law, the decision of Appropriate Commission shall apply."*

148. Clause 5.17 of the said Guidelines is as under:

> *"Where any dispute arises claiming any change in or regarding determination of the tariff or any tariff related matters, or which partly or wholly could result in change in tariff, such dispute shall be adjudicated by the Appropriate Commission.*
>
> *All other disputes shall be resolved by arbitration under the Indian Arbitration and Conciliation Act, 1996."*

149. It is necessary first to understand the nature and status of the said Guidelines. Section 63 of the said Act vests power to issue the said Guidelines for determination of tariff by competitive bidding process, in the Central Government. The said Guidelines contain the entire gamut of the determination of tariff by the bidding process. They deal with preparation for inviting bids, tariff structure, capacity charges, energy charges, combined capacity and energy charges, bidding process, bidding submissions and evaluation, deviation from process defined in the said Guidelines, arbitration, time-table for bid process and contract award and conclusion. As per the said Guidelines, bid process leads to execution of PPA and adoption of tariff by the Appropriate Commission. Execution of the PPA is mandated in the said Guidelines.

150. Certain clauses of the said Guidelines need to be seen. Clause 5.4 lists standard documentation to be provided by the procurer in the RfQ. Model PPA proposed to be entered into with the seller of electricity forms part of the said

documentation. Clause 5.4(ii) states what necessary details should be included in the PPA. Clause 5.6 lists standard documentation to be provided by the procurer in the RfP. It includes PPA proposed to be entered into with the selected bidder. Clause 6.11 states that the PPA shall be signed by the selected bidder consequent to the selection process in accordance with the terms and conditions as finalized in the bid document before the RfP stage. Clause 6.12 requires that consequent to the signing of the PPA between the parties, the evaluation committee shall provide appropriate certification on adherence to the said Guidelines. The final PPA along with the said certification by the evaluation committee shall be forwarded to the Appropriate Commission for adoption of tariff in terms of Section 63 of the said Act. At this stage, it is necessary to refer to Article 18.4 of the PPA, which reads thus:

> ***"18.4 Entirety***
>
> ***18.4.1*** *This agreement and the Schedules are intended by the Parties as the final expression of their agreement and are intended also as a complete and exclusive statement of the terms of their agreement.*

> ***18.4.2*** *Except as provided in this agreement, all prior written or oral understandings, offers or other communications of every kind pertaining to this agreement or the sale or purchase of Electrical Output and Contracted Capacity under this agreement to the Procurer by the Seller shall stand superseded and abrogated."*

151. Article 18.4 indicates that PPA is a controlling document. It sets out the rights and obligations of the respective parties in respect of generation and sale of electricity.

152. In our opinion, the said Guidelines and the PPA will have to be read and construed together. Having read the said Guidelines and the provisions of the PPA in their proper perspective, it is not possible to hold that the said Guidelines provide independent standalone provisions. It is not possible to hold that the Change in Law provision contained in Clause 4.7 of the said Guidelines provides an independent right being a standalone provision and the generators can claim that the Change in Law under the said clause has a wider implication than Article 13 of the PPA which refers to Change in Law so as

to get a relief de-hors the PPA. Similarly, Clause 5.17 of the said Guidelines cannot be construed as providing a separately enforceable dispute resolution (arbitration) provision de-hors Article 17.3 of the PPA. The generators cannot get any relief by invoking Clause 4.7 or 5.17 of the said Guidelines de-hors the provisions of the PPA.

153. We appreciate the contention of Mr. Ramachandran that the correct way of construing the said Guidelines particularly Clauses 4.7 and 5.17 is that the said Guidelines indicate what is to be considered as Change in Law and what can be referred to arbitration respectively and its scope is given in corresponding Articles 13 and 17.3 respectively of the PPAs. Thus, we reject the submission that Clauses 4.7 and 5.17 are standalone provisions and the generators can independent of the PPA base their claim on them and get relief.

154. We must now come to Articles 17.3 of the PPAs and Section 79(1)(f) of the said Act. Article 17.3, so far as it is relevant, reads thus:

> *"**17.3 Dispute Resolution***
>
> *17.3.1 Where any Dispute arises from a claim made by any Party for any change in or determination of the Tariff of any matter related to Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff or (ii) relates to any matter agreed to be referred to the Appropriate Commission under Article 4.7.1, 13.2, 18.1 or clause 10.1.3 of Schedule 13 hereof, such Dispute shall be submitted to adjudication by the Appropriate Commission. Appeal against the decisions of the Appropriate Commission shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time."*

155. Section 79(1)(f) of the said Act reads thus:

> *"**79. Functions of Central Commission:** - (1) The Central Commission shall discharge the following functions, namely:-*
>
> *(a) xxx xxx xxx*
>
> *(b) xxx xxx xxx*
>
> *(c) xxx xxx xxx*

(d) xxx xxx xxx

(e) xxx xxx xxx

(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;"

156. Section 79(1)(f) of the said Act as well as Article 17.3 deal with adjudicatory power. They do not deal with the regulatory power. We have to read these provisions keeping in mind the fact that we are dealing with a case where price is discovered under Section 63 through competitive bidding process. Role of an adjudicatory body in such a case is to decide rights and obligations of the parties before it in accordance with the existing contract and arrangement.

157. In exercise of adjudicatory powers, the Appropriate Commission cannot grant compensatory tariff where bidding process under Section 63 is involved. If a case of Force Majeure or Change in Law is made out, relief can be granted by exercising adjudicatory powers only as provided in the

PPA, which is a controlling document. Adjudicatory powers cannot be mixed with regulatory powers. The Central Commission in the instant case has only proceeded on the basis that it has the regulatory powers to grant compensatory tariff for the events relating to Indonesian Regulation and non-availability of the committed domestic coal. It has not considered Section 79(1)(f) of the said Act and Article 17.3 of the PPAs or Clause 5.17 of the said Guidelines while giving compensatory tariff. It is not, therefore, necessary for us to dwell on this issue. So far as Section 79(1)(k) is concerned, it provides for the functions to be delegated by the Central Government. It is not a substantive provision. The said Guidelines do not delegate power to grant compensatory tariff to the Appropriate Commission. Section 79(1)(k) has therefore no application to the present case.

158. Heavy reliance is placed by the generators on ***V.S. Rice & Oil Mills***. In that case, two notified orders issued by the State of Andhra Pradesh under Section 3 of Madras Essential Articles Control and Requisitioning (Temporary Powers) Act,

1949 ("Madras Act") purported to increase the rate for the supply of electricity to the appellants. The appellants who had entered into agreements with the State contended that the State has no authority to change the terms of the contract which stipulated rates at which the supply of electricity had to be charged, to their prejudice by taking recourse to Section 3(1) of the Madras Act. Section 3(1) of the Madras Act reads as under:

> *"The State Government so far as it appears to them to be necessary or expedient for maintaining, increasing or securing supplies of essential articles or for arranging for their equitable distribution and availability at fair prices may, by notified order, provide for regulating or prohibiting the supply, distribution and transport of essential articles and trade and commerce therein."*

It was argued that the power to regulate would not include the power to change the tariff. Rejecting the submission, the Supreme Court held that the word "regulate" is wide enough to confer power on the State to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to

maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and its availability at fair prices. We cannot dispute this proposition that the power to regulate include power to increase or decrease the tariff. However, this judgment cannot be applied to the present case because we are concerned with the competitive bidding process under Section 63 of the said Act and we have come to a conclusion that Section 79(1)(b) of the said Act which contains the power to regulate, is not applicable to Section 63. Moreover, the Supreme Court was concerned with a case of essential commodities under the Madras Act and has observed that Section 3(1) of the Madras Act confer power on the State to vary or modify the contractual terms in respect of supply or distribution of essential articles. Facts of this case are not comparable to the facts of ***V.S. Rice & Oil Mills***.

159. Reliance placed on the judgment dated 28/09/2015 of this Tribunal in ***Green Infra Corporation Wind Power Limited*** and batch matters is misplaced. In that case, this

Tribunal was concerned inter alia with Section 62 of the said Act, which has no application to the tariff discovered under Section 63 of the said Act with which we are concerned here.

160. We have stated that sanctity of bid needs to be preserved. That is a strong reason which persuades us to hold that regulatory powers cannot be exercised to grant compensatory tariff where tariff is discovered under Section 63 of the said Act. We need to further emphasize this point. In our opinion, once price is discovered under Section 63 of the said Act by adopting competitive bidding route, it is sacrosanct and cannot be tampered with. Section 63 process cannot be converted into Section 62 tariff determination. A generator can seek relief only through the mode prescribed in the PPA which is a controlling document. The reason for this approach is obvious. When the bidders offer their bid they must know all the conditions of the bid. The bidders must be aware of the possibility of any benefit being available to them on the happening of certain events, because had they known about it they would have improved their bid. If the tariff so discovered

is later on tampered with by offering the successful bidder compensatory tariff of which the other bidders had no knowledge, that would be unfair. Had they known earlier about it, they would have improved their bid. In this connection, reliance is placed by the procurers on the judgment of the Supreme Court in ***Natural Resources Allocation.*** In that case, while concurring with the main judgment and expressing his view Justice Khehar dealt with the applicability of Article 14 of the Constitution of India in matters where the State, its instrumentalities and their functionaries are engaged in constitutional obligations. Though this judgment has no direct application, certain observations made therein on which reliance is placed and have relevance, need to be quoted. Justice Khehar referred to two hypothetical situations. He observed that if the bidding process to determine the lowest tariff has been held, and the said bidding process has taken place without the knowledge that a coal mining lease would be allotted to the successful bidder, yet the successful bidder is awarded a coal mining lease, such a grant would not be valid because the competitive

bidding for tariff was not based on the knowledge of gains that would come to the vying contenders on account of grant of coal mining lease. Grant of mining lease would, therefore, be a windfall, without any nexus to the object sought to be achieved. In the bidding process, the parties concerned had no occasion to bring down the electricity tariff, on the basis of gains likely to accrue to them, from the coal mining lease. In this case, a material resource would be deemed to have been granted without a reciprocal consideration i.e., free of cost. Such an allotment may not be fair and may certainly be described as arbitrary, and violative of Article 14 of the Constitution of India. Justice Khehar then observed that if before holding the process of auction, for the award of a power project (based on competitive bids for tariff), it is made known to the contenders, that the successful bidder would be entitled to a mining lease over an area containing coal, those competing for the power project would necessarily incorporate the profit they were likely to make from such mining lease. While projecting the tariff at which they would supply electricity, they would be in a position to offset such profits

from their costs. This would result in an opportunity to the contenders to lower the tariff to a level lower than that would have been possible without the said lease. In such a situation the gains from the coal mining lease, would be enmeshed in the competitive bidding for tariff. Therefore even the allotment of such a mining lease, which appears to result in the allocation of a natural resource free of cost, may well satisfy the test of fairness and reasonableness contemplated in Article 14 of the Constitution of India.

161. The above observations in our opinion indicate that the underlying principle is that the bidding process contemplated under Section 63 has to be transparent and the bidders must know what benefits or concessions they would be entitled to. Otherwise, it would lead to violation of Article 14 of the Constitution of India. We have already held that Section 79(1)(b) is not a standalone provision under which compensatory tariff can be granted to a generator because that would violate the sanctity of the bid. The bidders did not know that they would be entitled to get the relief of

compensatory tariff. The submission that all the bidders were aware of the statutory framework, Clauses 4.7 and 5.17 of the said Guidelines, Sections 61, 63 and 79(1)(b) of the said Act read with Articles 12, 13 and 17 of the PPA and, therefore, Justice Khehar's above quoted observations are not applicable to the present case deserves to be rejected because we are of the opinion that the above provisions do not spell out that the Central Commission has regulatory power to vary or modify tariff discovered under Section 63 or grant compensatory tariff in a case where tariff is discovered through competitive bidding under Section 63 of the said Act. Relief, if any, could be available to a generator only on the grounds provided in the PPA.

162. It is true that as stated by counsel for Adani Power the said Act must be interpreted to fulfill the statutory objectives of safeguarding the interest of the consumers and at the same time protecting the interest of stakeholders by providing for recovery of cost of electricity in a reasonable manner. It is also true that private sector is to be encouraged for overall growth

of the electricity sector and to secure uninterrupted supply of electricity at a competitive price which is fair to all stakeholders. Nobody can deny that consumer interest takes priority. But, it is also true that electricity must be made available at reasonable rates so as to ensure that the sector sustains itself on the return it gets because if the sector perishes the consumers will suffer. Cheapest price is desirable but at the same time it must be reasonable and sustainable. Having accepted this, we must note that all actions of the Regulator must be within the framework of the said Act, the PPA and the said Guidelines which are in consonance with the said Act. Any measures, the regulator takes must be in sync with the said Act. If the scheme of the said Act discloses that the price discovered through the competitive bidding process contemplated under Section 63 of the said Act cannot be tampered with and relief cannot be granted to the generator unless its case falls within the purview of Force Majeure and Change in Law category mentioned in the PPA, the Appropriate Commission cannot exercise regulatory powers to grant compensatory tariff on the

ground that the interests of generator or investor require the exercise of regulatory power, however, genuine that ground may be. Such a generator will be entitled to only the relief which is provided in the PPA.

[J] Answers to Issue Nos.5, 6, 7, 8 and 9 of the Agreed Issues.

163. In the ultimate analysis, we hold that the Central Commission has no regulatory powers under Section 79(1)(b) of the said Act to vary or modify the tariff or otherwise grant compensatory tariff to the generating companies in case of a tariff determined under a tariff based competitive bid process as per Section 63 of the said Act. If a case of *Force Majeure* or Change in Law is made out, relief provided under the PPA can be granted under the adjudicatory power. **Accordingly, Issue No.5 is answered in the negative**. We also hold that the Appropriate Commission, independent of *Force Majeure* and Change in Law provisions of PPAs, has no power to vary or modify the tariff or otherwise grant compensatory tariff to the generating companies in pursuance of the powers under

Sections 61, 63 and 79 of the said Act and/or Clause 4.7 and 5.17 of the said Guidelines issued by the Central Government and/or Article 17.3 of the PPA and/or under the adjudicatory powers as per Section 79(1)(f) of the said Act. The adjudicatory powers available to the Appropriate Commission under Section 79(1)(f) of the said Act and Article 17.3 of the PPA can be used by the Appropriate Commission to give to the generator relief available under the PPA if a case of *Force Majeure* or Change in Law is made out under the PPA. **Accordingly we answer Issue No.6 in the negative**. We hold that in the facts and circumstances of the case, the Central Commission having held that *Force Majeure* and Change in Law provisions of the PPAs have no application, it was not right in granting compensatory tariff under any other powers. If a case of *Force Majeure* or Change in Law is made out, relief provided under the PPA can be granted to the generators. **Accordingly, Issue No.7 is answered in the negative**. In view of answers to Issue Nos.5 to 7 above, **Issue Nos.8 and 9 need not be answered**.

PART – V

CHANGE IN LAW:

XVI. AGREED ISSUES SUBMITTED BY PARTIES ON CHANGE IN LAW:

164. We shall now turn to the issues relating to Change in Law. The said issues read as under:

> *"10. Whether the Change in Law provided under Article 13 of the PPA or under Clause 4.7 of the Guidelines issued by the Central Government as per Section 63 of the said Act should be construed to include laws other than Indian Laws such as the Indonesian Law/Regulations prescribing the benchmark price for export of coal?*
>
> *11. Whether in the facts and circumstances of the present case, the increase in price of coal on account of change in National Coal Distribution Policy linked to reduced availability of domestic coal and/or promulgation of Indonesian Regulation constitute an event of Change in Law attracting Clause 4.7 of the Competitive Bidding Guidelines read with Article 13 of the PPA?"*

[A] Summary of Central Commission's view on Change in Law:

165. While rejecting generators' claim that there is Change in Law, the Central Commission held that "All laws" refer to the

laws of India which include Electricity laws. This is evident from the various provisions of the PPAs. It is further held that if the term "All laws" is interpreted to include foreign laws, it will lead to absurd results as any change in foreign law would be given effect to which would result in the changes in the rights and liabilities of the parties under the contract. It is further held that if any foreign law is to be made applicable, it should be specifically provided for in the contract. On the facts of Adani Power, it is held that since Adani Power applied for linkage of domestic coal to CIL on 28/01/2008 after Adani Power was awarded LoI by Gujarat Urja and Haryana Utilities, it cannot be said that the bids were premised on the linkage of domestic coal, and, hence, the change in the policy of GoI/CIL cannot be considered as Change in Law.

[B] <u>Submissions of Prayas on Change in Law.</u>

166. Gist of the submissions of Mr. Ramachandran, who appears for Prayas on Change in Law is as under:

(a) Change in Law provision under Article 13 of the PPA covers only Indian laws and not laws of any other country. The term 'Law' as defined in the PPA is to be construed as laws in force in India including the Electricity laws and not laws of any other country but including Electricity laws in force in India. In other words, in the context of definition of the term "Law", the qualifying expression "in India" is to any law and not to Electricity law.

(b) The term 'Electricity Laws' having been defined separately the same has been incorporated in the definition of the term 'Law'. This is to clarify that Electricity laws, separately defined, will also form part of the definition of the term 'Law' and therefore have been specifically included in the definition of the term "Law".

(c) The term `Electricity Law' has been defined as meaning the said Act. The said Act is an Indian law. Having

already defined the term 'Electricity Laws' with reference to Indian law, the reference to the laws in India in the definition of term `Law' cannot be again with reference to Electricity Laws. This would be superficial and redundant.

(d) In the context of the definition of the term `Law' and `Electricity Laws', the expression in force in India necessarily relates to all laws and not to Electricity laws.

(e) Everything that follows the term "in force in India" refers to Indian Government Instrumentality, Appropriate Commission, etc., all of which relate to India. The scheme of Article 13 is also to deal with laws in India and not laws outside India.

(f) Article 17.1 of the PPA states that the PPA shall be governed by and construed in accordance with the laws in India.

(g) If the term "Law" is to be interpreted as applying to all laws in the world, the same would also include Electricity laws. There was no need for defining Electricity laws of India separately.

(h) The definition of the term "Law" cannot be interpreted to mean that basic law of any part of the world would be covered by it but the ordinance, regulations, notifications, code, rules, interpretations, etc., which appear in later part of the definition apply only with reference to Indian laws and Indian Government Instrumentalities.

(i) The definition of the term 'Electricity Laws', Article 13 and Article 17.1 read together clearly establish that the intention of the parties was to apply only the Indian law. The construction of contract is dependent on ascertaining the intention of the parties. Such intention has to be gathered from the document itself and from the contemporaneous dealings at the relevant time and not

from what either of the parties would say much after the dispute has arisen.

(j) Tata Power, the bidder considered the term `Law ' used in the PPA as law covering Indonesian Law and the contention made subsequently is clearly an afterthought. This is clear from the representation made by Tata Power to various procurers and authorities vide letter dated 12/12/2011. The said letter makes it evident that Tata Power at all relevant times till 12/12/2011 had participated in the bid and entered into the PPA on the clear understanding that the term 'Law' would include only Indian law. Tata Power had always understood the laws to be the Indian laws.

(k) It is incorrect on the part of the CGPL to contend that the interpretation of the contractual provision being a question of law or mixed question of fact and law the concession made by the Managing Director of Tata Power in the letter dated 12/12/2011 is not binding. The basic

aspect is of intention of the parties in providing for Change in Law as at the time of bidding. The intention is a question of fact and is not a question of law or mixed question of fact and law. It is not a concession on legal issue or interpretation of contract.

(l) Apart from this, it is unbelievable that the PPA entered into in India would include the laws of all countries in the world. The parties to the contract at the time of the signing of the contract would not even know what would be the scope and extent of global laws.

(m) The argument of the CGPL that in the Articles of the PPA wherever the words "Indian law" are used, it would mean Indian laws and where only the word "Law" is used, it should be construed as global laws is incorrect. The use of the words "Indian law" is in respect of respective provisions.

[C] Submissions of Punjab Utilities on Change in Law.

167. Mr. Anand Ganesan, learned counsel appearing for the Punjab Utilities has submitted written submissions on 'Change in Law'. They are identical to Mr. Ramachandran's submissions except reference to the judgment of the Supreme Court in ***Gedela Satchidananda Murthy v. Dy. Commercial Endowment Department, Andhra Pradesh***[68], where the Supreme Court has held that if parties to a contract by their course of dealing put a particular interpretation on the terms of it on the faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation. It is submitted that this observation applies to the letter dated 12/12/2011 sent by Tata Power to various procurers, which establishes that till 12/12/2011, Tata Power had participated in the bid and entered into PPA with the clear understanding that the term 'Law' would include Indian law.

[68] (2007) 5 SCC 677

[D] Submissions of Rajasthan Utilities on Change in Law.

168. Gist of written submissions filed by Mr. Nitish Gupta, who appears for Rajasthan Utilities is as under:

(a) Definition of the term "Change in Law" appearing in Article 10.1.1, Article 14 which refers to Governing Law and Dispute Resolution and the definition of the term "Law" appearing in the PPA make it clear that "Law" for the purpose of determination of "Change in Law" would mean Indian law and not foreign law. Accordingly, reference to the terms 'Consents', 'Clearance' and 'Permits' in Clause 10.1.1 of the PPA, would mean 'Consents', 'Clearance' and 'Permits' with reference to Indian law and not law of any other country including Indonesia. It is absolutely clear from the provisions of the PPA that intention of the parties was to apply Indian law and not any foreign law. Therefore, the contention that promulgation of Indonesian Regulation would tantamount to 'Change in Law' under Clause 10.1.1 of

the PPA because either the same would amount to 'Consents', 'Clearance' and 'Permits' or the same would otherwise fall within the definition of Change in Law provided therein, is absolutely erroneous and baseless. As such, any consequence of Indonesian Regulation much less increase in coal price cannot in law be considered for granting any benefit to Adani Power.

(b) Change in policy of the Government of India governing coal allocation (New Coal Distribution Policy, 2007 to Model FSA dated November, 2012) also does not amount to Change in Law. Change in policy has not been included in the definition of Change in Law. Therefore, Adani Power can claim no benefit on this account.

(c) The bid design of Adani Power would also demonstrate that it had always envisioned reliance on imported coal taking into account any change in policies in allocation of coal. This position is clearly borne out by the PPA as well as the clarification dated 12/9/2009 issued by Adani Power.

(d) Clause 3.1.1 clearly provides that arranging fuel by entering into a FSA is an obligation that has to be discharged by Adani Power. It is, because of this reason unavailability, late delivery, or changes in cost of the fuel have been excluded from Force Majeure. Therefore, inclusion of the aforesaid change in policy in Change in Law would be contrary to the very fundamental basis/premise of the PPA.

(e) The issue of Change in Law is a matter of law and it is a settled principle of law that there cannot be estoppel against law. Therefore, it is erroneous for Adani Power to contend that Rajasthan utilities cannot now before this Tribunal take a stand which is different from the stand taken before the Rajasthan Commission. The aforesaid stand of Rajasthan Utilities that in the facts and circumstances of the present case, there is no Change in Law is based on re-appreciation of the provisions of the PPA and applicable law thereto.

[E] Submissions of Adani Power on Change in Law.

169. We have heard Mr. Kapil Sibal, learned senior counsel and Mr. Amit Kapur, learned counsel appearing for Adani Power on these Issues and also perused the written submissions filed by him. Gist of the said submissions is as under:

(a) The question whether terms "Law" in "Change in Law" should include foreign laws or be restricted to Indian laws must be understood in the context of the PPA. Provisions of the PPA have to be read in the context of the said Guidelines and not contrary to them.

(b) Clause 4.7 of the said Guidelines as on 19/1/2005 stated that any change in tax on generation or sale of electricity as a result of any Change in Law with respect to that applicable on the date of bid submission shall be adjusted separately. Change in Law referred to in

unamended clause could be said to be change in Indian law because generation and sale of electricity is in India and therefore only Indian tax laws could be held applicable. However, Clause 4.7 was amended w.e.f. 18/8/2006. Change in Law under the amended Clause 4.7 was described as "any Change in Law impacting cost or revenue from business of electricity to the procurer". Thus, the scope of the term 'Change in Law' was consciously expanded so as to include even a change in foreign law such as the promulgation of Indonesian Regulation. This clause was amended to address the specific concerns/issues which may arise in case of imported coal. The scope of this clause was consciously expanded to include all circumstances which impact cost or revenue.

(c) Similarly, w.e.f. 18/8/2006, Clause 5.17 was expanded to give the Central Commission jurisdiction to adjudicate all disputes relating to change in tariff, determination of

tariff, any tariff related matter and any dispute which partly or wholly could result in change in tariff.

(d) All the bidders were aware of this expanded scope of Articles 4.7 and 5.17 because the amendments were made effective before bids could be submitted.

(e) Definition of the term "Change in Law" is an inclusive definition. It is very wide and not restricted to Indian law. It includes Change in Law that results in change in any cost or revenue from the business of selling electricity by Adani Power to the procurers under the PPA. Any other interpretation would be contrary to amended Clauses 4.7 and 5.17 of the said Guidelines.

(f) Wherever the parties wanted the scope of the definition of law to be restricted to Indian law, the relevant provisions have stated so.

(g) Commercial agreement like the PPA must be interpreted in the context / background in which it was executed.

Whenever the parties wanted the scope of the definition of law restricted to Indian law, it has specifically stated the same (Definition of Prudent Utility Practice, Articles 4.1.1(a), 12.4(f) and 17.1 of the PPA.).

(h) A commercial contract is to be interpreted after considering the commercial background, the context of the contract and the circumstances of the parties (See: ***Union of India v. D.N. Revri & Ors.***[69])

(i) A commercial contract is to be interpreted in such a manner which gives it business efficacy. It should achieve the result or consequences intended by prudent businessmen (See : ***Cargill Intenational S.A. & Anr. v. Bengladesh Sugar & Food Industries Corporation***[70] and ***Satya Jain & Ors. v. Anis Ahmed Rushdie & Ors.***[71].

(j) The definition of 'Law' is an inclusive definition which includes "all laws" including the statutes, ordinance,

[69] (1976) 4 SCC 147
[70] (1998) 1 WLR 461
[71] (2013) 8 SCC 131

regulations, notifications. If PPA wanted to restrict meaning of law to be Indian law then it could have been worded as "All laws in force in India including Electricity laws" instead of "All laws including Electricity laws in force in India". The word 'include' is generally used in interpretation clauses in order to enlarge the meaning of the words and phrases in a statute.

(k) As regards the construction of the term "include", reliance is placed on ***Regional Director, Employees State Insurance Corporation v. High Land Coffee Works of P.F. X Saldanha & Son,***[72] and ***South Gujarat Roofing Tiles Manufacturers Association & Anr. v. The State of Gujarat & Anr.***[73]

(l) The meaning of the term "Change in Law" in Article 13 has been classified into four separate events which are independent of each other. Scope and meaning of one such event cannot be used to whittle down the meaning

[72] (1991) 3 SCC 617
[73] (1976) 4 SCC 601

and scope of other events. Change in Law as defined in the PPA amongst others, also means change in consent/approvals of licenses available or obtained for the project.

(m) The fact that the governing law of the PPA is Indian law makes no difference to the interpretation of the term "Law" for the purpose of understanding the meaning of the term "Change in Law". The PPA being governed by Indian law only means that the relief that may be granted would be in accordance with Indian law. The governing law does not restrict the scope of Change in Law. Judgment of the Supreme Court in ***NTPC v. Singer Company***[74] is apt for the meaning of the term proper law of contract.

(n) Change in Law as defined in the PPA also means change in consent/approvals or licences available or obtained for the project. The coal was sourced from Indonesia. It was to be procured at negotiated price from AEL, which has

[74] (1992) 3 SCC 551

back to back arrangement with the mining companies in Indonesia. These mining companies have a licence/consent from the Government of Indonesia. Any impact in change in consent will have a direct bearing on arrangement between Adani Power and AEL.

(o) In terms of the Indonesian Regulation, the fuel cannot be supplied at the agreed rate and if it is supplied at the agreed rate the same would amount to violation of the regulation/law of Indonesia.

(p) The PPA is based on imported coal (100% in case of Gujarat and 30% plus short supply by MCL in case of Haryana). Any Change in Law affecting the FSA affects the project. The promulgation of Indonesian Regulation has impacted the FSA thereby prohibiting the supply of fuel at the contracted rates. Fuel constitutes about 70% of the total cost during the operation period. Therefore, Change in Law would mean change in foreign law as it has a direct impact on the operation of the project

subsequently increasing the cost of generation of electricity making it unworkable.

(q) On 14/11/2006, GMDC gave in principle commitment to supply domestic coal for 1000 MW power plant. Adani Power submitted its bid dated 2/1/2007 in case of GUVNL based on GMDC's in principle commitment. GMDC did not honour its commitment. On 18/10/2007, GoI issued New Coal Distribution Policy which provided that 100% of the quantity as per the normative requirement of the IPPs would be considered for supply of coal, through FSA by CIL at notified price. On 24/11/2007, Adani Power submitted its bid to HPGCL based on this policy proposing blend of domestic and imported coal in the ratio of 70:30. Standing Linkage Committee (LT) for Ministry of Coal, in its meeting dated 12/11/2008 restricted coal linkage to costal power project to only 70%. As per new FSA, CIL is not bound to supply contracted quantity through domestic coal. It can meet this obligation by even supply

of imported coal, price of which is substantially higher than the domestic coal. The Cabinet Committee on Economic Affairs took a decision dated 21/6/2013 that CIL may import coal and supply the same to power plants on cost plus basis or the plants may import the coal themselves to meet the shortfall. The shortfall in supply of domestic coal by CIL and its subsidiary is act of the Government Instrumentality which falls under the purview of Change in Law.

[F] <u>Submissions of CGPL on Change in Law:</u>

170. We have heard Mr. Vaidyanathan, learned senior counsel appearing for CGPL. He has submitted written submissions of CGPL on "Change in Law". The legal submissions are identical to the submissions of Adani Power. Hence, it is not necessary to reproduce them. Gist of factual submissions is as under:

(a) The FSA executed by CGPL makes it clear that source of imported fuel was Indonesia, which was disclosed to procurers, who accepted fulfillment of all conditions

subsequent by letter dated 7/3/2012. The Indonesian coal was to be procured by CGPL at an agreed market discounted price from Indocoal which has back to back arrangement with the mining companies in Indonesia. Any impact of change in consent will have a direct bearing on the arrangement between Indocoal and CGPL. It cannot be accepted that the procurers, as prudent businessmen would have understood that scope of Change in Law under the PPA would be restricted to Indian law considering that Mundra UMPP is an imported coal based project.

(b) The mining companies in Indonesia have a licence/consent from the Government of Indonesia for mining and selling coal. In light of back to back arrangement between the mining companies and Indocoal, any impact or change in consent will have a direct bearing on the arrangement between Indocoal and CGPL.

(c) In terms of the Indonesian Regulation, the fuel cannot be supplied at the agreed rate and if it is supplied at the agreed rate, the same would amount to violation of the regulation/law of Indonesia.

(d) The PPA is based on imported coal and the project documents are defined in FSA. Any Change in Law affecting the FSA affects the project. The promulgation of Indonesian Regulation has impacted the FSAs thereby prohibiting the supply of fuel at the contracted rates. Fuel constitutes 70% of the total cost during the operation period. Therefore, Change in Law would mean change in foreign law as it has a direct impact on the operation of the project by substantially increasing the cost of generation of electricity making it unworkable.

(e) Reliance placed on Tata Power's letter dated 12/12/2011 is misplaced. The said letter is not an admission on interpretation of the term "Change in Law". Understanding of the parties has to be gathered on a

conjoint reading of the provisions of the PPA, the said Guidelines and Section 63 of the said Act.

(f) The said letter was sent immediately after the promulgation of Indonesian Regulation. It is not an exchange of communication between the parties to the PPA. It was sent by the Managing Director of Tata Power to the Government of Gujarat seeking its intervention to salvage the situation in case the scope of the definition of Change in Law is restricted to Indian law alone.

(g) The said letter cannot disentitle CGPL from making a submission that the promulgation of Indonesian Regulation amounts to Change in Law in terms of the PPA. There cannot be an estoppel against statute. Any concession made either in court or otherwise on a legal proposition cannot be the basis for adjudicating the matter. (See ***C.M. Arumugam v. S. Rajgopal***[75]***; Group Chimique Tunisien S.A. v. Southern Petrochemicals***

[75] (1976) 1 SCC 863

Industries Corporation Ltd.[76]***; P. Nallambhal v. State***[77]***; M.P. Gopalkrishnan Nair v. State of Kerala***[78] and ***LML Limited v. State of U.P.***[79]*)*.

(h) Intention of the parties must be ascertained from the language they have used, considered in the light of surrounding circumstances and the object of the contract. (See: ***Bank of India & Anr. v. V.K. Mohandas & Ors.***[80]).

[G] Analysis and conclusion of this Tribunal on the issues relating to Change in Law:

171. At the outset, it must be mentioned that in the entire PPA, there is no mention of forei gn law. If the intention of the parties was to consider change in foreign law as Change in Law, nothing prevented the parties from making a categorical

[76] (2006) 5 SCC 275
[77] (1999) 6 SCC 559
[78] (2005) 11 SCC 45
[79] (2008) 3 SCC 128
[80] (2009) 5 SCC 313

averment to that effect in the PPA. The definition of the term "Law" appearing in Article 1.1 of the PPA reads thus:

> ***"`Law'*** *means, in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the Appropriate Commission."*

172. There is sufficient indication in this definition that the words 'in India' qualify the term 'Law' and not the term 'Electricity Laws'. The term 'Electricity Laws' has been defined separately. The said definition reads as under:

> *"`**Electricity Laws'** means, the Electricity Act, 2003 and the rules and regulations made there under from time to time along with amendments thereto and replacements thereof in whole or in part and any other Law pertaining to electricity including regulations framed by the Appropriate Commission."*

173. The term 'Electricity Laws' thus means the said Act and inter alia the rules and regulations made thereunder. Therefore, there is no need to describe Electricity laws as

Electricity laws in force in India. The reference to the words 'laws in force in India' in the definition of the term 'Law' cannot be again to Electricity laws. It is obvious that the term 'Electricity Laws' has been incorporated in the definition of the term 'Law' to clarify that though the term 'Electricity Laws' has been separately defined they will also form part of the term 'Law'.

174. Pertinently, the words "in force in India" incorporated in the definition of the term 'Law' are followed by the words "*and any statute, ordinance, regulation, notification or code, rule or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the Appropriate Commission*". Needless to say that the entire sentence relates to laws in India and not to foreign laws. The definition of the term 'Indian Governmental

Instrumentality' appearing in Article 1.1 of the PPA also strengthens this view. It reads thus:

> "***Indian Governmental Instrumentality***' *means, the Government of India (GoI), the Government of Haryana and any ministry, department, body corporate, Board, agency or other authority of GoI or Government of the State where the Project is located and includes the Appropriate Commission."*

175. It is argued that the definition of the term 'Law' uses the word 'including' and, therefore, it is an inclusive definition and must, therefore, be construed widely. In this connection, our attention was drawn to ***Regional Director, Employees State Insurance Corporation***, wherein Act 44 of 1966 had amended the Employees State Insurance Act, 1948. The Supreme Court was considering the amended definition of the term "seasonal factory" which after describing certain manufacturing processes as seasonal factory used the words "including" and added certain other processes. The Supreme Court considered the Statement of Objects and Reasons of the Bill, which later became Act 44 of 1966 and stated that the amendment was in favour of widening the definition of

seasonal factory and made additions thereto by inclusion. The relevant observations of the Supreme Court could be quoted:

> *"The word "include" in the statutory definition is generally used to enlarge the meaning of the preceding words and it is by way of extension, and not with restriction. The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used, these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import but also those things which the interpretation clause declares that they shall include." (Emphasis supplied).*

176. In ***The South Gujarat Roofing Tiles Manufacturers Association & Anr.,*** the Supreme Court was considering the question of construction of the explanation to entry 22 to Part I of the Schedule to the Minimum Wages Act, 1948. The debate inter alia was whether the Mangalore pattern roofing tiles were covered by the explanation to the said entry. Explanation stated that for the purpose of this entry, potteries industry 'includes' manufacture of the nine articles of pottery named therein. It was contended that since the word 'includes' was used, all kinds of articles of pottery, Mangalore

pattern roofing tiles were covered by this explanation. This contention was rejected by the Supreme Court observing that there could be no inflexible rule that the word 'include' should be read always as a word of extension without reference to the context. The Supreme Court observed that if it had been the legislature's intention to bring within the entry all possible articles of pottery, it was quite unnecessary to add an explanation. The explanation could not possibly have been introduced to extend the meaning of potteries. The Supreme Court further observed that the word 'include' has been used in the sense of 'means'; this is the only construction that the word can bear in the context. In that sense, observed the Supreme Court it is not a word of extension, but limitation.

177. From the above judgments, it is clear that the word 'include' is very generally used to enlarge meaning of words but there is no inflexible rule that the word 'include' should be read always as a word of extension without reference to the context. The intention of the parties will have to be taken into account. Read in the light of the observations of the Supreme

Court, it is not possible for us to hold that in this case, the word 'including' would extend the meaning of 'Law' to include within its ambit foreign laws. The context of the term "Law" does not permit such interpretation. There is not even a slight or an indirect hint at foreign law anywhere in this definition or for that matter in the entire PPA. We are of the opinion that the averments in the PPA do not disclose any intention of the parties to include foreign law within the term 'Law'. We shall advert to the aspect of 'intention' a litter later.

178. At the cost of repetition, we reiterate that the definition of the term 'Law' refers to 'Indian laws'. There is absolutely no scope to insert the term "foreign law" in the said definition. The term 'foreign law' cannot be read even by implication in the definition of the term "Law". What follows the term 'all laws' merely gives a meaning to the term "all laws" or is merely a description thereof. In our opinion, even if this definition is widely construed, it cannot cover within its ambit foreign law because foreign law is nowhere mentioned in the PPA and

cannot be brought in by implication by stretching the term "Law" to absurdity.

179. We shall now go to the term "Change in Law" appearing in Article 13.1.1 of the PPA. It reads thus:

> ***13.1.1 "Change in Law"*** *means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:*
>
> > *(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement;*
>
> > *but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission.*

> *Provided that if Government of India does not extend the income tax holiday for power generation projects under Section 80 IA of the Income Tax Act, upto the Scheduled Commercial Operation Date of the Power Station, such non-extension shall be deemed to be a Change in Law (applicable only in case the Seller envisaging supply from the Project awarded the status of "Mega Power Project" by Government of India."*

180. This definition will have to be read in light of and taking into consideration the interpretation put by us on the term "Law" in the preceding paragraphs. Thus viewed, the term "Law" appearing in Article 13.1.1 means Indian law. Article 13.1.1.(ii) refers to change in interpretation of any law by the Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation. We have already referred to the definition of the term Indian Governmental Instrumentality. The term "Competent Court" has been explained under Article 13.1.2 of the PPA, which reads thus:

*"**13.1.2 "Competent Court**" means:*

> *The Supreme Court or any High Court, or any tribunal or any similar judicial or quasi-judicial body in India that has jurisdiction to adjudicate upon issues relating to the Project."*

Thus, this definition specifically refers to courts or tribunals or any similar judicial or quasi-judicial body in India as competent court. Against this background, it is not possible to hold that consents, approvals or licences referred to in Article 13.1.1 (iii) means consents, approvals or licenses of a foreign country.

181. We may also refer to Article 17.1 of the PPA, which defines the term "Governing Law". It reads thus:

*"**17.1 'Governing Law'**:*

> *This Agreement shall be governed by and construed in accordance with the Laws of India."*

182. It was submitted that the definition of the term 'Law' in the PPA is dependent on the construction of a contract where intention of parties is material. It was argued that PPA is a

commercial contract and, hence, must be construed by adopting common sense approach in such a manner so as to give efficacy to the contract. In ***M/s. D.N. Revri & Co.*** to which our attention was drawn, the Supreme Court was dealing with the interpretation of an arbitration clause in the agreement between Union of India and the respondent supplier. The question which fell for consideration was whether the appointment of the arbitrator was valid. The Supreme Court while holding that there was no vagueness in the arbitration clause stated how a commercial contract should be interpreted. The relevant observations are as under:

> *"A contract is a commercial document between the parties and it must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it. It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other formal documents. The meaning of such a contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow, pedantic and legalistic interpretation."*

183. In ***Satya Jain,*** the Supreme Court referred to the principles of business efficacy while interpreting the contract and observed that this principle is normally invoked to read a term in an agreement or contract so as to achieve the result or the consequence intended by the parties acting as prudent businessmen.

184. We have also been taken through the judgment of the Supreme Court in ***Mohandas***. In that case, the Supreme Court was considering whether the employees of banks who had opted for voluntary retirement under the VRS 2000, are entitled to addition of five years of notional service. While considering how VRS 2000 which was a contractual scheme should be construed, the Supreme Court observed as under:

> ***"28.*** *The true construction of a contract must depend upon the import of the words used and not upon what the parties choose to say afterwards. Nor does subsequent conduct of the parties in the performance of the contract affect the true effect of the clear and unambiguous words used in the contract. The intention of the parties must be ascertained from the language they have used, considered in the light of the surrounding circumstances and the object of the contract. The nature*

and purpose of the contract is an important guide in ascertaining the intention of the parties."

185. From the above judgments, it is clear that the intention of the parties at the time of execution of the PPA is important. It has to be gathered from the import of the words used in the PPA. The intention cannot be gathered from the subsequent conduct of the parties. Commercial contracts must be interpreted in such a manner so as to give efficacy to the contract and a narrow interpretation should not be put on them. A common sense approach needs to be adopted. Applying these principles to the case on hand, we feel that the definitions of the terms 'Law' and 'Change in Law' cannot be said to include foreign law or change in foreign law respectively. The language of the PPAs is clear and admits of no ambiguity. If the intention of the parties was to include foreign law within the ambit of the terms 'Law' or 'Change in Law', they could have incorporated a clear averment to that effect. It is unbelievable and inconceivable that parties at the time of the signing of the PPA desired or intended to include foreign laws within the scope of 'Change in Law' as at that

time they would not know what would be the scope and extent of any such foreign laws. There were no attendant circumstances to indicate that the parties were even considering any such change in foreign laws or possible repercussions thereof. Generators have not been successful in establishing that the conduct of the parties at the time of signing of the contract was such that it disclosed the intention to include foreign law in the term 'Change in Law'. The terms of the PPAs in the instant matters are so clear that even by adopting broad and commonsense approach, it is not possible to hold that the terms 'Law' or 'Change in Law' in the PPAs cover foreign laws.

186. The procurers have relied upon letter dated 12/12/2011 of the Managing Director of CGPL, wherein there is a concession that the term 'Change in Law' only covers Indian laws. It is urged by CGPL that interpretation of the PPA made by the Managing Director on mixed question of law and fact cannot bind CGPL. Since the conclusion which we have drawn that foreign law is not included in the definition of term

'Law' is fully substantiated by the averments of the PPA and other attendant circumstances, it is not necessary to go into this aspect though the procurers are right in contending that the Managing Director of CGPL was of the opinion that 'Change in Law' provision covers only Indian laws.

187. We are not impressed by the submission that Clauses 4.7 and 5.17 of the said Guidelines were amended by the GoI to address the specific issue / concerns which may arise in case of imported coal. If that was so, the amended Guidelines would have specifically mentioned the terms 'foreign laws' or 'change in foreign laws' in the said Guidelines. There is no reference to foreign laws in the amended Guidelines. In any case, the said Guidelines cannot be read independently. They have to be read along with the PPA. If both are read together, it is not possible to come to a conclusion that amendments in the said Guidelines were intended to address the specific issue which may arise in case of imported coal.

188. It was also urged that change in policy would, under certain circumstances, be included in Change in Law. It is not possible to stretch the definition of the term 'Change in Law' to include change in policy. We reject this submission.

189. Interpretation suggested by the counsel for the generators cannot be accepted also for the reason that it would introduce ambiguity, uncertainty and absurdity in the PPA. We concur with the Central Commission that if the change in foreign laws is treated as Change in Law, it would lead to absurdity. That would mean that change in any law of any foreign county could be considered as Change in Law for the purposes of the PPA. Such a situation could never have been contemplated by the parties when the PPAs were drafted. Besides, it would make the contract under the PPA vulnerable. Such interpretation apart from being legally unsustainable would lead to absurdity and must, therefore, be rejected. In the circumstances, we answer the issues as follows:

[H] Answers to Issue Nos.10 and 11 of the Agreed Issues:

190. In view of the above, we hold that Change in Law provided under Article 13 of the PPA or under Clause 4.7 of the said Guidelines issued by the Central Government as per Section 63 of the said Act should not be construed to include laws other than Indian Laws such as the Indonesian Law/Regulations prescribing the benchmark price for export of coal. **Accordingly, we answer Issue No.10 in the negative**. We also hold that in the facts and circumstances of the present case, the increase in price of coal on account of change in National Coal Distribution Policy linked to reduced availability of domestic coal and/or promulgation of Indonesian Regulation do not constitute an event of Change in Law attracting Clause 4.7 of the said Guidelines read with Article 13 of the PPA. **Issue No.11 is accordingly answered in the negative**.

PART – VI

FORCE MAJEURE

XVII. AGREED ISSUES SUBMITTED BY PARTIES ON *FORCE MAJEURE.*

191. We shall now turn to the issues relating to *Force Majeure*. The said issues read as under:

> "12. Whether in the facts and circumstances of the case, the increase in price of coal on account of the intervention by the Indonesian Regulation as also the non-availability/short supply of domestic coal in case of Adani Power constitute a *Force Majeure* Event in terms of the PPA?
>
> 13. Whether the bid for generation and sale of electricity by Adani Power to GUVNL was premised on the availability of coal from GMDC, and to what effect?
>
> 14. Whether the bid for generation and sale of electricity by Adani Power to Haryana Utilities was affected by non-availability of coal from

Mahanadi Coalfields Limited and if so to what extent?

15. Whether the CGPL had FSA for procurement of coal for Mundra Project at a price less than market price and if so to what extent?"

[A] Summary of Central Commission's Order dated 2/4/2013 on *Force Majeure* in Adani Group.

192. By Order dated 2/4/2013 which is challenged in Appeal No.98 of 2014, the Central Commission has rejected Adani Power's claim based on *Force Majeure*. Gist of the Central Commission's observations is as under:

(a) Adani Power's case does not fall either under the Natural *Force Majeure* Events or under Non-Natural *Force Majeure* Events provided under Article 12.3 of the PPA.

(b) The Indonesian Regulation does not prevent Adani Power from buying coal from Indonesia or any other sources. In fact, Adani Power is buying coal from Indonesia at the

spot price for generation of electricity in its Mundra Power Project. It is a well settled principle of law that increase in prices of a commodity does not lead to impossibility of performance under a contract.

(c) The provision of "*Force Majeure*" provided in the PPAs is made for saving the agreement from being frustrated.

(d) The law in relation to "*Force Majeure*" has been explained by the Supreme Court in ***M/s Dhanrajmal Gobindram v. M/s Shamji Kalidas & Co.***[81] and ***Alopi Parshad & Sons Ltd. v. Union of India***[82]***.***

(e) There is no provision in the PPAs to cover the change in procurement of prices as an event of "*Force Majeure*". In Case-1 bids, arrangement of fuel is the responsibility of the seller. Adani Power has quoted the entire energy charges as non-escalable element of tariff and thereby

[81] AIR 1961 SC 1285
[82] AIR 1960 SC 588

eliminating the prospect of being compensated on account of escalation in prices of fuel.

(f) The parties have intended that the rise in fuel cost would not be treated as a "*Force Majeure*" Event and accordingly have not factored rise in fuel cost under "*Force Majeure*".

(g) The parties have never agreed that Adani Power would supply power based on fuel at a fixed price from Indonesia and therefore, change in price of fuel in Indonesia cannot be said to have changed the original situation. Sourcing of fuel from Indonesia as per the rates agreed in the CSA is a decision between Adani Power and AEL, which decision could be said to be affected by "*Force Majeure*" under the CSA and cannot bind the procurers, who are not party to the CSA. The PPAs are also not premised on the basis of the CSA. Therefore, Indonesian Regulation affecting the agreed price under CSA cannot be said to be a "*Force Majeure*" Event under the PPAs with the procurers.

(h) The PPAs do not provide that Adani Power shall supply power by procuring coal from Indonesia under the CSA between Adani Power and the procurers.

(i) The PPAs were not premised on the availability of full coal linkage by GoI or CIL. For Phase III of the Project, Adani Power had submitted the MoUs from Kowa Company and Coal Orbis and a commitment letter from GMDC. All these MoUs did not result in FSA. Adani Power made its application to the Standing Linkage Committee (Long Term), Ministry of Coal for coal linkage for the entire capacity of the project (i.e. 4620 MW) on 28/1/2008 after it had been awarded the LoIs by the procurers. Therefore, the bids were not premised on the coal linkage to be provided by Ministry of Coal under the New Coal Development Policy. In case of GUVNL, Adani Power contracted for the coal by entering into a CSA with AEL on 24/3/2008. Therefore, change in Government policy to allocate 70% of the coal requirement of coastal projects cannot be considered as a "*Force Majeure* Event"

affecting Adani Power. In case of Haryana bid, Adani Power entered into a FSA with AEL on 15/4/2008 for import of coal from Indonesia, even before the issue of letter of assurance by Standing Linkage Committee. Moreover, Adani Power had got the linkage for Phase-IV of the project as per the policy of the Government. Non-availability of full coal linkage cannot be considered as a *Force Majeure* Event. The Indonesian Regulation neither prohibits nor delays Adani Power in performance of its duties under the PPAs. Adani Power is required to pay more for the coal in comparison to the price agreed in the CSA as a result of the Indonesian Regulation, but the said regulation has not rendered the PPAs impossible to perform.

[B] Summary of Central Commission's Order dated 15/4/2013 on *Force Majeure* in CGPL Group.

193. The Central Commission by its order dated 15/4/2013 challenged in Appeal No.97 of 2014 rejected CGPL's contention

based on *Force Majeure*. Gist of the Central Commission's observations is as under:

(a) In the Indonesian Regulation, there is no prohibition on the export of coal from Indonesia or otherwise on the implementation of the FSAs entered into by CGPL with Indonesian supplier of coal. Therefore, neither the said regulation delays nor prevents the performance of the obligation by CGPL under the PPA.

(b) The Indonesian Regulation has the only effect of matching the coal sale price with the prevalent international market prices for export of coal by the Indonesian Companies. CGPL cannot meet the international benchmark price through the tariff because it has an element of 55% non-escalable fuel energy charges on which the escalation index for payment notified by the Central Commission is not applicable.

(c) CGPL did not take reasonable care to quote for escalable energy charges in the bid which would have aligned the bid to market prices. CGPL decided to quote non-escalable fuel charges for 55% of the contracted coal supply.

(d) Article 12.4 of the PPA states that changes in cost of fuel cannot be considered as *Force Majeure* unless it is a consequence of an event of *Force Majeure*. Rise in international price of coal cannot be considered as an event of *Force Majeure*.

(e) Fluctuation in prices is a normal event in free market conditions and cannot be considered as an event of *Force Majeure*. In this connection reliance is placed on ***M/s. Alopi Prasad.***

(f) CGPL and the procurer never intended in the PPA that the tariff to be charged will be dependent on the coal price which CGPL will be required to pay to Indonesian

Coal Supplier under its CSA. In fact the responsibility for arrangement of fuel rests with CGPL only and therefore it cannot be said that any consideration of the terms of the PPA between CGPL and the procurer has changed on account of the promulgation of Indonesian Regulation which changed the bilaterally agreed price to international benchmark price for import of coal.

[C] Submissions of Prayas on *Force Majeure*.

194. We have heard Mr. Ramachandran, learned counsel appearing for Prayas on *Force Majeure* and perused the written submissions tendered by him. The gist of the submissions is as under:

(a) Article 12.3 is unambiguous. It clearly states that a *Force Majeure* Event should prevent or delay the performance of the obligations.

(b) The Indonesian Regulation does not contain any prohibition on the export of coal from Indonesia or otherwise on the implementation of FSAs entered into with the Indonesian Supplier of Coal. The Indonesian Regulation has the only effect of matching or aligning the coal sale price with the prevalent international market prices for export of coal by the Indonesian Company.

(c) There has been a prevention or unavoidable delay caused to the performance of the obligation by the generator. Generators have not been able to show how Indonesian Regulation has prevented or delayed the supply of coal from Indonesia to India.

(d) The fact that the generator is required to pay market prices of the coal cannot be said to be a *Force Majeure* Event or making the contract of PPA impossible to perform under Section 56 of the Contract Act. At the time when bid was submitted by CGPL, the assumption of the price in quoting the energy charges could only be

based on the then prevalent market prices. Admittedly, there was no FSA firmed up at the time of bid and accordingly any future arrangement after the bid could not be assumed to be at a price less than the applicable international market price. Though it was open to the generators to quote escalable energy charges in bid which would have aligned the bid to market prices, CGPL decided to quote non-escalable fuel charges for 55% and Adani Power quoted 100% non-escalable fuel charges.

(e) The reliance placed on Article 12.7 using the word hindered besides prevented and delayed to contend that Indonesian Regulation affecting cost of coal is an event of *Force Majeure* and "hindered" should be read in Article 12.3 is wrong. This overlooks the fact that the word "hindered" denotes the expression partially prevented which is set out in Article 12.3 of the PPA. The expression used in Article 12.3 is "wholly or partly prevents". Article 12.7 does not use wholly or partly but the expression hindered in its place.

(f) Reliance placed on Chitty on Contract to say that the price increase by reason of Indonesian Regulation constitute 'hindered' is erroneous. The quotation relied upon by the generators in fact contains a statement that 'Normally, however, a mere rise in price rendering the contract more expensive to perform will not constitute 'hindrance'.

(g) Reliance on Section 9(2) of the Sale of Goods Act is misplaced. Section 9(2) dealing with the reasonable price would be applicable only if Section 9(1) does not apply. The PPA contains quoted tariff consistent with Section 9(1) of the Sale of Goods Act. Therefore, Section 9(2) of the Sale of Goods Act will have no application.

(h) The increase in price or terms and conditions of an agreement making the performance onerous or difficult cannot be said to be an event bringing it under *Force Majeure* within the meaning of Article 12.3 of the PPA.

Reliance is placed on the judgments of the Supreme Court in ***Alopi Parshad***, ***The Naihati Jute Mills Ltd. v. Khyaliram Jagannath***[83], ***Numaligarh Refinery Ltd. v. Daelim Industries Co. Ltd.***[84], ***Satyabrata Ghose v. Mugneeram Bangur & Co. & Anr.***[85], ***Travancore Devaswom Board v. Thanath International***[86], the judgment of the Court of Appeals in ***Brauer & Co. v. James Clark***[87] and judgment in ***Coastal Andhra Power v. Andhra Pradesh Central Power Distribution Co. Ltd. & Ors.***[88].

(i) To the facts of this case the provisions of Article 12.4 of the PPA which provide for *Force Majeure* exclusions apply. The alleged events of *Force Majeure* claimed by CGPL are only the increase in the cost of fuel. This clearly comes under the exclusion provided in Article 12.4 (a) and (e).

[83] (1968) 1 SCR 821
[84] (2007) 8 SCC 466
[85] (1954) 1 SCR 310
[86] (2004) 13 SCC 44
[87] (1952) 2 All ER 497
[88] Judgment dated 2/7/2012 in OMP No.267 of 2012

(j) The events relating to increase in the price of coal should have been anticipated and was, in fact, anticipated by CGPL and cannot therefore be considered as unprecedented or unanticipated.

(k) The bidding documents including the draft PPA were circulated to the bidders who participated in the bid process. As per the Standard Bidding Documents and also as per the documents circulated to the bidders, the bidders were allowed the option of quoting either the escalable fuel charges or non-escalable fuel charges or even part of the fuel charges as escalable and the remaining to be non-escalable along with capacity charges, freight charges (transportation / handling charges) etc. The bid documents as well as PPA provide a formula for escalation based on Indexes to be notified by the Central Commission from time to time. It was open to the generators to quote the fuel charges entirely escalable, partially escalable or entirely non-escalable

based on its commercial decision to compete with others. The generator has to take the risk and reward of such decision made by it and cannot claim relief if such decision does not go the way it assumed or expected.

(l) The rise in price of coal is excluded from *Force Majeure* unless such rise is on account of an independent identifiable another event of *Force Majeure*.

(m) The contention of the generator that Article 12.4 by use of double negative implies that rise in price of coal could, in certain circumstances, be considered as *Force Majeure* is fallacious.

[D] <u>Submissions of Punjab Utilities on *Force Majeure*.</u>

195. Mr. Anand Ganesan, learned counsel appearing for Punjab Utilities has adopted the submissions of Mr. Ramachandran. His submissions are almost similar to the submissions of Mr. Ramachandran.

[E] Submissions of Adani Power on *Force Majeure*.

196. We have heard Mr. Harish Salve, learned senior counsel appearing for Adani Power with Mr. Amit Kapur, learned counsel on the point of *Force Majeure*. We have perused the written submissions tendered by them. The gist of the submissions is as under:

(a) Article 12 of the PPA specifically recognises the increase in price fuel, as a *Force Majeure* Event, if it is as a result of an event which is beyond the control of parties. Therefore, the PPA not only recognises physical impossibility but also commercial impracticability as preventing/ hindering its performance.

(b) A conjoint reading of Articles 12.3 and 12.4 demonstrates that the extent of Article 12 is not only restricted to physical prevention (impossibility) but it is broad enough to encompass hindrance and commercial impracticability (rise in price of fuel). In contradistinction, Section 56 of

the Indian Contract Act provides that the contract shall become void when performance of an act under the contract becomes impossible or unlawful. In other words, *Force Majeure* provision under the PPA is triggered when an event prevents or unavoidably delays or hinders the performance of the contract whereas Section 56 is triggered only when the performance has become impossible or illegal. Article 12 is a mechanism built within the PPA to deal with the current situation faced by the parties, to save the PPA from being frustrated in terms of Section 56 of the Indian Contract Act and restitute the parties to the same economic condition prevalent before the occurrence of such event.

(c) The definition of *Force Majeure* is not exhaustive but inclusive.

(d) Due to non-availability/shortage of domestic coal and increase in price of Indonesian coal due to promulgation of Indonesian Regulation, Adani Power could not procure

coal at the contracted price and was forced to procure coal at the prevailing market price which was significantly higher than the contracted price. This altered/ wiped out the premise on which the bids were submitted by Adani Power. Therefore, this non-availability of domestic coal and the increase in price of imported coal due to Indonesian Regulation is a *Force Majeure* Event.

(e) Adani Power premised its bid for supply of electricity - (a) in case of Haryana, on 70% domestic coal and 30% imported coal. However, due to shortage of domestic coal, Adani Power is constrained to supply electricity by procuring 58% imported coal and (b) in case of Gujarat, on the basis of domestic coal to be supplied by GMDC. However, due to non-supply of domestic coal by GMDC, Adani Power is constrained to supply electricity by procuring 100% imported coal.

(f) Non-availability / short supply of domestic coal and promulgation of Indonesian Regulation resulting into import of coal at benchmark price is an event which has clearly hindered the performance of the PPA.

(g) Increase in cost of generation of electricity has made it impossible for Adani Power to fulfill its obligation of supplying power for 25 years under the PPA.

(h) The law in Indonesia allowed negotiation of price since 1967. This was suddenly changed. Adani Power took reasonable care to assess the situation in Indonesia before executing contracts with Indonesian mining companies. The sudden event of promulgation of Indonesian Regulation was beyond the reasonable contemplation of Adani Power. Adani Power could not have foreseen the change in law.

(i) The 'Affected Party' as defined under Article 12.2 of the PPA means any person whose performance is affected

under the PPA. Therefore, Adani Power qualifies as an Affected Party since its performance under the PPA is affected by an event of '*Force Majeure*'.

(j) The provisions of the PPA have to be given a holistic interpretation and read in the context of the scheme of the said Act to balance the interest of all stakeholders, including the procurers, generating companies and the consumers.

(k) The provisions of the PPA are not watertight compartments wherein no flexibility can be exercised by the Regulatory Commission while interpreting the provisions. A Regulatory Commission can pass orders, which prevent the sector from suffering due to possible shortage of electricity while balancing the interest of stakeholders and preventing the assets from becoming stranded.

(l) The promulgation of Indonesian Regulation is an event that is preventing / hindering Adani Power in supplying electricity to the procurers in terms of the tariff quoted under the PPA. It is not within the reasonable control of Adani Power either directly or indirectly and could not have been avoided by Adani Power even if it had taken reasonable care or complied with Prudent Utility Practices.

(m) Article 12.4 of the PPA provides that *Force Majeure* shall not include changes in cost of fuel and/or the agreement becoming onerous unless they are consequence of an event of *Force Majeure*. Article 12.4 is a double negative clause, which provides for *Force Majeure* Exclusions. In other words, if the price of fuel has changed and/or the agreement becomes onerous, due to a *Force Majeure* Event then the Affected Party can claim *Force Majeure* for such event.

(n) On a plain reading of Article 12.3 and Article 12.4 of the PPA shows that the parties did not intend to exclude change in the cost of fuel and/or the agreement becoming onerous from the purview of *Force Majeure*. It is not mere change in price of fuel due to usual market conditions but a change in price of fuel due to consequential unforeseen and unavoidable event being the promulgation Indonesian Regulation, which is a *Force Majeure* Event.

(o) The definition of "Project documents", as provided under the PPA, includes "FSA". Article 3.1.2(v) read with Article 3.3.3 of the PPA makes it clear that fuel procurement/ supply is subject to events of *Force Majeure*.

(p) The definition of *Force Majeure* cannot be restricted to few examples set out in Article 12.3 of the PPA when the intention of the parties is to save the performing party from the consequence of anything over which he has no control. In this context, reliance is placed on the

judgment of Supreme Court in ***Dhanrajamal Gobindram.***

(q) Non-availability/shortage of domestic coal along with promulgation of Indonesian Regulation has resulted in (a) Adani Power paying exorbitantly high cost for import of coal from Indonesia resulting in unsustainable losses; (b) made it commercially impracticable for Adani Power to secure coal at agreed contracted rate either from Indonesia or from any other sources; (c) wiping out the premise on which Adani Power had quoted its bids; (d) made it impracticable and financially impossible for Adani Power to perform its obligations under the PPA on long term basis and (e) Adani Power to align its coal supply agreements to the Indonesian Regulation failing which punitive consequences and sanctions including suspension and revocation of mining permit are envisaged under the Indonesian Regulation.

(r) The Central Commission erred in holding that increase in price of commodity does not lead to impossibility of performance under a contract. It is a settled position of law that impossibility in performance of a contract is not restricted to physical impossibility.

(s) The Central Commission erred in holding that there is no provision under the PPA to cover the change in procurement of price as an event of '*Force Majeure'*. The said finding is erroneous. It is well settled position of law that if there is an abnormal rise in price of material it may frustrate the contract.

(t) Article 12.4 makes it clear that if price of fuel has changed and/or the agreement becomes onerous due to a *Force Majeure* Event then Affected Party can claim *Force Majeure* for that event. In other words, 'change in cost of fuel' and/or 'the agreement becoming onerous' is contemplated as a *Force Majeure* Event.

(u) The Central Commission decided to grant the compensatory tariff to Adani Power in the impugned order due to the impact of the Indonesian Regulation, which was beyond the control of the parties. The acknowledgment of hardship and evolving mechanism in itself suggests that there is an occurrence of an event of *Force Majeure*. The occurrence of event is acknowledged by the Government of Gujarat in their GR dated 3/5/2013.

(v) As per Article 12.7 of the PPA, the relief available to a party in case of a *Force Majeure* Event was not limited to those specified under Article 4.5 of the PPA pertaining to extension of time since the relief stipulated under Article 12.7 was an inclusive one.

(w) The Central Commission wrongly held that the parties never agreed that Adani Power would supply power on fuel at a fixed price from Indonesia and therefore, change in price of fuel in Indonesia cannot be said to have

changed the original situation. The said observation is erroneous. The FSA forms an integral part of the PPAs. One of the mandatory conditions subsequent contained in Article 3.1.1 (iv) requires to be fulfilled by seller is that seller shall have executed FSA and provided the copies of the same to the procurer. Therefore, FSA entered into by Adani Power, copies of which were served on the procurer, becomes integral part of the PPAs. This submission is without prejudice to Adani Power's stand that PPAs dated 02/02/2007 stands terminated in view of non-fulfillment of condition subsequent as GMDC failed to execute FSA.

(x) The Central Commission erred in holding that the PPAs are not premised on availability of full coal linkage from CIL. The said finding is contrary to the facts that (a) in case of Gujarat, Adani Power submitted the bid on the basis of commitment letter from GMDC. Failure of execution of FSA by GMDC qualifies to be a '*Force Majeure'* which led to supply of power to Gujarat by using

Indonesian coal and (b) in case of Haryana, Adani Power submitted the bid on the basis of domestic coal along with imported coal (70:30) to achieve higher PLF. Although the New Coal Distribution Policy provided for 100% coal linkage to power plants, Adani power legitimately expected only 70% of coal linkage. However, in view of acute shortage in coal availability the assured coal supply from CIL has reduced drastically contrary to what has been assured in New Coal Distribution Policy. These changes in domestic policies have been appreciated by the Central Government – CCEA on 21/06/2013 and Ministry of Power on 31/07/2013 have allowed the cost of imported coal to be a pass through. With regard to 30% of the imported coal, the promulgation of Indonesian Regulation has affected the viability by increasing the cost of generation. Promulgation of Indonesian Regulation is a *Force Majeure* as it is a sovereign act of the Indonesian Government and beyond the control of Adani Power.

(y) For effective implementation of business contracts, it has to be interpreted in a way to achieve the result intended by a prudent businessman. Adani Power never expected that the law in Indonesia which existed since 1967 will change. In this regard, reliance is placed on the judgment of Supreme Court in ***Satya Jain*.**

(z) As observed by the Central Commission the subsequent events were beyond the contemplation of the parties and impact of such subsequent events have rendered the PPA unworkable. In this regard, reliance is placed on the judgments of the Supreme Court in ***Satyabrata Ghose v. Mugneeram Bangur & Co. and Anr.***[89] and ***Tarapore & Co. v. Cochin Shipyard Ltd.*[90].**

(aa) In the present case risk sharing on account of certain adverse events was contemplated in the *Force Majeure* clause – one such area of risk sharing was in relation to the availability of raw material. The *Force Majeure* Event

[89] AIR 1954 SC 44
[90] (1984) 2 SCC 680

is non-availability of GMDC coal and the promulgation of Indonesian Regulation, which have consequently resulted into unavailability of fuel on the economic basis on which the contract was signed. Supply under PPA was predicated on the fact that coal would be sourced from negotiated contracts in Indonesia or from mines in India. It is not mere change in price of fuel due to market conditions but the unavailability of fuel on commercial terms from the sources from which it was to be sourced is the *Force Majeure* Event.

(bb) The doctrine of frustration enshrined under Section 56 of the Contract Act, 1872 comes into play only when the contract does not provide for a remedy when the same becomes commercially impracticable. However, in the present case, Articles 12 and 13 of the PPA read with the statutory framework take care of such situations when the PPA becomes commercially impracticable and provide for continued operation of the PPA by ensuring compensation and restitution to the Affected Party.

(cc) In view of the above, the compensatory tariff granted to Adani Power under Section 79 read with Section 61 of the said Act could also have been granted by the Central Commission under the contractual framework in terms of Article 12 (*Force Majeure*) and 13 (Change in Law) of the PPA read with the Competitive Bidding Guidelines.

[F] Submissions of CGPL on *Force Majeure*.

197. We have also heard Mr. C.S. Vaidyanathan, learned senior counsel appearing for CGPL on *Force Majeure*. His legal submissions are almost similar to the submissions of Mr. Harish Salve. However, Mr. Vaidyanathan has also argued on the facts of the case and submitted written submissions. The gist of the submissions is as under:

(a) A holistic reading of Article 12 (more particularly Articles 12.3, 12.4 read with 12.7) of the PPA makes it clear that any event which prevents, hinders or delays performance

of obligations of the PPA is a *Force Majeure* Event. Promulgation of Indonesian Regulation resulting into import of coal at international benchmark price is an event which has clearly hindered the performance of the PPA. CGPL is not in a position now to procure coal at a negotiated rate (i.e., price lower than the market price, as was agreed by CGPL with Indonesian mining companies) as it could before the promulgation of Indonesian Regulation. Therefore, it may be possible but commercially impracticable for CGPL to source coal from Indonesia at the contracted rate. This increase in cost of generation of electricity has made it impossible for CGPL to fulfil its obligation of supplying power for 25 years under the PPA.

(b) The law in Indonesia allowed negotiation of price since 1967 and law which existed for a period of 40 years was changed by the Sovereign. CGPL took reasonable care to assess the situation in Indonesia before executing contracts with Indonesian mining companies. The

sudden event of promulgation of Indonesian Regulation was beyond the reasonable contemplation or control of the parties/CGPL.

(c) Thereafter, to mitigate the impact of promulgation of Indonesian Regulation, on 04/11/2011, CGPL informed GUVNL (as Lead Procurer) and MoP, GoI regarding the issue of escalation in price of imported coal due to the promulgation of Indonesian Regulation, which was well beyond any developer's reasonable control or expectations, requesting MoP to intervene.

(d) CGPL also approached the Indonesian Government and was told that no exception was likely in implementing the Indonesian Regulation.

(e) CGPL qualifies as an Affected Party since its performance under the PPA is affected by an event of '*Force Majeure*' being the promulgation of Indonesian Regulation coupled

with unprecedented and unforeseen price rise of imported coal.

(f) The PPA executed between CGPL and the procurers was predicated upon the imported coal. The definition of Project Documents, as provided under the PPA, includes "FSA". Article 3.1.2(v) read with Article 3.3.3 of the PPA makes it clear that fuel procurement/ supply is subject to events of *Force Majeure*.

[G] Facts surrounding PPA dated 2/2/2007 with GUVNL.

198. In order to examine whether *Force Majeure* Event has occurred, it is necessary to revisit the facts. Let us first see the relevant facts surrounding the PPA dated 2/2/2007 executed by Adani Power with GUVNL for supply of 1000 MW of power.

199. On 1/2/2006, GUVNL issued RfQ for Bid No.2 for supply of 1000 to 2000 MW. On 13/3/2006, Gujarat Commission approved the bidding documents.

200. On 24/11/2006, GUVNL issued RfP for Bid No.2 to the qualified bidders. In accordance with Clause 3.1.3 of the RfP for Bid No.2, the seller was required to assume full responsibility to tie up the fuel linkage to set up the infrastructure requirement for fuel transport and its storage. Clause 4.1.1 of the said RfQ reads as under:

> *"4.1.1*
>
> *(9) Proof of Fuel Arrangement – Bidder needs to indicate the progress/proof of fuel arrangement through submission of copies one or more of the following-*
>
> *(a) Linkage letter from Fuel Supplier,*
>
> *(b) Fuel Supply Agreement between Bidder and Fuel Supplier*

(c) Coal Block Allocation Letter/In Principle Approval for Allocation of Captive Block from Ministry of Coal,

(d) Other details submitted by Bidder subject to acceptance by GUVNL as sufficient proof for demonstration of ability."

201. In January, 2007, Adani Consortium (AEL - 95% and Vishal Exports 5%) submitted its bid for supply of power to GUVNL under Bid No.2. Adani Power submitted its bid to supply 1000 MW at levelised tariff of Rs. 2.35 per Unit. Relevant portion of the bid is as under:

"A brief summary of the project is given below:

• *Project Size:*	*1200 MW (2 units of 600 MW)*
• *Location:*	*The proposed site of the project is located near Korba town at a distance of around 60 Kms. The nearest broad gauge railway station at a distance of 45 Kms from the site. The nearest Airport of Raipur is at 150 Kms from the Project site.*
• *Technical Features:*	*The proposed power poject of 1200 MW consists of 2 units of 600 MW capacity. The primary*

	fuel shall be Indigenous coal/Washed Coal/Blended coal.
• *Fuel*	*We propose to use either indigenous coal, or Washed Coal or blended coal of imported coal and indigenous coal depending on techno-economic feasibility.* *The technical specification of indigenous coal supply committed by GMDC are as under:* • *GCV : 3500 - 4000 Keal/Kg.* • *Ash% : 38-42%* • *T< % : 8-10%* • *Sulpher Content : 0.2-0.3%* *The technical specification of imported coal supply committed by M/s. Coal Orbis Trading GMBH and M/s. Kowa Trading Ltd. are as under:* • *GCV : 5800 – 6000 Keal/Kg.* • *Ash % : 5% - 10%* • *TM % : 21 – 28%* • *Sulpher Content : Less than 1%*

Clause 1.2 of the details of the proposed project reads thus:

"1.2 Fuel:

The lead member, Adani Enterprises Ltd. has tied up the indigenous coal requirement of the Project with GMDC, who has been allocated Morga II coal block in the State of Chhatisgarh. Further with a view to ensure supply of fuel with optimum techno-commercial parameters, we have also tied up supply of imported coal with M/s Coal Orbis Trading GMBH, Germany and M/s Kowa Company Ltd. and accordingly executed separate MoUs with them dated 9th Sept 2006 respectively."

It was also indicated that alternatively, Adani Power was evaluating Mundra as an alternate project site with blended / imported / washed coal, however, the quoted tariff inclusive of transmission charges, losses and all other costs will remain the same.

Proof of fuel arrangement was indicated by enclosing a copy of the letter dated 14/11/2006 of GMDC confirming to supply indigenous coal from Morga II coal block and MoUs executed by AEL with M/s. Coal Orbis Trading GMBH and M/s. Kowa Trading Ltd. dated 9/9/2006 and 21/12/2006 respectively for supply of imported coal. Relevant portion of

the letter dated 14/11/2006 sent by GMDC to Adani Power reads as under:

> *"Please refer to your letter dated 10th October, 2006 regarding Fuel Supply Agreement (FSA) for your proposed Pithead Mega Power Plant at Morga, Chhattisgarh.*
>
> *Subject to execution of a detailed take or pay agreement, we agree to supply you adequate quantity of coal for your pithead power project of 1000 MW from the Morga II Coal block allotted to us.*
>
> *We expect to finalise the FSA with you within the next two months."*

202. On 11/1/2007, GUVNL awarded the LoI to Adani Power for supply of 1000 MW power (under Bid No.2) at the levelised tariff of Rs. 2.35 per Unit. On 13/1/2007, Adani Power accepted the LoI and agreed to sign the PPA with the GUVNL.

203. On 2/2/2007, the PPA was executed between Adani Power and GUVNL for supply of 1000 MW of power.

204. Initially it was agreed that Adani Power would supply power from the power project which was being set up at Korba in Chhattisgarh State. It made a proposal to GUVNL by its letters dated 12/2/2007 and 20/2/2007 to supply power from its Mundra Power Project.

205. On 18/4/2007, supplementary PPA was entered into between GUVNL and Adani Power for supply of 1000 MW from Mundra Power project instead of Chhattisgarh.

206. On 20/12/2007, Gujarat Commission adopted the tariff under Section 63 of the said Act and also approved the PPA under clause (b) of sub-section (1) of Section 86 of the said Act.

207. Adani Power's MoU dated 21/12/2006 with the Kowa Company Ltd. of Japan was terminated on 5/2/2008 and its MoU dated 9/9/2006 with Coal Orbis Trading GMBH of Germany was terminated on 18/3/2008.

208. On 24/3/2008, Adani Power executed CSA with AEL for supply of imported coal for Mundra Phase III power project for 15 years. This is evident from the Directors' Report and Annual Report as well as Prospectus submitted by Adani Power to SEBI on 5/8/2009.

209. On 27/3/2008, Financial Closure for Unit Nos. 5 and 6 (i.e. 2x660 MW) of Mundra power plant was achieved by Adani Power.

210. On 28/12/2009, Adani Power terminated PPA dated 02/02/2007 owing to non-fulfilment of condition subsequent of execution of FSA. The said termination notice was challenged by GUVNL in Petition No. 1000 of 2009 filed before the Gujarat Commission. By Order dated 31/08/2010, the Gujarat Commission disposed of the said petition holding that the termination of the PPAs was invalid. Appeal No.184 of 2010 was filed by Adani Power challenging the said judgment before this Tribunal which was dismissed by this Tribunal on 07/09/2011. We have already noted that Civil Appeal

No.11133 of 2011 filed by Adani Power against the said judgment dated 07/09/2011 is pending before the Supreme Court. However, the Supreme Court has not stayed the impugned judgment.

211. On 23/09/2010, Minister of Energy and Mineral Resources, Republic of Indonesia promulgated "Regulation of Ministry of Energy and Mineral Resources No.17 of 2010". Article 2 of the Indonesian Regulation provides that the holders of the mining permits and special mining permits for production and operation of mineral and coal mines shall be obliged to sell the minerals and coals by referring to the benchmark price either for domestic sales or exports, including to its affiliated business entities. As per Article 11 of the Indonesian Regulation, the Director General on behalf of the Minister shall set a benchmark price of coal on monthly basis based on a formula that refers to the average price index of coal in accordance with the market mechanism and/or in accordance with the prices generally accepted in the

international market. The Indonesian Regulation recognizes direct sale contract (spot) and term sale contract (long term) which have been signed by the holders of mining permits and special mining permits and further provides that the existing direct sale contracts and term sales contracts shall adjust to the regulation within a period not later than 6 months and 12 months respectively. In case, of violation, the holders of mining permits and special mining permits are liable for administrative sanction in the form of written warning, temporary suspension of sales or revocation of mining operations permits.

212. On 25/7/2011, Adani Power informed GUVNL about the existence of *Force Majeure* Events and requested for adjustment of tariff to get the power supply under the PPA. On 15/9/2011, GUVNL replied to Adani Power stating that it is not possible for GUVNL to agree for any change in the issue and any adjustment/review of tariff on account of increase in cost of imported coal as it is within the exclusive jurisdiction of the Gujarat Commission.

213. On 2/2/2012, Adani Power achieved SCOD and started supplying power to GUVNL.

214. On 6/2/2012, Adani Power issued a communication to GUVNL stating that it is in the process of approaching the Appropriate Authority for seeking suitable adjustment in tariff and the present supply to GUVNL is being commenced strictly with the condition that whenever the revised tariff is finalized the same shall be applicable with a retrospective effect.

[H] Facts surrounding PPAs dated 7/8/2008 with Haryana Utilities.

215. Let us now examine facts surrounding execution of PPAs dated 7/8/2008 entered into by Adani Power with Haryana Utilities for supply of 1424 MW of power from Mundra Power Plant.

216. On 25/5/2006, Haryana Utilities, who had been authorised to carry out competitive bidding process issued RfQ

for procuring 2000 MW power on long term basis on behalf of Haryana Utilities. In Clause 2.1.5 thereof, it was mentioned that the "*bidder shall submit a comfort letter from a fuel supplier for fuel linkage or enter a PPA at the time of submission of proposal in response to the RfP.*"

217. On 4/6/2007, on behalf of Haryana Utilities, HPPCL issued RfP to the bidding companies, who had been qualified on the basis of their responses to RfQ. It is necessary to quote the relevant extract of the said RfP.

> *"2.1.5 All Bidders are required to submit copies of one or more of the following-*
>
> *(a) Linkage letter from the fuel supplier; or*
>
> *(b) Fuel Supply Agreement between Bidder and Fuel Supplier; or*
>
> *(c) Coal Block Allocation letter/In principle approval for allocation of captive block from Ministry of Coal; or*

(d) Other details submitted by Bidders subject to acceptance by the Procurer as sufficient proof for demonstration of ability.

The above proof of fuel arrangement is not required in case the fuel to be used by the Bidder is imported fuel.

2.1.5 A The Successful Bidder is required to show a firm fuel supply agreement/ linkage by the time limit specified for fulfillment of Conditions Subsequent as mentioned in the PPA."

218. On 18/10/2007, the Ministry of Coal issued the New Coal Distribution Policy. Clause 2.2 of the said policy reads as under:

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

219. On 24/11/2007, Adani Power submitted its bid offering a total contacted capacity 1425 MW from Mundra Power Plant at levelised tariff of Rs. 2.94 per Unit. Adani Power did not opt for any escalation on the tariff for 25 years period either in the capacity charges or in the variable / energy charges. The bid of Adani Power was based on blend of domestic and imported coal in the ratio of 70:30. In Format 4, Adani Power indicated the representative fuel as coal and the fuel type as "imported/indigenous coal". In support of fuel linkage, Adani Power submitted copies of the MoUs dated 9/9/2006 and 21/12/2006 between AEL and M/s. Coal Orbis Trading GMBH of Germany and Kowa Company Limited of Japan respectively.

220. On 28/1/2008, a letter was addressed by Adani Power to the Ministry of Coal, GoI requesting for the allocation of long term linkage of coal.

221. After termination of AEL's MoUs with Kowa Company Limited of Japan and Coal Orbis Trading GMBH of Germany,

on 15/4/2008, Adani Power executed FSA with AEL, which has back-to-back arrangement with the mining companies in Indonesia for supply of imported coal.

222. Adani Power was declared as successful bidder and on 17/7/2008, a LoI was issued by Haryana Utilities to Adani Power for procurement of 413 MW.

223. On 1/8/2008, LoI was issued by Haryana Utilities to Adani Power for procurement of 1011 MW.

224. On 7/8/2008, Adani Power entered into PPAs with Haryana Utilities for supply of contracted capacity of 712 MW each. Adani Power was at that time to receive 70% indigenous domesic coal supply from Mahanadi Coalfields Limited (a subsidiary of CIL) and balance 30% was to be imported coal for which on 15/4/2008, Adani Power had tied up with AEL.

225. On 12/11/2008, a meeting of the Standing Linkage Committee (Long Term) ["**SLC (LT)**"] for Power was held. The

minutes of the said meeting indicate that it was recommended in the meeting that the projects considered as 'coastal projects' will have an import component of 30% for which developer has to tie up sources directly. Letter of Assurance will be issued for 70% of the recommended capacity only. The SLC (LT) recommended Letter of Assurance by CIL for capacity of 1366 MW (70% of installed capacity of 1980 MW) in accordance with New Coal Distribution Policy.

226. On 24/6/2009, Financial Closure was achieved by Adani Power for unit No. 7 to 9 (i.e. 3x660 MW) of Mundra power plant.

227. Mahanadi Coalfields Ltd. issued Letter of Assurance dated 25/06/2009 for supply of 6.409 Million Tonnes of coal per annum to Adani Power which is equivalent to 70% of the required capacity. The said restriction of 70% capacity for domestic source of CIL is a result of SLC (LT) dated 12/11/2008.

228. On 23/09/2009, Adani Power sent Progress Report to HPPC as required under the PPA stating that finalization of FSA (Clause 3.1.2(iv)) was under process and Letter of Assurance was received from Mahanadi Coalfields Ltd. for supply of indigenous coal (70% coal of coal requirement) and for balance, it proposed to use imported coal from AEL's mines in Indonesia. As per Schedule VII of the CSA, supply of coal under CSA from domestic sources is not likely to exceed 80% of ACQ and balance 20% shall be sourced through import subject to confirmation by Adani Power either to accept the supply through import or to surrender the required ACQ. Adani Power has exercised its option to accept 20% of ACQ through import.

229. On 15/2/2010, Adani Power sent further Progress Report to HPPC reiterating that finalization of FSA was under process and Letter of Assurance was received from Mahanadi Coalfields Ltd. for supply of indigenous coal (70% coal of coal requirement) and for balance, it was proposed to use imported coal from AEL's mines in Indonesia.

230. On 9/3/2010, Adani Power sent further Progress Report to HPPC informing that the Letter of Assurance was received for 70% coal from Mahanadi Coalfields Ltd. Balance quantity to be procured from AEL's mines in Indonesia.

231. On 26/7/2010, AEL entered into a consolidated CSA with Adani Power which replaced the CSA dated 8/12/2006 (for Phase-I and II), CSA dated 24/3/2008 (for Phase-III) and CSA dated 15/4/2008 (for Phase-IV). The consolidated CSA provided for supply of 10 MMT of coal per annum at CIF USD 36/MT for a period of 15 years from the scheduled COD of last unit of Phase IV of the project.

232. As stated earlier, on 23/9/2010, the Indonesian Regulation was promulgated. It is not necessary to enter the details of the Indonesian Regulation as the nature of the Indonesian Regulation has been already discussed.

233. Units 7, 8 and 9 of the Mundra Power Plant were commissioned on 7/11/2011, 3/3/2012 and 9/3/2012 respectively.

234. By letter dated 25/5/2012, Adani Power communicated to HPCC that with respect to PPAs dated 07/08/2008 entered into with Haryana Utilities there was *Force Majeure* Event, Change in Law and frustration of operation of PPAs. Adani Power stated its difficulties in procuring coal required for generation of power and reason as to how the tariff revision is urgently required to cover the increased cost of generation.

235. On 2/6/2012, Mahanadi Coalfields Limited addressed a letter to Adani Power. The relevant paragraphs of the said letter read as under:

> *"While issuing the LOA it was made clear that there was a negative coal balance position arising out of demand commitments being far in excess of the coal availability from domestic sources of the coal companies of CIL. Details of such availability were made available in the websites of respective coal company for information of the concerned.*

Clause 4.3 of the FSA provides that in view of such deficit coal position, the Seller shall have the option to supply from the balance quantity of coal through import, at its sole discretion, after meeting the quantity available from domestic production. It may be noted that as per present availability of coal, supply of coal under FSA from domestic sources is not likely to exceed 80% of Annual Contracted Quantity which is subject to review every year for any revision that may be necessary."

In order to enable Mahanadi Coalfields Limited to make firm arrangement for sourcing coal through import, Adani Power was required to opt for either Option-A i.e. Confirmation for acceptance of coal through import or Option-B i.e. Confirmation for surrender of coal through import.

236. On 9/6/2012, CSA was executed between Mahanadi Coalfields Limited and Adani Power. The annual contracted capacity agreed to be supplied to Adani Power was 6.405 MTPA from Mahanadi Coalfields and/or through import. The coal linkage granted was 70% of 1980 MW total installed capacity. According to Adani Power, as per the provisions of the FSA, the take/pay commitment is pegged at 80% of annual contracted capacity. According to Adani Power, under the

FSA, it is getting domestic coal only 42% of its requirement. For rest 58%, Adani Power is procuring Indonesian coal. However, the percentage of availability of domestic coal is disputed by Prayas and other procurers.

237. On 05/07/2012, Adani Power filed a petition being Petition No.155/MP/2012 under Section sections 79(1)(b) and (f) of the said Act. We have already quoted the prayers made by Adani Power in the said petition.

[I] Facts surrounding CGPL's PPA dated 22/4/2007 with procurers of Gujarat, Maharashtra, Punjab, Haryana and Rajasthan.

238. We shall now go to the case of CGPL and facts surrounding PPA dated 22/4/2007. CGPL which was a subsidiary of Power Finance Corporation Limited, a Government of India Undertaking, was issued RfQ on 31/3/2006 for Tariff Based Bidding Process for Procurement of Power on Long Term Basis from Power Station to be set up at Mundra District Kutch, Gujarat based on imported coal for

supply of 4000 MW of power to the procurers (namely, Haryana Procurers, GUVNL, Maha Discom, Rajasthan Procurers, and PSPCL) for 25 years.

239. RfP was issued for Tariff Based Competitive Bidding for Procurement of Power on Long Term Basis from Power Station at Mundra, District Kutch, Gujarat based on imported coal.

240. On 7/12/2006, bids were submitted by the qualified bidders, including Tata Power. Tata Power's Bid comprised 45% escalable fuel energy charge and 55% non-escalable fuel energy charge. Upon evaluation, Tata Power was identified as the successful bidder with an equivalent levelised tariff of Rs. 2.26367/kWH.

241. On 28/12/2006, LoI was issued to Tata Power. On 30/3/2007, Tata Power entered into a CSA with IndoCoal Resources (Cayman) Ltd. ('IndoCoal'), whereby IndoCoal agreed to sell and deliver and provide to Tata Power a total of

approximately 10.11 MMTPA + 20% (upto 12.132 MMTPA) of coal from mines/ suppliers in Indonesia, for its three electricity generating facilities, namely, Trombay (0.75 MMT), Mundra (5.85 MMT) and Coastal Maharashtra (3.51 MMT).

242. On 22/4/2007, Tata Power, being the successful bidder, acquired 100% equity of CGPL. As per bid documents, on 22/4/2007, PPA was entered into by CGPL with procurers across five states (Gujarat 47.5%, Maharashtra 20%, Punjab 12.5%, Haryana 10% and Rajasthan 10%). Articles 3.1.2(v) and 3.3.3 of the PPA required CGPL to execute a FSA and provide copies of the same to the procurers by 22/04/2008 (12 months from the effective date), unless such completion is affected by any *Force Majeure* Event. One of the conditions subsequent [Article 3.1.2(v)] to be fulfilled as per the PPA was for the Seller (i.e., CGPL) to execute FSA and provide copies of the same to the procurers.

243. On 27/6/2007, Tata Power acquired 30% equity stake in IndoCoal, KPC (Indonesia) and Arutmin (Indonesia), holders of mining licensees in Indonesia.

244. On 19/9/2007, the Central Commission allowed CGPL's Petition No.18 of 2007 for adoption of tariff for supply of electricity from the Mundra Ultra Mega Power Project of Coastal Gujarat Power Limited under Section 63 of the said Act.

245. On 24/4/2008, Financial Closure was achieved by CGPL as it signed financing agreements for the entire debt requirement of Mundra UMPP.

246. On 5/5/2008, Communication was issued by CGPL to GUVNL intimating the revised scheduled COD as per Article 3.1.2 of the PPA: (i) Unit 1: September 2011 (ii) Unit 2: March 2012 (iii) Unit 3: July 2012 (iv) Unit 4: November 2012 (v) Unit 5: March 2013.

247. On 9/9/2008, CGPL entered into an agreement with Tata Power (its parent company) for balance coal requirement of approximately 6.15 MMTPA (above the Tied IndoCoal Requirement of 5.85 MTA + 20%) to meet the total coal requirement of 12 MMTPA under the PPA.

248. On 31/10/2008, Tata Power's umbrella CSA with IndoCoal was substituted by individual project specific CSA.

1. IndoCoal and CGPL contracted for supply of 5.85 MMTPA + 20% coal (i.e., upto 7.02 MMTPA 'Tied In Coal Requirement') at the following Coal Price (Clause 12):-

   (a) 55% of the contracted quantity, (3.28 to 3.862 MMTPA) @ USD 32 per tonne with an annual escalation of 2.5% after one year of commissioning of Unit-1 at Mundra.

   (b) 45% of the contracted quantity (2.63 to 3.159 MMTPA) @ USD 34.15 per tonne escalating per month or pro rata for part

of the month as per CERC Escalation Rate).

Schedules 1 and 3 confirm that the coal would be supplied from mines in Indonesia.

2. Tata Power entered into a CSA with IndoCoal for the supply of approximately 3.51 MMTPA + 20% (upto 4.212 MMTPA) coal in connection with the Coastal Facility from mines in Indonesia meant for coastal Maharashtra.

249. On 18/12/2008, CGPL informed GUVNL about satisfaction of Conditions Subsequent by CGPL pursuant to Article 3.1.2 of the PPA, including the agreement for supply of 5.85 MMTA with IndoCoal.

250. As already stated on 23/09/2010, the Indonesian Regulation was promulgated. On 28/3/2011, "Assignment and Restatement Agreement" was executed for assigning the

CSA dated 31/10/2008 for supply by IndoCoal of 3.51 MMTPA + 20% (upto 4.212 MMTPA) of coal from Tata Power to CGPL.

251. It is the case of the CGPL that despite the commercial impracticalities, CGPL made best efforts to honour its commitment under the PPA. Consequently, CGPL commissioned all its Units as under:-

> "(a) Unit-1 : 07.03.2012; (b) Unit-2 : 30.07.2012; (c) Unit-3 : 27.10.2012; (d) Unit-4 : 21.01.2013; (e) Unit-5 : 22.03.2013."

252. On 25/5/2011, a communication was issued by CGPL to GUVNL enclosing the duly certified executed version of the CSA dated 31/10/2008.

253. On 22/7/2011, a letter was sent by Indian Embassy at Jakarata conveying the clarification received from the Director General of Coal, Ministry of Energy and Mineral Resources of the Government of Indonesia stating that, the CSA (including

the existing CSA) in Indonesia is now to be governed by the Indonesian Regulation.

254. On 4/8/2011, CGPL informed GUVNL (as Lead Procurer) and MoP regarding the issue of escalation in price of imported coal due to the Indonesian Regulation. CGPL also requested MoP to intervene as such escalation was well beyond anyone's reasonable expectations.

255. On 12/8/2011, GUVNL confirmed to CGPL that, it had received the FSA with IndoCoal for supply of 5.85 MMTPA. CGPL was requested to provide a copy of the FSA for balance coal requirement executed between CGPL and Tata Power in fulfillment of condition subsequent under Article 3.1.2(v) of the PPA.

256. On 9/9/2011 and 18/11/2011, CGPL organized two procurers' meetings to inform them about the challenges in procuring coal due to promulgation of Indonesia Regulation. Further details of equity infused by Tata Power and impact on

commercial viability of the project due the promulgation of the Indonesian Regulation were also shared with the procurers.

257. On 30/9/2011, MoP responded to CGPL's representation stating that: "…. *PPA is a legally binding document exclusively between the procurers and the developer. Therefore, any issue arising therein is to be settled within the provisions of PPA by the contracting parties for which Gujarat being the Lead Procurer may take necessary action…*"

258. On 17/10/2011, a communication was issued by Haryana Procurers to the MoP requesting that no cognizance be taken of CGPL's letter dated 04/08/2011.

259. On 19/10/2011, CGPL invited all procurers for a meeting with CGPL management on 10/11/2011.

260. On 22/11/2011, in response to GUVNL's letter dated 12/08/2011, CGPL sent to GUVNL the 'Assignment and Restatement Agreement' dated 28/03/2011 executed between

IndoCoal, Tata Power and CGPL and the FSA dated 31/10/2008 executed between CGPL and Tata Power. CGPL requested GUVNL to issue consent for reduction in the Performance Bank Guarantee in view of the fulfillment of the condition subsequent under the provisions of Article 3.1.2(v) of the PPA.

261. On 12/12/2011, representation was made by Tata Power to members of the Planning Commission, Secretary Government of Gujarat and Government of Maharashtra indicating "*the key issues that are relevant to Mundra UMPP, which need to be considered in order to arrive at a solution to utilize the 4000 MW plant which is a national asset created in a record time span*" and urging Government's intervention.

262. On 27/12/2011, CGPL conveyed that date of synchronization for the first Unit of 830 MW was expected to be on or around 07/01/2012 and requested GUVNL to initiate necessary steps for synchronization of first Unit and smooth

evacuation of power to Grid system. The reason provided by CGPL for extension of the date of synchronization was:-

> *"… introduction of new coal regulations by the Govt. of Indonesia, CGPL will be required to buy coal at the market price and this has directly impacted the commercial viability of the Project. As a part of risk mitigation, we are exploring various option to minimize the impact including possibility of using lower grade coal as may be required to reduce the operating losses going forward. We have already ordered a lower grade coal for trials. Since this coal is not as per original plan, it may significantly impact the commissioning schedule of the Units. As already communicated by us in our earlier letters on the subject followed by the Procurers meeting held on November 18, 2011 commercial difficulties are being faced by the project due to such unexpected price rise in coal and we request your cooperation in this regard. The commissioning activities for 1st Unit prior to synchronization are nearing completion…"*

263. On 6/2/2012, 11th Meeting of the Joint Monitoring Committee was held. Change in price of coal due to Indonesian Regulation was specifically discussed. The Minutes of the Meeting were forwarded by GUVNL to CGPL and other members of the Joint Monitoring Committee by letter dated 28/02/2012.

264. On 15/2/2012, CGPL responded to GUVNL's concern that CGPL had not tied up the full quantity of coal required for the project and had not fulfilled its obligations under Article 3.1.2(v) of the PPA, inter alia, stating as under:-

> *"(a) CSA executed with IndoCoal and Assignment & Restatement Agreement executed jointly with Tata Power and IndoCoal was sent by letters dated 25.01.2011 and 26.12.2011.*
>
> *(b) Total coal tied up for the Project is 11.23 MMTPA. The total requirement on normative availability basis is between 10.75 to 11.22 MMTPA."*

265. On 16/2/2012, a communication was issued by CGPL to the Indonesian Government reiterating its requests (made directly and through the Coal Supplier) that the existing contracts for coal supply should not be brought under the purview of the Indonesian Regulation.

266. On 22/2/2012, Tata Power (parent company of CGPL) represented to the Planning Commission, Governments of

Gujarat and Maharashtra etc. regarding the following key issues:-

> *"(a) Fuel Supply Agreement entered into by Tata Power with mines in Indonesia which had mirrored the way the escalable and non-escalable portions of the coal cost considered by Tata Power while bidding were no more enforceable due to the recent change in the Indonesian laws resulting in a huge impact on coal costs.*
>
> *(b) The adverse changes in the coal market, prices and the export regulations in coal producing and exporting countries of Indonesia, Australia and South Africa are beyond anyone's reasonable control to be factored while making investments.*
>
> *(c) The recent changes in conditions/ laws at Indonesia, Australia and South Africa has made it impossible for CGPL to p*erform obligations under existing contracts."

267. On 28/2/2012, GUVNL sent minutes of the 11th Meeting of the Joint Monitoring Committee of 06/02/2012, wherein issues of change in price of coal due to Indonesian Regulation were discussed.

268. On 6/3/2012, CGPL wrote to GUVNL explaining the FSA between its parent company (Tata Power) and the fuel supplier, in response to some procurers seeking additional details regarding investments made by Tata Power in Indonesia.

269. On 7/3/2012, no objection was granted by GUVNL to CGPL's request for reduction of Contract Performance Bank Guarantee, upon CGPL having fulfilled Conditions Subsequent per Article 3.1.2 of PPA.

270. On 9/3/2012, 'Notice of Change in Government Approvals' dated 09/03/2012 issued by IndoCoal calling upon CGPL to align the original CSA with the Indonesian Regulation and amend the CSA. This was in compliance with the Indonesian Regulation.

271. On 23/5/2012 and 22/6/2012, CGPL was constrained to accept an amendment to the CSA in order to ensure compliance with the Indonesian Regulation since even after

the Indonesian Regulation, Indonesian coal was cheaper than coal available from other countries.

272. It is the case of CGPL that promulgation of Indonesian Regulation coupled with unprecedented, unforeseeable and steep price rise of imported coal destroyed the financial equilibrium on which Tata Power/CGPL had premised its bid and, therefore, supplying power on the bid out tariff made the project commercially unviable and unsustainable. These subsequent events completely wiped out/ altered the premise on which the bid was submitted by Tata Power. In order to offset the hardship caused to CGPL, on 14/7/2012, it filed a petition before the Central Commission invoking its power under Sections 79(1)(b), 79(1)(f), 61 and 63 of the said Act read with:-

> *"(i) Clauses 4.7 and 5.17 of the Competitive Bidding Guidelines;*
>
> *(ii) National Electricity Policy dated 12.02.2005 and Tariff Policy dated 06.01.2006 notified under Section 3 of the Electricity Act;*

(iii) RFP dated 22.06.2006; and

(iv) PPA in terms of Articles 12, 13 and 17.

273. To offset the hardship caused the prayers sought by CGPL in its petition are as under:-

> *"(a) Establish an appropriate mechanism to offset in tariff the adverse impact of:*
>
> *(i) The unforeseen, uncontrollable and unprecedented escalation in the imported coal price; and*
>
> *(ii) Change in law by Government of Indonesia.*
>
> *(b) Evolve a methodology for future fuel price pass through to secure the Project to a viable economic condition while building suitable safeguards to pass to Procurers benefit of any reduction in imported coal price."*

[J] Analysis and conclusion of this Tribunal on *Force Majeure*.

274. Extensive submissions have been advanced by counsel for Adani Power to persuade us to hold that availability of coal

from GMDC was the basic premise and condition of the PPA and Adani Power entered into PPA dated 2/2/2007 with GUVNL solely on the assurance given by GMDC that domestic coal would be supplied by it. It was urged that GMDC resiled from its commitment which resulted into a *Force Majeure* Event or Change in Law Event. It is not possible to accept this submission because whether the supply from GMDC was the basic premise or condition of PPA dated 2/2/2007 or not has been considered by this Tribunal in its judgment dated 7/9/2011 in Appeal No.184 of 2010 arising out of termination of PPA dated 2/2/2007 executed between Adani Power and GUVNL. In that judgment, after considering all the relevant documents, this Tribunal has returned a finding that this claim is not sustainable. There, this Tribunal noted the contention raised by Adani Power, who was the appellant therein, as under:

> *"45. According to the Appellant, the coal supplied from Gujarat Mineral Corporation was the basic condition of the PPA dated 2.2.2007 and the PPA was entered into solely on the basis of the availability of the coal from Gujarat Mineral Corporation."*

275. This Tribunal then recorded that on the date of bidding, the appellant did not have a firm agreement with GMDC. The relevant paragraphs could be quoted:

> *"47. On the date of bidding, the Appellant did not have a firm agreement with Gujarat Mineral Corporation for supply of fuel. Appellant was required to execute a detailed agreement with Gujarat Mineral Corporation within two months but no such agreement was ever executed.*
>
> *49. The Claim made by the Appellant that fuel supply from Gujarat Mineral Corporation was the only source for implementation of the PPA is patently wrong. There was no such stipulation either in the bid documents or in the PPA. The condition subsequent as specified in Article 3.1.2 (ii) dealing with Fuel Supply Agreement was duly satisfied with firming up of the coal supply from Adani Enterprises Ltd/Indonesian Mines as per the admissions of the Appellant.*
>
> *52. Admittedly, the Appellant executed MOU with two Foreign Companies for supply of significant quantum of imported coal. The quantum that was agreed to under the MOU was certainly more than what was required for the purpose of blending with the indigenous coal. In any event, the Appellant had option to arrange other sources of indigenous coal or imported coal so that its contractual obligations under the PPA can be fulfilled. The PPA does not indicate that it is dependent on supply of fuel to the project*

from any particular source i.e. Gujarat Mineral Corporation or otherwise.

78. There might have been some understanding between the parties that supply of power from the Appellant's project is conditional on supply of coal from the GMDC. But this is not reflected in the bid documents or the PPA. As indicated above, these are all subsequent communication within the various Govt agencies which would not help the Appellant to give different interpretation for the terms contained in bid documents and PPA."

This Tribunal then went through all the relevant documents and correspondence and observed as under:

"94. The perusal of these three documents would indicate that in none of these three documents there was any reservation that the change in location shall be subject to coal being available from Gujarat Mineral Development Corporation. In other words, the Appellant did not stipulate that though the project from where 1000 MW capacity has been shifted from Chhatisgarh to Mundra (Gujarat), the same shall be subject to availability of coal from Gujarat Mineral Corporation.

95. In terms of above, neither in the case of Chhatisgarh Power Project nor in case of Mundra Power Project, the purchase of coal from Gujarat Mineral Corporation was the basic premise for the PPA as referred to earlier, the Fuel supply was the responsibility of the Seller and only the Seller must decide the type and source of fuel. The PPA did not

make availability of fuel from Gujarat Mineral Corporation as the basic condition. The Appellant is fully entitled to source fuel from any source of its choice that is any type of fuel indigenous or imported. Therefore, it cannot be interpreted that the coal supply from Gujarat Mineral Corporation was envisaged as the only source.

96. The claim of the Appellant that the Condition specified in Article 3.1.2 (ii) of the PPA dealing with the FSA was not satisfied cannot be accepted in the light of the material available on record. The condition subsequent dealing with FSA was duly satisfied with firming up of coal supply from Adani Enterprises Limited/Indonesian Mines even as per the admissions of the Appellant itself."

This Tribunal then observed that M/s. Kowa Company Ltd. of Japan and M/s. Coal Orbis Trading GMBH of Germany terminated their MoUs with Adani Power. This Tribunal further observed that Adani Power did not take steps to finalize its agreements with those companies because it had already firmed up agreements for the entire supply of fuel as per FSA executed with AEL which had back-to-back arrangement with the mining companies in Indonesia. In view of these findings of this Tribunal, which have been recorded after going through the relevant record, it is not possible for us

to accept the submission of Adani Power that PPA dated 2/2/2007 was entered into solely on the basis of availability of coal from GMDC and the non-availability of coal from GMDC to Adani Power has resulted in Change in Law or *Force Majeure* Event. We see no reason to take a different view. We, therefore, reject this submission. It may be noted here that appeal carried against the said judgment is admitted by the Supreme Court. But, the Supreme Court has not stayed the said judgment. It is evident from the above judgment of this Tribunal that PPA of Adani Power with GUVNL is not solely based on domestic coal from GMDC. Adani Power was entitled to source fuel from any source and admittedly, Adani Power sourced coal from Indonesia to fulfill its contractual obligations.

276. So far as PPAs with Haryana Utilities are concerned, we may have to restate certain facts. The bid was submitted by Adani Power on 24/11/2007 offering a total Contracted Capacity of 1424 MW from the Mundra Power Plant at a levelised tariff of Rs. 2.94 per Unit. The bid of Adani Power

was based on blend of domestic and imported coal in the ratio of 70:30. The New Coal Distribution Policy dated 18/10/2007 notified by the GoI assured that 100% of the quantity, as per normative requirement of the IPPs would be considered for supply of coal through FSA by CIL. However, on 12/11/2008, New Coal Distribution Policy was amended in SLC (LT) meeting to restrict coal linkage to coastal power plants to 70% of their capacity. On 25/06/2009, Letter of Assurance issued by Mahanadi Coal Fields Ltd. for supply of 70% of the coal required for Unit 7, 8 and 9 for Mundra Power Plant. On 09/06/2012, on the basis of draft FSA issued by Ministry of Coal, FSA was executed between Adani Power and Mahanadi Coal Fields, in terms of new draft FSA dated 19/04/2012 issued by CIL. In terms of FSA, Mahanadi Coal Fields was to supply coal of 6.405 MTPA. This quantity of 6.405 MTPA corresponds to 70% of coal required for generation of 1980 MW power. However, Mahanadi Coal Fields vide its letter dated 2/6/2012 stated that due to shortage of coal, it would supply only 80% of the 70% coal linkage. Adani Power did not get the assured quantity under the coal linkage because of the

amendment in the New Coal Distribution Policy which had adversely impacted its viability. We may note that there is some dispute between Adani Power and the procurers/Prayas as to what percentage of coal Adani Power had to import from Indonesia. Prayas referred to Schedule VII to the FSA dated 9/6/2012 with Mahanadi Coalfields Limited contemplating supply of domestic coal upto 70% of 1980 MW, i.e., 1386 MW, of which assured quantum is for 80% of the 70% (1386) i.e., 1109 MW. The real effect of Schedule VII, according to Prayas is that out of the ACQ of 6.405 MTPA (covering 1386 MW), 80% is available from domestic sources and the balance 20% was offered by CIL through imports in case of shortfall. According to Prayas, there was availability of domestic coal of 5.124 MTPA covering 1109 MW. This is disputed by Adani Power. According to Adani Power, it is getting linkage of domestic coal to the extent of 42% of the installed capacity. According to Prayas, Adani Power is getting much more than 42%. It is not necessary for us to go into this aspect at this stage because one thing is certain that Adani Power was constrained to generate electricity by procuring substantial

quantity of imported coal from Indonesia due to shortage of domestic coal availability. So far as CGPL is concerned, admittedly, the PPA is based entirely on imported coal from Indonesia.

277. Having come to the conclusion that all the above PPAs are either fully or partly premised on imported coal from Indonesia, we shall now examine whether there is a *Force Majeure* Event.

278. In ***Dhanrajamal Gobindram***, the Supreme Court had an occasion to consider what is meant by *Force Majeure*. The relevant observations of the Supreme Court could be quoted:

> *"17. McCardie, J. in Lebeaupin v. Crispin, (1920) 2 KB 714 has given an account of what is meant by "force majeure", with reference to its history. The expression "force majeure" is not a mere French version of the Latin expression "vis major". It is undoubtedly, a term of wider import. Difficulties have arisen in the past as to what could legitimately be included in "force majeure". Judges have agreed that strikes, breakdown of machinery, which, though normally not included in "vis major" are included in "force majeure". An analysis of rulings on the subject into which it is not necessary in this case to go, shows that where reference is made to "force majeure", the*

intention is to save the performing party from the consequences of anything over which he has no control. This is the widest meaning that can be given to "force majeure".

279. Thus, the term '*Force Majeure'* is a term of wider import and the widest meaning that can be given to '*Force Majeure'* is that where reference is made to '*Force Majeure'*, the intention is to save the performing party from the consequences of anything over which he has no control.

280. We shall now go to Article 12 of the PPA which deals with '*Force Majeure'* of PPA dated 2/2/2007 executed by Adani Power with GUVNL. Other PPAs are similar. Relevant portion of the said Article reads thus:

"12 ARTICLE 12: FORCE MAJEURE

12.1 Definitions

In this Article 12, the following terms shall have the following meanings:

12.2 Affected Party

An affected Party means the Procurer or the Seller whose performance has been affected by an event of Force Majeure.

An event of Force Majeure affecting the STU or any other agent of Procurer, which has affected the Interconnection and Transmission Facilities beyond the Delivery Point, shall be deemed to be an event of Force Majeure affecting Procurer.

Similarly, any event of Force Majeure affecting the CTU which has affected the Interconnection and Transmission Facilities upto the Delivery Point, shall be deemed to be an event of Force Majeure affecting the Seller.

Any event of Force Majeure affecting the performance of the Seller's contractors, shall be deemed to be an event of Force Majeure affecting Seller only if the Force Majeure event is affecting and resulting in:

a. late delivery of plant, machinery, equipment, materials, spare parts, Fuel, water or consumables for the Project; or

b. a delay in the performance of any of the Seller's contractors.

Similarly, any event of Force Majeure affecting the performance of the Procurer's contractor for the setting up or operating Interconnection Facilities shall be deemed to be an event of Force Majeure affecting Procurer only if the Force Majeure event is resulting in a delay in the Performance of Procurer's contractors.

12.3 Force Majeure

A 'Force Majeure' means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:

i) Natural Force Majeure Events:

act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the Site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years.

ii) Non-Natural Force Majeure Events:

1. Direct Non-Natural Force Majeure Events.

a) Nationalization or compulsory acquisition by any Indian Governmental Instrumentality of any material assets or rights of the Seller or the Seller's contractors; or

b) The unlawful, unreasonable or discriminatory revocation of, or refusal to renew, any Consent required by the Seller or any of the Seller's contractors to perform their obligations under the Project Documents or any unlawful, unreasonable or discriminatory refusal to grant any other consent required for the development / operation of the Project. Provided that an appropriate court of law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.

c) Any other unlawful, unreasonable or discriminatory action on the part of an Indian Government Instrumentality which is directed against the project. Provided that an appropriate court of law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.

2. Indirect Non-Natural Force Majeure Events

a) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; and

b) Radioactive contamination or ionizing radiation originating from a source in India or resulting from another Indirect Non Natural Force Majeure Event excluding circumstances where the source or cause

of contamination or radiation is brought or has been brought into or near the site by the Affected Party or those employed or engaged by the Affected Party.

c) *Industry wide strikes and labour disturbances having a nationwide impact in India.*

12.4 Force Majeure Exclusions:

Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an even of Force Majeure:

a. *Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts, Fuel or consumables for the Project;*

b. *Delay in the performance of any contractor, sub-contractors or their agents excluding the conditions as mentioned in Article 12.2;*

c. *Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;*

d. *Strikes or labour disturbance at the facilities of the Affected Party;*

e. Insufficiency of finances or funds or the agreement becoming onerous to perform; and

f. Non-performance caused by, or connected with, the Affected Party's;

i) Negligent or intentional acts, errors or omissions;

ii) Failure to comply with an Indian Law; or

iii) Breach of, or default under this Agreement or any RFP Documents."

12.5 *xxx xxx xxx*

12.6 Duty to perform and duty to mitigate.

To the extent not prevented by a Force Majeure event pursuant to Article 12.3, the Affected Party shall continue to perform its obligations pursuant to this Agreement. The Affected Party shall use its reasonable efforts to mitigate the effect of any event of Force Majeure as soon as practicable.

12.7 Available Relief for a Force Majeure Event.

Subject to this Article 12:

(a) no Party shall be in breach of its obligations pursuant to this Agreement to the extent that the performance of its

obligations was prevented, hindered or delayed due to a Force Majeure Event;

xxx *xxx* *xxx*

281. Article 1.1 which defines Prudent Utility Practices needs to be quoted. It reads thus:

Article 1.1

"Prudent Utility Practice:	*means the practices, methods and standards that are generally accepted internationally from time to time by electric utilities for the purpose of ensuring the safe, efficient and economic design, construction, commissioning, operation and maintenance of power generation equipment which practices, methods and standards shall be adjusted as necessary, to take account of:* • *Operation and maintenance guidelines recommended by the manufacturers of the plant and equipment to be incorporated in the Project;* • *The requirements of Indian Law; and* • *The physical conditions at the Site;"*

……." ***[Emphasis Supplied]***

282. For an event to fall in the category of '*Force Majeure'*, it has to satisfy the requirements and tests laid down in Article 12.3 of the PPA. While this article recognises certain events as

Force Majeure, it does not make the protection of *Force Majeure* available to the party claiming occurrence of *Force Majeure* Event easily. An Affected Party can successfully take a plea of *Force Majeure* Event if the Affected Party is seen to be vigilant and careful, who could not avoid the occurrence of the said event despite taking reasonable care and complying with prudent utility practices described in Article 1.1. The use of the words 'only if' and 'to the extent that' make the rigour of this article clear. Protection of this article is available only if occurrence of such events or circumstances is not within the control of the Affected Party. Protection of this article is available to the extent that such events are not within the reasonable control of the Affected Party. Burden to prove the presence of these factors lies on the Affected Party.

283. Article 12.3.1 refers to Natural *Force Majeure* Events with which we are admittedly not concerned. Article 12.3.2 refers to Non Natural *Force Majeure* Events. On a plain reading of this article, it is clear that the generators' case that there was a rise in Indonesian coal prices on account of Indonesian

Regulation which is a *Force Majeure* Event does not fall in this article. Article 12.4 however is relevant. It refers to '*Force Majeure* Exclusions'. It reiterates that *Force Majeure* shall not include anything within the reasonable control of the parties. It delineates certain conditions specifically as not being covered by *Force Majeure*. However, this is qualified by adding that if those delineated conditions are the consequences of an event of *Force Majeure* they would be covered by *Force Majeure*. Changes in the cost of fuel are one of the conditions. Thus, if changes in the coal/fuel are not within the reasonable control of the parties and they are consequences of an event of *Force Majeure*, they would be covered by *Force Majeure*. Agreement becoming onerous to perform would be covered by *Force Majeure* if it is a consequence of an event of *Force Majeure*. Article 12.6 states that the Affected Party shall continue to perform its obligations pursuant to the agreement, to the extent not prevented by *Force Majeure* and it shall use its reasonable efforts to mitigate the effect of any event of *Force Majeure* as soon as practicable. Article 12.7 states the available relief for a *Force Majeure* Event. Article 12.7(a)

clarifies that no party shall be in breach of its obligations pursuant to this Agreement to the extent that the performance of its obligations was prevented, hindered or delayed due to a *Force Majeure* Event.

284. A reading of Articles 12.3, 12.4 and Article 12.7(a) establishes that an event constitutes a *Force Majeure* Event, if

(a) It wholly or partly prevents or unavoidably delays the performance of obligations under the PPA or hinders or delays the performance of obligations of the PPA.

(b) Such event is not within the reasonable control of the Affected Party, directly or indirectly.

(c) Such events and circumstances could not have been avoided by the Affected Party, even if it had taken reasonable care or complied with Prudent Utility Practices.

(d) The events that materially impact the cost of fuel are expressly covered, so long as they are a consequence of an event of *Force Majeure*.

285. It is contended by Mr. Ramachandran, learned counsel for Prayas that on a correct reading of Article 12.3 of the PPA which relates to *Force Majeure* what needs to be considered is whether the Indonesian Regulation has the effect of preventing or delaying the performance of the obligations. If the performance is not prevented or delayed, Article 12.3 will have no application. The Indonesian Regulation did not prevent wholly or partly import of coal from Indonesia or otherwise the implementation of FSAs entered into with the Indonesian suppliers of coal. The Indonesian Regulation has the only effect of matching or aligning the coal sale price with the prevalent international market prices for export of coal by the Indonesian Company. The generators went on supplying power to the procurers. Thus, there has been no prevention or unavoidable delay caused to the performance of the obligation by the generators. Mr. Ramachandran also contended that

the increase in price or terms and conditions of an agreement making the performance onerous or difficult cannot be said to be a *Force Majeure* Event within the meaning of Article 12.3 of the PPA nor can it be said that such an agreement is frustrated under Section 56 of the Indian Contract Act. In this connection, he relied on the judgment of the Supreme Court in ***Alopi Parshad***.

286. According to us, scope of Article 12.3 read with Articles 12.4 and 12.7 which contemplate *Force Majeure* is wider than the scope of Section 56 of the Indian Contract Act. We shall first go to Section 56 of the Indian Contract Act, which reads thus:

> *"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."

287. In ***Alopi Parshad***, the Appellants therein had entered into Agreement dated 3/5/1937 with GoI under which GoI had appointed the Appellants as agents for purchasing ghee required for use of the Army personnel. In September, 1939, the World War II broke out. On 20/6/1942, the original agreement was, by mutual consent, revised, and a graded scale was introduced. The Appellants claimed revision of rates on the plea that the existing rates, fixed in peace time, were "entirely superseded by the totally altered conditions obtaining in war time". The dispute was referred to arbitration as per the agreement. There were several rounds of litigation. It is not necessary to refer to all the details of the litigation. Suffice it to say that on 2/5/1954, the Arbitrators made an award rejecting the primary claim on the view that the supplementary agreement dated 20/6/1942 was for

consideration and the same was valid and binding upon the agents. The Arbitrator s however awarded certain amounts under the head of 'establishment and contingencies' being the actual loss, which the Appellant had suffered in addition to the amounts received by the agents from the Government for *mandi* and financing charges. The GoI applied for setting aside the award on the ground that it was invalid. The Commercial Subordinate Judge held that the arbitrators had committed an error apparent on the face of the award in ordering the GoI to pay to the agents additional remuneration and financing and overhead charges, but, in his view, specific questions having been expressly referred for adjudication to the arbitrators, the award was binding upon the parties and could not be set aside on the ground of an error apparent on the face thereof. The learned Judge, accordingly, rejected the application for setting aside the award. Against the said order, an appeal was filed by GoI in the High Court. The High Court reversed the order passed by the Subordinate Judge, and set aside the award of the arbitrators, holding that there was no "legal basis for awarding any compensation" to the agents for

any loss which they might have sustained. The said order was challenged in the Supreme Court. The Supreme Court dismissed the appeal. It was submitted before the Supreme Court that the circumstances existing at the time when the terms of the contract were settled, were "entirely displaced" by reason of the commencement of hostilities in the Second World War, and the terms of the contract agreed upon in the light of circumstances existing in May, 1937, could not, in view of the turn of events which were never in the contemplation of the parties, remain binding upon the agents. The Supreme Court rejected the submission by observing that the modification was made nearly three years after the commencement of the hostilities. The Appellants were fully aware of the altered circumstances at the date when the modified schedule for payment of overhead charges, contingencies and buying remuneration, was agreed upon. After referring to Section 56 of the Indian Contract Act, the Supreme Court observed that a contract is not frustrated merely because the circumstances, in which the contract was made, are altered. Performance of the contract had not become impossible or unlawful. The

contract was in fact, performed by the Appellants. They received remuneration expressly stipulated to be paid therein. The relevant observations of the Supreme Court could be quoted:

> *"The Indian Contract 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 some vague plea of equity. "The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate — a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet, this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point — not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation."*

288. It is also necessary to refer to ***Satyabrata Ghose***, where the Supreme Court was dealing with a case where the defendant-company had started developing land for residential

purposes. Defendant No.2 therein entered into a contract to purchase the plot of land with defendant-company and paid earnest money. The appellant-plaintiff was made a nominee by defendant No.2. The land in question was requisitioned by the Government. The defendant-company, therefore, addressed a letter intimating that the agreement for sale be treated as cancelled. It is not necessary to enter all other facts except that a suit came to be filed by the Appellant for a declaration that the contract in question be declared as subsisting. The suit was decreed by the trial court and the said judgment was confirmed by the lower appellate court. In the second appeal, however, the High Court reversed the decree and dismissed the suit. In appeal filed against the said order, the Supreme Court considered the question whether as a result of the requisition order issued by the Government, the contract of sale between the defendant-company and the plaintiff's predecessor stood dissolved by frustration or in other words became impossible of performance and held on facts that the order of requisition had not affected the fundamental basis upon which the agreement was rested.

While considering the said question, the Supreme Court referred to Section 56 of the Contract Act. The Supreme Court observed that the word "impossible" had not been used in Section 56 in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable. The relevant portion could be quoted:

> ***"9.*** *The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general, and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment. This much is clear that the word "impossible" has not been used here 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 which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promissor finds it impossible to do the act which he promised to do."*

The Supreme Court further observed that Section 56 of the Contract Act lays down the rule of positive law. The relevant paragraph of the said judgment reads thus:

> *"In the large majority of cases however the doctrine of frustration is applied not on the ground that the parties themselves agreed to an implied term which operated to release them from the performance of the contract. The relief is given by the court on the ground of subsequent impossibility when it finds that the whole purpose or basis of a contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement. Here there is no question of finding out an implied term agreed to by the parties embodying a provision for discharge, because the parties did not think about the matter at all nor could possibly have any intention regarding it. When such an event or change of circumstance occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the court which can pronounce the contract to be frustrated and at an end. The court undoubtedly has to examine the contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are evidence, but evidence only on which the court has to form its own conclusion whether the changed circumstances destroyed altogether the basis of the adventure and its underlying object. This may be called a rule of construction by English Judges but it is certainly not a principle of giving effect to the intention of the parties which underlies all rules of construction. This is really a rule of positive law and as such comes*

within the purview of Section 56 of the Indian Contract Act."

289. These two judgments explain how Section 56 of the Indian Contract Act is to be read. Parties to a commercial contract are often faced with unexpected events such as abnormal rise or fall in prices of fuel or raw materials or a sudden depreciation of currency. Experienced businessmen take calculated risk and enter into a contract. Such unexpected events do not by themselves make the bargain made by them unworkable or frustrated. But, if the basic agreed terms of the contract are altered or wiped out and the parties find themselves in a situation which was never agreed upon or when they find themselves in a fundamentally different situation, the contract ceases to bind them as the performance of the contract becomes impossible. However, the word "impossible" has not to be interpreted to mean physical or literal impossibility. The performance of the contract may be impracticable. If due to fundamentally changed situation which was beyond the contemplation of the

parties, performance of the contract becomes commercially impracticable, it can still be said that the promissor finds it impossible to do the act which he promised to do.

290. At this stage, Article 12.7 of the PPA needs to be revisited. It speaks of performance of obligation being hindered due to the *Force Majeure* Event. It states that in such a case a party shall not be in breach of its obligation under the PPA to that extent. **New Concise Oxford English Dictionary, 12th Edition** defines the word hinder as "make it difficult for (someone) to do something or for (something) to happen". Thus, the fact that in this case, the generators went on supplying electricity to the procurers will not necessarily lead to the conclusion that there was no occurrence of *Force Majeure*. The question is whether the performance of their obligations was hindered due to *Force Majeure* Event.

291. In ***Chitty on Contract***, the word "hindered" is described as under:

> *"15-158 "**Hindered".** A wider scope is, however, given to the word "hindered" and Lord Loreburn said:*
>
> > *"…… to place a merchant in the position of being unable to deliver unless he dislocates his business and breaks his contracts in order to fulfil one surely hinders delivery"*
>
> *Where, due to executive restrictions following a strike, charterers could not load unless they dislocated their businesses and broke other contracts, loading was "hindered". A contract of sale of goods which contemplates, the carriage of goods by sea may be hindered by the shortage of ships due to enemy action and an increased risk with resultant rise in freight rates. Normally, however, a mere rise in price rendering the contract more expensive to perform will not constitute "hindrance". The words "impaired" and "interfered with" may, in context, be construed as equivalent to "hindered".*

292. It is clear from the above extract that the word "hindered" may in context be construed as impaired and interfered with. We see no reason why in this case, the rise in prices of coal imported from Indonesia cannot be said to have impaired the generators in the performance of their obligations under the PPAs. Reliance was placed on the second last sentence of the

above extract to say that "a mere rise in price rendering the contract more expensive to perform will not constitute "hindrance". We note that the above words are preceded by the words "Normally, however,". Therefore, it is not an absolute rule that rise in price would never constitute hindrance. It would depend on the facts and circumstances of each case. In fact, change in fuel price is mentioned in Article 12.4 under the heading "*Force Majeure* Exclusions". Change in fuel price if it is not within the reasonable control of the parties and is a consequence of *Force Majeure* Event, it will be covered by *Force Majeure*. Admittedly, so far as Adani Power's PPA with GUVNL is concerned, Adani Power terminated the PPA with GUVNL on the ground of non-fulfillment of condition subsequent. The petition was dismissed by the Gujarat Commission and the said order was confirmed by this Tribunal. Admittedly, the appeal carried against the said order is pending in the Supreme Court. There is, however, no stay order of the Supreme Court. Adani Power has been supplying electricity under the orders of this Tribunal, which is not disturbed by the Supreme Court. It is true, however,

that so far as Adani Power's PPAs with Haryana Utilities and CGPL's PPAs with other procurers are concerned, this argument will not be open to them as they have been supplying electricity despite the adverse effect of rise in price of coal imported from Indonesia. The extensive correspondence to which we have made a reference establishes that the generators had communicated to MoP and to the procurers and others about the serious difficulties faced by them in performing their obligations under the long term PPAs because of rise in prices of imported coal due to promulgation of Indonesian Regulation. We have also made reference to all the facts surrounding the relevant PPAs of Adani Power and CGPL. All the relevant documents and events establish that the promulgation of Indonesian Regulation which resulted in unprecedented rise in prices of imported coal which wiped out the premise on which CGPL and Adani Power had offered their bids. It hindered or impaired the performance of their obligations under the contracts. Their case of occurrence of *Force Majeure* Event is therefore made out.

293. A generator may continue to supply electricity in spite of *Force Majeure* Event so that its assets are not stranded; that it can fulfill debt service obligations and that consumers can get uninterrupted power supply though a *Force Majeure* Event materially impairs the economic viability of its contract. The generator may do so with a hope that the *Force Majeure* clause in the PPA would take care of such a situation. If such a view is not taken, then the *Force Majeure* provision in the PPA would be a dead letter. In our opinion, *Force Majeure* clause found in the instant PPAs has a wider scope as stated by the Supreme Court in ***Dhanrajamal Gobindram*** and situations in which Adani Power and CGPL have landed themselves on account of Indonesian Regulation fall within the scope of *Force Majeure* Event. In fact, because PPAs are a long term contract and it may not be possible to envisage all possible risks over such a long period of time that *Force Majeure* and Change in Law are provided for in the PPAs. Simply stated as observed by the Supreme Court in ***Dhanrajamal Gobindram,*** the intention behind providing these clauses is to save the

performing party from the consequences of anything over which it has no control and in that light, it can be concluded in the facts of this case that Indonesian Regulation resulted in rise in prices of imported coal which led to *Force Majeure*.

294. We must now go to the submission that the generators have quoted non-escalable tariff and, therefore, they cannot make any grievances about rise in prices of coal on account of promulgation of Indonesian Regulation.

295. In this case, no doubt, the generators had partly or fully quoted non-escalable tariff but not in all circumstances can a generator be denied relief just because it quoted non-escalable tariff in the bid or under the PPA. It would depend on the facts and circumstances of the case. It must be noted that the generators had entered into a long term contract of 25 years with the procurers. Adani Power and CGPL had negotiated agreement for supply of Indonesian coal. Promulgation of the Indonesian Regulation was a totally unexpected and drastic event. The Indonesian Regulation is also extremely harsh in

nature. Article 2 of the Indonesian Regulation provides that the holders of the mining permits and special mining permits for production and operation of mineral and coal mines shall be obliged to sell the minerals and coals by referring to the benchmark price either for domestic sales or exports, including to its affiliated business entities. As per Article 11 of the Indonesian Regulation, the Director General on behalf of the Minister shall set a benchmark price of coal on monthly basis based on a formula that refers to the average price index of coal in accordance with the market mechanism and/or in accordance with the prices generally accepted in the international market. The Indonesian Regulation recognizes direct sale contract (spot) and term sale contract (long term) which have been signed by the holders of mining permits and special mining permits and further provides that the existing direct sale contracts and term sales contracts shall adjust to the regulation within a period not later than 6 months and 12 months respectively. In case of violation, the holders of mining permits and special mining permits are liable for administrative sanction in the form of written warning,

temporary suspension of sales or revocation of mining operation permits. It can by no stretch of imagination be said that Adani Power and CGPL would have known that Indonesian Government in exercise of its sovereign power would issue regulation directing that the coal prices for import of coal by the mining companies in Indonesia should be benchmarked to the international market price. Therefore, in the peculiar facts of this case, the fact that they had quoted non-escalable rates cannot be taken against them. The Indonesian Regulation is an event which was not at all in contemplation of the parties. It is an abnormal event which did affect the economics of the contract of Adani Power and CGPL. Reliance placed by the procurers on the judgment of this Tribunal in **Sasan Power Limited v. CERC**[91] is misplaced because in that case, Sasan Power was aware of de-regulation of diesel price before the cut-off date. In the cases of Adani Power and CGPL, the promulgation of Indonesian Regulation was not known to them even when the PPA was executed. Promulgation of Indonesian Regulation obliterated

[91] Judgment dated 23/3/2015 in Appeal No.90 of 2014

the negotiated coal price agreed between generators and coal supplier.

296. It was also argued that rise in price is a normal incident of all commercial transactions and those who contract with open eyes must accept the burdens of the contract along with its benefits. It was argued that when experienced businessmen take a calculated risk while offering their bid, they cannot be relieved of the obligation under the contract because of events which are a common occurrence associated with the business. In this connection, reliance is placed on ***Har Shankar & Ors. v. The Dy. Excise & Taxation Commr. & Ors.***[92] In that case, the Appellants, who were mostly retail vendors of liquor holding licences for the sale of liquor in specified vends filed writ petitions in the Punjab & Haryana High Courts *inter alia* praying for a direction quashing the auction held for granting the right to sell country liquor and for order restraining the respondents from enforcing the obligations arising under the terms and

[92] (1975) 1 SCC 737

conditions of the auctions. The appellant had given bids in the said auction, which were accepted and the appellants were granted licenses. A part of the licence fees was deposited by the appellants, but they were unable to meet their obligations under the conditions of auction and fell in arrears. The State Government demanded the payment; threatened to cancel the appellants' licences and hence the writ petitions came to be filed. In the Supreme Court, a preliminary objection was raised to the maintainability of the writ petition in the High Court. It was argued that writ jurisdiction of the High Court is not intended to facilitate avoidance of contractual obligations voluntarily incurred and, therefore, writ petitions ought not to have been entertained. It was argued that the appellants who offered their bids in the auction did so with a full knowledge of the terms and conditions of the auction and hence they should not be allowed to wriggle out of contractual obligations. Since, the appellants were heard at length, the Supreme Court chose to decide the matter on merits but the Supreme Court accepted the preliminary objections raised by the respondents as being well founded. The Supreme Court's observations on

the process of bidding made in the auctions which have relevance to the present case are as under:

> *"16. Those interested in running the country liquor vends offered their bids voluntarily in the auctions held for granting licences for the sale of country liquor. The terms and conditions of auctions were announced before the auctions were held and the bidders participated in the auctions without a demur and with full knowledge of the commitments which the bids involved. The announcement of conditions governing the auctions were in the nature of an invitation to an offer to those who were interested in the sale of country liquor. The bids given in the auctions were offers made by prospective vendors to the Government. The Government's acceptance of those bids was the acceptance of willing offers made to it. On such acceptance, the contract between the bidders and the Government became concluded and a binding agreement came into existence between them. The successful bidders were then granted licences evidencing the terms of contract between them and the Government, under which they became entitled to sell liquor. The licensees exploited the respective licences for a portion of the period of their currency, presumably in expectation of a profit. Commercial considerations may have revealed an error of judgment in the initial assessment of profitability of the adventure but that is a normal incident of all trading transactions. Those who contract with open eyes must accept the burdens of the contract along with its benefits."*

297. Reliance is also placed on the judgment of the Supreme Court in ***State Bank of Haryana & Others v. Jage Ram & Others***[93] wherein in an auction held by the Excise and Taxation Commissioner, Haryana, the Respondents offered highest bid. The bid was knocked in their favour. The Respondents paid necessary amount by way of security. The Respondents were liable to pay licence fee in 22 equal instalments. The Respondents defaulted. The Respondents were served with a notice in which they were called upon to pay the said amount. The Respondents filed a writ petition in the High Court challenging inter alia the rule requiring them to pay the licence fee. The High Court allowed the writ petition. Appeal was carried to the Supreme Court. The Supreme Court upheld the preliminary objection to the maintainability of the writ petition before the High Court and observed that the High Court was in error in entertaining the writ petitions for the purpose of examining whether the Respondents could avoid their contractual liability by

[93] 1980 3 SCC 399

challenging the rules under which they became entitled to their business. The Supreme Court further observed that it cannot ever be that a licensee can work out the licence if he finds it profitable to do so, and he can challenge the conditions under which he agreed to take the licence if he finds it commercially inexpedient to conduct his business.

298. Reliance is also placed on the judgment of the Supreme Court in ***Assistant Excise Commissioner & Others v. Issac Peter and Others***[94] wherein the Supreme Court was considering the question whether there was failure on the part of the State in supplying arrack undertaken by it to the licensees and whether the licensees are entitled to any rebate/remission in the amounts payable by them under the contracts on account of such failure, if any. While dismissing the appeals preferred by licensees the Supreme Court observed that having regard to the number of shops and the amounts of bids offered by the Respondent justifiably presumption can be drawn that the Respondent is an

[94] (1994) 4 SCC 104

experienced businessman. As experienced businessman, he must have anticipated that there would be problems in supply. The Supreme Court further observed that if the licensees offered their bids with their eyes open, they cannot blame anyone for the loss nor are they entitled to reduction in licence fee proportionate to the actual supplies made. The Supreme Court further observed that the licensees might have taken a calculated risk or they might not have been wise in offering their bid. But in law there is no basis upon which they can be relieved of the obligations undertaken by them under the contracts.

299. There can be no dispute about the propositions laid down by the Supreme Court in the above cases. But, it is important to note that in Article 12.4, which relates to *Force Majeure* Exclusions, there is a reference to the agreement becoming onerous to perform. The PPA contemplates that if the agreement becomes onerous because of *Force Majeure* Event and because of circumstances beyond the control of the Affected Party, it shall be covered by *Force Majeure* Event.

Bearing Article 12.4 in mind, we must approach this case.

300. It is true however that businesses involve risks and experienced businessmen are accustomed to such risks. The possibility of rise in prices of fuel, raw-material, etc. is always there and is known to the businessmen and it is anticipated by them yet they take calculated risk and enter into contracts and they cannot normally avoid contractual obligations. But, the present case cannot be equated with the cases on which reliance is placed by the procurers because here we are not concerned with normal rise in prices. The Indonesian Regulation which is an act of Indonesian sovereign and over which the generators had no control at all, was a least expected event which hindered the performance of the contract. We have already discussed the drastic nature of the Indonesian Regulation. It is not necessary to repeat the same. The cheapest coal was available in Indonesia at a negotiated price which was much less than the benchmark price prior to promulgation of Indonesian Regulation. The generators had

taken reasonable care and complied with Prudent Utility Practices by executing CSA with the mining companies in Indonesia. The law in Indonesia allowed export of coal at a negotiated price since 1967. The practice of negotiation with mines in Indonesia was in existence for more than 40 years. The generators have entered into a long term CSA with the mining companies in Indonesia. Indisputably, Indonesia was the cheapest source for India to procure imported coal. It is clear from the events surrounding the relevant PPAs, which we have noted above and the correspondence exchanged between the generators and the authorities that (i) the Indonesian Regulation impacted the economy of the generators; (ii) the generators had to pay exorbitantly high cost for import of coal from Indonesia making the fulfillment of their contractual obligations commercially impracticable and (iii) the Indonesian Regulation wiped out the fundamental premise on which the generators had quoted their bids thereby making their project commercially unviable. The generators took all reasonable care to assess the situation in Indonesia before executing contracts with Indonesian mining companies. In such a

situation, relief available in the PPA can be granted to the generators, on the ground that their case falls in *Force Majeure*.

301. In order to answer the issue whether the CGPL had FSAs for procurement of coal for Mundra Project at a price less than market price, we must go to CGPL's case. According to CGPL, Mundra UMPP is based on imported coal and has an estimated coal requirement of approximately 12 MMTPA. CGPL had made arrangement of imported coal from Indonesia by entering into CSA dated 31/10/2008 with IndoCoal Resources (Cayman) Limited under the laws of Republic of Indonesia for supply of 5.85 MMTPA. Tata Power had also entered into an agreement with CGPL on 9/9/2008 for meeting the balance coal requirement of 6.15 MTTPA. Subsequently, Tata Power has assigned its agreement with IndoCoal Resources (Cayman) Limited for supply of 3.51 MMTPA (which was earlier meant for Coastal Maharashtra facility) in favour of CGPL vide Assignment and Restatement Agreement dated 28/3/2011. The coal requirement of

Mundra UMPP is met by sourcing coal on the basis of these two agreements. The Indonesian Regulation made all long term CSAs from Indonesia to be adjusted with the Indonesian Regulation within a period of 12 months i.e. by 23/9/2011. On account of this and escalation in international coal prices, CGPL is supplying power to the procurers by purchasing coal at a higher price than what was agreed in the CSAs without any adjustment of tariff and is consequently stated to suffer a loss of Rs.1873 crores per annum and Rs.47,500 crores over a period of 25 years. CGPL took up the matter with GUVNL, who is the lead procurer and the MoP, GoI vide its letter dated 4/8/2011. CGPL also took up the matters with the procurers in the Joint Monitoring Meeting dated 6/2/2012 for suitable adjustment in tariff. MoP, GoI in its Reply dated 30/9/2011 responded to CGPL's representation by stating that "….PPA is a legally binding document exclusively between the procurers and the developer. Therefore, any issue arising therein is to be settled within the provisions of PPA by the contracting parties for which Gujarat being the Lead Procurer may take necessary action…..". CGPL also approached the Indonesian

Government vide its letter dated 16/2/2012 requesting to exempt the existing CSAs from the purview of Indonesian Regulation, but in vain. Thereafter, IndoCoal Resources (Cayman) Limited, which supplies coal to CGPL under the CSAs issued a notice to CGPL on 9/3/2012 calling upon it to align the original CSAs with the Indonesian Regulation. The CSAs were accordingly amended on 23/5/2012 and 22/6/2012 to align them with the Indonesian Regulation and to ensure uninterrupted supply of coal under the provisions on the PPA. CGPL submitted that Tata Power submitted its bid for Mundra UMPP in December 2006 after considering the prevailing economic situation at the time of the bidding. According to CGPL, Tata Power surveyed the global coal market before it submitted its bid for the project, based on which Indonesia was chosen as the source given the coal availability, time-frames and costs as compared to the two other major coal exporting countries namely Australia and South Africa apart from Indonesia having a legal regime honouring bilateral contracts since 1967. According to CGPL, between the bid date and June 2012, the actual increase in

the price of coal was 153%. This shows the steep increase in actual prices vis-à-vis past historical trends. Such an unforeseeable and unprecedented increase in coal prices was not foreseen by any bidder and has completely wiped the basis of which the Bid was submitted by CGPL. There is no doubt that the promulgation of the Indonesian Regulation which required the sale price of coal in Indonesia to be aligned with the international benchmark price has, prima facie, altered the premise on which the energy charges were quoted by Tata Power in its bid. The bid submitted was based on the prevalent economic situations in Indonesia to enter into a long term CSAs at competitive prices with discounts to the prevailing market conditions. CGPL would have continued to supply power at this price had the Indonesian Regulation not made it mandatory for sale of coal from Indonesia at international benchmark prices. Therefore, the competitive advantage of securing coal at lower prices that CGPL was enjoying by acquiring mining rights in Indonesia or by entering into long term CSAs with the coal suppliers in Indonesia appears to have been fundamentally altered/wiped out after the coal

sales from Indonesia are required to be aligned with international benchmark prices of coal. The procurers and consumer organizations have not been successful in controverting the above case of CGPL. We therefore have no hesitation in holding that the CGPL had FSA for procurement of coal for Mundra Project at a price less than market price.

302. In view of the above, while inter alia, holding that tariff discovered through competitive bidding process under Section 63 of the said Act cannot be tampered with as it is sacrosanct and that where the tariff is so discovered, the Appropriate Commission cannot grant compensatory tariff to the generators by using the regulatory power under Section 79(1)(b), we hold that the generators have made out a case of *Force Majeure.* We hold that promulgation of Indonesian Regulation has resulted in a *Force Majeure* Event impacting the projects of Adani Power and CGPL adversely. The generators would, therefore, be entitled to relief only as

available under the PPA. In the circumstances, we answer the issues in the following manner:

[J] Answers to the issues relating to *Force Majeure*:

303. In view of the above discussions, we hold that the increase in price of coal on account of the intervention by the Indonesian Regulation as also the non-availability/short supply of domestic coal in case of Adani Power constitute a *Force Majeure* Event in terms of the PPA. **Accordingly, we answer Issue No.12 in the affirmative**. In view of the judgment of this Tribunal dated 7/9/2011 in Appeal No.184 of 2010, we also hold that the bid for generation and sale of electricity by Adani Power to GUVNL was not solely premised on the availability of coal from GMDC. Admittedly, Adani Power sourced coal from Indonesia to fulfill its contractual obligations. **Accordingly, Issue No.13 is answered in the negative**. We also hold that the bid for generation and sale of electricity by Adani Power to Haryana Utilities was affected by non-availability of coal from Mahanadi Coalfields Limited. The

shortfall in domestic coal was made good by Adani Power by importing Indonesian coal. **We answer Issue No.14 in the affirmative**. For the reasons stated hereinabove, we also hold that the CGPL had FSA for procurement of coal for Mundra Project at a price less than the market price. **Accordingly, we answer Issue No.15 in the affirmative.**

304. Since we have already answered Issue No.5 in the negative holding that the Central Commission, de-hors the provisions of the PPAs, has no regulatory powers to vary or modify the tariff or otherwise grant compensatory tariff to the generating companies in the case of a tariff determined under a tariff based competitive bid process as per Section 63 of the said Act, the issues concerning computation of compensatory tariff need not be answered. To sum up, we may reproduce the Agreed Issues and our answers thereto as follows:

ISSUES & ANSWERS

1. What is the scope and extent of Order dated 31/3/2015 passed by the Supreme Court in Civil Appeal No.10016 of 2014 in the case of Adani Power allowing the plea of *Force Majeure* and Change in Law to be raised?

Ans: Order dated 31/03/2015 passed by the Supreme Court in Civil Appeal No.10016 of 2014 in the case of Adani Power permits Adani Power to raise the plea of *Force Majeure* and Change in Law in full measure only with one restriction that it cannot urge that on account of the said grounds, the contracts with the procurers are frustrated and it must be relieved of its obligations under the said contracts. In short, Adani Power can urge the plea of *Force Majeure* and Change in Law with restriction placed on it by the Supreme Court.

2. Whether the CGPL is entitled to raise the plea of *Force Majeure* or Change in Law to support the compensatory tariff granted by Order dated 21/2/2014 in terms of the principles of Order

XLI Rule 22 (First Part) of the CPC or otherwise, claiming parity with Order dated 31/03/2015 passed in Civil Appeal No.10016 of 2014 in the case of Adani Power?

Ans: CGPL is entitled to raise the plea of *Force Majeure* or Change in Law to support the compensatory tariff granted by Order dated 21/2/2014, claiming parity with Order dated 31/03/2015 passed in Civil Appeal No.10016 of 2014 in the case of Adani Power. CGPL can be permitted to do so in the light of Section 120 of the said Act and in light of the principles underlying the provisions of the CPC.

3. Whether the supply of power to procurers in more than one State from the same generating station of a generating company, *ipso facto*, qualifies as 'Composite Scheme' to attract the jurisdiction of the Central Commission under Section 79 of the said Act?"

Ans: We hold that the supply of power to more than one State from the same generating station of a generating company, *ipso facto*, qualifies as 'Composite Scheme' to attract the jurisdiction of the Central Commission under Section 79 of the said Act.

4. Whether in the facts and circumstances of each of the cases of –

(a) Adani Power's generation and sale of electricity in Gujarat and Haryana under PPAs dated 2/2/2007 and 7/8/2008 and

(b) GMR Kamalamga's generation and sale of electricity to Odisha, Bihar and Haryana under PPAs dated 28/9/2006, 9/11/2011 and 31/10/2007 (with back-to-back PSAs between PTC and Haryana dated 7/8/2008),

there exists a Composite Scheme for generation and sale of electricity within the

scope of Section 79(1)(b) of the said Act, for the Central Commission to exercise jurisdiction?"

Ans: We have answered Issue No.3 in the affirmative and held that supply of power to more than one State from the same generating station of a generating company *ipso facto*, qualifies as a 'Composite Scheme' to attract the jurisdiction of the Central Commission under Section 79 of the said Act. It is an admitted position that both GMR Energy and Adani Power are selling electricity in more than one State from their respective generating stations. Hence, we hold that so far as Adani Power and GMR Energy are concerned, there exists a 'Composite Scheme' for generation and sale of electricity in more than one State by a generating station of a generating company within the meaning of Section 79(1)(b) of the said Act for the Central Commission to exercise jurisdiction.

5. Whether the Central Commission, de-hors the provisions of the PPAs, has the regulatory powers to vary or modify the tariff or otherwise grant compensatory tariff to the generating

companies in the case of a tariff determined under a tariff based competitive bid process as per Section 63 of the said Act?

Ans: We hold that the Central Commission has no regulatory powers under Section 79(1)(b) of the said Act to vary or modify the tariff or otherwise grant compensatory tariff to the generating companies in case of a tariff determined under a tariff based competitive bid process as per Section 63 of the said Act. If a case of *Force Majeure* or Change in Law is made out, relief provided under the PPA can be granted, under the adjudicatory power.

6. Whether the Appropriate Commission, independent of *Force Majeure* and Change in Law provisions of PPAs, has the power to vary or modify the tariff or otherwise grant compensatory tariff to the generating companies in pursuance of the powers under Sections 61, 63 and 79 of the Act and/or Clause 4.7 and 5.17 of the said Guidelines issued by the Central Government and/or Article 17.3 of the PPA and/or under the

adjudicatory powers as per Section 79(1)(f) of the said Act?

Ans: The Appropriate Commission, independent of *Force Majeure* and Change in Law provisions of PPAs, has no power to vary or modify the tariff or otherwise grant compensatory tariff to the generating companies in pursuance of the powers under Sections 61, 63 and 79 of the Act and/or Clause 4.7 and 5.17 of the said Guidelines issued by the Central Government and/or Article 17.3 of the PPA and/or under the adjudicatory powers as per Section 79(1)(f) of the said Act. The adjudicatory powers available to the Appropriate Commission under Section 79(1)(f) of the said Act and Article 17.3 of the PPA can be used by the Appropriate Commission to give to the generator relief available under the PPA if a case of *Force Majeure* or Change in Law is made out under the PPA.

7. Whether, in the facts and circumstances of the case, the Central Commission having held that *Force Majeure* and Change in Law provisions of

the PPAs have no application, is right in granting compensatory tariff under any other powers?

Ans: In the facts and circumstances of the case, the Central Commission having held that *Force Majeure* and Change in Law provisions of the PPAs have no application, it was not right in granting compensatory tariff under any other powers. If case of *Force Majeure* or Change in Law is made out, relief provided under the PPA can be granted to the generators.

8. Whether in the facts and circumstances of the case, the Central Commission is right in construing the order dated 2/4/2013 in case of Adani Power and order dated 15/4/2013 in the case of CGPL as a decision of the Commission to grant compensatory tariff not being limited to a conciliatory process to explore an amicable agreed solution which would exhaust if no consensus emerges?

Ans: In view of our answer to Issue Nos.5 to 7, this Issue need not be answered.

9. Whether, in the facts and circumstances of the case, the Central Commission is right in giving effect to the payment of compensatory tariff retrospectively from the respective Scheduled COD of the generating units instead of considering the same prospectively from Order dated 21/2/2014?

Ans: In view of our answer to Issue Nos.5 to 7, this issue need not be answered.

10. Whether the Change in Law provided under Article 13 of the PPA or under Clause 4.7 of the said Guidelines issued by the Central Government as per Section 63 of the said Act should be construed to include laws other than Indian Laws such as the Indonesian Law/Regulations prescribing the benchmark price for export of coal?

Ans: Change in Law provided under Article 13 of the PPA or under Clause 4.7 of the said Guidelines issued by the Central Government as per Section 63 of the said Act should not be construed to include laws other than Indian Laws such as the Indonesian Law/Regulations prescribing the benchmark price for export of coal.

11. Whether in the facts and circumstances of the present case, the increase in price of coal on account of change in National Coal Distribution Policy linked to reduced availability of domestic coal and/or promulgation of Indonesian Regulation constitute an event of Change in Law attracting Clause 4.7 of the said Guidelines read with Article 13 of the PPA?

Ans: We hold that in the facts and circumstances of the present case, the increase in price of coal on account of change in National Coal Distribution Policy linked to reduced availability of domestic coal and/or promulgation of Indonesian Regulation do not

constitute an event of Change in Law attracting Clause 4.7 of the said Guidelines read with Article 13 of the PPA.

12. Whether in the facts and circumstances of the case, the increase in price of coal on account of the intervention by the Indonesian Regulations as also the non-availability/short supply of domestic coal in case of Adani Power constitute a *Force Majeure* event in terms of the PPA?

Ans: We hold that the increase in price of coal on account of the intervention by the Indonesian Regulation as also the non-availability / short supply of domestic coal in case of Adani Power constitute a *Force Majeure* Event in terms of the PPA.

13. Whether the bid for generation and sale of electricity by Adani Power to GUVNL was premised on the availability of coal from GMDC, and to what effect?

Ans: In view of the judgment of this Tribunal dated 7/9/2011 in Appeal No.184 of 2010, we hold that the bid for generation and sale of electricity by Adani Power to GUVNL was not solely premised on the availability of coal from GMDC. Admittedly, Adani Power sourced coal from Indonesia to fulfill its contractual obligations.

14. Whether the bid for generation and sale of electricity by Adani Power to Haryana Utilities was affected by non-availability of coal from Mahanadi Coalfields Limited and if so to what extent?

Ans: The bid for generation and sale of electricity by Adani Power to Haryana Utilities was affected by non-availability of coal from Mahanadi Coalfields Limited. The shortfall in domestic coal was made good by Adani Power by importing Indonesian coal.

15. Whether the CGPL had fuel supply agreements for procurement of coal for Mundra Project at a

price less than market price and if so to what extent?

Ans: We hold that CGPL had fuel supply agreements of coal for Mundra Project at a price less than market price.

305. In view of our answer to Issue No.5 holding that the Central Commission has no regulatory powers to vary or modify the tariff or otherwise grant compensatory tariff to the generating companies in the case of a tariff determined under a tariff based competitive bid process as per Section 63 of the said Act, Issue Nos.16 and 17 relating to computation of compensatory tariff need not be answered.

[L] Decision on Adani Power and CGPL Group Appeals.

306. In the view that we have taken, Interim Order dated 2/4/2013 passed in Petition No.155/MP/2012, which is impugned in Appeal No.100 of 2013 and Interim Order dated

15/4/2013 passed in Petition No.159/MP/2012, which is impugned in Appeal No.151 of 2013 are set aside. Appeal No.100 of 2013 and Appeal No.151 of 2013 are, therefore, allowed. In view of answer to Issue No.5 above, we set aside the Final Order dated 21/2/2014 in Petition No.155/MP/2012 and Final Order dated 21/2/2014 in Petition No.159/MP/2012 granting compensatory tariff to Adani Power and CGPL respectively. Appeal No.125 of 2014, Appeal No.134 of 2014, Appeal No.98 of 2014, Appeal No.116 of 2014, Appeal No.124 of 2014, Appeal No.133 of 2014, Appeal No.97 of 2014, Appeal No.91 of 2014, Appeal No.100 of 2014, Appeal No.139 of 2014 and Appeal No.115 of 2014 are thus allowed.

307. We remand Petition No.155/MP/2012 filed by Adani Power and Petition No.159/MP/2012 filed by CGPL to the Central Commission and direct the Central Commission to assess the extent of impact of Force Majeure Event on the projects of Adani Power and CGPL and give them such relief as may be available to them under their respective PPAs and

in the light of this judgment after hearing the parties. The entire exercise should be done as expeditiously as possible and at any rate within a period of three months from today.

[M] Decision on GMR Group Appeals.

308. Appeal No.44 of 2014 has been filed against Order dated 16/12/2013 passed by the Central Commission in Petition No.79/MP/2013 and Petition No.81/MP/2013. By the said order dated 16/12/2013, the Central Commission, while relying on the judgment and order dated 16/10/2012 passed in Petition No.155/MP/2012 (Adani Power Limited v. Uttar Haryana Bijli Vidyut Nigam Ltd.), has held that it has jurisdiction to entertain a petition for determination of tariff under Section 79(1)(b) of the said Act. There is no dispute that GMR-Kamalanga Energy Limited, the petitioners therein were supplying power to procurers in more than one State from its power plant at Kamalanga in the State of Orissa. We have

already answered Issue No.3 of the Agreed Issues that the supply of power to more than one State from the same generating station of a generating company, *ipso facto*, qualifies as 'Composite Scheme' to attract the jurisdiction of the Central Commission under Section 79 of the said Act. In view of this, Appeal No.44 of 2014 is devoid of any merit and is dismissed.

309. Appeal No.74 of 2014 has been filed against Order dated 3/1/2014 passed by the Central Commission in Petition No.77/GT/2013. By the said order dated 3/1/2014, the Central Commission, while relying upon its common order dated 18/12/2013 passed in Petition No.79/MP/2013 and Petition No.81/MP/2013, has held that it has jurisdiction to entertain a petition for determination of tariff under Section 79(1)(b) of the said Act. There is no dispute that GMR-Kamalanga Energy Limited, the petitioner therein was supplying power to procurers in more than one State from its power plant at Kamalanga in the State of Orissa. We have

already answered Issue No.3 of the Agreed Issues that the supply of power to more than one State from the same generating station of a generating company, *ipso facto*, qualifies as 'Composite Scheme' to attract the jurisdiction of the Central Commission under Section 79 of the said Act. In view of this, Appeal No.74 of 2014 is devoid of any merit and is dismissed.

[N] Decision on Sasan Group Appeals.

310. Appeal No.99 of 2014 and Appeal No.104 of 2014 have been filed against Order dated 21/02/2014 passed by the Central Commission in Petition No.14/MP/2013. Petition No.14/MP/2013 had been filed by SASAN Power inter alia for a declaration that the unprecedented, unforeseen and uncontrollable depreciation in the Indian Rupee vis-a-vis US Dollar as a Force Majeure Event under the PPA and to restitute SASAN to the same economic condition as if the Force Majeure Event had never occurred. By Order dated

21/2/2014, the Central Commission held that the depreciation in Indian Rupees is not a Force Majeure Event within the meaning of Article 12 of the PPA. However, after referring to its Interim Order dated 15/4/2013 in Petition No.159/MP/2012 (CGPL v. GUVNL & Ors.), the Central Commission proceeded to exercise its regulatory power under Section 79(1)(b) of the said Act and sought for certain documents from SASAN Power. Being aggrieved by the said order, Haryana Utilities have filed Appeal No.99 of 2014 and Rajasthan Utilities have filed Appeal No.104 of 2014. Admittedly, this matter relates to the generation and sale of electricity from the power plant of SASAN Power where the tariff was determined under the tariff based competitive bid process under Section 63 of the said Act. We have already answered Issue No.5 of the Agreed Issues that the Central Commission has no regulatory powers under Section 79(1)(b) of the said Act to vary or modify the tariff or otherwise grant compensatory tariff to the generating companies in case of a tariff determined under a tariff based competitive bid process as per Section 63 of the said Act. In view of this, Appeal

Nos.99 of 2014 and Appeal No.104 of 2014 are allowed. The impugned Order dated 21/2/2014 is hereby set aside.

311. The appeals are disposed of in the aforestated terms. Needless to say that all interim applications shall stand disposed of accordingly.

312. Pronounced in the Open Court on this **7th day of April, 2016**.

I.J. Kapoor	**T. Munikrishnaiah**	**Justice Ranjana P. Desai**
[Technical Member]	**[Technical Member]**	**[Chairperson]**

√**REPORTABLE/~~NON-REPORTABALE~~**