IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 345 OF 2021

Dated: 08.05.2025

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

In the matter of:

RATTAN INDIA POWER LIMITED
Through its Authorised Signatory
A-49, Ground Floor,
Road No. 4, Mahipalpur,
New Delhi – 110037

… Appellant

Versus

1. **MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**
Through its Secretary
World Trade Centre,
Centre No. 1, 13th Floor,
Cuffe Parade, Mumbai- 400005
secretary@merc.gov.in

2. **MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED**
Through the Chairman and Managing Director
6th Floor, Prakashgad,
Plot No. G-9, Anant Kanekar Marg,
Bandra (East), Mumbai – 400 051
cepp@mahadiscom.in … Respondent (s)

Counsel for the Appellant(s)	:	Amit Kapur Vishrov Mukerjee
Counsel for the Respondent(s)	:	Pratiti Rungta for Res. 1 Ravi Prakash, Sr. Adv. Samir Malik Rahul Sinha for Res. 2

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. In this appeal, assail is to the order dated 16/11/2021 passed by 1st respondent Maharashtra Electricity Regulatory Commission (in short "Commission" or "MERC") in petition no. 83/2021 filed by the appellant seeking compensation on account of Change in Law (CIL) events.

2. Appellant is a Public Limited Company and owns as well as operates a 1350 MW (5x270 MW) coal fired power plant located at Nandgaonpeth, Amravati District in the State of Maharashtra. It is a generating company as defined in Section 2 (28) of the Electricity Act, 2003.

3. In pursuance to the Case-I Competitive bidding process initiated by 2nd respondent Maharashtra State Electricity Distribution Company Ltd. (in short "MSEDCL") which is a Distribution Licensee operating in the State of Maharashtra, two power Purchase Agreements (PPAs) dated 22/04/2010

(for 450MW) and 05/06/2010 (for 750 MW) were executed between MSEDCL and the appellant for supply of 1200 MW aggregate power by Appellant to MSEDCL at levelized tariff of Rs.3.260/kWh. The PPAs were duly approved by the Commission vide order dated 28/12/2010.

4. The Appellant had approached the Commission by way of Petition no.83/2021 under Section 86(1)(f) of the Electricity Act, 2003 read with Article 10 of the PPAs seeking compensation on account of following Change in Law events:

> *"(a) Levy and increase in Surface Transportation Charge and Crushing/Sizing Charges by Coal India Limited pursuant to Notifications dated 15.10.2009 and 13.11.2013.*
> *(b) Levy of Port Congestion Surcharge by Ministry of Railways on 20.11.2014 pursuant to power granted under Section 30-32 of Railways Act, 1989.*
> *(c) Notification dated 25.01.2016 issued by Ministry of Environment, Forest and Climate Change ("**MoEFCC**") which for the first time introduced the condition that thermal power plants were to bear the complete cost of transportation of fly ash till 100km and half the cost from 100-300km."*

5. The petition was disposed off by the Commission vide impugned order dated 16/11/2021 holding, *inter alia,* that: -

> "*(a) Imposition of Port Congestion Charges by Indian Railways qualifies as a change in law event. However, in view of compensation allowed for difference in landed cost of domestic coal and alternate coal as per Order dated 16.11.2021 in Case No. 240 of 2020, no separate compensation is required to be allowed on account of Port Congestion Surcharge. The landed cost of imported coal would include all taxes, duties, transportation charges etc.*
>
> *(b) Revision in Surface Transportation Charges and Sizing/crushing charges by the Coal India do not constitute a Change in Law event as per provisions of PPAs.*
>
> *(c) RattanIndia's claim for transportation of fly ash as per MOEFCC notification dated 25.01.2016 being a change in law event was rejected. Ld. MERC further observed that RattanIndia has not incurred any expenses towards transportation of fly ash. Thus, RattanIndia's claim is premature.*
>
> *(d) No carrying cost is payable in the present matter as Ld. MERC has not allowed any compensation. Also*

carrying cost cannot be allowed for the period of delay attributable to RattanIndia."

6. The Appellant assails these findings of the Commission on following three issues:-

"(a) Disallowance of change in rate of Surface Transportation Charges, Sizing/Crushing charges.
(b) Disallowance of levy of charges for transportation of fly ash pursuant to MOEFCC Notification dated 25.01.2016.
(c) Disallowance of payment of Carrying Cost."

7. We have heard learned counsels for appellant and the respondents. Written Submission filed by them have also been perused.

8. Article 10 of the PPAs provides definition of the term "Change in Law" and the same is extracted hereinbelow: -

"10. ARTICLE 10: CHANGE IN LAW

10.1 Definitions

In this Article 10, the following terms shall have the following meanings:

10.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven

(7) days prior to the Bid Deadline resulting into any additional recurring/ non-recurring expenditure by the Seller or any income to the Seller:

- *the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*
- *a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
- *the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- *a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;*
- *any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement.*

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

9. It is not in dispute that cut-off date i.e. date of consideration of CIL events in this case is 31st July 2009, being seven days prior to Bid Deadline date i.e. 7th August, 2009. Thus, as per Article 10, if:

(i) any new law is enacted or any existing law including rules/regulations is/are amended, modified or repeated after 31/07/2009;

(ii) there has been any change in interpretation of any law by any Govt. Instrumentality having legal power to do so or by any Competent court after 31/07/2009;

(iii) there has been any change in consent, clearances and permits or in terms and conditions prescribed therefor after 31/07/2009;

(iv) there has been any change in existing tax or new tax is introduced relating to supply of power after 31/07/2009; and

(v) such change has an effect on the expenditure on a power project as well as on the revenues therefrom;

such an event would be a CIL event entitling the affected party for compensation so as to be restored to the same economic position as if such CIL had not occurred.

10. As per Article 1.1 of the PPAs, "Law" means "*all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include without limitation all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the Appropriate Commission.*"

11. Therefore, all the rules, regulations, orders, notifications, ordinances issued by an Indian Government Instrumentality or any interpretation thereof

would come within the ambit of “Law” referred to in Article 10 and if issued after the cut-off date, would constitute CIL event. We find it profitable to quote following observations of the Supreme Court on this aspect in GMR Warora Energy Ltd. v. CERC and Others (2023) 10 SCC 401 :-

> “*96. Perusal of the definition of the term “Law” itself would clearly show that the term “Law” would mean all laws including Electricity Laws in force in India and any statute, ordinance, regulation, Notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law. It would further reveal that the term “Law” shall also include all applicable rules, regulations, orders, Notifications by an Indian Governmental Instrumentality and shall also include all rules, regulations, decisions and orders of the CERC and the MERC.*
>
> *97. In any case, the issue as to what would amount to “Law” is no more res integra. This Court, in Energy Watchdog, has observed thus: (SCC p.131, para 57)*
>
> *“57. Both the letter dated 31-7-2013 and the revised Tariff Policy are statutory documents being issued under Section 3 of the Act and have the force of law. This being so, it is clear that so far as the procurement*

of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in Clause 13.2 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. This being the case, we are of the view that 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."

98. The aforesaid view of this Court taken in Energy Watchdog has been approved by a Bench of three learned Judges of this Court in Adani Rajasthan case and also followed by this Court when the two linked matters out of this batch of appeals were decided by this Court in Maharashtra State Electricity Distribution Co. Limited v. Adani Power Maharashtra Limited. It cannot be denied that CIL is an instrumentality of the

Government of India and its orders, insofar as price of fuel are concerned, are binding on all its subsidiaries.

99. It will further be relevant to refer to Clause 9.0 of CSA, which reads thus:

"9.0 PRICE OF COAL:

The "As Delivered Price of Coal" for the Coal supplies pursuant to this Agreement shall be the sum of Base Price, Other Charges and Statutory Charges, as applicable at the time of delivery of Coal."

It is thus clear that price of coal includes the sum of base price, other charges and statutory charges as applicable at the time of delivery of coal.

100. As discussed herein above, the term 'Law' would also include all applicable rules, regulations, orders, Notifications issued by an Indian Governmental Instrumentality.

101. It would thus be clear that all such additional charges which are payable on account of orders, directions, Notifications, Regulations, etc., issued by the instrumentalities of the State, after the cut-off date, will have to be considered to be 'Change in Law' events. The Generators would be entitled to

compensation on the restitutionary principle on such changes occurring after the cut-off date."

12. It is limpid from these observations of the Apex Court that all additional charges payable on account of orders, directions, notifications, regulations etc. issued by the Government Instrumentalities, after the cut-off date, will have to be considered to be "Change in Law" events entitling power generators for compensation under the principle of restitution.

Imposition of fly ash Transportation Charges vide Notification dated 25/01/2016.

13. Certain guidelines had been laid by Ministry of Environment, Forest & Climate Change (in short MoEF&CC) vide notification dated 14/09/1999 for utilization of fly ash by thermal power plants. Relevant portion of the said notification is extracted hereunder: -

"Notification dated 14 September, 1999:

…

And, whereas, there is a need for restricting the excavation of top soil for manufacture of bricks and promoting the utilisation of fly ash in the manufacture of building materials and in construction activity within a specified radius of fifty kilometers from coal or lignite based thermal power plants;

2. Utilisation of ash by Thermal Power Plants.

All coal or lignite based thermal power plants shall utilise the ash generated in the power plants as follows: -

(1) Every coal or lignite based thermal power plant shall make available ash, for at least ten years from the date of publication of this notification, without any payment or any other consideration, for the purpose of manufacturing ash based products such as cement, concrete blocks; bricks, panels or any other material or for construction of roads, embankments, dams, dykes or for any other construction activity.

(2) Every coal or lignite based thermal power plant commissioned subject to environmental clearance conditions stipulating the submission of an action plan for full utilisation of fly ash shall, within a period of nine years from the publication of this notification, phase out the dumping and disposal of fly ash on land in accordance with the plan. Such an action plan shall provide for thirty per cent of the fly ash utilisation, within three years from the publication of this notification with further increase in utilisation by at/east ten per cent points every year progressively for the next six years to

enable utilisation of the entire fly ash generated in the power plant at/east by the end of ninth year. Progress in this regard shall be reviewed after five years."

14. This notification was partially modified by way of notification dated 27/08/2003, relevant portion of which reads as under:-

"…

1. In the said notification, in the preamble, for the words "fifty kilometers", the words "one hundred kilometer" shall be substituted.

…

3. In the said notification, in paragraph 2.

(a) for the marginal heading Utilisation of ash by Thermal Power Plants", the marginal heading 'Responsibilities of Thermal Power Plants" shall be substituted;"

15. An amendment was carried out in the original notification dated 14/9/1999 vide notification dated 03/11/1999 and we reproduce the relevant portion of the same :-

"…

AND, WHEREAS, the representations of the brick kiln owners were considered with regard to transporting of

fly ash over a long distance and also the logistics involved including the energy cost;

…

3. in the said notification, in paragraph 2, -

(a) For sub-paragraphs (1), (2) and (3), the following sub-paragraph shall be substituted namely:-

(1) All coal or lignite based thermal power stations would be free to sell fly ash to the user agencies subject to the following conditions, namely:-

(i) The pond ash should be made available free of any change on ' as is where basis' to manufacturers of bricks, blocks or tiles including clay fly ash producer manufacturing unit(s), farmers, the Central and the State road construction agencies, Public Work Department, and to agencies engaged in baclifilling or stowing of mines.

(ii) At least 20% of dry ESP fly ash shall be made available free of charge to unit manufacturing fly ash or clay-fly ash bricks, blocks and tiles on a priority basis over other users and if the demand from such agencies falls. short of 20% of quantity, the balance quantity can be sold or disposed of by the power station as may be possible;

…

(3) New coal and, or lignite based thermal power stations and, or expansion units commissioned after this notification to achieve the target of fly ash utilization as per Table III given below:

Sr. No.	*Fly Ash utilization level*	*Target Date*
(1)	(2)	(3)
1.	*At least 50% of fly ash generation*	*One year from the date of issue of commissioning*
2.	*At least 70% of fly ash generation*	*Two year from the date of issue of commissioning*
3.	*90% of fly ash generation*	*Three year from the date of issue of commissioning*
4.	*100% of fly ash generation*	*Four year from the date of issue of commissioning*

The unutilised fly ash in relation to the target. during a year, if any, shall be utilized within next two years in addition to the targets stipulated for these years and the balance unutilized fly ash accumulated during first four years (the difference between the generation and utilization target) shall be utilized progressively over next five years in addition to 100% utilization of current generation of fly ash. "

…

(6) The amount collected from sale of fly ash and fly ash based products by coal and or lignite based thermal power stations or their subsidiary or sister concern unit. as applicable should be kept in a separate account head and shall be utilized only for development of infrastructure or facilities, promotion and facilitation activities for use of fly ash unit (100) percent fly ash utilization level is achieved; thereafter as long as 100% fly ash utilization levels are maintained. the thermal power station would be free to utilize the amount collected (or other development programmes also and in case. there is a reduction in the fly ash utilization levels in the subsequent year(s), the use of financial return from fly ash shall get restricted to development of infrastructure or facilities and promotion or facilitation activities for fly ash utilization until 100 percent fly ash utilisation level is again achieved and maintained."

16. It would be seen from the perusal of these notifications that there is no mention of any transportation cost to be borne by the power generators in transportation the fly ash from the power plant by the bricks/blocks/tiles manufactures. In fact, the notification dated 03/11/2009 mandates that fly ash shall be made available to the bricks/blocks/tiles manufactures free of cost on 'as is where is basis' implying that the cost of transportation has to be borne entirely by the manufactures.

17. Then came that notification dated 25/01/2016. It reads as under: -

> *"15. Taking note of the lower utilization of the ash despite demand in several infrastructure projects, Ministry of Environment issued more stringent notification to enforce the commitments given by thermal power plants as part of the environmental clearance. Subsequent to cutoff date, Notification dated 25 January, 2016 has been issued by the MoEF. Relevant part of the said notification is reproduced below:*
>
> *2. In the said notification, in paragraph 2:*
>
> *(a) after sub-paragraph (1), the following proviso shall be inserted, namely: -*

"provided further that the restriction to provide 20% o[dry ESP fly ash free o[cost shall not apply to those thermal power plants which are able to utilize 100 % fly ash in the prescribed manner."

(b) after sub-paragraph (7), the following sub-paragraphs shall be inserted, namely: -

…

10) The cost of transportation of ash for road construction projects or for manufacturing of ash based products or use as soil conditioner in agriculture activity within a radius of hundred kilometers from a coal or lignite based thermal power plant shall be borne by such coal or lignite based thermal power plant and the cost of transportation beyond the radius of hundred kilometers and up to three hundred kilometers shall be shared equally between the user and the coal or lignite based thermal power plant.

(11) The coal or lignite based thermal power plants shall promote, adopt and set up (financial and other associated infrastructure) the ash based product manufacturing facilities within their premises or in the

vicinity of their premises so as to reduce the transportation of ash.

(12) The coal or lignite based thermal power plants in the vicinity of the cities shall promote. support and assist in setting up of ash based product manufacturing units so as to meet the requirements of bricks and other building construction materials and also to reduce the transportation.

…

(14) The coal or lignite based thermal power plants shall within a radius of three hundred kilometers bear the entire cost of transportation of ash to the site of road construction projects under Pradhan Mantri Gramin Sadak Yojna and asset creation programmes of the Government involving construction of buildings, road. dams and embankments "

…

5. The time period to comply with the above provisions by all concerned authorities is 31st December, 2017. The coal or lignite based thermal power plants shall comply with the above provision in addition to 100 %

utilization of fly ash generated by them before 31st December, 2017.

MoEF notification dated 25 January, 2016 has imposed further obligation on the coal based Thermal Power Plants to transport fly ash to the location of user within 100 km from the plant free of cost and to the user within 300 km from the plant at 50% cost of transportation so as to ensure full utilization of the ash."

18. This notification, for the first time, places the burden of cost of Transportation of fly ash upon the power plants. By virtue of the said notification, the power generators are required to bear the entire cost of transportation of fly ash within a radius of 100 kilometers from the power plant and 50% of it beyond the radius of 100 kilometers upto three hundred kilometers.

19. Appellant had contended before the Commission that the said notification dated 25/01/2016 requires it (the Appellant) to incur additional expenditure towards fly ash transportation cost and since the same has been issued after the cut-off date, it constitutes a CIL event.

20. The Commission has rejected the Appellant's claim as being premature observing that: -

"The Commission notes that RPL has approached the Commission without any comprehensive information about the impact of the said notification and further at the time of hearing RPL it has stated that the said notification has not yet impacted them financially. The basis for approving the change in Law claims is to restore the party to the same economic position as if change in Law has not occurred. Here as the said notification has not yet impacted RPL financially, it would be highly premature for RPL to approach the Commission for compensation under Change in Law for the said notification."

21. Further, the Commission has founded its decision as an earlier dt. 26/01/2019 order passed in case no 301/2018 Adani Power Maharashtra Ltd. V/s MSEDCL in which it had held:-

"19. The Commission also notes that provisions of PPA which requires the Commission to determine impact of Change in Law reads as follows:

… …

As per above provision of the PPAs, for claiming impact of arty Change in Law event, Seller needs to provide documentary proof of increase / decrease in

cost or revenue / expenses. In present Petition, APML has only submitted indicative figures of possible impact of MoEF notification dated 25 January, 2016. In the opinion of the Commission, relief for Change in Law cannot be decided on estimated impact especially when other related aspects of cost savings on account of O&M costs, land resource, revenue generated from productive assets created within the premises and promotional costs in developing ash utilizing industry in the vicinity have not been computed and included in the overall costs that include the additional transportation costs being claimed as change in law. Hence, present Petition of APML is premature.

20. Further, considering all above aspects highlighted by the Commission relating to implementation of MoEF notification dated 25 January, 2016, the Government of Maharashtra (Energy Department) needs to evolve a policy for uniform application within the State of Maharashtra based on which intra state impact of additional liability on account of transportation charges could be properly assessed.

21. The Commission rules that it is the primary responsibility of APML to fully utilize the fly ash as per its commitment and action plan submitted to environment ministry while setting up thermal

power station in terms of governing notifications on the material date. Later notification dated 25 January 2016 is in the nature of ensuring stringent compliance for full utilization of fly ash in a sustained manner. APML will have to make its case for claims in change in law if it can clearly demonstrate the additional liability of transportation charges for ash utilization, which in the instant cases as discussed in the foregoing paragraphs does not seem so."

22. We are unable to countenance the reasoning given in the impugned order for rejecting the claim of the Appellant vis-à-vis notification of MoEF&CC dated 25/01/2016. The Commission has erred in holding appellant's claim as premature as it had approached the Commission without comprehensive estimate about its financial impact. The Commission had been called upon to declare the notification dated 25/01/2016 a CIL event entitling the appellant for compensation on the basis of restitutionary principle under Article 10 of the PPAs. The issue of financial impact of the said notification or the quantum of compensation would have arisen only after declaring the said notification a CIL event. The approach of the Commission in examining whether or not has the said notification entailed

any financial impact upon the appellant without acknowledging it as a CIL event is not acceptable. Such exercise would prove a futility in case it is ultimately held that the said notification is not a CIL event.

23. With regards the previous order dated 26/01/2019 in case no. 301/2018, upon which it has relied in passing the impugned order, it is to be noted that the said order had been assailed before this Tribunal by way of appeal no. 148/2019 and has been set aside vide judgement dated 21/10/2022 passed in that appeal. The relevant portion of that judgement is reproduced hereunder: -

> *"13. There is no doubt in our mind that the responsibility to bear the burden of transportation cost cannot be read in any of the guidelines of MOEF&CC prior to the Notification dated 25.01.2016. The guidelines did oblige the thermal power project developer to ensure that fly ash which was not environment friendly by-product of its process, was properly utilized for purposes some of which have been mentioned earlier. The duty to so utilize meant either some proactive action on the part of the project developer to utilize the fly ash on its own or making it available to appropriate agencies. There may have been some defaults in full compliance with the obligations under 1999 notification. That might have*

been the reason why the original notification of 1999 underwent certain changes in 2003, 2009 and eventually in 2016. But then, the failure to abide by the said obligations in full was not the only reason for the subsequent modification. MOEF&CC also seems to have learnt from experience. The policy was evolving. What was introduced as duty to utilize was labelled, in 2003, as a responsibility. This only meant a more vigorous effort was expected to be made on the part of the generator. The 2009 amendment further facilitated the disposal by allowing certain commercial gain for the thermal power projects. But, since that does not seem to have given the desired results, the statutory authority came up with 2016 notification and, in larger public interest, created an express responsibility of the generator to share the burden of transportation expenditure. There can be no denial that it is not a matter of choice for the power project to abide or not to abide by the directives in 2016 notification. Given the very nature of the said notification, it is nothing but a CIL event. In these circumstances, the declaration of the notification dated 25.01.2016 as an event of CIL under the provisions of the respective PPAs and further a declaration to the effect that the appellant was entitled to appropriate compensation on such basis could not have been denied.

14. The Commission has misdirected itself by recording observations vis-à-vis the failure of the thermal power plants to fulfill their obligations under the preceding notifications or that the 2016 notification is in the nature more of a penalty. Since the notification of MOEF&CC does not so envisage, it is meaningless to speculate that the thermal power generators could have first sought the transportation costs from the government agencies executing the infrastructure projects wherein fly ash is utilized. When the appellant had approached the State Commission for reliefs in the above nature, the entire impact on the expenditure could not have been accurately presented. That would be an exercise which would necessarily follow once the State Commission had acknowledged that the Notification dated 25.01.2016 constituted an event of CIL. Therefore, it was incorrect on the part of the State Commission to reject the claim outright holding it being immature or that it was founded on "estimated impact".

15. For the foregoing reasons, we find the impugned order to be incorrect, unjust and unfair. It is consequently set aside and vacated. We declare that the Notification dated 25.01.2016 of MOEF&CC is an

event of CIL within the meaning of relevant clauses (quoted earlier) of the PPAs binding the appellant and the second respondent herein. We declare that the appellant is entitled to compensation to the extent of additional burden resultantly suffered in expenditure on account of transportation cost under the said notification."

24. We find ourselves in complete agreement with the above noted observations of this Tribunal in appeal no.148/2019. There is no gainsaying that the guidelines issued by MoEF&CC prior to the notification dated 25.01.2016 did not mandate the power generator to bear or share the cost of transportation of fly ash. The responsibility to bear or share such transportation cost was fixed upon the power generators for the first time by way of the said notification dated 25.01.2016. The said notification does not require the power generators to first seek the cost of transportation of fly ash from the government agencies involved in executing the infrastructure project where fly ash is utilized and then to seek compensation in this regard. Further, at the time of filing the petition before the Commission, the appellant could not have anticipated or calculated the entire impact of the said notification dated 25.01.2016 on the expenditure, which exercise could

be appropriately done once the Commission acknowledged that the said notification constitutes CIL event.

25. In view of the foregoing reasons, we are unable to sustain the impugned order of the Commission vis-à-vis the said notification dated 25.01.2016 of MoEF&CC. The same patently appears to be erroneous, unfair and unjust. Accordingly, the same is hereby set aside. We declare that the notification dated 25.01.2016 of MoEF&CC is a CIL event within the meaning of Article 10 of the PPAs executed between the appellant and MSEDCL. Consequently, the appellant is entitled to compensation to the extent of additional burden suffered by it by way of expenditure on account of transportation cost of fly ash under the said notification.

26. We may note here that initially, the appellant had sought declaration only of notification dated 25.01.2016 of MoEF&CC as a CIL event. However, during the pendency of this appeal another notification dated 31.12.2021 was issued by MoEF&CC which was followed by notification dated 30.12.2022 vide which additional obligations were imposed upon the power generators. Subsequently, the notification dated 31.12.2021 was amended by way of notification dated 01.01.2024. The additional obligations imposed upon the power generators including the appellant herein by way of notification dated

31.12.2021 as amended by subsequent notifications dated 30.12.2022 and 01.01.2024 are as follows: -

Prior to Notification dated 25.01.2016	*Notification dated 25.01.2026*	*Post Notification dated 31.12.2021*
• *No dispensation mandating TPPs to bear transportation charges.*	• *Transportation charges to be borne completely by TPP within 0-100 kms.* • *Transportation charges to be borne equally by TPP and user within 100-300 kms.*	• *Coal/Lignite based TPPs shall be responsible for 100% utilization of ash.* • *TPPs to bear transportation cost for supplying fly ash for activities within 300 km radius of the coal-based power plant.* • *Statutory obligation of 100% utilization of ash shall be treated as Change in Law.*

27. Accordingly, the appellant amended the Memorandum of Appeal with the permission of this Tribunal by incorporating additional prayer for declaration of the notification dated 31.12.2021 (as amended by notification dated 30.12.2022 and 01.01.2024) also as a CIL event.

28. There is no gainsaying that certain additional financial obligations have been imposed upon the power generators by way of notification dated 31.12.2021 by MoEF&CC qua transportation of ash and therefore it also constitutes a CIL event within the meaning of Article 10 of the PPAs executed between the appellant and MSEDCL. As a consequence thereof, the appellant would be entitled to compensation to the extent of additional financial burden suffered by it on account of the obligations imposed under these subsequent notifications also.

Levy of and increase in surface transportation charges and crushing / sizing charges on coal by Coal India Limited pursuant to notifications dated 15.10.2009 and 13.11.2015.

29. The contention of the appellant is that the surface transportation charges and coal sizing charges applicable as on the cutoff date i.e. 31.07.2009 were as per the notification dated 12.12.2007 issued by Coal India Limited which were revised by subsequent notifications dated 15.12.2009, 13.11.2013 and 15.11.2017. It is stated that the crushing /sizing charges of coal were also applicable as per the notification dated 12.12.2007

issued by Coal India Limited which were revised through subsequent notifications dated 06.12.2013 and 31.08.2017. It is argued on behalf of the appellant that these subsequent notifications vide which the crushing / sizing charges of coal as well as surface transportation charges were enhanced significantly constitute CIL event for the reason that :-

(a) these have been issued by Coal India Limited which is an Indian Government instrumentality;

(b) these notifications were issued by Coal India Limited after the cutoff dated i.e. 31.07.2009; and

(c) the notifications have led to significant increase in coal sizing charges and surface transportation charges resulting in additional recurring expenditure for the appellant.

30. The Commission, in the impugned order has rejected the contentions of the appellant while holding that the notifications issued by Coal India Limited thereby enhancing the coal sizing charges and surface transportation charges do not constitute CIL event under the PPAs. The Commission has based its findings on the judgment of this Tribunal dated 07.06.2021 in appeal no.158/2017 Adani Power (Mundra) Limited v. CERC, in which this Tribunal has held as under:-

"61. As against this, the learned counsel for Respondent Discom vehemently argues by placing reliance on the Judgment of this Tribunal in Appeal No. 111 of 2017 so also Appeal No. 119 of 2016 contending that this Tribunal rejected the claim of the generator so far as sizing and surface transportation charges and opined in favour of the procurer-Discom. Pertaining to increase in sizing charges of coal, they rely upon the following Judgments dated 14.08.2018:

(i) Appeal No. 111 of 2017 – GMR Warora Energy V. MSEDCL & Ors. (Para xv, Pages 66-69).

"xv. The present case is also similar to the case as in the Adani Judgement. The provisions of the RFP are also similar. Accordingly, in view of our decision Adani Judgement as reproduced above we are of the considered opinion that there is no merit in the contentions of GWEL on the issues of change in sizing charges of coal and surface transportation charges. Accordingly, these issues are answered against GWEL/Appellant and we do not find any error on the face of record in the findings recorded by the Central Commission on these issues."

(ii) Appeal No. 119 of 2016 – Adani Power Limited Rajasthan Ltd. V. CERC & Ors. (Para xix)

"xix. In view of our discussions as above, perusal of the Impugned Order and the order of the CERC quoted by the State Commission and the judgement of this Tribunal quoted by CERC, we are of the considered opinion that any change in sizing charges for coal must be reflected in the price of coal charged by CIL and gets covered in the CERC Escalation Rates for coal. We uphold the findings of the State Commission. Accordingly, this issue is answered against APRL/Appellant."

62. Pertaining to increase in surface transportation, they rely upon the following Judgments of this Tribunal dated 14.08.2018:

(i) A No. 111 of 2017 – GMR Warora Energy V. MSEDCL & Ors.(Para xv, pgs. 63-65):

"xv. The present case is also similar to the case as in the Adani Judgement. The provisions of the RFP are also similar. Accordingly, in view of our decision Adani Judgement as reproduced above we are of the considered opinion that there is no merit in the

contentions of GWEL on the issues of change in sizing charges of coal and surface transportation charges. Accordingly, these issues are answered against GWEL/Appellant and we do not find any error on the face of record in the findings recorded by the Central Commission on these issues."

(ii) A No. 119 of 2016 – Adani Power Limited Rajasthan vs. CERC & Ors. (Page 64-65 Para xxv):

"xxv. In view of the above, we are of the considered opinion that any change in surface transportation charges must have been taken care by APRL in its quoted tariff appropriately. Accordingly, the contention of APRL that the increase in transportation charges which forms part of coal cost by an Indian Government Instrumentality i.e. CIL would be covered under Change in Law provision of PPA is misplaced. Accordingly, we do not find any legal infirmity in the decision of the State Commission on this issue. Hence, this issue is answered against APRL/Appellant."

63. Learned counsel for Respondent Discoms, Mr. Ganesan Umapathy also contends that the Judgment relied upon by the Appellant Generator i.e., MP/72/2018 dated 02.04.2019 will not come to the aid

of the Appellant. He further contends that the specific claim of Appellant in respect of the above two events came to be rejected after referring to the Judgment of Sasan Power, therefore, this Tribunal has to follow its own earlier dictum. He also contends that CERC at Para 42 of the Order dated 02.04.2019 has clearly held that introduction of evacuation facility charges beyond cut-off date of the respective PPAs deserves to be allowed as change in law event. He also brought to our notice the Order dated 29.03.2020 of CERC in Petition No. 23/MP/2018 pertaining to Dhariwal Infrastructure Limited vs. TANGEDCO, Para 56, 57 & 58, which reads as under:

"56. Issues pertaining to Sizing Charges and Surface Transportation Charges has been dealt with by the Commission in its earlier orders. The Commission in its order dated 1.2.2017 in Petition No. 8/MP/2014, while dealing with the issue of increase in Sizing and Crushing Charges and Surface Transportation Charges observed as under:

"93. We have considered the submission of the Petitioner and the respondent and perused the notifications issued by Coal India Ltd. with regard to Sizing Charges of coal and surface transportation

charges. The Petitioner has not placed on record any document to prove that these notifications have been issued pursuant to any Act of the Parliament. On the other hand, a perusal of the Fuel Supply Agreement dated 22.2.2013 between the Petitioner and SECL shows that under para 9.0, the delivery price of coal for supply pursuant to Fuel Supply Agreement has been shown as the sum of basic price, other charges and statutory charges as applicable at the time of delivery of coal. Base price has been defined in relation to a declared grade of coal produced by the seller, the pit head price notified from time to time by CIL. Under Para 9.2 of the FSA, other charges include transportation charges, Sizing/crushing charges, rapid loading charges and any other charges as notified by CIL from time to time. Sizing/crushing charges and transportation charges have been defined as under:-

"9.2.1 Transportation Charges: Where the coal is transported by the seller beyond the distance of 3 (three) kms from Pithead to Delivery Point, the Purchase shall pay the transportation charges as notified by CIL/seller from time to time.

9.2.2 Sizing/Crushing Charges: Where coal is crushed/sized for limiting the top-size to 250 mm or any other lower size, the purchaser shall pay

sizing/crushing charges as applicable and notified by CIL/seller from time to time.

Therefore, the revision in sizing charges of coal and transportation charges by Coal India Limited from time to time is the result of contractual arrangement between the Petitioner and SECL in terms of the FSA dated 22.2.2013 and is not pursuant to any law as defined in the PPAs and therefore cannot be covered under Change in Law."

57. The Appellate Tribunal vide its judgment dated 14.8.2018 in Appeal No. 111 of 2017 has upheld the Commission's order dated 1.2.2017 in Petition No. 8/MP/2014 pertaining to treatment of Sizing and Crushing Charge and Surface Transportation Charge as Change in Law events. Relevant portion of the Appellate Tribunal's judgment dated 14.8.2018 in Appeal No. 111 of 2017, in the matter of GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors., is extracted as under:

xiv. We consider that similar issues have been decided by this Tribunal in the Adani Judgment. In our opinion the findings of this Tribunal in the said judgment are directly applicable to the instant case. The relevant

portion from the said judgment is reproduced below: Sizing Charges:

"11. A xvii. ..... The State Commission based on the order of CERC has held that increase in Sizing Charges for Coal is part of the methodology for the calculation of the cost of coal decided by CIL and merely CIL being Indian Government Instrumentality the change in method of charging made by it for coal pricing does not qualify for Change in Law event and dismissed the claim of APRL xviii. APRL has contended that the GoI under Sub Section 3 of the CC Rules, 2004 (notified under MMDR Act) has the power to categorise the coal including its classes, grades and sizes and the specifications for each such class, grade or size of coal and hence any change in sizing charges of coal by CIL an Indian Government Instrumentality qualifies for Change in Law event. We observe that GoI under the said Rules have power to categorise the coal including its classes, grades and sizes and the specifications for each such class, grade or size of coal. Here the case is not that the GoI have changed the sizing of coal under the said Rules, the case is that CIL has changed the sizing charges for coal for sizes, which already existed as specified by the GoI. The change in sizing charges of coal by CIL is part of coal pricing mechanism.

Further, in terms of the RFP, APRL was required to quote an all-inclusive tariff including coal costs in escalable/ non-escalable components based on the risks perceived by APRL. Accordingly, this contention of APRL is misplaced.

xxiv. We have gone through the Schedule 8 (Quoted Tariff) of the PPA executed between the Discoms and APRL. After careful perusal of the same we find that the tariff quoted by APRL comprises of Non- escalable and escalable components of tariff elements viz. Capacity Charges, Energy Charges and Inland In view of our discussions as above, perusal of the Impugned Order and the order of the CERC quoted by the State Commission and the judgment of this Tribunal quoted by CERC, we are of the considered opinion that any change in sizing charges for coal must be reflected in the price of coal charged by CIL and gets covered in the CERC Escalation Rates for coal. We agree to the findings of the State Commission. Accordingly, this is decided against APRL. Transportation Charges: xxiv. We have gone through the Schedule 8 (Quoted Tariff) of the PPA executed between the Discoms and APRL. After careful perusal of the same we find that the tariff quoted by APRL comprises of Non- escalable and escalable components of tariff elements viz. Capacity

Charges, Energy Charges and Inland Transportation Charges. There is no separate component surface transportation charges either in the bid or in the standard bidding documents. We observe that APRL was supposed to consider all the cost inputs for generation of power in its bid as per the RFP. It is presumed that the surface transportation charges charged by CIL forms part of cost of coal and it was the responsibility of APRL consider the same in its bid appropriately.

xxv. In view of the above, we are of the considered opinion that any change in surface transportation charges must have been taken care by APRL in its quoted tariff appropriately. Accordingly, the contention of APRL that the increase in transportation charges which forms part of coal cost by an Indian Government Instrumentality i.e. CIL would be covered under Change in Law provision of PPA is misplaced. Accordingly, we do not find any infirmity in the decision of the State Commission on this issue. Hence, this issue is answered against APRL/Appellant."

xv. The present case is also similar to the case as in the Adani Judgment. The provisions of the RFP are also similar. Accordingly, in view of our decision Adani

Judgment as reproduced above we are of the considered opinion that there is no merit in the contentions of GWEL on the issues of change in sizing charges of coal and surface transportation charges. Accordingly, these issues are answered against GWEL/Appellant and we do not find any error on the face of record in the findings recorded by the Central Commission on these issues."

58. In line with the above decisions of the Commission and the Appellate Tribunal, claim of the Petitioner for relief under 'Change in Law' in respect of Sizing Charges and Surface Transportation Charges of coal is disallowed."

64. We accept the contention of the Respondent's counsel that the Order dated 02.04.2019 made by CERC in Petition No. MP/72/2018 is distinguishable. This Tribunal in Appeal Nos. 111 of 2017 and 119 of 2016 on the very same issue did express its opinion and rejected the claim of the generators therein pertaining to sizing / crushing charges and surface transportation charges of coal. We are not convinced that there is modification of such opinion by any higher authority i.e., Hon'ble Supreme Court of India. In that view of the matter, we are not inclined to accept the

contention of the Appellant and we opine that the rejection of change in law compensation in respect sizing charges and surface transportation charges of coal is just and proper."

31. It is pointed out by learned counsel for the respondent that in the judgment dated 07.06.2021 in appeal no.158/2017 Adani Power case, this Tribunal had referred to and relied upon its previous judgment dated 14.08.2018 in appeal no.111/17 GMR Warora Energy Limited v. CERC and Ors. It is further submitted that the said judgment of this Tribunal in appeal no.111/2017 was carried in appeal to the Hon'ble Supreme Court by the power generator in the form of Civil appeal no.11095 of 2018 which, along with other connected appeals was decided by the apex court vide judgment dated 20.04.2023, thereby refusing to interfere with the concurrent findings of the Commission as well as this Tribunal and accordingly the appeals were dismissed. Thus, it is canvassed that the findings of the Commission that the increase in coal sizing charges and service transportation charges do not constitute CIL events under the PPAs has been upheld even by the apex court and has attained finality, which cannot be reopened now.

32. This Tribunal has, in the judgment dated 14.08.2018 in appeal no.111/2017 held as under: -

"The Central Commission has held that increase in Sizing Charges and Surface Transportation Charges for Coal are part of the methodology for the calculation of the cost of coal decided by CIL/SECL. The Central Commission has further held that CIL/SECL merely being Indian Government Instrumentality the revision in sizing charges of coal and transportation charges by them from time to time is the result of contractual arrangement between GWEL and CIL/SECL and in terms of the FSA do not qualify for Change in Law event and disallowed the claim of GWEL.

xiv. We consider that similar issues have been decided by this Tribunal in the Adani Judgement. In our opinion the findings of this Tribunal in the said judgement are directly applicable to the instant case. The relevant portion from the said judgement is reproduced below: Sizing Charges:

"11. A.

xvii. ……..

The State Commission based on the order of CERC has held that increase in Sizing Charges for Coal is part of the methodology for the calculation of the cost of coal decided by CIL and merely CIL being Indian Government Instrumentality the change in method of

charging made by it for coal pricing does not qualify for Change in Law event and dismissed the claim of APRL.

xviii. APRL has contended that the GoI under Sub Section 3 of the CC Rules, 2004 (notified under MMDR Act) has the power to categorise the coal including its classes, grades and sizes and the specifications for each such class, grade or size of coal and hence any change in sizing charges of coal by CIL an Indian Government Instrumentality qualifies for Change in Law event.

We observe that GoI under the said Rules have power to categorise the coal including its classes, grades and sizes and the specifications for each such class, grade or size of coal. Here the case is not that the GoI have changed the sizing of coal under the said Rules, the case is that CIL has changed the sizing charges for coal for sizes, which already existed as specified by the GoI. The change in sizing charges of coal by CIL is part of coal pricing mechanism. Further, in terms of the RFP, APRL was required to quote an all-inclusive tariff including coal costs in escalable/ non-escalable components based on the risks perceived by APRL. Accordingly, this contention of APRL is misplaced.

xix. In view of our discussions as above, perusal of the Impugned Order and the order of the CERC quoted by the State Commission and the judgement of this Tribunal quoted by CERC, we are of the considered opinion that any change in sizing charges for coal must be reflected in the price of coal charged by CIL and gets covered in the CERC Escalation Rates for coal. We agree to the findings of the State Commission.

Accordingly, this issue is decided against APRL.

……..

Transportation Charges:

xxiv. We have gone through the Schedule 8 (Quoted Tariff) of the PPA executed between the Discoms and APRL. After careful perusal of the same we find that the tariff quoted by APRL comprises of Non- escalable and escalable components of tariff elements viz. Capacity Charges, Energy Charges and Inland Transportation Charges. There is no separate component surface transportation charges either in the bid or in the standard bidding documents. We observe that APRL was supposed to consider all the cost inputs for generation of power in its bid as per the RFP. It is presumed that the surface transportation charges charged by CIL forms part of cost of coal and it was the

responsibility of APRL consider the same in its bid appropriately.

xxv. In view of the above, we are of the considered opinion that any change in surface transportation charges must have been taken care by APRL in its quoted tariff appropriately. Accordingly, the contention of APRL that the increase in transportation charges which forms part of coal cost by an Indian Government Instrumentality i.e. CIL would be covered under Change in Law provision of PPA is misplaced. Accordingly, we do not find any infirmity in the decision of the State Commission on this issue.

Hence, this issue is answered against APRL/Appellant."

xv. The present case is also similar to the case as in the Adani Judgement. The provisions of the RFP are also similar. Accordingly, in view of our decision Adani Judgement as reproduced above we are of the considered opinion that there is no merit in the contentions of GWEL on the issues of change in sizing charges of coal and surface transportation charges.

Accordingly, these issues are answered against GWEL/Appellant and we do not find any error on the

face of record in the findings recorded by the Central Commission on these issues."

33. Since, a fervent plea has been raised before us on behalf of the appellant that all these previous judgments of this Tribunal are not applicable to the instant case for the reason that those have been rendered in the peculiar facts and circumstances brought before the Commission and this Tribunal in those cases, we find it appropriate to examine all these judgments in detail.

34. The first judgment of this Tribunal on this aspect is in appeal no.119/2016 Adani Power Limited Rajasthan v. CERC & Ors. In that case, the commission had based its order on a previous order of CERC and held that increase in sizing charges for coal is part of the methodology for calculation of the cost of coal decided by Coal India Limited and merely Coal India Limited being Indian Government instrumentality, the change in method of charging made by it for coal pricing does not qualify for Change in Law event. This Tribunal observed that the Government of India under sub-section 3 of CC Rules, 2004 has power to categorize the coal including its classes, grade and sizes and the specification for each such class, grade, size of coal. It was noted that the case is not that the Government of India

has changed the sizing of coal under the said rules, the case is that the Coal India Limited has changed the sizing charges for coal which already existed as specified by Government of India. It was further held that the change in sizing charges of coal by Coal India Limited is part of coal pricing mechanism and in terms of RFP, the appellant Adani was required to quote all inclusive tariff including coal cost, escalable and non-escalable factors based on risk perceived by it. In the light of this discussion, this Tribunal ultimately held: -

> *"xix. In view of our discussions as above, perusal of the Impugned Order and the order of the CERC quoted by the State Commission and the judgement of this Tribunal quoted by CERC, we are of the considered opinion that any change in sizing charges for coal must be reflected in the price of coal charged by CIL and gets covered in the CERC Escalation Rates for coal. We agree to the findings of the State Commission."*

35. With regards to the surface transportation charges, this Tribunal observed that there is no separate component as surface transportation charges either in the bid or standard bid document and that the appellant Adani was supposed to consider all the cost inputs for generation of power in

its bid as per the RFP. This Tribunal assumed that the surface transportation charges levied by Coal India Limited form part of cost of coal and it was the responsibility of Adani to consider the same in its bid properly. Accordingly, this Tribunal held as under: -

> "*xxv. In view of the above, we are of the considered opinion that any change in surface transportation charges must have been taken care by APRL in its quoted tariff appropriately. Accordingly, the contention of APRL that the increase in transportation charges which forms part of coal cost by an Indian Government Instrumentality i.e. CIL would be covered under Change in Law provision of PPA is misplaced. Accordingly, we do not find any infirmity in the decision of the State Commission on this issue.*"

36. Next case in line is judgment dated 14.08.2018 passed by this Tribunal in appeal nos.111/2017 and 290/2017, in GMR Warora Energy Limited v. CERC and Ors. In this judgment, this Tribunal referred in detail to the findings of this Tribunal in previous judgment in appeal No.119/2016 (which have already been noted hereinabove) and observed as under: -

"*xv. The present case is also similar to the case as in the Adani Judgement. The provisions of the RFP are also similar. Accordingly, in view of our decision Adani Judgement as reproduced above we are of the considered opinion that there is no merit in the contentions of GWEL on the issues of change in sizing charges of coal and surface transportation charges.*

Accordingly, these issues are answered against GWEL/Appellant and we do not find any error on the face of record in the findings recorded by the Central Commission on these issues."

37. Then came the judgment of this Tribunal in appeal no.158/2017 Adani Power (Mundra) Limited v. CERC dated 07.06.2021. In this judgment, this Tribunal heavily relied upon the above noted two previous judgments in appeal nos.119/2016 and 111/2017 by quoting extensively from the two judgments and ultimately held as under: -

58. In line with the above decisions of the Commission and the Appellate Tribunal, claim of the Petitioner for relief under 'Change in Law' in respect of Sizing

Charges and Surface Transportation Charges of coal is disallowed."

38. We find that the decision of this Tribunal in only one of the above appeals i.e. appeal no.111/2017 (decided on 14.08.2018) was assailed by the power generator before the Hon'ble Supreme Court. As already noted hereinabove, the said appeal was heard along with several connected appeals and was disposed off vide judgment dated 20.04.2023. The Hon'ble Supreme Court, in Paragraph nos.95-101 of the report discussed and laid down as to what constitutes a Change in Law event. In Paragraph nos.129-132, the apex court has discussed the approach of the court in the cases arising out of concurrent findings recorded by the central/state commissions and the appellate tribunal. Upon taking note of the previous judgments of the court, the Hon'ble Supreme Court observed that the court should be slow in interfering with the concurrent findings of the facts unless they are found to be perverse, arbitrary and either in ignorance or contrary to the statutory provisions. Accordingly, it dismissed the appeal of the power generator by noting in Paragraph no.137 of the report as under: -

"137. Insofar as rest of the claims, which are concurrently allowed and disallowed by both the CERC and the learned APTEL, are concerned, in view of the

judgments of this Court on this issue, as stated above, we do not find any reason to interfere with the same, not noticing any perversity, arbitrariness and/or any contravention of the statutory provisions. The appeals of both the Generator and the DNH-DISCOM are, therefore, liable to be dismissed."

39. It would be immensely pertinent to note here that subsequent to passing of judgments by this Tribunal in appeal no.119/2016 and appeal no.111/2017 (decided on 14.08.2018), upon the representations of various stakeholders the Central Electricity Regulatory Commission (CERC) initiated a *suo-motu* exercise for issuing a methodology for computation of coal price index applicable for power sector by way of *suo motu* petition no.10/SM/2019 which was decided vide order dated 18.10.2019. The list of stakeholders and other interested persons who had participated in the proceedings of the *suo motu* petition and had presented their views / suggestions in response to public notice dated 25.04.2019 has been given in Paragraph no.7 of the order which is extracted hereinbelow:-

"7. Views and suggestions of the stakeholders and other interested persons on the staff paper were invited through a public notice dated 25.4.2019 and 24.5.2019.

In response to the public notice, views and suggestions on the staff paper have been received from the following stakeholders:

(i) Maharashtra State Electricity Distribution Company Ltd (MSEDCL)
(ii) Gujarat Urja Vikas Nigam Ltd (GUVNL)
(iii) Tata Power Company (TPC)
(iv) Dhariwal Infrastructure Ltd (DIL)
(v) GMR Energy Ltd (GMR)
(vi) M B Power (Madhya Pradesh) Ltd (MBPL)
(vii) Association of Power Producers (APP)
(viii) Adani Power Ltd (APL)
(ix) Madhu Gupta & Co
(x) Centre for Energy Regulation (CER)"

40. Manifestly, the respondent no.2/MSEDCL had also participated in these proceedings and had submitted its views / suggestions.

41. M/s Adani Power Limited had raised the issue of increase in the rates of sizing charges and surface transportation charges by Coal India Limited which have been noted in Paragraph No.19 of the order in the following words: -

"19. APL has submitted that CIL has been increasing the rates of Sizing Charges and Surface Transportation

Charges steeply while it is increasing the basic coal price (ROM Price) moderately. The Bidders are unable to recover this abnormal increase in expenditure on Sizing Charges and Surface Transportation Charges as they are neither covered in escalation rates nor allowed in change in law. Such charges not allowed under change in law may be compensated by subsuming these charges in the price of coal used for the proposed coal price index."

42. Paragraph no.23 of the order mentions that a public hearing was conducted on 08.07.2019 for wider public consultation which was attended by 14 representatives from various organizations. Upon considering the submissions / suggestions made by stakeholders and the representatives of various organizations who participated in the public hearing as well as proceedings of the petition, following principles for determining the methodology for compilation of coal price index were laid down by the CERC in the said order: -

"28. Considering the submissions made by the stakeholders and views expressed during the public hearing, the Commission has decided the following principles for determining the methodology for compilation of the coal price index:

(i) ***Price Index****: Laspeyres Index is generally used for compilation of price indices (Ex:-Wholesale Price Index and Consumer Price Index i.e. for the purpose of inflation). In their submissions, some of the stakeholders have suggested to use Paasche Index for compilation of the coal price index. The Laspeyres Index uses base period quantities, whereas the Paasche Index uses current period quantities. Paasche Index can be used only when up-to-date data on price and quantity of Non-coking coal is available. Based on the purpose and practicability, the Commission has considered Laspeyres Index for compilation of the coal price index.*

(ii) ***Base Year:*** *The year 2017-18 has been considered as the base year for compilation of the coal price index. The Commission has already notified the escalation rate for domestic coal applicable till September, 2019. Therefore, the proposed coal price index shall be applicable prospectively.*

(iii) ***Grades of Coal****: Some of the stakeholders have submitted that majority of power producers are using G10-G13 grades of Non-coking coal. However, keeping in view the grades of Non-coking coal used by all power producers through competitive bidding, the Commission has decided to*

consider G7 to G14 grades of Non-coking coal for compilation of the coal price index.

(iv) ***Price of Non-coking coal**: Coal India Ltd notifies the pit head run of mine (ROM) price of non-coking coal applicable for power sector (a) for all subsidiaries of CIL excluding WCL and (b) for WCL separately. These prices reflect adequately the changes in the price of non-coking coal applicable for power sector. Therefore, the Commission has decided to consider the price of WCL and all other subsidiaries of CIL for compilation of the coal price index.*

(v) ***Base Year Price**: Base year price shall be the geometric mean of monthly prices of Non-coking coal of the base year. Monthly price of Non-coking coal has been computed on pro-rata basis based on the day of the price increase and the same has been used for computing the base period price.*

(vi) ***Base Year Weights**: Weights shall be based on the value of Noncoking coal dispatched to power sector. Value of Non-coking coal shall be computed based on monthly price and quantity of Non-coking coal.*

(vii) ***Exclusion**:*

a. *Though some of the stakeholders suggested to compute the index based on price including taxes, the same has not been considered for the*

reason that it would distort the index and inflation figures.

b. *Surface Transportation Charges and Sizing Charges are not part of the price of coal notified by CIL and are therefore not considered in the price of coal used for compilation of the coal price index."*

(Emphasis supplied)

43. It is, therefore, evident that while determining the methodology for compilation of coal price index on the basis of views / suggestions submitted by various stakeholders as well as interested persons, the CERC clarified that the surface transportation charges and sizing charges are not part of the price of coal notified by the Coal India Limited and are not considered in the price of coal used for compilation of coal price index.

44. We do not find any reference to the said order dated 18.10.2019 for CERC in judgment of this Tribunal dated 07.06.2021 in appeal no.158/2017, upon which the 2nd respondent Commission has founded its impugned order. In the said judgment, this Tribunal has referred to another order dated 29.03.2020 passed by CERC in petition no.327/MP/2018 wherein the Commission refused to declare increase in surface transportation charges

and sizing charges of coal as CIL event. We have gone through the said order dated 29.03.2020 passed by CERC in petition no.327/MP/2018. Curiously, there is no reference in the said order to the previous order of the Commission dated 18.10.2019 passed in *suo motu* petition no.10/SM/2019. Neither has the Commission in the order dated 29.03.2020 as well as in the impugned order nor has this Tribunal in the judgment dated 07.06.2021 in appeal no.158/2017 considered or distinguished the order dated 18.10.2019 of CERC in *suo motu* petition no.10/SM/2019.

45. In our opinion, the order dated 18.10.2019 of CERC passed in *suo motu* petition no.10/SM/2019 carries much weight for the reason that it has been passed in exercise of regulatory powers and upon wider consultation with all the stakeholders as well as interested persons and upon considering their views/suggestions. Therefore, the said order ought to have been taken note of and discussed by this Tribunal in the judgment dated 07.06.2021 passed in appeal no.158/2017. Therefore, we feel in agreement with the submissions made on behalf of the appellant that judgment of this Tribunal in appeal no.158/2017 as well as the previous judgments referred to therein, cannot be applied to the instant case for the reason that these have been rendered in ignorance of a material fact that the surface transportation

charges and sizing charges of coal are not part of the price of coal notified by Coal India Limited, and therefore, not considered in the prince of coal used for compilation of coal price index, as clarified by the CERC in *suo motu* order dated 18.10.2019.

46. This Tribunal has in appeal no.158/2017 (Adani case) erred in relying upon the previous judgment in appeal no.111/2017 (GMR Warora case) for the reason that in GMR case, this Tribunal held that change in sizing charges and transportation charges of coal is part of coal pricing mechanism which came to be clarified by the CERC in *suo motu* order dated 18.10.2019 that these charges do not form part of coal price notified by Coal India Limited.

47. With regards to the judgment of the Supreme Court in Civil Appeal No.11095 of 2018 arising out of the judgment dated 14.08.2018 of this Tribunal in appeal no.111/2017 GMR Warora Energy Limited v. CERC and Ors. vide which it dismissed the said appeal, it is to be noted that the Hon'ble apex court has affirmed the concurrent judgments of the CERC and this Tribunal which had been rendered on the assumption that change in sizing charges and transportation charges of coal by Coal India Limited is part of the coal pricing mechanism and therefore had to be factored by the power

generator while submitting the bid, which is factually incorrect in view of the CERC Order dated 18th October, 2019. As already noted hereinabove, in the clarificatory *suo motu* order dated 18.10.2019, the CERC has very specifically mentioned that the surface transportation charges and sizing charges of coal are not part of price of coal notified by Coal India Limited and therefore not considered in the price of coal used for compensation of coal price index. Thus, the said clarificatory *suo motu* order issued by CERC in exercise of its regulatory powers completely shook the edifice upon which this Tribunal had based its judgment in said appeal no.111/2017. It appears that the said *suo motu* order dated 18.10.2019 of CERC was not brought to the notice of the Hon'ble Supreme Court during the hearing of Civil appeal no.11095 of 2018 along with other connected appeals.

48. Further, we find that while passing the judgment dated 14.08.2018 in said Civil Appeal No.11095 of 2018 (GMR Warora case), the Hon'ble Supreme Court did not find it necessary to examine in detail the judgment of this Tribunal in view of concurrent findings of the Commission and this Tribunal and dismissed the appeal merely on finding no reason to interfere with the concurrent findings of the CERC and this Tribunal. The Hon'ble apex court has not specifically held that the revision in surface transportation charges and sizing charges of coal do not constitute Change in Law.

49. According to the respondents, the ratio and principles laid down by this Tribunal in appeal no.111/2017 have been affirmed and upheld by Hon'ble Supreme Court in Civil Appeal No.11095 of 2018, and therefore, there is no scope for reopening the discussion on the said issue.

50. The submissions of the parties with regards to the said judgment dated 20.04.2023 of the Hon'ble Supreme Court in Civil Appeal No.11095 of 2018 leads us to discuss as to which portion of a judgment operates as *ratio decidendi* to be followed as a precedent. On this aspect we find following observations of the Hon'ble Supreme Court itself in Union of India and Ors. V. Dhanwanti Devi and Ors. (1996) 6 SCC 44 very apt:-

> *9. …. It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well settled theory of precedents, every decision contain three basic postulates – (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law*

applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is only an authority for what it actually decides. What is of the essence in decision is its ratio and not every observation found therein not what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. The complete decision alone is binding between the parties to it, but it is the abstract ratio decidendi, ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding. It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution. A deliberate

judicial decision arrived at after hearing an argument on a question which arises in the case or is put in issue may constitute a precedent, no matter for what reason, and the precedent by long recognition may mature into rule of stare decisis. It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its ratio decidendi."

51. Thus, the decision of a superior court based upon the facts of the case is a binding precedent between the parties thereto but it is the enunciation of the reasons or principles upon which the issue before the court has been decided which constitutes *ratio decidendi* and has the force of law to be followed by subordinate courts / tribunals. Clearly, it is only the principle of law laid down in the judgment of the apex court which is a binding law under Article 141 of the Constitution. Therefore, in order to ascertain the binding nature of a decision of a superior court, it is necessary to analyze the facts and circumstances of the case in which the decision was given, the legal point or issue raised and discussed in the judgment and the principle of law evolved in the judgment.

52. In judgment dated 20.04.2023 in Civil Appeal No.11095 of 2018 GMR Warora Energy Limited v. CERC and Ors. Reported as (2023) 10 SCC 401,

the Hon'ble Supreme Court has, in Paragraph No.95 to 101 discussed and laid down as to what constitutes a Change in Law event. These Paragraphs have already been extracted in Paragraph No.11 of this judgment hereinabove. However, Paragraph No.100 and 101 are very relevant and are again quoted hereunder at the cost of repetition: -

> "*100. As discussed herein above, the term 'Law' would also include all applicable rules, regulations, orders, Notifications issued by an Indian Governmental Instrumentality.*
>
> *101. It would thus be clear that all such additional charges which are payable on account of orders, directions, Notifications, Regulations, etc., issued by the instrumentalities of the State, after the cut-off date, will have to be considered to be 'Change in Law' events. The Generators would be entitled to compensation on the restitutionary principle on such changes occurring after the cut-off date."*

53. It would be seen that the basic issue before the court was as to what constitutes Change in Law entitling power generators to compensation on the basis of restitutionary principle which has been answered in these two Paragraphs of the report. Therefore, it is these two Paragraphs of the report

which contain the principle of law laid down by the apex court and thus constitute its *ratio decidendi,* having force of law under Article 141 of the Constitution.

54. In Paragraph no.129-132 of the report, the apex court has discussed the approach of the court in cases arising out of concurrent findings recorded by the central/state commissions and the appellate tribunal. Upon taking note of the previous judgments of the court, the Hon'ble Supreme Court observed that the court should be slow in interfering with the concurrent findings of the fact unless they are found to be perverse, arbitrary and either in ignorance or contrary to the statutory provisions. Accordingly, it dismissed the appeal.

55. Therefore, the ultimate decision of the Hon'ble Supreme Court in the said appeal is based upon the principle enunciated in Paragraph no.129-132 to the effect that the court should not easily and readily interfere in the concurrent findings of facts recorded by the central/state commission and the appellate tribunal. Thus, in our opinion, the decision of the apex court contained in paragraph no.137 of the report thereby dismissing the appeal by refusing to interfere in the concurrent findings of CERC and this tribunal, cannot be treated as *ratio decidendi* having the force of law under Article 141

of the Constitution of India even though it is binding upon the parties to the appeal.

56. The situation which now arises is that the CERC has clarified in suo motu order dated 18.10.2019 that the surface transportation charges and sizing charges of coal are not part of the price of coal notified by Coal India Limited and are not considered in the price of coal used for compilation of coal price index. This clarificatory order of CERC has neither been taken note of nor discussed by this Tribunal in judgment dated 07.06.2021 in Appeal No.158/2017 nor was brought to the notice of the Hon'ble Supreme Court in judgment dated 20.04.2023 in Civil Appeal No.11095 of 2018.

57. Further, it is not in dispute that as on cutoff date i.e. 31.07.2009, surface transportation charges of coal were applicable as per the notification dated 12.12.2007 which were later on revised by subsequent notifications dated 15.12.2009, 13.11.2013 and 15.11.2017. Similarly, the crushing / sizing charges of coal were applicable on the cutoff date as per the notification dated 12.12.2007 issued by Coal India Limited which were revised vide subsequent notifications dated 06.12.2013 and 31.08.2017. In Paragraph no.98 of the judgment in Civil Appeal No.11095 of 2018 (GMR Warora case), the Hon'ble Supreme Court has clearly held that the Coal India

Limited is an instrumentality of Government of India and its orders, in so far as price of fuel is concerned, are binding on all its subsidiaries. Undisputedly, all the above subsequent notifications were issued by Coal India Limited after the cutoff date i.e. 31.07.2009 and imposed a significant financial burden upon the coal-based power generators by increasing the surface transportation charges and sizing charges. Therefore, in view of the law laid down in the said judgment by the apex court in Paragraph nos.100 and 101, all these notifications will have to be considered as Change in Law events entitling the power generators for compensation on the basis of restitutionary principle.

58. We are not impressed by the argument on behalf of MSEDCL that the revision of surface transportation charges and sizing charges by Coal India Limited is the result of contractual arrangements under the Fuel Supply Agreement (FSA) and not due to any legislative or regulatory change. As we have noted hereinabove that the notifications imposed additional financial burden upon coal-based power generators by increase in surface transportation charges and coal sizing charges have been issued after the cutoff date but much before the execution of FSA by the appellant. Manifestly, these charges are uncertain and keep on fluctuating. These can

be known only at the time of execution of FSA and therefore, there was no reason or occasion for the appellant to factor in the same at the time of submitting the bid. These charges have been increased by Coal India Limited by way of the above stated notifications and cannot be said to be a result of contractual arrangements under the FSA.

59. In the light of above discussion, we are unable to sustain the impugned order of the Commission on this aspect. The claim of the appellant that increase in coal sizing charges and surface transportation charges of coal imposed by the Coal India Limited constitute Change in Law event in terms of Article 10 of PPAs deserves to be allowed.

Carrying Cost

60. We note that even though the Commission in the impugned order had held that imposition of Port Congestion Charges by Indian Railways constitutes a Change in Law event, yet it did not allow any separate compensation with regards to the same in view of the compensation allowed for difference in landed cost of domestic coal and alternate coal as per order dated 16.11.2021 in case no.240/2020. Accordingly, it held that since no compensation has been allowed to the appellant, the issue of allowing carrying cost does not arise at all. Notwithstanding the same, the

Commission has gone further to state that even if the appellant would have been found entitled to any compensation on account of Change in Law events, then also carrying cost would not have been allowed for the reason that the appellant had approached the Commission very belatedly for claiming the compensation due to Change in Law events.

61. Now since this Tribunal has allowed the claims of the appellant by declaring the notifications whereby surface transportation charges and crushing / sizing charges of coal were increased as well as the notification dated 25.01.2016 issued by MoEF&CC as Change in Law events, the appellant has claimed carrying cost at the LPS rate specified in Article 8.3.5 read with 8.8.3 of the PPAs i.e. SBI PLR +2% on monthly compounding basis.

62. There is no gainsaying that the compensation for the Change in Law has to be such that it restores the affected party to the same economic position as if the Change in Law event had not occurred. Therefore, the compensation for Change in Law would necessarily include carrying cost as well. It is also to be noted that the carrying cost is payable from the date

when the additional expenditure is incurred by the affected party on account of Change in Law event.

63. Mere fact that the appellant had filed the petition in the instant case before the Commission in the month of March, 2021 i.e. more than three years after the issuance of the notifications in question which have been held to constitute Change in Law events, does not disentitle the appellant to claim carrying cost. What is to be seen is as to when the appellant actually suffered the impact of Change in Law events i.e. when did it start incurring additional expenditure on account of Chang in Law events. That would be the start point from which the appellant would be entitled to carrying cost on the compensation amount in line with the restitutory principle. Relevant date, therefore, is not the date of happening of Change in Law event but the date when additional expenditure is incurred by the affected party.

64. Therefore, we hold the Appellant entitled to carrying cost on the amount of compensation payable to it on account of the above noted change in law events, from the date it suffered additional expenditure, which shall have to be determined by the Commission.

Conclusion:

65. In view of the above discussion, we declare that: -

(a) the notifications dated 25.01.2016 and 31.12.2021 issued by MoEF&CC constitute Change in Law events within the meaning of Article 10 of the PPAs executed between the appellant and MSEDCL for which the appellant would be entitled to compensation;

(b) notifications dated 15.12.2009, 13.11.2013 and 15.11.2017 whereby surface transportation charges of coal were increased by Coal India Limited as well as the notifications dated 06.12.2013 and 31.08.2017 issued by Coal India Limited whereby crushing / sizing charge of coal were increased constitute Change in Law events in terms of Article 10 of the PPAs executed between the appellant and MSEDCL for which the appellant would be entitled to compensation.

66. So far as the aspect of carrying cost is concerned, we hold that the appellant would be entitled to carrying cost at LPS rates as per Articles 8.3.5. and 8.8.3 of the PPAs on the amount of compensation from the date it has started incurring additional expenditure on account of Chang in Law events.

67. Accordingly, the impugned order of the Commission is set aside and the appeal stands allowed to the extent indicated hereinabove.

Pronounced in open court on this the 08th day of May, 2025.

(Virender Bhat)	(Sandesh Kumar Sharma)
Judicial Member	Technical Member (Electricity)

✓

REPORTABLE / ~~NON REPORTABLE~~

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