APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 195 of 2016

Dated : 27th May, 2019

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

IN THE MATTER OF :

1. **GMR Karmalanga Energy Ltd.**
   Skip House
   25/1 Museum Road
   Bangalore – 560025

2. **GMR Energy Limited**
   Skip House, 25/1 Museum Road
   Bangalore - 560025 .... **APPELLANT**

Versus

1. **Central Electricity Regulatory Commission**
   4th Floor, Chanderlok Building,
   36 Janpath,
   New Delhi – 110001

2. **Dakshin Haryana Bijli Vitran Nigam Limited**
   Vidyut Nagar, Hissar,
   Haryana

3. **Uttar Haryana Bijli Vitran Nigam Limited**
   Vidyut Sadan, Plot No. C-16, Sector 6,
   Panchkula,
   Haryana

4. **Haryana Power Generation Corporation Limited**
   Urja Bhawan, C-7, Sector 6,
   Panchkula,

Haryana

5. **PTC India Limited**
2nd Floor, NBCC Tower,
15 Bhikaji Cama Place,
New Delhi

6. **Bihar State Power (Holding) Company Ltd.**
Vidyut Bhawan, Bailey Road,
Patna – 800001

7. **Bihar State Power Generation Company Ltd.**
Vidyut Bhawan, Bailey Road,
Patna – 800001

8. **South Bihar Power Distribution Company Ltd.**
Vidyut Bhawan, Bailey Road,
Patna – 800001

9. **North Bihar Power Distribution Company Ltd.**
Vidyut Bhawan, Bailey Road,
Patna - 800001 .... **RESPONDENTS**

Counsel for the Appellant(s) : Mr. Amit Kapur
Mr. Vishrov Mukherjee
Ms. Raveena Dhamija
Mr. Yashaswi Kant
Mr. Rohit Venkat

Counsel for the Respondent(s) : Mr. K.S. Dhingra for R-1

Mr. G. Umapathy
Mr. Aditya Singh
Ms. R. Mekhala for R-2 & 4

Mr. Ravi Kishore
Mr. Gautam Kumar
Ms. Prerna Singh
Ms. Rajshree Chaudhary
Mr. Prashant Mathur for R-5

Mr. R.B. Sharma for R-6 to 9

J U D G M E N T

PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON

1. This Appeal is directed against the impugned order dated 03.02.2016 by Central Electricity Regulatory Commission (hereinafter referred to as **'CERC/Central Commission'**). The facts in brief which led to filing of the Appeal are as under:

2. The first Appellant – GMR Kamalanga Energy Limited (hereinafter referred to as **'GKEL'**) is a public limited company constituted under Companies Act as a subsidiary of the second Appellant - GMR Energy Limited (hereinafter referred to as **'GEL'**). The first Appellant was constituted to set up 1400 MW Thermal Power Plant at Village Kamalanga, District Dhenkanal in the State of Odisha. The first stage was envisaged to have three units of 350 MW each and the second stage, one unit of 350 MW. This was accorded as Mega Power Project by Ministry of Power, Government of India on 01.02.2012. The first Appellant – GKEL entered into Power Purchase Agreement (PPA) for supply of power from the power plant with the details as under:

(a) Gross power of 350 MW to Grid Corporation of Orissa (GRIDCO) by virtue of PPA dated 28.09.2006 (came to be amended

on 04.01.2011) – 262.5 MW in Stage-I and balance 87.5 MW in Stage-II.

(b) 282 MW gross power (260 MW net of auxiliary consumption) to Bihar State Electricity Board in terms of the PPA dated 09.11.2011.

(c) 350 MW gross power to Haryana DISCOMS based on the competitive bidding through back-to-back arrangement by virtue of PPA dated 07.08.2008 between PTC India Ltd. (hereinafter referred to as **'PTC')** and Haryana DISCOMS and back-to-back PPA dated 12.03.2009 between GEL – second Appellant and PTC India Ltd.

3. Appellants approached CERC in Petition No. 79/MP/2013 claiming compensation for certain change in law events contending that such events have impacted power project of the Appellants during the operating period. CERC disallowed compensation for the following events:

(a) Change from UHV to GCV based pricing of coal pursuant to notification issued by the Government of India.

(b) Increase/revision in the railway freight charges pursuant to notifications issued by Ministry of Railways and Ministry of Finance.

(c) Increase in the rate of Minimum Alternate Tax ("***MAT***") rates.

(d) Increase in Value Added Tax in the State of Odisha.

(e) Increase in water charges pursuant to notifications issued by the Government of Odisha.

(f) Incremental increase in interest on working capital on account of increase in costs during the operating period.

Aggrieved by the rejection of compensation in respect of the above items, the present Appeal is filed.

4. The Appellants contend that in response to a Request for Proposal (hereinafter referred to as **'RFP')** of fourth Respondent — Haryana Power Generation Corporation Ltd. (hereinafter referred to as **'HPGCL'**) on 01.03.2007 requesting for supply of 2000 MW power on long term basis to second and third Respondents (Haryana DISCOMS) on 13.07.2007, the Board of Directors of GEL passed a resolution to the following effect:

(a) PTC to sell up to 500 MW power from the Project to HPGCL and to take all necessary steps in this regard including submission of bid, signing and execution of documents etc.

(b) Provide a bank guarantee of Rs. 15 Crores to PTC, so that PTC could issue a back-to-back bank guarantee to the fourth Respondent — HPGCL.

5. On 02.08.2007, the Standing Linkage Committee (Long-Term) for power approved firm coal linkage for the project. This came to be

uploaded on the website and was communicated to the second Appellant — GEL on 24.09.2007. On 06.11.2007, Ministry of Coal intimated its decision to allocate Rampia and Dip Side Rampia coal blocks in Odisha to a consortium comprising of GEL and five other allottees. Bid was submitted by PTC to Haryana DISCOMS on 23.11.2007 wherein it was clearly mentioned that the bid was procurement of power from GKEL through GEL for sale to Haryana DISCOMS. Subsequently, on 17.01.2008, the Ministry of Coal wrote to GEL confirming the allotment of Dip Side Rampia coal blocks in Odisha to a consortium of GEL and five others.

6. On 17.07.2008, PTC's bid was accepted and was declared as one of the successful bidders. Subsequently, Mahanadi Coalfields Limited (hereinafter referred to as **'MCL**') on 25.07.2008 issued Letter of Assurance (LOA) in favour of GEL — second Appellant intimating provision of firm linkage of 2.14 MPTA coal for 500 MW power capacity.

7. On 31.07.2008, Haryana Electricity Regulatory Commission (hereinafter referred to as **'HERC'**) adopted the tariff of the successful bidders including GKEL (through PTC) in pursuance of Section 63 of the Electricity Act. Two separate PPAs came to be executed between PTC and Haryana DISCOMS, i.e. Dakshin Haryana Bijli Vitran Nigam Limited (hereinafter referred to as **'DHBVNL'**) — second Respondent, and Uttar

Haryana Bijli Vitran Nigam Limited (hereinafter referred to as **'UHBVNL'**) — third Respondent on 07.08.2008. On 12.08.2008 the Standing Linkage Committee (long term) approved tapering coal linkage for the project. On 12.03.2009, back-to-back arrangement came to be entered into between GEL and PTC.

8. On 08.07.2009, MCL issued LOA in favour of GEL providing tapering linkage of 2.384 MTPA for 550 MW capacity till coal from Rampia coal block was made available. On 20.08.2009, GEL and State of Odisha amended the MOU in favour of the first Appellant — GKEL. Meanwhile, on 01.04.2010, the Finance Act came to be notified. On 04.01.2011, PPA between GRIDCO and GEL was amended in favour of GKEL. The two LOAs (coal) were transferred in favour of GKEL by Ministry of Coal, Government of India on 17.02.2011.

9. Meanwhile, Ministry of Railways issued a circular increasing the developmental surcharge from 2% to 5% on 12.10.2011. On 09.11.2011, GKEL entered into a PPA with Bihar State Electricity Board for supply of 282 MW gross power in a competitive bid process. On 30.12.2011, Government of India issued a Gazette Notification directing a switch over from Useful Heat Value (hereinafter referred to as '**UHV**) based pricing system to Gross Calorific Value (hereinafter referred to as '**GCV**') based

pricing system. Accordingly, CIL and its subsidiaries switched over to GCV-based pricing system.

10. On 30.03.2012, Government of Odisha increased Value Added Tax (hereinafter referred to as **'VAT'**) from 4% to 5%. On 26.09.2012, Ministry of Railways issued a circular notifying the total Service Tax of 3.708% imposition on transport of goods through railways.

11. Another notification came to be issued on 28.09.2012 indicating the imposition of Service Tax. On 25.03.2013, Ministry of Railways by a circular increased Busy Season Surcharge from 5% to 12%.

12. On 26.03.2013, MCL signed Fuel Supply Agreement (hereinafter referred to as **'FSA'**). The FSA (based on model FSA issued by CIL) which significantly deviated from the New Coal Distribution Policy (hereinafter referred to **'NCDP'**).

13. The Appellants contend that on 30.04.2013, COD of Unit-I was declared. Similarly, Unit-II achieved COD on 12.11.2013 and Unit-III on 25.03.2014. The Appellants in the above-mentioned petition approached CERC claiming compensation on different events of change in law consequences. All documents were provided as called for by the Commission (CERC).

14. They also brought to the notice of CERC by an additional affidavit on 18.03.2015 that captive coal blocks allocated to GKEL were cancelled. They also claimed interest on working capital in this affidavit.

15. On 19.05.2015, in pursuance of the Finance Act, 2015 appointing 01.06.2015 as the date on which Section 108 of the Act would come into force, increased the Service Tax at 4.2% (14% with abatement of 70%). They also increased clean energy cess, Service Tax and also levy of Swachh Bharat Cess as events of change in law.

16. The Appellants contend that in terms of Article 13 of Haryana PPAs, any change in law after cut-off date (16.11.2007) amounts to change in law; therefore, in terms of inclusive definition, it includes any notification, order, circular etc. issued by an Indian Governmental Instrumentality. They contend that accordingly the affected party (Appellants) have to be compensated for such change in law events. The Revised Tariff Policy issued by Ministry of Power dated 28.01.2016 acknowledges increase in taxes and levies as change in law events and had to be allowed as pass-through. They further contend that any increase in input cost or operating cost which has occasioned specifically on account of change in law event, the same deserves to be allowed.

17. So far as shift of coal pricing from UHV to GCV based pricing, according to Appellants, the CERC was wrong in holding that the switch

over from UHV to GCV based pricing is merely a change in pricing methodology and did not constitute a change in law. The CERC totally ignored the introduction of change in pricing methodology by way of gazette notification which falls within the definition of Law under Haryana PPAs. The change in pricing regime has led to an increase in the base price of Grade F coal from Rs.570 per tonne to Rs.660 per tonne thereby leading to an increase in cost during the operating period. The CERC, though allowed items like royalty and clean energy cess on coal on the ground that these items have an impact on the cost of coal, but failed to appreciate the change in law in pricing regime which has increased base price. According to the Appellants, CERC was not justified in relying on Clause 2.7.2.4 of RFP since it has no applicability to the present case. Similarly, it misinterpreted the judgement of the Tribunal in Appeal No. 288 of 2013. The Appellants further contend that they are not seeking compensation for an increase in base price of fuel but seeking compensation for increase in cost on account of change in law which has led to increase in the cost of fuel.

18. Regarding increase in busy season surcharge and development surcharge, so also Service Tax, the Appellants contend that coal requirement for the project in question is being transported by MCL through railway. Therefore, they are entitled for compensation on account of increase in the cost in terms of levy on transportation like busy season

surcharge, development surcharge and Service Tax, since these levies and charges are issued through notification and rate circulars by Railway Board which is an instrumentality of Union of India which functions under the Ministry of Railways. Therefore, it falls within the Governmental Instrumentality in terms of PPA. The Appellants contend that CERC was not justified in opining that Appellants were expected to take into account the possible revision in these charges while quoting the bid. They contend that this was totally uncalled for since they are not required to take into account such factors while quoting the bid since such factors are subject to change through Governmental Instrumentality on account of change in law. They further contend that there is no specific trend in the increase in either busy season surcharge or development surcharge. These two charges were constant at the time of bidding and remained so for 4 to 5 years. Therefore, even on factual scenario, no developer can forecast the increase in these charges subsequent to their bid in 2007.

19. Service Tax which was imposed on transportation of goods through railways was increased from time to time in terms of two different Finance Acts, as stated above. The imposition of Service Tax lead to an increase in the landed cost of coal which in turn lead to an increase in cost of generation and supplying power to the DISCOMS. All these three events are in pursuance of change in law. Therefore, they are entitled for compensation in terms of Article 13.2 of PPAs. They also contend

that these charges were allowed by Maharashtra Electricity Regulatory Commission as change in law events in Petition No. 163 of 2014. Based on these submissions, they contend that CERC was wrong in holding that Appellants were expected to take into account possible revision of these charges while quoting the bid. Once conditions envisaged under Article 13 of PPA in question are fulfilled, automatically compensation has to be allowed towards these change in law events. As a matter of fact subsequently, CERC did allow Service Tax by order dated 07.03.2016 in Petition No. 81/MP/2013 on EPC contracts when incident on increase in Service Tax occurred.

20. So far as Minimum Alternate Tax (**MAT**) rate, the Appellants contend that CERC again went wrong in disallowing the increase from 11.33% to 20.01% which came to be introduced by way of Finance Act 2012 with effect from 01.04.2012. This increase in MAT also affects the revenue of GKEL; therefore, they are entitled for compensation since MAT is a statutory expenditure which squarely falls under Article 13 since it mandates compensation for any impact on other cost and/or revenue of the project. The companies are required to follow Accounting Standards. Any change in law which affects the company financially so far as business of generation, it has to be compensated. CERC ignored that this Tribunal pertaining to Appeal No. 39 of 2010 in the case of *Jaiprakash Hydro Power Ltd. vs. Himachal Pradesh State Electricity Regulatory*

Commission & Anr. allowed the MAT amount when MAT was introduced opining that it is an event of change in law. Even otherwise, in terms of Revised Tariff Policy such increase in tax rate has to be treated as change in law event. Similar claim before the Maharashtra Electricity Regulatory Commission (hereinafter referred to as '**MERC**'**)** was allowed in Petition No. 163 of 2014.

21. In respect of VAT, the contention of the Appellants is that CERC erred in holding that the increase in VAT as amended by Government of Odisha by a notification dated 30.03.2012 does not constitute change in law. The increase in VAT is in pursuance of notification dated 30.03.2012 issued by Government of Odisha which is an Indian Governmental Instrumentality under Haryana PPAs. This notification was effective admittedly from 01.04.2012 which is subsequent to cut-off date; therefore, they are entitled for the same. CERC went wrong by relying on its own earlier order in Petition No. 6/MP/2013. It proceeded wrong on the premise that Para 2.7.2.4 of the RFP is applicable. They contend that VAT is applicable on various components, i.e. ROM price of coal, royalty, Central Excise Duty, Clean Energy Cess which themselves have undergone changes several times subsequent to cut-off date. Increase in VAT is not due to absolute increase in rate, but it could also be due to increase on account of the above said components; therefore, Appellants were required to take into account tax prevailing at the cut-off date and not

future assumptions since such assumption cannot be forecasted by any bidder. VAT depends on Central Excise Duty, Royalty, and clean energy cess which are allowed in the impugned order as change in law events. MERC ought to have allowed this item – VAT as change in law event.

22. In respect of Increase in costs on account of change in water charges, according to the Appellants, CERC erred in disallowing the claim of the Appellant on account of increase in water charges in pursuance of amendments to Orissa Irrigation Rules which comes within the ambit of law under Haryana PPAs. Government of Orissa is an Indian Governmental Instrumentality; therefore, as water charges from time to time came to be increased subsequent to cut-off date have to be allowed, since it has revenue burden on the generation of power. CERC, according to the Appellants, went wrong in opining that Appellants were expected to take into account possible escalation of charges at the time of quoting the tariff. According to Appellants, the increase in water charges is tenfold since it has increased from Rs. 0.44 per cusec in 2007 to Rs.4.5 per cusec in 2010. No bidder can practically envisage such sudden and abrupt increase in water charges. Once the conditions envisaged in PPA are fulfilled, the Appellants are bound to get compensation on such events. Therefore, they content that they are entitled for compensation on this count as well.

23. The Appellants also have sought interest on working capital and carrying cost. According to the Appellants, CERC went wrong in opining that there is no concept of return on equity or interest on working capital in competitive bid process since bidders are required to quote all inclusive tariff. The Appellants contend that though there is no return on equity concept in competitive bid tariff, but the increase in cost due to change in law event which have indirect bearing on them, have to be considered. According to the Appellants, the interest on incremental working capital at normative interest rate has to be allowed to put the Appellants to the same economic position as if change in law has not occurred. They further contend that in terms of Article 13.2 of PPA, restoring the affected party to the same economic position means it is not just a simple correlation of increased expenditure and a corresponding compensation; but also means the loss caused to the Appellant on account of time gap between payment (working capital) by the generating company till recovery of deployed additional funds. Since it has a cost attached to it, restoration to the same economic position would take into such time gap between the time money is spent and the time money is recovered. They have relied upon the judgment of the Tribunal dated 20.12.2012 in Appeal No. 150 and batch appeals titled *SLS Power Ltd vs. Andhra Pradesh Electricity Regulatory Commission*, judgement in *North Delhi Power Ltd vs. DERC* reported as 2010 ELR (APTEL) 0891 and judgment in *Tata Power Company Ltd vs.*

Maharashtra Electricity Regulatory Commission reported as 2011 ELR (APTEL) 336. Placing reliance on the above judgments, they contend that carrying cost is a well accepted principle in regulatory jurisprudence since it is based on time value of money.

24. With these submissions, the Appellants have sought for relief by holding the above disallowed claims as events of change in law. They contend appellants are entitled for compensation for the enhanced working capital as well as carrying cost on such payments. They have also prayed for a direction to the CERC to assess such claims as set out at Para 1.2(a) to (e) of the Appeal which read as under, and to direct the Respondents 2 to 4 to pay the said amounts to the Appellants:

> *"(a) Change from UHV to GCV based pricing of coal pursuant to notification issued by the Government of India (Para 57-58 of the Impugned Order).*
>
> *(b) Increase/revision in the railway freight charges pursuant to notifications issued by Ministry of Railways and Ministry of Finance (Para 59-60 of the Impugned Order).*
>
> *(c) Increase in the rate of Minimum Alternate Tax ("**MAT**") rates (Para 62-63 the Impugned Order).*
>
> *(d) Increase in Value Added Tax in the State of Odisha (Para 66 of the Impugned Order)*
>
> *(e) Increase in water charges pursuant to notifications issued by the Government of Odisha. (Para 69 of the Impugned Order)."*

25. As against this, Respondent No. 2 to 4 placed on record their counter affidavit contending that the present Appeal is devoid of merits and deserves to be dismissed. According to these Respondents, the impugned order of CERC is based on cogent reasons in support of its conclusions; therefore, no interference is called for. According to them, it had invited Case-1 bid where the Appellants through PTC were the successful bidders. The essence of Case-1 bidding is that the bidder has to quote tariff including all factors; therefore, Appellant ought to have factored all the issues at the time of Case-1 bidding participation and is not permitted to seek any revision on any of the ground now raised. They further contend that it is the duty of the project developer to take care of all the issues and the procurers are only required to pay the agreed tariff towards power received by them, since the project was conceived based on domestic coal and the imported coal was never the basis for the project and any increase in cost on account of imported coal cannot be fastened to the procurers. In terms of Para 2.7.2.1 of RFP issued by HPGCL, the bidders were required to quote tariffs under Stream-1 and Stream-2 while submitting their financial bid. They were required to quote a fixed tariff under Stream-1 for both capacity charge and energy charge. They were required to quote firm Capacity Charge or a combination of escalable and non-escalable capacity charges under Stream-2 in terms of the PPA. Therefore, under both the Streams, according to these Respondents, the

transmission charge of the intervening CTU network up to the delivery point would not be part of capacity or energy charge, since it has to be quoted separately. In terms of RFP, the Appellant/PTC were required to indicate the progress/proof of in support of fuel arrangement by submitting copies of any one or more of linkage from fuel supplier and also FSA and coal block allotment etc. Further, the bidder was required to show a firm Fuel Supply Agreement if he comes out as successful bidder. Therefore, the bidder should be able to demonstrate its ability to procure fuel for supply of power.

26. According to the Respondent No. 2 to 4, in terms of Article 13 which deals with change in law and the consequences, one has to see the scenario prior to 01.01.2004 and the subsequent changes. Prior to 01.01.2000, the Central Government, in terms of Section 4 of the Colliery Control Order was empowered to fix the grade-wise and colliery-wise prices of coal. Subsequently, it came to be changed and decided to deregulate the prices of all grades of cooking coal, i.e. A, B, and C grades of non-cooking coal from 22.03.1996. Later, in terms of Integrated Coal Policy, the Committee decided to de-regulate the prices of soft coke, hard coke and D grade of non-cooking coal with effect from 12.03.1997 onwards. It also decided to allow CIL and SCCL to fix prices for E, F and G grades of non-cooking coal once in every six months by updating the cost indices as per the escalation formula in terms of the report of BICP in

the year 1987. On 13.03.1997, proper instructions were issued to CIL and SCCL in this regard. Therefore, the pricing of coal was fully de-regulated by a notification dated 01.01.2000 in supersession of 1945 Colliery Control Order. The prices of coal from CIL and its subsidiaries were market based. Only the pricing methodology were UHV based at the time of bid submission which was switched over to GCV based with effect from 01.01.2012 in terms of the notification dated 30.12.2011 by Government of India. Therefore, this does not amount to change in law event.

27. So far as increase in railway freight charges on account of development surcharge and busy season surcharge, Respondents 2 to 4 contend that they are in the nature of change in rates of freight charges in exercise of powers under Sections 30 to 32 of the Indian Railway Act through Railway Board. Therefore, Appellants ought to have taken into consideration the possible revision in these charges at the time of quoting the bid since freight charges of cost involved for procuring coal which is an input for generating power for supply any power to DISCOMS under Haryana PPA. Therefore, Appellants cannot claim any relief under change in law on account of revision in freight charges. Hence, CERC was justified in disallowing this amount.

28. According to Respondent No. 2 to 4, so far as MAT, CERC followed its order dated 30.03.2015 in Petition No. 6/MP/2013. Therefore, CERC

was justified in rejecting the increase in MAT rate also. Similarly, as regard to increase in VAT, it followed the above-said order dated 30.03.2015; therefore, there was justification on the part of CERC. Regarding increase in water charges, the Respondents contend that CERC was justified in rejecting this relief by relying upon Para 2.7.2.4 of RFP wherein the Appellant was required to take into account all costs including capital and operating cost in the quoted tariff. With these submissions, placing reliance on Petition No. 79/MP/2013, counter filed by Respondents 2 to 4 to rely upon certain paragraphs, have sought for dismissal of the Appeal.

29. Respondent Nos. 6 to 9 have placed on record combined written submissions on behalf of Bihar State Power (Holding) Company Limited and other power companies in the state of Bihar. Though the controversial issue raised in the appeal is between Haryana Discoms (Respondents) and the Appellants-Generator, since Bihar Discoms are made parties to this appeal, their written submissions are taken on record. According to them, the preliminary issue that arises for consideration is whether Section 79 or Section 64 of the Electricity Act, 2003 (for short "**the Act**") is applicable in the instant appeal to determine the jurisdictional issue. According to Respondent Nos. 6 to 9 though the above issue pertaining to jurisdictional question was raised in the impugned order, there is not even any discussion on this aspect. They further contend that since PPA in

issue was tariff based bidding process for procurement of power on long term using Case-1, between two Discoms of Haryana and PTC India, the following Article is mentioned under the heading "Governing Law and dispute Resolution" at 17.1.1, which reads as under:

> *" 17.1.1 This Agreement shall be governed by and construed in accordance with the Laws of India. Any legal proceedings in respect of any matters, claims or disputes under this Agreement shall be under the jurisdiction of appropriate courts in Chandigarh."*

30. In the PPA between PTC and the Appellant-GMR Energy Limited so far as "Governing Law on Dispute Resolution is concerned, it is mentioned as under:

> *"The terms of this Article under the Haryana PPA shall be applicable to the parties in its totality without any deviations under this Agreement."*

31. Based on these two PPAs, the Full Bench of this Tribunal heard Appeal No. 44 of 2014 along with other appeals but its Judgment dated 07.04.2016 was confined to examining Section 79 of the Act vis-à-vis composite scheme for generation and sale of electricity in more than one state.

32. Section 64(5) of the Act came up for consideration before the Hon'ble Supreme Court in its famous judgment in **Energy Watch Dog's case**, the relevant paragraph states as follows:

> *" 27. That this definition is an important aid to the construction of Section 79(1) (b) cannot be doubted and, according to us, correctly brings out the*

meaning of this expression as meaning nothing more than a scheme by a generating company for generation and sale of electricity in more than one State. Section 64(5) has been relied upon by the Appellant as an indicator that the State Commission has jurisdiction even in cases where tariff for inter-State supply is involved.

This provision begins with a non-obstante clause which would indicate that in all cases involving inter-State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact this further supports the case of the Respondents. Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. We, therefore, hold that the Central Commission had the necessary jurisdiction to embark upon the issues raised in the present cases."

33. According to Respondents 6 to 9, in the light of Section 64(5) of the Act, the Central Commission ought to have examined its jurisdiction to decide the matter. They contend that CERC has assumed jurisdiction in the matter in utter violation of the PPA read with Section 64 (5) of the Act.

34. From this what we notice is according to Bihar Discoms, CERC did not have jurisdiction as both parties had consented to the jurisdiction of HERC so far as Haryana Discoms are concerned.

35. On perusal of impugned order, it is seen that at Paras 10 & 11 of the impugned order jurisdictional issue was discussed by the CERC and opined as under:

"10. The petitioners have submitted that GKEL has a composite scheme for generation and sale of electricity in more than one State as much as they have PPAs to supply electricity to the States of Odisha, Haryana and Bihar. As regards supply of electricity to Haryana through an inter-State trading licensee, namely, PTC, the petitioners have submitted that there is a direct nexus between GKEL and Haryana Discoms in the light of the judgement of

the Appellate Tribunal for Electricity in Appeal No. 15 of 2011 (Lanco Power Ltd Vs Haryana Electricity Regulatory Commission) and therefore, the present petition is maintainable. Haryana Discoms vide their affidavit dated 12.7.2013 have raised a preliminary issue regarding the jurisdiction of the Commission to adjudicate the dispute. Haryana Discoms have submitted that the PTC was selected as the successful bidder to supply power from the power project of GKEL through Case 1 competitive bidding and the essence of the bidding process was to supply electricity at the State periphery. Haryana Discoms have further submitted that the Discoms filed petition before HERC for adjudication of disputes and the petitioners participated in the proceedings before HERC without taking objection with regard to jurisdiction and therefore, the petitioners cannot invoke the jurisdiction of the Commission. The Commission considered and decided the issue of jurisdiction in its order dated 16.12.2013 as under:

> *"33. To sum up, it is held that supply of electricity by the petitioner to the States of Odisha, Haryana and Bihar is under the composite scheme for generation and sale of electricity in more than one State. Accordingly, this Commission has power to regulate the tariff of the generating station of the petitioner under clause (b) of sub-section (1) of Section 79 of the Electricity Act, 2003. As a corollary it follows that the powers of adjudication of the claims and disputes involving force majeure and Change in Law events under the PPAs is vested in this Commission.*
>
> *34. In view of the above discussion, the petitions are maintainable."*

11. Haryana Discoms have filed Appeal No. 44/2014, before the Appellate Tribunal for Electricity against the said order dated 16.12.2013. The appeal is presently pending, though the Appellate Tribunal in its order dated 30.5.2014 has permitted, subject to the result/outcome of the appeal, continuation of the proceedings before this Commission. It is, therefore, made clear that this order being passed in this petition shall be subject to the outcome of appeal of the Haryana Discoms pending before the Appellate Tribunal."

36. It is also noticed that Appeal No. 44 of 2014 was disposed of on 07.04.2016. In the said judgment, according to Respondent Nos. 6 to 9 the Tribunal confined its opinion by examining Section 79 of the Act related to the composite scheme for generation and sale of electricity in more than one state and similar other peripheral issues.

37. We further note that the Haryana Discoms have not contested the main appeal with regard to jurisdictional issue at all neither in its reply nor in its written submissions or during oral arguments. However, it is relevant to mention the following paragraphs from the Judgment of the Apex Court in Energy Watch Dog's case, which reads as under:

*"**Jurisdiction of the Central Commission***

21. The appellants have argued before us that the expression "composite scheme" mentioned in Section 79(1) must necessarily be a scheme in which there is uniformity of tariff under a PPA where there is generation and sale of electricity in more than one State. It is not enough that generation and sale of electricity in more than one State be the subject matter of one or more PPAs, but that something more is necessary, namely, that there must be a composite scheme for the same.

22. In order to appreciate and deal with this submission, it is necessary to set out Section 2(5) of the Act which defines appropriate Government as follows:

"2. Definitions. - In this Act, unless the context otherwise requires,

(5) "Appropriate Government" means, -

(a) the Central Government, -

(i) in respect of a generating company wholly or partly owned by it;

(ii) in relation to any inter-State generation, transmission, trading or supply of electricity and with respect to any mines, oil-fields, railways, national highways, airports, telegraphs, broadcasting stations and any works of defence, dockyard, nuclear power installations;

(iii) in respect of the National Load Despatch Centre; and Regional Load Despatch Centre;

(iv) in relation to any works or electric installation belonging to it or under its control ;

(b) in any other case, the State Government, having jurisdiction under this Act;"

23. Sections 25 and 30 also have some bearing and are set out as under :

"25. Inter-State, regional and inter-regional transmission. For the purposes of this Part, the Central Government may, make region-wise demarcation of the country, and, from time to time, make such modifications therein as it may consider necessary for the efficient, economical and integrated transmission and supply of electricity, and in particular to facilitate voluntary interconnections and co-ordination of facilities for the inter-State, regional and inter-regional generation and transmission of electricity.

* * *

30. Transmission within a State. The State Commission shall facilitate and promote transmission, wheeling and inter-connection arrangements within its territorial jurisdiction for the transmission and supply of electricity by economical and efficient utilisation of the electricity."

24. The scheme that emerges from these Sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in sub-sections (c), (d) and (e)

speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression "within the State" in sub-clauses (a), (b), and (d), and "intra-state" in sub-clause (c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission's jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression "composite scheme" does not mean anything more than a scheme for generation and sale of electricity in more than one State.

25. This also follows from the dictionary meaning [(Mc-Graw-Hill Dictionary of Scientific and Technical Terms (6th Edition), and P.Ramanatha Aiyar's Advanced Law Lexicon (3rd Edition)] of the expression "composite":

> *(a) 'Composite' – "A re-recording consisting of at least two elements. A material that results when two or more materials, each having its own, usually different characteristics, are combined, giving useful properties for specific applications. Also known as composite material."*
>
> *(b) 'Composite character' – "A character that is produced by two or more characters one on top of the other."*
>
> *(c) 'Composite unit" – "A unit made of diverse elements."*

The aforesaid dictionary definitions lead to the conclusion that the expression "composite" only means "consisting of at least two elements". In the context of the present case, generation and sale being in more than one State, this could be referred to as "composite".

26. Even otherwise, the expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a "composite scheme". This makes it clear that the expression "composite scheme" does not have some special meaning – it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State.

xxx xxx xxx

28. Another important facet of dealing with this argument is that the tariff policy dated 6th June, 2006 is the statutory policy which is enunciated under Section 3 of the Electricity Act. The amendment of 28th January, 2016 throws considerable light on the expression "composite scheme", which has been defined for the first time as follows:

> *"5.11 (j) Composite Scheme: Sub-section (b) of Section 79(1) of the Act provides that Central Commission shall regulate the tariff of generating company, if such generating company enters into or otherwise have a composite scheme for generation and sale of electricity in more than one State.*
>
> *Explanation: The composite scheme as specified under section 791) of the Act shall mean a scheme by a generating company for generation and sale of electricity in more than one State, having signed long-term or medium-term PPA prior to the date of commercial operation of the project (the COD of the last unit of the project will be deemed to be the date of commercial operation of the project) for sale of at least 10% of the capacity*

of the project to a distribution licensee outside the State in which such project is located."

29. That this definition is an important aid to the construction of Section 79(1) (b) cannot be doubted and, according to us, correctly brings out the meaning of this expression as meaning nothing more than a scheme by a generating company for generation and sale of electricity in more than one State. Section 64(5) has been relied upon by the Appellant as an indicator that the State Commission has jurisdiction even in cases where tariff for inter-State supply is involved. This provision begins with a non-obstante clause which would indicate that in all cases involving inter-State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact this further supports the case of the Respondents. Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. We, therefore, hold that the Central Commission had the necessary jurisdiction to embark upon the issues raised in the present cases."

38. In the absence of such challenge by the Haryana Discoms with regard to jurisdiction of CERC, we are of the opinion that we need not ponder over much on this issue further.

39. Based on the above pleadings, the following points arise for our consideration:

(a) "Whether CERC was wrong in disallowing certain claims of Appellants opining that it is contrary to the provisions of competitive bidding guidelines under PPAs?"

(b) "Whether Appellants are entitled for compensation on account of change from UHV to GCV based prices (coal)?"

(c) "Whether Appellants are entitled for railway freight charges as entitled for compensation towards increase/revision in railway freight charges on account of increase in busy season surcharge, development surcharge and Service Tax?"

(d) "Whether Appellants are entitled for change in compensation towards change in MAT rate which came to be introduced by the Finance Act of 2012?"

(e) "Whether Appellants are entitled for compensation towards increase in water charges?"

(f) "Whether Appellants are entitled for carrying cost?"

(g) "Whether the Appellants are entitled for VAT rate as claimed?"

(h) "Whether the Appellants are entitled for interest on additional working capital?"

40. We heard arguments of counsel for Appellants and Respondents at length.

41. Apart from reiterating the contention raised in the Appeal, the Appellants have placed on record judgments of the Tribunal in Appeal No. 119 of 2016 dated 14.08.2018 titled ***Adani Power Rajasthan Limited vs. RERC & Ors.*** and in Appeal No. 111 of 2017 on 14.08.2018 titled ***GMR Warora Energy Limited vs. CERC & Ors.*** They also placed reliance on judgments of the Apex Court on ***Gulf Goans Hotels Co. Ltd. v. Union of India,*** reported as (2014) 10 SCC 673, ***Rai Sahib Ram Jawaya Kapur & Ors. v. State of Punjab,*** reported as AIR 1955 SC 549 to contend that similar change in law events came up for consideration and were allowed. They also contend that placing reliance on Clause 2.7.2.4 of RFP is totally uncalled for and such claim came to be rejected by this Tribunal in the case of ***Sasan Power v. CERC*** *and Ors*. in Appeal No. 161 of 2015 dated 19.04.2017.

42. They further contend that the shift from UHV pricing to GCV pricing is change in law event in view of the following:

> *"(a) As per Section 18 (1)(2) of the Mines and Mineral (Development and Regulation) Act, 1957 ("**MMDR Act**") read with Rule 3 of Colliery Control Rules, 2004 ("**Colliery Control Rules**"), Government of India has the power to specify the grades of coal.*

> *(b) On 30.12.2011, the Ministry of Coal, Government of India in exercise of its powers under section 18 of the MMDR Act and Rule 3 of the Colliery Control Rules, issued Gazette Notification No. 22021/1/2008-CRC-II directing a switch from UHV based pricing to GCV-based pricing. This Notification falls within the definition of Law under the PPA, having been issued by the Union Ministry of Coal which is an Indian Government Instrumentality."*

43. They further contend that the change in pricing methodology of coal was pursuant to the notification No. 22021/1/2008-CRC-II and the Standing Committee on Coal and Steel on coal pricing and issues relating to Coal Royalty has clarified its statutory power over the coal companies in the following terms:

> *"For their operational day to day management, the coal companies are free to work on their own as per rules and regulations and their Memorandum of Association. As far as certain policy directions are concerned, there are occasions when the Government of India can give them either Presidential directives or specific directions or guidelines which is approved by the Government of India. Under the guidelines of the DPE, there is a clause about acceptance of Presidential Directives which all the Government companies have incorporated in their Memorandum of Association and so has the CIL done. It is in accordance with that the Government of India can give them the Presidential Directives. Under the Companies Act, every company which has incorporated this is bound to have a Memorandum of Association and there are certain guidelines about incorporating certain provisions."*

44. According to them, since the notification issued by Government of India through Coal India Limited and its subsidiaries is nothing but change in law, therefore, the pricing methodology of coal has an impact on the cost of fuel; hence, it has to be taken into consideration. The reliance of CERC on Clause 2.7.2.4 of RFP is totally incorrect and it has wrongly placed reliance on the judgment of this Tribunal on 12.09.2014 in Appeal No. 288 of 2013 titled ***Wardha Power Company Ltd. v. Reliance Infrastructure Limited & Anr.*** The Appellants contend that the primary issue in that case was "whether the State Commission was incorrect to link the computation of compensation payable to the Appellant under Change in Law provisions of the PPA with the base used in the bid i.e. energy charges quoted to the bid by the Appellant?" The said findings have no relevance to the present case since GKEL is not seeking compensation for an increase in base price of fuel, but it is seeking compensation on account of change in law which has led to increase in cost of fuel.

45. The Appellants also placed reliance on ***Adani judgment*** **and** ***GMR Warora's case*** quoted above for allowing compensation towards increase in busy season surcharge, development surcharge and imposition of Service Tax. According to them, these charges have to be allowed since the Tribunal has already opined so in the case of the above generators.

46. They contend that change in VAT rate was also held to be change in law event in the ***Sasan Power*** judgment quoted above. Therefore, the increase in VAT was not just due to absolute increase in rate, but was also increase on account of various components like price of coal, royalty, Central Excise duty, clean energy cess etc., and the same has to be allowed if the increase in VAT is after cut-off date which is in this case also, since it amounts to change in law.

47. Coming to water charges, the Appellants contend that since it is introduced by the Government of Orissa which is also an Indian Governmental Instrumentality, and if the amendments are after cut-off date resulting in increase in cost, the same has to be allowed as change in law, rejecting the opinion of CERC that it is an input cost in terms of 2.7.2.4.

48. Similarly, they contend that MAT rate has to be allowed as change in law based on the judgment of ***Sasan Power***, Article 13.1.1, also relevant paragraph, i.e. Para 50 in the case of ***Energy Watchdog vs. Central Electricity Regulatory Commission & Ors.*** in Civil Appeal No.5399-5400 of 2016 by Hon'ble Supreme Court. They also placed reliance on ***Jaiprakash Hydro Power*** referred to above in Appeal No. 39 of 2010.

49. Coming to interest on working capital and carrying cost, the Appellants contend that no finding on the issue of carrying cost was given by CERC though claim was made towards interest on working capital and

carrying cost on change in law events. To substantiate the above contention, they placed reliance on the judgment of the Tribunal dated 13.04.2018 in Appeal No. 210 of 2017 titled ***Adani Power Ltd. vs CERC & Ors.*** wherein this Tribunal recognised concept of restitution and allowed carrying costs in respect of the allowed change in law events. With these arguments, they sought for allowing the Appeal as prayed for.

50. As against this, the Respondent Commission (CERC) contends that the Commission was justified in rejecting the compensation towards -

(a) Change of methodology of pricing of coal

(b) Rate of Minimum Alternate Tax

(c) Increase in Water charges

(d) Interest on working capital and carrying cost

The Commission also contends that compensation for increase in costs due to interest payable on working capital which is consequential to change in law events and compensation under the Head – Carrying Cost claimed for the first time. Therefore, the Appellants are not entitled for the said amount.

51. Respondent No. 2 to 4 – DISCOMS contend that CERC has rightly disallowed change in law events which is the subject matter of this Appeal since they are contrary to the provisions of competitive bidding guidelines

and PPA. They further pressed upon the fact that since bidders were required to quote tariff for both Stream-1 and Stream-2 while submitting financial bid keeping in mind they were required to quote a fixed tariff for both the capacity and energy charge during the term of PPA. The transmission charge of the intervening CTU network up to the delivery point was not part of capacity or energy charges; therefore, it had to be quoted separately. In terms of RFP, the bidder was required to indicate the progress/proof in support of fuel arrangement. Article 13 of PPA refers to change in law and how the application and principles would apply for computing compensation on account of change in law events during the operating period of the project. Several other requirements like notification of change in law, tariff adjustment payment on account of change in law were also part of this PPA at Article 13. The Respondents 2 to 4 further place reliance on the judgment of this Tribunal dated 23.03.2015 in Appeal No. 90 of 2014 (*SPL v CERC)* referring to Para 43 to contend that change in law in price of diesel did not amount to change in law; therefore, contend that it squarely applies to the present case.

52. So far as increase in railway freight charges on account of increase in busy season surcharge and development surcharge, they contend that the Appellant ought to have taken into account these charges at the time of submitting the bid quoting the tariff. They rely upon ***Sasan Power***

judgment in Appeal No. 161 of 2015 to contend that MAT rate cannot be allowed.

53. So far as increase in VAT rate, they contend that the above judgment in ***Sasan Power*** applies since the tariff quoted by the Appellant was through bidding process. They reiterate their contentions raised in the objections with regard to increase in water charges contending that the charges of increase in water charges by Government of Orissa cannot be considered as a change in law event, since it was a period phenomena and the said change was in terms of Odisha Irrigation Act, 1959 and the Appellant has not chosen to quote any escalable element in tariff to take care of such revision. With these submissions, they seek for dismissal of the Appeal.

Findings:

54. One has to understand what exactly the parties understood by the word 'Law' in terms of PPA between them. One should also understand what exactly change in law amounts to in terms of PPA. Law is defined at Article 1.1 of the PPA which reads as under:

> *"Law means in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality*

pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the Appropriate Commission".

Article 13, 13.1, 13.1.1, 13.2 read as under:

"13 article 13 change in law

13.1 Definitions

In this Article 13, the following terms shall have the following meanings:

13.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:

(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of Law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement;

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission.

Provided that if Government of India does not extend the income tax holiday for power generation projects under Section 80 IA of the Income Tax Act, upto the Scheduled Commercial Operation Date of the Power Station, such non-extension shall be deemed to be a Change in Law

(applicable only in case the Seller envisaging supply from the Project awarded the status of "Mega Power Project" by Government of India).

13.1.2 "Competent Court" means:

The Supreme Court or any High Court, or any tribunal or any similar judicial or quasi-judicial body in India that has jurisdiction to adjudicate upon issues relating to the Project.

13.2 Application and Principles for computing Impact of Change in Law

While determining the consequence of Change in Law under this Article 13, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff Payments, 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.

a) ***Construction Period***

As a result of any Change in Law, the impact of increase/decrease of Capital Cost of the Project in the Tariff shall be governed by the formula given below:

For every cumulative increase/decrease of each Rs.1,87,50,000 (Rupees one crore eighty seven lakh fifty thousand only) in the Capital Cost over the term of this Agreement, the increase/decrease in Quoted Capacity Charge shall be an amount equal to zero point two two seven (0.227%) percent of the Quoted Capacity Charge. Provided that the Seller provides to the Procurer documentary proof of such increase/decrease in Capital Cost for establishing the impact of such Change in Law. In case of Dispute, Article 17 shall apply.

It is clarified that the above mentioned compensation shall be payable to either Party, only with effect from the date on

which the total increase/decrease exceeds amount of Rs.1,87,50,000 (Rupees one crore eighty seven lakh fifty thousand only).

b) ***Operation Period***

As a result of Change in Law, the compensation for any increase/decrease in revenues or cost to the Seller shall be determined and effective from such date, as decided by the Appropriate Commission whose decision shall be final and binding on both the Parties, subject to rights of appeal provided under applicable Law.

Provided that the above mentioned compensation shall be payable only if and for increase/decrease in revenues or cost to the Seller is in excess of an amount equivalent to one percent (1%) of Letter of Credit in Aggregate for a Contract Year."

55. Since PPA defines what law means, so far as the parties, PPAs, i.e. the Agreement between them, we are of the opinion, we need not look into the general principles how *John Austin*'s theory of law came to be developed. Further, with reference to change in law and especially Article 13 of the PPA came up for consideration in the case of ***Energy Watchdog*** before the Apex Court wherein the Hon'ble Apex Court clearly mentioned what amounts to change in law. With reference to notifications issued by CIL and its subsidiaries, whenever policy of Ministry of Coal came to be changed directions are given to CIL and its subsidiaries.

56. With reference to increase in transportation charges on account of levy of busy season surcharge, development surcharge and Service Tax subsequent to the impugned judgment, this Tribunal in the case of ***Adani judgment*** dated 14.08.2018 at Para (x) to (xiii) opined as under:-

> *"(x) We are of the considered opinion that the Articles 298 and 77 of the Constitution cannot be read in isolation and they are complimentary to each other as far as the scheme of carrying out the business/ commercial activity by GoI/ State Government is concerned. The Corporations/ Companies are carrying out businesses under various ministries and departments of GoI/State Govt. are the creations from the Act of the Parliament/ State Assembly. Their formation is having force of law. The PPA defines the Indian Government Instrumentality, which includes departments and corporations/companies like those that IR/CIL formed under a statue. Further, there are various other stipulations under the RFP and the PPA, which are required to be considered before arriving at any event as an any Change in Law event.*
>
> *(xi) We have carefully gone through the judgements relied by the Discoms and we find that the context of the said judgements is different from that of the case in hand presently. The said judgements cannot be directly applicable to the facts and circumstances of the case as the present case has to be analysed based on the provisions of the PPA under Article 10 which are related to notifications, circulars, order etc. issued by the Indian Government Instrumentality which have force of law.*

(xii) APRL has relied on judgements on Hon'ble Supreme Court in case of Rai Sahib Jawaya Kapur and Ors. V. State of Punjab AIR 1955 SC 549, Rashmi Metaliks v. UOI (1998) 5 SCC 126 &(1973) 1 SCC 781 and Gulf Goans Hotels Company Ltd. v. Union of India & Ors. (2014) 10 SCC 673. Ultra Tech Cement Ltd. v. UOI 2014 (4) KHC 190 Kerala High Court and KIOCL Ltd. v. Railway Board &Ors. WP(C) 532 of 2010 of Karnataka High Court are also relied on Rail Circulars being policy decisions of GoI. APRL has further contended that Hon'ble Supreme Court's judgement in case of Rai Sahib Ram Jawaya Kapur and Ors. v. State of Punjab has held that executive can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by legislature. In terms of Hon'ble Supreme Court's judgement in (1998) 5 SCC 126 and the power of Railway Board to fix charges in terms of Section 30 of the Railways Act is untrammelled and enforceable. We have gone through the said judgements and find these judgements not substantial.

APRL has also relied on the judgement of Hon'ble Supreme Court in case of Kusum Ingots and Alloys v. Union of India (2004) 6 SCC 254 on the issue that executive instructions without any statutory backing would also be considered as 'Law'. We have perused the said judgement. The relevant extract from the said judgement is reproduced below:

"26…….. In a case where the field is not covered by any statutory role, executive instructions issued in this behalf shall also come within the purview thereof. …."

According to the above judgement the executive instructions issued on a missing field under statue will have force of law.

APRL, on the issue of interpretation of contract has relied on the judgements of Hon'ble Supreme Court in case of United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal (2004) 8 SCC 644, DLF Universal Ltd. & Anr. v. Director Town and Country Planning Deptt. Haryana &Ors. and Batch (2010) 14 SCC 1 and Rajasthan State Industrial Development and Investment Corporation & Anr. v. Diamond & Gem Development Corpn. India Ltd. & Anr. (2013) 5 SCC 470.

We have carefully gone through the said judgements and find that the Hon'ble Court has held that the terms of the contract have to be strictly read and natural meaning is to be given to it. Hon'ble Court has further held that outside aid in a contract can only be sought only when the meaning is ambiguous. In the present case too while interpreting the PPA we cannot artificially divide the circulars, notifications, rules etc. issued by Indian Government Instrumentality as issued under sovereign functions/ non-sovereign function of the Government.

(xiii) From the above it is crystal clear that the Circulars issued by MoR regarding Busy Season Surcharge, Development Surcharge and Port Congestion Charges which have bearing on costs of the Kawai Project of APRL have force of law."

Similarly, Para (xi) to (xii) of ***GMR Warora*** judgment is relevant, which reads as under:

*"(xi) At the outset we observe that similar issues have been decided by this Tribunal in its judgement dated 14.8.2018 in Appeal Nos. 119 & 277 of 2016 in case of Adani Power Ltd. v. RERC &Ors. ('**Adani Judgement**'). In our opinion the said findings of this Tribunal are directly applicable to the instant case. The relevant portion from the said judgement is reproduced below:*

> *"11. A. ……*
>
> *xiii.From the above discussions it is clear that the Circulars issued by MoR regarding Busy Season Surcharge, Development Surcharge and Port Congestion Charges which have bearing on costs of the Kawai Project of APRL have force of law.*
>
> *……*
>
> *xvi.From the above discussions it is clear that the CERC escalation index for transportation covers only the basic freight charges. The Bidder was required to suitably incorporate the other taxes, duties, levies etc. existing at the time of bidding. The Bidder cannot envisage any changes happening regarding taxes, levies, duties etc. in future date. As such, any increase in surcharges or imposition of new surcharge after the cut-off date i.e. 30.7.2009 in the present case cannot be said to be covered under CERC Escalation Rates for Transportation Charges, which is indexed for basic freight rate only. Accordingly, any such change by Indian Governmental Instrumentality herein Indian Railways has to be necessarily considered under Change in Law event and need to be passed on to APRL. In terms of the PPA, such changes in the*

surcharges and levy of new Port Congestion Surcharge which does not exist at the time of cut-off date falls under 1st bullet of Article 10.1.1 of the PPA read with the definitions of the 'Law' and 'Indian Government Instrumentality' under the PPA.

Accordingly these issues are decided in favour of APRL."

This Tribunal has concluded that the circulars issued by MOR have force of law. CERC escalation rate notifications cover only basic freight and other prevailing charges were to be factored in by APRL at the time of bidding. Accordingly any change in such surcharges/levy of new surcharge was to be treated as Change in Law event requiring compensation to be paid to APRL.

(xii) In view of the decision of this Tribunal as above which is squarely applicable to the present case, we are of the considered opinion that GWEL is entitled for compensation arising out of change in Busy Season Surcharge and Development Surcharge by the Railways under Change in Law. The Development Surcharge is not applicable in DNH-PPA.

Accordingly, these issues are decided in favour of GWEL."

57. Subsequent to the cut-off date on 16.11.2007, the development surcharge was increased from 2% to 5% in terms of Ministry of Railways circular dated 12.10.2011 which came into effect from 15.01.2011. Similarly, busy season surcharge was increased from 5% to 12% by

notification dated 25.03.2013 from Ministry of Railways. We are of the opinion that increase in development surcharge as well as busy season surcharge amount to change in law events for the following reasons:

(a) The increase in Development Surcharge and Busy Season Surcharge was pursuant to Rate Circular Notifications issued under the Railways Act, 1989 which fall within the definition of law under the Haryana PPA.

(b) The notifications were issued by the Railway Board in terms of Sections 30-32 of the 1989 Act. Moreover, the Railway Board functions under Ministry of Railways, Government of India and is an Indian Governmental Instrumentality.

(c) The Notifications were issued after the Cut-Off Date.

(d) The increase in Development Surcharge and Busy Season Surcharge has led to an increase in the landed cost of coal which in turns has led to an increase in cost of generating and supplying power to the Haryana Discoms.

58. We are therefore, of the view that CERC was not justified in opining that the Appellant – GKEL was expected to take into account the possible revision in these charges while quoting the bid. We also

accept the contention of the Appellant that the fact that the busy season surcharge or development surcharge was constant at the time of the bid date which was 2% till 2010 and thereafter it was increased to 5%. Therefore, the Appellants are justified in saying that it was not possible to forecast the increase in these charges so as to factor them in the bid submitted as back as in 2007.

59. Coming to imposition of Service Tax on transportation of goods through railways, the facts are as under:

(a) Service tax was imposed on transportation of goods through rail vide Section 76 of Finance Act, 2010. However, Indian Railways was exempted from imposition of service tax through notifications issued by the Ministry of Finance, Government of India.

(b) The last exemption was granted vide Notification No. 43 of 2012 dated 02.07.2012 issued by the Ministry of Finance, Government of India. In terms of the said notification, the exemption was granted up to 30.09.2012.

(c) Thus, in terms of the Finance Act, 2010 read with the exemption notifications including Notification No. 43 of 2012 dated 02.07.2012, Service tax became applicable on transportation of goods by Indian Railways with effect

from 01.10.2012 at the rate of 3.708% (12.36% with an abatement of 70%).

(d) The aforesaid notification was followed by Notification No. 27 of 2012 dated 26.09.2012 and Notification No. 29 of 2012 dated 28.09.2012 issued by the Ministry of Railways, Government of India taking note of the notification issued by the Ministry of Finance.

(e) The Service Tax was increased to 4.2% (14% with abatement of 70%) by way of Section 108 of the Finance Act, 2015. Section 108 was made effective from 01.06.2015 vide Notification D.O.F. No.334/5/2015-TRU 14/2015-Service Tax dated 19.05.2015 issued by Ministry of Finance. The aforesaid notification also falls within the ambit of law under the Haryana PPAs.

(f) The aforesaid notifications have been issued by Ministry of Finance and Ministry of Railways, Government of India. Both Ministries fall within the definition of Indian Governmental Instrumentality.

(g) The Notifications are effective from the dates which are after the cut-off date.

(h) The imposition of service tax leads to an increase in the landed cost of coal which in turn leads to an increase in cost of generating and supplying power to the Haryana Discoms.

60. It is also noticed that CERC did opine subsequently in the following orders that imposition of Service Tax on transportation of goods is change in law event. Details of those orders are as under:

(a) Order dated 01.02.2017 in Petition No. 08/MP/2014 titled EMCO Energy Limited v. MSEDCL & Anr. (Para 89)

(b) Order dated 06.02.2017 in Petition No. 156/MP/2014 titled Adani Power Ltd. v. UHBVNL & Ors. (Para 54)

(c) Order dated 07.03.2016 in Petition 81/MP/2013 titled GKEL v. DHBVNL & Ors. wherein increase in service tax was allowed on EPC contracts. (Para 66)

(d) Order dated 17.03.2017 in Petition No. 157/MP/2015 titled Coastal Gujarat Power Limited v. Gujarat Urja Vikas Nigam Ltd. & Ors.

(e) Order dated 07.04.2017 in Petition No. 112/MP/2015 titled GMR Kamalanga Energy Ltd & Anr. v. Bihar State Power (Holding) Company Ltd & Anr.

61. In the light of the above discussion and reasoning, we are of the opinion that the Appellants are entitled for these three items, i.e. compensation claimed towards increase in transportation of goods by railways due to increase in busy season surcharge and development surcharge, and Service Tax.

62. Then coming to VAT as change in law event, according to the Appellant–generator, the rate of VAT which was 4% got increased to 5% from 30.03.2012. This notification being issued by the Government of Orissa, the same has to be considered as a notification issued by the Indian Governmental Instrumentality in terms of Haryana PPA. Apparently, the notification resulting in increase in VAT rate subsequent to cut-off date resulted in increase in cost during operating period. In several judgments of this Tribunal viz., **M/s Wardha Power Company Limited vs. Reliance Infrastructure Limited** (Appeal No. 288 of 2013, dated 12.09.2014) and in **Sasan Power Limited vs. Central Electricity Regulatory Commission** (Appeal No. 161 of 2015 dated 19.04.2017) VAT came to be considered as change in law event. It is also seen that VAT is applicable on various components of ROM price of Coal, Royalty, Central Excise Duty, Clean Energy Cess, which themselves have undergone change several times after the cut-off date. Therefore, the increase in VAT rate is not just due to absolute increase in rate from 4%

to 5% but also due to increase on the above items due to change in law. VAT depends on the Central Excise Duty, Royalty and Clean Energy Cess. Similarly, in terms of revised tariff policy issued by Ministry of Power, change in taxes, duties and levies after the cut-off date have to be recognised as change in law events thereby they have to be allowed as a pass through. In the light of the above discussion, we are of the opinion that the Appellants are entitled for compensation due to change in law i.e., enhancement of rate of VAT subsequent to cut-off date.

63. Then coming to interest on additional working capital and also carrying cost, Appellants have sought for interest on working capital and carrying cost as change in law events. During the course of arguments, the Respondent-Commission contended that in the absence of claiming such amounts in the original petition, Appellant is not entitled for these claims since it is a new contention raised by the Appellant for the first time in this appeal. In support of its contentions, the Respondent-Commission relies on the following judgments. The relevant portions of the judgments read as follows:

(i) ***Steel Authority of India Limited vs. Gupta Brother Steel Tubes Limited*** reported in 2009 (10) SCC 63.

"*34. The learned senior counsel for the appellant also urged that claim A pertaining to difference in price has come to be determined by the*

arbitrator de-hors contract stipulations. In this regard the learned senior counsel referred to paragraph 20.21 and 20.22 of the award. We are afraid, this contention too, cannot be permitted to be raised before us since no such contention was raised before the High Court. There has to be some sanctity and finality attached to the decision of the arbitrator and new plea cannot be allowed to be raised in an appeal under Article 136 which was not raised before the High Court."

(ii) **State of Maharashtra vs. Hindustan Construction Company Limited** reported in 2010 (4) SCC 518

"*35. The question then arises, whether in the facts and circumstances of the present case, the High Court committed any error in rejecting the appellant's application for addition of new grounds in the memorandum of arbitration appeal.*

36. As noticed above, in the application for setting aside the award, appellant set up only five grounds viz., waiver, acquiescence, delay, laches and res judicata. The grounds sought to be added in the memorandum of arbitration appeal by way of amendment are absolutely new grounds for which there is no foundation in the application for setting aside the award. Obviously, such new grounds containing new material/facts could not have been introduced for the first time in an appeal when admittedly these grounds were not originally raised in the arbitration petition for setting aside the award. Moreover, no prayer was made by the appellant for amendment in the petition under Section 34 before the concerned court or at the appellate stage.

37. As a matter of fact, the learned Single Judge in para 6 of the impugned order has observed that the grounds of appeal which are now sought to be advanced were not originally raised in the arbitration petition and that the amendment that is sought to be effected is not even to the grounds contained in the application under Section 34 but to the memo of appeal. In the circumstances, it cannot be said that

discretion exercised by learned Single Judge in refusing to grant leave to appellant to amend the memorandum of arbitration appeal suffers from any illegality."

(iii) Gridco Limited vs. GMR-Kamalanga Energy Limited & Ors.

(Appeal No. 45 of 2016 dated 01.08.2017)

"d) On Question No. 6 d) i.e Whether the determination of tariff in present case is contrary to the CERC Tariff Regulations, 2009?, we observe as below:

i) From the perusal of the issues raised by the Appellant we find that the following issues can be related to Tariff Regulations, 2009 which are not dealt above:

A. Very high Project Cost due to delay in completion of the project; High Project Cost due to consideration of EPC completion Time Line as Schedule of Completion Date; High Project Cost due to time over-run allowed by the Central Commission;
B. Very High Capital Cost/MW (i.e. Hard Cost);
C. Loading of entire Capital Cost of Dedicated Transmission Line i.e. 400 kV Single Circuit GMR-Meramundali Line;
D. Higher rate of Interest on Loan and thus IDC allowed is on higher side;
E. Cost incurred on account of Non-EPC Cost and Pre-Operative Expenses;
F. Very High Energy Charge Rate (ECR).

ii. The Central Commission has submitted that the Appellant has raised many fresh issues which were not raised before the Central Commission during the pleadings before it. These issues include non-impleadment of GoO, loading of entire Capital Cost of Dedicated Transmission Line i.e. 400 kV Single Circuit GMR-Meramundali Line based on single quotation from L&T and Alstom, Higher rate of

Interest on Loan, Cost incurred on account of Non-EPC Cost and Pre-Operative Expenses, high start up fuel cost and related establishment expenses, refund of excess amount earned through sale of infirm power not supplied to the Appellant and non-consideration of sale of infirm power prior to April, 2013.

The Central Commission also submitted that the Appellant has not indicated reasons why these issues cannot be raised before the Central Commission. It is settled in law that fresh issues cannot be raised in an appeal. We agree with the contention of the Central Commission that fresh issues cannot be taken at the appeal stage. Hence, we are not inclined to deal with these issues in the present Appeal."

64. In the case of **Adani Power Limited's case (**Appeal No. 210 of 2017 dated 13.04.2018**)** this Tribunal recognised the concept of restitution by placing the parties to the same economic position. On that concept carrying cost came to be allowed in respect of change in law events. Of course, the carrying cost has to be on actual after ascertainment of actual amount but carrying cost is payable from the date of occurrence of the expenditure. Sub-para Nos. (Ix) and (x) of the said Judgment at Page Nos. 67 to 69 are relevant, which read as under:

"Ïx. In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central

Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial. As pointed out by the Central Commission that the Appellant is only eligible for surcharge if the payment is not made in time by the Respondent Nos. 2 to 4 after raising of the supplementary bill arising out of approved Change in Law event and in PPA there is no compensation mechanism for payment of interest or carrying cost for the period from when Change in Law becomes operational till the date of its approval by the Central Commission. We also observe that this Tribunal in SLS case after considering time value of the money has held that in case of re-determination of tariff the interest by a way of compensation is payable for the period for which tariff is re-determined till the date of such re-determination of the tariff. In the present case after perusal of the PPAs we find that the impact of Change in Law event is to be passed on to the Respondent Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA. The relevant extract is reproduced below:

> *"13.4 <u>Tariff Adjustment Payment on account of Change in Law</u>*
>
> *13.4.1 <u>Subject to Article 13.2, the adjustment in Monthly Tariff Payment shall be effective from</u>*
>
> *(a) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or*
>
> *(b) the date of order/ judgement of the Competent Court or tribunal or Indian Government instrumentality, it the Change in Law is on account of a change in interpretation of Law.*
>
> *(c) the date of impact resulting from the occurrence of Article 13.1.1.*

From the above it can be seen that the impact of Change in Law is to be done in the form of adjustment to the tariff.

To our mind such adjustment in the tariff is nothing less then re-determination of the existing tariff.

x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of 'restitution' i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon'ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India &Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA."

65. So also, the Apex Court in the latest judgment in **Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. vs. Adani Power Limited & Ors.,** in Civil Appeal No. 5865 of 2018 approved the carrying cost being allowed and reiterated the principle that in terms of contract, parties must be put to same economic position which they enjoyed prior to the change in law occurrence.

66. The contention of the Respondent-Commission that this claim was originally not sought for, has been considered, and we are of the opinion that this Tribunal has wide discretionary powers to mould relief. In

support of this, reliance can be placed on the Judgments in **Bhagwati Prasad vs. Chandramaul reported in AIR 1966 SC 735 and Hindalco Industries Ltd. vs. Union of India reported in (1994) 2 SCC 594** wherein it was held that this Tribunal has wide discretionary powers to mould relief, if not specifically prayed for.

67. Similarly, the Appellate Authority has all the powers which the original authority may have in deciding the question before it. In support of this, we may refer to the judgments of the Supreme Court in **Remco Industrial Workers House Building Co-operative Society vs. Lakshmeesha M. & Ors. (2003) 11 SCC 666**; ***Pasupuleti Venkateswarlu vs. Motor and General Traders (1975) 1 SCC 770; Shikharchand Jain vs. Digamber Jain Praband Karini Sabha (1974) 1 SCC 675***; ***OTIS Elevator Co. (India) Ltd. vs. CEE (2016) 16 SCC 461 and Jute of Corporation of India Ltd. v. Commissioner of Income Tax & Ors. 1991 Supp. (2) SCC 744***.

68. Therefore, it is clear that this Tribunal being the Appellate Authority having regard to the facts and circumstances of the case can allow the prayer by moulding the relief to meet the ends of justice. If the terms of the contract provide that parties must be brought to same economic position, it would include that all additional costs, which occurs after the cut-off date in terms of the change in law event, have to be compensated

and if there is any time gap between the date of spending and realising the said amount, carrying cost/interest has to be paid then only the parties could be put to same economic position. Therefore, this claim of the Appellant is also allowed.

69. Coming to interest on additional working capital on account of change in law, the judgment of this Tribunal dated 14.08.2018 in **GMR Warora Energy's** case (Appeal No. 111 of 2017) is relevant, the relevant portion reads as under:

> *"xxvii Now we take the next issue i.e. increase in working capital requirementdue to Change in Law events. Let us examine the findings of the Central Commission in the Impugned Order. The relevant extract is reproduced below:*
>
> > ***"(L) Increase in working capital requirement due to higher cost of imported coal.***
> >
> > *109. The Petitioner has submitted that change in law events will have an impact on the interest on working capital due to increase in investment in value of coal stock including alternate coal, imported coal sourced at significantly higher cost. This will have an impact on interest on working capital resulting from Change in Law event and the Petitioner is eligible for tariff relief on account of increase in working capital in such a manner that it is restored to the same economic position as before such change. In this connection it is clarified that there is no concept of interest on working capital in competitively bid tariff and the bidders are required to quote all inclusive tariff. The claim on this account is rejected under Change in Law."*

The Central Commission has held that there is no concept of IWC in competitively bid projects and the bidders are required to quote all-inclusive tariff under Section 63 of the Act and rejected the claim of GWEL.

xxvii. *After perusal of the RFP/PPA, we also observe that the tariff to be quoted was all-inclusive tariff and there is no provision for separately allowing IWC arising out of Change in Law events. GWEL has contended that it has to be restored to the same economic position and hence it is entitled for compensation on account of increase in IWC. We observe that the Change in Law provision is to restore GWEL to same economic position as if the Change in law event has not occurred by way of increase/decrease in tariff. This does not mean that the differential tariff (if any) is to be determined component wise as done for Section 62 based PPAs as the bidder was required to quote an all inclusive tariff for a period of 25 years considering all relevant aspects. Hence, the contention of GWEL is unsustainable.*

Accordingly, this issue is not applicable to the facts of the case."

In view of this Tribunal already taken such view on the issue of interest on additional working capital, we decline to allow the said claim.

70. Then coming to levy of water charges, apparently, the present tariff was based on competitive bidding. It is the contention of the Appellants that the notification issued by the Government of Orissa wherein water charges were increased has to be treated as change in law event, as such increase in water charges increases cost in the business of generation of

electricity for supply to the procurers. Apparently, water charges were consistently held as operating cost incurred for procuring water during operation period. In terms of PPA, bidder has to make independent enquiry and satisfy itself with respect to the details like information, inputs, conditions and circumstances and all such factors that may have effect on the quote in the bidding. In competitive bidding process, bidder is required to quote an all inclusive tariff including capital cost, operating cost etc., In that view of the matter, we are of the opinion that the Appellant is not entitled for any compensation towards increase in water chares. It is an admitted fact that price on water charges if not envisaged in the PPA and depending upon whether in any particular case bidder has quoted the energy charges in escalable or non-escalable components considering the market risks, the same price, if found in the escalation rate index published on half yearly basis by the Central Commission, one can seek such increase in water charges, since bidder is entitled to quote only escalable energy charges or only non-escalable energy charges or combination of both. In that view of the matter, we are of the opinion that there cannot be any compensation on this count.

71. Then coming to the issue of change in MAT rate, it is relevant to quote the observation of this Tribunal in the judgment of **GMR Warora**

Energy's case. The relevant portion of the said Judgment reads as under:

> *"xxiii. Now we take the issue of Change in MAT rate. We first examine the impugned findings of the Central Commission. The relevant extract is reproduced below:*
>
> *"65. We have considered the submission of the Petitioner. The similar issue has been considered by the Commission in its order dated 30.3.2015 in Petition No. 6/MP/2013 where in the Commission has not considered MAT under change in law. The relevant portion of the said order is extracted as under:*
>
> > *"46. We have considered the submission of the Petitioner and the respondents. The question for consideration is whether the Finance Act, 2012 changing the rate of income tax and minimum alternate tax are covered under Article 13.1.1(i) of the PPA. The income tax rates are changed from time to time through various Finance Acts and therefore, therefore they will be considered as amendment of the existing laws on income tax. However, all amendments of law will not be covered under "Change in Law" under Article 13.1.1(i) unless it is shown that such amendments result in change in the cost of or revenue from the business of selling electricity by the seller to the procurers under the terms of the agreement…… Accordingly, any increase or decrease in the tax on income or minimum alternate tax cannot be construed as "Change in Law" for the purpose of Article 13.1 of the PPA. In the case of tariff determination based on capital cost under Section 62*

of the Electricity Act, 2003, one of the components specifically allowed as tariff is tax on income. The pass through of minimum alternate tax or income tax in case of tariff determination under section 62 is by virtue of the specific provision in the Tariff Regulations which require the beneficiaries to bear the tax on the income at the hand of the generating company from the core business of generation and supply of electricity. Such a provision is distinctly absent in case of tariff discovered through competitive bidding where the bidder is required to quote an all-inclusive tariff including the statutory taxes and cesses. Thus, the change in rate of income tax or minimum alternate tax cannot be construed as "Change in Law" for the purpose of Article 13.1 of the PPA."

66. In the light of the above decision, the claim of the Petitioner for relief under change in law on account of increase in MAT rate is not admissible and is accordingly disallowed."

The Central Commission has held that all events cannot be said to covered under Change in Law event unless such amendments result in change in the cost of or revenue from the business of selling electricity by the seller and accordingly, change in MAT rate cannot be construed to be Change in Law event as it does not affect the cost or revenue from business of selling electricity.

xxiv. From perusal of the provisions of the Change in Law Article we find that the change in MAT is not resulting in change in cost or revenue of GWEL for selling electricity to MSEDCL/the Discom. Accordingly, there is no legal infirmity in the observations of the Central Commission on this issue.

xxv. GWEL has relied on the judgement of Hon'ble Supreme Court in the JK Industries Case on this issue. We have gone through the said judgement and we find that the issue in the said judgement and the issue in hand are different and hence in view of facts and circumstances of the present case the said judgement is not applicable to the present case.

xxvi. GWEL has also relied on the judgement of this Tribunal in case of Jaiprakash Hydro Power Ltd. v. Himachal Pradesh State Electricity Regulatory Commission &Anr. in Appeal No. 39 of 2010 (JP Judgement) wherein reimbursement of MAT was allowed on account of Change in Law. The order dated 20.04.2015 in Petition 163 of 2014 of MERC is also relied for allowing increase in MAT Rate as a Change in Law. We have gone through the JPJudgement of this Tribunal and we find that there was a specific provision in the PPA in the said case for payment of tax on income by the Himachal Pradesh Electricity Board based on which the change in MAT rate was allowed by this Tribunal. In the present case there is no such provision in the PPA for allowing payment of tax on income by the Procurer. Hence, the said judgement is not applicable to the present case. Accordingly, the reliance on the JPJudgement and the order of the MERC which is based on the JPJudgement and other judgements of this Tribunal is misplaced. The other two judgements of this Tribunal quoted by MERC in the said order has no relevance to the present case as they are not related to bidding under Section 63 of the Act. Reliance of GWEL on new tariff policy which was issued in 2016 is also misplaced as the bidding was conducted based on the earlier tariff policy issued by GoI.

In view of our discussions as above, this issue is answered against GWEL/Appellant."

In view of the above, the Appellants are not entitled for increase in MAT rate.

72. Then coming to shift from UHV base/methodology to GCV methodology, pricing of the coal on account of notification of the Central Government resulting in increase in the cost of coal, this Tribunal in **GMR Warora Energy's case** had an occasion to consider the said issue. The relevant paragraphs read as under:

> *"xix On next issue i.e. shift from UHV based pricing to GCV based pricing mechanism the Central Commission has held as below. The relevant extract from the Impugned Order is reproduced below:*
>
> *"111. We have considered the submissions of the Petitioner and the Respondents. The Commission dealt with the same issue in order dated 3.2.2016 in Petition No. 79/MP/2013 as under:*
>
> *"58. We have considered the submissions of the Petitioner. Prior to 1.1.2000, the Central Government under Section 4 of the Colliery Control Order, 1945, was empowered to fix the grade-wise and colliery-wise prices of coal. Subsequently, based on the recommendations of Bureau of Industrial Costs and Prices (BICP), Government of India decided to de-regulate the prices of all grades of coking coal and A, B, and C grades of non-coking coal from 22.3.1996. Subsequently, based on the recommendation of the Committee on Integrated Coal Policy, the Government*

of India decided to de-regulate the prices of soft coke, hard coke and D grade of non-coking coal with effect from12.3.97. The Government also decided to allow CIL and SCCL to fix prices of E, F and G grades of non-coking coal once in every six months by updating the cost indices as per the escalation formula contained in the 1987 report of the BICP and on 13.3.1997, necessary instructions were issued to CIL and SCCL in this regard. The pricing of coal was fully deregulated after the Colliery Control Order, 2000 notified on 1.1.2000 in supersession of the Colliery Control Order, 1945. Under the Colliery Control Order, 2000 the Central Government has no power to fix the prices of coal. Therefore, the prices of coal from CIL and its subsidiaries were market based. Only the pricing methodology was UHV basis at the time of bid submission which was switched over to GCV based pricing w.e.f. 1.1.2012 vide Govt. of India notification dated 30.12.2011. In our view, any decision affecting the price of inputs for generating electricity including coal cannot be covered under Change in Law except the statutory taxes, levies and duties having an impact on the cost of or revenue from the supply of electricity to the procurers. As already noted, para 2.7.2.4 of the RfP required the bidders to reflect all costs involved in procuring the inputs (including statutory taxes, duties and levies thereof) in the quoted tariff. Moreover, the Petitioner has quoted stream 1 tariff consisting of non-escalable capacity charges and non-escalable energy charges, thereby taking all risks of price escalation in inputs including coal. Therefore, change from UHV to GCV based pricing cannot be covered under change in law. Hon`ble Appellate Tribunal For Electricity in the

judgment dated 12.9.2014 in Appeal No. 288 of 2013 has observed as under:

> *"According to the bidding documents, the Appellant is not entitled to any increase in energy charges on account of increase in base price of fuel. However, the impact on account of change in the expenditure due to Change in Law has to be allowed as per the actuals subject to verification of proof submitted by the Appellant."*

In the light of above judgement also, the change in the base price of fuel on account of switchover from the UHV method to GCV method of coal pricing is not admissible under change in law."

112. In the light of above order, the change in the base price of fuel on account of switchover from the UHV method to GCV method of coal pricing is not admissible under change in law."

The Central Commission based on the judgement of this Tribunal and considering deregulation of price of coal has decided that change in the basis of pricing mechanism is not admissible under Change in Law.

xx. *We observe that any change in base price of coal is not envisaged in the PPA and the same is reflected in the CERC escalation rate index published on half yearly basis. Any such change in base price of coal could be taken care in the form of escalation. However, it depends on the way the bidder has quoted the energy charges in escalable and non escalable components considering market risks. The bidder is free to quote only escalable energy charges or only non escalable energy charges or a combination of both. In any case the bidder is not*

eligible for compensation due to change in base price of coal as it has already inbuilt in its bid the perceived risks. We also observe that GWEL has quoted only the escalable energy charges and would have been adequately compensated for such change in pricing mechanism. The Central Commission has also observed that GWEL has also not quantified the claim in its petition before the Central Commission due to such change in pricing mechanism.

xxi. *This Tribunal in the judgment dated 12.9.2014 in Appeal No. 288 of 2013 has clearly concluded that as per the provisions of the said PPA, there is no co-relation of the base price of electricity quoted by the Seller and computation of compensation as a consequence of Change in Law. The compensation is only with respect to the increase/decrease of revenue/expenses of the Seller following the Change in Law. The same view has been reiterated by this Tribunal in the Sasan Judgement. The provisions in the PPA in the instant case are similar to that dealt by this Tribunal in Appeal No. 288 of 2013 on issue of base price of coal.*

xxii. *In view of the above, we are of the opinion that there is no legal infirmity in the order of the Central Commission on this issue.*

Accordingly, this issue is answered against GWEL."

In the light of above opinion of the Tribunal in the other appeals on this issue, we decline to interfere with the opinion of Commission.

73. In view of our discussion and reasoning, we are of the opinion that the Appellants are entitled for compensation on the following change in law events:

i) Increase/revision in the railway freight charges in terms of notifications issued by the Ministry of Railways and Ministry of Finance on account of imposition of development surcharge, busy season surcharge and service tax;

ii) VAT rate enhancement from 4% to 5% from 30.03.2012 onwards;

iii) Carrying cost/interest on compensation on the above items after ascertainment of the same by computation.

iv) The carrying cost shall be computed on the compensation assessed from the date of respective notification/circular/order from the concerned Ministry/Department/Governmental instrumentality till payment is made.

74. We direct the CERC to compute the compensation on the above change in law events which are allowed in this Judgment within two months from the date of receiving a copy of this judgment.

75. Appeal is allowed in part. The parties to bear their own costs.

76. Pronounced in the Open Court on this 27th day of May, 2019.

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

ts/tpd