APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 121 of 2015

Dated : 20th November, 2018

PRESENT:HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

APPEAL NO. 121 of 2015

IN THE MATTER OF:

Sasan Power Limited
C/o. Reliance Power Ltd.
3rd Floor, Reliance Energy Centre,
Santa Cruise East, Mumbai …Appellant

Versus

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

2. MP Power Management Company Limited
   Shakti Bhawan,
   Jabalpur – 482008, Madhya Pradesh

3. Paschimanchal Vidyut Vitran Nigam Limited
   Victoria Park,
   Meerut – 250001, Uttar Pradesh

4. Purvanchal Vidyut Vitran Nigam Limited
Hydel Colony, Bhikaripur, Post-DLW,
Varanasi – 221004, Uttar Pradesh

5. Madhyanchal Vidyut Vitran Nigam Limited
4A-Gokhale Marg, Lucknow – 226001,
Uttar Pradesh

6. DakshinanchalVidyutVitran Nigam Limited
220 kV Vidyut Sub-Station,
Mathura Agra by-pass road,
Sikandra, Agra-282007,
Uttar Pradesh

7. Ajmer VidyutVitran Nigam Limited
Hathi Bhata, City Power House,
Ajmer-305001, Rajasthan

8. Jaipur Vidyut Vitran Nigam Limited
Vidyut Bhawan,
Jaipur – 302005, Rajasthan

9. Jodhpur Vidyut Vitran Nigam Limited
New Power House, Industrial Area,
Jodhpur-342003, Rajasthan

10. Tata Power Delhi Distribution Limited
Grid Sub-station Building, Hudson Lines,
Kingsway Camp,
New Delhi-110009

11. BSES Rajdhani Power Limited
BSES Bhawan, Nehru Place,
New Delhi - 110019

12. BSES Yamuna Power Limited
BSES Bhawan, Nehru Place,
New Delhi – 110 019

13. Punjab State Power Corporation Limited
The Mall,
Patiala – 147001, Punjab

14. Haryana Power Purchase Centre
Room No. 239, Shakti Bhawan,
Sector 6, Panchkula – 134109,
Haryana

15. Uttarakhand Power Corporation Limited
Urja Bhawan, Kanwali Road,
Dehradun-248001, Uttarakhand …Respondents

Counsel for the Appellant(s) : Mr. Sajan Poovayya, Sr. Adv.
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Mr. Vishrov Mukherjee
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Mr. G. Umapathy
Ms. R. Mekhala
Mr. Aditya Singh for R-2

Mr. Rajiv Srivastava
Ms. Gargi Srivastava
Ms. Garima Srivastava for R-3 to R-6

Mr. Bipin Gupta
Mr. Sunil Bansal for R-7 to 9

Mr. Alok Shankar
Mr. Mahip Singh for R-10

Mr. Mohit Aggarwal
Mr. Rahul Dhawan
Ms. Pratiksha Chaturvedi
Mr. Karan Grover for R-11 & R-12

Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Neha Garg for R-13

Mr. M.G. Ramachandran
Ms. Ranjitha Ramachandran
Ms. Anushree Bardhan
Ms. Poorva Saigal
Mr. Shubham Arya for R-14

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

APPEAL NO. 121 of 2015

1. The Appellant has filed the present Appeal challenging the Impugned Order dated 04.02.2015 passed in Petition No. 21/MP/2013 on the file of Central Electricity Regulatory Commission (hereinafter called the '**Central Commission'**) under Section 111 of the Electricity Act, 2003 for compensation for increase in Capital cost due to change in law events during the construction period of the 3960MW Ultra Mega Power Project located at Sasan, Madhya Pradesh ("***Sasan UMPP/Project***").

1.1 The Appellant is aggrieved by the following findings of the Central Commission:-

(a) The Appellant is not eligible for compensation for the increase in the cost of the geological report for Moher Coal Block, Moher-Amlohri Extension Coal Block and Chhatrasal Coal Block.

(b) The Appellant is not eligible for compensation for the increase in cost of Water Intake System which was based on water intake study report prepared by WAPCOS (a premier Government of India agency appointed by the Procurers)provided by the Procurers prior to the bid submission which has led to an increase in the cost of the Project.

(c) The Appellant is not eligible for compensation on account of increase in cost due to imposition of Excise Duty on Cement and Steel

(d) The Appellant is not eligible for the exemption of custom duty on mining equipment under Notification No. 21/2002 and consequently is not eligible for compensation for change in law in light of clarification issued by the Ministry of Power dated 17.06.2011.

(e) The Appellant is only entitled to the relevant increase in the costs relating to the captive coal taking into consideration supply of coal from these coal mines to other Projects.

(f) The Appellant cannot be compensated for impact of change in law events by devising of a mechanism which is different from the formula prescribed in Article 13 of the Power Purchase Agreement dated 07.08.2007("***PPA***").

2. Facts of the Case:-

2.1 The Appellant is Sasan Power Limited, a special purpose vehicle which was incorporated by M/s Power Finance Corporation Limited ("***PFC***"), the nodal agency of Government of India for implementation of its Ultra Mega Power Project initiative on 10.02.2006 for the development and implementation of a coal fired, ultra mega power project based on linked captive coal mine using super-critical technology with an installed capacity of 4000 MW (plus/minus 10%) at Sasan, District Singrauli, Madhya Pradesh. The Project was conceived by Government of India to be implemented by a developer selected through a tariff based international competitive bidding process.

2.2 Respondent No. 1 is the Central Electricity Regulatory Commission which has passed the Impugned Order. The registered office of Respondent No. 1 is situated at 3rd & 4th Floor, Chanderlok Building, 36, Janpath, New Delhi-110001.

2.3 Respondent No. 2 MP Power Management Company Limited is the lead Procurer under the PPA, having its office address at Shakti Bhawan,

Jabalpur – 482008, Madhya Pradesh. It is a successor of MPSEB vested with the functions of bulk purchase of electricity from generating companies and supply the same to the 3 Discoms of MP. It was originally named as MP Power Trading Company Limited, which was changed on 10.04.2012. Respondent No. 2, being the lead Procurer, is authorised to represent all the Procurers for discharging the rights and obligations of the Procurers. The quantum of power allocated to Respondent No. 2 is 37.5% of the Contracted Capacity of the Project.

2.4 Respondent No. 3, Paschimanchal Vidyut Vitran Nigam Limited is a Procurer under the PPA being the distribution licensee for supply in Western UP, having its office address at Victoria Park, Meerut – 250001, Uttar Pradesh also at the Superintending Engineer, SPAT Circle, UP Power Corporation limited, Sakti Bhavan, 14 Ashok Marg, Hazratganj, Lucknow – 226001, Uttar Pradesh. The quantum of power allocated to Respondent No. 3 is 7.5% of the Contracted Capacity of the Project.

2.5 Respondent No.4, Purvanchal Vidyut Vitran Nigam Limited is a Procurer under the PPA being the distribution licensee for supply in Eastern UP, having its office address at Hydel Colony, Bhikaripur, Post-DLW, Varanasi – 221004, Uttar Pradesh also at the Managing Director, Purvanchal Vidyut Vitran Nigam Limited, Hydel Colony, Varanasi – 221004, Uttar Pradesh.

The quantum of power allocated to Respondent No. 4 is 1.25% of the Contracted Capacity of the Project.

2.6 Respondent No.5, Madhyanchal Vidyut Vitran Nigam Limited is a Procurer under the PPA being the distribution licensee for supply in Central UP, having its office address at 4A-Gokhale Marg, Lucknow – 226001, Uttar Pradesh. The quantum of power allocated to Respondent No. 5 is 1.25% of the Contracted Capacity of the Project.

2.7 Respondent No.6, Dakshinanchal Vidyut Vitran Nigam Limited is a Procurer under the PPA being the distribution licensee for supply in Southern UP, having its office address at 220 kV Vidyut Sub-Station, Mathura Agra by-pass road, Sikandra, Agra-282007, Uttar Pradesh. The quantum of power allocated to Respondent No. 6 is 2.5% of the Contracted Capacity of the Project.

2.8 Respondent No.7, Ajmer Vidyut Vitran Nigam Limited is a Procurer under the PPA being the distribution licensee for supply in 11 districts of Rajasthan, having its office address at Hathi Bhata, City Power House, Ajmer-305001, Rajasthan. The quantum of power allocated to Respondent No. 7 is 3.6% of the Contracted Capacity of the Project.

2.9 Respondent No.8, Jaipur Vidyut Vitran Nigam Limited is a Procurer under

the PPA being the distribution licensee for supply in 12 districts of Rajasthan, having its office address at Vidyut Bhawan, Jaipur – 302005, Rajasthan. The quantum of power allocated to Respondent No. 8 is 3.6% of the Contracted Capacity of the Project.

2.10 Respondent No.9, Jodhpur Vidyut Vitran Nigam Limited is a Procurer under the PPA being the distribution licensee for supply in 10 districts of Rajasthan, having its office address at New Power House, Industrial Area, Jodhpur-342003, Rajasthan. The quantum of power allocated to Respondent No. 9 is 2.8% of the Contracted Capacity of the Project.

2.11 Respondent No.10, Tata Power Delhi Distribution Limited is a Procurer under the PPA being a distribution licensee for North and North-West Delhi (earlier known as North Delhi Power Limited), having its office address at Grid Sub-station Building, Hudson Lines, Kingsway Camp, New Delhi-110009. The quantum of power allocated to Respondent No. 10 is 3.2625% of the Contracted Capacity of the Project.

2.12 Respondent No.11, BSES Rajdhani Power Limited is a Procurer under the PPA being a distribution licensee for South and South-West Delhi, having its office address at BSES Bhawan, Nehru Place, New Delhi - 110019. The quantum of power allocated to Respondent No. 11 is 4.95% of the Contracted Capacity of the Project.

2.13 Respondent No.12, BSES Yamuna Power Limited is a Procurer under the PPA being a distribution licensee for Central and East Delhi, having its office address at BSES Bhawan, Nehru Place, New Delhi – 110 019 also at Shakti Kiran Building, Karkardooma, Delhi – 110 092. The quantum of power allocated to Respondent No. 12 is 3.0375% of the Contracted Capacity of the Project.

2.14 Respondent No. 13, Punjab State Power Corporation Limited created to handle generation, trading, distribution of power within the State (since 2010) is a Procurer under the PPA (being the successor of erstwhile Punjab State Electricity Board), having its office address at 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. The quantum of power allocated to Respondent No. 13 is 15% of the Contracted Capacity of the Project.

2.15 Respondent No. 14, Haryana Power Purchase Centre represents Uttar Haryana Bijlee Vitran Nigam Ltd. and Dakshin Haryana Bijlee Vitran Nigam Ltd., the successors to the distribution business of Haryana Power Generation Corporation Limited, one of the Procurers under the PPA, having its office address at 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. The quantum of power allocated to Respondent No. 14 is 11.25% of the Contracted Capacity of the Project.

2.16 Respondent No. 15, Uttarakhand Power Corporation Limited is a Procurer under the PPA, having its office address at Urja Bhawan, Kanwali Road, Dehradun-248001, Uttarakhand. The quantum of power allocated to Respondent No. 15 is 2.5% of the Contracted Capacity of the Project.

3. Facts in issue:-

3.1 On 31.03.2006, with a view to select a suitable project developer to establish and operate the Sasan UMPP and supply power to the Procurers for 25 years, the bid process was initiated by issuing the Request for Qualification for *"tariff based bidding process for procurement of power on long-term basis from power station to be setup at Sasan, Madhya Pradesh"* ("**RFQ**"). The RFQ set out the technical and financial requirements that any interested party/consortium must fulfil to bid with a time table to submit responses.

3.2 In response to the RFQ, 15 potential bidders submitted their response to the RFQ. Upon evaluation, 13 potential bidders including Reliance Power Limited ("***R-Power***") were found to have met the qualification criteria and were qualified. On 21.08.2006, after evaluating and short-listing qualified potential bidders including RPower, the Request for Proposal for "*tariff*

based bidding process for procurement of power on long term basis from power station to be set up at Sasan, Madhya Pradesh" ("***RFP***") was issued to the shortlisted entities with a view to identify a successful bidder to undertake the development, operation and maintenance of the Project. RFP was amended on 22.09.2006.

3.3 As per Paragraph 1.4 of the RFP, the Procurers through the Appellant (which was a wholly-owned subsidiary of PFC at that time) which was acting as the Authorized Representative of the Procurers, was required to complete the following obligations:

(a) Provide to the qualified bidders the indicative price of land and the estimate cost of the R&R Plan for the Power Station Land.

(b) Allocation of the main captive coal mine and supply the geological report for the said mine at least 90 days prior to the bid deadline.

(c) Allocation of other captive coal mine and geological report related information at least 30 days prior to the bid deadline date

(d) The indicative cost of the geological report was to be provided at least 30 days prior to the bid deadline.

(e) The water intake study report and Project report were to be made available 90 days prior to the bid deadline date. This was to contain the geotechnical study, topography survey, area drainage study and socio-economic study.

(f) Procure a certificate from the Ministry of Power that the benefits of the Mega Power Policy would be extended to the Project till scheduled

Commercial Operations Date of the Power Station.

3.4 On 20.10.2006, the Project was accorded in-principle mega power project status by the Ministry of Power. The final certificate granting mega power project status to the Project was issued on 21.09.2007

3.5 The estimates were provided to the qualified bidders, including R Power through a letter dated 23.10.2006. The said letter detailed the indicative Price of Land for the Power Station, the Coal Blocks, Geological Report**,** the cost of implementing the R&R Plan for the Power Station Land as well as the Coal Blocks and the cost of compensatory afforestation for the Coal Blocks.

3.6 The indicative costs provided in letter dated 23.10.2006 are as under:

(a) The Declared Price of Land for the Power Station was stated to be Rs 190.67 Crore. This included the power plant, the fuel transport system land, the water pipeline corridor and the ash pipeline corridor.

(b) The estimate cost of the draft R&R package for the Power Plant Land was stated to be Rs 136 Crore and indicative cost of the R&R Plan for Fuel Transport system was stated to be Rs 34 Crore.

(c) The Declared Price of Land for the Moher Coal Block was stated to be Rs 57.29 Crore. The Declared Price of Land for the Moher-Amlohri Extension Coal Block was stated to be Rs 28 Crore.

(d) The cost of implementation of compensatory afforestation for the Moher Coal Block was stated to be 14.90 Crores. The cost of implementation of compensatory afforestation for the Moher-Amlohri Extension Coal Block

was stated to be Rs 6.60 Crore.

(e) The cost of the Geological Report for the Moher-Coal Block was estimated to be Rs 8.5 Crore. The cost of Geological Report for the Moher-Amlohri Coal Block was stated to be Rs 6.0 Crore. This information was supplied vide letter dated 04.10.2006.

(f) The cost of implementation of the R&R Plan for the Moher Coal Block was stated to be Rs 30 Crore and the cost of implementation of the R&R Plan for the Moher-Amlohri Extension Coal Block was stated to be Rs 15 Crore aggregating to Rs 45 Crore.

(g) The Declared Price of Land for the Chhatrasal Coal Block was stated to be Rs 57 Crore.

(h) The cost of implementation of compensatory afforestation for the Chhatarasal Coal Block was stated to be Rs 13.30 Crore.

(i) As per the letter dated 04.10.2006 referred to in point (e) above, the cost of Geological Report for the Chhatrasal Coal Block was stated to be Rs 4.5 Crore.

(j) The cost of implementation of the R&R Plan for the Chhatrasal Coal Block was stated to be Rs 30 Crore.

3.7 In response to the RFP, 10 bidders including RPower submitted their bids in December 2006. On the basis of these bids, Globaleq-Lanco consortium was declared as successful bidder. Subsequently on the Globaleq-Lanco consortium being found not meeting the prescribed qualification criteria the Letter of Award issued in favour of Globaleq-Lanco consortium was

cancelled. Instead of declaring the lowest bidder among the other bidders as the successful bidder, the financial bids of December 2006 were scrapped and in July 2007, revised financial bids were invited from the short listed bidders.

3.8 On 28.07.2007, RPower submitted its revised bid containing Quoted Capacity Charges and Quoted Energy Charges which resulted in an evaluated levellised tariff of Rs. 1.19616/kWh.

3.9 On 30.07.2007, 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 a letter of intent to the lowest bidder, which was RPower.

3.10 On 01.08.2007, the revised bid submitted by RPower which resulted in evaluated levellised tariff of Rs. 1.19616 was accepted as the lowest levellised tariff by the Appellant and the LoI was issued in favour of RPower.

3.11 On 07.08.2007, RPower acquired the entire shareholding of the Appellant from PFC. On the same day; the Appellant executed the PPA with the Procurers Thereafter, on 15.10.2008, the PPA was amended vide a Supplemental PPA. The following provisions of the PPA are noteworthy:

(a) "*Construction Period*" means the period from (and including) the date upon which the Construction Contractor is instructed or required to commence work under the Construction Contract up to (but not including) the Commercial Operations date of the Unit in Relation to a Unit and of all the Units in relation to the Power Station.

(b) "*Law*" has been defined to mean "*all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include all applicable rules, regulations, decisions and orders of the Appropriate Commission;*".

(c) "Indian Governmental Instrumentality" has been defined to mean "*the GOI, Government of States where the Procurers and Project are located and any ministry or department of or board, agency or other regulatory or quasi-judicial authority controlled by GOI or Government of States where the Procurers and the Project are located and includes the Appropriate Commission.*"

(d) Article 1.2.12. provides that "*different parts of this Agreement are to be taken as mutually explanatory and supplementary to each other and if there is any inconsistency between or among the parts of this Agreement, they shall be interpreted in a harmonious fashion so as to give effect to each part."*

(d) Article 13 of the PPA provides the mechanism to recognize and deal with Change in Law, including how the Appellant has to be compensated.

3.12 On 15.12.2012, the Appellant wrote to the Procurers, *inter-alia* setting out the impact that the increase in cost of various items had on the Capital Cost of the Project such as land, R&R Plan for captive mines, geological reports, water intake system, afforestation, excise duty, custom duty, etc.

3.13 On 29.12.2012 a meeting of the Appellant with the Procurers was held to *inter-alia* discuss the issues raised by the Appellant in its letter dated 15.12.2012. At the meeting the Appellant made a detailed presentation on the Project. The presentation, copies of which were handed over to the Procurers also had relevant details of the increase in capital cost of the Project.

3.14 On 31.12.2012, the Appellant once again wrote to the Procurers informing them that the letter sent to them on 15.12.2012 was a notice under Article 17.2.1 of the PPA and highlighted the critical nature of the issues raised in the letter dated 15.12.2012.

3.15 On 07.01.2013, the Lead Procurer i.e. Respondent No.2 wrote to the Appellant refuting the Appellant's claim on hyper-technical grounds and requesting additional details pertaining to the claims set out in the letter.

3.16 Since the Procurers had refused to acknowledge, let alone address the issues pertaining to increase in capital cost of the Project set out in the Appellant's letter dated 15.12.2012, on 08.02.2013, the Appellant wrote to the Procurers providing them detailed documentation and evidence of the increase in

Capital Cost, as desired by the Lead Procurer.

3.17 The Procurers did not respond to the issues raised by the Appellant in its letter dated 15.12.2012 and elaborated in the presentation made on 29.12.2012 and letter dated 08.02.2013. Therefore, the Appellant filed Petition No.21/MP/2013 on 20.02.2013 before the Commission seeking restoration of Project Economics and compensation for increase in capital cost of the Project by Rs 1330 Crores as a result of increase in the costs of land, R&R plan, Water intake system, geological reports, excise /custom duty, etc.

3.18 On 04.02.2015, the Central Commission passed the Impugned Order partly allowing the claims of the Appellant. The Central Commission also issued directions to the Appellant to file certain documents/data relating to change / increase in costs of indicated items.

4. Questions of Law:-

(A) Whether the Ld. Commission has erred in not granting compensation to the Appellant for the increase in cost for carrying out the Geological Report for the Coal Blocks resulting in an increase in the cost of the Project which is a direct consequence of the errors in the information provided by the Procurers?

(B) Whether the Ld. Commission erred in not granting compensation to the Appellant for the increase in cost for setting up the Water Intake System, resulting in an increase in cost of the Project which falls in the ambit of Change in Law and/or is a direct consequence of thegrave errors contained in the WAPCOS Report which was prepared on behalf of and provided by the Procurers?

(C) Whether the Ld. Commission has erred in holding that the Appellantis not eligible for compensation for increase in cost of the Project due to levy of excise duty on cement and steel used for the Projectas a result of the revocation of the benefit of nil excise duty, granted to the Project, bya clarification in the Finance Act, 2011would not constitute as change in law in terms of the PPA?

(D) Whether the Ld. Central Commission has erred in holding that the Appellant was not eligible for exemption of custom duty on mining equipment prior to the Change in Law event viz. withdrawal of exemption pursuant to the clarification issued by the Ministry of Power vide its office memorandum dated 17.06.2011?

(E) Whether the Ld. Central Commission has erred in holding that the Appellant will be entitled to only such relevant increase in the cost of the captive coal mines as in relation to the coal being supplied to the Project and taking into

consideration the costs incurred with respect to coal supplied from these mines to other Projects?

(F) Whether the Ld. Commission erred in not formulating and devising a mechanism whereby the Appellant's economic position is restored as if such Change in Law had not taken place and Appellant is compensated for the entire financial impact and increase in Capital Cost on account of Change in Law events on account of failure of the extant provisions?

5. Reliefs sought

The Appellant has prayed that this Tribunal be pleased to:-

(a) Set aside the Impugned Findings of Ld. Central Commission in Order dated 04.02.2015.

(b) Direct the Commission to devise a mechanism such that the relief along with the carrying cost may be granted in lieu of Change in Law events and restore the Appellant to the same economic condition prior to occurrence of the Change in Law.

(c) Pass any such other and further reliefs as this Hon'ble Tribunal deems just and proper in the nature and circumstances of the present case.

6. Mr. Sajan Poovayya, learned counsel for the Appellant has filed his written submission as follows :-

- ***SPL is entitled to be compensated for Increase in Cost of Geological***

Report for the Captive Coal Blocks

6.1 The Commission has erred in disallowing the claim of SPL for compensation due to increase in the cost of conducting geological survey of the Captive Blocks from the firm estimated amount indicated at the pre-bid stage. The Project had been allocated Moher, Moher-Amlohri Extension and Chhatrasal Coal Blocks ("***Captive Coal Blocks***")as captive coal blocks. The Procurers had provided the shortlisted bidders with the total estimate of the cost of Geological Reports for the Captive Coal Blocks as Rs.19.0 crores vide letter dated 4.10.2006. However, actual cost to this account incurred by SPL was Rs.24.98 crores.

6.2 Therefore, the actual expenditure on the Captive Coal Blocks exceeded the indicated cost by Rs. 5.98 Crores. Since SPL had bid premised on the estimates provided by the Procurers, SPL is entitled to be compensated for the additional expenditure incurred in this regard.

6.3 The Commission has wrongly relied on Para 2.7.2.1 and Para 4 of the RFP to disallow SPL's claim. It is submitted that Para 2.7.2.1 and Para 4 of the RFP are merely disclaimers and cannot absolve the Procurers of all the liability in the event of any errors in the information provided to potential bidders. The said disclaimers of the RFP ought not to be considered absolute

in nature so as to prevent loading of costs which are incurred by SPL as a direct result of omission or error on part of the Procurers in providing information during the pre-bid stage.

- ***SPL is entitled to be compensated for increase in cost of water intake system.***

6.4 As per Clause 1.4(v) of the RFP for the Project, the Procurers were required to provide a water intake study. WAPCOS (a premier Government of India agency) was engaged to conduct the study and prepare the Report. ("WAPCOS Report") The Report identified the water intake pump house location at 12.5 km from the Power Station. As per the WAPCOS Report, the cost of construction of the water intake system was Rs. 92 Crores. This report was made available to all the bidders before bid submission so that the bidders could factor in the cost of water intake system in preparation of their financial bids i.e. the tariff at which power would be supplied to the Procurers.

6.5 After Reliance Power Limited was selected as the Successful Bidder and execution of the PPA, WAPCOS was re-appointed to confirm the technical feasibility of the water intake system as per the aforesaid WAPCOS Study. During this process, it emerged that the water intake location identified in the WAPCOS Study was not appropriate since it would lead to the power

plant being shut down during the lean season. Therefore, WAPCOS recommended a new location for water intake, which was 23 km from the power plant as against the 12.5 km initially indicated.

As a result of the foregoing, the total cost of the Water Intake System was approximately Rs. 268 Crores i.e. an increase of approximately Rs. 176 Crores.

6.6 The Water Intake System is part of the Declared Price of Land for the Power Station as noted by the Commission in the Impugned Order:-

"*19. Change in the declared price of land is covered under "Change in Law". The procurers have also agreed that this item of expenditure is admissible under "Change in Law".* ***The declared price of land for the Power Station*** *was stated to be 190.677 crore. This has been verified from the communication dated 23.10.2006 from the representative of the procurers to the bidders.* ***This included the power plant area, the fuel transport system land, the water pipeline corridor and the ash pipeline corridor.***"

6.7 In terms of Article 13.1.1(iv)(a), any change in the Declared Price of Land for the Project is a change in law event. It is submitted that the increase of Rs. 176 Crores in the cost of the Water Intake System is a change in law event in terms of Article 13 of the PPA and SPL is entitled to be compensated for the same. The Commission has erred in rejecting the claim of SPL in this regard by placing reliance on Paragraphs 2.7.2.1 and 4 of the RFP documents.

6.8 Paragraphs 2.7.2.1 and Para 4 of the RFP cannot operate as an absolute bar against all claims with respect to verification of inputs etc. It is submitted that the Procurers had provided a report by a technical agency. SPL acted with due care and relied upon the said report. However, that will not act as a bar against the liability of procurers for deficiencies in the report. Any duty to independently verify inputs, information factors etc. require only a reasonable duty of care. The grave technical deficiencies and huge difference between actual cost and estimates provided to the bidders defeat the fundamental objective of providing information to the bidders especially when the nature of expense in this case was of buying a report from a Government Company which had carried out a detailed study.

- ***Imposition of Excise Duty on Cement and Steel is a change in law event***

6.9 SPL was granted exemption from payment of excise duty on cement and steel for the Project in terms of Notification No.06/2006 dated 01.03.2006. This exemption provided to the Project was further clarified in Notification No. 6/2007 dated 22.01.2007. The Project was accorded in-principle mega power project status as per Ministry of Power's letter no. F.No. 12/18/2006-P&P dated 20.10.2006. The final certificate was issued on 21.09.2007.

6.10 On 14.08.2008, Ministry of Finance, Government of India issued

Notification No. 46/2008 clarifying that Ultra Mega Power Projects were granted exemption from payment of excise duty on goods required for setting up the same. On 11.01.2010, SPL applied for exemption from payment of excise duty on cement and steel being procured for use in UMPPs.

6.11 The Government of India in the Union Budget, 2011-12 (Para M4) withdrew the excise duty exemption for cement and steel being used in UMPPs. The operative portion of the Union Budget is reproduced below:-

"M4 It is being clarified that the cement and steel going into construction activity of the power project are not eligible for the benefit of customs duty and excise duty exemptions and that the special power cables connecting generators and right upto the transformer within the power generation plant would be eligible for the benefits of the said exemptions"

6.12 It is evident from the foregoing that as on 21.07.2007, which is the Cut-Off Date for determination of change in law under Article 13 of the PPA, SPL was entitled to excise duty exemption on cement and steel. The said exemption has been withdrawn by way of the Union Budget and amounts to change in law. Due to the aforesaid Change in Law, the aggregate excise duty paid by SPL for cement and steel is Rs.75.9 Crores. The Commission has wrongly disallowed the claim of SPL as the increase in amount payable towards for excise duty payment has arisen due to a Change in Law during

the construction period. Accordingly, SPL is required to be compensated for the same and the findings of Ld. Commission are liable to be set aside.

- ***Levy of Customs Duty on Mining Equipment Imported for the Project is a change in law event***

6.13 As per Notification 21 of 2002- Customs dated 01.03.2002 issued by the Ministry of Finance, Government of India, goods required for setting up mega power projects were exempt from payment of customs duty.

6.14 The Project is a domestic coal based UMPP. The Policy for Setting up of Mega Power Projects in Private Sector (D.O.No.C-286/95-IPC dated 10.11.1995) envisages domestic coal based UMPPs as integrated projects where the power station and the captive coal mines are treated as an integrated unit. The operative portion of the Policy is reproduced below:-

" When the mega projects come up in the private sector, they would mostly be composite proposals and include the scheme for development of the linked coal mine in many cases."

6.15 The Ultra Mega Power Project Policy issued by the Ministry of Power, Government of India provides that one of the salient features is, an UMPP being an integrated power project with dedicated captive coal blocks for pit head projects. This is also recognized in the PPA as well as other projects documents such as the RFQ and the RFP. In this regard, the following may be noted:

(a) Project was bid along with captive coal mine. The captive coal mine forms an integral part of the Project since the Project is conceptualized as thus

(b) The PPA defines Project as Power plant along with captive coal mines

(c) The Captive Coal Mines are an integral part of the Project as noted in Paragraph 21 of the Impugned Order which is reproduced below:-

> *"21. Project has been defined in the PPA as "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." Therefore, captive coal mines are part of the project and any change in the declared price of coal mines would be covered under the "Change in Law"*

The Coal Blocks being an integral part of the Project, mining equipment imported for the Project would be entitled to all benefits including exemption from excise duty. SPL applied to the Energy Department, Government of Madhya Pradesh vide Application dated 05.05.2011 seeking a recommendation to import mining equipment for the Project under nil custom duty as applicable for other equipment such as power plants of the Project. This application was premised on the Notification 21 of 2002-Customs.

6.16 However, on 17.06.2011, Ministry of Power issued an Office Memorandum limiting the customs duty exemption for UMPPs to power equipment only.

This was forwarded to SPL on 20.06.2011. The decision of the Ministry of Power detailed in its Office Memorandum dated 17.06.2011 amounts to Change in Law under Article 13.1 of the PPA as under:-

(a) The exemption from Customs Duty was declined / withdrawn by way of a Notification (which falls within the definition of law)

(b) The Notification was issued by Ministry of Power in its capacity of a *Government Instrumentality*.

(c) The Memorandum was issued on 17.06.2011 i.e. after the Cut-Off Date.

6.17 The total amount of customs duty paid by SPL on mining equipment till date is Rs 459 Crore. The total custom duty for mining equipment is estimated to be approximately Rs 531 Crore. The Commission's reliance on Serial No. 399 of Customs Notification 21 of 2002 and the segregation of mining and power projects is incorrect. It is submitted that SPL has set up an ultra-mega power project which comprises of captive coal mines as an integrated part of the Project. The mining equipment is for use of the Project and not by a mining company. Moreover, the coal from the Project is being used only for the Project. Hon'ble Supreme Court's judgment dated 25th August 2014 (***Manohar Lal Sharma v. Principal Secy.*, (2014) 9 SCC 614**) clearly directs that coal from captive coal mines will be used only for the Project

(UMPP). The capital cost of the power project includes the cost of the coal mines. This is also evident from Article 13 of the PPA where increase in cost of land and R&R expenditure for the coal mines is included as change in law. Lenders to Sasan UMPP have appraised and assessed the viability of the Project as an integrated project.

6.18 Therefore, the finding that the captive coal mines are a separate activity and will fall under Serial No. 399 is incorrect and ought to be set aside. In the present case, the entire project including the captive coal mines will fall within the category of Serial No. 400. In view of the foregoing, it is submitted that the findings of the Ld. Commission are untenable and liable to be set aside.

- ***Findings with respect to allocation of increase in cost of Captive Coal Mines***

6.19 The Commission has erroneously held that the adjustment of compensation on account of Change in Law with respect to the captive coal mines of the Project will be based on the consideration of relevant factors such as quantum and price of coal supplies to other Projects. In this regard, it is submitted that:

(a) The Central Commission has given this finding without examining all documents and facts on record. It is submitted that the Reply of Respondent

No. 13, PSPCL, relied upon by the Central Commission was never served or received by SPL.

(b) In the facts of the present case the finding regarding adjustment of the cost of coal mines is inappropriate and the issue of apportionment of the coal cost does not arise since the captive coal mines are a part of the Project and any increase in cost thereof is to be borne by the Procurers in terms of the PPA.

(c) Coal from the Captive Coal Blocks is being used for Sasan UMPP only. Further, as mentioned in the foregoing, Hon'ble Supreme Court has, in its judgment dated 25.08.2014, directed that coal from captive coal mines will be used only in UMPP.

6.20 SPL has also filed an auditor's certificate certifying that no coal has been sold or supplied to any other Project or third party before the Ld. Commission in connected proceedings being Petition No. 162/MP/2015. In light of the foregoing, there was no occasion for the Ld. Commission to go into the issue of supply of coal from the Captive Coal Blocks to any other project. The Ld. Commission's findings in this regard ought to be set aside.

- ***Need to devise suitable compensation mechanism for Construction Period Change in Law Events***

6.21 Article 13.2 is the over-arching provision and Articles 13.2(a) and (b) have

to be interpreted in light of the principle of restoration of affected parties to the same economic position and PPA has to be read in the prospective which gives correct and just explanation to the intent of the parties and principle laid down therein. It is submitted that the guiding principle for Article 13.2 is that the affected party is restored to the same economic position as if the change in law event had not occurred. However, the formula prescribed under Article 13.2(a) of the PPA, which is a subordinate provision does not lead to 'restoring the affected party to the same economic position'. Therefore, SPL had prayed that the Ld. Commission devise a suitable mechanism for compensation keeping in mind the guiding principle of restitution.

6.22 The aggregate impact on the Capital Cost of Project due to actual and estimated expenditure due to all Change in Law events is approximately 1353.9 Crores. However, it is submitted that the compensation amount as approved by the Commission in the Impugned Order relying only on clause 13.2 (a) of the PPA is not sufficient to compensate SPL against the actual expenditure incurred due to the Change in Law events.

6.23 SPL is entitled to be compensated for the change in law events in accordance with the principle that SPL is to be restored to the same economic position as

if such 'Change in Law' has not occurred. It is pertinent to mention that the emphasis articulated in the said principle is on "to be restored to the same economic position" and "as if such 'Change in Law' has not occurred". In this context, it is submitted that the Commission has erroneously held that the compensation for Change in Law is subject to the limitation provided under Article 13.2(a) of the PPA and therefore, no relief can be granted ignoring or deviating from the said provision. The erroneous formula does not restore the Seller to the same economic position. It fails to provide restitution which would put the Seller in a position as if no Change in Law had occurred. It was wrongly held by the Commission that the main reason for non-recovery of the capital cost is fully attributable to the low non-escalable capacity charges and not on account of any flaw in the formula which determines the compensation for the change in law events.

6.24 The provisions of the PPA must be read harmoniously with the principle set out in Article 13.2 of the PPA which stipulates that the objective of Article 13 of the PPA is to restore the party affected by Change in Law to the same economic position as if the Change in Law did not take place.

6. 25 In case of any conflict between Article 13.2 and 13.2(a), Article 13.2(a) will yield to Article 13.2 since article 13.2(a) is a subsidiary / secondary

provision. In this context, reliance is placed on the judgment of the Hon'ble Supreme Court in the case of Gujarat ***Urja Vikas Nigam Ltd vs. Essar Power****2008 4 SCC 755* wherein the Hon'ble Supreme Court recognized the **Gunapradhan axiom** which provides that "*if a word or a sentence purporting to express a subordinate idea clashes with the principle idea, the former must be adjusted to the latter or must be disregarded altogether"*. Further, it is a well-recognized rule of construction termed as the "main purpose rule" which is summarized in the case of Glynn vs Margetson & Co reported as 1893 A.C 357 as under:

"Looking at the whole of the instrument, and seeing what one must regard as the main purpose, one must reject words, indeed the whole provision, if there are inconsistent with what one assumes to the be main purpose of the contract"

6.26 The main purpose rule was relied on by the Hon'ble Supreme Court of India in the case of ***Skandia Insurance Co. Ltd vs Kokilaben Chandravan & Ors*** reported as (1987) 2 SCC 654 to prevent an exclusion clause of an insurance contract from defeating the main purpose of the provisions enacted for protection of accident victims.

6.27 Even applying the test of purposive interpretation, Article 13.2(a) will have to be interpreted to give effect to the primary purpose being restoration of the affected party to the same economic position. In this regard, it is

submitted that the Hon'ble Supreme Court in the case of ***DLF Universal Limited v. Director, Town and Country Planning Department, Haryana, (2010) 14 SCC 1***has held that:

"*13. It is a settled principle in law that a contract is interpreted according to its purpose. The purpose of a contract is the interests, objectives, values, policy that the contract is designed to actualise. It comprises the joint intent of the parties. Every such contract expresses the autonomy of the contractual parties' private will. It creates reasonable, legally protected expectations between the parties and reliance on its results. Consistent with the character of purposive interpretation, the court is required to determine the ultimate purpose of a contract primarily by the joint intent of the parties at the time the contract so formed. It is not the intent of a single party; it is the joint intent of both the parties and the joint intent of the parties is to be discovered from the entirety of the contract and the circumstances surrounding its formation.*"

6.28 Further, in the case of ***Sumitomo Heavy industries vs. Oil and Natural Gas Commission*** of India, reported as 2010 11 SCC 296, the Hon'ble Supreme Court of India has, while dealing with a case in relation to compensation under a Contract for extra costs arising out of Change in Law, held the similar views.

6.29 In the present case, the mechanism provided under Article 13.2(a) of the PPA to compensate SPL is not sufficient to restore it to the same economic position. In fact, by applying the mechanism provided in Article 13.2(a) of the PPA, SPL will only be able to recover Rs. 172 Crores over the term of the Project that i.e. over 25 years instead of Rs 1353.9 which is the

additional Capital Cost SPL would incur for reasons of Change in Law.

6.30 At the time of entering into the PPA, it could not have been within the contemplation of the parties that the Capital Cost would increase by Rs 1353.9 Crores on account of Changes in Law which results in increase in project cost by nearly 7% which has grave impact on Project economics. This is clearly a situation which is not provided for in Article 13.2 of the PPA. It is submitted that the terms of a contract have to be interpreted in a manner which provides business efficacy to the contract, as held by the Hon'ble Supreme Court in the case of ***Nabha Power Limited v PSPCL*** dated 05.10.2017 in Civil Appeal No. 179 of 2017.

6.31 Further, the Commission has powers under Section 79(1)(b) to devise an alternate mechanism to compensate SPL for the increase in capital cost. In this regard, reliance is placed on the judgment of the Hon'ble Supreme Court of India in the case of ***Energy Watchdog vs. CERC***.

In terms of the above judgment, Ld. Commission may exercise its regulatory powers under Section 79(1)(b) to devise a mechanism which will adequately compensate SPL and restore it to the same economic position as if change in law did not take place.

6.32 It is also pertinent to note that in a meeting of Procurers for Tilaiya UMPP held on 08.07.2013 at CEA office, New Delhi, the CEA has informed

the Procurers that the formula:

(a) Is flawed and does not restore the affected party to the same economic position as if Change in Law event during construction period had not occurred; and

(b) Results in different compensation to different bidders for same amount of increase/decrease in project cost due to Change in Law during construction period.

6.33 The extract of the Minutes of Meeting of the Procurers of Tilaya UMPP obtained by the Petitioner from its affiliate company JIPL is set out below:

"*6. As requested by Procurers, Chief Engineer, CEA, explained the actual recovery of additional capital cost with the existing formula of PPA under Article 13.2 (a) for all the UMPPs awarded so far. It is found that incremental tariff corresponding to Rs 50 Cr in capital change on account of change in Law, as provided in PPA, does not result in recovery of the entire Rs 50 Cr capital expenditure for any of the UMPP and is different for each of the UMPP because the quoted non escalable capacity charge is different for every UMPP.*"

6.34 It is noteworthy that the Project offers one of the lowest tariffs in the country. The Project offers a benefit of nearly Rs. 3,25,000 Crore to the Procurers over the PPA period, thereby benefiting the Procurers and nearly 42 Crore consumers of the procuring states. The ultra-competitiveness of the Project has been highlighted by the Commission in its Order dated 21.02.2014 in Petition No. 14/MP/2013. It was specifically noted by the Commission that in comparison even the cost of generation of Hydro Power

Projects is generally higher. Therefore, it is imperative that the economic viability of the Project be kept intact so that the gains accruing from the operation of the Project do not stand diminished.

6.35 In light of the foregoing, the finding of the Commission that the formula prescribed under Article 13.2(a) cannot be altered is erroneous and ought to be set aside.

7. Mr. G. Umapathy, Learned Counsel appearing for Respondent No. 2 has filed his written submission as follows:-

7.1 The questions of law raised in support of the contention in the appeal are wholly untenable. CERC has rightly limited the compensation in accordance with Power Purchase Agreement (PPA) and there is no infirmity in the order passed by it. The claims relating to change in law by the Appellant during the Construction period has been rightly dealt with by the CERC.

Issue No.(i) Not formulating and devising a mechanism for restoring the same economic position as if such change in law has not occurred

7.2 The claim of the Appellant that Art 13.2(a) of the PPA does not limit the restoration of the affected party to the same economic position is wholly unsustainable. The clauses of the PPA is a complete code between the parties and the restoration on account of change in law has to be strictly in accordance with Art 13 of the PPA and not otherwise. The Appellant while

signing the RFP and the PPA, had complete knowledge about the provisions enshrined in the documents and the principle of change in law under Art 13 of the PPA. The Appellant cannot claim that the method of calculating the compensation on account of change in law is wrong and this Hon'ble Tribunal ought to award compensation so as to restore to the same economic position unmindful of the restriction enshrined in Art.13(2) of the PPA is untenable and would be beyond the scope of the PPA.

7.3 The effect of Change in Law to be given is restricted to the specific stipulation and conditions contained in Article 13. Article 13.2 stipulates that while awarding compensation to the party affected by Change in Law is to restore through monthly tariff payments **to the extent contemplated in this Article 13**, the affected party to the same economic position as if such change in law has not occurred. Article 13.2 of the PPA has to read along with provisions pertaining to the compensation to be awarded during the construction period i.e. For every cumulative increase/decrease of each Rs. Fifty Crores (Rs. 50 crores) in the capital cost over the term of this Agreement, the increase/decrease in Non Escalable Capacity Charges shall be an amount equal to zero point two six seven (0.267%) percent of the Non Escalable Capacity Charges. Provided that the Seller provides to the

Procurer documentary proof of such increase in Capital Cost for establishing the impact of such Change in law.

7.4 The Appellant participated in the bid and signed the PPA after taking into consideration the entire circumstances viz RFP, GOI Guidelines etc. The PPA signed between the appellants and the procurers provides for specific provision relating to change in law and the methodology to be adopted for compensation in case of such change in law. The computation provided in the PPA is in conformity to the guidelines issued by the Central Government.

7.5 The appellant after evaluating the bid and subsequent participation in the bidding process became the successful bidder. The Appellant accepted all the terms and conditions stipulated in the RFP and the PPA. The submission of the appellant at this belated stage and challenging the method of calculation of payment of compensation under Art 13.2(a) during the construction period is wholly untenable. The compensation for every Rs 50 Crores change in the capital cost, the impact would be 0.267% of the non escalable capacity charge and such a formula forms part of the PPA which was evaluated and subsequently accepted by the Appellant. The Appellant cannot seek to reopen or enlarge the scope of the PPA and seek a full

restoration to the same economic position as if such change in law has not occurred.

7.6 The claim of the Appellant that Art 13.2(a) of the PPA does not lead to restoring the affected party to the same economic position unmindful of the limitation prescribes in Art.13(2)(a) is untenable. The PPA is a complete code between parties and the restoration on account of change in law has to be strictly in accordance with the PPA and not otherwise. The Appellant while signing the RFP and the PPA had knowledge about the provisions enshrined in the documents and the principle of change in law under Art 13 of the PPA. The Appellant cannot claim that the method of calculating the compensation on account of change in law is contrary to law. This Hon'ble APTEL does not have power to award compensation which falls beyond the scope of the PPA.

7.7 The submission of the Appellant that both the provisions are independent provisions is wholly unjustified since the language of the Art 13.2 is very clearly and stipulates that it is limited to the extent contemplated in Art 13 and not otherwise. CERC rightly held that compensation for change in law is subject to the limitation provided under Art 13.2(a) of the PPA and therefore no relief can be granted ignoring or deviating from the said provision.

7.8 The submissions of the Appellant that it is entitled to full restoration to the same economic position not only in terms of the PPA, Government of India Guidelines but also in equity is wholly unsustainable. The PPA is a statutory contract approved under Section 63 of Act, 2003. The PPA has been entered into keeping in view the GoI guidelines. The terms of the PPA cannot be varied or modified. The question of invoking the principles of equity for restoring to the same economic position is wholly misplaced. Even with regard to the amendment of PPA, the same ought to have been done prior to entering into PPA which is evident from clause 5.6 of the GoI Guidelines as extracted in para 48 at pg.122 of the Judgment of the Hon'ble Supreme Court in Energy Watchdog case reported in 2017(14) SCC 80.

7.9 The reliance of the Appellant on the Judgment of the Hon'ble Supreme Court in Energy Watchdog, for the proposition that this Hon'ble Tribunal may exercise the regulatory powers under Section 79(1)(b) of Act, 2003 to device a mechanism which will adequately compensate the Appellant and restore to the same economic position as if Change In Law did not take place is fully untenable. The Hon'ble Supreme Court clearly held in Energy Watchdog case that the regulatory power can only be resorted to in the absence of GoI Guidelines or the PPA. In the present case, the submissions

of the Appellant to restore to the same economic position dehors the limitation prescribed in Article 13.2(a) of the PPA is wholly untenable.

7.10 Further, the reliance placed by the Appellant on the judgement of this Hon'ble Tribunal in the matter of Sasan Power Ltd. v. CERC in Appeal No. 161 of 2015 is wholly untenable. The RFP and the PPA have to be read together in tandem as the RFP provides the disclaimers which ought to be have been considered by the Appellant while signing the PPA. Article 5.2 of PPA also provides for Disclaimer Clause. It is not the submission of the 2nd Respondent that the RFP overrides the PPA but that both documents have to be considered while allowing any change in law event in terms of Article 13 of the PPA and has to be strictly considered in the light of Art 13 only and not otherwise.

7.11 The provisions in the PPA signed between the parties also contemplate that the provisions enshrined under the RFP are binding and cannot be overridden by the provisions of the PPA between the parties and they have to read together. The disclaimer provided in Clause 4 of the RFP cannot be ignore and the Appellant was bound to make an independent enquiry and investigation before signing the PPA. It is also submitted that the standard PPA which was to be executed was circulated along with the RFP and the Appellants were very well aware of the Change in Law Clause in the PPA

and after participating in bidding, accepted all the stipulated bidding conditions. It is not open now to raise any issues on the terms of the PPA.

Issue No.(ii) Increase in cost for carrying out geological reports

7.12 The Appellant was provided with all the documents before signing the PPA and it was the responsibility of the bidder to make independent enquiry before signing of the PPA in accord with Clause 2.7.2.1 and 2.7.2.2 of the RFP and the onus of any misinformation cannot be shifted to the procurers. It was the duty of the Appellant to verify the actual geographical area and incorporate the cost of such study and survey. In any event the same would not fall under change in law as contemplated in Article 13 of the PPA. CERC rightly held that the Appellant is not entitled to any compensation since it is not a change in law event.

7.13 The submission of the appellant that the expenditure incurred by Appellant exceeds the estimates given by Procurers Authorized Representative prior to Bid submission is wholly misconceived. In any event, as submitted earlier, these are not covered under in "Change in law" as defined in Article 13.1.1 of the PPA. The increase in cost of geological report for coal blocks is not covered in "Change in law" as defined in Article 13.1.1 of the PPA. As per PPA, Appellant quoted non-escalable charge. The claim for 100% compensation on account of claim under this head for Change in Law when

such an event is not permissible. The Appellant is not entitled to seek relief beyond the provisions of the PPA.

7.14 The expenditure incurred by Appellant exceeds the estimates given by Procurers Authorized Representative prior to Bid submission. These are not covered in "Change in law" as defined in Article 13.1.1 of PPA. Had the Appellant sought 100% compensation while filling up the tender, it would have been seen as a major technical deviation and the tender would not have been considered in the first place. Thus as per the PPA, the Appellant quoted non-escalable charge, 100% compensation for Change in Law events is not provided and, hence, Appellant is seeking relief beyond the provisions of the PPA which is wholly untenable and deserves to be rejected.

Issue No. (iii) Claim for increase in cost of water intake system

7.15 The increase in cost of Water Intake System is an expense incurred by the Appellant, but not covered in "Change in Law" as defined in Article 13.1.1 of the PPA. The Appellant at time of signing of the bid was fully aware that the change in costs of water intake system is not covered under any change in law event in terms of Para 2.7.2.1 of the RFP document. The Appellant ought to have conducted due diligence and no liability is attributable on to the Procurers. The Appellants relied on the report of the government agency WAPCOS and they even conducted an assessment later by the said

Government but now are questioning the validity of the said report by WAPCOS and ultimately seeking full restoration by bringing it under the scope and ambit of Art 13 which is not permissible. The provisions relating to change in law are exhaustive and cover all eventualities. CERC rightly rejected the claims of the Appellant. Further, Article 13.2 provides for compensation **"to the extent contemplated in Article 13"** to restore the affected Party to the same economic position as if such Change in Law has not occurred. Assuming without admitting that the event would fall under Change in Law still the compensation is not envisaged to be 100%, but only as provided in the terms of the PPA. It is further submitted that the sanctity of contract should be respected and Appellant is not entitled to claim compensation beyond the provisions of the PPA.

7.16 The contention of the Appellant pertaining to the above two issues i.e. geological report and the water intake system at the very outset do not even constitute a change in law event which ought to be summarily dismissed. Although ,the Hon'ble Commission went ahead and still adjudicated the events and came to the finding that they do not satisfy the conditions as stipulated under Art 13 of the PPA regarding compensation on account of change in law event as there was no pre existing law in relation to the above. The Disclaimer as envisaged under the RFP as well as Art 5.2 of the PPA

clearly enshrines that the Appellant was fully aware of the change in law clause and the Appellant had sufficient opportunity to investigate the site and the Appellant accepted full responsibility. The disclaimer under the RFP and the PPA being specific and cannot be ignored.

Issue No. (iv)Increase in cost due to levy of excise duty on cement and steel

7.17 The submission of the Appellant that it was granted exemption in accordance with the notification dated 01.03.2006 is wholly erroneous. Admittedly at the time of submission of the bid and the cut off date there was no such exemption available to the Appellant. With regard to the contention of the Appellant that notification for exemption from excise duty for UMPP was issued on 14.8.2008,it is stated that the same was much after the cut-off date viz 28.7.2007. Thus there was no occasion for the appellant to take into account such exemption while quoting the bid. Thus the subsequent clarification in the Finance Act 2011 would not constitute the change in law.

7.18 The Finance Act, 2011 brought certain clarifications which extended to the Power Projects and clarified the position that the benefits in terms of excise duty would not extend to the cement and steel used in the construction of the power plant.

> *"M-4 It is being clarified that the cement and steel going into construction activity of the power project are not eligible for the benefit of customs duty and excise duty exemption and that the special power cables connecting generators and right upto the transformer within the power generation plant would be eligible for the benefits of the said exemption."*

Thus the claim of the Appellant on this account is wholly unsustainable.

Issue No. (v) Exemption of custom duty of mining equipments prior to change in law event.

7.19 The submission of Appellant that mining equipment is covered under the notification dated 01.03.2002 is incorrect. The said notification clearly distinguishes between thermal power projects and hydro power mining projects. The communication issued by the Ministry of Power dated 17.06.2011 only clarified that the exemption only covers the power equipment and does not apply to any such mining equipments and no such custom duty was imposed by the said authority. It is submitted that there was no exemption from customs duty for the mining equipment as on the cut-off date and in accordance with the bid submitted by the petitioner. As on the cut-off date, customs duty was payable on the mining equipment. and the notification dated 1.3.2002 provides for customs duty exemption to the goods required for setting up of mega power project as specified and not for setting up of mines. The Appellant had considered the imposition of customs

duty in its bid and in the light of the same no claim can be raised by the Appellant on account of any change in law event.

7.20 As per the notification dated 01.03.2002, the equipment for the coal mining projects under Sl. No 399 are liable to pay customs duty, while SL. No. 400 exempts the mega power projects from payment of customs duty. The submission of the appellant that it is entitled to be compensated for the same is wholly unsustainable and CERC rightly rejected the case of the appellant.

Issue No.(vi) Entitlement of increase in the cost of captive coal mines only in relation to the coal being supplied to the project.

7.21 The Appellant is supplying coal from his captive mines to other projects but the fair and equitable share of the costs is not being done by the Appellants. The financial benefit should be considered to reduce the costs associated with the coal mines. In no case, can the procurers be compelled to pay for the coal which is being supplied by the Appellant to the other projects. It is submitted that only because the captive coal mines are allotted for the power project but that does not entitle the Appellant to make profits and benefit out of the same and in case the coal is being supplied to other projects, then such projects ought to share the costs of the mining and the associated costs should be reduced on the procurers.

8. Mr. Bipin Gupta, learned counsel appearing for the Respondent No. 7 to 9 has filed his written submissions as follows :-

8.1 Denial of increase in the cost of geological report for Mohar Coal Block, Moher-Amlohri Extension Coal Block and Chhatrasal Coal Block is for the reason that it was the responsibility of petitioner to verify the actual geological area to be surveyed and quote the cost of Geological Survey factoring in the appropriate escalation so that a realistic cost is reflected in the bid. The petitioner having failed to do so, the increase in cost on account of this head is not admissible. In terms of clause 13.1.1 (iv) (d) of the PPA, "Change in law" inter-alia includes the cost of implementing compensatory afforestation for the coal mine, indicated under the RFP and the PPA. Accordingly, the increase in cost of geological reports of the mines is not covered by provisions in respect of Change in Law", even though this increase in the cost of geological report. It is clear on record that as per the bid documents it was responsibility of the petitioner appellant to verify the geological area so that the realistic cost is reflected in the bid. Since the petitioner had failed to do so. The petitioner is not entitled for any increase in cost. It is further submitted that for denial of increase in cost Chhatrasal Block has also been refused for the same reason and it has been categorically held that such increase is not permissible under change in law therefore it has been disallowed. Reasons of Commission are cogent and there is no scope to

be interfered by this Tribunal and therefore on this issue appeal is liable to be rejected.

8.2 The appellant had claimed increase in cost in water intake system and in categorical terms it has been held by the Commission that the claim under this head is not covered under provisions of Article 13.1.1. of PPA for the reason that the petitioner being aware that cost of water intake system being indicative in nature and being not covered under the Change in law under Article 13 should have informed itself fully with the actual site condition before preparing the bid and accordingly factored in the possible estimates of water intake system while quoting the bid instead of relying on the indicative cost.

Further, para 4 of the RFP document provides that the pricing and other details given in the bidding documents are by way of information only and it was for the bidders to conduct independent enquiry and verify the details and information . Therefore, it is the responsibility of the petitioner to verify the suitability of the location of water intake and ensure reliable water supply for the power plant and workout the relevant approximate cost of water intake system independently and factor in the estimate in the bid so that a realistic cost is reflected in the bid. The petitioner having failed to do so, the increase

in cost on account of this head is not admissible. Thus on this issue also appeal is liable to be rejected.

8.3 Next claim of the petitioner is under head of compensation on account of increase in cost due to imposition of Excise duty on cement and steel. It is submitted that the Hon'ble Commission has recorded finding as under-:-

> *"Under Article 13.1.1 of the PPA, for the Change in Law to be applicable the enactment, adoption, promulgation, amendment or modification of any law should have taken place at any time after the due date which is seven days prior to the bid dead line. In this case, the original bid deadline was 7.12.2006 and the revised bid deadline was 28.7.2007 and the due date would be counted from seven days prior to the bid deadline. The notification for exemption from excise duty for ultra mega power project was issued on 14.8.2008 which much after the due date. In other words, there was no occasion for the RPower to take into account such exemption while quoting the bid. As a consequences, subsequent clarification in the Finance Act, 2011 would not constitute the Change in law. Accordingly, the relief sought on this ground is disallowed".*

Thus finding of the Commission is totally as per law and there is no perversity in the finding.

8.4 The next claim of the appellant is in exemption of custom duty on mining equipment under notification No.21/2002 and consequently is not eligible for compensation for change in law in light of clarification issued by the Ministry of Power dated 17.6.2011. The finding of the Commission are as under:-

"It is submitted that it is to be considered whether under the notification as stated above, mining equipments were exempted from customs duty. General Exemption No.122, under the Customs Notification No.21/2002 as amended from time to time contains the list of items which are exempted from customs duty. It is observed that Notification 21 of 2002 Customs clearly demarcates the power projects and mining projects separately, it is seen that at Ser. No.399 of the list, coal mining projects are liable to pay customs duty Ser. No.400 only exempts the mega power projects from payment of customs duty and there is no mention that it includes captive power plants. Therefore, it cannot be said that as on the cut off date, there was exemption on mining equipment and the petitioner had taken into consideration such exemption while quoting the bids. Nothing has been produced in the petition which could indicate that any such impression was given by the procurers or their representation prior to bidding. In view of the foregoing discussion, the submission of the petitioner that the decision of the Ministry of Power detailed in its office memorandum dated 17.6.2011 and refusal Energy Department Government of Madhya Pradesh to provide recommendation letter to import mining equipments for Sasan UMPP under nil custom duty amounts to a change in law under Article 13.1 of the PPA and the petitioner is entitled to be compensated for the same is not acceptable and hence no compensation would be available in this regard. "

Thus the findings of the Commission are as per law and does not require any interference.

8.5 The next claim of the appellant is that the Commission has wrongly given entitlement only upto the relevant increase in cost relating to the captive coal taking into consideration supply of coal from coal mines to other projects. It is submitted that the Commission has rightly found the appellant to be entitled to that extent only for the reason that the appellant had been using the Coal Mines for other power station also and not exclusive for Sasan U.M.P.P. and that to effect affidavits were filed by some of beneficiaries and

no rejoinder was filed by the appellant and therefore only the relevant increase was permitted to be loaded thus there is no illegality in finding.

8.6 The next claim of the appellant is that the appellant should be compensated for impact of change in law events by devising of a mechanism which is different from the formula prescribed in Article 13 of the Power Purchase Agreement dated 7.8.2007. It is submitted that such a claim is totally against PPA. The parties are bound by PPA and any compensation could be only admissible as provided under PPA and when under Article 13 specific clause provided under Article 13 it can not be deviated from them and therefore also claim of the appellant is perse illegal under this head also and the claim is liable to be rejected.

9. Mr. M. G. Ramachandran, learned counsel appearing for the Respondent No. 14 has filed his written submission as follows :-

***Re: ARTICLE 13.2 – Adequacy of Relief available under change in law and exercise of regulatory* powers**

9.1 The Appellant has contended that the formula/methodology provided in the PPA is not sufficient or adequate and therefore the Central Commission should (a) construe Article 13.2 opening part independent of the part dealing specifically with construction period and (b) exercise its regulatory powers to grant the relief to the Appellant independent of the the PPA.Both the claims made are devoid of any merit and are liable to be rejected. The

limitation of liability to compensate during the construction period dealt in Article 13.2(a) cannot be ignored. . There can also be no exercise of powers contrary to the terms of the PPA particularly when the exercise of such powers results in increase in tariff and adversely affects the interests of the consumers. The submission in detail are stated hereunder:

9.2 The Appellant has sought to contend that Article 13.2 providing for principle of change in law being to restore the party affected to the same economic position as if the Change in Law did not take place should override the specific formula for computing the quantum for Change in law under Article 13.2(a) of the PPA. The Appellant's plea is misconceived and without any legal basis.

9.3 Article 13.2 opening portion is not the dominant part and Article 13.2(a) is not a proviso in the nature of being a subordinate section, as argued by the Appellant.

9.4 The Appellant's claim, if accepted, would mean that the opening part of Clause 13.2 should be interpreted to override all other clauses which cannot be done. There is no priority to such opening part and in fact the said part specifically recognizes that the restoration is only to the extent contemplated in the Article 13. Therefore the other clauses of Article 13 including 13.2(a) would take priority over Article 13.2 opening part.

Thus the principle of compensation is limited to the extent contemplated in Article 13 and not otherwise. If Article 13 does not contemplate the compensation, the mere principle or purpose would not be helpful in providing any additional relief. Article 13.2 only provides for due regard to the above principle and that too, to the extent contemplated in the Article 13. There was no understanding between the parties that the compensation payable for change in law during construction period would be more than the formula specifically agreed to.

9.5 In any event, Article 13.2(a) being a specific provision providing for a specific formula would override general provision of opening portion of Article 13.2. It is well settled principle of law that a specific provision overrides a general provision (Commissioner of Income Tax v. D.P.S. (I) Pvt. Ltd [1996] 222 ITR 371 (Cal)at Para4).

9.6 If the contention of the Appellant is accepted that opening portion of Article 13.2 has to be applied excluding the limitation provided under Article 13.2(a) and (b), it would render the two sub-Articles otiose and redundant. It cannot be the case that specific formula provided in the PPA was not meant to be applied. Further Article 13.2 (a) provides for consideration of change in law only for cumulative increase/decrease of Rs. 50 crores (construction period) and similarly, minimum threshold of 1% of Letter of Credit

(operation period). This means that if the impact is less than Rs. 50 crores (construction period) or 1% of Letter of Credit (operation period), there would be no relief to the Appellant. Thus Article 13.2(a) and (b) provide for specific principles which have to be given effect to and the same cannot be ignored based on any general principle.

9.7 As per Clause 13.2 of the PPA, for change in law during construction period, the compensation for every Rs. 50 crores change in the capital cost, the impact would be 0.267 % of the non-escalable capacity charge. Therefore the compensation as per the formula is dependent on the non-escalable capacity charges quoted by the bidder, in this case, Reliance Power/ the Appellant. Therefore Reliance Power/the Appellant was well aware of the formula and should have quoted the non-escalable capacity charge accordingly. The Appellant itself had claimed that it is not able to recover the impact due to the low non-escalable capacity charge quoted by it.

9.8 The PPA was entered into pursuant to a Tariff based Competitive Bidding Process as per the Standard Bidding Documents and guidelines issued by the Central Government, including the formula prescribed in the PPA and further taken note of by the Central Commission. The draft PPA was provided to all bidders at the time of bidding and the Appellant was well

aware of the methodology or formula provided in the PPA for change in law in construction period.

9.9 The Bid was submitted by Reliance Power accepting the terms of the PPA. The bidder having consciously bid for the project with the condition that any increase or decrease shall be allowed only in terms of Clause 13 of the PPA, it is not open to the Appellant to claim the same by way of exercise of regulatory powers. The Appellant cannot be allowed to wriggle out of the contract or the contractual terms on the grounds that the performance has become onerous or that the compensation is not sufficient. The Appellant cannot now claim that it was not aware of the precise effect of the methodology/formula provided in the PPA. It is well settled that the contract has become onerous or burdensome is no ground to avoid the obligation. [**Ref**: Article 12.4(e) of PPA Force Majeure Exclusions and The Naihati Jute Mills Ltd. v. Khyaliram Jagannath AIR 1968 SC 522 Para 17].

9.10 The claim of the Generator for exercise of regulatory powers to grant relief has already been rejected in Energy Watchdog vs. Central Electricity Regulatory Commission and Ors. etc. (2017) 14 SCC 80 wherein the Hon'ble Supreme Court has limited the relief only to the specific provisions of the PPA.

9.11 The change in law provision is specifically provided in the PPA executed between the parties. The bidder having consciously bid for the project with the condition that any increase or decrease shall be allowed only in terms of Clause 13 of the PPA, there cannot be any claim contrary to the PPA.

9.12 The Appellant has relied on Para 19-20 of the Energy Watchdog decision to contend that the Central Commission has the regulatory powers to provide relief de hors the PPA and based on Guidelines.

9.13 The Hon'ble Supreme Court has held that the Central Commission is bound by the Guidelines and can exercise powers only in accordance with the Guidelines. The attempt of the Generators including the Appellant herein to claim relief under Clause 4.7 of the Guidelines ignoring contrary Article 13 of the PPA has already been rejected by the Hon'ble Supreme Court in Energy Watchdog decision. The generators in Energy Watchdog case had raised similar contention and sought to claim change in law in respect of foreign laws based on Clause 4.7 of the Guidelines and had contended that the PPA is subservient to the Guidelines and therefore PPA should be read to include foreign laws. The same contention that the PPA is subservient to Guidelines has been raised by the Appellant.

9.14 The plea of the Appellant by relying on a meeting of Procurers for another UMPP (Tilaiyya) held on 08.07.2013 at office of Central Electricity

Authority has no legal basis. The said pleas are not relevant for determination of compensation for change in law of the Appellant which is based on the PPA executed between the Appellant and the Respondent Procurers. In any case, a statement made in such meeting cannot contradict specific terms of the PPA which are part of the Guidelines and authored by the Government of India.

9.15 Further, the Power Purchase Agreements with similar methodology and formula for computation of relief admissible for change in law have been consistently incorporated in standard bid documents - PPAs as part of Guidelines and adopted by various Commissions. The Hon'ble Supreme Court Bihar State Electricity Board, Patna and Others v. M/s Green Rubber Industries and Others (1990) 1 SCC 731

Re: The disclaimers in respect of information provided during the bidding process: cost of geological report for captive coal blocks and cost of water intake system

9.16 The claims made by the Appellant is not covered under the specific areas of change in law under Article 13.1.1 of the PPA where the relief is admissible. There is no other provision in the PPA which provides for such compensation except specific changes in law under Article 13 and changes in specific costs under Article 13.1.1. The claim of the Appellant does not fall within any of the specific changes referred in Article 13 and therefore is

not covered by Change in Law. The claim made by the Appellant is liable to be rejected on this limited ground. As mentioned above there cannot be any relief under general exercise of Regulatory Powers .

9.17 The Appellant has contended that the information was supplied to the bidders as per the Request for Proposal (**RFP)** and the Appellant is entitled to rely on the information so provided by the RFP. However the Appellant is not bound by the disclaimers contained in the RFP. The Appellant wish to enforce the RFP terms selectively and the same is not permissible. It is incongruous on part of the Appellant to claim that the information was provided as per the RFP and yet claim that the disclaimers in the RFP would not apply to such information. The Appellant has to consider the document as a whole and not selectively..

9.18 The PPA provides that before entering into the agreement, the Appellant had sufficient opportunity to investigate the site and the Appellant accepts full responsibility for its conditions and it shall not be relieved of any of its obligations or entitled to any financial compensation by reason of unsuitability of the site:

> *"5.2 The Site*
> *The Seller acknowledges that, before entering into this Agreement, it has had sufficient opportunity to investigate the Site and accepts full*

responsibility for its condition (including but no limited to its geological condition, on the Site, the adequacy of the road and rail links to the Site and the availability of adequate supplies of water) and agrees that it shall not be relieved from any of its obligations under this Agreement or be entitled to any extension of time or financial compensation by reason of the unsuitability of the Site for whatever reason."

9.19 The validity of the disclaimer in the RFP documents has already been recognized by this Tribunal in Nabha Power Limited & Another v. Punjab State Power Corporation Limited and Another in Appeal No. 207 of 2012 dated 23.04.2014. In the said case, Nabha Power Limited had claimed that the information provided in the RFP in relation to the seismic zone of the project site was incorrect. The RFP had provided for a seismic zone of Zone III when in actuality it was Zone IV. The terms of the PPA in the case of Nabha Power Limited and in the present case are similar.

9.20 The contention of the Appellant with regard to the disclaimers in the RFP is also not sustainable. The disclaimer provided in the RFP is specific and cannot be ignored as irrelevant or inapplicable. It is denied that such responsibility of verification was limited only to certain information or factors as claimed by the Appellant or that the disclaimer is not absolute. There is no reservation or limitation in the disclaimer in the RFP or any provision for compensation for additional costs in this regard in the PPA. It

is incongruous for the Appellant to claim that a disclaimer, which issued for the specific purpose of informing the bidders to conduct their own verification and absolving any liability of the Procurer-Respondents of the accuracy of the information supplied and further bidder having submitted the bid accepting the same, should be rejected as irrelevant and the Appellant can sustain a claim against the Procurer-Respondents on the basis of the information supplied. This will be contrary to the basic tenet of the competitive bid process.

9.21 In view of the above, the claim of the Appellant for cost of Geological Report for captive coal blocks and the cost of water intake system is not sustainable and is liable to be dismissed.

9.22 The price and other details provided in the bidding documents were by way of information and it was for bidders to verify such information and details. There cannot be any allegation of breach or default on part of the Respondent-Procurers in regard to such information provided with disclaimers. As submitted hereinabove, the RFP states that the bidders shall make independent enquiry and verify all the required information (Clause 2.7.2.1 and 2.7.2.2). Further the RFP stipulates that there is no representation or responsibility by the Procurers on the accuracy or reliability of the information contained even if there is any loss or damage caused to the

bidder (Clause 4 and 1.4). The PPA also recognizes the that the Appellant had the opportunity to investigate the Site and takes full responsibility for it (Article 5.2). Thus the bidders were sufficiently told with regard to information to be provided by the Procurers under the RFP and it is not now open to the Appellant to claim that the above disclaimer is to be ignored and the Procurers be fastened with additional costs in complete contradiction to the terms of the PPA and the RFP.

9.23 There cannot be any compensation outside of the PPA. Therefore if the PPA does not provide for a relief, the same cannot be granted under regulatory powers or under common law or by equity. When there is a contract, there cannot be any relief under common law or equity. There cannot be any claim for seeking a relief not provided in the PPA and in fact being contrary to the PPA. In the present case, in view of the disclaimers and specific provisions of the PPA, a relief in terms of the Water intake system is contrary to the RFP and PPA which cannot be granted. The Appellant has relied on Clause 1.4(v) of the RFP to refer to the water intake study to be provided to the bidders but has failed to note that the Clause 1.4 of RFP itself specifically clarifies with regard to water intake study that there is no assurance on accuracy or reliability of information and that Procurers would not be

responsible for any loss to the Selected Bidder (Appellant) because of any error:

9.24 The WAPSCOS Report was a recommendation and the costs were merely estimates. Therefore the Appellant was not entitled to rely on the same as sacrosanct. The Appellant is free to choose to set up the power project and the necessary facilities as per its own wishes and designs. As per the Appellant's designs and engineering, the necessary amendments would have to be carried out but this does not mean that any change in costs due to the same would be claimed from the Procurers-Respondents. If there is any change in length of corridor due to such changes, the same is to the account of Appellant.

9.25 In any event, it is denied that there was any error or mistake in the WAPCOS report furnished during the bidding process. The new WAPCOS report relied on by the Appellant does not in any manner indicate that the earlier Report was incorrect, erroneous or mistaken. Despite a specific objection in the Reply by the Respondents, the Appellant has failed to point out any relevant portion of the WAPCOS Report or otherwise any document, which acknowledges any error or mistake or otherwise unsuitability of the location as per the earlier WAPCOS Report. The

Appellant has not submitted any proof or evidence of the alleged error in the WAPCOS report provided with the Bid.

9.26 The fact that the water intake system is not covered under Declared Price of Land is also obvious from the fact that the Appellant did not claim the above costs in the price of land component while seeking the relief under Change in Law. Even as per the Impugned Order referred to by the Appellant, the reference is to the land for the water pipeline corridor and not the cost of the water intake system.

9.27 Similarly in the order of Central Commission in the case of Coastal Gujarat Power Limited (Petition No. 141/MP/2016), the consideration was for land for water pipeline corridor. In fact the Central Commission has denied relief for the lease of water pipeline by Coastal Gujarat from Adani. Further the Central Commission has not included the cost claimed by the Coastal Gujarat Power Limited in regard to measurement fees, fencing work, jungle cleaning, leveling etc as they are not related to cost of acquisition of land.

9.28 The WAPCOS report was a recommendation and the costs were estimates. Thus there was no positive representation by the Procurer Respondent or the bid process coordinator in this regard. It was upto the Appellant to undertake

necessary inspections or verifications to ensure a realistic financial bid, particularly when the Appellant was well aware that the PPA did not provide any compensation in this regard. The Appellant cannot seek to pass on the blame for its own lack of due diligence to the consumers of the Procurer – Respondents in clear contradiction to the terms of the RFP and the PPA.

Re: Claim for imposition of excise duty on cement and steel

9.29 In the proceedings before the Central Commission, the Appellant did not raise any such specific plea on the specified notifications as sought to be made during the arguments before this Tribunal. Even in the Memorandum of Appeal filed by the Appellant before this Tribunal, there is no such specific analysis of the various notifications based on which the Appellant had claimed that the excise duty on cement and steel was not applicable as on the Cut of Date. The pleadings both in the petition before the Central Commission as well as in the Memorandum of Appeal are vague, devoid of particulars based on which such claim is being made. In the Rejoinder, the Appellant had only produced certain extracts from the notifications without stating the provision and in what manner the Appellant is claiming that the excise duty of cement and steel was not applicable as on the Cut of Date.

9.30 The power plant of the Appellant is undoubtedly an Ultra Mega Power Project which had undergone an International Competitive Bidding **(ICB)**

Process. The present controlling shareholders of Sasan Power Limited, namely, Reliance Power **(RPower)** had participated in the Competitive Bid Process and was selected. There is no dispute on this aspect. However this aspect is not relevant for claiming an exemption under Item No. 91 in Notification dated 01.03.2006.

9.31 The cement and steel has been procured by the Appellant for construction of the power plant. It is not the case of Sasan Power that it had procured cement or steel or any such goods for which it is claiming that there was an exemption on the Cutoff Date, through an International Competitive Bid Process. In other words, the procurement of cement, steel or goods has not been through the process initiated by Sasan Power holding International Competitive Bidding. In short, there was no International Competitive Bidding for procurement of steel or cement. It is submitted that the Notifications relied on by the Appellant have to be read in the context of the above namely while the developers for the Ultra Mega Power Project was selected through a competitive bid process, there was no competitive bid process much less an international competitive bid process held for the procurement of cement or Steel.

9.32 The Notification No. 6/2006/Central Excise dated 01.03.2006 issued by the Central Government in exercise of the powers under Section 5A of the Central Excise Act, 1944 provides for the reduction, remission, exemption etc. from excise duty in the manner mentioned in Item Nos 1 to 93 subject to fulfillment of the conditions specified in the Fifth Column of the Table. Item No. 91 provides ***that all goods supplied against the International Competitive Bidding will be exempted*** (nil rate of excise duty) subject to fulfillment of Condition No. 19**.**

9.33 The Appellant's case is not that the cement or steel was procured by the Appellant or otherwise supplied to it against International Competitive Bidding. The basic condition in the relevant entry namely Supply of goods against an international competitive bidding qua steel and Cement was, therefore, not satisfied. Accordingly, in terms of the Notification No. 6/2006 – Central Excise dated 01.03.2006, the exemption was not available to the Appellant under Item No. 91.

9.34 It may be seen from the Custom Notification dated 01.03.2002 that the exemption at Item 400 is not for all goods covered under any Chapter (as in the case of Excise Notification dated 01.03.2006) but is restricted to items falling under Chapter heading 98 and sub-heading 98.01. The Customs

Notification only exempts goods of description under the Chapter 98.01. It is, therefore, wrong on the part of the Appellant to proceed on the basis that the custom duty exemption is for all goods wherever classified. The custom duty exemption is restricted to goods which are specified in Chapter Heading/Sub Heading 98.01. Accordingly, it is necessary to see the classification under Chapter Heading 98 as on the Cut of Date of 21.7.2007.

9.35 The inter-relation between goods in Customs Notification dated 01.03.2002 and the chapter heading/sub-heading for the said goods is explained in the decision of the Authority for Advance Rulings (Central Excise, Customs and Service Tax) in Enercon (India) Limited v. Commissioner of Customs (Import) dated 15.05.2007 .

9.36 In this regard, the Hon'ble High Court of Bombay has also held that only capital goods were covered by the Customs Act. In Patel Engineering –v- Union of India decided on 21.07.2014 by the Division Bench of the Hon'ble High Court of Bombay in Civil Writ Petition Nos. 6846 and 8288 of 2012.

9.37 The Finance Act, 2011 does not modify any previous law which had allowed any benefit of excise duty exemption on cement and steel. There was no withdrawal of any exemption. The Finance Act, 2011 merely clarifies that

the benefit of Mega Power Project does not extend to the cement and steel used for the construction of the power project. In any case, a clarification of an existing provision in not a change in law or change in interpretation. This has also been held by the Tribunal in Talwandi Sabo Power Limited v. Punjab State Electricity Regulatory Commission decided on 04.07.2017 Appeal No. 32 of 2015 and Another.

9.38 The grant of Mega Power Status to the Appellant's project did not provide any exemption for excise duty at the time of bidding. It is reiterated that there was no exemption from excise duty on the cut off date and hence the Appellant could not have considered nil excise duty for the purpose of quoting tariff. Since there was no exemption from excise duty, there could not be any claim for change in law for withdrawl of such exemption.

Re: Change in law of customs duty on mining equipment imported for the coal mines

9.39 For a change in law, there has to be an existing law prior to the cut off date (21.07.2007) which provided for an exemption which was taken away subsequently. It is submitted that there was no existing law as on cut off date which provided an exemption from the payment of Customs Duty on the mining equipment notwithstanding that the power projects were being entitled to Ultra Mega Power Status. Thus there was no occasion for

Reliance Power Limited to take into account such exemption at the time of quoting the bid and is deemed to have considered the imposition of customs duty in its bid. Therefore there can be no claim of Change in Law as per Clause 13 of the PPA.

9.40 The contention of the Appellant that the mining equipment is covered under Serial No. 400 'Mega Power Projects' is wrong. The Appellant has not referred to the relevant portion of the Notification dated 01.03.2002 which provides for customs duty on coal mining projects at Serial No. 399.

9.41 The Notification clearly demarcates the power projects and the mining projects separately. On the other hand, Serial No. 399 does not distinguish between a captive coal mine linked to a power project or other coal mining projects. The purpose of the coal mine is not relevant for imposition of customs duty.

9.42 It is wrong on part of the Appellant to claim that the Customs Notification does not distinguish between the power project and captive coal mine when there is a specific entry for coal mining projects. In such a case, there would have to be a specific statement that captive coal blocks are included in the power projects for the Appellant to claim that the goods required for its

captive coal mines are covered under the exemption granted to the power project. Therefore it cannot be said that the exemption granted to the power project would apply to the mining projects also. It is not open to the Appellant to read into the Notification what has not been provided.

9.43 The issue of mining equipment for mega power project being covered under Serial No. 399 and not Serial No. 400 has also been held by the Authority for Advance Ruling in RE: Aes Chhattisgarh Energy Pvt. Ltd. dated 19.12.2008 (2009) 246 ELT 801. The generator therein had raised similar contentions relying on the mega power project policy of the Government of India, the Electricity Act, 2003 and the link of captive/dedicated coal block to the power plant and the contention was rejected and it was held that the dedicated/captive coal block are not included under Serial No./Entry No. 400:

9.44 Even otherwise, the clarification does not amount to imposition of customs duty on the mining equipment which until then was exempted. The Communication dated 17.06.2011 issued by Ministry of Power does not either interpret the provisions of the Customs Act or otherwise impose customs duty for the first time on mining equipment. In fact since the Communication is by Ministry of Power, it may not be the competent

authority to interpret the Customs Act. The PPA only recognized interpretation by an Authority competent to interpret the law. Any change in interpretation of the Customs Notification has to be by the Customs Authorities and not by the Ministry of Power. Since the Letter dated 17.06.2011 was issued by the Ministry of Power and not any customs authorities, it is clear that the contents of such Letter were merely clarifications and not a change in interpretation.

Re: Adjustment of compensation on change in law with regard to the captive coal block on consideration of relevant factors such as quantum and price of coal supplies to other projects

9.45 In case the coal mined from the captive mines was not being used exclusively for the power plant (Sasan UMPP) alone and the coal was being used for other projects, it would have been fair and equitable that the costs for mining the coal would also be shared proportionately by all the projects utilizing such coal. The financial benefit from sale or supply of coal from the captive coal mine should be taken into account to reduce the costs associated with the coal mines. The Appellant cannot contend that even if the coal was being used by other projects, the entire cost of coal mines should be borne by the Procurer-Respondents. In other words, the contention of the Appellant is that the Procurers of Sasan Power Limited should pay for the coal being supplied to other projects also, which is absurd and unacceptable.

9.46 Merely because the captive coal mines are allotted for the power project does not mean that the Procurers of the power from the said Power Project are liable to pay the entire mining costs and the Appellant be allowed to make windfall gains from supply of coal to other projects. If the coal is being supplied to other projects, then such projects should share in the costs of mining and the costs to be passed on to the Procurers should reduce to such extent. This was also held by the Central Commission in principle. The Central Commission requested the documents and information from the Appellant for the purpose of adjustment of the cost of the mines.

9.47 The stand of the Respondent No. 14 was further substantiated by the Reply of PSPCL wherein PSPCL has relied on the Report No. 6 of 2013 by Comptroller and Auditor General wherein it is noted that there was a recommendation to allow the use of surplus coal to the parent company of the Appellant (Reliance Power Limited). The Reply of PSPCL was dated 17.10.2013 which was much before the final date of hearing on 06.05.2014. However the Appellant had never raised any question of non-receipt of the Reply. This issue has been taken up for the first time in the Appeal. However even in the Appeal, the Appellant has not denied the CAG Report No. 6 of 2013 relied on by the PSPCL nor countered the same in any way. In

any event, the argument raised by PSPCL is also that the surplus coal from the captive coal mine allotted to the Appellant which is supplied to other projects should be taken into account while computing the costs of mining to be passed on to the Procurer-Respondents. The above principle had already been contended in the Reply of Respondent No. 14. Therefore, there was no lack of opportunity for the Appellant to respond to the aspect raised by the Procurer-Respondents that if the coal is used for other power projects, the costs related to coal blocks to be passed on to the Procurer-Respondents should be adjusted accordingly.

10. We have heard at length Mr. Sajan Poovayya, the learned senior counsel appearing for the Appellant and Mr. G. Umapathy, the learned counsel appearing for the Respondent No.2, Mr. Bipin Gupta, the learned counsel appearing for the Respondent No.7 to 9 and Mr. M.G, Ramachandran, the learned counsel appearing for the Respondent No. 14 and considered carefully their written submissions/arguments during the proceedings and available material on record. The following main issues arise out of the instant Appeal for our consideration:-

Issue No.1: Whether the Central Commission has erred in not granting compensation for the increase in cost for carrying out the geological investigation /report for the captive coal blocks?

Issue No.2: Whether the Central Commission has erred in non-granting compensation for the increase in cost for setting up the Water Intake System?

Issue No.3: Whether the Central Commission had rightly held that the Appellant is not eligible for compensation due to increase in cost of the project due to levy of excise duty on cement and steel used for the project?

Issue No.4: Whether the Central Commission had rightly held that the Appellant is not eligible for exemption of custom duty on mining equipment prior to the Change in Law event?

Issue No.5: Whether the Central Commission has erred in not devising an appropriate mechanism whereby the Appellant's economic position is restored as if such Change in Law had not taken place?

Issue No.6: Whether the Central Commission is correct in holding that relevant increase in the cost of captive coal mines will be entitled only in relation to the coal being supplied to this project?

11. Our findings and analysis :-

11.1 Issue No.1 :- Learned Senior counsel, Mr. Sajan Poovayya submitted that the Central Commission has erred in disallowing the claim of SPL for compensation due to increase in cost of conducting Geological survey of the Captive Coal Blocks. He further pointed out that the Procurers had provided

the shortlisted bidders with the total estimate of the cost of Geological Reports for the three Captive Coal Blocks as Rs.19.00 crores vide letter dated 4.10.2006. However, the actual cost to complete the geological survey / reports incurred by SPL became Rs.24.98 crores. Hence, the excess expenditure in conducting the survey to the tune of Rs. 5.98 crores needs to be compensated to the Appellant. He, vehemently submitted that this was the gross error on the part of the Respondent procurers in providing under estimated information during the pre-bid stage.

11.2 ***Per contra,*** the learned counsel(s) for the Respondent procurers contended that the Appellant was provided all the documents/reports before signing the PPA and it was his responsibility to make independent enquiry in accordance with Clause 2.7.2.1 and 2.7.2.2 of the RFP. They further submitted that the onus of any misinformation cannot be shifted to the procurers. Moreover, in any event, the same would not fall under change in law as contemplated in Article 13 of the PPA. Accordingly, the learned counsel(s) reiterated that the Appellant is not entitled for any compensation on account of increase in cost of geological report of mines, being not covered by the provisions in respect of change in law. The learned counsel(s) for the Respondents further submitted that the Appellant cannot

be relieved of any of its obligations or otherwise entitled to any financial compensation by reason of unsuitability of the site as under:-

"5.2 The Site
The Seller acknowledges that, before entering into this Agreement, it has had sufficient opportunity to investigate the Site and accepts full responsibility for its condition (including but no limited to its geological condition, on the Site, the adequacy of the road and rail links to the Site and the availability of adequate supplies of water) and agrees that it shall not be relieved from any of its obligations under this Agreement or be entitled to any extension of time or financial compensation by reason of the unsuitability of the Site for whatever reason. "

The Central Commission has analysed the issue in its impugned order and arrived at its conclusion that such increase in cost arising out of the excess expenditure in conducting a geological study is not permissible under change in law and has accordingly, disallowed any compensation to this account.

Our Findings :-

11.3 While considering the submissions of the learned counsel for the Appellant as well as learned counsel for the Respondent procurers, it is relevant to note that the reference claim due to excess cost of geological investigation in the captive mines is not covered under the specific provisions of change in law under Article 13.1.1 of the PPA where the relief is admissible. There is no other provision in the PPA which provides for such compensation. We

further hold that before entering into PPA, the Appellant had sufficient opportunity to investigate the site and satisfy itself before submitting the bids. The Appellant is duly bound with the disclaimers in the RFP documents which has already been recognized and held by this Tribunal in Nabha Power Ltd. vs. PSPSCL & Ors. in Appeal No.207 of 2012 dated 23.04.2014. **In view of the aforesaid facts, we are of the considered view that the Central Commission has rightly disallowed the claim of the Appellant for excess cost on completion of the geological studies / investigation. This issue is answered against the Appellant.**

12. Issue No.2:-

12.1 The learned senior counsel for the Appellant submitted that as per Clause 1.4(v) of the RFP, the Procurers were required to provide detailed report for water intake system along with estimated cost for which WAPCOS (a Government of India) was engaged as Consultant. The said study Report along with the projected cost for water intake system including location of the pump house, water piping etc. from intake up to the power plant was supplied to all the bidders. The learned counsel further submitted that after Reliance Power (R-Power) was awarded the Project, it considered prudent to confirm the suitability and given details of the water intake system which

being an independent system was of vital importance in not only setting up the project but also in its smooth operation for the entire life of the project. Accordingly, the same agency i.e. WAPCOS was appointed as Consultant to confirm the technical feasibility of the study report given to bidders including R-Power. Thereafter, WAPCOS conducted detailed bathymatric studies and recommended new location for water intake system, which was 23 km from the power plant as against the 12.5 km indicated in the previous report given to bidders at the time of bidding. WAPCOS finalized the new location so as to ensure reliable water supply to the power plant. The learned counsel highlighted that due to selection of new location for the water intake, substantive increase in distance, increased submergence area along the route and increased construction time etc., there has been substantial increase in cost of the water intake system by over Rs.176 crores and the same needs to be compensated to the Appellant as the increase in cost has been solely on account of inadequate study and erroneous report for the system provided by the Respondent Procurers.

12.2 ***Per contra,*** the learned counsel(s) for the Respondent procurers contended that the additional expenses incurred by the Appellant is not covered under Article 13.1.1 of the PPA as the price and other details given in the bidding documents were by way of information in which it was for the bidders to

conduct independent verification of the information / details. The learned counsel(s) further contended that in view of the specific disclaimer regarding independent enquiry for the supplied information the Appellant ought not to have proceeded only on the basis of indicated information given by the bid process coordinator. To further support their contentions, the learned counsel for the Respondents cited the judgment of this Tribunal in Appeal No. 207 of 2013 titled Nabha Power Limited Vs. PSPCL & Ors. dated 23.04.2014 wherein it has been held that though the information provided to the bidders concerning to the seismic zone was incorrect, Nabha power is not entitled to any compensation on account of the same.

12.3 The learned counsel(s) further submitted that the Appellant has failed to point out any relevant portion of the WAPCOS report or otherwise any document which acknowledges any error or on the unsuitability of the location as per the earlier report. As such, it is not correct to contend that there was error in the earlier report of the WAPCOS. The learned counsel(s) further stated that the Water Intake System is not covered under declared price of land. This is also derived from the fact that the Appellant did not claim the additional cost arising out of Water Intake System in the price of land component while seeking the relief under change in law. Thus, the Appellant cannot seek to pass on the blame for its own lack of due diligence

to the Respondent procurers in clear contradiction to the terms of the RFP and PPA.

Our Findings:-

12.4 After due consideration of the rival contentions of both the parties, what emerges is that after being declared as the successful bidder, the SPL with a view to affirm the technical suitability of the preliminary report of the WAPCOS on Water Intake System, re-engaged the same agency for finalization of the said report. It is not in dispute that the Consultant, WAPCOS reviewed its earlier report and came to a conclusion that the earlier location of Water Intake was not at proper place and would result in non-availability of water for the plant during lean period. It is relevant to note that based on the recommendations of WAPCOS, SPL decided to go ahead for selection of new location as recommended and got carried out the requisite design and engineering of the entire Water Intake System which resulted into longer piping system, increased submergence area along the route, additional construction period etc.. On account of these factors, the cost of Water Intake System went up by over Rs.176 crores. The learned counsel appearing for the Appellant pointed out that the judgment of this Tribunal in Nabha Power case is not applicable to the present case since no

cost relating to seismic zone data was provided to Nabha whereas in the instant case, costs were provided to the bidders. The Appellant has further reiterated that para 2.7.2.1 and para 4 of RFP which were relied upon by the Respondent procurers cannot be taken as obsolute in nature so as to absolve procurers of their responsibility for providing grossly incorrect information leading to substantial increase in cost of Water Intake System.

12.5 After thoughtful consideration of the submissions made by the learned counsel for the Appellant and the Respondents and the findings of the Central Commission, we find that while the responsibility of carrying out due diligence before bidding and verifying the correctness of information provided in the bid documents rested with the bidders, at the same time, Respondent procurers cannot justify providing grossly erroneous report on Water Intake System taking shelter under the disclaimer in the bid document. As a matter of fact, the water availability for a thermal power station of this magnitude on regular, reliable and uninterrupted basis is essential and is a vital input for successful operation of the plant. It is noticed that the report of WAPCOS supplied to bidders at the time of bidding was deficient in ensuring adequate water supplies throughout the year uninterrupted and if the same would have been taken for construction and implementation, the same could have resulted into huge loss to the

Respondent procurers being deprived of power supply for some period of the year due to less/ non-availability of water during the lean period. It is not in dispute that Sasan UMPP is supplying power to the Respondent procurer at one of the most competitive tariff in the country. It is noted from the contentions of the Respondent procurers that such an issue has not been dealt with either in the PPA or in the competitive bidding guidelines issued by Ministry of Power under Section 63 of the Act, however, in view of the criticality of such situation, we opine that the matter needs afresh re-look for suitable redressal. While the Central Commission has correctly concluded that it does not qualify as change in law under Articles 13.1.1 of the PPA, it, however, needs to be addressed on the basis of settled principles of law and equity also, in the light of the Hon'ble Supreme Court findings in its judgment at Para 19 in Energy Watchdog vs. CERC dated 11.04.2017. **Thus, we are of the considered view that this issue involving substantial additional expenditure basically arising out of erroneous report of the consultants needs to be re-examined afresh by the Central Commission. Hence, this issue is answered in favour of the Appellant.**

13. <u>Issue No.3:-</u>

13.1 The learned senior counsel for the Appellant submitted that the project was granted exemption from payment of excise duty on cement & steel in terms

of Notification No.06/2006 dated 01.03.2006 which was also clarified in Notification No. 6/2007 dated 22.01.2007. The Project was accorded in-principle mega power project status as per Ministry of Power's letter no. F.No. 12/18/2006-P&P dated 20.10.2006. The final certificate to this effect was issued on 21.09.2007. Further, on 14.08.2008, Ministry of Finance, Government of India issued Notification No. 46/2008 clarifying that Ultra Mega Power Projects were granted exemption from payment of excise duty on goods required for setting up the same. He further submitted that the Government of India in its Budget, 2011-12 (Para M4) withdrew the excise duty exemption for cement and steel being used in UMPPs. The operative portion of the Union Budget is reproduced below:-

"M4 It is being clarified that the cement and steel going into construction activity of the power project are not eligible for the benefit of customs duty and excise duty exemptions and that the special power cables connecting generators and right upto the transformer within the power generation plant would be eligible for the benefits of the said exemptions"

The learned counsel contended that from the foregoing facts, it is evident that the project was entitled to excise duty exemption as on cut of date (21.07.2007) but the Central Govt. has subsequently withdrawn the same which resulted into additional expenditure of about Rs. 76.00 crores to the Appellant. The Central Commission has wrongly disallowed the claim on this account, by not considering it a Change in Law during the construction

period.

13.2 ***Per contra,*** learned counsel(s) appearing for the Respondent Procurer contended that admittedly at the time of the submission of the bids and the cut of date, there was no exemption available to the Appellant as far as excise duty on cement and steel is concerned. In fact, the notification for exemption from excise duty for UMPP was issued much after the cut off date on 14.08.2008, thus there was no occasion for the Appellant to presume such exemption while submitting the bid. The learned counsel(s) further contended that the findings of Finance Act, 2011 brought certain clarifications under quoted Para M-4 and as such the claim of the Appellant on this account is wholly unsustainable. The learned counsel(s) for the Respondent procurers further submitted that the Central Commission has rightly recorded its findings in the impugned order as under:-

"Under Article 13.1.1 of the PPA, for the Change in Law to be applicable the enactment, adoption, promulgation, amendment or modification of any law should have taken place at any time after the due date which is seven days prior to the bid dead line. In this case, the original bid deadline was 7.12.2006 and the revised bid deadline was 28.7.2007 and the due date would be counted from seven days prior to the bid deadline. The notification for exemption from excise duty for ultra mega power project was issued on 14.8.2008 which much after the due date. In other words,

there was no occasion for the RPower to take into account such exemption while quoting the bid. As a consequence, subsequent clarification in the Finance Act, 2011 would not constitute the Change in law. Accordingly, the relief sought on this ground is disallowed".

"It is submitted that it is to be considered whether under the notification as stated above, mining equipments were exempted from customs duty. General Exemption No.122, under the Customs Notification No.21/2002 as amended from time to time contains the list of items which are exempted from customs duty. It is observed that Notification 21 of 2002 Customs clearly demarcates the power projects and mining projects separately, it is seen that at Ser. No.399 of the list, coal mining projects are liable to pay customs duty Ser. No.400 only exempts the mega power projects from payment of customs duty and there is no mention that it includes captive power plants. Therefore, it cannot be said that as on the cut off date, there was exemption on mining equipment and the petitioner had taken into consideration such exemption while quoting the bids. Nothing has been produced in the petition which could indicate that any such impression was given by the procurers or their representation prior to bidding. In view of the foregoing discussion, the submission of the petitioner that the decision of the Ministry of Power detailed in its office memorandum dated 17.6.2011 and refusal Energy Department Government of Madhya Pradesh to provide recommendation letter to import mining equipments for Sasan UMPP under nil custom duty amounts to a change in law under Article 13.1 of the PPA and the petitioner is

entitled to be compensated for the same is not acceptable and hence no compensation would be available in this regard."

To substantiate their contentions, the learned counsel(s) cited the judgments of the apex court in case of *Talwandi Sabo Power Limited Vs. Punjab State Electricity Regulatory Commission* and also, of Hon'ble High Court, Bombay in *Patel Engineering Vs. Union of India* case.

Our Findings:-

13.3 With due consideration of the rival contentions of the learned counsel for the Appellant and the learned counsel for the Respondent procurers, we observe that as on cut off date (21.07.2007), there was not any law existing which provided for an exemption in excise duty for cement & steel required by the Appellant in the bid. In fact, for clarifying under change in law, there has to be an existing law prior to the cut off date which has been taken away subsequently. In the instant case, the notifications of the concerned authorities and clarifications under the Union Budget for 2011-12 came much later to the cut off date and hence, the Appellant fails to qualify for any compensation under the head Change in Law. We also take note of the findings recorded by the Central Commission in its impugned order that the issue, in no way, constitutes any change in law and accordingly the relief sought on this ground is disallowed. **In view of these facts, we, therefore,**

hold that the finding of the Central Commission is in accordance with the law and there is no perversity in the impugned order to this effect. Accordingly, this issue is answered against the Appellant.

14. Issue No. 4:-

14.1 Learned senior counsel for the Appellant submitted that the Ultra Mega Power Project Policy envisages domestic coal UMPP as an integrated project where the captive coal mines and power station are treated as one integrated unit as also recognized in the PPA as well as other project documents such as RFQ and RFP. He further submitted that as per Notification 21 of 2002- Customs dated 01.03.2002 issued by the Ministry of Finance, Government of India, no custom duty will be levied on goods imported for setting up mega power projects. Sasan UMPP was accorded in principle Mega Power Project status as per Ministry of Power's letter No.F.No.12/18/2006-P&P dated 20.10.2006 and final certificate was issued on 21.09.2007. He stated that the captive coal mines allocated to Sasan UMPP form an integral part of the UMPP and any equipment imported for the project either for power plants or for captive coal mines, should therefore, be treated as goods imported for setting up of the UMPP. The counsel further submitted that the revised policy guidelines issued by

Ministry of Power dated 2.8.2006 stipulated that an Inter-state Thermal Power Plant of the capacity 1000 MW or more is eligible to grant of mega power status. Accordingly, the Appellant applied the State Govt. of Madhya Pradesh for recommendations to import mining equipments for Sasan UMPP under 'nil custom duty' as was applicable for the other power plant equipments. The learned counsel further contended that the Energy Deptt., Govt. of Madhya Pradesh refused to recommend the case of the Appellant on the premise of O.M. dated 17.06.2011 issued by Ministry of Power, Govt. of India intimating that the exemption of custom duty for UMPP is given only in respect of equipment for power plants.

14.2 The learned counsel further submitted that decision of the Ministry of Power vide its above mentioned OM dated 17.06.2011 and refusal of the Govt. of Madhya Pradesh to provide recommendation letter to import mining equipment for the project under 'nil custom duty' amounts to the change in law under Article 13.1 of the PPA and thus, the Appellant is entitled for the compensation in lieu of the same.

14.3 ***Per contra,*** the learned counsel for the Respondent procurers (Respondent NO. 2,7-9, 14 & others) contended that there was no exemption from the custom duties for the mining equipment as on the cut off date (21.07.2007)

i.e. 7 days before the bid deadlines, viz. reference date to the bid submitted by the Appellant. The learned counsel submitted that as on the cut off date, custom duty was payable on mining equipment and the notification dated 01.03.2002 provides for custom duty exemption to the good required for setting up of Mega Power Project as specified therein and not for setting up of mines. They further submitted that the communication dated 17.06.2011 issued by Ministry of Power does not either interpret the provisions of the Customs' Act or otherwise impose custom duty for the first time on the mining equipment. Instead, it only clarified the position as existing. The learned counsel for the Respondents further submitted that Notification 21 of 2002 – Customs clearly do not fix the power projects and mining projects separately at Sl.No.399 (Coal Mining Projects) and Sl.No.400 (Mega Power Projects). While as Sl.No.399 of the list, the Coal mining projects are liable to pay custom duty and Sl.No.400, do exempt the Mega power projects from payment of custom duty. Citing the details, the learned counsel for the Respondent procurers reiterated that the assumption of the Appellant for 'nil custom duty' for captive coal mines was, therefore, without any basis.

14.4 The Central Commission, after considering the submissions of the Appellant as well as the Respondent procurers has recorded its findings in the impugned order. In a nutshell, the Commission had inter alia observed that

while going through the notifications relating to the custom duty, with specific reference to Sl.No.399 & 400 relating to the coal mines projects and mega power projects respectively it cannot be said that as on the cut off date, there was exemptions from paying custom duty on mining equipment.

Our Findings:-

14.5 We have considered the submissions of the learned counsel for the Appellant and learned counsel for the Respondents along with the consideration of the Central Commission on this issue pertaining to the claims of the Appellant regarding compensation on account of additional payment towards custom duty on mining equipment. After careful consideration and critical evaluation of the same, the key question arises for consideration, whether the equipment required for captive coal mines allocated to UMPP should be considered at par with the equipment required for setting up the power plants as far as exemption from the custom duty is concerned. The contention of the Appellant that the captive coal mines allocated to Sasan UMPP are integral & essential part of the project as a whole and as such, the exemption of custom duty was applicable to all equipments being imported for the entire project i.e. captive coal mines as well as power plants. It is not in dispute that the captive coal mines were allotted for UMPP for its exclusive

use for power generation and in no way, meant for commercial utilization elsewhere.

14.6 In this regard, we also take the note of Hon'ble Supreme Court directions in judgment dated 24.08.2014 in Manohar Lal Sharma Vs. Principal Secy., in W.P.(CRL) 120 of 2012 (Para 158) that coal from captive coal mines is to be used for UMPP alone and no diversion of coal for commercial exploitation would be permitted. Keeping these facts in view, we notice the glowing difference between an independent coal mines up for exploitation and selling coal on commercial lines and a captive coal mine set up to meet requirement of UMPP only to generate power for the ultimate benefit of the Respondent procurers and in turn, consumers for obtaining electricity at cheaper rates. The actual positions purported the assumption made by the Appellant that the customs duty exemptions will be available for import of the equipment for the entire project including captive mines and power plants. We find force in the argument of the learned counsel for the Appellant that being the integral and inseparable part of the UMPP, the custom duty rates applicable for stand alone coal mining projects would not be applicable in the present case and the exemption would need to be given effect to. **We, thus opine that the Central Commission appears to have been mechanically guided by the mere description of the relevant entry**

(Sl.No.399 & 400) in the said custom duty notifications and has not appreciated that the captive coal mines being integral part of the UMPP cannot be equated to a stand alone coal mines, having commercial line of utilization. The Appellant was thus right in assuming that Custom Duty exemption will be available for the coal mining equipments. As such, this issue needs to be examined afresh in accordance with law and various provisions of the RFQ/RFP/PPA. Therefore, we answer this issue in favour of the Appellant.

15. <u>Issue No.5:-</u>

15.1 Learned senior counsel for the Appellant submitted that as per Article 13.2(a) of the PPA, the Appellant is entitled to be compensated on account of change in law for every cumulative increase / decrease of Rs. 50 crore in the capital cost @0.267% of the non-escalable capacity charges. The learned counsel further brought out that the above mechanism provided under the PPA is not sufficient to compensate the Appellant to the same economic position it could have been as if the change in law has not occurred. Learned counsel for the Appellant cited the judgment of this Tribunal dated 12.09.2014 in Appeal No.288 of 2013 namely M/s Wardha Power Company Ltd. vs. Reliance Infrastructure & Others and contended

that the intent of change in law provision in the PPA is to restore the seller to the same economic position as before the occurrence of the change in law. The learned counsel advancing his arguments vehemently submitted that the formula under Article 13.2 (a) is full of flaw and defeats the very principle and rationale of the PPA of the desired restoration to the same economic position. He also relied upon the judgment of Hon'ble Supreme Court in DLF Universal Ltd. vs. Director, Town and Country Planning Department, Haryana, (2010) 14 SCC 1 which has held that a contract should be interpreted according to its purpose and intention of the parties and not otherwise. As per the opening para of Article 13.2, the basic intentions of parties is to restore the affected party to the same economic position the formula therein contradicts the same putting undue limitations for arriving at actual compensation arising out of change in law.

15.2 The learned counsel reiterated that the aforesaid formula is erroneous and the same has been acknowledged by various authorities including Central Electricity Authority, Ministry of Power etc.. To support his contentions, he submitted that the latest standard bidding document issued by Ministry of Power, Govt. of India has done away with such formula, as provided in Article 13.2(a) of the PPA and also the Central Electricity Authority, in a meeting of procurers of Tilllaya UMPP held on 08.07.2013 informed the

procurers that the aforesaid formula besides being flawed and does not restore the affected party to the same economic position but also results in different compensation to different bidders for same amount of increase / decrease in the project cost due to change in law during construction period. The learned counsel further contended that if a subsidiary clause of the PPA (Article 13.2(a)) results into a conflict with the principal Article (13.2), the said subsidiary clause would be re-aligned to give an interpretation harmonious with the primary provision. To substantiate his contention, the learned counsel relied on the judgment of the Hon'ble Supreme Court in the Case of GUVNL Vs. Essar Power 2008 4 SCC 755.

15.3 ***Per contra***, the learned counsel for the Respondent procurers contended that the Appellant is trying to seek a relief which is beyond the scope of PPA. The learned counsel submitted that there is nothing wrong in the provisions of the PPA relating to various compensations arising out of the change in law and the reference clause only defines the mode of computations for arriving at the quantum of such compensation. The Appellant is making an effort to request the Central Commission to exercise its regulatory powers under Section 79(1)(b) read with section 61 of the Act over and above the scope of change in law provision contained in the PPA. They further submitted that the PPA was executed pursuant to a tariff based competitive

bidding as per the standard bidding document and guidelines issued by the Central Govt. of which the Appellant was fully aware of including the very formula now under question. The learned counsel further pointed out that in any event Article 13.2(a) is a specific provision providing for a specific formula and would accordingly, override the general provision of the opening portion of Article 13.2. To support their contentions, the learned counsel relied the judgment of Commissioner of Income Tax vs. DPS (I) Pvt. Ltd.(1996) 222 ITR271(CAL) at para 4.

15.4 The learned counsel further submitted that the claim of the generator for exercise of regulatory powers to grant relief , has already been rejected in Energy Watchdog case wherein the Hon'ble Supreme Court has limited the relief only to the specific provisions of the PPA. The learned counsel for the Respondent procurers while summing up their contentions further submitted that the Appellant cannot be allowed to wriggle out of the contract or the contractual terms on the grounds that the contract performance has become onerous or that the compensation is not sufficient as worked out by the formula provided in the PPA. Further, the plea of the Appellant by relying on a meeting of procurers for another UMPP (Tillaya) in the CEA has no legal basis.

Our Findings:-

15.5 We have considered the rival contentions of both the parties regarding this issue. We noticed the findings of the Central Commission in this regard before the proceeding to derive our conclusion thereon. The Central Commission has held that the Appellant had quoted tariff for the project after being acquainted with and having satisfied itself with the terms and conditions and various provisions of the draft PPA incorporating the mechanism for calculation of compensation under change in law etc.. Further, the PPA was executed by the Appellant under full acknowledgement and adherence to the provisions therein relating to the compensations to be given during construction period as well as operation period. The Central Commission has also observed that in the additional affidavit submitted by the Appellant, it has admitted to have quoted lower non-escalable capacity charges and thereby, not being able to get the full compensation out of the stipulated formula under clause 13.2(a). Accordingly, the Commission has disallowed the relief prayed by the Appellant recording that the compensation is subject to the limitation provided under Article 13.2(a) of the PPA.

15.6 We have critically evaluated the contentions of the parties presented by their respective learned counsel and observe that the Central Commission has only taken note of the various provisions under the PPA and has not considered the exceptional circumstances arising out of the Appellant's contention that the provided formula does not account for the requisite compensation. Regarding the reliance placed by learned counsel for the Appellant on the judgment of this Tribunal in Appeal No.288 of 2013, M/s Wardha Power Vs. Reliance Infrastructure case, the Central Commission has considered the cited judgment distinguishable from the present case. Further, the Commission has also clarified that the reference made by the Appellant for a mechanism akin to the compensatory tariff, as granted in the order dated 2.4.2013 in Petition No.155/MP/2012 in which it exercised the regulatory power under Section 79(1)(b) of the Act is not applicable in the present case as in the referred case, there was no provision in the PPA to cater to an extra ordinary situation arising out of the promulgation to Indonesian Regulations whereas in the present case, there is a specific formula given in the PPA for grant of relief during the construction period.

15.7 In view of the above facts, the core issue that arises in the matter is that once change in law event occurs and various claims made by the Appellant are considered genuine and admissible then how to evolve a mechanism for

restoring the affected party to the same economic position as if the change in law had not occurred. Admittedly, as acknowledged by the Central Electricity Authority and the Ministry of Power, Govt. of India, the said formula had several flaws and accordingly being not conducive for working out compensations for actual distress to the affected parties and accordingly the same has now been removed from the standard bidding guidelines for UMPP. As noticed from the facts presented before us, the formula does not provide a thorough reflection of the claims which are even genuine and admissible under logical & legal considerations. We also take note that the intended objective underlined the stated principle is restoration of the party to the same economic position and thus, the same needs to be interpreted in the right perspective with the main governing principles and not by a formula limiting to the said objective and yielding different reliefs to different generators as recorded by the CEA in its meeting held on 8.7.2013. In fact, the formula is essentially a vehicle to give effect to the guiding principle of economic restoration and the same needs to be read down to the extent it is inconsistent with the principle it seeks to serve. In the instant case, neither the guidelines nor the PPA envisage any provision to deal with a situation of an erroneous formula. **In view of the well settled law laid down by the Apex Court in case of *Energy Watchdog vs. Central***

Electricity Regulatory Commission and Ors. etc. (2017) 14 SCC 80, **the Central Commission is directed to devise the adequate formula / methodology under its general regulatory powers (Section 79 (1)(b) so as to allow the admissible claims of the Appellant regarding compensation in accordance with law.**

Issue No.6 :-

16. The learned senior counsel for the Appellant submitted that the Central Commission has erroneously held that adjustment of compensation on account of change in law with respect to the captive coal mines will be based on the consideration of relevant factors such as quantum and price of coal supplies to other projects. He brought out that all the documents and details were submitted to the Central Commission and taken on record but the Commission has given its finding without examining the details of th Appellant. The Commission has simply relied on the reply of R-13, PSPCL. He further submitted that the issue of apportionment of coal cost does not arise since the captive coal mines are integral part of the project and any increase in the cost thereof has to be borne by the Respondent procurers in terms of the PPA. The learned counsel also submitted that coal from the

captive coal blocks is exclusively being used for Sasan UMPP for which the Appellant had also submitted Auditor's Certificate to this effect.

16.1 ***Per contra,*** the learned counsel for the Respondent procurers contended that the Appellant is supplying coal from the captive mines to other projects but the equitable sharing of cost is not being done by the Appellant. They further contended that the financial benefit should be considered to reduce the cost associated with the coal mines and in no case, procurers should be compelled to pay for the coal which is being supplied to the other projects. The learned counsel further contended that merely because the captive coal mines are allotted to the Sasan Project does not mean that the procures of the power are liable to pay the entire mining costs and the Appellant is allowed to make windfall gains from the supply of coal to other projects.

16.2 The Central Commission has recorded its finding that the Appellant is entitled to the extent only for the coal cost to the Sasan project as some of the beneficiaries have submitted affidavits on this account that the coal from the captive coal blocks are being used by some other projects also for want of any reasoned reply to such affidavits from the Appellant, the Central Commission has permitted only the relevant increase in cost to be loaded.

Our Findings:-

16.3 After careful consideration of the rival contentions of learned counsel for both the parties, we find that the Respondent procurers have apprehension that the Appellant is diverting coal from the captive coal mines to some other projects and the mining cost should accordingly be proportioned in the ratio of such use. We, however, do not find any relevant document in the material placed before us to arrive at a conclusion that coal is being diverted to some other projects. **Accordingly, we hold that, the Central Commission should examine this issue afresh after obtaining legitimate and relevant documents showing that the coal is not being exclusively used for Sasan UMPP and is also utilized by some other projects. Hence, this issue is answered in favour of the Appellant.**

Summary of our Findings:-

17. Having regard to the findings of the Central Commission in its impugned order on various issues, the written submissions of the learned counsel for the Appellant and the Respondent Procurers and after careful consideration of all the material available on record, we sum up our views as under:-

Issue No. 1 - Geological Studies :- Regarding the claim of the Appellant for compensations on account of increase in cost for carrying out the geological studies / investigations for the captive coal blocks, we hold that the Central

Commission has rightly disallowed the claim and accordingly, this issue is held against the Appellant.

Issue No. 2 - Water Intake System:- We have critically analysed the proposition of the Appellant for grant of compensation due to increase in cost of water intake system arising on account of change in location / lay out, thereby resulting in substantial increase in cost. We are of the considered opinion that this issue involving substantial additional expenditure primarily arising out of erroneous report of the consultants provided to the bidder needs to be examined afresh by the Central Commission in accordance with law so as to arrive at a just and right decision.

Issue No. 3 - Excise Duty :-Regarding claim of the Appellant for increase in cost of the project due to levy of excise duty on cement & steel used for UMPP, we observe that there is no merit in the claim of the Appellant and accordingly we hold this issue against the Appellant.

Issue No. 4 - Custom Duty :-After careful consideration and critical evaluation of the key issues arisen in the claim of the Appellant for increase in cost due to imposition of custom duty on equipments for coal mining, we are of the considered opinion that as per definition of the project in various

bidding documents including PPA, the captive coal mines allocated to the Sasan UMPP are an integral and essential part of the project as a whole and thus exemption of custom duty was supposed to be applicable to all equipments being imported for the entire project i.e. captive coal mines as well as power plants. In view of our deliberations and analysis in forging paras', we find force in the arguments learned counsel for the Appellant that exemption of custom duty should be allowed on the equipments imported for captive coal mines at par with the power plant equipments as there is glowing difference in captive mines vis-a vis stand alone mines which operate on commercial principles. Accordingly, we are of the considered opinion that this issue needs to be examined afresh by the Central Commission in accordance with law and various provisions of bidding documents including PPA.

Issue No. 5 - Formula for Compensation:-This issue regarding flaws in the formula for computation of compensation is in fact a resultant issue requiring alignment to the primary objective of restoring the affected party to its original economic position as if the change in law has not occurred. In the instant case, neither the guidelines nor PPA envisage any provision to deal with such situation of an erroneous formula. We, therefore opine that in such an exceptional circumstances, the Central Commission may devise an

adequate methodology / formula under its general regulatory powers so as to allow the entitled / admissible compensation in accordance with law.

Issue No. 6 - Diversion of Coal:- Regarding exclusive utilization of captive coal mines for generation of power at Sasan UMPP, the Respondent procurers have expressed some apprehension that the coal mined from the captive coal blocks are being used in some other projects. The Respondent procurers are, therefore, of the opinion that the mining cost should accordingly be apportioned in ratio of such usage. Excepting the reply of the Respondent No.13 / PSPCL, we do not find any other relevant document in the material placed before us to arrive at a conclusion that coal is being diverted to some other projects. We are, therefore, of the considered opinion that the issue of diversion of coal to some other project (if happening) is an important issue and against the directions of the Apex Court in its judgement dated 25th August, 2014 in *Manohar Lal Sharma Vs. Principal Secy., (2014) 9 SCC 614 case.* It is justifiable that the Central Commission examines this issue afresh after obtaining further details from all the stakeholders and in accordance with law.

In view of the deliberations and analysis given above, the Issue Nos. 1& 3 are held against the Appellant and Issue Nos. 2,4,5 & 6 answered in favour of the Appellant.

ORDER

For the foregoing reasons as stated supra, the instant Appeal No.121 of 2015 filed by the Appellant is allowed in part. The Impugned Order dated 04.02.2015 passed in Petition No.21/MP/2013 on the file of the Central Electricity Regulatory Commission, New Delhi is hereby set aside so far it relates to Issue Nos. 2,4,5 & 6.

The Impugned Order dated 04.02.2015 passed by the Central Electricity Regulatory Commission in Petition No. 21/MP/2013 on the file of the Central Electricity Regulatory Commission, New Delhi on issue Nos. 1 and 3 is hereby affirmed.

The matter stands remitted back to the First Respondent, the Central Commission with the direction to re-consider the matter afresh in accordance with law and after affording reasonable opportunity of hearing to the Appellant and the Respondents and dispose of the same as expeditiously as possible.

The Appellant and Respondents are directed to appear either personally or through their counsel without further notice on 26.12.2018 to collect next date of hearing.

No order as to costs.

Pronounced in the Open Court on this **November 20th of 2018.**

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

REPORTABLE / ~~NON-REPORTABLE~~

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