APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 842 OF 2023 & IA NO. 1826 OF 2024

Dated: 16th April, 2025

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

In the matter of:

ESSAR POWER GUJARAT LIMITED (EPGL)
Through its Authorized Signatory, G. Srikar
Essar House 11, Keshavrao Khadye Marg
Mahalaxmi, Mumbai – 400 034. … Appellant

VERSUS

1. **GUJARAT ELECTRICITY REGULATORY COMMISSION**
Through its Secretary
6th Floor, Gift One, Road, 5C, Zone 5,
Gift City, Gandhinagar 382355, Gujarat. … Respondent No.1

2. **GUJARAT URJA VIKAS NIGAM LIMITED**
Through its Secretary
Sardar Patel Vidyut Bhavan, Race Course Circle,
Vadodara – 390007, Gujarat. … Respondent No.2

Counsel for the Appellant(s): Mahesh Agarwal
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Counsel for the Respondent(s): Anand K. Ganesan
Swapna Seshadri
Kriti Soni
Ashabari Basu Thakur
Srishti Khindaria
for Res.2

JUDGEMENT

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I. INTRODUCTION:

This Appeal is preferred against the order passed by the Gujarat Electricity Regulatory Commission ("GERC" for short) in Petition No. 1680 of 2017 dated 23.12.2019, and the order in Review Petition No. 1866 of 2020 dated 18.03.2023. The reliefs sought by the Appellant-Essar Power Gujarat Limited in the present Appeal are - (a) to set aside the order of the GERC in Petition No. 1680 of 2017 dated 23.12.2019 and the order in Review Petition No. 1866 of 2020 dated 18.03.2023; (b) direct the Respondent GUVNL to pay corresponding carrying cost on compounding basis in terms of the invoices dated 10.04.2023 on the principal amount of Change in Law compensation already granted by the GERC vide it Order in Review Petition No. 1866 of 2020, and to direct GUVNL to make payment in a time-bound manner; (c) to pay late payment surcharge to the Appellant in accordance with clause 11.3.5 of the PPA on the amounts set out in the invoices dated 10.04.2023 (from 09.06.2023 till the date of payment).

The short issue that arises for consideration, in the present appeal, is whether the Appellant Generator - Essar Power Gujarat Limited is entitled to carrying cost on the change in law ("**CIL**") compensation, granted to it by the Gujarat Electricity Regulatory Commission ("GERC" for short), under Article 13 of the Power Purchase Agreement dated 26.02.2007 ("PPA" for short) executed by the Appellant with Respondent No. 2 - Gujarat Urja Vikas Nigam Limited ("GUVNL" for short), for the time period between when the change in law event arose and the decision of the GERC.

The Appellant was awarded change in law compensation by the. GERC by its order in Petition No. 1680 of 2017 dated 23.12.2019, which was

enhanced by the Review Order in Petition No. 1866 of 2020 dated 18.03.2023, for the adverse impact of the Integrated Goods & Services Tax Act, 2017 ("GST Act" for short) notified by the Government of India on 12.04.2017 which was implemented with effect from 01.07.2017.

The GERC held that the GST Act constituted a change in law event, and opined that the appellant was entitled to be compensated for such an event. The GERC awarded compensation to the appellant, for the change in law event, by its Order dated 23.12.2019 and its Review Order dated 18.03.2023. It is relevant to note that the Appellant did not earlier claim carrying cost on the change in law compensation which they had sought as arising as a result of introduction of GST, which new levy subsumed many of the taxes and duties previously applicable. It is for the first time, in the additional affidavit filed in the Review Petition on 17.09.2021, that the appellant claimed carrying cost for the period April. 2019 to March, 2021. The GERC, however, did not award carrying cost holding that the issue of interest was "*raised subsequently and hence could not be allowed in the Review Petition*".

II. FACTS TO THE EXTENT RELEVANT:

The second Respondent-GUVNL published a Request for Qualification on 01.02.2006 inviting bids, under Bid No. 03/LTPP/2006, for supply of power on a long-term basis. Thereafter, on 24.11.2006, a Request for Proposal was issued by the second Respondent for procuring upto 2000 MW of power. Pursuant thereto, the Appellant submitted its bids on 03.01.2007, and was informed by the second Respondent on 10.01.2007 that it had been selected as the successful bidder to supply 1000 MW of power to GUVNL. On 26.02.2007, a Power Purchase Agreement was executed between the Appellant and the second Respondent for supply of 1000 MW electricity from Units 1 and 2 of the 1200 MW (200x6 MW) Phase-1 Salaya Thermal Power

Plant based on imported coal. Units 1 and 2 of Salaya Thermal Power Plant achieved commercial operation on 01.04.2012 and 15.06.2012 respectively.

The Appellant filed Petition No. 1296 of 2013 before the GERC on 16.01.2013, under Article 13 of the PPA, seeking compensation for the change in law events relating to Clean Energy Cess, Gujarat Green Energy Cess, counter-vailing duty, and basic Customs Duty. The said petition was partly allowed by the GERC on 03.08.2015.

The Government of India enacted the Integrated Goods & Services Tax Act, 2017 (GST Act) on 12.04.2017, and the said Act came into force on 01.07.2017. The Appellant issued a change in law notice to the second Respondent on 13.07.2017, under Article 13.3 of the PPA, seeking compensation for the change in law event regarding impact of the GST Act. The Appellant raised an invoice, towards change in law compensation for July, 2017, on 21.08.2017 for coal consumption prior to the GST Act. This amount was paid by the second Respondent-GUVNL on 18.08.2017.

The Appellant filed Petition No. 1680 of 2017 before the GERC on 30.08.2017 seeking its approval for GST to be treated as a change in law event under the PPA. In the said petition, the Appellant sought approval of the GERC (a) to raise supplementary bills/invoices, for levy of IGST on the assessable value and basic customs duty of the goods imported, under Article 13 of the PPA; (b) to allow the Appellant to raise supplementary bills/invoices for additional levy of IGST on import freight as per the provisions of the GST Act under Article 13 of the PPA; (c) allow the Appellant to raise supplementary bills/invoices for levy of compensation cess instead of clean energy cess. In Petition No. 1680 of 2017, filed by them before the GERC, the Appellant did not claim carrying cost on change in law compensation.

On 19.09.2017, the Appellant raised its first IGST invoice for the months of July and August, 2017 for the coal procured after the GST Act came into force. This invoice was not paid by the second Respondent-GUVNL contending that the PPA required the Appellant to seek approval of the GERC for change in law before the said could be allowed in the tariff. The Appellant filed an additional affidavit before the GERC, on 26.09.2017 in Petition No. 1680 of 2017, elaborating the impact of the enactment of the GST Act on the PPA tariff. On 16.10.2017, the second Respondent-GUVNL returned the invoice dated 19.09.2017. The supplementary invoices raised by the Appellant for the subsequent periods were also returned by the second Respondent-GUVNL contending that approval of the GERC was mandatory for a change in law claim. The second Respondent-GUVNL filed its reply in Petition No. 1680 of 2017 on 06.12.2017 contending that Article 13 of the PPA required any claim for change in law to be decided by the GERC, including the compensation payable for such change in law, and the effective date from which compensation was to be paid; after the decision of the Commission the Appellant was required to raise a supplementary invoice for such compensation for the past period and for the future, and the same would be reflected in the monthly invoices; the invoices raised by the Appellant had not been held by the Commission as change in law, and could not therefore to be paid by the second Respondent under Article 13 of the PPA; and any payment would only be made when the same was allowed by the GERC as change in law under the PPA.

The supplementary invoice dated 12.01.2018 raised by the Appellant was returned by the second Respondent-GUVNL on 16.01.2018. Orders were reserved by the GERC, in Petition No. 1680 of 2017, on 21.01.2018. On 23.01.2018 the Appellant stopped generation of power owing to rise in price of imported coal from Indonesia, and no power was generated till 21.04.2018. On 14.03.2018, the Central Electricity Regulatory Commission,

in Suo Moto Petition No. 13/SM/2017 dated 14.03.2018, held that introduction of GST amounted to a change in law event. On 13.07.2018, the second Respondent-GUVNL sought contract year compensation from the Appellant for Rs. 68.11 Crores for declaration of availability below 75 percent during 2017-18. The Appellant was requested to immediately deposit payment for FY 2017-18 with the applicable late payment surcharge as per the PPA (which, according to the Appellant, was on a compounding basis).

On 03.10.2018 a High Power Committee. constituted by the Gujarat Government. submitted its report recommending measures to tackle the financial stress faced by private thermal plants in the State (which included the Appellant) on account of the rise in price of imported coal from Indonesia. On 01.12.2018, a resolution was passed by the Government of Gujarat deciding to implement the recommendations of the High Power Committee with certain modifications. On 01.03.2019, the third supplementary PPA was executed between the Appellant and the second Respondent in terms of which energy and capacity charges, in terms of the policy directions, were revised upwards. The PPAs stipulated that there would be no further change in law impact on coal, as coal charges were to be paid on actuals subject to certain norms. The amended effective date was 15.10.2018. The Appellant resumed generation of power on 21.04.2019, and continued generation till 11.03.2021.

On 28.03.2019, the second-respondent-GUVNL filed Petition No. 1807 of 2019 seeking approval of the GERC to the supplementary PPA dated 01.03.2019. GERC passed an interim order, in Petition No. 1680 of 2017 dated 23.10.2019, for payment of GST, and directed parties to submit the impact/quantum of change in law for GST. The Appellant did not, however, raise any invoice on the second respondent pursuant to the said interim order till final orders were eventually passed by the GERC. On 01.11.2019 the

Appellant submitted its calculation and methodology to the second respondent for determining the impact of change in law in compliance with the orders of the GERC dated 23.10.2019. On 18.11.2019, the Appellant filed an affidavit before the GERC furnishing details of the computation made with respect to the impact of GST on tariff. On 23.12.2019, the Appellant raised a supplementary invoice for November, 2019 claiming GST and compensation cess in terms of the interim order of the GERC in Petition No. 1680 of 2017 dated 23.12.2019. On the same day ie 23.12.2019 the GERC passed the final order in Petition No. 1680 of 2017 holding the Appellant eligible for compensation on account of change in law, and that the impact of the change in law as approved would be applicable till 14.10.2018 as the first Supplementary Power Purchase Agreement dated 01.03.2019 was to be made effective from 15.10.2018. On 26.12.2019, the Appellant raised the supplementary invoice for the period 26.07.2017 to January, 2018. They did not, however, claim any carrying cost thereon. These amounts were paid by the second Respondent.

On 09.01.2020 an affidavit was filed by the Appellant in compliance with the order of the GERC dated 23.12.2019 stating that there was no reduction in cost to the Appellant on account of introduction of the GST Act. On 01.02.2020, the second respondent-GUVNL returned the invoice raised by the Appellant on 23.12.2019 stating that the impact of change in law was applicable only till 14.10.2018, and the said invoice was contrary to the final order passed by the GERC on 23.12.2019.

On 07.02.2020, the Appellant filed Petition No. 1866 of 2020 before the GERC seeking review of the original order dated 23.12.2019 contending, among others, that the Appellant was entitled to compensation for change in law as granted by the order dated 23.12.2019 for the period between the amended effective date and the date of approval of the supplementary PPA

by the GERC as per Article 13 of the PPA dated 26.03.2007, and Para 10 of the order dated 23.12.2019 be modified accordingly. On 20.02.2020, the second Respondent-GUVNL paid the principal change in law compensation to the Appellant for the period 26.07.2017 till 30.01.2018 since the GERC, in its order dated 23.12.2019, had restricted change in law compensation to 14.10.2018, ie a day prior to when the first supplementary PPA was to be made effective from 31.01.2018, and as plant operations were stopped from 23.01.2018 till 20.04.2019.

On 27.04.2020, the GERC passed orders in Petition No. 1807 of 2019 approving the supplementary PPA dated 01.03.2019. In the said order the GERC, while directing certain amendment to the supplementary PPA, directed that the change in law claim, as approved in its order in Petition No. 1680 of 2017 dated 23.12.2019, would be applicable till 19.08.2019 or till when coal is procured directly from Indonesia whichever was later. Appeal No. 108 of 2020, preferred thereagainst by the Appellant, was dismissed as withdrawn on 25.06.2021. On 12.06.2020, the Government of Gujarat issued GR substituting the first SPPA with a fresh SPPA. The fresh SPPA was finally executed on 12.12.2021.

On 05.06.2021, the Government of Gujarat issued the third Government resolution providing that the effective date of the revised SPPA shall be the date on which it was approved by the GERC. On 12.08.2021 the supplementary agreement was executed between the Appellant and GUVNL substituting the earlier PPA dated 01.03.2019. By the said supplementary PPA, the tariff which the Appellant was entitled to was further increased at the request of the Appellant, on the ground that the existing provisions of the approved PPA was still causing loss to them. Article 3.7 clarified that the provisions dealing with the change in law event under the PPA dated 26.06.2007 would continue to apply.

On 12.08.2021 the second Respondent-GUVNL filed Petition No. 2004 of 2021 before the GERC seeking approval of the second SPPA. On 17.09.2021, the Appellant filed an additional affidavit in the review petition referring to the factual developments which had taken place during the pendency of the review petition, and sought for interest/carrying cost representing the time value of money. The interest which the Appellant sought to be decided by the GERC was on the amount of change in law compensation for the period between April, 2019 and March, 2021. In its reply dated 07.10.2021, the second Respondent-GUVNL opposed the Appellant's claim for interest on change in law compensation.

On 20.11.2021, GERC approved the second SPPA making the effective date of the second SPPA as 20.11.2021. The Appellant did not, however, start generation of electricity even after approval of the said SPPA from 20.11.2021 till 12.03.2022. The Appellant resumed generation of electricity, in terms of the Section 11 directive issued by the Government of India, from 13.03.2022. Both the appellant and the second Respondent-GUVNL agree that there would be no impact of change in law on the above as the tariff itself was not in terms of the PPA.

On 18.03.2023, the GERC passed the review order holding that the change in law compensation would be available till 19.11.2021 in terms of the SPPA dated 12.08.2021. On the issue of interest, the GERC held that no such prayer was sought in the application, and was raised subsequent to the hearing of the review petition; and payment of interest would not be allowed at this stage since the scope of review petition was limited. On 23.03.2023, the Appellant requested the second Respondent to reconcile the outstanding payment, refrain from deducting the penalty amount, and refund the surplus.

On 30.03.2023 and 08.04.2023, the second Respondent-GUVNL requested the Appellant to pay the amount towards their fault in declaration of

availability below 75 percent. The second Respondent levied interest on the said amount in terms of Article 11.8.3 of the PPA ie LPS rates (compounding basis). Another letter was addressed by the Appellant to the second Respondent on 10.04.2023 contending that the second Respondent was liable to pay the Appellant Rs. 150.98 Crores towards compensation on account of change in law relating to introduction of GST, and the second Respondent may set off the yearly component of change in law amount against the outstanding penalty pertaining to the respective years. On the same day ie 10.04.2023, the Appellant raised three supplementary invoices which was received by the second Respondent. On 12.04.2023, the Appellant issued two fresh supplementary invoices. In response to the Appellant's letter dated 23.03.2023 and 10.04.2023, the second Respondent, vide letter dated 08.05.2023, informed that the GERC had, in its review order dated 18.03.2023, rejected the Appellant's claim for interest for change in law compensation. On 12.05.2023, the second Respondent paid the Appellant Rs. 150.98 Crores towards the principal change in law amount for the period April, 2019 to March, 2021, and on 11.08.2023, the Appellant filed the present Appeal.

III. ORDER IN PETITION NO. 1680 OF 2017 DATED 23.12.2019 TO THE EXTENT RELEVANT:

Petition No. 1680 of 2017 was filed by the Appellant herein under Section 86(1)(f) of the Electricity Act, 2003 read with Article 17 of the PPA dated 26.02.2007. In the said petition, the Appellant sought the following reliefs:- (a) to approve and allow the Petitioner (Appellant herein) to raise supplementary invoices for the additional levy of Integrated GST (IGST) on the Assessable Value and Basic Customs Duty (BCD) of the goods imported under Article 13 of the PPA; (b) to approve and allow the Petitioner (Appellant herein) to raise supplementary invoices for the additional levy of

IGST on import freight as per the provisions under GST law under Article 13 of the PPA; and, (c) to approve and allow the Petitioner (Appellant herein) to raise supplementary invoices for levy of Compensation Cess instead of Clean Energy Cess.

In its order, in Petition No. 1680 of 2017 dated 23.12.2019, the GERC observed that the following issues arise for consideration ie (i) whether the dispute, with regard to Change in Law in this case, was maintainable; (ii) whether the notice as per Article 13.3 was issued by the Petitioner (Appellant herein); (iii) whether the PPA provided for any compensation as raised by the Petitioner (Appellant herein) under the Change in Law; (iv) is the claim of the Petitioner (Appellant herein) higher than 1% in value of the yearly LC amount as per the terms of the PPA; and (v) what are the components or items to be allowed under Change in Law as prayed by the Petitioner (Appellant herein).

On issue No. (i), the GERC held that, both in terms of Section 86(1)(b) of the Electricity Act, 2003 and Article 17.3.1 of the PPA dated 26.02.2007, the Commission was empowered to adjudicate the dispute, and the Petition was maintainable. On issue No. (ii), the GERC held that the Petitioner (Appellant herein) had issued notice dated 13.07.2017 to the Respondent in accordance with Article 13.3 of the PPA with respect to Change in Law, which had taken place subsequent to the relevant date, as Annexure-H to the Petition; the said notice was in accordance with the provisions of the PPA; and the Petitioner (Appellant herein) had complied with the requirement for its claim on account of Change in Law. On issue No. (iii), the GERC held that the present Petition was for Change in Law that had taken place during the operation phase which, in the present case, was the period from the respective COD of the Petitioner’s (Appellant herein) two units of 600 MW each until expiry of the earlier termination of the PPA, in

accordance with Article 2 of the PPA; the COD of the units were 01.04.2012 and 15.06.2012 respectively; and thus, as per the provisions of the PPA, the Petitioner (Appellant herein) was eligible for compensation on account of Change in Law. On issue No. (iv), the GERC held that it had by its order dated 23.10.2019, in principle, recognized the enactment of GST Act, 2017 as Change in Law under Article 13 of the PPA, and had held that the Petitioner (Appellant herein) was entitled to compensation thereof, if increase or decrease in revenue or cost was in excess of an amount equivalent to 1% of the LC in aggregate for a contract year; in the said order, the GERC had directed both the parties to work out the compensation payable on this account in consultation with each other; and, accordingly, both the parties had computed the impact of GST and had come to the conclusion that the same was in excess of 1% of the value of the LC (Rs.132 Crore) i.e. Rs.1.32 Crore in aggregate for a contract year; the Commission had examined the computations filed by both the parties, and they concurred with the computation of the Respondent as the same excluded the impact of GST on Sea Freight as per the Commission's Order dated 23.10.2019. With respect to issue No. (v), the Commission recognized the following as Change in Law i.e. (a) Basic Custom Duty (BCD) on Assessable Value, (b) Countervailing Duty (CVD) on Assessable Value, (c) Clean Energy Cess *CES), (d) IGST on Assessable Value and BCD, (e) Compensation Cess, (f) IGST on Sea Freight, and (g) Water Cess. The Commission directed the parties to work out and share the computations considering taxes prevailing seven days prior to the final bid submission date, taxes prevailing as on 30.06.2017, and taxes prevailing w.e.f. 01.07.2017 i.e. enactment of the GST Act, 2017; while the computations of both the parties were in consonance with each other, the Respondent had reduced the Petitioner's (Appellant herein) computation by the amount of GST on Sea Freight which was in line with the Commission's order dated 23.10.2019; it was apparent that the

impact of Change in Law was higher than the 1% of LC value of Rs.1.32 Crores; as the Respondent had submitted that it should process/ compute the actual Change in Law claim based on Auditor's Certificate, normative coal consumption or actual coal consumption whichever was lower as per the Commission's order dated 03.08.2015 corresponding to proportionate actual injection subject to ceiling of Scheduled Generation, and only after verifying all supporting documents towards payment to Statutory authority; the Commission recognized that the actual annual impact on account of GST may vary with actual energy, coal consumption, actual technical parameters, assessable value of coal, actual water consumption etc. The Petitioner (Appellant herein) was directed to confirm to the Respondent that there was no reduction in their cost due to introduction of GST; and for any other Change in law as per the terms of the PPA, the Respondent shall not process the Appellant/ Petitioner's claim if such confirmation on affidavit was not submission by the Petitioner; and the Respondent shall be entitled to claim the adjustments in tariff for any such reduction. The GERC made it clear that the impact of Change in Law as approved by it shall be applicable till 14.10.2018 as the Petitioner (Appellant herein) and the Respondents had executed a Supplementary PPA on 01.03.2019 to be effective from 15.10.2018.

IV. ORDER OF GERC IN PETITION NO. 1807 OF 2019 DATED 27.04.2020

Petition No. 1807 of 2019 was filed by the Respondent-GUVNL, under Section 86(1)(b) and (f) of the Electricity Act, 2003 read with Article 18.1 of the PPA dated 26.02.2007 under the 1000 MW (Bid – 03), executed between GUVNL and the Appellant, for approval of the amendments to the PPAs by way of Supplementary PPA dated 01.03.2019. It is relevant to note that Article 18.1 of the PPA dated 26.02.2007 relates to Amendment, and there-

under Agreement between the parties, after duly obtaining approval of the Appropriate Commission, was necessary.

In Petition No. 1807 of 2019, filed by them before the GERC on 28.03.2019, the Respondent-GUVNL stated that the Petitioner (Appellant herein) had shut down its thermal power plant since the past one year, and was not supplying electricity to them; the Appellant, through its letter dated 09.06.2017, had stated the difficulties faced by them due to inadequate cash-flows, requesting GUVNL to take early appropriate decision so that operation of the Appellant's plant could continue and consumers would not be affected; the Appellant had further stated that its net-worth had been wiped out, and its debt had increased to Rs.5062 Crores due to losses incurred so far; and, due to continued financial difficulties, the Appellant had shut down its plant for over a year.

The said order of the GERC then records the recommendations of the High Power Committee which included the recommendation to amend the PPA; sacrifice by the lenders, sacrifice by promoters etc; the order of the Supreme Court in Miscellaneous Application Nos. 2705-2706 of 2018 in Civil Appeal No.5399-5400 of 2016 dated 29.10.2018 whereby the Supreme Court clarified that the parties should approach the Central Electricity Regulatory Commission for approval of the proposed amendment, and the Judgment dated 11.04.2017 would not stand in the way of such amendment; and the Supreme Court had also directed the GERC to decide the matter expeditiously and within a period of eight weeks from 29.10.2018 taking note of the conclusions of the HPC Report.

In its order in Petition No. 1807 of 2019 dated 27.04.2020, the GERC, after dealing with the objections, suggestions and comments from consumer groups on major articles of the Supplementary PPA, rendered its conclusion and decision on each provision of the SPPA executed between GUVNL and

the Appellant affecting the power purchase cost of GUVNL as a procurer. The Commission then discussed each provision of the Supplementary PPA. With respect to Article 3.9 of the Supplementary PPA, the GERC observed that the said provision provided that the Appellant withdraw all its pending cases against GUVNL in various legal forums/Commission, except their case for Change in Law in lieu of relief granted vide Government of Gujarat G.R. dated 01.12.2018 towards pass through of actual fuel cost. The Commission held that the Supplementary PPA signed between the parties dated 01.03.2019 be modified with regard to review of the coal price, ceiling price of coal, SHR, Auxiliary Consumption, incentive in excess of 90% etc. for determination of energy charge and other conditions as decided and directed by the Commission in the earlier part of the order; both the Appellant and the Respondent-GUVNL were directed to modify the Supplemental PPA dated 01.03.2019 as per the decision, and submit a modified supplemental PPA to the Commission; this approval with modifications was being granted to the proposed Supplementary PPA dated 01.03.2019, along with Addendum No.1 and 2 subsequently filed by GUVNL, and any change in the ownership of the Appellant's power plant shall only be done with the prior intimation of any such move and approval of the Government of Gujarat and the GERC.

The GERC further observed that the change in law, as allowed in its Order in Petition No. 1680 of 2017 dated 23.12.2019, shall be applicable till 19.08.2019 for payment of energy charge or till the coal was procured directly from Indonesia, whichever was later; computation of energy charge shall be as per the Supplementary PPA from 20.08.2019 or from the date coal was procured directly from Indonesia, whichever was later; the Supplementary PPA allowed pass through of actual coal cost and, hence, it covered the cost approved under Change in Law order dated 23.12.2019 of the Commission; and further, for any change in law taking place after approval of the order, GUVNL had to approach the Commission for its approval.

The GERC further observed that the Appellant shall start raising bills as per the aforesaid decision with terms of the PPAs from the date of the said order dated 27.04.2020; however, for the past period, GUNL should submit details such as invoices raised and energy supplied by the Appellant and recovery/ payment due as per the terms of SPPA and clarification, and submit to the GERC for its approval. In Para 23.6, the GERC held that the revised energy charges shall be payable as per the Supplementary PPA only from 20.08.2019 or from the date coal was directly procured from Indonesia, whichever was later; prior to this, rates of energy charges shall be as per the PPA dated 26.02.2007, and any other payment approved as per Change in Law by the Commission; and, for all other purposes, the effective date of the Supplementary PPA shall be 15.10.2018.

V. RELEVANT PORTIONS OF THE APPELLANT'S ADDITIONAL AFFIDAVIT DATED 17.09.2021 FILED IN REVIEW PETITION NO. 1866 OF 2020:

In Para 9 of the Additional Affidavit dated 17.09.2021, the Petitioner (Appellant herein) submitted that they had not received any change in law compensation from the Respondent for the period after 14.10.2018, although the power plant of the Petitioner was operational from April, 2019 till March, 2021; during the said entire period, while Change in Law compensation was denied to it, the Petitioner (Appellant herein) had paid the compensation amount to the Government of India; thus, non-payment which the Petitioner (Appellant herein) should have rightfully got on a regular basis today stands at around Rs. 150 crores; due to shortage in receipt of funds, the Petitioner (Appellant herein) could not make payment to its creditors, and there was huge outstanding as on date of O&M and coal vendors which formed part of operational creditors; and these creditors were

already claiming penal charges from the Petitioner (Appellant herein) for the delay in their payments.

In Para 10 of the Additional Affidavit, the Petitioner (Appellant herein) submitted that, since there was no fault on their part despite which it had not been given change in law compensation for the period between April, 2019 and March, 2021, they were seeking payment of interest from the Respondent-GUVNL at the rate as may be decided by the Commission on the amount of Change in Law compensation for the period between April, 2019 and March, 2021. In Para 11 of the Additional Affidavit, the Appellant/ Petitioner stated that, in view of the aforesaid factual developments that had occurred during the pendency of the captioned Review Petition, the Petitioner (Appellant herein) prayed that it was entitled to Change in Law compensation till the date of the approval of the Supplemental PPA dated 12.08.2021 by the Commission along with interest as may be directed by the Commission.

VI. ORDER OF GERC IN REVIEW PETITION NO. 1866 OF 2020 DATED 18.03.2023

The Petitioner (Appellant herein) filed Review Petition No. 1866 of 2020 under Section 94 of the Electricity Act, 2003 read with Regulation 72 of the GERC (Conduct of Business) Regulations, 2004 seeking review of the Order of the GERC in Petition No. 1680 of 2017 dated 23.12.2019. The relief sought by the Petitioner (Appellant herein) in the said Review Petition was for the Commission – (i) to review the Order dated 23.12.2019 and to hold that the Petitioner (Appellant herein) was entitled to compensation for Change in Law as granted, vide Order dated 23.12.2019, for the period between the Amendment effective date and the date of approval of Supplemental PPA by the Commission as per Article 13 of the PPA dated 26.02.2007, and to modify Para 10 of the order dated 23.12.2019; (ii) to

rectify its typographical error in the later paragraph 9(v) of the order dated 23.12.2019, and note the correct impact of Change in Law as discussed in para 10(b) of this Application; (iii) to direct the Respondent to accept the invoice for the Change in Law compensation as granted, vide order dated 23.12.2019, for the period between the amendment effective date and the date of approval of the Supplemental PPA by the Commission.

In its Order, in Review Petition No. 1866 of 2020 dated 18.03.2023, the GERC also considered the Petitioner's (Appellant herein) Additional Affidavit dated 17.09.2021 filed by them in the Review Petition. In Para 4.11 of the Review Order, the Commission noted that, during the pendency of the Review Petition, the Petitioner (Appellant herein) had referred to Appeal No. 108 of 2020 before APTEL against the Order of the Commission dated 27.04.2020 approving the Supplemental PPA dated 01.03.2019; the Government of Gujarat had issued a resolution dated 12.06.2020 i.e. 2020 GR revoking its earlier resolution dated 01.12.2018, which was the basis for passing the said order dated 27.04.2020 by the Commission; the Petition (Appellant herein) had filed an additional affidavit on 18.07.2020; and, in order to place on record the above developments before the Commission, the documents mentioned as Annexures I to III therein, may be treated as part of the Review Petition.

In Para 4.35 of the Review Order, the Commission noted the contention of the Petitioner (Appellant herein) that they were entitled to the following reliefs in the present Review Petition, i.e. (b) to grant Change in Law compensation, vide Order dated 23.12.2019, for the period between 15.10.2018 till 20.11.2021, the Amendment Effective date, being the date of approval of the Supplemental PPA by the Commission; and (c) to grant interest on the amounts towards change in law compensation for each month it had become due and payable to the Petitioner (Appellant herein) by

GUVNL, till payment, at such rate that may be prescribed by the Commission.

After taking note of Para 10 of its earlier order in Petition No. 1680 of 2017 dated 23.12.2019, GERC held that a bare reading of Para 10 made it clear that, at the time of passing of the said order, the Commission had noted that the Supplementary PPA had been executed on 01.03.2019 wherein the effective date was from 15.10.2018, and had approved the impact of Changes in Law only till 14.10.2018; the prayer of the Petitioner to review the order dated 23.12.2019, for the period between the amended effective date and the date of approval of the Supplemental PPA i.e. 20.11.2021, needed to be allowed by the Commission in view of the subsequent development that had taken place, and as the Petitioner and the Respondent had also submitted for the same to the Commission; Para 10 needed to be revised considering that review of an order or Judgment was permissible under certain circumstances; in the present case, neither party could have foreseen that the Supplemental PPA, entered amongst the parties which was valid at relevant time, would subsequently stand superseded for all intents and purpose, and would not have effect post signing of Supplemental PPA on 12.08.2021; and, hence, the review was allowed looking at the developments as stated in the earlier paras. Para 10 of the earlier order of the Commission, in Petition No. 1680 of 2017 dated 23.12.2019, was revised holding that *"the impact of Changes in Law, as approved by the Commission hereinabove shall be till the approval of the revised Supplemental PPA by the Commission i.e. 19.11.2021 as the Petitioner and the Respondents had executed a Supplementary PPA on 12.08.2021 to be effective from 20.11.2021."*

In Para 7.25 of the Review Order, the GERC noted that, from the reliefs sought in the Review Petition, it could be seen that payment of interest was

not in the application and the prayers, and it was raised subsequently during the hearing of the Review Petition. The GERC referred to the judgements of the Supreme Court in **M/s Trojan & Company vs. RM. N.N. Nagappa Chettiar [AIR 1953 SC 235),** and **Ram Sarup Gupta (dead) by LRs. V Bishun Narain Inter College [(1987) 2 SCC 555],** and then observed that they were of the opinion that payment of interest, as raised by the Petitioner (Appellant herein), could not be allowed at this stage, since the scope of a review petition was very limited and can only be on the errors apparent on the face of the record or any new facts or evidence that was available, which was not within the knowledge of the parties at the time of passing of the original order; and they had ascertained that the interest issue was raised subsequently, and hence could not be allowed in the Review Petition.

On the issue of raising invoices, the GERC observed that the Petitioner (Appellant herein) was at liberty to raise invoice/ supplementary invoice, as a result of the review order, with the Respondent, and the Respondent was required to make payment in accordance with the review order read with the earlier orders of the Commission and in line with the PPA/ Supplementary PPAs as approved and in accordance with law. The earlier order of the Commission in Petition No. 1680 of 2017 dated 23.12.2019 was modified accordingly.

VII. RIVAL CONTENTIONS:

Elaborate submissions, both oral and written, were made by Sri Amit Kapur, Learned Counsel for the appellant, and Sri Anand. K. Ganeshan, Learned Counsel for the Respondent-GUVNL. It is convenient to examine the rival contentions under different heads.

VIII. CAN INTEREST BE AWARDED EVEN IN THE ABSENCE OF A SPECIFIC PRAYER IN THIS REGARD?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri Amit Kapur, Learned Counsell for the Appellant, would submit that the Supreme Court has in various judgments, while allowing the change in law claims on clauses identical to Article 13 of the subject PPA, held that: (a) carrying cost is *intrinsic* to any change in law claim; (b) Courts are required to grant carrying cost irrespective of whether a prayer to that effect has been made; and (c) carrying cost must be calculated at the same rate as Late Payment Surcharge ("LPS") provided in the agreement i.e., on compound interest basis; given that carrying cost is rooted in Article 13 of the subject PPA, it may be granted even without a specific prayer; it is settled law that carrying cost / interest need not be specifically claimed or pleaded, since it is intrinsic to full restitution: (a) in ***BESCOM v. Hirehalli Solar Power Project LLP& Ors.,*** 2024 SCC OnLine SC 2253, the appellant BESCOM had argued that *APTEL was not justified in granting late payment surcharge to the respondent as the* same was not pleaded before the KERC or in appeal; rejecting this argument, the Supreme Court held that APTEL had rightly restored the tariff of Rs. 8.40 per unit, and had directed the appellant to pay the differential amount; the direction to pay late payment surcharge on this amount was explicitly rooted in the PPA, and hence was in furtherance of the intention of the parties; (b) in ***GMR Kamalanga Energy Ltd. & Anr. v. CERC & Ors.***, 2019 SCC OnLine APTEL 36, (upheld by the Supreme Court in (2023) 10 SCC 401), this Tribunal had similarly allowed carrying cost on the change in law claim, although the same was not specifically pleaded; (c) ***Abati Bezbaruah v. Geological Survey of India***, (2003) 3 SCC 148; (d) ***Tejinder Singh Gujral v. Inderjit Singh***, (2007) 1 SCC 508; (e) in ***UHBVNL v. CERC & Ors,*** (Review Petition No. 3 of 2024 dated 18.11.2024), carrying cost was not specifically sought in the original proceedings, but was sought only in Appeal. and yet this Tribunal granted

carrying cost, holding that interest is a natural corollary of any delayed payment, even in equity**;** and (f) ***Lanco Amarkantak Power Ltd. v. HERC & Ors.*** 2019 SCC OnLine APTEL 37.

Sri Amit Kapur, Learned Counsell for the Appellant, would further submit that the Appellant's case stands on a better footing since they had specifically raised the issue before the GERC in the additional affidavit filed by them in the review petition, and have sought carrying cost in the instant Appeal, in any case, a first appeal is a continuation of proceedings of the original court [Refer: ***Ramnath Exports (P) Ltd. v. Vinita Mehta***, (2022) 7 SCC 678 followed by this Tribunal in its Order in ***Tata Power Delhi Distribution Ltd. v. Delhi Electricity Regulatory Commission*** (order in IA No. 1766 of 2022 in Appeal No. 334 of 2021 dated 23.03.2023); there is no limitation on this Tribunal's power to grant relief in the form of carrying cost to ensure full restitution to the Appellant as envisaged under the PPA, and in a catena of judgments of the Supreme Court; Courts are empowered to mould the relief to be granted to the parties according to the facts proved which are not inconsistent with the pleadings [Refer: ***Hindalco Industries Ltd. v. Union of India***, (1994 (2) SCC 594]; the Appellant had specifically sought relief for change in law under Article 13 of the PPA; Courts have a duty to apply the correct law, especially when the law stands well settled (Refer: ***State Bank of Travancore v. Mathew K.C.,*** (2018) 3 SCC 85); absence of a specific prayer for carrying cost, in the original petition, does not denude the GERC or this Tribunal of its power to ensure that the Appellant is restituted fully, for the change in law event, as required by law.

Sri Amit Kapur, Learned Counsell for the Appellant, would also submit that the respondent GUVNL has wrongly relied on the following judgments to claim that the Appellant is not entitled to relief: (a) ***Nabha Power Limited v. Punjab State Power Corporation Limited***, (2018) 11 SCC 508 pertained

to interpretation of the provisions of the contract and late payment surcharge in the event of delay in payment of monthly bills; it did not deal with carrying cost being intrinsic to restitutive relief for change in law; in that case, the Supreme Court rejected the claim for interest on the facts and circumstances of that case, since Nabha Power did not seek interest at any stage; this judgment cannot be relied upon to reject the Appellant's claim for carrying cost which, admittedly, has been made during the review proceedings and this Appeal; (b) the judgement in ***UHBVNL*** makes it clear that judgment in ***NTPC v. Madhya Pradesh State Electricity Board & Ors.***, (2011) 15 SCC 580 cited by GUVNL would not apply in the light of Article 13 of the PPA; (c) ***Trojan and Company v. RM N.N. Nagappa Chettiar*** **(1953) 1 SCC 456** related to compensation claimed on the ground of breach of instructions, and decided whether relief could be granted on the ground of failure of consideration; in that case, relief on the ground of failure of consideration was not pleaded at all, and it was held that relief must be based on pleadings; in contrast, in the present case, the Appellant invoked Article 13 of the PPA in its pleadings, which has been held by the Supreme Court as contemplating full restitution (including carrying cost); (d) ***Bachhaj Nahar v. Nilima Mandal & Anr.*** **(2008) 17 SCC 491 and** ***Rajasthan Art Emporium v. Kuwait Airways & Anr.*** **(2024) 2 SCC 570** are cases where compensation was limited to the quantum sought in the prayer, since no case was made out for higher damages; and no such facts exist in the present case as the Appellant has not limited its claim.

B. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENT:

Sri Anand K. Ganeshan, Learned Counsel for the respondent-GUVNL, would submit that the appellant filed Petition No. 1680 of 2017 before the GERC seeking approval for GST to be treated as a change in law; in the

original order dated 23.12.2019, the impact of Change in Law was allowed till 14.10.2018 (effective date of the 3rd Supplementary PPA)***;*** the approval of the said PPA was then pending before the GERC; the GERC further required the Appellant to confirm on affidavit that, on account of GST, there was no reduction in the cost to the appellant; the invoices were directed to be paid only if confirmation was provided on affidavit by the appellant**;** after the Order dated 23.12.2019 was passed, the appellant raised the invoice dated 26.12.2019 for the period from July, 2017 to March, 2018; the same was duly paid; and no claim of carrying cost was made.

Sri Anand K. Ganeshan, Learned Counsel for the respondent-GUVNL, would further submit that the Appellant filed Review Petition No. 1866 of 2020 against the main order dated 23.12.2019, contending that, since the 3rd Supplementary PPA was pending approval before the GERC, the Change in Law ought to be till such approval and not till 15.10.2018; there was no claim, pleading or prayer for carrying cost in the Review Petition**;** the 3rd Supplemental PPA was approved by the GERC by Order dated 27.04.2020, effective on 27.04.2020; GERC specifically held that the change in law, earlier allowed in the Order dated 23.12.2019 till 14.10.2018, was extended till 19.08.2019 or till coal was imported directly from Indonesia, whichever was later; no carrying cost was allowed by GERC in the said order dated 27.04.2020; the said order was accepted, and no challenge was made that interest ought to have been allowed; on the other hand, the Appellant did not even raise invoices for the principal amount in terms of the said order dated 27.04.2020; carrying cost, in any event, would apply only till the decision of the GERC; the Appellant filed additional affidavit dated 17.09.2021, in Review Petition No. 1866 of 2020, wherein, for the first time, they claimed interest on the change in law compensation for the period April 2019 to March 2021; and this was without any amendment to the prayers in the Review Petition.

Sri Anand K. Ganeshan, Learned Counsel for the respondent-GUVNL, would also submit that provision for interest is a substantive provision; it has to be specifically provided for; Article 13.2 of the PPA – providing for restoration to the same economic position has been interpreted to be a provision for restitution and, therefore, for interest; [**UHBVN v. Adani Power, (2019) 5 SCC 325**]; the judgment also reiterates that general principles of equity have no application, and the judgments in cases of *SECL* on equity etc. have no application; being a substantive provision, and a substantive claim, interest has to be pleaded and prayed for; admittedly, there is no such pleading or prayer for interest; the expression interest or restitution is not even mentioned in the Petition of the appellant; the contention that interest is an incidental claim and, therefore, need not be pleaded or prayed for is misconceived; when interest is in terms of a specific contractual provision, being a substantive provision, it cannot be termed as incidental, without requiring pleading or prayer; in fact, the Review Petition also did not plead or pray for interest; the one averment for interest is only in the additional affidavit filed in the Review Petition on 17.09.2021, wherein interest was claimed from April 2019 to March 2021; GERC, in the Review Order, refused the prayer of carrying cost on the categorical finding that no such prayer or pleading was made in the Review Petition, and there was no error apparent on the face of the record; the decision of a case cannot be based on grounds outside the pleadings of the parties; without an amendment of the plaint, the court is not entitled to grant the relief not asked and prayed for (***Trojan and Company vs RM N.N. Nagappa Chettiar***, ***(1953) 1 SCC 456*****);** Civil Courts may be entitled to grant a lesser relief than sought for, but not grant any other relief on the principle of moulding the relief; only writ courts may be entitled to grant such relief; it is settled law that relief has to be granted only regarding the prayers made in the pleadings; and the Court ought not to grant

any relief ignoring the specific prayers or the pleadings. (***Bacchaj Nahar vs Nilima Mandal & Anr. (2008) 17 SCC 491*****).**

Sri Anand K. Ganeshan, Learned Counsel for the respondent-GUVNL, would state that the Supreme Court, in ***Nabha Power Limited vs Punjab State Power Corporation Limited & Anr., (2018) 11 SCC 508,*** has rejected the claim of interest on the ground that no such claim of interest was claimed by the generator in the courts below; this was a case where the principal amounts were being allowed by the Supreme Court for the first time, and the Late Payment Surcharge provision in the PPA was otherwise applicable; despite the above, since no claim was made earlier, the claim for interest was disallowed; reliance on the decision in ***BESCOM vs Hirehalli Solar Power Project LLP & Ors., 2024 SCC OnLine SC 2253*** is misplaced; this Tribunal had allowed the principal claim of tariff at Rs. 8.40/- as against Rs. 4.36/- determined by KERC and, on this principal amount, allowed interest; an Appellate court, while reversing or modifying a decree of a lower court, has the inherent power under Section 144 of the CPC to allow interest; the Supreme Court has upheld this in para 14; in the proceedings before this Tribunal, the principal amounts and interest thereon was specifically claimed, as recorded in the decision of the Tribunal; and it is not that, even without a claim, interest was allowed by this Tribunal.

Sri Anand K. Ganeshan, Learned Counsel for the respondent-GUVNL, would further state that the appellant ought not to seek any prayer or justify its claims on an entirely new claim or ground that was never part of the original pleadings before the GERC, and is also inconsistent with the grounds as sought in the Review Petition **[*Bhagwati Prasad vs Chandramauli 1965 SCC OnLine SC 111*];** reliance placed by the Appellant on this Tribunal's Judgment, in ***GMR Kamalanga Energy Limited vs CERC & Ors., 2019 SCC OnLine APTEL 36,*** is misplaced; this Tribunal had

proceeded on the principle of moulding the relief, which cannot be done by a court of limited jurisdiction or even a civil court; this is contrary to the law laid down by the Supreme Court in **Bacchaj Nahar**, which decision was not even noticed by this Tribunal; reliance placed by the Appellant, on ***GMR Warora Limited vs CERC & Ors.***, ***(2023) 10 SCC 401,*** *is* also misplaced as the issue of interest without prayer or pleading was not even raised, argued or decided therein; reliance on the Judgement of this Tribunal in ***Adani Power Rajasthan Ltd. v. RER &Ors., 2024 SC Onli ne APTEL 23*** is misplaced, as no issue was raised that carrying cost is to be allowed without pleadings or prayer; reliance on the decision of this Tribunal, in ***Tata Power Delhi Distribution Ltd. v. Delhi Electricity Regulatory Commission*** (***Appeal No. 334 of 2021*** dated 23.03.2023), on the submission that an appeal is a continuation of proceedings, has no application in the present case; an appeal is a continuation of the original proceedings, and the Appellate court can re-appreciate the evidence and come to its conclusion, even substituting the view of the court below; however, a new claim, which was not made in the court below, does not arise, as there is no continuation of the claim or proceeding for such a claim; in the main order dated 23.12.2019 granting relief till 14.10.2018, there was no claim or grant of carrying cost; the invoices were also duly paid; the present Appeal was filed only in the year 2023; the only ground for condonation is the pendency of the review; and when the claim in the additional affidavit in review was expressly only from April, 2019 onwards, the challenge to the original order for a prior period does not arise.

C. JUDGEMENTS CITED UNDER THIS HEAD:

1. The question which arose for consideration, in **Bescom vs. Hirehalli Solar Power Project LLP: (2024) SCC OnLine SC 2253,** was whether the extension of the Scheduled Commissioning Date was

occasioned under the force majeure clause of the Power Purchase Agreement and, consequently, whether the reduction in tariff payable to the respondents was justified. The decision of this Tribunal, in **Hirehalli Solar Power Project LLP v. Bangalore Electricity Supply Co. Ltd., 2021 SCC OnLine APTEL 66**, was upheld by the Supreme Court.

While rejecting the appellant's contention that APTEL's direction to pay late payment surcharge to the respondents was unjustified since the same was not pleaded, the Supreme Court observed that APTEL had rightly restored the tariff of Rs 8.4 per unit, and had directed the appellant to pay the difference amount; the direction to pay late payment surcharge on this amount was explicitly rooted in the PPA and, hence, was in furtherance of the intention of the parties; and there was no reason to set aside the same.

2. In **GMR Kamalanga Energy Ltd vs. CERC: (2019) SCC OnLine Aptel 36,** this Tribunal noted that the Supreme Court in **Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power Limited (**Judgement in Civil Appeal No. 5865 of 2018) had approved carrying cost being allowed, and had reiterated the principle that, in terms of the contract, parties must be put to the same economic position which they enjoyed prior to the change in law occurrence; on the contention of the Respondent-Commission, that this claim was originally not sought for, this Tribunal opined that it had wide discretionary powers to mould the relief; in **Bhagwati Prasad v. Chandramaul: AIR 1966 SC 735** and **Hindalco Industries Ltd. v. Union of India: (1994) 2 SCC 594** it was held that this Tribunal had wide discretionary powers to mould relief, if not specifically prayed for; similarly, the Appellate Authority had all the powers which the original authority may have in deciding the question before it as held in **Remco Industrial Workers House Building Co-operative Society v. Lakshmeesha M., (2003) 11 SCC 666; Pasupuleti Venkateswarlu v. Motor and General Traders, (1975) 1 SCC**

770; Shikharchand Jain v. Digamber Jain Praband Karini Sabha, (1974) 1 SCC 675, OTIS Elevator Co. (India) Ltd. v. CEE, (2016) 16 SCC 461 and **Jute of Corporation of India Ltd. v. Commissioner of Income Tax, 1991 Supp (2) SCC 744;** it was clear that this Tribunal being the Appellate Authority could, having regard to the facts and circumstances of the case, allow the prayer by moulding the relief to meet the ends of justice; if the terms of the contract provided that parties must be brought to same economic position, it would include that all additional costs, which occured after the cut-off date in terms of the change in law event, had to be compensated and, if there was any time gap between the date of spending and realising the said amount, carrying cost/interest had to be paid; then only the parties could be put to same economic position; and, therefore, this claim of the Appellant was also allowed.

3. In **Abati Bezbaruah vs. Dy. Director General, Geological Survey of India and Anr: (2003) 3 SCC 148,** the Supreme Court held that the rate of interest must be just and reasonable depending upon the facts and circumstances of each case, and taking all relevant factors including inflation, change of economy, policy being adopted by Reserve Bank of India from time to time, how long the case was pending, permanent injuries suffered by the victim, enormity of suffering, loss of future income, loss of enjoyment of life etc., into consideration; no rate of interest is fixed under Section 171 of the Motor Vehicles Act, 1988; varying rates of interest were being awarded by Tribunals, High Courts and the Supreme Court; interest could be granted even if a claimant did not specifically plead for the same as it was consequential in the eye of law; interest is compensation for forbearance or detention of money and that interest being awarded to a party only for being kept out of the money which ought to have been paid to him; no principle could be deduced nor could any rate of interest be fixed to have a general application in motor accident claim cases. having regard to the

nature of provision under Section 171 giving discretion to the Tribunal in such matters; in other matters, awarding of interest depends upon the statutory provisions, mercantile usage and doctrine of equity; neither Section 34 CPC nor Section 4-A(3) of the Workmen's Compensation Act were applicable in the matter of fixing rate of interest in a claim under the Motor Vehicles Act; courts have awarded the interest at different rates depending upon the facts and circumstances of each case; there could not be any hard-and-fast rule in awarding interest; and the award of interest was solely on the discretion of the Tribunal or the High Court.

4. In **Tejinder Singh Gujral vs. Inderjit Singh & Anr: (2007) 1 SCC 508,** the Supreme Court held that interest need not be claimed specifically; interest is granted by way of compensation but, as held in **Abati Bezbaruah v. Dy. Director General, Geological Survey of India [(2003) 3 SCC 148**, the same must be a reasonable one; in **Abati Bezbaruah**, the Supreme Court had directed payment of interest only at the rate of 9% per annum, whereas the rate of interest awarded in favour of the claimant was @ 12% per annum.

5. In **Lanco Amarkantak Power Ltd. vs. HERC: (2019) SCC OnLine Aptel 37,** this tribunal recorded its findings and analysis which, among others, related to the submission of Respondent No. 3 that interest was not claimed by the Appellant in their earlier proceedings. This Tribunal then noted the submission of the Appellant that it could not have and did not claim interest in the tariff application filed before the State Commission as the said proceedings was for tariff determination only and not for recovery of amount; and as such the scope of proceedings and the order was limited to determination of tariff.

6. In **Ramnath Exports P. Ltd. vs. Vinita Mehta (2022) 7 SCC 678,** the Supreme Court observed that Section 96 CPC provides for filing of an

appeal from the decree by any court exercising original jurisdiction to the court authorised to hear appeals from the decisions of such courts; an appeal is a continuation of the proceedings of the original court; ordinarily, in the first appeal, the appellate jurisdiction involves a re-hearing on law as well as on fact as invoked by an aggrieved person; the first appeal is a valuable right of the appellant, and therein all questions of fact and law are open for consideration by re-appreciating the material and evidence; therefore, the first appellate court is required to address all the issues and decide the appeal assigning valid reasons either in support or against by reappraisal; and the court of first appeal must record its findings dealing with all the issues, considering oral as well as documentary evidence led by the parties.

7. In **Tata Power Delhi Distribution Ltd. vs. DERC (Order in IA No. 1766 of 2022 in Appeal No. 334 of 2021 dated 23.03.2023),** this Tribunal held that it could, in the absence of any procedure having been stipulated by it to the contrary, always be guided by the provisions of the CPC; Order VII Rule 7 CPC requires the relief to be specifically stated, and provides that every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for; the plaintiff need do no more than suggest the relief to which he is entitled, and it is for the Court to determine what relief could be given on the facts found; where all the facts are stated in the plaint and the plaintiff claims only one relief, although he could have claimed another alternative relief, the Court can grant the latter relief; when necessary facts were stated in the plaint which, if established, entitled the plaintiff in law to obtain certain reliefs, it was open to the Court to grant him such reliefs if established, although the reliefs asked for and the issues raised may be inartistically framed. Judicis est judicare secundum allegate et probata, it is the duty of a Judge to decide according to facts

alleged and proved. (**Kesavalu Naidu v. Doraiswami Naidu (died) and others: 1958 2 MLJ 189);** where the Plaintiff claims more than what he is entitled to, the Court will not dismiss the Suit, but give the Plaintiff only such relief as he is entitled to.(**Lakshman v. Hari,I.L.R.4 Bom 584; Venkataramana v. Verabalu, A.I.R. 1940 Mad 308; Khamta Mandalassi v. Hem Kumari, A.I.R. 1941 Pat 29; Bhiku v. Puttu, (1905) 8 Bom L.R. 106 (D.B.); Pitambar v. Ram Joy, 1867 South W.R. 93; Angammal v. Komara Gounder, 2002 SCC OnLine Mad 23 (Madras HC); Sopanrao v. Syed Mehmood, (2019) 7 SCC 76)**; the Court should not refuse to grant a relief not specifically claimed in the plaint, if such relief is obviously required by the nature of the case and is not inconsistent with the relief specifically claimed and raised by the pleadings. (**Hindalco Industries Ltd. v. Union of India 1994 (2) SCC 594);** it is the duty of the Court to mould the relief to be granted to the parties according to the facts proved which, however, should not be inconsistent with the pleadings. (**Meher Chand v. Milkhi Ram, A.I.R. 1932 Lah 401 (F.B.); Hindalco Industries Ltd. v. Union of India 1994 (2) SCC 594);** and in the light of the law declared by the Supreme Court, in **Hindalco Industries Ltd. v. Union of India 1994 (2) SCC 594,** it is the duty of this Tribunal to mould the relief to be granted to the parties according to the facts proved as long as it not be inconsistent with the pleadings.

8. In **Hindalco Industries Ltd. vs. Union of India and Others: (1994) 2 SCC 594,** the Supreme Court held that the appellant had sought for a declaratory relief that the rates being charged were "wholly unjust and unreasonable", and for a direction to the railways to charge "reasonable rates" on the basis of actual distance of 568 km together with other consequential relief; Order VII Rule 7 CPC provides that every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the court may "think just" to the same extent

as if it had been asked for, and the same rule shall apply to any relief claimed by the defendant in his written statement; Order II Rule 2 enjoins to claim the relief in respect of a cause of action and under clause (3) of Order II Rule 2, if he omits to seek the relief, except with the leave of the court, he shall be precluded thereafter for any relief so omitted; it is settled law that it is no longer necessary to specifically ask for general or other relief apart from the specific relief asked for; such a relief may always be given to the same extent as if it has been asked for provided that it is not inconsistent with that specific claim in the case raised by the pleadings; the court must have regard to all the relief and look at the substance of the matter and not its form; if the relief asked for is as of right, something is included in his cause of action and if he establishes his cause of action, the court perhaps has been left with no discretion to refuse the same; but when it is not as of right, then it is one of the exercise of discretion by the court; in that event the court may, in given circumstances, grant which includes 'may refuse' the relief; it is one of exercising judicious discretion by the court; the Tribunal, while keeping justice, equity and good conscience at the back of its mind, may, when compelling equities of the case oblige them, shape the relief consistent with the facts and circumstances established in the given cause of action; any uniform rigid rule, if it be laid, it itself turns out to be arbitrary; if the Tribunal thinks just, relevant and germane, after taking all the facts and circumstances into consideration, it would mould the relief in exercising its discretionary power and equally would avoid injustice; likewise when the right to remedy under the Act itself arises on the presence or absence of certain basic facts, at the time of granting relief, may either grant the relief or refuse to grant the same; it would be one of just and equitable exercise of the discretion in moulding the ancillary relief; It is not as of right; a quasi-judicial Tribunal deciding the lis has the discretion to mould the ancillary relief; and the discretion is to be exercised with circumspection consistent

with justice, equity and good conscience, keeping always the given facts and circumstances of the case.

9. In **State Bank of Travancore & Anr. vs. Mathew K. C: (2018) 3 SCC 85,** the Supreme Court held that it is the solemn duty of the court to apply the correct law without waiting for an objection to be raised by a party, especially when the law stands well settled; Loans by financial institutions are granted from public money generated at the taxpayer's expense; such loan does not become the property of the person taking the loan, but retains its character of public money given in a fiduciary capacity as entrustment by the public; timely repayment also ensures liquidity to facilitate loan to another in need, by circulation of the money and cannot be permitted to be blocked by frivolous litigation by those who can afford the luxury of the same; and the caution required, as expressed in **United Bank of India v. Satyawati Tondon, (2010) 8 SCC 110**, has also not been kept in mind before passing the impugned interim order.

10. In **Trojan and Company vs. R.M.N.N. Nagappa Chettiar: (1953) 1 SCC 456,** the Supreme Court observed, on the question of Associated Cement shares, that the plaintiff's account was credited in the sum of Rs 6762-8-0 on account of the purchase of these shares; the plaintiff had pleaded that the transaction was not authorised by him, and that it had been made in contravention of his instructions ; he had claimed compensation on the ground of breach of instructions; he did not, in the alternative, claim, on the ground of failure of consideration, the amount credited by the defendants in the promissory note account, and which credit disappeared by reason of the failure of the suit on the promissory note; the High Court had negatived this contention on the ground that, though a claim for damages in respect of a particular transaction may fail, that circumstance was no bar to the making of a direction that the defendants should pay the plaintiff the money actually

due in respect of that particular transaction, and the plaintiff's claim in respect of this item of Rs 6762-8-0 was within limitation.

The Supreme Court expressed its inability to uphold the view taken by the High Court on this point, and observed that it was well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties, and it is the case pleaded that has to be found; without an amendment of the plaint, the court was not entitled to grant the relief not asked for, and no prayer was ever made to amend the plaint so as to incorporate in it an alternative case; the allegations on which the plaintiff claimed relief in respect of these shares were clear and emphatic; there was no suggestion made in the plaint or even when its amendment was sought at one stage that the plaintiff in the alternative was entitled to this amount on the ground of failure of consideration; and that being so, there were no valid grounds for entertaining the plaintiff's claim as based on failure of consideration on the case pleaded by him.

11. In **Bachhaj Nahar vs. Nilima Mandal [(2008) 17 SCC 491,** and **Rajasthan Art Emporium vs. Kuwait Airways & Anr. : (2024) 2 SCC 570],** the Supreme Court, referred with approval to its earlier judgements, in **Trojan & Co. Ltd. v. Nagappa Chettiar [Trojan & Co. Ltd. v. Nagappa Chettiar, (1953) 1 SCC 456] , Krishna Priya Ganguly v. University of Lucknow [Krishna Priya Ganguly v. University of Lucknow, (1984) 1 SCC 307 : AIR 1984 SC 186] , Om Prakash v. Ram Kumar [Om Prakash v. Ram Kumar, (1991) 1 SCC 441 : AIR 1991 SC 409] , Bharat Amratlal Kothari v. Dosukhan Samadkhan Sindhi [Bharat Amratlal Kothari v. Dosukhan Samadkhan Sindhi, (2010) 1 SCC 234 : (2010) 1 SCC (Cri) 757 : AIR 2010 SC 475] and Manohar Lal v. Ugrasen [Manohar Lal v. Ugrasen, (2010) 11 SCC 557 : (2010) 4 SCC (Civ) 524]**, to hold that

it was trite law that a party is not entitled to seek relief which he has not prayed for.

The Supreme Court further opined that the observation of the High Court that, when a plaintiff sets forth the facts and makes a prayer for a particular relief in the suit, he is merely suggesting what the relief should be, and that it is for the court, as a matter of law, to decide upon the relief that should be granted, is not sound; such an observation may be appropriate with reference to a writ proceeding; it may even be appropriate in a civil suit while proposing to grant as relief, a lesser or smaller version of what is claimed; but the said observation is misconceived if it is meant to hold that a civil court may grant any relief it deems fit, ignoring the prayer; it is fundamental that, in a civil suit,, relief to be granted can be only with reference to the prayers made in the pleadings; that apart, in civil suits, grant of relief is circumscribed by various factors like court fee, limitation, parties to the suits, as also grounds barring relief, like res judicata, estoppel, acquiescence, non-joinder of causes of action or parties, etc., which require pleading and proof; therefore, it would be hazardous to hold that in a civil suit whatever be the relief that is prayed, the court can on examination of facts grant any relief as it thinks fit; in a suit for recovery of rupees one lakh, the court cannot grant a decree for rupees ten lakhs; in a suit for recovery possession of property 'A', court cannot grant possession of property 'B'; in a suit praying for permanent injunction, court cannot grant a relief of declaration or possession; and the jurisdiction to grant relief in a civil suit necessarily depends on the pleadings, prayer, court fee paid, evidence let in, etc.

12. In **UHBVN vs Adani Power Limited & Ors : (2019) 5 SCC 325,** the Supreme Court held that a reading of Article 13 as a whole, leads to the position that, subject to restitutionary principles contained in Article 13.2, the

adjustment in monthly tariff payment, in the facts of the present case, had to be from the date of withdrawal of exemption; the present case, therefore, falls within Article 13.4.1(*i*); this being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn; this being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the hanged tariff; on the facts of the present case, it was clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective; this being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 4-5-2017 [***Adani Power Ltd.* v. *Uttar Haryana Bijli Vitran Nigam Ltd.*, 2017 SCC OnLine CERC 66**] that CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 1-4-2015; this being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA; and, since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, there was no reason to interfere with the judgment of the Appellate Tribunal.

The Supreme Court further observed that Reserve Bank of India Circulars dated 14-8-2003 and 3-3-2016 provided for a borrower to pay interest to the lender on compound interest basis; it was submitted on behalf of Respondent 1 Adani Power, that having borrowed money from banks to install the FGD unit and having paid compound interest on the borrowed sum, it was only seeking restitution for the interest incurred by it, and paid to the banks at the same rate, and that this was not a case of unjust enrichment; it was thus argued that, since the litigation in the instant case had commenced in the year 2014 and it took seven years to conclude the same, Respondent 1 Adani Power is entitled to carrying cost and interest thereon

on compounding basis from the date of change in law event, strictly in terms of the PPA and the law on the issue that has already been expounded by this Court.

13. In **Nabha Power Ltd. vs. Punjab State Power Corporation Ltd : [(2018) 11 SCC 508],** the appellant, in the synopsis filed by them before the Supreme Court, had for the first time claimed interest on the disputed energy charges in view of Article 11.3.4 read with Article 11.6.8 requiring payment of interest/late payment surcharge on the disputed component of the monthly bill from the date on which such payment was originally due against whom the dispute was settled/decided. They contended that, absence of a separate prayer for the payment of interest, could not deny them such benefit which must enure in case of their succeeding in the adjudication; and, as they had been deprived of the use of money, this deprivation cost should be compensated with interest/damages. Along with the synopsis, the appellant had filed some documents showing joint sampling in the presence of NPL and PSPCL representatives for the coal received at the project-site including coal received after washing, to deny the plea of Respondent 1 that such verification was being done only at the mine site.

On the appellant's claim for interest, the Supreme Court observed that it was undisputed that no such claim had been laid so far, at any stage; the appellant had relied upon Clause 11.3.4 read with Clause 11.6.8; no doubt there was a provision for late payment surcharge in the event of delay in payment of a monthly bill but, in the present case, it was not as if there were undisputed bills remaining unpaid; there were serious disputes regarding the interpretation of the contractual clauses itself; and the present case was not a fit case where the principle of compensation for deprivation should enure to the benefit of the appellant as a measure of restitution, more so as it had

not been claimed by them at any stage; it appeared that this inclusion in the written synopsis seemed to arise on account of the Tribunal not finding favour with such claim in the remand proceedings by reason of no claim being laid towards the same; and they were not inclined to grant this claim.

14. In **Bhagwati Prasad vs. Chandramauli : (1965) SCC OnLine SC 111,** the Supreme Court observed that, if a party asks for a relief on a clear and specific ground, and in the issues or at the trial, no other ground is covered either directly or by necessary implication, it would not be open to the said party to attempt to sustain the same claim on a ground which is entirely new; and the same principle was laid down in **Sheodhar Rai v. Suraj Prasad Singh: AIR 1954 SC 758.**

15. In **GMR Warora Ltd. vs. CERC : (2023) 10 SCC 401,** the Supreme Court held that the argument, that there was no provision in the PPAs for payment of compound interest from the date when the "change in law" event had occurred, had been specifically rejected by the Supreme Court; in view of this consistent position of law and application of restitutionary principles and privity of contractual obligations between the parties as contained in the PPAs, they did not find that the view taken by APTEL, with regard to carrying cost, warranted interference.

16. In **Adani Power Rajasthan Ltd. vs. RERC & Others [(2024) SCC OnLine Aptel 23],** this Tribunal noted that, in **GMR Warora Energy Limited,** the Supreme Court had relied on its earlier judgment in **Uttar Haryana Bijli Vitran Nigam Limited v. Adani Power Limited, (2023) 2 SCC 624** to hold that grant of compound interest on carrying cost, and that too from the date of occurrence of the change in law event, was based on sound logic; the idea behind granting interest on carrying cost was aimed at restituting a party that was affected by a change in law event, and to restore it to its original economic position as if such a change in law event had not taken place; the

contention that there was no provision in the PPA, for payment of compound interest from the date when the change in law event occurred, necessitated rejection; the entire concept of restitutionary principles, engrained in the relevant Article of the PPA, was that a party should be compensated for the time value of money; and this principle would be required to be invoked for grant of interest on carrying cost on account of the change in law event; in the light of the law declared by the Supreme Court, in **GMR Warora Energy Limited,** the party which has suffered an economic disadvantage, as a result of the change in law event, is not only entitled to be restored to its original economic position, it was in but for such change in law, but would also be entitled for compound interest on carrying cost from the date on which the change in law event occurred.

This Tribunal further held that Article 13.4.1 of the PPA referred to in **GMR Warora** was in pari-materia with Article 5.1 of the PPA in the present case, and Article 13.2 of the PPA referred to in **GMR Warora** was in pari-materia with Article 10.2 and 10.3 of the PPA under consideration in the present Appeal; Article 10.5 of the PPA, which was the subject matter of the present appeal, related to tariff adjustment payment on account of change in law, and Article 10.5.1 stipulated that, subject to Article 10.2, the adjustment in monthly tariff payment shall be effective from (i) the date of adoption, promulgation, amendment, re-enactment or repeal of the law or change in law, and (ii) the date of order/judgment of the competent Court or Tribunal or Indian Governmental Instrumentality, if the change in law was on account of a change in interpretation of law; Article 10.5.1 was subject to Article 10.2, which related to the application and principles for computing impact of change in law; Article 10.2.1 provided that, while determining the consequence of a change in law under Article 10, the parties shall have due regard to the principle that the purpose, of compensating the party affected by such change in law, was to restore, through monthly tariff payment, to the

extent contemplated in Article 10, the affected party to the same economic position as if such change in law had not occurred; to paraphrase the Judgment of the Supreme Court, in **GMR Warora Energy Limited,** Article 10.2, of the PPA in the present case, was a complete restitutionary principle which compensated the party affected by such change in law and which must restore, through monthly tariff payment, the affected party to the same economic position they would have been if such change in law had not occurred; the legal fiction created by Article 10.2 of the subject PPA would require the appellant to be put in the same economic position as if such change in law had not occurred i.e. the appellant should be given the benefit of restitution as understood in Civil Law; in short, the requirement of Article 10.2.1, which was the application of the restitutionary principle, could only mean that the consequence of the change in law would relate back to the date on which the law was subjected to change as a result of which the party concerned would have suffered an economic disadvantage, requiring them to be restored to the same position they were in as on that date; this, in turn, would require them to be compensated for the loss, suffered on that account, from the date the change in law occurred, and not after a supplementary bill is raised; it was by way of the present order, and as this issue, regarding levy of evacuation facility charges, was covered by the judgment of the Supreme Court in **GMR Warora Energy Limited,** that the circular of Coal India Limited dated 19.12.2017 was now being declared to amount to a change in law; and the benefit of the change in law, which the Appellant would be entitled to, would relate back to the date on which the circular of Coal India Limited dated 19.12.2017 was applied in the Appellant's case, and not from the date of the present judgment which is being pronounced by this Tribunal, more than six years after the aforementioned circular was issued.

17. In **Tata Power Delhi Distribution Ltd. vs. DERC (Order of Aptel in I.A. in Appeal No. 334 of 2021 dated 23.03.2023),** this Tribunal held that,

in the absence of any procedure having been stipulated by it to the contrary, this Tribunal could always be guided by the provisions of the CPC; Order VII Rule 7 CPC required the relief to be specifically stated, and provided that every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for; the plaintiff need do no more than suggest the relief to which he is entitled, and it is for the Court to determine what relief could be given on the facts found; where all the facts are stated in the plaint, and the plaintiff claims only one relief, although he could have claimed another alternative relief, the Court can grant the latter relief; when necessary facts are stated in the plaint which, if established, entitled the plaintiff in law to obtain certain reliefs, it is open to the Court to grant him such reliefs if established, although the reliefs asked for and the issues raised may be inartistically framed; Judicis est judicare secundum allegate et probata, it is the duty of a Judge to decide according to facts alleged and proved. (**Kesavalu Naidu v. Doraiswami Naidu (died) and others: 1958 2 MLJ 189);** where the Plaintiff claims more than what he is entitled to, the Court will not dismiss the Suit, but give the Plaintiff only such relief as he is entitled to (**Lakshman v. Hari,I.L.R.4Bom584; Venkataramana v. Verabalu, A.I.R. 1940 Mad 308; Khamta Mandalassi v. Hem Kumari, A.I.R. 1941 Pat 29; Bhiku v. Puttu, (1905) 8 Bom L.R. 106 (D.B.); Pitambar v. Ram Joy, 1867 South W.R. 93; Angammal v. Komara Gounder, 2002 SCC OnLine Mad 23 (Madras HC); Sopanrao v. Syed Mehmood, (2019) 7 SCC 76);** the Court should not refuse to grant a relief not specifically claimed in the plaint, if such relief is obviously required by the nature of the case and is not inconsistent with the relief specifically claimed and raised by the pleadings (**Hindalco Industries Ltd. v. Union of India 1994 (2) SCC 594)**; it is the duty of the Court to mould the relief to be granted

to the parties according to the facts proved which, however, should not be inconsistent with the pleadings. (**Meher Chand v. Milkhi Ram, A.I.R. 1932 Lah 401 (F.B.); Hindalco Industries Ltd. v. Union of India 1994 (2) SCC 594);** and in the light of the law declared by the Supreme Court, in **Hindalco Industries Ltd. v. Union of India 1994 (2) SCC 594,** it was the duty of this Tribunal to mould the relief to be granted to the parties according to the facts proved as long as it was not inconsistent with the pleadings.

D. ANALYSIS:

It is clear, and has in fact not been disputed, that the PPA, executed between the Appellant and the second Respondent-GUVNL on 26.02.2007, provides for restitution by way of payment of interest/ carrying cost for belated payment of change in law compensation. It is useful, in this context, to take note of the provisions of the said PPA to the extent relevant.

(i) RELEVANT PROVISIONS OF THE POWER PURCHASE AGREEMENT DATED 26.02.2007:

a. ARTICLE 11.3.5 OF THE PPA: LATE PAYMENT SURCHARGE:

Article 11.3.5 of the Power Purchase Agreement dated 26.02.2007 stipulated that, in the event of delay in payment of a monthly Bill by the Procurer beyond 30 days from the due date, a Late Payment Surcharge shall be payable by the Procurer to the Seller at the rate of two (2) percent in excess of the applicable SBAR per annum, on the amount of outstanding payment, calculated on a day-to-day basis (and compounded with monthly rests), for each day of the delay.

b. ARTICLE 13: CHANGE IN LAW:

Article 13.1 of the PPA is the definition clause and, thereunder, the following terms shall have the following meanings:

Article 13.1.1 of the PPA defines "Change in Law" to mean the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline: (i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement, or (iv) any change in the cost of implementing Environmental Management Plan for the Power Station; but shall not include (1) 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.

Under the proviso thereto, if the Government of India does not extend the income tax holiday for power generation projects under Section 80 IA of the Income Tax Act, up to the Scheduled Commercial Operation Date of the Power Station, such non-extension shall be deemed to be a Change in Law. Article 13.1.2 defines "Competent Court" to mean: the Supreme Court or any High Court, or any tribunal or any similar judicial or quasi-judicial body in India that has jurisdiction to adjudicate upon issues relating to the Project.

Article 13.2 relates to application and principles for computing impact of change in law and, thereunder, while determining the consequence of change in law under Article 13, the Parties shall have due regard to the

principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff payments, to the extent contemplated in Article 13, the affected Party to the same economic position as if such change in law had not occurred:

(a) Construction Period: as a result of any change in law, the impact of increase/decrease of Capital Cost of the Project in the Tariff shall be governed by the formula given below: “For every cumulative increase/decrease of each Rupees 1.25 lakhs in the per MW Capital Cost, in relation to the Installed Capacity, over the term of this Agreement, the increase/decrease in non-escalable Capacity Charges shall be an amount equal to zero point two six seven (0.267%) of the Non Escalable Capacity Charges. Provided that the Seller provides to the Procurer documentary proof of such increase/ decrease in Capital Cost for establishing the impact of such Change in Law. In case of Dispute, Article 17 shall apply”. It is clarified that the above mentioned compensation shall be payable to either Party, only with effect from the date on which the total Increase/decrease exceeds the amount equivalent to Rs. 1.25 lakhs in the per MW Capital Cost; (b) Operation Period: as a result of Change in Law, the compensation for any increase/decrease in revenues or cost to the Seller shall be determined and effective from such date, as decided by the Gujarat Electricity Regulatory Commission whose decision shall be final and binding on both the Parties, subject to rights of appeal provided under applicable Law.

The proviso thereto stipulates that the above mentioned compensation shall be payable only if and for Increase/ decrease in revenues or cost to the Seller is in excess of an amount equivalent to 1% of the Letter of Credit in aggregate for a Contract Year.

Article 13.3 relates to Notification of Change in Law. Article 13.3.1 stipulates that, if the Seller is affected by a Change in Law in accordance

with Article 13.2 and wishes to claim a Change in Law under this Article, it shall give notice to the Procurer of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change In Law. Article 13.3.2 stipulates that, without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurer contained herein shall be material. Under the proviso thereto, in case the Seller has not provided such notice, the Procurer shall have the right to issue such notice to the Seller. Article 13.3.3 stipulates that any notice served pursuant to Article 13.3.2 shall provide, amongst other things, precise details of: (a) the Change in Law; (b) the effects on the Seller of the matters referred to in Article 13.2; (c) the date of impact resulting from the occurrence of Article 13.1.1.

Article 13.4 relates to Tariff Adjustment Payment on account of Change in Law. Article 13.4.1 provides that, subject to Article 13.2, the adjustment in Monthly Tariff Payment shall be effective from: (a) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or (b) the date of order/judgment of the Competent Court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law; (c) the date of impact resulting from the occurrence of Article 13.1.1.

Article 13.4.2 stipulates that the payment for Changes in Law shall be through Supplementary Bill as mentioned In Article 11.8. However, in case of any change in Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed Tariff.

Article 13.5 relates to Appeal against Change in Law and, thereunder, if the results stated in Article 13.1.1 are brought about by a change in the

Interpretation of Law by a court or tribunal that does not qualify as a Competent Court, the Seller agrees that it shall, at its own cost, appeal against such order/Judgment up to the level of the appropriate Competent Court and the right of the Seller to recover the additional amount from the Procurer on account of Changes in Law shall, unless waived in writing by the Procurer, shall be dependent on the Sellers taking adequate steps to contest the increase.

In terms of Clause 13.2(b) of the PPA, the GERC is not only required to determine the compensation payable to the generator (seller), for increase in cost as a result of the change in law, but is also required to determine the date from which the compensation, for increase in cost as a result of change in law, shall be effective. The Appellant herein issued a notice to the second Respondent-GUVNL on 13.07.2017, with respect to change in law in terms of Article 13.3 of the PPA, contending that the Integrated Goods and Services Act, 2017, notified by the Government of India on 12.04.2017 and made effective from 01.07.2017, was a change in law event; and they would submit a detailed claim along with the methodology, for claiming the change in law, in due course of time after analysing the exact impact of the project.

The Appellant, thereafter, filed Petition No. 1680 of 2017 before the GERC wherein they furnished details of the component-wise summary of revision in taxes and duties on imported coal, and then stated that it had issued a notice to the second Respondent-GUVNL on 01.07.2017; after enactment of the GST Act, taxes and duties, which were admissible under the provisions of the change in law in the PPA, had been replaced either by the Central GST or by the State GST, and certain taxes had been abolished and certain new taxes had been introduced; the second Respondent-GUVNL had refused to accept the invoice issued by the Appellant pursuant to their notice dated 13.07.2017, and had informed them that they should seek

approval of the Commission prior to adjustment in the rate of tariff; and, hence, the Appellant was constrained to approach the GERC by filing the subject petition.

The Appellant further stated that the tariff, agreed upon between the parties in the PPA, ought to be adjusted by the Commission in accordance with Article 13 of the PPA as the cost of generation of electricity had undergone a change because of the aforesaid change in law event, which had taken place subsequent to the relevant date.

The Appellant sought the approval of the Commission to be permitted to raise supplementary bills/invoices for levy of IGST and basic customs duty on goods imported; for additional levy of IGST on imported freight as per the provisions of the GST law; and for levy of compensation cess instead of clean energy cess.

The GERC passed the order, in Petition No. 1680 of 2017 dated 23.12.2019, holding that the Appellant had complied with the requirements for its claim on account of change in law; as per the provisions of the PPA, the Appellant was eligible for compensation on account of change in law; the Appellant's claim for compensation was in excess of one percent of the value of the LC (Rs. 132 Crores ie 1.32 Crores in aggregate) for a contract year; and the impact of change in law, as approved by the Commission, would be applicable till 14.10.2018 as both the Appellant and second Respondent had executed a supplementary PPA on 01.03.2019 to be effective from 15.10.2018.

Consequent upon the execution of the supplementary PPA dated 01.03.2019, the second Respondent-GUVNL filed Petition No. 1807 of 2019 before the GERC on 28.03.2019, under Section 86(1)(b) and (f) of the Electricity Act read with Article 18.1 of the PPA dated 28.02.2007, seeking

approval of the GERC to the amendments to the PPA by way of the supplementary PPA dated 01.03.2019. In the said Petition, the 2nd Respondent-GUVNL stated that the Government of Gujarat had passed a resolution on 03.07.2018 constituting a high power committee for reviewing the report of the working group, and to obtain its recommendations with regard to resolution of issues on imported coal based power projects located in the State of Gujarat; the high power committee had submitted its recommendations; the agreement between the second Respondent-GUVNL and the power producers was required to be amended effective from 15.10.2018 to reflect the tariff based on the report of the committee in order to ensure that the projects keep running without any benefit to the power producers, and at the same time the interests of the banks lending money and the consumers were safeguarded; both the Government of Gujarat and GUVNL had approach the Supreme Court seeking clarifications and the Supreme Court had, by order dated 29.10.2018, clarified that the parties could approach the CERC for approval of the present amendment, and had directed the Commission to decide the matter expeditiously and preferably within a period of 8 weeks; Article 18.1 of the PPA required the parties to amend the PPA with the approval of the Appropriate Commission; both the Appellant and the second Respondent had mutually agreed and signed the supplementary PPA dated 01.03.2019, and the present petition was being filed before the GERC to approve the amendments in the PPA, as directed by the Supreme Court, after duly taking into consideration the views of the Respondent consumers groups.

During the pendency of Petition No. 1807 of 2019 before the GERC, the Appellant herein filed Petition No. 1866 of 2020 before the GERC on 07.02.2020 seeking review of its order in Petition No. 1680 of 2017 dated 23.12.2019. In the said Petition, the Appellant contended that they should be granted change in law compensation for the period between the amended

effective date (ie 15.10.2018) till the date of approval of the Supplementary PPA (dated 01.03.2019) by the GERC. During the pendency of the review petition (ie Petition No. 1866 of 2020), a supplementary PPA dated 12.08.2021 was executed between the Appellant and the second Respondent.

By its order in Petition No. 1807 of 2019 dated 27.04.2020, the GERC directed that the Supplemental PPA dated 01.03.2019 be modified as per the directions of the Commission in the said order, and the modified supplemental PPA be submitted to the Commission. The GERC held that the approval with modifications was being granted to the proposed supplementary PPA along with Addendum No.1 and 2 subsequently filed by the Petitioner (ie the second respondent-GUVNL in this appeal).

The GERC further observed that the change in law as allowed by it, in its order in Petition No. 1680 of 2017 dated 23.12.2019, shall be applicable till 19.08.2019 for payment of energy charges or till coal is procured directly from Indonesia whichever was later; computation of energy charge shall be, as per the supplementary PPA, from 20.08.2019 or from the date coal is procured directly from Indonesia whichever is later; the supplementary PPA allowed pass through of actual coal cost, and hence covered the cost approved under the change in law under the order dated 23.12.2019 of the Commission; further, for any change in law taking place after approval of the order of the Commission (27.04.2020), the Petitioner (the 2nd Respondent in this appeal ie GUVNL) had to approach the Commission for its approval.

When the Appellant filed the review petition before the GERC on 07.02.2020, neither had the GERC passed its order in Petition No. 1807 of 2019 dated 27.04.2020 approving the amendments made to the earlier PPA by way of the supplementary PPA dated 01.03.2019, nor had the parties executed the supplementary PPA dated 12.08.2021. In terms of the original

order passed by the GERC, in Petition No. 1680 of 2017 dated 23.12.2019, the Appellant was entitled for change in law compensation only till 14.10.2018, and not thereafter.

It is no doubt true that the GERC, in its order in Petition No. 1807 of 2019 dated 27.04.2020, had observed that the change in law as allowed by it, in its earlier order in Petition No. 1680 of 2017 dated 23.12.2019, shall be applicable till 19.08.2019 for payment of energy charges or till coal is procured directly from Indonesia whichever was later; and computation of energy charge shall be, as per the supplementary PPA, from 20.08.2019 or from the date coal is procured directly from Indonesia whichever is later. The fact, however, remains that Petition No. 1807 of 2019 was filed by the second Respondent-GUVNL before the GERC, under Section 86(1)(b) and (f) of the Electricity Act read with Article 18.1 of the PPA dated 28.02.2007, seeking its approval to the amendment to the PPA by way of the supplementary PPA dated 01.03.2019. By the time the GERC passed its order in Petition No. 1807 of 2019 dated 27.04.2020, the Appellant had already filed Petition No. 1866 of 2020 before the GERC on 07.02.2020 seeking review of its order in Petition No. 1680 of 2017 dated 23.12.2019; and, in the said review petition, they sought for grant of change in law compensation for the period between the amended effective date (ie 15.10.2018) till the date of approval of the Supplementary PPA (dated 01.03.2019) by the GERC. As their Review Petition, seeking change in law compensation for the period from the amended effective date (ie 15.10.2018) till approval of the supplementary PPA dated 01.03.2019 was pending by then, and as Petition No. 1807 of 2019 was filed not by them but by the 2nd Respondent-GUVNL seeking approval of the supplementary PPA dated 01.03.2019, the appellant cannot be faulted for not claiming change in law compensation, and for interest thereon from April 2019 to March,2021, in Petition No. 1807 of 2019.

(ii) CONTENTS OF THE ADDITIONAL AFFIDAVIT FILED BY APPELLANT ON 17.09.2021 IN REVIEW PETION NO. 1866 OF 2020 IN PETITION NO. 1680 OF 2017: TO THE EXTENT RELEVANT:

During the pendency of Review Petition No. 1866 of 2020, the Appellant herein filed an additional affidavit dated 17.09.2021 before the GERC. In Para 9 of the said additional affidavit, the Petitioner (ie the Appellant herein) had stated that they had not received any change in law compensation from the Respondent for the period after 14.10.2018, although the power plant of the Petitioner was operational from April, 2019 till March, 2021; during the said entire period, while Change in Law compensation was denied to it, the Petitioner had paid the compensation amount to the Government of India; thus, the non-payment which the Petitioner should have rightfully got on regular basis today stands at around Rs. 150 crores; due to shortage in receipt of funds, the Petitioner could not make payment to its creditors, and there is huge outstanding as on date of O&M and coal vendors which form part of operational creditors; and these creditors are already claiming penal charges from the Petitioner for delay in their payments.

In Para 10, the Petitioner (Appellant herein) submitted that, since there was no fault on their part, despite which it had not been given change in law compensation for the period between April, 2019 and March, 2021, they seek payment of interest from the Respondent, GUVNL at the rate as maybe decided by this Hon'ble Commission on the amount of change in law compensation for the period between April, 2019 and March, 2021.

In Para 11, the Petitioner (Appellant herein) stated that, in view of the aforesaid factual developments that had occurred during the pendency of the captioned Review Petition, the Petitioner (Appellant herein) prays that it

is entitled to Change-in-Law compensation till date of approval the Supplemental PPA dated 12.05.2021 by this Hon'ble Commission along with interest as may be directed by the Commission.

As is clear from the contents of the additional affidavit dated 17.09.2021, as noted hereinabove, the Appellant's claim was for payment of interest/carrying cost, at the rate as may be decided by the Commission, on the amount of change in law compensation, for the period between April, 2019 and March, 2021, which is for the period subsequent to 14.10.2018, to which period alone was the change in law compensation restricted by the GERC in its order in Petition No. 1680 of 2017 dated 23.12.2019.

The Appellant's entitlement, for interest/carrying cost on the change in law compensation, for the period from April, 2019 till March, 2021, arose consequent only to the order passed by the GERC in Review Petition No. 1866 of 2020 dated 18.03.2023 whereby change in law compensation was granted to the Appellant for the period from 15.10.2018 till 19.11.2021.

In its order in Review Petition No. 1866 of 2020 dated 18.03.2023 the GERC revised Para 10 of its earlier order in Petition No, 1680 of 2017 dated 23.12.2019, holding that the impact of change in law, as approved by the Commission, shall be till the approval of the revised supplementary PPA by the Commission ie 19.11.2021, as the Appellant and the second Respondent had executed the supplementary PPA on 12.08.2021 to be effective from 20.11.2021. The Appellant, in its additional affidavit dated 17.09.2021, had only sought interest on change in law compensation for the period between April, 2019 and March, 2021 which is well within the period for which change in law compensation was granted by the GERC in its review order in Petition No. 1866 of 2020 dated 18.03.2023. While it is no doubt true that the Appellant did not make a specific prayer for payment of interest on carrying cost in the Review Petition filed by them on 07.02.2020, the fact remains

that, during the pendency of the review petition, they filed additional affidavit dated 17.09.2021 wherein they specifically prayed for being granted interest at the rate which may be decided by the Commission on the amount of change in law compensation for the period between April, 2019 and March, 2021. Since the original order passed by the GERC in Petition No. 1680 of 2017 dated 23.12.2019 granted the Appellant change in law compensation only till 14.10.2018, and in as much as the Appellant has confined its relief for interest, in its additional affidavit dated 17.09.2021, only for the period between April, 2019 and March, 2021, their failure to claim interest in Petition No. 1680 of 2017 matters little, since, even if they had claimed interest for the period April, 2019 to March, 2021 in Petition No. 1680 of 2017 no such interest could have been granted to them since their claim for change in law compensation was itself restricted, in the order of the GERC in Petition No. 1680 of 2017 dated 23.12.2019, only for the period prior to 14.10.2018.

As Review Petition No. 1860 of 2020 was filed by the Appellant before the GERC on 07.02.2020, it is only for a part of the period for which they have claimed interest in their additional affidavit dated 17.09.2021, ie for the period April, 2019 till 06.02.2020, that the Appellant could have claimed interest. For the subsequent period, from 07.02.2020 till April, 2021, they could have only sought the relief for payment of interest, on belated payment of change in law compensation, by either seeking amendment of the prayer in the review petition or by filing a fresh petition before the GERC after it had passed the review order on 18.03.2023. The Appellant has substantially complied with this requirement by filing an additional affidavit on 17.09.2021 claiming interest for the period April, 2019 till March, 2021. In the light of the relief which they sought by way of their additional affidavit dated 17.09.2021, as they have confined their claim for interest therein only for the period April, 2019 to March, 2021, and as the appellant could not have sought such a relief when they filed the review petition before the GERC on 07.02.2020,

the submission, urged on behalf of the second Respondent-GUVNL, that,, in the absence of a specific prayer, the Appellant cannot be granted carrying cost/interest, necessitates rejection.

This aspect can also be examined from another angle. As is evident from the Appellant's prayer, in their additional affidavit dated 17.09.2021, their claim for interest, for the period April, 2019 to March, 2021, is at the rate to be determined by the Commission. It is not in dispute, and has in fact been admitted on behalf of the second Respondent-GUVNL, that Article 13.2 (b) of the PPA provides for restitution for belated payment of change in law compensation. The object of insisting on pleadings is to ensure that the respondents to the dispute are given a reasonable opportunity of meeting the contentions urged on behalf of the petitioner (ie the Appellant herein). The second Respondent-GUVNL does not dispute the Appellant's entitlement for change in law compensation nor does it dispute the Appellant's contractual right for payment of interest in terms of Article 13.2 (b) of the original PPA. It is not even their case that Section 11 of Civil Procedure Code would bar the Appellant from raising any such claim on the grounds of res-judicata. It is also not the case of the Respondent-GUVNL that such a claim for interest is barred under the law of limitation. Article 137 of Schedule I of the Limitation Act stipulates a period of 3 years for raising such a claim and, as the claim for interest for the period April, 2019 to March, 2021 was raised and a specific prayer was sought for grant of such a relief in the additional affidavit dated 17.09.2021, it does appear that the claim for interest, for the period April, 2019 to March, 2021, is well within the period of limitation stipulated under the Limitation Act. The endeavour of the second Respondent-GUVNL appears to be to somehow wriggle out of its contractual obligations to restitute the appellant by payment of interest, on the belated payment of change in law compensation, for the period April, 2019 to March, 2021, on a hyper technicality ie on the ground that a specific prayer was not

sought by the Appellant in Petition No. 1680 of 2017. As already held hereinabove, absence of such a prayer, in the said petition, is of no consequence since the Appellant was not even granted change in law compensation for the period April, 2019 to March, 2021 in the order of the GERC in Petition No. 1680 of 2017 dated 23.12.2019. Not only has the Appellant sought such a prayer for grant of interest, in the additional affidavit filed by them on 17.09.2021 in Review Petition No. 1866 of 2020, they have specifically sought such a relief in the present appeal also. Prayer (b) in the said appeal is to direct the second Respondent-GUVNL to pay carrying cost on compounding basis on the principle change in law compensation granted by the GERC in its order in Review Petition No. 1866 of 2020 dated 18.03.2023.

The Appellant's entitlement for change in law compensation for the period from 15.10.2018 till 19.11.2021 arose only after the review order was passed by the GERC in Review Petition No. 1866 of 2020 dated 18.03.2023. The Appellant cannot, therefore, be faulted for raising the claim in their additional affidavit dated 17.09.2021, seeking payment of interest for the period April, 2019 to March, 2021. The aforesaid claim relates to a period not covered by the earlier order of GERC in Petition No. 1680 of 2017 dated 23.12.2019, since the GERC had held therein that the appellant was entitled for change in law compensation only for the period upto 14.10.2018. For the period on or after 15.10.2018, the appellant claimed change in law compensation only in Review Petition No. 1866 of 2020 filed by them before the GERC on 07.02.2020, which culminated in the order being passed on 18.03.2023. We are satisfied that, as the Appellant has raised its claim for interest, on change in law compensation, for the period April, 2019 to March, 2021, in the additional affidavit, filed in the review petition, on 17.09.2021, the objection of the second Respondent-GUVNL that, the appellant cannot

be awarded interest for this period in the absence of a specific plea/prayer in Petition No. 1680 of 2017, is wholly unjustified.

Though the question whether carrying cost can be awarded, even in the absence of a specific prayer in this regard, may not even arise for consideration in the present case, as the appellant's entitlement for interest/carrying cost is now confined only to the period April, 2019 to March, 2021, we have nonetheless noted the judgements cited under this head for the sake of completeness, and to avoid the possibility of parties on either side having any grievance on this score. As noted hereinabove, the GERC had, in its order in Petition No. 1680 of 2017 dated 23.12.2019, granted the Appellant the relief of change in law compensation only till 14.10.2018, and not thereafter. Even if they had prayed for grant of interest in the said petit, the appellant would only have been entitled for such interest only for the period for which change in law compensation was granted ie till 14.10.2018 and not beyond, As the Appellant has, in its Additional Affidavit filed in the Review Petition on 17.09.2021, confined its claim for payment of interest/ carrying cost on belated payment of change in law compensation only for the period from April, 2019 to March, 2021, it matters little that they did not seek a specific prayer in this regard in Petition No. 1680 of 2017 filed by them earlier. As the Appellant has chosen not to claim interest/ carrying cost for the period prior to April, 2019, and the change in law compensation granted by the GERC, in its order in Petition No. 1680 of 2017 dated 23.12.2019, was only for the period up to 14.10.2018 and not thereafter, the appellant's claim for interest, during the period April, 2019 to March, 2021, does not flow from the relief granted by the GERC in Petition No. 1680 of 2017 dated 23.12.2019.

It is only in Petition No. 1866 of 2020 filed by the Appellant before the GERC on 07.02.2020, seeking review of the order in Petition No. 1680 of

2017 dated 23.12.2019, that the Appellant had sought change in law compensation for the period from 15.10.2008 till the Supplementary PPA dated 01.03.2009 was approved by the GERC; and, during the pendency of this Review Petition, the Appellant filed the Additional Affidavit dated 17.09.2021 specifically seeking grant of interest for the period April, 2019 to March, 2021. As the Appellant's prayer for change in law compensation was allowed by the GERC by its order in Petition No. 1866 of 2020 dated 18.03.2023, holding that the impact of change in law shall be till the approval of the revised Supplementary PPA by the Commission i.e till 19.11.2021, it is only pursuant to this order that the Appellant was entitled for change in law compensation from 15.10.2018 till 19.11.2021.

The Appellant's prayer for grant of interest on change in law compensation is for the period April, 2019 to 20201 which clearly falls within the period for which the GERC had granted them change in law compensation by its order in Petition No. 1866 of 2020 dated 18.03.2023. Viewed from any angle, we are satisfied that the Appellant cannot be held disentitled to this relief on the spacious plea, urged on behalf of the 2nd Respondent GUVNL, that their failure to seek a specific relief for payment of interest in Petition No. 1680 of 2017, which culminated in an order being passed by the GERC on 23.12.2019, is fatal.

IX. IS CARRYING COST, REPRESENTING TIME VALUE OF MONEY, REQUIRED TO BE GRANTED AS A MEASURE OF RESTITUTION?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri Amit Kapur, Learned Counsell for the Appellant, would submit that due to non-grant of carrying cost, being time value of money, the Appellant

has not been restituted and put back to the same economic position as it was when the GST Act was not enacted; proceedings were pending before the GERC cumulatively for more than 66 months (Original Petition for 28 months and Review Petition for 37 months), and the Appellant was not granted any interest *pendente-lite* for this period; carrying cost is intrinsic to change in law compensation under Article 13 of the PPA entered into under Section 63 of the Electricity Act, and Clause 4.7 of the Competitive Bidding Guidelines; the Supreme Court has held that carrying cost is intrinsic to and part of restitutive compensation in terms of Article 13 of the PPA for change in law compensation; it is required to fully restore the affected party to the same economic position, as if such change in law had not occurred. (Refer: (a) ***Energy Watchdog v. CERC & Ors.***, (2017) 14 SCC 80; and (b) ***Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. v. Adani Power (Mundra) Ltd. & Anr.*** (2019) 5 SCC 325 ("***UHBVNL***"); and, given that the language of Article 13 in the aforesaid two judgments are identical to Article 13 of the subject PPA, the Appellant's right to carrying cost is no more *res-integra*.

B. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENT:

Sri Anand K. Ganeshan, Learned Counsel for the respondent-GUVNL, would submit that the PPA specifically requires the decision of the GERC before any such levy can be made in tariff; it is not a *lis* between the parties, whereby GUVNL has wrongly denied the claim, and the same is to be adjudicated by the GERC; change in law claims are for tariff adjustment and, necessarily, requires approval and determination of the State Commission, before the tariff can be adjusted; this is in the nature of tariff determination by the GERC; and, therefore, general principles of restitution in equity, justice and fair play, applying the principles of Section 34 of the Civil

Procedure Code have no application. [**NTPC v. MPSEB, (2011) 15 SCC 580**].

C. JUDGEMENTS CITED UNDER THIS HEAD:

1. In **Energy Watchdog vs. CERC: [(2017) 14 SCC 80,** the Supreme Court observed that Clause 13.2 of the PPA provided that, while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred; further, for the operation period of the PPA, compensation for any increase/decrease in cost to the seller shall be determined and be effective from such date as decided by the Central Electricity Regulation Commission; and this being the case, though change in Indonesian law would not qualify as a change in law under the guidelines read with the PPA, change in Indian law certainly would.

2. In **Uttar Haryana Bijli Vitaran Nigam Ltd. vs. Adani Power (Mundra) Ltd. : (2019) 5 SCC 325,** the Supreme Court observed that Article 13.4.1 makes it clear that adjustment in monthly tariff payment on account of change in law shall be effected from the date of the change in law, in case the change in law happens to be by way of adoption, promulgation, *amendment*, re-enactment or repeal of the law or change in law; as opposed to this, if the change in law is on account of *a change in interpretation of law* by a judgment of a Court or Tribunal or governmental instrumentality, the case would fall under sub-clause (*ii*) of clause 4.1, in which case, the monthly tariff payment shall be effected from the date of the said order/judgment of the competent authority/Tribunal or the governmental instrumentality; Article 13.4.1 is subject to Article 13.2 of the PPA which is an in-built restitutionary principle which compensates the party affected by

such change in law and which must restore, through monthly tariff payments, the affected party to the same economic position as if such change in law had not occurred; this would mean that by this clause a fiction is created, and the party has to be put in the same economic position as if such change in law had not occurred i.e. the party must be given the benefit of restitution as understood in civil law; Article 13.2, however, goes on to divide such restitution into two separate periods; the first period is the "construction period" in which increase/decrease of capital cost of the project in the tariff is to be governed by a certain formula; however, the seller has to provide to the procurer documentary proof of such increase/decrease in capital cost for establishing the impact of such change in law, and in the case of dispute as to the same, a dispute resolution mechanism as per Article 17 of the PPA is to be resorted to; compensation is payable to either party only with effect from the date on which the total increase/decrease exceeds the amount stated therein; so far as the "operation period" is concerned, compensation for any increase/decrease in revenues or costs to the seller is to be determined and effected from such date as is decided by the appropriate Commission; this compensation is only payable for increase/decrease in revenue or cost to the seller if it is in excess of an amount equivalent to 1% of the Letter of Credit in aggregate for a contract year; and what is clear from a reading of Article 13.2 is that restitutionary principles apply in case a certain threshold limit is crossed in both sub-clauses (*a*) and (*b*).

The Supreme Court further observed that, on the facts of the present case, it was clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective; this being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 4-5-2017 (***Adani Power Ltd.* v. *Uttar Haryana Bijli Vitran Nigam Ltd.*, 2017 SCC OnLine CERC 66**] that CERC held that the respondents

were entitled to claim added costs on account of change in law w.e.f. 1-4-2015; this being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA; and, since it was clear that this amount of carrying cost is only relatable to Article 13 of the PPA, they found no reason to interfere with the judgment of the Appellate Tribunal.

3. In **NTPC Ltd. v. M.P. SEB, (2011) 15 SCC 580,** the Central Commission had determined the final tariff at a rate lesser than the pre-existing tariff, as a result of which NTPC was found to have collected excess amounts during this intervening period, and the Electricity Boards became entitled to get the refund/adjustment of these differential amounts; the Central Commission had, however, disallowed the claim of the Electricity Boards for payment of interest on the differential amounts between (*i*) the tariff finally determined by the Central Commission and (*ii*) the pre-existing tariff continued by the Central Commission until the final determination of the tariff. Thereafter NTPC duly and immediately adjusted the excess amounts in favour of the purchaser Electricity Boards in their subsequent bills.

MPSEB, PSEB and Delhi Vidyut Board filed appeals against the orders of the Central Commission before this Tribunal which rejected the claim of the Electricity Boards for interest as being payable under Section 62(6) of the Electricity Act, 2003. It, however, held by its impugned common order that NTPC was liable to pay interest on the differential amounts on the grounds of justice, equity and fair play. NTPC, therefore, filed three civil appeals challenging this order. As against that, PSEB and Delhi Vidyut Board filed Civil Appeals challenging the same order of the Appellate Tribunal to the extent it rejected their claim for interest under Section 62(6) of the Electricity Act.

Two principal questions arose for determination by the Supreme Court in the Civil Appeals: (*a*) Whether the Appellate Tribunal erred in denying interest on the differential amounts to the Electricity Boards concerned under Section 62(6) of the Electricity Act, 2003, and (*b*) Whether the Appellate Tribunal was justified in allowing interest on the differential amounts on the basis of justice, equity and fair play.

It is in this context that the Supreme Court, in **NTPC Ltd. v. M.P.SEB, (2011) 15 SCC 580,** observed that, prior to 1-6-2006 there was no specific provision for claiming interest for the intervening period; the very fact that such a regulation was required to be issued, indicated the necessity for having such a regulation, but at the same time it was not possible to make it applicable retrospectively; the provision for charging interest was a substantive provision which had to be specifically provided, and would become operative when provided; **Union of India v. A.L. Rallia Ram, AIR 1963 SC 1685,** was one of the earliest cases where the principles concerning payment of interest by way of restitution came up for consideration; the Supreme Court had noted that there was no provision for interest in the contract or in the Act, and laid down the proposition that interest is payable in equity only if there are circumstances attracting equitable jurisdiction or under the Interest Act; the power to make restitution is inherent in every Court as observed in ***Kavita Trehan* v. *Balsara Hygiene Products Ltd.*:(1994) 5 SCC 380;** restitution will apply even where the case does not strictly fall under Section 144 CPC; however, ***Kavita Trehan*: (1994) 5 SCC 380,** was a case where the submission was made to the effect that termination of the contract was wrong and an injunction was sought in a civil suit to restrain the respondent from interfering with the disposal of goods; it was in this context that the principle of restitution was applied; the Appellate Tribunal could not bring in either the principles of justice, equity and fair play or that of restitution in the present case; in Para 16 of its order, the Appellate

Tribunal has specifically observed in terms that this was not a case where the beneficiaries were made to pay the excess tariff at the instance of NTPC through force, coercion or threat; this being the position the principles of equity, justice and fair play could not have been brought in to award interest to the Electricity Boards; while there was delay in the process of determination of the tariff, NTPC was not in any way responsible; ultimately, the tariff was reduced, but the tariff charged by NTPC, in the meanwhile, was in accordance with the rates permitted under the notifications issued by the Commission; it could not be said that NTPC had held on to the excess amount in an unjust way to call it unjust enrichment on the part of NTPC, so as to justify the claim of the Electricity Boards for interest on this amount.

The Supreme Court further held that the tariff that was being charged at the relevant time was as per the previous notifications; once the tariff was finalised subsequently, NTPC had adjusted the excess amount which it had received; it could not be said that, during this period, NTPC was claiming charges in an unjust way to make a case in equity; the industry practice also showed that, on all such occasions, interest had never been either demanded or paid when price fixation takes place; the claim for interest could not be covered under Section 62(6); the provision for interest had been introduced by the Regulations subsequent to the period which was under consideration before the Commission; if the propositions in ***Union of India* v. *A.L. Rallia Ram*, AIR 1963 SC 1685,** and ***Union of India* v. *Watkins Mayor and Co.*, AIR 1966 SC 275,** were to be applied, the terms of the supply agreement, the governing regulation and notifications did not contain any provision for interest; the industry practice did not provide for it as well; and, in view thereof, interest could not be claimed either on the basis of equity or on the basis of restitution.

D. ANALYSIS:

As noted hereinabove, Article 13.2(b), of the PPA executed between the Appellant and the 2nd Respondent on 26.02.2007, stipulates that the purpose of compensating the party affected by a change in law is to restore. through monthly tariff payments to the extent contemplated in Article 13, the affected party to the same economic position as if such change in law had not occurred; and the compensation, for any increase in cost to the seller, shall be determined and effective from such date as decided by the GERC. The contractual obligation of restoring the affected party to the same economic position they would be in, but for the change in law, is the underlying principle of restitution.

(i) RESTITUTION: ITS SCOPE:

Black's Law Dictionary defines "restitution" as a body of substantive law in which liability is based not on tort or contract but on the defendant's unjust enrichment; return or restoration of some specific thing to its rightful owner or status; the term 'restitution' suggests restoration to the successful party of some benefit obtained from him; 'Restitution' is an ambiguous term, sometimes referring to the disgorging of something which has been taken, and at times referring to compensation for injury done. Often, the result under either meaning of the term would be the same. Unjust impoverishment as well as unjust enrichment is a ground for restitution.

P. Ramanatha Aiyar, Advanced Law Lexicon defines "Restitution" to mean return or restoration of some specific thing to its rightful owner or status; compensation for benefits derived from a wrong done to another; compensation or reparation for the loss caused to another; in the afore-said senses, restitution is available in tort and contract law. 'Restitution' is an ambiguous term, sometimes referring to the disgorging of something which has been taken, and at times referring to compensation for injury done. Often, the result under either meaning of the term would be the same. Unjust

impoverishment as well as unjust enrichment is a ground for restitution. It is the act of restoring or a condition of being restored; restoration of a person to a former position or status; restoration of a thing or institution to its original state or form [Section 144(1), C.P.C. (5 of 1908)].

Unjust enrichment has been defined as a benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense. A claim for unjust enrichment arises where there has been an “unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience”. Unjust enrichment is “the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience”. Unjust enrichment occurs when a party wrongfully secures a benefit or passively receives a benefit which would be unconscionable to retain. **(Indian Council for Enviro-Legal Action v. Union of India, (2011) 8 SCC 161; Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd. [[1943] A.C. 32 : (1942) 2 All ER 122 (HL); Nelson v. Larholt [[1948] 1 K.B. 339 : (1947) 2 All ER 751).**

In law, the term “restitution” is used in three senses: (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done to another; and (iii) compensation or reparation for the loss caused to another. (*Black's Law Dictionary*, 7th Edn., p. 1315). (**South Eastern Coalfields Ltd. v. State of M.P., (2003) 8 SCC 648; Clearsky Solar (P) Ltd. v. Karnataka ERC, 2024 SCC OnLine APTEL 50; The Law of Contracts by John D. Calamari & Joseph M. Perillo).)**

The principle of restitution has been statutorily recognized in Section 144 of the Civil Procedure Code, 1908 which speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on par with a decree; and the scope of the provision is wide enough to include therein almost all kinds of variation, reversal, setting aside or modification of a decree or order. (**South Eastern Coalfields Ltd. v. State of M.P., (2003) 8 SCC 648; Clearsky Solar (P) Ltd. v. Karnataka ERC, 2024 SCC OnLine APTEL 50).** Restitution sometimes refers to the disgorging of something which has been taken, and at times to compensation for injury done. Often, the result under either meaning of the term would be the same. Unjust impoverishment, as well as unjust enrichment, is a ground for restitution (**South Eastern Coalfields Ltd. v. State of M.P, (2003) 8 SCC 648; Blacks Law Dictionary, 7th Edn., p. 1315; Kotak Mahindra Bank Limited v. Station House Officer, 2015 SCC OnLine Hyd 285; The Law of Contracts by John D. Calamari & Joseph M. Perillo).**

The concept of restitution is a common law principle, and it is a remedy against unjust enrichment or unjust benefit. The core of the concept lies in the conscience of the Court which prevents a party from retaining the benefit derived from another which it has received. The obligation to restitute lies on the person or the authority that has received unjust enrichment or unjust benefit. (**State of Gujarat v. Essar Oil Ltd., (2012) 3 SCC 522; Kotak Mahindra Bank Limited v. Station House Officer, 2015 SCC OnLine Hyd 285; Halsburys Laws of England, 4th Edn., Vol. 9, p. 434).** The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made, but also what the party under obligation has or might reasonably have made. **(South Eastern Coalfields Ltd. v. State of M.P, (2003) 8 SCC 648; Kotak Mahindra Bank Limited v. Station House Officer, 2015 SCC**

OnLine Hyd 285). The principle of restitution should be fully applied in a pragmatic manner in order to do real and substantial justice. (**Ramrameshwari Devi v. Nirmala Devi, (2011) 8 SCC 249; Siddavarapu Anantha Sigvarama Krishna Reddy v. Penna Cement Industries Limited, 2018 SCC OnLine Hyd 186).**

In **Indian Council for Enviro-Legal Action v. Union of India, (2011) 8 SCC 161,** the Supreme Court observed that, if the judgment-debtor had borrowed money from a nationalised bank as a clean loan, and had paid the money into the Supreme Court, then what was relevant was what would be the bank's demand; in other words, if payment of an amount, equivalent of what the ledger account in the nationalised bank on a clean loan would have shown as a debit balance today, was not paid and something less than that was paid, that differential or shortfall was that there had been : (1) failure to restitute; (2) unfair gain by the non-complier; and (3) provided the incentive to obstruct or delay payment; unless this differential was paid, justice would not be done to the creditor; it only encouraged non-compliance and litigation; even if no benefit had been retained or availed even then, to do justice, the debtor must pay the money; in other words, it was not only disgorging all the benefits but making the creditor whole i.e. ordering restitution in full and not dependent on what he might have made or benefited was what justice required

In **State of Gujarat v. Essar Oil Ltd., (2012) 3 SCC 522,** the Supreme Court held that the concept of restitution, a common law principle, is a remedy against unjust enrichment or unjust benefit. From the concept of restitution one thing which emerges is that the obligation to restitute lies on the person or the authority that has received unjust enrichment or unjust benefit (**Halsbury's Laws of England, 4th Edn., Vol. 9, p. 434)**. A person is enriched if he has received a benefit and similarly a person is unjustly

enriched if the retention of the benefit would be unjust. The word “benefit” denotes any form of advantage. Ordinarily, in cases of restitution, if there is a benefit to one, there is a corresponding loss to the other and, in such cases, the benefiting party is also under a duty to give to the losing party, the amount by which he has been enriched.

In **Citibank N.A. v. Hiten P. Dalal, (2016) 1 SCC 411,** the Supreme Court held that the law on restitution under Section 144 CPC is quite well settled; it vests expansive power in the court but such power has to be exercised to ensure equity, fairness and justice for both the parties; in the context of restitution, the court should keep under consideration not only the loss suffered by the party entitled to restitution but also the gain, if any, made by other party who is obliged to make restitution; and no unmerited injustice should be caused to any of the parties.

In **NTPC Ltd. v. CERC, 2023 SCC OnLine APTEL 27,** this Tribunal, after referring to the definition of “unjust enrichment” in **Black's Law Dictionary, 8th Edition** and **P. Ramanatha Aiyar's, The Major Law Lexicon, 4th Edition, Volume 6**, held that the doctrine of “unjust enrichment” is that no person can be allowed to enrich inequitably at the expense of another; a right of recovery under the doctrine of “unjust enrichment” arises where retention of a benefit is considered contrary to justice or against equity; the juristic basis of the obligation is not founded upon any contract or tort but upon a third category of law, namely, quasi-contract or the *doctrine of* restitution. (**Sahakari Khand Udyog Mandal Ltd. v. CCE & Customs, (2005) 3 SCC 738)**

For example, if a generator had paid GST in April, 2019 and they were compensated by GUVNL for such payment, say in April 2023, the only way in which the said generator can be restored to the same economic position they were in, but for their being required to pay GST in April, 2019, would be

to grant them interest for the period April, 2019 till April 2023 on the amount paid by them towards GST. It is only in this manner that they can be restored to the same economic position they were in, but for the change in law. And this is the contractual requirement of Article 13.2 of the PPA.

It is no doubt true that Article 13.2(b) requires the compensation for change in law to be decided by the GERC as also the date from which compensation for such change in law would be effective. In its review order, in Petition No. 1866 of 2020 dated 18.03.2023, the GERC revised para 10 of its earlier order, in Petition No. 1680 of 2017 dated 23.12.2019, holding that the impact of change in law shall be till approval of the revised Supplementary PPA by the Commission i.e. till 19.11.2021. Consequently, it was permissible for the Appellant to claim interest from 15.10.2018 till 19.11.2021. The Appellant had, in its Additional Affidavit dated 17.09.2021, confined its claim for interest only for the period April, 2019 to March, 2021, and this claim of theirs' for interest clearly falls within the period for which the GERC had allowed towards the impact of change in law i.e. from 15.10.2018 till 19.11.2021. Consequently, in terms of Article 13.2(b), and as determined by the GERC in its review order in Petition No. 1866 of 2020 dated 18.03.2023, the Appellant is justified in its claim for being paid carrying cost for the period April, 2019 to March, 2021 in view of the belated payment of change in law compensation by GUVNL.

(ii) IS INTEREST A NATURAL CORROLARY TO DELAYED PAYMENT:

The law declared by this Tribunal in **Maharashtra State Elecy. Dist. Co. Ltd Versus Maharashtra Electricity Regulatory Commission : (Judgement in Appeal No. 15 of 2007 dated 05.02.2008),** relying on **Central Bank of India Vs. Ravindra &Ors. (2002) 1 SCC 367,** and **CIT Vs. Shyam Lal Narula (AIR 1963 Punjab 411),** is that interest is a natural

corollary of any delayed payment; ‘Interest’ is the return or compensation for the use or retention by one person of a sum of money belonging to or owned to another; and it is a charge for the use or forbearance of money; and interest is intended to compensate the party who was entitled for payment of amount due to it.

Even in the absence of a provision in the PPA with regards payment of delayed payment charge, interest can be claimed on principles of restitution and equity. In **PTC India Limited v. Gujarat Electricity Regulatory Commission: (Judgement in Appeal Nos. 47 and 62 of 2013 dated 30.06.2016),** this Tribunal, relying on **South Eastern Coalfields Ltd. vs. State of M.P. (2003) 8 SCC 648, Sovintorg (India) Ltd. vs. State Bank of India, (1999) 6 SCC 406**, **Mahanadi Multipurpose Industries vs. State of Orissa &Anr. AIR 2002 Orissa, 150,** and **Chitty on Contracts, 1999 Edn., Vol.II, Para 38-248 at p. 712,** observed that interest was payable in equity even in the absence of any agreement or custom to that effect, though subject to a contrary agreement; interest in equity is payable on the market rate even though the deed contains no mention of interest; a person deprived of the use of money, to which he is legitimately entitled, has a right to be compensated for the deprivation be it as interest, compensation or damages; and, in the absence of a prohibition either in law or in the contract, there was no reason not to compensate by payment of interest; Section 34 CPC, which is based upon justice, equity and good conscience, authorizes grant of appropriate interest under the circumstances of each case; interest may also be awarded in lieu of compensation or damages or on equitable grounds; and interest can be awarded on the principle that the defendants are bound to disgorge the benefit they might have derived out of the amount advanced by the plaintiffs.

The law declared by this Tribunal, in **Lanco Amarkantak Power Limited v. Haryana Electricity Regulatory Commission and others:(Order in Appeal No. 308 of 2017 dated 22.05.2019),** is that money not paid in time, but paid subsequently at a much later stage after lapse of several years, loses its real money value to a great extent and is effectively less money paid; therefore, for equity and restitution, payments made at a later stage, of the amount due in the past, must be compensated by way of appropriate rate of interest so as to compensate for the loss of money value, and to safeguard the interest of the receiving party.

The law declared by this Tribunal, in **Lanco Amarkantak Power Limited v. Haryana Electricity Regulatory Commission: (Order in Appeal No. 48 of 2019 dated 13.01.2022),** is that payments made after a long gap cannot be treated as the recovery of full or actual charges in as much as real value has eroded over the period; and denial of interest, in such cases, would be unjust and unfair.

The principles, culled out from the afore-said judgements, are summarised thus: (i) interest is a natural corollary of any delayed payment, it is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another, and it is a charge for the use or forbearance of money; (ii) interest is payable in equity even in the absence of any agreement or custom to that effect, though subject to a contrary agreement; a person, deprived of the use of money to which he is legitimately entitled, has a right to be compensated for the deprivation; and Section 34 CPC, which is based upon justice, equity and good conscience, authorizes grant of appropriate interest in the facts and circumstances of each case; and (iii) money not paid in time, but paid subsequently at a much later stage after lapse of several years, loses its real money value to a great extent, and is effectively less money paid; therefore, for equity and restitution, payments

made at a later stage, of the amount due in the past, must be compensated by way of appropriate rate of interest so as to compensate for the loss of money value, and to safeguard the interest of the receiving party.

In the present case, the Appellants have been deprived of the money which they should have received from the Respondent GUVNL, soon after the Commission declared, in its earlier orders, that the appellant was entitled to change in law compensation. By the time these amounts were paid by the Respondent-GUVNL, the present value of the money, the appellant was hitherto forced to part with towards payment on account of change in law, would be much lower. The only manner in which they can be suitably restituted, for the loss caused to them in this regard, is only by way of payment of appropriate interest.

(iii) JUDGEMENT IN NTPC vs MSEB:

As reliance is placed on behalf of the 2nd Respondent-GUVNL on **NTPC vs. MSEB (2011 15 SCC Page 580,** it is necessary for us to refer thereto, albeit in brief, bearing in mind that an order of a court must be construed having regard to the text and context in which the same was passed; for the said purpose, the judgment of the Court is required to be read in its entirety; a judgment cannot be read as a statute; construction of a judgment should be made in the light of the factual matrix involved therein; what is more important is to see the issues involved therein and the context wherein the observations were made **(Goan Real Estate & Construction Ltd. v. Union of India, (2010) 5 SCC 388);** a judgment is a precedent for the issue of law, which is raised and decided; discussions in a judgment cannot be read out of context, and interpreted as the dictum of the Court **(Vijayan v. State of Kerala, (2022) 17 SCC 177);** words and/or phrases in a judgment cannot be read as “Euclid's Theorems” **(State of Bihar v. Meera Tiwary, (2020) 17 SCC 305);** and observation made in a judgment should

not be read in isolation and out of context. **(Goan Real Estate & Construction Ltd. v. Union of India, (2010) 5 SCC 388).**

In **NTPC Ltd. v. M.P. SEB, (2011) 15 SCC 580,** the CERC had determined the final tariff at a rate lesser than the pre-existing tariff, as a result of which NTPC was found to have collected excess amounts during this intervening period, and the Electricity Boards became entitled to get the refund/adjustment of these differential amounts. The CERC had, however, disallowed the claim of the Electricity Boards for payment of interest on the differential amounts between (*i*) the tariff finally determined and (*ii*) the pre-existing tariff which was continued until the final determination of the tariff. Thereafter NTPC duly and immediately adjusted the excess amounts in favour of the purchaser Electricity Boards in their subsequent bills.

It is in this context that the Supreme Court, in **NTPC Ltd. v. M.P.SEB, (2011) 15 SCC 580,** observed that there was no specific provision earlier for claiming interest for the intervening period; the provision for charging interest was a substantive provision which had to be specifically provided, and would become operative when provided; interest is payable in equity only if there are circumstances attracting the equitable jurisdiction or under the Interest Act; the power to make restitution, which is inherent in every Court, will apply even where the case does not strictly fall under Section 144 CPC; ***Kavita Trehan*****: (1994) 5 SCC 380,** where the principle of restitution was applied, was a case where termination of the contract was held to be wrong.

The Supreme Court further observed that, in the case before it, the Appellate Tribunal had specifically observed that this was not a case where the beneficiaries were made to pay the excess tariff at the instance of NTPC through force, coercion or threat; consequently, the principles of equity, justice and fair play could not be brought in to award interest to the Electricity Boards; NTPC was not responsible for the delay in determination of tariff;

the tariff charged by NTPC, in the interregnum, was in accordance with the rates permitted under the notifications issued by the CERC; NTPC had not held on to the excess amount in an unjust way to call it unjust enrichment or to make a case in equity, so as to justify the claim of the Electricity Boards for interest; and, in view thereof, interest could not be claimed either on the basis of equity or on the basis of restitution.

In the present case the principles of restitution are contained in Article 13.2 of the PPA, and the only manner in which the appellant can be restored to the position they were in, but for the change in law, is by compensating them with interest on the belated payment of change in law compensation by the 2nd Respondent-GUVNL. Consequently, for the amount paid by them, as a result of change in law, during the period April, 2019 to March, 2021, the appellant is entitled to be paid interest, from the date they paid the amounts for this period till they were compensated by the 2nd Respondent-GUVNL for such amounts.

X. DOES THE CLAIM FOR CHANGE IN LAW ARISE FROM THE REVIEW ORDER?

A. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENT:

Sri Anand K. Ganeshan, Learned Counsel for the respondent-GUVNL, would submit that the appellant did not raise any invoice even after the order of the GERC dated 27.04.2020; GERC, by its Order in Petition No. 1807 of 2019 dated 27.04.2020, had approved the 3rd Supplemental Agreement dated 01.03.2019 with some modification; in view of the above, the effective date of 15.10.2018 was amended; GERC, in the said Order dated 27.04.2020, also directed that the change in law claims as approved in the

main order dated 23.12.2019 would be applicable till 19.08.2019 or till when the coal is procured directly from Indonesia whichever was later; the above order dated 27.04.2020 was challenged by the Appellant in Appeal No. 108 of 2020 before this Tribunal, but there was no challenge to the issue of change in law or non-grant of interest; the appeal was also subsequently withdrawn by the appellant on 25.06.2021; the effect of the Order dated 27.04.2020 on change in law covers the entire period from April, 2019 to March 2021; the direct import from Indonesia is not even claimed by the appellant to be made before March, 2021; when the principal claim for the period in issue was allowed by the order dated 27.04.2020, and no interest was allowed in the said order, the claim for interest on the said principal amounts cannot be made in the present Appeal; in other words, when the Change in Law claims were allowed by the Order dated 27.04.2020, the claim for interest on such change in law claims cannot be made in an appeal against a different order; further, even after the Order dated 27.04.2020 allowing the change in law claims for the period after 15.10.2018, the Appellant, for reasons best known to itself, did not raise the change in law invoices; the proceedings leading to the order dated 27.04.2020 was for approval of the Supplementary PPA entered into by the parties; it was not a lis inter-se, but the common interest of both parties was for approval; the fact that GUVNL was the Petitioner and the Appellant was the respondent is not relevant in these proceedings, as the Petition could have been filed by either or both the parties; the claim for carrying cost is only for the pendent lite period, till the decision of the GERC, and entitling the appellant to raise an invoice for change in law; once the invoice is raised, the interest for the posterior period is covered by the Late Payment Surcharge provision under the PPA; and, in this regard, the following provisions are relevant:

Article 11.3	Payment of Monthly Bill by Due Date	@Pg. 181
Article 11.3.5	Late payment surcharge for delay in payment of a Monthly Bill beyond due date	@Pg.182
Article 11.8.1	Payment of Supplementary Bill including Change in Law Bill	@Pg.191
Article 11.8.3	Delay in Payment of Supplementary Bill to carrying Late Payment Surcharge	@Pg.191
Article 13.2 (b)	Compensation for change in law to be determined and effective from such date as decided by the GERC	@Pg.200
Article 13.4.2	Tariff Adjustment on account of Change in Law to be paid through Supplementary Bills as mentioned in Article 11.8	@Pg.201

Sri Anand K. Ganeshan, Learned Counsel for the respondent-GUVNL, would further submit that the Review Order only fixes the last date, till when the Change in Law claims would be allowed, namely till 20.11.2021; it is not that the Review Order allows the Change in Law claims for the first time for the period from 15.10.2018 till 20.11.2021; the issue of Carrying Cost or restitution will arise if there is a default in the payment of the principal amount by any of the parties; in the present case, there is no default in the payment of change in law claims, and GUVNL has made due and timely payments of all the invoices; and claim for carrying cost is an after-thought.

B. ANALYSIS:

The 2nd Respondent-GUVNL may not be justified in its submission that the Appellant ought to have claimed interest on change in law compensation in Petition No. 1807 of 2019 which culminated in an order being passed by the GERC on 27.04.2020 approving the 3rd Supplementary PPA dated 01.03.2019 with certain modifications. While it is true that the GERC had, in its order in Petition No. 1807 of 2019 dated 27.04.2020, also directed that the change in law claim in the main order dated 23.12.2019 would be applicable till 19.08.2019 or till coal was procured directly from Indonesia whichever was later, it is only in the review order. in Review Petition No. 1866 of 2020 dated 18.03.2023, that the GERC specifically considered the Appellant's claim for change in law compensation for the period after 14.10.2015 (upto which alone was change in law compensation granted by the order of the GERCC in Petition No. 1807 of 2019), and directed that change in law would be applicable from 15.10.2018 till 19.11.2021. It matters little, therefore, that the GERC did not grant interest in its order in Petition No. 1807 of 2019 dated 27.04.2020 since the said Petition was filed by GUVNL seeking approval of the Supplementary PPA dated 01.03.2019, and was not a petition filed by the Appellant seeking change in law compensation. The fact remains that such a prayer sought by the Appellant in its Review Petition No. 1866 of 2020 found favour with the GERC which, by its order dated 18.03.2023, granted them change in law compensation till 19.11.2021.

While granting the Appellant the benefit of change in law compensation in Review Petition No. 1866 of 2020 dated 18.03.2023, the GERC curiously rejected their prayer for interest thereon. In its order in Review Petition No. 1866 of 2020 dated 18.03.2023, the GERC noted the prayers sought by the Appellant in Review No. 1866 of 2020, and observed that payment of interest had not been sought in the Review Petition, but was raised subsequently during the hearing of the Review Petition; payment of interest as raised by the Appellant/ Petitioner could not be allowed at this stage, since the scope

of the Review Petition was very limited, and could only be on the errors apparent on the face of the record or any new facts or evidence that was available, but was not within the knowledge of the parties at the time of passing of the original order; they had ascertained that the interest issue was raised subsequently; and, hence, could not be allowed in the Review Petition.

It is not as if the Appellant's Review Petition No. 1866 of 2020, wherein they had sought change in law compensation for the period between 15.10.2018 till 20.11.2021, had been rejected by the GERC. As noted hereinabove, in its order in Petition No. 1866 of 2020 dated 18.03.2023, the GERC had granted the Appellant change in law compensation for the period subsequent to its earlier order ie. for the period 15.10.2018 till 19.11.2021. It does not stand to reason that the GERC, having granted the Appellant the benefit of change in law compensation in its review order in Petition No. 1866 of 2020 dated 18.03.2023, should deny the Appellant interest claimed by them for a part of this period (i.e. April, 2019 to March, 2021), on a hyper technicality that the Appellant had not sought such a prayer in the Review Petition, but had thereafter, in the Additional Affidavit dated 17.09.2021, sought the prayer for grant of interest for the period April, 2019 to March, 2021, and in holding that such prayer cannot be granted in a Review Petition, since the scope of enquiry therein related only to errors apparent on the face of the record.

It defies reason that, having granted the Appellant relief of change in law compensation for the period 15.10.2018 till 19.11.2021, the GERC should, in the very same order in Petition No. 1866 of 2020 dated 18.03.2023, deny the Appellant interest on the ground that it is beyond the scope of the Review Petition. It is only because the GERC had granted the Appellant the relief of change in law compensation in the Review Petition

that it was required to consider the Appellant's claim for interest which, as noted herein above, arises strictly in terms of the contractual provisions in Article 13.2(b) of the PPA. The additional affidavit filed by the appellant on 17.09.2021 was in Review Petition No. 1866 of 2020, and during its pendency, for the said Review Petition was disposed of, more than a year and half thereafter, by order dated 18.03.2023. While the appellant may not have sought the relief of interest when they filed Review Petition No. 1866 of 2020 on 07.02.2020, it is evident from the contents of the additional affidavit, as noted hereinabove, that they had sought the relief of payment of interest for the period April, 2019 till March, 2021 therein. It is not discernable from the review order dated 18.03.2023, as to why the relief of interest sought for in the additional affidavit dated 17.09.2021, filed during the pendency of Review Petition No.1866 of 2020, could not be granted when the relief of change in law compensation was granted by the very same order.

XI. SHOULD CARRYING COST BE CALCULATED ON COMPOUND INTEREST AND BE PAID FROM THE DATE OF OCCURRENCE OF THE CHANGE IN LAW EVENT?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri Amit Kapur, Learned Counsell for the Appellant, would submit that, in terms of the above provision, the total amount of carrying cost, on change in law compensation payable by the respondent-GUVNL, as on 31.12.2024 is computed and set out in Annexure – 2 of the Appellant's Written Submissions dated 07.01.2025; the Supreme Court has held that carrying cost is to be calculated on the same basis as LPS in the PPA in order to reflect the time value of money, while fully restituting a party adversely affected by the change in law; compound interest on carrying cost must be calculated from the date of occurrence of the change in law event; in ***Uttar***

Haryana Bijli Vitran Nigam Ltd. & Anr. v. Adani Power (Mundra) Ltd. & Anr., (2023) 2 SCC 624, the Supreme Court held that the "*Grant of compound interest on carrying cost and that too from the date of occurrence of the change in law event is based on sound logic*"; the judgment in ***GMR Warora Energy Limited v. CERC & Ors.**,* 2023 10 SCC 401 ("***GMR Warora***") reiterated the same principle that: "grant of compound interest on carrying cost and that too from the date of the occurrence of the "change in law" event is based on sound logic" and held that "the **argument that there is no provision in the PPAs for payment of compound interest from the date when the "change in law" event had occurred, has been specifically rejected by this Court**; (Refer: Judgement of this Tribunal in **Adani Power Rajasthan Ltd. v. RERC & Ors.**, 2024 SCC Online APTEL 23]; GUVNL has asserted that change in law compensation has to be accompanied by carrying cost at the rates prescribed for LPS under the PPA, as seen from Para 8.6 of the Impugned Order; GUVNL's letters dated 13.07.2018and 08.05.2023 establish that GUVNL itself had levied LPS i.e., @ SBAR + 2% on compounding basis with monthly rests (in terms of Article 11.3.5 of the PPA) along with penalties for declaring availability below 75% during periods when the Plant was under shut down; furthermore the Appellant, by letters dated 23.03.2023 and 10.04.2023 requested GUVNL (without prejudice) to set-off the total change in law compensation amount of Rs. 151 Crores payable to them against the outstanding penalty from July 2017 onwards (i.e., date of CIL impact), and refrain from deducting any further amounts towards penalty; the respondent-GUVNL instead, by its letter dated 08.05.2023, not only refused to adjust the change in law compensation against the penalty amounts but continued to recover the balance penalty for declaring lower availability and imposing LPS; evidently, the respondent-GUVNL has all along levied and recovered interest on compounding basis; and, under these circumstances, it is not open to the

respondent-GUVNL to argue that it is not required to fully compensate the Appellant in accordance with law by paying compound interest.

Sri Amit Kapur, Learned Counsell for the Appellant, would further submit that the appellant generated and supplied power to the respondent-GUVNL during (i) 01.07.2017 to 23.01.2018 (206 days); and (ii) 21.04.2019 to 11.03.2021 (the Power Plant was under shut down between 23.01.2018 and 21.04.2019) (690 days); CIL compensation (only principal amount) for the said periods was paid by GUVNL on 20.02.2020 (after GERC's Impugned Original Order dated 23.12.2019 – for period of 26.07.2017 to 31.01.2018); and 12.05.2023 (after GERC's Review Order dated 18.03.2023 – for period of 21.04.2019 to 11.03.2021) respectively; since this compensation was accruing from 01.07.2017, carrying cost would accrue daily at LPS rates from the due date of payment till the date of actual payment; the respondent-GUVNL erroneously argued that the above judgments (i.e. **UHBNVL** and **GMR Warora**) are contrary to **MSEDCL v. MERC & Ors** *:* (2022) 4 SCC 657], and hence cannot be relied upon to grant carrying cost on compound interest basis at LPS rates; the **UHBVNL** judgment is of a larger bench; further these judgments are also subsequent to that of **MSEDCL***;* and this Tribunal, in ***Adani Power Rajasthan Ltd. v. RERC & Ors.***, 2024 SCC Online APTEL 23, has followed **UHBVNL and GMR Warora** to grant carrying cost on compounding basis at LPS rate from the date of occurrence of the change in law event, while specifically rejecting submissions similar to GUVNL's in the said Judgment.

B. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENT:

On the contention of the appellant, that Late Payment Surcharge should be paid for the claim for carrying cost on the ground of restitution, Sri Anand K. Ganeshan, Learned Counsel for the respondent-GUVNL, would

submit that the said contention is misconceived; Late Payment Surcharge is a penal provision under the PPA; the carrying cost for change in law claims is on the principle of restitution in terms of the PPA; both are not the same; reliance placed by the appellant, on **UHBVNL v Adani Power, (2023) 2 SCC 624,** does not support their case; the Supreme Court only held that the principle of restitution also permits the grant of compound interest; in that case, the generator Adani Power had specifically pleaded that it was paying compound interest to the bank and that, by restitution, the generator should also get compound interest; this was allowed; in fact, the Supreme Court specifically held that reliance on Article 11.3.4 and 11.8.3 (*Late Payment Surcharge)* was misplaced; carrying cost was allowed only on restitution as per Article 13.2; and, in **MSEDCL v. MERC, (2022) 4 SCC 657**, (which applies on all fours to the present case), the Supreme Court has specifically held that LPS is only payable when payment against monthly bills is delayed and not otherwise; the object of LPS is to enforce and/or encourage timely payment of charges by the procurer; LPS dissuades the procurer from delaying payment of charges; the rate of LPS has no bearing or impact on tariff; changes in the basis of the rates of LPS do not affect the rate at which power was agreed to be sold and purchased under the power purchase agreements; the principle of restitution under the change in law provisions of the power purchase agreements are attracted in respect of tariff; LPS cannot be equated with carrying cost or actual cost incurred for the supply of power; LPS under the power purchase agreements do not correspond to the actual interest paid by the power generating companies for funds raised by them; and payment of late payment surcharge ("LPS") is penalty suffered by the procurer on account of default in timely payment.

Sri Anand K. Ganeshan, Learned Counsel for the respondent-GUVNL, would further submit that the Supreme Court, in ***GMR Warora v. CERC***, (2023) 10 SCC 401, relied on the above decisions and only held that

compound interest is permissible and is based on the sound logic of restitution, and carrying cost at compounding rate was granted on restitution only, and not by applying the LPS provision; in the present case, there is no pleading or evidence to justify the claim for the rate or otherwise for compound interest; there is no material on record; restitution cannot be a means for profit; the principle of restitution itself requires that a party cannot profit or that the other party is not put to undue loss; as held in **MSEDCL**, LPS is a penal measure and not for restitution; when the generator seeks to make a claim for interest for the first time in an appeal, it is for the generator, at the least, in appeal to plead and prove the claim for restitution; there is no such claim; restitution cannot be a means for profiteering by the generator; in ***Citi Bank vs Hiten P. Dalal (2016) 1 SCC 411***, the Supreme Court held that the courts should adopt a realistic and verifiable approach instead of resorting to hypothetical and presumptive values and should keep under consideration not only the loss suffered by the party entitled to restitution but also the gain, and that no unmerited injustice should be caused to any of the parties; in ***Suneja Towers v. Anita Merchant*** (2023) 9 SCC 194, it was held that, for the award of compound interest, various factors shall be taken into account, including uncertainties of the market and several other imponderables; this is in relation to the Consumer Protection Act, which is in fact a beneficial legislation for consumers; and, in applying restitution, there cannot be automatic application of compound interest by applying the Late Payment Surcharge provision.

C. JUDGEMENTS CITED UNDER THIS HEAD:

1. In **Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power (Mundra) Ltd., (2023) 2 SCC 624,** Respondent 1 Adani Power had approached this Appellate Tribunal with a copy of the order passed by the Central Commission allowing the relief of change in law for installation of the

FGD unit, but disallowing the relief of carrying cost. They prayed that carrying cost ought to have been allowed in its favour from the date of change in law event pertaining to installation of FGD unit along with other change in law events. By its judgment dated 12-8-2021 [**Adani Power (Mundra) Ltd. v. CERC, 2021 SCC OnLine APTEL 67]** , this Tribunal not only held that Respondent 1 Adani Power was entitled for carrying cost in respect of compensation for change in law events towards FGD unit installation, as approved by the Central Commission, reckoned from the date of change in law occurrence, it had further held Respondent 1 Adani Power to be entitled for compound interest on carrying cost. Aggrieved thereby, the appellants had approached the Supreme Court.

The contention, urged on behalf of the appellants, was that they were not liable to pay compound interest to Respondent 1 Adani Power as carrying cost interest; only simple interest was payable by the appellants to Respondent 1 Adani Power, for the reason that there was no wrongdoing/default/unjust enrichment that could be attributable to the appellants for the delay caused in determination of the amount by the Central Commission/Appellate Tribunal; there was no stipulation in the PPA for payment of compound interest for the period from the date when change in law event had occurred till the date of adjudication of the claim by the Central Commission and raising of the supplementary bill by Respondent 1 Adani Power in terms of Article 11.8.1(*iii*) of the PPA; and there was no statutory provision in the Electricity Act, 2003 or the relevant rules/regulations framed therein, as applicable at the relevant time, which permitted payment of compound interest for carrying cost.

Alluding to Reserve Bank of India Circulars dated 14-8-2003 and 3-3-2016 that provide for a borrower to pay interest to the lender on compound interest basis, it was submitted on behalf of Respondent 1 Adani Power, that

having borrowed money from banks to install the FGD unit and having paid compound interest on the borrowed sum, it was only seeking restitution for the interest incurred by it and paid to the banks at the same rate, and this was not a case of unjust enrichment; since the litigation in the instant case had commenced in the year 2014 and it took seven years to conclude the same, Respondent 1 Adani Power was entitled to carrying cost and interest thereon on compounding basis from the date of change in law event, strictly in terms of the PPA and the law on the issue that had already been expounded by the Supreme Court.

It is in this context that the Supreme Court observed that it was clear that the restitutionary principles encapsulated in Article 13.2 would take effect for computing the impact of change in law; there was no reason to interfere with the impugned judgment [***Adani Power (Mundra) Ltd.* v. *CERC,* 2021 SCC OnLine APTEL 67] ,** wherein it had been held by the Appellate Tribunal that Respondent 1 Adani Power had started claiming change in law event compensation in respect of installation of FGD unit along with carrying cost, right from the year 2012, and that it had approached several fora to get this claim settled; Respondent 1 Adani Power finally succeeded in getting compensation towards FGD unit only on 28-3-2018, but the carrying cost claim was denied; the relief relating to carrying cost was granted to Respondent 1 Adani Power by the Appellate Tribunal vide order dated 13-4-2018 [***Adani Power Ltd.* v. *CERC,* 2018 SCC OnLine APTEL 5]** which was duly tested by this Court and upheld on 25-2-2019 [***Uttar Haryana Bijli Vitran Nigam Ltd.* v. *Adani Power Ltd.*, (2019) 5 SCC 325 : (2019) 2 SCC (Civ) 657]**; once carrying cost has been granted in favour of Respondent 1 Adani Power, it cannot be urged by the appellants that interest on carrying cost should be calculated on simple interest basis instead of compound interest basis; grant of compound interest on carrying cost, and that too from the date of occurrence of the change in law event, was based

on sound logic; and the idea behind granting interest on carrying cost was aimed at restituting a party that was adversely affected by a change in law event and restore it to its original economic position as if such a change in law event had not taken place.

The Supreme Court further held that, in the instant case, Respondent 1 Adani Power had to incur expenses to purchase the FGD unit and install it in view of the terms and conditions of the environmental clearance given by the Ministry of Environment and Forests, Union of India, in the year 2010; for this, it had to arrange finances by borrowing from banks; the interest rate framework followed by scheduled commercial banks and regulated by Reserve Bank of India mandated that interest shall be charged on all advances at monthly rests; in this view of the matter, Respondent 1 Adani Power was justified in stating that if the banks had charged it interest on monthly rest basis for giving loans to purchase the FGD unit, any restitution would be incomplete, if it was not fully compensated for the interest paid by it to the banks on compounding basis; interest on carrying cost was nothing but time value for money and the only manner in which a party could be afforded the benefit of restitution in every which way; and, in the facts of the instant case, the Appellate Tribunal was justified in allowing interest on carrying cost in favour of Respondent 1 Adani Power for the period between the year 2014, when the FGD unit was installed, till the year 2021.

2. In **GMR Warora Energy Ltd. vs. CERC : (2023) 10 SCC 401,** the Supreme court observed that the argument that there was no provision in the PPAs, for payment of compound interest from the date when the "change in law" event had occurred, had been specifically rejected by the Supreme Court; in view of this consistent position of law and application of restitutionary principles and privity of contractual obligations between the

parties as contained in the PPAs, they did not find that the view taken by APTEL, with regard to carrying cost, warranted interference.

3. In **Adani Power Rajasthan Ltd. vs. RERC & Others. [(2024) SCC OnLine Aptel 23],** this Tribunal observed that, in **GMR Warora Energy Limited,** the Supreme Court had relied on its earlier judgment in **Uttar Haryana Bijli Vitran Nigam Limited v. Adani Power Limited, (2023) 2 SCC 624** to hold that grant of compound interest on carrying cost, and that too from the date of occurrence of the change in law event, was based on sound logic; the idea behind granting interest on carrying cost was aimed at restituting a party that was affected by a change in law event, and to restore it to its original economic position as if such a change in law event had not taken place; the contention that there was no provision in the PPA, for payment of compound interest from the date when the change in law event occurred, necessitated rejection; the entire concept of restitutionary principles, engrained in the relevant Article of the PPA, was that a party should be compensated for the time value of money; and this principle would be required to be invoked for grant of interest on carrying cost on account of change in law event; and, in the light of the law declared by the Supreme Court in **GMR Warora Energy Limited,** the party which has suffered an economic disadvantage, as a result of the change in law event, is not only entitled to be restored to its original economic position it was in but for such change in law, but would also be entitled for compound interest on carrying cost from the date on which the change in law event occurred.

Paraphrasing the Judgment of the Supreme Court in **GMR Warora Energy Limited,** this Tribunal further held that Article 10.2, of the PPA in the present case, was a complete restitutionary principle which compensated the party affected by such change in law and which must restore, through monthly tariff payment, the affected party to the same economic position they

would have been if such change in law had not occurred; the legal fiction created by Article 10.2 of the subject PPA would require the appellant to be put in the same economic position as if such change in law had not occurred i.e. the appellant should be given the benefit of restitution as understood in Civil Law; in short, the requirement of Article 10.2.1, which was the application of the restitutionary principle, could only mean that the consequence of the change in law would relate back to the date on which the law was subjected to change as a result of which the party concerned would have suffered an economic disadvantage, requiring them to be restored to the same position they were in as on that date; this, in turn, would require them to be compensated for the loss, suffered on that account, from the date the change in law occurred, and not after a supplementary bill is raised; the Supreme Court, in **GMR Warora Energy Limited,** had affirmed the judgment of this Tribunal in **Adani Power Maharashtra Limited v. MERC** (Order in Appeal No. 40 of 2022 dated 22.03.2022), wherein the rate prescribed for LPS in the relevant Article of the PPA (i.e., SBI PLR plus 2%) was directed to be considered for recovery of carrying cost; and it was held that, unless the rate of interest applicable for LPS is granted, the Appellant cannot be restored to the same economic position it was in prior to the occurrence of the change in law event; and, in the light of the judgment of the Supreme Court in *GMR Warora Energy Limited*, affirming the Judgment of this Tribunal in *Adani Power Maharashtra Limited* v. *MERC* (Appeal No. 40 of 2022 dated 22.03.2022), the Appellant was entitled for carrying cost at LPS rates.

4. In **MSEDCL vs. MERC : (2022) 4 SCC 657,** the Supreme Court observed that, as argued by the respondent power generating companies, LPS is only payable when payment against monthly bills is delayed and not otherwise; the object of LPS was to enforce and/or encourage timely payment of charges by the procurer i.e. the appellant; in other words, LPS

dissuaded the procurer from delaying payment of charges; the rate of LPS had no bearing or impact on tariff; changes on the basis of the rates of LPS did not affect the rate at which power was agreed to be sold and purchased under the power purchase agreements; the principle of restitution under the change in law provisions of the power purchase agreements were attracted in respect of tariff; LPS cannot be equated with carrying cost or actual cost incurred for the supply of power; the appellant had a contractual obligation to make timely payment of the invoices raised by the power generating companies, subject, of course, to scrutiny and verification of the same; if the funding cost was so much lesser than the rate of LPS, as contended by the appellant, the appellant could have raised funds at a lower rate of interest, made timely payment of the invoices raised by the power generating companies, and avoided LPS; the argument that the power generating companies were availing loans at a lesser rate of interest, but charging LPS on the basis of a higher rate of interest, leading to unjust enrichment, was untenable in law; LPS under the power purchase agreements do not correspond to the actual interest paid by the power generating companies for funds raised by them; the payment of late payment surcharge ("LPS") is penalty suffered by the procurer, ie the appellant, on account of default in timely payment.

5. In **CITI Bank vs. Hiten P. Dalal : (2016) 1 SCC 411,** the Supreme Court held that, in the ultimate analysis, the law on restitution under Section 144 CPC was quite well settled; it vests expansive power in the court but such power has to be exercised to ensure equity, fairness and justice for both the parties; the court should adopt a realistic and verifiable approach instead of resorting to hypothetical and presumptive value; in the context of restitution, the court should keep under consideration not only the loss suffered by the party entitled to restitution but also the gain, if any, made by

other party who is obliged to make restitution; and no unmerited injustice should be caused to any of the parties.

6. In **Suneja Towers Pvt. Ltd. vs. Anita Merchant : [(2023) 9 SCC 194],** the Supreme Court referred with approval to **Clariant International Ltd. v. SEBI, (2004) 8 SCC 524]** , wherein the Supreme Court had held that, in the absence of any agreement or statutory provision or mercantile usage, interest payable could only be at the market rate; and the interest could be payable upon establishing totality of circumstances justifying exercise of such equitable jurisdiction. The Supreme Court further held that the observations in **Alok Shanker Pandey v. Union of India, (2007) 3 SCC 545** made it clear that there could be no hard-and-fast rule as to how much interest should be granted, and it would depend on the facts and circumstances of each case; however, interest is not considered to be a penalty or punishment but is considered to be a normal accretion on capital; for award of compound interest, relevant factors shall have to be taken into account which would include uncertainties of market and several other imponderables; awarding of compound interest without examining other factors would only lead to unjust enrichment of the respondent in the name of disgorgement of benefits purportedly derived by the appellants.

D. ANALYSIS:

It is no doubt true that, since GERC had granted the Appellant the benefit of change in law from the date of occurrence of change in law event, by its order in Petition No. 1680 of 2017 dated 23.12.2019, the Appellant could have, in appropriate legal proceedings, sought payment of interest, for belated payment of change in law compensation, from that date. The fact however remains that the Appellant had, in the Additional Affidavit dated 17.09.2021, explicitly sought payment of interest only for the period from April, 2019 to March, 2021. As shall be elaborated later in this order, it is

clear there-from that the Appellant has waived its claim for interest for the period anterior to April, 2019. Having waived its claim for interest for the period prior to April 2019, the Appellant cannot be permitted to turn around and claim interest even for the earlier period in the Appeal preferred against the order of the GERC.

With regards the Appellant's claim for compound interest, it is necessary to note that the Appellant had, in the Additional Affidavit dated 17.09.2021 filed by them before the GERC, sought payment of appropriate interest from the GERC. The Appellant's entitlement for interest, in view of Article 13.2(b) of the PPA, is as a measure of restitution, and in order to put them back in the same position they were in, but for the change in law event. Article 13.2 of the PPA does not prescribe the manner in which a party should be restituted or the nature of interest (whether simple or compound) or the rate of interest they are entitled to as a measure of restitution. The interest they are entitled to should, therefore, be such as to put them back in the same position they would have been in, but for the occurrence of the change in law event.

Consequently, the Appellant would be entitled not only to the principal amounts which they incurred as a result of the change in law, but also for interest thereon till the date on which they were compensated for the change in law event, on payment of the principal sum. What Article 13.2 requires is for the Appellant to be compensated for the loss and not to permit the Appellant to unduly enrich itself in the process. The obligation of the Court/ Tribunal is to ensure equity, fairness and justice for both the parties. It should not only adopt a realistic and verifiable approach, but also take into consideration the actual loss suffered by the party entitled to restitution, while at the same time ensuring that the said party is not unduly enriched in the process. **[Citybank vs. Hiten P. Dalal (2016) 1 SCC 411]**.

In **Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power (Mundra) Ltd., (2023) 2 SCC 624,** the Supreme Court, alluding to Reserve Bank of India Circulars dated 14-8-2003 and 3-3-2016 that provided for a borrower to pay interest to the lender on compound interest basis, noted the submission urged on behalf of Respondent 1 Adani Power, that, having borrowed money from banks to install the FGD unit and having paid compound interest on the borrowed sum, it was only seeking restitution for the interest incurred by it and paid to the banks at the same rate; and this was not a case of unjust enrichment.

The Supreme Court held that the restitutionary principles encapsulated in Article 13.2 would take effect for computing the impact of change in law; in the instant case, Respondent 1 Adani Power had to incur expenses to purchase the FGD unit and install it in view of the terms and conditions of the environment clearance given by the Ministry of Environment and Forests; it had to arrange finances by borrowing from banks; the interest rate framework followed by scheduled commercial banks and regulated by Reserve Bank of India mandated that interest shall be charged on all advances at monthly rests; and, in this view of the matter, Respondent 1 Adani Power was justified in stating that, if the banks had charged it interest on monthly rest basis for giving loans to purchase the FGD unit, any restitution would be incomplete, if it was not fully compensated for the interest paid by it to the banks on compounding basis.

Following its earlier judgement in **Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power (Mundra) Ltd., (2023) 2 SCC 624**, the Supreme Court, in **GMR Warora Ltd. vs. CERC : (2023) 10 SCC 401**, held that grant of compound interest as carrying cost. on occurence of the change in law event, is based on sound logic; the idea behind granting interest on carrying cost is aimed at restituting a party that is affected by a change in law event, and to

restore it to its original economic position as if such a change in law event had not taken place; in order to restore the party, which has suffered an economic disadvantage as a result of the change in law event, to its original economic position it was in but for such change in law, it is permissible to grant them compound interest on carrying cost; application of restitutionary principles and privity of contractual obligations between the parties as contained in the PPA, may, in view of the consistent position of law declared by the Supreme Court, justify payment of compound interest even if there is no specific provision in the PPA for payment of compound interest.

In **GMR Warora Ltd. vs. CERC : (2023) 10 SCC 401,** the Supreme Court affirmed the judgment of this Tribunal, in **Adani Power Maharashtra Limited v. MERC** (Order in Appeal No. 40 of 2022 dated 22.03.2022), wherein the rate prescribed for LPS in the relevant Article of the PPA (i.e., SBI PLR plus 2%) was directed to be considered for recovery of carrying cost; and it was held that, unless the rate of interest applicable for LPS is granted, the Appellant cannot be restored to the same economic position it was in prior to the occurrence of the change in law event.

In **MSEDCL vs. MERC : (2022) 4 SCC 657,** the Supreme Court observed that Late payment surcharge is only payable when payment against monthly bills is delayed, and not otherwise; the object of LPS was to enforce and/or encourage timely payment of charges by the procurer; in other words, LPS dissuaded the procurer from delaying payment of charges; and LPS cannot be equated with carrying cost or actual cost incurred for the supply of power.

The law on restitution vests expansive power in the court but such power has to be exercised to ensure equity, fairness and justice for both the parties. The court should adopt a realistic and verifiable approach instead of resorting to hypothetical and presumptive value. In the context of restitution,

the court should keep under consideration not only the loss suffered by the party entitled to restitution but also the gain, if any, made by other party who is obliged to make restitution. No unmerited injustice should be caused to any of the parties. (**CITI Bank vs. Hiten P. Dalal : (2016) 1 SCC 411).**

In the absence of an express stipulation in this regard in Article 13.2 of the PPA, there can be no hard-and-fast rule as to how much interest should be granted as a measure of restitution, and it would depend on the facts and circumstances of each case. Awarding of compound interest without examining the relevant factors may, in certain cases, lead to unjust enrichment by the party seeking restitution in the name of disgorgement of benefits purportedly derived by the other party. (**Suneja Towers Pvt. Ltd. vs. Anita Merchant : (2023) 9 SCC 194; Clariant International Ltd. v. SEBI, (2004) 8 SCC 524;** and **Alok Shanker Pandey v. Union of India, (2007) 3 SCC 545**).

While the Appellant may be entitled to claim compound interest as a measure of restitution in case they had paid compound interest while borrowing money to make payment for the change in law event, as in **Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power (Mundra) Ltd., (2023) 2 SCC 624**, they may not be entitled, under the guise of restitution, to unduly enrich themselves in the process. For instance, if they had borrowed money at simple interest to discharge their dues which arose as a result of the change in law, paying them compound interest as a measure of restitution would undoubtedly result in their unjust enrichment, at the cost of the 2nd Respondent-GUVNL, which cost would, eventually, be borne by the consumers whose interest the GERC is obligated to protect under Section 61(d) of the Electricity Act. It is only for the loss suffered by them as a result of the change in law event, can they seek restitution, and not beyond.

The extent of loss they have suffered, as a result of belated payment of compensation for change in law to them by the 2nd Respondent, is a question of fact which necessitates consideration on the basis of the documentary evidence adduced in this regard. The onus is on the Appellant to produce documentary proof to show that they had paid compound interest for borrowing money to pay GST, and they are therefore entitled to be paid the same rate of compound interest to compensate them for the loss they suffered on account of belated payment of change in law compensation. We may not be understood to have held that the quantum of loss suffered by the Appellant must be determined with absolute precision or with mathematical exactitude. All that we have held is that the Appellant must adduce documentary evidence to reasonably establish the quantum of loss suffered by them.

We may also not be understood to have held that the Appellant is disentitled for compound interest. As held in **Uttar Haryana Bijli Vitran Nigam Limited vs. Adani Power Mundra Limited: (2023) 2 SCC 624**, in case the Appellant is able to establish that they had paid compound interest to borrow money from the banks for meeting the expenditure incurred on account of the change in law event, they would be entitled to be compensated for such amount by payment of compound interest.

Article 11.3.5 of the subject PPA provides that Late Payment Surcharge shall be calculated on the basis of compound interest, and stipulates thus: -

> *"**11.3.5:** In the event of delay in payment of a Monthly Bill by the Procurer beyond 30 days from Due Date, a Late Payment Surcharge shall be payable by the Procurer to the Seller **at the rate of two (2) percent in excess of the applicable SBAR per annum**, on the amount of outstanding payment, **calculated on a***

***day to day basis (and compounded with Monthly rest), for each day of the delay**." [emphasis supplied]*

While it is no doubt true that LPS cannot be equated with carrying cost [**MSEDCL vs. MSERC (2022) 4 SCC 657]**, the affected party may, in a given case, only be restored to the same economic position they were in before the change in law occurred, by applying the LPS rate, as held by the Supreme Court in **GMR Warora Ltd. vs. CERC : (2023) 10 SCC 401** while affirming the judgment of this Tribunal, in **Adani Power Maharashtra Limited v. MERC** (Order in Appeal No. 40 of 2022 dated 22.03.2022), The interest (simple or compound) to which the appellant is entitled to, and in case of compound interest, whether it should be on quarterly or half yearly or yearly rests, are matters to be decided on the basis of documentary evidence adduced on behalf of the Appellant in this regard.

As there is no material on record to show how the Appellant had paid the amounts as a result of the change in law, whether or not they had borrowed money to pay the said amounts, and whether any such borrowings were on payment of compound interest, we deem it appropriate to remand the matter, requesting the GERC to determine the interest, and the applicable rate thereof, to which the appellant is entitled to as a measure of restitution for belated payment of change in law compensation, after permitting them to adduce documentary evidence in this regard. Needless to state that the 2nd Respondent-GUVNL shall also be given a reasonable opportunity of rebutting the contentions urged on behalf of the Appellant.

XII. HAS THE APPELLANT WAIVED ITS CLAIM FOR CARRYING COST?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri Amit Kapur, Learned Counsell for the Appellant, would submit that the respondent-GUVNL claims that the Appellant has waived its right to carrying cost because: (a) the Appellant failed to claim carrying cost during the proceedings in Petition No. 1807 of 2019 before the GERC (filed by GUVNL for approval of the 1st Supplemental PPA dated 01.03.2019 between the Appellant and the respondent-GUVNL ("2019 SPPA")]; (b) the Appellant failed to claim carrying cost in its challenge to the order dated 27.04.2020 passed in the said Petition No. 1807 of 2019; (c) the Appellant failed to raise an invoice for change in law compensation after Order dated 27.04.2020 was passed by the GERC approving the 2019 SPPA, and (d) as the Appellant claimed interest from April 2019 till March 2021 in its Additional Affidavit dated 17.09.2021 in Review Petition No.1866 of 2020, they are estopped from claiming interest for the prior period; and these submissions are clearly contrary to the facts on record.

In support of his contention that the order of the GERC dated 27.04.2020 is not relevant, Sri Amit Kapur, Learned Counsell for the Appellant, would submit that Petition No. 1807 of 2019 was filed by the respondent-GUVNL seeking approval of the 2019 SPPA; it did not relate to the Appellant's claim for grant of restitutive relief for change in law and relatable carrying cost, as seen from the issues framed and at paras 23.52 and 25.2 in the said Order; since it was not an issue before the GERC in the said Petition, there was no occasion for the Appellant to file an appeal against the Order dated 27.04.2020 on the issue of carrying cost; it was only on 20.11.2021, once the GERC approved the 2nd Supplemental PPA dated 12.08.2021 ("2nd SPPA") in Petition No. 2004 of 2021, that change in compensation was to be paid by the respondent-GUVNL to the Appellant until 19.11.2021; this is evident from the Impugned Review Order*;* in this backdrop, the appellant had no occasion to raise supplementary invoices after the Order dated 27.04.2020, or to raise these issues in Appeal No. 108

of 2020 challenging the Order dated 27.04.2020; the respondent GUVNL's reliance on the said Order dated 27.04.2020 is solely to perplex the issue at hand; soon after the Order dated 27.04.2020 was passed, the Gujarat Government issued the 2nd Government Resolution (GR) dated 12.06.2020 in which it (i) revoked the earlier GR dated 01.12.2018 (based on which the 2019 SPPA was executed and approved) for all intents and purposes; and (ii) envisaged that the parties shall execute a fresh SPPA based on the terms and conditions mentioned; the 2nd SPPA was approved by the respondent-GERC only on 12.08.2021 in Petition No. 2004 of 2021; since October 2017, the respondent-GUVNL kept returning the Appellant's Supplementary Invoices towards change in law, refusing to accept them without a specific order from the GERC; as such, the Appellant was constrained to seek permission to raise invoices in Petition No. 1680 of 2017, which culminated in the Impugned Order dated 23.12.2019 against which Review Petition No. 1866 of 2020 was pending as on 27.04.2020; the Impugned Review Order was finally passed only on 18.03.2023; given the respondent GUVNL's own stand regarding invoices and the requirement to seek specific directions from the GERC, it is disingenuous for it to now claim that even *sans* specific directions in Review Petition No. 1866 of 2020, the Appellant could have raised supplementary invoices based on an obiter observation in the Order dated 27.04.2020 passed in a distinct proceeding; and, having filed Appeal No. 108 of 2020 against the Order dated 27.04.2020, the Appellant could not have raised an invoice under the same order.

In support of his contention that the additional affidavit did not estop the appellant from raising its full change in law claim, Sri Amit Kapur, Learned Counsel for the Appellant, would submit that, at para 10 of the Additional Affidavit dated 17.09.2021, the Appellant pleaded that the respondent-GUVNL did not pay the principal compensation for change in law from 14.10.2018, although the plant was operational from 21.04.2019 to

11.03.2021, and hence in that context reference to interest relates to the principal claim at para 10; evidently, the Appellant's claim is not limited to interest during April 2019 to March 2021, as is reflected at Para 4.35 of the Impugned Review Order dated 18.03.2023 which, in the relevant part, asks for "*…interest on the amounts towards Change in Law Compensation for each month it had become due and payable to EPGL by GUVNL, till payment, at such rate that may be prescribed by the Commission*"; it is settled law that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated [***State of Maharashtra v. Ramdas Shrinivas Nayak*,** (1982) 2 SCC 463; ***Central Bank of India v. Vrajlal Kapurchand Gandhi*,** (2003) 6 SCC 573; and ***Competent Authority v. Barangore Jute Factory,*** (2005) 13 SCC 477]; in terms of Article 18.3 of the PPA, a valid waiver "*shall be in writing and executed by an authorised representative of that Party*"; neither the Additional Affidavit waives the Appellant's right to receive interest as a part of its restitutive relief for change in law, nor does any alleged delay in raising invoices amount to a waiver of the Appellant's claim to carrying cost; and the appellant has not waived or surrendered any part of its claim for Carrying Cost.

B. JUDGEMENTS CITED UNDER THIS HEAD:

1. In **State of Maharashtra vs. Ramdas Srinivas Nayak: (1982) 2 SCC 463,** the Supreme Court held that they could not launch into an enquiry as to what transpired in the High Court; public policy barred them, and Judicial decorum restrained them; matters of judicial record were unquestionable; they were not open to doubt; judges could not be dragged into the arena; "Judgments cannot be treated as mere counters in the game of litigation."; they were bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court; they could not

allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence; if the Judges said in their judgment that something was done, said or admitted before them, that had to be the last word on the subject; statements of fact as to what transpired at the hearing, recorded in the judgment of the court, were conclusive of the facts so stated and no one could contradict such statements by affidavit or other evidence; if a party thought that the happenings in court had been wrongly recorded in a judgment, it was incumbent upon the party, while the matter was still fresh in the minds of the Judges, to call the attention of the very Judges who had made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error; that was the only way to have the record corrected; and if no such step was taken, the matter must necessarily end there.

2. In **Central Bank of India vs. Vrajlal Kapurchand Gandhi: (2003) 6 SCC 573,** the Supreme Court held that the only course open to a party taking the stand that an order does not reflect the actual position was to move the High Court in line with what had been said in **State of Maharashtra v. Ramdas Shrinivas Nayak: (1982) 2 SCC 463;** in **Bhavnagar University v. Palitana Sugar Mill (P) Ltd: (2003) 2 SCC 111,** the view in the said case was reiterated; Statements of fact as to what transpired at the hearing recorded in the judgment of the court were conclusive of the facts so stated and no one can contradict such statements by an affidavit or other evidence; if a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter was still fresh in the minds of the judges, to call the attention of the very judges who had made the record; that was the only way to have the record corrected; if no such step was taken, the matter must necessarily end there; it was not open to a party to contend before the Supreme Court to the contrary; this Court could not launch into an enquiry as to what

transpired in the High Court; public policy and judicial decorum do not permit it; matters of judicial record in that sense were unquestionable; however, the Court could pass appropriate orders if a party moves it contending that the order had not correctly reflected happenings in court.

3. In **Competent Authority vs. Barangore Jute Factory: (2005) 13 SCC 477,** the Supreme Court held that the plea of the learned counsel for the acquiring authority, that possession was taken on the basis of oral observations of the court, was a totally misconceived plea; court orders are always in black and white; and Oral orders are never passed.

C. ANALYSIS:

Before examining the submissions urged by Learned Counsel, under this head, it is useful to understand what 'waiver' means. The word "waiver" has been described in Halsbury's Laws of England, 4th Edn., Para 1471, thus: "1471. Waiver—Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. … A person who is entitled to rely on a stipulation, existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist.

In Halsbury's Laws of England, Vol. 16(2), 4th Edn., Para 907, it is stated: "The expression "waiver" may, in law, bear different meanings. The primary meaning has been said to be the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may aise from a party making an election, for example whether or not to exercise a contractual right… Waiver may also

be by virtue of equitable or promissory estoppel; unlike waiver arising from an election, no question arises of any particular knowledge on the part of the person making the representation, and the estoppel may be suspensory only. Where the waiver is not express, it may be implied from conduct which is inconsistent with the continuance of the right, without the need for writing or for consideration moving from, or detriment to, the party who benefits by the waiver, but mere acts of indulgence will not amount to waiver; nor may a party benefit from the waiver unless he has altered his position in reliance on it.

Waiver is an intentional relinquishment of a known right or advantage, benefit, claim or privilege which, except for such waiver, the party would have enjoyed. Waiver can also be a voluntary surrender of a right. The doctrine of waiver, which the courts of law recognize, is a rule of judicial policy that a person will not be allowed to take inconsistent positions to gain advantage through the aid of courts. Waiver sometimes partakes of the nature of an election. Waiver is consensual in nature. It implies a meeting of the minds. It is a matter of mutual intention. The doctrine does not depend on misrepresentation. Waiver actually requires two parties, one party waiving and another receiving the benefit of waiver. There can be waiver so intended by one party and so understood by the other. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. There should exist an opportunity for choice between the relinquishment and an enforcement of the right in question. (**P. Dasa Muni Reddy v. P. Appa Rao, (1974) 2 SCC 725; Kanchan Udyog Ltd. v. United Spirits Ltd., (2017) 8 SCC 237; (Southern Power Distribution Co. of A.P. Ltd. v. Vaayu (India) Power Corpn. (P) Ltd., 2024 SCC OnLine APTEL 137)**.

When waiver is spoken of in the realm of contract, Section 63 of the Contract Act, 1872 governs. Unless there is a clear intention to relinquish a right that is fully known to a party, a party cannot be said to waive it. (All **India Power Engineer Federation v. Sasan Power Ltd., (2017) 1 SCC 487).** Waiver must be spelt out with clarity for there must be a clear intention to give up a known right. (**All India Power Engineer Federation v. Sasan Power Ltd., (2017) 1 SCC 487)**. For considering, as to whether a party has waived its rights or not, it will be relevant to consider the conduct of a party. For establishing waiver, it will have to be established that a party, expressly or by its conduct, has acted in a manner, which is inconsistent with the continuance of its rights. **(Kalpraj Dharamshi v. Kotak Investment Advisors Ltd., (2021) 10 SCC 401).** Waiver can be inferred only if and after it is shown that the party knew about the relevant facts and was aware of his right to take the objection in question. Waiver or acquiescence, like election, pre-supposes that the person to be bound is fully cognizant of his rights, and, that being so, he neglects to enforce them, or chooses one benefit instead of another, either, but not both, of which he might claim. (**Kalpraj Dharamshi v. Kotak Investment Advisors Ltd., (2021) 10 SCC 401; Manak Lal v. Prem Chand Singhvi: AIR 1957 SC 425).** Waiver is contractual and may constitute a cause of action. It is an agreement between the parties and a party fully knowing its rights has agreed not to assert a right for a consideration. (**Kalpraj Dharamshi v. Kotak Investment Advisors Ltd., (2021) 10 SCC 401; Krishna Bahadur v. Purna Theatre, (2004) 8 SCC 229)**

Waiver is the abandonment of a right which normally everybody is at liberty to waive. A waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon the right. It may be deduced from acquiescence or may be implied. (**Waman Shriniwas Kini v. Ratilal Bhagwandas & Co., AIR 1959 SC 689; Kanchan Udyog Ltd. v. United**

Spirits Ltd.", (2017) 8 SCC 237). As waiver is an intentional relinquishment of a known right, unless there is a clear intention to relinquish a right that is fully known to a party, a party cannot be said to waive it. (**All India Power Engineer Federation v. Sasan Power Ltd., (2017) 1 SCC 487)**.

Waiver is a voluntary act and the intention of the Appellant to waive its contractual right to claim carrying cost/interest, for belated payment of change in law compensation, must be evident from the material on record.

Article 18.3 of the PPA relates to "No Waiver" and, thereunder, a valid waiver by a Party shall be in writing and executed by an authorized representative of that Party. Neither the failure by any Party to insist on the performance of the terms, conditions, and provisions of this Agreement nor time or other indulgence granted by any Party to the other Parties shall act as a waiver of such breach or acceptance of any variation or the relinquishment of any such right or any other right under this Agreement, which shall remain in full force and effect.

Article 18.3 of the PPA requires a valid waiver by a party to be in writing and to be executed by an authorized representative of the party. After restricting their claim, in the Additional Affidavit dated 17.09.2021, only for payment of interest for the period April, 2019 to March, 2021, the Appellant now seeks payment of interest even for the period anterior thereto. The ingredients of waiver, under Article 18.3 of the PPA, are satisfied in the present case, in that the Additional Affidavit dated 17.09.2021, confining their claim for interest only for the period April, 2019 to March, 2021, would amount to a waiver in writing executed by a person authorized to do so on behalf of the Appellant. Having waived its rights to claim interest for the period anterior to April, 2019, the Appellant cannot be permitted to now turn around and contend that they should be granted interest for the period prior thereto also.

In Para 10 of the Additional Affidavit dated 17.09.2021, the Appellant had categorically stated that they had sought payment of interest from the Respondent-GUVNL, at the rate as may be decided by the Commission on the amount of change in law compensation, for the period between April, 2019 and March, 2021. Having confined its prayer specifically to payment of interest only for the period April, 2019 till March, 2021, the Appellant cannot now be heard to contend that their claim for interest is not confined to this period, but that they are entitled for payment of interest from the date on which the change in law event had originally occurred.

All that is recorded, in Para 4.35 of the review order in Petition No. 1866 of 2020 dated 18.03.2023, are the contentions of the Petitioner, and are not findings recorded by the GERC. As noted hereinabove, in the Review Petition filed by them in Petition No. 1866 of 2020, the Appellant herein had not claimed interest at all, and it is only in the Additional Affidavit dated 17.09.2021 that they claimed interest, however, confining such claim only for the period April, 2019 to March, 2021. The contentions urged during the hearing of the Review Petition, even if it be accepted as true, would not fall within the ambit of Article 18.3 which requires waiver to be in writing. On the other hand, it is the Additional Affidavit dated 17.09.2021, filed by the Appellant themselves, which attracts the doctrine of waiver, as they had, by confining their claim of interest only for the period April, 2019 to March, 2021, waived their claim for interest for the period prior to April, 2019.

Reliance placed by the Appellant, on the judgements of the Supreme Court, in **State of Maharashtra v. Ramdas Shrinivas Nayak,** (1982) 2 SCC 463**, Central Bank of India v. Vrajlal Kapurchand Gandhi,** (2003) 6 SCC 573 and **Competent Authority v. Barangore Jute Factory,** (2005) 13 SCC 477, is wholly misplaced, since all that is declared therein is that an appellate court should accept what is recorded in the impugned order as having

transpired during the hearing before the court below. All that is recorded in Para 4.35 of the review order is what was stated on behalf of the Appellant before the Commission during the hearing. Even if this is accepted as true, that does not negate the specific waiver made in the Additional Affidavit dated 17.09.2021 whereby the Appellant had confined its claim for interest only for the period April, 2019 to March, 2021. No finding has been recorded by the GERC, in the review order, to the contrary.

XIII. ARE SETTLED ISSUES SOUGHT TO BE RE-AGITATED?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri Amit Kapur, Learned Counsell for the Appellant, would submit that the respondent-GUVNL is attempting to re-agitate settled principles of law, which has been deprecated by the Supreme Court in ***GMR Warora.***

B. JUDGEMENTS CITED UNDER THIS HEAD:

In **GMR Warora (Energy Ltd.) vs. CERC : (2023) 10 SCC 401,** the Supreme Court held that, when the PPA itself provided a mechanism for payment of compensation on the ground of ‘Change in Law’, unwarranted litigation, which wastes the time of the Court as well as adds to the ultimate cost of electricity consumed by the end consumer, ought to be avoided; and, ultimately, the huge cost of litigation on the part of DISCOMS as well as the Generators adds to the cost of electricity that is supplied to the end consumers.

C. ANALYSIS:

An Appeal, under Section 111 of the Electricity Act, lies against the orders of the Regulatory Commissions both on questions of fact and law. The contentions raised by the Appellant, and the objections taken thereto by

the Respondent, have been examined in detail in the order now passed by us. In the light of our analysis and findings on several issues, it may be difficult for us to hold that the 2nd Respondent-GUVNL should be faulted on the ground that they were seeking to re-agitate settled issues. We refrain from saying anything more.

XIV. SHOULD THE MATTER BE DECIDED BY THIS TRIBUNAL INSTEAD OF REMAND?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri Amit Kapur, Learned Counsell for the Appellant, would submit that, considering the delay in grant of relief to the appellant, for a change in law event which occurred in 2017, and the above observations in **GMR Warora,** it is in the interest of both the parties concerned that this Tribunal decide the above issues raised finally; and, in the light of the contractual position and law laid down by the Supreme Court, this Tribunal be pleased to grant carrying cost on the change in law compensation allowed [Re: Order dated 23.12.2019 (in Petition No. 1680 of 2017) and Review Order dated 18.03.2023] calculated at the rate specified in Article 11.3.5 of the PPA [i.e., "*at the rate of two (2) percent in excess of the applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with Monthly rest), for each day of the delay*"] with effect from 01.07.2017 (i.e., impact of CIL) till the date of payment.

B. ANALYSIS:

While the Appellant has no doubt been denied interest, as a measure of restitution, from April, 2019 till March, 2021, for an unduly long period of time, we may not be in a position to determine the rate of interest to which the Appellant is entitled to as a measure of restitution in the absence of any

material on record to show the extent to which the Appellant had suffered loss on account of such belated payment. While the Appellant is entitled for interest for the period April, 2019 to March, 2021, the question whether they are entitled for simple or compound interest; if so, at what rate; and whether it should be on quarterly, half yearly or yearly rests, can only be determined on the Appellant placing documentary evidence on record to show how and to what extent they have suffered a loss on account of such belated payment. While their not being paid interest undoubtedly amounts to their not being restituted, granting them interest more than what they are entitled to would result in their unjustly enriching themselves at the cost of the consumer whose interest the Commission is obligated to protect under Section 61(d) of the Electricity Act. We must, therefore, express our inability to agree with the submission, urged on behalf of the Appellant, that the matter should not be remanded to the GERC, and that we should decide the Appellant's claim for interest in the present Appeal itself.

Suffice it, to safeguard the Appellant's interest on this score, to direct GERC to give both parties a reasonable opportunity of being heard and pass orders afresh granting the Appellant appropriate interest (simple or compound as the case may be), fix the rate of interest to which they are entitled to, and, in case compound interest were to be granted, then the periodic rests at which such interest should be compounded. The GERC shall consider the afore-said aspects based on the documentary evidence placed on record by the appellant. We request the GERC to pass orders afresh with utmost expedition, preferably within four months from the date of receipt of a copy of this order.

XV. CONCLUSION:

The Appellant is held entitled for payment of interest for the period April, 2019 to March, 2021 on belated payment of compensation on account

of change in law. The GERC shall, after giving both parties a reasonable opportunity of being heard, and after permitting the Appellant to adduce documentary evidence on this particular issue, pass orders afresh determining the interest to which the Appellant is entitled to for the period April, 2019 to March, 2021, whether it be simple or compound; the rate of interest; and, in case they are held entitled to compound interest, the periodic rests at which such interest should be compounded ie quarterly or half yearly or yearly rests.

The GERC is requested to complete the entire exercise, culminating in a final order being passed afresh, with utmost expedition, preferably within four months from the date of receipt of a copy of this order.

The Appeal is allowed and the impugned order is set aside to the extent indicated hereinabove. All the IAs therein shall, consequently, stand disposed of.

Pronounced in the open court on this the **16th day of April, 2025**.

(Seema Gupta) Technical Member	(Justice Ramesh Ranganathan) Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

tpd