IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO.90 OF 2014

Dated: 23rd March, 2015

Present: Hon'ble Smt. Justice Ranjana P. Desai, Chairperson.
Hon'ble Shri Rakesh Nath, Technical Member.

IN THE MATTER OF:

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

Versus

1. **Central Electricity Regulatory Commission, 3rd and 4th Floor, Chanderlok Building, 36, Janpath, New Delhi – 110 001.**

2. **MP Power Management Company Limited, Shakti Bhawan, Jabalpur – 482 008, Madhya Pradesh.**

3. **Paschimanchal Vidyut Vitran Nigam Limited, Victoria Park, Meerut – 250 001, Uttar Pradesh.**

4. Purvanchal Vidyut Vitran Nigam Limited, Hydel Colony, Bhikaripur, Post – DLW, Varanasi – 221 001, Uttar Pradesh.

5. Madhyanchal Vidyut Vitran Nigam Limited, 4A – Gokhale Marg, Lucknow – 226 001, Uttar Pradesh.

6. Dakshinanchal Vidyut Vitran Nigam Limited, 220 kV Vidyut Sub-Station, Mathura Agra By-pass Road, Sikandra, Agra – 282 007, Uttar Pradesh.

7. Ajmer Vidyut Vitran Nigam Limited, Hathi Bhata, City Power House, Ajmer – 305 001, Rajasthan.

8. Jaipur Vidyut Vitran Nigam Limited, Vidyut Bhawan, Jaipur – 302 005, Rajasthan.

9. Jodhpur Vidyut Vitran Nigam Limited, New Power House, Industrial Area, Jodhpur – 342 003, Rajashtan.

10 Tata Power Delhi Distribution Limited, Grid Sub-Station Building Hudson Lines, Kingsway Camp, New Delhi – 110 009.

11. BSES Rajdhani Power Limited, BSES Bhawan, Nehru Place, New Delhi – 110 019.

12. BSES Yamuna Power Limited, BSES Bhawan, Nehru Place, New

Delhi – 110 019.)

13. Punjab State Power Corporation Limited, The Mall, Patiala – 147 001, Punjab.)

14. Haryana Power Purchase Centre Room No. 239, Shakti Bhawan, Sector 6, Panchkula – 134 109, Haryana)

15. Uttarakhand Power Corporation Limited, Urja Bhawan, Kanwali Road, Dehradun – 248 001, Uttarakhand.) **... Respondents**

Counsel for the Appellant(s) : Mr. J.J. Bhatt, Sr. Adv.
Mr. Vishrov Mukherjee
Mr. Janmali Manikala

Counsel for the Respondent(s) : Mr. Saurabh Misra for **R.1**

Mr. G. Umapathy
Ms. R. Mekhala for **R.2**

Mr. Pradeep Misra
Mr. Manoj Kumar Sharma for **R.3 to 6.**

Mr. Anand K. Srivastava
Mr. Parinay Shah for **R.10**

Mr. Rahul Dhawan for **R.11 & 12.**

Mr. Anand K. Ganesan
Ms. Mandakini Ghosh for **R.13**

Mr. M.G. Ramachandran
Ms. Poorva Saigal
Ms. Anushree Bardhan for **R.14**

J U D G M E N T

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

1. The Appellant - Sasan Power Limited, is a special purpose vehicle which was incorporated by M/s Power Finance Corporation Limited **("PFC")**, the nodal agency of Government of India for implementation of its Ultra Mega Power Project initiative on 10/02/2006 for the development and implementation of a coal fired, ultra mega power project based on linked captive coal mine using super-critical technology with an installed capacity of 4000 MW (plus/minus 10%) at Sasan, Madhya Pradesh (**"the Project")**. The Project was conceived by Government of India to be implemented by a developer selected through a tariff based international competitive bidding process.

2. Respondent No.1 is Central Electricity Regulatory Commission (**"the Commission"),** which has passed the impugned Order. Respondent No.2 is the lead procurer under the Power Purchase Agreement **("PPA")** executed between the

Appellant and the procurers. Respondent Nos. 3 to 15 are the procurers. Respondent No.2 being the lead procurer is authorized to represent all the procurers.

3. Gist of the facts must be stated to understand the controversy involved in this case. On 30/03/2006, with a view to selecting a suitable project developer to establish and operate the Project and supply power to the procurers for 25 years, the bid process was initiated by issuing the Request for Qualification ("**RFQ**") for tariff based bidding process for procurement of power on long-term basis from power station to be setup at Sasan, Madhya Pradesh. In response to the RFQ, 15 potential bidders submitted the response. Upon evaluation, 13 potential bidders including Reliance Power Limited (**"R-Power")** were found to have met the qualification criteria and were qualified. On 21/08/2006, after evaluating and short-listing qualified potential bidders including RPower, the Request for Proposal **("RFP")** was issued to the shortlisted entities. RFP was subsequently amended on 22/09/2006.

4. In response to the RFP, 10 bidders including RPower submitted their bids in December, 2006. On the basis of these bids, Globaleq-Lanco consortium was declared as successful bidder. Since Globaleq-Lanco was found not meeting the prescribed qualification, financial bids of December, 2006 were scrapped and in July 2007 fresh/revised financial bids were invited. On 28/07/2007, R-Power submitted its revised bid containing Quoted Capacity Charges and Quoted Energy Charges, which resulted in an evaluated levallised tariff of Rs. 1.19616/kWh. On 01/08/2007 as advised by the Empowered Group of Ministers**(EGoM)**, the revised bill submitted by R-Power, which resulted in evaluated levallised tariff of Rs. 1.19616, was accepted as the lowest levallised tariff by the Appellant and Letter of Intent was issued in favour of R-Power. On 07/08/2007, R-Power acquired the entire shareholding of the Appellant from PFC. On the same day, the Appellant executed the PPA with the procurers. On 15/10/2008, a supplemental PPA was entered into between the Appellant and the procurers primarily to

advance the scheduled date of commercial operation of various units of the Project.

5. On 17/01/2013, the Cabinet Committee on Political Affairs took a decision with respect to the deregulation of price of diesel based on which the Ministry of Petroleum and Natural Gas ("**MoPNG**") had issued orders to the Oil Marketing Companies ("**OMCs**") relating to the diesel price change. In terms of this decision, two major changes in the pricing policy were made. They are as under:

> *"(a) Two separate categories of diesel consumers were created (i) bulk consumers who purchased diesel directly from the refineries of the marketing companies; and (ii) retail consumers who would purchase diesel from the fuel pumps operated by the Oil Marketing Company (OMC) and their dealers.*
>
> *(b) For bulk diesel consumers, the subsidy available on diesel was withdrawn and they were required to purchase diesel at the actual market prices."*

A copy of the said decision communicated to OMCs obtained by the Appellant under the Right to Information Act is annexed to

the Appeal, Relevant directions issued to the OMCs could be quoted:

a) increase the retail price of diesel in the range of 40 paise to 50 paise per litre per month(excluding VAT as applicable in different States/Union Territories) until further orders.

b) sell diesel to all consumers taking bulk supplies directly from the installations of the OMCs at the non-subsidized market determined price with immediate effect. OMCs will not be eligible to any subsidy on such direct sale of diesel to bulk consumers.

6. On 10/04/2013, the Appellant wrote a letter to the procurers informing them of the change in law and its financial impact on the Project. In this letter, the Appellant wrote that the estimated impact on account of this change in law by creation of two separate categories of diesel consumers would be approximately Rs.133 crores considering the annual peak coal production level. The Appellant further wrote that it would approach the Central Commission for suitable compensation for the event of change in law.

7. On 11/04/2013, the Appellant filed a petition being Petition No.75/MP/2013 seeking compensation relief on account of adjustment of the project economics due to change in law which had led to an increase in the price of diesel and impacted the costs during the operative period of the Project. On 22/02/2014, the Central Commission passed the order rejecting the Appellant's petition. The Central Commission observed *inter alia* that change in the price of diesel did not amount to change in law. The said order is challenged in this Appeal. Following prayers are made in this appeal.

> *"(a) Set aside the Impugned Order of the Ld. Commission dated 22.02.2014;*
>
> *(b) Declare that the decision of the Government of India with respect to creation of two categories of diesel consumers and charging of market linked price of diesel to the bulk consumers (Appellant being one such bulk consumer) is a Change in Law event impacting revenues and costs of the Appellant during the Operating Period for which the Appellant may be compensated in terms of Article 13 of the PPA; and*
>
> *(c) Restore the Appellant to the same economic condition prior to occurrence of Change in Law by*

permitting the Appellant to raise Supplementary Bills in terms of Article 13.4.2 of the PPA as per the Computation set out in Paragraph 9.15(l)(v) of the Appeal to compensate the Appellant as and when the financial impact of the Change in law arises."

8. In support of the appeal, we have heard learned senior counsel Mr. J.J. Bhatt. We have also perused the written submissions tendered by him. Counsel submitted that decision of the Government of India ("**GoI**") with respect to deregulation of diesel price creating two separate categories of diesel consumers as bulk consumers and retail consumers and withdrawing subsidy available on diesel from bulk diesel consumers so as to make them purchase diesel at actual market price amounts to change in law as prior to the categorization all consumers of diesel were paying a single uniform price which was regulated/fixed by GoI. The Appellant being a bulk consumer is now required to procure diesel from OMCs at the 'non-subsidized market determined' price as opposed to the subsidized price at which diesel was made available to all consumers prior to 17/1/2013. Drawing our attention to the definition of the term

"Law" occurring in Article 14 of the PPA, counsel submitted that the said definition is an inclusive definition. It includes 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. It further includes all applicable rules, regulations, decisions of the Appropriate Commission. In support of his submission that the word "includes" has an extending force, counsel relied on ***Regional Director, Employees State Insurance Corporation v. High Land Coffee Works of PFX Saldanha & Sons & Anr.***[1] and ***The South Gujarat Roofing Tiles Manufacturers Association & Anr. v. State of Gujarat & Anr.***[2]

9. Counsel also drew our attention to the definition of the term 'Indian Governmental Instrumentality'. The said term has been defined to mean amongst others, decision of GoI. Counsel submitted that the decision of the Government authorities and

[1] (1991) 3 SCC 617
[2] (1976) 4 SCC 601

bodies to regulate inter alia the pricing of products would fall under the definition of 'Law'. Counsel also took us to Article 13.1.1 which defines 'Change in Law' inter alia as the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal of any law, occurrence of any of the events mentioned therein after the date which is seven days prior to the bid deadline. Counsel took us to the other relevant provisions of the PPA and submitted that since the decision to create two categories of consumers and withdraw subsidy from bulk consumers was after the bid deadline, the same will amount to a change in law for which compensation ought to be granted in terms of Article 13 of the PPA.

10. Drawing our attention to the response of MoPNG dated 12/2/2013 to a query under the Right to Information Act, counsel submitted that the said response indicates that creation of separate categories of retail and bulk consumers was pursuant to the decision of GoI to authorize such categorization. Such a decision falls within the ambit of Article 13 of the PPA

and will amount to change in law. Counsel submitted that in terms of Article 73 of the Constitution of India, the executive power of GoI extends *inter alia* to matters with respect to which Parliament has power to make laws. Counsel pointed out that power to regulate petroleum and petroleum products has been given to the Union in terms of Entry 53 of List 1 of the Seventh Schedule to the Constitution. On the scope of the executive power of GoI, counsel relied on ***Rai Sahib Ram Jawaya Kapur v. State of Punjab***[3], where it is held that it is not necessary for the existence of a particular law for the executive branch to exercise its powers. The executive is free to exercise all powers with respect to any matters upon which the Union is competent to legislate. Counsel also relied upon ***Reliance Natural Resources Ltd. V. Reliance Industries Ltd.***[4] in support of his submission that the decision of GoI acting through the Cabinet Committee on Political Affairs to create two categories of consumers and to withdraw the subsidy on diesel for bulk consumers has a force of law and would therefore amount to

[3] AIR 1955 SC 549
[4] (2010) 7 SCC 1

change in law in terms of Article 13 of the PPA. Counsel submitted that GoI was and is still regulating the price of petroleum products in the country notwithstanding dismantling of Administered Price Mechanism ("**APM**"). Counsel submitted that the State Commission has erred in holding that APM was dismantled in 1997 and 2002 and reading the same as automatic or imminent deregulation/decontrol of prices of petroleum products. Counsel submitted that GoI decided to dismantle APM with effect from 1/4/2002 vide Notification dated 1/4/1998. However, there is intrinsic evidence to show that even thereafter GoI continued regulation of the pricing of diesel. In this connection, counsel drew our attention to the questions answered by the Minister of MoPNG, reports of MoPNG and of various Committees constituted by GoI on the issue of pricing of petroleum products. We shall advert to them at the appropriate time. Counsel further submitted that the Commission erred in considering the issue of increase in price of diesel as change in law and linking the same to the Appellant not having quoted an escalable component of the tariff. Counsel submitted

that increase in the price is a consequence of change in law i.e. creation of two categories of diesel consumers. Counsel submitted that the Appellant had indeed considered appropriate escalation in submitting its bid. Relying on the State Commission's judgment in Petition No.155/MP/2012 and Petition No.159/MP/2012, counsel submitted that in that case, the State Commission had granted compensatory tariff on account of increase in price of imported coal even though the increase in price was not covered in the escalable component of tariff in either case.

11. Counsel further submitted that the Commission erred in holding that the Appellant could purchase diesel from private players because the private players are either no longer operating or have limited operation. Counsel submitted that GoI's decision to create two separate categories of consumers and withdraw subsidy for bulk consumers of diesel has gravely affected the economic equilibrium of the Project. Due to this, the bulk consumers like the Appellant will have to bear an additional

impact of about 148 crores annually as per the diesel prices prevailing on 1/3/2014. Counsel submitted that coal-bids are an integral part of the Project. Diesel is required for operating the essential mining equipment. Counsel pointed out that at the time of bid submission, all consumers of diesel paid uniform subsidized price. The price of diesel as on 21/7/2007 i.e. cut-off date for submission of bids was around Rs.33.91 per litre. After deregulation of diesel, the Appellant being a bulk consumer had to purchase the diesel at the market price from OMCs. Steep increase in diesel price has a serious impact on Project economics. Counsel submitted that it is necessary to ensure financial viability of the Project to achieve the object of the Electricity Act, 2003. Counsel submitted that the Appellant had only considered a reasonable escalation of 4.5% in the bid. The impact of the same was built into the non-escalable component. By quoting the non-escalable component, the benefits of the escalation index are not available to the Appellant and the same have to be passed on to the consumers. Counsel submitted that the Commission erred in not devising a mechanism to

compensate the Appellant. Counsel urged that in the circumstances, the impugned order deserves to be set aside and prayers made in the appeal may be granted.

12. Counsel for Respondent No.1 has supported the impugned Order.

13. On behalf of Respondent No.2, it is submitted that the Appellant must confine its claim to the terms of the PPA and the tariff based competitive bidding process needs to be maintained. The change in diesel prices from time to time is not on account of any law including the electricity laws in force in India. The change over from APM to the market driven prices for diesel did not occur post the cut-off date to constitute a change in law under Article 13 of the PPA. The provision of subsidy thereafter by GoI for diesel was not pursuant to any legal mandate and, in any event, the increase in diesel prices cannot be said to be covered by the term 'Law' as defined in the PPA. It is further submitted that unless there is an impact on cost or revenue related to the business of selling electricity by the Appellant to

the procurers, mere change in law is not sufficient. The increase in diesel prices cannot, therefore, be treated as an increase in the cost of business of selling electricity. Diesel is used for exploitation of coal mines as a whole. The Appellant cannot claim the impact of the increase in diesel prices as a cost of generation of electricity when the coal mine exploitation and mining operation is independent of generation and sale of electricity to the procurers. It is submitted that the Appellant was fully aware at the time of submission of bid that the decision of phased dismantling of APM gradually migrating towards specific timeline for it was determined in Gazette Notification dated 24/11/1997 which was further reiterated in the Gazette Notification dated 28/3/2002 where APM was discontinued and was market determined with effect from 1/4/2002. It is submitted that the subsequent grant of subsidy to the OMCs was a policy decision which cannot be termed as law as the law is the Notification dated 28/3/2002 issued by GoI declaring the dismantling of APM in Hydro Carbon Sector with effect from 1/4/2002. It is

submitted that, the appeal is totally devoid of merit and, therefore, be dismissed.

14. On behalf of Respondent No.10 – Tata Power Delhi Distribution Ltd., written submissions have been filed. It is submitted by Respondent No.10 that the Project was conceived by GoI to be implemented by a developer to be selected through tariff based international competitive bidding process. Pursuant to the competitive bidding process based on the RFP issued, R-Power was declared as successful bidder for execution of the Project. LoI was issued to R-Power on 1/8/2007 and in terms of the provisions of the RFP, it acquired 100% shareholding of the SPV on 7/8/2007. Thereafter, PPA and supplementary PPA were entered into between the Appellant and the procurers, which included Respondent No.10. It is submitted that in ***Essar Power Ltd. v. UPERC & Anr.***,[5] this Tribunal has upheld the sanctity and rationale for determination of tariff through competitive bidding. Rights and obligations of the parties in the Project are

[5] Judgment dated 16/12/2011 in Appeal No.82 of 2011

governed by the terms and conditions of the PPA. Accordingly, the claims of the Appellant for increase in tariff and/or monetary compensation for change in law, would have to be based on the PPA between the parties. GoI decided to dismantle the APM and deregulate the petroleum products in 1997. Vide Notification dated 21/11/1997, it was decided by GoI to dismantle the APM in a phased manner. It was decided that the consumer prices of major petroleum products will be moved to market prices. Thereafter, vide Notification dated 1/4/2002, GoI decided to dismantle the APM in Hydrocarbon Sector with effect from 2002. The winding up of the Oil Pool Account was announced with effect from 01/4/2002. The decision to dismantle APM and market linked pricing of diesel existed before the cut-off date for submission of bid i.e. 21/7/2007. Therefore, the Appellant's case that there is change in law as contemplated in PPA and, therefore, it is entitled to seek compensation, is misplaced. Reliance is placed on the judgment of this Tribunal in ***Nabha Power Ltd. & Anr. v. Punjab State Power Corporation Ltd.***

& Anr.[6] wherein it is held that the press release of a Cabinet decision is only a communication of the decision of the Cabinet and cannot be termed as 'Law' or having any enforceable effect. Therefore, the impugned decision communicated by GoI to the Appellant would not be covered by the definition of the term 'Change in Law' as incorporated in Article 13 of the PPA. It is submitted that the policy decisions are not subject to judicial review except on limited grounds. Eliminating the subsidy on bulk consumers is a policy decision of the Government and not law in terms of the PPA. It is the prerogative of the Government. The Government orders increasing or decreasing the subsidy would not be law as per the definition of 'Change in Law' contemplated under Article 13 of the PPA. It is submitted that in clause 13.2 of the PPA, upon the compensation for a change in law event, seller would only be paid if the change in revenue or cost is in excess of 1% of the aggregate value of the LC. Therefore, only after incurring the additional cost, a claim can be

[6] Judgment dated 30/6/2014 in Appeal No.29 of 2013

made. It is submitted that the Appellant's request before the Commission was not maintainable since it was merely in anticipation of the increased cost. Hence, there is no ground for interference with the tariff that has been arrived at after competitive bidding.

15. It is further submitted that in terms of provisions of paragraph 2.7.1.1.3 of the RFP, escalation price of diesel is not admissible under the competitive bidding guidelines and it ought to form a part of the levallised tariff quoted by the Appellant. In any event, the Appellant had the full liberty to quote an escalable component keeping in view the diesel price variation at the time of the bid submission. The Appellant did not disclose in the bid the necessary details as to the figures utilized / considered for the internal calculation. Hence, claim for escalation in price is misplaced. It is submitted that computation of additional liability by the Appellant is based on conjectures. Even if it is held that discontinuance of subsidy on the bulk consumers is held to be a change in law, the computation of the increased cost

is incorrect. It is based on artificially assumed escalation factor of 4.5% per annum. If the prayer made by the Appellant is allowed, the same would have the effect of decreasing the benefit which the beneficiaries including Respondent No.10 were to get from the Project. Counsel submitted that there is no merit in the appeal and the appeal is liable to be dismissed.

16. It is submitted on behalf of Respondent No.13 that the PPA was entered into on the basis of tariff based competitive bidding wherein the Appellant decided to quote non-escalable component of energy charges keeping in view the diesel price variation for the entire project term of 25 years. This was a commercial decision of the Appellant and, it must be borne in mind that, the Appellant decided to take the risk of any escalation of diesel prices on itself. The crucial date is the cut-off date with reference to the bid submitted by the Appellant i.e. 27/7/2007. The alleged change in law or the de-regulation of diesel prices through APM by GoI had occurred as early as in the year 2002. Therefore, the change in law, if any, had occurred much prior to

the cut-off date of the bids. Thus, the change over from APM to the market driven prices for diesel did not occur post the cut-off date so as to constitute a change in law under Article 13 of the PPA. Unless the Appellant is able to establish that there was a clear positive interpretation of law by a competent court of law, Tribunal or the Indian Government Instrumentality different at the time of cut-off date and such an interpretation got changed subsequently, it cannot be construed as change in law. The clarifications, issued from time to time by the Government authorities, are on interpretation and are premised on existing law being the same and, do not amount to a change in law. Unless the Appellant shows that there exists a law prior to the alleged change in law different from the law which has come into existence later and the new law has brought about an increase as compared with the existing law, the Appellant cannot be given any relief. GoI had in the year 2002 changed the legal position, de-regulated the oil prices and permitted private parties to enter into the sector. Pursuant thereto, the private parties entered into the business of sale of petrol and diesel. GoI did not control the

market price as a whole but it only directed PSU OMCs to control their selling price which establishes the fact that since the market prices were de-regulated with effect from 1/4/2002 and there were private players, whose prices were not covered under GoI directive, they were free to price their products as per their discretion. It is further contended that GoI as the controlling shareholder of the State entities and by providing subsidy, controlled the selling prices of the PSUs. This was not by virtue of the law as existing, but because of the shareholder of the companies and the decision to provide subsidy from time to time. GoI did not control the market price of the entire sector. Giving of subsidy would not change the legal regime. The bidders were fully aware of the legal regime on the pricing of diesel at the time of submission of bids in July, 2007. If the subsidy was not provided, the Appellant, right from 2007, would have paid higher price for diesel. The Appellant has, in fact, benefitted till the time the subsidy was provided. The PPA under which the claim is being made was entered into pursuant to a competitive bidding conducted by the State Government for procurement of power.

The regulatory power of the Commission cannot be sought to be exercised as overriding the contractual provisions so as to vitiate the entire competitive bidding process conducted by the procurers. In the circumstances, it is submitted that the appeal deserves to be dismissed.

18. We have heard Mr. M.G. Ramachandran, learned counsel for Respondent No.14. We have also carefully perused the written submissions filed in the court. Counsel submitted that the diesel price was subject to the statutory control known as APM till 31/3/2002. The APM was dismantled vide Resolution dated 28/3/2002. Prior to the same, by Resolution dated 21/11/1997, GoI had declared the phased programme of dismantling the APM. This was acted upon and led to the complete dismantling of the statutory mechanism on 28/3/2002 with effect from 1/4/2002. After Resolution dated 28/3/2002, there has been no statutory mechanism to control the diesel price. Counsel also relied on the Report of the Expert Group on Pricing of Petroleum Products dated 2/2/2010 under the

Chapter "Overview of the Government Policy on Pricing of Petroleum Products". Relying on the extracts from this Overview, counsel submitted that it is evident that after 1/4/2002, the price control measures were by administrative decisions. There was no attempt to statutorily regulate or control the price of the petroleum products or to reintroduce the APM. Counsel also relied on the judgment of this Tribunal in ***Indian Oil Corporation Limited, etc. v. Reliance Industries Limited*** [7] to explain the nature of measures adopted by GoI after dismantling of the APM. Counsel also relied on Order dated 12/12/2008 passed by the Petroleum and Natural Gas Regulatory Board ("**PNGRB**") where upon consideration of relevant notifications, the PNGRB has observed that in the absence of revocation of the Gazetted Policy of the Central Government, the directions issued by the Central Government in respect of price fixation appear to be administrative orders of the concerned Ministry. Counsel also relied on the subsequent Order dated 2/7/2012 passed by the PNGRB where the PNGRB

[7] 2000 ELR(APTEL) 954

has noted the distinction between the Government acting in its sovereign statutory capacity and as a shareholder of the PSUs. Counsel submitted that it is evident from the relevant documents that the measures taken by GoI after 1/4/2002 cannot be categorized as statutory exercise of powers to control or regulate the price of petroleum products including diesel. These were only administrative measures attempted to reduce the impact of the petroleum product prices. There was no representation or assurance that GoI would either enact a law or provide for a resolution of the nature of APM to continue such control over the prices of petroleum products. It is not correct to assume that the price of diesel or the petroleum products had continued to be controlled by GoI and, proceed to submit the bid for award of the contract assuming that such prices will be controlled during the life of the PPA. When the bidders submitted their bid in 2007, APM had been dismantled and, therefore, they were required to assume the risk and reward of the market fluctuation of the diesel price including risk on account of the administrative measures that may not be continued by GoI. Counsel submitted

that it is not correct to contend that the decisions of GoI from the year 2004 onwards till the year 2013 are 'Law' within the meaning of the definition of the term 'Law' read with Article 13 of the PPA. The source of the power to notify the APM is Section 3 of the Essential Commodities Act, 1955. With the Gazette Notification on 28/3/2002, the exercise of powers by GoI to control the petroleum products as an essential commodity i.e. through statutory measures was over. Counsel submitted that the documents referred to and relied upon by the Appellant relating to the period 2004 onwards till 2013 are not Gazette notifications pursuant to any exercise of power but are only administrative decisions communicated to OMCs essentially the PSUs. The references to the regulation of diesel price in different reports relied upon by the Appellant are by way of general observations. They do not lead to the conclusion that there was a statutory exercise of power under the Essential Commodities Act or otherwise to control the price of diesel. Counsel submitted that there is no dispute about the proposition of law that GoI can exercise executive powers with respect to matters on which

Parliament has the power to make law. This does not, however, mean that any and every action taken by GoI would become a law as envisaged in Article 73 of the Constitution. In the present case, it was a conscious and deliberate decision of GoI to dismantle the APM with effect from 1/4/2002. It is then not open to the Appellant to contend that through executive directions, GoI again created a change in the legal position of dismantling of the APM through executive action. Counsel submitted that the Appellant had entered into a PPA with Respondent No.14 and others pursuant to the tariff based competitive bidding process where the quoted tariff is sacrosanct. The Appellant had voluntarily quoted the tariff to be non-escalable in all respects. It is not now open to the Appellant to claim any additional tariff on account of the increase in the diesel price. Counsel submitted that in the circumstances, the appeal be dismissed.

18. The question which arises for consideration is whether the decision of Cabinet Committee on Political and Economic Affairs

dated 17/1/2013 with respect to creation of two categories of diesel consumers and charging of market linked price of diesel to the bulk consumers is a change in law event. The crucial issue linked to this question is whether APM was dismantled by GoI in 1997 and 2002 thus deregulating the prices of petroleum products or whether GoI continued to regulate the prices of petroleum products even after the decision taken to dismantle APM in 1997 and 2002.

19. To understand the controversy, it is necessary to refer to the definitions of certain important terms set out in the PPA. They are as under:

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

(b) *"Indian Government Instrumentality" has been defined to mean "GoI, Government of States where the Procurers and Project are located and any*

ministry or department of or board, agency or other regulatory or quasi-judicial authority controlled by GOI or Government of States where the Procurers and the Project are located and includes the Appropriate Commission."

(c) *The term "operating Period" means "In relation to the Unit means the period from its COD and in relation to the Power Station the date by which all units achieve COD, until the expiry or earlier termination of this Agreement in accordance with Article 2 of this Agreement,"*

(d) *Article 13 of the PPA provides the mechanism to recognize and deals with Change in Law, including how the Appellant has to be compensated, as reproduced below:*

20. Article 13 of the PPA refers to Change in Law. It reads 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 or (iv) any change in the (a) the Declared Price of Land for the Project or (b) the cost of implementation of the resettlement and rehabilitation package of the land for the project mentioned in the RFP or (c) the cost of implementing Environmental Management Plan for the Power Station mentioned in the RFP; OR (d) the cost of implementing compensatory afforestation for the Coal Mine, indicated under the RFP and the PPA;

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

21. The other relevant Articles of the PPA are as under:

"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 Rupees Fifty crores (Rs.50 crores) in the Capital Cost over the term of this Agreement, the increase/decrease in Non Escalable Capacity Charges shall amount to zero point two six seven (0.267%) of the Non Escalable Capacity Charges. Provided that the Seller provides to the procurers 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.

(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 1% of Letter of Credit in aggregate for a Contract Year.

13.3 Notification of Change in Law.

13.3.1 If the Seller is affected by a Change in Law in accordance with Article 13.2 and wishes to claim a Change in Law under this Article it shall give notice to the Procurer of such Change in Law as soon as reasonable practicable after becoming aware of the same or should reasonably have known of the Change in Law.

13.3.2 Notwithstanding Article 13.3.1, the Seller shall be obliged to serve a notice to all Procurers under this Article 13.3.2 if it is beneficially affected by a Change in Law. Without prejudice to the factor of materially or other provisions contained in this Agreement, the obligation to inform the Procurer contained herein shall be material. Provided that in case the Seller has not provided such notice, the Procurer shall have the right to issue such notice to the Seller.

13.3.3 Any notice served pursuant to this Article 13.3.2 shall provide, amongst other things, precise details of:

(a) the Change in Law; and

(b) the effects on the Seller of the matters referred to in Article 13.2.

13.4 Tariff Adjustment Payment on account of Change in Law.

13.4.1 Subject to Article 13.2, the adjustment in Monthly Tariff Payment shall be effective from:

(i) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or

(ii) the date of order/judgment of the Competent Court or tribunal or Indian Government Instrumentality, if the Change in Law is on account of a change in interpretation of Law.

13.4.2 The payment for Change in Law shall be through supplementary bill as mentioned in Article 11.8. However, in case of any change in Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed Tariff."

22. Definition of 'Change in Law' mentions certain events which must take place after the date which is seven days prior to the bid deadline which events bring about change in existing law. Bid deadline was 28/7/2007. Therefore, the cut-off date for the purpose of considering change in law is 21/7/2007. So the event as described in the definition of the term 'Change in Law' must take place after 21/7/2007 for it to partake the character of 'Change in Law'. For a change in law to occur as per the definition of the term "Change in Law' quoted hereinabove (a) there must be in existence a law seven days prior to the Bid deadline and (b) it must change in view of occurrence of any of the events mentioned in the said definition after the cut off date.

In this case the Appellant will have to establish that there was a law prior to 21.7.07 which changed because of the occurrence of any of the events mentioned in the clause defining 'Change in Law' after 21.07.2007. If the Appellant is successful in establishing that there existed a law prior to 21.7.07, he must further establish that there is an enactment, bringing into effect adoption, promulgation, amendment, notification or repeal of the said law or that there is a change in interpretation of the said law by a competent court of law, tribunal or Indian Governmental Instrumentality who are final authority under law for such interpretation. It bears repetition to state that 'Law' has been defined in the PPA to mean *inter alia* all Laws including Electricity Laws in force in India, any statute, ordinance, regulation, notification or code, rule or any interpretation of any of them by an Indian Governmental Instrumentality having force of law. Now we must go to the Gazette Notifications of GOI on which reliance is placed by the Appellant.

23. Diesel price (generally petroleum product price) was subject to the statutory control known as APM till 31/3/2002. By Resolution dated 21/11/1997, GoI had declared the phased programme of dismantling the APM. It was dismantled by Resolution dated 28/3/2002. The relevant portion of the said Resolution reads as under:

> **"*MINISTRY OF PETROLEUM AND NATURAL GAS***
>
> ***RESOLUTION***
>
> *New Delhi, the 28th March, 2002*
>
> *No.P-20029/22/2001-PP. - The Government of India, Ministry of Petroleum & Natural Gas vide Resolution No.P-20012/29/97-PP dated 21st November, 1997 had notified the details of phased programme of dismantling of administered pricing mechanism (APM). As a result, the consumer prices of all products except motor spirit (MS), high speed diesel (HSD), aviation turbine fuel (ATF), kerosene for public distribution (PDS kerosene) and LPG used for domestic cooking (domestic LPG) were decontrolled with effect from 1st April 1998. As a follow up of the aforesaid decision, the Government vide Ministry of Petroleum & Natural Gas Resolution No.20018/2/2000-PP dated 30th March 2001 decontrolled the pricing of aviation turbine fuel (ATF) with effect from 1st April 2001.*
>
> *2. Pursuant to the decisions contained in the aforesaid Resolution of November 1997, the Government have now decided to dismantle the APM*

in the hydrocarbon sector with effect from 1st April 2002. The details of the decisions are given below:

(i) Consumer prices of motor spirit (MS) and high speed diesel (HSD) will be market determined with effect from 1st April 2002. Consequently, the pricing of petroleum products, except for PDS kerosene and domestic LPG will be market determined with effect from 1st April 2002.

(ii) The subsidies on PDS Kerosene and domestic LPG will be borne by the Consolidated Fund of India from 1st April 2002. These subsidies will be on a specified flat rate basis, scheme for which will be notified separately. These subsidies will be phased out in the next 3 to 5 years.

(iii) xxx xxx xxx

(iv) The price of indigenous crude oil of Oil and Natural Gas Corporation Ltd. and Oil India Ltd. will be market determined with effect from 1st April 2002.

(v) xxx xxx xxx

(vi) xxx xxx xxx

(vii) xxx xxx xxx

(viii) The new entrants, including private sector, will be allowed to market transportation fuels namely, motor spirit, high speed diesel and aviation turbine fuel as per the guidelines contained in the Ministry of Petroleum and Natural Gas Resolution No.P-23015/1/2001-Mkt. Dated 8th March 2002."

These Gazette Notifications would fall within the ambit of the definition of the term "Law".

24. We find substance in the contesting Respondents case that after Resolution dated 28/3/2002, there has been no statutory mechanism to control the diesel price or the price of petroleum products such as diesel. The Appellant has relied on Resolution dated 8/3/2002, a copy of which is produced by the Appellant at Annexure-"C" to the Written Submissions. In this resolution, there is a reference to the Resolution dated 21/11/1997 whereby GoI had decided the phased dismantling of APM. It is stated that in Resolution dated 21/11/1997, it was envisaged that investments in the refining sector will be encouraged by providing reasonable tariff protection and making marketing rights for transportation fuels viz. MS, HSD and ATF conditional on owning and operating refineries with an investment of atleast Rs.2000 crore or oil exploration and production companies producing at least three million tonnes of crude oil annually. After referring to the Report of the Group of Ministers set up for working out a specific framework for developing "Indian

Hydrocarbon Vision – 2025", the resolution goes on to say that GoI had decided to grant authorization to market transportation fuels viz. MS, diesel and ATF to the new entrants including the private sector. The resolution lays down the guidelines for granting authorization to market transportation fuels. This, in our opinion, does not in any manner suggest that APM was not dismantled and that GoI continued to control the diesel price. The subsequent Notification dated 28/3/2002, to which we have already made a reference makes it clear that the APM was dismantled and in fact in clause 2(viii) of this Resolution there is a reference to Resolution dated 8/3/2002.

25. Having referred to two Gazette Notifications of GOI whereby APM was dismantled we will now go the decision taken by the Cabinet Committee on Political Affairs on 17.1.2013, whereby two categories of diesel consumers were created i.e. bulk consumers and retail consumers and subsidy available to bulk consumers was withdrawn and they were required to purchase

diesel at the actual market price. This decision according to the Appellant has force in law and it effected a change in law.

26. We must in this connection refer to the various Reports of the Committees and orders of the PNGRB and of this Tribunal on which reliance is placed by both sides to see whether they reflect any change in law as contended by the Appellant, particularly in the context of the decision of the Cabinet Committee on Political Affairs dated 17.1.13.

27. The Appellant has relied on the Report of the Committee on Pricing and Taxation of Petroleum Products of February, 2006. This Committee was established by GoI on 26/10/2005 to look into the various aspects of pricing and taxation of petroleum products. Under the heading '*Context – Need for Urgent Adjustment of Prices and Taxes*', the Committee has observed that with the declared objective of moving towards market determined prices for petroleum products, GoI announced the dismantling of the APM effective from 1/4/2002. However, it was decided to continue to subsidize PDS kerosene and domestic LPG

on the ground that these were fuels of mass consumption largely consumed by "economically weaker sections of society". The Report further stated that the subsidy on these two products was to be continued on a flat rate basis financed from the budget and was to be phased out in three to five years. The OMCs were to adjust the retail selling prices of these products in line with international prices during this period. The Report further stated that however in compliance with GoI directions, the OMCs did not make the necessary adjustment in prices of PDS kerosene and domestic LPG commensurately, resulting in losses on account of these two products. In October, 2003, GoI decided that the OMCs would make good about a third of the losses on these two products from the surpluses generated by them on petrol and diesel while the balance losses would be shared equally by the upstream companies and the OMCs. The Report further goes on to say that this burden sharing arrangement began to collapse in the face of unprecedented sharp and spiraling increase in international oil prices particularly since late 2003, combined with sharp week-to-week and even day-to-

day volatility. The impact of this global price trend on the domestic situation has been two fold. First, the burden of subsidy on PDS kerosene and domestic LPG ballooned to unprecedented levels. Second, states this Report, GoI took back control of price setting for petrol and diesel and restrained the 'pass-through' of the international prices to domestic consumers, this year (2006).

28. The Appellant also relied on Report of International Energy Agency on Petroleum Prices, Taxation and Subsidies in India, released in June, 2009. This appears to be a study Report *inter alia* on the system of petroleum pricing. It is observed in this Report that by mid-2004, the post-APM model of product pricing was effectively abandoned and GoI was monitoring the petroleum pricing. The relevant paragraph could be quoted.

> *"In reality, the post-APM product pricing regime beginning in 2002 was adhered to only very briefly by the Indian Central Government and OMCs. With the sustained rise in crude prices beginning in 2004, the Central Government increasingly looked to restrict the*

ability of OMCs to increase prices, in order to protect Indian consumers. By mid-2004, the post-APM model of product pricing had been effectively abandoned, with the Central Government once again centrally sanctioning upward price revisions. Since 2004, retail prices for petrol and diesel have been revised upward less than ten times by the Central Government, while LPG and kerosene prices have remained effectively fixed."

29. Reliance is also placed on the Report of Expert Group on a viable and sustainable system of pricing of Petroleum Products by Kirit Parikh Committee dated February, 2010. This Expert Committee was set up by MoPNG to advise the Government. It is necessary to refer to the relevant paragraphs of this Report.

"1.3 …. Since only the OMCs were provided financial support, the private sector companies withdrew from oil marketing.

1.7 As the authorized private sector oil marketing companies, viz. Reliance Industries, Essar Oil and Shell India were not part of the above subsidy sharing arrangement, they closed down their retail marketing business across the country. Thus, the emerging competitive structure of the domestic petroleum product market received a setback.

…

5.2 The Governmetn has not permitted public sector oil marketing companies to pass global prices to domestic consumers. We have examined the impact of the formula-based prescriptive pricing of major petroleum products devised by the Government from time to time, particularly since 2002. The present system of price control on petrol and diesel in particular has resulted in major imbalances in the consumption pattern of petroleum products in the country, and has put undue stress on finances of the PSU oil marketing companies as well as of the Government. It has also led to withdrawal of private sector oil marketing companies from the market. This has affected competition in the domestic petroleum product market."

30. The Report of the Committee on Roadmap for Fiscal Consolidation by Shri Vijay L. Kelkar of September, 2012 is relied upon. It is observed in the said Report that although diesel prices have been deregulated in principle, prices are still being administered by GoI.

31. The Report of the Expert Group to Advise GoI on Pricing Methodology of Diesel, LPG and PDS Kerosene, 2013 by Kirit Parekh Committee is also relied upon. Following are the relevant observations.

"2.3 With the objective of moving towards market determined prices for petroleum products, government announced dismantling of APM effective 01.04.2002 (except for providing a fixed subsidy on PDS Kerosene and domestic LPG during the next 3-5 years). However, the same could not be implemented and post May 2004, the government re-started controlling the prices of major petroleum products i.e. Petrol, Diesel, PDS Kerosene and Domestic LPG.

…

2.5 Currently, the retail selling prices of only 3 products i.e. Diesel (retail sales), PDS Kerosene and Subsidized Domestic LPG are regulated by the Government. The prices of all other petroleum products including Petrol, are market determined. It was decided 'in principle' to deregulate the price of Diesel also in June 2010 which could not be implemented except that effective 18th January 2013, the Government has allowed the OMC's to

(i) increase the retail selling price of Diesel by 40-50 paisa per litre per month, &

(ii) sale Diesel to bulk consumers at non-sbusidized market determined price…"

32. The Appellant has also relied upon the copies of the question and answers on the pricing policy of GOI collected by it from Lok Sabha and Rajya Sabha, which we have perused.

33. The Appellant has submitted that the fact that GoI continued to control and determine the retail price of petroleum products including diesel has been noted by the PNGRB in its judgment dated 2/7/2012 in Complaint No.4 of 2008 titled ***Reliance Industries Ltd. & Ors. v. Indian Oil Corporation & Ors.*** It is pointed out that in this judgment, PNGRB took note of the submissions of the OMCs that the price of petroleum products was kept well below the market price and that it is also an admitted position of the OMCs that the price of petroleum products was administered by GoI through pricing orders. We may quote the relevant part of the PNGRB's judgment.

> *"52. It is a well-known fact that soon after the policy to dismantle APM was notified, global crude prices began to harden. According to the Respondents, passing on the burden of increasing global prices to the domestic consumers would have resulted in inflationary impact to the tune of Rs.1,80,000 crores. No democratic government can afford to ignore such inflationary pressures. The Government of India cannot be expected to pursue the sole objective of profit maximization. It has sought to maximize the welfare of its citizen by keeping prices down, petroleum fuels being an integral part of daily consumption by everyone either directly or indirectly. If welfare of the people can be maximized through*

affordable pricing policies, the Government cannot be faulted for pursuing such policies especially when more than two thirds of the burden of the policies is borne by its own PSUs."

34. Respondent No.14 on the other hand has relied upon the same Report of the Expert Group on a Viable and Sustainable System of Pricing of Petroleum Products dated 2/2/2010. Certain extracts from the Chapter "Overview of Government Policy on Pricing of Petroleum Products" are relied upon. We may quote the said extracts.

"(a) ***Reference Para 2.5*** *- "Administrative Price Mechanism" was dismantled during the period from 1997 to 2002 and the process was completed in 2002;*

(b) ***Reference Paragraph 2.5*** *- The Consumer Price of all other products excluding domestic LPG and PSD Kerosene will thereafter be market determined;*

(c) ***Reference Para 2.5*** *- The price of indigenous crude oil would be market determined;*

(d) ***Reference Paragraphs 2.7 and 2.8*** *– From July 2004, administrative efforts were made by the*

Government and Government Authorities to address oil prices volatility. These include measures adopted by the Public Sector Units (PSUs) deciding not to charge full price, the Government of India providing subsidy, rationalization of taxes on Petroleum Products etc as more fully set out in Paragraph 2.8 of the said report at ***Pages 81 to 84*** *attached hereto.*

(e) In the said report at ***Page 67*** *in Para 5.2, the nature of the efforts made to deal with the volatility of the price in Petroleum Products has been set out in the recommendations as under:*

> *5.1 India's imports of oil are increasing. Our import dependence has reached 80 per cent and is likely to keep growing. At the same time 2008 saw an unprecedented rise in oil price on the world market. Oil price volatility has also increased. Though future oil prices are difficult to predict, they are generally expected to rise. Given our increasing dependence on imports, domestic prices of petroleum products have to reflect the international prices.*
>
> *5.2 The Government has not permitted public sector oil marketing companies to pass global prices to domestic consumers. We have examined the impact of the formula based prescriptive pricing of major petroleum products devised by the Government from time to time, particularly since 2002. The present system of price control on petrol and diesel in particular has resulted in major imbalances in the consumption pattern of petroleum products in the country, and has put undue stress on finances of the PSU oil marketing companies as well as of the*

Government. It has also led to withdrawal of private sector oil marketing companies from the market. This has affected competition in the domestic petroleum product market.

5.3 Intervention through price control necessitates that someone bears the financial costs. The issue therefore is to assess the costs and incidence of the burden of alternative mechanisms on different groups in the society. On whom the burden falls depends on the policy and the instruments used.

5.4 A viable long term strategy for pricing major petroleum products is required. A viable policy has to be workable over a wide range of international oil prices and has to meet the various objectives of the government. It should limit the fiscal burden on government and keep the domestic oil industry financially healthy and competitive."

35. Relying on this Report, it is contended by Respondent No.14 that after 1/4/2002, the price control measures were by administrative decision of the Government. There was no attempt to statutorily regulate or control the price of the petroleum products. In any event, there was no attempt to re-introduce the APM or similar such statutory mechanism to control the petroleum product prices.

36. Contesting Respondents have relied on Order dated 12/12/2008 passed by the PNGRB where it is observed that in the absence of revocation of the Gazetted Policy of GoI, the directions given by GoI in respect of price fixation are only administrative orders. We may quote the relevant paragraphs.

> *"20. The second objection raised by the Respondents is that pricing of petroleum products is a matter of policy and the Courts normally refrain from interfering with policy matters unless the decision is contrary to any statutory provision or the Constitution or is unreasonable. In the instant case, the Respondents contend that it is the Central Government which determines the prices of petroleum products. However, it has not been brought out that the Gazettee notification of the Central Government of 28th March, 2002 which unequivocally states that market determined prices will prevail from April, 2002, has been revoked. The Gazetted Policy of the Central Government, which is in the public domain, vide notification dated 28.3.2002 states:*
>
> *"Consumer prices of motor spirit and high speed diesel will be market determined from 1.4.2002."*

The new entrants including the private sector, will be allowed to market transportation fuel namely motor spirit, high speed diesel and aviation turbine fuel as per the guidelines contained in the Petroleum and Natural Gas Resolution no. P-23015/1/2001 – Mkt. dated 8/3/2002.

21. In the absence of revocation of the Gazetted Policy of the Central Government given above, the directions by Central Government in respect of price fixation appear to be administrative orders of the concerned Ministry. It is, therefore, to be seen whether the Central Government is fixing the prices of petroleum products as Sovereign or as a dominant shareholder in these companies. We also have to scrutinize whether the fixation of petroleum prices in this manner comes under the definition of Policy decision. None of the Central Government orders on price fixation that were submitted before us mention revocation of the policy of the Central Government dated 28/3/2002. Clearly, there is a lot of ambiguity on what is the stated policy of the Central Government vis-à-vis pricing of petroleum products."

37. Reliance is also placed on the judgment of this Tribunal in ***Indian Oil Corporation Limited, etc. v. Reliance Industries Limited*** which arose out of PNGRB's order mentioned in the preceding paragraph to contend that administrative instructions issued by the Government should not be construed as a policy decision of the Government when the earlier Notification dated

28/3/2002 had not been revoked. The relevant extracts are as under:

> *"43. It is a settled law that administrative instructions issued by one limb of the Government to the Appellant companies would not be construed to be the policy decision taken by the Government. As stated earlier, nothing has been produced to show that the earlier notification has been revoked. In the absence of any fresh notification revoking the earlier gazette policy notification of the Central Government dated 28.3.2002, the mere information or opinion expressed by the Ministry to the Appellant companies, in respect of price fixation can only be considered to be mere administrative instruction of the concerned Ministry and the same cannot be construed to be the policy Notification. If the prices of the petroleum products are fixed by the Central Government as a sovereign, it has to be declared as a public policy after observing formalities as provided under Article 72 of the Constitution.*
>
> *44. Even according to the Appellants, the Ministry of Petroleum is a dominant shareholder in these companies. It is not the case of the Appellant that the prices are being fixed by the Government in the capacity of a dominant shareholder. Admittedly, the Appellants have not produced necessary documents to show that the prices are being fixed by the Government as a sovereign under the policy decision taken by the Government. If it is the specific stand of the Appellants that prices are being fixed by the Government as a Sovereign under policy decision,*

even now it is open to them to produce before the Board the materials to establish the same before the Board and in that event the same can be considered by the Board at the time of final disposal.

45. At this stage, in the absence of any evidence available on record, we are not inclined to hold that prices are fixed by the Central Government under the policy decision. So the second contention also has to fail. Under these circumstances, it would be proper to allow the Board to continue the enquiry over the complaint by providing opportunity to both the parties to adduce the evidence to substantiate their respective plea. Accordingly ordered."

38. From the Reports of various Committees, copies of questions and answers in connection with pricing of diesel collected by the Appellant from Lok Sabha & Rajya Sabha and the orders of the PNGRB and of this Tribunal, it appears to us that there were certain administrative decisions taken by GOI to reduce the impact of rise in the prices of petroleum products. There was no statutory exercise of power by GOI to revert to APM. The administrative decisions/directions are premised on the existing law being the same i.e. dismantling of the APM. The

earlier Gazette Notifications dismantling APM were not revoked by any statutory order.

39. We must now examine the argument of the Appellant based on Article 73 of the Constitution of India that the decision of EGoM dated 17/1/2013 amounts to change in law. Article 73 of the Constitution of India so far as it is relevant reads as under:

> *"73. Extent of executive power of the Union – (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend –*
> *(a) to the matters with respect to which Parliament has power to make laws;*
>
> *….."*

The power to regulate petrol and petroleum products have been given to the Union in terms of Entry 53 of List 1 of the Seventh Schedule of the Constitution. The Entry is reproduced hereinbelow:

> *"53. Regulation and development of all fields and mineral oil resources; petroleum and petroleum products; other liquids and substances declared by Parliament by law to be dangerously inflammable".*

40. In this connection, reliance is placed on ***Rai Sahib Ram Jawaya Kapur v. State of Punjab***[8], where the Supreme Court has discussed the scope of the Executive Powers of Union of India/GoI. It is held that it is not necessary that a particular law should exist in order to enable the executive branch to exercise its powers in respect of any subject. The executive is free to exercise all powers with respect to any matters upon which the Union/GoI is competent to legislate. The relevant portion of the judgment reads as under:

> *"7. Article 73 of the Constitution relates to the executive powers of the Union, while the corresponding provision in regard to the executive powers of a State is contained in Article 162. The provisions of these articles are analogous to those of Sections 8 and 49(2) respectively of the Government of India Act, 1935 and lay down the rule of distribution of executive powers between the Union and the States following the same analogy as is provided in regard to the distribution of legislative powers between them. Article 162, with which we are directly concerned in this case, lays down:*
>
> > *"Subject to the provisions of this Constitution, the executive power of a State shall extend to*

[8] AIR 1955 SC 549

the matters with respect to which the Legislature of the State has power to make laws:

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof."

Thus, under this article the executive authority of the State is exclusive in respect of matters enumerated in List II of Seventh Schedule. The authority also extends to the Concurrent List except as provided in the Constitution itself or in any law passed by the Parliament. Similarly, Article 73 provides that the executive powers of the Union shall extend to matters with respect to which the Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or any agreement. *The proviso engrafted on clause (1) further lays down that although with regard to the matters in the Concurrent List the executive authority shall be ordinarily left to be State it would be open to the Parliament to provide that in exceptional cases the executive power of the Union shall extend to these mattes also. Neither of these articles contain any definition as to what the executive function is and what activities would legitimately come within its scope.* ***They are concerned primarily with the distribution of the executive power between the Union on the one hand and the States on the other. They do not mean, as Mr. Pathak seems to***

suggest, that it is only when Parliament or the State Legislature has legislated on certain items appertaining to their respective lists, that the Union or the State executive, as the case may be, can proceed to function in respect to them. On the other hand, the language of Article 172 clearly indicates that the powers of the State executive do extend to matters upon which the State Legislature is competent to legislate and are not confined to matters over which legislation has been passed already. The same principle underlies Article 73 of the Constitution. These provisions of the Constitution therefore do not lend any support to Mr. Pathak's contention."

...

"12. **It may not be possible to frame an exhaustive definition of what executive function means and implies.** Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away. The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law. **This is clear from the provisions of Article 154 of the Constitution but, as we have already stated, it does**

> **not follow from this that in order to enable the executive to function there must be a law already in existence and that the powers of executive are limited merely to the carrying out of these laws**.

41. There can be no doubt about the proposition of law based on Article 73 of the Constitution that GoI can exercise executive powers with respect to matters on which Parliament has the power to make law. In ***Rai Sahib Ram Jawaya Kapur***, the Supreme Court has reiterated the same proposition. The question is whether when by Gazetted Notifications issued in November, 1997 and in March, 2002, GoI had taken a conscious decision to dismantle APM, executive instructions issued by Cabinet Committee on Political Affairs in respect of diesel prices can have the effect of reintroducing APM. The question is whether such exercise of powers in all cases would have the force of law.

42. In this connection it is necessary to quote the relevant portion of ***Reliance Natural Resources Limited v. Reliance***

Industries Ltd.[9] on which reliance is placed by the Appellant. In that case the Supreme Court has discussed the nature of policy decisions taken by the EGoM. Following are the relevant observations of the Supreme Court.

> ***"286. The Empowered Group of Ministers framed a utilization policy and also approved the price formula/basis submitted by RIL. It was constituted pursuant to Business Rules framed under Article 77(3) and its decisions are treated as the decisions of the Cabinet itself. It is a policy decision of the Government and has force of law since the field is not occupied by any legislation made by the Parliament.*** *It is needless to state that under Article 73 of the Constitution the powers of the Union executive do extend to matters upon which the Parliament is competent to legislate and are not confined to matters over which the legislation has been passed already."*

43. In view of the law above laid down by the Supreme Court there can be no debate on the preposition that the policy decision of EGoM constituted pursuant to the Business Rules framed under Article 77(3) will have force of law where the field is not occupied by any legislation made by Parliament. On the basis of

[9] (2010) 7 SCC 1

this judgment it is contended that the decision of the Cabinet Committee dated 17.1.13 to create two categories of diesel consumers and to withdraw subsidy from bulk consumers and drive them to market linked prices of diesel is change in Law. We are not informed whether this Committee has the same status as that of EGoM. Assuming however that it is on par with EGoM in the facts of this case we do not see in this decision a direction having a force of law to revert to APM. The Gazette Notifications dated 21.11.97 and 28.3.02 were not revoked by any statutory order. Pertinently GoI did not control the market price as a whole. It only issued administrative directions to PSUs & OMCs. Private players were not covered by this decision. They were free to price their products as per their discretion. We are not able to uphold the contention of the Appellant that the Cabinet Committee's decision dated 17.1.13 has effected a change in law as was the case in **Reliance Natural Resources Ltd.** In the circumstances we reject this submission.

44. Another important submission of the contesting Respondents which appeals to us must be mentioned. At the time of submission of the bid, the Appellant was very much aware of the Gazette Notifications issued by GoI dismantling APM. The move towards market determined prices was known to the Appellant. It was clear that APM as the legal mechanism of pricing diesel no longer subsisted and the pricing of diesel would be governed by market determined factors. Dismantling of APM occurred much prior to the cut-off date. The Appellant cannot be heard to say that the possibility of rise in prices of diesel was not present in its mind. The Appellant could not have submitted the bid on the assumption that the GoI would continue to control the prices. It is also not the case of the Appellant that the Appellant had a long term Fuel Supply Agreement with OMCs at a subsidized price of diesel and the decision of the Cabinet Committee on Political and Economic Affairs dated 17/01/2013 had affected the price of diesel. The legal position as on the cut-off date for submission of bids by the Appellant was that APM had been dismantled by GoI notification dated 28/3/2002.

There was no assurance to the Appellant from the GoI or the OMCs that the GoI would continue to control the diesel price and free market mechanism would not be introduced. APM was never re-introduced. The Appellant had full liberty to quote an escalable component keeping in view the diesel price variation at the time of submission of bid or include the same in the non-escalable cost quoted for different years of contract period. The Appellant decided to quote non-escalable component of energy charges for the entire project term of 25 years. This was a commercial decision taken by the Appellant. The Appellant cannot now make any claim for compensation on the ground of change in law which had occurred much prior to the cut-off date when APM was dismantled. Competitive bidding process cannot be allowed to be set at naught by such method.

45. In the circumstances we find no merit in the appeal. It is dismissed.

46. Pronounced in the Open Court on this **23rd day of March, 2015.**

(Rakesh Nath)
Technical Member

(Justice Ranjana P. Desai)
Chairperson

√**REPORTABLE/~~NON-REPORTABALE~~**