**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY**
(Appellate Jurisdiction)

**APPEAL No.143 OF 2020 &**
**APPEAL No.66 OF 2022**

Dated: 04.09.2025

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

**In the matter of:**

**APPEAL No. 143 of 2020**

**Adhunik Power and Natural Resources Limited**
*Through its Authorised Representative*
9B, 9th Floor Hansalaya Building
15, Barakhamba Road, Connaught Place,
New Delhi-110001
*Email: powertrading@adhunik.co.in* …. Appellant

**Versus**

1. **Central Electricity Regulatory Commission**
*Through its Secretary*
3rd & 4th Floor, Chanderlok Building
36, Janpath, New Delhi-110001
*Email: info@cercind.gov.in*

2. **West Bengal State Electricity Distribution Company Limited**
*Through its Managing Director*
Vidyut Bhawan, 7th Floor,
DJ-Block, Sector-11
Salt Lake, Kolkata 700091

West Bengal
*Email: wbsedcl.compsec@gmail.com*

**3. PTC India Limited**
*Through its Managing Director*
2nd Floor, NBCC Tower 15
Bhikaji Cama Place
New Delhi-110066
*Email: info@ptcindia.com*

**4. Tamil Nadu Generation and Distribution Corporation Limited**
*Through its Managing Director*
NPKRR Maligai, 6th Floor
Eastern Wing, 144, Anna Salai
Chennai-600002 Tamil Nadu
*Email: chairman@tnebnet.org*

**5. Jharkhand State Electricity Board**
Presently known as
Jharkhand Bijli Bitran Nigam Limited
*Through its Managing Director*
HEC Building, Dhurwa,
Ranchi -834004
*Email: contactus@jbvnl.co.in* …. Respondents

| | | |
|---|---|---|
| Counsel for the Appellant(s) | : | Sajan Poovayya, Sr. Adv.<br>Deepak Khurana<br>Vineet Tayal<br>Abhishek Bansal<br>Nishtha Wadhwa Bhaskar |
| Counsel for the Respondent(s) | : | Amit Kapur<br>Akshat Jain<br>Avdesh Mandloi<br>Shikhar Verma<br>Surbhi Gupta<br>Sayan Ghosh for Res. 2 |

Ravi Kishore
Niraj Singh
Prerna Singh
Rajshree Chaudhary for Res. 3

## APPEAL No. 66 of 2022

**West Bengal State Electricity Distribution Company Limited**
*Through its Authorized Representative*
Vidyut Bhawan, Block DJ,
Bidhannagar, Kolkata 700091
*cereg.wbsedcl@gmail.com* …. Appellant

**Versus**

1. **Adhunik Power and Natural Resources Limited**
*Through its Authorized Representative*
9B, 9th Floor Hansalaya Building
15, Barakhamba Road, Connaught Place,
New Delhi-110001
*ydwivedi@adhunikgroup.co.in*

2. **Central Electricity Regulatory Commission**
*Through its Secretary*
3rd & 4th Floor, Chanderlok Building
36, Janpath, New Delhi-110001
*secy@cercind.gov.in*

3. **PTC India Limited**
*Through its Authorized Representative*
2nd Floor, NBCC Tower 15
Bhikaji Cama Place
New Delhi-110066
*s.khurshid@ptcindia.com*

4. **Tamil Nadu Generation and Distribution Corporation Limited**
NPKRR Maligai, 6th Floor
Eastern Wing, 144, Anna Salai
Chennai-600002 Tamil Nadu
*sechnn@tnebnet.org*

**5. Jharkhand State Electricity Board**
Presently known as DGM
**Jharkhand Bijli Bitran Nigam Limited**
Engineer's Building, HEC, Dhurwa, Ranchi
Jharkhand-834004
*contactus@jbvnl.co.in* …. Respondents

| | | |
|---|---|---|
| Counsel for the Appellant(s) | : | Amit Kapur<br>Akshat Jain<br>Avdesh Mandloi<br>Shikhar Verma<br>Surbhi Gupta<br>Sayan Ghosh |
| Counsel for the Respondent(s) | : | Sajan Poovayya, Sr. Adv.<br>Deepak Khurana<br>Vineet Tayal<br>Abhishek Bansal<br>Tejasv Anand for Res. 1<br><br>Ravi Kishore<br>Niraj Singh<br>Prerna Singh for Res. 3 |

## J U D G M E N T

## PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

*1.* The order dated 29.01.2020 passed by Central Electricity Regulatory Commission (hereinafter referred to as "the Commission") in petition no.305/MP/2015 filed by M/s Adhunik Power and Natural Resources Limited (in short APNRL) has been assailed in these two appeals. Since both the

appeals arise out of the same order dated 29.01.2020, we propose to dispose off these vide this common judgment.

*2.* For the sake of convenience, we shall be referring to the parties in the two appeals by their names instead of appellant or respondent.

*3.* APNRL (appellant in appeal no.143/2020) has set up a 540MW (2x270MW) Thermal Power Project at Saraikela-Kharsawn District in Jharkhand.

*4.* West Bengal State Electricity Distribution Company Limited (in short WBSEDCL), which is respondent no.2 in appeal no.143/2020 and appellant in appeal no.66/2022, is a distribution licensee and carrying on business of distribution as well as retail sale of electricity in the State of West Bengal. APNRL has back-to-back arrangement with WBSEDCL for supply of 100MW power through PTC for a period of 25 years vide Power Sale Agreement (PSA) dated 05.01.2011 and Power Purchase Agreement (PPA) dated 25.03.2011.

*5.* The other three respondents in these two appeal are PTC, which is an inter-state trader of electricity, Tamil Nadu Generation and Distribution Corporation Limited (in short TANGEDCO) which is a distribution licensee in the State of Tamil Nadu with whom also APNRL has back-to-back

arrangement for supply of 100MW power through PTC for a period of 15 years and Jharkhand State Electricity Board (now known as Jharkhand Bijli Vitran Nigam Limited) which is a distribution licensee in the State of Jharkhand with whom also APNRL has entered into a PPA for supply of 189.25MW power.

*6.* The facts and circumstance, in brief, which are material for disposal of these two appeals are stated hereinbelow.

*7.* On 03.01.2011, a meeting was held between APNRL, WBSEDCL and PTC in which it was agreed that the parties will enter into an agreement whereby WBSEDCL would procure power from the power project of APNRL through PTC at a levelized tariff of Rs.3.13/kWh inclusive of trading margin i.e. Rs.0.06/kWh. It was further agreed that formal PSA and PPA would be executed between the parties in this regard.

*8.* Accordingly, a PSA dated 05.01.2011 was executed between the WBSEDCL and PTC for supply of 100MW power contracted from the project of APNRL on Round-The-Clock (RTC) basis at the delivery point i.e. metering point on the inter-connection between the power project and Central Transmission Utility (in short CTU). The term of the PSA is 25 years from the scheduled delivery date which has been agreed as 01.04.2013.

*9.* Subsequently, a PPA dated 25.03.2011 was executed between the APNRL and PTC for sale of 100MW of electricity from the power project of APNRL on RTC basis for a period of 25 years for onward sale by PTC to WBSEDCL. Since PSA dated 05.01.2011 was the basis for execution of PPA, its copy was annexed to the PPA as Schedule-B.

*10.* Certain amendments appear to have been made to the PPA vide amendment agreement no.1 dated 26.04.2011 and amendment agreement no.2 dated 01.12.2011.

*11.* Vide letter dated 22.12.2011, WBSEDCL wrote to PTC informing that PSA dated 05.01.2011 has been approved by the West Bengal Electricity Regulatory Commission vide its order dated 15.12.2011.

*12.* On 30.04.2012, WBSEDCL enquired through PTC about the status of the progress in development of activities pertaining to mining of coal from Ganeshpur Coal Block, which had been allotted to APNRL jointly with Tata Steel. Vide letter dated 10.05.2012, APNRL informed that it is following up consistently with Tate Steel Limited (being the lead miner) for opening of coal mine for coal production.

*13.* A Public Interest Litigation (PIL) being Writ Petition (Criminal) No.120 of 2012 was filed by one Mr. Manohar Lal Sharma in Supreme Court on

14.09.2012 with regards to the validity of coal block allocation process. In pursuance to the same, the government authorities kept in abeyance all the permissions and clearances to be given in development of any coal block.

*14.* On 09.02.2013, APNRL sent a letter to PTC submitting the coal cost calculations for sourcing coal through Tapering Linkage from Central Coalfields Limited (in short CCL) including breakup of coal price. By way of subsequent letter dated 13.03.2013, APNRL requested PTC to further request WBSEDCL to make actual coal cost of procurement of coal as passthrough till the Ganeshpur Coal Block becomes operational. This was followed by reminders dated 13.03.2013 and 22.03.2013.

*15.* Vide letter dated 17.05.2013, PTC informed APNRL that its proposal for passthrough of actual coal cost is not acceptable to WBSEDCL.

*16.* Vide letter dated 26.06.2013, APNRL informed PTC that the power project is ready to commence supply of 100MW to WBSEDCL and accordingly PTC may schedule this power to be supplied to WBSEDCL and also to open letter of credit as per Article 8.4 of the PPA in favour of APNRL.

*17.* The Ministry of Coal, vide Office Memorandum dated 26.07.2013, notified certain changes in the New Coal Distribution Policy (in short NCDP), as approved by the Cabinet Committee on Economic Affairs (CCEA) in

relation to the coal supply for the following four years of 12th Plan. It was noted in the Office Memorandum that in case of Tapering Linkage, supply of coal would be as per the Tapering Linkage Policy.

*18.* The first unit of the power project of APNRL achieved commercial operation on 21.01.2013 whereas its second unit achieved commercial operation on 19.05.2013. Thereafter, the supply of 100MW power to WBSEDCL under the PPA/PSA was commenced on 26.07.2013.

*19.* The Ministry of Power, Government of India, notified the New Coal Distribution Policy, 2013 (in short NCDP 2013) on 31.07.2013.

*20.* In pursuance to the same, the APNRL wrote a letter dated 27.12.2013 to PTC with the request to make the fuel cost i.e. cost of coal sourced through e-auction, spot market, coal import etc. to make good the short supply of coal, as a passthrough for the reason that CCL does not provide coal as per Fuel Supply Agreement (FSA) quantities and the APNRL has to source coal from other sources.

*21.* The request of APNRL was refused by PTC vide letter dated 15.07.2014 stating that the claim of APNRL is not acceptable in view of Article 2.5 of the Power Purchase Agreement. Same was the response of WBSEDCL also to the request of APNRL.

*22.* Vide letter dated 03.03.2014, PTC informed APNRL that in view of Article 2.5 of the PPA, it cannot ask for separate escalation rate for escalable energy purchases on the ground of sourcing coal from any other source, and therefore, its request for additional fuel cost conveyed vide letters dated 31.01.2014 and 27.12.2013 is not tenable.

*23.* Similar request conveyed by APNRL vide letters dated 13.06.2014 and 14.07.2014 was also rejected by PTC as well as WBSEDCL.

*24.* Vide judgment dated 25.08.2014 passed by Hon'ble Supreme Court in the PIL being Writ Petition (Criminal) No.120 of 2012, it was held that allotment of coal blocks made by the Screening Committee of the Government of India as also the allotments made through government dispensation route are arbitrary and illegal. Vide subsequent order dated 24.09.2014, the Hon'ble Supreme Court held that allotment of all such coal blocks, including the coal block at Ganeshpur allotted to APNRL, stood cancelled. The two judgments are reported as Manohar Lal Sharma v. The Principal Secretary and Ors. (2014) 9 SCC 516 and Manohar Lal Sharma v. The Principal Secretary and Ors. (2014) 9 SCC 614.

*25.* Vide letter dated 23.09.2014, PTC conveyed to APNRL that it should raise issue related to recovery of fuel cost as a passthrough for the power

project due to delay in development of Ganeshpur Coal Block, before the appropriate regulatory commission.

*26.* In pursuance to the above noted judgment dated 25.08.2014 passed by the Hon'ble Supreme Court read with subsequent order dated 24.09.2014, the Government of India issued an Ordinance dated 21.10.2014 for allocation of coal mines so as to ensure continuity in coal mining operation and production of coal. Schedule-I of the said Ordinance listed all the coal mines and coal blocks, the allocation of which was cancelled by the judgment dated 25.08.2014 and order dated 24.09.2014 passed by the Apex court. The captive coal block of APNRL was listed at item no.96 in the said Schedule.

*27.* Thereafter, the APNRL again sent a notice dated 15.11.2014 to PTC with request to make fuel cost as passthrough stating that after cancellation of the captive coal block allotted to APNRL in pursuance to the judgment of the Apex court, it does not have any confirmed fuel source except Tapering Linkage provided by Ministry of Coal, Government of India and it is meeting the coal requirement from e-auction, import of coal etc. The request of APNRL was again turned down by WBSEDCL vide its response dated 10.12.2014 which was conveyed by PTC to APNRL vide letter dated 11.12.2014.

*28.* The Government of India issued Coal Mines (Special Provisions) Second Ordinance, 2014 in pursuance to the introduction of the Coal Mines (Special Provisions) Bill, 2014.

*29.* APNRL also participated in the fresh bidding of the coal blocks and submitted its bid on 08.03.2015 for allocation of the Ganeshpur Coal Block which was now a Schedule-III coal mine subsequent to the coal block cancellation orders. However, APNRL did not succeed in getting any coal block in the auction.

*30.* The Coal Mines (Special Provisions) Act, 2015 enacted by the Parliament came into force on 30.03.2015.

*31.* Vide letter dated 06.02.2015, APNRL again requested PTC to take up the cost escalation with WBSEDCL for making payments based on actual energy purchase in terms of the supplementary bills raised by APNRL since 31.03.2014. The request of APNRL was again turned down by WBSEDCL vide letter dated 10.02.2015 stating that WBSEDCL has already taken the view that since the tariff is payable to APNRL as determined in the PPA, the terms of PPA cannot be deviated from. Vide response dated 23.02.2015, PTC also stated that claim of the APNRL is not in line with the PPA and as such the supplementary invoices are not acceptable.

*32.* APNRL continued to raise supplementary bills in respect of difference between actual energy charges and the tariff determined under the PPA but the WBSEDCL has time and again refused to make payment in respect of payments reflected in these supplementary bills.

*33.* In these circumstances, APNRL approached the Commission with petition no.305/MP/2015 on 25.10.2017 praying for following reliefs: -

> *"a. Declare that the Appellant is entitled to the actual landed cost of coal with respect to the PSA dated 05.01.2011 and PPA dated 25.03.2011;*
>
> *b. Direct the Respondent No.2/WBSEDCL to make a payment of Rs.257.25 Crore to the Appellant, which amount has accrued on account of the Change in Law events claimed in the present petition with respect to base price of coal, till March-2017;*
>
> *c. direct the Respondent No.2/WBSEDCL to continue to make payments accrued in favour of the Appellant, post March-2017, in terms stated in the present petition; and*

*d. Pass such other and further order or orders as this Hon'ble Commission deems appropriate under the facts and circumstances of the present case Declare that the Appellant is entitled to the actual landed cost of coal with respect to the PSA dated 05.01.2011 and PPA dated 25.03.2011;"*

*34.* The said petition of APNRL has been disposed off by the Commission vide impugned order dated 29.01.2020 which has been impugned in these tow appeals.

*35.* In the said impugned order dated 29.01.2020, the Commission: -

(a) Held that in terms of provisions of PSA dated 05.01.2011 between PTC and WBSEDCL as well as PPA dated 25.03.2011 between PTC and APNRL and the correspondences exchanged between the parties, they had recognized that source of fuel for generation and supply of power in the power project of APNRL was captive coal block allocated to it at Ganeshpur Coal Block;

(b) held that cancellation of Ganeshpur Coal Block pursuant to judgment of 25.08.2014 of Hon'ble Supreme Court read with subsequent order

dated 24.09.2014 om the PIL being Writ Petition (Criminal) No.120 of 2012 does not constitute a Change in Law event; and

(c) held APNRL entitled to claim compensation for costs incurred to procure coal from alternate sources on account of shortfall in Tapering Linkage and directed it to file a separate petition giving details of Tapering Linkage granted to it, the reasons for the delay in operationalization of captive coal block, the alternate coal procured etc.

*36.* In appeal no.143/2020, APNRL has assailed the order of the Commission in so far as: -

a) It holds that the cancellation of allotment of Ganeshpur Coal Block in pursuance to the judgment of the Supreme Court dated 25.08.2014 (hereinafter referred to as the Supreme Court Coal Block Deallocation Judgment) does not constitute a Change in Law event in terms of PSA and PPA.

*37.* In appeal no.66/2022, WBSEDCL has assailed the order of the Commission in so far as: -

(a) It holds that Ganeshpur Captive Coal Block allotted to APNRL is identified source of coal for the power project of APNRL in terms of PSA and PPA; and

(b) it holds APNRL entitled to compensation for costs incurred for procuring coal from alternate sources on account of shortfall in Tapering Linkage.

*38.* We have heard Mr. Sajan Poovayya, learned senior counsel appearing on behalf of APNRL along with Mr. Deepak Khurana, advocate, and Shri Amit Kapur learned counsel appearing for WBSEDCL. We have also perused the impugned order of the Commission and the written submissions submitted by the learned counsels.

*39.* Following three issues arise for our consideration in these two appeals:-

(i) Whether Ganeshpur Captive Coal Block allotted to APNRL was identified as source of coal to the power project of APNRL in terms of the PSA/PPA executed between the parties?

(ii) Whether cancellation of allotment of Ganeshpur Captive Coal Block in favour of APNRL in pursuance to Supreme Court Coal Block Deallocation Judgment constitutes a Change in Law event in terms of PSA and PPA?

(iii) Whether APNRL is entitled to compensation for costs incurred in procuring coal from alternate sources on account of shortfall in Tapering Linkage.

**Our Analysis: -**

**Issue No.(i): Whether Ganeshpur Captive Coal Block allotted to APNRL was identified as source of coal to the power project of APNRL in terms of the PSA/PPA executed between the parties?**

*40.* On this issue the Commission has, after referring to minutes of meeting dated 03.01.2011 between the representatives of APNRL, WBSEDCL and PTC, Article 2.2 and 2.5 of the PSA/PPA and letter dated 30.04.2012 sent by WBSEDCL to PTC, observed in the impugned order as under: -

> *"The above correspondence and provisions of the PPA and PSA show that the parties have recognised that the source of fuel for generation and supply of power by the Petitioner to WBSEDCL through PTC is the captive coal block allocated to the Petitioner at Ganeshpur in the State*

*of Jharkhand. Moreover, Schedule A of the PSA states that energy charge is based on estimated coal prices and shall be adjusted on the basis of the prevailing escalation factors for captive fuel sources as notified by CERC. It is pertinent to mention that the tariff in the PPA/PSA has been determined through negotiation between the parties. The "estimated coal price" can only be in respect of the captive coal block as the parties were aware that the Petitioner had been allocated a captive coal block for generation and supply of power from its generating station. Moreover, the parties have linked the escalation rates with the escalation factors for captive fuel sources which also supports the contention of the Petitioner that the negotiated tariff agreed in the PSA/PPA was based on the estimated price of coal from the captive mine of the Petitioner. Article 2.5 of the PPA/PSA is of special relevance. It begins with the words "on the ground of sourcing coal from any other sources by the Seller", and proceeds on to conclude that "it will be considered that such coal has been deemed to be sourced from the captive source only". Reference to "any other sources"*

*means the sources other than the captive source and in such cases, it will be deemed to be sourced from captive source only. This deeming provision in the PSA/PPA clearly establishes that the tariff agreed in the PPA/PSA was based on captive coal."*

*41.* Thus, the Commission came to conclusion that the source of fuel as agreed by the parties in the PSA/PPA was captive coal mine.

*42.* It is vehemently argued on behalf of WBSEDCL that the Commission has failed to consider that APNRL did not place any document on record to show that APNRL was allocated a captive coal block which was slated to commence production in synchronization with scheduled delivery date under the PSA and therefore, in the absence of any such document the Commission erred in declaring Ganeshpur captive coal block as identified source of fuel under the PPA/PSA. It is argued that neither the PPA nor PSA mentions any specific coal block as source of fuel for the power project of APNRL. It is submitted that the parties consciously intended not to mention any specific coal block in the PPA/PSA and therefore it was not open for the Commission to read an implied source of fuel into the PPA/PSA contrary to the intention of the parties. Reliance is placed upon the judgment of the

Supreme Court in GUVNL v. Solar Semiconductor Power Company (India) 2017 16 SCC 498, GUVNL v. AMCO Ltd. 2016 11 SCC 182, Bescom v. Konark Power Project Ltd 2016 13 SCC 515 and HPPC v. Sasan Power Ltd 2024 1 SCC 247.

*43.* Learned counsel for WBSEDCL also argued that the meeting dated 03.01.2011 between the representatives of APNRL, WBSEDCL and PTC had taken placed prior to the execution of PPA/PSA and thus, the Commission has erred in placing reliance upon these minutes, which are contrary to the express terms of PPA/PSA. It is submitted that in case the parties intended to recognize Ganeshpur captive coal block as identified fuel source for the power project in question, the same would have been expressly provided in PPA/PSA.

*44.* On behalf of APNRL, the learned senior counsel argued that in view of Article 2.5 of the PPA/PSA as well as the contents of various correspondences exchanged between the parties, the Commission has rightly come to conclusion that Ganeshpur captive coal block allotted to APNRL was the identified coal source for the power project of APNRL in terms of PPA/PSA.

**Our Analysis: -**

*45.* It is true that none of the provisions of the PSA and PPA executed between the parties provides as to what would be the source of fuel I,e, coal for the power project of APNRL.

*46.* We may note here that PSA was executed between WBSEDCL and PTC on 05.01.2011 which was followed by execution of PPA between APNRL and PTC on 25.03.2011. The PSA dated 05.01.2011 was approved by West Bengal Commission on 15.12.2011. Soon thereafter, WBSEDCL wrote a letter dated 30.04.2012 to PTC inquiring about the present status of the work related to lifting of coal from Ganeshpur captive coal block and its transportation from the captive coal mine to coal handling plant. We find it apposite to extract here the contents of the said letter.

> **"***Dear Sir,*
>
> *A PPA has been executed on 05.01.2011 by and between WBSEDCL and PTC India Ltd. As per undertaking of APNRL, it is understood that they have already obtained, allocation of Ganeshpur Coal Block in the State of Jharkhand for captive mining of coal block jointly with Tata Steel Limited, on equal sharing, i.e. 50:50 basis.*

*In this context, I would request you to provide us the present status of the work related to lifting of coal from the coalmine and transportation of coal from captive mine, allocated to APNRL, to the coal handling plant, within 10.05.2012."*

*47.* We wonder as to why would WBSEDCL enquire about the status of work in Ganeshpur Coal Block soon after the approval of PSA by the West Bengal Commission if the parties never intended or agreed that said coal block would be the source of coal for the power project.

*48.* It appears that the said letter was forwarded by PTC to APNRL for its response. Accordingly, APNRL in its response dated 10.05.2012 sent to PTC informed that APNRL has been allocated Ganeshpur captive coal block jointly with Tata Steel in 50:50 joint venture, Tata Steel being a lead miner. It was further stated that APNRL is following strenuously with Tata Steel for opening of coal mine for co-generation and the work of Railway siding for transportation of coal is in very advanced stage.

*49.* It appears that since the captive coal mines had not been operationalized, the project developers were granted Tapering Linkages to

meet their contractual obligations for supply of power to the distribution companies. The APNRL was granted Tapering Linkages on 09.07.2009 and 25.11.2010 prior to the date of singing of PSA by PTC with WBSEDCL. This arrangement was to continue till the captive mines were developed and operationalized. Actual supply of coal under the Tapering Linkage Policy was allowed only when the project developer entered into a PPA with the distribution company. Upon execution of PPA with PTC, APNRL began sourcing coal under Tapering Linkage and commenced power supply to WBSEDCL through PTC. APNRL was meeting the shortfall in supply under Tapering Linkage by purchasing coal from other sources which is e-auction, import of coal etc.

*50.* On 09.02.2013, APNRL sent a letter to PTC submitting the coal cost calculations for sourcing coal through Tapering Linkage from Central Coalfields Limited (CCL) including breakup of coal price. In the said letter, APNRL had also stated that at the time of signing of PPA it was taken into consideration that the coal block allocated to it would be operational by the date of supply of power to WBSEDCL but there has been delay in the operationalization of the coal block and the production of coal is expected to start by the end of year 2015. The relevant portion of the letter is extracted hereinbelow: -

"…

*As you are aware, at the time of signing of the PPA it was taken into consideration that our coal block would be operational by the date of supply of power to WBSEDCL but because of reasons beyond our control (Getting clearances from different Governmental Instrumentalities), now we are hoping to start production from coal block by 2015 end. If required, we can share the details of coal block developments with PTC/WBSEDCL on quarterly basis.*

*We request you to kindly approach to WBSEDCL to make coal cost as pass through till our coal block gets fully operational. We shall submit the requisite documentary proof for coal cost if required.*

*We would like to apprise you that the Unit-2 of 2X270 MW power plant of APNRL from which power is to be supplied to PTC for onward sale to WBSEDCL is expected to declare COD by May/June' 13.*

**…"**

*51.* It is seen that in the said letter, APNRL had requested WBSEDCL to make coal cost as passthrough till the captive coal block gets fully operational. This was followed by reminders dated 13.03.2013 and 22.03.2013. However, vide letter dated 17.05.2013 PTC informed APNRL that its proposal for passthrough of actual coal cost is not acceptable to WBSEDCL.

*52.* Meanwhile, the first unit of the power project of APNRL achieved commercial operation on 21.01.2013. Its second unit achieved commercial operation on 19.05.2013. APNRL commenced supply of 100MW power to WBSEDCL under the PPA/PSA was commenced on 26.07.2013.

*53.* Thereafter, APNRL again wrote a letter dated 27.12.2013 to PTC with request to make the fuel cost i.e. cost of coal sourced through e-auction spot market, import etc. to make good short supply of coal as a passthrough for the reason that CCL does not provide coal as per Fuel Supply Agreement quantities and APNRL is constrained to source coal from other sources. The request of APNRL was turned down by PTC vide letter dated 15.07.2014 stating that the claim of APNRL is not acceptable in view of Article 2.5 of Power Purchase Agreement. Similar was the response of WBSEDCL also to the request of APNRL.

*54.* Similar request was made by APNRL vide letters dated 13.06.2014 and 14.07.2014. In the letter dated 13.06.2014, APNRL has specifically mentioned that the intention at the time of execution of the PPA was to procure coal from captive coal mine and therefore the escalation rate used while signing of PPA was that of captive mine to arrive at the levelized tariff. The relevant portion of the letter is reproduced hereinbelow: -

> *"…*
>
> *We have been requesting WBSEDCL through PTC for mitigating the loss arising on account of tapering linkage accorded to the project and meeting the short supply of coal from CCL by procuring the coal from other sources. The philosophy and intent of the PPA was to procure coal from captive coal mine block and thus the escalation rate used while signing of PPA was that of Captive Mine to arrive at the Levelized Tariff.*
>
> *…"*
>
> *(Emphasis supplied)*

*55.* What comes out from the perusal of these correspondences exchanged between the parties is that APNRL has been continuously stating

that the intention of the parties at the time of execution of PSA/PPA was that source of fuel for the power project would be captive coal block which could not be operationalized due to certain factors not attributable to it and accordingly it was constrained to source fuel from CCL under Tapering Linkage Policy as well as from other sources in view of shortfall in supply of coal under Tapering Linkage. Neither the PTC nor WBSEDCL has refuted in any of their responses to the communications of APNRL that source of fuel was never intended or agreed upon to be captive coal block.

*56.* We now turn to Article 2.5 of the PSA/PPA upon which reliance has been placed by the Commission in reaching its conclusion in the impugned order and which was attempted to be interpreted by the learned counsels for the parties as per their respective cases. The Article reads as under: -

> **"***2.5. On the ground of sourcing of coal from any other sources by APNRL, Seller shall not ask for any separate escalation rate for escalable energy charges and it will be considered that such coal has been deemed to be sourced from the captive source only for the purchasing of Power by the Buyer from the Seller under this Agreement."*

*57.* As rightly argued by learned counsel for WBSEDCL, it is a deeming provision according to which any coal sourced by APNRL from any source other than captive source shall be deemed to be sourced from the captive source only, and the seller (i.e. PTC in the PSA and APNRL in the PPA) shall not ask for any separate escalation rates for escalable energy charges.

*58.* It was argued by learned counsel for WBSEDCL that evidently, the parties had anticipated sourcing of coal from sources other than the captive block and mutually agreed with the procurement of coal from another source would be deemed to source from captive source only and therefore, non-availability of coal from captive coal block to APNRL will have no bearing on the present case.

*59.* We are unable to countenance the submissions of the learned counsel for WBSEDCL. It is manifest that in case the parties did not intend and were not conscious at the time of execution of PSA/PPA that APNRL has to source coal from the power project from the captive coal block at Ganeshpur, there was no reason or occasion for including Article 2.5 in the PPA/PSA. Mere fact that the said Article 2.5 finds place in PSA as well as PPA clearly indicates that the parties were aware that APNRL has to source coal for the power project from captive source only and thus in order to prevent it from

buying coal from outside despite captive coal block being in operation, this Article was included in the PSA/PPA. In case the parties, at the time of execution of PPA/PSA, intended that the source of coal for the power project would not be captive source only, APNRL was free to source coal from another source and no impediment could have been placed upon it for claiming actual coal cost as purchased by it from another source. In that case, Article 2.5 would become totally redundant.

*60.* We are not impressed by the argument on behalf of WBSEDCL that the Commission has read an implied source of fuel into the PPA/PSA, contrary to the intention of the parties.

*61.* We find it relevant to refer on this issue to the judgment of the Hon'ble Supreme Court in Nabha Power Limited v. Punjab State Power Corporation Limited (2018) 11 SCC 508, wherein the Apex court had the occasion to consider as to when an implied term can be read into a contract and has laid down guiding principles in this regard. It has been held: -

> *"It should certainly not be an endeavour of commercial courts to look to implied terms of contract. In the current day and age, making of contracts is a matter of high technical expertise with legal brains from all sides involved*

*in the process of drafting a contract. It is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into. Thus, normally a contract should be read as it reads, as per its express terms. The implied terms is a concept, which is necessitated only when the Penta-test referred to aforesaid comes into play. There has to be a strict necessity for it."*

*62.* The "Penta-test" as referred by the Hon'ble Supreme Court in the above judgment to ascertain implied terms while interpreting commercial contracts is as under: -

*"(1) it must be reasonable and equitable;*

*(2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;*

*(3) it must be so obvious that "it goes without saying";*

*(4) it must be capable of clear expression;*

*(5) it must not contradict any express term of the contract."*

*63.* The issue with regard to interpretation of a commercial contract had come up before the Hon'ble Supreme Court in Transmission Corporation of Andhra Pradesh Limited and Others versus GMR Vemagiri Power Generation Limited and Another (2018) 3 SCC 716 wherein it has been held that a commercial document cannot be interpreted in a manner to arrive at complete variance with what may originally had been the intendment of the parties. We find it pertinent to reproduce relevant paragraph of the said judgment: -

> *"26. A commercial document cannot be interpreted in a manner to arrive at a complete variance with what may originally have been the intendment of the parties. Such a situation can only be contemplated when the implied term can be considered necessary to tend efficacy to the terms of the contract. If the contract is capable of interpretation on its plain meaning with regard to the true intention of the parties it will not be prudent to read implied terms on the understanding of a party, or by the court, with regard to business efficacy as observed in Satya Jain v. Anis Ahmed Rushdie, as follows: (SCC pp.143-44, paras 33-35)*

*"33. The principle of business efficacy is normally invoked to read a term in an agreement or contract so as to achieve the result or the consequence intended by the parties acting as prudent businessmen. Business efficacy means the power to produce intended results. The classic test of business efficacy was proposed by Bowen, L.J. in Moorcock. This test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied – the bare minimum to achieve this goal. If the contract makes business sense without the term, the courts will not imply the same. The following passage from the opinion of Bowen, L.J. In the Moorcock sums up the position: (PD p.68)*

> *'… In business transactions such as this, what the law desires to effect by the implications is to give such business efficacy to the*

*transaction as must have been intended at all events by both parties who are businessmen; not to impost on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.' "*

*64.* A meaningful perusal of the Article 2.5 of PSA/PPA executed between the parties in this case along with the correspondences exchanged between the parties post execution of PPA/PSA, which have been discussed already hereinabove, leads to an inevitable conclusion that the intention of the parties at the time of execution of PPA/PSA was that fuel i.e. coal required by power project of APNRL was to be sourced from captive coal block at Ganeshpur. We do not find anything on record either in the PPA/PSA or the correspondences exchanged between the parties to show or suggest that the parties, at the time of execution of PPA/PSA, neither intended nor were conscious that the source of coal for the power project of APNRL would be captive coal block only. On the contrary, Article 2.5 of the PPA/PSA as well

as the correspondences exchanged between the parties clearly indicate that they recognized source of fuel for generation and supply of power in the power project of APNRL to be captive coal block allocated to APNRL at Ganeshpur in the State of Jharkhand. It is also evident from the perusal of Schedule-A of the PSA which states that energy charge is based on the estimated coal prices and shall be adjusted on the basis of prevailing escalable factors for captive fuel source as notified by CERC. Linking of escalation rates with the escalation factors for captive fuel sources supports the contention of APNRL that the tariff agreed in the PPA/PSA was based on the estimated price of coal from its captive mine.

*65.* Here, the minutes of meeting held between the representatives of WBSEDCL, PTC and APNRL on 03.01.2011 would also assume importance. We find it apposite to extract the minutes of the said meting hereunder: -

> ***" …*** *The meeting has been held for negotiation of rate and finalization of PPA for purchase of power from M/s. Adhunik Power & Natural Resources Ltd. through PTC India Ltd. The main issues have been highlighted and discussed in detail:*

*The discussion took place in connection with sale of power on long term basis from M/s. Adhunik Power & Natural Resources Ltd. from their power plant situated at Saraikala, Kharsawan in Jharkhand through PTC India Ltd. WBSEDCL proposed that the purchase of power may be through regulated route. However, APRNL stressed for negotiated route. The salient features of the transaction are as under:-*

1. *Contracted quantum of power will be 100 MW RTC.*
2. *Scheduled delivery date: 1st April, 2013. However, preponment is allowed with 4 months prior notice.*
3. *Based on detailed discussion, it has been mutually agreed that the levelized tariff shall be Rs.3.13 per unit inclusive of trading margin. Environmental Cess, if applicable, will be reimbursed extra in addition to the tariff, on production of documentary evidence of payment.*
4. *MOEF clearance for 270 MW has already been obtained and the balance is in the process.*

5. *Land around 400 acres have been acquired and balance land of around 125 acres will be acquired within next 12 months.*
6. *Water clearance railway transport clearance, aviation clearance have already been obtained.*
7. *Financial closure has been done.*
8. *APRNL has a captive coal block at Ganeshpur in Jharkhand and this coal block is a joint venture with TISCO.*
9. *Approximate project cost is 2350 cr. Excluding IDC of Rs.300 cr.*
10. *Payment security mechanism is only letter of credit and payment will be through RTGS. No collateral arrangement or CPG is required.*
11. *2% rebate is to be paid of payment is made within two business day and 1% within 15 days.*
12. *Termination clause is applicable in case of event of default.*
13. *All relevant points have been discussed and agreed upon by the parties.*

14. *The draft PPA has been discussed threadbare and thereafter it has been finalized based on mutually agreed terms and conditions.*

15. *APNRL shall submit, as discussed, all relevant documents on 05.01.2011."*

*66.* Perusal of these minutes would reveal that the meeting had been held to negotiate the rate of electricity and for finalization of PPA for purchase of power from APNRL by WBSEDCL through PTC. At Sl.No.8 of the salient features of the transactions discussed in the meeting, it is specifically stated that APNRL has a captive coal block at Ganeshpur in Jharkhand, which is a joint venture with M/s Tata Steel Ltd. This would indicate that the negotiations had taken place between the parties while being conscious of the fact that APNRL has been allocated a captive coal block jointly with M/s Tata Steel Ltd. at Ganeshpur from which the fuel for the power project would be sourced. Had the parties not intended so, there was no reason or occasion to mention about the captive coal block in the minutes. Just two days thereafter i.e. on 05.01.2011 PSA was executed between the WBSEDCL and PTC which contains Article 2.5, already discussed hereinabove. Concededly, PSA is the outcome of the minutes of the meeting dated 03.01.2011. Whatever was agreed between the parties in the said

meeting dated 03.01.2011 with regards to sale of power by APNRL to WBSEDCL through PTC, has been incorporated in the PSA dated 05.01.2011 as well as in the PPA dated 25.03.2011. Based upon the understanding between the parties that APNRL has been allocated captive coal block at Ganeshpur from where it would source fuel for the power project, Article 2.5 has been incorporated in PSA as well as PPA even though none of the provisions of these two documents specifically state that source of fuel for the power project would be captive coal block. No explanation has come forth either from WBSEDCL or PTC as to why there has been mention of captive coal block at Ganeshpur in the minutes of the meeting dated 03.01.2011 if the parties did not intend it to be the source of fuel for the power project. The only logical conclusion which is deductible from these circumstances as well as from the conduct of the parties as also upon perusal of Article 2.5 of PSA/PPA in conjunction with the subsequent correspondences exchanged between the parties, is that all the parties intended and were aware at the time of execution of PSA/PPA that the source of fuel for the power project of APNRL would be captive coal block at Ganeshpur.

*67.* In the light of above discussion, we do not find any error in the impugned order of the Commission on this issue.

**<u>Issue No.(ii)</u>: Whether cancellation of allotment of Ganeshpur Captive Coal Block in favour of APNRL in pursuance to Supreme Court Coal Block Deallocation Judgment constitutes a Change in Law event in terms of PSA and PPA?**

*68.* Article 10 of PPA dated 25.03.2011 deals with "Change in Law" and is extracted hereinbelow: -

> *"In this Article 10, the following terms shall have the following meanings:*
>
> ***I. Change in law means occurrence of any of the following events:***
>
> *a) the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*
>
> *b) a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the*

*legal power to interpret or apply such Law, or any Competent Court of Law;*

*(c) the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*

*(d) 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;*

*(e) any change in tax or introduction of any tax made applicable for supply of power by the Seller*

*(f) any change in law relating to Mining laws and Environment Laws or tax cess or duty affecting input cost or raw material.*

***II. But change in law shall not include :***

*(a) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or*

*(b) change in respect of UI Charges or frequency intervals by an Appropriate Commission.*

***III. Such change in Law could be but not restricted to any of the following cased where it,***

*a) Results in any change in respect of tax.*

*b) Affects Seller's or PTC's obligation under this Agreement.*

*c) Materially affects the construction, Commissioning or operation of the Project."*

*69.* We may note here that Article 10 of PSA dated 05.01.2011 also relates to "Change in Law" and is similarly worded as that of Article 10 of the PPA which has been quoted hereinabove.

*70.* Perusal of the Article 10 of the PPA would reveal that following events would constitute Change in Law: -

(a) Any enactment bringing into effect adoption, promulgation, amendment, modification or repeal of any law in India including rules and regulations framed pursuant to such law;

(b) any change in interpretation or application of any law by any Indian Governmental Instrumentality having the legal power to interpret or apply such law or by any competent court of law;

(c) imposition of requirement for obtaining any consent, clearance, permit which was not required earlier;

(d) any change in terms and conditions prescribed for obtaining any consent, clearance or permit or the inclusion of any new terms and conditions for obtaining such consent, clearance and permits except due to any default of the seller;

(e) any change in tax or introduction of any tax made applicable for supply of power by the seller; and

(f) any change in law relating to mining law and environment laws or tax, cess or duty affecting input cost or raw material.

Further, such event must materially affect the construction, commissioning or operation of the power project.

*71.* As per Article 10.3, any party affected by Change in Law event is required to give a notice to the other party mentioning therein the precise details of Change in Law and its effect on the seller of power.

*72.* The term “applicable law(s)” has been defined in Article 1.1 of the PPA/PSA as under: -

> *“Applicable Law (s)” in relation to this Agreement means and includes (i) all laws in force in India and any statute,*

*ordinance, regulation, notification, code and /or rules and/or (ii) any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and/ or (iii) all applicable rules, regulations, orders, notifications by an Indian Government Instrumentality pursuant to the items in (i) hereof or under any of them and includes all rules, regulations, decisions and orders of the Appropriate Commission."*

*73.* The terms "Indian Governmental Instrumentality" and "competent court" have also been defined in Article 1.1 of the PPA/PSA as under: -

*"Indian Governmental Instrumentality" means the Government of India, Government of States where the Buyer, Seller and the Project are located and any Ministry or department of or board, agency, or other regulatory or quasi- judicial authority controlled by the Government of India or Government of States where the Buyer, Seller and Project are located and includes the Appropriate Commission."*

*"Competent Court" means the Supreme Court or High Court at Delhi/Calcutta, or any Electricity appellate tribunal or Appropriate Commission in India that has jurisdiction to adjudicate upon issues relating to this Agreement."*

*74.* Thus, the term "law" used in Article 10.1 of the PSA/PPA would include (a) all laws in force in India; (b) any statute, ordinance, regulation, notification, code, rule as well as their interpretation by any Indian Governmental Instrumentality i.e. Government of India or the Government of States or any Ministry/Department/Board/Regulatory or Quasi-judicial Authority in such Governments; (c) all applicable rules, regulations, orders, notifications issued by Indian Governmental Instrumentality; and (d) all rules, regulations, decisions and orders passed/issued by the appropriate Commission. In case any of these laws affect the cost of generation or revenue from the business of selling electricity by the seller to the procurers, the same can be considered as "Change in Law" as contemplated under Article 10 of the PPA/PSA. The "competent court" includes the Supreme Court, High Court at Delhi / Kolkata, Electricity Appellate Tribunal or appropriate Commission having jurisdiction to adjudicate upon the issues relating to the agreement.

*75.* The case of the APNRL before the Commission was that since laws governing allocation / allotment of coal block i.e. Coal Mines Nationalization Act, 1957 (in short CMN Act) and Mines and Minerals Development and Regulation Act, 1957 (in short MMDR Act) were interpreted by the Hon'ble Supreme Court in its Coal Block Deallocation Judgment dated 25.08.2014 and connected matters in a manner different from interpretation of the Government of India under which coal blocks were allotted, the interpretation of the Hon'ble Supreme Court has resulted in “Change in Law” and this clearly qualifies as Change in Law under the Article 10.1.1(b) of PPA/PSA. The Commission has repelled the contentions of the APNRL saying that the Hon'ble Supreme Court, in the said judgment, has ultimately ordered cancellation of the allotment of coal blocks on the ground that the allocation of coal blocks through screening committees and government dispensation was arbitrary, non-transparent and unfair and therefore, the said judgment of the Supreme Court cannot be considered as change in interpretation of the provisions of either CMN Act or MMDR Act. Thus, it does not constitute Change in Law envisaged under Article 10.1.1(b) of PPA/PSA.

*76.* It was also contended by the APNRL before the Commission that the judgment of the Supreme Court cancelling the coal blocks also qualifies as Change in Law under Article 10.1.1(c) and Article 10.1.1(d) of the PSA/PPA

as a new condition for participation in the auction process for coal blocks under the Coal Mines (Special Provisions) Act, 2015 has been prescribed, which did not exist earlier. These contentions of the APNRL also did not find favour with the Commission. It has been held by the Commission that the judgment of the Supreme Court did not impose any new requirement nor changed the terms and conditions for obtaining consents/clearances and permits for allocation of coal blocks.

*77.* Thus, the Commission held that the Coal Block Deallocation Judgment of the Supreme Court does not constitute "Change in Law".

*78.* Such conclusion reached by the Commission does not appear to be credible or acceptable. The Commission has relied upon only the operative portion of the judgment of the Supreme Court whereby allocation of coal blocks was found to be arbitrary, non-transparent and unfair and accordingly the allocation was cancelled. In order to ascertain as to whether the said Judgment of the Supreme Court had rendered any change in the interpretation of any existing rule or law, what is required is to peruse the entire judgment including the observations made by the Supreme Court upon which the ultimate conclusion reached by the court is founded. The Government of India had previously allocated the captive coal blocks to the project developers including the APNRL within the framework of CMN Act

and MMDR Act. As per the interpretation given by the Government of India to these two statutes it had assumed power as well as duty to allocate coal blocks to private entities for captive use/mining. This is manifest from the following submissions made on behalf of the Central Government before the Hon'ble Supreme Court during the hearing of the coal block deallocation cases: -

> *41. The Central Government has highlighted that once Section 3(3) of the CMN Act [Coal Mines once Section 3(3) of the CMN Act [Coal Mines Nationalisation Act] was amended to permit private sector entry in coal mining operations for captive use, it became necessary to select the coal blocks that could be offered to private sector for captive use. The coal blocks to be offered for the captive mining were duly identified and a booklet containing particulars of 40 blocks was prepared which was revised from time to time.*
>
> *42. Mr. Goolam E. Vahanvati, learned Attorney General with all persuasive skill and eloquence at his command has sought to justify the allocation of coal blocks by the*

*Central Government. He submits that the Central Government is not only empowered but is duty bound to take the lead in allocation of coal blocks and that is what it did. He traces this power to Sections 1A and 3(3) of the CMN Act. It is argued by the learned Attorney General that in addition to the declaration contained in Section 2 of the 1957 Act, Parliament has made a further declaration in terms of Entry 54 of List 1 (Union List) of the Seventh Schedule in Section 1A of the CMN Act which makes specific reference to Section 3 (3) of the CMN Act and both have to be read in conjunction with each other. By virtue of Parliament having placed the regulation and development of coal mines under the control of the Union, Section 1A of the CMN Act regulates coal mining operations under Sections 3(3) and 3(4). He argues that coal reserves are primarily concentrated in seven States, viz., Maharashtra, Madhya Pradesh, Chhattisgarh, Odisha, Jharkhand, Andhra Pradesh and West Bengal and all these seven States have accepted and acknowledged the source of power of Government of India with respect to allocation of coal blocks."*

*79.* However, such interpretation sought to be given by the Government of India to the relevant provisions of these two statutes has been rejected by the Hon'ble Supreme Court in the said judgment in the following words: -

> *"69. In view of the foregoing discussions, we hold, as it must be, that the exercise undertaken by the Central Government in allocating the coal blocks, or, in other words, the selection of beneficiaries, is not traceable either to the 1957 Act or the CMN Act. No such legislative policy (allocation of coal blocks by the Central Government) is discernible from these two enactments. Insofar as Article of the Constitution is concerned, there is no doubt that the executive power of the Union extends to the matters with respect to which the Parliament has power to make laws and the executive instructions can fill up the gap not covered by statutory provisions but it is equally well settled that the executive instructions cannot be in derogation of the statutory provisions. The practice and procedure for allocation of coal blocks by the Central Government through administrative route is clearly*

*inconsistent with the law already enacted or the rules framed."*

*80.* Hence, manifestly, the Supreme Court in the said judgment has interpreted the provisions of CMN Act and MMDR Act in a manner different than the interpretation given by the Government of India. It has been clearly observed by the Supreme Court that the power of the Central Government in allocating the coal blocks or selection of beneficiaries is not traceable either to CMN Act or MMDR Act. This was one of the reasons for the Hon'ble Supreme Court to come to conclusion that the entire allocation of coal blocks as per recommendations made by screening committee as well as the allocation through government dispensation route suffered from vice of arbitrariness and legal flaws. The inconsistent and non-transparent manner of functioning of the screening committee as also the non-application of mind by the screening committee as well as breach of necessary guidelines by the screening committee were additional factors which persuaded the Hon'ble Supreme Court to direct cancellation of allocation of coal block.

*81.* The Government of India, on the basis of its own interpretation and understanding of CMN Act as well as MMDR Act had proceeded to allocate captive coal mines thereunder. Such interpretation as well as understanding

of the Government of India concerning these two enactments and the consequential application of such interpretation/understanding for the purpose of allocating coal mines came to be rejected/set aside by the Hon'ble Supreme Court in the said judgment. It is therefore, evident that the Hon'ble Supreme Court, by rejecting the interpretation and understanding of these two statutes of the Government of India, has changed the "interpretation" or "application" of these two statutes as adopted by the Government of India. In view of the same, it would be preposterous to say that there has been no change in the interpretation of provision of CMN Act and MMDR Act by the Hon'ble Supreme Court in the said judgment. Thus, the change in interpretation of these two statutes resulting in the wake of the aforesaid judgment of the Hon'ble Supreme Court undoubtedly constitutes "Change in Law" event envisaged under Article 10 of the PPA/PSA.

*82.* We find it very material to note here that this Tribunal in judgment dated 21.12.2018 passed in appeal no.193/2017 GMR Kamalanga Energy Ltd and Anr v. CERC and Ors. 2018 SCC OnLine Aptel 151 has held the cancellation of coal blocks in pursuance to the judgment of the Supreme Court in coal block deallocation case to be a "change in law" event. It is also necessary to note that the said observation of this Tribunal in the said judgment has been taken note of with approval by the Hon'ble Supreme Court in GMR Warora Energy Ltd v. CERC and Ors (2023) 10 SCC 401.

*83.* The said judgment of this Tribunal in GMR Kamalanga case was brought to the notice of the Commission by APNRL by way of IA No.24/2019 to canvass that the said judgment applies squarely to the instant case also. However, the Commission has chosen not to rely upon the said judgment of this Tribunal while distinguishing the facts of that case with the facts of the instant case. It would be necessary to quote here the relevant portion of the said judgment of this Tribunal hereunder: -

> *"62. In terms of judgment of the Apex Court in Manohar Lal Sharma v. The Principal Secretary, the Captive Coal Blocks came to be cancelled. Normative date of production of the coal block was 17-10-2013. This block was allowed to Appellant GKEL on 17-1- 2008. It is not in dispute that the delay in development of coal block was on account of Go-No-Go policy of the MoEF which was beyond the control of the developers. The same came to be recorded in the minute of the meeting between Inter-Ministerial Group held on 7-7-2015 to review issue of bank guarantee so also the letter dated 16-1-2014 issued by the Ministry of Coal (Annexure A-24, page-620, Vol. III of the Appeal Paper Book). On account of the reasons beyond*

*the control of GKEL operationalization of the Captive Coal Block was delayed.*

*63. In lieu of the Captive Coal Blocks tapering linkage was extended and subsequent cancellation of the coal block was intimated in terms of letter dated 16-1-2014 (Annexure A-13, page 510 of Appeal Paper Book). MoLI dated 2-7-2015 between IVICL and GKEL (Annexure A-23, page 615, 616, 617 of Appeal Paper Book and Anexure-A-27, Page 638 of Appeal Paper Book) indicate that tapering linkage was also extended. Since cancellation of coal block was on account of judgment of the Apex Court in 2014, event subsequent to cut-off date, this also amounts to change in law."*

*84.* We do not see any significant distinction between the facts of the instant case and facts of the GMR Kamalanga case. In both the cases Tapering Linkage was granted to the power generators till operationalization of captive coal blocks. Since there was delay in operationalization of coal blocks, the power generators in both the cases had to rely upon Tapering Coal Linkage. Meanwhile, the allocation of coal blocks was cancelled by the

Hon'ble Supreme Court by way of the aforesaid judgment. Therefore, the finding of this Tribunal in GMR Kamalanga case to the effect that the cancellation of coal blocks on account of the judgment of the Supreme Court being an event subsequent to the cutoff date, amounts to Change in Law, squarely applies to the instant case also.

*85.* It was argued on behalf of WBSEDCL that in case of GMR Kamalanga, the PPA was under Section 63 of the Electricity Act, 2003 and specifically mentioned the captive coal blocks (Rampia and dip-side Rampia) as a fuel source, which is not the case herein. The arguments have been noted only to be rejected. We have already held in the foregoing Paragraphs that in this case also, the parties had identified the source of fuel for the power project of APNRL to be a captive coal block allotted to APNRL at Ganeshpur, which came to be cancelled subsequently in pursuance to the judgment of the Hon'ble Supreme Court. Further, once a particular event is held to be constituting “Change in Law” event, it would hold good in both cases i.e. where the PPA is executed in pursuance to the competitive bidding as provided under Section 63 of the Electricity Act or in pursuance to the negotiations between the parties.

*86.* Learned counsel for WBSEDCL also argued that APNRL is not entitled to any relief for any Change in Law event on account of delay in

operationalization of Ganeshpur coal block which is solely attributable to APNRL. It is his submission that if APNRL had operationalized the said coal block within the time stipulated for its development by the Government of India at the time of its allocation to APNRL, it would have fallen into category of coal mines which were saved from cancellation by the Hon'ble Supreme Court in Coal Block Deallocation Judgment. In support of his submissions, the learned counsel has referred to letter dated 29.02.2016 issued by Ministry of Coal regarding invocation of bank guarantee in respect of Ganeshpur coal block on the ground of delay in its development.

*87.* We do not find any merit in these submissions of the learned counsel. There is no plausible evidence on record to say that the delay in operationalization of Ganeshpur coal block is solely attributable to APNRL. It has already been noted in the foregoing Paragraphs of the judgment that APNRL was allocated said coal block jointly with M/S Tata Steel Ltd and the M/s Tata Steel Ltd. was lead miner. In the correspondences exchanged between the APNRL, PTC and WBSEDCL, which have been referred to and discussed hereinabove, APNRL has been stating that it is pursuing the matter with M/s Tata Steel Ltd. and is insisting upon M/s Tata Steel Ltd. to start development of the coal block. It appears that the delay, if any, in development of the coal block was only on account of inaction of M/s Tata Steel Ltd. and cannot be attributed to APNRL which was not the lead miner.

*88.* The delay in operationalization of the coal block also appears to be on account of go-no-go policy of Ministry of Environment and Forests. In fact, as observed by the Commission in the impugned order also, APNRL itself accepted that the captive coal block would be operational by the time it would start supply of power to WBSEDCL and other beneficiaries. However, due to delays in getting various approvals, the captive coal block could not be developed and operationalized by that time. Taking cognizance of such situation in which project developers were placed due to non-operationalization of the captive coal mines on account of delays in getting various approvals, they were granted Tapering Linkage to meet their contractual obligation for supply of power to the distribution companies. WBSEDCL has admitted that APNRL was granted Tapering Linkage on 09.07.2009 and 25.11.2010 prior to the date of signing of PSA. This is indicative of the fact that WBSEDCL was aware that APNRL was granted Tapering Linkage till the captive mines are developed and operationalized. These facts and circumstances nowhere show or suggest that APNRL was responsible for the delay in development of the captive coal mine.

*89.* In so far as the letter dated 29.02.2016 issued by Ministry of Coal is concerned, its perusal reveals that it has been addressed to the Coal Controller, Coal Controller Organization, Kolkata with the directions to invoke

the bank guarantee furnished by the allotees of the Ganeshpur coal block. There is nothing on record to show as to what action, if any, was taken on the said letter by the Coal Controller. We are unable to discern from the record as to whether the bank guarantee in respect of the Ganeshpur coal block had actually been invoked or not. It also does not appear as to whether the validity of said letter requiring invocation of bank guarantee of the allottees of Ganeshpur coal block has been tested by the Commission or by this Tribunal in any proceedings. Further, the letter nowhere specifies that the delay in development of the Ganeshpur coal block was attributable to APNRL alone.

*90.* The Commission has, thus, fallen into grave error in not recognizing the Coal Block Deallocation Judgment of the Supreme Court as a Change in Law event in this case in terms of Article 10.1.1(b) of the PPA.

*91.* Having held the said judgment of the Supreme Court to be a Change in Law event, it is to be noted that due to cancellation of the Ganeshpur coal block, there has been significant change in the economic position of APNRL which is evident from the fact that the total energy charges based on captive fuel sources as per Schedule-A to the PPA is Rs.0.951/kWh where as total energy charges based on coal from other sources, such as e-auction, open market etc. workout to more than twice the same. Thus, there is no

gainsaying that the economic position of APNRL has got affected adversely on account of the said Change in Law event and it is entitled to be suitably compensated for the same.

*92.* We may also note that subsequent to the Coal Block Deallocation Judgment of the Supreme Court, Government of India enacted Coal Mines (Special Provisions) Act, 2015, thereby changing the process of allocation of coal blocks. As per this newly enacted statute, the allocation of coal blocks is to be done through auction and not by screening committee route or government dispensation route which was earlier practice. The Commission has rightly held that this enactment constitutes Change in Law in terms of Article 10.1.1(f) of the PPA/PSA. However, the Commission has erred in holding that APNRL cannot take benefit of said Change in Law event for the reason that APNRL, though participated in the fresh bidding, did not become successful. Actually, the fact that APNRL did not emerge a successful bidder in the fresh bidding subsequent to the enactment of Coal Mines (Special Provisions) Act, 2015, in itself is sufficient to provide benefit of the said Change in Law to the APNRL. Undisputedly, if there had not been cancellation of the coal blocks including that of APNRL in pursuance to the Coal Block Deallocation Judgment of the Supreme Court and there had not been any fresh bidding in pursuance to enactment of Coal Mines (Special

Provisions) Act, 2015 wherein APNRL did not succeed, APNRL would have sourced coal for its power project without any impediment from the captive coal block allotted to it at Ganeshpur. It is only due to the cancellation of the said coal block and rejection of its fresh bid post enactment of Coal Mines (Special Provisions) Act, 2015 that APNRL had to purchase coal from other sources such as e-auction and open market, cost of which is concededly much higher than the cost of coal sourced from captive coal block. The fact that APNRL did not emerge successful bidder in the fresh bidding has evidently impacted adversely the operation of its power project resulting in increase in the cost of power produced from the project.

*93.* Therefore, APNRL is entitled to benefit of the enactment of Coal Mines (Special Provisions) Act, 2015 as a Change in Law event under Article 10.1.1(f) of the PPA also.

**Issue no.(iii): Whether APNRL is entitled to compensation for costs incurred in procuring coal from alternate sources on account of shortfall in Tapering Linkage.**

*94.* On this issue, it is argued on behalf of the WBSEDCL that as per Articles 2.2 and 2.5 read with Schedule-A of PSA, WBSEDCL is liable to pay

only the capacity charges, non-escalable energy charges and escalable energy charges. It is also pointed out that as per Article 2.5 of the PPA/PSA, in case of sourcing of coal by APNRL from a source other than captive source, such supply would be treated as supply from captive source only. Thus, the submission made is that APNRL is not entitled to any compensation on account of procurement of coal from alternate sources.

*95.* We have already quoted and discussed the scope and ambit of Article 2.5 of PPA/PSA. In our considered opinion, the restriction placed by said Article 2.5 of PSA/PPA shall apply only after the operationalization of the captive coal mine and not before that. In this case, we have already noted that despite efforts of APNRL, the captive coal mine at Ganeshpur allotted jointly to it and M/s Tata Steel Ltd. could not be operationalized on account of delay in various approvals and at the same time APNRL as well as other power generators were finding it difficult to fulfill their obligations under the PPAs in supplying power to the distribution companies. In order to help the power generators in discharging their obligations under their respective PPAs, they were granted Tapering Linkages so that they are able to produce power and supply it to the distribution companies with whom they had executed the PPAs. Accordingly, APNRL was also granted Tapering Linkage on 09.07.2009 and 25.11.2010 pursuant to which it started

supplying power to WBSEDCL on 26.07.2013. It is also to be noted that since the actual supply of coal under Tapering Linkage was not sufficient as per the requirements of APNRL, it was meeting the shortfall in supply by purchasing coal from other sources such as e-auction, import of coal etc. Realizing the situation, the Ministry of Power vide letter dated 31.07.2013 addressed to Central Commission as well as State Commissions advised them that as per the decision of the Government, the higher cost of imported/market based e-auction coal be considered for being made a passthrough on case to case basis to the extent of shortfall in quantities indicated in the Letter of Award/Fuel Supply Agreement. Having regard to these circumstances, the Commission has rightly noted in the impugned order that it will defeat the purpose of Tapering Linkage if the project developers are to get the tariff at the rate fixed for captive coal even while buying the coal under Tapering Linkage and meeting the shortfall in supply of coal under Tapering Linkage through e-auction and imported coal.

*96.* As rightly held by the Commission, the provision of Article 2.5 of the PPA/PSA is applicable only in those cases where the project developer buys coal from outside even after the operationalization of the captive coal mine and claims reimbursement of actual cost. That is not the case herein. We are also in agreement with the observations of the Commission that said

Article 2.5 of PPA/PSA cannot be used to deprive the project developer from reimbursement of actual cost of coal procured under Tapering Linkage or to meet shortfall in supply of coal under Tapering Linkage through import/e-auction in terms of New Coal Distribution Policy, 2013.

*97.* We may also note that for similar reasons and on similar grounds, this Tribunal has held the power generator GMR Kamalanga Energy Ltd. entitled for compensation for increase in cost due to continued use of Tapering Linkage coal in the judgment dated 21.12.2018 in appeal no.193/2017 GMR Kamalanga Energy Ltd. and Anr. v. CERC and Ors. upon which the Commission has also relied in holding APNRL entitled to compensation for increase in cost due to continued use of Tapering Linkage. We are not impressed by the argument on behalf of WBSEDCL that no reliance could be placed on this aspect in the said judgment of this Tribunal in GMR Kamalanga case for the reason that the facts of that case were totally distinct from the facts of this case. We have already observed and held hereinabove that facts of the GMR Kamalanga case as well as this case are identical and no significant dissimilarity can be found in the facts of the two cases.

*98.* Hence, we do not find any error or infirmity in the impugned order of the Commission on this issue.

**Conclusion: -**

*99.* In the light of above discussion, we affirm the findings of the Commission that in terms of the provisions of PSA dated 05.01.2011 executed between PTC and WBSEDCL as well as PPA dated 23.03.2011 executed between PTC and APNRL and the correspondences exchanged between the parties, they had recognized that source of fuel for generation and supply of power in the power project of APNRL was captive coal block allocated to APNRL at Ganeshpur.

*100.* We also hold that cancellation of allotment of Ganeshpur captive coal block in pursuance to the Coal Block Deallocation Judgment of the Supreme Court, constitute Change in Law event in terms of Article 10.1(b) of the PPA/PSA executed between the parties.

*101.* We also affirm the findings of the Commission that APNRL is entitled for compensation to the extent of shortfall in Tapering Linkage granted to it pending operationalization of the captive coal block, which it met through e-auction or import of coal etc. for generation of electricity in its power project and supply of the same to WBSEDCL. However, we do not agree with the direction of the Commission that the petitioner should approach the Commission through a fresh petition in this regard giving details of Tapering Linkage granted to it and the details of coal requirement met through e-

auction, imported coal etc. to meet the shortfall of the coal in the Tapering Linkage.

*102.* Resultantly, appeal no.143 of 2020 stands allowed whereas appeal no.66 of 2022 stands dismissed.

*103.* The Commission shall now take up the matter within two weeks from the date of this judgment, seek requisite documents from APNRL with regards to its claim for compensation on account of Change in Law events allowed in this judgment (which shall be effective from 25.08.2014) as well as regarding the extent of coal sourced through e-auction/import etc. to meet the shortfall in Tapering Linkage and pass a fresh order thereby awarding appropriate compensation along with carrying cost in this regard to APNRL as per Article 10.2 of the PPA/PSA till actual payment is made to APNRL. The Commission is directed to conclude this exercise within three months from date of this judgment.

**Pronounced in the open court on this the 04th day of September, 2025.**

| | |
|---|---|
| (Virender Bhat)<br>Judicial Member | (Sandesh Kumar Sharma)<br>Technical Member (Electricity) |

√
REPORTABLE / ~~NON-REPORTABLE~~

*tp*