

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

**APL No. 22 OF 2019 & IA No. 1483 OF 2018 & IA No. 36 OF 2019 &
IA No. 2068 OF 2019 & IA No. 2164 OF 2019 & IA No. 1503 OF 2020
& IA No. 2069 OF 2019 & IA No. 1333 OF 2020**

and

APL No. 58 OF 2019 & IA No. 353 OF 2020

Dated: 12th August, 2021

**Present: Hon`ble Mrs. Justice Manjula Chellur, Chairperson
Hon`ble Mr. Ravindra Kumar Verma, Technical Member**

**APL No. 22 OF 2019 & IA No. 1483 OF 2018 & IA No. 36 OF 2019 &
IA No. 2068 OF 2019 & IA No. 2164 OF 2019 & IA No. 1503 OF 2020
& IA No. 2069 OF 2019 & IA No. 1333 OF 2020**

In the matter of:

**Tamil Nadu Generation and Distribution
Corporation Limited
Rep. by Chief Engineer/PPP
144, Anna Salai,
Chennai-600002**

.... Appellant(s)

Versus

- 1. Central Electricity Regulatory
Commission
Through its Secretary,
3rd and 4th Floor, Chanderlok Building,
36, Janpath, New Delhi- 110001** **Respondent No.1**

- 2. Bharat Aluminium Company Limited
Through its Managing Director
Balco Nagar, Korba- 495684
Chhattisgarh** **Respondent No.2**

- 3. Power Trading Corporation (PTC)
Through its Managing Director**

- 2nd Floor NBCC Tower 15
Bhikaji Cama Place,
New Delhi, Delhi 110066
- Respondent No.3
4. Kerala State Electricity Board,
Through its Managing Director,
Vydyuthi Bhavan, Pattom,
Trivandrum – 695 004 Kerala
- Respondent No.4
5. Prayas Energy Group,
Through its Managing Director
Unit III A and B, Devgiri,
Joshi Railway Museum Lane
Kothrud Industrial Area.
Kothrud, Pune-411038 Maharashtra
- Respondent No.5
6. Chhattisgarh State Power Distribution
Company Ltd.
Through the Chief Engineer (ETIC)
Energy Infer Tech Centre,
Block No. 8, CS, Power Companies
Campus, Daganiya, Raipur-492013
Chhattisgarh, India
- Respondent No.6
7. Chhattisgarh State Power Trading
Company Ltd.
Through the Chief Engineer (ETIC),
Energy Info, Tech Centre,
Block No. 8 CS Power Companies
Campus, Daganiya, Raipur-492013
Chhattisgarh, India
- Respondent No.7

**Counsel for the Appellant (s) : Mr. Jayanth Muth Raj, Sr. Adv.&
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Mr. Jyotisman Kar**

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Mr. Tushar Srivastava
Mr. Ambuj Dixit
Ms. Jyotshna Khatri
Mr. Rajeev Goswami
Ms. Supriya Rastogi
Mr. Harshit Singh for R-2

APL No. 58 OF 2019 & IA No. 353 OF 2020

In the matter of:

Bharat Aluminium Company Limited
Through its Managing Director
Balco Nagar, Korba- 49584
Chhattisgarh

.... Appellant(s)

Versus

- 1. Central Electricity Regulatory Commission**
Through its Secretary,
3rd and 4th Floor, Chanderlok Building,
36, Janpath, New Delhi- 110001 **Respondent No.1**

- 2. Tamil Nadu Generation and Distribution Corporation Limited**
Through its Managing Director
NPKRR Maligai, 6th Floor
Eastern Wing, 144, Anna Salai,
Chennai-600002, Tamil Nadu, India **Respondent No.2**

- 3. Power Trading Corporation (PTC)**
Through its Managing Director
2nd Floor NBCC Tower 15

- Bhikaji Cama Place,
New Delhi, Delhi 110066** **Respondent No.3**
- 4. Kerala State Electricity Board,
Through its Secretary,
Vydyuthi Bhavan, Pattom,
Thiruvananthapuram,
PIN-695004
Kerala, India** **Respondent No.4**
- 5. Prayas Energy Group,
Through its Co-Founder
Unit III A and B, Devgiri,
Joshi Railway Museum Lane
Kothrud Industrial Area.
Kothrud, Pune-411038 Maharashtra** **Respondent No.5**
- 6. Chhattisgarh State Power Distribution
Company Ltd.
Through Its Managing Director
O/o The Chief Engineer (ETIC)
Energy Infer Tech Centre,
Block No. 8, CS, Power Companies
Campus, Daganiya, Raipur-492013
Chhattisgarh, India** **Respondent No.6**
- 7. Chhattisgarh State Power Trading
Company Ltd.
Through Its Managing Director,
O/o The Chief Engineer (ETIC)
Energy Info, Tech Centre,
Block No. 8 CS Power Companies
Campus, Daganiya, Raipur-492013
Chhattisgarh, India** **Respondent No.7**

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Mr. Hemant Singh**

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**Mr. Aashish Anand Bernard
Mr. Paramhans Sahani for R-3**

**Mr. P.V. Dinesh
Mr. Sindhu T.P
Mr. Ashwini Kumar Singh
Ms. Rashmi Singh for R-4**

**Ms. Ranjitha Ramachandran
Ms. Anushree Bardhan
Ms. Poorva Saigal
Mr. Shubham Arya
Mr. Arvind Kumar Dubey for
R-5**

JUDGMENT

**PER HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL
MEMBER**

APL No. 22 OF 2019

1. This Appeal is filed against the order dated 27.04.2018 passed by the Central Electricity Regulatory Commission (hereinafter referred to as "**Central Commission or Commission**") in 126/MP/2016.

2. Prayer

- i. to set aside the order dated 27.04.2018 passed by the Central Electricity Regulatory Commission in 126/MP/2016; and
- ii. to pass any other order or orders as this Appellate Tribunal may deem fit and proper in the facts of the case.

Facts of the case:

3. The Tamil Nadu Generation and Distribution Corporation Limited(hereinafter referred to as “**Appellant or TANGEDCO**”), is the State Distribution Licensee. In compliance with the Competitive Bidding guidelines issued by Ministry of Power dated 19.01.2005, the appellant invited bid for supply of 1000MW RTC power under long term for the period from 01.10.2013 to 30.09. 2028. The appellant invited interested companies to bid as per RFP terms and conditions dated 21/12/2012, under Case 1 bidding procedure.

Clause 2.4.1.1(8) (xi) of the RFP. The extract of clause is as follows:

"The bidder shall take into account all costs including capital and operating costs, statutory taxes, levies, duties while quoting such Tariff. It also includes any applicable transmission costs, and transmission losses from the generation source up to the Interconnection Point. Availability of the inputs necessary for supply of power shall be ensured by the seller and all costs involved in procuring the inputs (Including statutory taxes, duties,

levies thereof) at the plant location must be reflected in the quoted tariff”.

4. In response to the above tenders, the respondent generator offered their bid for supply of 200 MW under long term for a period of 15 years. The respondent generator became successful bidder in the tender with a levelized tariff of Rs.4.91/Kwh for supply of 200 MW RTC power. The appellant issued Letter of Intent on 18.07.2013/14.11.2013 to the respondent generator for purchase of 100/100 MW RTC power from the generator for a period of 15 years from 01.02.2014/01.06.2014 to 30/09/2028.
5. Consequent to the above, Power Purchase Agreement (*PPA*) was executed with BALCO on 23.08.2013/10.12.2013 for supply of 100/100 MW RTC power for the period from 01.02.2014/01.06.2014 to 30 09 2028. The relevant Articles of the PPA for adjudicating the issue involved in the present appeal are:

Schedule 4 — TARIFF

- (i) The method of determination of Tariff Payments for any Contract Year during the Term of Agreement shall be in accordance with this Schedule.
- (ii) The Tariff shall be paid in two parts comprising of Capacity Charge and Energy Charge as mentioned in Schedule 8 of this Agreement.

(iii) For the purpose of payments, the Tariff will be Quoted Tariff as specified in Schedule 8, duly escalated as provided in Schedule 6 for the applicable Contract Year.

Schedule 6: ESCALATION INDEX

6.1.1. The index ("Escalation Index") to be applied for escalation of Quoted Escalable Capacity Charges, Quoted Escalable Energy Charges, shall be computed by assuming that as on the date of the Bid Deadline (for Quoted Escalable Energy Charges) and Scheduled Delivery Date (for Quoted Escalable Capacity Charges) or Revised Scheduled Delivery Date, as the case may be, the value of such Escalation Index is 100. Thereafter for each Month after the Bid Deadline (for Quoted Escalable Energy Charges) and Scheduled Delivery Date (for Quoted Escalable Capacity Charges) or Revised Scheduled Delivery Date, as the case may be, the value of the Escalation Index shall be computed by applying the per annum inflation rate specified by CERC for payment of Escalable (or indexed) Capacity Charge and Escalable Energy Charge, as per the provisions of this Agreement.

Article 10 of the PPA:

"Article 10: Change in law means the occurrence of any of the following events after the date which is seven days prior to the Bid Deadline resulting into any additional recurring/nonrecurring expenditure by the Seller or any Income to the seller."

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

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI charges or frequency intervals by an appropriate commission or (iii) any change on account of regulatory measures by the appropriate commission including calculation of availability.

Article 15 of the PPA:

Article 15 of the PPA provides for Miscellaneous Provisions. Under article 15.18 dealing with Taxes and Duties the following clauses are set out:

15.18.1 The seller shall bear and promptly pay all statutory taxes, duties, levies and cess assist levied on the seller, contractors or their employees, that are required to be paid by the seller as per the Law in relation to the execution of the agreement and for supplying power as per the terms of this agreement.

15.18.2 Procurer shall be indemnified and held harmless by the seller against any claims that may be made against procurer in relation to the matters set out in article 1518.1.

15.18.3 Procurer shall not be liable for any payment of taxes, duties, levies, cess whatsoever for discharging any obligation of the seller by the procurer on behalf of seller or its personnel provided the seller has consented in writing to procurer for such work which consent shall not be unreasonably withheld."

6. On application of the escalation index of CERC to energy charges and tariff progressively increased as under:

Name of the Procurer	Energy Charge		
	Escalable energy	Inland transportation	Total Energy charge

	Rs/Kwh		
TANGEDCO Quoted tariff (bid dead line) 06.03.2013	1.685	0.280	1.965
Kerala Quoted Tariff(bid deadline)4.11.2014	1.04	-	1.04

7. It is seen that though the petitioner had opted to evacuate power from the same plant and intend to supply to both TANGEDCO and Kerala using the linkage coal supplied from- the same location, the quoted tariff for TANGEDCO towards energy charge is more than the tariff quoted for Kerala by Rs.0.925 per unit.

The escalation index Was applied to* Long Term PPA. The tariff progressively increased as under:

Long Term PPA – Phase I			
Date	Energy Charge Rs/kWh	Capacity Charge Rs/kWh	Total Charge Rs/kWh
06.03.13 (Bid)	1.9650	1.2000	3.1650
Nov'2014	1.7342	1.290	3.0242
03.09.15(supply commenced)	1.7975	1.3500	3.1475
October 2017	1.9341	1.1637	3.0978
Long Term PPA – Phase II			
06.03.13 (Bid)	1.965	1.200	3.1650
Nov' 2014	1.7342	1.290	3.0242
19.12.15(supply commenced)	1.8119	1.3500	3.1619
October 2017	1.9341	1.1638	3.0979

8. It is relevant to mention that the petitioner is also supplying power from the same project (Balco Plant, Korba) to Kerala under Long Term PPA, which is based on Design, Built, Finance, Own and Operate (DBFOO) where the entire expenses are pass through. The tariff paid by Kerala Genco to this petitioner are under:-

DATE	Procurer	Energy Charge Rs/kwh
October 2017	Kerala	1.03
October 2017	TANGEDCO	1.9341

9. The Energy Charge for TANGEDCO for October'17 is Rs.1.9341/- per unit as claimed by the petitioner after applying CERC escalation index on the Energy charge component inclusive of taxes, cess and transportation charges as on October'2017 and the Energy Charge of KSEB inclusive of all the taxes, cess and transportation charges is Rs.1.03 per unit i.e. pass through price including Charge due to impact of Change in Law under DBFOO method implemented from Oct'2017. In fact the petitioner is getting Rs.0.9041 per unit more from TANGEDCO as compared to KSEB, which is the Energy Charge at actuals.

Thus, the claim of the petitioner that it is affected on account of Change in Law is wholly untenable and is liable to be rejected. The fuel price under DBFOO is the actual fuel price. The fuel price after applying escalation index of CERC is higher than the DBFOO fuel price. That means there is no loss due to change is law. Therefore,

no compensation can be claimed. The onus of proving that there is a financial loss to the generator is not discharged by the generator. The generator can claim compensation only in the event of it proving that it incurred loss due to the change in law event.

10. The respondent generator issued notice of force majeure under Article 10 of the PPA subsequent to Change in Law arising out of increase in introduction of certain taxes, levies and duties.
11. The respondent generator filed Miscellaneous Petition before CERC seeking compensation under Change in Law as per Article 10 of the PPA dated 23.08.2013/10.12.2013. The petition was registered as Petition No.126 MP of 2016,
12. The respondent filed the Petition under Section 79 (1) (b) and (f) of Electricity Act, 2003 praying inter alia for:
 - a. declare and adopt the events and notifications in the petitions are Change in Law events within the meaning of Article -10 of PPA dated 23:08.2013 read with the Addendum dated 10.12.2013 and allow compensation thereof.
 - b. direct the respondent to make payment of Rs.48,97,00,000/(Rupees Forty-Eight Crores and Ninety-Seven Lakhs only) to the Petitioner, which amount has accrued on account of the Change in Law events, till June 30, 2016.

c. direct the direct the respondent to continue to make payments accrued in favour of the Petitioner on account of Change in law events mentioned in prayer, post the filing of the petition, in terms of the protocol/ formula envisaged in Annexure LL of the Petition, till the validity of the PPA dated 23.08.2013 read with the Addendum dated 10.12.2013.

13. The appellant in its reply to the above petition seeking revision of tariff on the ground of Change in Law stated that the quoted tariff per unit of the respondent generator was made after taking into account all eventualities. The appellant entered into the PPA taking into consideration the impact of the proposed tariff on its consumers. The escalable energy and capacity charge components, raise in taxes, duties and levies are taken care in CERC escalation percentage published once in 6 months vide. Notification No. EO/2/2016 of this Commission dated 06.10.2016. It is the contention of appellant that Article 15.18.1 absolve the procurer from any type of tax, duty, levy or cess.

14. The appellant filed its written submission giving explanation as to how the escalation indices of CERC is applied to the energy component of the respondent generator as per Schedule 4 and Schedule 6 of the PPA and the energy component having in itself embodied the taxes, levies, duties and cess as per the provisions of RFP, the taxes, levies, duties and cess also get escalated. It was further stated by the appellant that it was for this reason the PPA has Article 15.18.1, which absolves the appellant from payment of any taxes, levies,

duties and says under the PPA. The appellant also annexed a table form showing the escalated energy charges collected by the respondent generator from the date of commencement of supply till date.

15. The CERC by order dated 27.04.2018 rejected the contentions and explanations of the appellant and held that the respondent generator is entitled to be compensated for the impact it had on the cost of generation pursuant to the Change in Law alleged in the petition before it. The CERC also held that Article 15 does not have a non-absente clause and therefore Article 10 of the PPA overrides the provisions of Article 15. The CERC without giving any reasonable explanation to the contentions raised by the appellant before it granted relief sought by the respondent generator for some of the components and dis-allowed the rest on account of want of relevant documents.
16. Aggrieved by the impugned order dated 27.04.2018 , the appellant has presented the instant appeal.

APL No. 58 OF 2019

17. This Appeal is filed against the order dated 27.04.2018 passed by the Central Electricity Regulatory Commission (hereinafter referred to as “**Central Commission or Commission**”) in 126/MP/2016.

18. Prayer

- i. to set aside the order dated 27.04.2018 passed by the Central Electricity Regulatory Commission in Petition No. 126/MP/2016, to the extent challenged in the present appeal;
 - ii. pass any order and/or any such orders as this Tribunal may deem appropriate.
19. The Appellant, Bharat Aluminium Company Ltd., is a company incorporated under the provisions of the Companies Act, 1956, and *inter alia* engaged in title business of generation, transmission and sale of electrical power. The Appellant is a Generating Company within the meaning of Section 2(28) of the Electricity Act, 2003 having a generation capacity of 810 MW (4x67.5 MW and 4x67.5 MW) and 1200 MW (4x300 MW) Thermal Power Project at Balco Nagar, Korba in the State of Chhattisgarh.
20. The Appellant entered into the following long-term PPAs for supply of power from its Power Project:
- (a) Supply of 5 of the net power generated from the Power Plant to the State of Chhattisgarh at energy (variable) charges, in lieu of assistance provided by the State of, Chhattisgarh in obtaining applicable clearances/ approvals and incentives to the Project as per applicable Industrial Policy, etc. For the said purpose, the Appellant executed a Long term Power Purchase Agreement dated 19.1.2015 on back to back basis with Chhattisgarh State Power Trading Company (CSPTrdCo.) for supply of 5 of net power generated from the said Power Plant to Chhattisgarh State Power Distribution Company Limited.

(b) Supply of 200 MW Round the Clock (RTC) power to Respondent No.2 (TANGEDCO) under Long Term PPA dated 23.8.2013 read with the Addendum No.1 dated 10.12.2013 entered into with TANGEDCO/ Respondent No.2. The supply under this PPA became effective from 03.09.2015 for the first 100 MW and from 01.12.2015 for the balance 100 MW.

(c) Supply of 100 MW RTC Power to Respondent No.4, Kerala State Electricity Board (KSEB) under back to back Medium Term PPA dated 13.06.2013 entered into between KSEB and PTC India Limited. The Supply under this PPA became from 1.3.2015 and was valid till 28.02.2017.

(d) Supply of 100 MW RTC power under Long Term PPA dated 26.12.2014 entered into with KSEB under the DBFOO guidelines. The supply under this PPA became effective from 01.10.2017.

21. The Respondent No.1, Central Electricity Regulatory Commission is a statutory authority constituted under the Electricity Regulatory Commissions Act, 1998 with powers vested in it by Section 79 of the Electricity Act, 2003. The powers of Commission, amongst others, include power to regulate tariff of generating companies having composite scheme for supply of power in more than one State.

22. The Appellant and the Respondent No. 2 entered into a Power Purchase Agreement on 23.08.2013 and the Addendum No. 1 dated

10.12.2013 ('TANGEDCO PPA/PPA') for supply of 200 MW Round the Clock (RTC) power for a period of fifteen years from the Scheduled Delivery Date, for onward sale on long term basis.

The aforesaid Power Purchase Agreement dated 23.08.2013 and the Addendum No. 1 dated 10.12.2013 was executed with the Respondent No. 2 ("TANGEDCO PPA") for sale and supply of aggregate contracted capacity of 200 MW in bulk. The said PPA was executed pursuant to a Competitive Bidding Process initiated by the Respondent No.1 through issuance of a Request for Proposal (RFP) for procurement of power on long term basis under a Case-I bidding process for meeting the Respondent's base load power requirements.

23. It is submitted that pursuant to the PPA entered into by the Appellant, there were certain change in law events which took place. Subsequently, the Appellant filed a petition, being Petition No. 126/MP/2016, before the Respondent Commission seeking to bring on record the change in law events, as per Article 10 of the TANGEDCO PPA, which events have resulted in additional expenditure on account of recurring/ non-recurring events including but not limited to change in the base price of domestic/e-auction coal, introduction of new taxes, levies etc., change in the rates of taxes, levies etc. or change in the incidences on which the taxes, levies etc. are imposed. It is submitted that the aforesaid changes squarely fall under the above Article 10 of the PPA. The said clause of the PPA is reproduced hereunder for the ready reference of this Tribunal:

"ARTICLE 10: CHANGE IN LAW

10.1 Definitions

In this Article 10, the following terms shall have the following meanings:

10.1.1 "Change in law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline resulting into any additional recurring/non-recurring expenditure by the seller or any income to the Seller:

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

- Any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement.

But shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission or (iii) any change on account of regulatory measures by the Appropriate Commission including calculation of Availability.

10.2 Application and Principles for computing impact of Change in Law

10.2.1 While determining the consequence of Change in Law under this Article 10, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through monthly Tariff Payment, to the extent contemplated in this Article 10, the affected Party to the same economic position as if such Change in Law has not occurred.

10.3 Relief for Change in law

10.3.1 During Construction Period

As a result of any Change in Law the impact of increase/decrease of Capital Cost of the power Station in the Tariff shall be governed by the formula given below:

For every cumulative increase/decrease of "Each rupees on Crore twenty five Lakhs (1.25 Crores) in the capital cost" during the Construction Period, the Increase/decrease in Non Escalable Capacity Charges shall be "an amount equal to zero point two six seven percent (0.267%) of the non escalable" Capacity Charges. In case of Dispute, Article 14 shall' apply.

'It is clarified that the above mentioned compensation shall be payable to either party, only with effect from, the date on which the total increase/decrease "exceeds amount of Rupees on Crore twenty Five Lakhs (1.25 Crores)"

10.3.2 During Operating Period

The compensation for any decrease in revenue or increase in expenses to the Seller shall be payable only if the decrease in revenue or increase in expenses of the Seller is in excess of an amount equivalent to 1% of the value of the Standby Letter of Credit in aggregate for the relevant Contract Year.

10.3.3 For any claims made under Articles 10.3.1 and 10.3.2 above, the Seller shall provide to the Procurer and the Appropriate Commission Documentary proof of such increase/decrease in cost of the Power Station or revenue/expense for establishing the impact of such Change in Law.

10.3.4 The decision of the Appropriate Commission, with regards to the determination of the compensation mentioned above in Articles 10.3.1 and 10.3.2, and the date from which such compensation shall become effective, shall be final and binding on both the Parties subject to right of appeal provided under applicable Law.

10.4 Notification of Change in Law

10.4.1 If the Seller is affected by a Change in Law in accordance with Article 10.1 and the Seller wishes to claim relief for such a Change in Law under this Article 10, it shall give notice to the Procurer of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.

10.4.2 Notwithstanding Article 10.4.1 the Seller shall be obliged to server a notice to the Procurer under this Article 10.4.2, even if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the procurer contained herein shall be material.

Provided that in case the Seller has not provided such notice, the procurer shall have the right to issue such notice to the seller .

10.4.3 Any notice served pursuant to this Article 10.4.2 shall provide, amongst other things, precise details of:

- (a) The Change in Law and
- (b) The effects on the Seller

10.5 Tariff Adjustment Payment on account of Change in law

10.5.1 Subject to Article 10.2 the adjustment in monthly Tariff payment shall be effective from:

(i) the date of adoption promulgation, amendment, re-enactment or repeal of the Law or Change in Law:

or

(ii) the date of order/Judgment of the Competent Court or tribunal or Indian Governmental Instrumentality if the Change In Law is on account of a change in interpretation of Law.

10.5.2 The payment for Change in Law shall be through Supplementary bill as mentioned in Article 8.8. However, in case of any change in Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed Tariff."

(underline supplied)

24. As per the above-mentioned Article 10 of the PPA, it is apparent that an event of change in law would only be considered for compensating

the seller/ Appellant in the event the said changes have occurred after the date which is 7 days prior to the bid submission deadline. In the present case, the bid submission deadline was 06.03.2013, and as such the cut-off date for a Change in Law event resulting in compensation as per Article 10.1.1 of the PPA is 27.02.2013 ('Cut-off date'). Any Change in Law event occurring after the said date shall result in compensation to the Appellant as per the said Article .

25. The Appellant issued the following notices to the Respondent No.2 for claiming compensation on account of change in law events, in accordance with Article 10.4 of the PPA:

(i) Notice dated 16.03.2016 wherein the Petitioner claimed compensation on account of change in clean energy cess (now renamed as "Clean Environment Cess");

(ii) Notice dated 04.06.2016 and, supplementary notices dated 07.06.2016 and 07.07.2016 wherein the Petitioner claimed compensation on account of change in law events elaborately discussed in the present petition.

26. It is further submitted that as per Article 10.2 of the PPA, the principle behind determining the consequence/compensation on account of Change in Law event is to reconstitute the affected party (in the present case, the Appellant) to the same economic position as if the said Change in Law event(s) had not occurred, in order to neutralize the effect of the changed circumstances which were not present when the Appellant submitted its bid and as such changes could not have

been factored in the said bid. Further the said provision empowers the parties to immune themselves from the adverse economic impact which may ensue out of changed legal regime affecting the operation of the project qua supply of power under the PPA.

27. However, the Respondent Commission passed the final impugned order dated 27.04.2018 in Petition No. 126/MP/2016, wherein Seven (7) events were allowed as change in law, seven (7) events were disallowed, and further three (3) events were disallowed with liberty to the Appellant to Approach the appropriate forum with relevant documents. The Following change in law events were completely disallowed:

- a. Increase in sizing and crushing charges;
- b. Increase in Coal Surface Transportation charge;
- c. Increase in base price of coal;
- d. Increase In base Freight of Coal Transportation;
- e. Levy of Busy Season Charges & Levy of Development Surcharge;
- f. Withdrawal of Rebate and Additional Rebate loss due to change in base freight rate from Rs. 150.20 to Rs.205.60;

Submissions on behalf of Respondent No. 2/BALCO in Appeal No. 22 of 2019

28. The present appeal is filed against the impugned order dated 27/04/2018 passed by the Respondent No.1 Commission in Petition No. 126/MP/2016, by way of which the Commission has allowed appropriate contractual compensation to the Respondent No. 2 on

account of change in law events, falling under Article 10 of the Power Purchase Agreement (“PPA”) dated 23.08.2013 for a quantum of 100 MW.

Pursuant to the said PPA, the Respondent No. 2 also executed an addendum to the said PPA, dated 10/12/2013 with the Appellant for another 100 MW at a levellized tariff of Rs.4.91/-per Unit.

29. The present case deals with the issue of change in law compensation under Article 10 of the PPA. As per the said clause, the Respondent No. 2 is entitled to claim compensation on account of any additional expenditure incurred pursuant to the occurrence of a change in law event, which occurs subsequent to 7 days prior to the date of bidding based on which the above PPA was entered. This is called the cut-off date for claiming compensation under change in law. In the present case, the said cut-off date is 27/02/2013.
30. It is submitted that the impugned order allows the following change in law components allowed in favour of the Respondent No. 2:
- a. Royalty on Coal;
 - b. Service Tax on Royalty of Coal;
 - c. Increase in Environment Cess /Paryavaran Upkar;
 - d. Change in Infrastructure Development Cess;
 - e. Change in the components of Central Excise Duty;

- f. Change in Clean Energy Cess (subsequently known as Clean Environment Cess); and
- g. Increase in Service Tax Rate and imposition of Swachh Bharat Cess and Krishi Kalyan Cess on Railway freight and trip siding charges.

It is pertinent to state that all the aforementioned allowed change in law components, have also been upheld as change in law by this Tribunal, in the following judgments passed in other appeals:

S. No.	Change in Law components	Judgments
1.	Royalty on coal	Allowed. Appeal No. 111 of 2017, GMR WARORA Energy Ltd. v. CERC & Ors. [<i>Para 13(B)(xi) at page 100 to 104 of the Judgment</i>]
2.	Service tax on royalty of Coal	Allowed. Service Tax on transportation of coal stands allowed in Appeal No. 119 of 2016, M/s Adani Power Rajasthan Ltd. v. Rajasthan Electricity Regulatory Commission & Ors. [<i>para 11(B)(xi) at page 80 of the judgment</i>] Service Tax has been allowed in Appeal No. 284 of 2017, Adani Power Rajasthan Limited v. RERC & Ors. [<i>para 47 & 48 at Pg. 28-30</i>]

3.	Clean Energy Cess (Presently known as Clean Environment Cess)	Allowed. Appeal No. 119 of 2016, M/s Adani Power Rajasthan Ltd. v. Rajasthan Electricity Regulatory Commission & Ors. [<i>para 11(B)(iv) at page 73 of the judgment</i>]
4.	Change in Components of Central Excise Duty	Allowed. Appeal No. 119 of 2016, M/s Adani Power Rajasthan Ltd. v. Rajasthan Electricity Regulatory Commission & Ors. [<i>para 11(B)(iv) at page 73 of the judgment</i>]
5.	Increase in Service tax Rate and Imposition of Swachh Bharat Cess and Krishi Kalyan on Railway freight and trip siding charges	Allowed. Appeal No. 284 of 2017, Adani Power Rajasthan Limited v. RERC & Ors. [<i>para 55 at Pg. 37</i>]
6.	Increase in Environment Cess/Paryavaran Upkar	Allowed. Appeal Nos. 284 of 2017 and 09 of 2018, titled as Adani Power Rajasthan Limited and Ors. v. Rajasthan Electricity Regulatory Commission and Ors. [<i>para 46 at Pg. 27-28</i>]
7.	Change in Infrastructure Development Cess	Infrastructure Development Cess, is imposed under the provisions of Chhattisgarh Adhosaanrachna Vikas Evam Paryavaran Upkar Adhiniyam, 2005.

		<p>Appeal Nos. 284 of 2017 and 09 of 2018, titled as Adani Power Rajasthan Limited and Ors. vs. Rajasthan Electricity Regulatory Commission and Ors (Supra), allows Increase in Environment Cess/Paryavaran Upkar, imposed under the provisions of Chhattisgarh Adhoshanrachna Vikas Evam Paryavaran Upkar Adhiniyam, 2005, as a change in law. [para 46 at Pg. 27-28]</p>
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31. It is most pertinent to mention herein that the Appellant has nowhere challenged the merits of the aforesaid change in law components allowed in favour of the Respondent No. 2. Rather the challenge is primarily with respect to the methodology to be followed for computing the change in law compensation.
32. Before proceeding further, reference is made to the following provisions of the PPA which provide for change in law compensation:
- a) Definition of "Change in Law";
 - b) Definition of "Indian Governmental Instrumentality";
 - c) Definition of "Law";
 - d) Article 10 of the PPA (*page 119, Vol. I, of the Appeal paperback*).

The aforesaid provisions are set out hereinbelow:

Definition of “Change in Law”

“shall have the meaning ascribed thereto in Article 10.1.1 of this Agreement;”

Definition of “Indian Governmental Instrumentality”

“Shall mean the Government of India, Governments of state of Tamil Nadu, Chhattisgarh, Korba, New Delhi and any ministry department, board, authority, agency, corporation, commission under the direct or indirect control of Government of India or any of the above state Government of both, any political sub-division of any of them including any court of Appropriate Commission or tribunal or judicial or quasi- judicial body in India but excluding the Seller and the Procurer;”

Definition of “Law”

“Shall mean 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 without limitation all applicable rules, regulations, orders, notifications by an Indian

Governmental instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and order of the Appropriate Commission;”

Article 10 of the PPA

“10 ARTICLE 10: CHANGE IN LAW

10.1 Definitions

In this Article 10, the following terms shall have the following meanings;

10.1.1 “Change in Law” means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline resulting into any additional recurring/non-recurring expenditure by the Seller or any income to the Seller:

- The enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re- enactment or consolidation) in India, or any Law, including rules and regulations framed pursuant to such Law;
- A change in the interpretation or application of any Law by any India Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;

- The imposition of a requirement for obtaining any Consent, Clearances and Permits which was not required earlier;
- A change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;
- Any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement.

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by the Appropriate Commission or (iii) any change on account of regulatory measures by the Appropriate Commission including calculation of Availability.

10.2 Application and Principles for computing impact of Change in Law

10.2.1 While determining the consequence of Change in Law under this Article 10, the Parties shall have due regard to the principle that the purpose of compensation

the Party affected by such Change in Law, is to restore through monthly Tariff Payment, to the extent contemplated in this Article 10, the affected Party to the same economic position as if such Change in Law has not occurred.

It is submitted that the Appellant has not the complete copy of the PPA in the appeal.

33. From the above provisions of the PPA, the following can be ascertained:

- a) For construing as to what is Change in Law, reference has to be first made to the definition of “Law”;
- b) Definition of “Law” is in two parts. The first part means all laws 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”.

The second part states that “Law” shall further include all applicable rules, regulations, orders, notifications issued by an Indian Governmental Instrumentality pursuant to or under any of documents mentioned under the first part;

- c) As per the definition of “Indian Governmental Instrumentality”, the same is wide enough to include the Central Government, Government of Chhattisgarh and any ministry, department,

body corporate, board, agency or other authority of the Central Government or the Government of the State where the power project is situated and includes the appropriate commission.

- d) As per Article 10.1.1 of the PPA, for an event to qualify as a Change in Law, the said event has to occur post 7 days prior to the bid deadline, which in the present case is 27/02/2013. Hence, any event of Change in Law occurring after 27/02/2013, which results in an additional expenditure for the Respondent No. 2 while performing the obligations contained under the PPA, would result in a compensation to be awarded to the said Respondent.

34. The Respondent No. 2/ BALCO now proceeds to deal with the challenge of the Appellant in the appeal, which is limited to the following issues:

- a) As per Article 15.8.1 of the PPA, the Respondent No. 2 is liable for payment of all taxes and duties, and therefore, the said Respondent cannot be allowed change in law compensation; and
- b) The Appellant has further raised the issue that the Ld. Commission did not consider the compensation received by the Respondent No. 2 with respect to the escalation index issued by the said Commission.

35. The Appellant/ TANGEDCO referred to Article 15.8.1 of the PPA, in order to content that the said Appellant is not liable to make any payment towards change in law compensation provided under article 10 of the PPA. In the above context, it is necessary to reproduce Article 15.18.1, as follows:

“15.18 Taxes and Duties

15.18.1 The Seller shall bear and promptly pay all statutory taxes, duties, levies and cess, assessed/ levied on the Seller, contractors or their employees that are required to be paid by the Seller as per the Law in relation to the execution of the Agreement and for supplying power as per the terms of this Agreement.”

36. It is submitted that the reliance placed by the Appellant upon the aforesaid clause of the PPA, is fundamentally flawed, for the reason that the aforesaid clause only mandates that the Respondent No. 2/ BALCO as to make payment of statutory taxes, duties, levies and cess. However, this does not mean that after making the said payment of statutory charges by the Respondent No. 2, the said Respondent is not entitled to claim compensation under change in law, as per Article 10, in the event of increase in, or introduction of, any change in law component after the cut-off date.

37. It is further stated that it is not the case of the Respondent No. 2 that it will not pay any taxes or duties, however, the case is that for any increase in such charges, the Appellant has to reimburse the same to the said Respondent. Further, there is no non-obstante clause in

Article 15.18.1, which overrides Article 10 of the PPA. As both the said provisions, have to operate independently.

38. The Ld. Commission observed as follows on the aforesaid argument in the impugned order:

“36. TANGEDCO has submitted that as per Article 15.18.1, the seller is required to pay all statutory taxes, duties, levies and cess assessed/levied on the seller, etc. for supplying power as per the terms of this agreement.

37. The Appellate Tribunal for Electricity in its judgment dated 19.4.2017 in Appeal No. 161/2015 and Appeal No. 205/2015 (Sasan Power Limited Vs. CERC & Ors. and Haryana Power Purchase Centre Vs. Sasan Power Ltd & Ors.) has dealt with the issue as under:

“44. It is true that according to the provisions of the RFP, the quoted tariff shall be inclusive one including statutory taxes, duties and levies. But the PPA gives express right to an affected party to claim Change in Law if the event qualifies thus in terms of Article 13. The RFP cannot override this right if an event qualifies as Change in Law. The Competitive Bidding Guidelines (Article 4.7 thereof has already been reproduced hereinabove) and the PPA have to be read

together. If an event qualifies as a Change in Law event then the compensation must follow because otherwise Article 13 of the PPA will become redundant. But, this will of course depend on facts and circumstances of each case. Facts of each case will have to be carefully studied before granting such a relief. It is rightly pointed out that in Wardha Power Company Limited, this Tribunal has rejected the obligation to any escalable index or indexing of cost of fuel in order to determine the compensation due on account of Change in Law. Sasan will have to be compensated keeping in law in mind.”

In view of the above, the objection of TANGEDCO does not survive and the Petitioner is entitled for compensation for change in taxes, duties, cess, etc.”

(Underline Supplied)

39. As such, the scope of Articles 10 and 15.18.1 of the PPA, is entirely different. Article 15.18.1, cannot at all render Article 10 as otiose. In this context, reference be made to the principle that a contract has to be read as a whole, meaning thereby each and every provision has to be given effect to. This principle has been settled by the Hon'ble Supreme Court in *Provash Chandra Dalui v. Biswanath Banerjee*, reported in *1989 Supp (1) SCC 487*. The relevant extract of the said judgement is set out hereinbelow:

“10. ‘Ex praecedentibus et consequentibus optima fit interpretatio.’ The best interpretation is made from the context. Every contract is to be construed with reference to its object and the whole of its terms. The whole context must be considered to ascertain the intention of the parties. It is an accepted principle of construction that the sense and meaning of the parties in any particular part of instrument may be collected ‘ex antecedentibus et consequentibus;’ every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that is possible. As Lord Davey said in N.E. Railway Co. v. Hastings [1900 AC 260, 267] :

“... the deed must be read as a whole in order to ascertain the true meaning of its several clauses, and... the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning of which they are naturally susceptible....”

In construing a contract the court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. If the words are clear, there is very little the court can do about it. In the construction of a written instrument it is

legitimate in order to ascertain the true meaning of the words used and if that be doubtful it is legitimate to have regard to the circumstances surrounding their creation and the subject-matter to which it was designed and intended they should apply.”

(underline supplied)

Hence, Article 15.18.1 and Article 10 of the PPA have to be read as a whole and in harmony to each other. In other words, Article 15.18.1 cannot at all be construed in a manner so as to defeat the purpose and intent of Article 10 of the PPA. As such, the reliance placed by the Appellant on Article 15.18.1, is liable to be rejected.

40. It is stated that under Section 63 of the Electricity Act, 2003, the Central Government framed the competitive bidding guidelines. As per Clause 4.11, read with Clause 5.6 (vi), of the guidelines, the bidders/ generators are entitled to quote energy/ variable charges as escalable or non-escalable. In case, escalable energy charges are quoted, the generator is entitled to the additional cost incurred on account of increase in base price of coal, based upon the escalation index issued by the Ld. Commission.

A copy of the relevant extract of the bidding guidelines issued under Section 63, is annexed herewith and marked as ANNEXURE WS-2.

41. In this context, it is stated that contention of the Appellant linking compensation as per escalation index, with the change in law compensation, is fundamentally flawed.
42. It is submitted that change in law provision is provided under Article 10 of the PPA, while the provision for compensation as per escalation index is provided under Schedule 6 of the PPA.
43. It is pertinent to state herein that, qua the aforementioned provisions of the PPA, there is no link, whatsoever, between the compensation as per escalation index, and the compensation as per change in law. In this context, the judgment of this Hon'ble Tribunal in *Appeal No. 288 of 2013* is relevant. In the said judgment, titled as *M/s Wardha Power Company Limited v. Reliance Infrastructure Limited & Anr.* the following was held:

“24. We find that as per the provisions of the PPA, there is no co-relation of the base price of electricity quoted by the Seller and computation of compensation as a consequence of Change in Law. The compensation is only with respect to the increase/decrease of revenue/expenses of the Seller following the Change in Law. The minimum financial impact to qualify for claim of compensation is also linked to the increase in expenses/decrease in revenue of the seller.

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.”

(underline supplied)

44. It is further submitted that in a Section 63 bid PPA, the tariff quoted by the generator cannot be re-opened. The Respondent No. 2/ BALCO executed the PPA with the Appellant on the basis of the provisions of the bidding guidelines, and the standard RFP and PPA documents, which did not contemplate any correlation between change in law compensation and compensation based on escalable parameters, as both are distinct.

Therefore, the Appellant cannot today shift the goal post, and add words to the PPA by seeking to deduct change in law compensation with the perceived/ alleged increase in the component of energy charges quoted in the bid which may or may not include the applicable tax as on the bid date.

45. In the above context, further reference be made to the *order dated 18.10.2019*, passed by the Ld. CERC in *Petition No. 10/SM/2019*. In the said order, with respect to escalation index, the following was held:

“28. Considering the submissions made by the stakeholders and views expressed during the public hearing, the Commission has decided the following

principles for determining the methodology for compilation of the coal price index:

...

(vii) Exclusion:

a. Though some of the stakeholders suggested to compute the index based on price including taxes, the same has not been considered for the reason that it would distort the index and inflation figures.

b. Surface Transportation Charges and Sizing Charges are not part of the price of coal notified by CIL and are therefore not considered in the price of coal used for compilation of the coal price index.”

(underline supplied)

In view of the aforesaid, it is submitted that the escalation index does not factor at all any component of taxes/ duties/ cess. Instead, the said index is only based upon the base price of coal. The change in the base price of coal is not allowed as change in law, and as such there is no correlation between compensation under escalation index and compensation under change in law. As such, TANGEDCO cannot be permitted to take the aforesaid argument.

46. On the aforesaid issue, the Ld. Commission observed as follows:

“14. TANGEDCO vide its affidavit dated 26.11.2016, which was filed before the Commission on 30.3.2017, has made additional submissions as under:

....

(b) The per unit tariff was quoted by the Petitioner after taking into account all eventualities. The PPA entered into by TANGEDCO was only after taking into consideration the impact of the proposed tariff on its consumers. The escalable energy charge components, increase in duties and levies are taken care in CERC escalation index published once in 6 months.

...

16. TANGEDCO vide its additional submissions dated 6.12.2017 has submitted as under:

(a) The quoted tariff for TANGEDCO towards energy charge is more than the tariff quoted for Kerala (DBFOO basis) by Rs.0.925 per unit, even though the Petitioner had opted to evacuate power from the same plant and intend to supply to both TANGEDCO and Kerala using the linkage coal supplied from the same location. Therefore, the claim of the Petitioner that it is affected on account of Change in Law is wholly untenable and is liable to be rejected. The fuel price under DBFOO is the actual fuel price. The fuel price after applying escalation index of CERC is higher than the DBFOO fuel price. That means there is no loss due to change in law. Further, the effect of change in law is absorbed by the

escalation index of this Commission. Therefore, no compensation can be claimed by the Petitioner.

....

(c) The escalation index of the Commission has sufficiently taken care of the financial impact of Change in Law. The escalation was not only on the coal charge but also on the levies, taxes and cess, etc. i.e. on the tariff adopted under Section 63 of the Act. The Petitioner has not brought on record anything to even suggest that it had incurred loss after applying the escalation index of the Commission.

...

Issue No. 4: Whether compensation claims are admissible under Change in Law events in the PPA.

....

35. TANGEDCO has submitted that as the Petitioner quoted escalable energy charge components, rise in duties and levies are taken care in CERC escalation index published once in 6 months. Further, TANGEDCO has submitted that as per clause 2.4.1.1(B) (xi) of the RFP, the quoted tariff is inclusive of all taxes, levies, duties, etc. Clause 2.4.1 (B) xi of the RfP provides as under:

...

36. TANGEDCO has submitted that as per Article 15.18.1, the seller is required to pay all statutory taxes, duties, levies and cess assessed/levied on the seller,

etc. for supplying power as per the terms of this agreement.

37. The Appellate Tribunal for Electricity in its judgment dated 19.4.2017 in Appeal No. 161/2015 and Appeal No. 205/2015 (Sasan Power Limited Vs. CERC & Ors. and Haryana Power Purchase Centre Vs. Sasan Power Ltd & Ors.) has dealt with the issue as under:

“44. It is true that according to the provisions of the RFP, the quoted tariff shall be inclusive one including statutory taxes, duties and levies. But the PPA gives express right to an affected party to claim Change in Law if the event qualifies thus in terms of Article 13. The RFP cannot override this right if an event qualifies as Change in Law. The Competitive Bidding Guidelines (Article 4.7 thereof has already been reproduced hereinabove) and the PPA have to be read together. If an event qualifies as a Change in Law event then the compensation must follow because otherwise Article 13 of the PPA will become redundant. But, this will of course depend on facts and circumstances of each case. Facts of each case will have to be carefully studied before granting such a relief. It is rightly pointed out that in Wardha Power Company Limited, this Tribunal has rejected the obligation to any escalable index

or indexing of cost of fuel in order to determine the compensation due on account of Change in Law.
Sasan will have to be compensated keeping in law in mind.”

In view of the above, the objection of TANGEDCO does not survive and the Petitioner is entitled for compensation for change in taxes, duties, cess, etc.”

(underline supplied)

47. From the aforesaid it is evident that the Ld. Commission rejected the argument of the Appellant/ TANGEDCO, by relying upon the judgment of this Hon'ble Tribunal passed in *Appeal No. 161/2015 and Appeal No. 205/2015*, titled as *Sasan Power Limited Vs. CERC & Ors. and Haryana Power Purchase Centre Vs. Sasan Power Ltd & Ors.* Hence, the objection of the Appellant with respect to the attempt to link compensation under escalation index, with compensation under change in law, is liable to be rejected.

Findings and analysis

48. We have heard the Appellants, Respondents in both the appeals i.e. 22 of 2019 and 58 of 2019 and have gone through the Appeals and written submissions and we are of the opinion that following issues arise for our consideration:

Issue No.: 1 Whether the decision of the Central Commission to allow compensation in respect of seven (7) items

on account of change in law is as per the relevant provisions of the PPA?

Issue No.: 2 Whether the decision of the Central Commission to disallow the compensation in respect of seven (7) items on account of change in law is as per the relevant provisions of PPA?

Issue No.: 3 Whether BALCO can be allowed carrying cost on the amount of compensation allowed by the Central Commission on account of change in law?

Let us examine the above issues as under:

Issue No.: 1 Whether the decision of the Central Commission to allow compensation in respect of seven (7) items on account of change in law is as per the relevant provisions of the PPA?

49. It is the case of the TANGEDCO that escalable energy charge quoted by BALCO consists not only coal price but also all the taxes and levies and therefore by applying escalation rate on energy tariff every month, not only the coal price and taxes get escalated but also the hidden component like profit also get escalated. It is precisely for this reason, no further compensation on account of change in law can be allowed to BALCO as it would result in double payment.

50. The TANGEDCO has further submitted that compensation on change in law is the payment of difference in cost due to changes in taxes or introduction of taxes. The generator/seller has to prove increase/decrease in cost of power generation or revenue/ expense due to change in law. A portion of tax components has already been escalated and paid in monthly tariff. The argument of the TANGEDCO is that no further compensation on account of change in law should be allowed to BALCO and if allowed, then the same should be allowed only after adjusting the amount of taxes and duties which have already been paid to BALCO on monthly basis as tariff.
51. We note the submission of the BALCO that Article 15.8.1 of the PPA only mandates that BALCO to make payment of statutory taxes, duties, levies and cess. However, this does not mean that after making the said payment of statutory charges BALCO is not entitled to claim compensation under change in law, as per Article 10, in the event of increase in, or introduction of, any change in law component after the cut-off date.
52. Further, there is no *non-obstante* clause in Article 15.18.1, which overrides Article 10 of the PPA. As both the said provisions, have to operate independently.
53. The Central Commission in the impugned order dated 27.04.2018 has referred to the judgment dated 19.4.2017 in Appeal No. 161/2015 and Appeal No. 205/2015 (*Sasan Power Limited Vs. CERC & Ors. and Haryana Power Purchase Centre Vs. Sasan Power Ltd & Ors.*).
The relevant portion of the Impugned Order reads as under:

37. *The Appellate Tribunal for Electricity in judgment dated 19.04.2017 in Appeal No. 161/ 2015 and Appeal No. 205/2015 (Sasan Power Ltd. Vs. CERC & Ors. and Haryana Power Purchase Centre Vs. Sasan Power Ltd. & Ors.) has dealt with the issue as under:*

“44. It is true that according to the provisions of the RFP, the quoted tariff shall be inclusive one including statutory taxes, duties and levies. But the PPA gives express right to an affected party to claim Change in Law if the event qualifies thus in terms of Article 13. The RFP cannot override this right if an event qualifies as Change in Law. The Competitive Bidding Guidelines (Article 4.7 thereof has already been reproduced hereinabove) and the PPA have to be read together. If an event qualifies as a Change in Law event then the compensation must follow because otherwise Article 13 of the PPA will become redundant. But, this will of course depend on facts and circumstances of each case. Facts of each case will have to be carefully studied before granting such a relief. It is rightly pointed out that in Wardha Power Company Limited, this Tribunal has rejected the obligation to any escalable index or indexing of cost of fuel in order to determine the compensation due on account of Change in Law. Sasan will have to be compensated keeping in law in mind.”

BALCO has submitted that in view of the above, the objection of TANGEDCO does not survive and the Petitioner is entitled for compensation for change in taxes, duties, cess, etc.

54. We note the submission of BALCO that the scope of Articles 10 and 15.18.1 of the PPA is entirely different. Article 15.18.1, cannot at all render Article 10 as otiose. In this context, reference be made to the principle that a contract has to be read as a whole, meaning thereby each and every provision has to be given effect to. This principle has been settled by the Hon'ble Supreme Court in *Provash Chandra Dalui v. Biswanath Banerjee*, reported in 1989 Supp (1) SCC 487. The relevant extract of the said judgement is set out hereinbelow:

“10. ‘Ex praecedentibus et consequentibus optima fit interpretatio.’ The best interpretation is made from the context. Every contract is to be construed with reference to its object and the whole of its terms. The whole context must be considered to ascertain the intention of the parties. It is an accepted principle of construction that the sense and meaning of the parties in any particular part of instrument may be collected ‘ex antecedentibus et consequentibus;’ every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that is possible. As Lord Davey said in N.E. Railway Co. v. Hastings [1900 AC 260, 267] :

“... the deed must be read as a whole in order to ascertain the true meaning of its several clauses,

and... the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning of which they are naturally susceptible....”

In construing a contract the court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. If the words are clear, there is very little the court can do about it. In the construction of a written instrument it is legitimate in order to ascertain the true meaning of the words used and if that be doubtful it is legitimate to have regard to the circumstances surrounding their creation and the subject-matter to which it was designed and intended they should apply.”

55. We note the submission of BALCO that Article 15.18.1 and Article 10 of the PPA have to be read as a whole and in harmony to each other. In other words, Article 15.18.1 cannot at all be construed in a manner so as to defeat the purpose and intent of Article 10 of the PPA.

56. We note the submission of BALCO that, *qua* the aforementioned provisions of the PPA, there is no link, whatsoever, between the compensation as per escalation index, and the compensation as per change in law. In this context, the judgment of this Hon’ble Tribunal in *Appeal No. 288 of 2013* is relevant. In the said judgment, titled as

M/s Wardha Power Company Limited v. Reliance Infrastructure Limited &Anr. the following was held:

“24. We find that as per the provisions of the PPA, there is no co-relation of the base price of electricity quoted by the Seller and computation of compensation as a consequence of Change in Law. The compensation is only with respect to the increase/decrease of revenue/expenses of the Seller following the Change in Law. The minimum financial impact to qualify for claim of compensation is also linked to the increase in expenses/decrease in revenue of the seller.

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.”

57. We also note the submission of BALCO that in a Section 63 bid PPA, the tariff quoted by the generator cannot be re-opened. BALCO executed the PPA with TANGEDCO on the basis of the provisions of the bidding guidelines, and the standard RFP and PPA documents, which did not contemplate any correlation between change in law compensation and compensation based on escalable parameters, as both are distinct. Therefore, TANGEDCO cannot today shift the goal post, and add words to the PPA by seeking to deduct change in law compensation with the perceived/ alleged increase in the component of energy charges quoted in the bid which may or may not include the applicable tax as on the bid date.

58. In view of foregoing, we are of the considered opinion that the decision of the Central Commission to allow compensation on seven (7) items on account of change in law is as per the relevant provisions of the PPA, the Regulations on the subject and is as per law. As such the appeal No. 22 of 2019 cannot be allowed and is accordingly dismissed as devoid of merits.

Issue No.: 2 Whether the decision of the Central Commission to disallow the compensation in respect of seven (7) items on account of change in law is as per the relevant provisions of PPA?

59. We note the submission of BALCO that this Tribunal has passed judgments substantially covering the components disallowed by the Central Commission. A summary of the said judgments, against each of the above change in law components, is provided hereinbelow:

Sl. NO.	Change in Law Events	Judgment
1	Levy of Busy Season Charges & Levy of Development Surcharge	Allowed. Appeal 119 of 2016, M/s Adani Power Rajasthan Ltd. Vs. Rajasthan Electricity Regulatory Commission & Ors. [Para 11 (A), Point xiii- xvi, Pg. 50-55]
2.	Increase in sizing and crushing charges	Disallowed. Appeal 111 of 2017, GMR WARORA Energy Ltd. Vs. CERC & Ors. [Para 13 (A), Point (xiv), Pg. 66]
3	Increase in Coal Surface Transportation Charge	Disallowed. Appeal 111 of 2017, GMR WARORA Energy Ltd. Vs. CERC & Ors. [Para 13 (A), Point (xv), Pg. 68-69]
4	Increase in Base Price of Coal	Disallowed. Appeal 195 of 2016, GMR Kamalanga Energy Ltd. Vs. CERC & Ors. [Para 72, Pg. 63-66]

5	Increase in base Freight of Coal Transportation	Disallowed. Appeal 119 of 2016, M/s Adani Power Rajasthan Limited Vs. Rajasthan Electricity Regulatory Commission & Ors. [Para 11(A), point xxvii, Pg. 66]
6	Withdrawal of Rebate and Additional Rebate loss due to change in base freight rate from Rs. 150.20 to Rs. 205.60	Disallowed. Appeal 119 of 2016, M/s Adani Power Rajasthan Limited Vs. Rajasthan Electricity Regulatory Commission & Ors. In the above appeal, increase in base freight was not allowed as change in law [Para 11(A), point xxvii, Pg. 66] As such, withdrawal of rebate and additional rebate on base freight is also covered by the above judgment.
7	Increase in trip siding charges	Disallowed. Appeal 119 of 2016, M/s Adani Power Rajasthan Limited Vs. Rajasthan Electricity Regulatory Commission & Ors. In the above judgment, increase in base freight has been disallowed as change in law [Para 11(A), point xxvii, Pg. 66] Trip siding charges are also a part of base freight charges, and the above judgment will also cover any increase in such charges.

60. BALCO has submitted that though BALCO is fully aware of the fact that components at Serial No. 2 to 7 in the table shown above have been disallowed by this Tribunal in various judgments passed already. However, BALCO is not giving up these issues and have made detailed submissions in the appeal.

61. In view of the fact that this Tribunal has already disallowed the components shown at serial No. 2 to 7 in the table shown above, we obviously cannot allow these change in law events.

62. We note the submissions made by BALCO that levy of busy season charges and levy of development surcharge has been allowed by this Tribunal as a change in law event in appeal No. 119 of 2016, M/s. Adani Power Rajasthan Ltd. Vs. Rajasthan Electricity Regulatory Commission & Ors. and the relevant extract of the judgment reads as under:

“xiii. From the above it is crystal clear that the Circulars issued by MoR regarding Busy Season Surcharge, Development Surcharge and Port Congestion Charges which have bearing on costs of the Kawai Project of APRL have force of law.

xiv. It is also observed that the State Commission has concluded that the CERC Escalation Rates covers only the Base Freight Rate. This is obvious from the observations of the State Commission at various paras in the Impugned Order. The relevant extract from the Impugned Order is reproduced below:

“43. Further, it is observed that the Base Freight Rate is being used by the CERC for computation of the Escalation Index. Service Tax on Transportation being levied additionally as a percentage of Normal Tariff Rate, is not covered in the escalation rates notified by CERC.

.....

47. Commission observes that there is merit in this contention of Respondents. It is noted that CERC computes escalation in the Base Freight. Any variation in base freight due to any reason including FAC gets reflected in the escalation index.

Therefore, we hold that the Fuel Adjustment Component does not qualify as a change in law event as claimed by the Petitioner.

.....
56. The Commission notes that class 150 of Railways freight schedule was applicable to the Petitioner at the time of bid deadline. The change in class to 145 was vide notification dated 16.03.2015, which is subsequent to the bid deadline. Commission observes that the CERC index, which uses Base Freight Rate linked to the class of goods, includes the impact of change in class for railway freight for coal from 140 to 150.....”

xv. APRL/Appellant has further submitted that, MERC has allowed the Development Surcharge and Busy Season Surcharge under Change in Law in Case No. 163 of 2014. Let us examine the findings of the MERC on the said issues. The relevant extract from the order of MERC is reproduced below:

“J. Development Surcharge on Coal Transportation

12.35 The Commission notes that:

(a) Increase in Development Surcharge on Coal Transportation has been effected by the Ministry of Railways, GoI in exercise of powers under Sections 30, 31 and 32 of the Railways Act, 1989. Rate Circulars issued by the Ministry of Railways are akin to Orders issued pursuant to an Act, in this case the Railways Act, 1989, by an Indian Governmental Instrumentality, i.e. Indian Railways.

(b) Thus, the increase in Development Surcharge on Coal Transportation falls within the definition of “Law” and Article 13.1.1(i) of the PPA

(c) At the time seven days prior to the bid deadline, i.e. 14.2.2008, the applicable “Development Surcharge on Coal Transportation” was 2% of the Normal Tariff Rate (NTR) as notified in Rate Circular No. 28 of 2007 dated 29.5.2007.

That rate has been revised to 5% vide Rate Circular No. 38 of 2011 dated 12.10.2011.

(d) Further, as mentioned earlier, only the Base Freight Rate is being used by the CERC for computation of the Escalation Index. Development Surcharge on Coal Transportation, being levied additionally as a percentage of NTR, is not covered in the escalation rates notified by CERC.

12.36 In view of the above, the Commission finds that the increase in Development Surcharge on Coal Transportation is a “Change in Law” event as per Article 13.1.1(i) of the PPA and satisfies the requirements as explained in Paras. 12.6 and 12.8 above.

K. Busy Season Surcharge on Coal Transportation

12.37 The Commission observes as follows:

(a) Busy Season Surcharge on Coal Transportation has been imposed by the Ministry of Railways, Gol in exercise of powers

conferred by Section 30, 31 and 32 of the Railways Act, 1989. Rate Circulars issued by Ministry of Railways are akin to the Orders issued pursuant to the Act, i.e. the Railways Act, 1989 by an Indian Governmental Instrumentality, i.e. Indian Railways.

(b) Thus, the introduction of Busy Season Surcharge on Coal Transportation falls within the definition of "Law" and Article 13.1.1 (i) of the PPA.

(c) The imposition of Busy Season Surcharge on Coal Transportation is admittedly subsequent to seven days prior to the Bid Deadline, i.e., on 29.03.2011, vide Rate Circular No. 13 of 2011. The rate of 5% was subsequently increased to 10%, 12% and then to 15% vide Rate Circular Nos. 38 of 2011 (dated 12.10.2011), 28 of 2012 (dated 27.09.2012) and 24 of 2013 (dated 18.09.2013), respectively.

(e) Further, as mentioned in para. 12.32 above, only the Base Freight Rate is being used by the CERC for computation of the Escalation Index. Busy Season Surcharge on Coal Transportation, being levied additionally as a percentage of the Base rate, is not covered in the escalation rates notified by CERC.

12.38 Considering the above, the Commission is of the view that imposition and further increase in Busy Season Surcharge on Coal Transportation are "Change in Law" events as per Article

13.1.1(i) of the PPA and meet the requirements set out at Paras.12.6 and 12.8 above.”

Now let us consider the provisions of Article 13.1.1 of the PPA in Case No. 163 of 2014. The relevant extract is reproduced as below:

“ARTICLE 13: CHANGE IN LAW 13.1. Definitions

In this Article 13, the following terms shall have the following meanings:

13.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:

- (i) The enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any law or;*
- (ii) A change in interpretation of any law by a competent court of law, tribunal, Indian Governmental Instrumentality provided such court of law, tribunal, Indian Governmental Instrumentality is final authority under law for such interpretation.*

But shall not include (i) any change in withholding tax on income or dividends distributed to the shareholder of the seller, or (ii) change in respect of UI charges or frequency interval by an appropriate commission.

.....”

The provisions of Article 13.1.1 (i) of the PPA under MERC is similar to that of the PPA under instant case.

xvi. From the above discussions it is clear that the CERC escalation index for transportation covers only the basic freight charges. The Bidder was required to suitably incorporate the other taxes, duties, levies etc. existing at the time of bidding. The Bidder cannot envisage any changes happening regarding taxes, levies, duties etc. in future date. As such, any increase in surcharges or imposition of new surcharge after the cut-off date i.e. 30.7.2009 in the present case cannot be said to be covered under CERC Escalation Rates for Transportation Charges, which is indexed for basic freight rate only. Accordingly, any such change by Indian Governmental Instrumentality herein Indian Railways has to be necessarily considered under Change in Law event and need to be passed on to APRL. In terms of the PPA, such changes in the surcharges and levy of new Port Congestion Surcharge which do not exist at the time of cut-off date falls under 1st bullet of Article 10.1.1 of the PPA read with the definitions of the 'Law' and 'Indian Government Instrumentality' under the PPA.

According these issues are answered in favour of APRL/Appellant.”

63. In view of the above judgment passed by this Tribunal the levy of busy season charges and levy of development surcharge is hereby allowed as change in law event.

Issue No.: 3 Whether BALCO can be allowed carrying cost on the compensation allowed by the Central Commission on account of change in law?

64. BALCO has prayed for carrying cost on the compensation allowed on account of change in law and has referred to the judgments passed by the Hon'ble Supreme Court as well as this Tribunal wherein it has been held that carrying cost is inbuilt in the change in law claims as the same is based upon the principle of restitution, so that the generator/affected party is restored to the same economic position as if the change in law event did not occur. This principle is provided in Article 10.2.1 of the PPA. The counsel representing BALCO submitted that BALCO has filed an application seeking amendment of the present appeal for the purpose of claiming carrying cost.

BALCO has submitted that the principle qua grant of carrying cost on allowed Change in Law claims is no more res-integra. BALCO has referred to various judgments passed by the Hon'ble Supreme Court and this Tribunal. This Tribunal by its Judgment dated 28.08.2020 passed in **Appeal No. 21 of 2019 titled Talwandi Sabo Power Ltd. v. Punjab State Electricity Regulatory Commission & Anr.**, allowed carrying cost with the view to bring the generator to the same economic position as if the Change in Law event(s) had not occurred. Relevant extract of the Judgment is as under:

“140. In the light of our discussion and reasoning, we are of the opinion that the impugned Orders, dated 21.12.2018 and 09.01.2019 challenged in both the appeals deserve to be set aside and accordingly set aside by allowing the appeals.

.....

.....

e) Appellants are entitled for carrying cost in terms of provisions of the PPAs to bring the seller-Appellants to the same economic position as if such Change in Law event has not occurred.”

This Hon'ble Tribunal by its judgment dated 13.04.2018 passed in **Appeal No. 210 of 2017 titled Adani Power Ltd. vs CERC & Ors.**, considering the restitutionary principle under the change in law provision of the PPA allowed carrying cost on the allowed change in law claims from the effective date of change in law till the approval of the said claim by the appropriate authority. Relevant extract of Adani Judgment is as under: -

“x. Further, the provisions of Article 13.2 i.e., restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of ‘restitution’ i.e., restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon'ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India & Ors., we are of the considered opinion that the Appellant is eligible for

Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA.”

The above judgment of this Tribunal in Appeal No. 210 of 2017 was challenged before the Hon'ble Supreme Court. The Hon'ble Supreme Court vide its judgment dated 25.02.2019 upheld the aforesaid Judgment passed by this Hon'ble Tribunal and held as under:-

“7. Article 13.2 is an in-built restitutionary principle which compensates the party affected by such change in law and which must restore, through monthly tariff payments, the affected party to the same economic position as if such change in law has not occurred. 10 Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal... 16...There can be no doubt from this judgment that the restitutionary principle contained in Clause 13.2 must always be kept in mind even when compensation for increase/decrease in cost is determined by the CERC.”

With respect to the application for seeking amendment, filed by BALCO in the present appeal, which was filed out of abundant caution to claim carrying cost, it is submitted that this Tribunal in the

following judgments allowed reliefs, including the relief of carrying cost, by way of moulding of relief:

(a) *GMR Kamalanga Energy Ltd. Vs. CERC & Ors., APPEAL NO. 195 of 2016:*

“66. The contention of the Respondent-Commission that this claim was originally not sought for, has been considered, and we are of the opinion that this Tribunal has wide discretionary powers to mould relief. In support of this, reliance can be placed on the Judgments in Bhagwati Prasad vs. Chandramaul reported in AIR 1966 SC 735 and Hindalco Industries Ltd. vs. Union of India reported in (1994) 2 SCC 594 wherein it was held that this Tribunal has wide discretionary powers to mould relief, if not specifically prayed for.

67. Similarly, the Appellate Authority has all the powers which the original authority may have in deciding the question before it. In support of this, we may refer to the judgments of the Supreme Court in Remco Industrial Workers House Building Co-operative Society vs. Lakshmeesha M. & Ors. (2003) 11 SCC 666; Pasupuleti Venkateswarlu vs. Motor and General Traders (1975) 1 SCC 770; Shikharchand Jain vs. Digamber Jain Praband Karini Sabha (1974) 1 SCC 675; OTIS Elevator Co. (India) Ltd. vs. CEE (2016) 16 SCC 461 and Jute of Corporation of India Ltd. v. Commissioner of Income Tax & Ors. 1991 Supp. (2) SCC 744.

68. *Therefore, it is clear that this Tribunal being the Appellate Authority having regard to the facts and circumstances of the case can allow the prayer by moulding the relief to meet the ends of justice. If the terms of the contract provide that parties must be brought to same economic position, it would include that all additional costs, which occurs after the cut-off date in terms of the change in law event, have to be compensated and if there is any time gap between the date of spending and realising the said amount, carrying cost/interest has to be paid then only the parties could be put to same economic position. Therefore, this claim of the Appellant is also allowed.”*

(b) *Adani Power Maharashtra Ltd. v. MERC & Ors. Appeal No. 241 of 2016:*

“153. In order to grant relief on equities by keeping justice, equity and good conscience at the back of the mind, the Tribunal can shape the relief consistent with facts and circumstances established in a given cause of action. The Tribunal feels moulding of relief is necessary to meet ends of justice, after taking all facts and circumstances into consideration, can mould the relief by exercising discretionary power.

155. If new facts comes into existence after litigation has come to Court and the same has impact on the right to relief or the manner of moulding the relief and if it is diligently brought to

the notice of the Tribunal, such fact has to be taken into consideration since equity justifies such action.

201. For the reasons mentioned above, the reliefs deserve to be moulded in the above appeal. Accordingly, all points are answered in favour of appellant.”

65. In view of the foregoing, we are of the considered opinion that in order to grant relief on equities by keeping justice, equity and good conscience at the back of the mind, the Tribunal can shape the relief consistent with facts and circumstances established in a given cause of action. The Tribunal feels moulding of relief is necessary to meet ends of justice, after taking all facts and circumstances into consideration, can mould the relief by exercising discretionary power and accept the prayer of BALCO for carrying cost on the amount of compensation allowed on account of change in law.
66. If the terms of the contract provide that parties must be brought to same economic position, it would include that all additional costs, which occurs after the cut-off date in terms of the change in law event, have to be compensated and if there is any time gap between the date of spending and realising the said amount, carrying cost/interest has to be paid then only the parties could be put to same economic position. Therefore, the prayer of BALCO for carrying cost on amount of compensation allowed on account of change in law is hereby allowed.

ORDER

In view of the foregoing, we pass the following order:

- i) The decision of the Central Commission to allow compensation in respect of the following seven (7) items on account of change in law is as per the relevant provisions of the PPA, regulations on the subject and is as per law.
1. Royalty on Coal;
 2. Service Tax on Royalty of Coal;
 3. Increase in Environment Cess /Paryavaran Upkar;
 4. Change in Infrastructure Development Cess;
 5. Change in the components of Central Excise Duty;
 6. Change in Clean Energy Cess (subsequently known as Clean Environment Cess); and
 7. Increase in Service Tax Rate and imposition of Swachh Bharat Cess and Krishi Kalyan Cess on Railway freight and trip siding charges.

Accordingly, Appeal No. 22 of 2019 is dismissed as devoid of merits.

- ii) Compensation on account of change in law in respect of “Levy of Busy Season Charges and Levy of Development Surcharge” is allowed.
- iii) Compensation on account of change in law in respect of the following items is not allowed.

1. Increase in sizing and crushing charges;
 2. Increase in Coal Surface Transportation charge;
 3. Increase in base price of coal;
 4. Increase In base Freight of Coal Transportation;
 5. Withdrawal of Rebate and Additional Rebate loss due to change in base freight rate from Rs. 150.20 to Rs.205.60;
- iv) Carrying cost on the compensation allowed on account of change in law is allowed.
- v) In view of the above orders at ii) and iv), the appeal No. 58 of 2019 is partly allowed. The impugned order dated 27.04.2018 passed by the Central Commission in Petition No. 126/MP/2016 is hereby set aside to the extent indicated above. The Central Commission is hereby directed to pass the appropriate order considering the opinion expressed in this judgement within three months from the date of pronouncement of judgment.

In terms of the above, the pending applications, if any, stand disposed of.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERENCING ON THIS 12th DAY OF AUGUST, 2021.**

(Ravindra Kumar Verma)
Technical Member

(Justice Smt. Manjula Chellur)
Chairperson

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REPORTABLE/NON-REPORTABLE
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