THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 358 OF 2019

Dated: 30th June, 2021

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

In the matter of:-

1. **Uttar Haryana Bijli Vitran Nigam Limited**
   Vidyut Sadan, Plot No. C-16,
   Sector 6, Panchkula – 134112,
   Haryana.

   Represented by:
   Haryana Power Purchase Cehtre
   Shakti Bhawan, Sector 6,
   Panchkula, Haryana – 134108.

2. **Dakshin Haryana Bijli Vitran Nigam Limited**
   Vidyut Nagar, Vidyut Sadan,
   Hissar – 125005, Haryana

   Represented by:
   Haryana Power Purchase Centre
   Shakti Bhawan, Sector 6,
   Panchkula, Haryana - 134108 **…Appellants**

VERSUS

1. **Adani Power (Mundra) Limited**
   Through its Managing Director
   Shikar, Near Mubhakali Circle,

Navrangpura, Ahmedabad – 390 009

2. Central Electricity Regulatory Commission
Through its Secretary
3rd and 4th Floor, Chandralok Building
36, Janpath, New Delhi – 110 001. **… Respondents**

Counsel for the Appellant(s)	:	Mr. M. G. Ramachandran, Sr. Adv. Ms. Ranjitha Ramachandran Ms. Poorva Saigal Ms. Anushree Bardhan Mr. Shubham Arya Mr. Arvind Kumar Dubey
Counsel for the Respondent(s)	:	Mr. Amit Kapur Ms. Poonam Verma Ms. Aparajita Upadhyay Ms. Sakshi Kapoor **for R-1**

JUDGMENT

(PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON)

1. This appeal is filed by the Appellants Haryana Utilities challenging the legality and validity of the order dated 13.06.2019 (**"Impugned Order"**) passed by the Central Electricity Regulatory Commission (**"CERC/Central Commission"**) in Petition No. 251/MP/2018 whereby the Central Commission held that the communication dated 22.05.2017 by Ministry of

Coal (**"MoC"**) to be considered as Change in Law for shortage of coal for the period 01.04.2017 onwards.

2. The facts that are necessary for disposing of this appeal, in brief, are narrated here-in-below:

A. The Appellants are the distribution licensees in the State of Haryana undertaking the distribution and retail supply of electricity to the consumers at large in the State.

B. The Appellants have entered into two Power Purchase Agreements (hereinafter referred to as **"PPAs"**) both dated 07.08.2008 with the 1st Respondent - **Adani Power (Mundra) Limited** (for short **"Adani Power / Adani Mundra"**) for a contracted capacity of 1424 MW from the generating units 7, 8 and 9 established by Adani Power in Mundra in the State of Gujarat on the terms and conditions contained in the said PPAs. The PPAs were entered into between the Appellants and the Adani Power in pursuance to a Tariff Based Competitive Bidding Process initiated by the Haryana Utilities under Section 63 of the Electricity Act, 2003 (for short **"the Act"**) as per the Guidelines notified by the Central Government. Similar PPA was entered

into between Appellant No. 2 and Adani Power on 07.08.2008. The bid submitted by Adani Power in pursuance to which the PPAs dated 07.08.2008 were entered into was based on generation and supply of electricity by using imported coal and domestic coal.

C. Adani Power had filed proceedings before the Central Commission being Petition No 155/MP/2012 on 05.07.2012 seeking inter alia, relief of increase in the tariff from the quoted tariff mentioned in the bid on various grounds. Adani Power had submitted the bid based on the availability of imported coal from Indonesia and the promulgation of the Indonesian Regulations by the Republic of Indonesia providing for the bench mark price for export of coal which had significantly affected Adani Power in the generation and supply of electricity from the Mundra Power Project including the generating units 7, 8 and 9 in respect of Haryana PPAs. While the primary claims of Adani Power was based on the effect of the Indonesian Regulations on the import

of coal, in the proceedings Adani Power had also claimed that there has been a shortage in the availability of domestic coal.

D. At the time when Adani Power submitted the bid, there was no Letter of Intent (for short **"LoI"**) or Letter of Assurance (for short **LoA"**) or Fuel Supply Agreement (for short **"FSA")** available with Adani Power in regard to the domestic coal. At the time of the submission of the bid, Adani Power had relied only on the two Memorandum of Understandings entered into by Adani Power with Messrs Coal Orbis, Germany and Kowa and Company, Japan. Subsequent to the above, Adani Power was issued a LoA dated 25.06.2009 by Mahanadi Coalfield Limited (for short **"MCL")** for supply of 6.405 MTPA of coal. In pursuance of the LoA, Adani Power entered into a FSA with MCL for 6.405 MTPA. The quantum of MTPA of domestic coal assured under the LoA and for which the FSA dated 09.06.2012 was signed between Adani Power and MCL was not sufficient for generation and sale of electricity from the Mundra Power Project Units 7, 8 and 9 with an aggregate capacity of 1980 MW.

E. In the circumstances mentioned above Adani Power had, proceeded and represented to the Haryana Utilities as well as in the proceedings before the Central Commission that the bid of Adani Power was premised on the availability of domestic coal to the extent of 70% and imported coal to the extent of 30%. In this regard Adani Power had taken the position that the LoA and the FSA was signed within the time provided in the PPA for fulfillment of the conditions subsequent, namely, within 15 months from the date of the PPAs and accordingly the FSA with MCL should also be considered as a source of coal available to Adani Power for generation and supply of electricity to the Haryana Utilities.

F. The proceedings initiated by Adani Power by way of the above Petition No 155/MP/2012, after adjudication by the Central Commission (vide Orders dated 02.04.2013 and 21.02.2014) and this Hon'ble Tribunal (vide Order dated 07.04.2016 in Appeal No. 100 of 2013 and batch) became a subject matter of proceedings in Civil Appeal Nos. 5399-5400 of 2016 and batch matters, namely, ***Energy Watchdog v Central Electricity***

Regulatory Commission and Others and was decided by the Hon'ble Supreme Court vide judgment and Order dated 11.04.2017 passed in Civil Appeal Nos. 5399-5400 of 2016 reported as (2017) 14 SCC 80. The Hon'ble Supreme Court, inter alia, held as under:

> *"57. Both the letter dated 31-7-2013 and the revised Tariff Policy are statutory documents being issued under Section 3 of the Act and have the force of law. This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India Limited and other Indian sources is cut down, the PPA read with these documents provides in Clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred. Further, for the operation period of the PPA compensation for any increase/decrease in cost to the seller shall be determined and be effective from such date as decided by the Central Electricity Regulatory Commission.*
>
> *58.…The Central Electricity Regulatory Commission will, as a result of this judgement, go into the matter afresh and*

determine what relief should be granted to those power generators who fall within clause 13 of the PPA as has been held by us in this judgement."

G. In the said decision, the Hon'ble Supreme Court, however, rejected any claim of Adani Power for relief in respect of Indonesian Coal either on account of Change in Law or otherwise under Force Majeure provisions of the PPA (Article 12) or by exercise of general regulatory powers by the Central Commission.

H. In pursuance to the above, Adani Power had filed Petition No. 97/MP/2017 before the Central Commission. In the said Petition also, Adani Power itself had claimed relief only with regard to 70% domestic coal.

I. The Central Commission vide Order dated 31.05.2018 decided the Petition No 97/MP/2017 allowing, inter alia, the following relief in terms of change in law:

(a) The Central Commission proceeded on the basis that the project was based on domestic coal for 1386 MW (which is

equivalent to the 6.405 MTPA for which allocation was made, instead of 1109 MW which is 70% of contracted capacity of 1424).

According to Appellant this is contrary to all the documents and pleadings on record.

(b) The Central Commission rejected the contention that the change in law is applicable only for shortage of supply up to the specified percentage i.e. 65%, 65%, 67% and 75% of the ACQ during the years 2013-14, 2014-15, 2015-16 and 2016-17 which is actually provided in the NCDP 2013 and Ministry of Power Letter dated 31.07.2013 which was the 'law' on the basis of which claim was made.

According to Appellant, the Central Commission allowed the shortfall even beyond the above percentage and was also contrary to the earlier decisions of the Central Commission in various cases.

(c) The Central Commission has allowed the change in law as the difference between the actual cost of generation using

alternate coal and energy charges quoted by the 1st Respondent. The change in law is for procurement of alternate coal to make up for shortfall in domestic coal and therefore, the compensation is for the difference between landed cost of domestic linkage coal if the domestic coal had been procured and landed cost of alternate coal.

(d) The relief was granted up to 31.03.2017 being the end of 12th Five Year plan which was as per the NCDP 2013 / Letter dated 31.07.2013.

(e) In case of any refund by the 1st Respondent of any excess amount recovered on the basis of interim order dated 28.9.2017, interest at 9% would be applicable.

J. Aggrieved by the Order dated 31.05.2018, the Appellants filed a petition being Review Petition No. 24/RP/2018 before the Central Commission for review of the Order.

K. By judgment and Order dated 03.12.2018 the Central Commission rejected the Review Petition filed in terms of the observations contained in the said Order.

L. The Appellants have filed an Appeal being DFR No. 4981 of 2018 against the Order dated 31.05.2018 which is pending before this Tribunal.

M. In the meantime, the Ministry of Coal vide Communication dated 22.05.2017 which provided for a new regime of allocation of coal under SHAKTI Policy and further for the projects under the old regime i.e. projects who had already been granted LOA / FSA would continue to get supply at 75% of ACQ beyond 31.03.2017.

N. On 07.08.2018, the 1st Respondent filed a Petition being Petition No. 251/MP/2018 allegedly as implementation of Order dated 31.05.2018 and claimed relief for shortfall beyond 31.03.2017. The 1st Respondent also raised the issue of the Communication dated 22.05.2017 which provided for supply at 75% for the

power projects with FSAs beyond 31.03.2017. The 1st Respondent also claimed carrying cost for the above.

O. On 13.06.2019 the Impugned judgment came to be passed.

3. Aggrieved by the impugned order, the Appellants have approached this Tribunal seeking the following reliefs:

(A) Allow the appeal and set aside the Order dated 13.06.2019 passed by the Central Commission in Petition No. 251/MP/2018 to the extent challenged in the present appeal;

(B) Pass such other Order(s) as this Tribunal may deem just and proper.

4. The Appellants have filed written submission, which in brief, is as under:

5. According to Mr. M. G. Ramachandran, learned senior counsel arguing for the Appellants, in the impugned order the Central Commission has adopted the formula / mechanism for computation of impact as per the earlier Order dated 31.05.2018 passed in Petition No. 97/MP/2017. The said earlier Order dated 31.05.2018 had already then been challenged by the

Appellant in Appeal No. 168 of 2019 on various grounds, some of which, as given under, also arise in the present Appeal:

(i) Consideration of domestic coal at 1386 MW out of 1424 MW contracted capacity, even though the consistent position of the Respondent - Adani Power as well as decisions of the Courts has been that the bid was based on 70% domestic coal (***ISSUE NO. I in Appeal No. 168 of 2019***).

(ii) The compensation has been allowed as the difference between the actual cost of generation using alternate coal and energy charges quoted by Adani Power (***ISSUE NO. IV in Appeal No. 168 of 2019***).

(iii) Consideration of the entire shortfall in coal as shortfall due to change in law even though the communication dated 22.05.2017 itself (which is the law) had provided for supply at 75% only as change in law (***Similar to ISSUE NO. 2 in Appeal No. 168 of 2019***).

6. The Appeal No. 168 of 2019 has been decided by this Tribunal vide Judgment dated 03.11.2019 whereby the Tribunal has dismissed the

appeal filed by the Appellant including the above aspects. The Appellant has filed a Second Appeal before the Hon'ble Supreme Court being Civil Appeal No. 4143 of 2020 wherein notice has been issued and interim orders have been passed.

7. In addition to the above aspects, the Central Commission had failed to consider the following issues raised by the Appellant.

(i) Consideration of Communication dated 22.05.2017 under change in law even though the requirements under Clause 13 of the PPA for issuance of notice was not followed.

(ii) Allowance of carrying cost even for the period of delay attributable to Adani Power.

No notice of change in law pertaining to period post 31.03.2017

8. Though Adani Power had filed the Petition No. 251/MP/2018 for implementation of Order dated 31.05.2018 in Petition No. 97/MP/2017, the Central Commission had considered the issue of change in law as a separate petition for change in law. The claim for the period beyond 31.03.2017 is based on a Communication dated 22.05.2017 issued by the Ministry of Coal providing for supply of coal at 75%. Therefore, the change

in law event claimed is the issuance of the letter dated 22.05.2017. The above communication was not even produced or referred during the proceedings in Petition No. 97/MP/2017 which is also noted in Impugned Order at Para 25 and the Order dated 31.05.2018 had also proceeded only on basis of NCDP 2013 / Letter dated 31.07.2013 and provided relief only until 31.03.2017. When the Order dated 31.05.2018 clearly referred to the relief only till 31.03.2017, there was no question of any Petition for implementation of the said Order for period beyond 31.03.2017.

9. Adani Power had not filed any appeal or even Review against the said Order dated 31.05.2018 and therefore, cannot claim any error in the said Order dated 31.05.2018 or claim that there was any inadvertent restriction of the Period of consideration. Adani Power had accepted the above Order dated 31.05.2018.

10. The Appellants further contend that Adani Power itself admits that it filed a separate petition for the issue of Communication dated 22.05.2017 (referred as SHAKTI Policy letter). Under the guise of implementation of Order dated 31.05.2018 passed in Petition No. 97/MP/2017, Adani Power had sought for additional relief which is not correct. The Central

Commission in Petition No. 251/MP/2018 ought not to have entertained such claims. However, if Central Commission was considering the Communication in the separate Petition as a change in law, the same was required to be tested as per the requirements of Article 13 of the PPA. The Central Commission failed to consider that no change in law notice required under Article 13.3 of the PPA was indisputably issued by Adani Power in regard to the same.

11. According to Appellants, though the proceedings in Petition No. 97/MP/2017 were pending, the 1st Respondent chose not to produce the said Communication before the Central Commission and did not even issue any Notice for Change in Law as required under Article 13 of the PPAs. Article 13.3 of the PPA requires a specific Notice to be issued to the Appellants as soon as reasonably practicable and provide details of the change in law and its effects. No such notice was issued in respect of Communication dated 22.05.2017 claiming it to be a Change in Law. In absence of such Notice, there could have been no consideration of any change in law. It is stated that issuance of a Notice is a mandatory requirement for claiming any relief of change in law. Article 13.3 clearly says that "*if the Seller…. and wishes to claim relief for such change in law,*

it shall give notice…". Therefore, notice is a pre-condition to claim relief.

12. The Appellants further contend that they had specifically raised the contention of lack of notice on change in law and this has also been recorded by the Central Commission in the Impugned Order at Para 11 (e) and Para 14 (i). However, there is no finding or consideration on the said issue. When a contract provides for something to be done in a particular manner, then it has to be done in that manner in terms of Section 50 of Contract Act, 1872. If the PPA requires issuance of notice, then notice has to be issued.

13. The Communication dated 22.05.2017 is a separate document and cannot be claimed as a continuation of the old policy so as to not to consider it as a new law as sought to be claimed by Adani Power. There is no continuous cause of action. The contention is also contrary to the finding of Central Commission in the Impugned Order at **Page 90** wherein the issue is considered as a separate petition. Adani Power has not challenged the above finding and it is therefore, not open to Adani Power to allege to the contrary at this stage.

Period of Carrying cost

14. According Appellants, the Central Commission erred in granting relief of carrying cost for the period where the delay is attributable to Adani Power itself in seeking relief and there is no justification for the same. The issue is not of principle of carrying cost but the issue of delays on the part of Adani Power. It was the responsibility of Adani Power to approach the Central Commission in time with all the relevant facts and supporting documentation for its claim for change in law. For such period of delay by Adani Power, there cannot be any carrying cost. The carrying cost, if at all to be considered, can be considered only from the date of filing of the complete information. Adani Power cannot claim any relief in respect of the period prior to the filing of the Petition. The Appellant had raised this issue as recorded in the Impugned Order Para 14(m), but the Central Commission has not dealt with the said objection.

15. The Appellants further contend that the relief for the period beyond 01.04.2017 is based on Letter dated 22.05.2017; however, Adani Power had raised this issue for the first time in the Petition No. 251/MP/2018 filed only on 07.08.2018. Therefore, the period from 01.04.2017 till the filing of the Petition i.e., 07.08.2018 cannot be considered for carrying cost. Even in

the said Petition, Adani Power has not provided any details/information for alleged shortfall in coal beyond 01.04.2017 let alone any supporting details or certificates from the coal company. There is no justification for the delay.

16. Further, there can be no dispute that the filing of the Petition and determination by Central Commission is mandatory for any relief under change in law in operation period and there is no contemplation of any bilateral discussion or agreement envisaged for the operation period, unlike in the construction period. This is clear from Article 13.2(b).

17. According to Appellants, Adani Power has only relied on the pending proceeding in Petition No. 97/MP/2017. The Central Commission in the said Petition No. 97/MP/2017 was only considering the issue of NCDP 2013 / MOP Letter dated 31.07.2013 and could not have considered or allowed any relief based on Communication dated 22.05.2017, particularly when the same had not even been produced by Adani Power. This has also been noted in the Impugned Order at Para 25. Adani Power has failed to address the above failure of Adani Power while seeking to blame the Central Commission for inadvertent restriction. Further, Adani Power had not even

challenged the said Order dated 31.05.2018 in Petition No. 97/MP/2017 and therefore, cannot claim any error in the said Order.

18. According to Appellants, the doctrine of "*actus curiae neminemgravabit*" does not apply here as - (a) there is no mistake of the court, and (b) Adani Power did not challenge the Order. The order of the Central Commission or any other authority did not, in any manner, prevent or cause any hindrance or come in the way of Adani Power filing the Petition for relief immediately after 22.05.2017.

19. The Appellant further contends that the Central Commission has ignored well settled principle that the delays in filing Petition / information would result in denial of carrying cost which has been held by the Courts in the following cases:

(a) ***Maharashtra State Electricity Distribution Co Ltd vs. Maharashtra Electricity Regulatory Commission*** dated 19.09.2007 in Appeal No. 70 of 2007 Para 7,8,9.

(b) Torrent ***Power Ltd vs. Gujarat Electricity Regulatory Commission*** dated 30.05.2014 in Appeal No. 147, 148 and 150 of 2013 – Para 17.

(c) ***Paschim Gujarat Vij Company Ltd. and Ors. vs. Gujarat Electricity Regulatory Commission*** dated 04.12.2014 in Appeal No. 45 of 2014 – Para 10.

(d) ***Kanwar Singh and Ors. vs. Union of India (UOI)***, [2005 (82) DRJ 397], [120 (2005) DLT 348] – Para 12.

(e) ***Budh Ram Vs. Union of India (UOI) and Ors.*** [2011 SCC online del 1192] - Para 18.

20. The Tribunal in ***Punjab State Power Corporation Limited vs. Punjab State Electricity Regulatory Commission*** dated 22.04.2015 in Appeal No. 174 of 2013 has also considered the delay in providing complete documents as a reason for denying carrying cost. Para 29 and 30(iv) are relevant.

21. According to the Appellants, even as a matter of equity or restitution,

the burden of carrying cost for the period of delay by Adani Power cannot be on to the consumers. The Generators should be required to act in a prompt manner, without delaying the filing of the Petition. Adani Power cannot delay the filing of the Petitions and necessary information / documents and then claim carrying cost for such period of delay. It is the Adani Power's obligation to demonstrate the occurrence of change in law and if Adani Power fails or delays in its obligations, the additional burden cannot be passed on to the consumers. Adani Power has not acted in a prudent manner in not issuing the notice for change in law and filing the Petition only in August 2018 and that too without complete information.

22. *Per contra, l*earned counsel for 1st Respondent – Adani Power has filed its written submissions stating as under:

23. According to the 1st Respondent – Adani Power, following are the details of the Appeals filed and grounds raised by Uttar Haryana Bijli Vitran Nigam Ltd. and Dakshin Haryana Bijli Vitran Nigam Ltd. **("*Haryana Utilities*")**. The grounds at Sl. Nos 1, 2 and 3 of NCDP matter as stated below are identical to the grounds raised by Haryana Utilities in SHAKTI matter:

Appeal No.	**Impugned CERC Order**
Appeal No. 168 of 2019 **(NCDP Appeal)**	Order **dated 31.05.2018** passed by CERC disposing Petition No, 97/MP/2017 ("***NCDP Order'***)
Appeal No. 358 of 2019 **(SHAKTI Appeal)**	Order **dated 13.06.2019** passed by CERC disposing of Petition No. 251/MP/2018 ("***SHAKTI Order***)

Sl.No.	**Grounds in Appeal No. 168 of 2019 (NCDP Appeal)**	**Grounds in Appeal No. 358 of 2019 (SHAKTI Appeal)**
1.	Adani Mundra's bid was premised on domestic and imported coal in a 70:30 ratio. CERC granted Change in Law relief on account of domestic coal shortfall considering Adani Mundra's bid as based entirely on domestic coal availability. This is inconsistent with directions of Hon'ble Supreme Court in ***Energy Watchdog & Anr. vs. CERC & Ors.*** [(2017) 14 SCC 80] (for short "***Energy Watchdog***").	
2.	Shortfall in domestic coal and compensation for it should be limited to 65%, 65%, 67% and 75% of ACQ as per the values specified in the New Coal Distribution Policy ("***NCDP***") 2013. Shortfall below the said limit is a contractual issue and must be dealt by Adani Mundra with the coal companies.	Shortfall in domestic coal and compensation for the same should be limited to domestic coal shortfall up to trigger level of 75 % of the ACQ as per SHAKTI Scheme. Any shortfall below the said limit is a contractual issue and must be dealt by Adani Mundra with the coal companies.
3.	The CERC erred in ignoring the methodology for computation of Change in Law compensation laid down in its earlier Order in Petition No. 79/MP/2013 – ***GMR Kamalanga Energy Ltd. & Anr.*** **vs.** ***DHBVNL & Ors.*** (for short "***GMR***	

Sl.No.	Grounds in Appeal No. 168 of 2019 (NCDP Appeal)	Grounds in Appeal No. 358 of 2019 (SHAKTI Appeal)
	Case").	
4.	The CERC erred in granting retrospective operation to Ministry of Power's ("***MoP***') letter dated 31.07.2013 which is impermissible.	
5.		The CERC erred in extending Change in Law relief beyond 31.03.2017.
6.		Adani Mundra has belatedly claimed reliefs regarding the implications of SHAKTI Scheme. The period of delay in claiming relief, being attributable to Adani Mundra, the CERC erred in ignoring the same while granting carrying cost.
7.		Notice in terms of Article 13.3 of the PPAs is a mandatory requirement for claiming Change in Law relief. Adani Mundra did not give any change in law notice regarding SHAKTI Scheme.

24. 1st Respondent - Adani Power contends that they were constrained to file Petition No. 251/MP/2018 seeking *inter alia* the continuation of Change in Law relief due to domestic coal shortfall beyond 31.03.2017 *i.e.* until such

Change in Law event continues / supply of the coal is restored to quantum as assured by virtue of NCDP 2007.

25. According to 1st Respondent, the CERC in the SHAKTI Order *inter alia* correctly held as:

(a) In terms of ***Energy Watch***dog judgment, any change in the assured coal supply by amendment to NCDP 2007 qualifies as a Change in Law event and entitles the affected party to restitution.

(b) Adani Mundra is entitled to Change in Law relief till shortfall continues including the period covered by NCDP 2013 i.e. from 01.04.2013 and subsequently continued by SHAKTI Scheme beyond 31.03.2017

(c) The methodology to consider actual coal shortage without restricting it to percentage of the ACQ, as adopted in the CERC Order dated 31.05.2018 in Petition No. 97/MP/2017, shall be applicable in the present case as it relates to period beyond 31.03.2017 in relation to the same PPAs

(d) For the period 01.04.2017 onwards, Adani Mundra is entitled to carrying cost

26. According to 1st Respondent, Adani Mundra is entitled to Change in Law relief until domestic coal shortfall continues. Haryana Utilities' contention that the CERC erred in extending Change in Law relief to Adani Mundra beyond 31.03.2017 lacks merit and ought to be rejected. SHAKTI Scheme extends the provisions of NCDP 2013 beyond the end of 12th five-year plan period *i.e.* 31.03.2017. Thus, Change in Law relief ought to continue til the Change in Law event continues / supply of the coal is restored to 100% of normative requirement as assured by MoC in NCDP 2007.

27. They further contend that on 22.05.2017, GoI through MoC notified the SHAKTI Scheme. In terms of ***Energy Watchdog*** Judgment, introduction of SHAKTI Scheme by MoC also qualifies as a Change in Law event *vis-à-vis* NCDP 2007 which was in place when APMuL had submitted its bid. SHAKTI Scheme qualifying as a Change in Law event is not in dispute. Relevant extract of SHAKTI Scheme is as under: -

> *"…(A) Under the old regime of LoA-FSA:*
>
> *…(iii) The capacities totalling about 68,000 MW as per the decision of CCEA dated 21.6.2013* ***would <u>continue</u> to get coal at 75% of ACQ even***

> ***beyond 31.3.2017.****The coal supply to these capacities may be increased in future based on coal availability."*

28. According to 1st Respondent, Paragraph (A)(iii) of the SHAKTI Scheme deals with capacities totalling about 68,000 MW as per CCEA decision dated 21.06.2013 which would continue to get coal at 75% of ACQ even beyond 31.03.2017. The capacity of Adani Mundra's Thermal Power Project falls within the said 68000 MW capacity covered by the decision of CCEA.

29. Under NCDP 2013 regime, revised assured coal allocation *qua* 100% assured supply under NDCP 2007 stood at 65%, 65%, 67% and 75% of ACQ for the years FY 2013-14, 2014-15, 2015-16 and 2016-17 respectively. The phrase 'continue to get coal at 75% of ACQ even beyond 31.3.2017' in Paragraph (A)(iii) of the SHAKTI Scheme evidences the continuation of NCDP 2013 regime beyond FY 2016-17.

30. They further contend that Paragraph (A)(iii) of the SHAKTI Scheme also provides that "*The coal supply to these capacities may be increased in future based on coal availability*." Thus, the said Scheme, as in case of NCDP 2013, recognizes that availability of coal is not commensurate with

the demand and that once coal availability increases, the supply to these capacities of power plants would be increased.

31. In effect, it is evident from a plain construction of Paragraph (A)(iii) of the SHAKTI Scheme that it extends the provisions of NCDP 2013 beyond the end of 12th five-year plan period i.e. 31.03.2017. Even the ***Energy Watchdog*** Judgment does not restrict the relief for Change in Law impact for a particular period or an end date.

32. In view of the afore said, 1st Respondent contends that the shortfall in supply of coal is a continuous cause of action and the SHAKTI Scheme acknowledges and recognizes such shortfall with reference to NCDP, 2013. This position of law has now been settled by this Tribunal in ***Adani Rajasthan*** Judgment at Para 12.1, 12.2, 12.3, 12.5 and 12.6. Therefore, having determined that Adani Mundra is entitled to relief under Change in Law provision in terms of the PPAs for the shortfall of domestic coal, the CERC rightly appreciated that the mandate was to entitle Adani Mundra to compensate for the entire period till the shortfall continues *i.e.* beyond 31.03.2017.

33. 1st Respondent further contends that the CERC rightly granted carrying cost to Adani Mundra to compensate time value of money. It is a settled position of law that carrying cost is payable to compensate the affected party for time value of money. Haryana Utilities' contend that Adani Mundra has belatedly claimed reliefs regarding the implications of SHAKTI Scheme and the period of delay in claiming relief being attributable to Adani Mundra, the CERC erred in ignoring the same while granting carrying cost. The said contentions of the Haryana Utilities are wrong for the following reasons:

(a) Shortfall in supply of coal is a continuous cause **of action** and the SHAKTI Scheme acknowledges and recognizes such shortfall with reference to NCDP 2013.

(b) The CERC by limiting the Change in Law relief up to 31.03.2017 in Order dated 31.05.2018 in Petition No. 97/MP/2017, inadvertently restricted the implementation of ***Energy Watchdog*** Judgment.

(c) In Petition No. 97/MP/2017, Adani Mundra had not prayed for any restrictive relief *qua* Change in Law. It was only because of a restrictive interpretation of Article 13 of the PPAs in the CERC Order

dated 31.05.2018 in Petition No. 97/MP/2017 that Adani Mundra was constrained to file a separate Petition seeking continuation of Change in Law relief beyond 31.03.2017.

(d) It is a settled position of law *viz.* the doctrine of *'**Actus curiae neminem gravabit**'* that a party cannot be allowed to suffer on account of a mistake of the Court. Reliance in this regard is placed on the judgment of the Hon'ble Supreme Court in ***Neeraj Kumar Sainy vs. State of U.P.***, [(2017) 14 SCC 136] (Para 26).

34. According to 1st Respondent, to restitute Adani Mundra for the actual additional expenditure incurred and to ensure that no additional benefit is retained by Adani Mundra, the CERC in the Impugned Order has prescribed that carrying cost shall be paid for the period starting with the date when the actual payments were made to the authorities till the date of issue of the Impugned Order (SHAKTI Order). The said methodology ought to be upheld. In this regard, the 1st Respondent placed reliance on the following judgments: -

(a) ***Uttar Haryana Bijli Vitran Nigam Ltd & Anr. vs. Adani Power Ltd. & Ors.*** [(2019) 5 SCC 325] (Para 13).

(b) Tribunal's ***Adani Rajasthan*** Judgment (Para 13.4).

(c) This Tribunal's judgment dated 20.12.2012 in ***SLS Power Limited vs. Andhra Pradesh Electricity Regulatory Commission*** [2012 SCC Online APTEL 209] (Para 35.5).

(d) This Tribunal's judgment dated 22.05.2019 in ***Lanco Amarkantak Power Limited vs. Haryana Electricity Regulatory Commission*** in Appeal No. 308 of 2017 (Para 93(iv)).

35. The 1st Respondent Adani Power further contends that Haryana Utilities' contention regarding Change in Law notice is erroneous. Haryana Utilities contend that 'notice' in terms of Article 13.3 of the PPAs is a mandatory requirement for claiming Change in Law relief. Adani Mundra contends that since shortfall in supply of coal is a continuous cause of action and the SHAKTI Scheme acknowledges and recognizes such shortfall with reference to NCDP, 2013, there was no separate requirement to notify Haryana Utilities in terms of Article 13.3 of the PPAs. As such, Adani Mundra filed Petition No. 251/MP/2018 seeking continuation of Change in Law relief beyond 31.03.2017 where Haryana Utilities were party-

Respondents and hence, there was no need to send a Change in Law notice separately.

36. 1st Respondent further contends that it is noteworthy that the Haryana Utilities have admitted that Adani Mundra is entitled to carrying cost on merits but have raised an issue only with respect to the propriety of the procedure not being followed so far as the requirements concerning 'notice' under PPAs. In such an eventuality, substantial rights of parties cannot be thwarted on grounds of procedural technicalities. In this regard, Adani Mundra placed reliance on the following judgments:

(a) ***B.K. Narayana Pillai v. Parameswaran Pillai***, [(2000) 1 SCC 712], Para-3.

(b) ***Sk. Salim Haji Abdul Khayum sab v. Kumar***, [(2006) 1 SCC 46], Para 10, 13 & 14.

37. In light of the aforesaid, 1st Respondent submits that Haryana Utilities' Appeal lacks merit and ought to be dismissed.

38. In view of the above pleadings and arguments, the point that would arise for our consideration is as under:

39. "Whether the impugned order warrants interference? If so, what order?"

ANALYSIS & DISCUSSION

40. According to Mr. M. G. Ramachandran, learned senior counsel, arguing for the Appellants, the CERC has granted the change in law claim of the generator beyond the period 31.03.2017. The notification dated 22.05.2017 (pertaining to SHAKTI Scheme), which in effect extended the provisions of NCDP 2013 beyond the end of 12th Five Year Plan which would be 31.03.2017. Now it is settled position that even NCDP 2013 is a change in law event and a continuation of the coal supply restrictions contained in NCDP 2013, though named as different Policy i.e 'SHAKTI Scheme' would have the same impact on the generating companies, if the coal supply is affected. Hence, according to us, the change in law relief contemplated under the terms of PPA would continue to be available even after introduction of the SHAKTI Scheme. The very purpose of change in law relief is to restitute the affected party as long as the change in law event continues, which has occurred in this case. In other words, it would mean restoration of supply of 100% of normative coal requirement as assured in

the NCDP 2007.

41. In terms of ***Energy Watchdog*** Judgment, the SHAKTI Scheme introduced by Ministry of Coal also qualifies as a change in law event vis-à-vis NCDP 2007, which was in place when the Respondent Adani Power had submitted its bid. It is evident from the records that SHAKTI Scheme is in continuity of NCDP 2013 for the project of Adani Power. In terms of Paragraph (A) (iii) of the SHAKTI Scheme deals with "capacities totaling about 68,000 MW as per the decision of CCEA dated 21.06.2013 which would continue to get coal at 75% of the ACQ even beyond 31.03.2017." Since capacity of Adani Mundra Thermal power project falls within the said capacity of 68,000 MW, it is covered by the decision of CCEA. The phrase used at Paragraph (A) (iii) of the SHAKTI Scheme i.e., 'continue to get coal at 75% of ACQ even beyond 31.03.2017' substantiates continuation of NCDP 2013 regime beyond the Financial Year 2016-2017.

42. It is also brought to our notice that the SHAKTI scheme as in case of NCDP 2013, recognizes that availability of coal is not commensurating with the demand and that once coal availability enhances, the supply of 68,000 MW capacity power plants would be increased. The moment NCDP 2013

regime ends, the SHAKTI Scheme comes into play immediately. Therefore, we have no doubt that the shortfall in supply of coal, measured against the assurance contained in NCDP 2007 is a continuous cause of action and the SHAKTI Scheme acknowledges and recognizes such shortfall with reference to NCDP 2013. In other words, Paragraph (A) (iii) of SHAKTI Scheme indicates that it extends the provisions of NCDP 2013 beyond the end of 12th Five Year Plan period i.e., 31.03.2017 as noted above.

43. Even the ***Energy Watchdog*** Judgment does not restrict the relief for change in law impact for a particular period or indicate an end date. In the case of ***Adani Rajasthan*** referred to above, in our Judgment dated 14.09.2019, we have held that as long as the shortfall of coal continues, the affected party will be entitled to claim compensation for change in law in terms of the PPA. The introduction of SHAKTI Policy being notified after the cut-off date by an Indian Governmental Instrumentality i.e., Ministry of Coal itself constitutes a change in law event. Therefore, the coal supply under SHAKTI FSA needs to be compared against the 100% normative coal supply assured under the NCDP 2007 and if there is continuation of shortfall, the generator has to be compensated for such a shortfall through the change in law provisions. Therefore, the contention of the Appellants

that the Commission was wrong in granting relief for change in law for shortfall below 75% as specified in SHAKTI Policy, we opine that the said issue is settled and no longer *res integra* in terms of ***Adani Rajasthan***'s case.

44. It is useful to refer to the Judgment of the Hon'ble Supreme Court of India dated 31.08.2020 in the case of ***Jaipur Vidyut Vitaran Nigam Ltd. & Ors. vs. Adani Power Rajasthan Limited & Anr.*** *(Civil Appeal Nos. 8625-8626 of 2019)*. In this Appeal, the Hon'ble Supreme Court upheld the Judgment of this Tribunal wherein shortfall in coal supply under SHAKTI FSA was held to be a change in law. The relevant Paragraphs in this regard reads as under:

> *"48. Shri C. Aryama Sundaram argued that the FSA related approximately 61 percent of the fuel requirement. Thus, the change in law claim may be confined to 35 to 40 percent. 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 percent of imported coal and domestic coal respectively. Apart from that, we find from the order of the APTEL, that change in law provision would be limited to a shortfall in the supply of*

domestic linkage coal. The finding recorded by the APTEL is extracted hereunder:

> *"12.5 In the instant case, we have found in the previous paragraphs that Adani Rajasthan's bid was premised on domestic coal on the basis of the 100% domestic coal supply assurance contained in NCDP 2007. Since SHAKTI Policy and the FSA executed thereunder still do not meet the assurance of 100% supply of domestic coal to Adani Rajasthan, it would follow that Adani Rajasthan would need to be compensated for any shortfall in supply of domestic linkage coal even post grant of coal linkage under the SHAKTI Policy. Rajasthan Discoms have not disputed that the introduction of SHAKTI Policy constitutes a Change in Law under the PPA. Their contention is that any shortfall of coal under the SHAKTI FSA by the coal companies is a contractual matter to be sorted out between Adani Rajasthan and the Coal companies. We are not persuaded by this argument for the reason that we have already held in GMR Kamalanga case that the contractual conditions or limitations were not present in NCDP 2007 at the time of bid submission by Adani Rajasthan. This contention of Rajasthan Discoms is also against the principle laid down in Energy Watchdog judgment. The SHAKTI policy continues the earlier coal*

supply restriction to 75% of ACQ. If actual supply of domestic linkage coal under the SHAKTI FSA is higher, it goes without saying that the generator's relief or compensation under the Change in Law provisions would be limited to the actual shortfall in supply of domestic linkage coal. We also note that there is no rational basis to assume that the supply under the SHAKTI FSAs would be higher or better than that under the pre-SHAKTI FSAs.

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

> *"57. …… This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian 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 ipayments, 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."

45. In another Appeal No. 116 of 2019, in our Judgment dated 28.09.2020, we opined that change in law compensation for shortfall in coal supply is allowable beyond 31.03.2017. Para 15.1 and 15.2 are relevant which reads as under:

"15.1 Issue No.1:- We hold that the introduction of SHAKTI POLICY amounts to change in law and all the ingredients of change in law are duly met under the respective PPAs. The impugned order is therefore affirmed on this issue.

15.2 Issue No.2:- 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 basic principles of restitution under the change in law provisions of the PPAs."

46. In view of the above discussion, we are of the opinion that CERC was

justified to allow SHAKTI Policy as change in law to grant compensation to Adani Power Mundra for shortfall in coal supply for a period beyond 31.03.2017. We also opine that there is no merit in the contention of the Appellants to restrict compensation to a maximum of 25% (not below 75%) which would be against the very basic principles of restitution policy under the change in law provisions of the PPAs.

47. Coming to the argument of learned senior counsel, Mr. M. G. Ramachandran that CERC has incorrectly decided the issue of PPAs dated 07.08.2008 being premised entirely on domestic coal availability when the Order of the Hon'ble Supreme Court in ***Energy Watchdog***'s case at Para 55 specifically refers to *"Others as is the case in the Adani Haryana matter, would source fuel to the extent of 70% from India and 30% from abroad"*. Learned senior counsel arguing for the Appellants also contended that CERC has adopted improper methodology of calculation of the change in law effect i.e., considering the differences between the actual cost of generation using alternative coal and energy charges quoted by Adani Power instead of differences between the landed cost of domestic coal which Adani Power would have incorporated, if there was no coal procured for covering the shortfall in domestic coal.

48. So far these two contentions as referred to in the above Paragraph pertaining to these two issues, we have dealt with similar issues in Appeal No. 168 of 2019. These two contentions are common involving the same PPAs.

49. In the light of our reasoning in Appeal No. 168 of 2019 disposed of on 03.11.2019, we are of the opinion that CERC was justified in allowing change in law compensation to Adani Power Mundra for the entire 100% shortfall in domestic coal, and so also the methodology adopted by the Commission in the Order dated 31.05.2018, we cannot find fault with the same.

50. Another contention of the Appellants as addressed in the arguments of learned senior counsel, Mr. M. G. Ramachandran is that in terms of Article 13.3 of the PPA that "notice is a mandatory requirement for claiming any relief for change in law". According to Mr. Amit Kapur, learned counsel arguing for the Respondent Adani Power, the shortfall in supply of coal is a continuous cause of action and the SHAKTI acknowledges such shortfall with reference to the position prevailing under NCDP 2013. It is seen that Adani Power filed Petition No. 251/MP/2018 seeking continuation of change

in law relief beyond 31.03.2017. Hence, there was no requirement to separately notify to Haryana Utilities in terms of Article 13.3 of the PPA.

51. We also note that Haryana Utilities have admitted that Adani Power is entitled to carrying cost as a matter of principles, but have raised an objection only with regard to the procedure not being followed so far as the requirement of notice contemplated under the PPAs. Adani Power has submitted that substantial rights of parties cannot be thwarted on grounds of procedural technicalities. We agree with the submission of Adani Power that the Notification dated 22.05.2017 was a continuous cause of action as the notification continued supply of coal at 75% of ACQ for Adani Power beyond the period specified in NCDP 2013 i.e., 31.03.2017. The said notification merely continues the supply as committed under NCDP 2013. Therefore, we are of the opinion that there is no requirement to issue fresh notice for change in law in the present case. We opine, as stated above, because the Appellants have not suffered any prejudice by the absence of a fresh change in law notice after notification of the SHAKTI Scheme; accordingly, we decline to accept the contention of the Appellants on this count.

52. Then coming to the question of carrying cost, it is well settled that the carrying cost is entitled to compensate the affected party for time value of money. The Haryana Utilities have contended that Adani Mundra belatedly claimed reliefs regarding the implication of SHAKTI Scheme. We are of the opinion that since shortfall in supply of coal is a continuous cause of action and the SHAKTI Scheme itself recognizes such shortfall with reference to the provisions prevailing under NCDP 2013, Adani Power is entitled to claim carrying cost based on the principles of restitution for the additional expenditure incurred by it in procuring the shortfall quantity of coal. In fact the CERC has ensured that no additional benefit would be retained by Adani Power by prescribing that carrying cost shall be paid for the period starting with the date when the actual payments were made to the coal suppliers till the date of the impugned order. The said methodology adopted by CERC is the correct approach, since it balances the interest of all the stakeholders.

53. In light of the above discussion and reasoning, we are of the considered opinion that the impugned order does not warrant any interference and the same is upheld. Accordingly, the Appeal is dismissed.

54. IAs pending, if any are disposed of accordingly.

55. No order as to costs.

Pronounced in the Virtual Court through video conferencing on this the **30th day of June, 2021**.

(Ravindra Kumar Verma)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

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