

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 116 OF 2017

Dated: 23rd July, 2024

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

Sasan Power Limited
Through Authorized Representative
C/o. Reliance Power Ltd.
3rd Floor, Reliance Energy Centre,
Santa Cruise East,
Mumbai – 400055

...Appellants

Versus

1. Central Electricity Regulatory Commission
3rd& 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi – 110001
...Respondent No. 1
2. The Managing Director,
MP Power Management Company Limited
Shakti Bhawan, Jabalpur – 482008,
Madhya Pradesh.
...Respondent No. 2
3. The Managing Director,
Paschimanchal Vidyut Vitran Nigam Limited
Victoria Park, Meerut – 250001,
Uttar Pradesh
...Respondent No. 3
4. The Managing Director,
Purvanchal Vidyut Vitran Nigam Limited,

- Hydel Colony, Varanasi – 221004,
Uttar Pradesh ...Respondent No. 4
- 5.** The Managing Director,
Madhyanchal Vidyut Vitran Nigam Limited
4A-Gokhale Marg, Lucknow – 226001,
Uttar Pradesh ...Respondent No. 5
- 6.** The Managing Director,
Dakshinanchal Vidyut Vitran Nigam Limited
220 kV Vidyut Sub-Station,
Mathura Agra By-Pass Road,
Sikandra, Agra – 282007,
Uttar Pradesh ...Respondent No. 6
- 7.** The Chairman and Managing Director,
Ajmer Vidyut Vitran Nigam Limited
Hathi Bhata, City Power House,
Ajmer – 305001, Rajasthan. ...Respondent No. 7
- 8.** The Chairman and Managing Director,
Jaipur Vidyut Vitran Nigam Limited
Vidyut Bhawan, Jaipur – 302005,
Rajasthan. ...Respondent No. 8
- 9.** The Chairman and Managing Director,
Jodhpur Vidyut Vitran Nigam Limited
New Power House, Industrial Area,
Jodhpur – 342003, Rajasthan. ...Respondent No. 9
- 10.** The Managing Director,
Tata Power Delhi Distribution Limited
Grid Sub-Station Building
Hudson Lines, Kingsway Camp,
New Delhi – 110009. ...Respondent No. 10
- 11.** Chief Executive Officer,
BSES Rajdhani Power Limited
BSES Bhawan, Nehru Place,

- New Delhi – 110019. ...Respondent No. 11
- 12.** Chief Executive Officer,
BSES Yamuna Power Limited
BSES Bhawan, Nehru Place,
New Delhi – 110 019 ...Respondent No. 12
- 13.** Punjab State Power Corporation Limited
The Mall, Patiala – 147001, Punjab
Also at
The Chief Engineer (PP & R)
Punjab State Power Corporation Ltd.,
Shed C-3, Shakti Vihar,
Patiala – 147 001, Punjab. ...Respondent No. 13
- 14.** Haryana Power Purchase Centre
Room No. 239, Shakti Bhawan,
Sector 6, Panchkula – 134109, Haryana
Also at
The Chief Engineer,
Haryana Power Purchase Centre (HPPC)
Sector 6, Shakti Bhawan,
Panchkula – 134109, Haryana. ...Respondent No. 14
- 15.** The Chairman and Managing Director
Uttarakhand Power Corporation Limited
Urja Bhawan, Kanwali Road,
Dehradun – 248001,
Uttarakhand. ...Respondent No. 15

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Counsel for the Respondent(s) :

for Res. 1

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JUDGMENT

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The order dated 17th February, 2017 passed by the 1st Respondent, the Central Commission, i.e. Central Electricity Regulatory Commission in Appellant's Petition No. 16/MP/2016 filed under Section 79 of the Electricity Act, 2003 has been assailed in this Appeal. The Appellant is aggrieved by :-

- (a) Denial of compensation on account of imposition new conditions in the revised environment clearances dated 30th June, 2015 impacting costs and revenue of the Appellant during the operating period;
- (b) Denial of carrying cost on compensation on account of Change in Law events during the operating period.

2. Additionally, the Appellant has also claimed enhanced rate of interest applicable on the refund of forest transit fee levied by the Govt. of Madhya Pradesh from it, as allowed by the Commission vide the impugned order.

3. The Appellant is a special purpose vehicle which was incorporated by M/s. Power Finance Corporation Limited, the nodal agency of the Government for implementation of its Ultra Mega Power Project initiative

on 10th February, 2006 for the development and implementation of coal fired, UltraMega 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, Madhra Pradesh. The project was conceived by Govt. of India to be implemented by a developer selected through a tariff based international competitive bidding process.

4. The Respondent Nos. 2 to 15 are the procurers under the Power Purchase Agreement dated 7th August, 2007 executed by them with the Appellant for purchase of power from the above noted power project.

5. With a view to select a suitable project developer to establish and operate Sasan Ultra Mega Power Project (UMPP) and to supply power to the procurers for a period of 25 years, bid process was initiated on 31st March, 2006 by issuing the request for qualification for “tariff based bidding process for procurement of power on long-term basis from power station to be set up at Sasan, Madhya Pradesh.

6. After evaluating and short-listing qualified potential bidders including Reliance Power Limited, the Request for Proposal (RFP) was issued to the short-listed entities on 21st August, 2006 with a view to identifying

successful bidder to undertake the development, operation and maintenance of the project. The RFP was amended on 22nd September, 2006.

7. The Reliance Power Limited submitted its revised bid containing Quoted Capacity Charges and Quoted Energy Charges on 28th July, 2007 which resulted in an evaluated levelized tariff of Rs. 1.19616 per kWh. On 30th July, 2007, the Empowered Group of Ministers considered the comparative position of all existing bidders and advised the Appellant to take up for immediate consideration the issuance of letter of intent to the lowest bidder, which was Reliance Power Limited.

8. The revised bid submitted by Reliance Power Limited and was accepted on 1st August, 2007 as the lowest levelized tariff by the Appellant and letter of intent was issued in its favour.

9. Subsequently, the Appellant Company was acquired by Reliance Power Limited on 7th August, 2007 upon its being declared as a successful bidder. On the same date, the Appellant executed the PPA with the procurers i.e. Respondent Nos. 2 to 15

10. Subsequently, certain events occurred which, according to the Appellant, were Change in Law events as contemplated under Article 13 of the PPA and accordingly it approached the 1st Respondent Commission with the Petition No. 16/MP/2016 seeking compensation for Change in Law. Following events were stated by the Appellant in its petition as Change in Law events :-

(i) Levy of Forest Transit fee of Rs. 7 per MT by Government of Madhya Pradesh of coal being produced and dispatched by the Appellant from the Moher, Moher Extension Coal Block (Moher Coal Block) under the M.P. Transit (Forest Produce) Rules 2000.

(ii) Imposition of new condition in the Revised Environmental clearance (EC) in terms of which the Appellant has to pay Rs.5 per tonne of coal produced towards CSR cost which has to be adjusted as per annual inflation.

(iii) Imposition of levy of 2% of royalty to be paid to the National Mineral Exploration Trust in terms of Section 9C of the Mines and Minerals Development and Regulation (MMDR) Act, 2015 read with Rule 7(3) of the National Mineral Exploration Trust Rules, 2015.

11. Since the Appellant had already paid the amounts accruing due to these Change in Law events, it sought carrying cost also along with the refund of the amounts already paid.

12. Vide the impugned order, the Commission has held the events at Sl. No. (i)&(iii) herein above to be Change in Law events affecting the performance of the Appellant Company and accordingly directed it to be compensated for the same. However, the Commission held that the expenditure with regards to the event at Sl. No. (ii) herein above cannot be allowed under Change in Law for the reasons that the environmental clearance has specifically been classified as CSR cost for which provisions have been made in the Companies Act, 2013 to be met out of the net profit of the Company. Further, the Commission also rejected the claim of the Appellant with regards to the carrying cost.

13. We have heard Learned Counsels appearing for the Appellant as well as on behalf of the Respondent Nos. 1, 2, 7, 8, 9,10, 13 & 14. We have also perused the written submission filed on behalf of the Appellant as well as Respondent Nos. 2, 7, 8, 9, 10, 13 & 14. None appeared on behalf of the remaining respondents to argue the appeal.

14. At the outset, we may note that the Commission, vide the impugned order, held the Appellant entitled to refund of Forest Transit Fee along with interest @ 9% per annum from the procurers subject to the decision of the Hon'ble Supreme Court in Civil Appeal No. 14874 of 2017 filed by the State Governments of Uttar Pradesh and Madhya Pradesh and Uttarakhand wherein the levying of Forest Transit Fee had been challenged. It has been fairly brought to our notice by the Appellant's Counsel that vide judgement dated 15th September, 2017 passed by the Hon'ble Supreme Court in the said batch of appeals, it has upheld the legality of notification passed by the State Governments including the Government of Madhya Pradesh levying Forest Transit Fee and, therefore, the claim of the Appellant for refund of Forest Transit Fee has become infructuous.

15. Now, only the following two issues arise for our consideration in this appeal :-

(a) Denial of compensation on account of imposition of new conditions in the revised environment clearance dated 30th June, 2015 impacting costs and revenue of the Appellant during the operating period; and

(b) Denial of carrying cost on compensation on account of Change in Law events during the operating period.

Our Analysis

(a) Denial of compensation on account of imposition of new conditions in the revised environment clearance dated 30th June, 2015 making costs and revenue of the Appellant during the operating period; and

16. It is not in dispute between the parties that the mining plan of Moher Coal Block was approved by the Ministry of Coal, Govt. of India on 4th June, 2008 on which basis, Ministry of Environment and Forests (MOEF) granted Environment Clearance (EC) for the said coal block for 12 MTPA (normative) with a peak production capacity of 16 MTPA of coal. Subsequently, on 2nd March, 2009, Ministry of Coal approved the revised mining plan of the said Moher Coal Block for a normal output of 15 MT with peak annual output of 20 MT.

17. The Appellant applied to the MOEF for approval of expansion under Section 7 (2) of Environment Impact Assessment (EIA) Notification, 2006 of the production capacity of Moher Coal Block from 12 MTPA to 15

MTPA (normative) and from 16 MTPA to 20 MTPA (peak) which was approved by the Ministry of Environment Forest and Climate Change on 30th June, 2015. Accordingly, revised EC conditions were issued to the Appellant which included following two new conditions :-

- (i) The Over Burdendump (OB) shall be completely re-handled at the end of the mining and the area should be backfilled up to the ground level and covered with about a meter thick top soil; and
- (ii) The CSR cost should be Rs.5 per Tonnes of coal produced which should be adjusted as per annual inflation.

18. According the Appellant, these two new conditions imposed vide revised EC dated 30th June, 2015 constituted Change in Law events in terms of Article 13 of the PPA and it is entitled to be compensated for the expenditure incurred by it in complying with these conditions as the same would impact the costs and revenue of the project during the operating period.

19. The Commission, while declining the claim of the Appellant has reasoned as under :-

“The petitioner was required under law to obtain EC for operating the project and comply with the conditions specified therein which is also recognized in Article 5.5 of the PPA which provides that it is the responsibility of the petitioner for maintaining/reviewing the initial consents and for fulfilling all obligations specified therein. Schedule 2 of the PPA defines initial consents to include necessary environmental and forest clearance for the power station. Since there was no EC obtained prior to the cut-off date relevant to the bid date, any condition imposed by the environmental authority for the grant of EC would not qualify as a change in law. It is noted that the additional conditions in the EC was for seeking an increase in the capacity from 16 MPTA to 20 MPTA subsequent to the cut-off date for application Change in Law provisions. However, for such increase claimed, additional conditions would not have been imposed. In our view, such additional conditions were not part of the EC dated 10.12.2008 dealing with the capacity of 16 MPTA and it were for increasing in the 20 MPTA capacity.”

20. Further, after noting the provisions of Section 135 of the Companies Act, 2003, the Commission has held as under :-

As per the above provision, any company with a networth of Rupees five hundred crore or more or turnover of Rupees one thousand crore or more or net profit of Rupees five crore or more is required to constitute a Social Corporate Responsibility Committee of the Board consisting of three directors to formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII. Schedule VII deals with the subjects which may be included by the companies in their corporate social responsibility policies. Sr. No.(iv) of Schedule VII provides as under.

“(iv) ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agro forestry, conservation of natural resources and maintaining quality of soil, air and water.”

Thus corporate social responsibility also includes expenditure on ensuring environmental sustainability, ecological balance and conservation of natural resources and maintaining quality of soil, air and water. MoEF has prescribed that the CSR cost should be Rs. 5 per Tonne of Coal produced which should be adjusted as per adjusted as per annual inflation. As per sub-section (5) of section 135 of the Companies Act, 2013, the Board of the Company shall ensure that the Company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy. Therefore, the Corporate Social Responsibility Committee of the Petitioner’s company should consider and include the expenditure on account of condition (xxiii) of the environmental clearance in the Corporate Social Responsibility Policy of the company and meet the expenditure out of the net profits of the company. In our view, this expenditure cannot be allowed under Change in Law as the environment clearance has specifically classified as CSR cost for which provisions have been made in the Companies Act, 2013 to be met out of the net profit of the Company.

28. As regards the condition regarding complete handling of the overburden and backfilling of the mines upto the ground level, we are of the view that this is part of the mine closure plan which was sanctioned to the Petitioner as the mine lease holder of Moher and Moher Amlori mines. In any case, the Petitioner has submitted that it is not incurring any cost on refilling of overburden.

21. It is argued by the Learned Counsel for the Appellant that the perusal of various clauses of the PPA clearly reveals that the application to obtain environmental clearance was always on the procurers and not on the seller i.e. the Appellant herein. He would submit that EC for the coal mines is an Initial Consent. Part 2 of Schedule 2 states that the tasks mentioned in Article 3.1.2A including EC are part of the initial consent which was required to be fulfilled by the procurers within a period specified in the said Article. It is argued by the Learned Counsel that the Commission has failed to acknowledge the distinction between the revised EC and CSR under Section 135 of the Companies Act, and therefore has erred in directing the Appellant to meet the CSR cost imposed vide condition No. (ii) herein above put forth in the revised EC out of the profit of the Company. He would point out that the CSR cost, as per the revised EC is required to be payable by the Appellant on production of each tonne of coal which makes the said expenditure recurring in nature and to be borne by the Appellant irrespective of any commercial adversity or financial crunch whereas the CSR under Section 135 of the Companies Act is attracted only when the Company falls in any of the three conditions laid down in sub-Section 3 of Section 135 and has average net profit during the three immediately preceding financial

years. He also pointed out under Section 135 of the Companies Act, there is an uppercap of 2% of the average net profit made by a company during the three immediately preceding financial years for which provision for CSR has to be made but in terms of Condition No. (ii) herein above CSR may exceed the amount which the Appellant is required to incur under Section 135 of the Companies Act towards CSR.

22. Relying upon the judgement of this Tribunal dated 27th April, 2021, in Appeal No. 172 of 2017, Coastal Gujarat Power Limited Vs. CERC &Ors., the Learned Counsel further argued that :-

- (a) *It was erroneous on part of Ld. CERC to treat the additional expenditure sought to be incurred by the Appellant therein on account of modification in the EC by MoEF, as similar to the one considered under CSR, as defined under Section 135 of the Companies Act.*
- (b) *The conditions imposed by MoEF in the Revised EC are not linked to the net profits, unlike under the Companies Act and such obligation must be met irrespective of whether or not the generating company is making any profits or not. Hence, the CSR and CER are two non-identical terms and have to be construed distinctly to each other.*
- (c) *The arguments of the Procurers that since there was no EC on the Cut-Off date, there is no 'change in consent' as required under Article 13.1.1 (parimateria to Appellant's PPA) is meritless in as much as it was the obligation of the Procurers (respondents) to*

obtain EC before the Cut-Off Date which is evident from the Articles of the PPA (parimateria to Appellant's PPA).

(d) The procurers cannot benefit from their own wrong doings as this would be against the settled principles of law.

23. According to the Learned Counsel, the ratio of the above noted judgement of the Tribunal is fully applicable to the instant case and, therefore, the imposition of the new conditions in the revised EC should be held as Change in Law event entitling the Appellant for compensation under Article 13 of the PPA.

24. On behalf of the contesting Respondents, it is argued that the claim on account of Change in Law should be strictly in terms of Article 13 of the PPA which only allows the claim regarding Change in Law under specified circumstances and not for every change in price/rate. It is argued that expenditure on account of new conditions in the revised EC cannot be allowed under Change in Law as it has specifically been classified as cost towards Corporate Social Responsibility for which provisions have been made in the Companies Act, 2013 to be met out of net profit of the company. It is argued that the Commission has correctly held that the corporate social responsibility committee of the Appellant company should consider and include the expenditure on account of Condition No. (ii) of

the revised EC in the corporate social responsibility policy of the Company to meet the expenditure out of the net profits of the company.

25. It is further argued that there exists clear distinction between the terms “Power Station”, “Project” and “Captive Coal Mine” which are defined separately in the PPA. It is argued that schedule 2 of the PPA exclusively relates to the ‘Power Station’ and not the ‘Project’ as it refers only to generation facility and not the Captive Coal Mine. This is evident from the perusal of Article 3.1.2(A) where the term used is as “Site clearance from the MOEF” without mentioning EC for the coal mines. It is submitted that the obligations of procurers are outlined in Recital (B) of the PPA along with schedule 2 which primarily concern the initial consent focusing specifically on acquiring EC for “Power Station” and not for “Captive Coal Mine”. It is stated that the distinction between the terms ‘Project’, ‘Power Station’ and ‘Captive Coal Mine’ within the same PPA has been recognized by the Hon’ble Supreme Court in the case of Haryana Power Purchase Centre Vs. Sasan Power Limited 2024 1 SCC 247.

26. Learned Counsels would further submit that the Respondents/procurers were not obligated to acquire EC for the coal

mines/coal blocks and it is the Appellant which is accountable/responsible for seeking all consents except initial consents which include obtaining EC for the coal mines.

27. It is further argued that additional conditions in the revised EC were a result of the action of the Appellant itself which had sought enhancement of the capacity of coal to be extracted from the mines from normative output of 15 MTPA to peak annual output of 20 MTP and, therefore, the Appellant cannot seek to pass on the cost of its own actions to the procurers. It is submitted that these changes in the revised EC, which are on account of the actions of the Appellant itself cannot be considered as Change in Law events benefitting the Appellant.

28. According to the Learned Counsels, reliance placed on behalf of the Appellant in the judgement of this Tribunal in Appeal No. 172 of 2017 is totally misplaced for the reason that the decision in the said case was in respect of the conditions imposed in the EC for the power station and not regarding the conditions with respect to the EC for coal mine as in the present case. It is submitted that even otherwise also that the said judgement of this Tribunal has been stayed by the Hon'ble Supreme Court vide order dated 14th October, 2022 in the Civil Appeal Nos. 2295-96 of

2021 and, therefore, it cannot be relied upon. Thus, according to the Learned Counsels, the judgement of the Commission on this aspect is absolutely legal and sound which does not call for any interference of this Tribunal.

29. We have considered the rival submissions of the Ld. Counsels and have perused the impugned order, the PPA as well as the written submission.

30. We note that the rights and responsibilities of the parties herein i.e. Appellant on one hand and the Respondent Nos. 2 to 15 on the other hand are spelled out and governed by duly executed PPA dated 7th August, 2007 between them. Article 3.1.2A mentions the responsibilities of the procurers and is quoted herein below :-

3.1.2A The Procurers shall ensure that the following activities are completed within the time period mentioned below :-

<i>Activity</i>	<i>Time for Completion</i>
<i>1. Ensure the completion of the following tasks: i. Handing over the possession of the land for the Power Station and water intake pipeline. ii. Issuance of notice</i>	<i>Within six (6) months from the Effective Date or eight (8) months from the date of issue of Letter of Intent, whichever is later.</i>

<p><i>under Section 9 of Land Acquisition Act in respect of land for coal mines (as applicable) and fuel transportation system.</i></p> <p><i>iii. Site clearance from Ministry of Environment and Forests for the coal mines.</i></p>	
<p><i>2. Providing an irrevocable letter to the Lenders duly accepting and acknowledging the rights provided to the Lenders under the terms of this Agreement and all other RFP Project Documents.</i></p>	<p><i>On or prior to the date of NTP</i></p>

31. Thus, it was the responsibility of the procurers to ensure handing over of the possession of the land for the power station, issuance of notice under Section 9 of Land Acquisition Act in respect of land for coal mines as well as fuel transportation system and site clearance from Ministry of Environment and Forests for the Coal Mines within the time period specified therein.

32. "Site" has been defined in Article 1.1 of the PPA as "the land over which the project will be developed as provided in Annexure 1(A)". Therefore, the procurers i.e. the Respondent Nos. 2 to 15 were responsible to obtain clearance from the Ministry of Environment and Forests for the entire land over which the project was to be set up which include the Coal Mine.

33. Article 4.1.1 of the PPA spells out the obligation of the seller i.e. the Appellant herein regarding the development of the project. Same is reproduced herein below :-

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

- a) *obtaining (other than Initial Consents) and maintaining in full force and effect all Consents required by it pursuant to this Agreement and Indian Law;*
- b) *executing the Project in a timely manner so as to enable each of the Units and the Power Station as a whole to be Commissioned no later than its Scheduled Commercial Operations Date and such that as much of the Contracted Capacity as can be made available through the use of Prudent Utility Practices will be made available reliably to meet the Procurers' scheduling and dispatch requirements throughout the term of this Agreement but under no event earlier than 42 months from NTP;*
- c) *owning the Project throughout the term of this Agreement free and clear of encumbrances, except those expressly permitted by Article 16;*
- d) *procure the requirements of electricity at the Project (including construction, commissioning and start-up power) and to meet in a*

- timely manner all formalities for getting such a supply of electricity;*
- e) *provide on a timely basis relevant information on Power Station specifications which may be required for interconnecting system with the transmission system;*
 - f) *fulfilling all other obligations undertaken by him under this Agreement.*

(Emphasis supplied)

34. The Appellant was, thus, responsible for obtaining all consents other than the initial consents and maintaining those in full force. Schedule 2 describes the initial consents as under :-

SCHEDULE 2:INITIAL CONSENTS

PART 1

- i. *Section 6 notification by Government of Madhya Pradesh under Land Acquisition Act;*
- ii. *Necessary environmental and forest clearances for the Power Station*
- iii. *Allocation of Captive Coal Mine(s);*
- iv. *Water linkage for the reasonable Project requirements.*

PART 2

The tasks as mentioned in Article 3.1.2A shall also be deemed to be part of the Initial Consents on their completion within the time period provided therein.

(Emphasis supplied)

35. Two important aspects come out and are noticeable from the perusal of above noted schedule 2 attached to the PPA. Firstly, the environment and forest clearance for the power station alone constitutes initial consents which was the responsibility of the procurers i.e. Respondent Nos. 2 to 15. Secondly, tasks mentioned in Article 3.1.2A (already noted herein above) were also to be deemed part of initial consents on their completion within the time period provided therein and those were the responsibility of the procurers.

36. "Power Station" Power Station has been defined in Article 1.1 of the PPA :-

- (a) Coal fired power generation facility comprising of any or all the Units;*
- (b) Any associated fuel handling, treatment or storage facilities of the power generation facility referred to above;*
- (c) Any water supply, treatment or storage facilities required for the operation of the power generation facility referred to above;*
- (d) The ash disposal system including ash dyke;*
- (e) Township area for the staff colony; and*
- (f) Bay/s for transmission system in the switchyard of the power station,*
- (g) All the other assets, buildings/structures, equipments, plant and machinery, facilities and related assets required for the efficient and economic operation of the power generation facility;*

Whether completed or at any stage of development and construction or intended to be developed and constructed as per the provisions of this Agreement.

37. This Article further defines “Project” as :-

Means the Power Station and the Captive Coal Mine(s) undertaken for design, financing, engineering, procurement, construction, operation, maintenance, repair, refurbishment, development and insurance by the Seller in accordance with the terms and conditions of this Agreement;

38. “Captive Coal Mine” is defined in the said Article 1.1 as :-

The Captive Coal Mine as described in Schedule 1A and associated fuel transport system up to the Power Station;

39. A combined reading of these necessary and relevant provisions of the PPA indicate that Power Station and Captive Coal Mine are two separate parts of the entire power project. The project, as defined in Article 1.1 of the PPA comprises of both the power station as well as Captive Coal Mine but they are totally distinct from each other. A Power station cannot be treated as same as the Captive Coal Mine. In holding so, we are fortified by the observation of the Hon’ble Supreme Court in Haryana Power Purchase Centre Vs. Sasan Power Ltd. (2024) 1 SCC 247. We have already noted that obtaining necessary environment and forest clearance for the power station was part of initial consents as per the Schedule 2 of the PPA for which the procurers were responsible as per Article 4.1.1 of the PPA. There is nothing in the entire PPA to show

that the procurers were also responsible for taking necessary environment and forest clearances for the Captive Coal Mine. The two new conditions imposed upon the Appellant by way of revised EC dated 30th June, 2015 have been already noted in the paragraph No. 16 herein above. We may note at the cost of repetition here that the revised EC dated 30th June, 2015 was issued by MOEF to the Appellant while approving its request for enhancement of capacity of coal to be extracted from the Moher Mine Block from normative output of 15 MTPA to peak annual output of 20 MTPA. Therefore, patently the revised EC as well as the two new conditions imposed by it related to the Captive Coal Mine and not the Power Station. As per the PPA, it was the responsibility of the seller i.e. the Appellant herein to obtain the necessary environment and forest clearances for the Captive Coal Mine.

40. We now turn to Change in Law Clause i.e. Article 13 of the PPA.

Same reads as under :-

*“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 licences 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 or (iv) any change in the (a) the Declared Price of Land for the Projector (b) the cost of implementation of the resettlement and rehabilitation package of the land for the project mentioned in the RFP or (c) the cost of implementing Environmental Management Plan for the Power Station mentioned in the RFP ;OR (d) the cost of implementing compensatory afforestation for the Coal Mine, indicated under the RFP and the PPA;

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 Date of the Power Station, such non-extension shall be deemed to be a Change in Law.

41. It is evident from the perusal of the said clause that only certain specific circumstances/events are envisaged which constitutes Change in Law events benefitting either the seller or the procurer. According to the Appellant, its case is covered by Clause (iii) of Article 13.1.1 for the reason that the two new conditions imposed upon it vide revised EC dated 30th June, 2015 tantamount to change in consents/approvals which would

cause additional financial burden upon it and also would impact revenue generated by it from selling the electricity from the power project.

42. We do not find any force in the submissions made in this regard on behalf of the Appellant. Fresh twin conditions imposed upon the Appellant vide revised EC dated 30th June, 2015 may cause some financial burden upon it but do not affect change in any consent or approval for the power project. We have already noted herein above that obtaining necessary environment and forest clearance for the Captive Coal Mine was the responsibility of the seller i.e. Appellant herein right since the beginning and, therefore, it is difficult to say that there has been any Change in consents/approvals by way of revised EC dated 30th June, 2015. We may also note that the occasion for issuing revised EC to the Appellant arose on account of the request of the Appellant itself seeking enhancement of capacity of coal to be extracted from the Moher Coal Mine from normative output of 15 MTPA to peak output of 20 MTPA. Therefore, we agree with the submissions of the Learned Counsels for the Respondents that since the change in the revised EC were on account of the request of the Appellant itself, these cannot be considered a Change in Law event benefitting the Appellant. It would be totally unjustified to pass on the extra

financial burden caused to the Appellant due to the said new two conditions in the revised EC, on to the procurers and ultimately to the consumers when the revised EC is the outcome of the actions of the Appellant itself and not mandated/required either by the procurers or by way of any amendment in the existing law/rule or promulgation of a new law/rule by any Government/Statutory Authority.

43. We also find the reliance placed by the Appellant's counsel upon the judgement of this Tribunal dated 27th April, 2021 in Appeal No. 172 of 2017 titled "Coastal Gujarat Power Limited Vs. CERC and Others" totally misplaced. We find it profitable to quote the relevant portion of the said judgement herein below :-

"144. There is no merit in the argument that since there was no EC on the Cut-Off Date, there is no 'change in consent' as required under Article 13.1.1. Change means altering or modifying. Issuance of a consent with terms and conditions as well as costs that didn't exist as on the Cut-Off Date amounts to a 'change' in consent since it modifies the earlier position where no consent terms existed. The generator could not have foreseen any amendment or change in the law or binding directives of the executive branch in exercise of statutory authority existing on the Cut-Off Date during the stipulated long term (25 years) of the PPA. It is rightly pointed out that it was the obligation of the Procurers (respondents) to obtain EC before the Cut-Off Date as is evident form Recital B of the PPA read with the definition of 'Initial Consents', Part 1 of Schedule 2 and Clause 1.4 (iii) of the RFP. For defaults in timely action on

their part, the Seller cannot be made to suffer, the CIL event being subsequent.

145. In our considered view, the CERC has fallen into error by treating the additional expenditure incurred by the appellant for adding to the infrastructure in terms of mandatory works undertaken in compliance with modified conditions of EC issued by the MoEF as an expenditure in nature of Corporate Social Responsibility (CSR) under Section 135 of the Companies Act ...

150. More than semantics, however, it is pertinent to note that the mandate by MoEF in EC (whether called CSR or CER) is not linked to the net profits (unlike under the Companies Act). Such obligation must be met irrespective of whether or not the generating company is making any profits. This obligation, noticeably, is also applicable during the construction period of the power plant, where there may not be any revenue received much less profits earned. This obligation is, therefore, a cost or expense added to the business of generation and sale of electricity in the particular context of the appellant – a one project company. Hence, we agree, the comparison with Income Tax or other cesses which are levied on profits or income is misplaced and erroneous

153. It is rightly submitted by the appellant that the Procurers, having failed to obtain the necessary EC before the Cut-Off Date (i.e. 30.11.2006), cannot seek to benefit from their own default by alleging that imposition of Additional Conditions by MoEF is not a CIL. Had the Procurers obtained the EC and made it available to all the Bidders, all Bidders including Tata Power would have taken into account the costs involved for complying with the EC at the time of quoting its tariff. It is a settled position of law that a person cannot take benefit of its own wrong. Reliance is placed on Union of India v. Major General Madan Lal Yadav 1996 (4) SCC 127 and Ashok Kapil v. Sana Ullah &ors. 1996 (6) SCC 342. Since procuring the EC was not its responsibility, CGPL cannot be held liable for any additional costs that have resulted from the EC and on account of any change to the EC and which qualify to be treated as a CIL...

157. We, thus, unhesitatingly hold that the additional expenditure incurred by the appellant in terms of the modified EC added to the capital expenditure for the project, there being no nexus with CSR under Section 135 of the Companies Act, the obligation having arisen due to CIL event within the meaning of Article 13 of the PPA, the appellant (seller) is entitled to commensurate compensation. We order accordingly.”

44. A perusal of the said judgement would reveal that there was no requirement of EC in that case on the cut-off date and subsequently there had been some Change in Law as well as binding directives making it mandatory for the generator in that case to obtain EC with modified conditions. Further, in that case, it was obligation of the procurers to obtain EC before the cut-off date as indicated from the Recital (B) read with definition of “Initial Consents” in Schedule 2 as well as clause 1.4. (iii) of the RF and the procurers who had failed to obtain the said necessary EC before the cut-off date. Hence under these circumstances, this Tribunal felt that the procurers who had failed to obtain necessary EC before the cut-off date, cannot seek to benefit from their own default by contending that the imposition of additional conditions by MOEF do not constitute Change In Law. Accordingly, this Tribunal held in that case that the additional conditions imposed by way of modified EC, throwing extra

expenditure upon the Appellant for the project, constitute Change in Law Event for which Appellant was entitled to suitable compensation.

45. That is not the case herein. The facts of the instant case are clearly distinct and distinguishable from the facts of Coastal Gujarat case (supra). In the instant case, it was always the responsibility of the Appellant to obtain EC for the Coal Mine and even the modified conditions imposed by revised EC dated 30th June, 2015 were necessitated on account of the request of the Appellant itself for enhancement of capacity of the coal to be extracted from Moher Coal Mine. Hence, the judgement of this Tribunal in the said case cannot be applied to the instant appeal.

46. We are, thus, unable to hold that the fresh twin conditions imposed upon the Appellant vide revised EC dated 30th June, 2015 constituted Change in Law event in terms of Article 13 of the PPA. We hasten to add that the prayer of the Appellant before the Commission as well as before this Tribunal was only to hold that two new conditions imposed by the revised EC dated 30th June, 2015 constituted Change in Law Event as envisaged in Article 13 of the PPA, which we have rejected. The legality and propriety of the two new conditions itself has not been assailed by the Appellant either before the Commission or before us.

(b) Denial of carrying cost on compensation on account of Change in Law events during the operating period.

47. We have already noted that the Commission, in the impugned judgement has held the imposition of levy of 2% of royalty upon the Appellant to be paid to the National Mineral Exploration Trust in terms of Section 9(c) of the Mines and Minerals Development Regulation (MMDR) Act, 2015 read with Rule 7(iii) of the National Mineral Exploration Trust Rules, 2015 as Change in Law event and further holding the Appellant entitled to reimbursement of the amount already deposited with the Trust on this account. However, the Commission has rejected the claim of the Appellant for carrying cost on such reimbursement during the period of delay in reimbursement. The Commission has based its decision on the premise that there was no clear provision in the PPA for allowing carrying cost to the Appellant upon the amount to be reimbursed to it.

48. In this regard, we may note that Article 13.2 of the PPA expressly provides for restoration of affected party to the same economic position as if the Change in Law event had not occurred. This Clause of the PPA has an in-built restitutionary principle envisaging compensation to the party affected by Change in Law event thereby restoring it, through

monthly tariff payments, to the same economic position as if such Change in Law event had not occurred.

49. It appears that the Appellant had already made certain payment to the National Mineral Exploration Trust as 2% of royalty in terms of Section 9(C) of the MMDC Act, 2015 read with rules framed thereunder. Therefore, the Commission, while holding the imposition of such levy as a Change in Law event, has directed the amounts so paid by the Appellant to be reimbursed to it. We are unable to understand as to why the Commission refused to grant carrying cost to the Appellant on such amount during the period the amount was with the Trust.

50. Payment of carrying cost/interest is neither a penalty nor fine but normal accretion to the money when invested lawfully by the person in whose hands it is. We cannot lose sight of the fact that the royalty amount deposited by the Appellant with National Mineral Exploration Trust was at the disposal of the Trust from the date of deposit to be appropriately used by the Trust in whatever manner it deemed fit and necessary. The money had left the pocket of the Appellant from the date of deposit itself and was not available with the Appellant. Therefore, when Article 13.2 speaks about restoration of the party affected by Change in Law event to the

same economic position as if Change in Law event had not occurred, it logically follows that the Appellant is entitled to interest as carrying cost also on the royalty amount to be reimbursed to it for the period it remained deposited with the Trust. It would be fallacious to say that in the absence of any clear proviso in the PPA for allowing carrying cost, same cannot be allowed to the Appellant. Restoration of the affected party to the previous position, in which it was prior to happening of Change in Law event, would be only partial as well as inadequate in case the carrying cost is not allowed on the reimbursement of the amount already deposited under such Change in Law event.

Conclusion

51. Having regard to the above discussion, we do not find any error or infirmity in the impugned order of the Commission, in so far as it has held that the fresh twin conditions imposed by revised EC dated 30th June, 2015 do not constitute Change in Law event in terms of Article 13 of the PPA.

52. However, the Commission has erred in rejecting the claim of the Appellant for carrying cost on the amount to be reimbursed to it, which it

has deposited as royalty with the National Mineral Exploration Trust. We set aside the findings of the Commission in the impugned order to that extent and hold the Appellant entitled to carrying cost upon the said amount to be reimbursed to it at the SBIPLR rate. We order accordingly.

53. The Appeal stands disposed off in above terms.

Pronounced in the open court on this 23rd day of July, 2024.

(Virender Bhat)
Judicial Member
js

(Sandesh Kumar Sharma)
Technical Member (Electricity)