APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 340 of 2019& IA No. 1749 of 2019

Appeal No. 354 of 2019

Dated :05th October, 2020

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

IN THE MATTER OF :

APPEAL NO. 340 of 2019

Maharashtra State Electricity Distribution Company Ltd.
Through its Chief Engineer (Power Purchase),
5th Floor, Prakashgadh, Plot No. G-9,
AnandKanekar Marg, Bandra (East),
Mumbai – 700051. …….Appellant

Versus

(1) Maharashtra Electricity Regulatory Commission
Through its Secretary,
World Trade Centre No. 1,
13th Floor, Cuff Parade,
Mumbai – 400 005.

(2) Adani Power Maharashtra Ltd.,
Through its Managing Director,
Achalraj, Opp Mayor Bungalow,
Law Garden, Ahmedabad,
Gujarat – 380006.

(3) M/s. Prayas Energy Group,
Through its Secretary,
Unit – III, A7B, Devgiri,
Joshi Railway Museum Lane,
Kothrud Industrial Area,
Kothrud, Pune – 4110038 …….Respondents

Counsel for the Appellant(s) : Mr. Anand K. Ganesan
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Mr. S. Rama,
Mr. Anup Jain

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Ms. AparajitaUpadhay
Mr. VishrovMukherjee,
Mr. Yashaswi Kant,
Ms. Adishree Chakraborty,
Mr. Saunak Kumar Rajguru,
Ms. Sakshi Kapoor for R-2

Ms. Ranjitha Ramachandran,
Ms. PoorvaSaigal,
Ms. AnushreeBardhan,
Mr. Shubham Arya
Mr. Arvind Kumar Dubey for R-3

IN THE MATTER OF :

APPEAL NO. 354 of 2019

Adani Power Maharashtra Ltd.,
Through its Authorized Signatory,
9th Floor, Shikhar, Mithakhali Six Road,
Ahmedabad, Gujarat – 380006. …… Appellant

Versus

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

(2) Maharashtra State Electricity Distribution Company Ltd.
Through its Chief Engineer (Power Purchase),
5th Floor, Prakashgadh, Plot No. G-9,
AnandKanekar Marg, Bandra (East),
Mumbai – 700051.

(3) M/s. Prayas Energy Group,
Through its Authorized Signatory,
Unit – III, A&B, Devgiri,
Joshi Railway Museum Lane,
Kothrud Industrial Area,
Kothrud, Pune – 4110378 …….Respondents

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Mr. Anup Jain for R-2

Ms. Ranjitha Ramachandran,
Ms. PoorvaSaigal,
Ms. AnushreeBardhan,
Mr. Shubham Arya
Mr. Arvind Kumar Dubey for R-3

JUDGMENT

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

1. The present Appeals being cross appeals have been filed challenging the findings of Maharashtra Electricity Regulatory Commission's ("***MERC***") in the Order dated 06.09.2019 disposing of Case No. 68 of 2012 (*"**Impugned Order**"*). The Impugned Order was passed pursuant to the remand by Appellate Tribunal for Electricity ("**Tribunal" or "*APTEL***") in judgment dated 31.05.2019 in Appeal No. 241 of 2016 ("***Remand Order***"). By a detailed judgment, this Tribunal had remanded the matter to Maharashtra Electricity Regulatory Commission (**"MERC/Commission"**) for fresh consideration on claims of force majeure and change in law, while holding that MERC can exercise regulatory powers to grant compensatory relief.

1.1 Maharashtra State Electricity Distribution Co. Ltd. ("***MSEDCL***"), the Appellant in **Appeal No. 340 of 2019**, has challenged the Impugned Order to the extent it granted change in law relief to Respondent No 2. Adani Maharashtra Power Ltd. ("***Adani/APML***"), the Appellant in Appeal No. 354 of 2019, has partly challenged the findings of the Impugned Order regarding the applicable methodology for computing the change in law reliefs granted to Adani and on the issue of force majeure.

2. **Facts of the Case**

Following facts which led to the filing of the present Appeals have been brought to our attention:

2.1 On 17.11.2006, MSEDCL initiated the bidding process and issued a Request for Qualification ("***RFQ***") for procurement of 2000 MW power under Case-1 bidding process. On 10.01.2007, Adani applied to the

Ministry of Coal ("***MoC***"), Government of India ("***GoI***") for the allotment of Lohara Coal Blocks.

2.2 On 03.02.2007, Adani submitted its response to the RFQ. On 03.04.2007, Adani was shortlisted for Request for Proposal ("***RFP")*** stage and MSEDCL issued the first RFP.

2.3 On 18.10.2007, GoI issued the New Coal Distribution Policy ("***NCDP"***) through the MoC Office Memorandum No. 23011/4/2007-CPD.

2.4 On 06.11.2007, MoC issued Letter of Allocation to Adani conveying allocation of Lohara (West) and Lohara Extension (E) Coal Blocks as the allocated source of fuel ("***MoC's allocation letter***"), pursuant to Adani's application dated 10.01.2007. The allocation was done in terms of Section 3(3)(a)(iii) of the Coal Mines Nationalisation Act, 1973.

2.5 On 23.11.2007, Adani applied to the Standing Linkage Committee (Long-term) "***SLC(LT)***", MoC for the grant of coal linkage for balance capacity to cover the coal requirement of Units 1, 2 and 3 of the Tiroda TPS.

2.6 On 27.12.2007, Government of Maharashtra ("***GoM***") issued a Notification under Section 38(V) of the Wildlife (Protection) Act, 1972, classifying 625.82 Sq. Km of the Tadoba National Park and Andheri Wildlife Sanctuary as a Critical Tiger Habitat ("***CTH***"). However, the area demarcating the CTH did not include the area of Lohara Coal Blocks and as such there were no restrictions on coal mining in the allotted mining lease area (Lohara Coal Blocks) to Adani.

2.7 On 16.02.2008, MSEDCL issued the revised RFP (final) which envisaged price bids under different structures/tariff components *viz.* whether the power supply was based on captive coal, imported coal or domestic coal. MSEDCL issued the revised RFP pursuant to MERC's approval to the

revised bid documents on 24.01.2008 for 2000 MW capacity power procurement under case-1 bidding process.

2.8 As per the revised RFP, the bid deadline was 21.02.2008. Accordingly, the cut-off date was 14.02.2008 (*i.e.*, 7 days before the deadline). Adani submitted its bid for supply of 1320 MW power to MSEDCL specifying Lohara Coal Blocks (captive coal mine) as the fuel source for part of the contracted capacity *i.e.* 800 MW capacity out of 1320 MW. Along with its bid, a copy of MoC's allocation letter dated 06.11.2007 was attached by Adani which qualified as the 'comfort letter' with respect to source of fuel, as per the bid requirements.

2.9 On 21.02.2008 i.e., 7 days after the bid cut-off date (14.02.2008), Chief Conservator, Forests gave approval for constituting an Expert Committee for creating the Buffer Zone surrounding the core area of TATR under Section 38(V) of the Wildlife Protection Act, 1972 (i.e. a statutory requirement for creating a Buffer Zone).

2.10 On 07.03.2008, *i.e.*, 24 days after the cut-off date, the Conservator, TadobaAndhari Tiger Reserve ("***TATR***") submitted the proposal to the Chief Conservator of Forest, Maharashtra for creating the Buffer Zone surrounding the core area of TATR in terms of Section 38(V) of the Wildlife Protection Act, 1972. The proposal was without any (i) information on qualification of the area as a Buffer Zone; and (ii) report on consultation/consent of Gram Sabhas of the areas involved in the proposal.

2.11 The Expert Appraisal Committee ("***EAC***") of the MoEF during its 21st meeting between 28.04.2008 to 30.04.2008 exercised its powers in terms of Regulation 7 of the Ministry of Environment, Forests and Climate Change's ("***MoEF***") Notification dated 14.09.2006 and recommended grant

of Terms of Reference ("***ToR***"), a pre-requisite for obtaining environmental clearance, for Lohara Coal Blocks to Adani.

2.12 On 16.05.2008, the MoEF granted the ToR to Adani for mining in the Lohara Coal Blocks on the basis of recommendation of the EAC in its 21st meeting.

2.13 On 29.07.2008, MSEDCL issued a Letter of Intent ("***LoI***") to Adani for supply of 1320 MW power from its Units 2 and 3 of the Tiroda TPS at levelized tariff of Rs. 2.642/kWh.

2.14 On 21.08.2008, Adani submitted the Rapid Environment Impact Assessment ("***EIA***")/ Environment Management Plan ("***EMP***") to the MoEF.

2.15 On 08.09.2008, Adani executed a Power Purchase Agreement ("***PPA***") with MSEDCL for supply of the contracted capacity *i.e.*, 1320 MW power from Units 2 and 3 of the Tiroda TPS.

2.16 On 08.10.2008, the Conservator, TATR submitted a revised proposal for creating the Buffer Zone surrounding the core area of TATR. The area suggested to be a part of the Buffer Zone in the said revised proposal, for the first time, included the mining lease area of about 176 Hectares of the Lohara Coal Blocks.

2.17 On 21.10.2008, Adani applied for Forest Clearance ("***FC***") for Lohara Coal Blocks. Subsequently, Adani, on 27.10.2008, requested MoC for tapering linkage.

2.18 Pursuant to Adani's request for coal linkage, SLC(LT), MoC held a meeting on 12.11.2008 wherein the SLC(LT) authorized issuance of Letter of Assurance ("***LoA***") by Coal India Limited ("***CIL***") for 1180 MW of Adani's Tiroda TPS. While authorizing the said LoA, SLC(LT), MoC acknowledged

that Lohara Coal Blocks catered to the requirement for generation of part of Adani's contracted capacity *i.e.* 800 MW to MSEDCL.

2.19 On 24.04.2009, Conservator, TATR's proposals dated 07.03.2008 and 08.10.2008 were discussed in the meeting of the EAC and an area of 1067.21 sq. km. was proposed to be the Buffer Zone of TATR. The mining lease area of about 176 Hectare of Lohara Coal Blocks was falling within the proposed Buffer Zone.

2.20 On 24.11.2009 and 25.11.2009, the EAC held its 59th meeting. In the said meeting, based on the reports and requests of (i) GoM and (ii) National Tiger Conservation Authority ("***NTCA***"), EAC decided to withdraw the ToR issued for Lohara Coal Blocks on the ground that the mining project falls within the proposed Buffer Zone of TATR and that a tiger corridor is part of the proposed mining lease areas. The EAC, however, suggested allocation of a new/alternate coal block to Adani.

2.21 On 03.12.2009, in view of (i) the withdrawal of ToR by EAC and (ii) the recommendation of the EAC, Adani requested MoC for allocation of an alternate coal block in lieu of the Lohara Coal Blocks.

2.22 On 02.01.2010, Adani informed MSEDCL regarding the cancellation of the ToR for Lohara Coal Blocks. Adani further stated that it requested MoC to make allocation of an alternate coal block but pending such allocation, Adani informed that it would be constrained to use imported coal to generate electricity from Units 2 and 3 of Tiroda TPS.

2.23 On 07.01.2010, MoEF formally withdrew the ToR for Lohara Coal Blocks. Further, Adani was informed that MoEF had requested MoC for allocating an alternate coal block to Adani.

2.24 Between January 2010 and February 2011, Adani made efforts to obtain an alternate coal block or to reinstate the TOR for Lohara Coal Blocks by redefining the boundary. Adani kept MSEDCL updated on the same from time to time. However, MoC could not allocate an alternate coal block since there was no policy in place for allocation of an alternate coal block in lieu of cancellation of original coal block on account of environmental reasons.

2.25 On 02.02.2010, Ministry of Power ("***MoP***") requested the MoC to consider allocating an alternate coal block to Adani since Lohara Coal Blocks were cancelled by MoEF.

2.26 On 11.03.2010, GoM (100% owner of MSEDCL), in its letter to MoP acknowledged that (i) Adani's bid to supply power to MSEDCL was based on fuel supply from Lohara Coal Blocks; and (ii) that cancellation of the ToR by MoEF and decision not to consider Lohara Coal Blocks for Environment Clearance ("***EC***") turned the Tiroda TPS techno-commercially unviable. GoM, therefore, requested the MoP to allocate an alternate coal block to APML.

2.27 On 05.05.2010, the GoM exercised its powers in terms of Section 38(V) of the Wildlife Protection Act, 1972 and issued a notification declaring 1101.7 Sq. Kms as the Buffer Zone to TATR. The notified Buffer Zone covered part of the Lohara Coal Blocks and accordingly, this rendered the Lohara Coal Blocks a no-go area.

2.28 On 22.05.2010, Adani informed MSEDCL regarding its inability to supply power under the PPA from Units 2 and 3 at the PPA agreed tariff due to cancellation of Lohara Coal Blocks. Subsequently, on 14.06.2010, Adani informed MSEDCL regarding the occurrence of a force majeure event in terms of Article 12 of the PPA due to the cancellation of Lohara Coal Blocks.

2.29 Having made several efforts to mitigate the hardship caused on account of cancellation of Lohara Coal Blocks and since such efforts did not fructify, Adani, on 16.02.2011 issued seven days' termination notice to MSEDCL under Article 3.3.3 of the PPA, on account of cancellation of the Lohara Coal Blocks and non-allocation of an alternate coal block.

2.30 On 17.07.2012, Adani filed a petition before MERC under Section 86 (1) (f) of the Electricity Act, 2003 being Case No. 68 of 2012 ("***Original Petition'***). In the Original Petition, Adani *inter alia* claimed change in law and force majeure reliefs on account of the cancellation of the Lohara Coal Blocks.

2.31 On 21.08.2013, MERC passed its Order in Case No. 68 of 2012 ("***Original Order***") wherein: -

(i) It was *inter alia* observed that MERC had the power to revise the tariff under an executed PPA in terms of its regulatory powers.

(ii) MERC deemed it appropriate to look into the matter of providing relief to prevent an operational asset from becoming stranded, given the special circumstances in Adani's case. Accordingly, an Expert Committee was constituted to evaluate the impact of withdrawal of the ToR on Units 2 and 3 of Tiroda TPS and determine a compensatory charge to be paid to Adani.

(iii) MERC further worked out an interim relief at Rs. 3.124 per kWh, which would be applicable only for sale of power above the initial 520 MW from the date of commercial operation. However, Adani's claim regarding the force majeure relief was rejected.

(iv) Although Adani's submissions on change in law were recorded but no finding was returned on the issue of change in law relief to Adani.

2.32 On 07.10.2013, Prayas filed Appeal No. 296 of 2013 challenging the Original Order and Adani filed Appeal No. 241 of 2016 challenging *inter alia* the rejection of its plea of force majeure and consequential reliefs in terms of the PPA.

2.33 On 09.12.2013, the GoM constituted a High-Level Expert Committee in compliance of the Original Order dated 21.08.2013. The High-Level Expert Committee submitted its report on 17.02.2014 ("***Expert Committee Report'***) wherein it recommended grant of compensatory tariff to Adani for 800 MW capacity, which was entirely dependent on the coal from the Lohara Coal Blocks. The Expert Committee Report contained a detailed analysis of the cost of production of coal from Lohara Coal Blocks and its transportation to Tiroda TPS of Adani.

2.34 On 17.02.2014, MoC cancelled and de-allocated the Lohara Coal Blocks allocated to Adani on the ground that the EC and the FC were not given to the said coal blocks ("***MoC's de-allocation letter***"). It is noteworthy that the bank guarantee/performance security furnished by Adani was not encashed by the MoC which establishes that the Lohara Coal Blocks were not cancelled on account of Adani's default.

2.35 On 05.05.2014, MERC passed its Order in Suo Motu Case No. 63 of 2014 and devised the mechanism for calculating the compensatory fuel charges payable to Adani by MSEDCL. The Order was challenged by MSEDCL and Prayas in Appeal No. 166 of 2014 and Appeal No. 218 of 2014 respectively before this Tribunal.

2.36 On 25.08.2014, Supreme Court passed its judgment in *Manohar Lal Sharma* vs. *The Principal Secretary and Ors.* (2014) 9 SCC 516, ("***Manohar Lal Judgment'***)wherein entire allocation of coal blocks made by Screening Committee from 14.07.1993 onwards in 36 meetings and

allocations made through the government dispensation route were held to be illegal. Lohara Coal Blocks were also cancelled as part of this order.

2.37 On 16.04.2015, MoP issued a policy direction under Section 107 of the Electricity Act, 2003 to treat allocation of coal block under Coal Mines (Special Provisions) Ordinance, 2014 as a change in law event.

2.38 On 28.01.2016, MoP notified the revised Tariff Policy.

2.39 On 11.04.2016, Full Bench of the Tribunal pronounced Judgment in Appeal Nos. 98 of 2014 and 100 of 2013 filed by Haryana Utilities and GUVNL against CERC Order dated 21.02.2014 in Petition No. 155/MP/2012 (which culminated in Energy Watchdog judgment). In its judgment, APTEL rejected change in law and exercise of regulatory powers, however, allowed force majeure claims of generators.

2.40 On 11.05.2016, in terms of Full Bench judgement, the Tribunal partly allowed Appeal No 296 of 2013 filed by Prayas setting aside the MERC Original Order dated 21.08.2013 except on the issue of ToR cancellation not being a force majeure event. By a separate order dated 11.05.2016, the Tribunal allowed MSEDCL's Appeal No. 166 of 2014 and Prayas' Appeal No. 218 of 2014 against MERC Order dated 05.05.2014 in Case No. 63 of 2014. This Tribunal held that MERC cannot exercise regulatory powers setting aside the award of compensatory fuel charge to Adani by MERC in exercise of its regulatory power. The Tribunal, however, kept the force majeure issue open for the decision on the issue of withdrawal of the ToR for the Lohara Coal Blocks and related de-allocation.

2.41 On 11.04.2017, the Supreme Court passed its judgement in *Energy Watchdog* vs. *Central Electricity Regulatory Commission and Ors*. (2017) 14 SCC 80 and held that change in policies of the government affecting availability of domestic coal to the generating companies qualifies as a

change in law event and entitles the affected party to restitution ("***Energy Watchdog Judgment***").

2.42 On 31.05.2019, this Tribunal allowed Adani's Appeal No. 241 of 2016 by setting aside the MERC Order dated 21.08.2013 with respect to force majeure; regulatory power of MERC to grant compensatory tariff was upheld; and the matter was remanded back to MERC for fresh consideration on the issues of Force Majeure and Change in Law.

2.43 Pursuant to the directions in the Remand Order, on 03.06.2019, Adani filed an Amendment Application bearing M.A. No. 25 of 2019 before MERC to bring on record all facts and law which came into existence subsequent to the Original Order. On 22.07.2019, MERC allowed M.A. No. 25 of 2019 including Adani's application for production of additional documents. Accordingly, Adani was directed to file the Amended Petition before the MERC.

2.45 On 27.07.2019, Adani filed its Amended Petition in Case No. 68 of 2012.

2.45 On 06.09.2019, MERC passed the Impugned Order in Case No 68 of 2012.

2.46 Aggrieved by the impugned order, MSEDCL has preferred Appeal No 340 of 2019 on the grounds that MERC erred in declaring the event of de-allocation of the Lohara Coal Blocks as a change in law event under the PPA. It has been contended that Adani had no legal entitlement towards the Lohara Coal Blocks as on the cut-off date. Therefore, Adani has no locus or corresponding entitlement for getting compensated under Article 13 of the PPA. MSEDCL has also contended that MERC has erred in linking NCDP 2007 with allotment of the Lohara Coal Blocks considering that Adani had applied for Lohara Coal Blocks on 10.01.2007, i.e. prior to the coming into force of NCDP 2007 i.e. 18.10.2007. Accordingly, the

Appellant, MSEDCL, has prayed for the following reliefs in the Appeal No 340 of 2019.

> *"(a) Allow the present appeal and set aside the impugned final order and judgment dated 06.09.2019 passed by MERC in Case No. 68 of 2012; and or*
>
> *(b) pass such other Order(s) as this Hon'ble Tribunal may deem just and proper."*

2.47 APML has preferred a Cross Appeal No 354 of 2019 against the impugned order on the ground that while granting relief under change in law, the MERC has adopted an erroneous methodology which does not restore it to the same economic position as if no change in law had occurred in terms of the restitution principle enshrined in Article 13 of the PPA. It has been argued that MERC erred in considering the landed cost of linkage coal as the basis for computing change in law compensation when Lohara Coal Blocks were the bid-identified source of coal for 800 MW capacity, and not the linkage coal. APML has also contended that the MERC in its methodology has adopted an erroneous approach to link Station Heat Rate ("SHR") with the bid parameters instead of lower of normative or actuals and GCV to 'middle value of the Gross Calorific Value ("GCV") range' of the assured coal grade in the LoA/FSA/MoU, instead of the actual GCV measured on 'as received' basis. APML has also contested the restriction of change in law relief to the difference between 100% coal assured under the New Coal Distribution Policy ("NCDP"), 2007 and 75% assurance contained under the SHAKTI Policy based on the Fuel Supply Agreement ("FSA") dated 29.03.2018. APML has also submitted that MERC also erred in rejecting Adani's plea that cancellation/de-allocation of the Lohara Coal Blocks, being the bid-identified source of fuel, qualifies as a force majeure event. Further, APML has also contended that the Impugned Order has wrongly pegged the Carrying Cost to the prevalent Multi Year Tariff ("MYT") Regulations (which govern Section 62 PPAs) and has wrongly rejected

Adani's plea to apply the rate for late payment surcharge provided in the PPA itself. Accordingly, the Appellant, APML, has prayed for the following reliefs in Appeal No 354 of 2019:-

"(a) Allow the Appeal and set aside the Impugned Order dated 06.09.2019 passed by Ld. MERC in Case No. 68 of 2012 to the extent of grounds set out in this Appeal;

(b) Consider the landed cost of coal from Lohara Coal Blocks as the basis for computation for change in law relief granted to Adani;

(c) Hold and declare that the rate of carrying cost must be as per the rate specified for late payment surcharge in terms of Article 11.3.4. of the PPA;

(d) Hold and declare that SHR, being an operational parameter, ought to be considered based on lower of actual SHR and normative SHR as per MYT Regulations while computing change in law compensation payable to Adani;

(e) Consider the actual GCV of coal on 'as received basis' for computing change in law relief.

(f) Hold and declare that Adani Power Maharashtra Limited is entitled to relief under change in law provision for actual shortage in supply of domestic coal, as against the 100% supply assured under the NCDP 2007.

(g) Hold and declare the cancellation of the Lohara Coal Blocks is a force majeure event in terms of Article 12 of the PPA;

(h) Pass such other Orders as this Hon'ble Tribunal deems fit and proper in the facts and circumstances of the case."

3. On the basis of the facts and the submissions made before us, following questions arise for consideration in the present Appeals:

(1) Whether MERC was justified in declaring the event of de-allocation of the Lohara Coal Blocks as a change in law event?

(2) Whether MERC was justified in considering the landed cost of linkage coal as the basis for computing change in law compensation to Adani when Lohara Coal Blocks were the bid-identified source of coal?

(3) Whether MERC was justified in pegging the carrying cost to the rate specified in prevalent Multi Year Tariff ("**MYT**") Regulations?

(4) Whether MERC was justified in restricting the change in law relief to the difference between 100% assurance in New Coal Distribution Policy ("***NCDP***"), 2007 and 75% assurance under the SHAKTI Policy based on the Fuel Supply Agreement ("***FSA***") dated 29.03.2018 being signed under the SHAKTI Policy?

(5) Whether MERC was justified in linking NCDP 2007 with allotment of the Lohara Coal Blocks?

(6) Whether deallocation of the Lohara Coal Blocks was a foreseeable risk for Adani and whether the same has any implication on change in law relief allowed to Adani?

(7) Whether MERC adopted the correct methodology regarding Station Heat Rate ("***SHR***") and Gross Calorific Value ("***GCV***") in the Impugned Order while computing the change in law relief allowed to Adani? Whether such methodology adheres to the principle of restitution?

(8) Whether MERC erred in rejecting Adani's plea that cancellation/de-allocation of the Lohara Coal Blocks qualifies as a force majeure event?

4. **The issue involved in all these appeals are common in nature, therefore, we decide to adjudicate the batch of appeals by this common judgment.**

5. We have considered the oral and written submissions made by Mr. SajanPoovayya, learned senior counsel for APML, Mr. Anand K. Ganesan, learned counsel for MSEDCL, Ms. PratitiRungta, learned counsel for MERC and Ms. Ranjitha Ramachandran, learned counsel for Prayas.

6. Further, pursuant to the directions of this Tribunal in daily order dated 16.06.2020, Adani filed an Affidavit on 18.06.2020 clarifying that:-

(a) The Change in Law claim due to cancellation of Lohara Coal Blocks is limited to the present proceedings only [i.e., Appeal Nos. 340 and 354 of 2019]

(b) Adani had not claimed any relief regarding 800 MW portion of its Tiroda TPS in Case No. 189 of 2013. Case No. 189 of 2013 dealt with a Petition seeking change in law compensation on account of short supply of linkage coal from Coal India subsidiaries for the remaining 2500 MW capacity(out of 3300 MW installed capacity), which culminated into Appeal Nos. 116 of 2019, 155 of 2019 and 182 of 2019 before this Tribunal.

6.1 During the proceedings, APML has raised objections to certain grounds taken by MSEDCL which are contended to be in repetition of their contentions taken in Appeal No. 241 of 2016 and were duly adjudicated upon by the Tribunal in the Remand Order. APML has submitted that the same were taken into consideration by the MERC while passing the Impugned Order. Accordingly, MSEDCL is merely trying to re-agitate its submissions concerning the change in law claims of Adani without placing on record any additional material or rationale in support of its claims. In view thereof, the issues raised by MSEDCL should be dismissed in limine.

6.2 ***Per Contra***, MSEDCL has submitted that the remand by the Tribunal to MERC was an open remand and not a limited remand with specific direction to relook the matter holistically and afresh, particularly on the issue in hand i.e. Force Majeure and Change in law.

6.3 At the outset, we would like to mention that this Tribunal in its Remand Order dated 31.05.2019 (Appeal No. 241 of 2016) has already returned findings/observations regarding certain issues raised by MSEDCL and Prayas in the present Appeals. None of the parties has filed any Appeal challenging the Remand Order. As such, this Tribunal's findings have

attained finality and it is no longer open for any party to re-argue or contest those findings/observations in the present Appeals. Accordingly, it is important to set-out relevant findings/ observations in the Remand Order with regards to the issues raised by MSEDCL in the present appeal, before we analyse specific issues raised by the parties in the cross-appeals: -

Grounds raised by MSEDCL in Appeal No. 340 of 2019.	***Findings of Tribunal in Appeal No. 241 of 2016***
(i) That the event of Change in Law is allowed only when one's legal right is affected and altered. However, in the present case, ***Respondent No. 2 herein had at the first place itself no legal entitlement or accrued right in their favour towards the Lohara Coal Blocks*** *and as such accordingly no locus or corresponding legal entitlement for getting compensated.*	***167****. PPA came to be signed on 08.09.2008 and the cancellation or withdrawal of Lohara coal block was much later i.e., 25.11.2009 (along 1 ½ years later).* ***The legitimate expectation of the parties at the time of allocation, TOR and submission of bid would be that in the normal course of business, allocation of coal blocks would be in their favour****. If they had any doubt about the same, probably they would have quoted different tariff.* *168. Was Commission justified in saying that the Appellant took the risk of submitting its bid on the allocation letter dated 06.11.2007 when it was still to receive TOR dated 16.05.2008? TOR was in the hands of the Appellant when it signed the PPA on 08.09.2008.* *178. It is noticed from the pleadings and the documents placed before this Tribunal that the* ***Appellant based on the allocation of coal letter dated 06.11.2007 made the bid****.*
(ii) That the Ld. State Commission had also erroneously appreciated the issue raised qua ***Red Herring Prospectus*** *with its date of issuance not with the declaration and affirmation of Respondent No.2 about the knowledge and awareness of the risk of coal mine de-allocation being in existent right from the date of its application,*	***182.*** *We are of the opinion that* ***Red Herring Prospectus*** *dated 14.07.2009 has no relevance to the controversy before us since it is a standard statement which are required to be made to the SEBI pertaining to risk factors, so that worst scenario possible is cautioned to investors. In other words, it is an indication what such risk is possible…*

Grounds raised by MSEDCL in Appeal No. 340 of 2019.	***Findings of Tribunal in Appeal No. 241 of 2016***
which was much prior to the cut-off date.	
(iii) ***Adani submitted flawed EIA/EMP Report*** *and suppressed core issues including presence of the tigers in mining lease areas.*	***189.*** *It is also noticed that* ***on 21.10.2008 by abundant caution****, the* ***Appellant had sought for coal linkage pending forest clearance*** *of the coal block. It is also noticed that the A****ppellant had sought for modifications to the boundary line of mining and also to take mining activities phase-wise so as to conserve the tiger zone****, the* ***apprehension*** *expressed in the meeting held on 25.10.2009 which led to withdrawal of TOR. Many attempts were made by the Appellant to secure alternate coal block allocation which was also recommended by Ministry of Power and so also Government of Maharashtra; but no such allocation came to the rescue of appellant. The Appellant offered to resolve the issue with Respondent No. 2 seeking to change identified Units 2 and 3 to Units 4 & 5 of Tiroda project. But Respondent No. 2 – MSEDCL did not respond.* ***190.Appellant cannot anticipate the movement of tiger in the project area****. Once it has come to its knowledge, it had proposed to modify the wild life conservation plan as per the requirements of the State Government. The Appellant even* ***proposed to surrender 176 hectors [hectares]*** *of area which falls under the proposed buffer of TATR. In the remaining area said to be the tiger corridor, the Appellant proposed to divide the Mining Line Area into 40 blocks and do mining only one block every year, so that it will have minimum impact on the wild life.*
(iv) Manohar Lal Sharma Judgment cannot be claimed as a change in law event since MoC had de-allocated coal blocks prior to Manohar Lal sharma Judgment	***195.*** *If coal blocks were not withdrawn, still problem of Appellant would have continued as a consequence of judgment of Hon'ble Supreme Court in Manoharlal Sharma in 2014****.***
(v) MERC cannot exercise	*164. In the light of above subsequent*

Grounds raised by MSEDCL in Appeal No. 340 of 2019.	***Findings of Tribunal in Appeal No. 241 of 2016***
regulatory powers to determine compensatory tariff	*development since this appeal was pending when Energy Watchdog judgment came, this Tribunal has to proceed on this point as held by Hon'ble Apex Court. Therefore,* ***we opine that MERC was justified in exercising Regulatory Powers to grant compensatory tariff****.* *198. We are of the opinion, in view of the opinion of the Hon'ble Apex Court on the issue of exercising regulatory powers by appropriate Commission, we hold that* ***MERC can exercise regulatory powers to grant compensatory tariff. Therefore, MERC need not ponder over this issue afresh****.*

6.4 As may be seen from the above, this Tribunal has already held that MoC's allocation letter dated 06.11.2007 was the fulcrum of Adani's bid and that Adani therefore had a legitimate expectation that in the normal course of business, allocation of coal blocks would be in its favour. It was also held that the comfort letter (being MoC's allocation letter dated 06.11.2007) was enough to participate in the bidding process, i.e., MSEDCL accepted Adani's bid as a responsive bid based on the MoC's allocation letter as evidence of fuel tie-up arrangement. Red Herring Prospectus dated 14.07.2009 issued by Adani Power Ltd. has no relevance for the adjudication of the present dispute since it is a standard statement which are required to be made to the SEBI pertaining to risk factors, so that the investors are made aware of worst scenarios possible. Adani cannot be made responsible for its EIA/EMP Report not being satisfactory as contended by MSEDCL. Adani could not have anticipated the movement of tiger in the project area. Once it came to its knowledge, it had proposed to modify the wildlife conservation plan as per the requirements of Government of Maharashtra. Adani even proposed to surrender 176 hectors of area which fell under the proposed buffer of TATR.

In the remaining area said to be the tiger corridor, Adani proposed to divide the Mining lease area into 40 blocks and do mining only one block every year, so that it would have minimum impact on the wildlife. As such, a number of mitigations efforts were suggested by Adani to overcome the supervening event occasioned by the proposed buffer zone covering part of the Lohara Coal Blocks. If TOR for the coal blocks were not withdrawn, still Adani's problem would have continued as a consequence of judgment of Hon'ble Supreme Court in Manoharlal Sharma in 2014. Lastly, it was also held that MERC was justified in exercising regulatory powers to grant compensatory tariff in light of the Energy Watchdog Judgment.

6.5 MSEDCL has contended that this Tribunal's judgment dated 31.05.2019 in Appeal No. 241 of 2016 was an 'open remand'. This is not correct. We are of the opinion that this Tribunal's Remand Order was a case of 'limited remand in terms of Order XLI Rule 25 of CPC, 1908 since the Tribunal specifically laid down the scope of the remand proceedings before MERC. MSEDCL's preliminary objection to Adani's Appeal is bereft of the true interpretation of the Remand Order and runs contrary to the settled law regarding scope of the remanded court's powers in cases of 'limited remand'. In the Remand Order, this Tribunal allowed Adani's Appeal and set aside the MERC's Original Order dated 21.08.2013 in so far as it related to the issue of force majeure. This Tribunal after upholding the correctness of exercise of regulatory powers of MERC, remanded the matter for fresh consideration on the issues of force majeure and change in law. MERC being the remanded court, was bound by the findings of the Tribunal made in the Remand Order. In a case of 'limited remand', the remanded court (i.e. MERC) ought to act upon the strict directions of the remand order. In this context we refer to the judgment of the Hon'ble Supreme Court in K.P. Dwivedi vs. State of U.P., (2003) 12 SCC 572, which holds as under: -

"**10.** *We have heard learned counsel appearing for the parties. On the résumé of the contents of various orders passed by the Prescribed Authority, the Appellate Authority and the High Court, we find that the grievance raised on behalf of the appellant has great justification. The* ***Prescribed Authority, in carrying out the limited remand, for re-examination of the categorization of land as irrigated or unirrigated, could not have disturbed the order dated 5-8-1977 of the District Judge passed in appeal and confirmed on 19-1-1979 by the High Court*** *in respect to the appellant's objections which were allowed to the extent of accepting his case of his share to be 1/10th in joint family property, the exclusion of the "grove" land, sale deed dated 10-12-1971 being bona fide and grant of fresh option to him to surrender land which may have been covered by the canal*.

12. *From the contents of the order of the High Court, we have no manner of doubt that the writ petition of the holder of the land against the judgment of the District Judge had only succeeded with an order of the* ***remand limited to re-examination of the nature of the lands****. In all other respects, the order of the District Judge was confirmed prohibiting reopening of the same. We have already mentioned above that the order of the District Judge passed in appeal dated 5-8-1977 was not challenged by the State of U.P. and therefore, that order to the extent it was in favour of the appellant, had attained finality and could not have been disturbed. The Prescribed Authority and the appellate court in their orders passed on 29-3-1996 and 18-3-1997 respectively, overlooked this aspect of the case of the finality of the order of the District Judge dated 5-8-1977.* ***They misdirected themselves by assuming that the whole case was open before them for reconsideration and redetermination of the ceiling area.*** *In the second writ petition filed by the appellant to the High Court against the orders passed by the authorities under the Act after remand, the learned Single Judge took no care to re-examine the contents of the orders previously passed and which had attained finality to the extent indicated in those orders. The High Court by the impugned order dated 9-5-1997 cursorily examined the case and wrongly dismissed it as being without merit.*"

6.6 This Tribunal in judgment dated 11.04.2018 titled Gujarat UrjaVikas Nigam Ltd. vs. Gujarat Electricity Regulatory Commission and Others, 2018 SCC On Line APTEL 7 has held as under: -

"Scope of Remand Proceedings

4.1 *The settled principles laid down by the Hon'ble Supreme Court and this Tribunal is that in the remand proceedings, the lower court (State Commission) is not entitled to inquire into or decide matters other than those directed by the Appellate Authority. In this regard reference may be made to the following judgments:—*

(i) K.P. Dwivedi v. State of U.P., (2003) 12 SCC 572 Paras 11 and 12

(ii) Sarkar on Code of Civil Procedure

(iii) Mulla on Code of Civil Procedure

(IV). Meghalaya State Electricity Board v. Meghalaya State Electricity Regulatory Commission (Appeal No. 37 of 2010 in the Order dated 10.08.2010)

After analyzing the decisions of the courts, the principles laid down in these authorities are given below:—

(i) The Court below to which the matter is remanded by the Superior Court is bound to act within the scope of remand. It is not open to the Court below to do anything but to carry out the terms of the remand in letter and spirit.

(ii) Ordinarily, the Superior Court can set aside the entire judgment of the Court below and remanded to the subordinate court to consider all the issues afresh. This is called 'open Remand'. The subordinate court can decide on its own afresh on the available materials.

(iii) The Superior Court can remand the matter on specific issues with a specific direction through a "Remand Order". This is called 'Limited Remand Order'. In case of Limited Remand Order, the jurisdiction of the Court below is confined only to the extent for which it was remanded".

6.7 Therefore, the Remand Order was an instance of limited remand to the MERC and not an open remand.

7. However, APML has not pressed for Issue No 8 i.e. rejection of Adani's plea that cancellation/de-allocation of Lohara Coal Blocks qualified as a force majeure event during the present proceedings. Therefore, we decide not to consider the said issue. We now proceed to deal with the remaining individual issues arising out of the present Appeals.

Issue-1- Whether MERC was justified in declaring the event of de-allocation of the Lohara Coal Blocks as a change in law event?"

7.1 Mr. SajanPoovayya Learned Senior Counsel for APML has made the following submissions for our consideration:-

(a) The de-allocation of Lohara Coal Block qualifies as a Change in Law event under Article 13 of the PPA. Explanation to Section 38(V) of the Wildlife Protection Act, 1972 states that the expression "tiger reserve" includes **(a)** Core/ Critical Tiger Habitat ("***CTH***") and (b) Buffer Zone consisting of the area peripheral "to" critical tiger habitat or core area. As per the said provision, the limits of a Buffer Zone are determined based on

scientific and objective criteria in consultation with**:** - (a) the concerned Gram Sabha; and (b) an Expert Committee constituted for the purpose.

(b) Prior to cut-off date (i.e. 14.02.2008), on 27.12.2007, Government of Maharashtra ("***GoM***") issued a Notification under Section 38(V) of the Wildlife (Protection) Act, 1972, classifying 625.82 Sq. Km of the Tadoba National Park and Andhari Wildlife Sanctuary as a Critical Tiger Habitat. However, the area demarcating the CTH did not include the area of Lohara Coal Blocks. As such, there were no restrictions on mining in the Lohara Coal Blocks.

(c) Post- CTH Notification, series of actions were undertaken by the two regulators *viz.* (1) Environmental Regulator [Expert Appraisal Committee ("***EAC***")] on the one hand and (2) Forest Regulator ("***Conservator, Forests, GoM***") and National Tiger Conservation Authority ("***NTCA***")] on the other hand. However, these regulators were acting in parallel without any coordination with each other. On 21.02.2008 i.e., 7 days after the cut-off date (14.02.2008), Chief Conservator, Forests gave approval for constituting an Expert Committee for creating the Buffer Zone surrounding the core area of TATR under Section 38(V) of the Wildlife Protection Act, 1972. Secondly, on 07.03.2008, i.e., 24 days after the cut-off date, the Conservator, TATR submitted the proposal to the Chief Conservator of Forest for creating the Buffer Zone surrounding the core area of TATR under Section 38(V) of the Wildlife Protection Act, 1972. However, such proposal was without any (i) information regarding qualification or demarcation of the area as a Buffer zone to the TATR (this exercise happened only in 2009) and (ii) report on Consultation/ Consent of Gram Sabha (such consultations happened only between May 2008 and November 2008).Thirdly, the EAC in its meeting held on 28.04.2008 had decided to issue the ToR for the Lohara Coal Blocks. This was a Stage-I clearance. ToR was recommended by the EAC even after Adani

disclosing the fact that Lohara Coal Blocks were within 15 KM aerial distance of the TATR (being an eco-sensitive zone). Subsequently, the ToR was issued to Adani by MoEF*vide* its letter dated 16.05.2008. Fourthly, on 08.10.2008, the Conservator, TATR submitted the revised proposal for Buffer Zone to TATR. The mining lease area of about 176 Hectares of Lohara Coal Blocks was falling within this revised proposed Buffer Zone. Fifthly, on 24.04.2009, Conservator, TATR's proposals were discussed in the meeting of the EAC and an area of 1067.21 sq. km. was proposed to be the buffer zone of TATR.

(d) Thereafter on 24.11.2009 and 25.11.2009, the EAC, in its 59th meeting took a decision to withdraw the ToR previously granted to Adani. While doing so, the EAC recorded that the ToR was not cancelled on account of any default of Adani but for the reason that EAC was not aware of the projects being within the proposed buffer zone of the TATRat the time of granting the ToRand that, based on further study of the area subsequent to grant of ToR, it was understood that the tiger corridor was a part of the proposed mining lease areas.

(e) Interestingly, MoEF by its letter dated 07.01.2010 withdrew the ToR and rejected grant of Environmental Clearance. MoEF's communication dated 07.01.2010 qua withdrawal of ToR specifically records that the ToR was withdrawn due to proposed Buffer Zone (and not due to any default or deficiency in the EIA/EMP prepared by Adani).

(f) On 05.05.2010, Government of Maharashtra exercising its powers under Section 38(V) of the Wildlife (Protection) Act, 1972 notified 1101.7711 sq. km as the Buffer Zone of TATR foreclosing all options for Adani to utilize Lohara Coal Blocks (i.e. bid-identified source of fuel). This notification qualifies as a Change in Law event in terms of Article 13 of the PPA. Prior

to this Buffer Zone Notification, CTH Notification dated 27.12.2007 was in operation which did not include the Lohara Coal Blocks under the area classified as CTH.

(g) Subsequently, MoC by its letter dated 17.02.2014 cancelled and de-allocated the Lohara Coal Blocks. However, recognizing no lapse on part of Adani, the bank guarantee was duly returned. This clearly acknowledges the factthat there was no fault of Adani. MoC's decision to deallocate Lohara Coal Blocks culminated from (a) proposals dated 07.03.2008 and 08.10.2008 of the Conservator, TATR regarding creation of a Buffer Zone to TATR; (b) EAC's 59th meeting Report; (c) MoEF's letter dated 07.01.2010 withdrawing the ToR and non-grant of EC and (d) GoM's Buffer Zone Notification dated 05.05.2010. As such, MoC's decision to cancel and de-allocate the Lohara Coal Blocks independently qualifies as a Change in Law event.

(h) In any case, Hon'ble Supreme Court by judgment dated 25.08.2014 in Manohar Lal Sharma Judgment cancelled 204 coal blocks including the Lohara Coal Blocks with immediate effect. If the Lohara Coal blocks had not been deallocated earlier, by virtue of the Manohar Lal Sharma Judgement, Adani would have been deprived of the Lohara Coal blocks in any event.

(i) In view of cancellation of the Lohara Coal Blocks, Adani was constrained to depend on the costlier alternate coal sources such as imported coal, coal supply under SHAKTI FSA dated 29.03.2018, and e-auction coal, which led to increase in cost of supply of power to MSEDCL. Adani's legal right or entitlement to use Lohara Coal Blocks for generating power from Tiroda TPS was completely altered or taken away after the cut-off date (14.02.2008). The same was pursuant to the actions/omissions of Indian

Governmental Instrumentalities. Such fundamentally altered circumstances resulted in increase in cost of supply of power to MSEDCL. As such de-allocation of Lohara Coal Blocks satisfies all elements of qualifying as a change in law event under Article 13.1.1 of the PPA.

(j) Reliance has been placed on the **Energy Watchdog Judgment** of the Hon'ble Supreme Court which laid down that the policy decisions issued or notified by the GoI which have an adverse impact on the coal supply, have the force of law and entitles the affected generators to restitution. Further, the MoP vide its Policy Direction dated 16.04.2015 under Section 107 of the Electricity Act, 2003 directed CERC to treat allocation of coal block under Coal Mines (Special Provisions) Ordinance, 2014 as change in law for already concluded PPAs under case-1 to enable downward revision in tariff. Hence, the corollary would be that if the allocated coal block is cancelled then the tariff will be revised upward under change in law. Further the MoP amended the Tariff Policy in 2016 to, inter-alia, provide for a pass-through of fuel cost on account of the failure of GoI or its instrumentalities to provide the assured coal supply. It is submitted that the word "assured quantity" used in revised Tariff Policy, 2016 covers cases where captive coal mines have been de-allocated for no fault of the allottees and also the assurances given under NCDP, 2007 dated 18.10.2007 for supply of coal from Coal India Limited.

7.2 ***Per contra***, Mr. Anand K. Ganesan, the learned counsel for MSEDCL has made the following submissions for our consideration

(a) Adani had no legal entitlement towards the Lohara Coal Blocks as on the cut-off date. Therefore, Adani has no locus or corresponding entitlement for getting compensated under Article 13 of the PPA.

(b) The Buffer Zone was demarcated prior to the cut-off date.The proposal for creating Buffer Zone to the TATR was initiated on 14.08.2007 i.e. much

before the cut-off date. Reliance in this regard was placed on letter dated 07.03.2008 of the Forest Conservator. It was also alleged that the correct translated version of this letter was not filed by Adani. A comparison chart was displayed to show differences between the 07.03.2008 letter on record and the translated version of MSEDCL.

(c) Further, the ToR does not confer any vested right on Adani over Lohara Coal Blocks. MoC's allocation letter dated 06.11.2007 and the ToR were subject to grant of EC. Adani cannot assume that EC will be granted merely because ToR was issued. ToR was granted to Adani based on the Form-1 submitted by Adani along with its application for prior EC.

(d) Reliance is placed on NTCA's letter dated 31.08.2009 and EAC's 59th meeting report to highlight that Adani's EIA/EMP Report was flawed since it did not cover core issues concerning the ecology of the mining lease area. The Conservation Plan prepared by Adani did not capture the tiger movements despite there being multiple past instances of human-tiger conflict in the said area. Based on such flawed Conservation Plan prepared by Adani, EAC recommended MoEF to reject the EC.

(e) As such, EC was rejected due to Adani's failure in disclosing at the relevant time, the tiger movements in the area, the presence of a proposed Buffer Zone, tiger corridor and tiger trails. Evidently, EC was already rejected prior to GoM notifying the Buffer Zone in 2010. Adani, therefore is wrong to argue that the ToR was withdrawn due to the Buffer Zone.

(f) MERC erroneously placed reliance on the Energy Watchdog Judgment and overlooked the certain distinguishing features between the PPA considered in Energy Watchdog and the present PPA. While the eventuality of change in any consent for the project was envisaged under the definition of change in law in the PPA considered by the Energy Watchdog Judgment, the same was not envisaged in the PPA between MSEDCL and Adani. The coal

allocation or coal linkage is a consent or permit to the project. The Energy Watchdog Judgment dealt with a situation of confirmed coal supply whereas, in the present case, the coal supply was only at the application stage.

7.3 Ms. Ranjitha Ramachandran, learned counsel appearing for Prayas adopted submissions made by learned counsel for MSEDCL. Learned counsel for Prayas additionally submitted that Manoharalal Sharma judgment and the de-allocation letters cannot be considered as Change in Law events since there was no impact on Adani due to the same. Environmental Clearance was rejected much prior to the said events. This is also evident from Adani's conduct since Adani did not even send any change in law notice claiming the said events as change in law.

7.4 Ms. PratitiRungta, learned counsel appearing for MERC submitted that the Commission has evaluated change in law claim of APML as per the provisions of the PPA and rightly decided the change in law issues in favour of APML. Learned counsel relied on the impugned order, and submitted, inter-alia, that the event of proposing buffer zone which ultimately led to withdrawal of ToR and subsequent cancellation of Lohara Coal Block is an event of Change in Law under Article 13 of the PPA. It was also submitted that APML is eligible for compensation under the change in law on account of shortfall in coal supply as against 100% assured coal supply under New Coal Distribution Policy, 2007. As regards contention of MSEDCL challenging applicability of Energy Watchdog judgement, learned counsel submitted that the judgment is squarely applicable in the present case as the Hon'ble Supreme Court has held that policy decisions issued or notified by the Government of India which have adverse impact on the coal supply have the force of law and entitles the affected generators to relief under the change in law provisions of the PPA.

7.5 Mr. SajanPoovayya, learned Senior Counsel for APML has made the following submissions in his rejoinder arguments:-

(a) Lohara Coal Blocks had contractual and legal validity and Adani had a vested right to utilize Lohara Coal Blocks. Lohara Coal Blocks were the fundamental basis of Adani's bid for part of its contracted capacity (800MW out of 1320 MW). Accordingly, Lohara Coal Blocks had legal and contractual validity. Hence, Adani had a corresponding legal entitlement regarding use of such bid-identified source of coal. In this regard, reliance is placed on MoC's allocation letter dated 06.11.2007, having been issued in terms of Section 3(3)(a)(iii) of Coal Mines (Nationalization) Act, 1973, which had legal validity and force of law. This is also in accordance with the Energy Watchdog Judgment, wherein at paragraph 57, it was held that letters issued by GoI instrumentalities shall have force of law. By such allocation, GoI vested the ownership of Lohara Coal Blocks in Adani.

(b) MoC's allocation letter being subject to conditions does not erode the validity of the allocation. In any event, none of the three conditions of cancellation mentioned in the Allocation Letter has fructified or, become the basis for de-allocation of coal block by the MoC. In fact, in terms of MoEF Notification dated 14.09.2006, all Category A Projects (includes TPS) are mandated to obtain Environment Clearance. In terms of Article 77 of the Constitution of India, 1950 MoC and MoEF are entrusted with specific responsibilities. Accordingly, MoC could not have allocated a coal mine without subjecting it to conditions *viz.* obtaining clearances etc. All Projects are always issued allocations which are subject to various conditions and that cannot be the basis for any party to argue that the allocation does not vest any right on the allottee. The fact that MoC had to de-allocate the mine by letter dated 17.02.2014 in itself testifies to the fact that Adani had a vested right in Lohara Coal Blocks.

(c) Reference was also drawn to Section 3 of the Coal Mines Nationalization Act, 1973 to argue that 'ownership' of Lohara Coal Blocks was vested on Adani by virtue of MoC's allocation letter dated 06.11.2007 conferring Adani with the right, title and interest to exploit the said mines for generating power from the Tiroda TPS.

(d) MSEDCL's reliance on translated version of a letter dated 07.03.2008 to contend that the proposal regarding creation of a Buffer Zone was initiated on 14.08.2007 is incorrect for the reason that the TATR was notified as CTH for the first time only on 27.12.2007. A Buffer Zone cannot be created prior to CTH itself being created. This is because Buffer Zone is a peripheral area "to" a CTH. Unless there is a CTH, there cannot be a Buffer Zone. Proposal for creating CTH was made by National Tiger Conservation Authority only on 16.11.2007.

(e) The effect of any document ought to be ascertained on the basis of the document itself. No external aid can be used to give a different meaning to the document. MoC's allocation letter dated 06.11.2007 ought to be independently read to ascertain Adani's vested rights in the Lohara Coal Blocks pursuant to such letter. Reliance was placed on the judgments of Hon'ble Supreme Court in *Sisir Kumar Mohanty*vs. *State of Orissa*, (2002) 9 SCC 219; and *Mohinder Singh Gill* vs. *Chief Election Commissioner*, (1978) 1 SCC 405.

(f) MSEDCL's contention that ToR was rejected on account of Adani's fault in preparing effective Environment Impact Assessment/Environment Management Plan Report is erroneous since ToR was withdrawn due to the proposed Buffer Zone. Further, MSEDCL's contention is also not consistent with the letter dated 13.01.2009 written by the NTCA to the MoEF wherein it recommended prohibiting any mining activity in the Lohara Coal Blocks to prevent human-tiger conflict since the mining lease was in

close proximity to a notified tiger reserve. This letter was independent of any EIA/EMP submitted by Adani.

(g) Section 38(O) of the Wildlife Protection Act, 1972 entrusts the NTCA with the powers to disallow mining activities in the Tiger Reserves. The said provision also confers overriding powers to the decisions of the NTCA. In other words, decisions of NTCA will bind other authorities. EAC in its 59th meeting Report specifically recorded the intervention by NTCA and its recommendation to EAC to not let mining be conducted in the proposed Buffer Zone. As such, even the best possible EMP Report could not have let mining be conducted in the said area due to the statutory bar under Wildlife Protection Act, 1972.

(h) MoC's allocation letter dated 06.11.2007 cannot be contended to have been subject to grant of Environmental Clearance and Forest Clearance, which are different statutory requirements under the Environment (Protection) Act, 1986. Further, Clause 2.1.5 of the Request for Qualification ("RFQ') expressly required Adani to submit a 'comfort letter' regarding sourcing of coal at the time of bid submission. Adani submitted MoC's allocation letter dated 06.11.2007 along with its bid as a 'comfort letter' in compliance with Clause 2.1.5 of the RFQ. Accordingly, Lohara Coal Blocks became the basis for Adani's bid. In view of the specific coal source indicated by Adani, MSEDCL accepted Adani's bid and issued the Letter of Intent ("***LoI***") on 29.07.2008 in favour of Adani. Therefore, MoC's allocation letter dated 06.11.2007 was accepted as an adequate 'comfort letter' by MSEDCL for the purposes of bid qualification and acceptable evidence of fuel tie-up by Adani. Such acceptance on part of MSEDCL is its acquiescence by conduct recognizing Lohara Coal Blocks as the bid-identified source of fuel in Adani's bid for the 800 MW portion of the contracted capacity. Reliance in this regard is placed on the judgment of

the Supreme Court in KanchanUdyog Limited vs. United Spirits Limited (2017) 8 SCC 237.

(i) Accordingly, Lohara Coal Blocks became the fundamental basis for Adani to discharge its contractual obligation *i.e.* supply of power to MSEDCL to the extent of 800 MW. Therefore, Lohara Coal Blocks as the agreed source of fuel for part of the contracted capacity under the PPA had legal and contractual sanctity. This factum has been accepted by this Tribunal in the Remand Order and the same has not been challenged by MSEDCL.

Our Findings and Analysis

7.6 On the basis of the submissions made by the parties, we observe that MSEDCL's main contention is that de-allocation of Lohara Coal Blocks was not a Change in Law event since the ToR was cancelled/withdrawn prior to notification of the Buffer Zone by GoM (dated 05.05.2010). For purposes of our analysis, the only relevant factor is whether the factum of de-allocation of Lohara Coal Blocks qualifies as a Change in Law event in terms of the PPA. In this regard, we proceed to analyze whether the following pre-conditions are fulfilled as regards change in law provision of the PPA:

(a) There must be enactment, adoption, bringing into effect or modification of any 'law';
(b) Such 'law' must have been enacted, adopted, brought into effect or modified after the cut-off date.
(c) Consequently, there must exist some increase/decrease in cost of or revenue from the business of selling electricity.

7.7 The expressions "Law" and "Indian Governmental Instrumentality" have been defined in Article 1.1 of the PPA as follows:

""Law"-means, in relation to this Agreement, all laws including Electricity Law in force in India and any statute, ordinance, regulation, Notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include all applicable rules, regulations, orders, Notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the CERC and the MERC.

"Indian Governmental Instrumentality" means the GOI, Government of Maharashtra and any ministry or, department of or, board, agency or other regulatory or quasi-judicial authority controlled by GOI or Government of States where the Procurer and Project are located and includes the CERC and MERC."

From the above definitions, it is evident that any order or notification, rule or regulation by an Indian Governmental Instrumentality constitutes "Law" and the Government of Maharashtra, Government of India and its departments or agencies fall within the definition of Indian Governmental Instrumentalities.

7.8 In the present case, the cut-off date under the PPA is **14.02.2008**. As such, we need to evaluate whether there was any change in Law after 14.02.2008 which resulted in some increase/ decrease in cost of or revenue from the business of selling electricity so far as Adani is concerned.

7.9 Before going into the factual analysis of the sequence of events *qua* Change in Law, we examine the statutory regime regarding creation of Critical Tiger Habitats and Buffer Zones. Section 38V of the Wildlife (Protection) Act, 1972 is the enabling provision which empowers the State Governments to notify an area as a Tiger Reserve. The Explanation to the said section states that a 'Tiger Reserve' includes (i) CTH and (ii) a Buffer Zone to such CTH. Section 38V of the Wildlife (Protection) Act, 1972 and the Explanation are quoted hereunder: -

***"38V. Tiger Conservation Plan**.—(1) The State Government **shall**, on the **recommendation of the Tiger Conservation Authority**, **notify an area as a tiger reserve**.*

***Explanation.**—For the purposes of this section, the expression "**tiger reserve" includes**—*

*(i) **core or critical tiger habitat areas of National Parks and sanctuaries**, where it has been established, on the basis of scientific and objective criteria, that such areas are required to be kept as inviolate for the purposes of tiger conservation, without affecting the rights of the Scheduled Tribes or such other forest dwellers, and notified as such by the State Government in consultation with an Expert Committee constituted for the purpose;*

*(ii) **buffer or peripheral area consisting of the area peripheral to critical tiger habitat or core area,** identified and established in accordance with the provisions contained in Explanation (i) above, where a lesser degree of habitat protection is required to ensure the integrity of the critical tiger habitat with adequate dispersal for tiger species, and which aim at promoting co-existence between wildlife and human activity with due recognition of the livelihood, developmental, social and cultural rights of the local people, wherein the limits of such areas are determined on the basis of scientific and objective criteria in consultation with the concerned Gram Sabha and an Expert Committee constituted for the purpose."*

7.10 As is evident from the Explanation to Section 38V of the Wildlife (Protection) Act, 1972, for a creation/notification of a Buffer Zone, three statutory requirements must be fulfilled *viz.*: (i) an Expert Committee must be constituted for identifying and establishing a Buffer Zone; (ii) Gram Sabha should be consulted before any such notification and (iii) the identification and establishment of a Buffer Zone shall be based on scientific and objective criteria.

7.11 It was contended by Adani that none of the statutory requirements for creating a Buffer Zone were even initiated as on the cut-off date (14.02.2008), let alone a Buffer Zone being identified or in fact created. We note that prior to cut-off date, parts of TATR was declared as a CTH which was notified by the GoM on 27.12.2007. Admittedly, there was no Buffer Zone to the said CTH. It is also evident that Lohara Coal Blocks were not falling within the said CTH. It was only after the cut-off date that the statutory action or process for creating the Buffer Zone kick started which is evident from the following uncontested facts: -

(i) The Chief Conservator, Forests, on 21.02.2008 i.e. 7 days after the bid cut-off date (14.02.2008), gave approval for constituting an Expert Committee for creating the Buffer Zone surrounding the core area of TATR under Section 38(V) of the Wildlife Protection Act, 1972 (i.e. a statutory requirement for creating a Buffer Zone).

(ii) On 07.03.2008, i.e. 24 days after the bid cut-off date (14.02.2008), the Conservator, TATR submitted the proposed demarcation to the Chief Conservator of Forest for creating the Buffer Zone surrounding the core area of TATR under Section 38(V) of the Wildlife Protection Act, 1972.

(iii) Consultation/Consent of Gram Sabha happened only between May 2008 and November 2008 *i.e.*, after the cut-off date.

(iv) Subsequently, on 08.10.2008, the Conservator, TATR submitted the revised proposal for Buffer Zone to TATR pursuant to conclusion of Consultation/ Consent of Gram Sabha.

(v) Numerous other deliberations, interventions by NTCA etc. culminated in the GoM's Notification dated 05.05.2010, wherein by exercising its powers conferred under Section 38(V) of the Wildlife (Protection) Act, 1972, the GoM notified 1101.7711 sq. km as the Buffer Zone of TATR.

7.12 It is not in dispute that the GoM notification dated 05.05.2010 creating a buffer zone to the TATR is a notification issued by an Indian Governmental Instrumentality and therefore, satisfies the definition of 'Law' contained in the PPA. All statutory actions *qua* identification and notification of the Buffer Zone to the TATR were taken post the cut-off date of 14.02.2008 and, therefore, we are of the view that the first two elements, namely, bringing into effect a Law after the cut off date are satisfied in this case.

7.13 We further observe that Adani's legitimate entitlement to mine coal from Lohara Coal Blocks was represented through actions of Indian Government Instrumentalities, namely, the MoC which allocated the coal blocks through allocation letter dated 06.11.2007 and MoEF which had granted the ToRfor the Lohara Coal Blockson 16.05.2008 (pursuant to EAC's recommendation during meeting dated 28.04.2008). A number of arguments were advanced with regards to significance and implications of such grants *vis-à-vis* Adani's legitimate entitlement to mine coal from Lohara Coal Blocks.

7.14 The Allocation letter issued by the MoC is clear and unequivocal, it states that the allocation of Lohara West &LoharaExtn (E) coal block to M/s Adani Power Ltd. was made to meet the coal requirement of its 1000 MW power plant in Distt. Gondia, Maharashtra. Evidently, the coal allocation was made for captive usage by Adani and thereby, it created a legal right or interest in favour of Adani and a legitimate expectation in favour of Adani that it had acquired the right to use and exploit the allotted coal mines to feed its Tiroda TPS to meet its power supply obligations under the PPA. It is not MSEDCL's case that any additional document or instrument was required to be issued by the MoC to create a vested right in favour of Adani to use and exploit the allotted Coal Blocks. As such, by allocating Lohara Coal Blocks on 06.11.2007, MoC transferred the necessary right and entitlement for use and exploitation of Lohara Coal Blocks in favour of Adani. This Tribunal in the Remand Order categorically held that MoC's allocation letter dated 06.11.2007 was the fulcrum of Adani's bid and that Adani therefore had a legitimate expectation that in the normal course of business, it would utilize the coal from Lohara Coal Blocks. MSEDCL's contention that the allocation letter was subject to grant of EC is not correct as no such condition is stipulated in the allocation letter. Further, grant or receipt of EC, approval of mining plan, etc. are approvals which would have

been expected to be received in ordinary course of business. Adani could not have planned its affairs or submitted bid to MSEDCL in the knowledge that its request for EC for the Lohara Coal Blocks would be denied, especially when it had submitted alternate proposals for mining in the allotted coal blocks. We are also in agreement with Adani's contention that the fact that MoC had to de-allocate the mine by letter dated 17.02.2014 itself testifies that Adani had a vested right in Lohara Coal Blocks.

7.15 Based on MoC's sanction to Adani to utilize Lohara Coal Blocks, Adani submitted its bid on 21.02.2008 and specified captive coal as one of its bid-identified sources of fuel. Lohara captive Coal Blocks thus became the fundamental basis of Adani's bid for part of its contracted capacity (800MW out of 1320 MW).

7.16 We observe that Clause 2.1.5 of the RFQ expressly required Adani to submit a 'comfort letter' regarding sourcing of coal at the time of bid submission. Adani submitted MoC's allocation letter dated 06.11.2007 along with its bid as a 'comfort letter' in compliance with Clause 2.1.5 of the RFQ. It has not been denied by MSEDCL in view of the specific bid parameters indicated by Adani, MSEDCL accepted Adani's bid and issued LoI dated 29.07.2008 in favour of Adani. Therefore, MoC's allocation letter dated 06.11.2007 was accepted as an adequate 'comfort letter' by MSEDCL for the purposes of bid qualification. We agree with the contentions of Adani that MSEDCL's acceptance of Adani's bid basis the comfort letter or the MoC allocation letter submitted by Adani is an acknowledgment by MSEDCL of Adani's legal right to obtain coal from the allotted coal mines. Having accepted its bid, MSEDCL cannot now question or impugn the legal sanctity of the MoC allocation letter dated 06.11.2207.

7.17 MSEDCL cannot take contradictory and shifting stands regarding the validity and effect of MoC's allocation letter dated 06.11.2007. We refer to

the Hon'ble Supreme Court's findings in *Suzuki ParasrampuriaSuitings Private Ltd*. vs. *Official Liquidator of Mahendra Petrochemicals Limited* (2018) 10 SCC holding that a litigant can take different stands at different times but cannot take contradictory stands in the same case. A party cannot be permitted to approbate and reprobate on the same facts and take inconsistent shifting stands. The untenability of an inconsistent stand in the same case was considered in Amar Singh v. Union of India [Amar Singh v. Union of India, (2011) 7 SCC 69. The Supreme Court also held in *Joint Action Committee of Airline Pilots' Association of India* vs. *Director General Association of India* (2011) 5 SCC 435 that the doctrine of election is based on the rule of estoppel—the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. Taking inconsistent pleas by a party makes its conduct far from satisfactory. Further, the parties should not blow hot and cold by taking inconsistent stands and prolong proceedings unnecessarily.

7.18 Additionally, we hold that MoC's allocation letter dated 06.11.2007 cannot be held as conditional as contended by MSEDCL. It is a separate document and the effect of the same ought to be ascertained based on the contents of the said document itself. As observed above, MoC's allocation letter dated 06.11.2007 created enforceable legal rights and interests over Lohara Coal Blocks in favour of Adani. Denial or rejection of other required permissions such as EC would not make the allocation letter conditional or insufficient in any manner. The fact remains that basis the same allocation letter, MSEDCL signed the PPA with Adani without any demur or objection.

7.19 MSEDCL has further contended that cancellation of Lohara Coal Blocks was Adani's own making and therefore no change in law compensation is payable. We are not in agreement with this contention. No material has been produced by MSEDCL to support this position. Secondly Adani could not have anticipated the creation of buffer zone covering a large part of the project area. Once it became aware of the proposed buffer zone, it had proposed to modify the wildlife conservation plan as per the requirements of Government of Maharashtra. Thirdly, Adani even proposed to surrender 176 hectares of area which fell under the proposed buffer zone of TATR. In the remaining area said to be the tiger corridor, Adani had proposed to divide the Mining lease area into 40 blocks and do mining only in one block every year, so that it will have minimum impact on the wildlife. As such, we take note of the mitigations efforts suggested by Adani to overcome the obstacles caused by the proposed buffer zone but it was not enough to persuade the relevant government authorities in affirmative.

7.20 In the Remand Order, we have noted that under the MoC's allocation letter dated 06.11.2007, allocation/mining lease could have been cancelled only on the three grounds mentioned therein viz.: -

"Allocation / mining lease of the coal block may be cancelled, inter-alia, on the following grounds:-

***a.** Unsatisfactory progress of implementation of their end use sponge iron plant / power plant/cement plant.*

***b.** Unsatisfactory progress in the development of coal mining project*

***c.** For breach of any of the conditions of allocation mentioned above."*

7.21 None of the three conditions envisaged a situation of withdrawal of allocation of coal blocks. The three conditions clearly referred to are unsatisfactory progress of implementation of end use of the allottees or unsatisfactory progress in the development of coal mining or breach of any of the conditions in the allocation letter would lead to cancellation.

Therefore, when ToR came to be issued on 16.05.2008, Adani could not have envisaged cancellation or withdrawal of coal block for any other reason other than conditions referred to in the allocation letter. The cancellation of coal block did not happen because of any of the identified three conditions. MSEDCL argued that the allocation letter mentions '*inter alia*' in the conditions for cancellation, meaning the said conditions were not exhaustive. In this context, it may be noted that the condition 'c' of allocation letter envisages cancellation for breach of any condition of allotment. However, it is not even MSEDCL's case that Adani was in breach of any condition of the allocation or breach of any other applicable law, which would warrant such cancellation. From the terms of the allocation letter, it is clear that no reasonable person could have read into it a condition regarding withdrawal of ToR as the basis for cancellation of the coal blocks.

7.22 On 24.11.2009 and 25.11.2009, the EAC, in its 59th meeting took a decision to withdraw the ToR previously granted to Adani. We are also mindful of the fact that while doing so, EAC recorded that the ToR was not cancelled on account of any default of Adani but for the reasons that at the time of granting the ToR, EAC was not aware of the mining project being within the proposed buffer zone of the TATR. Pursuant to further study of the area and subsequent to the grant of ToR, it was understood that the tiger corridor was a part of the proposed mining lease areas.

7.23 We also observe that NTCA has been given overriding powers under the Environmental Protection Act, 1986 with regards to demarcation of Buffer Zones. The same is made amply clear by sub-section (2) of Section 38(O) of the Wildlife (Protection) Act, 1972 which states that NTCA's directions are binding on other statutory authorities (including GoM, EAC and MoEF) *viz.*: -

***"38O**. Powers and functions of Tiger Conservation Authority:*

*(2) The **Tiger Conservation Authority may, in the exercise of its powers and performance of its functions under this Chapter, issue directions in writing** to any person, officer or authority for the protection of tiger or tiger reserves and **such person, officer or authority shall be bound to comply with the directions**:*"

7.24 The same is also evident from the use of the "shall" in the opening portion of Section 38V of the Wildlife (Protection) Act, 1972 wherein it is stated if NTCA so recommends, State Government is bound to notify the area as Tiger Reserve. The use of the word "shall" indicates that a particular provision is mandatory. The Supreme Court in *Delhi Airtech Services (P) Ltd. v. State of U.P.*, (2011) 9 SCC 354 held that:-

"*80. Basically, the language used is "shall" which primarily indicates mandatory compliance. That apart, in the context of the nature of the statute which is admittedly expropriatory in character and the nature of the statutory requirement under Section 17(3-A) which is clearly and undoubtedly a condition precedent to the taking over of possession in emergency acquisition, there can be no doubt that the requirement under Section 17(3-A) is mandatory.*

122. The distinction between mandatory and directory provisions is a well-accepted norm of interpretation. The general rule of interpretation would require the word to be given its own meaning and the word "shall" would be read as "must" unless it was essential to read it as "may" to achieve the ends of legislative intent and understand the language of the provisions. It is difficult to lay down any universal rule, but wherever the word "shall" is used in a substantive statute, it normally would indicate mandatory intent of the legislature."

7.25 The EAC in its 59th meeting Report had also specifically recorded the intervention by NTCA and its recommendation to EAC to not let mining be conducted in the proposed Buffer Zone. The relevant extracts of the EAC meeting are as under:-

"DIG & Joint Director, NTCA informed that under the direction of Hon'ble MEF, Director, NTCA had undertaken a site visit and had recommended that no mining operations should be undertaken in the proposed buffer zone. He further informed that the NTCA has legal obligations under Section 38 (O) of the Wildlife Protection Act 1972, and is authorised to regulate the landuse that can impact the Tiger Reserves in the country. "

As such, we observe that EAC was statutorily bound to follow directions/request of NTCA and had no option but to recommend MoEF to withdraw the ToR. Based on EAC's recommendation, MoEF withdrew the ToR on 07.01.2010. Even MoEF recorded the cause of such withdrawal was that the Lohara Coal Blocks were falling within the proposed Buffer Zone (and not Adani's default). This was bolstered by the fact that later while de-allocating the Lohara Coal Blocks on 17.02.2014, MoC returned the bank guarantee furnished by Adani. If Adani had been in default of any condition of allocation, its bank guarantee would not have been returned by the MoC. In view of cancellation of the Lohara Coal Blocks, Adani had no choice but to depend on the costlier alternate coal sources such as imported coal, coal supply under SHAKTI FSA dated 29.03.2018, and e-auction coal, which led to increase in cost of supply of power to MSEDCL. Thus, the third pre-condition to qualify for change in law, i.e. impact on cost or revenue from sale of electricity, is also fulfilled. As such de-allocation of Lohara Coal Blocks satisfies all elements of qualifying as a change in law event under Article 13.1.1 of the PPA. We, therefore, hold that the following events qualify as change in law events in terms of the PPA: -

(i) MoEF's letter dated 07.01.2010 withdrawing the ToR and rejecting grant of EC. This was based on EAC's recommendation in its 59th meeting. This led to foreclosing of all options for Adani to undertake coal mining in the Lohara Coal Blocks. MoEF is an Indian Governmental Instrumentality and its withdrawal of ToR, which is a pre-requisite for obtaining EC, for the Lohara Coal Blocks amounts to a change in law event under Article 13.1.1 of the PPA.

(ii) GoM's Notification dated 05.05.2010 creating Buffer Zone to the TATR constitutes a change in law event in terms of Article 13.1.1 of the PPA.

(iii) MoC letter dated 17.02.2014 cancelling and de-allocating the Lohara Coal Blocks, which was made after the cut-off date, squarely falls within the definition of Change in Law under the PPA.

(iv) It may also be noted that even if the MoC had not deallocated the Lohara Coal Blocks on 17.02.2014, Adani would not have been able to utilise and exploit the Lohara Coal Blocks on account of the Manohar Lal Judgment rendered by the Hon'ble Supreme Court on25.08.2014 and would have been entitled for relief under change in law.

7.26 We, therefore, hold that the Appellant was affected by Change in law on account of the de-allocation of Lohara Coal Blocks andaccordingly, the impugned order of the State Commission is upheld on this issue.

8. **Issue-2: - Whether MERC was justified in considering the landed cost of linkage coal as the basis for computing change in law compensation when Lohara Coal Blocks were the bid-identified source of coal?**

8.1 Mr.SajjanPoovayya, the learned senior counsel for APML, has made the following submissions for our consideration:-

(a) Change in law compensation towards cost of alternate coal on account of cancellation / de-allocation of Lohara Coal Blocks ought to be computed considering the difference in cost of coal that would have been produced from Lohara Coal Blocks and the alternate coal sources availed by Adani in order to restitute Adani to the same economic position as if no change in law had occurred under the terms of the PPA. MERC rejected Adani's proposed methodology and erroneously considered the landed cost of linkage coal as the basis for computing change in law compensation. MERC erred in holding that Adani's claim for considering landed cost of coal from Lohara Coal Blocks as the basis for computing change in law compensation is premised on assumptions.

(b) While submitting the bid, Adani quoted its energy charges towards the tariff based on the computed landed cost of the coal from Lohara Coal Blocks. The cost computation was based on assumptions which were made considering that coal would be available from Lohara captive Coal Blocks. Having accepted Adani's bid, MSEDCL's letter of intent dated 29.07.2008, inheres in it, Adani's assumptions of the landed cost of coal from Lohara Coal Blocks.

(c) MERC in its Order dated 21.08.2013 in Case No. 68 of 2012 used its regulatory powers and constituted an Expert Committee to work out and recommend a package for compensatory tariff to offset the hardship faced by Adani due to de-allocation of Lohara Coal Blocks. On 17.02.2014, the Expert Committee furnished its Report which inter alia captured Adani's computed landed cost of the coal from Lohara Coal Blocks in Chapter 6 of the Report. Admittedly, Expert Committee had arrived at the Lohara coal costs by virtue of transfer pricing. Therefore, the price was derived by the Committee and not assumed as contended by MSEDCL. The Expert Committee, through its Report, recommended MERC to consider the landed cost of coal from the Lohara Coal Blocks to be taken as the base for computing the compensation.The cost of coal from Lohara, as determined by the Expert Committee, ought to have been considered as base for computing compensation.

(d) MSEDCL, being a member of the Expert Committee, did not raise any objection to the final methodology proposed to offset the hardship faced by Adani during any of the Expert Committee proceedings. It is now not open to MSEDCL to cast aspersions on the recommendations of the Expert Committee.

(e) Further, the Full Bench Judgment of APTEL in Appeal Nos. 100 of 2013 and batch set-aside the said of MERC Orderof 05.05.2014. However, by the time Adani's Appeal No. 241 of 2016 was considered by this Tribunal,

Energy Watchdog Judgment had occupied the field, which, in principle, lays down that ERCs have regulatory powers to determine compensatory tariff. Accordingly, this Tribunal in the Remand Judgment (31.05.2019) specifically recorded that MERC was right in determining compensatory tariff. MSEDCL has also not challenged this finding. Thus, the constitution of Expert Committee and consequently findings of its Report cannot be now questioned. MSEDCL's contention that Adani's claim is based on a unilateral assumption is thus misleading, is oblivious to the principle of bid sanctity and ought to be rejected.

(f) Guided by the principle laid down in Energy Watchdog Judgment and the specific directions in the Remand Judgment, MERC was required to consider the issues qua change in law compensation. As such, for the purpose of computing the relief under Change in Law, the landed cost of the respective fuel stream needs to be considered as the base and not otherwise.

(g) MERC cannot adopt inconsistent methodologies to compute change in law reliefs. This position has been accepted by MERC in its Order dated 07.03.2018 in *Adani Power Maharashtra Limited* vs. *MSEDCL* in Case No. 189 of 2013 and accordingly in approving the compensation for shortfall in linkage coal supply, MERC considered landed cost of linkage coal as base corresponding to 520 MW capacity of total contracted capacity of the same 1320 MW PPA. MSEDCL has been making payments based on the said findings and the same has never been challenged and thus has attained finality. The details of landed cost of linkage coal was not part of bid submitted by Adani since it was under Case-I. Yet, MERC rightly considered linkage coal cost as basis to award compensation for shortfall in linkage coal availability in the said case. Based on the same principle, in present case, the landed cost of Lohara Coal Blocks ought to have been

considered as the base since MERC cannot adopt inconsistent methodologies to compute change in law reliefs.

(h) Further, MSEDCL did not contest the methodology proposed by Adani for computing compensation towards change in law on account of cancellation of Lohara Coal Blocks. Accordingly, without any specific pleading of MSEDCL, MERC ought not to have tinkered with the Adani's proposed methodology. The proposed methodology was based on the principles followed by MERC in its earlier orders and is consistent with (i) the principle of restitution enshrined in the PPA, (ii) Energy Watchdog Judgment, (iii) the directions of CCEA, MoP and (iv) provisions of Tariff Policy, 2016.

(i) It is further contended that the landed cost of coal should also include transportation costs. Landed cost of coal consists of two parts viz. (i) cost involved in the production of coal from Lohara Coal Blocks and (ii) the cost of transportation of such coal from mine to Adani's Tiroda TPS. The details of the cost of transportation of coal is provided in the Expert Committee Report dated 17.02.2014. The present cost of transportation may be considered based on Railways Freight with applicable taxes and duties as submitted in the tables, while determining the landed cost of coal.

(j) MERC Multi-Year Tariff Regulations, 2015 consider cost of transportation in landed cost of coal. Further, this Tribunal in *DPSC Limited* vs. *WBERC* 2014 SCC Online APTEL 162 [Appeal No. 244 of 2012 dated 26.08.2014] held that 'transit and handling losses' (i.e. part of transportation cost) shall be included in the landed cost of fuel.

8.2 ***Per contra***, Mr. Ganesan appearing for MSEDCL has made the following submissions for our consideration:-

(a) The Expert Committee was constituted by MERC by way of an interim order to ascertain whether Adani will be entitled to any compensatory tariff

dehors the PPA. Although MSEDCL was a party to the Committee, MSEDCL was not a signatory to the Report.

(b) In the proceedings before the Committee, MSEDCL had made objections on several aspects. In this regard, Expert Committee Report's relevant pages were displayed which captures MSEDCL's objections. It was submitted that Chapter 6 of the Expert Committee clearly records that the cost analysis of the Lohara coal block was made on assumptions based on documents submitted by Adani.

(c) There was no tangible evidence given by Adani to justify the coal cost assumptions. As such, MERC rightly did not place reliance on the Expert Committee findings while setting out the methodology for compensation.

(d) MERC's exercise of regulatory powers to grant compensatory tariff to Adani was questioned before this Tribunal in Appeal and this Tribunal clearly held that MERC did not have the power to exercise regulatory powers and grant such compensatory tariff. This Tribunal's decision was not appealed by Adani and the said judgment has attained finality.

8.3 Ms. Rungta appearing for MERC made the following submission for our consideration:-

(a) The Commission has noted in the impugned order that the Expert Committee in its report dated 18.02.2014 had only reflected on the APML's assumptions of arriving at landed cost of coal to be mined from Lohara Coal Block. Based on the said submissions of APML, mining plan and geographical survey report, the Committee proceeded to recommend a mechanism for arriving at compensatory tariff. The Commission has further noted that such assumptions/submissions of the appellant were never part of bidding documents and therefore, cannot be the basis for arriving at compensation to be allowed under the change in law. The actual quality and cost of coal that would have been produced from Lohara Coal Block

cannot be ascertained in the backdrop of the same being in the nature of assumption and presumption. Therefore, the Commission did not err in deciding that such cost, being based on assumptions, cannot be considered as basis for determining the change in law compensation.

(b) While submitting its bid for 1320 MW (Unit 2 and 3), APML has assumed sourcing of coal for 1000 MW capacity from Lohara Coal Block and balance from coal linkage. However, subsequent to the cut-off date, the Standing Linkage Committee (SLC) in it meeting held on 12.11.2008 noted that Lohara Coal Blocks can sustain a capacity of only 800 MW instead of the earlier identified 1000 MW which makes the sourcing of coal for 1320 MW PPA as 800 MW from Lohara Coal Block and 530 MW from CIL. The Commission has considered the same composition for approving various change in law claims of APML subsequently, which has been accepted by APML.

(c) In view of the above, the Commission has observed that as the assumptions of coal (coal from 1000 MW from Lohara Coal Block) prevailing at the time of cut-off date itself had undergone change (1000 Mw reduced to 800 MW) and such change has been accepted and adopted by the parties. Thus, there is no merit in the submission of APML to arrive at compensation for change in law on the basis of landed cost of Lohara Coal Block.

Our Findings and Analysis

8.4 After hearing the parties, we observe that it is relevant to record that this Tribunal in its Remand Order dated 31.05.2019 held that MERC was justified in exercising regulatory powers to grant compensatory tariff. The relevant extract of the Remand Order is as under.

"161. The present Appeal was pending when the judgment in Energy Watchdog came to be pronounced by the Hon'ble Apex Court. It is well settled that since the Appeal is

continuation of the original proceedings, the Court of Appeal can take into consideration facts and events which have come into existence after the impugned order. This Appeal was pending when the judgement in Energy Watchdog, came to be pronounced. Therefore, now we have to consider what is the effect of observations of the Hon'ble Apex Court with regard to regulatory powers to be exercised by the appropriate Commission to grant compensatory tariff.

162. This Tribunal in the Full Bench judgment opined that appropriate Commissions have no regulatory powers to grant compensatory tariff. This is no more good law in the light of Energy Watchdog judgment. Therefore, said issue has to be disposed of in line with the final opinion on the subject of Regulatory Powers of Commission as held in the judgment of Energy Watchdog. It is relevant to refer to certain Paragraphs from the judgment of Energy Watchdog [(2017) 14 SCC] which read under.

> *"20. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions dehors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to "regulate" tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various sections must be harmonised. Considering the fact that the non obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways — either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff. Whereas "determining" tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to "regulate" tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used.*

163. Above Para clearly indicate that if Central Government's guidelines are not in existence or if the situation is not covered by the existing guidelines, the appropriate

Commission can exercise regulatory power which is general in nature even in cases of Section 63 competitive bidding.

164. In the light of above subsequent development since this appeal was pending when Energy Watchdog judgment came, this Tribunal has to proceed on this point as held by Hon'ble Apex Court. Therefore, we opine that MERC was justified in exercising Regulatory Powers to grant compensatory tariff.

…

198. We are of the opinion, in view of the opinion of the Hon'ble Apex Court on the issue of exercising regulatory powers by appropriate Commission, we hold that MERC can exercise regulatory powers to grant compensatory tariff. Therefore, MERC need not ponder over this issue afresh."

8.5 In light of the above judgment, we hold that it is not open to MSEDCL to contest the constitution of the Expert Committee and the validity thereof, especially since MSEDCL was a participant before the Expert Committee. The MERC Order dated 05.05.2014 was set aside by this Tribunal only on the ground that the Commission had no regulatory powers to award compensatory tariff, it was not set aside on any infirmity in the constitution or the role performed by the Expert Committee. After the Energy Watchdog Judgment, we have already reiterated that the State Commission has the regulatory powers to issue appropriate directions, especially where competitive bidding guidelines are silent or do not cover the field. The Expert Committee constituted by the MERC was in exercise of its regulatory powers and was only a means to discover the appropriate commercial parameters to compute change in law relief. Therefore, the real issue for our determination is whether the methodology suggested by the Expert Committee for computation of change in law relief to Adani is appropriate or justified.

8.6 While the MERC in the Impugned Order has declined to take cognizance of the Expert Committee Report on the ground that the Report only reflected Adani's assumptions of arriving at landed cost of coal to be mined from

Lohara Coal Block, it is worth noting that the MERC had not found anything objectionable in the Committee Report in its order of 05.05.2014 in Case No. 63 of 2014. Relevant paragraphs from the MERC's order are extracted below:

> *"21.10 APML further added that the Committee, including MSEDCL deliberated upon and dealt with all the issues raised before it and thereafter they have recommended methodology for calculation of compensatory charge. Therefore, it is wrong to state on the part of Prayas that the Committee's methodology and/or prescription cannot be relied upon for arriving at any decision, just because certain objections have been raised by MSEDCL and GoM. It is also denied that the Committee has failed to give computation of the actual impact on Tariff. In view thereof, APML submits that the Commission may adopt the report of the Committee recommending the methodology of computation of Compensatory Charges in entirety as the same is in line with the mandate given by the Commission vide Order dated 21 August, 2013.*
> *21.11 The Commission notes that the assertion that APML was not a party to the proceedings of the Committee is incorrect. While formulating the Committee, GoM had kept out APML from the Committee and stated that APML shall be invited as and when required. During the proceedings of this case, the Commission took a note of the same. The Commission observed that it had directed for formation of a Committee including APML; however, GoM has altered the composition of the Committee, which was not open to its discretion. Accordingly, in line with the principle stated in Order in Case No. 68 of 2012, the Commission directed in its daily Order in Case No. 150 of 2013 that APML be a permanent invitee in the proceedings of the Committee and all documents will be shared with APML.*
>
> ***21.12 APML has accepted the Committee Report and in fact prayed the Commission to accept the Committee Report in entirety. GoM has also accorded in principle acceptance to the Committee Report with some modification suggested. Each of the contentions of MSEDCL and GoM have been considered on merit. Therefore, there is no question of not relying on the Committee Report****."*

8.7 What emerges from the above is that, in Case No. 63 of 2014, the MERC had in fact relied on the Committee Report to allow a compensatory tariff to Adani in lieu of cancellation of Lohara coal blocks. While the legal basis of awarding compensatory tariff was initially rejected by this Tribunal and then reinstated and reiterated following the Energy Watchdog Judgment of the Hon'ble Supreme Court, it would not be correct to state that on account of this Tribunal's Order dated 11.05.2016 (Full Bench Judgment) , the Expert Committee Report, which had been constituted by the MERC itself and was

approved by the Government of Maharashtra as well, completely loses its relevance or sanctity. This Tribunal did not find any fault with the Expert Committee Report in its order dated 11.05.2016 and neither did the MERC in its order dated 05.05.2014. Having constituted an Expert Committee with the participation of all concerned, we do not find any strong justification furnished by the MERC to completely discard or reject the Expert Committee Report, especially when no alternative compensation formula was presented by MSEDCL before the MERC.

8.8 We note that the Expert Committee in its Report has *inter alia* observed that the compensation payable to Adani would depend on the cost assumptions indicated in the bid. The Expert Committee having financial experts on board acknowledged that most of such cost assumptions were substantiated through documents *viz.* Mining Plan, Geological Survey and Adani's estimations founded on applicable Regulations etc. We also note that the Expert Committee determined the price of coal from Lohara Coal Blocks using "transfer pricing method" which is one of the commonly used methods and the same is being used for determining the transfer price of lignite of Neyveli Lignite Corporation Ltd. No material has been placed on record by MSEDCL to contest the merits of computation formula suggested by the Expert Committee. In fact, it appears that even during the proceedings in Case No. 63 of 2014, the difference between Adani and MSEDCL was only on the issue of performance parameters to be applied to determine the quantum of alternate coal. Following paragraphs from the MERC Order dated 05.05.2014 are noteworthy:

> **"***25. The Commission notes that MSEDCL has raised certain arguments on the methodology outlined in the Committee Report. However, while forwarding the workings of compensatory energy charge computed by SBI Caps, it has not taken any objections or any contrary views to the number computed therein. The Commission has considered the contentions of MSEDCL and GoM while deciding the matter to arrive at a considered decision. Accordingly, the Commission notes that the*

computations submitted by both the parties are identical and the only difference in the computations is on the SHR and Auxiliary Consumption.

26. ***Since both the parties have disagreed only on the performance parameters, the Commission has delved on the performance parameters as follows****:....”*

We are, therefore, of the view that the Expert Committee report provides a reasonable basis to arrive at the cost of mining from Lohara Coal blocks and could not have been rejected by the MERC without strong justifications.

8.9 We also observe that MSEDCL ought not to cast aspersions on such use of methodology of transfer pricing to deduce/determine the coal cost. Expert Committee Report was furnished after carrying out a detailed exercise of analysing all relevant technical, commercial, and financial aspects through a consultative process. The Expert Committee had also appointed external industry experts i.e. legal consultant, financial experts and independent auditors. Admittedly, the Expert Committee took cognizance of view of all the stakeholders (including MSEDCL) and it is not the case of MSEDCL that it was not heard before submission of the Report to MERC. In fact, we are mindful of the fact that the cover letter submitted to MERC records MSEDCL representative being one of the members which submitted the Report. As such, we see no reason why the recommendations of the Expert Committee cannot be relied upon.

8.10 It is also not a case where MSEDCL produced any document to contradict such determination of Lohara coal cost by Expert Committee. We therefore hold that MERC ought to have conducted a prudence check to arrive at a conclusion regarding the correctness of the figures so derived/determined towards coal costs by the Expert Committee. Prudence check, however, does not mean taking linkage coal cost as the base to grant or determine change in law compensation to Adani. The MERC clearly fell in error on this issue.

8.11 The MERC's erroneous approach erodes the restitutionary principle enshrined under Article 13 of the PPA. In fact, Adani submitted that the Lohara coal cost cross-subsidizes fuel cost from Linkage portion, which has also been noted by the Expert Committee in its Report, but ignored by MERC. MSEDCL has not disputed this fact.

8.12 The Expert Committee Report further notes that based on the said cost parameters, Adani had arrived at two different bid streams for each of the fuel source (i.e. captive coal and linkage coal). The overall bid numbers were based on a weighted average of the individual bid streams. Observing thus, in Chapter 7, the Expert Committee suggested MERC to consider the Lohara coal cost to be considered as the base for restituting Adani. Expert Committee gave the following rationale for the recommended methodology: -

> "7.1 …*The company had entered into a PPA based on the assurance of one of the instrumentality of GoI to provide the coal mine. Therefore, other instrumentality of a state government may need to consider the fact of subsequent non-availability of coal mine. This fact has been acknowledged by MERC*…"

8.13 We are in agreement with this rationale. This rationale conforms to the Tribunal's findings in the judgment dated 14.09.2019 (Appeal No 202 of 2018 & 305 of 2018) (***Adani Rajasthan judgment***) wherein it was held that: -

> *"11.13. The 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."*

8.13 In the aforesaid case, the principle which was considered by us is that to restore the affected party to the same economic position as prevailing at the time of bid submission, the affected party shall be compensated for any additional cost incurred in procuring alternate coal to mitigate the non-availability / shortfall of coal from the bid-identified source. Since the bid-identified source of coal in the aforesaid case was linkage coal, the compensation allowed by the Tribunal was the difference between alternate coal cost and linkage coal cost. The formula for such computation is: **Compensation = A – B** [where '**A**' is cost of alternate coal and '**B**' is cost of coal from the bid-identified source of fuel i.e. linkage coal.] Here, we find it important to note that the methodology approved in Adani Rajasthan Judgment has not been interfered with by the Hon'ble Supreme Court in its order dated 31.08.2020 in *Jaipur VidyutVitran Nigam v. Adani Power Rajasthan Limited and Anr. (Civil Appeal No. 8625-8626 of 2019)*.

8.14 Applying the same ratio as held in Adani Rajasthan Judgment, the formula for compensation for non-availability of coal from Lohara Coal Blocks should have been **Compensation = A – B [**where, '**A**' is cost of alternate coal and '**B'** is cost of coal from the bid-identified source of fuel i.e. Lohara Coal Blocks.] Considering linkage coal cost as base will not restitute Adani to the same economic position as if no change in law had occurred and thus runs contrary to the mandate laid down by the Energy Watchdog Judgment, the Uttar Haryana Judgment and the revised Tariff Policy 2016.

8.15 Adani further prayed before us to direct MSEDCL that in so far as the costs incurred towards transportation of coal from the Lohara Coal Blocks to Tiroda TPS is concerned, the same may be considered based on applicable Railway Freight with applicable taxes and duties, while determining the landed cost of coal from the Lohara Coal Blocks. We are in agreement with this contention. It is no longer *res integra*that landed cost of

coal includes transportation costs. Supreme Court's judgment in *Nabha Power Ltd.* vs. *Punjab State Power Corp. Ltd.* (2018) 11 SCC 508 is locus classicus on the subject wherein it was held that landed costs cannot exclude transportation costs *viz.*:-

> "64. *We fail to appreciate as to how these costs can be excluded, as the transportation costs to the project site have to be compensated to the appellant. It is not qualified by the methodology of transfer, i.e., railways or road. It is also a matter of necessity, since the railway siding had not reached the project site due to some complications in acquisition of land. It is really the transportation cost from point to point which would be involved and the mere mention in the RFP under project related activity/milestone about Railway siding and the Railway lines from nearby station to site cannot imply that the Railways is the only mode of transportation when the siding has not been made, albeit on account of land acquisition problems*."

8.16 We, therefore, hold that MSEDCL ought to pay Lohara coal cost as base (including transportation costs) while compensating Adani for the change in law events. This issue is decided accordingly and the Impugned Order on this issue is set aside.

9. Issue-3- Whether having allowed carrying cost, MERC was justified in pegging the carrying cost to the prevalent Multi Year Tariff ("MYT") Regulations?

9.1 Learned senior counsel for APML has contended that carrying cost ought to be allowed at the same rate as provided for Late Payment Surcharge. It was submitted that carrying cost is payable as per the provisions of PPA to compensate the affected party for time value of funds deployed on account of change in law events. The LPS provision in the PPA is also meant for compensation towards time value of money on account of delayed payments. Therefore, the rate prescribed for LPS in Article 11.3.4 of the PPA (i.e. SBI PLR plus 2%) ought to be considered for the recovery of carrying cost. It has been contended that Adani cannot be restored to the same economic position, as it was prior to the cancellation of Lohara Coal Blocks, unless the rate of interest applicable for LPS is granted. It has been argued that, subsequent to passing of the Impugned Order, this Tribunal in

Adani Rajasthan Judgment dated 14.09.2019 (Appeal No 202 of 2018 & 305 of 2018) has allowed carrying cost at the rate of interest applicable for LPS.

9.2 ***Per Contra***, the learned counsel for MSEDCL has submitted that the basic principle of payment of carrying cost is to restitute the economic position and compensate the aggrieved party for parting with liquidity i.e., it is time value of money. The time value of money is derived by using appropriate rate of interest. Hence, carrying cost is not treated as penalty. It has been submitted that the decision and determination on the payment in compensation of change in law claims to APML at this stage is not due to fault of MSEDCL of non-payment of amounts, but it is on account of the approval by the State Commission on the change in law event. As per the provisions of Article 13 of the PPA the change in law event has to be approved by the State Commission for payment of change in law claims and there cannot be any payment without the determination by the State Commission. Hence, there is no default on part of MSEDCL in respect of approval of change in law event, so as to attract LPS mechanism. Therefore, the State Commission in impugned order has rightly considered the rate of interest for payment of carrying cost equivalent to the rate specified for interest on working capital in the MYT Regulations. It has been submitted by MSEDCL that Adani had in fact sought carrying cost at the rate prescribed in the MYT Regulations in its petition before the MERC.

9.3 Learned counsel for MERC has submitted that while restoring the affected party to the same economic position in terms of principle of restitution, it is not expected to impose any penalty/punitive cost on other party when there is no default of other party. The Commission allowed carrying cost from the date of occurrence of change in law till approval of such change in law by the Commission for compensating APML towards working capital it has

to arrange towards impact of change in law event. As PPA does not specify rate of interest to be allowed in such situation, the Commission has used interest rate of Working Capital stipulated in its MYT order. It was also submitted that rate of surcharge/delayed payment charges stipulated in PPA is always higher than rate of working capital as it has to compensate for cost of working capital during the period of delay plus some penal cost on defaulting party. In case rate of surcharge/delayed payment charges as claimed by APML is allowed, it will lead to penalising other party i.e. MSEDCL without any default of it. This would be against the principle of equity and may not be the intent of principle of restitution as envisaged in the PPA.

Our Findings and Analysis

9.4 We have considered the submissions made by both the parties. The MERC has returned the following finding on this issue in the Impugned Order:

"*63. Further, in view of settled position of Law regarding carrying cost, the Commission allows APML to claim carrying cost from the date the Change in Law events affected it to the date of the present Order. Further the rate of interest for the payment of carrying cost shall be as specified for the interest on working capital in the MYT Regulations applicable to the relevant periods.*"

9.5 It has been brought to our notice by MSEDCL that Adani itself had sought the carrying cost at the rate prescribed in the MYT Tariff Regulations in its Petition before MERC. Therefore, we see no reason to interfere with the Impugned Order on this issue since Adani cannot raise a claim contrary to what had been sought before MERC.

10. **Issue 4- Whether MERC was justified in restricting the change in law relief to the difference between 100% assurance in New Coal Distribution Policy ("NCDP"), 2007 and 75% assurance under the SHAKTI Policy based on the Fuel Supply Agreement ("FSA") dated 29.03.2018 being signed under the SHAKTI Policy?**

10.1 At the outset, it was clarified by all the parties that they agree that the detailed submissions are made in other batch of Appeals (A. Nos. 116, 155 and 182 of 2019) and the submissions and the findings in those appeals shall be adopted in this matter.

10.2 Briefly put, MSEDCL contented that SHAKTI is a different and distinct policy from NCDP 2013 and therefore compensation for Change in Law be restricted to domestic coal shortfall upto trigger level of 75 % of the ACQ as per SHAKTI Scheme. It was also argued by MSEDCL that any shortfall in coal supply below 75 % of the ACQ is a contractual issue between Adani and the coal company and the compensation in that regard cannot be claimed from MSEDCL.

10.3 Learned senior counsel appearing for APML made the following submissions for our consideration

(a) Adani is entitled to Change in Law relief for the actual shortfall and until domestic coal shortfall continues. The issue involved in the present case is the determination of change in law relief due to cancellation of a captive coal block (i.e. Lohara Coal Blocks). Adani was assured by MoC of a fuel source corresponding to 800 MW portion of the installed capacity (i.e. 1320 MW) of Tiroda TPS. As such, to restitute Adani to the same economic position as if no change in law event had occurred, MERC ought to have considered the entire coal required for 800 MW generation as shortfall since there is no coal supply from the assured Lohara Coal Blocks. Thus, change in law relief ought to continue until the change in law event continues. MERC wrongly considered that the restrictions specified in the NCDP, 2013 or SHAKTI Policy have relevance for captive coal blocks and erroneously restricted the change in law relief to 75% of ACQ as specified in SHAKTI Policy.

(b) Coal procured under SHAKTI Policy qualifies as 'alternate coal'. The coal supply received under the FSA signed pursuant to SHAKTI Policy shall form part of alternate coal for the purpose of computing compensation. Change in Law has to be seen for changes in law with respect to 'Law' prevailing as on cut-off Date. Admittedly, as on cut-off date (14.02.2008), 800 MW portion of Adani's bid was premised on coal from Lohara Coal Blocks. Coal supply for 800 MW is not based on any FSA with Coal India Ltd. It was only due to non-availability of coal from the Lohara Coal Blocks that Adani was constrained to depend on the costlier alternate coal sources such as imported coal, e-auction coal and coal supply under SHAKTI FSA dated 29.03.2018. Adani could tie up alternate coal supply arrangement for 800 MW capacity under SHAKTI Policy by way of offering discount in quoted tariff. Such use of alternate coal led to increase in cost of supply of power to MSEDCL. Accordingly, Adani is entitled to compensation for the additional expenditure incurred towards arranging alternate coal sources in lieu of Lohara Coal blocks. Accordingly, the Change in Law compensation ought to consider the difference in the landed cost of SHAKTI coal (as alternate coal) and the landed cost of Lohara coal so as to restitute Adani to the same economic position as if no change in law event had occurred.

(c) Without prejudice to the above, even if coal allocation under SHAKTI Policy is considered relevant, MERC ought not to have restricted the change in law relief to the trigger level of ACQ specified in SHAKTI Policy (75%). Due to inadequate availability of domestic coal, GoI revised NCDP, 2007 and issued certain directions regarding inability of the state-owned coal companies to supply the assured quantity of coal to the power producers. Recognizing that due to shortfall in availability of coal, generating companies would be compelled to purchase coal

from alternate sources and to avoid rendering the PPAs unviable, GoI itself agreed to compensate for any shortfall of domestic coal from NCDP, 2007 (100% entitlement for normative coal requirement). This formed the basis of the binding/statutory decisions to compensate (pass through) for the higher costs reflected above. In this regard, reliance is placed on NCDP, 2007, MoP reference dated 09.05.2013 to CERC, CERC statutory advice dated 20.05.2013, CCEA decision dated 21.06.2013, NCDP 2013, MoP letter dated 31.07.2013 and Revised Tariff Policy dated 28.01.2016. On 11.04.2017, Hon'ble Supreme Court in Energy Watchdog Judgment has held MoP letter dated 31.7.2013 and Tariff Policy, 2016 as change in law events and allowed restitutive relief to generators on account of domestic coal shortfall faced due to actions of Indian Government Instrumentalities. The documents referred above are statutory and binding documents and explicitly provide for restituting the generator in an event of any coal shortfall in supply from Coal India Ltd. Hon'ble Supreme Court in Energy Watchdog Judgment has held that the purpose of compensating the party affected by Coal India Ltd., i.e., generator in the present case, is to "restore the affected party to the same economic position as if such change in law has not occurred". Therefore, compensation is not pegged at or limited to any particular ceiling but premised on 'actual' increase in cost of procurement of alternate coal. In fact, all the statutory documents also envisage pass through of actual additional cost. 'Actual incremental expenditure' for the actual shortfall in coal supply vis-à-vis the 100% assurance under NCDP, 2007 cannot be restricted in view of the restitutive principle enshrined in the PPA, the statutory documents referred above and Paras 56 and 57 of the Energy Watchdog Judgment. The underlying principle enshrined in the Energy Watchdog Judgment is that any curtailment in coal supply from Coal

India Ltd. or its subsidiaries due to changes in NCDP, 2007 entitles the generators to restitution.

(d) On 22.05.2017, GoI through MoC notified the SHAKTI Policy. In terms of Energy Watchdog Judgment, the introduction of SHAKTI Policy by MoC, which is the continuation to the NCDP, 2013 Policy also qualifies as a change in law event vis-à-vis NCDP 2007 which was in place when Adani had submitted its bid. The shortfall in supply of coal is a continuous cause of action and the SHAKTI Policy acknowledges such shortfall and accordingly entitles pass through of higher costs incurred for coal procurement from alternate sources.

(e) The mandate is to compensate the generator for the entire period, till the shortfall continues, and such compensation cannot be capped to any trigger levels has now been settled by this Tribunal in the Adani Rajasthan Judgment.

(f) Contractual remedy under FSA will not restitute the generators to the same economic position. Since Adani had to rely on alternate sources for procuring coal, MSEDCL's contention regarding contractual dispute between Adani and fuel supplier ought to be rejected. Adani would have never relied on any fuel supplier, in case the captive coal mine i.e. Lohara Coal Blocks would have been available. Further, the statutory documents mentioned above and Energy Watchdog Judgment were delivered while the remedy available under the FSA was known, yet restitution was not restricted. This Tribunal in the Adani Rajasthan Judgment has already held that such contractual remedy is not appropriate.

(g) Even otherwise, the contractual remedy is not efficacious since it is a token amount and not restitutive in nature. Such contractual remedy therefore falls short of fulfilling the mandate set-out by Supreme Court

in the Uttar Haryana Judgment regarding grant of restitution as understood in civil law.

Our Findings and Analysis

10.4 We have heard the parties at length. At the outset, we find merit in the submission made by Adani that MERC, being oblivious to the fact that restrictions specified in the NCDP, 2013 or SHAKTI Policy have no relevance for captive coal blocks, has erroneously restricted the change in law relief to 75% of ACQ as specified in SHAKTI Policy. The issue involved in the present case is the determination of Change in Law relief due to cancellation of a captive coal block (i.e. Lohara Coal Blocks). Adani was assured by MoC of a fuel source corresponding to 800 MW portion of the installed capacity (i.e. 1320 MW) of Tiroda TPS. As such, to restitute Adani to the same economic position as if no change in law event had occurred, MERC ought to have considered the entire coal required for 800 MW generation as shortfall since there is no coal supply from the assured Lohara Coal Blocks.

10.5 We also agree with the contention that coal procured under SHAKTI Policy qualifies as 'alternate coal'. Adani could tie up alternate coal supply arrangement for 800 MW capacity under SHAKTI Policy by way of offering discount in quoted tariff. Such use of alternate coal is stated to have led to increase in cost of supply of power to MSEDCL and loss of revenue to Adani. Therefore, Adani is entitled to compensation for the additional expenditure incurred towards arranging fuel linkage in lieu of Lohara Coal blocks. In light of this, Change in Law compensation should be considered as the difference of the landed cost of SHAKTI coal under the FSA dated 29.03.2018 (i.e. alternate coal) and the landed cost from Lohara coal blocks so as to restitute Adani to the same economic position as if no Change in Law event had occurred.

10.6 In any case, Change in Law compensation cannot be restricted to trigger value of ACQ stipulated in SHAKTI Policy as the said issue has been settled in the Adani Rajasthan Judgment. In the said judgment, this Tribunal also held that Contractual remedy under FSA will not restitute generators. The relevant findings in Adani Rajasthan Judgment are extracted as under.

"**12.1** *…RERC in the Impugned Order held that in the present case there is a Change in Law event and this has been upheld by us in the paragraphs above. RERC seems to have lost sight of the fact that 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…*

12.2 *The fact that shortfall continues even after the execution of FSA would mean that the compensation to make up for this shortfall would need to continue until the shortfall exists.*

12.3 *…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.*

12.5 *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…*

12.6 *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*."

10.7 The above findings of the Tribunal in Adani Rajasthan Judgment have been upheld by the Hon'ble Supreme Court in its order dated 31.08.2020 in Jaipur VidyutVitran Nigam v. Adani Power Rajasthan Limited and Anr. (Civil

Appeal No. 8625-8626 of 2019). The relevant paragraphs are extracted as under.

"48. *Shri C. AryamaSundaram 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 previousparagraphs 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……"* (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."

10.8 It is noted that the Hon'ble Supreme Court has not interfered with this Tribunal's finding that the change in law compensation is not to be restricted to the ACQ trigger levels specified in the SHAKTI Policy.

10.9 Having noted the aforesaid findings of the Hon'ble Supreme Court, we direct that the findings and directions in Appeal No. 116 of 2019 & batch will apply to the present case since these issues are common in the two sets of appeals and the parties have also sought the same reliefs.

11. **Issue-5- Whether MERC was justified in linking NCDP 2007 with allotment of the Lohara Coal Blocks?**

11.1 Although this issue was not specifically pressed by MSEDCL, MSEDCL contended that MERC erred in linking NCDP, 2007 with the allocation of the Lohara Coal Blocks since Adani's application to MoC for allotment of coal blocks was made prior to coming into force of NCDP.

11.2 ***Per contra***, APML has contended that such a contention is bereft of an understanding with respect to the difference between statutory provisions and policy decisions regarding coal allotment and distribution. As on the date of allocation of Lohara Coal Blocks to Adani *i.e.* 06.11.2007, while Section 3(3)(a)(iii) of Coal Mines (Nationalization) Act, 1973 was the '*statutory basis*' to allocate mining lease areas for coal mining to the power generators, NCDP, 2007 was the '*policy*' governing the coal distribution. Learned senior counsel for APML submitted that as on the date of Adani's application to MoC for allotment of the Lohara Coal Blocks i.e. on 10.01.2007, the statutory provision governing the allotment of mining lease areas for coal mining to the power generators was Section 3(3)(a)(iii) of Coal Mines (Nationalization) Act, 1973. Pertinently, MoC while allocating the Lohara Coal Blocks to Adani on 06.11.2007 referred to the said provision. However, as on the date of allocation of the Lohara Coal Blocks to Adani (06.11.2007), the policy decision of the GoI with respect to the coal

distribution in the country *i.e.*NCDP, 2007 was already notified on 18.10.2007 and had the force of law. Evidently, NCDP, 2007 prescribed for application of the provisions therein to all previous and future commitments with respect to power projects made by MoC with respect to the coal requirements of the power projects.

11.3 Since this issue was not pressed during the hearing, we do not find it necessary to return a finding on this issue.

12. **Issue-6- Whether deallocation of the Lohara Coal Blocks was a foreseeable risk for Adani and whether the same has any implication on change in law relief entitlement of Adani?**

12.1 Learned counsel for MSEDCL contended that the fuel was the sole responsibility of Adani in terms of Clause 2.1.1 of the RFP. It was APML which applied specifically for the Lohara Coal Blocks. This was despite being aware of the fact that the same mining lease area was previously cancelled in 1999 due to tiger movements in the area. MSEDCL also contended that MERC faulted in duly appreciating the issue *qua* red-herring prospectus with its date of issuance and not with Adani's declaration and affirmation of the knowledge and awareness of the risk of de-allocation of the Lohara Coal Blocks.

12.2 ***Per contra*,** Learned senior counsel for APLML submitted the following for our consideration

(a) De-allocation of Lohara Coal Blocks was not a foreseeable risk and qualifies as a supervening impediment beyond Adani's control. Further, the responsibility of Adani to arrange fuel cannot be construed as absolute and inflexible. On 20.02.2008, Adani submitted its bid. Adani proceeded based on Scenario 1 and indicated Lohara Coal Blocks for supplying part of its contracted capacity to MSEDCL (800 MW out of 1320 MW). Adani

submitted MoC's allocation letter dated 06.11.2007 as a 'comfort letter' in compliance with the Clause 2.1.5 of the RFQ. Accordingly, Lohara Coal Blocks became inherent to Adani's bid.

(b) Both parties recognized that when fuel is not from a linkage route, it is not possible to have any binding contract with the fuel supplier, and that a 'comfort letter' will suffice for the purposes of qualifying to make a bid. Further, under Clause 2.1.1 of the RFP, the obligation on Adani was to ensure "tie-up" of linkage fuel. Execution of the Fuel Supply Agreement ("*FSA"*) was a condition subsequent. Once it is established that the execution of the FSA is a condition subsequent, it is clear that the same is not a risk that was assumed at the time of the bid and execution of the PPA. Coal is a controlled / nationalized commodity and the availability of the same depends on several factors, which are beyond the control of the bidder/ generating company.

(c) The reasons for de-allocation of Lohara Coal Blocks is not attributable to Adani. While withdrawing ToR, in its 59th meeting Report, EAC clearly recorded that at the time of granting of the ToR, EAC was not aware of the projects being within the proposed buffer zone of the TATR. However, pursuant to further study of the area and also subsequent to the grant of ToR, it was understood that the tiger corridor was a part of the proposed mining lease areas. The MoEF and MoC must work in tandem to identify go and no-go areas while considering allotment of coal blocks in the country so that such problems are not encountered in the future.

(d) The submission of MSEDCL regarding the red herring prospectus is erroneous and is in disregard to the specific observations of the Remand Order. An identical submission was raised by Prayas (Energy) Group before this Tribunal during the proceedings in Appeal No. 241 of 2016. In the Remand Order, this Tribunal had specifically observed that the red-herring prospectus, being a standard document, has no relevance so far as

the imputability of knowledge on Adani regarding cancellation of Lohara Coal Blocks was concerned.

(e) Since MERC was adjudicating the issues in a remand proceeding, it was bound by the specific observations and directions of APTEL in view of the mandate envisaged under Order XL Rule 23A read with Order XL Rule 25 of the Code of Civil Procedure, 1908. It is a settled position of law that in a case of 'limited remand', the remanded court (i.e. MERC) ought to act upon the strict directions of the remand order. Reliance in this regard was placed on the judgment of this Tribunal dated 11.04.2018 titled *Gujarat UrjaVikas Nigam Ltd.* vs. *Gujarat Electricity Regulatory Commissionand Others*, 2018 SCC OnLine APTEL 7.

(f) In view of the aforesaid, it was argued that MSEDCL's reference to the red-herring prospectus as a ground to seek setting aside of the Impugned Order is a mere delay tactics to withhold the legitimate entitlement of Adani. In any case, red-herring prospectus itself was issued after the cut-off date.

Our Findings and Analysis

12.3 We are of the view that foreseeability of any event on the part of the affected party is not at all relevant for determination of whether certain actions of Governmental Instrumentalities constitute Change in Law in terms of the PPA and the reliefs allowed therefor. In any case, neither can Adani be imputed with the knowledge of de-allocation of Lohara Coal Blocks nor can it be denied change in law relief on this count.

12.4 In our view it was not under the reasonable control of Adani to foresee the mining lease area being declared as a Buffer Zone to the TATR rendering the Lohara Coal Blocks a 'no-go' area. Substantive evidence to this effect is the *volte face* between the initial proposal dated 07.03.2008 and that of 08.10.2008 submitted by the Conservator, TATR declaring the surrounding

area to the TATR as a Buffer Zone to the TATR. In the 1st proposal of the Conservator, TATR dated 07.03.2008, the mining lease area forming Lohara Coal Blocks was clear of any impediment. Suddenly, in its 2nd proposal dated 08.10.2008, the Conservator, TATR submitted a proposal whereby the Buffer Zone was to include Lohara Coal Blocks.

12.5 As already observed above, we note that all statutory actions *qua* identifying and creating a Buffer Zone were initiated only after the cut-off date. Clearly cancellation of the primary fuel source (Lohara Coal Block) could not be avoided, nor its impact on the bid price be overcome by Adani. As on the cut-off date, neither the MoEF nor MoC raised any objections towards Adani's proposal regarding using the Lohara Coal Blocks as part of its fuel source for generating and supplying power to MSEDCL. As a matter of fact, the allocation was made by MoC only on 06.11.2007. As such, as on the cut-off date, Adani cannot be held to have reasonably anticipated that the mining lease area had chances of being declared as a Buffer Zone to the TATR.

12.6 Withdrawing ToR, in its 59th meeting report on 25.11.2008 read with 07.01.2009, EAC clearly recorded that at the time of granting the ToR, EAC was not aware of the projects being within the proposed buffer zone of the TATR. Pursuant to further study of the area and subsequent to the grant of ToR, it was understood that the Tiger corridor was a part of the proposed mining lease areas. In fact, MoEF and MoCshould have worked in tandem to identify go and no-go areas while considering allotment of coal blocks in the country so that such problems are not encountered in the future.

12.7 Admittedly, the cancellation of the Lohara Coal Blocks was on account of MoEF's and MoC's failure to identify the overall ecological impacts of the

mining activity in the area, prior to MoEF giving a go-ahead for such mining.

12.8 We hold that de-allocation of Lohara Coal Blocks is not attributable to any default on the part of Adani. As already demonstrated, MoC in its allocation letter dated 06.11.2007, enumerated three grounds under which Lohara Coal Blocks may be de-allocated without any liability of the government instrumentalities. The de-allocation of the Lohara Coal Blocks was not made on any of the three conditions enumerated therein. Lohara Coal Blocks were de-allocated in view of the area being declared as a Buffer Zone to TATR. Adani could not have prevented or mitigated the impact of such government policy or decision by taking any other measures except pursuing the relevant government departments to allot an alternate coal block. Adani made several efforts in order to mitigate the impact of impediment by approaching MoC, MoP, MoEF, CEA etc. insisting for allocation of alternate coal blocks. However, none of the government instrumentalities could successfully allocate alternative coal block to Adani.

12.9 Evidently, Adani has suffered the consequences of acts, omissions and commissions of GoIand its agencies in not correctly identifying that the Lohara Coal Blocks fall within the wildlife protected Buffer Zone to the TATR. The post facto realization of mistake by MoEF and reversal of decisions taken by the Government Instrumentality qualify as change in law events. Adani could not have anticipated that acts and omissions of MoEF and its agencies would render mining in the allotted coal blocks legally impossible (a position distinct from that as on cut-off date).

12.10 As such, Adani argued that MoEF itself which had granted the ToR to Adani on 16.05.2008 (based on EAC's recommendation), subsequently, withdrew the ToR (on 07.01.2010) based on substantially altered facts

surrounding the mining lease area after the cut-off date. Accordingly, the cancellation of the Lohara Coal Blocks was on account of MoEF's and MoC's failure to identify the overall ecological impact of the mining activity in the area, prior to MoEFgiving a go-ahead for such mining. We are in agreement with this submission.

12.11 We, therefore, hold that a generator's rights and obligations under the PPA cannot be thwarted based on omissions on part of Government Instrumentalities. This is in conformity with the settled position of law that a party cannot be penalized for not being able to carry out an 'impossible' act (here coal mining in view of proposed Buffer Zone to TATR). Even this Tribunal in the Remand Judgment observed that MoEF and MoC must work in tandem to avoid such situation, of subsequent de-allocation of Coal Blocks due to failure of identification of overall ecological impact of mining activity in the area by MoEF and MoC. The fact that there is no default on part of Adani is also evident as MoC returned the bank guarantee to Adani.

12.12 This issue is decided accordingly.

13. **Issue-7- Whether MERC adopted the correct methodology regarding Station Heat Rate ("SHR") and Gross Calorific Value ("GCV") in the Impugned Order while computing the change in law relief allowed to Adani? Whether such methodology is in lines of the principle of restitution?**

13.1 At the outset, it is clarified that both parties had agreed that the detailed submissions made in other batch of Appeals (A. Nos. 116 of 2019 and batch), shall be adopted in this matter so far as the issues of SHR and GCV is concerned.

13.2 Briefly put, both MSEDCL and Prayas contended that SHR and GCV ought to be considered as per bid parameters while computing Change in Law compensation. Learned counsel for MSEDCL relied on the Judgment of this Tribunal in Appeal No. 210 of 2017 to argue that the configuration and technical parameters of a generating station are decided by the bidders and are their commercial decisions which are disclosed during bid submissions. It was submitted that Adani cannot argue that SHR reflected in bid was only indicative and that change in law compensation should be based on actual SHR.

13.3 Learned counsel for Prayas submitted that, for computation of coal as submitted with the bid, Adani had reflected SHR and GCV figures with respect to coal which was to be mined from the Lohara coal blocks. It was contended that while on one hand Adani is claiming that Lohara coal cost which was based on bid assumptions should be considered as base for compensating Adani, on the other hand, SHR and GCV which were clearly reflected in the bid are being claimed as merely indicative in nature. Such contradictory stand ought not to be entertained.

13.4 ***Per contra***, Learned senior counsel for APML submitted the following for our consideration

(a) SHR cannot be considered as per bid parameters while computing change in law compensation. Further, MERC also erred in considering the 'middle value of the GCV range' of the assured coal grade in the LoA/FSA/MoU, instead of the actual GCV calculated on 'as received' basis.

(b) The Impugned Order records that the net SHR as submitted by Adani in its bid must be considered while computing the change in law compensation. This approach is not in line with the extant law and deserves reversal since

linking SHR to bid parameters while computing change in law reliefs does not conform to the mandate of restitution.

(c) In Case-1 bidding, unlike Case-2 bid projects, only Fixed Charges and Variable Charges are biddable parameters and SHR, GCV and Auxiliary Consumption are not biddable parameters. Further, Adani did not submit its bid based on net SHR. Therefore, MERC has grossly erred in considering SHR as a bid parameter. MERC in its Order dated 07.03.2018 in *JSW* vs. *MSEDCL* in Case No. 123 of 2017 held that auxiliary energy consumption shall be considered as per MYT Regulations or actuals whichever is lower for computing Change in Law reliefs since the auxiliary energy consumption considered in competitive bidding is not known. Therefore, a similar treatment ought to have been given to SHR which is also an operating parameter like auxiliary energy consumption.

(d) It is a settled position of law that the bid parameters cannot be considered to compute change in law reliefs since the same does not fulfil the requirement of restituting the affected party. In this regard, reliance is placed on the judgments of the Tribunal in Adani Rajasthan Judgment, Wardha Power judgment and Sasan Judgment.

(e) The SHR or GCV mentioned in the bid as part of the qualifying requirements of the RFP has little/no relevance for the determination of change in law compensation payable to Adani. SHR submitted as part of the qualifying requirement in the bid is estimated prior to award of EPC contract for the project and varies from actual SHR. In the present case, Adani's project was significantly impacted due to de-allocation of Lohara Coal Blocks. Quality of coal as envisaged by Adani in the bid was altered since Adani had to procure coal from alternate sources. Therefore, such bid parameters cannot be considered to determine change in law compensation. The SHR mentioned in Adani's bid to MSEDCL was for the limited purpose of establishing the coal requirement. Submission of coal

quantities from different sources (which is part of the qualifying requirements) cannot be arbitrarily elevated to a bid parameter contrary to the express terms of the Bidding Guidelines, RfP and the terms of the PPA and then used to deny the entitlement of Adani to receive compensation for Change in Law in terms of the PPA. The Supreme Court in the Energy Watchdog Judgment has not found this as limiting or constraining the right of the generator to obtain relief for change in law at para 42 where it was observed that the fact that the fuel supply agreement has to be appended to the PPA is only to indicate that the raw material for the working of the plant is there and is in order.

(f) Further, Ministry of Power, on 08.03.2019, by way of an Office Memorandum, has directed Normative SHR to be considered for the purpose of deriving Annual Contracted Quantity ("***ACQ***").

(g) MSEDCL's contention regarding inefficiency in maintaining operating parameters by Adani has no relevance. In fact, MSEDCL's concern that Adani should not be allowed to pass on its plant inefficiencies as part of any change in law relief is fully addressed in the relief sought by Adani, *i.e.*, coal quantity for change in law relief should be computed on the basis of actual SHR or, that prescribed under the MERC MYT Regulations, 2011 for the corresponding Unit capacity, whichever is lower. By taking the lower of the two values, it will be ensured that no inefficiency will be passed on to MSEDCL or the consumers.

(h) Therefore, for computing the compensation for change in law events, MERC ought to have considered the normative SHR as per the MYT Regulations, 2011/2015 or actual SHR, whichever is lower.

(i) The consideration of GCV of coal on the basis of 'middle value of the GCV range' of the assured coal grade, instead of the actual GCV calculated on 'as received' basis is erroneous. The said methodology subjects Adani to a notional GCV, which is higher than the actual GCV. Consideration of

'middle value of the GCV range' of the assured coal grade results in non-recovery of the actual additional expenditure incurred by Adani on account of change in law events. As such, the said methodology is contrary to Article 13.2 of the PPA which envisages that the entire additional expenditure incurred on account of change in law must be allowed as a pass through.

(j) Coal India Ltd. notifies the grades on equilibrated basis calculated at 5% moisture, 60% humidity and at temperature of 40^0 C. In other words, these are based on Air Dried Basis ("***ADB***") which are basically laboratory conditions and would not exist under normal operating conditions. Since coal received at plant and the coal fired in the boiler are at different conditions than the laboratory conditions, heat loss on account of moisture has to be taken into account while computing the compensation under restitutionary principle envisaged in Article 13.2 of the PPA. It is a settled position that measurement of GCV of coal must be on 'as received' basis only.

(k) MERC MYT Regulations, 2015 not only provides for 'as received' GCV but also includes adjustment for maximum stacking loss by way of deducting 150 kcal/kg from GCV 'as received'. MERC *vide* order dated 08.02.2013 in Case No. 77 of 2012 and order dated 18.06.2012 in Case No. 06 of 2012 while approving truing up of fuel cost, even recommended allowance of stacking loss at 150 kcal/kwh.

(l) In this regard, reliance is also placed on the judgement of Hon'ble Supreme Court in case of *Nabha Power Limited* vs. *PSPCL* (2018) 11 SCC 508 wherein it has been held that the GCV of the coal must be taken as at the project site.Further, in Wardha Power Judgment, this Tribunal considered similar PPA provisions regarding change in law and held that it is not correct to consider the GCV of coal mentioned in the bidding documents while computing change in law reliefs.

(m)On 17.10.2017, Central Electricity Authority acknowledged that there is a loss of GCV from point of "as received" to the point of "as fired" inside a power plant. CEA agreed that a margin of 85-100 kCal/kg for a pit head station and a margin of 105-120 kCal/kg for a non-pit head station may be considered as a loss of GCV measured at wagon top till the point of firing of coal in boiler. CERC in the Tariff Regulations 2019 has not only considered that the GCV is to be considered on as received basis but in addition allowed reduction of 85 kCal/kg towards stacking loss.

(n) Accordingly, the actual GCV of coal should be considered based on reputed third-party coal sampling agency's certificates for computation of relief under Change in Law in order to restore Adani to same economic condition as if no Change in Law had occurred.

Our Findings and Analysis

13.5 We note that so far as the contention that SHR cannot be considered as per bid parameters while computing Change in Law compensation, this is now a 'covered issue' by virtue of the Wardha Power Judgment, Adani Rajasthan Judgment and Sasan Judgment.

13.6 This Tribunal in its judgment dated 12.09.2014 in *Wardha Power Co. Ltd*. vs. *Reliance Infrastructure &Ors*. in Appeal No. 288 of 2013 [reported as 2014 SCC Online 142] considered a similar PPA and held as under: -

> "**25.** *For example, if the tax on cost of coal has been increased from 5% to 8%, then for computing the impact of Change in Law, only the increase in the actual expenditure of Seller due to increase in tax from 5% to 8% has to be considered. This is because if the tax had not increased, the Seller would have paid tax of 5%* ***on the actual cost of coal****. With the Change in Law, the Seller has now to pay 8% on the actual cost of coal. Therefore, to restore the Seller to the same economic position as if such Change in Law has not occurred, the Seller has to be compensated for additional tax of 3%* ***on the actual cost of coal****. However, the Seller will have to submit proof regarding payment of tax on coal.*"

> **26.** *The price bid given by the Seller for fixed and variable charges both escalable and non-escalable is based on the Appellant's perception of risks and estimates of expenditure at the time of submitting the bid.* ***The energy charge as quoted in the bid may not match with the actual energy charge corresponding to the actual landed price of fuel. The seller in its bid has also not quoted the price of coal. Therefore, it is not correct to co-relate the compensation on account of Change in Law due to change in cess/excise duty on coal, to the coal price computed from the quoted energy charges in the Financial bid and the heat rate and Gross Calorific value of Coal given in the bidding documents by the bidder for the purpose of establishing the coal requirement. The coal price so calculated will not be equal to the actual price of coal and therefore, compensation for Change in Law computed on such price of coal will not restore the economic position of the Seller to the same level as if such Change in Law has not occurred.*****"**

13.7 This Tribunal in the Adani Rajasthan Judgment held that the operating parameters should be considered as per applicable Tariff Regulations on account of change in law events. The relevant finding is extracted as under.

> "**14.2** *Rajasthan Discoms are directed to pay the amount of Change in Law compensation, as approved herein, along with applicable Carrying Cost by duly verifying the relevant supporting documents for fuel cost and* ***as per applicable Tariff Regulations for operating parameters****. Since Adani Rajasthan has already incurred the costs in procuring alternate coal and supplying power to the Rajasthan Discoms using such coal, equity requires that the compensation payments for the period up to the date of this order be made expeditiously."*

13.8 The said position of law has been reaffirmed in this Tribunal's judgment dated 13.11.2019 in *Sasan Power Limited vs. CERC &Ors. Appeal No. 77 of 2016* as under.

> *"18.13.4 In view of the facts, as stated supra, we are of the opinion that while compensation of various levies on coal cannot be linked to the dispatched quantity,* ***we do not see merit in the Central Commission's view that the compensation should be restricted to bid auxiliary consumption (at 6%)****.* ***It is also noticed that the Central Commission has in subsequent orders taken a position that compensation for Change in Law events cannot be restricted to bid parameters****.*
>
> *18.13.5 Having decided that the change in law compensation shall be based on the quantum of coal consumed as opposed to coal dispatched, we hold that for determination of coal consumption for scheduled generation, the* ***auxiliary consumption should be based on actual****.* ***However, to adequately protect the interest of the consumers/procurers, the auxiliary consumption shall be capped to the applicable normative levels contained in the CERC Tariff Regulations, 2009.*** *Hence, this issue, i.e. Issue (C) is partially decided in favour of the Appellant.*

19.8.2 Having regard to the contentions of the Appellant and the Respondents and after critical analysis of the issue, we are of the opinion that while we have held that compensation of various levies cannot be linked to the dispatched quantity of coal, ***the compensation should not be restricted to bid SHR****. It is also relevant to note that the Central Commission has in subsequent orders taken a position that compensation for Change in Law events cannot be restricted to bid parameters.*

*19.8.3 In light of the above, we are of the opinion that for determination of coal consumption for scheduled generation****, SHR should be based on the actual instead of bid SHR.However, to adequately protect the interest of the procurers and consumers at large, the SHR is required to be capped to the applicable normative levels contained in the CERC Tariff Regulations, 2009.*** *Hence, this issue, i.e. Issue (D) is partially decided in favour of the Appellant.*

22.10.6 It is also relevant to note from another ***Order of the Central Commission dated 15.11.2018 in Petition No. 88/MP/2018*** *in the case of GMR Warora Energy Limited vs. MSEDCL &Anr., wherein CERC has observed that SHR given in the bid is under test conditions and may vary from actual SHR. Therefore,* ***it would only be correct to take the SHR specified in the Regulations as a reference point instead of other parameters, given that the SHR as per the bidding document cannot be considered for deciding the coal requirement for the purpose of calculating the relief under Change in law****.*

22.10.7 In the light of above, we are of the opinion that the ***technical parameters such as SHR and GCV quoted in the bidding documents cannot be considered for deciding the coal requirement for the purpose of calculating relief under Change in Law****. Accordingly, we hold that the Central Commission has analyzed this issue in detail and passed the impugned Order in a judicious manner. Hence, any interference by this Tribunal is not called for."*

13.9 So far as the issue of GCV issue is concerned, it now settled by our judgment in Wardha Power case and by the Hon'ble Supreme Court that measurement of GCV of coal must be on 'as received' basis only. We must note that we are also mindful of the MYT Regulations, 2015 which not only provides for 'as received' GCV but also includes adjustment for maximum stacking loss by way of deducting 150 kcal/kg from GCV 'as received'. Judgment in *Nabha Power Limited vs. PSPCL* (2018) 11 SCC 508 is *locus classicus* on this issue and we are bound to follow the said judgment. Relevant extract of the judgment in Nabha Power is quoted here-

"*17. The second dispute relates to the GCV of the coal, and is in a sense, linked to the first dispute. This is so as the PSPCL takes into account the theoretical/Equilibrated*

GCV 2 ('EGCV') of unwashed coal at the mine-end rather than GCV of washed coal on an As Received Basis ('ARB') at the project-end as part of PCVn in the Energy Charges formula. The GCV of the coal is stated to change significantly due to transportation by rail over a period of 4 to 5 days, as coal contains moisture. The critical stage is stated to be the measure of GCV when the project coal reached the site (from the mine-end in Chhattisgarh to the project-site at Rajpura) when it is stated to be jointly sampled, tested and recorded by NPL and PSPCL. This is stated to be obvious from the definition of PCVn. The joint sampling done at the mines of SECL is only of unwashed coal.

66. Now turning to the other aspect of the GCV of the coal. If the issue is one of SECL billing for higher Calorific Value while actually supplying a low Calorific Value of coal, that would be a matter between the appellant and the SECL and the first respondent cannot be blamed for the same. That does not take away from the application of the formula for energy charge which provides for PCVn as the weighted average Gross Calorific Value delivered to the project. This Calorific Value of coal would have to be, thus, on the same parameter determined at the project site.

69. We are, thus, of the view that the reading of the energy formula leads to only one conclusion that all costs of coal up to the point of the project site have to be included and the Calorific Value of the coal has to be taken as at the project-site."

13.1 Further, in light of the commonality of the parties and almost identical submissions made by the parties on the issue of SHR submitted in the bid and use of mid-range of GCV, we direct that the findings of this Tribunal in Appeal No 116 of 2019 & batch will govern and apply to the present appeals, as agreed by the parties.

13.2 In view of the above, Appeal No. 340 of 2019 filed by MSEDCL is liable to be dismissed. Appeal No. 354 of 2019 filed by APML deserves to be allowed on all issues except on the issue of carrying cost. The Impugned Order deserves to be affirmed on the issues of Re-allocation of Coal block as Change in Law & Carrying Cost and to be set aside on the issues allowed in Appeal No. 354 of 2019, as above.

14. **Summary of Findings**:-

In view of the issue-wise deliberations and findings stated in the above paras, we sum up our findings as under:-

14.1 **Issue No.1**:-We hold that the Appellant was affected by change in law on account of the de-allocation of Lohara Coal Blocks. **Accordingly,the impugned order is upheld on this issue.**

14.2 **Issue No.2**:-We hold that the Appellant is entitled to be paid Lohara Coal cost including transportation cost as base while computing the compensations for the change in law events. **The issue is decided in favour of the Appellant.**

14.3 **Issue No.3**:- As the Appellant itself had sought the carrying cost at the rate prescribed in the MYT Tariff Regulations in its petition before the State Commission, we see no reason to interfere with the impugned order on this issue. Hence, the Appellant cannot raise its claim contrary to what has been sought before the State Commission. **The issue is decided against the Appellant.**

14.4 **Issue No.4**:-In line with our judgment dated 28.9.2020 in A.No.116 of 2019 & batch, we hold that findings in the impugned order relating to the issue of restricting the quantum of shortfall in domestic coal to a maximum of 25% are against the principles of restitution under the change in law provisions of the PPA. **The issue is decided in favour of the Appellant.**

14.5 **Issue No.5**:- Since this issue was not pressed during the proceedings, we do not find it necessary to return a finding on this issue. **No decision required.**

14.6 **Issue No.6**:- We hold that the Appellant's rights and obligation in the PPA cannot be thwarted based on omissions on part of Government instrumentalities and hence, the de-allocation of the Lohara Coal blocks was not a foreseeable risk for the Appellant. **The issue is decided in favour of the Appellant.**

14.7 **Issue No.7**:- In line with our judgment dated 28.9.2020 in A.No.116 of 2019 & batch, we hold that the change in law compensation shall be calculated based on the SHR specified in the MERC MYT Regulations, 2011 or the actual SHR **whichever is lower** and actual GCV of coal as received at the plant site.**The issue is decided in favour of the Appellant.**

ORDER

In light of the above, we are of the considered view that the issues raised in Appeal No.340 of 2019 are devoid of merits and hence, the Appeal is rejected. The Appeal No.354 of 2019 is allowed on all the issues except on the issue of carrying cost.

The impugned order dated 06.09.2019 passed by the Maharashtra Electricity Regulatory Commission in Case No. 68 of 2012 is upheld on the issues of de-allocation of coal blocks as Change in Law & Carrying Cost and is set aside on the issues allowed in Appeal No.354 of 2019, as per our above findings in Para Nos. 14.1 to 14.7.

In view of the disposal of the Batch of Appeals, the relief sought in the IA No.1749 of 2019 in Appeal No. 340 of 2019 does not survive for consideration and accordingly, stands disposed of.

No order as to costs.

Pronounced in the Virtual Court on this **05th day of October, 2020.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

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