

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 385 of 2017
APPEAL No. 383 of 2017
APPEAL No. 404 of 2017
APPEAL No. 401 of 2017
APPEAL No. 40 of 2018

Dated : 25th October, 2024

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

In the matter of:

APPEAL No. 385 of 2017

The Tata Power Company Limited

Through its Authorized Representative

Having its office at:

34, Sant Tukaram Road, Carnac Bunder,
Mumbai – 400 009

...Appellant

Versus

1. Central Electricity Regulatory Commission

Through its Secretary

Having its office at: 3rd & 4th Floor,

Chander lok Building,

36 Janpath, New Delhi – 110 001

2. Gujarat Urja Vikas Nigam Limited

Through its Managing Director

Having its office at: Sardar Patel Vidyut Bhavan,

Race Course Circle,

Vadodara – 390 007, Gujarat

- 3. Maharashtra State Electricity Distribution Company Limited**
Through its Managing Director
Having its office at: 4th Floor, Prakashgad,
Plot No. G-9, Bandra (East),
Mumbai – 400051, Maharashtra
- 4. Ajmer Vidyut Vitran Nigam Limited**
Through its Managing Director
Having its office at: Hathi Bhata,
Old City Power House,
Ajmer – 305001, Rajasthan
- 5. Jaipur Vidyut Vitran Nigam Limited**
Through its Managing Director
Having its office at: Vidyut Bhawan,
Janpath, Jaipur – 302005, Rajasthan
- 6. Jodhpur Vidyut Vitran Nigam Limited**
Through its Managing Director
Having its office at: New Power House,
Industrial Area, Jodhpur – 342003, Rajasthan
- 7. Punjab State Power Corporation Limited**
Through its Managing Director
Having its office at: The Mall,
PSEB Head Office,
Patiala, Punjab – 147001
- 8. Uttar Haryana Bijli Vitran Nigam Limited**
Through its Managing Director
Having its office at: Vidyut Sadan,
Plot No. C-16, Sector 6,
Panchkula – 134 112, Haryana
- 9. Dakshin Haryana Bijli Vitran Nigam Limited**
Through its Managing Director
Having its office at: Vidyut Nagar,

Vidyut Sadan, Hissar, Haryana – 125 005 ...Respondents

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APPEAL No. 383 of 2017

Gujarat Urja Vikas Nigam Limited

Sardar Patel Vidyut Bhavan,
Race Course Circle,
Vadodara – 390007, Gujarat

...Appellant

Versus

- 1. The Tata Power Company Limited**
Through its Managing Director
34, Sant Tuka Ram Road, Carnac Bunder,
Mumbai – 400 021, Maharashtra
- 2. Maharashtra State Electricity Distribution Company Limited**
Through its Managing Director
4th Floor, Prakashgad,
Plot No. G-9, Bandra (East),
Mumbai – 400 051, Maharashtra
- 3. Ajmer Vidyut Vitran Nigam Limited**
Through its Managing Director
Hathi Bhata, Old Power House,
Ajmer – 305001, Rajasthan
- 4. Jaipur Vidyut Vitran Nigam Limited**
Through its Managing Director
Vidyut Bhawan, Janpath,
Jaipur – 302005, Rajasthan

5. Jodhpur Vidyut Vitran Nigam Limited

Through its Managing Director
New Power House, Industrial Area,
Jodhpur – 342003, Rajasthan

6. Punjab State Power Corporation Limited

Through its Chief Engineer (PP&R)
PP&R, Shed T-1, Thermal Design,
Patiala – 147001, Punjab

7. Uttar Haryana Bijli Vitran Nigam Limited

Vidyut Sadan, Plot No. C-16,
Sector 6, Panchkula – 134112, Haryana

Through Chief Engineer,
Haryana Power Purchase Centre
Shakti Bhawan, Sector 6,
Panchkula 134109, Haryana

8. Dakshin Haryana Bijli Vitran Nigam Limited

Vidyut Nagar, Vidyut Sadan,
Hissar – 125 005, Haryana

Through Chief Engineer,
Haryana Power Purchase Centre
Shakti Bhawan, Sector 6,
Panchkula 134109, Haryana

9. Central Electricity Regulatory Commission

Through its Secretary
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi – 110001

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Amal Nair for Res. 6

Amal Nair for Res. 7

Amal Nair for Res. 8

APPEAL No. 404 of 2017

- 1. Uttar Haryana Bijli Vitran Nigam Limited**
Vidyut Sadan, Plot No. C-16, Sector 6,
Panchkula – 134112, Haryana
- 2. Dakshin Haryana Bijli Vitran Nigam Limited**
Vidyut Nagar, Vidyut Sadan,
Hissar – 125005, Haryana

...Appellants

Versus

- 1. Central Electricity Regulatory Commission**
Through its Secretary
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi – 110001
- 2. The Tata Power Company Limited**
Through its Chairman & Managing Director
34, Sant Tuka Ram Road, Carnac Bunder,
Mumbai – 400 021, Maharashtra
- 3. Gujarat Urja Vikas Nigam Limited**
Through its General Manager (Commerce)
Sardar Patel Vidyut Bhawan, Race Course Circle,
Vadodara – 390007, Gujarat
- 4. Maharashtra State Electricity Distribution Company Limited**
Through its Chief Engineer (Power Purchase)
4th Floor, Prakashgad, Plot No. G-9,
Bandra (East), Mumbai – 400051, Maharashtra
- 5. Ajmer Vidyut Vitran Nigam Limited**
Through its Chairman & Managing Director
Hathi Bhata, Old Power House,
Ajmer – 305001, Rajasthan
- 6. Jaipur Vidyut Vitran Nigam Limited**
Through its Chairman & Managing Director
Vidyut Bhawan, Janpath,
Jaipur – 302005, Rajasthan
- 7. Jodhpur Vidyut Vitran Nigam Limited**
Through its Chairman & Managing Director
New Power House, Industrial Area,
Jodhpur – 342003, Rajasthan
- 8. Punjab State Power Corporation Limited**
Through its Chief Engineer
PP&R, Shed T-1, Thermal Design,

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Shubham Arya for Res. 7

Amal Nair for Res. 8

APPEAL No. 401 of 2017

Punjab State Power Corporation Limited

PP&R, T-1, Thermal Design,
Patiala, Punjab – 147001

...Appellant

Versus

- 1. Central Electricity Regulatory Commission**
Through its Secretary
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi – 110001
- 2. Tata Power Company Limited**
Through its Chairman & Managing Director
34, Sant Tuka Ram Road, Carnac Bunder,
Mumbai – 400 021, Maharashtra
- 3. Gujarat Urja Vikas Nigam Limited**
Through its General Manager (Commerce)
Sardar Patel Vidyut Bhawan, Race Course Circle,
Vadodara – 390007, Gujarat
- 4. Maharashtra State Electricity Distribution Company Limited**
Through its Chief Engineer (Power Purchase)
4th Floor, Prakashgad, Plot No. G-9,
Bandra (East), Mumbai – 400051, Maharashtra
- 5. Ajmer Vidyut Vitaran Nigam Limited**
Through its Chairman & Managing Director
Hathi Bhata, Old Power House,
Ajmer – 305001, Rajasthan

6. Jaipur Vidyut Vitaran Nigam Limited
Through its Chairman & Managing Director
Vidyut Bhawan, Janpath,
Jaipur – 302005, Rajasthan

7. Jodhpur Vidyut Vitaran Nigam Limited
Through its Chairman & Managing Director
New Power House, Industrial Area,
Jodhpur – 342003, Rajasthan

8. Uttar Haryana Bijli Vitaran Nigam Limited
Vidyut Sadan, Plot No. C-16, Sector 6,
Panchkula – 134112, Haryana

Through Chief Engineer,
Haryana Power Purchase Centre
Shakti Bhawan, Sector 6,
Panchkula 134109, Haryana

9. Dakshin Haryana Bijli Vitaran Nigam Limited
Vidyut Nagar, Vidyut Sadan,
Hissar, Haryana – 125005

Through Chief Engineer,
Haryana Power Purchase Centre
Shakti Bhawan, Sector 6,
Panchkula 134109, Haryana

...Respondents

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Amal Nair for Res. 8

Amal Nair for Res. 9

APPEAL No. 40 of 2018

- 1. Ajmer Vidyut Vitaran Nigam Limited**
Hathi Bhata, Old Power House,
Ajmer – 305001, Rajasthan
- 2. Jaipur Vidyut Vitaran Nigam Limited**
Vidyut Bhawan, Janpath,

Jaipur – 302005, Rajasthan

3. Jodhpur Vidyut Vitaran Nigam Limited

New Power House, Industrial Area,
Jodhpur – 342003, Rajasthan

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Vidyut Nagar, Vidyut Sadan,
Hissar, Haryana – 125005

Through Chief Engineer,
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Swapna Seshadri
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Amal Nair for Res. 5

Amal Nair for Res. 6

JUDGMENT

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. Order dated 31st August, 2017 passed by the Central Electricity Regulatory Commission (hereinafter referred to as "Central Commission") in Petition No. 141/MP/2016 is under challenge in all the above captioned appeals. Hence, all the appeals had been tagged and were heard together. Accordingly, we proceed to dispose of all the appeals vide this common judgement.

2. Appeal No. 385 of 2017 is filed by the Generating Company whereas the other four appeals have been filed by the affected distribution companies wherein the generating company and the remaining distribution companies have been arraigned as

respondents. Hence, we find it appropriate to refer to the parties by their names in this judgement for the reason that referring to them as Appellant or respondent would create confusion.

3. M/s. Tata Power Company Limited (formerly Coastal Gujarat Power Limited) (in short "TPCL"), the Appellant in Appeal No. 385 of 2017, has set up Mundra Ultra Mega Power Project (Mundra UMPP) consisting of 5 units having the capacity of 800 MW each. All the 5 units have achieved commercial operation and have been generating as well as supplying electricity to the procurers. The Company TPCL was selected as successful bidder through tariff based competitive bidding carried out in accordance with Section 63 of the Electricity Act, 2003. The tariff for the said Mundra UMPP was adopted by the Central Commission vide order dated 19th September, 2007 in Petition No. 18 of 2007 under Section 63 of the Electricity Act, 2003. TPCL has entered into Power Purchase Agreement (PPA) dated 22nd April, 2007 with the Distribution Companies in the States of Gujarat, Maharashtra, Rajasthan, Punjab and Haryana for supply of 3800 MW power from the said Mundra UMPP for a period of 25 years. Subsequently, TPCL and the procurers have entered into a supplementary PPA dated 31st July, 2008 for advancement of

Scheduled Commercial Operation Date (SCOD) in terms of Article 3.1.2(iv) of the PPA. The 5 units of Mundra UMPP were commissioned on 7th March, 2012, 30th July, 2012, 27th October, 2012, 21st January, 2013 and 21st March, 2013 respectively.

4. Petition No. 141/MP/2016 was filed by TPCL before the Central Commission seeking reliefs under Change in Law events during the construction period under the following heads:-

- (a) "Difference in the actual cost of land acquired by Petitioner and the declared price of land as per PFC's letter dated 23.10.2016;*
- (b) Revenue from Sale of Infirm power as per the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 read with the Central Electricity Regulatory Commission (Unscheduled Interchange charges and related matters) Regulations, 2009;*
- (c) Levy of Green Energy Cess on imported Coal in the Finance Act, 2010 with effect from 1.7.2010 in terms of Notification No. 354/72/2010- TRU dated 24.6.2010 issued by the Ministry of Finance, Government of India;*
- (d) Changes in Customs Duty on imported Coal (Customs Duty "BCD" and Countervailing Duty "CVD")`*
- (e) Changes in Excise Duty on civil material including Steel & Cement and LDO & HFO etc., in terms of Notification No. 6/2006-Central Excise dated 1.3.2006&Notification No. 46/2008- Central Excise dated 14.8.2008 and Notification dated 2/2008-Central Excise dated 1.3.2008 & Notification No. 18/2012-Central Excise dated 17.3.2012, respectively issued by the Ministry of Finance, Government of India;*
- (f) Reduction in Central Sales Tax Rate with effect from 1.4.2007 and 1.6.2008 in terms of Notification No. 34/135/2005-ST dated 29.3.2007 and Notification No. 28/11/2007-ST dated 30.5.2008 respectively issued by the Ministry of Finance, Government of India;*
- (g) Increase in the Gujarat Value Added Tax Rate with effect from 1.4.2008 pursuant to Gujarat Value Added Tax (Amendment) Act,*

2008;

- (h) Increase in the rate of Service Tax pursuant to Notification No. 32/2007-Service Tax dated 22.5.2007 and Notification No. 7/2008-Service Tax dated 1.3.2008 issued by the Ministry of Coal, Government of India;
- (i) Levy of Green Cess with effect from 28.7.2011 in terms of the Gujarat Green Cess Act, 2011 and the Gujarat Green Cess Rules, 2011;
- (j) Additional conditions imposed by Ministry of Environment & Forests (MOE&F), GOI pursuant to Corrigendum dated 26.4.2011 which amended the earlier Environmental clearance dated 2.3.2007 and 5.4.2007 issued by MOE&F, GOI;
- (k) Additional Stamp duty paid by CGPL on its Indenture of Mortgagee with the Security Trustee as per Circular No. Stamp/KPD/593/2202 dated 2.4.2007 issued by the Superintendent of Stamps, State of Gujarat and in terms of Order dated 3.12.2012 of the Hon'ble High Court of Gujarat in Stamp Reference No.1/2011 and the Judgment of the Hon'ble Supreme Court of India dated 11.8.2015 in C.A. No. 6054/2015."

5. According to the TPCL, the financial impact of these events of Change in Law, as certified by the auditor, is as under :-

Sl No	Change in Law events (During the Construction Period)	Financial Impact (` in crore)
1	Declared price of land	235.09
2	Adjustment of Revenue from Sale of Infirm Power	(-) 37.89
3	Levy Clean Energy Cess on imported coal	2.30
4	Changes in custom duty on imported coal	1.25
5	Changes in excise duty on civil material including Steel and Cement	51.67
6	Changes in excise duty on civil material including LDO and HFO	(-) 2.10
7	Reduction in central sales tax rate	(-) 35.80
8	Increase in Gujarat value added tax rate	7.48
9	Increase in rate of service tax	21.22
10	Levy of Green Cess	0.48
11	Additional conditions imposed by MoEF, GOI	24.60
12	Additional Stamp duty	1.36
	Total	269.66

6. Hence, TPCL had prayed in the petition as under :-

- (a) *“Hold and declare that each of the items set out in the petition (Table 1 at Para 10) constitutes Change in Law events, in terms of PPA, impacting capital costs of the project during the construction period;*
- (b) *Hold and declare that the capital cost of the project has increased to `269.66 crore alongwith carrying cost on account of Change in Law events during the construction period;*
- (c) *Restitute the Petitioner to the same economic condition as if the said Change in Law hadnot occurred by increasing the Petitioner’s non-escalable capacity charges as per formula prescribed in terms of the provisions of the PPA along with carrying cost;*
- (d) *Permit the Petitioner to raise supplementary bills in terms of the PPA to recover the aforesaid amounts/ tariff due and payable to the Petitioner; and*
- (e) *Pass any such other and further reliefs as Commission deems fit and proper in the nature and circumstances of the present case.”*

7. Upon analysis of the contention as well as submissions made on behalf of the parties, the Commission vide the impugned order allowed some of the claims of TPCL while rejecting the others. The summary of the decision of the Commission is as under:-

Change in Law	Decision
Declared Price of Land	Allowed in terms of para 43 of the order
Adjustment of Revenue from Sale of infirm Power during construction period	Not allowed in terms of para 58 of the order
Levy of Clean Energy Cess on coal consumed for generation of infirm power	Not allowed
Changes in Basic Customs Duty and Countervailing duty on imported coal consumed for generation of infirm power	Not allowed
Changes in Excise Duty on Civil Materials during the Construction period	
(i) Steel & Cement	Not allowed
(ii) LDO & HFO	Allowed
Reduction in Central Sales Tax during the Construction period	Allowed

Increase in Gujarat Value Added Tax during the Construction period	Allowed
Increase in rate of Service Tax on Works Contract during the construction period	Not Allowed
Levy of Green Cess on coal consumed during construction period	
(i) 8.1.2012 to 31.3.2012	At present not payable in terms of the interim directions of the Hon'ble Supreme Court. If paid/ payable, the same shall be adjusted against the revenue earned from sale of infirm power.
(ii) April, 2012 to 31.3.2013	
Additional conditions imposed by MOE&F towards expenditure on CSR activity during construction period	Not Allowed
Additional Stamp Duty paid on Indenture of Mortgage	Not allowed
Carrying cost	Not allowed

8. TPCL, feeling aggrieved by rejection of some of its claims under Change in Law as mentioned in the Table reproduced herein above, has filed the Appeal No. 385 of 2017.

9. Gujarat Vikas Nigam Limited (GVNL), Punjab State Power Corporation Limited (PSPCL), Uttar Haryana Bijli Vitran Nigam Limited (UHBVNL) and Ajmer Vidyut Vitran Nigam Limited (AVVNL) have also assailed the said order dated 31st August, 2017 of the Central Commission in so far as it has allowed certain claims of TPCL, by way of Appeal Nos. 383 of 2017, 401 of 2017, 404 of 2017 and 40 of 2018 respectively.

10. Before advertng to the respective contentions/submissions made before us on behalf of the parties, we feel it necessary to note the list of important dates and events which are material for decision in these appeals. The same is as under :-

"List of Dates & Events

19.01.2005	The Ministry of Power, Government of India issued "Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees" (with amendments dated 30.03.2006 and 18.08.2006) (" the Bidding Guidelines ") under Section 63 of the Electricity Act, 2003 (" Electricity Act ").
30.03.2006	Pursuant to the Bidding Guidelines, the Ministry of Power finalized Standard Bid Documents (" SBD ") in consultation with the concerned stakeholders and issued the SBD.
10.02.2006	Coastal Gujarat Power Limited (" CGPL ") was incorporated Company under the Companies Act, 1956 as a wholly owned subsidiary of Power Finance Corporation Limited (" PFC "), with a total authorized and paid up share capital of Rs. 5 Lakhs.

31.03.2006	<i>Request for Qualification ("RFQ") was issued by Power Finance Corporation ("PFC") (on behalf of the Respondents) for selecting a successful bidder to build, own, operate and maintain Mundra UMPP based on imported coal for supply of contracted power to Procurers for 25 years.</i>
22.06.2006	<i>Request for Proposal ("RFP") was issued to all shortlisted bidders for "Tariff Based Bidding Process for Procurement of Power on Long Term Basis from Power Station to be set up at Mundra, District Kutch, Gujarat based on imported coal". It is pertinent to note that, the "Bid Deadline Date" in the RFP was mentioned as 22.11.2006. However, upon enquiry by CGPL, PFC vide its letter dated 19.03.2015, clarified that the Bid Deadline Date was 07.12.2006 and not 22.11.2006 as mentioned in the RFP.</i>
30.11.2006	<i>Cut-Off Date (i.e., Seven days prior to the Bid Deadline Date of 07.12.2006.)</i>
07.12.2006	<i>Bid Deadline Date (as per PFC's letter dated 19.03.2015).</i>
On or around 07.12.2006	<i>The bids were submitted by the qualified bidders including Tata Power. Upon evaluation, Tata Power was</i>

	<i>identified as successful bidder with an equivalent levellized tariff of Rs. 2.26367/kWh.</i>
<i>28.12.2006</i>	<i>Letter of Intent ("LOI") was issued to Tata Power, being a successful bidder of Mundra UMPP.</i>
<i>22.04.2007</i>	<i>Tata Power, entered into a Share Purchase Agreement ("SPA") with PFC and CGPL for acquiring 100% equity of CGPL. On the same date, Tata Power acquired 100% equity of CGPL.</i>
<i>22.04.2007</i>	<p><i>CGPL executed a Power Purchase Agreement ("PPA") with the Procurers across five States, namely Maharashtra, Gujarat, Rajasthan, Haryana and Punjab. The PPA identified the site for the Project to be located near south Tunda Wanda village in Mundra, Taluka Kutch District of coastal Gujarat area. In this regard, the following is noteworthy:</i></p> <p><i>(i) The said Project was proposed on imported coal to be constructed on the land to be provided by Government of Gujarat, details of which are set out in Schedule 1A of the PPA.</i></p> <p><i>(ii) As per Article 3.1.2A of the PPA, the Procurers were to ensure handing over possession of the</i></p>

	<p><i>land for the Power Station, water intake pipeline and fuel transportation system (if required).</i></p> <p><i>(iii) Under the PPA, the provision relating to the Change in Law during the Construction Period, is prescribed under Article 13.2(a) whereby the affected party is to be restituted/ compensated in terms of the mechanism/ formula provided therein i.e., for every cumulative increase/ decrease of Rs. 50 Crores in the Capital Cost over the term of the PPA, there shall be an increase/ decrease in Non-Escalable Capacity Charges by an amount equal to Zero point Two Six Seven percent (0.267%): The said compensation for Change in Law is payable to either party only with effect from the date on which the total increase/ decrease exceeds Rs. 50 Crores (Rupees Fifty Crores).</i></p> <p><i>(iv) In case of any dispute between the parties qua the claim made for Change in Law, the same is to be referred to Ld. Central Commission in terms of Article 17 of the PPA.</i></p> <p><i>The parties signed a Supplemental PPA on 31.07.2008.</i></p>
19.09.2007	Ld. Central Commission adopted the tariff under the PPA in terms of Section 63 of the Electricity Act.
11.07.2011	CGPL issued a Notice under Article 13.3.1 of the PPA, thereby raising its Change in Law claims (Construction Period) upon the Procurers in terms of the PPA.

21.07.2011	GUVNL requested CGPL to provide information/ documents as regards its Change in Law Claims raised vide its Notice dated 11.07.2011.
09.09.2011	A Procurers Meet was held in Mumbai to discuss the progress of the Project and the pending matters to be complied with as per the PPA. Various issues were discussed during the meeting such as PGCIL transmission lines, status of acquisition of balance project land, ambiguity in transmission charge payment, reduction of performance bank guarantee, appointment of Independent Engineer and Statutory Auditor, Letter of Credit format, ambiguity in rebate mechanism, approval of bill formats, confirmation of off-take of infirm power, Change in Law etc.
07.10.2011	CGPL replied to GUVNL's letter dated 21.07.2011 and submitted all the necessary documents and information with regard to its claim of Change in Law (construction period) raised vide its Notice dated 11.07.2011.
28.12.2011	GUVNL issued a letter to CGPL informing them about the appointment of M/s. Parikh Mehta & Associates, Chartered Accountants for examining CGPL's claim for Change in Law during construction period. The said Auditors' were appointed by GUVNL, the lead Procurer.

18.01.2012	<i>The Auditors appointed by GUVNL emailed CGPL as regards their visit to the Power Plant on 23.01.2012 in order to assess CGPL's claims.</i>
07.03.2012	<i>Unit-1 of Mundra UMPP achieved Commercial Operation.</i>
30.07.2012	<i>Unit-2 of Mundra UMPP achieved Commercial Operation.</i>
27.10.2012	<i>Unit-3 of Mundra UMPP achieved Commercial Operation.</i>
21.01.2013	<i>Unit-4 of Mundra UMPP achieved Commercial Operation.</i>
21.03.2013	<i>Unit-5 of Mundra UMPP achieved Commercial Operation.</i>
07.06.2013	<i>The Auditors vide their email once again requested CGPL to arrange for their visit to the Power Plant on 10.06.2013 (Monday) with regard to CGPL's claim of Change in Law during construction period.</i>
08.09.2014	<i>The Auditor appointed by GUVNL, issued a Report as regards the claim raised by CGPL on 11.07.2011. As per the said Report, GUVNL's Auditor verified that the Change in Law during Construction Period had an impact to the tune of Rs. 247.65 Crores on the capital cost of the Project. The said assessment was against CGPL's actual claim of Rs. 353.85 Crores.</i>

21.11.2014	GUVNL sent a letter to all the Procurers enclosing the Auditor's Report verifying the claim of CGPL. GUVNL further requested all Procurers to provide their views on the same and also informed that a Procurer Meet can be convened to discuss CGPL's claim.
12.12.2014	GUVNL once again requested all the Procurers submit their views/ comments on the Auditor's Report so that a meeting could be convened to discuss and finalise the same.
28.01.2015	PSPCL submitted its view on the Auditor's Report to GUVNL. PSPCL stated that the Auditors Report has quantified the claim at Rs. 247.65 Crores as against CGPL's actual claim of Rs. 353.85 Crores and the same may further change on scrutiny by the appropriate forum. Since, CGPL's Project is a tariff based competitively bid out Project and in terms of Article 13 of the PPA, any claim raised by CGPL under Change in Law has to be decided by Ld. Central Commission. Accordingly, CGPL may approach Ld. Central Commission as regards it Change in Law claim.
30.01.2015	GUVNL forwarded PSPCL's letter dated 28.01.2015 to CGPL.

18.02.2015	<p><i>CGPL sent a reminder to all the Procurers to provide their views/ comments on GUVNL's Auditor's Report dated 08.09.2014. In the said letter it was, inter alia, submitted that:-</i></p> <p><i>(i)As regards Construction Period (the period from the date upon which the Construction Contractor is instructed or required to commence work under the Construction Contract upto the COD of the Unit in relation to an Unit and of all Units in relation to the Power Station), the impact of increase/ decrease of Capital Cost of the Project, as a result of any Change in Law, is governed by the formula provided in Article 13.2(a) of the PPA, (which has been approved by Ld. Central Commission).</i></p> <p><i>(ii)As is evident from Article 13.2(a) of the PPA the impact of Change in Law for the Construction Period, on the Capital Cost of the Project, is to be calculated and awarded in terms of the pre-approved formula as provided in Article 13.2(a). The said claim is to be determined between the parties itself in accordance with the formula and is not required to be referred to or decided by Ld. Central Commission. Only in the event, there is a dispute between the parties as regards the Change in Law claim for the Construction Period, the parties are to follow the Dispute Resolution mechanism as prescribed in the PPA,</i></p> <p><i>(iii)However, despite repeated reminders by GUVNL and oral requests by CGPL, the Procurers failed to provide their comments on the Auditor's Report. As' a result of the</i></p>
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	<p><i>Procurers inaction, CGPL's Change in Law claim for the Construction Period was pending determination and payment. CGPL was facing severe financial crisis due to nonpayment of the Compensatory Tariff by the Procurers and the delay in determination and payment of CGPL's Change in Law claim for the Construction Period had added to increasing financial woes.</i></p> <p><i>(iv)CGPL requested the Procurers to provide their comments and suggestions on the Auditor's Report dated 08.09.2014, so that its claim on Change in Law during the Construction Period could be finalised and implemented at the earliest.</i></p> <p><i>(v)It was also requested that in order to avoid any further delay, GUVNL may convene a meeting of all Procurers immediately to finalise CGPL's Change in Law claim for the Construction Period.</i></p> <p><i>(vi) The said letter was issued by CGPL without prejudice to its rights under law and without expressing any comments on the Audit's Report dated 08.09.2014.</i></p>
19.02.2015	<p><i>CGPL replied to PSPCL's letter dated 28.01.2015, stating that PSPCL's stand for adjudication of CGPL's claim of Rs. 353.85 Crores towards Change In Law during the construction period by Ld. Central Commission is contrary to the provisions of the PPA. CGPL reiterated its submissions made in its letter dated 18.02.2015 mentioned hereinabove.</i></p>

20.02.2015	<i>Haryana Power Purchase Centre (“HPPC”) also submitted that CGPL may approach the Appropriate Commission for prudence check of its, claim for Change in Law both for the Construction Period as well as for the Operation Period.</i>
02.03.2015	<i>MSEDCL provided its comments on the Auditor's Report dated 08.09.2014.</i>
03.03.2015	<i>CGPL sent letters to GOVNL, HPPC, RPPC and MSEDCL informing them that it had not received their views on the Auditor's Report; and accordingly, CGPL requested them to provide their comments at the earliest. Additionally, CGPL also requested GUVNL to convene a meeting of all the Procurers for finalising CGPL's claim towards the Change in Law during the Construction Period.</i>
17.03.2015	<i>CGPL replied to HPPC's letter dated 20.02.2015 stating that the stand taken by HPPC for adjudication of the claim of Rs. 353.85 Crores by Ld. Central Commission is contrary to the provisions of the PPA. CGPL reiterated its submissions made in its letter dated 18.02.2015 mentioned hereinabove.</i>
18.03.2015	<i>GUVNL informed. CGPL that the Procurer Meet was scheduled' on 30.03.2015 at 11.00 am at Western Regional Power Committee (“WRPC”) office and I requested CGPL to attend the same.</i>

19.03.2015	PFC clarified that the Bid Deadline Date as 07.12.2006 and not 22.11.2006 as mentioned in the RFP.
30.03.2015	<p>The Procurers Meet was held at WRPC, Mumbai to discuss the Change in Law during the construction period. The said Meeting was attended by all the Procurers as well as CGPL. The relevant extracts of the said minutes are noteworthy:</p> <p>"Procurers:</p> <p>GUVNL: Report of Independent Auditors is placed for discussion</p> <p>Maharashtra: While seeking clarification on certain issues, which shall be provide separately by CGPL, they are of the view that since it has impact on PPA tariff(capacity charges), it should be allowed after prudence check by CERC. Copy of MSEDCL's letter dated 02.03.2015 is enclosed.</p> <p>Punjab, Haryana: Have reiterated their earlier stand communicated vide letter dated 28.01 .2015 and 20.02.2015 respectively that the claim filed is Rs353.85 Crs where as independent auditor in its report has opined that eligible quantifiable claim is of Rs247.65 Crs which may further change even in the scrutiny by appropriate forum. Accordingly, CGPL may approach CERC to settle the dispute. Copy of letters attached.</p> <p>Rajasthan: Also expressed same views as that of Punjab and Haryana</p> <p>Seller:</p> <p>CGPL informed the Procurers that the Report does not include impact of infirm power injection on capital cost</p>

	<p><i>,which also needs to be factored in the total change in law construction claim. In addition certain CSR expenditure has inadvertently not been included in CGPL's claim which needs to be considered. Lastly CGPL is not in agreement with Independent Auditors recommendations on the following</i></p> <ol style="list-style-type: none"> <i>1) Partial allowance of outfall channel land cost.</i> <i>2) Claim of CGPL on Excise Duty refund being denied by DGFT.</i> <p><i>In view on lack of consensus amongst the Procurers and the Seller on the aforesaid issues, there is a dispute which needs to be addressed under Article 17 to PPA.</i></p>
<i>15.04.2015</i>	<i>GUVNL submitted that since no consensus was arrived at between the Procurers and CGPL, on the issue of CGPL's Change in Law (construction period), CGPL may take appropriate action in terms of the PPA.</i>
<i>08.06.2016</i>	<i>CGPL has filed a Petition before Ld. Central Commission under Section 79 of the Electricity Act Read with Article 13.2(b) of the PPA seeking adjustment of tariff. For increase/ decrease in revenues/ costs of CGPL due to 'Change in Law' during the "Operation Period" for the Financial Year 2011-12, 2012-13 and 2013-14. The said Petition was reserved for Orders on 15.10.2015.</i>

22.07.2016	CGPL issued a Notice (under Article 13.3.1 of the PPA), in addition to its Change in Law Notice dated 11.07.2011, thereby raising an additional Change in Law claim (Construction Period) on account of additional costs paid towards deficit stamp duty in terms of the Hon'ble Supreme Court of India's Judgment dated 11.08.2015 passed in Civil Appeal No. 6054 of 2015 (arising out of S.L.P (C) No. 32319 of 2013).
05.08.2016	GUVNL issued a letter to CGPL rejecting its additional Change in Law claim (Construction Period) on account of additional costs paid towards deficit stamp duty in terms of the Hon'ble Supreme Court of India's Judgment dated 11.08.2015, stating that, the imposition of higher duty with interest as per the said Judgment did not qualify as' a Change in Law event as per Article 13 of the PPA.
11.08.2016	CGPL filed Petition No.141/MP/2016 before Ld. Central Commission.

11. As already noted herein above that the said petition No. 141/MP/2016 has been disposed of by the Commission vide the impugned order dated 31st August, 2017.

12. We have heard Learned Counsels for the parties extensively on several dates. We have also gone through impugned order as well as the written submissions filed on behalf of the parties and also the judgements cited at par.

13. We note that in accordance with Article 13.3.1 of the PPA, the TPCL notified the procurers on 11th July, 2011, 18th February, 2015, 19th February, 2015, 3rd March, 2015 and 22nd July, 2016 about the above mentioned events, amounting to Change in Law (CIL) affecting the revenues/cost of the company during construction period. Upon receipt of notice dated 11th July, 2011, the lead procurers GUVNL requested TPCL to provide information/documents as regards Change in Law claims and to arrange for the site visit of the auditor to be appointed by GUVNL. The auditor, after making the site visit has submitted its report dated 8th September, 2014 in which he has quantified the impact of Change in Law during the construction period as Rs.247.65 crores as against the actual claim of TPCL to the tune of Rs.353.85 crores. GUVNL shared the auditors report among all the procurers and sought their views. Thereafter, these Change in Law events were discussed in the procurers meet held on 30th March,

2015 at Western Regional Power Committee office, Mumbai wherein all the procurers expressed their views that TPCL may approach the Commission for prudence check claims for Change in Law. It is pertinent to note that vide notice dated 22nd July, 2016, TPCL has raised an additional Change in Law claims during construction period on account of additional cost paid towards deficit stamp duty in terms of the judgement dated 11th August, 2015 of the Hon'ble Supreme Court in Civil Appeal No. 6054 of 2015.

14. Since the claims of TPCL pertains to the construction period, we note that "Construction Period" has been defined in the PPA as "the period from (and including) the date upon which the construction contractor is instructed or required to commence work under the construction contract upto (but not including) the commercial operate date of the Unit in relation to a Unit and of all the Units in relation to the power station."

15. It is not in dispute that the construction work of the project commences on 11th October, 2007 and the 1st unit was declared under commercial operation on 7th March, 2012. The last unit i.e. Unit 5 achieved commercial operation on 21st March, 2013.

Therefore, the construction period had to be reckoned from 11th October, 2007 till 21st March, 2013.

16. Now, we deal with and discuss the rival contentions and submissions of the parties on each claim of TPCL separately.

A. Claim relating difference under the actual cost of land acquired by TPCL and the declared price of land as per letter dated 23rd October, 2016 of Power Finance Corporation (PFC);

17. The case of TPCL before the Commission was that the project site, as identified in RFP and PPA was located in Kutch District of Gujarat and the proposed project site comprised approximately 2750 acres (i.e. 1113 hectares) excluding land for water pipeline corridor (intake and outfall channel). Out of the proposed area of land, about 1250 acres (505.85 hectares) was identified for main Power Plant, 1000 acres (404.68 hectares) was identified for ash disposal/dyke and 500 acres (202.34 Hectares) was identified for housing colony. As per Article 3.2.1(A) of the PPA, the procurers were obliged to handover the possession of land to the TPCL for the power station, water intake pipeline and for fuel transportation system (if applicable) within six

months from the effective date (i.e. on or before 21st October, 2007), but the same was not done by them. Subsequent to the issue of RFP on 22nd June, 2006, the detailed project report (DPR) was prepared by M/s. Tata Consultant Engineers Limited (a Consultant appointed by PFC) to present the details of the project which was shared by PFC with all bidders prior to the submission of the financial bid. Chapter-2 of the DPR specifies the land requirement for construction and development of the project. The DPR also contains provision for additional requirement of land for water intake/outfall channels and further specifies that the parameters furnished therein are illustrative only to demonstrate feasibility of the project and associated infrastructure are as under:-

Facility	Area in Ha
Power Plant	500
Ash disposal area	200
Colony	120
Water intake/ outfall channels	102
Total	1092 (2750 acres)

18. TPCL has further contended that it has set up the power plant and the associated infrastructure facilities (i.e. land for construction and development of power plant inclusive of land for ash disposal/dyke as well as housing colony and water pipeline corridor

comprising of intake and outfall channels) on a total area of 1400-26-12 hectares of land as under :-

(a) 909.61.56 hectares of Government land for setting up power plant and associated infrastructure facilities;

(b) 130 hectares of forest land for setting up of power plant and associated infrastructure facilities ;

(c) 51-62-81 Hectares of Private Land for setting up of Power Plant and associated infrastructure facilities;

(d) 268-01-75 hectares of Salt Pans for setting up associated infrastructure facilities (outfall channel);

(e) 41 hectares for setting up associated infrastructure facilities (intake channel)

19. PFC vide email dated 23rd October, 2006 addressed to the shortlisted bidders, had communicated the indicative price of land (Project Site) for Mundra UMPP has raised 29.80 crores(Rs. 28.68 crores for power plant and Rs.01.12 crores for the land for water Pipe line corridor comprising of intake and outfall channel. However,

since the procurers did not hand over the project site to TPCL within 6 months from the execution of the PPA as mandated under Article 3.1.2A, and as the same was not done, TPCL with the help of State Government /Private Individuals acquired the following pieces of land :-

- (i) 1092 Hectares of land for Power Plant and associated infrastructure facilities for Rs.74.37 crore
- (ii) 268 Hectares of land for water outfall channel @Rs.80.52 crore, and
- (iii) leased 41 Hectares of land at an annual fees of Rs.4.74 crore for a period of 30 years, with 10% increase in the annual fees every three years as per agreement.

20. It was the case of the petitioner that as against the declared price of land for Rs.29.80 crores for approximately 1100 hectares of land (excluding land for water pipeline corridor comprising of intake/ outfall channel) it has paid an amount of Rs.154.89 crores for acquiring 1092 Hectares of land for Power Plant and associated facilities, as well as 268 Hectares of land for Water outfall channel and would incur an additional amount of Rs.110 crore for leasing of 41 Hectares of land for Water intake channel.

21. It is further contended by TPCL that in order to ensure the timely availability of water through intake channel for the power plant, it executed an agreement with MPSEZL (now M/s Adani Ports & SEZ i.e. 'APSEZL') for operation and maintenance of sea water intake channel and as per the agreement, TPCL is assured continuous and uninterrupted supply of 6,30,000 cubic meter/hour of sea water for cooling of power plant, for a period of 30 years, for which it is required to pay an annual fee of Rs.4.74 crore considering the base year as 2010-11 with 10% increase every three years.

22. Thus TPCL had claimed cost of 1400 hectares of land in aggregate. In addition to 1092 hectares (2750 acres) of land which was proposed for the project as per PPA/RFP, TPCL has claimed to 268 hectares of land acquired for water outfall channel and 41 hectares of land claimed has to be leased from APSEZ-MPSEZ. It had also claimed Rs.2,39,52,716 (Rs.1,71,89,716/- for Government land and Rs.67,63,000/- for Forest Land) towards measurement fees, barbed wire fencing work, jungle cleaning leveling etc.

23. The Commission, in the impugned order, had held that the Change in Law as contemplated under Article 13.1.1.(iv)(a) of the PPA

dated 27th April, 2007 relates to only the cost/price of identified land and not for any change in the area of land. Accordingly, it held the TPCL entitled to difference between the indicative price and actual price incurred by it with regards to the 1092 hectares (2697 acres) of land to be recovered from the procurers. The Commission also held TPCL entitled to be compensated for actual expenditure on acquisition of 102 hectares of land out of claimed 268 hectares of land towards water intake/outfall channel over and above the indicative price of Rs.1.12 crores. It further held that the cost of Rs.2,39,52,716 does not fall within the scope of Change in Law under Article 13 of the PPA and, therefore, cannot be passed on to the procurers.

24. It is argued on behalf of the TPCL that the proposed project site as per schedule 1A of the PPA was only illustrative and was to be finalized by the developer of the project considering the ground realities and the indicative declared price of land, as the name suggests, was only an indicative price to be paid by the developer to the procurers /PFC on handing over of the project site. Learned Counsel for the TPCL submitted that the DPR specified that the parameters furnished therein are only illustrative for demonstrating the

feasibility of the project and actual parameters would be those to be finalized by the developer of the project. He pointed out that the DPR also envisaged that TPCL/developer would be required to acquire additional land for the infrastructure facilities and, therefore, Article 13.1.1(iv)(a) of the PPA would have to be read so as to ensure the recovery of actual cost for the land prudently acquired by the TPCL. He argued that Change in Law cannot be restricted to change in declared price of identified land alone as held by the Commission. According to the Learned Counsel, the entire land acquired by TPCL for construction of the power plant as well as the scheduled infrastructural facilities is not only prudent and justified but also necessary for the operation of the plant.

25. Referring the various provisions of the PPA as well as DPR, Learned Counsel argued that the water intake and outfall channels are integral for operating the power station and it was always held out and agreed that the same would be acquired by the procurers and handed over to the successful bidder for which PFC provided indicative declared price in its email dated 23rd October, 2006. He submitted that if the said land was to be acquired by the successful bidder solely at

its own cost, there was no reason for PFC to have contemplated and/or provided the indicative declared price for the same in the said email dated 23rd October, 2006. Referring to the environmental clearance (EC) dated 22nd March, 2007 granted by the Ministry of Environment and Forests (MOEF) for the project, corrigendum made thereto on 22nd April, 2007, proceedings of 1st joint monitoring committee meeting dated 11th July, 2007 as well as communications exchanged between TPCL and GUVNL, Learned Counsel argued that it was an accepted fact that the procurers were to acquire the requisite land for water channels and hand over the same to TPCL for which TPCL would pay the applicable price. He submitted that procurers cannot now be allowed to renege from these representations as well as commitments held out to TPCL. He also argued that the sum of Rs.1.12 crores indicated in the email dated 23rd October, 2006 for intake and outfall water channels was only indicative as neither the location nor the path of the water channels were known to the parties at that time and hence, it was subject to the actual expenditure to be incurred for acquisition of land needed for the project. He submitted that the actual expenditure incurred by TPCL for intake and outfall water channels is, therefore, covered under Article 13 of the PPA. He further pointed out that

pursuant to the discussions and on the recommendation of National Institute of Oceanography (NIO) which was engaged by PFC to procure the Rapid Marine Environmental Impact Assessment for the project, it was decided that cooling water requirement for the plant would be met by using the intake channel to be developed by MPSEZL and shared between TPCL and Adani Power Limited which was also setting up of a power plant adjacent of the power plant of the TPCL in question. It is submitted that consequently, TPCL was unable to acquire 41 hectares of land required for intake water channel as it has already been allotted by Government of Gujarat to MPSEZL with a rider to permit TPCL also to utilize the same and accordingly, the TPCL was constrained to enter into an agreement to avail water for cooling purposes of the power plant. It is clarified that TPCL is not claiming the cost of construction of the said water intake channel but only the lease money which it is to pay to MPSEZL.

26. On behalf of the contesting procurers, GUVNL, AVVNL, JVVNL, PSPCL, UHGVNL, BHBNL and MSEDCL, it is argued that TPCL had willingly participated in the bidding process, being

well aware to the specific terms and conditions of the PPA including the events to be allowed as Change in Law and had accordingly bid its fixed charges as well as energy charges. The Change in Law claim has to be based on specific provisions of Article 13 of the PPA and except as specifically provided in the said article, any actual cost incurred by TPCL on any account, is deemed to be recovered by the quoted tariff and deemed to have been included therein by TPCL. It is argued that the quoted tariff needs to be considered as an all inclusive consideration and there cannot be any further or additional compensatory claims with regards to any expenditure. It is submitted that the inadequacy of consideration or the contract having become onerous/ burdensome cannot be made basis of claim for Change in Law under Article 13 of the PPA. It is submitted that in case the claim of TPCL is allowed on the ground that it had not anticipated the costs or that the costs have become higher than envisaged, it would make the entire process of competitive bidding redundant and such a view has been rejected continuously by the Courts in several judgements.

27. Learned Counsels referred to the PPA executed between TPCL and the procurers and argued that recitals as well as

schedules are part and parcel of the PPA. It is pointed out that the schedule 1(A) of the PPA specifically refers to identification of 2750 acres (roughly 1100 hectares) of land for the power project. It is pointed out that Annexure 5 to the RFP also refers to identified land of 2750 acres and therefore, there cannot be any doubt that the identified land is the specific land of 2750 acres only. Learned Counsels conceded that the claim of TPCL can be considered and actually has been considered by the Commission with regards to 1092 hectares of land and in case TPCL has acquired any further land, same would not fall under Article 13 of the PPA and TPCL will have to bear the cost of said additional line on its own as being covered by the quoted tariff.

28. It is further argued that the contention of the TPCL that it was not possible for it to envisage the total land requirement, is not valid and sustainable in the light of specific disclaimers in the RFP. In this regard, reference is made to clause 1.4, 2.7.1(iv)(B) and 2.7.2 of RFP as well as Article 5 of the PPA. It is argued that TPCL chose to participate in the bid on the terms and conditions contained therein and, therefore, estimation of area of land required for the project as well as the costs involved therein are part of risk that TPCL undertook.

It is submitted that the bidders are required to estimate the area of land as well as the price and bid accordingly, and later on, are not entitled to any compensation under Change in Law on this account.

29. With respect to email dated 23rd October, 2006 of the PFC, it is submitted by the Learned Counsels that the email refers to various aspects and reports that were provided to the bidders and this does not mean that all the information contained therein can be considered for Change in Law by the bidders. It is submitted that the contents of the email cannot over-ride the terms of PPA as well as the disclaimers contained in RFP and, therefore, it is not of any help to TPCL.

30. It is further argued that while the Commission has rightly restricted the area of land in principle to what was identified land, it has failed to consider that the identified land is to be as per the PPA and not as per the DPR. It is submitted that DPR is not the part of the PPA or RFP documents nor is there any reference to the same in the PPA, and, therefore only the relevant clauses of the PPA should have been considered. It is argued that as per the PPA, land for water system was not part of the identified land and it was entirely up to the developer to make its own selection.

31. It is submitted that even if the DPR is to be considered, the total land envisaged therein is also 1092 hectares inclusive of all aspects but the Commission has, contrary to the same, considered the land of 1092 hectares for power plant and additional land of 102 hectares separately for water channels which is erroneous. It is argued that TPCL was well aware that it would need land for water channels and the total land identified is only 1092 hectares and, therefore Change in Law has to be only with respect to such area of land.

32. It is further argued that the contentions of TPCL with regard to 268 hectares of land are inconsistent which indicates that the entire claim is only an after thought. It is argued that reliance placed by TPCL upon the NIO report of February, 2009 as well as the letter dated 2nd November, 2009 of MOEF is totally misplaced for the reason that the application towards additional 268 hectares of land was made by TPCL on 11th November, 2008 i.e. much before the said report and the letter came into existence.

33. Thus, according to the Learned Counsels, there cannot be any consideration of land in excess of 1092 hectares under Article 13 of

the PPA and the decision of Central Commission to consider any extra land is liable to set aside.

Our Analysis :

34. Since the claim of the TPCL is under Change in Law as contemplated under Article 13 of the PPA dated 22nd April, 2007 executed by it with the procurers, we find it pertinent to reproduce the same hereunder :-

“13.1 Definitions

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

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

(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurers under the terms of this Agreement, or (iv) any change in the (a) Declared Price of Land for the Project or (b) the cost of implementation of the resettlement and rehabilitation package of the land for the Project mentioned in the RFP or (c) the cost of implementing Environmental Management Plan for the Power Station mentioned in the RFP, indicated under the RFP and the PPA;

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii)

change in respect of UI Charges or frequency intervals by an Appropriate Commission..

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

35. Thus, Change in Law means occurrence of any of the following events on or after the cut-off date which is 30th November, 2006 in this case, which results in any change in the cost of/or revenue from the business of generating and selling electricity by TPCL to the procurers under the terms of the PPA:-

- (i) ***Enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal***, of any Law;
- (ii) ***Change in interpretation of any Law*** by a Competent Court of law, tribunal or Indian Governmental Instrumentality, provided such Court of law, tribunal or Indian Governmental Instrumentality ***is final authority under law for such interpretation***; or
- (iii) ***Change in any consents***, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller; or
- (iv) ***Any change in the Declared Price of Land for the Project***; or the cost of implementation of the resettlement and rehabilitation package of the land for the Project mentioned in the RFP or cost of implementing Environmental Management Plan for the Power Station mentioned in the RFP, indicated under the RFP and the PPA.

36. Thus, Article 13 of the PPA gives express right to an affected party to claim compensation if the event qualifies as Change in Law event in terms of said Article. Once Change in Law is established, compensation in terms of restitutory principles as enunciated in Article 13.2 must follow. The purpose of compensating the party affected by Change In Law is no longer *res integra* and it is to restore the affected party through monthly tariff payments, to the same economic position as if such Change in Law event have not occurred.

37. In this appeal, we are concerned with the scope and interpretation of clause (iv) of Article 13.1.1 of the PPA which brings “any change in the declared price of land for the project” within the fold of change in Law. In other words, the issue which arises for our determination is whether the word “land” used in Act 13.1.1(iv) of the PPA denotes only the “identified land of 2750 Acres (1100 hectares) as per the PPA” or the entire land actually acquired by the developer TPCL for setting up of he Power Project.

38. We note that Request for Proposal (RFP) dated 22nd June, 2006 was issued to all the short-listed bidders for tariff based bidding process for procurement of power on long-term basis from the power

project in question to be set up at Mundra. Clause 1.4 of this document refers to site identification for the project and is extracted herein below:-

“1.4 The Procurers through the Authorised Representative, have initiated development of the Project at Mundra, District Kutch, Gujarat and shall complete the following tasks in this regard by such time as specified hereunder:

i. Site identification (already identified) as indicated in Annexure 5;

ii. Issue of Section 6 notification by Government of Gujarat under Land Acquisition Act will be completed at least thirty (30) days prior to Bid Deadline. Intimation of Declared Price of Land and intimation of the estimated costs of the draft resettlement and rehabilitation package, relating to land required for the Power Station will also be given at least thirty (30) days prior to Bid Deadline;

iii. Obtain necessary environmental, coastal regulation zone and forest clearances for the Power Station, prior to the issue of the Letter of Intent. The draft environment management plan will be made available at least ninety (90) days prior to Bid Deadline. These clearances are being obtained in relation to a project of gross capacity of 4000 MW employing Supercritical Technology;

iv. The schedule of port charges which would be applicable for importing coal, would be made available at least thirty (30) days prior to Bid Deadline;

v. *Project Report including geo-technical study, topographical survey, area drainage study, socio-economic study, EIA study (rapid) and hydrographic study would be made available at least ninety (90) days prior to Bid Deadline;*

vi. *Issue of certificate by Ministry of Power, Government of India extending the benefits to power generation projects under Mega Power Policy upto the Scheduled COD of the Power Station by Government of India at least thirty (30) days prior to Bid Deadline;*

vii. *Indicative costs of the following:*

(a) Land for Fuel transport system;

(b) Rehabilitation and resettlement for (a) above; and shall be provided at least thirty (30) days prior to Bid Deadline;”

(Emphasis supplied)

39. Clause 2.7.1.4 of this document RFP is also material and its relevant portion is reproduced herein below :-

“3. The Quoted Tariff in Format 1 of Annexure 4 shall be an all inclusive tariff and no exclusions shall be allowed. The Bidder shall take into account all costs including capital and operating costs, statutory taxes, duties, levies while quoting such tariff. Availability of the inputs necessary for generation of power should be ensured by the Seller at the Project Site and all costs involved in procuring the inputs (including statutory taxes, duties, levies thereof) at the Project Site must be reflected in the Quoted Tariff.”

40. We find clause 2.7.2 of the said RFP document also relevant and is noted hereinbelow:-

“2.7.2 Bidder to inform himself fully

2.7.2.1 The Bidder shall make independent enquiry and satisfy itself with respect to all the required information, inputs, conditions and circumstances and factors that may have any effect on his Bid. In assessing the Bid, it is deemed that the Bidder has inspected and examined the site conditions and its surroundings, examined the laws and regulations in force in India, the transportation facilities available in India, the grid conditions, the conditions of roads, bridges, ports, etc. for unloading and/or transporting heavy pieces of material and has based its design, equipment size and fixed its price taking into account all such relevant conditions and also the risks, contingencies and other circumstances which may influence or affect the supply of power.

2.7.2.2 In their own interest, the Bidders are requested to familiarize themselves with the Electricity Act, 2003, the Income Tax Act 1961, the Companies Act, 1956, the Customs Act, the Foreign Exchange Management Act, IEGC, the regulations framed by regulatory commissions and all other related acts, laws, rules and regulations prevalent in India. The Procurers shall not entertain any request for clarifications from the Bidders regarding the same. Non-awareness of these laws or such information shall not be a reason for the Bidder to request for extension of the Bid Deadline. The Bidder undertakes and agrees that before submission of its Bid all

such factors, as generally brought out above, have been fully investigated and considered while submitting the Bid.

2.7.2.3 The Procurers and Authorised Representative shall not permit any change in any time schedule mentioned in this RFP or any financial adjustment arising due to lack of clear information on matters such as Site conditions, laws and regulations and other related information and/or its effect on the Bid.”

(Emphasis supplied)

41. Annexure 5 attached to the RFP mentions the site details along with site map and the same is extracted herein below:-

“ANNEXURE 5
<i>SITE DETAILS ALONG WITH SITE MAP</i>

The Site is located near south of Tunda Wand village at 22°49' N latitude and 69°30' E longitude in Mundra Taluka, Kutch District of coastal Gujarat area. The proposed project site is located at 22 km from Mundra port and 1.5 km from Gulf of Kutch.

About 2750 acres of land has been identified for the project covering villages of Tunda Wand, Khandagra and Nana Bhadia. Out of this about 1250 acres of land has been identified for main plant, about 1000 acres for ash disposal/dyke and 500 acres for colony.

Nearest Railway stations are Bhuj/Gandhidham/Adipur which are about 65/80/70 km from the Site. Adipur is well connected to multi-

terminal Mundra port through a broad gauge rail network privately owned by Mundra Special Economic Zone Authority. Nearest Airport is Bhuj which is 70 km away from the Site.

The water source for the project is sea water from the Gulf of Kutch which is about 1.5 km from the Site.

Source of coal for the project will be imported coal.

Vicinity map of Site is enclosed.

Further details are provided in the Project Report”

(Emphasis supplied)

42. Detailed Project Report (DPR) submitted by the TCE Consulting Engineers Limited appointed by PFC in July, 2006 is the 2nd document prepared with regards to the power project in question. Under the heading “project at a glance” it states:-

“5. Fuel, Water & Land

i) Fuel

Main fuel: Imported coal (to be received at Mundra port)

Annual coal requirement: Approximately 12 millions tones

Auxiliary fuel: Heavy fuel oil (HFO)/Light diesel oil (LDO)

Coal transportation to site: *Through merry-go-round (MGR) railway system with bottom open hopper wagons*

Fuel oil (HFO) *By railway wagons/road tankers*

Transportation:

ii) Water

Source: *Sea water from Gulf of Kutch*

iii) Land Availability *Adequate land available;*

1092 Ha (about 65% is government land);
Acquisition under progress”

(Emphasis supplied)

43. Regarding land requirement and availability, it is mentioned in the DPR as under :-

“LAND REQUIREMENT AND AVAILABILITY

7. *The power plant would require an estimated land area of about 820 Ha (2050 acres) for its various facilities as below.*

a) *Power plant* : *500 Ha (1250 acres)*

b) *Ash disposal area* : *200 Ha (500 acres)*

c) Colony : 120 Ha (300 acres)

Depending upon the unit size and final layout, requirement of land would change.

8. The chosen site has adequate land area considering the above requirements. A total of 1092 Ha (2697 acres) of area has been identified for the above facilities. Most of the land at the site (705 Ha) belongs to Gujarat government. However areas to the extent of 218 Ha and 169 Ha are in the possession of MSEZ and private parties respectively. Action has been initiated to acquire the identified land. The land being acquired for the project would be transferred to the project developer along with clear titles and ownership.

The estimated land required for other project facilities / infrastructural facilities are as below.

a) Water intake/discharge corridors	: 102 Ha (once through system)
	: 13 Ha (recirculating system)
b) MGR system	: 125 Ha
c) Roads	45 Ha”

44. In Chapter 7 of the DPR under the heading “basic power plant requirements and availability” it is mentioned as under :-

“CHAPTER 7

BASIC POWER PLANT REQUIREMENTS AND AVAILABILITY

LAND REQUIREMENT AND AVAILABILITY

1. The power plant of the size being envisaged would require substantial extent area. Considering various plant facilities that are needed, it is estimated that total land to the extent of about 650 Ha (1625 acres) would be required as below.

(a) Main power plant	:	500 ha (1250 acres)
(b) Ash disposal area	:	200 ha (500 acres)
(c) Colony	:	120 ha 300 acres)
Total requirement	:	820 ha (2050 acres)

Depending upon the unit size and final layout, requirement of land would change.”

45. Next in line comes the PPA dated 27th April, 2007 executed between TPCL and the procurers. It defines declared price of land as the amount mentioned in the RFP by the procurers at which the identified land for the site will be transferred to the seller.

46. “Site” is defined in the PPA as the land for which the project will be developed as provided in Annexure 1A.

47. Annexure 1A /Schedule 1A attached to the PPA is with respect to the “Site” and is reproduced herein below :-

“IA. SCHEDULE IA: SITE

The Site is located near south of Tunda Wand village at 22°49' N latitude and 69°30' E longitude in Mundra Taluka, Kutch District of coastal Gujarat area. The proposed project site is located at 22 km from Mundra port-and 1.5 km from Gulf of Kutch.

About 2750 acres of land has been identified for the project covering villages of Tunda Wand, Khandagra and Nana Bhadia. Out of this, about 1250 acres of land has been identified for main plant, about 1000 acres for ash disposal/dyke and 500 acres for colony.

Nearest Railway stations are Bhuj/Gandhidham/ Adipur which are about 65/80/70 kms from the Site. Adipur is well connected to multi-terminal Mundra port through a broad gauge rail network privately owned by Mundra Special Economic Zone Authority. Nearest Airport is Bhuj which is 70 km away from the Site.

The water source for the project is sea water from the Gulf of Kutch which is about 1.5 km from the site.

Source of coal for the project will be imported coal.

Vicinity map of Site is enclosed.”

(Emphasis supplied)

48. Here we may note that RFP is a basic formal document that is used to solicit proposals/bids from qualified bidders for a specific project. The RFP specifically defines project requirements as well as its scope, timelines as well as deadlines and contract terms/conditions.

It ensures transparency and fairness in the procurement process and reduces the risk of bias/favoritism.

49. In the instant case, the RFP dated 22nd June, 2006 is a very detailed document specifying each and every thing about the project and the terms/conditions for the same. The details of the site identified for the power project to be developed by the successful bidder have been given in Annexure 5 attached to the RFP wherein it is mentioned that about 2750 acres of land have been identified for the project out of which 1250 acres of land have been identified for the main plant, about the 1000 acres for ash disposal/dyke and 500 acres for colony. Therefore, it is amply clear that the bidders including TPCL were aware that 2750 acres of land have been identified for the power project and they were expected to bid accordingly. In other words, it can be said that the RFP document clearly required the bidders to construct the power project on the said identified piece of land measuring 2750 acres.

50. Clause 2.7.2.1 of RFP enjoins upon the bidders to make independent inquiries in order to satisfy themselves about the conditions/circumstances and factors that may have any effect on their

respective bids. It further states that the bidder shall be deemed to have inspected and examined site conditions and its surroundings, the transportation facilities, the conditions of roads etc. etc. and has fixed its price taking into account all such relevant conditions. There is a disclaimer in clause 2.7.1.4 of the RFP also which states that the bidders shall take into account all costs including capital and operating costs, statutory taxes, duties, etc. while quoting the tariff and the quoted tariff shall be of inclusive tariff and no exclusions shall be allowed.

51. These provisions of RFP indicate that the bidders were required to submit their bids and to quote the tariff by keeping in mind that the power project has to be developed on the said identified piece of land measuring 2750 acres.

52. The DPR also mentions that the chosen site of 1092 hectares (2750 acres) had adequate land area for all the requirements of the power project.

53. Similarly, schedule 1A attached to the PPA also mentions that 2750 acres of land have been identified for the power project out of

which 1250 acres of land have been identified for main plant about 1000 acres for ash disposal/dyke and 500 acres for colony. A PPA is a sacrosanct document between a power generator and procurer. The rights and responsibilities of both are governed by and flow from the provision of the PPA.

54. Concededly, none of the bidders while submitting the bid had objected to identification or earmarking only 2750 acres of land for the power project on the ground of inadequacy. Similarly, after TPCL was declared successful bidder and LOI was issued to it, it did not object at that time too to the identification or earmarking of such piece of land measuring 2750 acres for the power project on the ground that it is not sufficient for the entire power project along with the other project facilities/infrastructure facilities.

55. Notably, neither RFP nor PPA specifies any portion of the identified land or any additional land for water intake and outfall channels. It appears that after the issuance of RFP, it was realized that some expenditure has also to be incurred by the developer for water intake and outfall channels and therefore a clarification was issued by PFC vide email dated 23rd October, 2006 sent to all the qualified

bidders wherein the indicative declared price for land for power station was stated as under:-

(i)	Power Plant Area	-	Rs. 28.68 Crores
(ii)	MGR Land		
	(a) Land other than portion of MSEZ Land	-	Rs. 1.83 Crores
	(b) MSEZ Land	-	Under Finalization
(iii)	Water Pipeline Corridor (intake and outfall channel)	-	Rs. 1.12 Crores

56. Thus in the said email, which can be construed as an amendment to the terms/conditions of the RFP, PFC acknowledges that water pipeline corridor is required for the power project and the expenditure involved for the same is not included in the price of identified land measuring 2750 acres for the power station. The natural implication thereof would be that the expenditure incurred by TPCL for acquiring additional land for water outfall channel and taking on lease further land for intake channel needs to be included in the declared price of land for the project and any escalation in such expenditure would definitely fall within the ambit of (Change in Law) as envisaged under Article 13.1.1 of the PPA. Therefore, the word "Land" used in Article 13.1.1(iv) would include not only identified land of 2750 acres but also the additional land acquired/taken on lease for water outfall and intake channel.

57. We do not find any merit in the arguments on behalf of the procurers that total land envisaged for the project is only 1092 hectares i.e. 2750 acres inclusive of all aspects. Further argument on behalf of the procurers that the information/clarification contained in email dated 23rd October, 2006 of PFC cannot be considered for Change in Law by the bidders, also is found devoid of any substance. It is true that TPCL chose to participate in the bid on the terms and conditions contained in the RFP document dated 22nd June, 2006 wherein the identified land is stated to be only 2750 acres but it is also equally true that the RFP stood amended by way of the clarification issued by PFC vide email dated 23rd October, 2006 with regards to the inclusion of expenditure in the sum of Rs.1.12 for water pipeline corridor (Intake and outfall channel) in indicative declared price of land for power station. The said email forms part and parcel of the RFP document and its contents cannot be avoided by the procurers.

58. It also cannot be gainsaid that the sum of Rs.1.12 crores specified in the said email dated 23rd October, 2006 of PFC for water pipeline corridor is only indicative and not final. Therefore, TPCL is entitled to be compensated for actual expenditure on acquisition of

268 hectares of land for water outfall channel as well as for lease of 41 hectares of land for water intake channel, as claimed by it.

59. Therefore, we do not find any infirmity in the impugned order of the Commission on this ground. TPCL had further claimed Rs.2,39,52,716 towards measurement fee for the acquired land, barbed wire fencing work, jungle cleaning leveling etc. which has been rejected by the Commission in the impugned order. The Commission has opined that the declared price of land under Article 13 of the PPA refers to cost of acquisition of land to be transferred to TPCL and does not include miscellaneous costs incurred by TPCL in developing the said land. In our view also, the expenditure to be incurred for these works was to be considered at the time of submitting the bids and quoting the tariff as envisaged in the disclaimers contained in Clauses 2.7.1.4 and 2.7.2 of the RFP document which have already been extracted herein above. Therefore, we do not find any ground to interfere in the findings of the Commission on this aspect also.

60. So far as land for Merry-Go-Round (MGR) and road is concerned, neither RFP nor PPA does talk about the same. However,

in the email dated 23rd October, 2006, PFC has given the indicative price for MGR land. We are in agreement with the observation of the Commission that wherever the indicative prices have not been indicated by PFC the bidder is expected to factor the costs of such expenditure in the bid including the price for additional land that bidder expects to acquire for the plant. The PFC has given the indicative price of Rs.1.83 crores on MGR land in the email dated 23rd October, 2006 but, admittedly, the MGR has not materialized and in its place TPCL has implemented coal convener system. Therefore, the Commission has rightly held that amount of Rs.1.83 crores shall be reduced from the claims of TPCL.

61. We have gone through the judgement of the Hon'ble Supreme Court in the case Haryana Power Purchase Centre vs. Sasan Power Limited & ors. 2024 1 SCC 247 upon which heavy reliance has been placed by the Learned Counsel for the procurers. In this judgement, the Apex court has emphasized that a case must be viewed from the prism of the specific provisions defining Change in Law and actual Change in Law as explained therein. The Court also held that the Tribunal cannot make a new bargain for the parties and cannot re-

write a contract solemnly entered into between the parties and cannot disregard the provisions of the contract on any ground whatsoever. This judgement has been cited on behalf of the procurers probably to show that by including the expenditure incurred by TPCL for acquiring/leasing of land for water pipeline corridor for the power project in the declared price of land for the project and holding TPCL entitled to be compensated for actual expenditure in this regard on the basis of Change in Law clause in the PPA i.e. Article 13.1.1(iv), the Commission or this Tribunal would be going beyond the provisions of the RFP as well as PPA and it would tantamount to re-writing the contract entered between the parties. We are unable to accept these submissions made on behalf of the procurers. We have already explained herein above that the claim of TPCL for escalated expenditure incurred by it on water pipeline corridor is in consonance with the RFP as amended vide email dated 23rd October, 2006 of PFC and, therefore, definitely falls within the ambit of Change in Law as envisaged under Article 13.1.1 of the PPA.

62. Even otherwise also, the facts of the Sasan Power Limited case before the Apex Court were totally distinct from the instant case.

In that case, in terms of RFP, WAPCOS was commissioned to study availability of water for the project and it submitted its report on 3rd August, 2006 estimating total cost for construction of water intake system at Rs.92 crores. After the Reliance Power Limited was declared successful bidder and acquired the project, it appointed WAPCOS again to confirm technical feasibility as part of detailed engineering exercise. This time in its report, WAPCOS recommended new location for water intake, the cost for which was estimated at Rs.244/- crores. On these facts and referring to the disclaimers in the RFP, the Apex Court observed :

“The matter must be viewed from the prism of the specific provisions defining the change in law and the actual change in law which is as we have explained above. In short, being awarded a contract and having entered into the PPA and without any basis as such in facts, the first respondent ventured to commission a new study and acting on the same, a new pipeline corridor came on the scene. Necessarily the cost may go up. But the question we are to decide is as to whether it is change in law and we are of the view that it could not be a change in law as contemplated in the agreement as it is not a change in initial consent which is the only case which has been argued in this regard.”

(Emphasis supplied)

63. Thereafter, in paragraph 84, the Hon'ble Court further observed :-

“Moving on to the findings actually which have been rendered by the Tribunal, the Tribunal has, in the impugned order, found that the first report of the WAPCOS is grossly erroneous. We are at a loss to understand as to what was the basis for rendering such a finding. Without any material, it is a little inexplicable as to how the Tribunal could have rendered such a finding which has serious consequences as we have noticed. This is after finding undoubtedly that there is no change in law. Virtually, the Tribunal has brushed aside the disclaimer clauses. Before we go to the disclaimer clauses, we may also indicate that a perusal of the first WAPCOS report indicates that it is a fairly elaborate report. The second WAPCOS report apart from it being prepared without reference to the procurers as we have noticed does not appear to say anything which is critical of the first WAPCOS report. At least, there is, in fact, no express whisper about the first report. All that the second WAPCOS report seems to indicate is upon being awarded the work, WAPCOS has gone about preparing another report. At least we are unable to find as to how the Tribunal could on the basis of the second report find that the first WAPCOS report was grossly erroneous. The Tribunal has not undertaken a comparative study of the two reports. There is no discussion whatsoever of the two reports. Nor is there any other material provided to render such a finding.”

(Emphasis supplied)

64. Thus the Apex Court rejected the claim of Reliance Power Limited that escalation of costs of water intake system based on 2nd

WAPCOS report constituted Change in Law. It is amply clear that there is no similarity at all between the facts of that case and the facts involved in the instant case before us. Therefore, the findings of the Hon'ble Supreme Court in that case have no relevance with regards to the instant case.

65. With regards to the expenditure stated to have been incurred by TPCL on re-settlement and rehabilitation (R&R), we note that in the email dated 23rd October, 2006, PFC has tentatively provided a sum of Rs.10 crores towards estimated cost for R&R package. The procurers are aggrieved by non-consideration of Change in Law under Article 13.1.1(iv)(b) of PPA on account of less expenditure incurred by TPCL on R&R as compared to the indicative cost mentioned in the above noted email of PFC.

66. We are unable to discern as to how the procurers are affected by any findings of the Commission in the impugned order with regards to R&R. We have already noted specific heads of expenditure, regarding which the relief under Change in Law clause of PPA was sought by TPCL, in paragraph No. 4 herein above. No claim has been made by TPCL with regards to the expenditure incurred by it on R&R

package. It is for this reason that even though the Commission has noted the contention raised in this regard by the procurers in paragraph No. 33(iv) and paragraph No. 45 of the impugned order yet has not given any findings on the same.

67. It needs to be kept in mind that the Commission was dealing with the petition filed by TPCL seeking relief under Change in Law clause of PPA with regards to various expenditure incurred by it on the completion of the power project. In case the actual expenditure on any head was less than indicated in RFP as amended by email dated 27th October, 2006 of PFC which benefitted TPCL, it was for the procurers to issue requisite notice under the Change in Law clause of PPA and filed a separate petition or a counter petition before the Commission seeking passing off the said benefit to them and ultimately to the consumers. Patently, that has not been done. It is not permissible for the procurers to claim any relief under Change in Law in a petition filed by TPCL and without following proper procedure as laid down in the PPA.

68. We also note that after the arguments in the appeal were concluded and we reserved the judgement, an application bearing IA

No. 1409 of 2024 was filed by TPCL seeking permission to file additional documents in support of its claim to have incurred Rs. 9,54,81,054/- towards R&R. Accordingly, we heard the parties on the said IA on 30th September, 2024. In our opinion, the said application of TPCL is totally frivolous and misconceived. Since the expenditure incurred by TPCL on R&R was never an issue either before the Commission or before this Tribunal, there does not arise any reason or occasion to permit TPCL to file any additional document regarding the same. Therefore, the application is hereby dismissed.

69. Accordingly, the findings of the Commission on the issue under consideration, as noted herein above, stand modified by holding that the difference between indicative price of water pipeline corridor and the actual expenditure incurred by TPCL on it qualifies as Change in Law event and TPCL would be entitled to be compensated for the same.

B. Changes in the excise duty on civil material including Steel and Cement during the Construction period.

70. It is argued on behalf of the TPCL that the company at the time of bidding, was of the understanding that steel and cement required for

construction of the power project is exempted from payment of excise duty in view of notification issued in this regard by Ministry of Finance, Department of Revenue as well as Foreign Trade Policy dated 31st August, 2004 as updated subsequently. It is further submitted that in order to procure the material at the earliest for construction of the project, TPCL paid a sum of Rs.51.67/- crores towards excise duty payable on civil material required for the said construction on the belief that it would be able to claim a refund of the said amount but when it sought refund of the said amount, its claim was rejected by DGFT. It is pointed out that long after the cut-off date during the construction period, TPCL's vendors received show cause notice from excise department for payment of excise duty and the vendors accordingly raised debit notes on TPCL. In these circumstances, TPCL wrote a letter dated 14th July, 2010 to DGFT seeking clarification on this aspect and DGFT vide letter dated 28th October, 2010, stated that deemed exports were not available for supply of material like cement and steel to mega power projects, thereby altering the legal position which existed previously. It is argued that since the DGFT is the final authority for interpreting Foreign Trade Policy (FTP), its decision is final as well as binding and, therefore, its letter dated 28th October,

2010 constitutes a Change in Law events under the PPA entitled TPCL to appropriate relief in this regard.

71. On behalf of the procurers, it is argued that for claiming relief under Change in Law, it has to be shown that there was an existing law on the cut-off date which provided some exemption/benefit to a project developer and a subsequent law has taken away such exemption or, in other words, it must be established that there was an interpretation earlier or as on cut-off date which was beneficial to TPCL and there has been change in the said interpretation after the cut-off date. Reliance is placed upon the judgement of the Hon'ble Supreme Court in Haryana Power Purchase Centre vs. Sasan Power Limited 2024 1 SCC 247.

72. It is further argued that there was no existing law as on the cut-off date which provided an exemption from payment of excise duty on civil material such as cement and steel required for construction of the power project and, therefore, the Commission has rightly held that the TPCL was not entitled to any exemption under the notification dated 1st March, 2006 issued by the Central Government. It is submitted that there has been no change in the Excise Notifications/Custom

Notifications/Foreign Trade Policy to take away any benefit that it accrued to TPCL before the cut off date. It is pointed out that TPCL itself had sought clarification from DGFT vide letter dated 14th July 2010 which was given by DGPT vide letter dated 28th October, 2010 and, therefore, the said letter of DGFT clearly by way of clarification only, not a declaration of law constituting Change in Law.

73. The Commission in the impugned order as accepted the contentions made on behalf of the procurers holding that the letter dated 28th October, 2010 of DGFT is not a declaration of law entitling TPCL to claim relief under Change in Law. It also held that TPCL has mis-construed the notification dated 1st March, 2006 as existing on the cut-off date for the reason that schedule 1 annexed to the said notification clearly specified that exemption from excise duty is for goods which were procured through International Competitive Bidding (ICD) and it is not applicable to goods supplied to a project selected under competitive bidding. Accordingly, the Commission held the payment of excise duty towards civil materials such as steel and cement cannot be considered as Change in Law event in terms of article 13.1.1(i) of PPA and refused to given a relief to TPCL.

74. We have given our thoughtful consideration to the rival submissions made on behalf parties on this issue.

75. Admittedly, the bidding in this case was conducted for setting up an Ultra Mega Power Project (UMPP). Therefore, we find it necessary to refer to the following notification issued by the Ministry of Finance, Department of Revenue as well as the Central Government as also the policy circular issued by DGFT :-

“(a) On 01.03.2002, the Department of Revenue, Ministry of Finance, issued Notification No.21/2002 [@ pg. 847-851, CC-4]. Entry at Sr. No. 400 provided exemption from customs duty on import of goods required for setting up of any Mega Power Project. Relevant extract of Sr. No. 400 is reproduced below [@ pg. 848, CC-4]:-

S. No.	Chapter or Heading or sub-heading	Description of goods	Standard rate	Additional duty rate	Condition No.
400.	9801	Goods required for setting up of any Mega Power Project specified in List 42, if such Mega Power Project is- (a) an inter-State thermal power plant of a capacity of 1000 MW or more; or (b) an inter-State hydel power	Nil	Nil	86

		<p>plant of a capacity of 500 MW or more, as certified by an officer not below the rank of a Joint Secretary to the Government of India in the Ministry of Power</p>			
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Chapter Heading 9801 of the Customs Tariff Act, 1975 is extracted below for ease of reference:-

Tariff Item	Description of goods
9801	<p>All items of machinery including prime movers, instruments, apparatus and appliances, control gear and transmission equipment, auxiliary equipment (including those required for and research development purposes, testing and quality control), as well as all components (whether finished or not) or raw materials for the manufacture of the aforesaid items and their components, required for the initial setting up of a unit, or the substantial expansion of an existing unit, of a specified:</p> <p>(1) industrial plant, (2) irrigation project, (3) power project, (4) mining project, (5) project for the exploration for oil or other minerals, and (6) such other projects as the Central Government may, having regard to the economic development of the country notify in the Official Gazette in this behalf;</p> <p>and spare parts, other raw materials (including semifinished materials of consumable stores) not exceeding 10% of the value of the goods specified above, provided that such spare parts, raw materials or consumable stores are essential for the maintenance of the plant or project mentioned in (1) to</p>

	(6) above.
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(b) On 01.04.2003, Notification No. 26/ 2003-Cus. was issued amending the Notification No. 21/2002-Cus. Entry 400 as amended reads:

S. No.	Chapter or Heading or sub-heading	Description of goods	Standard rate	Additional duty rate	Condition No.
400.	9801	Goods for setting up of any Mega Power Project, that is to say- (a) an inter State thermal power plant of a capacity of 1000 MW or more; or (b) an State inter hydel power plant of a capacity of 500 MW or more, as certified by an officer not below the rank of a Joint Secretary to the Government of India in the Ministry of Power.	Nil	Nil	86

The said amendment was necessitated by reason of the policy decision taken by the Government as reflected in the Union budget speech of 2003-04. The following extract from the budget speech is relevant:

"Simultaneous to the emphasis on improvement in power distribution, our attention on capacity addition remains. The Government had earlier, in 1999, notified 18 power projects as mega projects, conferring upon them various duty and licensing benefits. **The Government now proposes to liberalise the mega power project policy further by extending all these benefits to any power project that fulfils the conditions already prescribed for mega power projects.** "

Thus, w.e.f. 01.04.2003, the list of specified power projects had been deleted in tune with the liberalized policy of the Government. This amendment and the policy shift has been considered by the Hon'ble Supreme Court in the Sasan Judgment [Para 129 @ pg. 22202, CC-5D]

(c) On 31.08.2004, the Central Government notified the Foreign Trade Policy (“FTP”) 2004 – 2009, which was in force from 01.09.2004 till 31.03.2009, during which it was amended on 07.04.2006, 19.04.2007 and 11.04.2008.

(d) Chapter 8 of the FTP provides for Deemed Export Benefits. Supply of good to the Projects by various suppliers qualifies as “deemed export” under Paragraphs 8.2(f) & (g) of the FTP which read as follow:

“(f) Supply of goods to any project or purpose in respect of which the MoF, by a notification, permits import of such goods at zero customs duty;

(g) Supply of goods to the power projects and refineries not covered in (f) above;”

(e) Paragraph 8.4.4 (iv) of the FTP links deemed export benefit to Entry 400 of the Customs Exemption Notification dated 01.03.2002, as amended from time to time, the relevant parts of which are excerpted hereinbelow:-

“8.4.4

(iv) Supply of Capital goods and spares upto 10% of the FOR value of the capital goods to the power projects in terms of paragraphs 8.2(g) shall be entitled for deemed export benefits provided the International Competitive Bidding procedures have been followed at Independent Power Producer (IPP)/Engineering and Procurement Contract (EPC) stage. The benefit of deemed exports shall also be available for renovation/ modernization of power plants. The supplier shall be eligible for benefits listed in paragraph 8.3(a) and (b) of the Policy, whichever is applicable. **However, supply of goods required for setting up of any mega power projects as specified in S. No. 400 of Department of Revenue Notification No.21/2002-Customs dated 1.3.2002, as amended, shall be eligible for deemed exports benefits** as mentioned in paragraph 8.3(a), (b) and (c) of the Policy,

whichever is applicable, if such mega power project is –

(a) an inter state thermal power plant of capacity of 1000 MW or more; or

(b) an inter state Hydel power plant of capacity of 500 MW or more.”

[Emphasis supplied]

(f) Thereafter, on 01.03.2006, the Central Government issued Notification No.6/2006-Central Excise [@ pg. 852-870, CC-4], exempting all goods supplied against ICB, from payment of Excise Duty. Relevant extract of Sr. No. 91 is reproduced below:-

S. No.	Chapter or heading or sub-heading or tariff item of the First Schedule	Description of excisable goods	Rate	Condition No.
91	Any Chapter	All goods supplied against International Competitive Bidding.	Nil	19

(g) On 19.07.2007, the Ministry of Power by its letter No.12/17/2006-P&P [@ pg. 871-873, CC-4] provided Mega Power Project certification for Mundra UMPP, to enable TPCL to avail all benefits applicable to Mega Power Projects (as project activities were to commence during the same period).

(h) On 14.08.2008, Ministry of Finance (Department of Revenue) issued Notification No.46/2008-Central Excise [@ pg. 874-875, CC-4], inserting Sr. No. 91A, clarifying that no Excise Duty was payable on procuring any goods required for setting up of a project based on super-critical (coal-thermal) technology, with installed capacity of 3960 MW or above, inter-alia, from which power procurement has been tied up through tariff based competitive bidding. Relevant extract is reproduced below [@ pg. 874, CC-4]:-

S. No.	Chapter or heading or sub-heading or tariff item of the First Schedule	Description of excisable goods	Rate	Condition No.
91A	Any Chapter	Goods required for setting up of an ultra mega power project based on super-critical coal-thermal technology, with installed capacity of 3960MW or above, from which power procurement has been tied up through tariff based competitive bidding.	Nil	26

Condition No. 26 in the Annexure [*@ pg. 874, CC-4*] provides as under:

Condition No.	Conditions
26	<p><i>If,-</i></p> <p><i>(a) such goods are exempted from the duties of customs leviable under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty leviable under Section 3 of the said Customs Tariff Act when imported into India;</i></p> <p><i>(b) an officer not below the rank of Chief Engineer in the Central Electricity Authority certifies that the said goods are required for the setting up of the said ultra mega power project under Government of India initiative, indicating the quantity, description, and specifications thereof; and</i></p> <p><i>(c) the Chief executive officer of the project furnishes an undertaking to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, having jurisdiction, to the effect that:-</i></p> <p><i>i. the said goods will be used only in the said project and not for any other use; and</i></p>

	<p><i>ii. in the event of non compliance of sub-clause (i) above, the project developer will pay the duty which would have been leviable at the time of clearance of goods, but for this exemption."</i></p>
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- (i) *On 20.08.2008, DGFT Policy Circular No. 29(RE-08)/2004-2009 [@ pg. 881, CC-4] **clarified that, deemed export benefits are available on supply of goods to Mega Power Projects, if:-***
- (a) *Power procurement for such projects has been tied up through ICB procedure; or*
- (b) *International Competitive Bidding procedure has been followed by such projects at Engineering and Procurement Contract ("EPC") stage. So, ICB procedure could be either at the stage of power procurement or EPC."*

76. We may note that at the cost of repetition that RFQ & RFP in this case were respectively issued on 31st March, 2006 and 22nd June, 2006 for setting up of 4000 MW Ultra Mega Power Project at Mundra, Gujarat. TPCL submitted its bid on 6th December, 2006 and the cut-off date was 30th November, 2006, being 7 days prior to the bid deadline date. Ministry of Power, Govt of India, vide its letter dated 19th July, 2007 provided Mega Power Project certification for the said Mundra UMPP to enable it to avail all benefits applicable to Mega Power Project.

77. It cannot be disputed that the notification dated 1st March, 2002 and 1st April, 2003 issued by Department of Revenue, Ministry of

Finance clearly provided exemption from excise duty for imported goods required for setting up of any mega power project. The fact that steel and cement are basic materials required for setting up a power project, also cannot be disputed. Therefore, what can be reasonably and prudently inferred from the contents of two notification dated 1st March, 2002 and 1st April, 2003 is that cement and steel required for setting up a mega power project was also exempted from the custom duty. Further, the DGFT vide policy circular No. 29 dated 28th October, 2008 has provided deemed export benefit with regards to the goods supplied to Mega Power Project in case the power procurement for such project has been tied up through international competitive bidding and a procedure under international competitive bidding has been followed. However, it is to be noted here that these notifications issued by the Department of Revenue, Ministry of Finance, Government of India as well as the policy circular dated 28th October, 2008 issued by the DGFT are not applicable to the power project of the Appellant which is an Ultra Mega Power Project and not a Mega Power Project.

These notifications and the circular have been issued only with regards to the Mega Power Projects. Similarly, reference to the judgement of High Court of Calcutta in Bharat Heavy Electricals Limited Vs. Union of India 2014 SCC online CAL 22815 in this regard is also misplaced for the reason that the said judgement has been rendered with regards to the Mega Power Project.

78. Hence, it is amply clear that no law existed before the cut-off date in this case exempting cement and steel required for construction of a Mega Power Project for Custom Duty and, therefore, it does not lie in the mouth of the Appellant – TPCL to say that it logically expected that any such benefit is available to its Mundra UMPP.

79. Learned Counsels for the procurers had cited the findings of the Hon'ble Supreme Court in Sasan Power Limited case (supra). However, we find that in the Sasan case, the Apex Court was dealing with the question related to the imposition of custom duty of mining equipment whereas the issue at hand involved in this appeal relates to imposition of excise duty on civil material i.e. steel and cement.

Therefore, patently, the observations of Hon'ble Supreme Court in Sasan case are not applicable to the instant case.

80. Hence, we do not find any error in the findings of the Commission on this issue and accordingly affirm the same.

C. Additional Stamp Duty paid by TPCL on indenture of Mortgage.

81. The issue relates to the stamp duty payable on the mortgage deed signed by TPCL with its lenders i.e. 13 banks on a single instrument.

82. The case of TPCL is that as per the practice followed by majority of the entities including banks, financial institutions and other project developers on the cut-off date i.e. (30th November, 2006), it was liable to pay stamp duty on the indenture mortgage/mortgage deed in terms of Article 6 & 36 of Schedule 1 of the Bombay Stamp Act i.e. as "Simple Mortgage" treating it as a single transaction even though 13 banks were involved and accordingly it paid the stamp duty of Rs.4,21,000/- on the said mortgage. When TPCL presented the

mortgage deed before the Sub-Registrar, Mundra, Bhuj, Gujarat on 6th October, 2009, the same was registered under Serial No. 3375 and on the same day, the letter was issued by the said Office to the Deputy Collector - Stamp Duty Valuation Organization, indicating that the Mortgage Deed was impounded as per Section 33 of the Bombay Stamp Act being deficiently stamped to the tune of Rs.50,41,600/-. TPCL challenged the said levy of deficit stamp duty, without any success, firstly before the Deputy Collector and than before the Chief Controlling, Revenue Authority, Gujarat. The order dated 28th March, 2011 passed by the Chief Controlling Revenue Authority, Gujarat was assailed by TPCL before the Hon'ble Gujarat High Court by way of Stamp Reference No. 1 of 2011 which was allowed vide order dated 3rd December, 2012 whereby the High Court over-turned the orders passed by Deputy Collector and Chief Controlling, Revenue Authority and held that TPCL was not required to pay the deficit stamp duty of Rs.50,41,600/-. However, the Supreme Court vide its judgement dated 11th August, 2015 in Civil Appeal No. 5 of 2015 over-ruled the said order dated 3rd December, 2012 of Gujarat High Court and held

that TPCL liable to pay deficit stamp duty as directed by the Revenue Authority.

83. According to the TPCL, the said judgement dated 11th August, 2015 of the Apex Court is a declaration of Law on the aspect of Stamp Duty payable on mortgage deed involving various transactions and, therefore, constitutes Change in Law in terms of Article 13 of the PPA. The submissions of TPCL have not been found favour with the Commission which has held in the impugned order that the said judgement of the Hon'ble Supreme Court is only an interpretation of law which existed as on the cut-off date and, therefore, does not constitute Change in Law.

84. We find ourselves in agreement with the findings of the Commission on this issue. Nothing has been brought either before the Commission or before this Tribunal on behalf of the TPCL to demonstrate that any law existed on the cut-off date i.e. 30th November, 2006 providing that stamp duty payable on a mortgage deed involving several transactions was not to be calculated as per

the value of the total amount of each of those transactions. As per the contentions of TPCL itself, there was a practice being followed by majority of banks/financial institutions/project developers to pay the stamp duty on such a mortgage deed as a “simple mortgage” only. Such practice, even if there was any, cannot take place of Law. No provisions in the Bombay Stamp Act has been brought to our notice which supported such practice. It is evident that TPCL had calculated the stamp duty payable on the mortgage deed as per its own assumptions as well as the interpretation of law which is not supported by any legal provision or decision of a judicial authority. Thus, we concur with the observation of the Commission that the Hon’ble Supreme Court by way of judgement dated 11th August, 2015, has only clarified the law with regards to the payment of stamp duty on mortgage deed which even existed on the cut-off date also and there has been no fresh declaration of law or any change in the interpretation of law subsequent to the cut-off date.

85. Therefore, we do not find any ground to interfere in the findings

of the Commission on this issue.

86. The remaining three issues related to “increase in rate of Service tax on Works Contract”, “additional conditions imposed by MO&EF vide amended EC” and “Carrying Cost” are taken up together for disposal and are dealt with in the following manner.

D. The increase in rate of Service Tax on Works Contract

87. The claim of TPCL under this issue is premised on the contention that it was required to submit the bid on the basis of the then prevailing rate of service tax @12% on the service components/element of the works contract in terms of the Finance Act, 2006 but on 1st April, 2007, in terms of Finance Act, 2007 a secondary and higher education cess was levied @ 1% on aggregate duty of service tax levied and collected by the Central Government. As per the Works Contract Rules notified on 22nd May, 2007, an option was given to the persons liable to pay service tax on works contract to discharge the liability by paying an amount equivalent to 2% of the gross amount charged for the works contract instead of paying service tax@12% on

the service component of the works contract. It is stated that such increase in service tax and levy of secondary and higher education cess has resulted in additional burden to the tune of Rs.21.22 crores for the services utilized by TPCL during the construction period towards capital expenditure for which it is entitled to be compensated by recovery from the procurers.

88. The Commission has held in the impugned order that the increase in service tax has resulted due to exercise of a option by TPCL in terms of Works Contract Rules dated 22nd May, 2007, the impact of the same cannot be passed on to the procurers.

E. Additional conditions imposed by Ministry of Environment and Forest (MOE&F), Govt. of India.

89. This issue is premised on the amended environment clearance granted to the power project imposing additional condition on TPCL to earmark an amount of Rs.72 crores as one time capital cost towards Corporate Social Responsibility (CSR) activity and further directing TPCL to earmark additional sum of Rs.14.40 crores per

annum as a recovering expenditure towards CSR activity. It is stated on behalf of the TPCL that obtaining environment clearance prior to cut-off date was obligation of the procurers and the same has been obtained after the cut-off date on 2nd March, 2007 and, therefore, these conditions were not known to it before the cut-off date to be factored in the bid.

90. The Commission has observed in the impugned order that since the project cost Rs.18,000/- crores includes Rs.200/- crores for Environmental Protection Measure, TPCL should meet the expenditure on capital cost on CSR out of said sum of Rs.200/- crores earmarked for environmental protection measure and has thus rejected the claim of TPCL.

F. Carrying Cost

91. TPCL had contended that since the procurers had belatedly raised dispute regarding its claims intimated to them vide Change in Law notices dated 11th July, 2011 seeking restitution to the same

economic position as if Change in Law had not occurred, it is entitled to carrying cost at prevalent rates.

92. The Commission has rejected the claim of TPCL for carrying cost on the ground that there is no provision in the PPA to allow carrying cost on the amounts covered under Change in Law.

93. We find that these three issues have been dealt with in detail in the judgement of this Tribunal dated 27th April, 2021 in Appeal No. 172 of 2017 (Coastal Gujarat Power Limited vs. CERC & Ors.). We note that the said judgement has been rendered by this Tribunal in absolutely identical facts and circumstances, which fact is not disputed on behalf of the respondents.

94. In the said judgement, this Tribunal has allowed the claim of Appellant- Coastal Gujarat Power Limited for compensation on account of increase in service tax on works Contract under Change in Law. The relevant portion of the judgement is quoted herein below:-

“74. We are of the considered opinion that CERC has failed to appreciate that at the time of bidding for UMPPs various works

contracts are not finalized but are contemplated to be finalized, inter alia, within fourteen months period thereafter [Article 3.1.2 of PPA]. To work out the bid numbers, each participant in the bid process is expected to factor in the applicable tax rates prevalent as on the Cut-Off Date which are beneficial to the person. Any change in such rates after the Cut-Off Date are covered by Article 13. It is not contested that Service Tax @ 12% on service component of a Works Contract considered by CGPL in its Bid amounts to approximately 2% of total contract value (including materials and services). Hence, the enhancement of the rate to 4% of total contract value (including levy of Secondary & Higher Education Cess @ 1%) constitutes a CIL event deserving restitution. We agree with the submission that in terms of Article 3.1.2 of the PPA, various Works Contracts (such as EPC & BTG contracts) were contemplated to be finalized either within twelve months from the Effective Date (i.e. 22.04.2007) or fourteen months from the date of issuance of Letter of Intent (i.e. 28.12.2006), each date being well after the Cut-Off Date (i.e. 30.11.2006). The CIL provision, for the purpose of Works Contract, is to be interpreted in light of Article 3.1.2 of the PPA.

75. What is crucial and must be the decisive factor, however, is the fact that the option of paying an amount equivalent to 2% of the gross amount charged for the Works Contract instead of 12% on the Service Component was granted to the Contractor(s) employed by CGPL for executing the Works Contract. This was not within the

choice, domain or discretion of the appellant. It cannot be penalised or faulted by denying it the offset of adverse effect of such CIL, due to the exercise of option by the contractor to pay Service Tax on Works Contract at the then prevalent rate of 2% and thereafter at the increased rate of 4% on the gross or total value of the contract.

76. It is the argument of the respondents that the claim of the appellant that it has been additionally burdened to the extent that there was an increase to 4% is misconceived. It is contrarily argued that by exercise of the option, there was discharge of the service tax liability at 12% and, therefore, the benefit of 12% has to be passed on to the Procurers. It is submitted that the benefit of 12% is likely to be higher than the expenditure of 2% and 4% because otherwise the person would not exercise the option of paying the tax at 2% or 4% as opposed to 12%. These arguments are based on unfounded assumptions. The Commission has not gathered the requisite information nor done the necessary mathematical exercise to find out the net effect of the changes brought about as a result of change in law, levy and method of calculation.

77. The reversal by impugned order dated 31.10.2017, thus, must be vacated and the dispensation on the subject upon correct view taken initially by original order dated 17.03.2017 being restored. We order accordingly. The Commission shall be obliged to undertake the exercise of ascertaining the net effect of the change effected by the option exercised after CIL event and the subsequent change in

rate of the tax and allow adjustment accordingly to recompense the party which has suffered the impact.”

95. Further, this Tribunal, has in the said judgement, held that additional expenditure incurred by the Appellant – Coastal Gujarat Power Limited in terms of modified EC added to the capital expenditure for the project and has arisen due to Change in Law event within the meaning of Article 13 of the PPA for which the Appellant is entitled to commensurate compensation. The extract of relevant portion of the judgement is placed herein below :

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

the EC and on account of any change to the EC and which qualify to be treated as a CIL.

153. The practice of mandating CSR expenditure while granting ECs was introduced by MoEF in 2010, some years after the Cut-Off date. All RFQ qualified bidders were advised by the Bid Coordinator i.e. PFC (an Indian Governmental Instrumentality) to consider/earmark certain amounts towards land cost and R&R cost by its email dated 23.10.2006 (before the Cut-Off Date) in their Bids. There was no occasion then for the RFQ qualified bidders to be informed to consider earmarking amounts towards CSR expenses during the Construction or Operation Periods. Such financial burden (expenditure relating to mandatory CSR) stemming from obligations imposed by MoEF later, thus, could not have been foreseen by any participant (including the promoter of appellant's project) to be taken into account in computations while submitting its Bid for Mundra UMPP.

154. The underlying assumption of argument to the contrary raised by the Procurers is that generating companies are expected to know or foresee any amendment or change in the existing law (i.e. law existing on the Cut-Off Date) which may take place over the long term of the PPA (25 years). That such assumption is misplaced and impermissible is clear merely from the fact that the PPA gives express right to an affected party to claim compensation if the event qualifies as a CIL event in terms of Article 13 of the PPA deserving restitution. But for the

agreed need for such possibility to be covered, there was no occasion to include Article 13 in the PPA.

155. In the Impugned Order dated 17.03.2017, the CERC has linked the expenditure mandated through EC by MoEF to the CSR mandated under the Companies Act, 2013. As discussed earlier, the expenditure mandated by MoEF is over and above the CSR mandated under the Companies Act, the former being directly linked to the Project cost. In sharp contrast, the CSR under the Companies Act is linked to the net profits of the company [see OM dated 11.08.2014 (supra)].

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

96. On the aspect of carrying cost also, this Tribunal has upheld the claim of Appellant – Coastal Gujarat Power Limited in this regard in the following words :-

“169. Thus, we accept the contention of the appellant and direct that the carrying cost in respect of the additional expenditure allowed on account of nexus with CIL events shall also be allowed for the period(s)

from which the Seller (appellant) incurred such additional expenditure, be it by payment to State under taxation laws or otherwise borne for infrastructural developments mandated by law. Needless to add, the CERC will have to pass necessary orders in such regard.”

97. We feel complete agreement with the reasoning given by this Tribunal in the above noted judgement in upholding the claims of the power generator on the above noted three issues under Change in Law clause of the PPA and see no reason to take a contrary view.

98. It was brought to our notice on behalf of the Respondents that said judgement dated 27th April, 2021 has been challenged before the Hon'ble Supreme Court by the procurers by way of Civil Appeal Nos. 2284 & 2285 of 2021, 2295 & 2296 of 2021, 4488 & 4489 of 2021, 4929-4930 of 2021 and 1433 & 1444 of 2022 by Gujarat Urja Vikas Nigam Ltd., Haryana Utilities, Punjab State Power Corporation Ltd., Rajasthan Utilities and Maharashtra State Electricity Distribution Company Ltd. respectively and an interim order in the following words has been passed by the Apex Court :-

“In the meantime, the impugned orders passed by the authority are stayed on the condition that the respective appellants deposit the balance amount due and payable under the impugned orders with the Registry of this Court within a period of four weeks from today and on such deposit, the contesting respondent (s) are permitted to withdraw the amount by furnishing the bank guarantee to the satisfaction of the Registry and the withdrawal of the amount shall be subject to the outcome of the appeals.”

99. Accordingly, we set aside the findings of the Commission on these three issues and we find it appropriate to direct the Commission to compute within one month from the date of this judgement, the impact of Change in Law on these three issues in favour of TPCL. The Respondents shall, thereafter, deposit the amount so calculated with the Commission within two weeks and upon such deposit, TPCL shall be permitted to withdraw the said amount by furnishing Bank Guarantee to the satisfaction of the Commission. We clarify that such withdrawal shall be subject to the outcome of the above mentioned appeals before the Hon’ble Supreme Court.

Conclusion

100. We sum up our findings on the above noted disputed issues as under :-

Sl. No.	Issue	Our decision
1.	Claim related to difference between the actual cost of land acquired by TPCL for the power project and the declared price of land as per the RFP.	We uphold the findings of the Commission on this issue with the modification that the difference between indicative price of water intake corridor and the actual expenditure incurred by TPCL on it also is covered by the Change in Law Clause of the PPA and TPCL is entitled to be compensated for the same subject to prudence check by the Commission.
2.	Changes in the excise duty on Civil Material including Steel and Cement during the construction period.	We affirm the findings of the Commission on this issue.

3.	Additional Stamp Duty paid by TPCL on indenture of mortgage.	We affirm the findings of the Commission on this issue.
4.	Increase in rate of Service Tax on “Works Contract”	We set aside the findings of the Commission on these three issues and hold that these are covered by previous judgement of this Tribunal in Appeal No.
5.	Additional conditions imposed by MO&EF amended EC	172 of 2017 (Coastal Gujarat Power Limited vs. CERC) decided on 27 th April, 2021. In terms of the said judgement, we uphold the claims of TPCL on all the three issues and direct the Commission to compute within one month from the date of this judgement, the impact of Change in Law on these three issues in favour of TPCL. We further direct that the Respondents shall deposit the amount so calculated by the Commission within two weeks from the date of Commission’s order and upon such deposit, TPCL shall be permitted to withdraw the said amount by furnishing Bank Guarantee to the satisfaction of the Commission. We also clarify that such withdrawal shall be
6.	Carrying Cost	

		subject to the outcome of the Civil Appeal Nos. 2284 & 2285 of 2021, 2295 & 2296 of 2021, 4488 & 4489 of 2021, 4929-4930 of 2021 and 1433 & 1444 of 2022 before the Hon'ble Supreme Court.
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101. The Appeals stand disposed off accordingly.

Pronounced in the open court on this 25th day of October, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

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