IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO.26 OF 2022 & IA 1818 OF 2023
APPEAL NO.52 OF 2022
APPEAL NO.88 OF 2022 & IA 2122 OF 2023
APPEAL NO.36 OF 2023
APPEAL NO.419 OF 2023
APPEAL NO.420 OF 2023
APPEAL NO.475 OF 2023
APPEAL NO.579 OF 2023

Dated: **14.08.2024**

Present: **Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson**
Hon'ble Smt. Seema Gupta, Technical Member (Electricity)

APPEAL NO.26 OF 2022 & 1818 OF 2023

In the matter of:

M/S FORTUM SOLAR PLUS PRIVATE LIMITED
Through its Authorized Representative,
1 A, Vandana Building,
11 Tolstoy Marg,
New Delhi – 110001 … Appellant(s)

VERSUS

1. **RAJASTHAN ELECTRICITY REGULATORY COMMISSION,**
Through its Secretary,
VidhyutViniyamakBhawan,
Sahakar Marg,
Near State Motor Garage,
Jaipur, Rajasthan – 302001 …Respondent No.1

2. **SOLAR ENERGY CORPORATION OF INDIA LIMITED**
Through its Managing Director,
6th Floor, Plate-B, NBCC Office,
Block Tower-2,
East Kidwai Nagar, Kidwai Nagar,
New Delhi – 110023 …Respondent No.2

3. **RAJASTHAN URJA VIKAS NIGAM LIMITED,**

Through its Managing Director,
RUVNL, VidyutBhawan,
Janpath, Jyoti Nagar,
Jaipur, Rajasthan – 302005 …Respondent No.3

Counsel on record for the Appellant(s)	:	Hemant Sahai Shryeshth Ramesh Sharma Nitish Gupta MolshreeBhatnagar ShefaliTripathi NishantTalwar Nehul Sharma Utkarsh Singh Neel KandanRahate AvdeshMandloi for App. 1
Counsel on record for the Respondent(s)	:	for Res. 1 Anushree Bardhan Srishti Khindaria Surbhi Kapoor Aneesh Bajaj for Res. 2 Anand K. Ganesan Swapna Seshadri Amal Nair Devi Nair Sugandh Khanna for Res. 3

APPEAL NO.52 OF 2022

In the matter of:

M/S SITARA SOLAR ENERGY PRIVATE LIMITED
Through its Authorized Representative,
85, Deerwood Chase, Nirvana Country,
Unitech Sector 50, Near South City-2,
Gurugram, Haryana-122018 … Appellant(s)

VERSUS

1. **SOLAR ENERGY CORPORATION OF INDIA,**
The Chairman & Managing Director,
6th Floor, Plate-B, NBCC Office,
Block Tower-2,
East Kidwai Nagar,

New Delhi – 110023 …Respondent No.1

2. **RAJASTHAN URJA VIKAS NIGAM LIMITED,**
The Chairman & Managing Director,
VidyutBhawan, Jyoti Nagar,
Janpath, Jaipur,
Rajasthan – 302005 …Respondent No.2

3. **RAJASTHAN ELECTRICITY REGULATORY COMMISSION,**
The Secretary,
VidhyutViniyamakBhawan,
Sahakar Marg,
Near State Motor Garage,
Jaipur, Rajasthan – 302015 …Respondent No.3

Counsel on record for the Appellant(s) : Aniket Prasoon
Shweta Vashist
AkankshaTanvi
Priya Dhankar
Mohd Aman Sheikh
Shubham Mudgil
Rishabh Bhardwaj
Mohd Munis Siddique
Akash Deep for App. 1

Counsel on record for the Respondent(s) : Anushree Bardhan
Srishti Khindaria
Surbhi Kapoor
Aneesh Bajaj for Res. 1

Anand K. Ganesan
Swapna Seshadri
Amal Nair
Devi Nair
Sugandh Khanna for Res. 2

APPEAL NO.88 OF 2022 & 2122 OF 2023

In the matter of:

M/S RENEW SOLAR ENERGY (JHARKHAND FIVE) PVT. LTD.

Represented through Authorized Signatory,
Commercial Block-1, Zone 6,
Golf Course Road,
DLF City Phase-V,
Gurugram-122009, Haryana … Appellant(s)

VERSUS

1. **RAJASTHAN ELECTRICITY REGULATORY COMMISSION,**
Through its Registrar,
VidhyutViniyamakBhawan,
Sahakar Marg,
Near State Motor Garage,
Jaipur, Rajasthan – 302001 …Respondent No.1

2. **SOLAR ENERGY CORPORATION OF INDIA LIMITED**
Represented its Managing Director,
6th Floor, Plate-B, NBCC Office,
Block Tower-2,
East Kidwai Nagar,
New Delhi – 110023 …Respondent No.2

3. **M/S RAJASTHAN URJA VIKAS NIGAM LIMITED,**
Represented Through Managing Director,
VidyutBhawan, Janpath,
Jyoti Nagar, Jaipur,
Rajasthan – 302005 …Respondent No.3

Counsel on record for the Appellant(s) : Mannat Waraich
Mohd Munis Siddique
Ananya Goswami
Mridul Gupta for App. 1

Counsel on record for the Respondent(s) : for Res. 1

Anushree Bardhan
Srishti Khindaria
Surbhi Kapoor
Aneesh Bajaj for Res. 2

Anand K. Ganesan
Swapna Seshadri

Amal Nair
Devi Nair
Sugandh Khanna for Res. 3

APPEAL NO.36 OF 2023

In the matter of:

MAHINDRA SUSTEN PRIVATE LIMITED
Through its Authorized Representative,
Mahindra Towers,
Dr. G.M. Bhosale Marg,
P.K. KurneChowk, Worli,
Mumbai – 400018,
Maharashtra, India … Appellant(s)

VERSUS

1. **RAJASTHAN ELECTRICITY REGULATORY COMMISSION,**
Through its Secretary,
VidhyutViniyamakBhawan,
Sahakar Marg,
Near State Motor Garage,
Jaipur-302001, Rajasthan …Respondent No.1

2. **SOLAR ENERGY CORPORATION OF INDIA LIMITED**
Through its Chairman,
6th Floor, Plate B, NBCC Office,
Block Tower-2,
East Kidwai Nagar,
New Delhi – 110023 …Respondent No.2

3. **RAJASTHAN URJA VIKAS NIGAM LIMITED,**
Through its Chairman,
VidyutBhawan, Jyoti Nagar,
Janpath, Jaipur,
Rajasthan – 302005 …Respondent No.3

4. **FORTUM SOLAR PLUS PRIVATE LIMITED**
Through its Director,
1 A, Vandana Building,
11 Tolstoy Marg,
New Delhi – 110001 …Respondent No.4

5. RENEW SOLAR ENERGY (JHARKHAND FIVE) PRIVATE LIMITED
Through its Director,
138, Ansal Chamber-II,
BhikajiCama Place,
New Delhi – 110066 …Respondent No.5

6. SITARA SOLAR ENERGY PRIVATE LIMITED
Through its Director,
Unit No.305,
Pioneer Urban Square,
Third Floor, Tower B,
Sector – 62, Gurgaon
Gurgaon-122005 …Respondent No.6

Counsel on record for the Appellant(s) : Hemant Sahai
Shryeshth Ramesh Sharma
Nitish Gupta
Molshree Bhatnagar
Shefali Tripathi
Nishant Talwar
Nehul Sharma
Utkarsh Singh
Neel Kandan Rahate
Avdesh Mandloi for App. 1

Counsel on record for the Respondent(s) : for Res. 1

Anushree Bardhan
Tanya Sareen
Srishti Khindaria
Surbhi Kapoor
Aneesh Bajaj for Res. 2

Anand K. Ganesan
Swapna Seshadri
Amal Nair
Sugandh Khanna for Res. 3

Rishabh Bhardwaj
Akash Lamba
Anandini Thakre

Aniket Prasoon
Shweta Vashist
AkankshaTanvi
Priya Dhankar
Shubham Mudgil for Res. 6

APPEAL NO.419 OF 2023

In the matter of:

AYANA ANATHAPURAMU SOLAR PRIVATE LIMITED
Through Mr. Sumit Kumar,
S 2904, 29th Floor, World Trade Centre,
Brigade Gateway Campus, #26/1,
Dr. Rajkumar Road, Rajajinagar,
Bangalore - 560055, … Appellant(s)

VERSUS

1. **NTPC LIMITED,**
Through its Managing Director,
NTPC Bhawan,
SCOPE Complex, 7 Industrial Area,
Lodhi Road, New Delhi – 110003 …Respondent No.1

2. **SOUTHERN POWER DISTRIBUTION COMPANY OF ANDHRA PRADESH LIMITED**
Through the Chairman & Managing Director,
19-13-65/A, Srinivaspuram,
Tiruchanur Road,
Tirupati – 517 503 …Respondent No.2

3. **EASTERN POWER DISTRIBUTION COMPANY OF ANDHRA PRADESH LIMITED**
Through its Chairman & Managing Director,
P&T Colony, Seethammadhara,
Visakhapatnam - 530013 …Respondent No.3

4. **ANDHARA PRADESH ELECTRICITY REGULATORY COMMISSION**
Through the Secretary,
4th Floor, SingareniBhavan,

Red Hills, Hyderabad - 500004 …Respondent No.4

Counsel on record for the Appellant(s)	:	Aniket Prasoon Utsav Mukherjee Priya Dhankar Aman Sheikh Rishabh Bhardwaj Dalima Gupta Aditya Tiwari for App. 1
Counsel on record for the Respondent(s)	:	Sakie Jakharia for Res. 1 Avijeet Lala Astha Sharma for Res. 2 Avijeet Lala Astha Sharma for Res. 3 Gaichangpou Gangmei Arjun D Singh Ankita Sharma Lothungbeni T. Lotha Maitreya Mahaley Yimyanger Long kumer for Res. 4

APPEAL NO.420 OF 2023

In the matter of:

M/S SPRNG AGNITRA PRIVATE LIMITED,
Through Shashank Kumar, General Counsel,
A-001, P-5 Pentagon Tower,
Magarpatta City, Hadapasar,
Pune-411013 … Appellant(s)

VERSUS

1. **ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION,**
Through its Secretary,
4th Floor, SingareniBhavan,

Red Hills,
Hyderabad–500004 …Respondent No.1

2. **NTPC LIMITED,**
Through: Managing Director,
7, Institutional Area,
Core-7, SCOPE Complex,
Lodhi Road,
New Delhi – 110003 …Respondent No.2

3. **SOUTHERN POWER DISTRIBUTION COMPANY OF ANDHRA PRADESH LIMITED**
Through: Managing Director,
Kesavayanagunta,
Tiruchanoor Road,
Tirupathi, Andhra Pradesh - 517501
CURRENT ADDRESS:
#19-13-65/A, Srinivaspuram,
Tiruchanoor Road,
Tirupati, Chittoor District,
Andhra Pradesh – 517 503 …Respondent No.2

4. **EASTERN POWER DISTRIBUTION COMPANY OF ANDHRA PRADESH LIMITED**
Through: Managing Director,
P&T Colony, Seethammadhara,
Visakhapatnam,
Andhra Pradesh - 530013 …Respondent No.3

CURRENT ADDRESS:
WALTAIR STATION APPROACH ROAD,
DOLPHIN AREA, ALLIPURAM,
VISAKHAPATNAM,
ANDHRA PRADESH - 530050

Counsel on record for the Appellant(s) : Hemant Sahai
Shryeshth Ramesh Sharma
Nitish Gupta
Molshree Bhatnagar
Shubhi Sharma
Parichita Chowdhury
NishantTalwar
Nipun Sharma

Nimesh Jha
Rishabh Sehgal
Neel Kandan Rahate
Deepak Thakur for App. 1

Counsel on record for the Respondent(s) : Gaichangpou Gangmei
Arjun D Singh
Ankita Sharma
Lothungbeni T. Lotha
Maitreya Mahaley
Yimyanger Long kumer for Res. 1

Sakie Jakharia for Res. 2

Avijeet Lala
Astha Sharma for Res. 3

Avijeet Lala
Astha Sharma for Res. 4

APPEAL NO.475 OF 2023

In the matter of:

M/S ADANI SOLAR ENERGY AP SEVEN PRIVATE LIMITED
(Through its authorized signatory {Mr. Tanmay Vyas}),
Adani Corporate House, 4 Floor,
South Wing, Shantigram,
Near Vaishnodevi Circle,
SG Highway, Ahmedabad - 382421 … Appellant(s)

VERSUS

1. **ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION,**
Through its Secretary,
1-4-660, 4th Floor, SingareniBhavan,
Red Hills Road, Khairatabad,
Hyderabad, Telangana – 500004 …Respondent No.1

2. **NTPC LIMITED,**
Through its Managing Director,
NTPC Bhawan, SCOPE Complex,

7 Industrial Area,
Lodhi Road, New Delhi – 110003 …Respondent No.2

3. **ANDHRA PRADESH EASTERN POWER DISTRIBUTION COMPANY LIMITED,**
Through its Managing Director,
P&T Colony, Seethammadhara,
Visakhapatnam,
Andhra Pradesh - 530013 …Respondent No.3

4. **ANDHRA PRADESH SOUTHERN POWER DISTRIBUTION COMPANY LIMITED,**
Through its Managing Director,
Kesavayanagunta,
Tiruchanoor Road, Tirupathi,
Andhra Pradesh-517501 …Respondent No.4

Counsel on record for the Appellant(s)	:	Poonam Verma Sengupta Gayatri Aryan Sakshi Kapoor for App. 1
Counsel on record for the Respondent(s)	:	Gaichangpou Gangmei Arjun D Singh Ankita Sharma Lothungbeni T. Lotha Maitreya Mahaley Yimyanger Long kumer for Res. 1 Sakie Jakharia for Res. 2 Avijeet Lala Astha Sharma for Res. 3 Avijeet Lala Astha Sharma for Res. 4

APPEAL NO.579 OF 2023

In the matter of:

BSES RAJDANI POWER LTD.

Through its Head Regulatory,
BSES Bhawan, Nehru Place,
New Delhi - 110019 … Appellant(s)

VERSUS

1. **CENTRAL ELECTRICITY REGULATORY COMMISSION,**
Through its Secretary,
Janpath Building,
Janpath,
New Delhi – 110001 …Respondent No.1

2. **AZURE POWER FORTY ONE PVT. LTD.**
Through its authorized representative,
5th Floor, Southern Park, D-II
Saket Place, Saket,
New Delhi – 110017 …Respondent No.2

3. **SOLAR ENERGY CORPORATION OF INDIA LTD.**
Through its Chairman,
1st Floor, A-Wing,
D-3, District Centre,
Saket, New Delhi – 110017

Present Address:
6th Floor, Plate B,
NBCC Office Block Tower 2,
East Kidwai Nagar,
New Delhi – 110023 …Respondent No.3

4. **GRID CORPORATION OF ODISHA**
Through its Chairman,
Janpath, Bhubaneswar,
Odisha – 751022 …Respondent No.4

Counsel on record for the Appellant(s) : Arijit Maitra
Pallavi Bagchi Maitra for App. 1

Counsel on record for the Respondent(s) : for Res. 1

Shashwat Kumar
Rahul Chouhan

Shikha Sood*
Raghav Kapoor for Res. 2

Babita Kushwaha for Res. 3

Hitendra Nath Rath for Res. 4

JUDGMENT

PER HON'BLE SMT. SEEMA GUPTA, TECHNICAL MEMBER (ELECTRICITY)

1. The Appeal Nos.26 of 2022, 52 of 2022, 88 of 2022 and 36 of 2023 have been preferred by Solar Power Developers generating total capacity of 950 MW in the State of Rajasthan challenging the Order dated 30.12.2021, passed by the Rajasthan Electricity Regulatory Commission "RERC/Commission" in Petition Nos. 1914 of 2021, 1922 of 2021 and 1941 of 2021 *("***Impugned Order"***).* By the impugned order RERC has rejected the Change in Law claims of the Appellants by observing that imposition of Safeguard Duty ("SGD") via notification dated 29.07.2020 is not a change in Law as per Power Purchase Agreements (PPA) and in fact, Safeguard Duty has actually been reduced from the rate that was applicable on the last day of bid and has no adverse financial impact on the project cost of the Appellants.

2. The Appeal Nos.419 of 2023, 420 of 2023 and 475 of 2023 have been preferred by solar power developers generating total capacity of 750 MW in Ananthapuramu Ultra Mega Solar Park, Andhra Pradesh challenging the Order dated 28.03.2023 ("**Impugned Order**") passed by the Andhra Pradesh Electricity Regulatory Commission

("**APERC/Commission**"), by which APERC has held that the imposition of Safeguard Duty by way of Notification No. 01/2018 Custom (SG) dated 30.07.2018 and Notification No. 02/2020 Custom (SG) dated 29.07.2020 is a change in law event as per PPAs, however, owing to Appellant's failure to produce evidence to establish the financial loss suffered due to aforesaid Change in Law event for determination of consequent compensation, the Commission ruled that the Appellants are not entitled to Change in Law relief under the PPA.

3. The Appeal No. 579 of 2023 has been preferred by BSES Rajdhani Power Limited challenging the Order dated 20.01.2023 passed by the Central Electricity Regulatory Commission ('**CERC**') in Petition No. 722/MP/2020 ('**Impugned Order**'), whereby the CERC has allowed the imposition of Safeguard Duty *vide* Notification No.2/2020-Custom (SG) dated 29.07.2020 issued by the Department of Revenue, Ministry of Finance, Government of India ('**SGD Notification 2020**') as a Change in Law Event.

4. The issues involved in this batch of appeals and the reliefs claimed are similar and inter connected to each other, they are being disposed of by this common judgment.

BRIEF BACKGROUND OF UNDISPUTED CHRONOLOGY OF EVENTS

5. In exercise of the powers conferred under Section 63 of the Electricity Act, the Ministry of Power, Government of India, issued the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar Power Projects on 03.08.2017 ("***Guidelines***").

6. A safeguard Duty Notification No 01/2018 – Customs (SG) dated 30.07.2018 (" **SGD Notification 2018**") was issued by Ministry of Finance (Department of Revenue), Govt of India, under powers conferred by Sub-section (1) of Section 8 (B) of the Customs Tariff Act read with rules 12, 14 and 17 of Customs Tariff (Identification and Assessment of safeguard Duty) Rules 1997 for import of "Solar cells whether assembled in modules or Panels from China PR and Malaysia". The aforesaid notification imposed following rates of Safeguard Duty minus anti-dumping duty payable, if any, as : 25% *ad valorem* during the period from 30.07.2018 to 29.07.2019, 20% *ad valorem* during the period from 30.07.2019 to 29.01.2020 and 15% *ad valorem* during the period from 30.01.2020 to 29.07.2020.

7. A safeguard Duty Notification No 02/2020 – Customs (SG) dated 29.07.2020 ("**SGD Notification 2020**") was issued by Ministry of Finance (Department of Revenue), Govt of India, under powers conferred by Sub-section (1) of Section 8(B) of the Customs Tariff Act read with rules 12, 14 and 17 of Customs Tariff (Identification and Assessment of safeguard Duty) rules 1997 for "import of solar cells whether assembled in modules or Panels" from Public Republic of China, Thailand and Vietnam. The aforesaid notification imposed rates of Safeguard Duty minus anti dumping duty payable, if any, as : 14.9% *ad valorem* during the period from 30.07.2020 to 29.01.2021 and 14.5% *ad valorem* during the period from 30.01.2021 to 29.07.2021.

RELEVANT FACTS IN APPEAL NOS. 26, 52 & 88 of 2022 and 36 of 2023

For the sake of convenience, these matters shall be referred to as "Rajasthan Batch of Appeals".

8. The Appellants – M/s Fortum Solar Plus Pvt. Ltd (established as a Special Purpose Vehicle) (A.No.26 of 2022); M/s Sitara Solar Energy Private Limited (A.No. 52 of 2022); ReNew Solar Energy (Jharkhand Five) Private Limited (A.No. 88 of 2022) and Mahindra Susten Private Limited (A.No. 36 of 2023) are the generating companies in terms of Section 2(28) of the Electricity Act 2003 ("***Electricity Act***"), being engaged to develop and undertake generation of solar power from the project to be established in the State of Rajasthan.

9. The Respondent-Rajasthan Electricity Regulatory Commission ("**Commission/State Commission**") is the State Regulator for Electricity in the State of Rajasthan. The Respondent-Solar Energy Corporation of India Limited ("**SECI")** is a Central Public Sector Undertaking and is under the administrative control of the Ministry of New and Renewable Energy ("**MNRE"**). SECI has been designated as the nodal agency for implementation of MNRE scheme for developing grid connected solar power capacity. The Respondent- Rajasthan Urja Vikas Nigam Limited ("**RUVNL**") has been formed by the Government of Rajasthan to carry out power trading business for the State power sector distribution companies.

10. On 03.08.2018, Respondent-SECI issued a Request for Selection ("**RfS**") inviting proposals for setting up of grid connected Solar PV projects in the State of Rajasthan on "Build Own Operate" ("**B-O-O**") basis for an aggregate capacity of 750 MW. The RfS was issued in line with the "Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects" ("Guidelines")

issued by the Ministry of Power ("MoP") vide Gazette Resolution dated 03.08.2017. The terms of the RfS was modified by SECI from time to time during pre-bidding meetings. At the request of the Appellants for the clarifications as regards 'Change in Law' clause in the RfS prior to first stage bid submission, the SECI, vide Amendment No.4, modified the RfS, whereby imposition of SGD or extension of taxes or change in rates of taxes that were originally excluded from Change in Law, had been included in Change in Law .

11. In response to the RFS issued by SECI, the Appellants submitted its technical and financial bids. It has been submitted by learned counsels for the Appellants that since as on the date of the bidding, the applicability of SGD Notification 2018 was valid only till 29.07.2020 and the SCOD for the project was indicated after 29.07.2020, the Appellants planned its project construction and procurement in a manner that would allow the Appellants to import solar modules for the project beyond 29.07.2020. As a result, while quoting the price bid, the Appellants did not include the element of SGD. The Appellants optimized its price quote having regard to the applicable law, by planning import of solar modules beyond 29.07.2020. Pursuant to the bidding process, the Appellants were emerged as successful bidders for development, generation and sale of electricity generated from their respective projects to SECI. Subsequently, the Appellants entered into a Power Purchase Agreement ("**PPA**") with SECI for the supply of solar power for a period of 25 years from the scheduled commissioning date ("**SCOD"**) of the Project for onward sale to the buying entity i.e. RUVNL on 03.06.2019. The **SCOD** of the Project was to be achieved within 18 months from the effective date of the PPA, which was declared as 02.06.2019 by SECI making SCOD

date as 02.12.2020. SECI had also entered into a Power Supply Agreement with RUVNL.

12. Having regard to the SCOD of the project, the Appellants said to have planned the procurement of solar PV modules on the *bona fide* belief that the safeguard duty would not be applicable on the import of solar PV modules post 30.07.2020 (after the expiry of SGD Notification 2018), accordingly, the purchase orders were placed by the Appellants keeping in mind that the goods would arrive in India after 29.07.2020.In this regard, counsels for the Appellants submitted that dates of the purchase order and the loading date of modules is clear evidence of the Appellant's plan/ intention at the relevant time to avoid the imposition of SGD rate on the modules. Due to the onset of the COVID-19 pandemic, the Ministry of New and Renewable Energy granted extension of SCOD for the solar power projects from time to time till 04.05.2021.

13. Department of Revenue under the Ministry of Finance, on 29.07.2020, issued another notification i.e. SGD Notification 2020 imposing Safeguard Duty on the import of solar cells and modules to India starting 30.07.2020 and up to 29.07.2021. The Ministry announced Safe Guard Duty (SGD) of 14.90% from 30.07.2020 to 29.01.2021, and 14.50% from 30.01.2021 to 29.07.2021, for all solar cells and modules imported from the People's Republic of China, Thailand, and Vietnam, whether or not assembled in modules or panels.

14. As submitted by the Appellants that they planned import of solar PV modules from the companies situated in China post cessation of SGD Notification 2018. The solar PV modules were imported after duly paying 14.9% - 14.5% SGD and 5% Integrated Goods and Services Tax ("**IGST**")

on the SGD amount in terms of SGD Notification 2020. The Appellants undisputedly had successfully commissioned their Projects well before the prescribed SCOD.

15. The case of the Appellants is that at the time of bidding, no SGD was applicable from 30.07.2020. The SGD Notification 2018 was limited in the period of its enforceability. As on the date of bidding, the Appellants were required to plan their projects and pricing based on prevalent law, whereunder SGD was applicable only upto 29.07.2020. The Appellants had planned its procurement activities to avoid SGD and had priced the project on such basis. The SGD Notification 2020 was issued subsequent to the date of bidding and even after signing of the PPA. The Appellants at the time of bidding and execution of the PPA could not have foreseen such imposition of SGD from 30.07.2020. The Appellants are entitled to recover additional amounts paid by them towards SGD after 29.07.2020, along with cost of such funds, to achieve the same financial position as it would have been without levy of SGD.

16. The relevant clauses of the PPA for the purpose of ascertaining the relief for "change in law" are as under:

> ***"ARTICLE 1: DEFINITIONS AND INTERPRETATION***
>
> ***Article 1.1 Definitions***
>
> *Law" shall mean 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 without limitation all applicable rules, regulations, orders, notifications by an Indian Governmental*

Instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the Appropriate Commissions;"

"Indian Government Instrumentality" shall mean the Government of India, Governments of state of Rajasthan and any ministry, department, board, authority, agency, corporation, commission under the direct or indirect control of Government of India or the above state Government(s) or both, any political sub-division of any of them including any court or Appropriate Commission(s) or tribunal or judicial or quasi-judicial body in India;"

...

ARTICLE 12: CHANGE IN LAW

12.1 Definitions

In this Article 12, the term Change in Law shall refer to the occurrence of any of the following events pertaining to this project only after the last date of the bid submission, including:
(i) the enactment of any new law; or
(ii) an amendment, modification or repeal of an existing law; or
(iii) the requirement to obtain a new consent, permit or license; or
(iv) any modification to the prevailing conditions prescribed for obtaining an consent, permit or license, not owing to any default of the Solar Power Generator; or ***(v) any change in the rates of any Taxes including any duties and cess or introduction of any new tax made applicable for setting up the solar power project and supply of power from the Solar Power project by the SPD which have a direct effect on the Project.***
However, Change in Law shall not include (i) any change in taxes on corporate income or (ii) any change in any withholding tax on income or dividends distributed to the shareholders of the SPD, or

(iii) any change on account of regulatory measures by the Appropriate Commission.

In the event a Change in Law results in any adverse financial loss/ gain to the Solar Power Generator then, in order to ensure that the Solar Power Generator ***is placed in the same financial position as it would have been had it not been for the occurrence of the Change in Law, the Solar Power Generator/ Procurer shall be entitled to compensation by the other party, as the case may be, subject to the condition that the quantum and mechanism of compensation payment shall be determined and shall be effective from such date as may be decided by the Appropriate Commission.***

In the event of any decrease in the recurring/ nonrecurring expenditure by the SPD or any income to the SPD on account of any of the events as indicated above, SPD shall file an application to the appropriate commission no later than sixty (60) days from the occurrence of such event, for seeking approval of Change in Law. In the event of the SPD failing to comply with the above requirement, in case of any gain to the SPD, SECI shall withhold the monthly tariff payments on immediate basis, until compliance of the above requirement by the SPD.

12.2 Relief for Change in Law

12.2.1 The aggrieved Party shall be required to approach the Appropriate Commission for seeking approval of Change in Law.

12.2.2 The decision of the Appropriate Commission to acknowledge a Change in Law and the date from which it will become effective, provide relief for the same, shall be final and governing on both the Parties."

(emphasis supplied)

17. According to the Appellants, it is clear from a combined reading of Article 12.1. and 12.2 of the PPA along with the amendments that had been carried out in the RFS and the PPA that (a) a 'change in law' event includes enactment of a new law and any statutory change in tax structure or introduction of any tax made applicable for setting up of a Solar Power Project and supply of power; and (b) such 'change in law' event must have occurred after the last date of bid submission.The tariff for the present Project was worked out on the basis that the SGD Notification dated 30.07.2018 prevailing on the date of bidding, will only exist up to 29.07.2020. The SGD Notification 2020 dated 29.07.2020 was issued after the last date of bid submission. The imposition of SGD w.e.f. 30.07.2020 amounts to a new imposition and qualifies as 'change in law' in terms of the PPA. The additional cost incurred by the Appellants due to occurrence of 'change in law' events (namely, imposition of SGD w.e.f. 30.07.2020) after the last date of bidding is liable to be reimbursed to the Appellants. In this regard, the Appellants informed SECI that the imposition of SGD vide the Notification dated 29.07.2020 amounts to a "change in law" event in terms of the PPA. Since the 'change in law' event on account of imposition of Safeguard Duty from 30.07.2020 has resulted in increase in cost of procurement, engineering, construction and operation of the Project, the Appellants are entitled to recover the increase in cost resulting from the imposition of Safeguard Duty w.e.f. 30.07.2020. Further, the Appellants are also entitled to the additional cost that it had to bear in terms of increased cost of funds that were used to make payment of the Safeguard Duty.

18. In view of the above, the Appellants approached the State Commission for claiming the reliefs on account of 'change in law' event in terms of Article 12.2 of the PPA. The Appellants filed Petitions bearing

Nos. 1914, 1922 and 1941 of 2021 before the Commission seeking declaration that the imposition of SGD on solar cells w.e.f. 30.07.2020 amounts to 'change in law' event and accordingly allow the appropriate reliefs including the carrying cost.

19. During the adjudication of the proceedings before the Commission, due to the reconciliation process, the Appellants as well as Respondent-SECI prayed before the Commission to pass an order approving/ determining the quantum and mechanism of compensation payment along with the effective date from which such compensation is payable by SECI and RUVNL. However, at the time of hearing before the Commission, RUVNL, which has a back-to-back Power Sale Agreement with the SECI has disputed the claim of the Appellants alleging that the Appellants are deemed to have considered the SGD rate prevailing on the date of the bid in its bid price. Thereafter, the State Commission, passed the impugned order on 30.12.2021 disposing of Petition Nos. 1914 of 2021, 1922 of 2021 and 1941 of 2021 holding that by Notification dated 29.07.2020 (SGD Notification 2020), no new tax was imposed but rather the earlier existing tax was reviewed and thus, it cannot fall under the definition of 'Change in Law' as being claimed by the Appellants. Also, the Commission proceeded to conclude that the rates existing at the time of bidding were higher than the rates under the Second Notification and that the Appellants had gained by payment of lesser SGD.

20. The Appellant in Appeal No. 36 of 2023, though not a party to the proceedings before RERC, since the facts and claim of the Appellant stands on the same footing as that of other Appellants in this batch of appeals, is made as part of this batch and to be disposed of accordingly. In this Appeal, it is stated that in response to the change in law notice

issued by the Appellant on 10.02.2022 under the CIL Rules 2021, Respondent-SECI vide its letter dated 09.03.2022 has rejected the claim of the Appellant in terms of the impugned order dated 30.12.2021 passed by RERC in Petition Nos. 1914, 1922 and 1941 of 2021, which were filed by other solar developers in the State of Rajasthan. Aggrieved thereby, the present appeal has been preferred by the Appellant.

RELEVANT FACTS

IN APPEAL NOS. 419, 420 AND 475 of 2023

For the sake of convenience, these matters shall be referred to as "Andhra Pradesh Batch of Appeals".

21. The Appellants – Ayana Ananthapuramu Solar Private Limited (A.No. 419 of 2023); M/s SPRNG Agnitra Private Limited (A.No. 420 of 2023) and M/s Adani Solar Energy AP Seven Private Limited (A.No. 475 of 2023)are the independent generating companies in terms of Section 2(28) of the Electricity Act 2003 ("***Electricity Act***"), being engaged in the business of generation and sale of solar energy from its 250 MW (AC capacity equivalent to 375 MW DC capacity) solar power generating system in the Ananthapuramu Ultra Mega Solar Park located in the State of Andhra Pradesh pursuant to the PPA.

22. Respondents-Southern Power Distribution Company of Andhra Pradesh Limited ("***APSPDCL***") and Eastern Power Distribution Company of Andhra Pradesh Limited ("***APEPDCL***"), respectively (collectively referred to as "***AP DISCOMs***"), are the distribution licensees in terms of Section 14 of the Electricity Act and undertake the distribution and retail supply of electricity in the State of Andhra Pradesh. The Respondent-

Andhra Pradesh Electricity Regulatory Commission (for short "APERC") is the State Regulatory commission for the State of Andhra Pradesh. The Respondent -NTPC is a Government of India undertaking and is entrusted with the work of facilitating the development of solar power projects for sale of solar power generated therefrom to state distribution licensees across India under the National Solar Mission ("***NSM***").

23. In accordance with the provisions of the Solar Bidding Guidelines, NTPC, as an intermediary procurer, issued the Request for Selection dated 09.03.2018 ("***RfS***") for selection of solar power developers for setting up of grid-connected solar-PV power projects of 750 MW capacity (250 MW x 03 Projects) in the Ananthapuramu Ultra Mega Solar Park (APL 419 of 2023) . Appellants submitted their bids for 750 MW project (250 MW capacity each) on 17.04.2018 before the "***Cut-Off date"***. Pursuant to the bidding process, the Appellants were selected as the successful bidders for the development of the Projects (250 MW each) and supply of electricity generated therefrom to NTPC for further sale to APDISCOMs and letter of Intent was issued on 05.06.2018 (APL 420 of 2023), 05.07.2018 (APL 475 of 2023) & (APL 419 of 2023). Accordingly, NTPC entered into a Power Sale Agreement ("***PSA***") with APDISCOMs on 04.06.2018 in terms whereof the power generated from the Appellants' Projects, was agreed to be sold by NTPC to APDISCOMs. Thereafter, the Appellants and the NTPC entered into PPA on 17.07.2018 (APL 419 of 2023) and 05.07.2018 (APL 475 of 2023 & 420 of 2023), whereby the Appellants were required to develop the Project and supply the electricity generated therefrom to NTPC. Article 12 of the PPA defined "Change in Law" and provided that upon occurrence of the same, the affected party shall be entitled to relief as determined by the Appropriate Commission. The relevant excerpt of the PPA is reproduced hereinbelow:

*"**ARTICLE 12: CHANGE IN LAW***

12.1 Definitions

In this Article 12, the following terms shall have the following meanings:

*12.1.1 "Change in Law" means the occurrence of **any** of the following events after the last date of bid submission resulting into any additional recurring/ non-recurring expenditure by the SPD or any income to the SPD:*

a. the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;

b. a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;

c. the imposition of a requirement for obtaining any Consents, Clearances, Permits and/or which was not required earlier;

d. a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the SPD;

e. any change in rates of taxes, duties and cess or introduction of any new tax made applicable for setting up of Solar Power Project and supply of power by the SPD after the date of submission of Bid, shall be treated as per the terms of this Agreement. For the purpose of considering the effect of this change in rate of taxes, duties and cess due to change in law after the date of submission of Bid under this part, the date of the submission of the bid shall be considered as effective date and not the date of the signing of the PPA as applicable to other changes dealt in other parts of this Article 12.1

f. but the above shall not however include

(i) any change in taxes on corporate income or any withholding tax on income or dividends distributed to the shareholders of the SPD,

or

(ii) any change on account of regulatory measures by the Central Commission.

12.2 Relief for Change in Law

12.2.1 The aggrieved Party shall be required to approach the Central Commission for seeking approval of Change in Law.

12.2.2 The decision of the Central Commission to acknowledge a Change in Law and the date from which it will become effective, provide relief for the same, shall be final and governing on both the Parties."

(Emphasis supplied)

24. In terms of the PPA, the Appellant was required to commission the Project within 13 months from the Effective Date. However, there was an inordinate delay in the adoption of tariff and approval of power procurement, which was finally done by way of this Tribunal's judgment dated 27.02.2020 in Appeal No. 368 of 2019 and batch. According to which, the start date for the purpose of commissioning the Project as per the PPA would commence only from the date when the tariff adoption reached finality i.e., 27.02.2020. Accordingly, NTPC vide its letter extended the Scheduled Commissioning Date to 26.01.2021, being 11 months from 27.02.2020 (i.e., the date on which the tariff adoption proceedings attained finality). Thereafter, on account of the COVID-19 pandemic, the Scheduled Commissioning Date was further extended by NTPC up to 31.03.2021. The Appellants successfully commissioned the entire capacity of the Project within the Scheduled Commissioning Date i.e. 31.03.2021 and has been accepted by NTPC. Learned Counsels for the Appellants have submitted that on the last date of bid submission under the RfS, i.e., on 17.04.2018, no Safeguard Duty was applicable upon import of solar modules (provisional or otherwise) and Safeguard Duty upon import of solar modules was issued for the first time only on

30.07.2018 by way of the SGD Notification 2018, and therefore, Safeguard Duty imposed upon import of solar modules is a new duty.

25. Accordingly, due to imposition of Safeguard Duty as per "SGD Notification 2018" and the "SGD Notification 2020", the Appellants have had to incur additional expenditure. The aforesaid additional expenditure incurred by the Appellants also includes the Integrated Goods and Service Tax ("***IGST***") paid by the Appellants on the imposition of Safeguard Duty.

26. In the meantime, Central Electricity Regulatory Commission ("***CERC***") as well as various other State Electricity Regulatory Commissions ("***SERCs***") by way of various orders held the issuance of the SGD Notifications to be Change in Law. Accordingly, the Ministry of New and Renewable Energy ("***MNRE***") vide its letter dated 12.03.2020 *inter alia* directed NTPC to immediately ensure that the dues payable to renewable energy developers on account of the Change in Law (including imposition of Safeguard Duty) are paid on annuity basis, if necessary. In addition, MNRE vide its addendum dated 23.03.2020 stated that the CERC's orders in respect of grant of Change in Law compensation for imposition of Safeguard Duty are very clear, and it directed that the same principles would apply in all similar cases obviating the need to approach the Appropriate Commission in every case.

27. The Appellants issued notice of occurrence of Change in Law event as per Article 12 of the PPA to NTPC and requested NTPC to complete the process of reconciliation and consequently reimburse the Appellants for the additional expenditure incurred by them towards Safeguard Duty as per Article 12 of the PPA.

28. Thereafter, the Ministry of Power notified the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 ("***Change in Law Rules, 2021***") on 22.10.2021, whereby the process of adjustment of tariff on the occurrence of a Change in Law event was provided.

29. Inasmuch as CERC in similar matters was directing the parties to follow the process stipulated under the Change in Law Rules, 2021 prior to approaching it, the Appellants issued a composite notice to NTPC under the Change in Law Rules, 2021. In response thereto, NTPC while relying on the issuance of the Change in Law Rules, 2021 stated that the Appellants are required to file a petition before the Respondent Commission for verification of the calculation of the impact of the Change in Law event and subsequent adjustment in provisionally billed impact and requested the Appellants to provide an undertaking stating that if the amount (approved/verified by Appropriate Commission) happens to be less than the proposed impact projected by the Appellants, then NTPC may make the necessary deductions from the next bill along with applicable interest. NTPC also relied upon Article 14.5.2 of the PPA and claimed that the Appellants claim against NTPC is subject to the ability of NTPC to enforce the corresponding obligations assumed by APDISCOMs.

30. The Appellants while stating that it is in the process of filing a petition before the Respondent Commission provided the undertaking sought by NTPC and regarding NTPC's reliance on Article 14.5.2 of the PPA, the Appellants categorically explained that the obligation of NTPC to make payment to the Appellants is independent and not contingent upon receipt thereof from APDISCOMs. The Appellants have also claimed carrying cost from the date of incurring the cost of Safeguard Duty till the date of

commissioning of their respective projects, while reserving their right to claim carrying cost from the date of commissioning.

32. The Appellants issued invoices to NTPC towards the additional impact of Change in Law and carrying cost on the electricity generated and supplied by the Appellant from the date of commissioning. However, though the NTPC accepted the formula suggested under CIL Rules 2021, which states that instead of paying CIL compensation on a lumpsum basis the same may be preferred to be paid on annuity model and ease of payment by NTPC, the said amount was not paid by NTPC.

33. Ministry of Power on 21.02.2022 clarified that the Change in Law Rules, 2021 will only be applicable with respect to the change in law events having occurred on or after 22.10.2021 (i.e., the date of notification of the Rules in the Official Gazette) and not to the change in law events occurred prior to the said date.

34. In the above factual background and pursuant to Article 12.2 of the PPA, the Appellants filed O.P. Nos. 23, 24 and 25 of 2022 before the Respondent Commission seeking relief on account of Change in Law, *viz.* the imposition of Safeguard Duty by way of SGD Notification 2018 and SGD Notification 2020. However, by way of Impugned Order, the Respondent Commission while holding that the imposition of Safeguard Duty falls within the ambit of Change in Law provision, but held that Appellants are not entitled to any change in law relief because:

a) Though Provisional DGS Recommendation may not qualify as "Law" within the definition in the PPA, the implications of the Provisional DGS Notification has to be considered as it had potential of enforceability

b) Commercial expediency warrants factoring potential liability qua Safeguard Duty while computing the Capital Cost. Working of the Capital Cost has not been furnished by Appellants. Withholding of such information raises an inference that Appellants might have factored the additional liability at least partially as per Provisional DGS Recommendation

c) Appellants ought to have disclosed its Change in Law claim qua Safeguard Duty during the proceeding of PPA/PSA approval before Ld. APERC. Since that was not done, it gives rise to a reasonable presumption that Appellants had factored in the potential liability in its bid.

RELEVANT FACTS IN APPEAL NO. 579 OF 2023

35. The Appellant herein has preferred Appeal No. 579 of 2023 challenging the order dated 20.01.2023 passed by the Central Electricity Regulatory Commission in Petition No. 722/MP/2020, deciding the liability to pay the financial impact for the change in law event on account of SGD Notification without affording an opportunity of being heard to the Appellant herein.

36. The Appellant-BSES Rajadhani Power Limited is a Distribution Licensee which has entered into a Power Purchase Agreement with SECI to procure 100 MW of power from the Respondent No.2-Azur Power Forty One Private Limited ("Azure") through the intermediary SECI, Respondent No. 3.

37. Respondent No.1 is the Central Electricity Regulatory Commission ("CERC"). Respondent No. 2 is a generating company and was selected for implementation of 300 MW Solar Power Project pursuant to a competitive bidding process under RFS dated 10.01.2019 by SECI, the Respondent No.3, and entered into a PPA with SECI. The Appellant executed PSA with SECI on 17.06.2019 for 350 MW solar power; SECI mapped 100 MW out of 300 MW project capacity of Respondent No. 2 i.e. M/s. Azure Forty One Pvt Ltd and balance from another generator called Eden.

38. As per the RFS, last date of bid submission was 15.02.2019 and Original Scheduled Commissioning Date (SCOD) of the project as per PPA is 01.03.2021. Respondent No 3, SECI vide letter dated 01.10.2021 communicated extension of SCOD as 60 days subsequent to operationalisation of LTA or actual date of commissioning whichever is earlier. Actually, the project was commissioned in phased manner given below:

	Capacity commissioned	Original SCOD	Actual COD
Part1	16.7	01-Mar-21	13-Oct-21
Part2	16.7		02-Nov-21
Part3	16.7		30-Nov-21
Part4	16.7		27-Dec-21
Part5	16.7		31-Jan-22
Part6	16.7		08-Mar-22
Total	**100**		

39. Respondent No. 2 filed Petition No. 722/MP/2020 before the CERC seeking change in law compensation by seeking declaration that the imposition of safeguard duty by the Ministry of Finance vide its SGD Notification 2020 on 29.07.2020 is a change in law event under Article 12 of its PPA. The Respondent No. 2 sought a declaration that it is entitled

to claim additional cost of Rs. 22,98,24,985 on account of the said change in law event. The same was objected to by the Appellant. However, the said claim of Respondent No.2 was allowed by the CERC. Hence the Appellant has approached this Tribunal challenging the said order.

Common submissions of Appellants in APL Nos 26 of 2022, 52 of 2022, 88 of 2022 and 36 of 2023 (Rajasthan Batch of appeals)

40. Learned counsel for the Appellants submitted that the RERC in the impugned order has failed to appreciate that, as per the SGD Notification 2018, Safeguard Duty (SGD) was leviable on the import of solar modules only up to 29.07.2020 and not thereafter. Given that the SCOD of the Projects as per the PPA was 02.12.2020, well beyond the SGD levy period, the Appellants could plan their affairs to import solar modules after 29.07.2020 to avoid imposition of SGD as per SGD Notification 2018. Additionally, the Module Supply Agreements were executed with delivery dates post the cessation of the SGD levy, which shows that the liability of SGD was not at consideration at the time of bid submission with SECI.

41. Learned counsel for the Appellants further submitted that at the time of bid submission on 19.02.2019, the Appellants could not have foreseen or anticipated the imposition of SGD beyond 29.07.2020. The SGD Notification 2020 led to imposition of Safeguard Duty beyond 29.07.2020, increasing the rate from 'Nil' (on account of sunset clause in the SGD Notification 2018) to 14.9% and 14.5% for the periods 30.07.2020 to 29.01.2021 and 30.01.2021 to 29.07.2021, respectively, thus constituting a Change in Law event under Article 12 of the PPA. The RERC failed to consider that other Commissions, such as MERC, UPERC and CERC

through its various orders have acknowledged SGD Notification 2020 as a Change in Law event. This Tribunal had also recognised imposition of safeguard duty as a change in law event. (Reliance is placed on "***Nisagra Renewable Energy Pvt Ltd v. Maharashtra ERC & Ors***," ***[2021 SCC OnLine APTEL 81]***; *and* "***Parampujya Solar Energy Pvt. Ltd. & Anr. v. CERC & Ors" [2022 SCC OnLine APTEL 80].*** The PPA nor the Competitive Tariff Bidding Guidelines require bidders to submit capital cost assumptions for Change in Law claims. Courts cannot substitute their own view for the explicitly stated commercial terms agreed upon by the parties. This contention is supported by the decision in "***GMR Warora Energy Ltd. vs. CERC & Ors***." (2023 SCC Online SC 464).

42. The criteria or assumptions considered by the Seller at the time of bidding are irrelevant for calculating Change in Law relief, as established in "***Wardha Power Company Limited vs. Reliance Infrastructure Limited and Anr.***" (2014 SCC OnLine APTEL 142).

43. Learned counsel for the Appellants further submitted that RUVNL's hypothesis that by planning imports subsequent after 29.07.2020 i.e end date of SGD notification 2018, the Appellants could not have commissioned the projects on time is erroneous. Even if the Appellants were to consider 01.04.2019 as the Effective Date for an 18-month construction period (30 days post-LOA issuance), they still had enough time to commission the Project after the SGD ended on 29.07.2020. Clause 14.3 of the RfS clearly states that the Effective Date is 30 days from the LOI issuance and in case of default, PPA signing date shall be the effective date. The PPA was executed on 03.06.2019, making the Effective Date 02.06.2019 and the SCOD 02.12.2020. Even if the Appellants had only two months to commission the Project, they would have planned module imports in advance, prepared the plant structure,

and promptly installed the modules upon arrival, ensuring timely commissioning. Notably, this contention of RUVNL's was never raised before the RERC. The hypothetical assumption of 01.04.2019 as start date for the 18-month construction period under the PPA is baseless and speculative.

44. It is further submitted by learned counsels for the Appellants that the RERC expected that the Appellants should have foreseen the continuation of imposition of Safeguard Duty beyond 29.07.2020. However, it is a fact that generating companies cannot foresee changes/amendments in existing laws over the long term of a PPA (25 years). In this regard, the Appellants place reliance upon the Hon'ble Supreme Court's judgment "***Energy Watchdog & Anr. v. CERC & Ors."*** **(2017) 14 SCC 80** and this Tribunal's judgment **"*Coastal Gujarat Power Ltd. v. Central Electricity Regulatory Commission and Ors.*" *2021 SCC OnLine APTEL 10*** as well as the "***Nisarga Renewable Energy Pvt. Ltd. v. Maharashtra Electricity Regulatory Commission and Anr" 2021 SCC OnLine 81.*** Further, the RERC has ignored the Supreme Court's judgment in "***Nabha Power Limited v. Punjab State Power Corporation of India Ltd. & Anr." (2018) 11 SCC 508,*** which states that contracts should be interpreted based on their express terms and not on implied terms of the contract.

45. Learned counsel for the Appellants also contended that section 8(B)(1) of the Customs Tariff Act allows the Central Government to impose Safeguard Duty (SGD). The 1997 Customs Tariff Rules outline the procedure, starting with an investigation initiated upon a complaint and the Director General's (DG) satisfaction of jurisdictional criteria. After completing the investigation, the DG issues a final finding recommending the levy of SGD. The Government then undertakes a quasi-judicial

determination followed by legislative action to issue a notification imposing the duty, if it proceeds to levy the duty. It is further contended that the first SGD Notification was a temporary statute with a shelf life of 2 years and, unlike a permanent statute, was not a continued levy, set to lapse on 29.07.2020. Thus, unless re-enacted, the levy was not contemplated with any certainty to extend beyond two years. A temporary statute ends with the efflux of time prescribed therein, as held by the Hon'ble Supreme Court in ***"State of Uttar Pradesh v. Seth Jagmander Das and others" [AIR 1954 SC 683]*** and ***"State of Orissa v. Manmohan Mishra and others" [AIR 1962 SC 945]*** The principle of temporary statutes applies to Notifications as well. Consequently, the first Notification lapsed on 29.07.2020, and the second Notification came into effect on 30.07.2020, thus imposing a fresh levy of SGD for one year. The second Notification was a fresh imposition, not a continuation of the first Notification, as the procedure under Rule 18 was followed, including Rules 5, 6, 7, and 11 *mutatis mutandis*, adhering to the entire quasi-judicial determination process as for fresh imposition.

46. Learned counsel for the Appellants asserted that in terms of Article 265 of the Constitution of India, no tax shall be levied or collected except by the authority of law. Article 13 defines 'law' to include 'Notifications'. The power to impose SGD vests with the Government by following the due procedure prescribed as per the Rules. The Second Notification uses the term 'hereby imposes'; 'hereby' means 'by this document', and 'impose' means 'to introduce a new law, rule, tax, etc. Hence, 'hereby imposes' signifies the levy of a new tax by this document, thereby making the issuance of the second Notification a fresh imposition. Further, the second Notification is in the nature of substitution. Substitution of a statute involves two steps i.e. the old rule ceases to exist and the new rule is

brought into existence in its place. Reliance in this regard is placed on the decision in "***State of Rajasthan* vs *Mangilal Pindwal," (1996) 5 SCC 60***.

47. Learned Counsel for the Appellant in Appeal No. 36 of 2023, which was filed by Mahindra Susten Pvt. Ltd., submitted that it has filed the appeal challenging the Impugned Order, though it was not the party to the proceedings before the commission while passing the impugned order, SECI and RUVNL rejected its claim for additional costs due to the imposition of SGD Notification 2020 from 30.07.2020 to 29.07.2021 relying on the impugned order. The Appellant's change in law notice dated 10.02.2022 was rejected by SECI and RUVNL on 09.03.2022 and 11.04.2022, respectively, based on the Impugned Order. Therefore, the application seeking leave to file appeal and challenge the Impugned order before this Tribunal has been allowed. Learned counsel for Appellant submitted that in the instant case, RfS was issued by SECI on 22.03.2019, and the bid was submitted by the Appellant on 04.06.2019, and the reverse auction was held on 19.06.2019. As per the RfS, the Effective Date for the 18-month construction period was to start 30 days from the issuance of the LOA, which was issued on 16.09.2019. Consequently, the Effective Date was stated as 16.10.2019 in the PPA, making the original SCOD as 16.04.2021. Due to Covid-19 disruptions, SECI extended the SCOD to 01.12.2021, and the Appellant's 200 MW Solar Power Project was duly commissioned on 14.10.2021, within the extended timelines. Therefore, the Appellant had sufficient time to plan its commissioning to import modules after the cessation of SGD Notification 2018, and thus, the additional costs incurred due to SGD Notification 2020 should be reimbursed to the Appellant. Learned counsel for the Appellant prayed that any relief that would be granted to the other Appellants of Rajasthan batch of appeals should also be made applicable to it.

Submissions of Respondent – RUVNL in – Rajasthan Batch of appeals)

48. Learned counsel for the Respondent-RUVNL submitted that two issues are involved in these matters; whether the SGD Notification 2020 is a law or whether the same is an amendment of law or the introduction of a new law; and whether the generators are entitled to relief in terms of the bid documents for change in law. The bid deadline or last date of bid submission for all generators was 19.02.2019, and the quoted tariff was frozen as of that date. In terms of Section II Clause 6 of bid document, the generators, while quoting the tariff, had to assume all taxes and duties as they were on 19.02.2019. Thus, the interpretation of "taking into account of the taxes and duties" in the bid documents, namely the RfS, has to be interpreted in subjective manner rather than objective.

49. Learned counsel for the Respondent-RUVNL further submitted that the bid documents require generators to consider all taxes and duties as on the bid submission date while quoting the tariff. Since in a bidding process, one cannot go into the minds of the bidder to verify what constituted the quoted tariff, hence an objective criterion is placed which is then assumed to have been followed. This ensures that there is no ambiguity in the input parameters for calculating the bid tariff. The case of the Appellants is that they accounted for the Nil Safeguard Duty as on 30.07.2020 while quoting the tariff, given the SGD Notification 2018 had an end date. However, this interpretation of Clause 6 is not supported by its express language, which mandates considering all taxes and duties as of the bid submission date and not actual levy dependent on future timelines. The interpretation canvassed by the generators introduces

ambiguity, whereas Clause 6 aims to maintain clarity by fixing the taxes and duties as existed on the specific date. Accepting the generators' interpretation would set a precedent allowing them to avoid accounting for taxes and duties existed as on the bid submission date, contrary to the bid documents' intent. Strengthening its contention, it is further submitted that the bid documents specifically state that the tariff shall include all taxes and duties applicable on the last date of bid submission, i.e., 19.02.2019. The Safeguard Duty was applicable for import from China on 19.02.2019 @ 25%.

50. Learned counsel for the Respondent RUVNL contended that the bid conditions stipulate that the tariff includes taxes applicable as of 19.02.2019, which is a deeming provision regardless of what the generators actually considered in their commercial decisions. Inference is drawn from ***"Chhotabhai Jethabhai Patel and Co. & Ors. v. Union of India and Anr."*** *(1961 SCC OnLine SC 12).* The change in law clause, i.e., Article 12 of the PPA, allows for tariff adjustment due to subsequent legal provisions, either through amendment or introduction of a new law, which subsequently prejudices the party. The adjustment of the tariff is based on the inclusion of such taxes in the quoted tariff and the impact of the new law. It is submitted that the quoted tariff includes the Safeguard Duty at 25% as of 19.02.2019, the last date of bid submission.

51. Learned counsel for the Respondent also contended that the subjective intention of the generators to plan imports after 29.07.2020 and assume a 0% Safeguard Duty at the stage of quoting the tariff is contrary to the bid condition that the tariff includes all taxes applicable as on 19.02.2019. The relevant expression pertains to the last date of bid submission, not any future date, whether it be the assumed date of planned import or any other assumption or planning by the generators,

including delaying the project to avoid the duty. The grant of change in law relief by increasing the tariff to include the Safeguard Duty of 14.9% would imply that the original tariff included the Safeguard Duty of 25% applicable as on 19.02.2019, plus an additional 14.9% Safeguard Duty made effective from 30.07.2020, resulting in a total Safeguard Duty of 39.9% included in the tariff. Therefore, as against the above, the actual payment is only 14.9%, leading to a financial gain to the generators on account of change in law as against what was included in the quoted tariff as per the bid condition. The principle of restitution is applicable for change in law. Based on the quoted tariff as on 19.02.2019 when Safeguard Duty was 25%, the subsequent notification to prescribe the duty at 14.9% does not in any manner adversely affect the bidder and the quoted tariff. In fact, there is only a gain to the bidder. The legal principle for such bidding process is that the bidding terms and conditions have to be strictly followed as held in ***"WB State Electricity Board v. Patel Engineering Co Ltd," ((2001) 2 SCC 451).***

52. Referring to the conditions stipulated within the bid documents, learned counsel submitted that it binds the parties - ***"Haryana Power Purchase Centre v. Sasan Power Ltd.," (2023 SCC OnLine SC 577).*** Consequently, when there exists a specific deeming fiction that the quoted tariff encompasses all taxes applicable as on 19.02.2019, all legal implications of such fiction must be upheld. In the present case, it is explicitly stated that the tariff includes taxes applicable as on 19.02.2019. Therefore, the generators cannot subsequently assert that they did not include the duty applicable as on 19.02.2019, nor can they claim that they assumed 0% duty based on future timelines or any date other than 19.02.2019. Learned counsel submitted that such contrary interpretation would result in:

a) A bidder could have assumed the duty as on 19.02.2019 as per the bid document and either quoted a higher tariff or chose not want to bid; or

b) If a person had, based on the bid timelines, imported the goods before 29.07.2020, paid 15% as Safeguard Duty and been not entitled to any change in law relief, but a bidder importing after 29.07.2020 pays a lower Safeguard Duty of 14.9% and claims the entire duty as change in law.

53. Asserting that the Appellants case is not supported by facts, learned counsel referred Clause 1.16 of the Request for Selection ("RfS"), and submits that the Effective Date was set as 30th day from the issuance of the Letter of Intent (LoI). Initially, under Clause 16.b of the RfS, the Scheduled Commissioning Date (SCOD) was 21 months from the effective date of the PPA for projects ranging from 10 MW to 240 MW, and 24 months for projects of 250 MW and above. However, the amendment dated 07.02.2019 modified Section III Clause 16.b, reducing the SCOD to 18 months from the Effective Date of the PPA. For all three generators, the Date of issuance of the LOI, the corresponding Effective Date, and the SCOD are as follows:

LoI	**Effective Date**	**SCOD**
02.03.2019	01.04.2019	30.09.2020

Additionally, Clause 6 i.e., the Change in law clause of the RfS was amended. The bid, therefore, as per the new clause became independent of the availability or non-availability of the fiscal incentives.

54. Learned counsel for the Respondent-RUVNL further contended that even if the generators are allowed to argue that they had not assumed the taxes as on 19.02.2019 (which would be contrary to the bid condition), the generators could at best have assumed that the LoI was to be issued on 19.02.2019, the last date of bid submission itself. The generators contend that at the time of submitting their bid and quoting the tariff, they had planned to import solar panels after 29.07.2020. Taking the said plan as it is, would indicate that the generators had accounted for the window from 30.07.2020 to 30.09.2020 to import the solar panels, clear customs, arrange for inland transport from the port to the plants in Rajasthan, erect the solar panels, conduct commissioning tests, and achieve SCOD, all within two months. What can be assumed from this planning, if the generators were to perform the contract.

55. It is further contended that there is no pleading or evidence before the State Commission to substantiate the contentions regarding adherence to timelines now sought to be advanced, that the generators had strategized to import solar panels beyond 29.07.2020 and still achieve the Scheduled Commercial Operation Date (SCOD). The factual details of import and commissioning in these cases establish that even a timeframe of four (4) months from import to achieving SCOD is insufficient.

56. The generators have relied on the timelines of the PPA stating that the PPA was executed on 03.06.2019 and the Effective Date of the PPA stood extended to 04.06.2020 by the Ministry of New & Renewable Energy on account of COVID -19 pandemic. The SCOD as provided in the PPA was 02.12.2020. Learned counsel submitted that the generators cannot base their claim for change in law relief on the PPA timelines because the execution of the PPA occurred after the tariff was quoted and

the LoI was issued. This timeline was not part of the bid or what generators could have anticipated when quoting the tariff. It is unreasonable to expect generators to plan their affairs based on a subsequent document yet to be executed. Visibility of PPA timelines wasn't available at the time of bidding, thus tariffs could only be quoted in terms of RfS timelines. Furthermore, even assuming the timeframe from 30.07.2020 to 02.12.2020, there is no specific pleading or evidence to support the contention that generators planned to import beyond 29.07.2020 and commission the project by 02.12.2020. It is incumbent upon the generators to demonstrate that the limited time available at that point was sufficient for their plans.

57. Learned counsel for the Respondent-RUVNL also submitted that the extension of SGD Notification 2020 is not a new law but rather falls under the purview of Rules 16 and 18 of the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1977. These rules stipulate that unless revoked earlier, the duty ceases to have effect on the expiry of four (4) years from its imposition, with provision for review by the Central Government for its continuation. The 2020 Notification, imposed within four years of the 2018 SGD Notification, continues the imposition rather than introducing a new levy. The Directorate General of Trade Remedies recommended its continuation after conducting a review investigation. Therefore, it is evident that the generators have contributed to the continued imposition.

<u>Submissions of SECI</u>

58. Learned Counsel for SECI submitted that as per RFS issued on 03.08.2018, Section II Clause 6 of the RFS provided that the Change in Law shall not include the imposition of and/or changes in applicable

Safeguard Duty. However, on 07.02.2019, Amendment No.04 to the RFS deleted the above part in Section II Cl 6.

59. SGD notification 2018 was issued on 30.07.2018, which was in effect till 29.07.2020. Subsequent to the Bid deadline date of 19.02.2019, LOAs were issued on 02.03.2019 (APL 26 of 2022, 52 of 2022 and 88 of 2022) and PPAs were entered into with these developers from 03.06.2019 to 10.06.2019. PSA was signed with RUVNL on 27.06.2019. SGD notification 2020 was issued on 29.07.2020.

60. SECI does not dispute that the SGD Notification 2020 is a Law in terms of PPA and the same has to be decided within the scope of Article 12 of the PPA. It is further submitted that even before RERC, the stand of SECI was that the goods which were imported or should have been imported prior to 30.07.2020, the safeguard duty was applicable under the Notification dated 30.07.2018 which was existing at the time of Bid Deadline date i.e. 19.02.2019 and the Appellants were required to factor the impact of the same in the tariff quoted by it in the bidding process. The Appellants will not be entitled to any relief in respect of such goods. However, If the imposition of SGD notification 2020 dated 29.07.2020 is considered as Change in Law by this Tribunal, then impact of the same will have to be reconciled among parties, and accordingly, such reconciled amount be paid / received on a back to back basis in a time bound manner.

<u>Appellants Common submissions In Andhra Pradesh Batch of Appeals:</u>

61. Learned counsel for the Appellants submitted that though the APERC in the impugned order has held that imposition of Safeguard Duty by SGD

Notification 2018 and SGD Notification 2020 constitutes change in law, but erroneously denied the said relief to the Appellants.

62. Learned counsel for the Appellant drawing our attention to "***Nisagra Renewable Energy Pvt Ltd v. Maharashtra ERC & Ors***."(2021 SCC OnLine APTEL 81) and "***Parampujya Solar Energy Pvt. Ltd. & Anr. v. Central ERC & Ors.***" (2022 SCC OnLine APTEL 80) (for the sake of convenience, it may be hereinafter referred to as "**Parampujya Judgment**") submitted that this Tribunal has already recognised imposition of Safeguard Duty by SGD Notification 2018 as a Change in Law event. Furthermore, learned counsel points out that the term 'potential' enforceability of a Provisional DGS Recommendation cannot be treated as 'law'. The Appellants had no occasion to factor such DGS Recommendations into their bidding process for the project. One of the reasons cited by APERC for not allowing the consequential relief to the Appellants is the lack of a declaration by the Appellants regarding whether they considered the potential liability of SGD when submitting their respective bids. This reasoning is erroneous since the Appellants in their affidavits clearly stated that they did not factor in any incidence on account of SGD at the time of bid submission.

63. Learned counsel for the Appellants further submitted that the Appellants have taken into consideration the prevailing "law/regulations" at the time of bid submission. Additionally, the "***Energy Watchdog & Anr. vs. CERC & Ors" (2017) 14 SCC 80*** case makes it clear that the bidders cannot reasonably be expected to anticipate potential future taxes and levies. Therefore, APERC's decision on expecting bidders to foresee a Change in Law event (i.e., imposition of Safeguard Duty) and act on such an assumption is erroneous. Notably, no prudent entity can anticipate or

foresee new Change in Law events as established in the "***Coastal Gujarat Power Limited v. CERC &Ors." 2021 SCC OnLine APTEL 10***. Further, referring to a case in "***Adani Power Maharashtra Limited vs. MERC and Anr." 2022 SCC OnLine APTEL 28,*** learned counsel submits that the Provisional DGS Recommendation published in the official gazette is a mere recommendation and does not have the force of law. This view was also upheld by the Hon'ble Supreme Court in ***"GMR Warora Energy Ltd. vs. CERC & Ors." (2023 SCC Online SC 464)*** which confirms that the publication of a notification or circular in the official gazette only disseminates information and does not qualify as a pre-requisite for an instrument to have a 'Force of Law'.

64. Learned counsel for the Appellants contended that while passing the impugned order, APERC has failed to appreciate that Safeguard Duty imposed by the SGD Notification 2018 and SGD Notification 2020 was done after conclusion of final investigation/findings of Director General (Safeguards):

(a) Provisional DGS Recommendation issued before Cut-off Date was at best a mere '**recommendation**' with no force or effect in the eyes of law. In **"*United Phosphorous Ltd. Vs. Director General (Safeguards)" (2000 (91) ECR765(SC)*** and "***Saurashtra Chemicals Ltd. Vs. Union of India" (2009) 17 SCC 529,*** the Hon'ble Supreme Court held that final findings issued by DGS are purely recommendatory. An Appeal lies against the final determination which has to be made by the Central Government. The Hon'ble Supreme Court in various judgments held that recommendations issued by a designated authority have no force of law/ not binding unless notified/ implemented by Central Government. The said judgments relate to cases of imposition of anti-dumping duty (*like Safeguard Duty emanates from Custom Tariff Act/ Rules*).

(b) Section 8B of Customs Tariff Actread with Rules 4, 9 and 10of Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 envisages as under:

(i) Director General (Safeguards) can only "**recommend**" levy of provisional or final Safeguard Duty. He has no powers to **impose** such duty.

(ii) Central Government (i.e., Department of Revenue, Ministry of Finance) has the authority to impose Safeguard Duty, (provisional or final) and has been vested with discretionary power. "***Vidarbha Industries Power Ltd. vs. Axis Bank Ltd." (2022) 8 SCC 352.***

(c) Central Government never implemented the Provisional DGS Recommendation. Until it is implemented, such recommendation had no force of law.

(d) Provisional DGS Recommendation dated 05.01.2018, was stayed by Madras High Court *vide* Order dated 19.01.2018 in W.P No. 1156 of 2018 and W.P Nos. 1436 to 1438 of 2018 **[*M/s Shapoorji Pallonji Infrastructure Capital Co. ltd. Vs. Union of India & Anr.*].** This Stay continued till16.04.2018(i.e., one day before the Cut-off date**)** and was in force at the time of issuance of Request for Selection dated 09.03.2018.

(e) In the proceedings before Madras High Court dated 16.04.2018, Director General (Safeguards) admitted that Provisional DGS Recommendation was 'merely' a 'recommendation' and not binding on the Central Government.

(f) In terms of Article 12 of the PPA, the Change in Law claim would be disqualified in case there is no 'change' in law after Cut-off date, i.e., the

safeguard duty existed before the bid cut-off date. Admittedly, there was no levy of Safeguard duty on import of solar cells and modules on the bid cut-off date, i.e., 17.04.2018**.** SGD Notification 2018 and SGD Notification 2020 were issued after Cut-off Date of 17.04.2018.

65. Learned counsel for the Appellants also contended that when the projects of the Appellants are established as per Section 63 of the Electricity Act, 2003, the jurisdiction of the appropriate commission is limited and do not extend to checking the costs and expenses incurred by the bidders. The Appropriate Commission cannot legally override the bid-derived tariffs under Section 63 by using powers conferred to it under Section 62, unless such bidding transparency or prescribed procedures are not followed. This position is supported by the decision in **"*Tata Power Co Ltd Transmission vs. MERC & Ors.***" (2022 SCC OnLine SC 1615) and "***Energy Watchdog & Anr. vs. CERC & Ors."*** (2017) 14 SCC 80). Moreover, the PPA and the Competitive Tariff Bidding Guidelines do not require the bidders to submit its capital cost assumptions in respect of Change in Law claims. In support of its contention, reliance is placed on "***GMR Warora Energy Ltd. vs. CERC & Ors"*** **(2023) 10 SCC 401.** It is well settled in legal precedent that courts cannot interpose their own interpretation in place of the express commercial terms agreed upon by the parties in the contract. Referring to the judgment in "***Wardha Power Company Ltd. vs. Reliance Infrastructure Ltd. and Anr.," (2014 SCC OnLine APTEL 142),*** learned counsel contended that it is now settled that various criteria/ assumptions that the Seller may have considered at the time of bidding are irrelevant for purposes of calculating Change in Law relief.

66. Learned counsel for the Appellants submitting that there is no delay in the Appellants' claim for restitution contended that neither the PPA nor

the bidding guidelines require the Appellants' to place on record the Change in Law events that may affect their Project, at the time of tariff adoption of PPA/PSA stage. This Tribunal in "***Parampujya Solar Energy (P) Ltd. v. CERC,*" 2022 SCC OnLine APTEL 80,** held that compensation for Change in Law should follow once it is acknowledged, and the Commission cannot add on any qualifiers or filters beyond what is outlined in the PPA and its relevant Articles as regards change in law. The Appellants have diligently pursued their Change in Law claims in a timely manner.

67. Learned counsel for the Appellants asserted that the Appellants are eligible for Carrying Cost as consequential relief due to the imposition of Safeguard Duty. In the absence of an express restitutive clause, the words "provide relief" under the Change in Law clause have been considered by this Tribunal in order to grant Carrying Cost to the Solar Power Developers as held in ***Parampujya Judgment***. Furthermore, in accordance with Article 10.3.3 of the PPA, the Appellants are entitled to Carrying Costs at the LPS rate on a compounding basis to restore them to their original economic position. This view aligns with the legal precedents set in "***GMR Warora Energy Ltd. vs. CERC & Ors."*** 2023 SCC Online SC 464 and ***"Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. v. Adani Power (Mundra) Ltd. & Anr."*** 2022 SCC OnLine SC 1068. Additionally, since the APERC has acknowledged the imposition of Safeguard Duty as a Change in Law event, consequential relief as per Article 12.2 must follow, and that the APERC cannot refrain from providing the said relief.

Respondent Nos.1, 3 & 4 Common submissions In Appeal No. 419 of 2023 & Batch (Andhra Pradesh Batch of Appeals):

68. Learned counsel for Respondent submitted that the Appellants had invoked the adjudicatory jurisdiction of the Commission under Section 86(1)(f) of the Electricity Act, 2003; unlike Section 63, where the Commission is mandated to adopt the tariff discovered through competitive bidding, the powers conferred under Section 86(1)(f) are broad and adversarial, following general principles of civil law, including rules of evidence and with the same powers as that of a Civil Court under the Code of Civil Procedure, 1908, due to which, the Commission requested the Appellants to produce their working sheets of capital cost to ascertain the impact of SGD Notifications on their bid calculations. However, the Appellants denied to provide the said details and documents before the Commission.

69. Learned counsel further submitted that the Appellants approached the Commission for restitutory relief, aiming to be placed in the same financial position as if the Change in Law event had not occurred inasmuch as Article 12.2 of the PPA and Para 5.7.1 of the Bidding Guidelines stipulate that the adversely affected party should be restored to its original financial position. However, the Commission for determining the quantum and mechanism of compensation is authorized to scrutinize documents to ascertain the exact loss incurred by the Appellants. It is a settled principle that restitution requires that the injury be both pleaded and proved, involving a two-fold test of enquiry and determination for assessment of compensation. As the adjudicatory authority at first instance, the Commission's powers of enquiry and determination cannot be restricted by the Appellants.

70. Learned counsel for the Respondent submitted that there is no dispute as regards imposition of the Safe Guard Duty as a Change in Law event. However, as per Article 12.2 of the PPA, the Commission has to

determine the relief and compensation quantum based on the pleadings and evidence adduced by the parties. The payment receipt submitted by the Appellants is only the proof of SGD due and paid to the Government, but that does not establish any adverse financial loss on the part of the Appellants warranting restitution. Anyhow, additional expenditure must be beyond the considered expenditure, which quantum is required to be scrutinized by the Commission since the PPA as well as Bidding Guidelines specifically empower the Commission to determine the compensation, considering the material evidence submitted by the parties. Furthermore, it is a settled principle of law that non-production of material documents may lead to adverse inference by the court. The burden of proof always lies on the party asserting a fact. Here, the Appellants have approached the Commission requesting to assess the loss and declare the compensation, therefore, the burden of proving such loss being suffered lies on the Appellants. However, the Appellants have admittedly refused to submit the bid working sheet, which is the material evidence for establishing the actual SGD, if any, factored at the time of bid submission and to show that adverse financial loss was suffered by them. By withholding these documents, the Appellants have hindered the Commission's adjudicatory power, which led to denial of the relief sought by the Appellants.

71. Learned counsel for the Respondents also submitted that the total compensation claimed by the Appellants exceeds Rs. 300 Crores. However, given that this amount will ultimately have to be borne by the consumers, the Commission has rightly demanded the bidders/Appellants to provide the working sheets to verify the exact quantum of loss suffered by them. More so, the Act also mandates that the Commission must protect consumer’s interest and ensure reasonable recovery of electricity

costs. As prudent and conscientious bidders, the Appellants are required to plead and prove the actual adverse financial loss suffered by them before the Commission in order to obtain restitutory relief.

72. Learned counsel asserted that the Appellants in the instant cases have not properly pleaded any financial loss suffered by them, as evidenced from their pleadings. Specifically, in Appeal No. 419 of 2023, the Appellant only mentioned the imposition of SGD as Change in Law and about the payment made to the Government, without detailing any financial harm suffered. It is a settled principle of law that court decisions are confined to the content of the pleadings submitted by the parties, and its findings are based on those submissions and prayers. The court cannot make assumptions based on unpleaded contentions or introduce any contentions that are not raised by the parties.

73. Learned counsel for the Respondents further asserted that the SGD was first notified on 30.07.2018 and then on 29.07.2020. However, the PPAs were approved by the Commission on 05.10.2019, over a year after the first SGD notification. Since it was a special fact only to their own knowledge as to whether they have considered any SGD impact in their bid or not, the Appellants were obliged to disclose to the Commission any additional liability that may accrue on account of SGD at the time of approval of PPAs. The burden of disclosing this fact lies on the part of the Appellants, as they are the ones who have incurred the additional expenditure. The Respondents were unaware of this additional cost until tariff adoption, as no Change in Law notice was served. The Appellants also did not disclose this fact during tariff adoption. As noted by the Commission in the Impugned Order, this omission presumably indicates that the Appellants had already factored in the potential liability.

74. Learned counsel for Respondent No 1 submitted that the obligations of the distribution licensee under the PSA is on back to back basis with the obligation of the Respondent No.1 (NTPC) to the Appellant. Therefore, the Respondent No.1 is in a position to discharge obligations under the PPA, including the payment for Change in Law implications, etc. only upon distribution licensee remitting the amount to the Respondent No.1 in terms of the PSA. Hence, it is pertinent that in the eventuality the Present Appeal is allowed and the relief sought by the Appellant is granted, then the compensation / relief shall be paid by the ultimate beneficiaries, viz the AP Discoms.

Appellant Submissions in Appeal No. 579/2023 ("BRPL Appeal")

75. Learned Counsel for the Appellant submitted that impugned order is contrary to the provisions of Customs Tariff Act, 1975 & Custom Tariff Rules, 1997, since the entire scheme of the Customs Act has been overlooked by CERC while passing the impugned order. The 1975 Act specifically provides "Sec. 8B(4) - *The duty imposed under the section shall, unless revoked earlier, cease to have effect on the expiry of four years from the date of such imposition. Provided that if the Central Government is of the opinion ..it may extend the period of such imposition. Provided further that in no case the safeguard duty shall be continued to be imposed, beyond a period of ten years from the date on which such duty was imposed".* Similar provisions are aligned in the 1997 Rules providing "*16. Duration- … (2) ..duty levied under Rule 12 shall, unless revoked earlier, cease to have effect on the expiry of four years from the date of its imposition.."*

76. Learned counsel submitted that SGD-1 was not revoked and in fact it was extended after the review undertaken by Ministry "*for continued imposition*" beyond 29.07.2020, and accordingly SGD-2 was notified on 29.07.2020. Learned Counsel draws our attention to the decision of the Hon'ble Supreme Court in ***"Union of India & Anr. Vs. Kumho Petrochemicals Co. Ltd. & Anr." (Rep. in (2017) 8 SCC 307)*** wherein it was held that "*… 33. From the scheme of Section 9-A of the Act, it becomes clear that though the notification for anti-dumping duty is valid for a maximum period of five years, the said period can be extended further with the issuance of fresh notification. ...*"

77. It is further submitted that Section 9A (5) is *in pari materia* with Section 8(B)(4) of the 1975 Act. In fact, taking into consideration that four years is the life of the safeguard duty from the date of its first imposition, the Central Government extended SGD-1 beyond 29.07.2020. Hence, the impugned order is in the teeth of Section 8(B)(4) of the 1975 Act since it holds that SGD-1 was not subjected to extension / revision after two years and that SGD-2 increased the rate of duty from 0 to 14.9% and 14.5%. Therefore, the Bidder's perception that SGD-1 will have an end date of 29.7.2020 at the time of bid submission, is wrong.

78. Learned counsel drawing our attention to the following submits that the two expressions cannot have one and same meaning -

> ***"Director General <u>recommends</u> the imposition of safeguard duty …for a period of two years…***".AND The Central Govt "***hereby <u>imposes</u> …. a safeguard duty at the following rate, namely:-"***

Here, the recommendation for two years will not bind the Central Government. If both the expressions ***recommends & imposes*** are given

the same meaning, then it will amount to revoking SGD -1 at the end of two years without there being an act of revocation ("***unless revoked earlier***") u/s. 8(B)(4) of the 1975 Act. Moreover, it will conflict with SGD-2 as it is a "***continued imposition***". Therefore, there is no reason to construe that SGD-1 ended on 29.07.2020. The 1st proviso to Sec. 8(B)(4) of the 1975 Act carves out an exception to the main enactment of Sec. 8(B)(4) i.e., if the duty is not revoked before the expiry of four years then the Govt. may extend the period of such imposition. In fact, SGD-2 extended the imposition for overall period of four years. If SGD-1 ended on 29.07.2020 then the 1st proviso to Section 8(B)(4) could not have been operated at all.

79. Learned Counsel contended that there was no *Sunset Review* of SGD-1 because four years was the life of the first imposition of the safeguard duty and there was balance of two years from 29.07.2020 for the four years to expire. However, there was "***continued imposition*** "of SGD-1 at "liberalized rate" i.e. 14.9% and 14.5%, respectively. Instead of revoking SGD-1 the Central Government continued the imposition of SGD-1 at lower rate of safeguard duty by way of SGD-2. SGD-1 continued beyond 29.07.2020 without any interruption and break. There was neither discontinuance nor any gap or vacuum between SGD-1 and SGD-2. Therefore, SGD-1 continued to remain in force beyond 29.07.2020 with slight amendment to the rate of safeguard duty carried out by SGD-2. SGD-2 amended SGD-1 during the lifetime of SGD-1.

80. Learned counsel for the Appellant submitted that the assessment of "Change in Law" as outlined in Article 12 of the PPA requires consideration of the applicable laws and notifications both at the time of bid submission and thereafter. The RfS mandates that

"6.0 … the maximum tariff shall be inclusive of statutory taxes, duty, levies, cess etc. if applicable as on the last date of bid submission. It is clarified that any change in the rates of any taxes after the last date of submission of the bid… shall only be considered as change in law."

Notably, RFS Amendment No. 01 envisages that "*extension of taxes.****.at the same rate.....****on the expiry of the current period****"*** shall not be change in law. RFS Amendment No. 02 dated 06.02.2019 has omitted the words in italics. On facts, SGD-2 modified the duty not ***"at the same rate….."*** as in SGD-1. Hence, replying on the aforesaid RFS amendments, it is erroneous on the part of CERC to hold that SGD-2 is a change in law.

81. However, given the bid submission date of 15.02.2019 while SGD-1 was in effect, the bidder must have factored the same in its bid. In such a situation, the CERC is incorrect in holding that since SGD 2 has increased the duty from 0 to 14.9% and 14.5% it is a change in law event. Here the issue is not the duty as on 29.07.2020 but the duty existed as on 15.02.2019, the date on which the bid was submitted.

82. Learned counsel for the Appellant submitted that the finding of the CERC that Respondent No. 2 (Solar Power Generator) was entitled to relief under Article 12 of the PPA is misreading of the said Article, inasmuch as the alteration in the rates of the safeguard duty from SGD-1 to SGD-2 has resulted in a financial benefit to the solar power generator, thereby entitling the Appellant, being the procurer, to seek compensation and quoted relevant provision of Article 12 of the PPA is referenced and its relevant provision is highlighted:

> *"12.1… In the event a change in law results in any adverse financial loss/gain to the solar power generator, then the solar power*

generator/procurer shall be entitled to compensation by the other party, as the case may be."

In addition, 1997 Rules specify *"17. Liberalization of duty- …duty shall be progressively regularized at regular intervals during the period of its imposition."* Accordingly, the duty rate was reduced from SGD-1 to SGD-2.

83. Learned counsel for the Appellant contended that the contention of Respondent No.2 regarding non-inclusion of SGD-1 in the quoted tariff is based on hypothesis and cannot be considered in law. In support of its contention reliance is placed on the decision of the Hon'ble Supreme Court in "***Tata Power Co. Ltd Vs. Reliance Energy Ltd"*** (Rep. in (2009) 16 SCC 659, wherein it is held as ***"***For the purpose of interpretation and/or application of a statute, this Court cannot base its decision on any hypothesis. Construction of a statute, same and except some exceptional cases, cannot be premised on the hardship of a party". Further, the Supreme Court in "***Nabha Power Ltd. Vs. Punjab State Power Corporation Ltd***." (Rep. in (2018) 11 SCC 508) mentioned "five condition test", emphasizing that implied conditions can only be read into a contract when specific conditions are satisfied, and there exists a strict necessity for it. Allowing SGD-2 as a Change in Law event would amount to modifying an essential term of the Bid i.e. Article 12. The business decision influencing the period of importation beyond 29.7.2020 by diluting Article 12 with some implied inclusions, is deemed unreasonable, inequitable, and contradictory to the express terms of the contract. It is asserted that no such hypothesis or implied term was intended by both parties, and it would unfairly impose all the perils of the transaction on the Appellant. It is settled principle that Courts cannot re-write the contracts and the purported claim of Respondent No. 2 is deemed unsustainable.

The RfS provisions and the timeline of events related to the project's commissioning date are cited to support the argument that SGD-1 was factored into the quoted tariff.

84. Learned counsel for the Appellant also contended that the principle of "temporary legislation" is inapplicable to the present matter. The life of SGD-1 was four years which has not expired, instead it was extended, continued, modified, and amended by SGD-2. Therefore, it is incorrect to assert that SGD-1 constitutes temporary legislation. Moreover, if at all, the second proviso to Section 8(B)(4) attracts the principle of *temporary legislation* as it pertains to the lapse of safeguard duty beyond a period of ten years. Furthermore, as SGD-1 was still in force at the time of notification of SGD-2 by which the amendment was made to SGD-1 during the life time of SGD-1, hence, the reliance on the principle of temporary legislation in relation to SGD-1 is misplaced. Additionally, the impugned order violated principles of natural justice since no notice of hearing was issued to the Appellant by CERC. However, the Appellant is not pressing for this ground and has instead argued on merits. Further, it is also contended that CERC also violated principles of natural justice by issuing a directive which was not prayed for by Respondent No. 2 and for which the Appellant was not given an opportunity of hearing. The Appellant relies on the case of "***Arikala Narasa Reddy v. Venkata Ram Reddy Reddygari," (2014) 5 SCC 312,*** in asserting that a court cannot go beyond the pleadings of the parties.

Respondent No. 2 Submissions in Appeal No. 579/2023

85. Learned counsel for the Respondent No.2-Azure Power Forty-one Private Limited (for short "Azure") submitted that the notification of the Ministry of Finance i.e., SGD Notification 2018 explicitly stipulated the imposition of Safeguard Duty for a period of two years, effective from July 2018. Consequently, Respondent No.2-Azure was under no obligation to anticipate the imposition of Safeguard Duty beyond the timelines prescribed under SGD Notification 2018. At the time of bid submission, Respondent No.2 prepared its bid in accordance with the existing legal framework and planned the project accordingly. Azure neither accounted for the imposition of Safeguard Duty beyond the expiration date of 29.07.2020 nor was under any obligation to do so, as there was no prevailing legislation at that time mandating the levy of Safeguard Duty beyond 29.07.2020.

86. It is further submitted that upon the expiration of the SGD Notification, 2020 on 29.07.2021, a one-year period transpired without the issuance of any notification imposing Safeguard Duty as per Section 8B of the Customs Act, thereby completing the requisite four-year period. The absence of Safeguard Duty imposition post the sunset date of the SGD Notification, 2020 indicates the absence of any restriction on the Ministry of Finance (Department of Revenue) to issue a notification imposing safeguard duty for a duration less than four years. Consequently, it was inferred that the SGD Notification 2018 was valid for a period of two years only, releasing bidders from the obligation to anticipate its imposition for a four-year term. The subsequent imposition of the SGD Notification 2020 via fresh notification constitutes a Change in Law Event under the PPA.

87. Learned counsel for Respondent No. 2 submitted that the Azure acknowledged the Central Government's notification dated 03.03.2020, as published in the official gazette on 04.03.2020, which signifies the

continuation of the Safeguard Duty on the import of solar cells. It is noted that the initiation of review of investigation for the levy of Safeguard Duty and its deliberations took place subsequent to the Bid Submission date, i.e., 15.09.2019, and therefore, have no bearing in the present case. Moreover, it is emphasized that Azure is obligated to submit the bid based on the prevailing circumstances and not on assumptions regarding future laws.

88. Learned counsel for the Respondent No.2 further contended that the assertion made by the Appellant regarding the anticipation at the time of bid submission, of the imposition of a 15% safeguard duty post the date of 29.07.2020, or any other rate thereof, in perpetuity without the issuance of any notification by 'Governmental Instrumentalities', is untenable and unsupported. Therefore, it is refuted that there has been reduction in the rate of Safeguard Duty imposition by virtue of issuance of the SGD Notification 2020 for those power suppliers who submitted their bids prior to SGD Notification 2020. Conversely, it is highlighted that the imposition rate has notably escalated from nil (as of the date of Bid submission) to 14.9% and 14.5% consequent to SGD Notification 2020, which was made effective from 30.07.2020. This substantial increase has resulted in 'adverse financial loss' to the bidder, specifically Azure in the present case.

89. Learned counsel for Respondent No.2 further asserted that taking into consideration the RfS stipulations, it is contended by the Appellant that Azure's assumption to commission the project within the prescribed timeline of 05.12.2020 after the end date of SGD Notification 2018 i.e., within 4-months from the end date of the SGD Notification 2018 till the commissioning date, is impossible. Refuting this argument of the Appellant, learned counsel submitted that this argument was not initially

raised by the Appellant in their pleadings and it is only an after-thought. Nevertheless, it is asserted that Azure had a 4-month window after the end date of the SGD Notification 2018, specifically from 30th July 2020 to 5th December 2020, which is sufficient to establish its project. It is further submitted that even in a worst-case scenario, Azure had 112 days to commission its project following the end date of the SGD Notification 2018. In view of the above submissions, learned counsel for Respondent No 2 prayed that the Appeals be dismissed.

Discussion and Analysis

90. We have heard learned counsels for the parties and after going through the comprehensive submissions by the learned counsels for the Appellants and Respondents in all the three batches, it is undisputed that SGD Notification 2018 was issued on 30.07.2018, effective for a period of two years from 30.07.2018 to 29.07.2020 and that SGD Notification 2020 was issued on 29.07.2020, effective for a period of one year from 30.07.2020 to 29.07.2021. The following is relevant for all these batch of appeals:

Rajasthan Batch of Appeals: SGD Notification 2020 has been issued after the bid submission cut off date of 19.02.2019 and the Appellants have prayed for financial compensation citing SGD Notification 2020 to be a Change in Law event. The State Commission, RERC, did not consider SGD notification 2020 to be a change in law event and denied the financial compensation (except Appeal No. 36 of 2023, which has been preferred directly to this Tribunal aggrieved by the impugned order). The Appellant in Appeal No. 36 of 2023, although not a party to the proceedings before the RERC, bases its facts and claim on the same footing as that of other Appellants in this batch of appeals, praying for similar relief as SECI has

rejected its claim under the change in Law provision, citing the impugned order.

Andhra Pradesh Batch of Appeals: In this batch of Appeals, the SGD Notification 2018 has been issued after the bid submission cut-off date of 17.04.2018. The Appellants have prayed for financial compensation citing SGD Notification 2018 and SGD Notification 2020 as Change in Law events. The State Commission, APERC, though acknowledging SGD Notifications to be a change in law event, however denied the financial compensation on the grounds that the financial loss to the Appellants could not be established due to the absence of disclosure of the financial data considered during bid submission by the Appellants.

BRPL Appeal: In this case, the Appellant has challenged the order of CERC whereby SGD Notification 2020 was held to be a change in Law event, and Financial compensation was granted to Respondent, Azure Power Forty – One Private Ltd. In view of the submissions of the Appellant in the BRPL appeal that, though the impugned order passed by CERC violates principles of natural justice inasmuch as no notice of hearing was given to them; since they are not pressing this ground in the instant appeal, we are of the view that there is no need for us to delve upon this issue.

91. After going through the deliberations, following issues emerge for our consideration:

a) **Is SGD Notification 2020 a Change in Law Event or it is Continuation/Amendment of SGD Notification 2018?**
b) **The relevant Provisions in RFS/PPA vis-s-vis Change in Law claim for respective SGD Notifications.**
c) **Performance of contract by importing solar panels/modules after SGD 2018 notification period vis-a-vis commissioning schedule as per RFS/PPA.**

92. Before deliberating the above issues, it is important to understand the process of issuance of Safeguard Duty Notification under Customs Tariff Act.

Process of Issuance of Safeguard Notification

The power, to apply safeguard measures on a particular article, can be exercised by the Central Government, under Clause (1) of Section 8B of the Customs Tariff Act, only on fulfilment of the following conditions: (i) after conducting such enquiry it deems fit; and (ii) on arriving at the satisfaction that the article, if imported into India in such increased quantity and under such conditions, would cause or threaten to cause serious injury to the domestic industry. It is only thereafter can the Central Government, by notification in the Official Gazette, apply such safeguard measures, as it deems appropriate, on that article.

Clause (2) of Section 8B, details the safeguard measures which can be applied, under Section 8B(1), on the article. Such measures shall include: (i) Imposition of safeguard duty; (ii) Application of tariff rate quota; and (iii) such other measures as the Central Government may consider appropriate. The aforesaid safeguard measures can be applied by the Central Government to curb increased quantity of imports of an article to prevent serious injury to the domestic industry. It is not necessary that, in

all cases falling under Section 8B(1), the Central Govt should invariably impose safeguard duty only, for Section 8B(2) confers on it the discretion to apply a tariff rate quota besides other measures also.

The manner in which the Central Government should have an enquiry conducted, before it arrives at the satisfaction, as required under Section 8B(1), that an article, if imported into India in increased quantity and under certain conditions, would cause or threaten to cause serious injury to the domestic industry is detailed by way of Rules made by the Central Government called "The Customs Tariff (Identification and Assessment of Safeguard Duty) Rules 1997 ("the 1997 Rules" for short).

In terms of the SGD Rules, the broad procedure for imposition of Safeguard Duty is as follows:

(1) A domestic producer files a written application before the Director General (Safeguards) (Rule 5(1)), who is then required to examine the accuracy and adequacy of the evidence provided in the said application and, upon satisfying himself of the same, initiate investigation to determine the existence of "serious injury" or "threat of serious injury" to the domestic industry, caused by the import of an article in such increased quantities, absolute or relative to domestic production.
(2) The Director General shall proceed with the conduct of investigation and, in critical circumstances, may record preliminary findings regarding serious injury or threat of serious injury and shall issue a public notice regarding the preliminary findings. (Rule 9(1)).
(3) The Central Government may, in accordance with Sub-section 2 of Section 8B of the Customs Tariff Act, 1975, impose provisional Safeguard Duty on the basis of the preliminary findings of the Director-General

(Safeguards), provided such duty shall remain in force for a maximum period of 200 days. (Rule 10).

(4) The Director General (safeguard) is required, within 8 months from the date of initiation of the investigation or within such extended period as the Central Government may allow, to determine whether, -

(a) the increased imports of the article under investigation has caused or threatened to cause serious injury to the domestic industry, and

(b) a causal link exists between the increase imports and serious injury or threat of serious injury. (Rule 11(1)).

(5) The Director General is also required to give his recommendation regarding the amount of duty which, if levied, would be adequate to prevent or remedy the serious injury and to facilitate positive adjustment (Rule 11(2)), the duration of levy of duty (Rule 11(3)), and, where the period recommended is more than one year, to also recommend progressive liberalisation adequate to facilitate positive adjustment (proviso to Rule 11(3)).

(6) The final findings of the Director-General, if affirmative, should contain all information on matters of fact and law, and the reasons which have led to the conclusion (Rule 11(4)).

(7) Thereafter, a public notice is required to be issued by the Director General recording his final findings (Rule 11(5)). He is then required to send a copy of the public notice regarding his final findings to the Central Government in the Ministry of Commerce and in the Ministry of Finance (Rule 11(6)).

(8) Thereafter, the Central Government is empowered, by way a notification in the Official Gazette, to impose, upon importation into India

of the product covered under the final finding, a safeguard duty not exceeding the amount which has been found adequate to prevent or remedy the serious injury and to facilitate positive adjustment (Rule 12(1)).

(9) The safeguard duty so levied shall take effect from the date of publication of the notification, in the Official Gazette imposing such duty. (Rule 14(1)).

(10) The duty shall be levied only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate positive adjustment. (Rule 16 (1)).

(11) The duty levied under Rule 12 shall, unless revoked earlier, cease to have effect on the expiry of four years from the date of its imposition. (Rule 16(2)).

(12) If the Central Government is of the opinion that the domestic industry has taken measures to adjust to such injury or threat thereof and it is necessary that the safeguard duty should continue to be imposed, it may extend the period of such imposition (Proviso to Rule 16(2)).

(13) In no case, shall the safeguard duty continue to be imposed beyond a period of ten years from the date on which such duty was first imposed. (second proviso to Rule 16(2)).

(14) The Director General (Safeguards) shall review the need for continued imposition of Safeguard Duty (in the same manner of conducting an investigation) and, upon being satisfied with the information received, either recommend continuation of the imposition of Safeguard Duty or withdrawal of the same (Rule 18).

The following sequence of events are reported which led to the imposition of Safeguard Duty in these batch of matters:

(i) Indian Solar Manufacturers Association on behalf of five Indian Producers filed an application dated 28.11.2017 before the Director General (Safeguards) on 05.12.2017 under Rule 5(1) of the SGD Rules seeking imposition of Safeguard Duty on imports of "Solar Cells whether or not assembled in modules or panels".

(ii) After examination of the said application, the Director General (Safeguards) initiated an investigation under Rule 5(3) of the SGD Rules vide Notice of Initiation dated 19.12.2017 published in the Gazette of India, Extraordinary vide GSR No.1522 (E).

(iii) During the investigation, the Director General (Safeguards) found *prima facie* evidence that there existed critical circumstances which warranted imposition of provisional safeguard duty and by way of its preliminary findings recommended imposition of 70% provisional Safeguard Duty. The Preliminary Findings of the Director General (Safeguards) under Rule 9 of the SGD Rules, 1997 were published vide Notification dated 05.01.2018.

(iv) However, the aforesaid Notification dated 05.01.2018 was challenged before the Hon'ble High Court of Madras by way of W.P. No.1156 of 2018 and stayed by the Hon'ble High Court of Madras from 19.01.2018 to 16.04.2018.

(v) There was no levy of provisional Safeguard Duty under Rule 10 of the SGD Rules in accordance with Section 8B(2) of the Customs Tariff Act, 1975.

(vi) Director General (Safeguards) published its final findings under Rule 11 of the SGD Rules by way of notification dated 16.07.2018, wherein it recommended levy of Safeguard Duty for a period of 2

years upon import of solar modules from **China and Malaysia** as per following rates:

First Year: Safeguard Duty @ 25% ad valorem
Second Year (first 6 months) : Safeguard Duty @ 20% ad valorem
Second Year (next 6 months) : Safeguard Duty @ 15% ad valorem

(vii) In exercise of the powers conferred by Section 8B(1) of the Customs Tariff Act, 1975 read with Rules 12, 14, and 17 of the SGD Rules, the Department of Revenue, Ministry of finance, Government of India issued the 2018 SGD Notification on 30.07.2018 (**"SGD Notification 2018")**, imposing Safeguard Duty on the import of solar panels and modules into India from the People's Republic of China and Malaysia for a period of two years, i.e., from 30.07.2018 till 29.07.2020 at the following rates:

(a) 25% ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30.07.2018 to 29.07.2019 (both days inclusive);

(b) 20% ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30.07.2019 to 29.01.2020 (both days inclusive); and

(c) 15% ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30.01.2020 to 29.07.2020 (both days inclusive).

(viii) Subsequently, Indian Solar Manufacturers Association. on behalf of three Indian Producers. filed application dated 15.01.2020 before the Director General (Safeguards) on 15.01.2020 seeking

continued imposition of Safeguard Duty against imports of "Solar Cells whether or not assembled in modules or panels" in India.

(ix) Director General (Trade Remedies), by way of notification no. 22/1/2020-DGTR dated 03.03.2020 published in the Gazette of India, Extraordinary on 04.03.2020, initiated a review under Rule 18 of the SGD Rules for examining the need for continued imposition of Safeguard Duty.

(x) Oral hearing was held on 03.07.2020. The Director General (Trade Remedies) published the final findings of its review investigation vide notification no. 22/1/2020 – DGTR dated 18.07.2020 in the Gazette of India, Extraordinary on 18.07.2020, whereby it recommended the continued imposition of Safeguard Duty for a further period of 1 year w.e.f 30.07.2020 upon import of solar modules from **China, Thailand and Vietnam** as per following rates:

First 6 Months: Safeguard Duty @ 14.90 % ad valorem
Next 6 Months: Safeguard Duty @ 14.50 % ad valorem

(xi) In exercise of the powers conferred under Section 8B (1) of the Customs Tariff Act, 1975 and Rules 12, 14, 17, and 18 of the SGD Rules, the Department of Revenue, Ministry of Finance, Government of India issued the 2020 SGD Notification on 29.07.2020 (**"SGD Notification 2020")** imposing Safeguard Duty on solar modules imported from People's Republic of China, Thailand and Vietnam for the period from 30.07.2020 to 29.07.2021 at the following rates:

(a) 14.9% ad valorem minus anti dumping duty payable, if any, when imported during the period from 30.07.2020 to 29.01.2021 (both days inclusive); and

(b) 14.5% ad valorem minus anti-dumping duty payable, if any, if imported during the period from 30.01.2021 to 29.07.2021 (both days inclusive).

Issue: Is SGD Notification 2020 a Change in Law Event or it is Continuation/Amendment of SGD Notification 2018.

93. In these batch of Appeals, there is no dispute that bids were submitted and accepted prior to SGD Notifications 2018/ SGD Notification 2020; SGD Notifications have been acknowledged as change in Law event by APERC in Andhra Pradesh Batch of appeals, but financial compensation was not granted, which is being disputed by the Appellants; in BRPL Appeal, the Central Commission i.e. CERC has granted financial compensation acknowledging SGD Notification 2020 as a Change in Law event, which is being disputed by the Appellant; while in Rajasthan Batch of Appeals, RERC has not acknowledged SGD Notification 2020 as a change in Law event, which is being disputed by the Appellants. We observe that the Procedure of imposition of safeguard duty, as specified in the Customs Tariff Act, 1975 and SGD Rules 1997, are quite elaborate, as detailed above. We also notice that the procedure of review for continuing imposition or its withdrawal is equally elaborate, and there is no dispute that the same procedure has been followed for issuance of SGD Notification 2018 and SGD Notification 2020. The main contention of the Appellant in BRPL Appeal and Respondents in Rajasthan Batch of Appeals is that, as per Sub section (8) of Section 8(B) of Customs Tariff

Act 1975, the lifespan of safeguard duty from the date of its imposition is four years unless revoked. The Central Government extended the SGD Notification 2018 beyond 29.07.2020, and in fact it could have further extended it beyond 29.07.2021. Therefore, it is incorrect to hold that the SGD Notification 2018 was not subject to extension/ revision after two years and SGD Notification 2020 has increased the rate of duty from 0 to 14.9 % and 14.5 %.

94. Sub section (8) of Section 8 (B) of Customs Tariff Act 1975 is reproduced below:

> *8(B)(8) The safeguard measures applied under this section shall, unless revoked earlier, cease to have effect on the expiry of four years from the date of such application:*
> *Provided that if the Central Government is of the opinion that the domestic industry has taken measures to adjust to such injury or threat thereof and it is necessary that the safeguard measures should continue to be applied, it may extend the period of such application:*
> *Provided further that in no case the safeguard measures shall continue to be applied beyond a period of ten years from the date on which such measures were first applied.*

95. Section 8(B)(8) commences with the words "*The safeguard measures applied under this section*". The said provision, evidently, relates to a situation where the safeguard measures are applied (among which is imposition of safeguard duty), by way of a notification issued by the Central Government, without either specifying the period for which such duty would remain in force; or is imposed, in the first instance itself, for a period of more than four years. In either of these situations, the safeguard

duty so imposed would, unless revoked earlier, cease to have effect upon expiry of four years.

The first proviso to Section 8(B)(8) confers on the Central Govt. the power to extend imposition of safeguard duty, even beyond four years, on its' forming an opinion that (i) the domestic industry has taken measures to adjust to such injury or threat, and (ii) it is necessary that the safeguard measures should continue to be applied. The power conferred on the Central Government to extend safeguard duty beyond four years is, however, subject to the stipulation, in the second proviso to Section 8(B)(8), that, in no case, the safeguard duty shall continue to be imposed beyond ten years from the date on which such duty was first imposed.

In view of the afore-said two provisos, the Central Govt would, after expiry of four years from the date of first imposition of safeguard duty, be required, on fulfilling the conditions stipulated in both the provisos to Section 8(B)(8), to extend the period, for which safeguard duty was initially imposed, by a further period of not more than six years, i.e. for a total period of ten years.

The period for which safeguard duty should be imposed is for the Central Govt to decide, and Section 8(B)(8) neither places any fetters on the power of the Central Govt to stipulate a period of less than four years, nor does it mandate that such imposition should, invariably and in all cases, be for a period of four years and not less. It is only because Section 8(B)(8) does not prohibit the Central Govt, even in the first instance, from imposing safeguard duty for a period less than four years, that, by way of the 2018 SGD Notification dated 30.07.2018, safeguard duty was imposed only for a period of two years. In our view, Section

8(B)(8) of Customs Tariff Act, 1975 does not stipulate any minimum period below which the Central Government is prohibited from imposing safeguard duty, it only provides an upper limiting period beyond which either it will cease to have effect or it cannot be extended beyond a certain period.

Accepting the submission, urged on behalf of the Appellant BRPL, that safeguard duty should always be imposed for four years, would render the notification dated 30.07.2018 illegal. The construction placed on Section 8(B)(8), by the Learned Counsel for BRPL, therefore necessitates rejection.

96. Reliance has been placed by the Appellants in BRPL Appeal on the decision of the Hon'ble Supreme Court in **"*Union of India & Anr Vs Kumho Petrochemicals Co Ltd & Anr" (Rep in (2017) 8 SCC 307),*** wherein it was held that, though the anti-dumping duty is valid for a maximum period of five years, the said period can be further extended by way of a fresh notification. Learned counsel for the Appellant, drawing parlance with anti-dumping duty, submitted that it was within the purview of Central Government to extend safeguard duty beyond two years, which was extended by the Central Government beyond 29.07.2020, and therefore SGD Notification 2020 cannot be held to be a new levy of safeguard duty.

In the present case, there is no dispute regarding the authority of the Central Government to extend safeguard duty beyond two years, as the Custom Tariff Act 1975 itself provides for extension, of safeguard duty imposition, even beyond four years, but up to a maximum period of 10 years. What is of relevance is that extension of the period for imposition of safeguard duty, beyond the period initially notified, is not automatic,

but is subject to compliance with the requirements of the SGD Rules as afore-mentioned, and is at the sole discretion of the Central Govt which may or may not extend the initial period for which safeguard duty was imposed. Consequently, the bidders could not have been aware, when they submitted their bids, that the SGD Notification 2018, whereby safeguard duty was imposed for two years, would be extended by the SGD Notification 2020 by a further period of one year.

The judgement of the Supreme Court in ***Kumho Petrochemicals Co Ltd***, on which reliance is placed by the learned counsel, has no application to the facts of the present case. In fact, the Supreme Court, in the said judgment, has also held that it is not mandatory to impose anti-dumping duty for the full period of five years, just because it can be revoked even earlier also. The relevant portion is reproduced below:

> ***"34.*** *After giving due consideration to the arguments advanced by the learned counsel for the parties, we are inclined to agree with the High Court that proviso to sub-section (5) of Section 9-A of the Act is an enabling provision. That is very clear from the language of the said provision itself. Sub-section (5) of Section 9-A gives maximum life of five years to the imposition of anti-dumping duty by issuing a particular notification. Of course, this can be extended by issuing fresh notification. However, the words "unless revoked earlier" in sub-section (5) clearly indicate that the period of five years can be curtailed by revoking the imposition of anti-dumping duty earlier. Of course, provision for review is there, as mentioned above, and the Central Government may extend the period if after undertaking the review it forms an opinion that continuation of such an anti-dumping duty is necessary in public interest. When such a notification is issued after*

review, period of imposition gets extended by another five years. That is the effect of the first proviso to sub-section (5) of Section 9-A. However, what we intend to emphasise here is that even as per sub-section (5), ***it is not necessary that in all cases anti-dumping duty shall be imposed for a full period of five years as it can be revoked earlier***

97. In the present case, though at first instance itself, the SGD Notification i.e. SGD Notification 2018 could have been imposed for four years, however, the Government chose to impose it for two years knowing fully well that even if it is imposed for four years, it can be revoked earlier. In our view, SGD Notification 2018 was issued with a sunset clause, with imposition of safeguard duty up to 29.07.2020. It is also a fact that safeguard duty imposed vide SGD Notification 2018 is applicable for import of Goods from China and Malaysia while safeguard duty in SGD Notification 2020, is applicable for import of Goods from China, Thailand and Vietnam. Thus, import of goods from Malaysia ceases to be subjected to safeguard duty subsequent to 29.07.2020. Likewise safeguard duty on import of goods from Vietnam and Thailand is imposed subsequent to SGD Notification 2020 w.e.f 30.07.2020 up to 29.07.2021.

98. Learned counsel for the Appellant in BRPL Appeal has contended that if the expression “recommend” and “imposes” are given one and the same meaning, then it will tantamount to revoking SGD 1 at the end of two years without there being an overt act of revocation. Moreover, it will conflict with SGD-2 as it is a continued imposition, there being no reason to construe that SGD-1 ended on 29.07.2020.

99. In our view, the above argument does not have any merit since it is very clear that SGD Notification 2018 was for a period of two years, albeit different safeguard duty rates for different years for two countries. For any further imposition of safeguard duty, an entirely fresh process, similar to the one taken up for SGD Notification 2018 was required to be undertaken as per SGD rules, and SGD Notification 2020 was issued, resulting in the imposition of safeguard duty for different countries. SGD Notification 2020 uses the phrase ***"hereby"*** as under:

> *"Now, therefore, in exercise of the powers conferred by sub-sections (1) and (4) of section SB of the Customs Tariff Act read with rules 12, 14, 17 and 18 of the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997, after considering the said findings of the designated authority and subject to the provisions of paragraph 2**, hereby** imposes on subject goods falling under tariff items 8541 40 11 or 8541 40 12 of the First Schedule to the Customs Tariff Act, when imported into India, a safeguard duty at the following rate",*

100. As per black law dictionary, the meaning of '*hereby*' is "*By this document; by these very words"*. Thus, 'hereby' is used to indicate that an action is being performed through the very document in which the terms appear. It emphasizes that the action is taking effect immediately and formally by virtue of the document. Consequently, the safeguard duty, imposed by the SGD Notification 2020, came into force when it was notified on 30.07.2020, and cannot be understood as a continuation of the earlier SGD notification 2018.

101. The Respondents as well as APERC in Andhra Pradesh Batch of Appeals have not disputed in holding SGD Notifications to be a change in law event.

102. Based on above deliberations, it is evident that the earlier process which preceded issuance of the SGD Notification 2018 had to be followed for issuance of SGD Notification 2020. Taking into account the applicability of safeguard duty in the two SGD notifications to different countries, and since the SGD Notification 2018 was issued only for two years, in our view, it is difficult to hold that the Central Govt intended, when it issued the SGD Notification 2018 for a two year period, to be extended for a further period of one year thereafter.

Further, no reasonable bidder could have submitted its bid, on the far-fetched premise that the SGD Notification 2018 would be extended by the SGD Notification 2020, more so as factoring in such a remote and unlikely possibility would result in their having to submit their bid for a higher tariff, which could possibly result in their losing out on being selected in such a bid process.

103. For the aforesaid reasons, we are satisfied that the SGD Notification 2020 would fall under "change in Law" event. ***Nisagra Renewable Energy Pvt Ltd v. Maharashtra ERC & Ors., 2021 SCC OnLine APTEL 81; and Parampujya Solar Energy Pvt. Ltd. & Anr. v. Central ERC & Ors., 2022 SCC OnLine APTEL 80]***

Issue: The relevant Provisions in RFS/PPA vis-s-vis Change in Law claim for respective SGD Notifications

104. Learned counsels for the Appellants in “Andhra Pradesh Batch of Appeals” and “Rajasthan Batch of Appeals” have contested for admissibility of change in law claim for SGD Notification 2018 /SGD Notification 2020, in view of relevant clauses of PPA/RFS, as the referred notifications were issued subsequent to last date of submission of bid; while Respondents in Andhra Pradesh Batch of Appeals & Rajasthan Batch of Appeals as well as the Appellant in BRPL Appeal have contested that change in law claim for SGD Notification 2018 / SGD Notification 2020 as per relevant clauses of PPA/RFS are not applicable because as per RFS document, bidders were required to quote the price inclusive of all statutory taxes, duties, levies, cess applicable as on the last date of bid submission; since at the time of bid submission, SGD Notification 2018 was in existence, that too with higher rates of safeguard duty, financial compensation on account of change in Law event by issuance of SGD Notification 2020 is not admissible.

105. Learned counsel for the Appellants in Rajasthan batch of appeals, has drawn our attention to the amendment carried out in the RFS document issued on 03.08.2018 by the Respondent SECI, especially with regard to Change in law vide Amendment No. 4 dated 07.02.2019, as given below :

<u>Section II Clause 6 (Existing clause) as per RFS document dated 03.08.2018</u>

“SECI shall enter into PPA with successful SPDs for a period of 25 years from the date as per the provisions of PPA. The maximum tariff payable to the Project Developer is fixed at INR 2.68/ kWh for 25 years. This shall be inclusive of all statutory taxes, duties, levies, cess applicable as on the last date of bid submission. It is clarified that any change in the rates of any Taxes after the last day of submission of the bid, including any

duties and cess or introduction of any new tax made applicable for setting up the solar power project and supply of power from the Solar Power project by the SPD which have a direct effect on the Project shall only be considered as change in law. It is further clarified that any extension of taxes, cess or levies at the same rate on the expiry of the current period shall not be considered as Change in Law. ***However, Change in Law shall not include the*** *(i)* ***imposition of and/or changes in applicable Safeguard Duty****; (ii) any change in taxes on corporate income; or (iii) any change in any withholding tax on income or dividends."*

Section II Clause 6 (Amended clause) as Amendment No 4 dated 07.02.2019 to RFS document dated 03.08.2018

"SECI shall enter into PPA with successful SPDs for a period of 25 years from the date as per the provisions of PPA. The maximum tariff payable to the Project Developer is fixed at INR 2.68/ kWh for 25 years. This shall be inclusive of all statutory taxes, duties, levies, cess applicable as on the last date of bid submission.

It is clarified that any change in the rates of any Taxes after the last day of submission of the bid, including any duties and cess or introduction of any new tax made applicable for setting up the solar power project and supply of power from the Solar Power project by the SPD which have a direct effect on the Project, shall only be considered as change in law. However, Change in Law shall not include (i) any change in taxes on corporate income; or (ii) any change in any withholding tax on income or dividends. The Bidders will be free to avail fiscal incentives like Accelerated Depreciation, Concessional Customs and Excise Duties, Tax Holidays etc. as available for such Projects.

106. From a reading of the above provision, it is evident that exclusion of imposition of and/or changes in applicable safeguard duty from change in Law claim was deleted in the Amendment No 4 dated 07.02.2019. This deletion may give rise to the legitimate belief that, with this amendment,

the applicability of/or changes in safeguard duty rates, which were previously excluded from Change in Law claims, are now claimable under the Change in Law provisions of the RFS/PPA. The Respondents in Rajasthan Batch of Appeals as well as the Appellant in BRPL Appeal, have contested that clause 6 of the RFS documents mandates bidder to consider all taxes and duties applicable as on the last date of bid submission i.e. 19.02.2019/ 15.02.2019 at which time the safeguard Duty @ 25 % was applicable as per SGD Notification 2018. In fact, SGD Notification 2020 has led to reduction in safeguard duty to 15 %.

107. The learned counsel for the Respondents in Rajasthan Batch of Appeals, placing reliance on the judgment in ***"Chhotabhai Jethabhai Patel and Co. & Ors. v. Union of India and Anr." (1961 SCC OnLine SC 12), "Haryana Power Purchase Centre V Sasan power Ltd", (2023) SCC online SC 577*** submitted that in the bid, condition that the tariff includes taxes applicable as on 19.02.2019, is a deeming provision, irrespective of what the generators have actually considered or not, as per their commercial decision. The change in law clause i.e., Article 12 of the PPA is for adjustment of tariff on account of subsequent legal provisions, either by way of amendment or introduction of a new law, which subsequently prejudices the party, which is not applicable in the present case, in view of the same principle which was also cited in the case of ***"WB State Electricity Board v. Patel Engineering Co. Ltd", (2001) 2 SCC 451.***

108. In ***Chhotabhai Jethabhai Patel and Co. vs. Union of India and Others (AIR 1962 SC 1006)*** the Supreme Court observed that the object of Section 64-A of the Sale of Goods Act was that, where contracts for the sale of goods are entered into and the price payable therefor determined

on the basis of existing rates of duty - either of excise or of customs - neither party shall be prejudiced or advantaged by reason of the increase or decrease of the duty; in the case of an increase in duty, the seller would be entitled to recover the duty from the buyer provided : (a) there was no contract to the contrary by which he had precluded himself from claiming such enhanced duty i.e. the contract having negatived or limited the seller's right to prefer such a claim, or was at least silent as regards what was to happen in the event of the duty being increased, (b) the change in the rate of duty was effected after the date of the contract; and Section 64-A of the Sale of Goods Act refers in express terms to "duties of excise" and has, therefore, to be read as part and parcel of every legislation imposing a duty of excise.

In the present case, the agreement between the parties provides for a change in law claim to be made. As noted hereinabove, the 2020 SGD notification amounts to a change in law, since the said notification is law and was issued long after an LOI was issued in favour of the generators, and even after an agreement was entered into between the parties. As the agreement itself provides for the generators to be compensated for the change in law event, it cannot be said that the Discoms would suffer prejudice or the generators would gain an unfair advantage by reason of the subsequent SGD Notification 2020. The judgement, in **Chhotabhai Jethabhai Patel and Co**, has therefore no application to the facts of the present case.

109. In ***Haryana Power Purchase Centre vs. Sasan Power Ltd. and Others (2023 SCC OnLine SC 577),*** the first respondent before the Supreme Court had contended that, since in regard to conditions about hydrology, they had relied on the procurers, and the report prepared by a

public sector unit in particular, they stood relieved of any obligation to conduct any further inquiry on their own.

While rejecting this contention, the Supreme Court observed that a just result in the matter of what a contract produces by way of a legal relationship must be viewed holistically on a harmonious survey of all the relevant clauses; in any other approach, the result would have the effect of rendering specific clauses dealing with the topic in question a dead letter; in view of Clause 1.4 of the RFP, the bidder was duty-bound, if it felt advised to check the correctness of the report made by WAPCOS, to undertake its own study; what it did four months after it was granted the contract and entered into the PPA, it could have done before it decided to make the bid and enter into the PPA; they were not shown anything which stood in the way of the bidder conducting its own study and being convinced by the correctness of the report; the bidding process is the foundation for the determination of the price in terms of Section 63 of the Act; the Commission approves the rates on being convinced that the rates are fair and competitive and arrived at on the basis of a fair bidding process; the provisions of the RFP must, therefore, be viewed from the perspective of it placing on alert the bidders about the imponderables which are inevitably involved in the pricing process; this meant that, having regard to Clause 1.4 of the RFP, no bidder could come forward with the claim that the contents of WAPCOS Report must be treated as sacrosanct; and, he who acted disregarding the caveat about the report acted at his own peril.

In the afore-said Judgement, four months after it was granted the contract and had entered into the PPA, the Respondent had conducted its own study and had thereafter contended that, as they had relied on the contents of the report prepared by a public sector unit while submitting its

bid (which report was later found to be erroneous), they stood relieved of their obligations. It in this context that the Supreme Court held that the bidder was duty bound to check the correctness of the report before it submitted its bid; it could have undertaken its own study; and what it did four months after it had entered into a PPA it could have done before it decided to submit its bid and enter into a PPA.

In the Rajasthan Batch of appeals, the SGD Notification 2020 was issued long after the PPA was executed and, at the time of submission of their bids, the bidders could not have been aware that, long after the last date of submission of bids, and after they, as the successful bidders, enter into a PPA, the Central Government would issue the SGD Notification 2020 bringing about a change in law. A harmonious reading of the provisions of the RFP does not give rise to any other interpretation. Reliance placed by the Respondents in Rajasthan Batch of appeals on **Haryana Power Purchase Centre vs. Sasan Power Limited** is also misplaced.

110. The Present batch of appeals pertains to the competitive bidding for the procurement of power from solar projects. The rationale behind the competitive bidding is to ensure that procuring organization secures the best possible price while maintaining transparency and fairness in the procurement process. As a general principle, change in law provisions in PPA and RFS document is included to address risks and uncertainties associated with regulatory and legislative changes that may occur during the term of the contract. Such provision facilitates better Risk Mitigation, Financial Stability, Fairness, Investment Security, operational continuity etc; it protects the interest of both customer and bidder and lead to optimal price discovery, as the regulatory & legislative changes subsequent to bid

submission but during the existence of PPA can be addressed through these provisions, instead of providing for such uncertainties at the stage of bid submission, which may lead to increase in cost of procurement so arrived through competitive bidding process. In the present case also, from a bare reading of RFS document provision, it is clear that RFS document do mandate that bidder should take all taxes applicable on the last date of bid submission. Additionally, it allows for the admissibility of Change in Law claims, where the exclusion of changes in safeguard duty has been removed. In the present case, though SGD Notification 2018 was in existence on the date of bid submission, but safeguard duty as per the said Notification had applicability for import of goods up to 29.07.2020, and no safeguard duty was leviable post 29.07.2020. Thus, we find merit in the submissions of the Appellants in Rajasthan batch of appeals and Respondents in BRPL Appeal that they were not mandated to assume that safeguard duty would be imposed for import of material post 29.07.2020 on SGD notification 2020 being imposed. In our view, it is difficult to hold/assume that bidders while submitting the competitive bids would have assumed safeguard duty as per SGD Notification 2018. In all likelihood, the bidders, with a view to ensure their selection in the competitive bid process, would have quoted a lower tariff, by planning to import the material subsequent to 29.07.2020, when SGD Notification 2018 came to an end, and their liability to pay safeguard duty would be nil.

111. In ***W. B. State Electricity Board vs. Patel Engineering Co. Ltd. and Others (2021 2 SCC 451),*** on which reliance has been placed by Respondents in Rajasthan Batch of appeals, the Supreme Court observed that, in an international competitive bidding which postulates keen competition and high efficiency, the degree of care required is greater than in ordinary local bids for small works; it was essential to maintain the

sanctity and integrity of the process of tender/bid and also award of a contract; the Appellant, Respondents 1 to 4 and Respondents 10 and 11 were all bound by the ITB which should be complied with scrupulously; in a work of this nature and magnitude, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach; the very purpose of issuing Rules/instructions is to ensure their enforcement; relaxation or waiver of a rule or condition, unless so provided under the ITB, by the State or its agencies in favour of one bidder would create justifiable doubts in the minds of other bidders; where power to relax or waive a rule or a condition exists under the Rules, it has to be done strictly in compliance with the Rules; adherence to ITB or Rules is the best principle to be followed; tenders are invited on the basis of competitive bidding for execution of the work of the project as it serves dual purposes; on the one hand it offers a fair opportunity to all those who are interested in competing for the contract relating to execution of the work, and on the other hand it affords the appellant a choice to select the best of the competitors on competitive price without prejudice to the quality of the work; the contract is, therefore, awarded normally to the lowest tenderer; and, merely because a bid is the lowest, the requirements of compliance of rules and conditions cannot be ignored.

The bidding process, which is the subject matter of the afore-said judgment of the Supreme Court, was not a bid governed by the provisions of Section 63 of the Electricity Act, nor does it relate to a claim made on account of a change in law post the last date of submission of the bid and an agreement having been executed after completion of the bidding process. In any event, it has not even been shown, in the present case, that any of the conditions of the RFP or the bidding guidelines have been violated. It is well settled that a word or a sentence in the judgments of

courts should not be read out of context, but must be considered in the factual context in which those observations were made. When so read, it is evident that the law declared by the Supreme Court, in **W. B. State Electricity Board vs. Patel Engineering,** has no application to the facts of the present case.

112. In Andhra Pradesh Batch of Appeals, the last date of bid submission was 17.04.2018, prior to the issuance of the SGD Notification 2018, which was issued on 30.07.2018. In Andhra Pradesh Batch of Appeals, the State Commission in the impugned order though recognized SGD Notifications as change in Law event but denied the financial claim of Appellants on the ground that DGS recommendation though not a law, but had the potential of enforceability and should have been considered while submitting the bid. Non-furnishing of working cost of the bids by the Appellant, led to believe that Appellants might have factored the additional liability as per provisional DGS recommendation. That requiring bidders to anticipate and plan for potential future changes in law, such as the imposition of Safeguard Duty, is unreasonable. This expectation is wholly unjustified, as it would be, beyond the realm of possibility, for any prudent entity to predict unforeseen legal changes, leading to an unfair and potentially deterrent effect on bidders, while the PPA gives express right to an affected party to claim compensation if the event qualifies as a Change in Law in terms of relevant clauses in RFS/PPA "***Coastal Gujarat Power Limited v. CERC & Ors." 2021, SCC OnLine APTEL 10***.

113. As held by this Tribunal in "***Adani Power Maharashtra Limited vs. MERC and Anr.",*** (2022 SCC OnLine APTEL 28) (*upheld by the Hon'ble Supreme Court in "**GMR Warora Energy Ltd. vs. CERC & Ors**.",* (2023

SCC Online SC 464), publication of notification or circular in the official gazette only disseminates information and it does not qualify as a pre-requisite for an instrument to have a 'Force of Law'. Similarly, it was also held by the Hon'ble Supreme Court in "***United Phosphorous Ltd. Vs. Director General (Safeguards)" 2000 (91) ECR765(SC)*** and "***Saurashtra Chemicals Ltd. Vs. Union of India", (2009) 17 SCC 529*** that findings issued by DGS are purely recommendatory in nature. APERC itself has acknowledged that the Provisional DGS Recommendation published in the official gazette is a mere recommendation, which may or may not be implemented, and it does not have force of law. In the present case also, prior to issuance of SGD Notification 2018, Director General, pending final determination, had recommended for imposition of provisional safeguard duty @ 70 % as per the following vide Notification in Gazette of India dated 05.01.2018

> ***"Recommendation***
>
> *In view of the aforementioned analyses and findings, I find that the product under consideration viz. "Solar Cells whether or not assembled in modules or panels" is being imported into India in such increased quantities and under such conditions so as to cause or threaten to cause serious injury to the DI manufacturing like or directly competitive products. I also find that existing critical circumstances justify the immediate imposition of a provisional Safeguard Duty in order to save the DI from further serious injury, which would be difficult to repair, if the application of the recommended Safeguard measure is delayed. Accordingly. I make the following recommendations:*
>
> *(i) I recommend that pending a final determination, considering the average cost of sales by the Domestic Industry arrived at on the basis of import quantity ratio of Solar cells and Solar modules (confidential), a reasonable return on the cost of sales excluding interest, the present level of import duties, and the present average import prices, a provisional Safeguard Duty be imposed at the rate of 70% (Seventy percent) ad valorem on the imports of the PUC viz. "Solar Cells whether or not assembled in modules or panels" falling under Customs Tariff Item 85414011 of the Customs Tariff Act, 1975 from all countries with*

the exception of the developing countries indicated in clause (iii) below. The Tariff Item mentioned herein is indicative only and the description of the imported goods will determine the applicability of the recommended Safeguard Duty.

(ii) I also recommend that the provisional Safeguard Duty on the import of the said product, as above, be levied for a period of 200 days (two hundred days), which is considered to be the minimum period of time required to protect the interests of the Domestic Industry.

(iii) As the imports from the developing countries listed in Notification No. 19/2016-Custom (NT), dated 5th February, 2016, other than China PR and Malaysia, do not exceed 3% individually and 9% collectively, the imports of "Solar Cells whether or not assembled in modules or panels" originating from such developing countries (other than China PR and Malaysia) will not attract the recommended provisional Safeguard Duly in terms of proviso to Section 8B(1) of the Customs Tariff Act, 1975."

114. The final recommendation of the Director General vide Notification in Gazette of India dated 16.07.2018, issued subsequent to last date of Bid submission, was at quite a variance, though the SGD Notification 2018 dated 30.07.2018 issued by Ministry of Finance (department of Revenue) is in line with the final recommendation but it is important to note that the recommendations of Director General both post initial investigation and final recommendations are advisory in nature and not binding on the Central Government. Likewise, the recommendations issued by Director General vide Notification in Gazette of India dated 03.03.2020 for the continued imposition of safeguard duty for another year with certain rates, also hold a recommendatory status. As per Section 8 (B) of the Customs Tariff Act 1975, read along with Custom Tariff Rules, Director General (Safeguards) shall conduct the investigation and record preliminary/final findings and recommend levy of provisional/final Safeguard Duty. He has no powers to impose such duty. The Central Government (Department of Revenue, Ministry of Finance) has the authority to impose safeguard duty and has been vested with discretionary power.

The power conferred on the Director-General (Safeguard) under Rule 11(2) is to give his recommendation regarding the amount of duty which, if levied, would be adequate to prevent or remedy serious injury and to facilitate positive adjustment, and under Rule 11(3) to make his recommendation regarding the duration of levy of duty.

Advanced Law Lexicon (P. Ramanatha Aiyer) defines the word **"Recommend"** as: to advise, to counsel, as recommended that something be done; to speak favourably as suited for some use, function, position etc.; to make acceptable or pleasing to suggest; to counsel a course of action and leave its acceptance to that person. Recommend implies a favourable or favouring report and precludes a favourable and unfavourable report. Thus 'to recommend' is to present one's advice or choice as having one's approval and involves the idea that another has the final decision; the word 'recommend' in the context of the Rules, would mean 'giving of a favourable report opposed to an unfavourable one'."

Oxford English Dictionary, defines the word "Recommend" as: "1 put forward with approval as being suitable for a purpose or role (advise as a course of action: advise to do something) 2. Make appealing or desirable 3. (recommend someone/thing to) commend or entrust someone or something to."

As the power exercised by the Director-General (safeguard), to recommend' the amount of duty and the duration of levy of duty, is advisory in nature, such recommendations, though entitled to great weight, is not binding on the Central Government which, as noted hereinabove, is required under Section 8B(1) r/w Rule 12, on receipt of the recommendations and the final findings of the Director General, to

arrive at its independent satisfaction that the article, if imported into India in such increased quantity and under such conditions, would cause or threaten to cause serious injury to the domestic industry, and thereafter to issue a notification in the Official Gazette, imposing/extending imposition of safeguard duty, on that article.

115. It was held in "***Vidarbha Industries Power Ltd. vs. Axis Bank Ltd.", (2022) 8 SCC 352*** that the use of the term "may" is, ordinarily, directory and "shall" postulates a mandatory requirement. As such, the possibility of such recommendation not getting accepted in totality by the Central Government or culminating into a Notification but with a variance cannot be ruled out.

116. In such a situation, it is difficult to hold that the bidders would have factored the safeguard duty at the time of bid submission on 17.04.2018 (Andhra Pradesh Batch of Appeals, prior to issue of SGD Notification 2018) or on 19.02.2019 (in the Rajasthan Batch of Appeals, prior to SGD Notification 2020 and with SGD Notification 2018 specifying safeguard duty up to 29.07.2020) , based on the respective DGS recommendations, primarily due to the risk of losing out in the competitive bidding process. Therefore, in our view, when such recommendation is merely advisory and is not binding on the Central Govt, the bidders are not obligated to consider such safeguard duty in their bid cost, more so as Change in Law provision exists in RFS, in the eventuality of the recommendation being accepted by the Central Govt later, and a notification is issued thereafter imposing safeguard duty.

117. Let us also look at the relevant clauses of PPA with regard to change in law (under Rajasthan Batch of appeals):

"ARTICLE 12: CHANGE IN LAW

12.1 Definitions

In this Article 12, the term Change in Law shall refer to the occurrence of any of the following events pertaining to this project only after the last date of the bid submission, including

(i) the enactment of any new law; or

(ii) an amendment, modification or repeal of an existing law; or

(iii) the requirement to obtain a new consent, permit or license; or

(iv) any modification to the prevailing conditions prescribed for obtaining an consent, permit or license, not owing to any default of the Solar Power Generator; or (v) any change in the rates of any Taxes including any duties and cess or introduction of any new tax made applicable for setting up the solar power project and supply of power from the Solar Power project by the SPD which have a direct effect on the Project.

However, Change in Law shall not include (i) any change in taxes on corporate income or (ii) any change in any withholding tax on income or dividends distributed to the shareholders of the SPD, or (iii) any change on account of regulatory measures by the Appropriate Commission."

Similar provision is there for Andhra Pradesh Batch of Appeals:

"Article 12.1 ………..

………e. any change in rates of taxes, duties and cess or introduction of any new tax made applicable for setting up of Solar Power Project and supply of power by the SPD after the date of submission of Bid, shall be treated as per the terms of this Agreement. For the purpose of considering the effect of this change in rate of taxes, duties and cess due to change in law after the date of submission of Bid under this part, the date of the submission of

the bid shall be considered as effective date and not the date of the signing of the PPA as applicable to other changes dealt in other parts of this Article 12.1:

f. but the above shall not however include

(i) any change in taxes on corporate income or any withholding tax on income or dividends distributed to the shareholders of the SPD,

Or

(ii) any change on account of regulatory measures by the Central Commission."

118. The learned counsels for Respondents in Andhra Pradesh batch of Appeals have also contended that the Appellants, particularly in Appeal 419 of 2023, have approached the commission for the limited extent of declaration of imposition of SGD as a Change in Law, and that they have paid a certain amount as SGD to the Government; they have not pleaded any financial injury caused to it. It has also been contended by the learned counsels for the Respondents that Safe Guard Duty was initially notified on 30.07.2018, and the PPAs were approved by the Commission on 05.10.2019 i.e., more than one year after the first SGD notification 2018 and no disclosure was made by the Appellants regarding any additional liability that may accrue on account of Safe Guard Duty, leading to presume that the Appellants had already factored the potential liability. Therefore, the commission was justified in requesting for submission of relevant documents from the Appellants for the purpose of inquiry, determination, and granting of restitutionary compensation. The denial of relief due to the non-submission of data by the Appellants was deemed appropriate by the Commission.

119. There is no dispute that bidders have paid Safeguard duty, since details of which were submitted by the Appellants in the Andhra Pradesh & Rajasthan Batch of Appeals and Respondents in BRPL Appeal. In the Andhra Pradesh Batch of Appeals, APERC acknowledged the SGD notification as a Change in Law event but denied financial relief due to the non-submission of working details of the competitive bids. There is no provision in the RFS/PPA, which mandates that, for a change in law claim, detailed working of their cost, considered at the time of bid submission, is to be submitted. It is also an established fact that detailed calculations in a bid, under competitive bidding, is not only considered to be confidential commercial data of the bidders, but also that, unlike determination of tariff under Section 62, the tariff adoption process under Section 63 does not require an examination of the factors which weighed with the bidders while submitting their bid. Denial of the claim, under change in Law, on account of non-disclosure of the same does not accord with law. As held in “***GMR Warora Energy Limited v CERC & Ors”, (2023 SCC online SC 464)***, the Court cannot rewrite a contract which is executed between the parties and explicit terms of contract are always the final word with regard to intension of parties. It has been held by this Tribunal in ***“Wardha Power company Ltd vs Reliance Infrastructure Ltd and Anr” (2014 SCC OnLine APTEL 142)*** that various criteria / assumptions that the bidder has considered at the time of bidding are not relevant for the purpose of calculating change in Law relief, however, the affected party need to submit proof of payment for which Change in Law is being claimed. To restore the bidder to the same economic position as if change in Law event has not occurred, the bidder has to be compensated for additional taxes, subject to verification. Neither the PPA nor the competitive bidding guidelines require the Appellants to submit its cost assumptions to substantiate its change in Law claim.

120. Regarding the contention of the Respondents in Andhra Pradesh Batch of Appeals about non-disclosure of occurrence of Change in Law event by the Appellants at the time of PPA approval, the Respondents, however, could not draw our attention to any clause in PPA, which mandates the Appellants requiring intimation/ notice to the commission about the time frame of occurrence of change in Law Event or submission of bid data. Article 12.2, which talks about granting of relief under Change in Law, is as follows:

> ***"12.2 Relief for Change in Law***
>
> *12.2.1 The aggrieved Party shall be required to approach the Central Commission for seeking approval of Change in Law.*
>
> *12.2.2 The decision of the Central Commission to acknowledge a Change in Law and the date from which it will become effective, provide relief for the same, shall be final and governing on both the Parties."*

121. The relevant clause in the PPA only provides for the aggrieved party to approach the Commission seeking approval for change in Law, which has been done by all the Appellants/ Respondents in these batch of appeals. It is for the Commission to acknowledge the event as change in Law, the period of its applicability and to provide relief.

122. We do not find merit in the submissions of Respondents in Andhra Pradesh Batch of Appeals that the prayer for holding SGD notification as change in Law and that they have paid some duty will not entitle the Appellants for financial restitution. We must express our inability to accept this submission as SGD Notifications are held to be a change in Law

event, and the relevant Article in PPA provides for the said relief. In **"Parampujya Solar Energy Pvt Ltd & Anr. vs. CERC & Ors" (2022 SCC OnLine APTEL 80),** this Tribunal, in the absence of an express restitutive clause, considered the words "***provide relief***" under Change in Law clause to grant Carrying Cost to the Solar Power Developers, and, therefore, the APERC has erred in denying the Appellants in Andhra Batch of appeals the financial relief on account of SGD Notifications. The carrying cost for Change in Law event on account of SGD Notifications to be considered the respective Commission in accordance with the law as declared by the Supreme Court and this Tribunal.

123. In view of the above, having held that recommendations of the Director General are only recommendatory in nature, considering that the SGD Notification 2018 was issued after the last date of bid submission in Andhra Pradesh Batch of Appeals, and SGD Notification 2020 was issued after last date of bid submission in Rajasthan Batch of appeals and BRPL appeal, the claim of the Appellants in Andhra Pradesh and Rajasthan Batch of appeals & Respondents in BRPL appeal qualifies as Change in Law event and are squarely covered under the provisions of RFS/PPA for claiming financial restitution/ relief on account of issuance of these Notifications.

Issue: Issue of performance of contract by importing solar panels/modules after SGD 2018 notification period vis-a-vis commissioning schedule as per RFS:

124. Learned counsels for the Respondents in Rajasthan Batch of Appeals have also contested the claim of the Appellants stating that they did not consider any safeguard duty in their bid price, as they had planned

their import of panels after cessation of safeguard duty under SGD Notification 2018 i.e. 29.07.2020. Considering the LOI date 02.03.2019, the effective date would be 01.04.2019, and the SCOD as per RFS, after 18 months of Effective date works out as 30.09.2020, that leaves very little time to the bidders from 30.07.2020 to 30.09.2020 for undertaking the activities of import of solar panels, custom clearance, inland transportation of panels to project site along with erection and commissioning so as to achieve SCOD as per RFS. Learned counsel for the Appellants have disputed the effective date as 01.04.2019 and the SCOD as 30.09.2020, stating that the RfS explicitly provides that the Effective Date shall be thirty days from the issuance of the LoI. However, in the event of unavoidable delays, the Effective Date shall be deemed as the date of signing of the PPA. Therefore, the timeline allegedly depicted by RUVNL, is not carved in stone and in actuality as well, since the PPA only came to be executed on 03.06.2019, the Effective Date was taken as 02.06.2019 and the SCOD as 02.12.2020. Learned counsel for the Appellants have contended that, even if they had only two (2) months to commission its Project, they could have planned import of modules in advance, kept the basic structure on the plant ready, and upon arrival of the modules in India, could have promptly installed the same, facilitating the timely commissioning of the Project. Learned Counsel, on both sides i.e. the Appellants as well as the Respondents, have acknowledged that this contention of planning the import subsequent to 29.07.2020 as well as the assertion that they could not have performed the contract due to the limited time between 29.07.2020 and SCOD is being raised for the first time, before this Tribunal, at the appellate stage of the proceedings. As no evidence has been placed on record to establish that it was impossible for the Generators to perform their obligations under the contract within the limited time available, we may not be justified in undertaking an

examination, for the first time at the appellate stage, whether or not the time available to the generators, to import the equipment and commission the plant, after expiry of the 2018 SGD Notification, was sufficient. Having held earlier in this order, the SGD Notifications 2018 and SGD Notification 2020 to be change in Law Events covered under the provisions of RFS/PPA, we do not consider it necessary to delve into this issue any further. Regarding contention of Respondent No1 in Andhra Pradesh Batch of appeals with regard to their liability, it is needless to state that liability of Respondent No 1 to the Appellants regarding Change in law claims shall be as per provision of Agreement between Respondent No1 and the Appellants.

125. In ***Arikala Nasara Reddy vs Venkata Ram Reddy Reddygari & Anr.((2014) 5 SCC 312)*** on which reliance has been placed on behalf of Appellant in BRPL Appeal, the Supreme Court observed that the court cannot go beyond the pleadings of the parties; the parties have to take proper pleadings and establish by adducing evidence that, by a particular irregularity/illegality, the result of the election had been "materially affected"; as a rule relief not founded on pleadings should not be granted; a decision of the case should not be based on grounds outside the pleadings of the parties; in the absence of pleadings, evidence if any, produced by the parties, cannot be considered; no party should be permitted to travel beyond its pleadings, and parties are bound to take all necessary and material facts in support of the case set up by them; pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration; issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party; it is neither desirable nor permissible for a court to frame

an issue not arising on the pleadings; courts cannot exercise discretion of ordering recounting of ballots just to enable the election petitioner to indulge in a roving inquiry with a view to fish material for declaring the election to be void; and, in the light of the judgements in **Ram Sewak Yadav v. Hussain Kamil Kidwai & Ors., (AIR 1964 SC 1249); Bhabhi v. Sheo Govind & Ors., (AIR 1975 SC 2117); and M. Chinnasamy v. K.C. Palanisamy & Ors., (2004) 6 SCC 341,** an order of re-counting can be passed only if the petitioner sets out his case with precision supported by averments of material facts.

The afore-said observations of the Supreme Court were in the context of an election petition filed under the Representation of the Peoples Act and the Conduct of Election Rules. What the Supreme Court has faulted in the afore-said case was the direction issued by the High Court to order recounting of ballots. This, the Supreme Court held, amounted to indulging in a roving inquiry with a view to fish out material for declaring the election to be void; and that an order of recounting can be passed only if a case with precision is made out.

In the present case, the Respondent-Generators have made out a case for grant of compensation for the change in law event. Since the agreement between the generators and SECI on the one hand, and SECI and the Appellant on the other, are back-to-back agreements, the liability of SECI to pay compensation for the change in law claim to the generators, would in turn entitle SECI to recover, the payment made by them to the generators, from the Appellant-Discom. The directions issued by the CERC, to the Appellant to make payment, is merely a consequence of the directions issued to SECI to pay compensation to the generators. It is not as if a completely new case has been made out by CERC which

is not based on the contentions on record. Reliance placed by the Appellant on **Arikala Narasa Reddy** is misplaced.

126. By the impugned order, the CERC has held the SGD notification 2020 to be a change in law event; and that the generators were entitled to be compensated for such a change in law event by SECI with whom they had an agreement. As the agreements are back-to-back agreements, the consequence of the directions to SECI to pay the generators compensation for the change in law event, would require the Discoms, in turn, to pay SECI the amounts which SECI had paid to the generators in this regard. That there is no specific prayer matters little, as the petition filed by the generators is only for them to be compensated for their change in law claim, and nothing more. In any event, the CERC has, by the impugned order, made it clear that payment to the generators by SECI is not conditional on payment to be made by the Discoms to SECI. The contention urged on behalf of the Appellant, regarding absence of a specific prayer does not therefore merit acceptance.

127. Learned counsel for Appellant in BRPL appeal has refuted the contention of Respondent that SGD Notification was not factored in the quoted tariff on commercial decisions is on a hypothesis which cannot be countenanced in law and placed reliance on ***"Tata Power Co. Ltd Vs. Reliance Energy Ltd"*** ((2009) 16 SCC 659). On the question of hardship being caused to the Respondent in the appeal before it, the Supreme Court observed that, for the purpose of interpretation and/or application of a statute, the Court cannot base its decision on any hypothesis; construction of a statute, save and except some exceptional cases, cannot be premised on the hardship of a party; enabling provisions are made for entering into a free contract; and, in a free market economy, the

right to enter into contract by and between two private parties are not to be discouraged in the absence of any statute or statutory regulation.

In the present case, the provisions of the Customs Tariff Act and the SGD Rules have been given a literal interpretation. No other mode of interpretation is being resorted to, much less on the ground of hardship being caused to a party as a result of an artificial interpretation being placed on the said provisions. This Tribunal has not based its decision on suppositions or hypothesis, but on a literal interpretation of the provisions of the Act and the Rules. Reliance placed by the Appellant, on **Tata Power Company limited,** is therefore of no avail.

128. Reliance is placed, on behalf of the Appellant in BRPL appeal, on ***Nabha Power Limited vs. Punjab State Power Corporation (2018 11 SCC Page 508)*** to contend that the Penta test or the five-condition test must be complied with for an implied condition to be read into the contract; and this includes the business efficacy test, the officious bystander standard test etc.

The Supreme Court, in the afore-said judgement, extended a word of caution, and observed that it should not be the endeavour of commercial courts to look to implied terms of a contract; making of contracts is a matter of high technical expertise; therefore, normally, a contract should be read as it reads, as per its express terms; the implied term is a concept, which is necessitated only when the Penta-test comes into play; there should be a strict necessity for it; in the present case, the court had really only read the contract in the manner it reads; the court did not read into the contract any ‘implied term’ but, from the collection of clauses, came to the conclusion as to what the contract said; and they

had only expounded it in accordance with its natural grammatical contour, keeping in mind the nature of the contract.

In the case on hand, this Tribunal has only resorted to a literal construction of the provisions of the Act and the Rules etc, and no implied term has been read into the provisions of the agreement between the parties. As this Tribunal has only read the contract in the manner it actually reads, the tests applicable for an implied term to be read into the contract has no application to the facts of the present case. Reliance placed, on Nabha Power Limited, is wholly misplaced.

129. Based on the above discussion and analysis, we summarize as under:

1) "Rajasthan Batch of Appeals": We hold "SGD Notification 2020" to be a change in Law event, therefore, we set aside the impugned order and remand the matter to the RERC for providing financial relief on this account including the carrying costs to the Appellants in accordance with PPA/law. As the Appellants in Appeal No 36 of 2023, part of Rajasthan batch of Appeals have approached this Tribunal directly, without first invoking the jurisdiction of the Commission, they are not entitled to be granted the relief which the other appellants have been granted. Suffice it to grant them liberty to approach the Commission seeking the reliefs they have sought in this Appeal. In case they approach the Commission within four weeks from today, the Commission shall consider their petition on its merits and in the light of the law declared in this judgement.

2) "Andhra Pradesh Batch of Appeals": We agree with the views of APERC in holding SGD Notifications to be a Change in Law event, and set aside the impugned order to the limited extent on the issue as deliberated above and remand the matter to the APERC for providing financial relief including the Carrying costs to the Appellants as per the provisions of PPA/Law on these accounts. Liability of Respondent No1 to the Appellants on referred Change in Law event shall be in accordance with the Agreement between Respondent No 1 & Appellants.

3) "BRPL Appeal": Upon review, we do not find any substantive errors or infirmities in the impugned order passed by the CERC that would warrant our intervention. The Appeal, is therefore, dismissed.

All the pending IAs shall stand disposed of. There shall be no order as to costs.

<u>Pronounced in open court on this 14th day of August, 2024</u>

(Seema Gupta) **(Justice Ramesh Ranganathan)**

Technical Member (Electricity) **Chairperson**

REPORTABLE/~~NON-REPORTABLE~~

ts/ag