APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 257 OF 2015

Dated : 9th November, 2020

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member (Electricity)

IN THE MATTER OF :

M/s Jaiprakash Power Ventures Ltd.
Sector 128, Noida, Uttar Pradesh - 201 304 ... Appellant

Vs.

1. Madhya Pradesh Electricity Regulatory Commission
   5th Floor, Metro Plaza, Arera Colony,
   Bittan Market, Bhopal - 462 016

2. M. P. Power Management Co. Ltd.
   Shakti Bhawan, Rampur, Jabalpur,
   Madhya Pradesh -482 008

3. M.P. Poorv Kshetra Vidyut Vitran Co. Ltd.
   Shakti Bhawan, Rampur, Jabalpur,
   Madhya Pradesh -482 008

4. M.P. Madhya Kshetra Vidyut Vitran Co. Ltd.
   Bijli Nagar Colony, Nishtha Parisar,
   Govindpura, Bhopal,
   Madhya Pradesh -462 023

5. M.P. Paschim Kshetra Vidyut Vitran Co. Ltd.
   G.P.H. Compound, Polo Ground,
   Indore, Madhya Pradesh. ...Respondents

Counsel for the Appellant(s) : Mr. Sajan Poovayya, Sr. Adv.
Mr. Sanjay Sen, Sr. Adv.
Mr. Hemant Sahai
Mr. Sakya Singha Chaudhuri

Mr. Anand Kumar Srivastava
Ms. Shikha Pandey
Mr. Shivam Sinha
Mr. Tushar Srivastava
Ms. Soumya Prakash
Ms. Molshree Bhatnagar
Mr. Avijeet Lala
Ms. Shreya Mukerjee
Ms. Nithya Balaji
Ms. Astha Sharma
Ms. Nameeta Singh
Ms. Gayatri Aryan
Mr. Nishant Talwar
Ms. Meha Chandra
Ms. Narayani Anand
Mr. Arnav Vidhyarthi
Mr. Jaideep Gupta
Mr. Akshay Shandilya
Mr. Ruth Elwin
Mr. Ashok Shukla
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Mr. Saraswata Mohapatra
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Ms. Ritika Singhal
Ms. Aradhna Tandon
Mr. Gajendra Tiwari
Mr. Saransh for R-1

Mr. Purushendra Kumar, Sr. Adv.
Mr. Nitin Gaur
Ms. Suparna Srivastava
Ms. Sanjana Dua
Ms. Anuradha Mishra
Mr. Rishabh Donnel Singh
Mr. Ashwin Nayak
Mr. Alok Shankar
Mr. Tushar Jain
Mr. Varun Mohan
Mr. K. K. Agarwal
Mr. Manoj Dubey for R-2

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The present Appeal has been filed by M/s Jaiprakash Power Ventures Ltd. under sub-section (1) and (2) of Section 111 of the Electricity Act, 2003 against the Order dated 12.08.2015 passed by the Madhya Pradesh Electricity Regulatory Commission (hereinafter referred to as the **"Commission" / "1st Respondent")** dismissing Petition No. 37 of 2015 **("impugned Order").** The said petition was filed by the Appellant herein for declaration that the Additional Levy raised by the fuel supply company (Madhya Pradesh State Mining Corp. Ltd.) on the Appellant pursuant to the direction of the Hon'ble Supreme Court in its Order dated 24.09.2014 in W.P. (Criminal) No. 120 of 2012 and the provisions of the Coal Mines (Special Provisions) Act, 2015, and which is paid by the Appellant as part of landed cost of coal supplied to the Appellant's 1320 MW (2 x 660 MW) coal based power project at Nigrie, district Singrauli (M.P) (hereinafter referred to as **"Project")** is recoverable as variable (fuel) charges from the procurers of electricity and so as to allow recovery of such Additional Levy from the distribution companies, the Respondents herein.

2. Facts of the Case:

2.1 The Appellant, Jaiprakash Power Ventures Ltd. **("JPVL"),** is a generating company within the meaning of Section 2(28) of the Electricity Act, 2003. JPVL is promoted by Jaiprakash Associates Limited **("JAL")** and Jaypee Infra Venture Limited. Appellant has entered into a long term power purchase agreement with Respondent No. 2, M. P. Power Management Co. Ltd., on 5th January 2011. Under the PPA, Appellant is required to supply 30% of the installed

capacity of the Project to the 2nd Respondent at a tariff determined by the 1st Respondent - Commission. Subsequently, the Appellant and the 2nd Respondent entered into a further PPA on 06thSeptember, 2011 for supply of 7.5% of the net power from the Project to the 2nd Respondent at variable charges/cost. The aforesaid two power purchase agreements are collectively referred to herein as **"PPA"** for the sake of convenience. The power supplied by the Appellant to the 2nd Respondent under the aforesaid PPA ensures to the benefit of 3rd to 5th Respondents herein, who are the distribution licensees engaged in the business of distribution and supply of electricity in the state of Madhya Pradesh.

2.2 The annual coal requirement of the Project is around 5.11 MTPA (projected) calculated at 85% PLF. Coal for the Project was accordingly arranged to be sourced from two dedicated coal mines at Amelia (North) and Dongri Tal II. Amelia (North) coal mine had at the relevant time been allocated to Madhya Pradesh Jaypee Minerals Ltd., a joint venture of JAL (49% holding) and Madhya Pradesh State Mining Corporation Ltd. **(“MPSMCL")** (51% holding). Therefore, the Appellant has entered into a coal supply agreement with coal supply company for supply for 2.5 MPTA coal from Amelia North coal block. Amelia (North) has commenced production from December 2013 and approximately 15,04,629 MT of coal has been supplied to the Project from Amelia (North) till March, 2015.

2.3 Unit I of the Project was commissioned on 03.09.2014. For the purpose of determination of tariff for the power to be supplied by the Appellant to 2nd Respondent under the PPA, Appellant had filed an application for determination of tariff before the 1st Respondent – Commission being Petition No. 3 of 2014. The 1st Respondent –

Commission while determining the provisional tariff for Unit I, directed MPSMCL, the fuel supplier to the Project, to file a break-up of the sale price of coal. Accordingly, MPSMCL filed the break-up of the sale price of coal on 22.08.2014 before the 1st Respondent – Commission. MPSMCL in its response provided the complete break-up for sale price of coal as per which the Total Sale Price of Coal broadly consisted of the following heads viz., (i) Production Cost to MDO, (ii) Basic Sale Price to MPSMCL, (iii) Basic Sale Price of Coal to Appellant, and (iv) Taxes and Levies. Over and above the aforesaid Total Sale Price, the Railway freight / coal transportation cost is added to arrive at the Landed Cost of Coal. On the basis of the submissions of MPSMCL, the 1st Respondent – Commission had been pleased to approve Rs. 2094,03 per Metric Tonne as the Landed Cost of coal supplied by MPSMCL to the Project.

2.4 As per Regulation 41 of the MPERC (Terms & Conditions for determination of Generation Tariff) Regulations, 2012 **("Generation Tariff Regulations[11]),** a generating company is permitted to recover energy (variable) charges on the basis of the Landed price of Primary Fuel (i.e. coal in the present case). Accordingly, the 1st Respondent – Commission vide its aforesaid tariff order dated 26.09.2014 allowed the Appellant to recover energy (variable) charges for the power supplied to 2nd Respondent under the PPA in accordance with Regulation 41 of the Generation Tariff Regulations. It is important to highlight here that as per Clause 4 of Regulation 41 of the Tariff Regulations, the landed cost of coal comprises of price of coal corresponding to the grade and quality of coal and includes the royalty, taxes and duties as may be applicable, along with transportation cost by rail/road or any other means. Hence, the applicable royalties, taxes and duties on actuals are considered to be

part of landed cost of coal and are, thus, a pass through in the energy charges payable to the generating company. Regulation 41(4) is reproduced here below:

> ***"Landed Cost of Coal:***
>
> *41.4 The landed cost of coal shall include price of coal corresponding to the grade and quality of coal* **inclusive of royalty, taxes and duties as applicable,** *transportation cost by rail/road or any other means, and; for the purpose of computation of Energy Charges, shall be arrived at after considering normative transit and handling losses as percentage of the quantity of coal despatched by the Coal Supply Company during the month as given below:*
>
> *Pit head generating stations: 0.2%*
>
> *Non-Pit head generating stations: 0.8%*
>
> *As per the above provision, it should be ensured that for computing energy charges, quantity of coal as dispatched by the Coal Supply Company is taken after accounting for permissible transit and handling losses alone. "*
>
> *(Emphasis supplied)*

2.5 In the meanwhile, in and around the year 2012, the legality and validity of coal blocks allotted by the Central Government through the Screening Committee route and Government Dispensation route came up for judicial scrutiny before the Hon'ble Supreme Court in a batch of writ proceedings. Hon'ble Supreme Court vide its judgment dated 25.08.2014 passed in W.P. (Criminal) No. 120 of 2012 held thatall the coal block allocations made by the Central Government, both through the Screening Committee route and Government Dispensation route, are arbitrary and illegal. Subsequently, Hon'ble Supreme Court vide its order dated 24.09.2014 directed all the allottees of operating / functional coal blocks to pay an additional levy of Rs. 295/- per metric ton of coal extracted from the date of extraction as per the Report of the Comptroller and Auditor General ("CAG") dealing with the financial loss caused to the exchequer by the illegal and arbitrary allotments. The relevant extracts of the order dated are set out below for the sake of easy reference:

> *"9. Learned Attorney General submitted that all the allottees of coal blocks should be directed to pay an additional levy of Rs. 295/- per metric ton of coal extracted from the date of*

extraction as per the Report of the Comptroller and Auditor General (CAG) dealing with the financial loss caused to the exchequer by the illegal and arbitrary allotments. It was further submitted that in the case of allottees supplying coal to the power sector, they should be mandated to enter into Power Purchase Agreements (PPAs) with the State utility or distribution company (as the case may be) so that the benefit is passed on to the consumers.

40. In addition to the request for deferment of cancellation, we also accept the submission of the learned Attorney General that the allottees of the coal blocks other than those covered by this order must pay an amount of Rs. 295/- per metric ton of coal extracted as an additional levy. This compensatory amount is based on the assessment made by the CAG. It may well be that the cost of extraction of coal from an underground mine has not been taken into consideration by the CAG, but in matters of this nature it is difficult to arrive at any mathematically acceptable figure quantifying the loss sustained. The estimated loss of Rs. 295/- per matric ton of coal is, therefore, accepted for the purposes of these cases. The compensatory payment on this basis should be made within a period of three months and in any case on or before31st December, 2014. The coal extracted hereafter till 31st March, **20)5** *will also attract the additional levy of Rs. 295/- per metric ton."*

2.6 Subsequently the Central government promulgated the Coal Mines (Special Provisions) Act, 2015 which gave statutory sanction to the Additional Levy imposed by the Hon'ble Supreme Court. This Act prescribed detailed mechanism inter-alia with respect to collection and apportionment of Additional Levy and implications for non-payment of Additional Levy.

2.7 Pursuant to the directions of the Hon'ble Supreme Court, the coal supplier i.e. MPSMCL started including the Additional Levy as part of invoice for the coal supplied to the Appellant's Project from September 2014 onwards.

2.8 The Appellant has since paid an amount of Rs. 46.61 Crores to MPSMCL by way of Additional Levy as part of the landed cost of coal supplied to the Project up to 31st March, 2015.

2.9 As aforesaid, Reg. 41 (4) of the Generation Tariff Regulations entitles the Appellant to claim reimbursement of all royalties, taxes and cess, which form part of the landed cost of coal, by way of energy (variable) charges from the 2nd Respondent herein. Accordingly, the Appellanthas been raising supplementary invoices on the 2nd Respondent herein for

reimbursement of Additional Levy paid by it to MPSMCL as part of landed cost of coal.

2.10 However, the 2nd Respondent vide their letter dated 22nd April, 2015, after keeping aforesaid bills in abeyance for long, categorically refused to make payments of the same on the following grounds, namely, (i) the Supreme Court order does not provide for pass through of the Additional Levy to power procurers, (ii) the order indicates that the Additional Levy has to be borne by the beneficiaries of the flawed coal block allocation process i.e. respective allottees of the coal blocks, (iii) the tariff regulations do not suggest that landed cost of fuel includes Additional Levy. The 2nd Respondent, thus, stated that the landed price of coal for calculation of energy charges in weekly / monthly bills of the Appellant should not include Additional Levy, and any such claim of the Appellant shall not be entertained by the 2nd Respondent.

2.11 The Appellant having been aggrieved by the arbitrary, unjust and unfair conduct of the 2nd Respondent in as much as the 2nd Respondent refused to pay the rightful claim of the Appellant for pass through of the Additional Levy, approached the 1st Respondent – Commission seeking for a declaration that Additional Levy raised on the Appellant by the fuel supply company i.e. MPSMCL for supply of coal to the Applicant's Project, pursuant to the direction of the Hon'ble Supreme Court in its Order dated 24.09.2014 and under the provisions of the Coal Mines (Special Provisions) Act, 2015, is recoverable as variable (fuel) charges from the procurers and thereupon to allow recovery of such Additional Levy from the procurers / Respondents herein. It was the specific case of the Appellant before the 1st Respondent – Commission in the hearing held on 04.08.2015 that the Additional Levy is in the nature of a statutory charge, which is imposed and collected in accordance with the

provisions of the Coal Mines (Special Provisions) Act, 2015. Therefore, Additional Levy is part of the landed cost of coal supplied by the fuel supplier and, accordingly, Additional Levy is a cost for the Appellant which it is entitled to pass through and recover from the Respondent as part of energy (fuel) charge. However, the 1st Respondent – Commission completely misdirected itself in so much so even without appreciating the legal contentions raised by the Appellant, the Commission dismissed the petition filed by the Appellant herein as not maintainable. Upon a completely erroneous and out of context reading of the order dated passed by the Hon'ble Supreme Court, the 1st Respondent Commission held that the issue of Additional Levy is beyond the scope of Generation Tariff Regulations notified by the Commission. It held that the Regulation 41 does not provide for onward recovery of Additional Levy or Compensatory Payment from the electricity consumers of the distribution companies in the State. Therefore, the grounds for pass through of Additional Levy in the energy charges determined for the Appellant's Project does not form any case to deal with by the 1st Respondent – Commission.

2.12 The Appellant has filed the instant appeal challenging the legality and validity of the Impugned Order passed by the 1st Respondent - Commission before this Appellate Tribunal on the below mentioned grounds and questions of law.

3. QUESTIONS OF LAW

Following Questions of Law have been raised in the Appeal for our consideration:

3.1 Whether there is any bar in law in the pass through of the Additional Levy to the distribution companies that has been paid by the Appellant to the

fuel supply company?

3.2 Whether the Additional Levy that has been recovered by the fuel supply company from the Appellant forms part of the landed cost of fuel under Regulation 41 of the MPERC (Terms & Conditions for determination of Generation Tariff) Regulations, 2012?

4. Ms. Neeti Niyaman, Learned Counsel for the Appellant has submitted the following Written Submissions for our consideration:

4.1 The present Appeal raises the following issues:

a) Whether Additional Levy is in the nature of a statutory levy in view of such Levy being charged under a Statute?
b) If the answer to (a) is in the affirmative, then whether Additional Levy would be covered under Regulation 41 of the Generation Tariff Regulation, and thereby be allowed to be pass through?
c) If the answer to (a) is in the negative, then what is the nature of Additional Levy?
d) In the absence of any dispute by Respondent no. 2/MPPMCL on the invoices raised by the Appellant as per terms of the PPA, could the Commission disallow Additional Levy?

4.2 Vide the Impugned Order, the Respondent no. 1 in para 8 has framed the two issues for maintainability of the petition. The relevant portion is extracted hereinbelow:

> "*8. Having heard the Counsel for the petitioner and also on examination of the issues raised in the petition, the Commission has come across the following issues for maintainability of this petition:*
>
> *(i) Whether the "Additional levy" of Rs. 295 per metric ton can be loaded on the end consumers of electricity in the state who were not the beneficiaries of the flawed process in terms of Para 27 of the order (dated 24th September'2014) passed by the Hon'ble Supreme Court of India?*
> (ii) *Whether the provisions under Regulation 41 of MPERC (Terms and Conditions for determination of Generation Tariff) Regulations provide for*

allowing such "Additional levy" (imposed by the Hon'ble Supreme Court of India in its aforesaid order) to pass on the electricity consumers of the Distribution Companies in the state through energy charges being determined for the independent Power producers using coal from the beneficiaries of the flawed process in terms of Para 27 of the order (dated 24th September'2014) passed by the Hon'ble Supreme Court of India?"

4.3 The Commission in para 9 of the Impugned Order mentioned that

"*To deal with the first issue, the Commission has gone through the judgement passed by the Hon'ble Supreme Court of India on 25th August'2014 and the order passed on 24th September'2014 in the following writ petitions: …"*

Similarly, for the second issue, the Commission looked at Regulations 41 of the MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2012.

4.4 On the basis of above, the Commission came to the conclusion that the petition is not maintainable and was accordingly, disposed of. The relevant paragraphs are extracted hereinbelow for the sake of brevity:

"*13. The above Regulations provide that the landed cost of coal shall include price of coal corresponding to the grade and quality of coal including the royalty, taxes and duties as applicable. These Regulations do not provide for inclusion of such 'Additional Levy' as discussed and decided in the afore mentioned judgment and order passed by the Hon'ble Supreme Court of India*.

14. With the above observations, the Commission has found that the grounds in the subject petition for pass through of "Additional levy" (in terms of the aforesaid order passed by the Hon'ble Supreme Court of India) in the energy charges determined by this Commission for the petitioner's power plant do not form any case to deal with by this Commission. Thus, the subject petition is not maintainable and hence disposed of."

4.5 The following are indisputable facts before this Tribunal in the present matter:

a) MPSMCL was the allottee and holder of the mining lease;
b) MPSMCL was selling coal to the Appellant/JPVL;
c) Energy charges fixed by the Commission was based on the costing provided by MPSMCL;

d) CIL price was charged under provisional tariff order in the absence of actual costs;

e) Additional Levy was imposed under Special Provisions Act;

f) Additional Levy was to be paid by MPSMCL for it being the prior allottee of Amelia (North) coal block;

g) Additional Levy included in 'as delivered price of coal' by MPSMCL.

NATURE & Background OF ADDITIONAL LEVY

4.6 To understand the genesis of Additional Levy, it is important to look into the observations made by the Hon'ble Supreme Court in M.L. Sharma v. Principal Secretary &Ors. (2014) 9 SCC 516 ("**Declaratory Order**")and M.L. Sharma v. Principle Secretary & Ors. (2014) 9 SCC 614 ("**Consequence Order**").

Relevant portions of the Declaratory Order are as under:

> "*163. To sum up, the entire allocation of coal block as per recommendations made by the Screening Committee from 14.07.1993 in 36 meetings and the allocation through the Government dispensation route suffers from the vice of arbitrariness and legal flaws. The Screening Committee has never been consistent, it has not been transparent, there is no proper application of mind, it has acted on no material in many cases, relevant factors have seldom been its guiding factors, there was no transparency and guidelines have seldom guided it. On many occasions, guidelines have been honoured more in their breach. There was no objective criteria, nay, no criteria for evaluation of comparative merits. The approach had been ad-hoc and casual. There was no fair and transparent procedure, all resulting in unfair distribution of the national wealth. Common good and public interest have, thus, suffered heavily. Hence, the allocation of coal blocks based on the recommendations made in all the 36 meetings of the Screening Committee is illegal."*
>
> *164. The allocation of coal blocks through Government Dispensation Route, however laudable the object may be, also is illegal since it is impermissible as per the scheme of the CMN Act. …*
>
> *…*
>
> *166. As we have already found that the allocations made, both under the Screening Committee Route and the Government Dispensation Route, are arbitrary and illegal, what should be the consequences, is the issue which remains to be tackled. We are of the view that, to this limited extent, the matter required further hearing*."

4.7 Also, it is important to go through the relevant portions of the Consequence Order, which are reproduced herein below for the sake of brevity:

> "*9. Learned Attorney General submitted that all the allottees of coal blocks should be directed to pay an additional levy of Rs. 295/- per metric ton of coal extracted from the date of extraction as per the Report of the Comptroller and Auditor General (CAG) dealing with the* ***financial loss caused to the exchequer by the illegal and arbitrary allotments. It was further submitted that in the case of allottees supplying coal to the power sector, they should be mandated to enter into Power Purchase Agreements (PPAs) with the State utility or distribution company (as the case may be) so that the benefit is passed on to the consumers****.*
>
> *…*
>
> *26. Learned counsels for the allottees have essentially raised two contentions. Firstly, the principles of natural justice require that they must be heard before their coal block allotments are cancelled.* ***Secondly, we should appoint a committee to consider each individual case to determine whether the coal block allotments should be cancelled or not.***
>
> *27.* ***As far as the second contention is concerned****, this is strongly opposed by the learned Attorney General and we think he is right in doing so. The judgment did not deal with any individual case****. It dealt only with the process of allotment of coal blocks and found it to be illegal and arbitrary. The process of allotment cannot be reopened collaterally through the appointment of a committee. This would virtually amount to nullifying the judgment. The process is a continuous thread that runs through all the allotments. Since it was fatally flawed, the beneficiaries of the flawed process must suffer the consequences thereof*** *and the appointment of a committee would really amount to permitting a body to examine the correctness of the judgment. This is clearly impermissible.*
>
> *…*
>
> *33****.*** *In Sheela Barse it was observed, and we endorse that view, that the relief to be granted in a case always looks to the future. It is generally corrective and in some cases it is compensatory. The present case takes within its fold all three elements mentioned in Sheela Barse. Our judgment highlighted the illegality and arbitrariness in the allotment of coal blocks and* ***these "consequence proceedings" are intended to correct the wrong done by the Union of India****; these proceedings look to the future in that by highlighting the wrong, it is expected that the Government will not deal with the natural resources that belong to the country as if they belong to a few individuals who can fritter them away at their sweet will;* ***these proceedings may also compensate the exchequer for the loss caused to it, in the manner suggested by the learned Attorney General****, and which we now propose to consider."*
>
> *…*

40. In addition to the request for deferment of cancellation, we also accept the submission of the learned Attorney General that the allottees of the coal blocks other than those covered by the judgment and the four coal blocks covered by this order ***must pay an amount of Rs. 295/- per metric ton of coal extracted as an additional levy. This compensatory amount is based on the assessment made by the CAG****. It may well be that the cost of extraction of coal from an underground mine has not been taken into consideration by the CAG, but in matters of this nature it is difficult to arrive at any mathematically acceptable figure quantifying the loss sustained. The estimated loss of Rs. 295/- per metric ton of coal is, therefore, accepted for the purposes of these cases.* ***The compensatory payment on this basis should be made within a period of three months and in any case on or before 31st December, 2014. The coal extracted hereafter till 31st March, 2015 will also attract the additional levy of Rs. 295/- per metric ton.****"*

(emphasis supplied)

4.8 The Union of India requested the Hon'ble Supreme Court for a direction on the allottees to pay an Additional Levy of Rs. 295 per MT of coal, towards financial loss caused to the exchequer by illegal and arbitrary allotments. Based on such submission, the Hon'ble Supreme Court directed payment of Additional Levy @Rs. 295 per MT by the allottees of the coal blocks.

Additional Levy is a statutory levy

4.9 On 21.10.2014, i.e., within a month of passing of the Consequence Order, the Parliament in exercise of its powers under Entry 54 of List I of the Seventh Schedule to the Constitution of India issued the firstCoal Mines (Special Provisions) Ordinance, 2014 ("**the Ordinance**").Thereafter, on 11.12.2014, the Coal Mines (Special Provisions) Rules, 2014 were also notified by the Ministry of Coal ("**the Rules**'). Under, the Rules, the entire process and methodology of how the amount of Additional Levy is to be collected has been elaborately set down. Subsequently, on 30.03.2015, the Coal Mines (Special Provisions) Act, 2015 was notified ("**Special Provisions Act**").

4.10 The Ordinance and the Special Provisions Act were made by the Parliament in exercise of its power under the Constitution of India to legislate, to implement the Declaratory Order as well as the Consequence

Order and to give the levy of the compensatory amount of Rs. 295/- per MT a statutory sanction. This, when read with the Rules provides a complete code for imposition and payment of Additional Levy.

4.11 The Hon'ble Supreme Court of India in *Kalpana Mehta and Ors. V. Union of India (2018) 7 SCC 1,* has emphasized upon the principle of parliament supremacy. The Hon'ble Court observed as under:

> "*20. The Constitution of India is the supreme fundamental law and all laws have to be in consonance or in accord with the Constitution. The constitutional provisions postulate the conditions for the functioning of the legislature and the executive and prescribe that the Supreme Court is the final interpreter of the Constitution. All statutory laws are required to conform to the fundamental law, that is, the Constitution. The functionaries of the three wings, namely, the legislature, the executive and the judiciary, as has been stated in Kesavananda Bharati v. State of Kerala, derive their authority and jurisdiction from the Constitution. Parliament has the exclusive authority to make laws and that is how the supremacy of Parliament in the field of legislation is understood. …*"

4.12 The legislation route adopted by the Parliament to implement the SC judgment in ***M.L. Sharma*** case is neither novel nor unprecedented. There are examples from the past where Parliament has passed legislation in order to give effect to the dictum of courts. A useful reference in this regard may be made to the following extracts from the Hon'ble Supreme Court's judgment in *Krishna Chandra Gangopadhyaya and Ors. V. The Union of India &Ors. (1975) 2 SCC 302*, wherein the Solicitor General while defending the impugned legislation succinctly summed up the intendment and rationale guiding the legislature when it issues a fresh legislation following the decision of court. The relevant excerpts are as under:

> "*6. Hidayatullah, C.J. in Baijnath Kedio speaking for the Court, pointed out that the declaration contemplated by Entry 54 of List I was contained in Section 2 of Act 67 of 1957 and thus the Central Government assumed control over regulation of mines and mineral development to the extent provided in the Central Act. Since Section 15 of the Central Act went on to state that the State Government may make rules for regulating the grant of prospecting licences and mining leases in respect of minor minerals and for purposes connected therewith, the whole subject of legislation regarding minor mineral was also*

covered by the Central Act and, to that extent, the powers of the State Legislature stood excluded. No scope was therefore left for the enactment of the second proviso to Section 10(2) of the Bihar Act which related to mining and minerals and was for that reason ultra vires. The fate of sub-Rule 20(2) was no better, according to the learned Chief Justice. Vested interests cannot be taken away except by law made by a competent Legislature. Since the Bihar Legislature had lost power to legislate about minor minerals, Parliament was the sole source of power in this behalf. Rule 20(2) of the Bihar Minor Minerals Concession Rules, 1964 was ineffective for modifying leases granted earlier. It could not derive sustenance on the second proviso to Section 10(2) of the Bihar Act which had been held ultra vires nor could legislative support be derived from Section 15 of the Central Act since the rule-making power conferred by that provision did not contemplate alteration of terms of leases already in existence before the Act was passed.

7. ***The direct lessons from Kedia were drawn by Parliament and suitable legislative action taken, according to the Solicitor General, resulting in the present Validation Act. So much so the purpose of the enactment was obvious, the law laid down by this Court was obeyed and the resultant referential legislation must therefore be interpreted to further and fulfil — not to frustrate or foil — the intendment of retroactive validation of earlier inoperative legislative and executive action taken by the Bihar State.***" (Emphasis added)

4.13 In the instant case, having regard to the exigency of the matter and being satisfied that circumstances exist which renders it necessary to take immediate action, the Ordinance was promulgated by the Hon'ble President of India, as the Parliament was not in session. It is important to note that while issuing such Ordinance, reference has been made to Entry 54 of List I to Schedule 7 of the Constitution of India to stress on the expediency of the Ordinance providing, *inter alia*, Additional Levy, in public interest.

4.14 The same was done because under Article 265 of the Constitution of India, which provides that no tax can be levied and collected, except by the authority of law. The Special Provisions Act is a taxing statute for it satisfies the conditions of a taxing statute, i.e., there is a charging section that created liability for tax, and there is a detailed mechanism with respect to collection and apportionment of Additional Levy and implications of non-payment thereof. Further, Additional Levy meets all the

characteristics of a 'tax', viz., (i) compulsory exaction of money; (ii) exaction by public authority; (iii) for a public purpose; (iv) enforceable by law and (v) is not a payment for services rendered. Therefore, in view of the above, it is safe to say that the Special Provisions Act is a taxing statute, and Additional Levy has got the status of a statutory levy under such Act.

4.15 Additional Levy is a standalone and dispassionate imposition on a *'prior allottee'* as defined under the Special Provisions Act. It is imposed and payable irrespective of the fact whether the prior allottee is seeking to participate in the subsequent auction of coal blocks or not. For the prior allottees who seek to participate in the coal block auction process, payment of Additional Levy is a pre-qualifying criterion. Additional Levy is a *'statutory liability'*. The payment in question is nothing but a statutory payment under Sec. 4 of the Special Provisions Act, and, therefore, such payment would be in the nature of a statutory levy, called by whatever name.

4.16 The fact that Additional Levy is in the nature of a statutory payment is established by the simplest test of answering the question – *"who should pay Additional Levy?"* As per the decision of Hon'ble Supreme Court this levy was payable by allottees of cancelled coal blocks whereas under the Special Provisions Act the Additional Levy is to be imposed on and collected from a *'prior allottee'* (as defined thereunder), who may not necessarily be the coal block allottee. This conclusively establishes that Additional Levy acquired statutory character as soon as it was given legislative/statutory clothing under the Special Provisions Act.

4.17 Further, in the demand letter dated 18.12.2014 issued by the Office of Coal Controller to all the prior allottees of Schedule-II coal mines, the payment of additional levy has been raised and demanded under Section

3(1)(a) of the Coal Mines Ordinance, read with the Rules. This also corroborates the statutory nature of Additional Levy.

4.18 A statutory levy can bear either of the following characters viz: tax, duty, cess or fees. All these four imposts have definite and defined connotations in law. While tax is a compulsory levy by the State Government going to the General Revenue of the State, the Duty is an indirect tax, the incidence of which could be passed on to the customers. Cess is a tax for specific purpose, while fees envisages a quid pro quo.

4.19 The essence of taxation is compulsion, that is to say, it is imposed under statutory power without the taxpayer's consent and the payment is enforced by law.

Additional Levy admitted to be statutory levy by Respondent no. 1/ MPERC

4.20 The Respondent no. 1/MPERC in its Written Submissions dated 21.08.2020 has admitted that the Special Provisions Act was notified to implement the Supreme Court judgments and recognizes the "Additional Levy". The relevant extract is reproduced herein under:

> "*18. The Central Government immediately thereafter, on 21.10.2014, promulgated the Coal Mines (Special Provisions) Ordinance, 2014 to implement the 2nd Supreme Court order. It was intended to re-auction and re-allot the coal mines. On 11.12.2014, the Ministry of Coal notified the coal mines (Special Provisions) Rules, 2014. On 26.12.2014, the Coal Mines (Special Provisions) Second Ordinance, 2014 was promulgated and thereafter the Coal Mines (Special Provisions) Act, 2015 ("Coal Mines Act") was passed, which is substantially the same as the Second Ordinance.* ***The Act was to implement the Supreme Court judgments.*** *The preamble to the said Act states that it has been passed for promoting optimum utilization of coal resources consistent with requirement of the country in national interest and for matters connected therewith. As per Section 4(4) of the Coal Mines Act a prior allottee would be eligible to participate in the coal mines auction process subject to the payment of additional levy. In the event it failed to pay the requisite amount then the allottee, its promoter or any of its company will not be allowed to participate in the auction. Section 3(n) of the Coal Mines Act defines the term prior allottee [See pages 184-186 @ Annexure 5, Appl Pprbk]. A plain reading of Section 3(n) and Section 4(4) of the Coal Mines Act clarifies that the additional levy must be paid by the allottee* ***Therefore, the statute which recognizes the 'Additional Levy'*** *makes no provision for the*

passing through of such amount to anybody else other than the allottee and the registered lease holder of the mine …"

(emphasis supplied)

Therefore, clearly, when Additional Levy is a statutory levy, MPSMCL was justified in including such levy in the delivered cost of coal. Moreover, such levy would be covered under Regulation 41 of the Generation Tariff Regulations.

Nature of Additional Levy under the Supreme Court judgment

4.21 Even otherwise and without prejudice to the submissions made above, if, the Additional Levy imposed by the Hon'ble Supreme Court is considered a compensatory charge for restituting loss to Exchequer. The phrase *loss to exchequer* as used by the Hon'ble Supreme Court can only be loss to the Government's revenue. Since the process of allotment of coal was fatally flawed, certain revenue was lost, such amount was estimated at Rs. 295/-MT. Irrespective if whatever may have been the basis for computing this amount, the moment it is held as compensatory for loss to exchequer by the Hon'ble Supreme Court, it can only compensate for something that is recoverable in law by the Central Government.

4.22 Central Government is entitled to levy royalty on mining of coal under Sec. 9 of the Mines and Minerals (Development and Regulation) Act, 1957 ("**MMDR Act**"). This is the source of revenue for the Central Government as far as any mining activity is concerned. The Additional Levy was to compensate for the shortfall in payment of such royalty. To such extent, the Additional Levy is in the nature of royalty payable under Sec. 9 of the MMDR Act, which has now been converted into a levy under the Special Provisions Act.

Therefore, even as per the judgment of Hon'ble Supreme Court, Additional Levy is a statutory levy.

WHETHER ADDITIONAL LEVY CAN BE ALLOWED TO BE PASSED THROUGH

4.23 Regulation 34.3 of the Generation Tariff Regulations provide that the energy (variable) charges shall cover the main fuel cost. Further, Regulation 41.1 of the Generation Tariff Regulations provides that the energy (variable) charges shall cover main fuel costs and shall be payable for the total energy scheduled to be supplied on ex-power plant basis, at the specified variable charge rate (with fuel price adjustment).

4.24 Regulation 41.4 provides for what would constitute the 'landed cost of coal'. In this regard, the regulations provide that price of coal, corresponding to the grade and quality of coal inclusive of royalty, taxes and duties as applicable, transportation cost by rail/ road or any other means. Thus, landed cost of coal includes royalty, taxes and duties as applicable. It is submitted that the Additional Levy being a statutory levy would be included in the landed cost of coal as provided under the Generation Tariff Regulations. That by implication, as well as by applying the principle of '*ejusdem generis*'[1], Additional Levy would form part of the landed cost of coal which provides that the price of coal would be inclusive of royalty, taxes and duties as applicable.

4.25 The imposition of levy is very different from its ultimate impact. The passing of any levy depends on the nature thereof, and the contract between parties. Additional Levy is not a tax on income. It is not a direct tax. It is a tax payable in relation to the activity of mining and can be included in the price of coal, like royalty, excise duty, cess, etc. It is noteworthy that even Section 9 of the MMDR Act does not provide for pass through. It is passed on in the price of coal, since it is not a direct tax and the incidence and impact of the Additional Levy need not be on the same person.

[1] M/s Siddeshwari Cotton Mills (P) Ltd. v. Union of India & Anr. (1989) 2 SCC 458 (para 12-19) [**pg. 55-57 of the Judgment Compilation filed by Appellant on 14.09.2020**]; Maharashtra University of Health Sciences and Ors. v. SatchikitsaPrasarakMadal& Ors. (2010) 3 SCC 786 (para 27-34) [**pg. 64-66 of the Judgment Compilation filed by Appellant on 14.09.2020**].

4.26 Under the Coal Supply Agreement, Clause 9 provides that the purchaser of coal to pay the "as Delivered Price of Coal", which, *inter alia*, includes the statutory charges as applicable at the time of delivery of Coal. Statutory Charges has been defined under clause 9.3 to comprise of royalties, cesses, duties, taxes including service tax, levies, etc., if any, payable under relevant statute but not included in the Base Price. These levies/ charges shall become effective from the date as notified by the government (Central or State Government)/ statutory authority and shall be payable as on date of delivery of Coal.

4.27 That Additional Levy has been imposed upon the prior allottee under the Special Provisions Act, i.e., under a statute promulgated by the Central Government. Thus, by virtue thereof, payment of Additional Levy becomes a statutory charge under Clause 9 of the Coal Supply Agreement, and therefore, was included in the price of coal by the MPSMCL, by way of invoices raised upon the Appellant. Similarly, the change in law clauses under the PPA dated 05.01.2011 and the PPA dated 06.09.2011, also recognize the levy of Additional Levy under the Special Provisions Act as a 'Change in Law' event.

4.28 Further, MPSMCL vide its letter dated 31.10.2014 has re-affirmed that the sale price of coal has been fixed provisionally by the Commission during the tariff determination process. This provisional sale price of coal was revised vide the said letter citing inclusion of Additional Levy and Clean Energy Cess. MPSMCL has also collected VAT on the Additional Levy raised through invoices upon the Appellant. A statutory charge, like any other duties, taxes, levies, will form part of the landed cost of coal.

4.29 The Hon'ble Supreme Court did not go into the treatment of Additional Levy as a pass through by the companies that were allotted coal blocks, as the Declaration Order deals with all coal blocks, allotted to other than

power sector (unregulated sectors such as steel), where onward recovery of cost is not guided by regulations**.**

4.30 It is also important to note here that in its Consequence Order while holding that allottees of operational coal blocks should pay Additional Levy, the Supreme Court did not delve into or specify as to how this levy would be imposed and collected, which authority/government should collect it, whether it has to be appropriated by the Central Government or the State Governments etc. It also bears reiteration that while directing for payment of Additional Levy, the Court was not concerned with the users of the coal mines be it power generators or steel manufacturers or anything else and, hence, Court made no observations on the pass through of Additional Levy. The Court was only concerned with loss of public exchequer on account of fault of Union of India and for repatriation of the lost revenue.

4.31 On a co-joint reading of Regulation 41 of the Generation Tariff Regulations, Special Provisions Act, along with provisions of the Coal Supply Agreement and the PPAs, it is clear that the Additional Levy, is a statutory charge which forms part of the landed cost of coal and entitled to be passed through as part of energy charges under the Generation Tariff Regulations.

4.32 It is submitted that being a captive coal block, the benefit of lower cost of coal, i.e., landed cost of coal minus Rs. 295/- per MT, flowed to the consumers, in the form of lower electricity tariff. Therefore, in case of any reversal in the value of coal caused due to a statutory imposition, the corresponding obligation to pay for such additional cost would also have to be borne by the consumers since they have been the real and ultimate beneficiaries of coal. In case of unregulated sectors, like cement, steel, etc., this additional cost would be ultimately passed on to the consumers, in the form of increased cost of the end product. Therefore, it is

superfluous to contend that pass through of Additional Levy to electricity consumers is discriminatory.

BENEFICIARY/ CONSEQUENCE OF THE FLAWED PROCESS

4.33 Respondent no. 1/MPERC has held that Additional Levy cannot be passed on to the consumers as the Hon'ble Supreme Court has held that the beneficiaries of the flawed process (of allocation of coal blocks) should bear the consequence.

4.34 A bare reading of paragraphs 26 and 27 of the Manohar Lal Sharma Judgment dated 24.09.2014 ("**Consequence Order**") shows that the consequence of flawed process, refers to the cancellation of the coal block allotted to the various allottees under the earliest dispensation, and not to the payment of additional levy. Paragraph 26 and 27 are extracted hereinbelow for the sake of brevity:

> "*26. Learned counsels for the allottees have essentially raised two contentions. Firstly, the principles of natural justice require that they must be heard before their coal block allotments are cancelled.* ***Secondly, we should appoint a committee to consider each individual case to determine whether the coal block allotments should be cancelled or not.***
>
> *27.* ***As far as the second contention is concerned****, this is strongly opposed by the learned Attorney General and we think he is right in doing so. The judgment did not deal with any individual case****. It dealt only with the process of allotment of coal blocks and found it to be illegal and arbitrary. The process of allotment cannot be reopened collaterally through the appointment of a committee. This would virtually amount to nullifying the judgment. The process is a continuous thread that runs through all the allotments. Since it was fatally flawed, the beneficiaries of the flawed process must suffer the consequences thereof*** *and the appointment of a committee would really amount to permitting a body to examine the correctness of the judgment. This is clearly impermissible."*

(emphasis supplied)

4.35 In paragraph 26, the allottees had raised two contentions that are reflected therein. On a plain reading of paragraph 27 (the very next paragraph), it is clear that the Court was addressing the second contention of the allottees, recorded in paragraph 26 namely, the appointment of a commitment to consider each individual case for cancellation. It was in this context that the Court proceeded in para 27

where it held that appointment of a committee would amount to nullifying their judgment. It is in this context that the Court held that the beneficiaries of the flawed process have to bear the consequence, i.e., cancellation of the coal blocks.

4.36 It is submitted that it is not proper to read a sentence from a judgment, divorced from the complete context in which it was given and to build up a case treating as if that sentence is the complete law on the subject.[2]

INVOICES WERE NEVER DISPUTED BY RESPONDENT NO. 2/MPPMCL

4.37 The PPA provides the procedure for disputing an invoice. Respondent no. 2/MPPMCL is required to adhere to the prescribed process. Otherwise, it is deemed that the invoice is not disputed and Respondent no. 2/MPPMCL is liable to pay the entire amount as per the invoice. Once the procedure for billing dispute has not been followed, it is not open to Respondent no. 2/MPPMCL to contend subsequently, that the basis of the invoice was wrong, or that the amount therein is not payable.

4.38 Appellant raised supplementary bills upon Respondent No. 2/MPPMCL, including the Additional Levy as part of landed cost of coal. Respondent no. 2/MPPMCL also did not follow the procedure spelt out under the PPA for disputing the invoices. Therefore, it was not open to the Respondents to deny payment of Additional Levy in such invoices once such invoice attains finality in terms of the PPA.

4.39 MPERC has acted contrary to the provisions of the PPA by upholding non-payment of Additional Levy, without disputing the invoice. The Respondent no. 1/MPERC cannot allow the procedure mentioned in the PPA to be surpassed, as it would amount to amending the clauses of the PPA, which the Respondent no. 1/MPERC has no power to do, once the claim has been crystallized under the PPA. Further, the same is in the

[2]J. K. Industries Ltd. & Ors. v. Chief Inspector of Factories and Boilers & Ors. (1996) 6 SCC 665 (para 23) [**pg. 88-89 of the Judgment Compilation filed by Appellant on 14.09.2020**].

teeth of the Coal Supply Agreement that has been acknowledged and considered by the Respondent no. 1/MPERC while determining the provisional tariff for the Appellant vide order dated 26.09.2014.

4.40 It is settled position of law that a court cannot rewrite the terms of the contract.[3]. Where a specific procedure has been laid down to dispute the amounts in the invoices raised, the said procedure has to be strictly followed. Not following the procedure provided under the PPAs, amounts to waiving of right to object at a later stage and further amounts to acceptance of the amounts raised by the Appellants in the invoices under the PPAs. The Respondent no. 1/ MPERC erred in disregarding the fact that Respondent no. 2/MPPMCL did not dispute the invoices raised by the Appellant as per the procedure laid down in Article 10 of the PPAs, and thus, the same amounts to acceptance on part of Respondent no. 2/MPPMCL.

RESPONSE OF RESPONDENT NO. 1/MPERC:

4.41 In its Written Submission dated 21.08.2020, Respondent no. 1/ MPERC has gone beyond the reasoning and scope of the Impugned Order. Respondent no. 1/ MPERC before APTEL is trying to add reasons in support of the Impugned Order which find no mention or reference therein. Reasons, such as, landed cost of coal was allowed based on CIL notification; full royalty was allowed as per MOP notification under Sec. 9 of MMDR Act; MPSMCL, MPJML and the Appellant have received market cost for the mined coal, the consumers have been deprived of cheap coal and the government has been deprived of the premium, etc.; treatment of power sold in open-market without any long term PPA, etc. These reasons have not even been discussed in the Impugned Order, even though extensive arguments are now made on these lines.

[3]GUVNL V. Semi Solar Conductor (2017) 16 SCC 498 (para 60, 61 and 68) [**pg. 138 and 141-142 of the Judgment Compilation filed by Appellant on 14.09.2020**]

4.42 The submissions made by Respondent no. 1/MPERC before this Tribunal cannot be permitted to be raised, or taken cognizance of being:

a) Improvement of the Impugned Order;
b) Contrary to the Impugned Order;
c) Contrary to the documents on record;
d) Incorrect statement;

and the same cannot be permitted.

Improvement of the Impugned Order:

4.43 Respondent no. 1/ MPERC in a bid to improve upon the reasoning provided in the Impugned Order to disallow pass through of Additional Levy has set out elaborate arguments in addition to what has been stated in the Impugned Order.

4.44 Respondent no. 1/ MPERC in its Written Note for Arguments has given reasons, improved upon the reasons, in support of the Impugned Order, which do not find any mention in the Impugned Order. Respondent no. 1/ MPERC is now trying to improve upon its stand by supplanting reasons and justifying the Impugned Order which is impermissible in law as held by the Hon'ble Supreme Court in *K.K. Bhalla v. State of M.P.* (2006) 3 SCC 581 and in *Mohinder Singh Gill v. Chief Election Commr.*, (1978) 1 SCC 405.

4.45 It is settled proposition of law that after passing of a judgement, decree or order, the court or the tribunal becomes functus officio and thus, is not entitled to vary the terms of the judgment, decree or order passed earlier.[4]

Contrary to the Impugned Order:

4.46 The Impugned Order has referred Additional Levy to be a 'compensatory payment', while Respondent no. 1/ MPERC is now portraying 'Additional

[4]Dwarka Das v. State of MP (1999) 3 SCC 500 (para 6) [**pg. 181 of the Judgment Compilation filed by Appellant on 14.07.2020**].

Levy' as in the nature of penalty. Relevant paragraphs of the Impugned Order are extracted hereinbelow:

> "*11.* ***It is observed from the above that the "Additional Levy" is also termed as Compensatory Payment. Further, there is no mention in the aforesaid order to recover/pass on this "Additional Levy" or Compensatory payment from /to anyone like the electricity consumers of the Distribution Companies in the state (in the instant case) who are other than the beneficiaries of the flawed process in terms of Para 27 of the said order passed by the Hon'ble Supreme Court of India****. Therefore, the grounds on which the petitioner has requested this commission to "declare that the Energy (Variable) Charges inclusive of the "Additional Levy" of Rs. 295/- per MT + 5% VAT as part of the landed cost of coal" are misplaced and having no merit to take up this issue by the Commission.*
>
> *12. In view of the above observations, the second issue for consideration of the aforesaid "Additional Levy" is obviously beyond the scope of the Regulations notified by this Commission. MPERC (Terms & Conditions for determination of Generation Tariff) Regulations, 2012 do not provide for onward recovery of such* ***"Additional Levy" of Compensatory payment from the electricity consumers of the Distribution Companies in the state****. The relevant Regulation 41 MPERC (Terms & Conditions for determination of Generation Tariff) Regulations, 2012 is reproduced below:*
>
> *…*" (emphasis supplied)

4.47 Also, in the Written Submission dated 21.08.2020, the Respondent no. 1/MPERC has at various places portrayed the 'Additional Levy' as a penalty. Some paragraphs are extracted hereinunder for the sake of brevity:

> "*16. The nature of Additional Levy is clarified by the Supreme Court at para 33 of the 2nd Supreme Court Order, the 'Additional Levy' is being levied on the allottees/beneficiaries of the flawed allocation process to achieve a three-fold measure – (i) to correct the wrong done by the Union of India; (ii) to act as a deterrent that by highlighting the wrong, it is expected that the Government will not deal with the natural resources that belong to the country as if they belong to a few individuals who can fritter them away at their sweet will; and (iii) the levy may also compensate the exchequer for the loss caused to it, in the manner suggested by the learned Attorney General and CAG Report.* ***Therefore, Additional Levy is not simpliciter a 'compensation', it is also a penalty for consuming the benefits of an illegal process.*** *The levy is an attempt to correct the wrongs of participating and enabling an illegal and arbitrary process by which national resources have been frittered away and handed over to private parties without transparency. Further, even the Attorney General in his submissions, noted at para 15 of the 2nd Supreme Court Order, has recognized Additional Levy to be a penalty. Therefore, Additional Levy is a charge which is both compensatory and penal by nature.*"
>
> …

18. …. Therefore, the statute which recognizes the 'Additional Levy' makes no provision for the passing through of such amount to anybody else other than the allottee and the registered lease holder of the mine (as provided in the Explanation to Section 3(n)). ***This is because the statute itself treats the levy as a penalty and compensation, i.e. the person who has benefitted alone has to ensure that the same is returned to the state exchequer.*** *The Sections read thus:*

…"

(emphasis supplied)

4.48 The Respondent no. 1/ MPERC at the stage of appeal cannot improve upon the reasons given by it in the Impugned Order. Once the order has been passed by the Respondent no. 1/ MPERC, it has become functus officio. It cannot now seek to alter its approach or reasoning or change the complexion of what it has already dealt with in the Impugned Order.

4.49 Once a Regulatory Commission has rendered its decision in the adjudicatory process over a dispute, it should be dispassionate about it. The role of the Regulatory Commission ends there, and the judgment/ order should speak for itself. This Tribunal in *M/s Sudhakara Infratech Private Ltd. v. UPERC &Ors. Appeal No. 319 of 2018* has observed as follows:

"*48. It must also be said that after the Electricity Regulatory Commission has rendered its decision in the adjudicatory process over the dispute, it is expected to be dispassionate about it. Assuming it has discharged its responsibility to the best of its fair judgment, the matter in so far as it concerns the Commission should end there. Its judgment would speak for itself. There would be no need for it to be expected to "defend" its decision subject, of course, to some just exceptions*

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49. …The Appeal before this Tribunal, as in any other litigative process, is continuation of the proceedings before the forum whose decision is under challenge by such appeal. As is well accepted, based on sound principles of fair justice, it not being a matter of personal stake for the forum of first instance, ordinarily it has no role to play to put in "contest" before the appellate forum. The only obligation of the forum of first instance is to make the record of its proceedings available to the appellate authority as and when required or called for. The exceptions to this general rule could include a case wherein personal bias or misconduct is attributed to the member(s) of the adjudicatory forum whose decision is being assailed. …"

4.50 However, in the present case, Respondent no. 1/ MPERC has defended its order, i.e., the Impugned Order, as if it is a contesting party and this was an adversarial litigation against it. It has added, substituted and modified the Impugned Order while defending it before this Tribunal, which is impermissible in law.

4.51 Without prejudice and in addition to the submissions made hereinabove, that the Respondent no. 1/ MPERC lacks any jurisdiction or opportunity to improve upon its order in appeal proceedings as being a fundamental objection to the submissions made by Respondent no. 1/ MPERC in the present proceedings. The Appellant proceeds to demonstrate how even otherwise the submissions now made by Respondent no. 1/ MPERC in the present proceedings do not merit any consideration.

Contrary to the documents on record:

4.52 Respondent no. 1/MPERC has made submissions that are contrary to the documents on record, as illustrated hereinbelow:

Tender Document

4.53 The coal block was allotted to MPSMCL who had signed the lease for such coal block and therefore falls within the definition of prior allottee under the Coal Mine (Special Provision) Act, 2015.

4.54 The tendering process was initiated by MPSMCL. Upon such allocation of Amelia (North) coal block, Jaiprakash Associate Ltd. was identified as the successful JV partner.

Joint Venture Agreement

4.55 As part of the JV Agreement, Jaiprakash Associate Ltd., was also required to set up a power plant in which the coal was to be utilized. The base price of coal under the JVA was to be determined on the basis of cost of production derived from the audited statement of account from JVC. The cost of coal was to be finally determined by the coal fixation committee on the basis of production cost derived from audited statement of account.

4.56 The JVC was to be paid an amount of 10% of the base price for the activities performed by JVC while the facilitation fee was paid to MPSMCL would be in the range of 20-35% (depending upon grade of coal) of the basic sale price fixed by Northern Coal Field Ltd or the price of coal sold by MPSMCL, whichever is higher.

Coal Supply Agreement:

4.57 The coal block was allocated to MPSMCL vide Order no. 13016/3/2003-CA/CA-1. The same is also mentioned in the Coal Supply Agreement dated 17.12.2013 entered into between MPSMCL and the Appellant.

4.58 The Base Price covers the Production Cost paid to the MDO and all direct and indirect costs incurred by the JV including but not limited to all costs and expenses in relation to environmental and statutory compliances and interest on borrowed capital.

4.59 The Production Cost to mean all direct and indirect costs of raising coal paid to MDO. It includes*, inter alia*, all obligations under the application laws including the Mines Act, 1952, Mine Closure Plan responsibilities, MoEF guidelines, the Forest Conservation Act, 1980, the Environment Protection Act, 1986, etc.

4.60 The Price of Coal includes 'as delivered price of coal' and 'statutory charges'. The price of coal to be supplied to the Appellant was determined by the Respondent no. 1/ MPERC on the basis of inputs provided by MPSMCL vide its order dated 26.09.2014 *of documents annexed with the Written Submissions dated 14.09.2020).* The provisional energy charge was based on CIL notified price.

Incorrect Statements made by Respondent no. 1/ MPERC:

4.61 Respondent No. 1/ MPERC in its Written Submissions dated 21.08.2020and also in the course of arguments have made several incorrect statements of facts as under:

INCORRECT STATEMENT	CORRECT POSITION OF FACT
Coal mine was allocated to MPSMCL and the JV company under the government dispensation route/ JAL owns 49% shares of the coal block. MPSMCL and JAL are the prior allottee in the present case as MPSMCL owns 51% and JAL owns 49% of shares in the Amelia (North) coal block as per the JV Agreement.	The coal block was allocated to MPSMCL vide Order no. 13016/3/2003-CA/CA-1. The same is also mentioned in the Coal Supply Agreement dated 17.12.2013 entered into between MPSMCL and the Appellant. Relevant portion is extracted hereinbelow: "*WHEREAS Madhya Pradesh State Mining Corporation Limited ("MPSMCL") a Government of Madhya Pradesh had applied and stands allotted the Amelia (North) Coal Block by the Ministry of Coal, Government of India through the Government Company Dispensation route vide Order number 13016/3/2003-CA/CA-1 dated ____.2006*" Jaiprakash Associates Ltd. was identified as a joint venture partner, after allocation of the coal mine to develop and operate the mine to bring in investment for the purpose of setting up a thermal power plant in the State of Madhya Pradesh in order to effectively and completely utilise the entire coal production from Amelia (North) Coal Block. The same is not in the nature of commercial mining but for end-use project.
Though the coal block was allocated to the State PSU, it suffered from all the illegalities that were discussed and recorded in the Supreme Court Orders whereby mining of the captive coal block was carried out by private parties and the price of coal was linked to CIL/market rates. There was no effort made by the JV Company to price the coal competitively to give the end consumers benefit of cheaper power. Instead, the coal was being mined by the JV company and then sold to the Appellant at the CIL notified prices.	Relevant paragraphs have been extracted at pages 12 to 17 above under point no. 2 (Synopsis of Facts).
MPSMCL, JVC and Appellant have received market cost for mined coal.	Same as above.
It is pertinent to note that the only way the Appellant could have	JPVL is not a prior allottee so the pre-qualification requirement of paying

participated in the coal auction was if the 'prior allottee', i.e. MPSMCL/JV Company had paid off the outstanding 'Additional Levy' under Section 4(4) of the Coal Mines Act. There seems to be no other reason why the Appellant chose to pay 'Additional Levy' instead of approaching the Respondent Commission for a clarification or disputing the bills against the 'Additional Levy' before the correct forum.	Additional Levy was not applicable to it. MPSMCL is the sole prior allottee under the Special Provisions Act as the allottee of the mine as well as the lease holder of the mine. Such oblique innuendo by Respondent no. 1/ MPERC as a regulatory authority based on incorrect facts reflects on the adversity of the Respondent no. 1/ MPERC on the entire issue from the very onset.
Appellant is selling only 37.5% power to MPPMCL. The rest of the power is sold as merchant power at competitive rates in the power market. Therefore, Appellant cannot cherry pick MPPMCL for passing on Additional Levy.	Appellant does not have medium or long term tied up power for the balance 62.5% capacity. Only part of the balance capacity is sold through short term contracts/ power market. Respondent no. 1 is well aware of this position as these aspects had been specifically raised before it in Petition no. 64 of 2015 titled as *Jaiprakash Power Ventures Ltd. v. MPPMCL &Ors.* Only the amount of Additional Levy related to Respondent no. 2/MPPMCL is being claimed in tariff, not the total amount of levy paid by the Appellant.

RESPONSE OF RESPONDENT NO. 2/ MPPMCL:

4.62 Respondent no. 2/MPPMCL has, *inter alia*, submitted that the Appellant being the generator is not liable to pay the Additional Levy under law and only the prior allottee should be made to pay the same. It is submitted in this regard that Additional Levy being in the nature of statutory levy, was added as 'as delivered price of coal' under the Coal Supply Agreement by MPSMCL, and therefore, payable as such by the Appellant. Non-payment of these amounts would have resulted in stoppage of supply of coal.

ADDITIONAL LEVY IS NOT A PENALTY

4.63 The imposition of Additional Levy cannot be said to be a penalty for the expression 'penalty' is an elastic term, with many different shades of meaning but it always involves as idea of punishment.

In *N.K. Jain v. C.K. Shah (1991) 2 SCC 495*, the Hon'ble Supreme Court has made the following observation at para 11:

> "*11. In the common parlance the word 'penalty' is understood to mean; a legal or official punishment such as a term of imprisonment. In some contexts it is also understood to mean some other form of punishment such as fine or forfeiture for not fulfilling a contract. But in gathering the meaning of this word, the context in which this is used is significant. …… The learned counsel referred to certain standard books on words and phrases. In Butterworths Words and Phrases, Legally Defined (3rd edn. page 343) the meaning of the word 'penalty' is given as that the word 'penalty' is large enough to mean, is intended to mean, and does mean, any punishment whether by imprisonment or otherwise. Blackburn, J. in R. v. Smith [(1862) Le & Ca 131, 138] , observed as under:*
>
> > *"I consider that the word 'penalty' falls to be read in a wide popular sense, … and I select two definitions adequately conveying that sense. The late MrRoberton Christie (The Encyclopaedia, Vol. 11, p. 204) said : 'Penalty in the broad sense may be defined as any suffering in person or property by way of forfeiture, deprivation or disability, imposed as a punishment by law or judicial authority in respect of … an act prohibited by statute.' The Oxford Dictionary echoes the same wide conception by referring to 'a loss, disability or disadvantage of some kind … fixed by law for some offence'."*
>
> *The meaning of the word 'penalty' as given in the Collins English Dictionary, is as under:*
>
> > *"Penalty: 1. legal or official punishment, such as a term of imprisonment. 2. some other form of punishment, such as a fine or forfeit for not fulfilling a contract. 3. loss, suffering, or other unfortunate result of one's own action, error, etc. 4. Sport, games etc. a handicap awarded against a player or team for illegal play, such as a free shot at goal by the opposing team, loss of points, etc."*
>
> *In addition, the learned counsel also relied on some decisions of foreign courts where the meaning of the word 'penalty' was considered. In People ex relRisso v. Randall [58 NY 2d 265, 268 Misc 1057] , it was held that:*
>
> > *"A 'penalty' may refer to both criminal and civil liability, being denied as penal retribution, punishment for crime of offence, the suffering in person, rights or property which is annexed by law or judicial decision to commission of a crime or public offence."*
>
> *In City of Fort Wayne v. Bishop [92 NE 2d 544, 547, 228 Ind 304] , it was observed as under:*
>
> > *"The term 'penalty' embraces all consequences visited by law on heads of those who violate police regulations and extends to all penalties whether exigible by state in interest of community or by private persons in their own interest, even when statute is remedial as well as penal."*
>
> *In City of Cincinnati v. Wright [67 NE 2d 358, 361, 77 Ohio App 261], it was noted that:*

"The word 'penalty' is not confined to punishment or crime; it has a broader meaning in law of contracts; it is used as contradistinguished from liquidated damages. It is also used to indicate the sum to be forfeited on breach of a bond. And in common parlance it expresses any disadvantage resulting from an act."

…"

In *M/s Pioneer Silk Mills Pvt. Ltd. &Anr. v. Union of India ILR (1992) 1 Delhi 433,* it has been held as under:

"35. *When penalty is additional tax, constitutional mandate requires a clear authority of law for imposition thereof. If long drawn arguments are needed to explain if the Act by referential legislation or legislation by incorporation levies penalty or not, it is better for the court to lean in favour of the tax payer. There is no room for presumption in such a case. The mere fact that all these years the Additional Duty Act has not been challenged on this ground is of no consequence if authority of law as mandated by the Constitution is lacking. We may also note in the passing that it was submitted before us that penalty so realised earlier has never been distributed among the States as part of net proceeds of the collection of the additional duties of excise under the Additional Duties Act. This statement made at the Bar was not challenged. Since, however, this point was not raised in the writ petition and the revenue had no opportunity to reply in its counter-affidavit, we leave the matter at that. Levy of penalty which is an additional tax has to be under the authority of law which should be clear, specific and explicit.*"

4.64 The following may be noted in this regard:

a) The Hon'ble Supreme Court has only held that the process of allocation was flawed and illegal;

b) No findings of malafide against any specific allottee;

c) In this case, allocation was made to a state government entity. Respondent no. 1/ MPERC in effect, is suggesting malpractices by MPSMCL, which can be examined in appropriate proceedings.

ADDITIONAL LEVY VERSUS ADDITIONAL PREMIUM

4.65 Respondent No. 1/ MPERC has confused the issue of Additional Levy and Additional Premium in its submissions. It is submitted that both are absolutely different concepts applicable at different point of time to completely different scenarios.

4.66 Additional Levy is a statutory imposition under the Special Provisions Act and is to be imposed and collected from all prior allottees, irrespective of the fact whether such prior allottee is desirous of participating in the future auctions of the cancelled coal blocks. Further, payment of additional levy was made a necessary condition precedent under the Special Provisions Actto participate in auction of coal blocks. Additional Premium, on the other hand is a tender condition and bidding criteria for winning the right to mine coal from the coal blocks that were subsequently put up for auction by the Central Government.

4.67 Additional Premium is in the nature of forward bidding where the bidder has to quote the highest price to secure the right to mining under the bidding process. It does not relate to and/or reflect the benefit of coal. It is paid to maximize the revenue to the government.

4.68 Order pertaining to Additional Premium in SMP 49/2015 dated 28.01.2016 cannot be allowed to be taken on record at this stage. Even otherwise, the said order was passed much later, i.e., after the Supreme Court judgments – Declaratory and Consequence Orders and even after the Special Provisions Act was promulgated on 30.03.2015. Therefore, it cannot have any bearing and/ or impact on imposition of Additional Levy. Also, the order dated 28.01.2016 passed in SMP 49/2015 is under challenge before this Tribunal in Appeal No. 95 of 2016 titled as "*Jaiprakash Power Ventures Ltd. v. MPERC &Ors.*" and is listed for hearing on 23.10.2020.

5. Ms. Mandakini Ghosh, Learned Counsel for the Respondent No. 1 (Madhya Pradesh Electricity Regulatory Commission) has submitted the following written note of arguments for our consideration :

5.1 On 05.01.2011, the Appellant and Respondent No. 2 enteredinto the first long term PPA to supply 30% of the installed capacity from its 2x660 MW thermal power plant ("Project") at tariff determined by the Respondent No. On 6.09.2011, the Appellant entered into the second long term PPA with Respondent No. 2 for supply of 7.5% of the net power from the Project at variable cost to be determined by the Respondent Commission (collectively **PPAs**).

5.2 The Amelia (North) coal mine was allocated to MPSMCL under the Government Dispensation route. On 27.01.2006 MPSMCL in turn formed a joint venture, Madhya Pradesh Jaypee Minerals Ltd. (MPJML), with Jaiprakash Associates Limited (one of the promoters of the Appellant having 49% holding) and MPSMCL (having 51% holding). The joint venture was responsible for mining and operating the coal block and selling the coal to the power plants developed by JAL. This agreement was amended on 11.04.2014 wherein it was agreed that instead of MPJML, Appellant would now execute a coal supply agreement/Fuel Supply Agreement with MPSMCL. As per Clause 8.5.8 of the amended JV Agreement dated 11.04.2014, MPSMCL shall supply coal to the Appellant as per the Coal Supply Agreement. However, MPJML (JV Company) shall assist MPSMCL in this regard. As per Clause 8.5.9, Facilitation Fees (fees payable for each tonne of run of mine coal sold), Royalty and other applicable taxes shall be retained by MPSMCL on sale of coal under the Coal Supply Agreement. Balance amount shall be remitted and belong to MPJML

5.3 In the interim, on 17.12.2013 the Appellant signed a Coal Supply Agreement/Fuel Supply Agreement with MPSMCL for supply of 2.5 MTPA coal from Amelia North Coal Block. The coal production from Amelia (North) Coal Mine commenced in December 2013.

5.4 The Units I and II of the Appellant's Project were commissioned on 03.09.2014 and 21.02.2015 respectively. On 26.09.2014, in Petition No. 3 of 2014, the Respondent Commission determined the provisional tariff for Unit I of the Appellant's Project for FY 2014-15 and 2015-16 in accordance with the EA 2003 and the Generation Tariff Regulations. Further, vide order dated 31.03.2015, the Respondent Commission provisionally determined the Annual Fixed Charges and Energy Charges for Unit 2 from its CoD till 31.03.2016. In both these orders, the Respondent Commission has determined energy charges based on coal sourced from Amelia Coal Block. The landed cost of coal was allowed based on notifications of Coal India Limited (CIL). The Respondent Commission allowed full royalty, of INR 191.53, on every tonne of coal consumed by the Appellant @ 14% is based on notifications issued by the Ministry of Coal under Section 9 of the Mines and Minerals (Development and Regulation) Act, 1957. The energy charge was determined at Rs. 1.171/unit while Annual Fixed Charge was determined INR 313.16 Crore.

5.5 Subsequently, the allotment of Amelia Coal Block to MPSMCL was cancelled by the Hon'ble Supreme Court on 25.08.2014 and 26.09.2014 (with effect from 31.03.2015). Thereafter, the Amelia Coal Block was auctioned. The Appellant participated and emerged successful in the bid. Due to auctioning of coal blocks across the country, the Ministry of Power, Government of India by letter dated 16.04.2015 and State Government's by Section 108 directions dated 18.05.2015, directed the Regulatory Commissions/Respondent Commission to re-determine energy charges for generators sourcing coal from auctioned coal mines (which in turn was a direct result of cancellation of allocation of coal mines by judgments of the Hon'ble Supreme Court dated 25.08.2014 and 26.09.2014). The objective was that benefit of cheaper coal should be passed onto the consumers.

5.6 Accordingly, on 28.01.2016, in SMP No. 49 of 2015, the Respondent Commission re-determined the energy charges for supply of power from the Appellant's Project under the PPAs effective from 1.04.2015. All other terms and conditions of Tariff Orders, dated 26.09.2014 and 31.03.2015, remained applicable. Even though coal was being sourced from the same Amelia Coal Block, the tariff was now competitive and reduced to Rs. 0.48/-unit. The Respondent Commission has allowed full royalty @ 14% in accordance with Ministry of Coal Notification. This order has been challenged in Appeal No. 95/2016 before this Tribunal by the Appellant. There is no stay operating against this order and the Appellant is being billed for the power supplied under the PPA in accordance with the lowered and competitive tariff determined in SMP 49/2015.

BASIS OF COMPUTATION OF 'ADDITIONAL LEVY'

5.7 Previously, in April 2012, the Comptroller and Auditor General of India prepared Report No. 7 on the "Allocation of Coal Block Augmentation of Coal Production" (**CAG Report**). The CAG Report was for submission to the President under Article 151 of the Constitution of India. The CAG Report *inter alia* recorded the Ministry of Coal's initiatives to introduce competitive bidding for allocation of captive coal blocks from 2004, the benefits arising out of competitive bidding and the likely benefits passed on to the private allottees by not resorting for competitive bidding. The CAG Report recognized that delay in introduction of competitive bidding and allocation of captive coal mines being conducted by the screening route has rendered the process beneficial to a large number of private companies. Most importantly, the CAG Report quantified the financial gain that accrued to private parties in respect of the allocated coal mines as on 31.03.2011 as Rs. 185,591.34 cores. The financial gain that accrued to private parties is as below:

Particulars	Extractable Reserves of OC (Figure in million tonne)	Average Sale Price of all grades of CIL OC Mines for 2010-11 (Rs. per tonne)	Average Cost Price of all grades of CIL OC Mines for 2010-11 (Rs. per tonne)	Financing Cost as stated by MOC (Rs. per tonne)	Net Gain (Rs. per tonne)	Financial Benefit (Rs. in crore)
Opencast Mines allocated to Private Parties (Annexure-III)	3,969.890	1028.42	583.01	150	295.41	117,274.52
Mixed Mines allocated to Private Parties where Mining Plans are available (Annexure-IV)	1,010.575	1028.42	583.01	150	295.41	29,853.40
Mixed Mines allocated to Private Parties where Mining Plans are not available (Annexure-V)	1,302.035	1028.42	581.01	150	295.41	38,463.42
Total	**6,282.500**					**185,591.34**

5.8 From the aforesaid table in the CAG Report, the following emerges:

a) The entire basis for the computation of financial gain accruing to private parties was the inflated and expensive sale price of coal being charged by the allottees of the captive coal mine;

b) The price of coal to the consumer was linked to the sale price of CIL Open Cast (OC) mines. Therefore, there was no benefit or discount on account of ownership of coal blocks; and

c) The cost price of CIL OC Coal mine is worked out at Rs. 583/- which is the benchmark cost. After adding financing cost of Rs. 150/- (as per MOC), the money in the hand of the allottee was Rs. 295.41/-. This amount of Rs. 295/- is not passed onto the benefit of the consumer. This is the amount the allottee/beneficiary of the flawed process of allotment was asked to pay back to the state exchequer.

5.9 Subsequently, the Standing Committee on Coal and Steel (2012-2013) constituted by the 15th Lok Sabha prepared a review of allotment,

development and performance of coal/ lignite blocks. The Standing Committee noted that the CAG report would be discussed by the Public Accounts Committee of the Parliament. In its report dated 23.4.2013 the Standing Committee held as follows:

> *"several coal blocks were allocated to few fortunates without disclosing the same to the public at large. The natural resources and state largesse were distributed to few fortunates for their own benefit without following any transparent system, was total abuse of power by the Government."*
>
> The Standing Committee also observed as under:
>
> "*Committee has come to conclusion that entire procedure for distribution of coal was unauthorized,* ***no one should enjoy the benefit of distribution/allocation and therefore, recommend that all coal blocks allotted to the private coal companies, atleast where coal production has not yet started, should be cancelled immediately*** *and the State and Central Government PSUs should be warned to start the mining work at the earliest. The State and Central Government PSUs should not allow private parties to extract coal from coal mines that are allocated to them."* (Emphasis Supplied)

The Standing Committee Report recognized that the natural resources and state largesse were distributed to few fortunates for their own benefit without following any transparent system. Further, the Standing Committee recommended against the current arrangement in the present appeal wherein State PSUs are handing over the mining rights to private parties allocated to them.

Nature and scope of Additional Levy

5.10 The Hon'ble Supreme court by orders dated 25.08.2014 and 26.09.2014 cancelled the allocation of captive coal mines from 1993 onwards, which were allocated through government dispensation route and screening committee route. The Amelia (North) Coal Block which was allocated through the government dispensation route to MPSMCL and being mined/operated by MPJML was also cancelled. The Hon'ble Supreme Court took note of the CAG Report's quantification of financial benefits accruing to private parties due to the illegal, non-transparent and arbitrary allocation process. Accordingly, on 25.08.2014, the Hon'ble Supreme

Court, in Writ Petition (CRL) No. 120 of 2012 & batch quashed the allocation of coal blocks to private companies made by the Central government by screening committee route and to State PSUs by Government dispensation route post 1993 as inconsistent with the constitutional principles and the fundamentals of the equality clause enshrined in the Constitution (1st Supreme Court Order). These were criminal writ petitions wherein the petitioners also sought CBI enquiries to be conducted in the process of allocation conducted by the Central Government.

5.11 On 26.09.2014, in "consequent proceedings" in WP (Civil) No. 463 of 2012, the Supreme Court by Order dated 24.09.2014 directed all the allottees of operating coal mines to pay an "Additional Levy" of Rs. 295per metric tonne of coal in accordance with the CAG Report (**2nd Supreme Court Order**).

5.12 It is crucial to note that at Annexure I of the 2nd Supreme Court Order, the Amelia (North) Coal Block which was allotted to MPSMCL (and being mined by MPJML) is mentioned. The allocation of Amelia (North) Coal Mine to MPSMCL was through the government dispensation route and it was being mined by the JV company (wherein the Appellant's promoter held 49% shareholding). Though the coal block was allocated to the State PSU, it suffered from all the illegalities that were discussed and recorded in the Supreme Court Orders whereby mining of the captive coal block was carried out by private parties and the price of coal was linked to CIL/market rates. There was no effort made by the JV Company to price the coal competitively to give the end consumers benefit of cheaper power. Instead, the coal was being mined by the JV company and then sold to the Appellant at the CIL notified prices. The allocation of the Amelia Coal Mine stood cancelled by the Supreme Court Orders. The cancellation of coal block was effective from 31.03. 2015.

5.13 On a combined reading of para 27, 33 and 40, it is clear that 'Additional Levy' of Rs. 295 per metric tonne is *only* being levied on the allottees who were allotted the captive coal block. The allottees were beneficiaries of the grant of state largesse and hence must bear the consequences of enabling an illegal process and consuming the benefits accruing out of the same. The 'consequences' of the flawed process is not restricted to suffering cancellation of coal blocks but also compensating the exchequer for the financial gains which have accrued to the allottees and which have not been passed onto consumers and the government.

5.14 The nature of Additional Levy is clarified by the Supreme Court at para 33 of the 2nd Supreme Court Order, the 'Additional Levy' is being levied on the allottees/beneficiaries of the flawed allocation process to achieve a three-fold measure – (i) to correct the wrong done by the Union of India; (ii) to act as a deterrent that by highlighting the wrong, it is expected that the Government will not deal with the natural resources that belong to the country as if they belong to a few individuals who can fritter them away at their sweet will; and (iii) the levy may also compensate the exchequer for the loss caused to it, in the manner suggested by the learned Attorney General and CAG Report. Therefore, Additional Levy is not simpliciter a 'compensation', it is also a penalty for consuming the benefits of an illegal process. The levy is an attempt to correct the wrongs of participating and enabling an illegal and arbitrary process by which national resources have been frittered away and handed over to private parties without transparency. Further, even the Attorney General in his submissions, noted at para 15 of the 2nd Supreme Court Order, has recognized Additional Levy to be a penalty. Therefore, Additional Levy is a charge which is both compensatory and penal by nature.

5.15 It is in this background that the Respondent Commission held as below in the Impugned Order:

"6. On examination of the contents in the petition and the documents annexed with it, the Commission has observed the following:

(i) The petitioner raised supplementary invoices on Respondent No.1 for recovery of the impact of "Additional Levy" of Rs. 295 per metric ton imposed by the Hon'ble Supreme Court of India in its order dated 24th September' 2014 in Writ Petition (CRL.) No. 120 of 2012.

(ii) In response to the above, M.P. Power Management Co. Ltd., Jabalpur (Respondent No. 1) refused to make payments of the aforesaid supplementary invoices (raised by the petitioner) on the following grounds:

(a) The judgement does not speak of pass through of the Additional levy" to the power procurers.

(b) In Para 27 of the Hon'ble Supreme Court's judgment, the intention of the Court, as who has to suffer the "Additional levy" is sufficiently clear. The judgement has dealt with the process of allotment of coal blocks and has found it to be illegal and arbitrary. The Court has intended that the beneficiaries of the flawed process, i.e. respective allottees of relevant coal blocks and not procurers/general public, 'must suffer the consequences', in the form of additional levy.

(c) CERC Tariff Regulations does not lay down or even suggest that the

landed cost of coal includes additional levy or penalty of any kind.

The petitioner has enclosed a copy of the Respondent's letter dated 22nd April'2015 with the aforesaid contention.

…..
9. To deal with the first issue, the Commission has gone through the judgement passed by the Hon'ble Supreme Court of India on 25th August' 2014 and the order passed on 24th September' 2014 in the following writ petitions:

(i) Writ Petition (CRL) No. 120 of 2012
(ii) Writ Petition (Civil) No. 463 of 2012
(iii) Writ Petition (Civil) No. 515 of 2012 (iv) Writ Petition (Civil) No. 283 of 2013.

…….

11. It is observed from the above that the "Additional Levy" is also termed as Compensatory Payment. Further, there is no mention in the aforesaid order to recover/ pass on this "Additional Levy" or Compensatory payment from/to anyone like the electricity consumers of the Distribution Companies in the state (in the instant case) who are other than the beneficiaries of the flawed process in terms of Para 27 of the said order passed by the Hon'ble Supreme Court of India. Therefore, the grounds on which the petitioner has requested this Commission to "declare that the Energy (Variable) Charges inclusive of the "Additional Levy" of Rs.295/-per MT + 5% VAT as part of the landed cost of coal" are misplaced and having no merit to take up this issue by the Commission."

5.16 The Central Government immediately thereafter, on 21.10.2014, promulgated the Coal Mines (Special Provisions) Ordinance, 2014 to implement the 2nd Supreme Court order. It was intended to re-auction and re-allot the coal mines. On 11.12.2014, the Ministry of Coal notified the coal mines (Special Provisions) Rules, 2014. On 26.12.2014, the Coal Mines (Special Provisions) Second Ordinance, 2014 was promulgated and thereafter the Coal Mines (Special Provisions) Act, 2015 ("**Coal Mines Act**") was passed, which is substantially the same as the Second Ordinance. The Act was to implement the Supreme Court judgments. The preamble to the said Act states that it has been passed for promoting optimum utilization of coal resources consistent with requirement of the country in national interest and for matters connected therewith.As per Section 4(4) of the Coal Mines Act a prior allottee would be eligible to participate in the coal mines auction process subject to the payment of additional levy. In the event it failed to pay the requisite amount then the allottee, its promoter or any of its company will not be allowed to participate in the auction. Section 3(n) of the Coal Mines Act defines the term prior allottee. A plain reading of Section 3(n) and Section 4(4) of the Coal Mines Act clarifies that the additional levy must be paid by the allottee Therefore, the statute which recognizes the 'Additional Levy' makes no provision for the passing through of such amount to anybody else other than the allottee and the registered lease holder of the mine (as provided in the Explanation to Section 3(n)). This is because the statute itself treats the levy as a penalty and compensation, i.e. the person who has benefitted alone has to ensure that the same is returned to the state exchequer. The Sections read thus:

> *"Section 3(n): "prior allottee" means prior allottee of Schedule I coal mines as listed therein who had been allotted coal mines between 1993 and 31st day of March, 2011, whose allotments have been cancelled pursuant to the judgment of the Supreme Court dated the 25th August, 2014 and its order dated 24th September, 2014 including those allotments which may have been de-*

allocated prior to and during the pendency of the Writ Petition (Criminal) No.120 of 2012.

Explanation.—In case a mining lease has been executed in favour of a third party, subsequent to such allocation of Scheduled I coal mines, then, the third party shall be deemed to be the prior allottee;

Section 4: (1)…….

(2)…….

(3)…….

(4) A prior allottee shall be eligible to participate in the auction process subject to payment of the additional levy within such period as may be prescribed and if the prior allottee has not paid such levy, then, the prior allottee, its promoter or any of its company of such prior allottee shall not be eligible to bid either by itself or by way of a joint venture."

5.17 Therefore, now, on a combined reading of the 1st and 2nd Supreme Court Order, along with the Coal Mines Act, it is established beyond doubt that not only the allottee, but also a third party, i.e., the leaseholder of mining rights, are liable to bear the burden of 'Additional Levy'. The explanation to Section 3(n) of the Coal Mines Act clarifies that in the event *a mining lease has been executed in favour of a third party, subsequent to such allocation of Scheduled I coal mines, then, the third party shall be deemed to be the prior allottee.* Therefore, either MPSMCL or MPJML will be liable for bearing the liability of 'Additional Levy'. The question whether the original allottee of a captive coal block (allocated through government dispensation route) or the company with the registered mining lease is liable for payment of 'Additional Levy' is pending before the Karnataka High Court in the matter of *Karnataka EMTA Coal Mines Ltd. and Anr. v. Union of India and Ors.*(WP Nos. 19823-24 of 2015).

Respondent No. 2 and consequently, the end consumers have not received any benefit from the allocation of captive coal mine to MPSMCL

5.18 The background of the present matter needs to be understood. There was an irregularity in allotment of coal blocks resulting in loss of crores of rupees to the exchequer due to activities of mining landing in the hands of

private parties/State PSUs. In case of coal mines being allocated to State PSUs, the right of mining went directly in favour of the private mining companies. Through this illegal nexus, the State PSUs and Private Companies, mined the coal block) and subsequently sold the coal to the generating company (as payable by the distribution licensee through tariff) either at the market price or at CIL price. Thus, makingprofit at the expense of exchequer. Further, the Appellant has received full royalty on every tonne of coal extracted from the Amelia (North) Coal Block through its tariff orders dated 26.09.2014 and 28.01.2016. The royalty, cess duties etc. received as part of Appellant's energy charge (landed cost of coal) has been passed onto the MPSMCL and MPJML as per the Coal Supply Agreement dated 17.12.2013. Therefore, while MPSMCL, MPJML and the Appellant have received market cost for the mined coal, the consumers have been deprived of cheap coal and the government has been deprived of the premium etc., that would have accrued to the government had the coal mine been allocated through a process of competitive bidding.

5.19 Pursuant to cancellation of allotment of Amelia Coal Block, the subsequent events that unfolded in the State further clarify that the distribution licensee and the end consumers never received any benefit from the process of coal allocation. After 31.03.2015, coal auctioning was conducted under the Coal Mines Act. The Appellant participated in the e-auction process conducted in accordance with the Coal Mines (Special Provisions) Rules, 2014. The Appellant was declared as the successful bidder for Amelia (North) Coal Mine. Accordingly, the Coal Mine Development and Production Agreement (CMPDA) was executed on 2nd March' 2015 and subsequently Vesting Order was issued to Appellant on 23rd March' 2015. It is pertinent to note that the only way the Appellant could have participated in the coal auction was if the 'prior allottee', i.e. MPSMCL/JV Company had paid off the outstanding 'Additional Levy'

under Section 4(4) of the Coal Mines Act. There seems to be no other reason why the Appellant chose to pay 'Additional Levy' instead of approaching the Respondent Commission for a clarification or disputing the bills against the 'Additional Levy' before the correct forum.

5.20 In the interim, vide its letter dated 16.04.2015, Ministry of Power, Government of India requested the State Governments to issue directions to respective State Electricity Regulatory Commissions under Section 108 of the Electricity Act, 2003 to ensure that the benefits of coal being sourced by the generating stations from the auctioned or allotted coal mines under Coal Mines (Special Provisions) Second Ordinance, 2014 (Coal Act) and Rules framed thereunder, are passed on to consumers. Accordingly, vide letter No. F-03-08/2013/13 dated 18.05.2015, Govt. of Madhya Pradesh (GoMP), Energy Department issued the following directions to the Respondent Commission:

> "3.*1 The Madhya Pradesh Electricity Regulatory Commission, shall review and determine the energy charges for cost plus Power Purchase Agreements under Section 62 or that in tariff bid based Power Purchase Agreements under Section 63, as the case may be, and shall review the components of the fuel price of energy charges including.*
>
> *a. Run of Mine (RoM) price of coal as per auction or allotment of coal mine;*
>
> *b. Transportation cost along with distance to the end use power plant (rail, road and other modes separately).*
>
> *c. Washery charges, if any;*
>
> *d. Crushing charges;*
>
> *e. Royalty/duties and levies etc;*
>
> *f. Other charges.*
>
> *3.2 The Madhya Pradesh Electricity Commission, while determining the components of energy charges, shall ensure the following:-*
>
> *a. Run of Mine (RoM) price of coal as quoted for the said coal block during coal block auction on the basis of which the block has been awarded, or Run of Mine cost of the coal as per allotment, as the case may be, shall be allowed for the purpose of determining the fuel cost throughout the tenure of the Power Purchase Agreement. In addition to this, the bidder will be eligible to recover an amount of Rs. 100 per metric tonne, as per clause 3.10.2 of Standard Tender Document for Coal Block Auction / Allotment (for Power Sector). The Standard Tender Document also provides for escalation in Run of Mine price of coal and in the amount of Rs. 100 per metric tonne, which will be factored in*

while determining the energy charges: Provided that the quoted Additional Premium, if any, shall not be reckoned for the purpose of determination of tariff of electricity as per corrigendum 3 to clause 3.10.2 issued on 31st January, 2015 of the Standard Tender Document (Power Sector) for coal block auction. The relevant extracts of Standard Tender Document (Power Sector) are enclosed for ready reference.

….

e. The revision of tariff undertaken by the Madhya Pradesh Regulatory Commission as above shall not lead to higher energy charges and total tariff throughout the tenure of Power Purchase Agreement than that which would have been obtained as per terms and conditions of the existing Power Purchase Agreement."

5.21 Thereafter, the Respondent Commission re-determined the tariff for supply of power from the Appellant's Project under the PPA vide its Order dated 28.01.2016 passed in SMP No. 49 of 2015 as below:

*"**Statutory Levies, Taxes and Duties***

Commission's Analysis:

88. The Commission has considered the following:

a. Amount of ₹ 100/MT payable as per tender document,

b. Royalty of ₹ 98/MT i.e., 14% of 700 i.e., the price of coal as notifiedby Coal India Limited for similar GCV of coal for the mines, nearest to the captive mine as per the Second Schedule to Mines and Minerals (Development and Regulation) Act, 1957….

……

89. The Fixed Rate of ₹ 100/MT shall be subject to escalation as per Clause 9.2 of the Coal Mine Development and Production Agreement executed by M/s JPVL in respect of Amelia (North) Coal Mine.

…91. In accordance with the tender documents issued for auctioning and allocation of coal blocks, in case of forward bidding, the RoM price is to be considered as nil and additional premium is not to be reckoned for computation of tariff. Accordingly, any other cost related to ROM price and additional premium is not pass through to the electricity consumers for arriving at the landed cost of coal in this order.

Landed Price of Coal

97. Based on above components of coal price, the total landed price of coal considered in this order is given in the following table:

Table 7: Landed Price of Coal approved by the Commission

S. No.	Particulars	₹ / MT
1	Surface Transportation Charges	31.03
2	Sizing & Crushing Charges	61.01
3	High Capacity Loading Charges	21.75
4	**Sub-total (1 to 3)**	**113.79**
	Taxes & Duties	
5	Royalty	98.00
6	Stowing Excise Duty	10.00
8	Fixed Rate as per the Tender Documents	100.00
9	MPGATSVA	5.69
10	**Assessable Value**	**327.48**
7	MP Forest Transit Fees	7.00
11	Excise Duty	21.61
12	Clean Energy Cess	200.00
13	**Total Price excluding Railway Freight**	**556.09**
14	Rail Freight	282.05
15	Incidental Charges (unloading Charges)	21.32
16	**Landed Price for JPVL**	**859.46**

Energy Charges Re-determined for FY 2015-16

99. Based on landed price of coal, operating parameters and GCV as discussed above, the energy charges which were determined in Para 103 of the Commission's Order dated 26th September, 2014 and Para 14 of the Commission's Order dated 31st March, 2015 in Petition No. 03 of 2014 and IA No. 01 of P-3/2014 respectively, are re-determined in this order for FY 2015-16 for JPVL's Nigrie 2x660 MW Power Station as detailed in the following table:

Table 9: Energy Charges re-determined for FY 2015-16 for both the units of M/s JPVL's Nigrie 2x660 MW Power Station

Sl. No.	Parameter	Units	Energy Charges provisionally determined in Commission's Order dated 26th September' 2014	Energy Charges re-determined in this Order
1	Capacity	MW	660	660
2	NAPAF	%	85.00	85.00
3	Gross Station Heat Rate	kcal/kWh	2200	2200
4	Sp. Fuel Oil Consumption	ml/kWh	1.00	1.00
5	Aux. Energy Consumption	%	6.00	6.00
6	Transit Loss	%	0.80	0.80
7	Weighted average GCV of Oil	kcal/ltr.	10000	10000
8	Weighted average GCV of Coal	kcal/kg	4200	4200
9	Weighted average price of Coal	₹/MT	2094.03	859.46
10	Heat Contributed from HFO	kcal/kWh	10	10
11	Heat Contributed from Coal	kcal/kWh	2190	2190
12	Specific Coal Consumption	kg/kWh	0.5214	0.5214
13	Sp. Coal Consumption including Transit Loss	kg/kWh	0.5256	0.5256
14	Rate of Energy Charge	₹/kWh	1.101	0.452
15	**Rate of Energy Charge ex bus**	**₹/kWh**	**1.171**	**0.481**

102. The energy charges as determined above are applicable with effective from 01st April 2015. All other terms and conditions in the Commission's Orders dated 26th September, 2014 and 31st March, 2015 in Petition No. 03 of 2014 and IA No. 01 of P-3/2014 respectively, shall remain unchanged.

5.22 From the above, it emerges that it is only now, after a process of auctioning of coal blocks that the consumers are receiving the benefit of cheap coal. The auctioning process was structured such, so as to incentivize the bidder to lower the difference between the market price of coal and the cost of coal for the allottee by way of foregoing the run of mine cost of coal completely. Therefore, the consumers are finally receiving cheap/competitive tariff due to a reduction from Rs. 1.71 (when coal block was allotted under the government dispensation route) to Rs. 0. 48 paise (when the same coal block has been allotted by auctioning process). Further, the government is now receiving the Additional Premium which would have accrued to the Government has the coal blocks been auctioned by a transparent process instead of the screening/government dispensation route. This has also been noted in para 105 of the 1st Supreme Court Order.

5.23 It is crucial to note that in the event, Additional Levy is erroneously recognized as part of the landed cost of coal under Regulation 41 of the Generation Tariff Regulations, it would amount to blessing a process already declared an illegality by the Hon'ble Supreme Court. The consumers would be deprived of hard won cheaper tariff and be made to bear the cost of a benefit (allocation of captive coal block through an illegal, flawed and arbitrary process) and resultant loss to the exchequer) which they have not enjoyed in the first place. Since the CAG report holds that the Rs. 295 per metric tonne is a financial gain that has accrued to the parties, the commission cannot then later view that such gain has passed on to the consumers. Had it been passed onto the consumers, the CAG would have said so. In the event, Additional levy is allowed as pass through, the tariff will be sharply hiked causing distress to the consumers. Such direction will also nullify the directions of the MoP and the State

Government for re-determining tariff to pass through the benefits of coal auctioning. The tariff shock suffered by state consumers will be as below:

Energy Charges (Coal Cost) of Nigrie Project					
S. No.	**Particular**	**Unit**	**Energy Charges**		
			Before Coal Block Allocation	**After Coal Block Cancellation without Additional Levy**	**After Coal Block Cancellation with Additional Levy**
1.	Capacity	MW	1320	1320	1320
2.	NAPAF	%	85	85	85
3.	Gross Station Heat Rate	kCal/kWh	2200	2200	2200
4.	Sp. Fuel Oil Consumption	ml/kWh	1.00	1.00	1.00
5.	Aux. Energy Consumption	%	6	6	6
6.	Transit Loss	%	0.80	0.80	0.80
7.	Weighted average GCV of Oil	kCal/ltr.	10,000	10,000	10,000
8.	Weighted average GCV of Coal	kCal/kg	4200	4200	4200
9.	Weighted average price of coal	Rs./MT	2094.03	**859.46**	**1154.46**
10.	Heat contributed from HFO	kCal/kWh	10	10	10
11.	Heat contributed from Coal	kCal/kWh	2190	2190	2190
12.	Specific Coal Consumption	Kg/kWh	0.5214	0.5214	0.5214
13.	Special Coal Consumption including Transit Loss	kg/kWh	0.5256	0.5256	0.5214
14.	Rate of Energy charge from coal	Paise/kWh	1.101	0.452	0.607
15.	**Rate of Energy Charge from Coal at ex bus**	**Rs./kWh**	**1.171**	**0.481**	**0.646**

5.24 Even the Standing Committee in its report while suggesting that all coal block allocations be cancelled also suggested, "*Since the very purpose of making available the national property free of cost was to ensure that benefits should be passed on to the consumers, the Committee feel that there should be no legal consequences even if the condition is incorporated retrospectively.*" Therefore, clearly the intent with the

executive, legislature and the judiciary was to keep the end-consumers insulated from any adverse effect/financial impact of the flawed process by which coal blocks were allocated to IPPs for generation of power

The Additional Levy is not recoverable under Regulation 41 of the Generation Tariff Regulations

5.25 The Appellant has also relied upon Regulation 41 of the Generation Tariff Regulations and argued that the amount charged by the fuel supplier from the Appellant must be treated as part of fuel price adjustment for change in landed cost of coal. The Appellant is arguing that 'Additional Levy' is to be treated as additional royalty.

5.26 The Respondent Commission has allowed full royalty @ *₹ 98/MT i.e., 14% of 700 i.e., the price of coal as notified by Coal India Limited for similar GCV of coal for the mines, nearest to the captive mine as per the Second Schedule to Mines and Minerals (Development and Regulation) Act, 1957.*Therefore, allowing 'Additional Levy' to be passed through as additional royalty will be in contravention to the Hon'ble Supreme Court Orders and subsequent resultant directives, issued by Ministry of Power and State Government. A charge which is part compensatory and part penal cannot be treated as part of the Landed Cost of Coal under Regulation 41. The Additional Levy is payable by the allottees/beneficiaries of the flawed process of allotment for solely enjoying the benefits ensuing out of the flawed process. The benefits may be enumerated as firstly, having received the captive coal mine through a flawed process. In fact, now that the Appellant has obtained the same coal block pursuant to a competitive bidding process, the government is receiving a payment of *Additional Premium* of Rs. 612/MT by the Appellant. This cost is not being passed through to the consumers and is being solely borne by the Appellant for receiving the coal mine. It is interesting to note that the CAG Report while computing the benefit

accrued to allottees like the MPSMCL/JV Company @ Rs. 295/MT had predicted that *a part of this financial gain could have been tapped by the Government by taking timely decision on competitive bidding*.

5.27 Secondly, the benefit received and solely retained by the allottee/JV Company is mining and selling the coal to consumers at CIL linked price without passing on the benefit of receiving a government allotted coal mine. As mentioned above, this situation has been remedied pursuant to auctioning of the Amelia Coal Block. The tariff for consumers has reduced by approximately 46 paise. However, it is reiterated any pass through of Additional Levy will be fatal to consumer interest as there will steep tariff hikes.

5.28 Under Clause 9 of the Coal Supply Agreement, the Appellant is to pay the price of coal on 'As delivered price of coal'. The 'As Delivered Price of Coal' is then treated as Landed Cost of Coal under the Generation Tariff Regulations after considering Run of Mine (ROM) price of coal as per auction or allotment of coal mine, Transportation cost, Washery charges, Crushing charges, Royalty/ duties and levies etc. Clauses 9.2 and 9.3 provide that the 'As delivered Price of Coal' is subject to revision on account of revision in Statutory Charges. Clause 9.3 defines Statutory Charges to comprise *"royalties, cesses, duties, taxes including service tax, levies, etc. if any, payable under relevant statute but not included in the Base Price. These levies/charges shall become effective from the date as notified by the government (Central or State government)/ statutory authority and shall be payable as on date of delivery of Coal*". In the present case, Additional Levy has been determined by the Hon'ble Supreme Court and only being collected from the prior allottees and third party leaseholders under the Coal Mines Act. There is no charging provision in the statute that authorizes a pass through of the Additional Levy to the end consumers of the state. Especially those consumers who

have never enjoyed the benefit of freely allocated national resource and paid the market price for coal consumption from 2013 onwards to 31.03.2015.

5.29 In view of the above, it is submitted that the Respondent Commission has rightly determined that 'Additional Levy' is not part of the Appellant's Landed Cost of Coal under Regulation 41 as below:

> *"12. In view of the above observations, the second issue for consideration of the aforesaid "Additional levy" is obviously beyond the scope of the Regulations notified by this Commission. MPERC (Terms & Conditions for determination of Generation Tariff) Regulations,2012 do not provide for onward recovery of such "Additional levy" or Compensatory payment from the electricity consumers of the Distribution Companies in the state….*
>
> *13. The above Regulations provide that the landed cost of coal shall include price of coal corresponding to the grade and quality of coal including the royalty, taxes and duties as applicable. These Regulations do not provide for inclusion of such 'Additional Levy' as discussed and decided in the afore mentioned judgment and order passed by the Hon'ble Supreme Court of India."*

5.30 Therefore, in view of the above submissions, this Tribunal may disallow the appeal and uphold the Respondent Commission's findings that only allottees/leaseholders are solely responsible for payment of Additional Levy. Any other holding will only amount to blessing an illegal, arbitrary and non-transparent allocation process, which resulted in windfall gain to the allottees and deprived the State and its consumers of the full value of its resources. It cannot be ignored that the State PSUs have signed agreements with private companies under which substantial benefits or interest from the coal blocks had accrued to the private companies thereby causing huge loss to the public exchequer and windfall gain to the private companies. In the event Additional Levy is passed through as Landed Cost of Coal, not only will it be a violation of the regulations and the Hon'ble Supreme Court's Orders, it will also enable the original allottees and leaseholder to foist its liabilities on the hapless consumers.

5.31 Lastly, this Tribunal will note that the Appellant has to supply 37.5% power of the installed capacity to Respondent No. 2 at under the PPAs, the Appellant is to supply 7.5% of the net power from the project at variable charges only. The rest of the power, being 62.5%, is sold by the Appellant as merchant power at competitive rates in the power market. The Appellant has supplied/is supplying only one-third of its power produced from its power station to Respondent No. 2 for which it has claimed the amount of Additional Levy/compensatory payment imposed by Hon'ble Supreme Court on all coal mine allottees. The Additional levy imposed by the Hon'ble Supreme Court is retrospective in nature and is imposed on the allottees from the date commencement of extraction from such coal mine. However, the Appellant has not stated whether it is claiming recovery of the Additional Levy from the purchasers/beneficiaries of power that has been generated from its power plant and sold in the open market without any long term PPA. It appears that the Appellant shall bear the amount of Additional Levy / compensatory payment for the quantum of coal burnt for generation of electricity supplied by it (62.5% of installed capacity) in the open market. Therefore, it is clear that the Appellant cannot cherry-pick the procurer from which it seeks to recover the Additional Levy/compensatory payment. In light of such unreasoned differential approach being adopted by the Appellant, the Additional levy/compensatory payment is not to be recovered from the Distribution Companies or the end consumers in the state as well.

5.32 In view of the foregoing, this Tribunal may consider the above submissions and dismiss the present appeal.

Additional written note of arguments dated 14.09.2020

5.33 The present appeal has been filed against order dated 12.08.2015 passed by Madhya Pradesh Electricity Regulatory Commission ("**Respondent Commission**") in Petition No. 37 of 2015 ("**Impugned Order**") under

Regulation 41 of MPERC (Terms and Conditions for determination of Generation Tariff) Regulations (**Generation Tariff Regulations**) read with Section 86(1)(b) of the Electricity Act, 2003 ("**EA 2003**").

5.34 That the instant appeal was last listed on 07.09.2020 on which date the Ld. Counsel for the Appellant made rejoinder submissions after which the order was reserved. The Bench allowed the parties to file written submissions, if any. The Respondent Commission has already filed its detailed Written Submissions on 10.05.2016 and 21.08.2020 and is now filing the instant supplementary submissions.

5.35 The Appellant in its rejoinder has submitted that the Written Submissions filed by the Respondent Commission cannot be considered as these submissions have not been discussed/ mentioned in the Impugned Order. This contention of the Appellant is denied. It is submitted that the Respondent Commission is not seeking to improve the Impugned Order. The Respondent Commission in the Impugned Order has recorded that only the *beneficiaries of the flawed process of allotment are to bear the consequences of the Additional Levy.* The Respondent Commission has only attempted to assist this Tribunal by illustrating how the Respondent No. 2 and the consumers of the state are not 'beneficiaries' of the flawed process of coal block allotment and therefore Additional Levy cannot be passed through as tariff either as per the Hon'ble Supreme Court's judgment or the Tariff Regulations.

5.36 Further, the Respondent Commission has placed on record the CAG report before this Tribunal. The CAG Report, a report by a constitutional body was considered by the Hon'ble Supreme Court while passing its judgment dated 24.09.2014 in W.P. (Criminal) No. 120 of 2012and levying Additional Levy on the beneficiaries of the flawed process of coal block allocation. The Respondent Commission had taken note by passing the Impugned Order. The Respondent Commission has also placed on record

its tariff order dated 28.02.2016 which has been challenged by the Appellant in Appeal No. 95 of 2016. Earlier, the present appeal was tagged along with Appeal No. 257 of 2015 and therefore, the Respondent Commission had not placed the tariff order dated 28.02.2016 on record as the matters were to be heard together. It is also respectfully stated that the Respondent Commission had taken the leave of the court to place these document on record on 10.08.2020.

5.37 In arguendo, it is submitted that this Tribunal in its judgment dated 20.07.2016, passed in *Appeal No. 271 of 2013*, TPDDL v. DERC, has clearly held that in certain situations *Mohinder Singh Gill and Anr. Vs. The Chief Election Commissioner, New Delhi and Ors.* would not apply. This Tribunal has also held that State Commission, acting as a Respondent, can mention reasons, not discussed in its order, to justify the order passed by it. The relevant extract is as under:

> "*7.3) We are unable to accept this contention of the appellant that the Delhi Commission cannot be allowed to take additional grounds during submissions in this appeal before this Appellate Tribunal, which grounds or reasons were not mentioned in the Impugned Order,* ***since the Delhi Commission is a respondent in this appeal before us, it is free to take the other reasons or grounds to justify its Impugned Order apart from the reasons already discussed or mentioned in the Impugned Order.***
>
> *7.4) The learned Delhi Commission has not acted upon the said press release of the CERC solely or in isolation but it has considered several other factors in disallowing the penal UI Charges of Rs.3.65 crore.* ***So far as the law laid down in Mohinder Singh Gill and Anr. Vs. The Chief Election Commissioner, New Delhi and Ors. (supra) is concerned the present case is not squarely covered by the said proposition of law.*** *We are further unable to accede to the contention of the appellant that natural justice principle has been violated in passing the Impugned Order by Delhi Commission, as no opportunity was given to the appellant to justify the said UI Charges."*
>
> (Emphasis supplied)

This order of the Tribunal having not been challenged has attained finality and is thus, binding. It is thus submitted that the submissions made by the Respondent Commission in the instant appeal can be considered by this Tribunal while adjudicating the matter.

5.*38* In view of the foregoing, this Tribunal may consider the above submissions and dismiss the present appeal.

6. Mr. Nitin Gaur, Learned Counsel for the Respondent No. 2 (Madhya Pradesh Power Management Company Ltd.) has submitted the following written submission for our consideration.

6.1 The present appeal is filed by the appellant against the order of dismissal dated 12.08.2015 in Petition no. 37 of 2015. The appellant in the said appeal had challenged the actions of the respondent no.2 rejecting the pass over of compensatory amount in form of additional levy amounting to Rs. 295/- per metric ton imposed by the Hon'ble Supreme Court on the original allottees.

6.2 The appellant and respondent no.2 entered into two PPA's i.e. PPA dated 05.01.2011 for supply 30% of the installed capacity and PPA dated 06.09.2011 for supply 7.5% of the net power from their power plant. Balance power generated from the plant of the appellant is sold in the open market.

6.3 The appellant for the generation of power from its power plant in turn entered into a Fuel Supply Agreement (FSA) with Madhya Pradesh State Mining Corporation Ltd. (MPSMCL) a joint venture of Jai Prakash Ltd. (49% holding) and MPSMCL (51% holding) for supply of coal. Jai Prakash Ltd is a sister concern of the appellant company working under same group.

6.4 The Hon'ble Supreme Court while dealing with allotment of coal blocks in its judgment dated 25.08.2014 held that the allotment of coal blocks made by the screening committee of the Govt. of India made through the Govt. dispensation route are arbitrary and illegal and as a consequence vide Judgment dated 24.09.2014, the Hon'ble Supreme Court cancelled the allotment of 42 coal blocks and imposed compensatory amount in form of additional levy of Rs.295 per metric ton to be paid specifically by the

allottees of the coal block. That the cancellation and imposition of compensatory amount in form of additional levy was a collective measure adopted by the Hon'ble apex court and there were specific reasons stated for not dealing with individual cases as the complete process was fatally flawed. The Hon'ble Supreme Court had cleared its intention by terming the additional levy as compensatory amount as there were irregularities in the process of allotment which had benefited the certain class of allottees. The relevant para 27 and para 40 of Judgment dated 24.09.2014 reads as under:-

> *"27. As far as the second contention is concerned, this is strongly opposed by the learned Attorney General and we think he is right in doing so. The judgment did not deal with any individual case. It dealt only with the process of allotment of coal blocks and found it to be illegal and arbitrary. The process of allotment cannot be reopened collaterally through the appointment of a committee. This would virtually amount to nullifying the judgment. The process is a continuous thread that runs through all the allotments. Since it was fatally flawed, the beneficiaries of the flawed process must suffer the consequences thereof and the appointment of a committee would really amount to permitting a body to examine the correctness of the judgment. This is clearly impermissible.*
>
> *40. In addition to the request for deferment of cancellation, we also accept the submission of the learned Attorney General that the allottees of the coal blocks other than those covered by the judgment and the four coal blocks covered by this order must pay an amount of Rs. 295/- per metric ton of coal extracted as an additional levy. This compensatory amount is based on the assessment made by the CAG. It may well be that the cost of extraction of coal from an underground mine has not been taken into consideration by the CAG, but in matters of this nature it is difficult to arrive at any mathematically acceptable figure quantifying the loss sustained. The estimated loss of Rs. 295/- per metric ton of coal is, therefore, accepted for the purposes of these cases. The compensatory payment on this basis should be made within a period of three months and in any case on or before 31st December, 2014. The coal extracted hereafter till 31st March, 2015 will also attract the additional levy of Rs. 295/- per metric ton."*

6.5 The Hon'ble Supreme Court in the judgment in para 40 quoted above while accepting the proposal of the Learned Attorney General above made it expressively clear that the compensatory amount in form of additional levy of Rs.295 per metric ton has to be paid by the allottees of the coal blocks only and there was no mention of pass on of such

additional levy by the allottees to the purchase of the coal or the end use consumers i.e. the general public in the instant case.

6.6 The MPSMCL (not made party before the Commission or before this Tribunal) raised supplementary bills under delivered price of coal on the appellant for the additional levy paid by them as a consequence of the Hon'ble Supreme Court judgment. The appellant who should have objected to the illegal act of transfer of liability of additional levy to be paid by the original allottees of the coal mine as per judgment dated 24.09.2014 to the appellant, cleared the bills amounting to Rs.46.61 crores without any objection as the sister concern of the appellant is a 49% stake holder in the fuel supply company wanted to shift the burden of compensatory amount illegally on general public through respondent no.2. It is submitted that in the instant case even the appellant was not legally bound to pay the compensatory amount imposed on the original allottees by the Hon'ble Supreme Court.

6.7 The appellant arbitrarily in turn raised supplementary bills 09.01.2015 to 11.04.2015 for inclusion of additional levy on the respondent no.2 MPPMCL who purchases 30% of the installed capacity and 7.5% of the installed capacity as part of landed cost of fuel. It is noteworthy that the respondent no.2 is a company owned by the State Govt. who is into the business of procurement and sale of power to its consumers i.e. the general public. Respondent no.2 vide its letter 24.04.2015 while rejecting the supplementary bills made it expressively clear that the judgment does not speak of pass through of the additional levy at all to the power procurer or the end use consumer and also the Regulation 41 of the MPERC (Terms & Conditions for determination of Generation Tariff) Regulations, 2012, does not provide for onwards recovery of such

additional levy in form of compensatory amount from the electric consumers of the respondent no.2.

6.8 The appellant in light of the rejection of bills vide letter dated 24.04.2015 approached the respondent no.1 in petition no. 37 of 2015 which was dismissed by the Commission vide its order dated 12.08.2015 appreciating the fact that the Hon'ble Supreme Court judgment does not direct for pass on such additionally levy at all and the same has to paid by the allottee of the coal mine only and the Regulation 2012 does not provide of inclusion of additional levy in the landed cost of fuel. It is submitted that the appellant did not challenged the 2012 Regulations hence no amended could have been made in the landed cost of fuel at all by the respondent no.1.

6.9 The Hon'ble Supreme Court as per the paragraphs quoted above had found the allotment process to be illegal and arbitrary and after complete appreciation of fact ordered for payment of additional levy by the allottees only. Therefore, parties cannot arrive at their own interpretations of the judgment which is clear about the consequences and the allottees those will bear such consequences and any wrong application of the same will have a cascading effect on the general public and will against the intention of the imposition of the additional levy. Any different orders or interpretation will dilute the intentions of the Hon'ble Supreme Court to penalize the original allottees of the coal block from paying the additional levy which is a compensatory amount as the same will free from the implication of flawed, illegal and arbitrary process of allotment. Even otherwise for any action or relief which is not mentioned or directed by the Hon'ble Apex court, the appellant has to approach Hon'ble Apex Court in from of an application for clarification or in review petition and the same has not be done by the appellant at all. That the Hon'ble Supreme Court in

the case of "*South Central Railways Employees Cooperative Credit Society Employees Union vs. B. Yashodabai and Others" reported in 2015 2 SCC 727* while dealing with the interpretation of the orders/judgment of the apex court, where certain direction has not been given but the party approaching the courts as per their understanding and courts further interpreting the judgment of the apex court has held as under:-

> *"15. If the view taken by the High Court is accepted, in our opinion, there would be total chaos in this country because in that case there would be no finality to any order passed by this Court. When a higher court has rendered a particular decision, the said decision must be followed by a subordinate or lower court unless it is distinguished or overruled or set aside. The High Court had considered several provisions which, in its opinion, had not been considered or argued before this Court when C.A. No.4343 of 1988 was decided. If the litigants or lawyers are permitted to argue that something what was correct, but was not argued earlier before the higher court and on that ground if the courts below are permitted to take a different view in a matter, possibly the entire law in relation to the precedents and ratio decidendi will have to be re-written and, in our opinion, that cannot be done. Moreover, by not following the law laid down by this Court, the High Court or the Subordinate Courts would also be violating the provisions of Article 141 of the Constitution of India.*
>
> *16. We do not want to go into the arguments advanced by the learned counsel appearing for the respondents before the High Court for the simple reason that it was not open to them to advance any argument which would run contrary to the judgment delivered by this Court in South Central Railway Employees Coop. Credit Society Employees' Union v. Registrar of Coop. Societies. In our opinion, the High Court did something which would be like setting aside a decree in the execution proceedings." Therefore on the basis of above the Appeal deserves to be dismissed as the issues cannot be raised again before the State Commission or this Tribunal which was urged and decided by the Hon'ble Supreme Court."*

Hence the respondent no.2 would like to mention that there cannot be any interpretation of the Judgment dated 24.09.2014 other than what mentioned in the judgment itself on the cancellation of the 42 coal blocks and the payment of compensatory amount of Rs.295/- as additional levy to be only paid by the allottees of the coal block.

6.10 The respondent no.2 is governed by the provisions of the 2012 Regulations and the Regulation 41.3 deals with the Landed Cost of Fuel where in it is envisaged that Landed Cost of Fuel will include price of coal

corresponding to the grade and quality of coal inclusive of royalty, taxes and duties as applicable only and does not include additional levy to determine the landed cost of coal. The relevant regulation 41.3 reads as under:-

> "*Landed cost of coal.*
>
> *41.3: The landed cost of coal shall include price of coal corresponding to the grade and quality of coal inclusive of royalty, taxes and duties as applicable, transportation cost by rail/road or any other means, and, for the purpose of computation of Energy Charges, shall be arrived at after considering normative transit an handling losses as percentage of the quality of coal despatched by the Coal Supply Company during the month as given below:……"*

Hence the Regulations of 2012 also does not provide for onwards pass through of additional levy at all which has been claimed by the appellant.

6.11 The additional levy is an compensatory amount as per the intention and direction of the Hon'ble Supreme Court because the Coal Mines (Special Provisions) Act, 2015 in section 4 (4) also mandates that a prior allottee shall be eligible to participate in the auction process subject to payment of the additional levy within the such period as may be prescribed and if the prior allottee has not paid such levy, then, the prior allottee, its promoter or any of its company of such prior allottee shall not be eligible to bid either by itself or by way of a joint venture, therefore additional levy is covered under the act specifically for creating an embargo on original allottees for the purpose of participation in the auction process clearly mandating of the same to be paid original allottee only and no other in case they want to participate.

Hence there is no mention either in the judgment dated 24.09.2014 or the Coal mines (Special Provisions) Act, 2015 for the payment or recovery of the additional levy by anyone else other than the allottee i.e. MPSMCL in the present case. It is also submitted that even the appellant at any stretch

of imagination is also not liable to make any such payment to the coal supplier at all.

6.12 The appellant has failed to disclose the fact that whether they have raised supplementary bills to other power procures also as in the present case he is only supplying 30% of installed capacity and 7.5% of net power to the respondent no.2 from its project. The rest of generated power is sold in open market, hence whether any proceedings have been initiated by the appellant on such purchasers also as the supplementary bills raised by MPSMCL must have also included the additional levy on delivered coal used for power produced and supplied to them.

6.13 The reliance of the appellant on Environmental Compensatory cess imposed by the Hon'ble Supreme court for entry of commercial vehicle in the State of Delhi travelling from north India towards Jaipur and onwards is completely wrong and misplaced as in the said judgment also the cess has been imposed on a certain category of vehicles only who to avoid higher toll enter Delhi and the said cess is not applicable on passenger vehicles or on vehicle carrying essential commodities including oil. The Hon'ble Supreme Court in the said case also had made it specifically clear that cess has be on a certain category only who could have opted for a alternate route causing less damage to the environment of Delhi and choose not to include the general public though they also have the option of taking alternate root i.e. passenger vehicle as the same will burden with additional payment. Hence in the present case where the respondent no.2, who does not have any relation or involvement in the illegal and arbitrary fatally flawed process of allotment of coal block if made to make the payment of additional levy at the end then the letter and spirit of the Hon'ble Supreme Court imposing the compensatory amount on the

original allottees will be completely washed away as there will be no impact on them.

6.14 Therefore, respondent no.2 would state that firstly the compensatory amount in form of additional levy has to be only paid by the allottee of the coal block as per the mandate of the Hon'ble Supreme Court judgment dated 24.09.2014 as there cannot be any such interpretation of the directions of Hon'ble Supreme Court which dilutes the responsibility of the original allottees from the liability of payment of additional levy. Secondly Regulation 41.3 of the 2012 Regulation does not include additional levy as a component to determine the landed cost of coal hence the appellant does not qualify for raising the same under the provisions of Regulation 41.3 or of the PPA for supplementary bills. Hence the appeal deserves to be set aside.

7. We have heard learned counsel appearing for the Appellant and learned counsel for the Respondents at considerable length of time and we have gone through carefully their written submissions/ arguments and also taken note of the relevant material available on records during the proceedings. On the basis of the pleadings and submissions available, the following issue emerges in the instant Appeal for our consideration: -

- **Whether in the facts and circumstances of the matter the additional levy of Rs. 295/- per metric ton imposed on the original allottee of coal block can be made pass through to be recovered from the end consumers of electricity under the provisions of Regulations notified by the Respondent Commission for determination of generation tariff?**

8. Our Consideration and Findings :

8.1 Learned Senior Counsel Mr. Sajjan Poovayya, appearing for the Appellant submitted that to understand the genesis of additional levy it is important to look into the observations made by the Hon'ble Supreme Court in M.L. Sharma v. Principal Secretary & Ors. (2014) 9 SCC 516 that the allocation of coal blocks through Government Dispensation Route and Screening Committee Route were arbitrary and illegal ("**Declaratory Order**") as well as in M.L. Sharma v. Principle Secretary &Ors. (2014) 9 SCC 614 ("**Consequence Order**"). Relevant Para (Para 166) of the Declaratory Order is reproduced as under :

> *"166. As we have already found that the allocations made, both under the Screening Committee Route and the Government Dispensation Route, are arbitrary and illegal, what should be the consequences, is the issue which remains to be tackled. We are of the view that, to this limited extent, the matter required further hearing*."

Also, the relevant para(Para No. 40) of the Consequence Order is reproduced here in below :

> *"40. In addition to the request for deferment of cancellation, we also accept the submission of the learned Attorney General that the allottees of the coal blocks other than those covered by the judgment and the four coal blocks covered by this order* ***must pay an amount of Rs. 295/- per metric ton of coal extracted as an additional levy. This compensatory amount is based on the assessment made by the CAG****. It may well be that the cost of extraction of coal from an underground mine has not been taken into consideration by the CAG, but in matters of this nature it is difficult to arrive at any mathematically acceptable figure quantifying the loss sustained. The estimated loss of Rs. 295/- per metric ton of coal is, therefore, accepted for the purposes of these cases.* ***The compensatory payment on this basis should be made within a period of three months and in any case on or before 31st December, 2014. The coal extracted hereafter till 31st March, 2015 will also attract the additional levy of Rs. 295/- per metric ton.****"*
>
> *(emphasis supplied)*

8.2 Learned counsel further submitted that the Union of India requested the Hon'ble Supreme Court for a direction on the allottees to pay an Additional Levy of Rs. 295 per MT of coal, towards financial loss caused to the exchequer by illegal and arbitrary allotments of coal mines. Based on such submission the Hon'ble Supreme Court directed payment of Additional Levy @Rs. 295 per MT by the allottees of the coal blocks. He further contended that the Additional Levy is in the nature of a statutory payment which is established by the simplest test of answering the question - "who should pay Additional Levy?" As per the decision of Apex Court this levy was payable by allottees of cancelled coal blocks whereas under the Special Provisions Act the Additional Levy is to be imposed on and collected from a *'prior allottee'* who may not necessarily be the coal block allottee. This conclusively establishes that Additional Levy acquired statutory character as soon as it was given legislative/statutory clothing under the Special Provisions Act.

8.3 Further, a statutory levy can bear either of the following characters viz: tax, duty, cess or fees. All these four imposts have definite and defined connotations in law. While tax is a compulsory levy by the State Government going to the General Revenue of the State, the Duty is an indirect tax, the incidence of which could be passed on to the customers. Cess is a tax for specific purpose, while fees envisages a quid pro quo. Learned counsel emphasized that the essence of taxation is compulsion, that is to say, it is imposed under statutory power without the taxpayer's consent and the payment is enforced by law.

8.4 Learned counsel for the Appellant was quick to submit that in its Written Submissions dated 21.08.2020, Respondent Commission has admitted that the Special Provisions Act was notified to implement the Supreme Court judgments and recognizes the "Additional Levy". Therefore, clearly, when

Additional Levy is a statutory levy, MPSMCL was justified in including such levy in the delivered cost of coal. Moreover, such levy would be covered under Regulation 41 of the Generation Tariff Regulations. Learned counsel brought out that Regulation 34.3 of the Generation Tariff Regulations provide that the energy (variable) charges shall cover the main fuel cost. Further, Regulation 41.1 of the Generation Tariff Regulations provides that the energy (variable) charges shall cover main fuel costs and shall be payable for the total energy scheduled to be supplied on ex-power plant basis, at the specified variable charge rate (with fuel price adjustment).

8.5 Learned counsel for the Appellant further submitted that the Regulation 41.4 provides for what would constitute the 'landed cost of coal'. In this regard, the regulations provide that price of coal, corresponding to the grade and quality of coal inclusive of royalty, taxes and duties as applicable, transportation cost by rail/ road or any other means. Thus, landed cost of coal includes royalty, taxes and duties as applicable and accordingly the Additional Levy being a statutory levy would be included in the landed cost of coal as provided under the Generation Tariff Regulations. It is further contended that under the Coal Supply Agreement, Clause 9 provides that the purchaser of coal to pay the "as Delivered Price of Coal", which, *inter alia*, includes the statutory charges as applicable at the time of delivery of Coal. Statutory Charges has been defined under clause 9.3 to comprise of royalties, cesses, duties, taxes including service tax, levies, etc., if any, payable under relevant statute but not included in the Base Price.

8.6 Learned counsel for the Appellant advancing his arguments further submitted that the Additional Levy has been imposed upon the prior allottee under the Special Provisions Act, i.e., under a statute promulgated by the Central Government. Thus, by virtue thereof, payment of Additional Levy becomes a statutory charge under Clause 9 of the Coal Supply Agreement,

and therefore, was included in the price of coal by the MPSMCL, by way of invoices raised upon the Appellant. Similarly, the change in law clauses under the PPA dated 05.01.2011 and the PPA dated 06.09.2011, also recognize the levy of Additional Levy under the Special Provisions Act as a 'Change in Law' event. In fact, the Hon'ble Supreme Court did not go into the treatment of Additional Levy as a pass through by the companies that were allotted coal blocks, as the Declaration Order deals with all coal blocks, allotted to other than power sector (unregulated sectors such as steel), where onward recovery of cost is not guided by regulations.

8.7 Learned counsel further submitted that being a captive coal block, the benefit of lower cost of coal flowed to the consumers, in the form of lower electricity tariff. Therefore, in case of any reversal in the value of coal caused due to a statutory imposition, the corresponding obligation to pay for such additional cost would also have to be borne by the consumers since they have been the real and ultimate beneficiaries of coal. Further, in case of unregulated sectors, like cement, steel, etc., this additional cost would be ultimately passed on to the consumers, in the form of increased cost of the end product. Therefore, it is superfluous to contend that pass through of Additional Levy to electricity consumers is discriminatory.

8.8 Learned counsel for the Appellant vehemently submitted that the PPA provides the procedure for disputing an invoice and the Second Respondent /MPPMCL is required to adhere to the prescribed process. Whereas the procedure for billing dispute has not been followed, it is not open to Second Respondent/MPPMCL to contend subsequently, that the basis of the invoice was wrong, or that the amount therein is not payable.

Learned counsel pointed out that the Appellant raised invoices on the Second Respondent including the Additional Levy as part of landed cost of coal. The Second Respondent also did not follow the procedure spelt out under the PPA for disputing the invoices. Therefore, it was not open to the

Respondents for disputing the invoices now. The Respondent Commission has acted contrary to the provisions of the PPA by upholding non-payment of Additional Levy, without disputing the invoices.

8.9 Learned counsel was quick to point out that the Respondent Commission in its Written Submission dated 21.08.2020has gone beyond the reasoning and scope of the Impugned Order. In fact, it is trying to add reasons in support of the Impugned Order which find no mention or reference therein. Reasons, such as, landed cost of coal was allowed based on CIL notification, full royalty was allowed as per MOP notification under Sec. 9 of MMDR Act; MPSMCL, MPJML and the Appellant have received market cost for the mined coal, the consumers have been deprived of cheap coal and the government has been deprived of the premium, etc.; treatment of power sold in open-market without any long term PPA, etc. In fact, these reasons have not even been discussed in the Impugned Order, even though extensive arguments are now made on these lines.

8.10 Learned counsel alleged that the Respondent Commission in a bid to improve upon the reasoning provided in the Impugned Order to disallow pass through of Additional Levy has set out elaborate arguments in addition to what has been stated in the Impugned Order. Learned counsel contended that such action on the part of State Commission is impermissible in law as held in *K.K. Bhalla v. State of M.P.* (2006) 3 SCC 581, by the Hon'ble Supreme Court. Learned counsel also placed reliance on the judgement of Apex Court in *Mohinder Singh Gill v. Chief Election Commr.*, (1978) 1 SCC 405.

8.11 Learned counsel further submitted that the Impugned Order has referred Additional Levy to be a 'compensatory payment', while Respondent Commission is now portraying the 'Additional Levy' as in the nature of penalty. Learned counsel further pointed out that the State Commission at the stage of appeal cannot improve the reasons given by it in the Impugned

Order. Once the order has been passed by the Commission, it has become functus officio and the Commission cannot now seek to alter its approach or reasoning or change the complexion of what it has already dealt with in the Impugned Order. To substantiate his arguments, learned counsel relied upon the judgment of this Tribunal in *M/s Sudhakara Infratech Private Ltd. v. UPERC &Ors. Appeal No. 319 of 2018*. Learned counsel alleged that the State Commission has made several submissions that are contrary to the documents on record such as the tender document, joint venture agreement, coal supply agreement, etc.

8.12 Learned counsel for the Appellant contended that the Second Respondent/MPPMCL has, *inter alia*, submitted that the Appellant being the generator is not liable to pay the Additional Levy under law and only the prior allottee should be made to pay the same. In this regard, it is submitted that Additional Levy being in the nature of statutory levy, was added as 'as delivered price of coal' under the Coal Supply Agreement by MPSMCL, and therefore, payable as such by the Appellant. Non-payment of these amounts would have resulted in stoppage of supply of coal. Further, the imposition of Additional Levy cannot be said to be a penalty for the expression 'penalty' is an elastic term, with many different shades of meaning but it always involves as idea of punishment. To further initiate its contentions learned counsel placed reliance on the judgment of the Apex Court in *N.K. Jain v. C.K. Shah (1991) 2 SCC 495*.

8.13 Learned counsel pointed out that the Respondent Commission has confused the issue of Additional Levy and Additional Premium in its submissions. In fact, both are absolutely different concepts applicable at different point of time to completely different scenarios. The Additional Levy is a statutory imposition under the Special Provisions Act and is to be imposed and collected from all prior allottees, irrespective of the fact whether such prior allottee is desirous of participating in the future auctions

of the cancelled coal blocks. Further, payment of additional levy was made a necessary condition precedent under the Special Provisions Act to participate in auction of coal blocks. On the other hand, the Additional Premium is a tender condition and bidding criteria for winning the right to mine coal from the coal blocks that were subsequently put up for auction by the Central Government.

8.14 Learned counsel for the Appellant further submitted that the Order pertaining to Additional Premium in SMP 49/2015 dated 28.01.2016 cannot be allowed to be taken on record at this stage. Even otherwise, the said order was passed much later, i.e., after the Supreme Court judgments – Declaratory and Consequence Orders and even after the Special Provisions Act was promulgated on 30.03.2015. Further, it cannot have any bearing and/ or impact on imposition of Additional Levy, the order dated 28.01.2016 is under challenge before this Tribunal in Appeal No. 95 of 2016. Learned counsel for the Appellant summed up his arguments and requested for setting aside of the Impugned Order.

8.15 **Per contra,** the learned counsel for the Respondent Commission Ms. Mandakini Ghosh, submitted that the Amelia (North) coal mine was allocated to MPSMCL under the Government Dispensation route.On 27.01.2006 MPSMCL in turn formed a joint venture, Madhya Pradesh Jaypee Minerals Ltd. (MPJML), with Jaiprakash Associates Limited (one of the promoters of the Appellant having 49% holding) and MPSMCL (having 51% holding). The joint venture was responsible for mining andoperating the coal block and selling the coal to the power plants developed by JAL. This agreement was amended on 11.04.2014 wherein it was agreed that instead of MPJML, Appellant would now execute a coal supply agreement/Fuel Supply Agreement with MPSMCL. As per Clause 8.5.8 of the amended JV Agreement dated 11.04.2014, MPSMCL shall supply coal to the Appellant as per the Coal Supply Agreement. However, MPJML (JV

Company) shall assist MPSMCL in this regard. As per Clause 8.5.9, Facilitation Fees (fees payable foreach tonne of run of mine coal sold), Royalty and other applicable taxes shall be retained by MPSMCL on sale of coal under the Coal Supply Agreement and balance amount shall be remitted and belong to MPJML.

8.16 In the interim, on 17.12.2013 the Appellant signed a Coal Supply Agreement/Fuel Supply Agreement with MPSMCL for supply of 2.5 MTPA coal from Amelia North Coal Block and the coal production from Amelia (North) Coal Mine commenced in December 2013. Learned counsel for the Respondent Commission further submitted that the Units I and II of the Appellant's Project were commissioned on 03.09.2014 and 21.02.2015 respectively. On 26.09.2014, the Respondent Commission determined the provisional tariff for Unit I of the Appellant's Project for FY 2014-15 and 2015-16 in accordance with the EA 2003 and the Generation Tariff Regulations. Further, vide order dated 31.03.2015, the Respondent Commission provisionally determined the Annual Fixed Charges and Energy Charges for Unit 2 from its CoD till 31.03.2016. It is relevant to note that in both these orders, the Respondent Commission has determined energy charges based on coal sourced from Amelia Coal Block. The landed cost of coal was allowed based on notifications of Coal India Limited (CIL). The Respondent Commission allowed full royalty, of INR 191.53, on every tonne of coal consumed by the Appellant @ 14% is based on notifications issued by the Ministry of Coal under Section 9 of the Mines and Minerals (Development and Regulation) Act, 1957. The energy charge was determined at Rs. 1.171 per unit while Annual Fixed Charge was determined INR 313.16 Crore.

8.17 Learned counsel for the Respondent Commission further submitted that on a combined reading of para 27, 33 and 40 of the judgement of Hon'ble Supreme Court, it is clear that 'Additional Levy' of Rs. 295 per metric tonne

is *only* being levied on the allottees who were allotted the captive coal block. The allottees were beneficiaries of the grant of state largesse and hence must bear the consequences of enabling an illegal process and consuming the benefits accruing out of the same. Learned counsel further brought out that the nature of Additional Levy is clarified by the Supreme Court at para 33 of the 2nd Supreme Court Order, the 'Additional Levy' is being levied on the allottees/beneficiaries of the flawed allocation process to achieve a three-fold measure – (i) to correct the wrong done by the Union of India; (ii) to act as a deterrent that by highlighting the wrong, it is expected that the Government will not deal with the natural resources that belong to the country as if they belong to a few individuals who can fritter them away at their sweet will; and (iii) the levy may also compensate the exchequer for the loss caused to it, in the manner suggested by the learned Attorney General and CAG Report. Learned counsel emphasized that, therefore, Additional Levy is not simpliciter a 'compensation', it is also a penalty for consuming the benefits of an illegal process. Further, even the Attorney General in his submissions, noted at para 15 of the 2nd Supreme Court Order, has recognized Additional Levy to be a penalty. Therefore, Additional Levy is a charge which is both compensatory and penal by nature.

8.18 Learned counsel for the Respondent Commission emphasized thaton a combined reading of the 1st and 2nd Supreme Court Order, along with the Coal Mines Act, it is established beyond doubt that not only the allottee, but also a third party, i.e., the leaseholder of mining rights, are liable to bear the burden of 'Additional Levy'. In fact, the explanation to Section 3(n) of the Coal Mines Act clarifies that in the event *a mining lease has been executed in favour of a third party, subsequent to such allocation of Scheduled I coal mines, then, the third party shall be deemed to be the prior allottee.* Therefore, either MPSMCL or MPJML will be liable for bearing the

'Additional Levy'. The question whether the original allottee of a captive coal block or the company with the registered mining lease is liable for payment of 'Additional Levy' is pending before the Karnataka High Court in the matter of *Karnataka EMTA Coal Mines Ltd. and Anr. v. Union of India and Ors.*(WP Nos. 19823-24 of 2015).

8.19 Learned counsel for the Respondent Commission drew our attention to the letter dated 16.04.2015 issued by the Ministry of Power, Government of India which inter alia requested the State Governments to issue directions to respective State Electricity Regulatory Commissions under Section 108 of the Electricity Act, 2003 to ensure that the benefits of coal being sourced by the generating stations from the auctioned or allotted coal mines under Coal Mines (Special Provisions) Second Ordinance, 2014 (Coal Act) and Rules framed thereunder, are passed on to consumers.

In pursuance of the same, Government of Madhya Pradesh vide its letter dated 18.05.2015 through Energy Department issued the relevant directions to the Respondent Commission as stated in the Ministry of Power, Govt. of India's reference letter. Thereafter, the Respondent Commission re-determined the tariff for supply of power from the Appellant's Project under the PPA vide its order dated 28.01.2016.

8.20 Learned counsel for the Respondent Commission contended that it is only now, after a process of auctioning of coal blocks that the consumers are receiving the benefit of cheap coal. The auctioning process was structured such, so as to incentivize the bidder to lowerthe difference between the market price of coal and the cost of coal for the allottee by way of foregoing the run of mine cost of coal completely. Therefore, the consumers are finally receiving cheaper/competitive tariff due to a reduction from Rs. 1.71 to Rs. 0.48. The Additional Premium which would have accrued to the Government had the coal blocks been auctioned by a transparent process

instead of the government dispensation route. This has also been noted in para 105 of the 1st Supreme Court Order.

8.21 Learned counsel for the Respondent Commission was quick to submit that in the event, the Additional Levy is erroneously recognized as part of the landed cost of coal under Regulation 41 of the Generation Tariff Regulations, it would amount to blessing a process already declared an illegal by the Hon'ble Supreme Court. The consumers would be deprived of hard won cheaper tariff and be made to bear the cost of a benefit which they have not enjoyed in the first place. Learned counsel pointed out that the Appellant has also relied upon Regulation 41 of the Generation Tariff Regulations and argued that the amount charged by the fuel supplier from the Appellant must be treated as part of fuel price adjustment for change in landed cost of coal. The Appellant is arguing that 'Additional Levy' is to be treated as additional royalty. The Respondent Commission has allowed full royalty@ *₹ 98/MT i.e., 14% of 700 i.e., the price of coal as notified by Coal India Limited for similar GCV of coal for the mines, nearest to the captive mine as per the Second Schedule to Mines and Minerals (Development and Regulation) Act, 1957.*Therefore, allowing 'Additional Levy' to be passed through as additional royalty will be in contravention to the Hon'ble Supreme Court Orders and subsequent resultant directives, issued by Ministry of Power and State Government.

8.22 Learned counsel for the Commission highlighted that in the present case, Additional Levy has been determined by the Hon'ble Supreme Court and only being collected from the prior allottees and third party leaseholders under the Coal Mines Act. There is no charging provision in the statute that authorizes a pass through of the Additional Levy to the end consumers of the state. Especially those consumers who have never enjoyed the benefit of freely allocated national resource and paid the market price for coal

consumption from 2013 onwards to 31.03.2015. Learned counsel for the Commission further submitted that in view of the above, the Respondent Commission has rightly determined that 'Additional Levy' is not part of the Appellant's Landed Cost of Coal under Regulation 41. Therefore, this Tribunal may disallow the Appeal and uphold the Respondent Commission's findings.

8.23 Learned counsel Mr. Nitin Gaur appearing for the Second Respondent/ MPPMCL submitted that the Appellant for the generation of power from its power plant in turn entered into a Fuel Supply Agreement (FSA) with Madhya Pradesh State Mining Corporation Ltd. (MPSMCL) a joint venture of Jai Prakash Ltd. (49% holding) and MPSMCL (51% holding) for supply of coal. It is relevant to note that Jai Prakash Ltd is a sister concern of the appellant company working under same group. Learned counsel referred to the both judgements (stated supra) of the Hon'ble Apex court which had cleared its intention by terming the additional levy as compensatory amount as there were irregularities in the process of allotment which had benefited the certain class of allottees. Learned counsel was quick to point out that after getting these supplementary bills from MPSMCL including the additional levy paid by them as a consequence of the Supreme Court Judgment, the Appellant should have objected to the illegal act of the transfer of liability of additional levy to be paid by the original allottee of the coal mine. The Appellant on its own cleared the bills amounting to Rs.46.61 crores without any objection as the sister concern of the appellant is a 49% stake holder in the fuel supply company wanted to shift the burden of compensatory amount illegally on general public through second respondent. Learned counsel submitted that in the instant case even the appellant was not legally bound to pay the compensatory amount imposed on the original allottees by the Hon'ble Supreme Court.

8.24 Learned counsel for the Second Respondent further submitted that the appellant arbitrarily in turn raised supplementary bills from 09.01.2015 to 11.04.2015 for inclusion of additional levy on the second respondent MPPMCL who purchases 30% of the installed capacity and 7.5% of the installed capacity as part of landed cost of fuel. The second Respondent vide its letter 24.04.2015 while rejecting the supplementary bills made it expressly clear that the judgment does not speak of pass through of the additional levy at all to the power procurer or the end use consumer and also the Regulation 41 of the MPERC (Terms & Conditions for determination of Generation Tariff) Regulations, 2012, does not provide for onwards recovery of such additional levy in form of compensatory amount from the electricity consumers.

8.25 The learned counsel for the second respondent further contended that the parties cannot arrive at their own interpretations of the judgment which is clear about the consequences and the allottees those will bear such consequences and any wrong application of the same will have a cascading effect on the general public and will against the intention of the imposition of the additional levy. Any different orders or interpretation will dilute the intentions of the Hon'ble Supreme Court to penalize the original allottees of the coal block from paying the additional levy which is a compensatory amount as the same will free from the implication of flawed, illegal and arbitrary process of allotment.

8.26 Hence the second respondent would like to reiterate that there cannot be any interpretation of the Judgment dated 24.09.2014 other than what mentioned in the judgment itself on the cancellation of the 42 coal blocks and the payment of compensatory amount of Rs.295/- as additional levy to be only paid by the allottees of the coal block. The second respondent is governed by the provisions of the 2012 Regulations and the Regulation

41.3 deals with the Landed Cost of Fuel where in it is envisaged that Landed Cost of Fuel will include price of coal corresponding to the grade and quality of coal inclusive of royalty, taxes and duties as applicable only and does not include additional levy to determine the landed cost of coal. Moreover, there is no mention either in the judgment dated 24.09.2014 or the Coal mines (Special Provisions) Act, 2015 for the payment or recovery of the additional levy by anyone else other than the allottee i.e. MPSMCL in the present case.

8.27 Learned counsel for the Respondent alleged that the Appellant has failed to disclose the facts that whether they have raised supplementary bills to other power procurers also as in the present case the Appellant is only supplying 30% of installed capacity and 7.5 of net power to the second respondent from its project. The rest of generated power is being sold in open market, hence whether any proceedings have been initiated by the appellant on such purchasers also as the supplementary bills raised by MPSMCL must have also included the additional levy on delivered coal used for power produced and supplied to them.

8.28 Further, the reliance of the appellant on Environmental Compensatory cess for entry of commercial vehicle in the Delhi travelling from north India towards Jaipur and onwards is completely wrong and misplaced as in the said judgment also the cess has been imposed on a certain category of vehicles only who to avoid higher toll enter Delhi and the said cess is not applicable on passenger vehicles or on vehicle carrying essential commodities including oil. Therefore, in the present case where the second respondent, who does not have any relation or involvement in the illegal and arbitrary fatally flawed process of allotment of coal block if made to make the payment of additional levy at the end then the letter and spirit of the Hon’ble Supreme Court imposing the compensatory amount on the

original allottees will be completely washed away as there will be no impact on them.

8.29 Learned counsel for the second respondent reiterated that firstly the compensatory amount in the form of the additional levy has to paid by the allottee of the coal block as per the mandate of the Hon'ble Apex Court and secondly regulation 41.3 of 2012 regulations does not include additional levy as a component to determine the landed cost of coal. Hence there is no merit in the appeal and it deserves to be dismissed.

9. Our Findings:

9.1 We have heard the learned counsel for the Appellant and learned counsel for the Respondents at considerable length of time and also carefully considered their submissions as well as the rulings rendered vide various judgements of the Apex Court and this Tribunal relied upon by the parties. The main issue to be decided before us is whether additional levy is in the nature of statutory levy and whether such levy could be covered under Regulation 41 of the Generation Tariff Regulation notified by the State Commission and thereby allowed to be a pass through.

9.2 It is the contention of the learned counsel for the Appellant that within a month of passing of the Consequence Order, the Parliament in exercise of its powers under Entry 54 of List I of the Seventh Schedule to the Constitution of India issued the first Coal Mines (Special Provisions) Ordinance, 2014 ("the Ordinance") on 21.10.2014.Subsequently, on 11.12.2014, the Coal Mines (Special Provisions) Rules, 2014 were also notified by the Ministry of Coal. Under which the process and methodology of how the amount of Additional Levy is to be collected has been elaborately set down. Subsequently, on 30.03.2015, the Coal Mines (Special Provisions) Act, 2015 was notified. As such the levy of the

compensatory amount of Rs. 295/- per metric tonne was given a statutory sanction.

9.3 Learned counsel for the Appellant contended that the Respondent Commission in its written submissions dated 21.08.2020 has admitted that the Special Provisions Act was notified to implement the Supreme Court judgments and recognizes the "Additional Levy". In view of the facts, learned counsel for the Appellant has reiterated that the additional levy be statutory nature should be included while computing the landed cost of coal under the Regulations 41.4.The Regulations also provide that price of the price of coal corresponding to the grade and quality of coal and includes the royalty, taxes and duties as may be applicable, transportation cost by rail/road or any other means. Thus landed cost of coal includes all kinds of royalty, taxes and duties as applicable. Further, under Clauses 9.2 and 9.3 the Coal Supply Agreement, it is provided that the purchaser of coal shall pay the "as Delivered Price of Coal", which, *inter alia*, includes the statutory charges as applicable at the time of delivery of Coal. The change in law clauses under the PPA dated 05.01.2011 and 06.09.2011, also recognize the levy of Additional Levy under the Special Provisions Act as a 'Change in Law' event. Learned counsel for the Appellant has submitted that being a captive coal block, the benefit of lower cost of coal flowed to the consumers, in the form of lower electricity tariff. Therefore, in case of any reversal in the value of coal caused due to a statutory imposition, the corresponding obligation to pay for such additional cost would also be borne by the consumers since they have been the real and ultimate beneficiaries of coal. Learned counsel for the Appellant has also brought out that the State Commission has erroneously held that additional levy cannot be passed on to the consumers. Further the invoices raised by the Appellant were never disputed by the second Respondent/MPPMCL.

9.4 Learned counsel for the Appellant pointed out that the State Commission in a bid to improve upon the reasoning provided in the Impugned Order to disallow pass through of Additional Levy has set out elaborate arguments in addition to what has been stated in the Impugned Order and the same is impermissible in law as has been held in the various judgements of the Apex Court namely *K.K. Bhalla v. State of M.P.* (2006) 3 SCC 581 and *Mohinder Singh Gill v. Chief Election Commr.*, (1978) 1 SCC 405 (Stated Supra).

9.5 Advancing his arguments, learned counsel for the Appellant further submitted that the additional levy is not a penalty as contended by the second Respondent/MPPMCL. Learned counsel pointed out that the State Commission had, in fact, confused the issue of additional levy and additional premium in its submission. As both are absolutely different concepts applicable at different point of time to completely different scenario. Vide his written submissions and arguments, learned counsel for the appellant has reiterated that the additional levy of Rs. 295 per metric tonne imposed by the statute deserves to be considered a statutory levy and included in the delivered cost of coal for computation of generation tariff as per Regulations of the State Commission.

9.6 On the other hand, the learned counsel for the first and second Respondents have categorically submitted that on a combined reading of Para 27, 33 and 40 of the judgement of the Apex Court, it is clear that 'Additional Levy' of Rs. 295 per metric tonne has been levied on the allottees who were allotted the captive coal block through illegal process and is in the nature of penalty. It has been clarified by the Hon'ble Supreme Court at para 33 of the 2nd Order, the 'Additional Levy' is being levied on the allottees/beneficiaries of the flawed allocation process to achieve a three-fold measure – (i) to correct the wrong done by the Union of India; (ii)

to act as a deterrent that by highlighting the wrong, it is expected that the Government will not deal with the natural resources that belong to the country as if they belong to a few individuals who can fritter them away at their sweet will; and (iii) the levy may also compensate the exchequer for the loss caused to it, in the manner suggested by the learned Attorney General and CAG Report. Therefore, Additional Levy is not simpliciter a 'compensation', it is also a penalty for consuming the benefits of an illegal process. Further on a combined reading of first and second Supreme Court Orders alongwith coal mines Act it establishes beyond doubt that not only the allottee, but also the third party i.e. the lease holder of mining rights, are liable to bear the burden of additional levy. Further, either MPSMCL or MPJML will be liable to bear the liability of additional levy.

9.7 Learned counsel for the first and second Respondents also referred to the Ministry of Power, Government of India's letter dated 16.04.2015, wherein it requested the State Governments to issue directions to respective State Electricity Regulatory Commissions under Section 108 of the Electricity Act, 2003 to ensure that the benefits of coal being sourced by the generating stations from the auctioned or allotted coal mines under Coal Mines (Special Provisions) Second Ordinance, 2014 (Coal Act) and Rules framed thereunder, are passed on to consumers. Accordingly, the Energy Department of Government of Madhya Pradesh issued respective directions to the Respondent Commission in this regard. Therefore, the additional levy is not recoverable under Regulation 41 of the Generation Tariff Regulations of the State Commission.

9.8 Learned counsel for the first and second Respondents have already pointed that only 37.5 % of power is being supplied to State Discom by the Appellant and balance 62.5 % is being sold at merchant power at competitive rates in the power market. However, the Appellant has not

state whether it is claiming recovery of the additional levy from the purchaser/beneficiaries of power that has been generated from its power plant and sold in the open market without any long term PPA.

9.9 Learned counsel for the Respondents further submitted that this Tribunal in its Judgement dated 20.07.2016 passed in Appeal No. 271 of 2013 has clearly held that in certain situation *Mohinder Singh Gill [Mohinder Singh Gill v. Chief Election Commr.* New Delhi and Others did not apply. This Tribunal has also held that the State Commission, acting as a Respondent can mention reasons, nor discussing its order, to justify the order passed by it. This Order of the Tribunal has attained finality and is thus binding.

9.10 Learned counsel for the Respondents have also brought the fact that Hon'ble Supreme Court did not direct or pass on such additional levy at all and has held that the same has to be paid by the allottee of the coal mine only. Further, the Regulation 2012 does not provide of inclusion of any additional levy in the landed cost of fuel. Further, learned counsel for the second Respondent pointed out that it is governed by the provisions of the 2012 Regulations and the Regulation 41.3 deals with the Landed Cost of Fuel where in it is envisaged that Landed Cost of Fuel will include price of coal corresponding to the grade and quality of coal inclusive of royalty, taxes and duties as applicable only and does not include additional levy to determine the landed cost of coal. Hence the same cannot be claimed to be included in the landed cost of coal as pass through to the end consumers.

9.11 Learned counsel for the second Respondent also emphasized that reliance of the appellant on Environmental Compensatory cess imposed by the Hon'ble Supreme court for entry of commercial vehicle in the State of Delhi travelling from north India towards Jaipur and onwards is completely wrong and misplaced as in the said judgment also the cess has been imposed on

a certain category of vehicles only who to avoid higher toll enter Delhi and the said cess is not applicable on passenger vehicles or on vehicle carrying essential commodities including oil.

9.12 Learned counsel for the first and second Respondents have also contended that the Appellant who should have objected to the illegal act of transfer of liability of additional levy to be paid by the original allottees of the coal mine has cleared the bills amounting to Rs.46.61 crores without any objection as the sister concern of the appellant is a 49% stake holder in the fuel supply company and in turn wanted to shift the burden of compensatory amount illegally on general public through second Respondent. In fact, in the instant case even the appellant was not legally bound to pay the compensatory amount imposed on the original allottees by the Hon'ble Supreme Court.

9.13 Having regard to the submissions/arguments and other relevant material placed before us during the proceeding, we notice that the compensation/ additional levy of Rs. 295 per metric tonne imposed by two orders of the Hon'ble Supreme Court is in the nature of penalty and by no stretch of imagination can be considered as statutory levy. In fact, the genesis of additional levy has originated from the flawed and arbitrary allocation process involved in the allotment of coal mines to various entities which has been held to be illegal by the Apex Court. It is evident from itsOrder that the additional levy has been levied on the allottees/beneficiaries of the flawed allocation process to achieve a three-fold measure – (i) to correct the wrong done by the Union of India; (ii) to act as a deterrent that by highlighting the wrong, it is expected that the Government will not deal with the natural resources that belong to the country as if they belong to a few individuals who can fritter them away at their sweet will; and (iii) the levy

may also compensate the exchequer for the loss caused to it, in the manner suggested by the learned Attorney General and CAG Report.

9.14 Therefore, we are of the opinion that the additional levy is not simpliciter a compensation but a penalty for consuming the benefits of an illegal process. Even the Attorney General in his submissions, noted at Para 15 of the second Supreme Court Order has recognized additional levy to be a penalty.

9.15 Admittedly, only 37.5 % of power generated from the Appellant's plant is being supplied to State Discom/ second Respondent under the PPA and balance 62.5 % is being sold by the Appellant in the power market. In that view of the matter, the question arises how the recovery is being made by the Appellant from the purchasers/ beneficiaries of this power which has been generated from the power plant and sold in the open market without any long term PPA.

9.16 It is also relevant to note from the records that the fuel supply company is a joint venture of the State Mining Corporation (51%) and sister concern of the Appellant company (49%). Keeping this in view, we opine that in stead of objecting the illegal act of transfer of liability of additional levy to be paid by the original allottee of the coal mine the appellant on its own has paid Rs. 46.61 crores without any objection and in turn has claimed to be pass through in tariff to be paid by the end consumers.

9.17 We have referred to the relevant Regulations notified by the State Commission for determination of generation tariff and noted that the same does not include such additional levy in the landed cost of fuel to be considered in tariff determination. The Regulation 41.3 of 2012 Regulation deals with the Landed Cost of Fuel which include price of coal corresponding to the grade and quality of coal inclusive of royalty, taxes

and duties as applicable only and does not include additional levy to determine the landed cost of coal. The Regulation 41.3 reads as under:-

> "*Landed cost of coal.*
>
> *41.3: The landed cost of coal shall include price of coal corresponding to the grade and quality of coal inclusive of royalty, taxes and duties as applicable, transportation cost by rail/road or any other means, and, for the purpose of computation of Energy Charges, shall be arrived at after considering normative transit an handling losses as percentage of the quality of coal despatched by the Coal Supply Company during the month as given below:……"*

9.18 In light of the above considerations and analysis, we are of the opinion that the additional levy of Rs. 295 per metric tonne imposed on original allottees of the captive coal block does not entitle to be included in the determination of the generation tariff to be passed on to the end consumers. Hence, the instant Appeal is liable to be dismissed.

ORDER

For the foregoing reasons as stated supra, we are of the considered view that the issues raised in the instant Appeal No. 257 OF 2015 are devoid of merits and hence Appeal is dismissed.

The Impugned Order dated 12.08.2015 passed by the Madhya Pradesh Electricity Regulatory Commission in Petition No. 37 of 2015 is hereby upheld.

Needless to mention that the pending IA, if any, shall stand disposed of.

No order as to costs.

Pronounced in the Virtual Court on this 9th day of November, 2020.

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

mkj