APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 283 of 2019 &
IA NOS. 2188 & 1229 OF 2019

Dated : 13th October, 2020

PRESENT: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

IN THE MATTER OF :

DNH Power Distribution Company Ltd.
(Previously Electricity Department,
Union Territory of Dadra and Nagar Haveli)
Vidyut Bhavan, Opp. Secretariat,
Silvassa – 396230, Dadra & Nagar Haveli .... **APPELLANT**

Versus

1. **Central Electricity Regulatory Commission**,
   Through its Secretary
   3rd & 4th Floor, Chanderlok Building,
   36, Janpath, New Delhi – 110001.

2. **GMR Warora Energy Limited,**
   Through its CMD
   (formerly EMCO Energy Limited)
   701/704, 7th Floor, Naman Centre,
   A-Wing, Bandra-Kurla Complex, Bandra
   Mumbai – 400 051.

3. **Maharashtra State Electricity Distribution Co. Ltd.**
Through its CMD
1st Floor, Prakashgadh, Plot No. G-9
Anand Kanekar Marg, Bandra (East),
Mumbai – 400 051.

4. **PRAYAS Energy Group**
Through its Research Associates
Unit-III A & B, Devgiri,
Joshi Railway Museum Lane,
Kothrud Industrial Area, Pune – 411038. .... **RESPONDENTS**

Counsel for the Appellant(s) : Mr. M. G. Ramachandran, Sr. Adv.
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Ashwin Ramanathan
Mr. Utkarsh Singh

Counsel for the Respondent(s) : Mr. Sajan Poovayya, Sr. Adv.
Mr. Amit Kapur
Mr. Vishrov Mukerjee
Mr. Yashaswi Kant
Mr. Pratyush Singh
Ms. Ameya Vikram Mishra
Ms. Catherine Ranji Ayallore
Mr. Girik Bhalla
Ms. Raveena Dhamija **for R-2**

Mr. Udit Gupta
Mr. Anup Jain
Ms. S. Rama **for R-3**

J U D G M E N T

PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON

1. This Appeal is directed against the Order dated 16.05.2019 passed by the Central Electricity Regulatory Commission (hereinafter referred to

as **“Central Commission/CERC”**) in Petition No. 8/MP/2014 and Petition No. 284/MP/2018.

2. **The facts that led to filing of this Appeal, in brief, are as under:**

i) The Appellant – DNH Power Distribution Company Ltd. (in short **“DNH”**) is a company incorporated under the provisions of the Companies Act, 1956 having its registered office at Silvassa in the Union Territory of Dadra and Nagar Haveli. The Appellant is the successor in interest of the Electricity Department of Union Territory of Dadra and Nagar Haveli in regard to the distribution and retail supply activities for the Union Territory of Dadra and Nagar Haveli.

ii) Respondent No. 2 – GWEL is a generating company having established a 600 MW generating station in the State of Maharashtra comprising of two units of 300 MW each.

iii) In March, 2012, the Appellant, initiated a competitive bidding process through issuance of a Request for Proposal (in short **“RFP”**) document dated March, 2012 for procurement of power on Long Term Basis under Case-I bidding procedure for meeting its base load power requirement. The cut-off date was 01.06.2012.

iv) On 07.06.2012, the 2nd Respondent submitted its bid. The Bid Deadline date was 08.06.2012. Thereafter, 2nd Respondent emerged as one of the successful bidders for supplying Aggregated Contracted Capacity of 200 MW to the Appellant with a levelised tariff of Rs.4.618 per Unit.

v) On 14.08.2012 the Appellant issued the Letter of Intent (in short **"LoI"**) for procurement of 200 MW of power.

vi) On 26.09.2012 the Appellant filed Petition No. 87/2012 before the Joint Electricity Regulatory Commission (in short **"Joint Commission"**) for approval of the Power Purchase Agreement (in short **"PPA"**) and adoption of tariff. In the said proceedings, the 2nd Respondent also filed an application and joined as a co-petitioner and the relief was sought jointly by the parties.

vii) By order dated 19.02.2013, the Joint Commission approved the purchase of power by the Appellant pursuant to the competitive bidding process.

viii) Pursuant to the above, the Appellant and the 2nd Respondent executed the PPA dated 21.03.2013 for procurement of electricity.

ix) On 01.04.2013, supply of power started from the 2nd Respondent's plant to the Appellant.

x) On 07.08.2013, Fuel Supply Agreement (in short **"FSA"**) for Unit No.2 of the 2nd Respondent was signed by 2nd Respondent with South Eastern Coalfields Limited (in short **"SECL"**). On 01.09.2013, Unit No.2 was commissioned.

xi) 17.03.2014 was the scheduled date of delivery to the 3rd Respondent herein (in short **"MSEDCL"**) for supply of power from 2nd Respondent.

xii) In 2014, 2nd Respondent filed Petition No. 8/MP/2014 before the Central Commission claiming certain claims as Change in Law. The Central Commission decided the Petition vide Order dated 01.02.2017.

xiii) In 2017, both the Appellant and the 2nd Respondent challenged the above Order dated 01.02.2017 by filing Appeal No. 290 of 2017 and Appeal No. 111 of 2017 before this Tribunal respectively. By Judgment dated 14.08.2018, the Tribunal dismissed Appeal No. 290 of 2017 filed by the Appellant, and partly allowed Appeal No. 111 of 2017 remanding the matter to the Central Commission on certain issues.

xiv) On 29.08.2018, the 2nd Respondent filed Petition No. 284/MP/2018 pursuant to the above said remand order of this Tribunal dated 14.08.2018.

xv) On 19.09.2018, the Appellant filed an Appeal against the Judgment dated 14.08.2018 before the Hon'ble Supreme Court being Civil Appeal No. 11910/2018. The Civil Appeal has been admitted on 29.01.2019 and is currently pending adjudication.

xvi) In 2018, the Central Commission took up the matter in remand in Petition No. 8/MP/2014 as well as the Petition No. 284/MP/2018 filed separately by the 2nd Respondent.

xvii) The Central Commission by Order dated 16.05.2019 allowed all the claims of the 2nd Respondent. Aggrieved by this Order of the Central Commission, the Appellant is filing the present Appeal.

xviii) Appellant contends that the Central Commission has erred in going beyond the scope of the ***Remand Judgment*** of this Tribunal and the issue is shortage of coal vis-à-vis the National Coal Distribution Policy (in short **"NCDP"**), which was limited to 31.03.2017. The Central Commission erred by going into the issue of coal allocated under the

Scheme for Harnessing and Allocating Koyala (Coal) transparently in India (in short **"SHAKTI Policy"**) and alleged shortage qua the same when the same was neither pleaded nor considered by this Tribunal in the ***Remand Judgment*** dated 14.08.2018, which is beyond the scope of the remand order dated 14.08.2018.

xix) The Central Commission, basing its decision on the broad principles laid down in the ***Energy Watchdog v. CERC***, *[(2017) 14 SCC 80]* Judgment and the Revised National Tariff Policy, has held that the 2nd Respondent is entitled to relief without going into the specific facts which clearly establish that in the case of the 2nd Respondent, there was no shortage of coal of which it was aware of on the cut-off date.

xx) Appellant further contends that the Central Commission proceeded on a general basis and did not render any finding on the following specifics:

> **(a)** In so far as the Appellant was concerned, there is no impact of the NCDP as the FSAs by the 2nd Respondent at the time of the bid itself was on the same lines as is prescribed in the NCDP. The premise and basis of the bid submitted by the 2nd Respondent itself

was only based on the availability of the coal at 65% and above and not to the full extent. Therefore, there is no impact on account of the NCDP for which compensation can be claimed on account of change in law.

(b) At the time of bidding by 2nd Respondent for supply to the Appellant, the position that there would be shortfall in supply of coal by SECL, which shortfall would have to be met by the 2nd Respondent at its cost from alternate sources, was well known to the 2nd Respondent.

(c) The Letter of Assurance (in short **"LOA"**) issued by SECL in June, 2010 to the 2nd Respondent for the quantum of 1300300 tonnes per annum, which translated into FSA for supply to the Appellant, had the specific clause that the parameter of imported coal shall be specified by CIL/assurer (SECL).

xxi) Appellant also contends that the Central Commission has erred in holding that the FSA only provided for the minimum quantity in relation to the penalty to be applied and therefore, cannot be treated as the assurance on the quantum to be supplied. The Central Commission has

failed to appreciate that the NCDP also only provides for the minimum quantum to be supplied and does not preclude higher supplies. On the same pedestal is the quantum provided for in the FSA and therefore, the comparison between the two has to be on the same basis.

xxii) According to Appellant, the only reasoning given by the Central Commission is that the Appellant has relied upon the penalty provision in the FSA below which level the penalty gets imposed which according to the Central Commission is not the assured quantity of coal under the FSA. This is misconceived. The Central Commission has failed to appreciate that even assuming the best case of the 2nd Respondent, the NCDP has only provided for shortfall up to 75% and not below that. Any reduction of quantum below 75% is not by virtue of the NCDP or SHAKTI policy. Therefore, there is no question of any change in law below the minimum quantum provided in the NCDP.

xxiii) Appellant further contends that the Central Commission has wrongly held that SHAKTI Scheme is a continuation of the NCDP 2013, and that the 2nd Respondent ought to be compensated for any change in coal supply on account of any change post 31.03.2017. Neither did the Judgment of the Appellate Tribunal dated 14.08.2018, nor does the

Judgment of the Hon'ble Supreme Court in the ***Energy Watchdog***'s case comment over any other event other than NCDP 2013 to be Change in Law.

xxiv) So far as MoEFCC Circular, whether change in law or not, the remand proceedings were not for any in-principle decision to be taken, but to provide for the change in law compensation, if any. If the 2nd Respondent does not provide any materials to establish the change in law, there is no purpose in the present proceedings on this issue.

xxv) Appellant further contends that the Central Commission has erred in granting carrying cost to the 2nd Respondent since the Central Commission has failed to appreciate that when there is delay in proving the details of the Change in Law and justifying the grant of change in law, carrying cost cannot be granted for the period prior to such justifications and details given by the 2nd Respondent.

xxvi) Being aggrieved by the impugned Order dated 16.05.2019 passed by the Central Commission in Petition Nos. 8/MP/148 & 284/M)/2018, the Appellant has filed this appeal seeking the relief of setting aside the impugned order.

3. *Per contra,* the 2nd Respondent filed reply, in brief, as under:

a) The Impugned Order is within the scope of remand:

i) According to 2nd Respondent – GWEL, the Impugned Order is within the scope of remand. This Tribunal had in terms of the Judgment dated 14.08.2018 passed in Appeal 111 of 2017 (in short "***Remand Judgment***") held the following to be change in law events and had accordingly remanded the same to CERC for determination of compensation due to GWEL: (a) Shortfall in linkage coal; (b) Change in coal quality pursuant to amendment of the Environment (Protection) Rules, 1986; (c) Increase in Busy Season Surcharge and Development surcharge on transportation of coal by Indian Railways; and (d) Carrying cost on allowed change in law claims.

ii) 2nd Respondent contends that the issue of continuing short supply of coal with reference to the New Coal Distribution Policy, 2007 including in terms of the SHAKTI Policy was squarely covered under the scope of remand since SHAKTI Policy acknowledges that short supply of coal (with reference to NCDP 2007) will continue.

iii) 2nd Respondent further contends that the CERC rightly held that the

SHAKTI Policy is a continuing cause of action and allowed relief to GWEL beyond 31.03.2017. This Tribunal has also allowed compensation for shortfall of coal under SHAKTI Scheme in Judgment dated 14.09.2019 in Appeal No. 202 of 2018 titled ***Jaipur Vidyut Vitran Nigam Ltd. & Ors. vs. RERC & Ors.*** (in short **"Adani 202** Judgment"). Therefore, the objection raised by the Appellant is no longer res integra. Further, the remand was for computation of impact of shortfall of coal without any reference to 31.03.2017 as a cut-off.

b) Shortfall in linkage coal and deviation in NCDP

iv) 2nd Respondent – GWEL also contends that GWEL had been granted coal linkage from SECL in terms (a) LOA dated 19.10.2006 for 1.327 MTPA of Grade F coal from the Korba / Raigarh coalfield of SECL; and (b) LOA dated 03.06.2010 for 1.3 MTPA of Grade F coal from the Korba / Raigarh coalfield of SECL. Since GWEL's coal requirement was assessed prior to NCDP 2007 [18.10.2007], it is covered under Para 2.2 of the NCDP and there was assurance of 100% coal linkage.

v) According to 2nd Respondent, the FSAs against the aforesaid LOAs were executed on 22.02.2013 (1.327 MTPA) and 07.08.2013 (1.3 MTPA),

which are after the cut-off date in the DNH PPA (01.06.2012). However, in terms of the *Adani 202* Judgment, the impact of change in law must 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 shortfall in supply of linkage coal will have to be reckoned as against the assurance for supply of coal required for actual generation from the Project.

vi) 2nd Respondent further contends that the Impugned Order is premised on the fact that prior to amendment of the NCDP 2007 by NCDP 2013, GWEL was assured supply of coal up to 100% of the normative requirement. Accordingly, CERC set out the formula for determination of compensation on account of shortfall in linkage coal based on linkage coal supplied against total coal assurance/requirement of the project.

vii) According to 2nd Respondent – GWEL, in Appeal No. 111 of 2017, the objections taken by the Appellant-DNH were –

(a) The bidding documents did not specify that the coal was to be procured from a particular source or that the bid is premised on linkage coal. When the bidding documents did not specify that coal has to be procured from a particular source, there cannot be any

claim on account of change in law or otherwise on the ground that an identified source of coal is insufficient and coal is to be procured from other sources.

(b) There is hardly any difference in quantum of coal under the FSAs signed by GWEL and the modifications to the FSAs proposed as per the amendment to NCDP. However, as recorded in the ***Remand Judgment***, DNH admitted that shortfall of coal was change in law. Having taken this stand (as recorded in the ***Remand Judgment***), DNH is precluded from impugning the Impugned Order on the ground that in GWEL's case shortfall of linkage coal is not change in law.

viii) 2nd Respondent also contends that the Appellant had in Petition No. 284/MP/2018 raised *inter alia* the issues that (a) at the time of bidding, GWEL was aware that there would be shortfall in supply of coal by SECL which would have to be met by GWEL; (b) there is no impact of the change in NCDP as the FSAs executed by GWEL were on the same lines as prescribed under the NCDP; and (c) the LOA issued by SECL had a specific clause regarding imported coal. Thus, the legal position as on that date was that SECL would not be able to provide the entire assured

quantum from the assured source, but from imported coal at a higher cost. According to 2nd Respondent, since GWEL is covered under Para 2.2 of NCDP 2007, it is assured domestic coal corresponding to 100% of the quantity as per its normative requirement. Therefore, the stipulation of imported coal will have no bearing on SECL's obligation to supply 100% linkage coal.

ix) According to 2nd Respondent, the Appellant's reliance on the penalty provisions in the PPA which provide that shortfall in the level of delivery of the coal by Coal India Limited (in short **"CIL"**) up to 65% of the Annual Contracted Quantity (in short **"ACQ"**) as applicable for domestic coal shall not be liable for penalty till 2014-15 which will get changed to 67% of ACQ in 2015-16 and 75% of ACQ in 2016-17, is misplaced. The CERC has rightly held that the impact of change in law for shortage in coal supply has to be computed with respect to shortage in actual linkage coal supply. The aforesaid is also in conformity with the ***Energy Watchdog*** Judgment. The relevant portion of the Energy Watchdog Judgment is at Para 58.

x) 2nd Respondent further contends that the Appellant's reliance on presentations made by GWEL is erroneous. The presentation did not

state that GWEL has factored in shortfall in coal supply and submitted its bid accordingly. The presentation merely referred to the overall scenario of the power sector. The DNH Bid was submitted based on the coal assurance given under LOA as on Cut-Off date, otherwise GWEL could not have been emerged as L-1 bidder. Moreover, at no point of time, GWEL had given up its claim for claiming shortfall in coal linkage.

xi) 2nd Respondent also contends that the Appellant's reliance on letter dated 27.07.2012 is misplaced. The rights and obligations of the parties are crystallised in the DNH PPA dated 21.03.2013. This supersedes all previous communication/presentations etc. In terms of the DNH PPA, an impact of Change in Law has to be seen vis-à-vis the Cut-Off Date. As on the Cut-Off Date, GWEL was assured 100% quantum of coal required by the project. Therefore, reliance by the Appellant-DNH on the letter dated 26.07.2012 and on presentations etc. is impermissible.

xii) According to 2nd Respondent, the Appellant-DNH is attempting to mislead this Tribunal by relying on the tariff quoted by GWEL in MSEDCL PPA since the same has no bearing on the claims pertaining to DNH PPA for the reasons that - (a) Tariff discovered in MSEDCL PPA was through a

separate competitive bidding process, and (b) the MSEDCL and DNH bid process were conducted in 2009 and 2012 respectively.

xiii) According to 2nd Respondent, the Appellant-DNH had premised its bid on the LOAs and NCDP 2007 which assured 100% quantum of coal. Accordingly, GWEL had factored the same in its bid and not short supply of coal.

xiv) According to 2nd Respondent – GWEL, the event of shortfall of linkage coal and its continuity for a foreseen period was first recognised in 2013 by *inter alia* - (a) Statutory advice issued by the Central Commission on 20.05.2013 to the Ministry of Power; (b) Resolution dated 21.06.2013 by the Cabinet Committee on Economic Affairs (in short **"CCEA"**) whereby the Committee approved a mechanism for coal supply to power producers; (c) Office memorandum dated 26.07.2013 issued by the Ministry of Coal, Government of India; and (d) Letter dated 31.07.2013 issued by the Ministry of Power, Government of India.

xv) 2nd Respondent – GWEL also contends that the ***Energy Watchdog*** Judgment has held that to the extent that the supply from Coal India and other Indian sources is cut down, the same qualifies as a change in law

event for which the affected party is entitled to compensation. The change in law event being the shortfall in linkage coal occurred in 2013 and is to be reckoned from the date from which supply under the domestic linkage was reduced. As on the Cut-Off Date, there was no “Law” which stipulated that GWEL will not be supplied 100% of coal requirement. Thus, GWEL would have not considered a prohibitive imported/ alternate coal cost in its bid.

xvi) In terms of the LOA, imported coal comes into picture only when there is incremental demand and the incremental supply available with CIL is not sufficient. This does not alter the obligation to supply 100% of GWEL’s normative requirement. Thus, GWEL was always assured of the same.

xvii) According to 2nd Respondent - GWEL the issue of Presidential Directive and its impact has not been pleaded/argued by the Appellant - DNH prior to the present Appeal. Moreover, this is a factual argument and DNH having not raised it at the first instance, is precluded from taking it now. Further, DNH has during the proceedings before this Tribunal in Appeal No. 111 of 2017 itself admitted that the impact has to be seen pre and post amendment in NCDP and not the Presidential Directive.

Further, the said Presidential Directive was issued in terms of Article 37 of the Articles of Association of CIL. Thus, the said directive was issued only in relation to conduct of business by CIL and for amendment/revision of model FSAs and accordingly does not qualify as Law. In this regard, the Press Information Bureau Notification dated 07.05.2012 records the background in which the Presidential Directive came to be issued.

xviii) According to 2nd Respondent - GWEL, the shortfall of linkage coal is to be seen with respect to the assurance given to GWEL under NCDP 2007 that it will be supplied 100% of its requirement since its coal requirement had been ascertained prior to NCDP 2007. In the light thereof, COD of units will have no correlation to change in law claims under NCDP.

xiv) According to 2nd Respondent, neither the ***Energy Watchdog*** Judgment, nor the ***Remand Judgment*** limit or restrict compensation to 31.03.2017. Further, they contend that it is clear and unambiguous that shortfall of linkage coal is a change in law event and the affected party is entitled to compensation for such shortfall during the Operating Period.

xx) 2nd Respondent – GWEL further contends that Part (A) of SHAKTI

policy “under the old regime of LoA-FSA” as per NCDP, 2007 provides in clause (iii) that as per the decision of CCEA dated 21.06.2013 the capacities aggregating about 68,000 MW would continue to procure coal at 75% of Annual Contracted Quantity even beyond 31.03.2017. Thus, SHAKTI Policy notes that the shortfall in NCDP 2013 will continue beyond 31.03.2017. Therefore, GWEL was entitled to be compensated for any shortfall in assured quantum of coal beyond 31.03.2017. Further, as is evident from the ***Adani 202*** Judgment, the change in law in relation of NCDP is not limited to 31.03.2017. Moreover, GWEL had in any case, pleaded continuing shortfall as a separate change in law event.

xxi) The Appellant’s contentions regarding SHAKTI not being a continuation of the NCDP 2013 and not constituting a change in law event are misplaced. Furthermore, this Tribunal has held that in terms of the ***Energy Watchdog*** Judgment relief ought not to be limited till the grant of linkage coal under SHAKTI Policy.

(c) Change in coal quality pursuant to amendment of the Environment (Protection) Rules, 1986:

xxii) According to 2nd Respondent, this Tribunal had in terms of the ***Remand Judgment*** held that the MoEF notification dated 11.07.2012 (which was subsequently subsumed by the Environment (Protection) Amendment Rules, 1986) prescribing the ash content of coal to be used, was a change in law event. This Tribunal has held the notification dated 11.07.2012 to be a change in law event. In terms of the above, the CERC examined the aforesaid issue taking into account the premise of the bid and the impact of the Notification dated 11.07.2012 on GWEL. However, in the absence of details of expenditure, the CERC granted liberty to GWEL to approach the Commission with the relevant particulars. Accordingly, no compensation has been granted to GWEL on this account.

(d) Carrying Cost

xxiii) According to 2nd Respondent, the issue of carrying cost has been settled by the Hon'ble Supreme Court vide its judgment (Para 10 & 13) in ***Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power Ltd. & Others*** reported as (2019) 5 SCC 325 (in short **"Judgment dated 25.02.2019**"), wherein carrying cost has been held to be a restitution element which is part of "restoration to the same economic position". In terms of the aforesaid judgment, the Hon'ble Supreme Court has held that the

compensation for change in law is to be effected from the date of the change in law event. Thus, CERC has rightly relied on the aforesaid judgment to approve carrying cost calculated by GWEL.

xxiv) With the above averments, 2nd Respondent – GWEL submitted that the present Appeal ought to be dismissed.

4. *Per contra,* the Appellant filed rejoinder to the reply of 2nd Respondent, in brief, as under:

i) The SHAKTI Scheme was not even a subject matter of consideration by the Tribunal. It is wrong that the SHAKTI Policy is a continuation of the NCDP and therefore, ought to be considered as Change in Law.

ii) Appellant contends that it is wrong that the 2nd Respondent is entitled to Change in Law benefit considering assurance of 100% coal linkage as on the bid deadline. As on the cut-off date, in terms of the bid documents, the 2nd Respondent was not entitled to 100% coal supply and in fact, the bid of the 2nd Respondent was premised on such short supply of coal.

iii) According to Appellant, the reliance of the 2nd Respondent on the decision in the case of other projects on the question of NCDP, including the decision in the case of Appeal No. 202 of 2018, is misconceived. All those generators had bid much prior to the year 2010 wherein the short supply of coal and limited availability was not envisaged. In fact, the tariff quoted by the 2nd Respondent for supply to the Appellant was much higher than the tariff to MSEDCL, which was precisely because of short supply in coal then envisaged.

iv) Appellant contends that in all of the other cases considered by the Tribunal and the Hon'ble Supreme Court, the bidding was much prior to the year 2010, and therefore, the decisions taken from 2010 to 2012 did not in any manner affect the claim for change in law. However, in the present case, since the cut-off date itself was only in June 2012, the position as on that date was that coal shortages were envisaged, and that the actual supply would only be up to 80% in view of the decisions and directives issued after 2010. There is a clear difference between the two LoAs, while the first one did not provide for supply of alternate coal, in the case of the second LoA dated 03/06/2010, there is a specific provision that SECL shall supply alternate/imported coal at higher cost. While, the LoA

dated 03.08.2010 specifically provides that the supply of coal to the extent of shortage shall be through imported/alternate coal, it is evident that the 2nd Respondent exactly knew the quantum of shortage and had quoted its bid accordingly.

v) The specific issue raised by the Appellant in the present case is that there is no impact of NCDP, 2013 in the case of the 2nd Respondent as the bid itself was based on shortfall in coal supply. However, this aspect though specifically raised, has not been dealt by the Central Commission in the impugned order. The specific issue to be considered by the Central Commission was the impact of NCDP, 2013 in the facts of case. It is also wrong that the position at the stage of bidding cannot be raised by the Appellant as is sought to be raised by the 2nd Respondent. The issues raised are questions of law in the factual admission by the 2nd Respondent in its own presentation given. The test to be applied is that if the NCDP, 2013 had not been notified, whether the Respondent No.2 would have been entitled to 100% coal supply or not. The answer is clearly no, which is evident from the position existing prior to the cut-off date, the basis of the bid itself being based on shortage of coal, the FSA also having lower quantity of coal supply commitment.

vi) According to Appellant it is wrong that merely because the 2nd Respondent stated that its fuel supply was from CIL in the bid, it can claim shortfall in coal as change in law. The responsibility of coal was that of the 2nd Respondent being a case-1 bid and its own statements in the bid cannot be the basis for change in law.

vii) Appellant further contends that it is also wrong that the presentation is to be completely ignored as is sought to be contended by the 2nd Respondent. The presentation is an admission of fact of the basis on which the bid was submitted. Further, it is also wrong that Presidential Directives does not have legal force.

viii) Appellant also contends that it is wrong that Carrying Cost has been correctly granted, particularly when there have been delays on the part of the 2nd Respondent. Even assuming that the 2nd Respondent - GWEL is entitled for compensation on this account, GWEL has however raised unilateral claims which are grossly inflated and have had several discrepancies. In this regard, while the Central Commission had passed the impugned order on 16.05.2019; on 30.05.2019 the 2nd Respondent raised bill for change in law, wherein the compensation for coal shortage was claimed for Rs. 78.15 Crores along with Carrying Cost of Rs. 42.58

Crores (Total Rs. 120.73 Crores), for the period April 2013 to March 2019. However, there are substantial discrepancies and defects in the claims made by the 2nd Respondent. The Appellant had vide communications dated 25.06.2019 and 01.08.2019 sought details and supporting documents from the 2nd Respondent on the claims made, which have not been satisfactorily explained.

ix) According to Appellant, in terms of the above, the difference in the amounts as per the impugned order allowed by the Central Commission as against the claims of the Respondent No. 2 is as under:

Period	**Amount Claimed**	**Amount allowable**	**Reason for Difference**
April -13 to July-13	12.32	0.00	No FSA
August-14 to March-15	11.73	0.00	No shortage of linkage coal as excess coal received on the normative parameters, Electricity Sold to others not eligible against linkage coal
April-15 to March-16	8.98	(2.73)	Recovery as alternative coal is cheaper say washed coal and as is where is coal due to lesser freight amount Electricity Sold to others not eligible against linkage coal
April-16 to March-17	0.56	0.18	Electricity Sold to others not eligible against linkage coal
April-17 to	15.26	1.07	Some alternative coal say washed

March-18			coal and as is where is coal due to lesser freight amount
April-18 to Mar-19	29.31	14.89	Higher average price assumed and methodology specified in the impugned order not followed.
	78.16	**13.41**	

x) They further contend that correspondingly, the 2nd Respondent has claimed an amount of Rs. 42.58 crore towards carrying cost, whereas the amount would only work out to Rs. 10.52 crore.

xi) According to Appellant, in terms of the direction of the Central Commission, the 2nd Respondent is "*entitled to recover the compensation on account of various changes in law* ***on quantum of coal as per actual*** *subject to ceiling* ***based on normative parameters corresponding to the scheduled generation for supply of electricity to the Procurers***." By letter dated 23.09.2019, the said details have been sought for, however, the 2nd Respondent has not provided the details of the computation in terms of the above.

xii) Appellant further contends that in terms of the direction of the Central Commission, the 2nd Respondent is required to provide the relevant documents duly supported by Auditor Certificate. Upon the aforesaid discrepancies pointed out by the Appellant, the 2nd Respondent

has not come forward to provide the methodology and details of the computation and also the average price considered for the computation adopted by the 2nd Respondent.

xiii) According to Appellant, in terms of the above, the amounts as per the order of the Central Commission would work out to Rs. 23.93 Crores. The said computation has been made by the Appellant, without prejudice to its rights on the challenge to the order of the Central Commission, and also considering the parameters directed by the Central Commission. The Central Commission has also directed the parties to reconcile the amounts in terms of the impugned order, which the 2nd Respondent has failed to provide details despite repeated requests by the Appellant.

xiv) With the above contentions, the Appellant submits that the impugned order of the Central Commission does not even consider the basic case of the Appellant and therefore, pray that the impugned order is erroneous and is liable to be set aside.

xv) Appellant has also filed detailed written submissions reiterating its stand as contended in the appeal memo and rejoinder. So also Respondent No.2-GWEL has filed detailed written submissions. We have gone through the same. Heard arguments also at length.

xvi) The point that arises for consideration is "***whether the impugned order warrants interference"?***

ANALYSIS & CONCLUSION:

5. Apparently, the impugned order is as a consequence of remand of the matter by this Tribunal by its Judgment dated 14.08.2018 in Appeal No. 111 of 2017. Appellant contends that the impugned order is beyond the scope of remand. However, Respondent No.2-GWEL reiterates its contention that the impugned order is very much within the scope of remand.

6. Admittedly, in terms of judgment of remand, there was a direction by this Tribunal to the CERC for determination of compensation for the following items:

(i) shortage in linkage coal;

(ii) change in the quality of coal on account of amendment to the Environment (Protection) Rules 1986;

(iii) Increase in Busy Season Surcharge and Development Surcharge on transportation of coal by Indian Railways; and

(iv) Carrying cost on the amount of compensation allowed by way of change in law claims.

7. Now we have to see "***whether short supply of linkage coal with reference to the New Coal Distribution Policy of 2007 including in terms of SHAKTI Policy is covered under the scope of remand or not"?***

8. Admittedly, in the impugned order CERC opined that SHAKTI Policy is a continuation of cause of action and thereby allowed the relief to Respondent No.2-GWEL beyond 31.03.2017. Respondent No.2 places reliance on the judgment of this Tribunal dated 14.09.2019 in Appeal No. 202 of 2018 in the case of "***Jaipur Vidyut Vitran Nigam Limited and ors., vs. RERC & Ors.***" (**Adani 202 judgment**).

9. Coming to the issue of shortfall in linkage coal and so called deviation in NCDP, the following facts are found from records. GWEL was granted coal linkage from SECL in terms of (a) LOA dated 19.10.2006 for 1.327 MPTA of F-Grade coal from the Korba/Raigarh coalfield of SECL (b) LOA dated 03.06.2010 for 1.3 MPTA F-Grade coal from the above said coalfields of SECL. Apparently, the requirement of coal for the power plant of GWEL came to be assed prior to NCDP 2007 (18.10.2007). It is clear form para 2.2 of the NCDP. In terms of this clause/para, there was 100% assurance of coal linkage. Two FSAs against the above said LOAs

were dated 22.02.2013 and 07.08.2013. Apparently, these FSAs were after the cut- off date so far as Appellant's PPA (01.06.2012) is concerned. This Tribunal in the case of Adani 202 judgment opined that impact of change in law must be computed based on the difference between 100% domestic coal supply as assured in terms of NCDP 2007 vis-à-vis actual domestic coal supply as long as shortage of domestic coal exists/continues. Therefore, it is clear that shortfall in supply of linkage coal has to be reckoned as against the assurance for supply of coal required for actual generation of the power from the project. In the impugned order, CERC rightly opined that prior to the amendment of NCDP 2007 by NCDP 2013, there was assurance of supply of linkage coal up to 100% of the normative requirement to Respondent No.2-GWEL. Therefore, in terms of NCDP 2007, there was assurance for allocation of coal to meet 100% of normative requirement of the plant. The amendment to NCDP 2007 was based on CCEA decision dated 21.06.2013. The relevant amendment reads as under:

> *"The New Coal Distribution Policy (NCDP) was issued vide Ministry's Office Memorandum No. 23011/4/2007-CPD dated 18th October 2007, laying down the guidelines for distribution and pricing of coal to various sectors. As per 2.2 of the said policy, Power Utilities including Independent Power Producers were to be supplied 100 percent of the quantity as per their normative requirement through Fuel Supply Agreement(s) (FSA) by Coal India Limited (CIL) at fixed prices to be declared / notified by CIL. As per para 5.2, in order to meet the*

domestic requirement, CIL was to import coal as required from time to time, if feasible and adjust the overall price accordingly.

2. Government has now approved a revised arrangement for supply of coal to the identified Thermal Power Stations (TPSs) of 78,000 MW capacities commissioned or likely to be commissioned during the period from 01.04.2009 to 31.03.2015. Taking into account the overall domestic availability and the likely actual requirements of the TPPS, it has been decided that FSAs will be signed for the domestic coal quantity of 65%, 65%, 67% and 75% of ACQ for the remaining four years of the 12th Plan for the power plants having normal coal linkages. To meet its balance FSA obligations towards the requirement of the said 78,000 MW TPPs, CIL may import coal and supply the same to the willing power plants on cost plus basis. Power plants may also directly import coal themselves, if they so opt, in which case, the FSA obligations on the part of CIL to the extent of import component would be deemed to have been discharged.

3. Para 2.2 and 5.2 of the New Coal Distribution Policy issued vide OM No. 23011/4/2007-CPD dated 18.10.2007 stand modified to the above extent."

10. In terms of amended NCDP 2013 and pursuant to the decision of CCEA, the Ministry of Power also addressed a letter to all the State Governments, ERC and SERCs on 31.07.2013 advising them to allow additional cost of coal as a pass through in terms of the decision taken by the CCEA. The relevant portions of the said letter is as under:

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

(i) …

(ii) …

(iii) higher cost of imported coal to be considered for pass through as per modalities suggested by CERC."
…

> *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 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.*
>
> *5. The ERCs are advised to consider the request of individual power producers in this regard as per due process on a case to case basis in public interest. The Appropriate Commissions are requested to take immediate steps for the implementation of the above decision of the Government"*

11. After reading the above paragraphs and FSAs executed in favour of GWEL, it is seen that LOA issued by SECL had a specific clause regarding imported coal. Thus, it was very clear that as on the date of FSAs, SECL would not be able to provide entire assured quantum from the assured source of coal, but will be able to provide from imported coal at a higher cost. However, in the light of the case of Respondent No.2-GWEL being covered under para 2.2 of NCDP 2007, the assurance was in respect of domestic coal corresponding to 100% of the quantity as per the normative requirement. Therefore, the contention of the Appellant that there was stipulation of imported coal will have no impact whatsoever on the obligation of SECL to supply 100% linkage coal.

12. Appellant contends that the penalty provisions in the PPA provide that in case of shortfall in the level of delivery of the coal by CIL up to 65% of the Annual Contracted Quantity (ACQ) as applicable, shall not be liable for penalty till 2014-15, which again gets enhanced to 67 % of ACQ in 2015-2016 and 75% of ACQ in 2016-17. Therefore, according to the Appellant, any shortfall in supply below the above said percentage of coal would become altogether a separate contractual dispute and not as a result of change in law. This stand of the Appellant is categorically opposed by the Respondent. In the impugned order, the CERC has rightly rejected this stand of the Appellant as such understanding of the penalty provisions *vis-a-vis* shortfall in the level of delivery of coal by the Appellant is misplaced. The letter of the MoP, referred to above, has two parts. First part refers to relief for higher cost of imported/E auction coal, which has to be considered on case to case basis to the extent of shortfall so far as quantity of coal indicated in the LOA/FSA. The second portion of the letter deals with minimum supply obligation of coal by Coal India Limited for the remaining four years of the 12th plan period. It is relevant to point out that this second portion of the letter, in no way, restricts the relief of higher price coal to the difference between the minimum supply obligation on the quantity indicated in the LOA/FSA. CERC has rightly opined that

the change in law event compensation so far as shortage in coal supply has to be computed with respect to shortage in actual linkage coal supply. This opinion is in consonance with the observations of the Apex Court in ***Energy Watch Dog***'s judgment at para 58, which reads as under:

> *"58. However, Shri Ramachandran, learned senior counsel for the appellants, argued that the policy dated 18th October, 2007 was announced even before the effective date of the PPAs, and made it clear to all generators that coal may not be given to the extent of the entire quantity allocated. 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. Certain other minor contentions that are raised on behalf of both sides are not being addressed by us for the reason that we find it unnecessary to go into the same. The Appellate Tribunal's judgment and the Commission's orders following the said judgment are set aside. 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."*

13. The Appellant relies upon the communication dated 29.03.2010 by CEA to CIL, Office Memorandum dated 14.06.2011 issued by Ministry of Coal recording the discussion of the Session to review the NCDP 2007, Communication dated 17.02.2012 from Ministry of Coal to CIL, Presidential Directive dated 04.04.2012 and Presentation made by GWEL to DNH in July 2012 to contend that there was indication to GWEL that

assurance of coal supply was reduced from 100%. The so called Presentation made by GWEL, as referred to by the Appellant, it is seen that it was in July 2012, which is much after the cut-off date under the PPA in question. In the said Presentation there is nothing to establish that GWEL has factored in shortfall in coal supply and accordingly had submitted its bid. The Presentation was referring to overall scenario of the power sector in general. The DNH bid was submitted only based on the coal assurance given under LOA as on cut-off date. If Appellant's case were to be accepted, the Respondent No.2 GWEL would not have emerged as L-1 Bidder. It is also noticed that all along GWEL was putting forth its claim for compensation in respect of shortfall in linkage coal and it had not given up its claim. It is well settled that the rights and obligations of the parties, which crystalised under PPA in question, between the Appellant and Respondent No.2 is dated 21.03.2013. One has to see the impact of change in law with reference to the cut-off date. The terms and conditions in the PPA supersedes/overrides all previous discussion/communication and Presentations. The Schedule 5 of the PPA evidences what is the primary source of coal i.e., domestic coal and the fuel source was indicated as CIL linkage. Therefore, the communication between the CEA, CIL and MoC is of no relevance, having any cascading

impact on the allocation of coal assured to GWEL in terms of LOA /FSA. Therefore, the contention of the Appellant that penalty provisions of FSA are to be considered for computing shortfall of coal deserves to be rejected. The Presidential Directive and the letter of Ministry of Coal, referred to above, clearly evidences that FSAs have to be signed for full quantum of coal assured under the LOA and trigger level for this incentive to be 80%. Therefore, the argument of the Appellant that there was curtailment of assured coal quantity is not sustainable. On the other hand, till 31.07.2013, there was no curtailment of assured coal quantity.

14. For the first time, on 31.07.2013, Government of India notified that actual supply of coal is to be reduced for the balance four years of the 12th Five Year Plan, as stated above. It is relevant to refer to amended Tariff Policy dated 28.01.2016, the relevant extract of the said policy is as below:

> *"However, some of the competitively bid projects as per the guidelines dated 19th January, 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."

15. The above said paragraph of the Tariff Policy of 2016 clearly indicates that while referring to the letter dated 31.07.2013 of Ministry of Power, there is no reference to limit the relief for shortfall in supply of domestic linkage coal to the minimum quantity of supply assured under NCDP 2013. This letter of MoP and Tariff Policy, both have statutory enforcement as subordinate legislation. Even in the case of ***Energy Watch Dog***, there is no restriction with reference to minimum supply quantity as specified in NCDP 2013. On the other hand, the compensation is to be granted to the extent of shortfall against the quantity specified in LOA/FSA. In other words, the shortfall has to be assessed against the 100 % quantity assured under NCDP 2007, which regime prevailed as on the cut-off date in question vis-à-vis actual supply, which is again clarified and crystal clear in the amendment Tariff Policy of 2016.

16. The contention of the Appellant is that Respondent No.2 is entitled to relief *qua* difference of quantum assured (80% as per Appellant's contention) and 65%, 67% and 75% assured supply as per MoP letter dated 31.07.2013. According to Respondent No.2-GWEL this contention is also completely misplaced. CERC has rejected this contention of the Appellant. It is pertinent to mention that in the judgment of ***Energy Watch Dog*** their Lordships have not placed any restriction on the entitlement of

shortfall *vis-a-vis* minimum assured supply quantity of 65% to 75%, as contended by the Appellant. Para 57 of the said Judgment supports this fact, which reads as under:

> *"Both the letter dated 31st July, 2013 and the revised tariff policy are statutory documents being issued under Section 3 of the Act and have the force of law. This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred. Further, for the operation period of the PPA, compensation for any increase/decrease in cost to the seller shall be determined and be effective from such date as decided by the Central Electricity Regulation Commission. This being the case, we are of the view that though change in Indonesian law would not qualify as a change in law under the guidelines read with the PPA, change in Indian law certainly would."*

17. This Tribunal in the judgment dated 21.12.2018 in the case of "***GMR Kamalanga and Anr. vs. CERC"*** (Appeal No. 193 of 2017) had occasion to consider relief for shortfall in supply of domestic coal. This Tribunal allowed the entire shortfall in terms of firm linkage as well as tapering linkage opining that compensation has to be granted to meet the expenditure involved for procuring alternative coal from alternate sources to mitigate the shortfall of coal from domestic sources. While opining so, this Tribunal did not impose any restriction in terms of ACQ percentage. The relevant para at 64 reads as under:

> "*64 In the light of the above foregoing reasons, shortfall of firm linkage of coal as well as tapering linkage of coal, GKEL is entitled to be compensated for meeting the expenditure involved in procuring coal from alternate sources to meet the shortfall of coal from domestic sources."*

18. Again, in the case of ***"Jaipur Vidyut Vitran Nigam Limited vs. RERC and Ors.***," (A.Nos. 202 of 2018 and 305 of 2018), this Tribunal opined as under:

> *"12.5 In the instant case, we have found in the previous paragraphs that Adani Rajasthan's bid was premised on domestic coal on the basis of the 100% domestic coal supply assurance contained in NCDP 2007. Since SHAKTI Policy and the FSA executed thereunder still do not meet the assurance of 100% supply of domestic coal to Adani Rajasthan, it would follow that Adani Rajasthan would need to be compensated for any shortfall in supply of domestic linkage coal even post grant of coal linkage under the SHAKTI Policy. Rajasthan Discoms have not disputed that the introduction of SHAKTI Policy constitutes a Change in Law under the PPA. Their contention is that any shortfall of coal under the SHAKTI FSA by the coal companies is a contractual matter to be sorted out between Adani Rajasthan and the coal companies. We are not persuaded by this argument for the reason that we have already held in GMR Kamalanga case that the contractual conditions or limitations were not present in NCDP 2007 at the time of bid submission by Adani Rajasthan. This contention of Rajasthan Discoms is also against the principle laid down in Energy Watchdog judgment. The SHAKTI Policy continues the earlier coal supply restriction to 75% of ACQ. If actual supply of domestic linkage coal under the SHAKTI FSA is higher, it goes without saying that the generator's relief or compensation under the Change in Law provisions would be limited to the actual shortfall in supply of domestic linkage coal. We also note that there is no rational basis to assume that the supply under the SHAKTI FSAs would be higher or better than that under the pre-SHAKTI FSAs.*
>
> *12.6 The Supreme Court in Energy Watchdog judgment has already concluded as follows:*
>
> *[quote omitted]*

> *Therefore, 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. 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."*

19. It is pertinent to mention that the finding of this Tribunal, as stated above, was upheld by the Hon'ble Apex Court in its judgment dated 31.08.2020 in the very same case of "***Jaipur Vidyut Vitran Nigam vs. Adani Power Rajasthan Limited & Anr."*** (Civil Appeal Nos. 8625-8626 of 2019). Relevant para is 48, which reads as under:

> *"48. Shri C. Aryama Sundaram argued that the FSA related approximately 61 per cent of the fuel requirement. Thus, the change in law claim may be confined to 35 to 40 per cent. The argument cannot be accepted as bidding was not based on dual fuel, but was evaluated on domestic coal. There was no such stipulation that evaluation of bidding was done on domestic basis; the tariff was to be worked out in the aforesaid ratio of 60:40 per cent of imported coal and domestic coal respectively. Apart from that, we find from the order of the APTEL, that change in law provision would be limited to a shortfall in the supply of domestic linkage coal. The finding recorded by the APTEL is extracted hereunder:*
>
> > *"12.5 In the instant case, we have found in the previous paragraphs that Adani Rajasthan's bid was premised on domestic coal on the basis of the 100% domestic coal supply assurance contained in NCDP 2007. Since SHAKTI Policy and the FSA executed thereunder still do not meet the assurance of 100% supply of domestic coal to Adani Rajasthan, it would follow that Adani Rajasthan would need to be compensated for any shortfall in supply of domestic linkage coal even post grant of coal linkage under the SHAKTI Policy. Rajasthan Discoms have not disputed that the introduction of SHAKTI Policy constitutes a Change in Law under the PPA. Their contention is that any shortfall of coal under the SHAKTI FSA by the coal companies is a contractual*

matter to be sorted out between Adani Rajasthan and the coal companies. We are not persuaded by this argument for the reason that we have already held in GMR Kamalanga case that the contractual conditions or limitations were not present in NCDP 2007 at the time of bid submission by Adani Rajasthan. This contention of Rajasthan Discoms is also against the principle laid down in Energy Watchdog judgment. The SHAKTI Policy continues the earlier coal supply restriction to 75% of ACQ. If actual supply of domestic linkage coal under the SHAKTI FSA is higher, it goes without saying that the generator's relief or compensation under the Change in Law provisions would be limited to the actual shortfall in supply of domestic linkage coal. We also note that there is no rational basis to assume that the supply under the SHAKTI FSAs would be higher or better than that under the pre SHAKTI FSAs.

12.6 The Supreme Court in Energy Watchdog judgment has already concluded as follows:

> *"57. …… This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sourcesis cut down, the PPA read with these documents provides in Clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred……" (emphasis supplied)*
>
> *49. It was clarified that APRL would be entitled to relief under the change in law provision to the extent of shortage in supply in domestic linkage coal. Thus, we find no merit in the submission raised. We find the findings of the APTEL to be reasonable, proper, and unexceptional."*

20. The presidential directive, referred to in the arguments of the Appellant, it is seen that the presidential directive was issued in terms of Article 37 of the Articles of Association of Coal India Limited, that was in the light of the fact that Board of Coal India Limited was not entitled to take any view on the final implementation of Government of India's instruction

issued to Coal India Limited for signing fuel supply agreements with power plants identified by CEA/Ministry of Power with reference to long term power purchase agreement with distribution companies and have been commissioned between 01.04.2009 to 31.03.2015. This directive, definitely, was issued only in relation to conduct of business by Coal India Limited therefore it does not qualify as law. That apart, presidential directive itself directed CIL to enter into FSA for the entire LOA quantum and further notwithstanding the presidential directive, SECL entered into FSAs assuring 100% ACQ. It is also pertinent to mention that this argument was neither pleaded nor argued by the Appellant till filing of this Appeal. There is nothing on record to substantiate the claim of the Appellant that Presidential Directive qualifies as law. That apart, vide letter dated 04.11.2019, Appellant did not raise this issue, but computed compensation payable by it for shortfall of coal by considering 100% assurance of coal.

21. Prior to letter of MoP dated 31.07.2013 pertaining to shortfall of coal there was no circular, notification of any kind issued by Government of India reducing the 100% assurance of coal. The reduction in coal supply was recognized as a change in law event on 31.07.2013. Therefore, this has to be reckoned from commencement of power supply under the PPA

in question. Therefore, contention of the Appellant that judgment of Adani 202 is not applicable since the bid was prior to 2010 is not sustainable. As already stated above, the Presentations made by GWEL in July 2012 and the letter dated 27.07.2012 are much prior to change in law event. Therefore, it has no bearing on the present claim. The PPA was executed much after the presentation, therefore it overrides all previous communication, in the light of terms and conditions of PPA at Article 15.6.2, therefore, it is clear that there was no commitment by way of provision in the PPA accepting reduction of ACQ.

22. Appellant also contends that the tariff quoted by GWEL pertaining to MSEDCL's PPA has to be taken into consideration. We are afraid that such contention is misplaced. The tariff discovered so far as MSEDCL is altogether a different one through a separate competitive bidding process, which was conducted in 2009. The bid process of Appellant was conducted in 2012 therefore the tariff quoted by different generators at different points of time cannot be the same.

23. Appellant contends that GWEL would not have supplied power from Unit-II of the project since the supply to Appellant commenced only on 01.04.2013 vide FSA for Unit- II, which was signed on 07.08.2015.

Therefore, Appellant contends that Respondent No.2 cannot claim compensation from the Appellant as power supplied to DNH was from Unit-II. This stand of the Appellant seems to be again erroneous. The entire coal supply under linkage has to be treated for the project as a coal and it cannot be preferred/prioritized for any procurer. This opinion was expressed by this Tribunal in "***Haryana Power Purchase Centre vs. GMR Kamalanga Energy Limited & Ors.,"*** by its judgment dated 20.12.2019 in Appeal No. 135 of 2018 and 54 of 2019. This Tribunal opined in the said case that shortfall of linkage coal is to be seen with reference to assurance given to the Generator (GWEL) under NCDP 2007 i.e., it will supply 100% of its requirement since its coal requirement was ascertained much prior to NCDP 2007. Therefore, COD of Units have no bearing so far as claims in respect change in law under NCDP.

24. In the light of above discussion and reasoning, we are of the opinion that shortfall in domestic supply of coal has to be calculated by taking into consideration the quantity assured under NCDP 2007 *vis-à-vis* actual supply by the CIL or its subsidiaries. Therefore, the contention of the Appellant that if shortfall in supply of coal falls below 65% to 75% in terms of 2013 letter of Ministry of Coal, one cannot drive the parties to different forum on the ground of contractual remedy for shortfall in supply

of coal. The penalties by way of disincentive or with reference to benefits on account of incentive stipulated do not take away the obligation of supply of coal i.e, required quantity of coal assured in terms of NCDP 2007. At the cost of repetition, we once again reiterate our opinion that the Tariff Policy of 2016 provides for a complete pass through of cost of procurement of alternate coal in the event of shortfall in supply of coal by supply of linkage coal by CIL and its subsidiaries. If the argument of the Appellant is taken, the Generator/Seller cannot be definitely placed to the same economic position as contemplated in terms of PPA.

25. Coming to shortfall of coal supply on account of SHAKTI Scheme, Appellant contends that it is outside the purview of the Remand Proceedings. They further contend that neither the Judgment of Remand of this Tribunal nor judgment of Energy Watch Dog deal with like SHAKTI Scheme other than amendment to NCDP as change in law. Therefore, Appellant contends that Respondent-CERC was not justified to opine that SHAKTI Scheme was in continuation of NCDP 2013.

26. According to Respondent neither the Energy Watch Dog judgment nor the Judgment of Remand limit or restrict compensation till 31.03.2017. According to GWEL, the change in law event of shortfall of linkage coal

was recognized by MoP letter dated 31.07.2013 and has been continued by the SHAKTI Policy, therefore, the affected parties are entitled for compensation for such shortfall during the operation period of PPA. According to the Appellant, even in the judgment of Adani 202, the change in law compensation in relation to NCDP was not limited to 31.03.2017. One has to see change in law event in question with reference to terms of PPA.

27. Apparently, SHAKTI Policy has been notified by an Indian Government instrumentality i.e., Ministry of Coal by Notification dated 22.05.2017. This is much later than the cut-off date under the PPA, which is 2012. It is relevant to mention here certain paragraphs from the judgment of Jaipur Vidyut Vitran Nigam (Adani 202 judgment), which read as under:

> "*12.3 From a bare reading of the SHAKTI Policy, it is clear that this policy has introduced further modifications to NCDP 2007 and NCDP 2013 such that the previous system of coal linkage allocation through the SLC(LT) mechanism has been done away with and a new transparent mechanism for coal linkage allocation has been introduced. The introduction of SHAKTI Policy, being notified after the cut-off date by an Indian Governmental Instrumentality, i.e., the Ministry of Coal, itself constitutes a Change in Law in terms of Article 10 of the PPA. Coal supply under SHAKTI FSA needs to be compared against the 100% coal supply assured under the NCDP 2007 and if there continues to be a shortfall, the generator would need to be compensated for such shortfall through the Change in Law provisions.*

12.4 We are inclined to agree with the submission of Adani Rajasthan that they cannot be penalized for uncontrollable factor/shortfall of coal once they have diligently availed all remedies available under the PPA and approached all relevant authorities and governmental instrumentalities. In GMR Kamalanga Energy Ltd. v. CERC &Ors. (Appeal No. 193 of 2017), we had occasion to consider, in the context of pre-SHAKTI FSA, as to whether relief for domestic coal shortfall needs to be limited to the ACQ levels specified in the FSA and we came to the conclusion that the impact or effect of change in law has to be considered against the originally assured quantum of coal. We also observed that "if the bid was based on the SLC allocation and LOA prior to the cut off date indicated in the PPA dated 09.11.2011, any new condition including supply of imported coal or penalty provisions cannot be taken into consideration.

12.5 In the instant case, we have found in the previous paragraphs that Adani Rajasthan's bid was premised on domestic coal on the basis of the 100% domestic coal supply assurance contained in NCDP 2007. Since SHAKTI Policy and the FSA executed thereunder still do not meet the assurance of 100% supply of domestic coal to Adani Rajasthan, it would follow that Adani Rajasthan would need to be compensated for any shortfall in supply of domestic linkage coal even post grant of coal linkage under the SHAKTI Policy. Rajasthan Discoms have not disputed that the introduction of SHAKTI Policy constitutes a Change in Law under the PPA. Their contention is that any shortfall of coal under the SHAKTI FSA by the coal companies is a contractual matter to be sorted out between Adani Rajasthan and the coal companies. We are not persuaded by this argument for the reason that we have already held in GMR Kamalanga case that the contractual conditions or limitations were not present in NCDP 2007 at the time of bid submission by Adani Rajasthan. This contention of Rajasthan Discoms is also against the principle laid down in Energy Watchdog judgment. The SHAKTI Policy continues the earlier coal supply restriction to 75% of ACQ. If actual supply of domestic linkage coal under the SHAKTI FSA is higher, it goes without saying that the generator's relief or compensation under the Change in Law provisions would be limited to the actual shortfall in supply of domestic linkage coal. We also note that there is no rational basis to assume that the supply under the SHAKTI FSAs would be higher or better than that under the pre-SHAKTI FSAs.

12.6 The Supreme Court in Energy Watchdog judgment has already concluded as follows:

> *"57. …… This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in Clause 13.2 that while determining the*

> *consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred……"*

Therefore, 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. 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."

28. It is noticed that CERC in various petitions pertaining to Madhya Pradesh, Adani Mundra has also opined that introduction of SHAKTI policy is change in law, after referring to the principles laid down in the Energy Watch Dog's of the Hon'ble Apex Court. It is further noticed that Part (A) of SHAKTI policy "under the old regime of LoA-FSA" as per NCDP, 2007 provides in clause (iii) that as per the decision of CCEA dated 21.06.2013 the capacities aggregating about 68,000 MW would continue to procure coal at 75% of Annual Contracted Quantity even beyond 31.03.2017. Thus, Shakti Policy notes that the shortfall in NCDP 2013 will continue beyond 31.03.2017. Therefore, GWEL was entitled to be compensated for any shortfall in assured quantum of coal beyond 31.03.2017. It is noteworthy that both, MoP letter dated 31.07.2013 and the SHAKTI Policy

were premised on the CCEA decision. It is clear that the impact of change in law must be computed based on the difference between 100% domestic coal supply assured under NCDP 2007 and actual domestic supply of coal until shortage of domestic coal exists. SHAKTI scheme is nothing but further modification to NCDP 2007 and NCDP 2013. Therefore, it constitutes as change in law event. SHAKTI Policy pertaining to the present appeal do not meet the assurance of 100% supply of domestic coal. Therefore, Respondent No.2 deserves to be compensated for any shortfall in supply of domestic linkage coal even subsequent to grant of coal linkage under the SHAKTI Policy. Therefore, once the claim is for shortfall in linkage coal beyond 31.03.2017 whether by virtue of NCDP 2013 or SHAKTI Policy, it would amount to change in law. Therefore, it is within the scope of Order of Remand and it does not expand the scope of Remand as contended by the Appellant. That apart, Respondent No.2 GWEL consistently and persistently was pleading shortfall of coal as a separate change in law event.

29. According to the Appellant, the amounts claimed in the invoices are inflated. Apparently, in the impugned order it is noticed that claim of Respondent No.2 was not supported with any particulars regarding As-Is-

Where-Is-Basis (AIWIB) coal and washery coal. Liberty is granted to Respondent No.2 by the CERC to approach CERC with relevant particulars to determine the impact of shortfall of linkage coal. Respondent No.2 GWEL clarifies that it has not included AIWIB, therefore it has not considered AIWIB coal and washery coal while computing quantum of alternate coal for claiming compensation, though all details were furnished to Appellant-DNH.

30. As to whether the impugned order is within the scope of directions granted in the Remand Order, it was observed as under:

> *"(xvii)…We observe that the parties are in agreement that change in coal quantities due to change in NCDP is a Change in Law event. We are of the view that this issue needs to be re-examined by the Central Commission thoroughly for the quantity of coal on which compensation can be allowed to GWEL in accordance with Law.*
>
> *xviii. In view of the above development, this issue is remanded to the Central Commission for further examination as directed above and allowing compensation to GWEL in terms of the Energy Watchdog Judgement by considering change in NCDP as a Change in Law event.*
>
> *…*
>
> *The Impugned Order dated 1.2.2017 passed by the Central Commission in Petition No. 8/MP/2014 on the file of Central Electricity Regulatory Commission is hereby set aside. The matter stands remanded back to the Central Commission to pass consequential orders so far as it relates to our observations/directions as indicated above on the issues related to Busy Season Surcharge, Development Surcharge, MOEF Notification on coal quality, change in NCDP and Carrying Cost."*

31. Apparently, there was no restriction to quantify shortfall of coal with reference to any date, for example 31.03.2017 as a cut-off date. In

that view of the matter, we are of the opinion, to cut short multiplicity of proceedings/litigations, the CERC was justified to consider shortfall of coal beyond 31.03.2017 as noted in the SHAKTI Policy. At the cost of repetition, we once again place on record that in Civil Appeals pertaining to <u>Jaipur Vidyut Vitran Nigam's case</u> (Adani 202 judgment), Honble Apex Court upheld the opinion of this Tribunal that SHAKTI Scheme is continuation of NCDP 2007 and 2013, therefore, the challenge raised by the Appellant with regard to SHAKTI Scheme issue is no longer *res integra.*

32. Pertaining to change in coal quality pursuant to amendment of Environment (Protection) Rules, 1986, the Tribunal itself had opined that MoEF Notification dated 11.07.2012 with reference to prescribing the ash content of coal to be used was a change in law event. CERC examined the said issue by considering the basis/premise of the bid and the impact of MoEF Notification dated 11.07.2012. However, for want of details of expenditure, liberty was granted to Respondent No.2 GWEL to approach the Commission with relevant particulars. Apparently, fresh Petition No. 25/MP/2020 is pending before the CERC in terms of impugned order.

33. Pertaining to carrying cost, this also no more a question to be pondered over. This issue is well settled. The Hon'ble Supreme Court in the case of "***Uttar Harayan Bijli Vitran Nigam Ltd. vs. Adani power Ltd. & Ors.,*** (2019 (5) SCC 325) has dealt with carrying cost by considering the principle of restitution and restoration. Paras 10 & 13 of the said judgment are relevant, which read as under:

> "*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 is if such change in law has not occurred, i.e., the party must be given the benefit of restitution as understood in civil law.*
>
> *[…]*
>
> *[…]*
>
> *13. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and 16.02.2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn. This being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective. This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 04.05.2017 that the CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 01.04.2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that*

this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal."

34. In view of the above opinion of the Hon'ble Apex Court, we are of the opinion that CERC was justified in granting carrying cost. The contention of the Appellant that Respondent No.2 GWEL is not entitled for carrying cost is unsustainable.

35. In the light of our discussion and reasoning, we are of the opinion that the instant appeal is devoid of merits. The impugned order do not warrant any interference. Accordingly, the appeal is dismissed. No order as to costs. Needless to say, all the pending IAs shall stand disposed of.

36. Pronounced in the Virtual Court on this **13th day of October, 2020.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

✓

REPORTABLE / ~~NON-REPORTABLE~~

Tpd/ts