IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 264 OF 2018

Dated: **13th November, 2020**

Present:

HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER

HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

IN THE MATTER OF

Rattan India Power Limited
Through its Authorized Signatory
World Mark – 1, Tower-B, 5th Floor, Aerocity,
Indira Gandhi International Airport
New Delhi **..... Appellant(s)**

VERSUS

1. **Maharashtra Electricity Regulatory Commission**
Through its Secretary,
World Trade Centre No. 1, 13th Floor, **..... Respondent No.1**
Cuffe Parade,
Mumbai 400 005, Maharashtra

2. **Maharashtra State Electricity Distribution Company Limited**
Through its Chairman-cum-Managing Director
4th Floor, Prakashgadh,
Plot No. G-9, Anant Kanekar Marg,
Bandra (East)
Mumbai 400 051, Maharashtra **..... Respondent No.2**

Counsel for the Appellant : Mr. Amit Kapur
Mr. Vishrov Mukerjee
Mr. Yashaswi Kant
Ms. Raveena Dhamija

Counsel for the Respondent(s): Mr. M.G. Ramachandran, Sr. Adv.
Mr. Udit Gupta
Mr. Anup Jain for R-2/MSEDCL

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

1. This matter was taken up for final hearing by video conference, physical presence being not possible due to National Lockdown imposed for containing spread of coronavirus (Covid-19).

2. The appeal, presented by RattanIndia Power Limited (hereinafter "RattanIndia" or "generator" or "appellant") challenging the Order dated 03.04.2018 passed by the first respondent Maharashtra Electricity Regulatory Commission ("MERC" or "the Commission") disposing of case no. 154 of 2013 and case no. 147 of 2014 is contested by the second respondent Maharashtra State Electricity Distribution Company Limited ("MSEDCL" or "the procurer"). The appeal was presented by the generator raising five issues, they relating to claim for computation of compensation on account of change in law on actual / normative basis as against assumed parameters of *Station Heat Rate* (SHR) or *Gross Calorific Value* (GCV); claim for computation on account of change in law on monthly basis with annual reconciliation as against annual basis; claim for compensation for shortfall in availability of domestic coal under New Coal Distribution Policy (NCDP), 2013 against the assured quantum under the *Letter of Assurance* (LOA) and *Fuel Supply Agreements* (FSAs) on actuals in contrast to it being limited to the extent of 65%, 65%,67% and 75% for four financial years till 31st March 2017; the claim for compensation for shortfall in supply of domestic coal under NCDP 2013 for the period even beyond 31st March 2017; and the claim to carrying cost for the compensation amount determined for the impact of change in law.

3. Three out of the above five issues are now admittedly covered by a judgment rendered on 14.09.2020 by the coordinate bench in Appeal no. 182 of 2019 *Adani Power Maharashtra Limited (APML) v. Maharashtra*

State Electricity Distribution Company Limited & ors. ("the *APML case*"). It was fairly conceded by the contesting respondent (MSEDCL) that the impugned order, to the extent it determines the said three issues, be set aside and the claim of the appellant be remitted for fresh consideration and decision by MERC, subject to the right of appeal against the principles settled by judgment in the *APML case* as is the prayer of the appellant. The parties are agreeable that, aside from such remit on the three covered issues, the appeal be decided by a detailed consideration of the remaining two issues on merits of the contentions urged. We have proceeded accordingly.

4. It is appropriate to take note, *albeit* briefly, the relevant facts which are substantially undisputed.

BACKGROUND FACTS

5. The appellant owns and operates a 1350 MW (5x270 MW) coal fired Power Plant located at Nandgaonpeth, Amravati District, in the State of Maharashtra. Its predecessor (Indiabulls Power Limited) had entered into two Power Purchase Agreements (PPAs) with respondent MSEDCL pursuant to Tariff Based Competitive Bid Process initiated by the respective State Utilities under Section 63 of the Electricity Act, 2003 and the Guidelines issued by the Central Government, for supply of 1200 MW aggregate power at levelized tariff of Rs.3.260/kWh for a period of 25 years, one PPA dated 22.04.2010 for supply of 450 MW power and the second

dated 05.06.2010 for supply of 750 MW power. The said PPAs were amended by way addenda dated 01.02.2012 (all collectively referred as "PPAs") to capture the change in unit configuration of the Project from 2 units of 660 MW each to 5 units of 270 MW each having net capacity of 1228 MW. The Cut-Off Date under the PPAs is 31.07.2009. Supply of power under the PPAs commenced from 03.06.2013.

6. The relevant clauses of both PPAs (dated 22.04.2010 and 05.06.2010) include Article 1.1 which defines Fuel, Indian Governmental Instrumentality and Law; Article 10 which defines Change in Law for adjustments in the quoted tariff by the selected bidder for the impact of the Change in law that may occur subsequent to the cutoff date specified in the PPA ("*NCDP, 2007*" notified by the Central Government being then in force); Schedule 5 which provides the details of generation and supply of power; and *Appendix A* dealing, *inter alia*, with fuel and SHR. Some of these relevant clauses of PPA may be quoted in extenso:

> *"1.1 Definitions*
> *"Fuel" shall mean the primary fuel to generate electricity namely domestic coal;*
>
> *"Indian Governmental Instrumentality" shall mean Government of India, Government of state(s) of Maharashtra, and any ministry, department, board, authority, agency … under the direct or indirect control of Government of India …*
>
> *"Law" shall mean in relation to this Agreement, all laws including Electricity Laws in force in India … and shall further include without limitation all applicable rules, regulations, orders. Notifications by an Indian Governmental Instrumentality …*

10 ARTICLE 10: CHANGE IN LAW
10.1 Definitions
In this Article 10, the following terms shall have the following meanings:
10.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline resulting into any additional recurring/ non-recurring expenditure by the Seller or any income to the Seller:

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

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission or (iii) any change on account of regulatory measures by the Appropriate Commission including calculation of Availability.
10.2 Application and Principles for computing Impact of Change in Law
10.2.1 While determining the consequence of Change in Law under this Article 10, the parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through monthly Tariff Payment, to the extent compensated in this Article 10, the Affected Party to the same economic position as if such Change in Law has not occurred.

10.3 Relief for Change in Law
...10.3.2 During Operating Period
The compensation for any decrease in revenue or increase in expenses to the Seller shall be payable on if the decrease in revenue or increase in expenses of the Seller is in excess of an amount equivalent to 1% of the value of the Letter of Credit in aggregate for the relevant Contract Year.
10.3.3 For any claims made under Articles 10.3.1 and 10.3.2 above, the seller shall provide to the Procurer and the Appropriate Commission documentary proof of such increase/ decrease in cost of the Power Station or revenue/ expense for establishing the impact of Change in Law.
10.3.4 The decision of the Appropriate Commission, with regards to the determination of the compensation mentioned above in Articles 10.3.1 and 10.3.2, and the date form which such compensation shall become effective, shall be final and biding on both the Parties subject to right of appeal provided under applicable law.
...10.4 Notification of' Change in Law
10.4.1 If the Seller is affected by a Change in Law in accordance with Article 10.1 and the Seller wishes to claim relief for such a Change in Law under this Article 10, it shall give notice to the Procurer of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law….
10.5 Tariff Adjustment Payment on account of' Change in Law
10.5.1 Subject to Article 10.2, the adjustment in monthly Tariff Payment shall be effective from: (i) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or
(ii) the date of order/ judgment of the Competent Court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law.
10.5.2 The payment for Change in Law shall be through Supplementary Bill as mentioned in Article 8.8. However, in case of any change in Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed Tariff."

7. The Schedule 5 to the PPA deals with "*Details of Generation Source and Supply of Power*" and in its terms the fuel source for the project was secured through coal linkage granted as per LOA dated 06.06.2009 for 2.346 MTPA of Grade E coal from *Western Coalfields Limited* (WCL) and LOA dated 12/13.06.2009 for 2.747 MTPA of Grade F coal from *South Eastern Coalfields Limited* (SECL) (collectively referred to as "LOAs").

8. On 28.12.2010, MERC adopted RattanIndia's levelized tariff of Rs.3.260/kWh vide its order in case no. 22 of 2010 in accordance with the provisions of the Electricity Act, 2003 and the Competitive Bidding Guidelines.

9. The LOA quantity from WCL was subsequently transferred to SECL. Pursuant to the aforesaid, RattanIndia executed an FSA with SECL on 22.12.2012 for 4.974842 MTPA which was subsequently increased to 5.49345 MTPA.

10. The FSA executed on 22.12.2012 with SECL for 4.974842 MTPA (Grade F) corresponded with the PPA capacity over 20 years against the entire aggregated LOA coal capacity being 5.093 MTPA, this being subsequently revised to 5.493 MTPA vide addendum dated 18.03.2014. the relevant Clauses of the FSA included the following:

> "*4.1 Annual Contracted Quantity (ACQ)*
> *4.1.1 The Annual Contracted Quantity of coal agreed to be supplied by the Seller and undertaken to be purchased by the Purchaser, shall be 24,39,336 tonnes per Year from the Seller's mines and/or from import, as per Schedule I. For part of the Year, the ACQ shall be prorated accordingly. The ACQ shall be in the proportion of the percentage of*

Generation covered under log term Power Purchase Agreement(s) executed by the Purchaser with the DISCOMs …

4.1.2 The Purchaser shall in advance under the Schedule I provide firm annual coal requirement for the initial years required for phasing of the Power Plant …

4.4 End-use of Coal

The total quantity of Coal supplied pursuant to this Agreement is meant for use at the Indiabulls Power Limited, IPP 1350 (5x270) MW, Units-1 to 5 …..

4.4 Quarterly Quantity The Annual Contracted Quantities from indigenous sources for the Year, as per Clause 4.1 shall be divided into Quarterly Quantities (QQ), expressed in tonnes, as follows:

Ist Quarter (Apr-Jun.)	*25% of ACQ*
IInd Quarter (Jul-Sep.)	*22% of ACQ*
IIIrd Quarter (Oct-Dec.)	*25% of ACQ*
IVth Quarter (Jan-Mar.)	*28% of ACQ*

4.5 Scheduled Quantity (SQ):

4.5.1 The monthly Scheduled Quantity (SQ) shall be one third (1/3rd) of the QQ.

4.5.2 Either the Purchaser or the Seller by serving a written Notice at least thirty (30) days prior to the commencement of a month may revise the SQ to be supplied by the Seller in that month, provided that the increase / decrease resulting from such revision shall not be in excess of 5% of the SQ and the Purchaser shall not seek any such increase in SQ for the months of July, August and September of any Year …

4.5.3 Seller shall have the right to make good the short supplies in a particular month in the succeeding month(s) of the same Quarter to the extent of 5% of the SQ. …

4.5.7 The above schedule of supply is in respect of coal from indigenous sources. Supply of imported coal shall be made as per availability, which is depending on many uncontrollable factors …"

11. On 09.05.2013, the Ministry of Power (MoP) in Government of India (GoI) sought statutory advice from the Central Electricity Regulatory Commission (CERC) on impact on account of non-availability of coal. The CERC, by its Letter dated 20.05.2013, responded by suggesting changes in the NCDP as well as the need for modifying FSA's through Supplementary Agreements.

12. On 21.06.2013, the Ministry of Coal (MoC) in GoI, by office memorandum, as per approval by Cabinet Committee for Economic affairs (CCEA), notified changes in the NCDP, *inter-alia*, stating that taking into account the overall domestic availability and the likely actual requirements of Thermal Power Stations, FSAs would be signed for domestic coal quantity of 65%, 65%, 67% and 75% of the ACQ for the remaining four years of the 12th Five Year Plan. On 31.07.2013, the MoP in GoI addressed a communication to CERC stating that:

> "*2. After considering all aspects and the advice of Ld. CERC in this regard, Government has decided the following in June 2013:*
>
> > *"... Taking into account the overall domestic availability and actual requirements, FSAs to be signed for domestic coal component for the levy of disincentive at the quantity of 65%, 65%, 67% and 75% of Annual Contracted Quantity (ACQ) for the remaining four years of the 12th Plan...*
> >
> > *... To meet its balance FSA obligations, CIL may import coal and supply the same to the willing TPPs on cost plus basis. TPPs may also import coal themselves if they so opt..."*

… Higher cost of imported coal to be considered for a pass through as per modalities suggested by Ld. CERC …"

4. As per decision of the Government, <u>the higher cost of import/market based e-auction coal be considered for being made a pass through on a case to case basis by Ld. CERC/SERC to the extent of shortfall in the quantity indicated in the LoA/FSA and the CIL supply of domestic coal which would be minimum of 65%, 65%, 67% and 75% of LoA for the remaining four years of the 12th Plan</u> for the already concluded PPAs based on tariff based competitive bidding."

(emphasis supplied)

13. The appellant RattanIndia filed case no. 154 of 2013 before MERC seeking compensation on account of shortfall in linkage coal. On 15.07.2014, the MERC passed Order in said case (no. 154 of 2013) approving a framework for compensatory fuel charge under its regulatory powers.

14. The appellant thereupon filed case (no. 147 of 2014) giving details as per MERC's order dated 15.07.2014 for grant of compensation. By its Order dated 20.08.2014, MERC passed Order in said case (no. 147 of 2014) approving a specified compensatory fuel charge in line with the framework approved in case No. 154 of 2013. RattanIndia filed petition (case no. 158 of 2014) seeking review of the orders dated 15.07.2014 and 20.08.2014 for acceptance of the change in shortfall in quantity of linkage coal and amendment in the NCDP as Change in Law and consequentially for the actual recovery

as per the PPAs to be allowed. The review petition was rejected by MERC by order dated 30.10.2015.

15. In the wake of above orders, the appellant preferred two appeals challenging the decisions of MERC - Appeal no. 98 of 2016 against the Order dated 15.07.2014 (passed in case no. 154 of 2013) and Order dated 30.10.2015 (passed in case no. 158 of 2014) and Appeal no. 99 of 2016 against the Order dated 20.08.2014 (passed in case no. 147 of 2014).

16. While the above mentioned two appeals were pending before this tribunal, two significant events occurred. On 28.01.2016, MoP in GoI issued the Revised Tariff Policy which provided that in case of shortage of linkage coal, the increased cost of alternate fuel shall be considered for being made a pass through by Appropriate Commission. On 11.04.2017, the Supreme Court of India pronounced its judgment dated 11.04.2017 in Civil Appeal Nos. 5399-5400 and batch titled *Energy Watchdog v. CERC & Ors*. reported as (2017) 14 SCC 80, *inter alia*, holding that (i) the MoP letter dated 31.07.2013 and the Revised Tariff Policy dated 28.01.2016 are statutory documents having the force of law and (ii) that the shortfall in linkage coal amounts to a *Change in Law* event for which the affected party must be restituted or compensated so as to be restored to the same economic position.

17. The relevant part of the decision in *Energy Watchdog* (supra) may be quoted as under:

"56. ……………. It is clear from a reading of the Resolution dated 21-6-2013, which resulted in the letter of 31-7-2013, issued by the Ministry of Power, that the earlier coal distribution policy contained in the letter dated 18-3-2007 {should be 18.10.2013} stands modified as the Government has now approved a revised arrangement for supply of coal. It has been decided that, seeing the overall domestic availability and the likely requirement of power projects, the power projects will only be entitled to a certain percentage of what was earlier allowable. In February 2012, it was decided that FSAs will be signed for full quantity of coal mentioned in the letter of assurance (LoAs) for a period of 20 years with a trigger level of 80% for levy of disincentive and 90% for levy of incentive. Subsequently, MoC indicated that CIL will not be able to supply domestic coal at 80% level of ACQ and coal will have to be imported by CIL to bridge the gap.

………..

2. After considering all aspects and the advice of CERC in this regard, Government has decided the following in June 2013:

> *(i) taking into account the overall domestic availability and actual requirements, FSAs to be signed for domestic coal component for the levy of disincentive at the quantity of 65%, 65%, 67% and 75% of annual contracted quantity (ACQ) for the remaining four years of the 12th Plan.*
>
> *…………..*

4. As per decision of the Government, the higher cost of import/market based e-auction coal be considered for being made a pass through on a case-to-case basis by CERC/SERC to the extent of shortfall in the quantity indicated in the LoA/FSA and the CIL supply of domestic coal which would be minimum of 65%, 65%, 67% and 75% of LoA for the remaining four years of the 12th Plan for the already concluded PPAs based on tariff based competitive bidding.

………

This is further reflected in the revised Tariff Policy dated 28-1-2016,

………

Clause 6.1 states:

…….

However, some of the competitively bid projects as per the guidelines dated 19-1-2005 have experienced difficulties in getting the required quantity of coal from Coal India Limited (CIL). In case of reduced quantity of domestic coal supplied by CIL, vis-à-vis the assured quantity or quantity indicated in letter of assurance/FSA the cost of imported/market based e-auction coal procured for making up the shortfall, shall be considered for being made a pass through by appropriate Commission on a case-to-case basis, as per advisory issued by Ministry of Power vide OM No. FU-12/2011-IPC (Vol-III) dated 31-7-2013.

57. ………… This being so, it is clear that so far as the procurement of Indian coal is concerned, <u>to the extent that the supply from Coal India and other Indian sources is cut down</u>, the PPA read with these documents provides in clause 13.2 that while determining the consequences of change in law, <u>parties shall have due regard to the principle</u> that <u>the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred</u>…….

58. ……. We are afraid that we cannot accede to this argument for the reason that the change in law has only taken place only in 2013, which modifies the 2007 Policy and to the extent that it does so, relief is available under the PPA itself to persons who source supply of coal from indigenous sources. It is to this limited extent that change in law is held in favour of the respondents. ………. The Central Electricity Regulatory Commission will, as a result of this judgment, go into the matter afresh and determine what relief should be granted to those power generators who fall within Clause 13 of the PPA as has been held by us in this judgment."

(emphasis supplied)

18. Following the above quoted ruling in *Energy Watchdog* (supra), this tribunal, by order dated 04.05.2017, remanded the matter arising out of appeal nos.98-99 of 2016, along with cross-appeals preferred by MSEDCL, for fresh adjudication by MERC.

19. On 22.05.2017, the CCEA approved the "*Scheme for Harnessing and Allocating Koyala Transparently in India*" ("Shakti Scheme"), in terms of paragraph (A) (iii) whereof, cap of 75% supply of linkage coal under NCDP 2013 was extended beyond 31.03.2017.

20. The impugned order dated 03.04.2018 was rendered by MERC thereby deciding afresh the case no. 154 of 2013 and case no. 147 of 2014 preferred by the appellant.

IMPUGNED FINDINGS

21. The crucial findings returned by MERC by the impugned order are summarized as under:

(i.) Station Heat Rate ("*SHR*") would be Net SHR submitted by RattanIndia in its bid or the SHR and Auxiliary Consumption norms specified for new Thermal Generating Stations in the Maharashtra Electricity Regulatory Commission (Multi-Year Tariff) Regulations, 2011 ("*MYT Regulations, 2011*"), whichever is superior;

(ii.) Computation of the impact is to be done on an annual basis instead of monthly basis;

(iii.) The Gross-Calorific Value ("*GCV*") of domestic coal for computing compensation is to be based on the middle value of the GCV range of the assured coal grade in the Letter of Assurance/ Fuel Supply Agreement;

(iv.) Impact of the change in law will be considered till 31.03.2017 i.e. the last year of the 12th plan referred in the CCEA decision and NCDP 2013. Any claim arising from the subsequent introduction of SHAKTI scheme as a purported change in law event may be taken up by RattanIndia separately in terms of the PPAs; and

(v.) RattanIndia is not entitled for carrying cost on the Change in Law events as the PPAs do not provide for carrying cost.

22. The appellant is aggrieved by all above mentioned conclusions.

CONSENT ORDER OF REMIT ON THREE ISSUES

23. Since some of the issues raised by the appellant are admittedly covered by the judgment dated 14.09.2020 in *APML case*, and the contesting respondent (MSEDCL) has conceded to an order of remit on such basis, *albeit* subject to exercise of the right to appeal against the said ruling dated 14.09.2020, it is only fair to briefly note here the rival contentions on such issues.

Issue of SHR

24. On the first issue of SHR, the MERC by the impugned order, has directed that it ("*SHR*") would be Net SHR submitted by the generator (RattanIndia) in its bid or the SHR and Auxiliary Consumption norms specified for new Thermal Generating Stations in the MYT Regulations, 2011, whichever is superior.

25. The respondent MSEDCL contends that the economic position existing prior to the occurrence of Change in Law is admittedly the tariff quoted by the appellant at the bidding, the computation of coal quantum and the parameters of such computation having been given by the appellant itself as a part of the bid, also stipulating the SHR (2175 Kcal/Kg) while submitting the bid. It defends the decision to above effect arguing that tariff determination by a competitive bid process as per Section 63 of the Electricity Act, 2003 cannot be converted at a later stage as a tariff determination under Section 62 any such attempt will be contrary to the Scheme and objective of the legislation providing for competitive bid process and sanctity of such process. It submits that SHR value cannot be considered "on actual" as the same would then encompass the in-efficiency of the generator. Relying upon the Order dated 13.04.2018 passed in Appeal No. 210 of 2017 ("*Adani Power case*"), it is submitted that SHR issue has been rightly decided in favour of the procurer.

26. The appellant, however, challenges the abovesaid conclusion on the plea that it is contrary to objective of economic restoration as compensation has not been granted on actuals, also submitting that this tribunal in Judgment dated 13.11.2019 in A. Nos. 77 of 2016 and batch titled *Sasan Power Limited vs. CERC & Ors.* ("*Sasan Judgment*") and CERC in Order dated 16.05.2019 in Petition No.

284/MP/2018 titled *GMR Warora Energy Ltd. vs. MSEDCL & Ors.* ("*GMR Order*") have rejected the applicability of Bid assumed SHR.

27. It appears that, by the decision rendered on 14.09.2020 in *APML case*, the coordinate bench has taken the view that under the Standard Biding Guidelines, the bidder is not required to quote SHR or GCV as a bid parameter in a Case I bidding process, it being only obliged to quote fixed and variable charges such Case 1 bids being determined on the basis of the lowest quoted levelized tariff and not on the basis of quoted net heat rate. It has been ruled that the fact that a certain SHR figure was mentioned as part of the qualifying requirements must be seen for what it is, i.e., to demonstrate availability of raw materials for the plant such SHR is submitted under test conditions, which is bound to vary from the actual SHR. Pertinently, the principle that change in law compensation for shortfall in supply of domestic coal has to be determined by reference to the operating parameters specified in the relevant tariff regulations has been reiterated.

Issue of GCV

28. The second issue relating to GCV has been determined by MERC by the impugned order taking the view that of domestic coal for computing compensation is to be based on the middle value of the

GCV range of the assured coal grade in the Letter of Assurance/ Fuel Supply Agreement.

29. The second respondent MSEDCL contends that the finding is correct. It argues that the concept of restoration to the same economic position would necessarily involve the application of the same aspects to the computation of coal quantum on account of impact of change in law as were applicable to the computation of coal quantum before the change in law occurred. The grade of coal consists the range of which the coal company gets the coal e.g., G11 having range 4001-4300 kcal/kg. It submits that MERC, by its order dated 7.03.2018 in Case No. 189 of 2013, has laid down the procedure for computing impact of change in law on account of coal shortage, taking into consideration the middle value of the GCV range for domestic coal or GCV mentioned in the invoices of imported coal, such methodology having been reiterated by the impugned order. It argues that the generator cannot base its claim on GCV on "as received" basis in place of as "on invoice" basis. It contends that the appellant has been aware of the degradation of GCV during the transit from source mine to the generation location even at the time of submission of the bid and would have factored the same in the quoted tariff. The upshot of the submissions is that any change of methodology would burden the end consumers with the payment of compensation to appellant, satisfying its unfair commercial gain.

30. The appellant, in contrast, pleaded in the appeal referring to *GMR Order* of CERC and *Sasan Judgment* of this tribunal (both mentioned above) affirming that that GCV has to be taken on 'As-Received Basis' for computation of compensation for Change in Law, the contention of MSEDCL for adopting middle value GCV Range having been rejected.

31. Reliance is now placed by the appellant on the ruling of coordinate bench rendered on 14.09.2020 in *APML case*, whereby in the context of parameters or reference values for determining Change in Law compensation, the foremost principle settled is that the generator has suffered due to a change in policy of the GoI and as per the provisions of the PPAs, it (the generator) is entitled to be restored to the same economic position as if the Change in Law had not occurred, the restitutive principle deserving to be adhered to in its true spirit. The principle that the reference GCV for the purposes of change in law compensation is to be the actual GCV as settled by *Sasan Judgment* (supra) and *GMR Order* (supra) has been reiterated. It has been observed that there is no guidance in the PPAs or in the Bidding Guidelines as to the reference GCV that should be applied in case of change in law claims in Case 1 bid projects where SHR or GCV is not a bid parameter. It is noted that the overarching principle for change in law compensation is that the generating company should not be left in a worse economic position.

Issue of compensation for change in law beyond 31.03.2017

32. The impugned order holds that the impact of the change in law will be considered till 31.03.2017 i.e. the last year of the 12th plan referred in the CCEA decision and NCDP 2013 and that any claim arising from the subsequent introduction of SHAKTI scheme as a purported change in law event may be taken up by RattanIndia separately in terms of the PPAs.

33. The contesting respondent (MSEDCL) supports the above view on the logic that appellant had admitted before MERC that the compensation under NCDP change in law is only to be considered to the extent of the change affected by NCDP, 2013. It is submitted that the remit order in earlier round of appeals was pursuant to the Supreme Court's ruling in *Energy Watchdog* relating to the change in law in NCDP, 2007 and any subsequent schemes and policies are irrelevant for the purposes of consideration of the present case. It is contended that by virtue of the NCDP, 2013 and the letter dated 31.07.2013 by operation of law (as held by the Supreme Court) the coal supply has been reduced up to the level of 65%, 65%, 67% and 75%, the GoI not having directed the reduction below the above percentage as a change in law, such reduction, if any, below the above percentage being a contractual issue. It is the view of the respondent that the appellant is required to take up the issue of supply

below the percentages mentioned in the letter of the MoP with Coal India Limited, it being inappropriate to claim expansion if the Government had restricted the compensation based on a certain percentage.

34. *Per contra*, it has been the averment of the appellant that limiting compensation to 31.03.2017 is erroneous when SHAKTI Scheme had extended NCDP 2013 beyond 31.03.2017 by capping the maximum quantum of linkage coal to 75% for existing linkage holders, reliance being placed on Judgment dated 14.09.2019 in Appeal No. 202 of 2018 titled *Jaipur Vidyut Vitran Nigam Ltd. & Ors. vs. RERC & Ors*. ("*Adani Judgment*") of this tribunal holding that Shakti Scheme qualifies as Change in Law and compensation cannot be restricted to 31.03.2017 and is to be paid so long as the shortfall continues. Reliance is also placed on the decision dated 14.09.2020 in *APML case*.

Decision on above three issues

35. As noted earlier, the learned counsel on both sides – appellant and second respondent – agreed that the impugned order to the extent of conclusions thereby reached on the above three issues requires to be remitted for fresh consideration by MERC in light of decision rendered on rendered on 14.09.2020 in the *APML case*, though such remit order being without prejudice to the contentions of

both sides and subject to appellate challenge to the said decision dated 14.09.2020. We order accordingly.

36. We now proceed to consider the remaining two issues on which there has been a contest in this appeal.

ISSUE OF MONTHLY COMPUTATION OF IMPACT OF CHANGE IN LAW

37. The relevant part of the impugned decision on this issue reads thus:

> *"52. RPL has proposed that the impact of Change in Law be computed on a monthly basis. MSEDCL has contended that the unavailed or unutilised domestic coal supplied by CIL needs to be carried forward.*
>
> *53. The Commission finds no justification for computing the impact of Change in Law on a monthly basis as the period for which the Change in Law is applicable was over on 31 March, 2017. Further, in order to factor in the monthly coal quantum variations, it would be more appropriate to compute the impact based on the principles approved in this Order on a financial year basis for the past period, i.e., from the effective date of the Change in Law to 31 March, 2017, in terms of the NCDP 2013 pursuant to the CCEA decision.*
>
> *54. The PPAs provide for claiming Change in Law compensation through Supplementary Bills. RPL may raise Supplementary Bills under the respective PPAs for the financial impact of the Change in Law, subject to the findings and stipulations in this Order and the caveats set out below. With its Supplementary Bills, RPL shall submit evidence regarding the expenditure actually incurred on account of the Change in Law. The PPAs require MSEDCL to make the payments within the due date, and it is liable to pay a Late Payment Surcharge for any delay. These Supplementary Bills shall be net of any Compensatory Fuel Charges already paid by MSEDCL to RPL based on earlier invoices*

considering the previous Orders of the Commission which have been set aside.”

(emphasis supplied)

38. The respondent MSEDCL defends the above decision arguing that the impact of change in law cannot be computed on any basis other than monthly for the reason the un-availed/un-utilized domestic coal for the specific month / year supplied by CIL needs to be carried forward. It relies upon decisions of MERC in case no. 189 of 2013 by order dated 07.03.2018 and in case no. 154 of 2013 by order dated 03.04.2018 whereby it has been held to be more appropriate “*to factor in the monthly coal quantum variations*” by computing “*the impact based on the principles approved … on a yearly basis (financial year) for the past period, i.e., from the effective date of the Change in Law to 31st March, 2017, in terms of the CCEA decision and the NCDP 2013*”.

39. It is the argument of MSEDCL that the appellant had taken a position before the MERC different from the one being canvassed before us in appeal. It quotes the same (from *Submissions dated 15.06.2017)* as under:

“*29. … it is submitted that as per the FSA, SECL may not supply ACQ of Domestic Coal required to maintain the normative plant availability of 85% as per PPAs. Under such circumstance, to meet the shortfall in coal supply and to fulfil the obligation of 85% normative plant availability under the PPA, RattanIndia had to procure coal from alternate sources.*

31. It is submitted that the deviation from 100% assured supply of coal in terms of the annual contracted quantity and short supply of coal by SECL is a change in law event in terms of Article 10 of the PPAs. <u>It is submitted that every instance of under delivery of assured quantity of coal by SECL gives rise to an event for which RattanIndia is entitled to be compensated</u>.

41. It is pertinent to note that the compensation to be granted would be in accordance with Article 10 of the PPAs, as per which the affected party is to be restored to the same economic position as if the change in law had not occurred. Accordingly the <u>compensation to be granted to RattanIndia would be based on actuals and normative parameters</u>. In this regard, RattanIndia is proposing the following formula which may be used to grant compensation to RattanIndia for the shortfall of coal (and procurement of coal from alternate sources). This formula is based on the difference between actual fuel cost and cost of domestic coal if coal supply or linkage would have been made available to RattanIndia by Coal India Limited as per NCDP 2007:-

Change in Law relief = [Actual landed cost of entire coal – landed cost of Domestic Linkage Coal]

46. In light of the aforesaid it is submitted that pass through of cost of alternate coal on account of short supply of domestic coal ought to be allowed as a change in law event for which RattanIndia ought to be compensated for."

(emphasis supplied)

40. It is argued that the appellant had not pleaded specifically their claim for computation being done at monthly stage without considering the stock of previous month. Though conceding that an illustrative calculation of computation was set out in the said submissions dated 15.06.2017 before MERC for calculating the effect for a month, the respondent submits that a mere indicative hypothetical illustration without any pleading, substantiating or

justifying such a stand of monthly calculation not taking into consideration the previous stock in particular cannot be regarded as a pleading presented before the State Commission. It submits that the appellant itself has justified the method enforced by the MERC by pleading thus in rejoinder:

> *"MSEDCL's contention that impact of Change in Law cannot be computed on a monthly basis, as the un-availed, unutilized amount of coal for the specific month/year needs to be carried forward is erroneous. It is submitted that regardless of coal remaining unutilized for a particular month, computation would take place regarding the coal utilized for generation of power and bills (for Change in Law) would be restricted to the coal utilized."*
>
> (emphasis supplied)

41. The respondent, relying on rulings in *Union of India Vs. Ibrahim Uddin*, (2012) 8 SCC 148 and *Shyam Narayan Prasad Vs. Krishna Prasad* (2018) 7 SCC 646, objects to the arguments pressed before this tribunal in appeal as an impermissible attempt to make out a case beyond pleadings.

42. It is the contention of the respondent MSEDCL that the appellant had premised its bid and generation capacity based on utilization of the domestic coal only but the claim for monthly computation reveals that the surplus coal is being left unutilized, against the contractual mandate under PPA for its utilization.

43. The appellant, on the other hand, argues that MERC has erred in stating that computation of compensation for monthly coal quantum variation shall be on an annual basis. It is submitted that demand and

consequent offtake of coal changes month to month and is subject to various factors such as Plant Load Factor (PLF), demand, actual coal supplied etc. Thus, it is possible that in a given month there is no (or low) demand of coal than the quantity of coal offered by CIL for offtake. If compensation is calculated cumulatively on annual basis, the aforesaid surplus may get set off against shortfall in coal in another month, when the demand of coal was higher than the quantity of coal supplied. This is illustrated by example based on data (*Considering capacity of 1000 MW*) as tabulated below:

Month	Coal Assured	Coal Delivered	Actual Generation	Shortfall
January	850 MW	750 MW	800 MW	50 MW
February	850 MW	800 MW	700 MW	+100 MW
March	850 MW	600 MW	750	50 W

44. It is submitted that correct application of ruling in *Energy Watchdog* and other orders of CERC would show shortfall of 50 MW each for January and March while the method stipulated in impugned order would result in the same getting neutralized and thus end up in being treated as zero (0) MW shortfall.

45. The moot point put forward by the appellant is that the expenditure towards procurement of alternate coal needs to be incurred on monthly basis and hence reimbursing such costs on a yearly basis shall result in mismatch of cash flow leading to stress on

cash flows. It is submitted that the direction of MERC for annual reconciliation is erroneous since it does not take into account short-fall during certain months as well as changes in demand by the procurer.

46. We must reject the argument of submissions of the appellant being beyond pleadings presented before MERC as, in our opinion, the case for methodology of calculation remains the same wherein the appellant does not press for recovery in excess of additional coal purchased and utilized. The difficulty, as shall be seen from discussion that follows, arises from the plea of the respondent that the generator cannot avail of the additional coal procured to make up for the shortfall due to reduction in supply of linkage coal if the supply in subsequent month results in linkage coal being added to the stock.

47. It is noted that, under the PPA, compensation for Change in Law is to be through Monthly Tariff Payments. Accordingly, the PPAs envisage compensation on a monthly basis, the impugned direction for computation of compensation to be done on an annual basis being contrary to the PPA.

48. As per Article 10.2.1 of the PPAs [Pg. 303], the underlying principle that the purpose of compensating the party affected by such Change in Law is to restore, through monthly tariff payments, the affected party to the same economic position as if such Change in Law had not occurred. This position has been settled in *Energy*

Watchdog (supra) wherein the Supreme Court held that changes in NCDP 2013 and the Revised Tariff Policy are change in law, and directed that the affected party is to be restored to the same economic position, as if such Change in Law event had not occurred.

49. In above context, reference would be in order to the following observations of Supreme Court in *Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power Ltd.*, (2019) 5 SCC 325 also relevant to the subject of carrying cost:

> "***10.*** *Article 13.2 is <u>an in-built restitutionary principle which compensates the party affected by such change in law and which must restore, through monthly tariff payments</u>, the affected party to the same economic position as if such change in law has not occurred. This would mean that by this clause <u>a fiction is created, and the party has to be put in the same economic position as if such change in law has not occurred</u> i.e. <u>the party must be given the benefit of restitution as understood in civil law</u>. Article 13.2, however, goes on to divide such restitution into two separate periods. The first period is the "construction period" in which increase/decrease of capital cost of the project in the tariff is to be governed by a certain formula. However, the seller has to provide to the procurer documentary proof of such increase/decrease in capital cost for establishing the impact of such change in law and in the case of dispute as to the same, a dispute resolution mechanism as per Article 17 of the PPA is to be resorted to. It is also made clear that compensation is only payable to either party only with effect from the date on which the total increase/decrease exceeds the amount stated therein.*"
>
> (emphasis supplied)

50. In Appeal No. 121 of 2018 titled *Sasan Power Limited vs. CERC & Ors*. this tribunal, by judgment dated 20.11.2018, having found several flaws in the methodology adopted by the Central Commission

it "*being not conducive for working out compensations for actual distress to the affected parties*", had expressed the need to evolve a uniform and consistent "*mechanism for restoring the affected party to the same economic position as if the change in law had not occurred*" holding thus:

> "*15.7 … We also take note that the intended objective underlined the stated principle is restoration of the party to the same economic position and thus, the same needs to be interpreted in the right perspective with the main governing principles and not by a formula limiting to the said objective and yielding different reliefs to different generators as recorded by the CEA in its meeting held on 8.7.2013. In fact, <u>the formula is essentially a vehicle to give effect to the guiding principle of economic restoration</u> and the same needs to be read down to the extent it is inconsistent with the principle it seeks to serve. In the instant case, neither the guidelines nor the PPA envisage any provision to deal with a situation of an erroneous formula. In view of the well settled law laid down by the Apex Court in case of Energy Watchdog vs. Central Electricity Regulatory Commission and Ors. etc. (2017) 14 SCC 80, the Central Commission is directed to devise the adequate formula / methodology under its general regulatory powers (Section 79 (1)(b) so as to allow the admissible claims of the Appellant regarding compensation in accordance with law.*"
>
> (emphasis supplied)

51. In Appeal No. 202 of 2018 titled *Jaipur Vidyut Vitran Nigam Ltd. & Ors. vs. Rajasthan Electricity Regulatory Commission & Ors.*, decided by this tribunal by judgment dated 14.09.2019 ("*Adani 202 Judgment*"), the above legal position was reaffirmed, it having been held that the impact of change in law ought to be computed based on the difference between 100% domestic coal supply assured in NCDP 2007 vis-à-vis actual domestic coal supply, until the shortage of

domestic coal exists. The following parts of the said decision are apt to be quoted:

> "*11.10 Coming to the objection of Rajasthan Discoms to the methodology adopted by Adani Rajasthan for arriving at the compensation to be paid by the Discoms towards Change in Law claim, it is noted that Adani Rajasthan had adopted the methodology in terms of the mandate in the CCEA decision dated 21.06.2013, MoP letter dated 31.07.2013, revised tariff policy dated 28.01.2016 and the Energy Watchdog case. In fact, all these documents recognize/ specify that the principle for compensation for change in law event is to give pass-through of the additional cost incurred on procurement of coal from alternate sources to mitigate the shortfall in domestic coal supply in order to restore the affected party to the same economic position. The RERC after considering all this had allowed Adani Rajasthan in para 60 of the Impugned Order to raise supplementary invoices towards domestic coal shortfall. …*
>
> *11.13The purpose of change in law relief/compensation is to restore the affected party to the same economic position as if the change in law had not occurred. In the instant case, this would involve compensating Adani Rajasthan for the cost incurred in purchasing alternate coal to meet the non-availability of domestic coal promised under the NCDP 2007. The MoP letter of 31.07.2013 as well as the Revised Tariff Policy of 2016 support the principle of compensation to the generators for the additional cost incurred in procuring alternate coal. The methodology proposed by Adani Rajasthan prima facie appears to be consistent with the principle/basis of compensation for shortfall/non-availability of domestic coal given by the MoP and we do not find any reason to interfere with the same.*
>
> *12.6 The Supreme Court in Energy Watchdog judgment has already concluded as follows:*
>
> > *"57. …… … the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred……"*

Therefore, <u>the application of above decision would mean that to the extent supply of domestic coal to Adani Rajasthan is cut down, the same needs to be compensated through the Change in Law mechanism provided in the PPA. For the aforesaid reasons, we hold that the RERC was not correct in limiting the relief to Adani Rajasthan till the grant of linkage coal under the SHAKTI Policy</u>. The Impugned Order is set aside on this point and it is clarified that Adani Rajasthan shall be entitled to relief under Change in Law provision until there is a shortage in supply of domestic linkage coal, against the 100% supply assured under the NCDP 2007.

13.1 Coming to the second issue in Appeal No. 305 of 2018, it is relevant to note that in terms of Article 10.2.1 of the PPA the Affected party is to be restored to the same economic position as if the 'Change in Law' event had not occurred. Adani Rajasthan contends that one of the key ingredients for such restitution as contemplated under the PPA would be the payment of 'Carrying Cost' from the date the Change in Law event occurred till the date of raising the claim/invoice. Late Payment Surcharge would apply for the subsequent period as per PPA provisions in the event of delay in payment by the Discoms beyond the Due Date."

(emphasis supplied)

52. In Appeal no. 77 of 2016 *Sasan Power Limited v. CERC and ors.*, decided on 13.11.2019, this tribunal held thus:

"*17.12.7 In a host of judgments of this Tribunal in various cases, it has been held that the increase in input cost cannot be allowed as Change in Law and, hence, we hold that changes in water charges are not eligible for compensation under Change in Law. However, as on the cut-off date, there was no water allocation fee to be paid by the Appellant to the Government of Madhya Pradesh and has been imposed subsequently by an amendment dated 22.06.2013, the same amounts to be a change in law event and as per Energy Watchdog judgment of the Hon'ble Supreme Court, the Appellant 112 Judgment in Appeal No.77 of 2016, Appeal No. 136 of 2016 & Appeal No. 324 of 2016 Page 111 of 136 needs to be compensated to this account so as to restore it to the same economic position.*

> *22.10.4 We have perused the rulings in various judgments of this Tribunal relied upon by the Respondent/SPL to note that compensation for Change in Law event is to be paid on the basis of actuals in line with the provisions of Article 13 of the PPA which requires the affected party to be restored to the same economic position as if such Change in Law event had not occurred.*"
>
> (emphasis supplied)

53. Following the consistent view taken by this tribunal in the wake of ruling of Supreme Court in *Energy Watchdog* (supra), we must reiterate that compensation has to be linked to the actual expenditure incurred by the affected party due to the said change in law event. Thus, in order to restore the appellant to the same economic position, it must be compensated for the actual cost of alternate coal it was constrained to procure due to non-supply of coal by SECL. The view taken by MERC by the impugned order unjustly results in denial of recovery of cost of additional coal despite the fact that the appellant spent additional Rs. 286.59 Crore (Rupees two hundred eighty-six crore and fifty-nine lakh) towards procurement of coal from alternate sources during March 2015 to June 2016, the disallowance being also on account of prescribing annual assessment of impact, in addition to limiting SHR, GCV, and restricting compensation to 31.03.2017.

54. We need to elaborate more.

55. In terms of NCDP 2007, there was 100% assurance of normative coal requirement (85% PLF). The ACQ guaranteed to the appellant in terms of LOA was revised to 5.493 MTPA which,

as per FSA (Clauses 4.4 and 4.5), is further divided into QCQ (1.7336 MT, 1.20856 MT, 1.7336 MT and 1.538166 MT respectively) and MCQ (1/3 of QCQ). Coal procurement, generation, supply and change in law compensation are on a monthly basis. Therefore, shortfall ought to be seen against assured MCQ every month with a reconciliation of accounts at the end of the year.

56. Discoms pay on the basis of scheduled energy. Therefore, they only pay for actual generation irrespective of the quantum of linkage / alternate coal actually procured. To illustrate, if the coal procured in a month is 1.5 lac tonnes and coal utilized is only 75,000 tonnes, the Discom will pay energy charges corresponding to 75,000 tonnes. In terms of Clause 4.5 of Schedule 4 of the PPA, in the event the generator fails to ensure availability of 80% in a contract year, it would have to pay penalty at the rate of 20% of the simple average Capacity Charge for all months in the Contract Year applied on the energy corresponding to the difference between 80% (960 MW out of 1200 MW contracted capacity) and Availability during such Contract Year. Accordingly, procurement of coal is premised on Availability so as to ensure that the average availability of 80% is ensured.

57. The appellant at the hearing shared the data (which was not disputed) of Plant availability for 2015-2016 as under:

Month	Availability (%)- PAF	PLF (%)	Variation in PLF v. PAF%
Mar-15	23.86	19.65	4.21
Apr-15	24.13	21.73	2.4
May-15	20.45	17.93	2.52
Jun-15	25.56	20.88	4.68
Jul-15	52.60	43.34	9.26
Aug-15	72.96	59.09	13.87
Sep-15	73.23	66.36	6.87
Oct-15	73.58	69.91	3.67
Nov-15	81.74	68.62	13.12
Dec-15	86.91	68.19	18.72
Jan-16	96.69	72.32	24.37
Feb-16	97.12	59.09	38.03
Mar-16	99.71	58.53	41.18
Apr-16	100.58	50.19	50.39
May-16	100.27	42.05	58.22
Jun-16	99.73	51.31	48.42

58. We do note that while the generator has ensured adequate availability, MSEDCL has not been optimally procuring power from it, the difference between PAF and PLF ranging from 4-5% to ~58%.

59. There can be no denial of the fact that in any given month, the appellant has to ensure adequate coal availability so as to declare the station availability and ensure that no penalty is imposed. Because of reduction in linkage coal, the generator is constrained to depend both on SECL supplies and on additional procurement from alternative sources. In this context, the delays involved in such procurements have to be borne in mind.

60. The generator explains the timelines involved in procuring FSA coal stating that it takes between 45-50 days, this inclusive of letter of request sent in the last week of current month (M-0) to SECL for allocation of coal quantity for the next month (M-1), the latter (SECL) issuing allocation letter latest by 2nd or 3rd of the Month (M-1), based on which the former (the generator) makes payment in advance for the entire allocated coal quantity, post which event Multiple Delivery Orders are issued by SECL for M-1 based on actual physical coal inventory available at its mines, the allocated quantity under each Delivery Order to be lifted by the agencies appointed by the appellant within 45 days, it being a part of the total monthly quantity offered by SECL and not the full Allocated Quantity paid for and spread over multiple Delivery Orders. To this exercise, the delay in transportation is added wherein after submission of rail programme for loading of rakes based on

Delivery Orders, payment for rake movement is done and after lifting of coal by the appointed agencies, coal is washed and loaded in rakes and dispatched to the Plant, this taking around 7-10 days depending upon the availability of rakes, the practice of using washed coal having resulted in time for coal availability being increased by another 10 days.

61. On the other hand, for e-auction coal it takes 10 days for issuance of order by the coal company and 30-40 days for delivery of coal to the Plant, in all process of delivery taking 40-50 days from payment, the coal company normally providing 90 days to 180 days for lifting of coal depending upon auction conditions. In contrast, in case of imported coal, the vessel statedly takes 30 days to reach India followed by 15-20 days for clearance of cargo and for delivery of coal at site, in all 45-50 days for the imported coal to reach the plant.

62. It is stated that the actual supply of FSA coal in a month is far lower than the MCQ and in such a scenario, and given the time taken for procurement of coal, the generator has to make up the deficit by purchasing alternate coal, each consignment of FSA coal reaching the Project at different times, the entire quantity not delivered in one go. The FSA coal supply varies from month to month and in this fact-situation the generator has to keep adequate stock of alternate coal for the reason that if

the procurer (MSEDCL) were to demand the entire contracted capacity, the quantity of FSA coal would not be sufficient. The generator (appellant) is constrained to avail of and utilize the coal inventory adopting the First-In-First-Out method to prevent storage loss of GCV (estimated at ~125 to 150 kCal/Kg) for every 1% increase in moisture. We agree with this explanation and find the argument of the respondent procurer that the generator should not be utilizing coal procured from alternative sources till there is some quantity of linkage coal available wholly unfair and unreasonable.

63. It is stated that the appellant has been prudently utilizing linkage coal and using alternate coal only to the extent of shortfall of linkage coal against the MCQ. It plans coal procurement approximately two months in advance keeping in perspective the expected demand for power, past trends in supply of FSA coal and the anticipated requirement at the Project Site.

64. In the facts and circumstances noted above, we agree that the method suggested by respondent is not feasible – financially or technically - since it would result in an anomalous situation wherein, for some months in the year, the generator will have to operate the plant on much costlier alternate fuel or predominantly on alternate fuel.

65. As was explained elaborately at the hearing, the generator (appellant), for the purpose of billing and accounting of coal consumption for a given month works out the difference between monthly assured quantum of FSA coal and actual FSA coal received and thereafter makes up the difference by utilizing alternate coal, carrying forward the excess coal (FSA or alternate) to the next month so as to claim compensation on the basis of actual generation, the respondent procurer (MSEDCL) being billed only for the actual shortfall, the Bills raised reflecting details of shortfall of FSA coal in the month as indeed the quantity of Alternate coal used to make up the shortfall.

66. In our considered view, the appellant is right in pointing out that the Project capacity has been set up exclusively for respondent MSEDCL and, thus, all fuel arrangements are to be to its benefit, the generator not excused from performing its obligations due to change in law (NCDP 2013), it being obliged to continue to perform at the revised price with restitution. The appellant does not bill respondent MSEDCL for coal to the extent of unscheduled energy. If it is not permitted to bill alternate coal to the extent of shortfall in MCQ, it will never be able to recover the expense incurred to keep the Project available for MSEDCL. Noticeably, there is no averment that the appellant has indulged in any imprudence in its operations.

67. The PPA stipulates monthly reimbursement of change in law claims. Therefore, the impact has to be seen on monthly basis. Thus, computation of relief for shortfall in linkage coal and deviation in NCDP are bound to be done on monthly basis and not annual basis as held by MERC.

68. In our view, the contention of MSEDCL that impact of Change in Law cannot be computed on a monthly basis, as the un-availed, unutilized amount of coal for the specific month/year needs to be carried forward is incorrect. Regardless of coal remaining unutilized for a particular month, computation respecting the coal utilized for generation of power would invariably be done and the bills (for Change in Law) would necessarily be restricted to the coal utilized. Pertinent to note here that in judgment dated 13.11.2019 in appeal of *Sasan Power Limited* (supra), it was held as under:

> "*16.8.4 We have perused the impugned Order of the Central Commission and also analyzed the submissions of the Appellant and the Respondents. It is the case of the Appellant that it should be compensated for increase in various levies based on despatched quantity of coal from the mines and not actual utilization of coal, keeping in mind the restitutionary principle of the change in law under the PPA. We do not agree with the contention of Appellant that Central Commission concluded that the compensation will be based on utilization of coal without assigning any reasons thereto. In fact, the Central Commission has stated that the liability of the beneficiaries/procurers under the PPA is towards the payment of tariff for the scheduled generation and not actual generation. Therefore, we find force in the findings of the Central Commission that the Procurers cannot be saddled with payment of compensation for the change in law for quantum of coal which may not be utilized for supplying*

> *<u>energy to the procurers</u>. Hence, we decide that <u>the change in law compensation should be based on quantum of coal consumed as opposed to coal dispatched</u>.*"
>
> (emphasis supplied)

69. Some of the relevant clauses of FSA have been quoted earlier. There is no logic in argument that linkage coal is to be set-off against alternate coal. Where shortfall has occurred and the generator has already procured and used alternate coal, setting off or adjusting the same will be contrary to the FSA since in terms of Clause 4.1 (definition of Annual Contracted Quantity), 4.4 (definition of Quarterly Quantity) and 4.5 (definition of Scheduled Quantity) of the FSA, the quantum of coal to be supplied every month and quarter is predetermined and there is no provision for setting-off alternate coal with linkage coal.

70. We, thus, set aide the decision of MERC on the captioned issue as erroneous and direct that a fresh order be passed by the Commission so that full impact of additional cost actually incurred in procurement of coal from alternative sources to the extent of shortfall in supply of linkage coal and to the extent of it being utilized on monthly basis is given pass through such that the appellant is fully compensated and put in the same economic position as it would have been but for change of law.

ISSUE OF CARRYING COST

71. The impugned order decides this issue thus:

"62. RPL has stated that, under the terms of the PPAs, it is, as the affected Party, to be restored to the same economic position as if such Change in Law had not occurred. Hence, RPL contends that it is entitled to carrying cost from the date of the cause of action till the payment of compensation. RPL has referred to certain Supreme Court Judgments holding that, if a person is deprived of the use of money to which he is legitimately entitled, he has a right to be compensated for such deprivation.

63. MSEDCL, on the other hand, has relied on the Order dated 16 February, 2017 in Review Petition No. 1/RP/2016 in which the CERC has held that, <u>in the absence of express provisions in the PPAs qua carrying cost, carrying cost on the compensation for Change in Law events cannot be approved for the period prior to the determination of the compensation</u>.

64. The Commission is of the view that this decision of the CERC is appropriate and applicable to the present matter also. CERC was also dealing with the impact of Change in Law in concluded competitively-bid PPAs. After considering the submissions of the Parties, CERC held that <u>interest is payable only from the date when the Change in Law claim was approved and the compensation determined</u>.

65. The PPAs provide that the decision of the Appropriate Commission with regard to the determination of the compensation and the date from which such compensation shall become effective shall be final and binding on both Parties, subject to their right of appeal.

66. The Commission notes that <u>the PPAs nowhere provide for carrying cost on the amounts payable after assessing the impact of Change in Law</u>. Moreover, the issue of entitlement to carrying cost in such circumstances has been decided by the Commission in its Order in Case No. 38 of 2016 as follows:

> *"21.3. Referring to the Commission's earlier observation, APML has now furnished some material in support of its claim of the interest cost that it has actually incurred since the Change in Law events became applicable and pending their adjudication by the Commission. However, neither Article13.4 of the*

PPA dated 8.9.2008 nor Article 10.5 of the other three PPAs, which govern the tariff adjustment payments on account of Change in Law, provide for such interest cost, nor do any other provisions. In the absence of any such provision in the PPAs, the Commission is of the view that APML is not entitled to interest. The Commission concurs in this regard with the similar ruling of the CERC in its Order dated 6.2.2017 in Petition No. 156/MP/2014, and with its elaboration of this decision and its discussion on the case law.

21.4. However, any delay by MSEDCL in the payment of the compensation on account of the events accepted as Change in Law by the Commission after Supplementary Bills are raised by APML would attract a Late Payment Surcharge, as expressly provided in the relevant provisions of the PPAs."

67. Hence, <u>the Commission has not allowed carrying cost on the amounts payable by MSEDCL</u>, which shall be crystallized pursuant to this Order, for the past period. This is also consistent with the approach adopted by the Commission in the more recent Order in a similar remanded matter in Case Nos. 189 of 2013 and 140 of 2014."

(emphasis supplied)

72. The respondent MSEDCL contests the appeal challenging denial of carrying cost placing reliance, *inter alia*, on *Uttar Haryana v. Adani Power* (2019) 5 SCC 325 holding that the claim of carrying cost is based on restitution principles and, therefore, such claim is to be restricted to the lower of (i) Interest on Working Capital (IoWC) as provided in the MYT Regulations, (ii) Actual rate of interest borne by the generator on funds raised, (iii) Rate as provided in PPA, (iv) Base rate / MCLR rate applicable from time to time. It refers in this context to decision of Central Electricity Regulatory Commission (CERC) in *Sasan Power Limited v. MP Power Management Company Limited*

(Petition no. 124/MP/2019) by order dated 21.01.2020 following the above method.

73. It is the plea of MSEDCL that carrying cost should be payable at minimum rates, based on reasonable interest rate, because consumers' interest is to be protected and there can be no burden created due to inefficiency of the generator. Reliance is also placed on the following observations of Supreme Court in a very recent decision rendered on 31.08.2020 in *Jaipur Vidyut Vitaran Nigam Limited v. Adani Power Rajasthan Limited* (Civil appeal nos. 8625-6 of 2019) reported as 2020 SCC OnLine SC 697, observing thus:

> "***61.*** *The purpose of change in law is to restore through monthly tariff payment to the extent contemplated that the affected party is placed in the same economic position as if such a change in law has not occurred. As monthly tariff was worked out on domestic law, the requirement is to compensate on that basis due to change in law. The same is based on the principle of restitution. In Uttar Haryana Bijli Vitran Nigam Limited (UHBVNL) (2019) 5 SCC 325, it was laid down by this Court thus:*
>
> > *"**10.** Article 13.2 is an in-built restitutionary principle which compensates the party affected by such change in law and which must restore, through monthly tariff payments, the affected party to the same economic position as if such change in law has not occurred. This would mean that by this clause a fiction is created, and the party has to be put in the same economic position as if such change in law has not occurred i.e. the party must be given the benefit of restitution as understood in civil law. Article 13.2, however, goes on to divide such restitution into two separate periods. The first period is the "construction period" in which increase/decrease of capital cost of the project in the tariff is to be governed by a certain formula. However, the seller has to provide to the procurer documentary proof of such*

increase/decrease in capital cost for establishing the impact of such change in law and in the case of dispute as to the same, a dispute resolution mechanism as per Article 17 of the PPA is to be resorted to. It is also made clear that compensation is only payable to either party only with effect from the date on which the total increase/decrease exceeds the amount stated therein."

(emphasis supplied)

***62.** It was also held that carrying cost is payable from the date the change in law has taken place, and carrying cost is passed on the restitution principle. Article 10.2.1 of the PPA in question is similar to Article 13.2 considered in Energy Watchdog. The carrying cost is nothing but a compensation towards the time value of month/deferred payment. Article 8.3.5 provides for methodology in case of delayed payment.*

***72.** Liability of the Late Payment Surcharge which has been saddled upon the appellants is at the rate of 2% in excess of applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with monthly rest) for each day of the delay. Therefore, there shall be huge liability of payment of Late Payment Surcharge upon the appellants-Rajasthan Discoms.*

***73.** With regard to the question of interest/late payment surcharge, we notice that the plea of change in law was initially raised by APRL in the year 2013. A case was also filed by APRL in the year 2013 itself raising its claim on such basis. However, the appellants-Rajasthan Discoms did not allow the claim regarding change in law, because of which APRL was deprived of raising the bills with effect from the date of change in law in the year 2013. We are, thus, of the opinion that considering the totality of the facts of this case and in order to do complete justice and to reduce the liability of the appellants-Rajasthan Discoms, payment of 2 per cent in excess of the applicable SBAR per annum with monthly rest would be on higher side. In our opinion, it would be appropriate to direct the appellants-Rajasthan Discoms to pay interest/late payment surcharge as per applicable SBAR for the relevant years, which should not exceed 9 per cent*

per annum. It is also provided that instead of monthly rest, the interest would be compounded per annum.

***74.** We accordingly direct that the rate of interest/late payment surcharge would be at SBAR, not exceeding 9 per cent per annum, to be compounded annually, and the 2 per cent above the SBAR (as provided in Article 8.3.5 of PPA) would not be charged in the present case.*"

(emphasis supplied)

74. The respondent, thus, pleads that the carrying cost should be restricted in terms of the principles settled by Supreme Court in above quoted ruling.

75. We agree with the appellant that the impugned decision of MERC holding that the appellant is not entitled to carrying cost for the approved change in law events is unjust and wholly erroneous. The entitlement to carrying cost emanates from the principle of restitution closely connected to the Change of law clause in PPA. The ruling of Supreme Court in *Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power Ltd.* (supra) as quoted earlier and reiterated in *Jaipur Vidyut Vitaran Nigam Limited* (supra) nails the argument of the contesting respondent.

76. The impugned decision falls foul of settled legal position on carrying cost. The same is, thus, set aside and the matter in this regard remanded to the MERC with direction that the benefit of carrying cost on account of impact of change in law resulting in additional burden of procuring coal from alternative sources be also given pass through.

DIRECTIONS

77. In view of the foregoing conclusions, we set aside the impugned

order passed on 03.04.2018 by the Maharashtra Electricity Regulatory Commission in case no. 154 of 2013 and case no. 147 of 2014 to the extent thereby the above-mentioned five issues were determined and direct that:

(i.) the matter relating to issues of *SHR, GCV* and of *compensation for change in law beyond 31.03.2017* be considered afresh in light of judgment dated 14.09.2020 by this tribunal in Appeal no. 182 of 2019 *Adani Power Maharashtra Limited (APML) v. Maharashtra State Electricity Distribution Company Limited & ors.* as per decisions summarized in para 35 above; and

(ii.) the full impact of additional cost actually incurred in procurement of coal from alternative sources to the extent of shortfall in supply of linkage coal and it being utilized on monthly basis for the period in question, and the consequent carrying cost, be given pass through such that the appellant is fully compensated and put in the same economic position as it would have been but for change of law, as concluded in paras 70 and 76 above.

78. The appeal is allowed in above terms.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING ON THIS 13th DAY OF NOVEMBER, 2020.

(Justice R.K. Gauba)
Judicial Member

(Ravindra Kumar Verma)
Technical Member

vt