

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.105 of 2011

Dated:21st January, 2013

**Present : HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,
CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

In the Matter of:

**M/s. JSW Energy Limited
Jindal Mansion,
5-1, Dr. G. Deshmukh Marg,
Mumbai-400 026**

...Appellant

Versus

- 1. Maharashtra State Electricity Distribution Co.
Ltd.,
Prakashgad, 5th Floor,
Bandra(East)
Mumbai-400 051.**
- 2. Maharashtra Electricity Regulatory Commission
World Trade Centre No.1, 13th Floor
Cuffe Parade, Colaba,
Mumbai-400 001**

.....Respondent(s)

**Counsel for the Appellant(s) : Mr. M G Ramachandran
Mr. Anand K Ganesan
Ms. Sneha Venkataramani**

Counsel for the Respondent(s):Ms. Deepa Chawan
Mr. Abhishek Mitra for R.1
Mr. Buddy A Ranganadhan for R.2
Mr. Varun Pathak
Mr. Amarjeet Singh

J U D G M E N T

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

1. JSW Energy Limited is the Appellant herein.
2. The Appellant filed a petition before the Maharashtra Commission claiming the cost of installation of Flue Gas De-sulphurisation (FGD) system to be included in the Project Cost as per Power Purchase Agreement dated 23.2.2008. However, the said claim was rejected by the State Commission through the order dated 25.5.2011.
3. Aggrieved by this, the Appellant has filed this Appeal.
4. The short facts are as follows:-
 - i) The Appellant is a generating company.

ii) The Maharashtra State Electricity Distribution Company Limited (MSEDCL) is the Distribution Licensee, the 1st Respondent.

iii) The Maharashtra State Regulatory Commission is the 2nd Respondent.

iv) The Appellant envisaged to set up a generating Station at Ratnagiri after identifying the land required and obtaining the requisite permissions and approvals.

v) The Appellant applied for Environmental clearance for the power project from the Ministry of Environment and Forest, Government of India.

vi) Accordingly, the Ministry, Government of India granted the Environmental clearance to the Appellant on 17.5.2007. In the said approval, the Government of India had imposed various conditions subject to which the Environmental clearance was granted.

vii) The clearance stipulated that adequate space shall be provided by the Appellant for installation of the Flue Gas De-sulphurisation(FGD) system for removal of

sulphur di-oxide, if required at later stage. Accordingly, the adequate space was provided for the installation of the FGD system.

viii) In the year 2007, the Distribution Licensee (R-1) initiated competitive bidding process for procurement of electricity in accordance with the guidelines issued by the Government of India under section 63 of the Electricity Act, 2003. From 21.2.2008 onwards, the Appellant and others submitted the bids for the sale of electricity to the Distribution Licensee on the terms and conditions of the bidding documents. After observing the required procedures, the Appellant was selected as a successful bidder. Thereafter, on the basis of selection of the Appellant as the successful bidder to supply 300 MW of electricity to the Distribution Licensee(R-1) both the parties have entered into the Power Purchase Agreement on 23.2.2008. The bid documents and the Power Purchase Agreement provided that in case of change in law after 7 days prior to the bid deadline, i.e. 14.2.2008, any financial impact on account of

such change in law needed to be compensated.

ix) The Ministry of Environment and Forest sent a letter, at the final stage of commissioning the Project on 16.4.2010 imposing a condition that FGD system shall be installed before the commissioning of the Project. The Appellant sent a reply to the Ministry on 22.4.2010 for cancellation of such imposition of condition mainly on the ground that the requirement of the FGD was not established yet and that the commissioning of the Project would get delayed further on account of condition now imposed for installing FGD prior to commissioning of the Project. On the basis of the representation made by the Appellant, the Ministry by the letter dated 28.6.2010 required the Appellant to install the FGD within a period of 23 months and conveyed its Environmental clearance for the Project subject to the compliance of the safeguards and conditions mentioned in the said letter.

x) In pursuance of the said letter sent by the Government, the Appellant incurred expenditure for installation of FGD. Thereupon, the Appellant sent a letter to the Distribution Licensee(R-1) on 27.7.2010 intimating that the mandate had been imposed by the Government of India dated 16.4.2010 and as such there was a change in law as per clause 13 of Power Purchase Agreement and accordingly, the Company incurred expenditure for installation of FGD which claimed to be included in the cost. In reply to the said letter, the Distribution Licensee(R1) sent a letter dated 11.8.2010 rejecting the claim of the Appellant contending that it was the obligation of the Appellant to maintain all required consents for the Power Project and as such there was no change in law in terms of clause 13 of Power Purchase Agreement.

xi) On receipt of the refusal of this claim, the Appellant issued notice to the Distribution Licensee on 20.8.2010 for resolution of the dispute arose between the parties. The Appellant further stated in the letter that notwithstanding the disputes that have arisen

between the parties, the Appellant will continue to perform its obligations by supplying power under the Power Purchase Agreement without prejudice to its claim.

xii) Thereupon, the meeting was held between the parties. It was decided in the meeting that the parties shall proceed for resolution of the dispute by way of adjudication by the State Commission.

xiii) In pursuance of the said decision, the Appellant filed a petition in petition No.99 of 2010 on 14.12.2010 before the State Commission for adjudication of dispute that has arisen between parties regarding the application of Clause 13 of the Power Purchase Agreement on account of imposition of the condition of installation of FGD by the Appellant.

xiv) The State Commission after hearing the parties by the impugned order dated 25.5.2011 dismissed the petition filed by the Appellant and rejected its claim on the ground that even under the initial Environmental clearance dated 17.5.2007, it was mandated for the installation

of the FGD and that the cost thereof ought to have been included in the total cost.

xv) Having aggrieved over this order, the Appellant has filed this Appeal.

5. Assailing the order impugned, the learned Counsel for the Appellant has made the following submissions:-

i) The State Commission held in the impugned order that there was no change in law in terms of clause 13 of Power Purchase Agreement entered into between the Appellant and Distribution Licensee (R-1) since the condition of installation of FGD imposed by the Government of India by the communication dated 16.4.2010 had already been imposed in the Environmental clearance dated 17.5.2007. This finding is wrong because there was no statutory direction in the Environmental clearance dated 17.5.2007 mandating the installation of the FGD and this mandate was issued only on 16.4.2010 and as such it squarely falls within the definition of "Change in Law" as per the PPA.

ii) The stipulation regarding FGD in the Environmental clearance dated 17.5.2007 was that the installation be done, only if required, in future. Thus, the installation of FGD as on the cut off date was not a mandate or certainty. This means that the installation of FGD may not be necessary at all at this stage. Therefore, there was no reason for the Appellant to consider at that stage that the cost of FGD should be included in the Project Cost.

iii) The State Commission held that there was an obligation on the part of the Appellant for maintaining a separate fund for implementation of the Environmental protection measures in the form of FGD to include FGD cost in the Project Cost. This finding is wrong. At the time when the bid was submitted and when the Power Purchase Agreement was signed, the cost of FGD did not form part of the Environmental protection measures as it was not directed to be incurred by the Ministry of Environment and Forest, as per the Environmental clearance.

iv) The initial Environmental clearance dated 17.5.2007 did not mandate the installation of FGD by the Appellant at its Power Station. The only condition as applicable then was the sufficient space needed to be provided by the Appellant, and the installation of FGD if required at the time in future. Therefore, the cost to be considered by the Appellant at such a point of time was only for the space to be kept aside. There was no mandate for the installation of the FGD at that time. Under those circumstances, the State Commission can not hold that the Appellant was under an obligation to install the FGD and its cost was to be included in the Project cost at that stage itself.

v) The Appellant at the time of submission of the bids had disclosed all the relevant events with regard to its activities. Further, the Appellant has acted in terms of PPA. In any event, there was no order in the pending litigation affecting in any manner, the implementation of the Project and as such it did not in any manner affect the claim of the Appellant. As such, the non disclosure of the

pending litigation is irrelevant to the issue in question.

6. On these grounds, the Appellant seeks to set aside the impugned order dated 25.5.2011 and to hold that the imposing the mandate of installation of FGD amounts to 'change in law' under clause 13 of the PPA and consequently the Distribution Licensee is liable to pay compensation to the Appellant for the adverse financial impact for installation of FGD on account of "Change in Law.
7. In reply to the above submissions, the learned Counsel for the Respondent-1, the Distribution Licensee has made the following submissions:-
 - i) The Appellant is totally wrong in contending that the requirement in the Environmental clearance dated 17.5.2007 was required to be carried out only in future and therefore, the mandate that the FGD must be installed issued by the Government would amount to change in law. Careful perusal of the Environmental Clearance would show that the argument advanced by the Appellant has no basis. As a matter of fact, the Environmental Clearance puts the conditions

that a detailed study with reference to the impact of the Project was to be undertaken and additional safeguards should be provided by identifying the separate space for the installation of FGD and not only that, it required that separate funds should be allocated for such measures which were to be included in the Project cost. Therefore, nothing prevented the Appellant from implementing these measures and claiming the same in the Project cost even at the first instance.

ii) In terms of the conditions in the Environmental Clearance, the Appellant was under bounden duty to include the FGD cost in the Project cost which the Appellant had failed to do. The Environmental clearance would specifically mandate that the space provision shall be made for installation of FGD, if required, at a later stage and it further mandated that separate allocation of funds for the Environmental protection measures must be made and that the same must be included in the Project cost. Admittedly, the funds were not allocated at that time even though it was

mandated that the funds were to be allocated at that stage itself, which shall be included in the Project cost. Therefore, it can not be contended that there was a change in law.

iii) RFQ and RFP and draft PPA were circulated to the bidders in October 2007 itself. As per the bid documents, the Appellant had to disclose at the bid stage itself, the litigation pending against it but actually there was litigation pending at that stage as against the Appellant both before the Appellate Forum and the High Court. However, this was not disclosed. As a result of the non-disclosure of the pending litigation by the Appellant, the Distribution Licensee was unable to consider the possible effects of the pending litigation and in good faith it considered the bid of the Appellant on the merits of the particulars disclosed by the Appellant. The factum of the non-disclosure by the Appellant of the pendency of the legal litigation related to the Environmental clearance is fatal to the claim of the Appellant.

iv) In the event the Appellant had disclosed to the Distribution Licensee, the pending litigation in respect of Environmental clearance, the Distribution Licensee would not have considered the bid of the Appellant or in the alternative the Distribution Licensee would have included adequate conditions in the PPA itself regarding the possible outcome of the pending litigation. In that event, the Distribution licensee could have analysed the impact of the adverse order on the tariff proposed by the Appellant and would have made provisions accordingly. As a result of the non- disclosure, the Distribution Licensee was prevented to consider the actual outcome of the pending litigation. On the other hand, the Appellant misled the Distribution Licensee to consider the bid of the Appellant on the merits of the limited particulars disclosed by the Appellant in the submissions for the bid. Therefore, the Appellant is estopped from contending that there was a change in law as provided in the PPA and also from claiming the benefits of the said provision.

8. In the light of the rival contentions, the following questions would arise for consideration:-

a) **Whether there was any change in law in accordance with the clause 13 read with other clauses of the Power Purchase Agreement in its entirety in the good faith and circumstances of the case?**

b) **Whether in the Environmental clearance dated 17.5.2007 or at any time prior to the bid deadline namely 14.2.2008, was there any mandate requiring the installation of FGD by the Appellant and allocation of funds as part of the Project cost for the installation of FGD?**

c) **Whether non-disclosure of pending litigation by the Appellant at the time of submission of bid documents would be fatal to the claim of the Appellant on the strength of subsequent notification issued by the Ministry dated 16.4.2010?**

9. Before dealing with these questions, it would be better to refer to the relevant chronological events

which would disclose the actual background of the case, which are given below:-

i) The Ministry of Power, Government of India notified tariff based competitive bidding guidelines for Distribution Licensees to ensure procurement of power in transparent and competitive manner. These guidelines were issued on 19.01.2005. Thereupon, on 14.9.2006, the Central Government issued notification relating to requirement of prior Environmental clearance. On the basis of this notification, the Ministry of Environment and Forest issued a circular in terms of the notification dated 14.9.2006 inviting applications from the applicants who are interested in putting up thermal power plants to grant prior Environmental clearance.

ii) The Appellant, seeking for the prior Environmental clearance, sent a proposal to the Ministry on 06.11.2006. On receipt of several applications, the expert appraisal committee was constituted by the Ministry of Environment and Forest.

iii) Ultimately on 17.5.2007, the Ministry of Environment and Forest issued Environmental clearance to the Appellant for the Power Project, subject to the implementation of the various terms and conditions.

iv) There were several conditions provided in the Environmental Clearance dated 17.5.2007. We shall quote the **relevant conditions** contained in the Environmental clearance which are given below:-

(iii) Space provision shall be made for installation of FGD of requisite efficiency of removal of SO₂, if required at later stage.

(xx) Separate funds should be allocated for implementation of Environmental protection measures along with item wise break up. These cost should be included as part of the project cost. The funds earmarked for the environment protection measures should not be diverted for other purposes and year wise expenditure should be reported to the Ministry.

v) Through these conditions, the Appellant had been communicated that the Appellant may be required to install FGD of required capacity at a later stage and called upon the Appellant to provide the space for installation of FGD of requisite efficiency as well as to allocate funds for implementation of those Environmental protection measures and the cost should be included as part of the Project cost. It also provided that the Appellant should not divert the said funds for any other purpose.

vi) As against the Environmental clearance issued in favour of the Appellant, one other party claiming himself aggrieved, filed an Appeal before the National Environment Appellate authority challenging the said Environmental Clearance on 27.7.2007. The same was pending.

vii) At that stage, in October, 2007, the Distribution Licensee (MSEDCL) initiated competitive bidding process for procurement of power. With reference to this, 14.2.2008 was decided as the cut-off-date for application for change in law being 7 days prior to the bidding

deadline. As on the cut-off-date, the prior Environmental clearance received by the Appellant stipulated that the cost relating to the implementation of the Environmental protection measures should be included as part of the Project cost. On 21.02.2008, the Appellant had submitted the bid for supply of 300 MW of power, in terms of the competitive bidding process initiated by the Distribution Licensee. In March, 2008 bidding evaluation was completed. At the end of technical evaluation; 10 bidders including the Appellant were selected. All technical bids were opened on 20.8.2008. At that stage on 12.9.2008, the Appeal filed against the Environmental clearance was dismissed by the Appellate Authority.

viii) As against this order passed on the Appeal, a writ petition was filed by the aggrieved party before the High Court, New Delhi on 18.9.2009. The High Court while disposing the writ petition directed the Expert Appraisal Committee to re-examine the issue and to file the report and that the issue of provision of FGD be decided. On 11.01.2010

Expert Appraisal Committee conducted a meeting. There also, it was decided regarding the requirement of installing FGD at a later stage.

ix) Since the Appellant became the successful bidder, Power Purchase Agreement was entered into between the Distribution Licensee, Respondent-1 and the Appellant for supply of 300 MW to the Distribution Licensee on 23.02.2010. Subsequently, the Ministry of Environment and Forest sent a letter to the Appellant on 16.4.2010 directing the Appellant that the FGD system shall be installed before commissioning the Project.

x) Though the Appellant sent a request through a letter dated 22.4.2010 praying for withdrawal of the condition of establishing FGD before commissioning the plant, the Ministry refused to withdraw the said direction but directed the Appellant to install FGD within a period of 23 months.

xi) Only thereafter, the Appellant gave all these details to the Distribution Licensee through its letter dated 11.8.2010 about the

pendency of the litigation, the committee's report and the letter sent to the Ministry of Environment and Forest and claimed the financial benefits due to "Change in Law". However, on 11.8.2010, the Distribution Licensee rejected the claim of the Appellant.

xii) On this basis, the Appellant raised the dispute for resolution. The meeting was held between the parties to explore the possibility of amicable settlement as contemplated in the Power Purchase Agreement but the same did not get materialised.

xiii) Therefore, the Appellant filed Petition No.99 of 2010 before the State Commission on 14.12.2010. The Appellant has prayed the State Commission in the petition to adjudicate upon the dispute between the Appellant and Distribution Licensee or in the alternative refer the dispute to adjudication through arbitration.

xiv) The State Commission after hearing the parties, by the order dated 25.5.2011 rejected the petition filed by the Appellant on the ground that the initial Environmental clearance dated 17.5.2007 itself mandated the

installation of the FGD and cost incurred for the said installation ought to have been included in the total cost by the Appellant and as such the same is not a “Change in law”.

xv) Aggrieved by this order, this Appeal has been filed by the Appellant mainly on the ground that there was no statutory direction in the Environmental clearance mandating the installation of FGD prior to the direction of the Ministry of Environment and Forest i.e. 16.4.2010 and as such, it squarely falls within the definition of ‘**Change in Law**’ under the PPA entered into between the Appellant and the Distribution Licensee.

10. Bearing these facts in our mind, let us now refer to the discussion and the finding referred to in the impugned order by the State Commission while rejecting the claim of the Appellant:

“Having heard the parties and after considering the materials placed on record, the Commission has following observations:

(i) The Petitioner states that as per Article 13.1.1 of the PPA dated 23rd February 2010, it is entitled to claim financial benefits due to change in

law of that of the condition to install FGD imposed under a letter dated 16th April 2010 of the MoEF issued to the Petitioner imposing the following as “ **“additional conditions”** under paragraph 2(i) in the said letter which is extracted as follows:

“Flue Gas Desulphurisation System (FGD) **shall be installed** before commissioning of the project and action in this regard shall be submitted within three months to the Ministry”.

ii) On account of the “**additional conditions**”, the Petitioner has sought to claim Rs.150 Crore as an increase in the project cost(one fourth of total projected cost of 600 Crore of FGD plant) subsequent to signing of the PPA and which is stated to have a significant cost impact on the contracted capacity of 300 MW to be supplied to the Respondent.

iii) it is necessary therefore to examine Article 13.1.1 of the PPA dated 23rd February 2010 as follows:-

“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 the interpretation of any Law by a Competent Court of law, tribunal of Indian Governmental Instrumentally provided such Court of law, tribunal on Indian Governmental Instrumentality is final authority under law for such interpretation 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.

(iv) As per the Environmental Clearance dated 17.5.2007, the direction was given to keep the space for installation of the FGD if required and also for allocation of separate funds for that purpose. The letter dated 16.4.2010 issued by the GOI MoEF binds the Petitioner to install the FGD before commissioning of the project. The Petitioner contended that this subsequent imposition of

the condition is a change in law. As per the above quoted provision of change in law, the contention of the petitioner is nowhere sustained in the definition. Furthermore, as per the Clause 5.4. of the PPA the Seller i.e. the Petitioner shall be responsible for obtaining all consents required for developing, financing, constructing, operating and maintenance of the project, the Petitioner shall also be responsible for obtaining/maintaining/renewing the Initial Consents and for fulfilling all conditions specified therein.

(v) As per Clause 3.1.2.i of the PPA, the Petitioner shall have received the initial Consents as mentioned in Schedule I either unconditionally or subject to conditions which do not materially prejudice its rights or the performance of its obligations under the Agreement. Schedule I include the Clearance of State Pollution Control Board/MoEF. All these clauses of the PPA cast the burden on the Petitioner and further the condition (xx) in the Environmental Clearance protection measures and that this cost should be included as part of the project cost and not diverted for any other purpose. Even though the Petitioner stated that he has not included the cost of the FGD in the bid and now claiming for enhancing the capital cost and tariff,

this claim is untenable. This claim of the Petitioner shows that, the Petitioner has disregarded the directions of the MoEF.

(vi) The Petitioner has made positive assertion/warranties in consonance with Condition 2.5. of Schedule 9 that no litigation was pending or threatened against the Petitioner. By such positive assertion the Petitioner suppressed the pendency of litigation regarding Environmental Clearance. While the Commission records the above contention of Respondents and notes that the Petitioner has not disputed the same, this matter can not be taken up in the present proceedings of the Petitioner.

In view of the above, the present Petition is hereby dismissed.”

11. The crux of the findings given in the impugned order are as follows:-

i) According to the generating company, it is entitled to claim financial benefits due to “Change in Law” with regard to the condition in FGD imposed under letter dated 16.4.2010 by the Government directing the Company to impose the additional condition to the effect that the company shall install FGD before commissioning the Project. On account of the

additional conditions, the generating company sought claim of Rs.150 crores incurred subsequent to signing the PPA as the said additional conditions would amount to change in law under clause 13.1.1 of the PPA.

ii) According to the Generating Company, as per the Environmental clearance dated 17.5.2007, direction was given to keep the space for installation of FGD, if required, in future, but the letter subsequently issued by the Government on 16.4.2010 only binds the generating company to install the FGD before the commissioning the Project and therefore, the subsequent imposition of condition is a change in law. This contention cannot be accepted as it would not satisfy the definition of the term 'Change in Law' as contained in clause 13 of the PPA.

iii) As per the clause 5.4. of the PPA, the generating company namely Seller shall be responsible for obtaining all the Consents required for developing, financing, constructing, operating and maintenance of the Project. This clause further provides that the

generating company shall be responsible for obtaining and renewing the initial consents and other financial conditions specified there.

iv) As per the clause 3.1.2 of the PPA, the generating company shall receive all the initial consents either unconditionally or subject to some conditions which do not prejudice its right or the performance of its obligations. All these clauses of the PPA cast burden on the generating company for obtaining all the consents unconditionally or subject to some conditions. Further, the condition (xx) in the Environmental clearance dated 17.5.2007 mandates the generating company not only to keep the space but also to allocate a separate fund for implementation of the Environmental protection measures and that this cost should included as part of the Project cost which should not be diverted for any other purpose.

v) Even though, the generating company has provided space for FGD, it has not allocated the separate funds and not included in the cost of the FGD in the bid. Even then, the generating company is now claiming for

enhancing the capital cost of the FGD which has been spent subsequent to the PPA. Thus, it is clear that the generating company has disregarded the direction of the Ministry who issued Environmental clearance. Therefore, this claim is untenable.

vi) The Distribution Licensee has pointed out that at the time of the submission of the bid documents some litigation was pending with reference to the Environmental clearance but the same was not disclosed to the Distribution Licensee while the bid documents have been submitted and this shows that the generating company has suppressed the pendency of the litigation regarding the Environmental clearance in the bid documents. Even though the Distribution Licensee raised this contention on the point of non disclosure and the Commission also recorded their contentions on the impugned order, the Generating Company has not disputed this. However, this issue cannot be decided in the present proceedings of the generating company and it can be decided later in the appropriate proceedings.

12. On these reasonings, the claim of the Appellant is rejected.
13. The Appellant, in this Appeal has raised two issues (1) **Change in Law** and (2) **The effect of non-disclosure of pending litigation.**
14. With reference to the **2nd issue** relating to non-disclosure of pending litigation, we do not propose to deal with the said issue as the State Commission has held that the said issue can be decided later in the appropriate proceedings. In the absence of any findings with regard to the said issue by the State Commission, we do not want to go into the merits of that issue though the said issue has been elaborately argued by both the parties before this Tribunal. That apart, the non-disclosure of the pending litigation will not be a relevant issue for considering the main issue which has been raised as the First Issue with regard to 'change in law'. Therefore, we deem it appropriate to go into the First issue regarding the change in law in detail.
15. The case of the Appellant in a nutshell is that the requirement as referred to in the Environmental Clearance dated 17.5.2007 was required to be carried out only in future and not at that stage, and

that therefore, the direction for enforcement of the said condition by the Government of India by the letter dated 16.4.2010 amounts to change in law as per the PPA executed between the Appellant and the Distribution Licensee and consequently, the Appellant is entitled to claim the financial benefits of the said change in law. Thus, the Appellant relies upon two documents namely Environmental Clearance dated 17.5.2007 and the letter of Ministry of Forest dated 16.4.2010 in the light of the Clause providing for change in law in the PPA.

16. **The relevant extract** of the Environmental clearance granted to the Appellant by the letter dated 17.5.2007 are as under:

“3. The proposal has been considered in accordance with para 12 of the EIA Notification dated 14.09.2006 read with para 2.2.1 (i) (a) of the Circular No.J-110013/41/2006-IA II (i) dated 13.10.2006 and Environmental clearance is hereby accorded under the provisions there of subject to implementation of the following terms and conditions:

.....

(ii) The detailed study regarding the impact of the project, if any, on Alphanso mango and marine fisheries as recommended in the report of Dr. B.S Konkan Krishi

Vidyapith shall be undertaken. Based on the same, additional safeguard measures as may be required will be taken by the proponent with prior approval of the Ministry of Environment and Forests. A copy of the report will be submitted to the Ministry. The cost towards undertaking the study and implementation of safeguard measures, if any, will be borne by the project.

(iii) Space provision shall be made for installation of FGD of requisite efficiency of removal of SO₂, if required at later stage.

.....

(xx) Separate funds should be allocated for implementation of Environmental protection measures along with item wise break-up. These cost should be included as part of the project cost. The funds earmarked for the Environmental protection measures should not be diverted for other purposes and year wise expenditure should be reported to the Ministry.

.....

7. In case of any deviation or alteration in the project proposed from those submitted to this Ministry for clearance, a fresh reference should be made to the Ministry to assess the adequacy of the condition (s) imposed and to add additional Environmental protection measures required, if any.

8. The above stipulations would be enforced among others, under the Water (Prevention and

Control of Pollution) Act, 1974, the Air (Prevention and Control of Pollution) Act, 1981, the Environment (Protection) Act, 1986 and Rules there under, Hazardous Wasters (Management and Handling) Rules, 1989 and its amendments, the Public Liability Insurance Act, 1991 and its amendments.”

17. The highlighted portion would indicate that the Appellant was mandated not only to undertake for providing additional safeguards but also it required for allotting separate space as well as for allocating certain funds for such measures which are to be included in the project cost.

18. It is true that in the Environmental clearance dated 17.5.2007 in Para-(iii), the Appellant was directed to install the FGD at a later stage if required. However, it was to be noted that there is not only reference relating to identification of the space in the Environmental Clearance but it specifically mandated under Para (xx) that the Appellant should allocate separate funds for implementation of the Environmental protection measures and cost of the same should be included as part of the project cost. It further provided the funds earmarked for the same should not be diverted for any other purpose.

19. According to the Appellant, when the Environmental clearance was issued in favour of the Appellant, the FGD was not foreseen at that stage. As indicated above, the Environmental clearance dated 17.5.2007 of course, provided for installation of FGD at a later stage but it clearly mandated that the cost of the Environmental protection measures must be allocated and the said funds allocated, have to be included in the project cost and the same should not be diverted for any other purpose.
20. According to the Appellant, under Clause 13.1.1 of the PPA it is entitled to claim financial benefits due to change in law as the additional condition was imposed only through the letter dated 16.4.2010 sent by the Ministry of Environment and Forest by directing the Appellant that the FGD was to be installed before commissioning the project and this additional condition was not provided in the Environmental Clearance dated 17.5.2007 and that on account of the additional condition, the Appellant had incurred a sum of Rs.150 Crores as an increase in the project cost.
21. Therefore, in view of the above contention urged by the Appellant, it would be appropriate to refer to

Clause 13.1.1 of the PPA dated 23.2.2011 which is as follows:

“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 the interpretation of any Law by a Competent Court of Law, tribunal of Indian Governmental instrumentality provided such Court of Law, tribunal on Indian Governmental Instrumentality is final authority under law for such interpretation

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.”

- 22.** In the light of the argument advanced by the Learned Counsel for the Appellant, on the basis of the definition of the term “Change in Law”, it would be proper to compare both the Environmental clearance dated 17.5.2007 and the letter dated 16.4.2010 issued by the Government of India. **The same are quoted as under:**

(a) **Environment Clearance Letter dated 17.5.2007**

3. The proposal has been considered in accordance with para 12 of the EIA Notification dated 145th September, 2006 read with para 2.2.1 (i) (a) of the Circular No.J-11013/41/2006-IA.II(I) dated 13.10.2006 and Environmental clearance is hereby accorded under the provisions there of subject to implementation of the following terms and conditions:

(i).....

(ii).....

(iii) Space provision shall be made for installation of FGD of requisite efficiency of removal of SO₂, if required at later stage.

(iv) to (xix).....

(xx) Separate funds should be allocated for implementation of Environmental protection measures along with item wise break up. These cost should be included as part of the project cost. The funds earmarked for the environment protection measures should not be diverted for other purposes and year-wise expenditure should be reported to the Ministry.

(b) **Environmental Clearance Letter dated 16.4.2010**

2. (i) Flue Gas De-Sulphurisation (FGD) system shall be installed before commissioning the

project and action in this regard shall be submitted within three months to the Ministry.

23. Under the Environmental Clearance dated 17.5.2007, the direction was issued to the Appellant to keep the space for installation of FGD if required at later stage and also to allocate separate funds for that purpose which should not be diverted for any other purpose.
24. On going through the letter dated 16.4.2010 issued by the Ministry, it is evident that the Appellant is bound to install the FGD before commissioning of the project. According to the Appellant, the subsequent imposition of the condition is a change in law. To interpretate this clause in order to understand the real meaning of the term "Change in Law", we have to refer to the other clauses.
25. As per clause 5.4 of the PPA, the Appellant shall be responsible for obtaining consents required for developing, financing, constructing, operating and maintenance of the project. Not only that, the Appellant shall be responsible for obtaining, maintaining and renewing the initial consents and also for fulfilling all conditions specified therein. Clause 5.4 of the PPA is quoted below:

“5.4. Consents

The Seller shall be responsible for obtaining all Consents required for developing, financing, constructing, operating and maintenance of the Project and maintaining/renewing all such Consents in order to carry out its obligations under this Agreement in general and this Article 5 in particular and shall supply to the Procurer promptly with copies of each application that it submits, and copies of each consent/approval/license which it obtains. For the avoidance of doubt, it is clarified that the Seller shall also be responsible for obtaining/maintaining/renewing the initial Consents and for fulfilling all conditions specified therein.

26. That apart, Clause 3.1.2 (i) of the PPA, the Appellant shall have received the initial consents either unconditionally or subject to conditions which do not materially prejudice its right or performance of its obligations under the agreement. Thus, all these clauses of the PPA cast the burden on the Appellant. Clause 3.1.2 (i) of the PPA is quoted below:

“Clause 3.1.2 (i)

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

27. That apart, the clause xx of the Environmental clearance dated 17.5.2007 has mandated the Appellant a separate fund for implementation of the Environmental protection measures. It also provided a condition that this cost, namely separate funds should be included as part of the project cost and not diverted for any other purpose. Clause xx of the Environmental Clearance is quoted below:

“(xx) Separate funds should be allocated for implementation of Environmental protection measures along with item wise break up. These cost should be included as part of the project cost. The funds earmarked for the environment protection measures should not be diverted for other purposes and year-wise expenditure should be reported to the Ministry”.

28. Under these circumstances, the question would arise like this: **“whether the Appellant can now claim for enhancement of the capital cost in the absence of the allocation of separate funds for installing FGD which is to be included as part of the project cost ?”.**

29. On a careful perusal and on a combined reading of relevant clauses of the PPA, the Environmental Clearance dated 17.5.2007 and the letter issued by the Central Government on 16.4.2010, it is clear that

there is no change in law as contemplated by the PPA.

30. As mentioned above, Environmental clearance dated 17.5.2007 provided for installation of the FGD at a later stage and further mandated that separate funds must be allocated for installation of the said FGD as well as for making such Environmental protection measures which are to be included in the project cost. Admittedly, this has not been complied with by the Appellant after getting the Environmental clearance. The letter dated 16.4.2010 issued by the Central Government merely confirms the requirement of installation of the FGD intimated earlier. It merely informs the Appellant the stage of installation. Therefore, there was no 'Change in Law' which has been occasioned as claimed by the Appellant.

31. The contention of the Appellant regarding the status of its Environmental clearance and the connected claim of change in law has also to be appreciated in view of the observations made by Delhi High Court in the order dated 16.9.2009 regarding the Environmental clearance as under:

“20. After noticing the report of the KKVD and considering the recommendation made, the project was approved subject to conditions as under:-

“(i) No activities in CRZ area will be taken up without requisite clearance under the provisions of the CRZ Notification, 1991.

(ii) The detailed study regarding the impact on Alphonso mango and marine fisheries as recommended in the report of Dr. B.S. Konkan Krishi Vidyapith shall be undertaken. Based on the same, additional safeguard measures as may be required will be taken by the proponent. A copy of the report will be submitted to the Ministry. The cost towards undertaking the study and implementation of safeguard measures, if any, will be borne by the project.

(iii) Space provision for FGD will be kept, if required at a later date.

(iv) Cooling water blow down will be discharge from the cold water side and not from the hot water.”

(emphasis supplied)

21. There is contradiction between the minutes of the meeting of the Expert Appraisal Committee held on 9-10th January, 2007 and 12-14th March, 2007. On 9th-10th January, 2007, the application was

decided to be kept in abeyance to await the report of KKVD which as per the said minutes would take six months. What was before the Committee on 12-14th March, 2007 was a preliminary report prepared within 2-3 months? The minutes dated 12-14th March, 2007 record that as per the report submitted by KKVD it would take about four years of detailed study to effectively evaluate the impact of the proposed plant. KKVD on the basis of the existing material, in form of assessment studies conducted by EQMS India Pvt. Ltd., and predictions on the level of pollutants made by MPCB and Central Pollution Control Board, Delhi, had stated that it was likely that there would not be any adverse impact on horticulture, mango plantations or marine life, subject to the condition that the respondent no.3 strictly maintained adherence to their commitments. The so called report submitted by KKVD is extremely guarded and cautious. It was not based on their data and studies. It was not conclusive and does not give approval but qualified statements were made. Further KKVD in clear terms had stated that any final assessment would require a detailed study for a period of four years to evaluate the impact on mango plantations and the marine life/fisheries. This was noted by the expert committee themselves in their minutes dated 12-14th March, 2007 quoted above. Further the issue of provision of FGD has been left to be decided at a later

stage. Position before NEAA remained the same”

32. The observation of Delhi High Court particularly at paragraph-21 quoted above, clarifies the status of requirement of the installation of the FGD in the project. The High Court has clearly stated that what the expert appraisal committee considered in its earlier meeting dated 14.3.2007 was only a preliminary report which was extremely guarded.
33. In fact, the High Court has stated clearly in its order “Further the issue of provision of FGD has been left to be decided at a later stage. Position before NEAA remained the same”.
34. This observation of the Delhi High Court read along with the mandate that the funds were to be separately allocated for the same which was to be included in the project cost clearly mandates that the situation as projected by the Appellant does not fall within “Change of Law”. It is in this light that the Environmental clearance granted on 17.5.2007 has to be seen.
35. As mentioned above, the condition No (iii) would mandate that the space provision shall be made for installation of FGD at a later stage. The Para (xx)

would also provide that separate funds would be allocated for implementation of these conditions and the said funds should be included as a part of the project cost. Therefore, the specific direction given to the Appellant even in the Environmental clearance would reveal that the Appellant was duty bound to include the fund allocation in the project cost. Admittedly, this was not done.

36. The Appellant now seeks to rely only upon the condition that the space provision for FGD is made if required in future. But the Appellant, in fact has not taken note of the remaining conditions as to the fund allocation and inclusion of the same in the project cost.
37. According to the Appellant, FGD fund is not required to be included in the project cost. There is no merit in this substance.
38. Let us again refer to the conditions in the Environmental clearance dated 17.5.2007:

“(ii) the detailed study regarding the impact of the project, if any, on Alphanso mango and marine fisheries as recommended in the report of Dr. B.S. Konkan Krishi Vidyapith shall be undertaken. Based on the same, additional safeguard measures as may be

*required will be taken by the proponent with prior approval of the Ministry of Environment and Forests. A copy of the report will be submitted to the Ministry. **The cost towards undertaking the study and implementation of safeguard measures if any, will be borne by the project.***

(iii) Space provision shall be made for installation of FGD of requisite efficiency of removal of SO₂, if required at later stage.

.....

(xx) Separate funds should be allocated for implementation of Environmental protection measures along with item wise break up. These cost should be included as part of the project cost. The funds earmarked for the environment protection measures should not be diverted for other purposes and year wise expenditure should be reported to the Ministry”.

39. So, the reading of the conditions in entirety referred to in the Environmental clearance would make it clear that there was a mandate with regard to the requirement of earmarking of funds for FGD as well. The study to be carried out was specific to the case of the Appellant's plant as it is recorded that the study is to be carried out in terms and the recommendations in the report of KKVD. This has been referred to in the order of the Delhi High Court

while reference was made to the minutes of the 42nd Meeting of the Expert Appraise Committee.

40. The contention of the Appellant to the effect that Environmental clearance did not require the installation of FGD is to be accepted, then the said Environmental clearance would have categorically stated that FGD is not required and in that event, the directions for such specific funds allocation would not have been issued.
41. On the other hand, as mentioned above, there is a specific requirement regarding space as well as separate fund allocation.
42. This can be viewed from yet another angle. Admittedly, the Appellant was declared as a successful bidder after competitive bidding process. As indicated above, the Environmental clearance dated 17.5.2007 contemplated installation of FGD at a later stage with inclusion of cost for all Environmental measures in the project cost. If the claim of the Appellant is to be accepted, then it would defeat the sanctity of the competitive bidding process. Not only that, the other bidders who had participated in the bidding would also be prejudicially affected. In fact, the Appellant after

ignoring the relevant conditions referred to in the Environmental clearance relating to the inclusion of project cost has allegedly submitted the bids without FGD cost, getting into the zone of consideration in the bidding process having been bidder L-3 and thereafter revising the project cost. Due to this, the entire bidding process and the interest of other bidders get vitiated.

43. Even the mandate contained in Clause 13 of the PPA relating to the change in law clearly stipulates that the change in law can be taken into consideration only in respect of occurrence of events after the cut-off date which is 7 days prior to the dead line. In the present case, the cut-off date is 14.2.2008. In a Regulatory regime, the sanctity of the PPA and the representation and warranties made by the parties in entering into such agreements have to be given due consideration. The claim of the Appellant cannot be permitted to vitiate the bidding process and to pre-judicially affect other bidders.
44. The case of the Appellant is that it was not required to install FGD system till the execution of the PPA

and also it was not required to allot separate funds. This is misconceived.

45. As indicated above, Clause 4.1.1 (a) of the PPA, read with Schedule-I, clearly casts the responsibility on the Appellant to obtain all requisite, consents and approvals. Clause 13 relating to change in law of the PPA has to be read along with Clause 2.5 of the Schedule 9 of the PPA which relates to the representation and warranties. Therefore, Clause 13 cannot be read in isolation. The change in law contemplated U/S 13 of the PPA is seven (7) days prior to the bid dead line in this case i.e. 14.2.2008.
46. It is a settled law that the terms of a contract have to be read as a whole and cannot be read in isolation. There is no change as sought to be claimed by the Appellant. The mere intimation of the stage for installation of FGD is not a change in law or interpretation of law. We find that prior Environmental clearance granted was conditional and that the entire bid of the Appellant was on the basis of the representation of the Appellant is indicative of the fact that the FGD was required to be installed by the Appellant and the Appellant was well aware of the same.

47. The Appellant's argument is that very purpose of Clause 13 of the PPA was to ensure that the lowest tariff is produced in the competitive bidding process based on the legal requirements as on the bid deadline and any future changes in law would be adjusted in the tariff. This argument has no basis.
48. According to the Distribution Licensee (R-1), fixing of the price is vital aspect in the bidding process but the requirement to disclose the material facts is more vital so as to enable the tenderer to disclose the most sustainable price offer as well.
49. There is one more document which is in support of the Respondent. The minutes of the 62nd Meeting dated 12.1.2010 will make it evident that the Environmental clearance was conditional and the requirement to install FGD was not done away with. As a matter of fact, this condition was made unambiguous from the subsequent letter from the Ministry of Environment and Forest dated 16.4.2010. In this letter, the Ministry has directed that subject to implementation of the condition of the Environmental clearance, the FGD shall be installed. This condition was expressly stipulated in the letter dated 16.4.2010, relating to the conditions mentioned in

both the clearance granted on 17.5.2007 as well as in the minutes of the 62nd Meeting of the Expert Appraisal Committee. Hence there is no merit in the claim of the Appellant.

50. **Summary of Our Findings**

(i) The Environmental Clearance dated 17.5.2007 provided for installation of the FGD at a later stage. It further mandated that separate funds must be allotted for installation of the said FGD, which are to be included in the project cost. Admittedly, these conditions have not been complied with by the Appellant after getting the Environmental Clearance.

(ii) On a careful perusal of the relevant clause of the PPA, the Environmental Clearance dated 17.5.2007 and the letter issued by the Central Government on 16.4.2010, it is clear that there is no “Change in Law” as contemplated by the PPA. In fact, the letter dated 16.4.2010 issued by the Central Government merely confirms the requirement of installation of the FGD intimated through the letter dated 17.5.2007. It merely informs the Appellant the state of the installation of the FGD. Therefore, there is no “Change in

law” as claimed by the Appellant. The reasonings given in the impugned order for rejecting the claim of the Appellant are perfectly valid in law.

51. In view of the above findings, we find that there is no merit in the Appeal.

52. Consequently, the Appeal is dismissed as devoid of merits. However, there is no order as to costs.

(Rakesh Nath) (Justice M. Karpaga Vinayagam)
Technical Member Chairperson

Dated:21st January, 2013

√REPORTABLE/~~NON-REPORTABLE~~