THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 423 OF 2019
AND
APPEAL NO. 173 OF 2021

Dated: 6th August, 2021

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

In the matters of:-

APPEAL NO. 423 OF 2019

1. **GMR Kamalanga Energy Limited**
   New Shakti Bhawan
   Building No.302-New Uddan Bawan,
   Opposite Terminal-3,
   Indira Gandhi International Airport
   New Delhi – 110037.

2. **GMR Energy Limited**
   New Shakti Bhawan
   Building No. 302 – New Uddan Bawan,
   Opposite Terminal-3,
   Indira Gandhi International Airport,
   New Delhi – 110037. **…Appellants**

VERSUS

1. **Central Electricity Regulatory Commission**
   4th Floor, Chanderlok Building
   36 Janpath, New Delhi – 110 001.

2. **Bihar State Power (Holding) Company Limited**
   1st Floor, Vidyut Bhawan,
   Bailey Road, Patna – 800001.

3. **Prayas Energy Limited**,
   Unit III A & B, Devgiri,
   Joshi Railway Museum lane,
   Kothrud Industrial Area,
   Kothrud, Pune – 4110384. **…Respondents**

Counsel for the Appellant(s) : Mr. Basava Prabhu S. Patil, Sr. Adv.
Mr. Amit Kapur
Mr. Vishrov Mukerjee
Ms. Raveena Dhamija
Mr. Yashaswi Kant **for Appellant-1**

Mr. Amit Kapur **for Appellant-2**

Counsel for the Respondent(s) : Mr. M. G. Ramachandran, Sr. Adv.
Ms. Ranjitha Ramachandran
Ms. Anushree Bardhan
Ms. Poorva Saigal
Mr. Shubham Arya
Ms. Tanya Sareen
Mr. Arvind Kumar Dubey **for R-2**

APPEAL NO. 173 OF 2021

1. **Bihar State Power (Holding) Company Limited**
   1st Floor, Vidyut Bhawan,
   Bailey Road, Patna – 800001. **…Appellants**

VERSUS

1. **GMR Kamalanga Energy Limited**

Through its Managing Director,
New Shakti Bhawan
Building No.302 - New Uddan Bawan,
Opposite Terminal-3,
Indira Gandhi International Airport
New Delhi – 110037.

2. **GMR Energy Limited**
Through its Managing Director,
Skip House, 25/1 Museum Road,
Bangalore – 560025.

3. **Prayas (Energy Group)**,
Unit III A & B, Devgiri,
Joshi Railway Museum lane,
Kothrud Industrial Area,
Kothrud, Pune – 411038.

4. **Central Electricity Regulatory Commission**
Through its Secretary
3rd and 4th Floor, Chanderlok 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. Basava Prabhu S. Patil, Sr. Adv.
Mr. Amit Kapur
Mr. Vishrov Mukerjee
Ms. Raveena Dhamija
Mr. Yashaswi Kant **for R-1**

J U D G M E N T

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

1. Since these two appeals are cross appeals, they are disposed of by this common judgment.

2. These Appeals are preferred challenging the legality, propriety and validity of the order dated 16.09.2019 (**"Impugned Order"**) passed by the Central Electricity Regulatory Commission (**"CERC"/"Central Commission"**) in Petition No. 112/MP/2016. The Impugned Order was passed by CERC pursuant to remand by this Tribunal in terms of Judgment dated 21.12.2018 in Appeal No. 193 of 2017 (for short "**Remand Judgment**") directing CERC to compute compensation payable to **GMR Kamalanga Energy Limited** (for short **"GKEL"**) for the Change in Law claims allowed by this Tribunal in the Remand Judgment. The remand was on certain specific aspects as set out at Para 83 of the Judgment of this Tribunal dated 21.12.2018 which reads as under:

> *"83. In view of the discussion, reasoning mentioned above, the Appeal is partly allowed. The Impugned Order dated 07.04.2017 is set aside. The matter stands remanded back to the Central Commission to pass consequential orders in the light of our observations as mentioned above on the issues relating to compensation on account of change in*

NCDP (cancellation of Captive Block vis-a-vis tapering linkage), busy season surcharge and developmental surcharge, carrying cost and add on premium price."

3. In the impugned order the Central Commission has decided the following aspects:

I. (a) Shortfall of domestic linkage coal due to deviation from NCDP and change in Fuel Supply Agreement

(b) Cancellation of the Captive Coal Block

(c) Shortfall in linkage coal beyond 31.03.2017, and

(d) Impact of Coal Shortfall and computation

II. Increase in cost of Railway Freight on account of Busy Season Surcharge and Development Surcharge.

III. Add-on premium price on the notified price of coal supplied to tapering linkage holders**.**

IV. Carrying Cost.

4. The facts that are necessary for disposing of these Appeals, in brief, are narrated hereunder:

<u>Appeal No. 423 of 2019</u>

5. Appellant No. 1 is a public limited company incorporated under the provisions of the Companies Act, 1956 on 28.12.2007. It is a project company which was set up by Appellant No. 2 - GMR Energy Limited (for short **“GEL”/“Appellant No. 2”**) to undertake the construction and operation of the Project.

6. Appellant No. 2 is the holding company of the Appellant No. 1 having over 80% shareholding in Appellant No. 1.

7. Respondent No. 1 is the Central Commission, a statutory authority constituted under the Electricity Regulatory Commissions Act, 1998 with specific powers vested under Section 79 of the Electricity Act, 2003.

8. Respondent No. 2, Bihar State Power (Holding) Company Ltd. (for short "**BSPHCL”/“Bihar Holding Company**"), is successor in interest of Bihar State Electricity Board (for short **“BSEB”**). The Bihar PPA was transferred from BSEB to BSHPCL pursuant to the Bihar State Electricity Reforms Transfer Scheme, 2012, wherein BSEB had been unbundled into five companies, i.e. Bihar State Power Company Limited (holding company), Bihar State Power Transmission Company, Bihar State Power Generation Company, South Bihar Power Distribution Company and North Bihar Power Distribution Company.

9. Respondent No. 3, Prayas Energy Group is a non-governmental non-profit organisation based in Pune, India with special focus on energy.

10. GKEL, a subsidiary of Appellant No. 2 - GMR Energy Limited (for short **"GEL"**), owns and operates the 1050 MW (3x350 MW) coal-fired power project at village Kamalanga, District Dhenkanal in Odisha (**"Project"**).

11. GKEL supplies power from the Project to three states namely, Odisha, Haryana and Bihar. For Bihar, GKEL supplies 282 MW gross (260 MW net of auxiliary consumption) power to Bihar State Electricity Board in terms of the PPA dated 09.11.2011 with delivery point being Bihar STU Bus bar interconnection point ("**Bihar PPA**"). The 5th Schedule of the Bihar PPA specified source of coal as Coal Linkage from Coal India Limited and Rampia and Dip Side Rampia coal block allocated to GEL. The Cut-Off date for Change in Law under the Bihar PPA is 28.03.2011.

12. The fuel requirements for the Project were secured through the following arrangements: -

(a) Firm coal linkage for the Project providing 2.14 MTPA for 500 MW approved by SLC-LT on 02.08.2007. Pursuant thereto, LOA dated 25.07.2008 providing firm linkage of 2.14 MTPA for 500 MW was issued in favour of GEL, the holding company of GKEL (**"LOA**

dated 25.07.2008").

(b) On 06.11.2007, the Ministry of Coal intimated its decision to allocate Rampia and Dip Side Rampia coal blocks in Odisha to a consortium comprising of GEL and five other allottees as confirmed by letter No. 38011/1/2007-CA-1 on 17.01.2008. GEL entitlement of coal from the said coal blocks was sufficient for the entire capacity of 1050 MW.

(c) Tapering coal linkage for 2.384 MTPA for 550 MW approved on 12.11.2008 by SLC-LT for the Project. Pursuant thereto, LOA dated 08.07.2009 providing tapering coal linkage of 2.384 MTPA coal for 550 MW was issued in favour of GEL. The Tapering Linkage was to be made available till supply of coal from Rampia Coal Block started (**"LOA dated 08.07.2009"**).

(d) GKEL and MCL signed FSAs dated 26.03.2013 and 28.08.2013 for 1.819 MTPA and 0.6556 MTPA respectively.

(e) On 16.01.2014, Ministry of Coal, Govt. of India wrote a letter extending supply of coal under Tapering Linkage for a period of 3 years beyond Normative Date of Production on account of delay in operationalization of the captive coal block.

(f) On 24.08.2014, the captive coal blocks allocated to GEL got cancelled pursuant to the judgment of the Hon'ble Supreme Court of India in the case of **Manohar Lal Sharma v. The Principal Secretary &Ors.** reported as (2014) 9 SCC 516 ("**Coal Judgment**") and the subsequent cancellation order dated 24.09.2014 reported as (2014) 9 SCC 614 ("**Cancellation Order**") (collectively referred as **"Manohar Lal Judgment"**).

(g) On 15.04.2015, GKEL filed Petition No. 112/MP/2015 before the Central Commission claiming compensation for certain Change in Law events which affected the Project during the Operating Period qua the Bihar PPA.

(h) On 30.06.2015, Ministry of Coal issued an Office Memorandum *inter-alia* granting temporary relief to Projects with Long Term PPAs be supplied coal on MoU basis till 31.03.2016.

(i) On 20.07.2015 and 24.12.2015, GKEL and MCL executed MOU with validity till 31.03.2016 for supply of coal (GCV grade of G10 to G13) "on best effort basis" as per the level prevailing as on 30.06.2015 along-with add-on price of 20% over and above the applicable price.

(j) On 13.04.2016, Ministry of Coal wrote to Coal India Limited *inter-alia* stating that coal supplied under MoU basis be extended till 30.06.2016.

13. The coal supply arrangement for the Project is as under:-

Feb-14 -- June 16	**July-16 -- Feb-18**	**March-18 onwards**
Firm Linkage: for 500 MWACQ: 2.14 MMTPA	Firm Linkage: for 500 MW ACQ: 2.14 MMTPA	Firm Linkage: for 500 MW ACQ: 2.14 MMTPA
Tapering Linkage/ MoU coal: ACQ: 1.4934 (in lieu of coal block)	*Discontinued*	*Discontinued*
Alternate/Market Coal	Alternate/Market Coal	Alternate/Market Coal (including SHAKTI Coal)

14. On 07.04.2017, the Central Commission passed an order in Petition No. 112/MP/2015 *inter-alia* disallowing shortage of domestic coal as Change in Law.

15. GKEL filed Appeal No. 193 of 2017 before this Tribunalimpugning disallowance of the above claims.

16. On 21.12.2018, this Tribunal passed the Remand Judgment allowing the following claims as Change in Law and remanded the same to the Central Commission to pass consequential ordersand to determine compensation due to GKEL.

(a) Shortfall in linkage coal and deviation in NCDP.

(b) Cancellation of captive coal block.

(c) Imposition of Busy Season Surcharge and Development Surcharge.

(d) Levy of Add-On Premium over and above the notified price of coal, and

(e) Carrying Cost.

17. Subsequent to the Remand Judgment, CERC re-opened Petition No. 112/MP/2015.

18. On 16.09.2019, CERC passed the Impugned Order and determined the compensation payable to GKEL for the allowed Change in Law events. Aggrieved by the impugned order, this Appeal is filed.

19. According to GKEL, the primary issue in the present Appeal is that the Central Commission failed to correctly give effect to the findings of this Tribunal in the Remand Judgment and provide for compensation to GKEL for meeting the expenditure incurred towards procuring coal from alternate sources to meet the shortfall of coal from domestic sources. The Central Commission provided a formula for computing compensation due to shortfall in supply of coal which fails to restore GKEL to the same economic position as mandated by Article 10 of the Bihar PPA.

20. Aggrieved by the impugned order, the Appellant has filed the present appeal praying for the following reliefs:

> "(a) Allow the present Appeal and set aside the Impugned Order to the extent impugned herein;
>
> (b) Allow GKEL to recover expenditure involved in procurement of alternate coal to service the Bihar PPA arising out of shortfall in domestic sources corresponding to scheduled generation so as to restore GKEL to the same economic position; and
>
> (c) Pass such other orders as this Hon'ble Tribunal deems fit. "

<u>Short facts in Appeal No. 173 of 2021</u>

21. The erstwhile Bihar State Electricity Board (the predecessor of the Appellant) had initiated a tariff based competitive bidding process under Section 63 of the Electricity Act, 2003. The bids were invited and the bids were submitted by the bidders accepting the terms and conditions contained in the bidding documents including the terms and conditions contained in the Standard PPA to be entered into.

22. Based on the above bidding process, the Respondent No. 2 was declared the successful bidder. The Respondent No. 2 incorporated Respondent No. 1 for the implementation of the power project. The erstwhile Bihar State Electricity Board and the Respondent No. 1 entered into a Power Purchase Agreement dated 09.11.2011 (hereinafter referred to as "**PPA**") for contracted capacity of 260 MW.The PPA, inter alia, deals with the Changes in Law that can be considered for effective change in the quoted tariff. Article 10 of the PPA, is relevant to this effect. The cut off date for consideration of change in law is 28.03.2011 (bid deadline date was 04.04.2011).

23. The Appellant has succeeded to the rights and obligations under the PPA dated 09.11.2011 upon reorganisation of the erstwhile Bihar Stare Electricity Board effective 01.11.2012.

24. On 21.06.2013, the Cabinet Committee of Economic Affairs inter alia decided as under:

> *"(i) Coal India Ltd. (CIL) to sign Fuel Supply Agreements (FSA) for a total capacity of 78000 MW including cases of tapering linkage, which are likely to be commissioned by 31.03.2015. Actual coal supplies would however commence when long term Power Purchase Agreements (PPAs) are tied up.*

(ii) Taking into account the overall domestic availability and actual requirements, FSAs to be signed for domestic coal quantity of 65 percent, 65 percent, 67 percent and 75 percent of Annual Contracted Quantity (ACQ) for the remaining four years of the 12th Five Year Plan.

(iii) To meet its balance FSA obligations, CIL may import coal and supply the same to the willing Thermal Power Plants (TPPs) on cost plus basis. TPPs may also import coal themselves. MoC to issue suitable instructions.

(iv) Higher cost of imported coal to be considered for pass through as per modalities suggested by CERC. MoC to issue suitable orders supplementing the New Coal Distribution Policy (NCDP). MoP to issue appropriate advisory to CERC/SERCs including modifications if any in the bidding guidelines to enable the appropriate Commissions to decide the pass through of higher cost of imported coal on case to case basis."

25. On 26.07.2013, the Ministry of Coal issued the New Coal Distribution Policy 2013. Para 2 is relevant.

26. The Ministry of Power issued a Letter dated 31.07.2013. Para 4 is relevant.

27. Though the Scheduled Commercial Operation Date (for short **"SCOD"**) under the PPA was 09.11.2015, the said date was preponed to

01.09.2014 and the supply of power from the Respondent No. 1's generating plant to the Appellant commenced on 01.09.2014.

28. In the meantime, the Respondent No. 1 entered into Fuel Supply Agreement (for short **"FSA"**) dated 26.03.2013 in respect of Firm Linkage dated 25.07.2008 and FSA dated 28.08.2013 in respect of Tapering Linkage dated 08.07.2009 with Mahanadi Coalfields Limited (for short "**MCL"**). The said Fuel Supply Agreements were amended from time to time. Further the FSA dated 28.08.2013 with MCL was split between MCL and Eastern Coalfields Limited and the Respondent No. 1 executed the FSA with Eastern Coalfields Limited. The quantum of coal was increased from time to time.

29. The Ministry of Railways issued rate circulars in respect of Busy Season Surcharge and Development Surcharge as part of the Dynamic Pricing Policy of the Railways. The Busy Season Surcharge was levied for a certain period being considered the busy season.

30. The Respondent No. 1 and 2 filed a Petition being Petition No. 79/MP/2013 before Central Commission seeking change in law in relation to the PPA with PTC/Haryana Distribution Companies during the operation period. However, the Respondent No. 1 and 2 had also made the Appellant a party to the said Petition.

31. The Central Commission vide Order dated 03.02.2016 decided the Petition and inter alia provided for compensation for shortfall in domestic coal due to New Coal Distribution Policy 2013.

32. GMR filed an Appeal being Appeal No. 110 of 2016 challenging the Order dated 03.02.2016. However, GMR had not challenged the computation/methodology for compensation for shortfall in domestic coal.

33. On or about 15.04.2015, the Respondents No. 1 and 2 filed a Petition being Petition No. 112/MP/2015 claiming change in law in respect of various events. The Central Commission vide Order dated 07.04.2017 decided the Petition No. 112/MP/2015, allowing certain claims and rejecting other claims. Aggrieved by the said Order the Respondent No. 1 and 2 filed an Appeal No. 193 of 2017 before this Tribunal.

34. On 22.05.2017, the Ministry of Coal provided for a new regime of allocation of coal under SHAKTI Policy. Under the said Communication/Policy, the Respondent No. 1 agreed to discount in the quoted tariff and was allocated coal.

35. Further the Communication dated 22.05.2017 provided that for the projects under the old regime i.e. projects who had already been granted LOA/FSA, they would continue to get supply at 75% of ACQ beyond 31.03.2017. The Communication inter alia stated "*The capacities totalling about 68,000 MW as per the decision of CCEA dated 21.6.2013 would continue 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.*"

36. By Order dated 21.12.2018, the Tribunal partly allowed the Appeal No. 193 of 2017 and remanded the matter to the Central Commission for consideration on certain specific aspects.

37. Aggrieved by the above Order of this Tribunal dated 21.12.2018, the Appellant has filed an appeal being Civil Appeal No. 3123 of 2019 before the Hon'ble Supreme Court in regard to certain aspects, and the same is pending.

38. In the meantime, on 09.01.2018, Ministry of Railways rationalized the freight and stopped the levy of busy season surcharge and development surcharge on transportation of coal with effect from 15.01.2018.

39. The Central Commission has passed the Impugned Order dated 16.09.2019. Aggrieved by this Order, the instant Appeal is filed.

40. Reply filed by BSPHCL in Appeal No. 423 of 2019, in brief, is as under:

41. The Bihar Holding Company/BSPHCL contends that the Central Commission has rightly decided the issues which have been challenged by the Appellant GKEL/GMR. However, there are certain errors in the Order which have been challenged by the Answering Respondent BSPHCL.It is however clarified that the contracted capacity as per the PPA with BSHPCL is 260MW and therefore, the same is the relevant capacity to be considered.

42. According to BSPHCL, the PPA recognized the source of fuel as linkage coal and the reference was also made to the coal block. The total coal quantum for the 1050 MW project was 2.14 MTPA + 2.384 MTPA i.e. 4.624 MTPA as per linkages or 4.6 MTPA as per the coal block allocation. Therefore, admittedly the said quantum was sufficient for the normative requirement of 1050 MW project of the Appellant. This was the basis of the bid by Appellant. The FSAs have been signed by MCL proportionate to the contracted capacity of power by the Appellant.

43. BSPHCL further contends that with regard to the claim for SHAKTI coal to be alternate coal is not correct. The Appellant GKEL/GMR had been allocated the domestic coal and to the extent of supply of such coal, there is no shortfall or claim. The Appellant GKEL/GMR itself had stated that it was not claiming any compensation in relation to SHAKTI coal which has been recorded in the Impugned Order at Para 36.

44. They further contend that while BSPHCL has also challenged certain aspects of the Impugned Order; however, the errors alleged by the Appellant GKEL/GMR are not correct. It is denied that the formula fails to restore the Appellant to the same economic position as if no change in law has occurred; in fact, the Appellant has been granted benefit beyond that provided by the law. The Appellant has been provided with the compensation for the shortfall in the coal supplied by the coal companies. Further, there is no merit in the questions in law raised by the Appellant GKEL/GMR. The Central Commission has in fact provided the relief in excess of what should be given. It is not clear on what basis the Appellant is making the claim that the Central Commission has not provided the compensation.

Re: Impugned Order effectively negates/fails to implement the Remand Judgement (Paras 9.1-9.13)

45. According to BSPHCL –

(a) The Appellant GKEL/GMR is only allowed relief as per the decision of the Tribunal for shortfall of coal in tapering linkage and the same is to be considered as per the above.

(b) This Tribunal at Para 64 & 83 has allowed relief only in respect shortfall of linkage coal including tapering linkage.

(c) With regard to the Go-No-Go Policy, the Tribunal has allowed at Para 69, the change in law only with regard to consequential financial impact on account of delay in development of coal block and cancellation of coal block as per the decision of the Hon'ble Supreme Court.

(d) There is no separate or independent relief for cancellation of coal block. The tapering linkage was granted to the Appellant GKEL/GMR in lieu of the coal block and coal was being supplied to the Appellant as per the tapering linkage. When coal was being supplied from tapering linkage, there can be no question of consideration of coal block in addition to the same.

(e) The claim of the Appellant GKEL/GMR that the supply of coal from captive coal block was envisaged for the entire capacity of 1050 MW is wholly misconceived, wrong. The Appellant had in its bid referred to Fuel Source as Coal India Ltd (CIL) Coal Linkage at Page 222 and had further enclosed both Letter of Assurance for firm and tapering linkage. It is now not open to the Appellant to claim that only coal block was envisaged. The tapering linkage was the recognized fuel source under the PPA and not an alternate.The Appellant has failed to give effect to the reference to two LOAs by Mahanadi Coalfields Ltd, which was the firm linkage and tapering linkage. In fact, the Appellant had not claimed any relief in respect of coal being supplied under the tapering linkage and therefore, the Appellant GKEL/GMR cannot now in the present Appeal claim additional reliefs.

(f) The Central Commission has allowed the compensation for shortfall in domestic sources as required by the Tribunal. The tapering linkage coal is also domestic source and is recognized under the PPA as source of fuel. In fact,it is the contention of the Answering Respondent that the Central Commission has allowed for more compensation than the Appellant was entitled to.

(g) It is further denied that the allocation of SHAKTI coal was an alternate coal. The Appellant itself had stated before the Central Commission that it is not claiming any compensation in respect of the coal supplied under SHAKTI allocation.

(h) The contention that coal block would have been less expensive than other sources of coal, in particular tapering linkage is also not accepted. There is no basis for such claim. In any case even if it was less expensive, the Appellant had relied on linkages, including tapering linkage in the bid and therefore the Appellant cannot now claim any compensation for using linkage coal.

(i) It is submitted that the fuel requirement of the Project of the Appellant was secured through firm linkage coal for 2.14 MTPA for 500 MW as approved by the Standing Linkage Committee-LT (hereinafter referred to as 'SLC-LT') on 02.08.2007. The LOA dated 25.07.2008 providing firm linkage of 2.14 MTPA for 500 MW was issued in favour of GMR Energy Limited (the holding Company of the Appellant).Thereafter, tapering coal linkage for 2.384 MTPA for 550 MW was approved by SLC-LT and LOA dated 08.07.2009 providing tapering coal linkage of 2.384 MTPA coal for 550 MW was issued in favour of the Appellant.

(j) The total coal quantum under the said linkages i.e. around 4.6 MTPA for the entire 1050 MW project was the basis of Appellant's bid.

There cannot be any claim of the Appellant that the coal requirement was more than the said quantum.

(k) The Appellant GKEL/GMR had signed the FSA only for 3.63 MTPA of coal though the total linkage was granted for 4.524 MTPA (2.14+2.384).This is because the Appellant had the PPA only for limited capacity and not for the entire capacity of 1050 MW. The Fuel Supply Agreements are signed only to the extent of PPA capacity. In any case, the said 3.63 MTPA included the contracted capacity of 260 MW related to Answering Respondent.

(l) The coal requirement can therefore be considered at maximum of 3.63 MTPA and if the coal requirement of the Appellant was higher than the coal assured, then the Appellant is not entitled to any relief in respect of such additional coal requirement. Even if there was no change in law, the Appellant would not received more than 3.63 MTPA for the contracted capacity (which includes 260 MW related to Answering Respondent-BSPHCL). The shortfall of coal can only be against the FSA quantum.

(m) The remand judgment by this Tribunal also notes the shortfall vis-à-vis the assured quantum/ Annual Contracted quantity under the FSA.

(n) Further it is submitted that any shortage below 65%, 65%, 67% and 75% respectively for the FYs 2013-14, 2014-15, 2015-16 and 2016-17 is a matter for the Appellant to deal with Coal companies and any such shortfall is not due to New Coal Distribution Policy (**'NCDP'**) 2013 and is therefore not covered by change in law.

46. BSPHCL further contends that in light of the above, it is wrong that the Central Commission has failed to comply with the Remand Judgement of this Tribunal as claimed by the Appellant GKEL/GMR. It is submitted that the Appellant's contentions are beyond the scope of the Remand Judgement of this Tribunal and it is a well settled principle of lawthat an Authority to which a matter is remanded has to comply with and confine its decision to the matters remanded.

47. The Central Commission has acted within the scope of remand. It is an established principle of law that it is not open to the Authority to which a matter is remanded to do anything but to carry out the terms of the remand in letter and spirit. The jurisdiction of the Central Commission is limited jurisdiction upon the terms of Remand Judgement. The Central Commission could have decided the present matter only in view of the directions issued by this Tribunal in the Remand Judgement and not in addition to the same.

Re: Compensation granted by the Central Commission fails to restore the Appellant to the same economic position

48. Bihar Holding Company further contends that the claim of GKEL/GMR that the Central Commission vide the Impugned Order has failed to restore the Appellant to the same economic position since it does not consider the actual expenditure incurred to meet the shortfall of coal under the linkage and captive coal block, are vague submissions without providing specific contention on its grievance with the decision of the Central Commission.The alleged principle of restoring the party to the same economic position as if such change in law had not occurred is limited by the phrase “to the extent contemplated in this Article 10.2 and therefore, the relief cannot be de hors the PPA. In fact, the Central Commission has provided compensation to the Appellant beyond what is contemplated by the Law and PPA.

49. According to BSPHCL, it is reiterated that the claim is for the shortfall in the quantity of domestic coal assured in the LOA for firm linkage which was issued prior to the cut-off date. The LOA dated 25.07.2008 was issued after the SLC-LT Meeting and before the cut-off date and, therefore, even as per the Appellant, the same is to be considered as the basis for relief. As per the above LOA, there was no assurance of supply of 100% domestic coal by Coal India Limited (**'CIL'**) or its subsidiaries. The Appellant could not have proceeded on the basis of full quantum of 2.14 MTPA of domestic coal being supplied to it and that the Appellant GKEL/GMR would have accounted for some portion of the same being imported.Similarly, as stated hereinabove, for the tapering linkage, LOA dated 08.07.2009 also provided for shortfall of quantity of coal to be met through import. Thus, the Appellant could not have assumed availability of 2.384 MTPA of domestic coal. The coal was to be supplied from both mines as well as imported coal.

50. BSPHCL further contends that even if the Appellant GKEL/GMR had been under Clause 2.2 of NCDP 2007, once the LOA has been issued prior to the cut-off date, the Appellant could not have relied on Clause 2.2 of the NCDP 2007 when the LOA was issued specifically to the Appellant, subsequent to the NCDP 2007 and incorporated the provision for import of coal. These are the letters on the basis of which the Appellant had bid its tariff and which are claimed to be the basis of the consideration of quantum of coal assured.

51. Further, even assuming that the assurance was for full quantum from domestic coal, the Appellant had signed the FSA only for 3.63 MTPA of coal for the total contracted capacity (out of which 260 MW was for the Answering Respondent BSPHCL). This was the assessed and accepted requirement of coal for the Appellant under NCDP 2007. The Appellant cannot claim that its coal requirement is more than the said quantum.

52. Therefore, according to BSPHCL, the coal requirement has to be considered only against the proportionate quantum related to domestic coal. There cannot be shortfall in coal due to a change in law event beyond the FSA quantum of 3.63 MTPA.If the coal requirement is higher than the said quantum, then the shortfall is not a shortfall in coal under NCDP 2013. The bid of the Appellant was based on 4.6 MTPA for the 1050 MW project and 3.63 MTPA is the proportionate quantum for the PPA capacity since Appellant did not have PPA for the entire capacity. The 3.63 MTPA includes the PPA capacity of 260 MW of the Answering Respondent. If the change in law had not occurred, the entitlement of the Appellant would only have been 3.63 MTPA for the entire contracted capacity.Therefore, even otherwise, the restoration of economic position cannot place Appellant in a better position that it would have been, had there been no change in law.

53. BSPHCL further contends that the compensation is to be considered only for the difference between quantum of domestic coal assured and the quantum of shortfall as per NCDP 2013. In terms of the NCDP 2013 and the Letter dated 31.7.2013, for 2013-14 (from 26/31.7.2013 to 31.3.2014) and 2014-15, the quantum assured is 65%; for the financial year 2015-16, the quantum assured is 67%; and for the financial year 2016-17, it is 75%. Any shortage of coal linkage below 65%, 65%, 67% and 75% respectively for 2013-14, 2014-15, 2015-16 and 2016-17 is a matter for the Appellant to deal with the Coal Companies. The shortfall due to NCDP 2013 alone has to be considered. This has been held by this Commission in various cases including in Order dated 03.02.2016 in Petition No. 79/MP/2013 filed by the Appellant.

54. The commencement of power supply for Bihar Utilities is from 01.09.2014 and, therefore, the availability of coal has to be considered from the said date and till 31.03.2017. Despite being aware that the proceedings were for calculation of impact of change in law, the Appellant GKEL/GMR has failed to produce supporting documentation and evidence to prove its claim and has not even produced the calculation. It is incumbent upon the Appellant to place the relevant details with supporting documents and information.

Re: The Impugned Order fails to compensate the Appellant for shortfall in domestic sources with effect from July 2016 and to meet scheduled generation/actual generation

55. BSPHCL further contends that the claim of the Appellant GKEL/GMR that the formula laid down by the Central Commission fails to compensate the Appellant for 100% of its normative coal requirementdoes not seem to match the issue-wise heading in the Memorandum of Appeal. Further there is no clarity on the actual grievance of the Appellant. The Central Commission has provided the compensation for shortfall in the availability of coal under the Linkages/Fuel Supply Agreement granted to Appellant GKEL/GMR. The coal requirement for the Appellant has been assessed at 3.63 MTPA based on its existing PPA capacity by the Coal Company and the FSA has been signed on the said basis. As per the Remand Judgement also, the shortfall in domestic coal is only to be measured to the extent of the annual contracted quantity (**'ACQ'**) or the assured quantum.

56. Further, there was no occasion for the Answering Respondent BSPHCL to challenge the formula. The issue of pro rata allocation does not arise in the present case. It is reiterated that the Central Commission has allowed the compensation for the shortfall vis-à-vis the assured quantum/ACQ as required by the Remand Judgment. It is the contention of the Answering Respondent that in fact the Central Commission has erred in considering the actual supply as against the applicable percentage under NCDP 2013 which was the impact of law. There can be no consideration of contractual issues under the change in law compensation.

57. The attempt of the Appellant GKEL/GMR seems to be to seek compensation for more than the ACQ for which FSA had been signed which is not admissible. The formula has to developed based on the contentions and facts in the specific case. The Appellant had claimed that it needed more coal than the FSA quantum. To that extent, there can be no consideration since the Appellant GKEL/GMR was not entitled to coal beyond what is provided in the FSA.

58. *Per contra*, the Appellant GKEL/GMR in this appeal, filed rejoinder to the reply of BSPHCL, in short, as under:

59. GKEL/GMR contends that the Power Purchase Agreement dated 09.11.2011 (**"Bihar PPA"**) is for net contracted capacity of 260 MW from the Project*.* Accordingly, it has to also take into account auxiliary consumption. Thus, Bihar Discom's contention that compensation is to be limited to 260 MW is misplaced and ought to be rejected. Further, auxiliary consumption is part of the total generation required for supplying power to the Bihar Discoms. Auxiliary consumption needs to be considered for restoring GKEL to the same economic position.

A. Domestic sources will include captive coal block

60. GKEL/GMR contends that Bihar Discom's contention that the Remand Judgment was specifically for linkage coal including tapering linkage coal is misplaced. In the Remand Judgment, specifically records the fact that the two issues; i.e. shortfall in domestic coal due to deviation in NCDP and cancellation of captive coal block were interconnected and accordingly proceeded to decide it together.With this approach and after referring to various documents and the submissions of the Parties, this Tribunal had specifically held that:-

(a) the fuel requirement for the Project was secured under firm linkage and captive coal block. Tapering linkage was only an interim arrangement till production from captive coal block starts;

(b) The delay in operationalization of the captive coal block due to Go-No Go policy of the Government qualifies as a Force Majeure event under the Bihar PPA.

(c) The cancellation of the captive coal blocks following Judgment of the Hon'ble Supreme Court is a Change in Law event.

61. The operative portion of the Remand Judgment is at Para 43, 62, 63 & 64.Accordingly, in the Remand Judgment, this Tribunal clearly held that GKEL is to be compensated for meeting the expenditure incurred towards procuring coal from alternate sources to meet the shortfall of coal from domestic sources. It is a settled principle of law, as held by the Hon'ble Supreme Court in a catena of judgements; viz ***Islamic Academy of Education and Ors. vs St. of Karnataka &Ors.*** *(2003) 6 SCC 697 (Para 139)****, Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa and Ors. Vs. N. C. Budhraj (Deceased)*** *through LRs &Ors. (2001) 2SCC721 (Para 23)*, that the Order of a Court has to be read in its entirety in the context of what is set out in the Order and not in parts to understand the true intent of the Order. Thus, the domestic sources of coal for GKEL referred to above are linkage coal and coal from captive coal blocks which formed the basis of the PPA. It is submitted that the 5th Schedule of the Bihar PPA specified source of coal as Coal Linkage from Coal India Limited and Rampia and Dip Side Rampia. Accordingly, it is clear that the sources of coal/fuel for generation and supply of power under the Bihar PPA included the captive coal block. Portion of Schedule 5 of the Bihar PPA is relevant as under:

"…

(B) Details of Primary Fuel

S. No	*Particulars*	*Details (to be furnished by bidder)*
1.	*Primary Fuel* *(insert as applicable: "Domestic coal/ Imported coal / Domestic (pipeline) gas/ Imported gas (R-LNG)")*	*Domestic Coal*
2.	*Fuel Source* *(Insert as applicable: "Coal India Limited (CIL) coal linkage / domestic captive coal mine / imported coal / domestic (pipeline) gas / imported gas (R-LNG)")*	*Coal India Limited (CIL) Coal Linkage*
3.	*Fuel Grade* *(Applicable only in case of coal)*	*Grade E to F*
4.	*Name of the CIL subsidiary from which coal is proposed to be sourced or name and location of the captive coal mine (as applicable).*	*LOAs received from Mahanadi Coalfields Ltd., details provided in Appendix D & E. Rampia and Dip side of Rampia coal block allotted, details provided in Appendix E*

62. Accordingly, Bihar Discom's contention that no separate or independent relief was granted qua the captive coal block is misplaced. The relief granted by this Tribunal is clear and encompasses all domestic sources. Any attempt to restrict the same would be contrary to the Remand Judgment of this Tribunal and also contrary to the restitutionary principle enshrined under the Change in Law provisions of the Bihar PPA.

63. GKEL/GMR further contends that Bihar Discom's contention that no separate or independent relief was granted qua the captive coal block is misplaced and ought to be rejected. This Tribunal specifically recognised that cancellation of the captive coal block pursuant to judgment of the Hon'ble Supreme Court of India in the case of ***Manohar Lal Sharma v. The Principal Secretary &Ors*.** reported as (2014) 9 SCC 516 ("**Coal Judgment**") and the subsequent cancellation order dated 24.09.2014 reported as (2014) 9 SCC 614 ("**Cancellation Order**") (collectively referred as **"Manohar Lal Judgment"**) qualifies as Change in Law. It is submitted that once an event has been held to be a Change in Law, GKEL ought to be compensated for the same. It is reiterated that this Tribunal directed that GKEL be compensated for meeting expenditure incurred in procuring coal for meeting shortfall from domestic sources. Accordingly, GKEL ought to have been granted relief by the CERC qua cancellation of captive coal block.

64. According to GKEL/GMR, Bihar Discoms have contended that GKEL's claim that captive coal block was envisaged for the entire Project is misplaced. It is submitted that the 5th Schedule of the Bihar PPA specified source of coal as Coal Linkage from Coal India Limited and Rampia and Dip Side Rampia coal block allocated to GMR Energy Limited (**"GEL"**).

65. Further, it is submitted that Bihar Discoms have contended the following:-

(a) Tapering linkage will be considered as source of coal for the Project under the Bihar PPA. The PPA made only a mere reference to the captive coal block.

(b) When coal was being supplied in lieu of the captive coal block, the question of considering captive coal block does not arise.

66. It is submitted that the foregoing contentions are erroneous and ought to be rejected. It is an admitted position that Tapering Linkage was granted in lieu of the captive coal block, as an interim source of coal till production from coal block starts. It is submitted that tapering linkage, by its very nature, was a temporary arrangement which was to finally be tapered off gradually and replaced with coal supply from the captive coal block, as the coal production is ramped up gradually. Further as the name suggest, the quantum of supply of coal under the Tapering Linkage gets proportionately reduced/tapers with the coal output from the captive coal block. Thus, Tapering Linkage is intrinsically linked with the captive coal block and same is only a temporary arrangement to make up for the shortfall/non-availability of coal from the linked captive coal mine. Tapering linkage cannot be granted without a coal block being allocated.Accordingly, and without prejudice to the admitted position that coal block was the identified fuel source for the Bihar PPA, if tapering linkage is admitted as a source under the Bihar PPA, the same would *ipso-facto* also include captive coal block as fuel source. Additionally, it is an admitted position that the captive coal block was for 1000 MW and which corresponded to the firm and tapering linkage awarded to GKEL.

67. GKEL/GMR further contends that Bihar Discom's contention that GKEL had not claimed any relief qua tapering linkage is erroneous. GKEL has claimed shortfall in supply of coal as a Change in Law event which includes shortfall under tapering linkage. Further, Bihar Discom's contention that GKEL is entitled to relief only qua the consequential financial impact on account of delay and cancellation of captive coal block and its reliance on the Tribunal's finding on *'Add-on Premium'* is misplaced. It is submitted that *'Add-On Premium'* is a separateChange in Law claim raised by GWEL and accordingly considered and adjudicated by the Tribunal in the Remand Judgment as a separate issue.The claim for *'Add-on Premium'* is not the only consequential financial impact related to either the delay or cancellation of the captive coal block. The increased cost of alternate coal to make up for the shortfall occasioned by the shortfall in coal supply under the tapering linkage due to delay in development and cancellation of the captive coal block, both of which has already been held to amount to Change in Law, is also a consequential financial impact of the delay in development and cancellation of the coal block. Accordingly, the claim for *'Add-on Premium'* cannot be considered to limit GKEL's compensation for shortfall in supply of coal, including from captive coal block.

68. According to GKEL/GMR, Bihar Discoms' contention that GKEL's claim for SHAKTI Coal is incorrect and the same doesn't form part as alternate coal is misplaced. By nature, SHAKTI Coal qualifies as 'Alternate Coal' since it has been availed post the bid date and to make up for the shortfall to occasioned by the shortfall in supply under the firm linkage ,cancellation of captive coal block and consequent termination of the tapering linkage. GKEL having participated in the auction for SHAKTI Coal after obtaining consent of Bihar Discoms, it is now not open to Bihar Discoms to contend otherwise.

69. GKEL/GMR further contends that Bihar Discoms have contended that GKEL has signed FSAs only for 3.63 MTPA (as compared to 4.524 MTPA allocated to it under Firm (2.14MTPA) and tapering (2.384 MTPA) linkages). Thus, the maximum coal requirement of GKEL is 3.63 MTPA. Any additional coal requirement cannot be considered.This contention is misplaced, because it fails to recognise the fact that part of this 3.633 MTPA includes the quantity under the Tapering linkage as well, which temporary in nature as was explained above.

70. It is further contended that the shortfall of coal has to be reckoned in the context of the LOAs as well as allocation of the captive coal block to the extent of 4.6 MTPA. Further, the requirement of coal is linked to the total generation and supply of power by GKEL to the Bihar Discoms. Since the coal allocated to GKEL (under firm linkage as well as coal block along with tapering linkage) corresponds to 100% of the plant capacity, GKEL is entitled to any shortfall in coal supply necessary to supply power to the Bihar Discoms. Accordingly, Bihar Discom's contention that compensation ought to be considered vis-à-vis requirement of 3.63 MTPA as provided under the FSAs is erroneous and ought to be rejected. The assurance under NCDP 2007 is for 100% of the normative requirement of coal. Since shortfall has to be reckoned against the LOAs, GKEL is entitled to compensation of shortfall in coal since there was an assurance for 100% coal which has since been changed.

71. Furthermore, this Tribunal in the Remand Judgment had specifically directed that ACQ under the FSAs cannot be considered. This Tribunal had directed that GKEL is entitled to compensation for shortfall in supply of coal vis-à-vis LOAs as well as allocation of the captive coal block to the extent of 4.6 MTPA, i.e. all the ***domestic sources of coal for GKEL.*** The operative portion of the Remand Judgment is at Para 55, 57, 59, 63 & 64. Accordingly, Bihar Discom's contention restricting compensation vis-à-vis ACQ mentioned in the FSAs stand rejected by this Tribunal in the Remand Judgment. Thus, Bihar Discoms cannot be permitted to reagitate the issue before this Tribunal.

72. GKEL/GMR further contends that Bihar Discom's submissions that GKEL is not entitled to compensation for shortfall below the percentage limits specified in Ministry of Power Letter dated 31.07.2013 (**"NCDP 2013"**) is misplaced. It is submitted that GKEL's coal requirement was assessed prior to New Coal Distribution Policy, 2007 (**"NCDP 2007"**). Accordingly, there was assurance of 100

73. Therefore, according to GKEL/GMR, any shortfall is be considered vis-à-vis 100% quantum assured to GKEL under NCDP 2007. This position was upheld by this Tribunal in the Remand Judgment at Para 63 & 64.

74. They further contend that this Tribunal in Judgment dated 14.09.2019 in Appeal No. 202 of 2018 titled ***Jaipur Vidyut Vitran Nigam Ltd. &Ors. vs. RERC &Ors.*** (**"Adani 202 Judgment"**) held that impact of change in law ought to be computed, based on the difference between 100% domestic coal supply assured in NCDP 2007 vis-à-vis actual domestic coal supply, until the shortage of domestic coal exists.

75. According to GKEL/GMR,Bihar Discom's contention that CERC erred in considering actual supply instead of the percentage specified under NCDP 2013 is erroneous. The objective behind compensation for a Change in Law event is to restore the affected party to the same economic position had such Change in Law event not occurred. Further, the term 'to restore' would be rendered redundant if the compensation fails to take into account actual expenditure and does not "restore" the party claiming Change in Law to same economic position, as if such change in law had not occurred. The said principle was confirmed by the Hon'ble Supreme Court in Judgment dated 25.02.2019 in Civil Appeal No. 5685 of 2018 titled ***Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. vs. Adani Power Ltd. &Ors.***, reported as (2019) 5 SCC 325 (**"SC Carrying Cost Judgment"**).

76. They further contend that The Hon'ble Supreme Court vide its judgment dated 11.4.2017 in ***Energy Watchdog vs. CERC &Ors.*** reported as (2017) 14 SCC 80 (**"EWD Judgment"**) has rejected the contention similar to those advanced by Bihar Discoms. The relevant portion of the ***Energy Watchdog*** Judgment is at Para 57 & 58. It is submitted that this position has been upheld by this Tribunal in various judgments including the Adani 202 Judgment and Judgment dated 20.11.2018 in Appeal No. 121 of 2018 titled ***Sasan Power Limited vs. CERC &Ors***. ("**Sasan Power Judgment**").

B. Bihar Discoms re-agitating issues rejected by this Tribunal in the Remand Judgment

77. GKEL/GMR contends that Bihar Discoms have contended thatunder the LOA, there was no assurance of supply of 100% domestic coal by Coal India Limited and GKEL would have accounted for some portion being imported coal. Accordingly, GKEL is not entitled to compensation vis-à-vis 100% assurance. This contention is misplaced. It is submitted that this very contention was rejected by this Hon'ble Tribunal in the Remand Judgment. The operative portion of the Remand Judgment is at Para 59, 60 & 61. Accordingly, this Tribunal had expressly held that any condition regarding imported coal cannot be considered and that compensation payable to GKEL is to be computed vis-à-vis 100% normative requirement of GKEL.

78. Further, according to GKEL/GMR, Bihar Discoms' contention that GKEL has failed to produce supporting documents is erroneous. It is submitted that all details regarding coal receipt, consumption and computation of compensation has been provided on a regular basis to Bihar Discoms. Further, this information along with necessary documents are provided along with all Supplementary Bills raised by GKEL on Bihar Discoms. Though these supplementary invoices were raised since 24thApril 2020, we haven't received any communication on supporting documents till date. Therefore, this statement is misplaced.

C. CERC has failed to ensure compensation to GKEL post June 2016

79. GKEL/GMR further contends that in terms of the Remand Judgment, computation for compensation due to GKEL ought to factor shortfall of coal from its domestic sources, viz. firm linkage, and captive coal block. Pertinently, tapering linkage as a source of coal was granted as an interim measure against the coal block allocation. However, it is submitted that the formula prescribed by Ld. CERC takes into account shortfall in tapering linkage coal as the quantum assured minus coal supplied. However, it is an admitted position that Tapering Linkage was discontinued from June 2016. Accordingly, for the period commencing from July 2016, the effective shortfall in Tapering Linkage would be zero as there is no assured quantum under Tapering Linkage. The aforesaid position fails to take into account that Tapering Linkage was only an interim measure till operationalisation of the captive coal block. Accordingly, the fuel source of the Project for supply of power under the Bihar PPA for 25 years was the coal block. The Impugned Order restricts GKEL's compensation to 2016 and does not factor the continued shortfall post June 2016. This continued shortfall ought to be seen as a result of the cancellation of coal block which has already been allowed as a change in law.

80. GKEL/GMR further submits that failure of Central Commission to grant compensation for non-availability of domestic coal after cancellation of the captive coal block (and subsequent withdrawal of the tapering linkage) is contrary to the Remand Judgment inasmuch as GKEL is not being compensated for alternate coal procured to overcome unavailability of tapering linkage/MoU/captive mine coal. It is submitted that the Impugned Order wrongly restricts the directions of the Remand Judgment by limiting the compensation to shortfall of linkage coal and not shortfall of coal from domestic sources. Further, it is submitted that this Hon'ble Tribunal in terms of Judgment dated 21.12.2019 in Appeal No. 135 of 2018 titled ***Uttar Haryana Bijli Vitran Nigam Ltd. &Ors. vs. GMR Kamalanga Energy Ltd.*** has upheld the principle of pro-rata allocation laid down by Ld. CERC in the 79/MP Order. It bears mention that the formula prescribes pro rata allocation of coal across all three beneficiaries viz. Haryana, Bihar and GRIDCO.

Therefore, prescribing a different formula for Bihar Discoms will result in incongruous results since the pro rata allocation for beneficiaries is premised on the generation and supply of power to these beneficiaries and not ACQ.

D. Formula prescribed by CERC would lead to anomalous situation of one Project being governed by contradictory formulas

81. According to GKEL/GMR, this Tribunal in the Remand Judgment had held that GKEL is covered under Clause 2.2 of NCDP 2007 and had been assured coal supply corresponding to 100% of GKEL's normative requirement. Accordingly, the quantum of coal to be considered for computing shortfall was to be the quantum assured under the LOAs relating to 100% of the normative generation of the Project as directed by this Tribunal in the Remand Judgment.However, it is submitted that the formula prescribed by CERC in the Impugned Order is contrary to the express direction of this Tribunal in terms of which GKEL is to be compensated for the coal shortfall to meet generation to service the Bihar PPA. It is submitted that the formula prescribed in the Impugned Order is inconsistent with previous formulas prescribed by CERC for GKEL itselfnamely, Order dated 03.02.2016 in Petition No. 79/MP/2013 (**"79/MP Order"**) and Order dated

20.03.2018 in Petition No. 105/MP/2017 (**"105/MP Order"**). It is further contended that in the 79/MP Order (which applies to the same Project), calculation of shortfall in supply of coal is based on quantum of coal received. However, the Impugned Order has directed shortage in coal to be computed based on quantity assured. Thus, there is a fundamental difference in the mechanism prescribed by CERC for the same Project. It is submitted that considering quantum assured as the basis for computing shortfall fails to consider the coal required for normative requirement for generation and sale of power under the Bihar PPA.

82. GKEL/GMR further contends that under the 79/MP Order shortfall in supply of coal is computed based on requirement for scheduled generation. This formulation laid down by Ld. CERC in the 79/MP Order has been followed by Ld. CERC in the following Orders:-

(a) Order dated 19.12.2017 in Petition No. 101/MP/2017 titled ***DB Power Ltd. vs. PTC India Ltd. & Ors.*** (Para 135, Pg. 93-94 of Order)

(b) Order dated 16.03.2019 in Petition No. 1/MP/2017 titled ***GMR Warora Energy Limited vs. MSEDCL & Ors.*** (Para 88, Pg. 49-50 of Order)

(c) Order dated 03.06.2019 in Petition No. 156/MP/2018 titled ***MB Power (Madhya Pradesh) Limited*** (Para 105, Pg. 62 of Order)

(d) Order dated 16.05.2019 in Petition Nos. 8/MP/2013 and 284/MP/2018 titled ***GMR Warora Energy Ltd. vs. MSEDCL &Ors.*** (Para 55, Pg. 30-31 of Order)

83. According to GKEL/GMR, Bihar Discoms' contention that 79/MP Order cannot be relied upon as no claim was made qua Bihar Discoms is misplaced. It is submitted that in fact Bihar Discoms have supported the 79/MP Order in proceedings before this Tribunal in Appeal N. 135 of 2018 (dealing with pro rata allocation of coal). Accordingly, Bihar Discoms cannot be permitted to resile from their position. The formula in the 79/MP Order prescribes pro rata allocation of coal across all three beneficiaries viz. Haryana, Bihar and GRIDCO.Further, CERC in the 79/MP Order (along with several other orders mentioned in the Appeal), shortfall in quantum of coal is derived vis-à-vis quantum required for scheduled generation. However, the Impugned Order has prescribed a formula wherein shortfall is computed vis-à-vis ACQ quantum.

84. According to GKEL/GMR,once a particular formula for coal allocation and computation of compensation has been prescribed for a composite scheme Project, attained finality and relied on in subsequent Orders, Ld. Central Commission ought not to have prescribed a different formula for the same project with respect to another PPA as the same would be incongruous and give rise to complications. Principles and computation of compensation ought to be similar for one composite project. There cannot be two different formulae for the same project. Further, it is trite law that the objective behind compensation for Change in Law is to restore the affected party to the same economic position. The formula prescribed in the Impugned Order fails to restore GKEL to the same economic position as mandated by the Bihar PPA.

85. According to GKEL/GMR, in view of the existing formulas, the Impugned Order will result in an absurd situation where linkage will be allocated on pro-rata basis but the compensation for shortfall will be computed differently. Thus, CERC has erred in prescribing an erroneous formula in the Impugned Order which is contrary to the Remand Judgment as well as past precedents of this Commission.

86. GKEL/GMR further contends that the Impugned Order has failed to account for compensation for cancellation of the allocation of the captive coal block which was held to be a Change in Law by this Tribunal in the Remand Judgment. Further, it is reiterated that the Impugned Order fails to address the issue that post June 2016, Tapering Linkage ceased to exist. Accordingly, even though there was complete shortfall of coal (as GKEL received no coal due to cessation of Tapering Linkage), the formula in the Impugned Order would compute zero shortfall in coal. This would result in under-recovery of cost incurred by GKEL for a Change in Law event and would be contrary to the judgments of the Hon'ble Supreme Court and this Tribunal as also contrary to the principle of economic restitution enshrined under Article 10.2 of the Bihar PPA.

87. In view of these averments, GKEL/GMR submits that the present Appeal No. 473/2019 ought to be allowed and the Impugned Order set aside to the extent challenged herein.

Analysis and opinion in Appeal No. 423 of 2019

88. Based on the above averments, the Appellant in Appeal No. 423 of 2019 prays for allowing the appeal. Similarly, the Appellant in Appeal No. 173 of 2021 prays for allowing the appeal.

89. We have heard the oral arguments of parties at length. Over and above this, consolidated written submissions are filed by both the parties. We have gone through the written submissions submitted on behalf of the parties. With these arguments at our command, we proceed to analyse and opine whether the impugned order deserves to be sustained or not.

90. Based on the above pleadings, arguments and written submissions the following points arise for our attention and consideration.

91. "***Whether the impugned order passed by the Respondent Commission warrants interference, if so, what order?***

92. We take up the issue in controversy pertaining to Appeal No. 423 of 2019. The admitted facts are as under:

93. GKEL is the power project in question. It owns a thermal power project having 1050 MW (3x350) in the State of Orissa. It supplies power to three states, namely, Orissa, Haryana and Bihar. We are concerned with the disputes between the Appellant and the Bihar State Power (Holding) Company Limited (**BSPHCL**). GKEL supplies 282 MWs gross power to Bihar State Electricity Board in terms of PPA, dated 09.11.2011 with delivery point being Bihar STU Bus bar interconnection point. The cut off date for claims under change in law so far as Bihar PPA is concerned, it is 28.03.2011.

94. Admittedly, the fuel requirement for the project was secured under two different arrangements i.e., firm linkage coal for 500 MWs under LOA dated

25.07.2008 and allocation of coal block situated at Rampia and Dip Side Rampia coal block for a period of 30 years. The coal blocks allocation in Orissa was to a consortium consisting of five allottees. The allocation of coal was 4.6 MTPA. It is not in dispute that the coal block was to commence supply from 17.10.2013 (normative date of production). It is also not in dispute that tapering in coal linkage for quantity estimated to be 2.384 MTPA for 550 MWs. The tapering linkage was to be made available till captive coal blocks commence its production. One LOA dated 08.07.2009 was for 2.384 MTPA. The FSA between GKEL and MCL is dated 28.08.2013 for 0.866909 MTPA. This means tapering linkage LOA culminated into approximately 1.49 MTPA FSA.

95. The relevant facts to be seen are that the total contracted capacity is 894.56 MWs, though the thermal power plant of the GKEL operates at 1050 MWs. Hence, the total estimated coal quantity required is about (3.64 MTPA), 2.14 MTPA from firm linkage and 1.49 MTPA from tapering linkage. This would serve 894.56 MWs. The present dispute pertains to claim of the Appellant in respect of shortfall of coal supply as against required coal for generating 894.56 MWs.

96. Appellant had to face difficulties pertaining to captive coal block. The Ministry of Coal extended supply of coal under tapering linkage on

16.01.2014 for period of three years beyond normative date of production, because of delay in operationalization of captive coal block, which was beyond the control of GKEL. Added to this, on 24.08.2014, the captive coal blocks allocated to GKEL was cancelled on account of judgment of the Hon'ble Supreme Court in the <u>Manohar Lal's case</u> (reported in 2014 (9) SCC 614). This was followed by cancellation of tapering linkage coal with effect from 30.06.2015. In this connection, Ministry of Coal issued a Memorandum on 30.06.2015 granting temporary reliefs to such projects to which captive coal blocks were allocated and stands cancelled, which projects had long terms PPAs, therefore, these projects by virtue of Memorandum of Understanding (MoU) were supplied with coal on the basis of MoU till 31.03.2016, which came to be extended up to 30.06.2016. According to the Appellant, the coal supplied between 02.07.15 to 30.06.2016 was under MoU, therefore, it was neither under tapering linkage nor under firm linkage of coal. The MoU was on "best efforts basis" as per the level prevailing as on 30.06.2015 along with add- on price of 20% over and above the applicable price. From July 2016 to March 2018, GKEL seems to have procured alternate coal, which includes e-auction, open market, imported coal etc., From March 2018, GKEL is procuring 1504300 tonnes of coal per annum from linkage coal under Shakti Scheme, therefore, the Appellant contends that no shortfall is being claimed vis-a-vis quantum of assured Shakti coal in this appeal.

97. The genesis for this appeal seems to be the litigation between the parties in Appeal No. 193 of 2017. When the Appellant was denied of compensation in lieu of change in law on account of deviation in NCDP and cancellation of captive coal block. They approached this Tribunal against the impugned order of CERC in Appeal No. 193 of 2017. This Tribunal considered the claim of shortfall of domestic coal on account of NCDP and so also shortfall of domestic coal on account of cancellation of coal blocks in the said appeal. Both issues were considered together. In other words, it was pertaining to shortfall of fuel for the project, which were assured under firm linkage as well as captive coal blocks, which came to be cancelled. This Tribunal, admittedly, opined that tapering linkage was available till supply of coal was commenced from captive coal blocks. It also opined that shortfall of coal has to be computed vis-a-vis the assurance provided under letter of Assurance (LOA), therefore it opined that it cannot be measured against the quantity under fuel supply agreement (FSA).

98. This Tribunal, apparently, noted that cancellation of coal blocks by virtue of judgment of the Hon'ble Supreme Court in Manohar Lal's case, is an event subsequent to cut off date amounts to change in law event.

Therefore, this Tribunal opined that GKEL is entitled to be compensated in respect of shortfall of coal, which was procured by GKEL from alternate sources to meet the shortfall of coal from domestic sources, i.e., firm linkage coal and so also tapering linkage coal in lieu of captive coal blocks. This Tribunal opined that add-on premium was not part of the LOA or the tapering linkage policy, therefore, compensation has to be paid for increase in the cost due to continued use of tapering linkage coal, on account of delay in development of coal blocks as well as its cancellation eventually by virtue of the judgment of the Hon'ble Supreme Court. This Tribunal also opined that increase in the freight was on account of levy of development surcharge and so also busy season surcharge, which were not part of the basic price of coal. Apart from the above reliefs, apparently, in the judgment of this Tribunal in Appeal No. 193 of 2017, this Tribunal opined that GKEL is entitled for carrying cost. It is noticed that this judgment in Appeal No.193 of 2017 dated 21.12.2018 is under challenged before the Hon'ble Supreme Court, however, there is no stay of the operation of the order in the above appeal. The Civil Appeal is pending before the Hon'ble Supreme Court.

99. The above facts are the admitted facts and there is no dispute over these facts. In this appeal, according to the Appellant when this Tribunal remanded the matter to the Commission by virtue of above judgment, the

Respondent Commission considered the same and disposed of the Petition by passing the impugned order. Pertaining to the above Appeal No. 423 of 2019, two limited issues are to be considered according to the Appellant i.e., CERC in total disregard to the directions of this Tribunal in remand judgment at Paragraph Nos. 57 to 61 has acted contrary to the express direction of this Tribunal by using the FSA document as the basis instead of LOA. The other issue is though this Tribunal directed GKEL to be compensated for expenditure incurred for procuring coal from domestic sources, both firm linkage and tapering linkage and also captive coal block, the formula adopted by CERC results in computation of compensation till 2016, after which, FSA stands discontinued so far as tapering linkage. In other words, according to the Appellant, this Tribunal's direction is that the changes in NCDP and cancellation of captive coal blocks being change in law events, the Appellant deserves to be compensated so far as the expenditure it incurred for procuring coal from alternate sources. In the impugned order, CERC did not provide for compensation on account of cancellation of captive coal blocks. Therefore, they contend that the CERC has totally ignored the directions of this Tribunal in remand judgment so far as cancellation of captive coal blocks being recognized as change in law event.

100. According to them, in the remand judgment, this Tribunal recognized primary fuel source for the project and supply of power to Bihar Discom is directly connected to cancellation of captive coal block and NCDP of 2013. Therefore, by virtue of impugned order, CERC limiting the compensation to shortfall of firm and tapering linkage only, and is nothing but contrary to the directions of this Tribunal apart form violating the principle of restitution provided under the PPA. Appellant contends that the impugned order fails to appreciate that the tapering linkage and MoU pertaining to captive coal block was in operation till June 2016 and thereafter the GKEL has to procure from alternate sources since captive coal blocks were cancelled. Therefore, the impugned judgment deserves to be set aside.

101. According to the Appellant, by virtue of remand judgment, the computation of compensation vis-a-vis the position as on cut off date i.e., assurance of coal under LOA was totally ignored by the Commission. They further contend that applying a different formula for computing compensation linking shortfall to quantity assured under FSA by the impugned order CERC is totally unjustified in considering the claim of the Appellant. They further contend that in Petition 79/MP, the very CERC on 03.02.2016, linked shortfall to the quantity required for generating and meeting the contracted quantities under the PPA, therefore, it has ignored its own decision pertaining to said 79/MP Order.

102. The learned senior counsel Mr. Basava Prabhu Patil arguing for the Appellant contends that the CERC was obliged to implement the remand judgment by providing compensation for cancellation of captive coal blocks, but the impugned order totally ignored the mandate and finding in the remand judgment, and further proceeded to formulate a formula, which does not take into consideration shortfall due to cancellation of captive coal blocks. It also ignored the fact that tapering linkage/coal supply under MoU was only up to 30.06.2016. The operative portion of the impugned order at Paragraph Nos. 33 and 46 makes it clear.

103. According to the Appellant's counsel, the expenditure incurred by the Appellant-GKEL is for procuring coal from alternate sources to meet the shortfall in coal due to cancellation of captive coal blocks (a change in law event), the impugned order totally ignores the said fact. In the remand judgment, this Tribunal, after noticing that GKEL had 100% assurance of coal at normative coal requirement, held that the compensation has to be on actual requirement of coal to meet scheduled generation, and it should not have been limited to ACQ under FSA. According to the Appellant, it had envisaged supply of coal from captive coal block for the entire capacity of

1050 MWs, however due to cancellation of coal block, the Appellant - GKEL was compelled to procure coal under tapering linkage till June 2015. Once tapering linkage comes to an end, it had to procure e-auction, open market, imported coal and shakti coal after cancellation of tapering linkage. Hence, Appellant's stand is the expenditure incurred towards procuring coal from alternate sources to meet shortfall by Appellant so far as domestic coal, the change in law compensation has to be extended to the benefit of Appellant GKEL.

104. They further contend that the entire scheduled generation of GKEL was secured by firm linkage and captive coal block with interim arrangement of tapering linkage so far as captive coal block is concerned. Therefore, the Respondent had to compensate the Appellant for any shortfall in the above said coal supply. The entire order of this Tribunal ought to have been read as a whole in its entirety is the stand. In other words, it has to be read in its entirety in the context what it means to convey, and not in parts. If it is read in parts, it would lead to misinterpretation of the order. Therefore, CERC ought to have compensated for the shortfall against all the three sources of coal keeping in mind the 100% assurance under NCDP 2007 as well as allocation, which corresponded to the capacity/generation. They rely upon the judgment in Appeal No. 241 of 2016 dated 31.05.2019 in the case of

Adani power Maharashtra vs MSEDCL (Lohara Coal Block Judgment 1). They also rely upon Appeal No. 340 of 2019 and 354 of 2019 (Lohara Coal Block Judgment 2, which was disposed of on 05.10.2020). According to learned Senior counsel, once cancellation of coal block held to be a change in law event, the only answer would be to pay compensation to the Appellant so as to restore the Appellant to same economic position, as if such change in law had not occurred.

105. They further contend that the formula described in the impugned order does not include recovery of expenditure involved in procuring alternate coal, once tapering linkage was discontinued from July 2015, and MoU coal was stopped from July 2016, because the formula adopted by the Respondent Commission is linked to FSA, ACQ and not to LOA and quantum of coal from captive coal blocks. Learned senior counsel also submits that in spite of the above position, the common written submissions of Bihar Discoms filed on 07.06.2021 at page 17 and consolidated written submissions dated 16.06.2021 accept the case of GKEL so far as compensation post 01.07.2016, which reads as under:

> *"28. In regard to the period and without prejudice to other contentions, from 01.07.2016 onwards (after tapering linkage was discontinued), the claim of GMR cannot possibly more than the quantum of coal supply for which they were eligible under the tapering linkage, i.e., proportionate to*

the PPAs capacity, as a basic condition is that the coal could not be used for any purpose other than the long term PPA."

106. According to the Appellant, by adopting so-called formula in the impugned order, if shortfall is ACQ under FSA minus quantum received, it can lead to zero since tapering linkage becomes zero after 01.07.2016, automatically ACQ under tapering linkage FSA will be zero, therefore this formula would result in showing no shortfall in coal supply. This cannot be the correct position. According to the Appellant, since cancellation of coal blocks being a change in law event, and tapering linkage was in lieu of cancellation of captive coal blocks, this formula has to be ignored. Once tapering linkage ends, the formula has to account for unavailability of coal on account of cancellation of captive coal blocks. Therefore, CERC instead of implementing all directions in Remand judgment, actually acted contrary to Article 10 of Bihar PPA, restitution provision.

107. According to the Appellant, the contention of the Respondent-Discom that GKEL signed FSAs only for 3.63 MTPA as against 4.524 MTPA for generation of 1050 MWs, which was allocated under firm linkage and tapering linkage though the maximum coal requirement of GKEL was 3.63, cannot be accepted since GKEL is not seeking compensation computing shortfall as against 4.5 MTPA i.e., required quantity estimated to generate

1050 MWs. But the Appellant's claim is restricted to deficit in coal, which is required to generate up to the contracted capacity of 894.5 MWs. This shortfall ought to be linked to the letter of assurance and the capacity of the PPAs to be served.

108. According to the Appellant, the Standing Linkage Committee allocated the quantum of coal to meet 100% of generation at normative requirement in terms of paragraph 2.2 of NCDP 2007. As on the cut-off date, only assurance under NCDP 2007 and LOA were with GKEL. Therefore, the shortfall in supply of coal is to be computed vis-a-vis assurance of coal prior to cut-off date in terms of LOAs, as noted in the remand judgment, but the impugned order has wrongly limited compensation to ACQ in FSA. In other words, according to the Appellant, GKEL has the assurance of supply of entire quantum of coal requirement to meet its generation at normative parameters. It was not restricted to a specified quantum, it was vis-a-vis the quantity of coal required to meet 100% of the normative requirement. They also rely upon the judgment of this Tribunal dated 14.09.2019 in Appeal No. 202 of 2018 in Jaipur Vidyut Vitran Nigam Ltd.'s case and contend that since this judgment of the Tribunal was upheld by the Hon'ble Supreme Court including all directions of computation, the same principle has to be applied to the present case. Therefore, the formula prescribed is totally wrong/misdirection of the CERC. They further contend that for computation of compensation for change in law, payment of compensation is linked to generation, since all the procurers pay only for the amount of power generated and supplied to them.

109. They bring to our notice that the Bihar Discoms have supported the order of CERC in 79/MP, wherein it was held that scheduled generation allows pro rata allocation of coal across all three beneficiaries i.e., Haryana, Bihar and GRIDCO, which was allowed by this Tribunal in A.No. 135 o 2018. That being the position, if the formula of CERC in the impugned order is adopted, it would result in absurdity. They refer to various orders of the CERC to contend that the CERC followed earlier orders of CERC to conclude the Petition in 79/MP Order. In all those matters, the generators were issued LOAs from CIL assuring supply of 100% of normative coal requirement of the project like that of the Appellant GKEL. If a particular formula is adopted to similarly placed generators, the CERC ought not to have treated the Appellant GKEL in a different manner.

110. They further contend that the impugned order totally ignores the principle of restoration as contemplated under Clause 10 of Bihar PPA. The non-restoration completely affects the financial position of the Appellant. Various judgments of this Tribunal and the Hon'ble Supreme Court, time and again, have promoted the principle of restoration restoring the affected party to the same economic position as if no change in law event has occurred. Therefore, they contend that the appeal deserves to be allowed setting aside the opinion of the CERC pertaining to the computation of compensation vis-a-vis shortfall in coal supply or procurement of alternate coal by the Appellant i.e., shortage in terms of LOA quantity.

111. As against this argument of the Appellant, learned senior counsel arguing for Bihar Holding Company, Mr. M. G. Ramachandran contends that the judgment in Appeal No. 193 of 2017 dated 21.12.2018 is pending before the Hon'ble Supreme Court of India in Civil Appeal No.3123 of 2019. He contends that without prejudice to the rights and contentions raised in the said Civil Appeal, the Respondent Bihar Holding Company would submit arguments in this Appeal. According to them, there was specific direction at Para 83 of the Remand Judgment dated 21.12.2018.

112. According to the 2nd Respondent, the challenges by GMR are only pertaining to the following aspects:

(a) Shortfall of domestic linkage coal due to deviation from NCDP and change in Fuel Supply Agreement;

(b) Cancellation of the Captive Coal Block;

(c) Shortfall in linkage coal beyond 31.03.2017, and

(d) Impact of Coal Shortfall and computation.

113. However, from the arguments of learned senior counsel for GMR, Mr. Basava Prabhu S. Patil and Mr. M. G. Ramachandran, learned senior counsel for 2nd Respondent, we note that GMR is not challenging impact of coal shortfall and compensation for the same so far as linkage coal beyond 31.03.2017. Therefore, we are concerned only with (a), (b) and (d) above.

114. According to the Respondent, apart from the above three aspects, what arises for consideration in this Appeal is with regard to shortage of coal linkage below 65%, 65%, 67% and 67% in pursuance of NDCP of 2013 and communication dated 22.05.2017 (Shakti Policy) in so far as computation under claim (d).

115. According to Appellant, Para 33 of the impugned order expresses opinion of the Central Commission totally disregarding the Remand Judgment of this Tribunal in Appeal No. 193 of 2017. The contention of the Appellant GMR is incorrect. What came up for consideration before this Tribunal in Appeal No. 193 of 2017 is not properly reflected in the arguments of the Appellant. Therefore, the 2nd Respondent contends that the argument of the Appellant that in a selective manner and in deviation of the observation of this Tribunal in the Remand Judgment the impugned order passed, is incorrect.

116. Mr. Ramachandran further contends and brings to our notice Paragraph 42 to 64, which is the discussion part of the Remand Judgment, but it is relevant to note that the contentions of the parties was at Para 50 and 51 of the said order. He took us through the above said Paragraphs. Based on the above Paragraphs, it is clear that this Tribunal in the Remand Judgment rejected the specific contention of the 2nd Respondent – Bihar Holding Company FSAs executed between the parties and the domestic companies itself contemplates importation of coal and supply of imported coal by the Coal Companies. Therefore, the use of imported coal cannot be considered to be on account of shortfall in the coal supply covered by NCDP. This Tribunal also observed that LOAs were provided for domestic coal supply without reference to imported coal supply. Therefore, in the Remand Judgment, shortfall was considered only with reference to the LOAs quantum of coal which was entirely domestic coal. Therefore, in the Remand Judgment, this Tribunal opined that claim of the Appellant GMR was 100% of the quantity as per normative requirement without any stipulation of supply of imported coal.

117. Learned senior counsel Mr. Ramachandran contends that in the impugned order CERC did not consider any aspect pertaining to the above issues which arose for our consideration in the Remand Judgment. But he contends that even otherwise the quantum of domestic coal supplied to coal companies had to be necessarily considered in terms of LOAs' i.e., normative requirement proportionate to the extent of matured long term PPAs and the normative requirements only. Therefore, the Appellant cannot claim quantum of coal more than the extent of long term PPAs.

118. Learned senior counsel Mr. M. G. Ramachandran further contends that the assurance under NCDP 2007 and in the LOAs is for normative requirement of coal, therefore since the assessment of coal was for requirement of 1050 MW capacity, the LOA was issued on normative requirement of coal. Therefore, quantum under the FSA is proportionate of the said quantum related to the contracted capacity therefore it is not open to GMR to claim otherwise or they are not entitled for higher quantity than the coal assured. Therefore, the 2nd Respondent's contention is that the Appellant is not entitled for anything beyond the capacity envisaged in FSA. Over and above this, according to learned senior counsel, if such claim is allowed, it is nothing but contrary to the decision in ***Energy Watchdog***'s case by the Hon'ble Supreme Court of India and so also the Remand Judgment.

119. According to 2nd Respondent, the Appellant cannot claim that in terms of NCDP 2007, they are entitled to coal quantum in excess of normative requirements i.e., 85% in the present case on the basis that coal to be given to them to the extent of 100% installed capacity. It is well settled that the coal requirement eligibility would be as per normative requirement of 85% which is to be considered as 100% normative requirement. To substantiate their contention, they contend that the total project capacity of the Appellant's power plant is 1050 MW in Stage-1 and further proposed for 350 MW in Stage-II. However, Stage-II never came into existence. In terms of LOAs, the firm linkage coal of 2.14 MTPA for 500MW was 100% of the quantity as per normative requirement for the said 500 MW. So far as tapering linkage in lieu of captive coal blocks, it was 2.38 MTPA for 550 MW under LOA dated 08.07.2009 which is also 100% of the quantity as per normative requirement for the said 550 MW.

120. Subsequently, the PPAs were entered into on different dates. So far as Bihar, it is 282 MW of gross power (260 MW as stated in the PPA (-) net of transmission losses and auxiliary consumption). There were only three long term PPAs i.e., apart from Bihar, one for GRIDCO and another for

Haryana, all put together it was 894.5 MW of gross capacity as against the total project capacity of 1050 MW. Till date, the Appellant not entered into any long term PPA in respect of the balance 155.5 MW of gross capacity.

121. According to 2nd Respondent, what could be analyzed from Fuel Supply Agreement related to tapering linkage is the basic condition for domestic coal supply against the LOAs and for signing FSA in terms of LOA is that the capacity which is tied up for generation and supply of electricity to distribution utilities on long term basis would get domestic coal supply. Therefore, the obligation of the coal company was to supply only in terms of LOAs at all times to the extent of 894.5 MW capacity for which long term PPAs exist. In other words, according to Respondents, if the Appellant had long term PPAs for the entire capacity of 1050 MW, the coal company had the obligation to supply coal in terms of LOA which again has to be reflected in FSA. Then there would have been complete synchronization of LOA capacity and FSA capacity of coal.

122. The FSAs were signed for 894.5 MW because of long term tie up for supply of power. Hence, according to the learned senior counsel, Mr. M. G. Ramachandran, there is no mismatch between LOAs and FSAs as contended by the Appellant. He further submits that under the signed FSA, the assured supply of coal would be for generating and supplying the electricity at a normative level of 80% or 85% as the case may, in terms of PPA. The shortfall, if any in the domestic coal supply has to be computed only on the quantum of coal assured under the LOAs proportionate to the capacity under the long term PPAs which is 894.5 MW in the present case. Hence, in the impugned order, CERC has rightly considered the shortfall on the above basis. Even if LOA refers to 100% supply of coal as against the contracted capacity, if for example, one PPA was terminated without replacement, still there is no obligation for 100% supply required for as against normative requirement, but it would be only the required coal necessary for contracted capacities which have long term PPAs. In other words, according to Appellant, if 894.5 MW is reduced to 550 MW, the coal requirement can be only against 550 MW and it cannot against 894.5 MW. Since FSA is for total contracted capacity, the assurance of coal can be considered only for such capacity.

123. According to the 2nd Respondent, GMR is mainly interpreting Para 57 and 59 of the Remand Judgment which refers to LOA totally in a different context. The Remand Judgment indicates that supply of coal has to be in terms of LOAs irrespective of quantum for which PPAs are concluded on long term basis. Such interpretation would be erroneous.

124. Coming to the methodology or formula provided by CERC by its Order dated 03.02.2016 in Petition No. 79/MP/2013, according to Respondents, once the Remand Judgment provides how the shortfall vis-à-vis assured quantum has to be calculated, GMR cannot claim any other formula. That apart, the said Order dated 03.02.2016 was prior to ***Energy Watchdog*** Judgment which has been considered by a specific remand by this Tribunal.

125. So far as Petition No. 105/MP/2017, which was upheld in Appeal No. 135 of 2018, again the issue is completely different since it is related to consideration of pro rata allocation in relation to supply of coal by coal company and its subsidiaries. The issue of pro rata allocation is not involved in the present Appeal.

126. It is further contended on behalf of Bihar Holding Company that from 01.07.2016, the claim of GMR is not possibly more than the quantum of coal supply for which they were eligible under tapering linkage i.e., proportionate to the PPAs capacity, as a basic condition is that the coal could not be used for any purpose other than long term PPA. Therefore, supply stops when tapering linkage was discontinued.

127. 2nd Respondent further contends that GMR has allocation of domestic coal under SHAKTI Policy, therefore there can be no claim in respect of any cancellation of tapering linkage in view of the above allocation. Admittedly, GMR is not challenging any aspect to the shortfall beyond 31.03.2017 which has been allowed by the Central Commission only in respect of coal as covered by Clause A (iii) of SHAKTI Scheme; the same need not be considered.

128. According to Respondents, CERC has taken into consideration every aspect which was required to comply with the Remand Judgment of this Tribunal in Appeal No. 193 of 2017. Therefore, according to them, there is no question of interfering with the impugned order.

<u>OUR OPINION in Appeal No. 423 of 2019</u>

129. The genesis for this appeal seems to be the judgment dated 21.12.2019 (remand judgment in Appeal No. 193 of 2017). The relevant paragraphs of the said judgment relied upon by the Appellant in this Appeal are paragraphs 57 to 61 and 64.

130. The Respondents also rely upon the remand judgment from paragraphs 42 to 64 especially para 50 and 51 to contend what was considered by this Tribunal in the remand judgment. Therefore, it would be just and proper to reproduce paragraphs 50, 51, 56, 57, 59, 60, 61 & 64, which read as under:

*“**50**. According to Appellants, the coal requirement of projects which had been assessed prior to NCDP 2007, had the assurance of coal supply up to 100% of normative requirement. GKEL’s coal requirement was assessed on 2-8-2007; therefore, they are covered by virtue of Clause 2.2 in terms of which GKEL is entitled to supply of 100% of the quantity as per normative requirement without any stipulation as to supply of imported coal.*

***51.** As against this, argument of the Respondents is that Appellant did not have the LOA or FSA at that stage; therefore, Clause 5.2 of NCDP 2007 alone applies. Therefore, CIL may have to import coal as may be required from time to time. It is further contended that in terms of the above-said Clause, LOA came to be issued on 25-7-2008 and subsequently FSA came to be entered into between the parties which provides for supply of coal to be supplied by MCL for domestic as well as imported coal. Since Appellant did not raise any objection at the time of LOA or signing of FSA, Appellant is entitled to financial benefit only with regard to domestic coal. The Respondents further contended that LOA was much prior to cut-off date 28-3-2011. Therefore, the commitment of coal to be supplied by CIL/MCL was through its mines as well as imported coal. Therefore, Appellant could not have assumed 100% domestic coal availability while submitting the bid for Bihar PPA.*

***56**. Mr. M. G. Ramachandran, learned counsel refers to Fuel Supply Agreement – Clause 4.1.1, 4.3.1, 4.3.2 and 4.6.1 (Pages 380 – 383 Vol II of Appeal Paper Book) which reads as under:*

“4.1.1 The Annual Contacted Quantity of Cola agreed to be supplied by the Seller and undertaken to be purchased by the Purchaser,

shall be 18.19 Lakh Tes. per Year from the Seller's mines and/or from import, as per Schedule 1. For part of Year, the ACQ shall be prorated accordingly. The ACQ shall be in the proportion of the percentage of Generation covered under long term Power Purchase Agreement(s) executed by the Purchaser with the DISCOMs either directly or through PTC(s) who has/ have signed back to back long term PPA(s) with DISCOMs. Whenever, there is any change in the percentage of PPA(s), corresponding change in ACQ shall be effected through a side agreement. Such changes shall be allowed to be made only once in year and shall be made effective only from the beginning of the next quarter. However, in no case ACQ should exceed the LOA quantity as mentioned in Schedule 1.

……..

4.3 Sources of Supply

4.3.1 The Seller shall endeavor to supply coal from own sources as mentioned in Schedule I. In case the seller is not in a position to supply the Scheduled Quantity (SQ) of coal from such sources as indicated in Schedule I, the Seller shall have the option to supply the balance quantity of coal through import, which shall not unless otherwise agreed between the parties, exceed 15% of the ACQ in the year 2012-13, 13-14 and 14-15, 10% of the ACQ in the year 2015-16 and 5% of the ACQ for the year 2016-17 and onwards. Seller may at its discretion, make such 0arrangements for supply of imported coal through CIL and/or other enterprises. Accordingly, the Purchaser has to enter into a Side Agreement with CIL and/or Seller, as the case may be, in addition to this Agreement. The Side

Agreement dealing with the terms and conditions for supply of imported coal would be an integral part of this Agreement.

4.6 Compensation for Short delivery/lifting 4.6.1 If for a Year, the Level of Delivery by the Seller, or the Level of Lifting by the Purchaser falls below ACQ with respect of that Year, the defaulting Party shall be liable to pay compensation to the other Party for such shortfall in Level of Delivery or Level of Lifting as the case may be ("Failed Quantity") in terms of the following:

Source	*Level of Delivery/Lifting of Coal in a Year*	*Percentage of Penalty for the failed quantity (at the rate of weighted average of Base Prices of Grades of coal supplied)*		
		2012-13,2013-14 & 2014-15	*2015-16*	*2016-17 onwards*
Imported + Domestic Qty	*Below 100% but up to 80% of ACQ*	*NIL*	*NIL*	*NIL*
Applicable for Imported Coal Only	*Below 80% but up to 75% of ACQ*	*0-1.5*	*0-1.5*	*0-1.5*
	Below 75% but up to 70% of ACQ			*-*
	Below 70% but up to 65% of ACQ		*-*	*-*
	Below 75% but	*-*	*-*	*0-5*

	up to 70% of ACQ			
Applicable for Domestic Coal Only	*Below 70% but up to 65% of ACQ*	*-*	*0-5*	*5-10*
	Below 65% but up to 60% of ACQ	*0-5*	*5-10*	*10-20*
	Below 60% but up to 55% of ACQ	*5-10*	*10-20*	*20-40”*
	Below 55% but up to 50% of ACQ	*10-20*	*20-40*	
	Below 50% of ACQ	*20-40*		

He contends that the modification of 2007 Policy by 2013 Policy is applicable to the extent of modification in terms of the above Clauses of FSA

***57**. We are afraid that this may not be correct position since the Clause 4.6.1 of FSA relates to penalty on account of short supply and it applies to both the parties. Further this Article does not have any effect on the obligation of MCL to supply coal up to ACQ. Therefore, it shall be reckoned against the quantum assured in the LOA and not Article 4.1.1 of FSA. The Revised Tariff Policy allows shortfall / in linkage coal to the quantum assured / LOA / FSA.*

***59**. The impact or effect of change in law has to be considered against the originally assured quantum of coal. LOAs and NCDP of 2007 are much prior to PPA between the parties, i.e. 9-11-2011. Learned Counsel for Respondents, Mr. M. G. Ramachandran also* *submitted that Appellant GKEL was aware that there will be a shortfall of domestic linkage coal and imported coal may be supplied.*

***60**. Learned Counsel for Appellant rightly brought to our notice Para-58 of Energy Watchdog judgment which is reproduced here-in-under:*

> *"58. However, Shri Ramachandran, learned Senior Counsel for the appellants, argued that the Policy dated 18-10-2007 was announced even before the effective date of the PPAs, and made it clear to all generators that coal may not be given to the extent of the entire quantity allocated. We are afraid that we cannot accede to this argument for the reason that the change in law has only taken place only in 2013, which modifies the 2007 Policy and to the extent that it does so, relief is available under the PPA itself to persons who source supply of coal from indigenous sources. It is to this limited extent that change in law is held in favour of the respondents. Certain other minor contentions that are raised on behalf of both sides are not being addressed by us for the reason that we find it unnecessary to go into the same. The Appellate Tribunal's judgment and the Commission's orders following the said judgment are set aside. The Central Electricity Regulatory Commission will, as a result of this judgment, go into the matter afresh and determine what relief should be granted to those power generators who fall within Clause 13 of the PPA as has been held by us in this judgment."*

***61**. Under these circumstances, when bid submitted by GKEL for Bihar PPA was premised on SLC-LT allocation and LOA when FSA had not been entered into between the parties as on the cut-off date what should be the consequence? If the bid was based on the SLC*

> *allocation and LOA prior to cut-off date indicated in PPA dated 9.11.2011, any new condition including supply of imported coal or penalty provisions cannot be taken into consideration.*
>
> ***64**. In the light of the above foregoing reasons, shortfall of firm linkage of coal as well as tapering linkage of coal, GKEL is entitled to be compensated for meeting the expenditure involved in procuring coal from alternate sources to meet the shortfall of coal from domestic sources."*

131. It is not in dispute that the capacity of the Appellant's thermal power plant was 1050 MW. For this, the firm linkage coal was for 500 MWs and captive coal block allocation was for 550 MWs. Apparently, tapering linkage of coal supply was in favour of the Appellant on account of delay in the production of coal from captive coal blocks that came to be allocated to the Appellant at Rampia and Dip Side Rampia. In the remand judgment, we opined that the cancellation of captive coal blocks in lieu of judgment of Manohar Lar's case amounts to change in law event because it was the judgment of the Hon'ble Supreme Court, which resulted in cancellation of coal blocks. It is not in dispute that tapering linkage, which was in lieu of captive coal blocks was not for the life time of the project and it was only for a certain period, which seems to have been ended by 30th June, 2016 in respect of captive coal block allocation. In other words, till the coal production from captive coal block started supply of coal to the thermal plant of the Appellant, the arrangement was made in the form of tapering linkage, which means, the supply of tapering linkage coal depends upon the quantity of production of coal from captive coal blocks. With the stoppage of tapering linkage coal, production of power cannot be stopped. Generator has to secure alternate coal by some means or the other to supply power in terms of PPAs.

132. Shortfall of domestic linkage coal was on account of deviation from National Coal Distribution Policy, and cancellation of captive coal blocks was in lieu of judgment of the Apex Court in Manohar Lal's case. Once cancellation of the captive coal blocks is held to be change in law, with stoppage of supply of coal from tapering linkage, there was practically no coal being supplied, which was meant for generation of power of 550 MWs. This is an undisputed fact. With this cancellation of captive coal blocks and stoppage of tapering linkage coal, the Appellant had to procure alternate coal to overcome the shortfall in domestic coal supply.

133. Similarly, shortfall of supply of domestic linkage coal due to NCDP, which was held to be change in law by virtue of judgment of the Apex Court in Energy Watch Dog's case, the shortfall of coal supply from firm linkage also has to be procured by the generator from alternate sources. Therefore, in the remand order, this Tribunal opined that shortfall of domestic coal on account of NCDP 2013 and cancellation of captive coal blocks pursuant to the judgment of the Hon'ble Supreme Court were change in law events. Hence, this Tribunal in the remand judgment directed the Commission to assess the compensation for meeting the expenditure involved in the procurement of alternate coal by the Appellant due to shortfall of coal from domestic sources.

134. In the impugned order, which was consequence of remand judgment of this Tribunal, CERC seems to have prescribed a formula which seems to be the grievance of the Appellant, since it does not take into account shortfall due to cancellation of captive coal blocks. They also contend that it does not take into account that tapering linkage/MoU route supply of coal existed only till 30.06.2016. Since tapering linkage was discontinued way back in June 2015. When the Hon'ble Supreme Court pronounced judgment in Manohar Lal's case, by virtue of directions of Government of India, MoU came to be entered into, which also ended by June 2016, therefore, the stoppage of tapering linkage coal by June 2015 and supply of coal under MoU came to an end by June 2016, one cannot dispute the fact that GEKL had to procure coal from alternate sources.

135. The judgment in Appeal No. 193 of 2017 is challenged before the Hon'ble Supreme Court, however there is no stay of the said judgment, but

Civil Appeals are pending adjudication. In that view of the matter, the position as on today is that Appellant-GKEL is to be compensated for shortfall in domestic coal supply on account of NCDP of 2013 and so also cancellation of captive coal blocks, both being change in law events.

136. The next question is ***"how this shortfall of alternate coal or how the procurement of coal from alternate sources have to be compensated to put the appellant to same economic position as if there was no change in law event?"***

137. In the impugned order, the paragraph 33 and 46 are relevant.

> *"33. From the above, it is observed that the LOAs which were issued to the Petitioner eventually got culminated to FSAs which assured the Petitioner, quantum of coal termed as ACQ. Accordingly, based on the FSAs, the Petitioner is required to be compensated for the shortfall in supply(ies) of coal.*
>
> *[…]*
>
> *46. Since the formulation is for mitigating coal shortage, the Specific Oil Consumption has been considered as „nil". Accordingly, the following formulation, is applicable for all period/s covering before (under NCDP 2013) and after 31.3.2017 (only to the extent as covered by Clause A (iii) of Shakti Scheme, notified by MOC, GOI on 22.5.2017:*
>
> *Step 1: **Shortage of Firm Linkage coal (MT) ******** *= Firm Linkage Coal Assured (MT) year/period* ***wise against the FSA dated 26.3.2013*** *as amended for quantity on 13.11.2013/18.9.2014 minus (–) Actual Firm Linkage Coal supplied by MCL.*
>
> *Step 2: **Shortage of Tapering Linkage coal (MT)** ***** = Tapering Linkage Coal Assured (MT) year/period* ***wise against the FSA dated 28.8.2013*** *as amended for quantity on various dates including part shifting to ECL from MCL minus (–) Actual Tapering Linkage Coal*

> *supplied by MCL/ECL.*
>
> *…*
>
> *Total Compensation = Compensation as computed at Step 3 + Compensation as computed at Step 4 + Add on Premium paid on Quantity of Actual Tapering Linkage Coal supplied by MCL/ECL.[…]"*

138. We note that CERC has not taken into consideration the procurement of coal from alternate sources by the Appellant and the expenditure involved in it on account of cancellation of captive coal blocks, therefore, it is in the teeth of the directions of this Tribunal in the remand judgment. From reading Step 1 suggested at para 46 of the impugned order as stated above, indicating the calculation of shortage of firm linkage coal, which has to be calculated, firm linkage coal assured year-wise against FSA dated 26.03.2013, which was subsequently amended. This would result in actual firm linkage coal supplied by MCL according to CERC.

139. Coming to Step 2 formula, it pertains to shortage of tapering linkage coal and the proposal or the formula is that tapering linkage coal assured year/period wise against the FSA dated 28.08.2013, which was also amended for different quantities on various dates minus actual tapering linkage coal supplied by MCL/ECL. What we notice from this Step 2 formula is that CERC totally ignored the fact that after discontinuation of tapering linkage with effect form 30.06.2015, there was practically no supply of coal from tapering linkage. Though some MoU came because of cancellation of captive coal blocks, supply of coal even under MoU route was stopped by June 2016. Therefore, subsequent to 30.06.2016, supply of coal under MoU route, no coal either under tapering linkage or MoU route was supplied so far as cancellation of captive coal blocks, which was meant to produce and supply coal for 550 MWs capacity. The Appellant did envisage supply of coal from captive coal blocks for the entire capacity of the project at the time of bid. With stoppage of tapering linkage coal and NCDP 2013 naturally the Appellant had to procure e-auction coal, open market, imported coal to overcome the shortfall in firm and tapering linkage.

140. As it stands today, in pursuance of the remand judgment, the Appellant-GKEL has to be compensated towards procurement of coal from alternate sources to meet the expenditure towards such procurement of alternate coal.

141. The entire scheduled generation of GKEL, as seen from the records, was secured by firm linkage coal and captive coal blocks. The remand judgment ought to be read in entirety to understand what exactly the directions of this Tribunal. This Tribunal in categorical terms opined that the domestic sources of coal are linkage coal and coal from captive coal blocks. Therefore, CERC ought to have considered compensating the Appellant

GKEL against all three sources of coal i.e., firm linkage, tapering linkage in respect of captive coal blocks and ultimately cancellation of coal blocks. The so-called formula drawn by the CERC in the impugned order has failed to consider the situation so far as shortfall in supply of coal from domestic sources with the stoppage of tapering linkage coal and cancellation of coal blocks.

142. According to the Appellant, the impugned order is wrong since the formula is linked to FSA, ACQ and not to LOA and quantum of coal from captive coal blocks, which came up specifically for consideration in the remand judgment of this Tribunal. It is seen that if there is shortfall in tapering linkage or with stoppage of tapering linkage coal and MoU route also from 01.07.2016, it would be zero supply of coal. In other words, the tapering linkage would be zero as the ACQ under tapering linkage FSA will be practically zero from 01.07.2016 because the formula in the impugned order ultimately results in concluding that shortfall is ACQ under FSA minus quantum received. If ACQ under FSA is zero from 01.07.2016 or some negative number, it would be '0-X', which practically results in a situation where there will be no shortfall at all, which cannot the factual position. Once captive coal blocks are cancelled and the same being change in law event, there is practically no supply of coal so far as captive coal blocks in lieu of cancellation of coal block since tapering linkage was also stopped in June 2015. Therefore, the shortfall being direct result of cancellation of coal block, which was considered as change in law, the consequence is that the Appellant GKEL deserves to be compensated. Linking of compensation only to tapering linkage FSA, ACQ, it amounts to no formula being provided for captive coal blocks cancellation.

143. Lengthy arguments were addressed pertaining to the actual contracted capacity of the thermal power plant of the Appellant. According to the Appellant, the FSAs were assigned only for 3.63 MTPA compared to 4.524 MTPA for generation of 1050 MWs under firm linkage (for 500 MWs) and so far as tapering it was 2.384 MTPA (for 550 MWs). According to Respondent Discoms the maximum coal requirement of GKEL is only 3.63 MTPA because the Appellant GKEL has long term PPAs only for capacity of 894.5 MWS and not 1050 MWs, which required 4.5 MTPA of coal. Therefore, Respondents Discom claim that the Appellant could claim shortfall in coal required for generation of contracted capacity up to 894.5 MWs and not 1050 MWs. Though, the Appellant initially contended that shortfall has to be linked to LoA, which was prior to cut off date and not the FSAs, ultimately, learned senior counsel Mr. Basava Prabhu Patil submitted that the contention of learned senior counsel Mr. M.G. Ramachandran that the long term PPAs was only for 894.5 MWs, therefore, the supply of coal required to generate up to that contracted capacity of 894.5 MWs alone has to be supplied. The contention of the Appellant is that the requirement of coal is linked to the total generation and supply of power by GKEL and the quantum of 3.633 MTPA is estimated to generate 894.5 MWs, which includes quantity under tapering linkage as well, which was temporary in nature.

144. According to the Appellant, the impugned order limiting the shortfall to FSA, ACQ instead of LoA is wrong. According to them, limiting the compensation to ACQ in FSA would lead to under recovery, which is contrary to remand judgment. For this purpose, they rely upon paragraph 2.2 of NCDP 2007

> *"2.2 Power Utilities including independent Power Producers (IPPs) / Captive Power Plants (CPPs) and Fertilizer Sector*
>
> *100% of the quantity as per the normative requirement of the consumers would be considered for supply of coal, through Fuel Supply Agreement (FSA) by Coal India Limited (CIL) at fixed prices to be declared/notified by CIL. The units/power plants, which are yet to be commissioned but whose coal requirements has already been assessed and accepted by Ministry of Coal and linkage/Letter of Assurance (LOA) approved as well as future commitments would also be covered accordingly."*

145. What we notice is that though the Appellant was persistently <u>harping</u> upon 1050 MWs, but later conceded to the fact that the contracted capacity on long term PPAs is only 894.5 MWs, therefore, assurance of 100% of requirement of coal for generating power of 894.5 MWs is required and any shortfall in that would result in the obligation of compensating the Appellant. According to them, entire quantum of coal required to meet its generation obligation has to be supplied and the quantum of coal cannot be limited or pegged. To substantiate this contention, they rely upon the above para 2.2 of NCDP, where the assurance was for 100% of the normative requirement. The direction in the remand judgment was for computation of shortfall in supply of coal has to be vis-a-vis assurance under LOAs. This opinion of the Tribunal was once again reiterated in the judgment in Appeal No. 202 of 2018 dated 14.09.2019 (Adani 202 judgment), which was affirmed by the Hon'ble Supreme Court i.e., SC 697 reported online.

146. We also note that in the impugned order the CERC had computed compensation for change in law always linking payment of compensation to the scheduled generation. However, in the impugned order, it has taken inconsistent view when compared to the previous orders of CERC. One of such Petition is 79/MP Order dated 03.02.2016. The formula prescribed in this is entirely different from the impugned order formula. In this 79/MP Order, the shortfall is based on quantum required to make scheduled generation. This would mean that the differential cost of alternate coal used to make the shortfall for actual energy supplied under the PPAs is to meet power supply obligations getting compensated. The Appellant contends that, in fact, Bihar Discoms did support order in 79/MP Order. In the judgment of this Tribunal in Appeal No. 135 of 2018, it was based on scheduled generation vis- a-vis pro rata allocation of coal between three beneficiaries i.e., Haryana, Bihar and GRIDCO. We opine that the benefit of firm linkage cannot be allocated to one or two Discoms but it must be allocated on pro rata basis.

147. As contended by Appellant, the basis for the opinion of CERC in 79/MP Order was on the basis of the following orders:

(a) Order dated 19.12.2017 in Petition No. 101/MP/2017 titled *DB Power Ltd. vs. PTC India Ltd. &Ors.*

(b) Order dated 16.03.2018 in Petition No. 1/MP/2017 titled *GMR Warora Energy Limited vs. MSEDCL &Ors.*

(c) Order dated 03.06.2019 in Petition No. 156/MP/2018 titled *MB Power (Madhya Pradesh) Limited*

(d) Order dated 16.05.2019 in Petition Nos. 8/MP/2013 and 284/MP/2018 titled *GMR Warora Energy Ltd. vs. MSEDCL &Ors.*

(e) Order dated 12.06.2019 in Petition No. 118/MP/2018 titled *TRN Energy Pvt. Ltd. vs. UP Discoms.*

148. According to the Appellant, in the above said orders CERC opined that there has to be supply of 100% of normative coal requirement of the project, since LOAs assured supply of 100% of normative coal. The contracted capacity of 1050 MWs is reduced to 894.5 MWs on account of having long term PPAs only for 894.5 MWs on account of assurance of supply of 100% of normative coal in terms of LOAs as noticed in the remand judgment, we are of the opinion that the Appellant GKEL is entitled for supply of 100% of normative coal requirement for the capacity of 894.5 MWs. The so-called formula arrived at in the impugned order according to us fails to actually compensate the Appellant towards shortfall of coal from domestic sources. In other words, the impugned order will not restore the Appellant to same economic position in terms of agreement between the parties i.e., Article 10 of Bihar PPA. This restoration of affected party to the same economic position is no more *res integra*. This principle is confirmed by the Apex Court in its judgment dated 25.02.2019 in the case of Uttar Haryana Bijli Vitran Nigam Ltd. &Ors., in Civil Appeal No. 5685 of 2018 and so also Energy Watch Dog's case reported in 2017 (14) SCC 80.

149. In the light of the above discussion and reasoning, we are of the opinion that GKEL is entitled to recover expenditure involved in procurement of alternate coal due to shortfall in domestic coal supply corresponding to scheduled generation pertaining to Bihar PPA obligation in order to restore the Appellant to the same economic position as before as if no change in law event has occurred.

Analysis and our opinion in Appeal No. 173 of 2021

150. Appellant in this Appeal – Bihar Holding Company's contention seems to be that since increase in the **Busy Season Surcharge and also Development Surcharge** is a change law, equally it should be treated as change in law whenever said Busy Season Surcharge and Development Surcharge are decreased. In this context, learned senior counsel Mr. M. G. Ramachandran submits that in the Remand Judgment, this Tribunal considered the increase for the period between 01.09.2014 to 14.01.2018, but has not considered the decrease and even to zero, since with effect from 15.01.2018 no such Busy Season Surcharge and Development Surcharge discontinued since they were made as part of the Dynamic Pricing Policy of the Railways. Except for certain period, these two surcharges were discontinued. Therefore, there has to be a specific direction i.e., Busy Season Surcharge and Development Surcharge when they are discontinued, the said benefit policy amounts to change law and must be extended to the Appellant Bihar Holding Company.

151. The Appellant Bihar Holding Company further contends that the Central Commission while considering the matter after remand, though allowed compensation for the increase in the Busy Season Surcharge and Development Surcharge for the period effective from 01.09.2014, but with effect from 15.01.2018, the CERC opined that there is no levy of Busy Season Surcharge and Development Surcharge. Therefore, the claim for increase is only until 14.01.2018.

152. According to Bihar Holding Company, it was not justified on the part of the Commission not to consider that the consequence of abolition/reduction from 15.01.2018 as a change in law benefit to the Bihar Holding Company. They placed reliance on Article 10.1.1 of PPA to point out that change in law means occurrence of any of the events referred to therein. Therefore, according to the Appellant, even the decrease/abolition/reduction of such surcharge ought to have been considered. This Tribunal in the Remand Judgment at Para 36 specifically opined that it amounts to change in law whenever there is escalation of price leading to increase in base price, since it does not cover increase in taxes and duties. Therefore, according to Appellant, if GMR is getting benefit of escalation for increase in any railway freight, the Appellant Bihar Holding Company is entitled to get adjustment of decrease in Busy Season Surcharge and Development Surcharge.

Therefore, they seek intervention of this Tribunal so far as the opinion of CERC on this aspect.

153. As against these arguments of Bihar Holding Company, the Respondent GKEL contends that the opinion of Central Commission on this issue that such surcharges would be liable as change in law events, question of any additional benefit falling to the GKEL would not arise even otherwise. They further contend that these charges were subsumed in the basic freight of Railways and the same gets accounted for through Escalation Indices which is effective from 15.01.2018. Therefore, according to GKEL, these charges cannot be claimed as change in law any more from 15.01.2018. Therefore, according to them, there is no justification in the claim of the Appellant Bihar Holding Company.

154. Without prejudice to their rights, GKEL further contends that it has been passing on the benefit of stoppage of levy of the above two surcharges with effect from 15.01.2018. In other words, no amount was claimed under these Heads. This is in consonance with the impugned order, since the Commission said that GKEL is entitled for such charges up to 14.01.2018. Therefore, GKEL contends that this argument of the Appellant Holding Company deserves to be rejected.

155. On perusal of the impugned order and so also the Remand Judgment, we note the following:

(i) In the Remand Judgment dated 21.12.2018 in Appeal No. 193 of 2017, we opined as under:

> "36.*Reading of the above paragraphs, it is clear that escalation price pertains to increase in base price and it does not cover increase in taxes and duties. This fact was reaffirmed by Tribunal in Adani judgment so also GMR Warora (mentioned above) wherein they have held as under:*
>
> > *"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 'e 'Law' and 'Indian Government Instrumentality' under the PPA."*

(ii) After the remand in the impugned order, after consideration of the matter pertaining to these surcharges, at Para 13 of the impugned order it opines as under:

> *"13. In terms of the judgment of the Tribunal, Busy Season Surcharge and Development Surcharge are covered under change in law and, therefore, the Petitioners are entitled to claim these from the Respondent as change in law. It is pertinent to mention that Busy Season Surcharge and Development Surcharge were being separately levied by Railways over and above basic freight. However, the Ministry of Railways, GOI vide its Notification No. TCR/1078/2015/07 dated 9.1.2018 has subsumed the Busy Season Surcharge and Development Surcharge under the basic freight with effective date of 15.1.2018. Accordingly, these surcharges would be allowable as change in law events only till 14.1.2018. With effect from 15.1.2018, these charges having been subsumed in the basic freight by Railways and being accounted for through the Escalation Indices published by the Commission, and the Petitioner is claiming the same in terms of the escalable component of tariff quoted by it while bidding. Therefore, these charges can no longer be claimed under change in law w.e.f. 15.1.2018. The compensation on this count needs to be computed in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to BSPHCL. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of change in law."*

156. From reading of the above relevant paragraphs of Remand Judgment and also the impugned order pertaining to these issues, what we notice is that in Appeal No. 193 of 2017, the Appellant claimed these two surcharges when they became change in law events, since they were not part of the basic price on cut-off date. Even otherwise we note that from 15.01.2018, these charges are specifically held not to be collected. It is not the case of the Appellant Bihar Holding Company that in spite of this direction, the GKEL is raising invoices claiming these amounts. On the other hand, GKEL specifically contends that from 15.01.2018 i.e., subsequent to reduction/abolition of these charges, the benefit is passed on to Bihar Discoms. They have explained how said benefit is passed on, as under:

"Benefit passed to Bihar under the head	***For period Jan'18 to Dec'19 (in Rs. Crores)***	***For period Jan'20 to Dec'20 (in Rs. Crores)***
BSS	*(2.74)*	*(1.51)*
DS	*(1.15)*	*(0.75)*
Total	*(3.89)*	*(2.26)"*

157. In light of the above discussion, we are of the opinion that so far as opinion of the CERC in respect of Busy Season Surcharge and Development Surcharge, the Appellant Bihar Holding Company's arguments cannot be sustained.

Add on premium

158. In the Appeal filed by Bihar Holding Company, they also raised grievances pertaining to add on premium charges. They contend that in the

Remand Judgment add on premium charges came to be allowed since change in law in respect of increase in the cost due to delay in development of coal block and cancellation of coal block the generator has to be compensated.

159. According to Appellant Bihar Holding Company, due to the delay in development of coal block and cancellation of coal block subsequently by virtue of the Judgment, the issue of add on premium cropped up. Therefore, according to them, to the extent that add on premium prices would have been payable even with the timely operationalization of coal block being not a change in law event and cannot be allowed.

160. Appellant further contends that GKEL entered into FSA on 28.08.2013 in respect of tapering linkage with Mahanadi Coalfields Limited. FSAs were amended from time to time. It was split between Mahanadi Coalfields Limited and Eastern Coalfields Limited. Therefore, GMR had to execute Fuel Supply Agreement with Eastern Coalfields Limited. In terms of FSA dated 28.03.2013 for tapering linkage, the supply of coal from the normative date of production of the coal block was envisaged as 18.10.2013. The supply of coal after the normative date of production i.e., when the coal block was scheduled to be operational at 75% of LOA quantity from 18.10.2013 onwards, 50% from 18.10.2014 to 17.10.2015 and 25% from

18.10.2015 to 17.10.2016. The coal is tapered over and above all three years once the coal block is operational.

161. According to Appellant Bihar Holding Company even if the coal block was operationalized instead of being cancelled, and to that extent GMR would have procured coal under tapering linkage and would have paid the add on premium price irrespective of whether the coal block was delayed or not. Therefore, the Appellant Holding Company claims that to that extent, the above quantum wherein the add on premium price provided in the FSA would have been payable even if the coal block had been operationalized, therefore, the payment is not due to any change in law. Hence, the Appellant Bihar Holding Company claims that GMR ought to have paid add on premium price for the said quantum irrespective of whether the coal block was delayed or not.. But however, the CERC did not consider this specific contention of the Appellant Bihar Holding Company, therefore, there is no finding by CERC on this aspect.

162. As against this contention of the Appellant, stand of the Respondent GKEL is that in the Remand Judgment, this Tribunal specifically opined that change in law is to be seen with respect to the position of the parties as on the cut-off date. The levy of add on premium was already opined as a change in law event by this Tribunal in the Remand Judgment. Therefore, the Appellant Bihar Discom cannot be permitted to challenge the same in this Appeal. They also bring on record the timeline table as under:

"Letter of Assurance (Tapering Linkage)	*Cut Off Date under Bihar PPA*	*Fuel Supply Agreement (which provided for Add-On Premium)*
08.07.2009	*28.03.2011*	*28.08.2013"*

163. Therefore, GKEL contends that the LOA dated 08.07.2009 issued for tapering linkage for 550 MW as well as Tapering Linkage Policy having not prescribed add on premium on price of coal delivered under tapering linkage in this Appeal, the same cannot be re-agitated since the Remand Judgment at Para 68 to 70 deals with the same.

164. According to GKEL, since the levy of add on premium was not in existence as on the cut-off date, any subsequent change resulting in the levy qualifies as change in law, therefore GKEL is entitled for compensation on this count. Hence, add on premium for the entire period of supply of tapering linkage coal till 30.06.2016, they are entitled for the same.

165. We have considered the submissions of both the parties. Para 14 onwards up to Para 19, the Commission has considered the controversy of add on premium price, which read as under:

"14. The Commission vide its order dated 7.4.2017 had earlier rejected the claim of the Petitioner for add on premium price on notified price on coal for supplies under tapering linkage holders as under:

> *"52. We have considered the submissions of the Petitioners and Prayas. The Petitioners have not placed on record any document with regard to add on procurers price on the notified price of coal for supplies under tampering linkage holders nor have explained as to how the said event can be considered under change in law in terms of Article 10.1.1 of the Bihar PPA. In any case, it appears that premium charged by the coal company for the add-on price on the notified price of coal is the result of contractual arrangement between the Petitioners and the MCL and therefore cannot be recovered under Change in Law."*

15. The Tribunal in its judgment dated 21.12.2018 had allowed the claim of the Petitioner as under:

> *"69. According to the Appellants, if Captive Coal Block had not been cancelled and if development of coal block was not delayed because of Go-No-Go policy, GKEL would not have to pay add on premium. For the reasons stated above, since the delay in development of Captive Coal Block and subsequent cancellation of the Block by virtue of judgment of Hon"ble Apex Court the consequential financial impact on account thereof in respect of add on premium is also covered as change in law.*
>
> *70. Apparently, add on premium was not part of LOA and tapering linkage policy. Therefore, we are of the opinion, Appellant GKEL is entitled for compensation for increase in cost due to continued use of tapering linkage coal on account of delay in development of coal block as well as eventual cancellation of blocks by judgment."*

Submissions of Petitioner

16. The Petitioner has submitted that the Tribunal in its judgment dated 21.12.2018 had held that Add on premium was not part of the LOA/ tapering linkage policy and qualifies as a change in law event under the Bihar PPA. It has further submitted that the Petitioner is to be compensated for add on premium paid on the coal received under *tapering linkage from MCL & ECL and therefore be entitled to the extra expenditure incurred (i.e for payment of add on premium) over and above the base price of the tapering linkage coal supplied to the Petitioner. The estimated compensation claimed by the Petitioner for Add-on premium is as under:*

(₹ in crore)

2014-15	***2015-16***	***2016-17***	***2017-18***	***2018-19***	***Total***
2.00	*4.00*	*2.00*	*-*	*-*	*8.00*

The Petitioner has submitted that the amount claimed as above is inclusive of the compensation claimed towards cancellation of captive coal blocks.

Submissions of Respondents BSPHCL & Prayas

17. The Respondents have submitted as under:

(a) The Tribunal has allowed change in law in respect of levy of add-on premium price on account of delay in operationalization and cancellation of coal blocks. Therefore, the use of tapering linkage coal due to delay and cancellation of coal block only has to be considered for any relief.

(b) The policy of tapering linkage is that the coal tapered off over a period of three years once the coal block is operational. Thus, the Petitioner would have continued to receive coal from the tapering linkage after the normative date of production even if the coal block is operationalized. To that extent, the Petitioner would have anyway procured coal under tapering linkage and paid the Add on premium price irrespective of whether the coal block was delayed on not.

(c) To the extent of the quantum wherein the add on premium price provided in the FSA would have been payable even if the coal block had been operationalized, the payment is not due to any change in law etc., related to Go-No-Go Policy or judgment of the Hon"ble Supreme Court in Manohar Lal Sharma vs Principal Secretary & ors dated 25.8.2014. Thus, the quantum of coal in respect of which compensation is to be considered is the quantum excluding the above quantum.

(d) As regards the amount claimed, there is no computation or supporting documentation.

18. The Petitioner has clarified that Add-on premium is a part of the financial impact incurred by them on account of delay in development of coal blocks and subsequent cancellation by the Hon'ble Supreme Court. The Petitioner has submitted that it was constrained to procure coal from tapering linkage post the scheduled operationalization of the captive coal blocks on account of the Go-No-Go Policy of GOI which was beyond the control of the Petitioner and this aspect has been recorded by the Tribunal in the said judgment. It has further clarified that no Add-on premium price would have been payable by the Petitioner, had the captive coal blocks operationalized as per the schedule. Accordingly, the Petitioner has prayed that it is entitled for relief for increase in cost due to payment of add-on premium price paid on the notified price of coal supplied to the tapering linkage holders.

Analysis & decision

19. The matter has been examined. The Petitioner had quoted tariff considering the coal availability from linkage and its own captive coal blocks since as on date of the bid, the Petitioner had the coal linkage as well as allocated coal block. However, the Petitioner was onstrained to procure coal from tapering linkage with add on premium price post the scheduled operationalization of captive coal blocks (17.10.2013) on account of the Go-No-Go Policy of the Government of India (in force up to 31.8.2012) and the same was beyond the control of the Petitioner. Subsequently, due to cancellation of coal blocks by the Hon"ble Supreme Court, including Rampia coal block (allotted to the Petitioner) vide judgment dated 25.8.2014/24.9.2014, there has been continued use of tapering linkage coal. The Tribunal in the said judgment (as quoted above) while observing that the Petitioner is entitled for compensation for the increase in cost due to continued use of tapering linkage coal on account of the delay in development of captive coal blocks and the subsequent cancellation of coal blocks as per judgment of the Hon'ble Supreme Court, has held that add-on premium was not part of the LOA/ tapering linkage policy and qualifies as a change in law event. Accordingly, the Petitioner is entitled for the additional expenditure incurred for payment of add-on premium over and above the base price of the tapering linkage coal received from

MCL and ECL. It shall be computed in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actuals, whichever is lower, for supply of electricity to BSPHCL. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of change in law."

166. According to the impugned order, though by virtue of Judgment dated 07.04.2017, claim of the Petitioner for add on premium price on the notified price of coal pertaining to tapering linkage was rejected. Subsequently, the same came to be allowed by virtue of the Judgment dated 21.12.2018 wherein the Tribunal opined that add on premium price was not part of LOA and Tapering Linkage Policy, therefore, GKEL is entitled for compensation for increase in cost due to continued use of tapering linkage coal on account of delay in development of coal block which was followed by cancellation of captive coal block eventually.

167. CERC opines that the cancellation of coal blocks was beyond the control of the generator since it was cancelled on account of Judgment of the Hon'ble Supreme Court, therefore the generator had to depend on tapering linkage coal. By placing reliance on the Judgment of this Tribunal dated 21.12.2018, the CERC opined that there was no good reason warranting interference with the same.

168. We notice that if the Appellant Bihar Holding Company was aggrieved by the opinion of this Tribunal in granting add on premium price, it ought to have become part of their challenge in the Civil Appeal pending for adjudication before the Hon'ble Supreme Court. Since we have already expressed our opinion in the Remand Judgment on this issue, and so also on consideration of facts, we reiterate our opinion that GKEL is entitled for compensation for the increase in cost due to continued use of tapering linkage coal because of delay in the development of coal block which was eventually cancelled.

<u>Carrying cost</u>

169. The next point contended by the Appellant Bihar Holding Company is with regard to carrying cost. According to the Appellant, the carrying cost if at all considered can be considered only from the date of filing of the complete information, but not in respect of prior period to the filing of the Petition which was prior to the Petition i.e., prior to 15.04.2015. The Petition came to be filed seeking change in law benefits only on 15.04.2015.

170. On perusal of dates to know when such change in law event would have happened which is contended at Para 69 of the written submission of the Appellant Bihar Holding Company (Bihar Discom), according to Bihar

Discoms, there was considerable delay in filing the claim itself. Therefore, GKEL is not entitled for carrying cost in respect of impact of change in law from the date of change in law/date of actual expenditure having incurred and the impact crossing the threshold of 1% of Letter of Credit.

171. The contention of the Appellant Bihar Discom is that the delay was not seriously denied by GKEL, but only in the reply they advanced serious challenge to this claim of the Bihar Discom which is nothing but an afterthought. They find fault with CERC's impugned order on the ground that CERC was not justified in granting such benefit in the light of various Judgments placed on record by the Appellant Bihar Discom where CERC and other State Commissions have denied carrying cost until the filing of the Petition or period prior to the date of filing of the Petition.

172. However, based on the Judgment of the Hon'ble Supreme Court in ***Uttar Haryana Bijli Vitaran Nigam Limited vs. Adani Power Limited*** *[(2019 5 SCC 325]*, which was relied upon by the GKEL, the Commission in the impugned order allowed the carrying cost.

173. According to Appellant Bihar Discom, though PPA does not provide that the carrying cost has to be from any specific date, but on the other hand PPA provides a clause for submission of documentary proof of impact of change in law in terms of Article 10.3.3 and 10.3.4 of the PPA. These provisions were not available in the PPA between Adani Power Limited and Haryana Distribution Companies. Therefore, the reliance placed by GKEL on the Judgment of ***Uttar Haryana Bijli Vitaran Nigam Limited vs. Adani Power Limited*** is totally misplaced.

174. If the GKEL has failed to demonstrate the occurrence of change in law and if it fails or delays in its obligation, for no fault of the Appellant Bihar Holding Company, additional burden cannot be passed on to the consumers by the Discom. The restitutionary principle cannot mean that the generator should get carrying cost even for the period of delay caused by the generator. Therefore, the Appellant Bihar Discom contends that the opinion of the CERC in the impugned order is unjust and it deserves to be interfered.

175. As against this, GKEL placed reliance on the Judgment in ***Uttar Haryana Bijli Vitaran Nigam Limited vs. Adani Power Limited***. It is argued on behalf of the Appellant that Article 13.2 of PPA in the above Judgment of ***Adani Power*** pertaining to restitutionary principle provides that the party must be restored to the same economic condition as if change in law did not take place. Therefore, the computation of compensation has to be from the date on which the impact of change in law started and not from the date of order granting compensation for change in law. Therefore, according to GKEL, it is entitled for carrying cost from the effective date of change in law event and the contention of the Bihar Discom that it is payable only from the date when the Petition is filed is quite contrary to the opinion expressed by the Hon'ble Supreme Court in the case of ***Uttar Haryana Bijli***.

176. GKEL also placed reliance on ***Nabha Power Limited vs. PSPCL*** *reported as [(2018 ELR (SC) 001 Para 72]* wherein the Hon'ble Supreme Court opined that carrying cost is computed from the date when Petition was filed/when complete information was provided, it would amount to insertion of an implied term which is impermissible.

177. The provision of PPA does not impact the liability of payment of carrying cost, according to GKEL. It merely states that the date from which compensation shall be payable in terms of determination of compensation by the CERC, it would be final and binding. Therefore, the PPA relied upon by the Bihar Discom i.e., Article 10.3.4 cannot be accepted as standard phrase in PPAs. As per the PPA in question, GKEL is entitled for relief qua the expenditure incurred till order of the CERC. Therefore, as long as there is a proof of expenditure by GKEL, question of adjustment in carrying cost payable to GKEL for the time taken by GKEL to provide all required information would not arise.

178. GKEL further contends that the carrying cost is to be for compensation on payment already made towards change in law events till the decision of the Commission. This payment of carrying cost will not endure any additional and undue benefit to GKEL.

179. According to GKEL, all the Judgments referred to by Bihar Discom were in the context of agreements under Section 62 of the Electricity Act. Therefore, those Judgments cannot be equated to the restitutionary principles enunciated under the PPAs wherein the tariff has been adopted under Section 63 of the Act, hence, contention of the Bihar Discom is to be rejected. They also referred to the latest Judgment of this Tribunal in ***Coastal Gujarat Power Limited vs. Central Electricity Regulatory Commission & Ors.*** in Appeal Nos. 172 of 2017 and 154 of 2018 dated 27.04.2021 and submits that similar contention of Bihar Discom was rejected by this Tribunal.

180. Upon consideration of the arguments of both the parties and so also perusal of various Judgments relied upon by the parties, we note that this Tribunal in the Remand Judgment dated 21.12.2018 did opine that the generator claimant was entitled for carrying cost. The basis for the claim of carrying cost was on the principle of restoration to same economic position which include grant of carrying cost. We note that it was open for Appellant

Bihar Discom to contend from what date the carrying cost had to be paid. Though there was argument whether carrying cost has to be allowed or not before this Tribunal when parties argued the case pertaining to Remand Judgment from what date it has to be paid was not raised. The Judgment of the Tribunal in Appeal No. 210 of 2017 dated 13.04.2018 (***Adani Power Limited vs. CERC and Ors***.) wherein carrying cost was allowed, is under challenge before the Hon'ble Supreme Court in Civil Appeal No. 5865 of 2018 and Civil Appeal No. 6190 of 2018. The Judgment of the Tribunal was upheld by the Hon'ble Supreme Court. The relevant paragraph of the Judgment is as under:

> *"10. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and 16.02.2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn.*
>
> *This being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective. This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 04.05.2017that the CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 01.04.2015. This being the case, it would be fallacious to say that*

> *the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal…*
>
> *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."*

181. By rejecting the submissions of Bihar Discom, this Tribunal in the recent Judgment dated 27.04.2021 in the case ***Coastal Gujarat Power Limited vs. Central Electricity Regulatory Commission & Ors.*** in Appeal Nos. 172 of 2017 and 154 of 2018 opined as under:

> *"167. The claim of the appellant for Carrying Cost is borne out from the restitutionary principle that is in-built in Article 13.2 of the PPA, being particularly covered by Article 13.4.1(i). Therefore, adjustment in monthly tariff payment becomes effective from the date of imposition or levy of the CIL events. The restitutionary principle under Article 13.2 will kick in for the reason that it is only after the notification or imposition or levy of the CIL events that the consequent additional expenditure is being allowed as a CIL event under Article 13.*
>
> *168. While resisting the appeals on this subject, the respondents contend that the benefit will inure only from the date the appellant approached the CERC and not earlier since there has been inordinate delay. This submission is neither correct nor fair. The effect of CIL is suffered from the date of such event. There is sufficient documentary proof adduced to show that the appellant had been informing the Procurers about Change in Law events since 11.07.2011, initially respecting the impact during construction period and thereafter for the operation period, the latter (Procurers) having responded by some letters exchanged during 2011 to 2015,*

holding meetings to discuss the subject amongst themselves, auditor having been appointed at their instance, the report of auditor having been shared on 21.11.2014, another Procurers' Meet on 30.03.2015 having failed to bring about agreement, it being insisted by some (Punjab and Haryana Procurers) for the matter to be taken to the Commission, lack of consensus being eventually communicated by letter dated 15.04.2015 (by GUVNL) asking the CGPL to take appropriate action under the PPA. The petition was filed before CERC on 08.06.2015.

169. Reliance is placed by the appellant on ruling in UHBVNL v. Adani Power Limited & Ors. (2019) 5 SCC 325 to the effect that the adjustment in monthly tariff payment on account of Change in Law shall be reckoned and made effective from the date of CIL in case the CIL happens by way of adoption, promulgation, notification, amendment, re-enactment or repeal of law. Clearly, if the relief for CIL is to be effected from the date on which the CIL has occurred, Carrying Cost has to be paid from the date on which the affected party became out of pocket due to the impact of CIL. This is also the letter and spirit of Article 13 of PPA.

170. Thus, we accept the contention of the appellant and direct that the carrying cost in respect of the additional expenditure allowed on account of nexus with CIL events shall also be allowed for the period(s) from which the Seller (appellant) incurred such additional expenditure, be it by payment to State under taxation laws or otherwise borne for infrastructural developments mandated by law. Needless to add, the CERC will have to pass necessary orders in such regard."

182. Once the PPA contains a restitutionary principle which provides that a party must be restored to the same economic position as if change in law did not take place, then the compensation is payable from the date of impact of the event of change in law and not on the date of granting compensation for change in law. We are of the opinion that the carrying cost must necessarily be calculated from the effective date of change in law event and not when the claim of the claimant is adjudicated upon. If we opine that the carrying cost would become payable only when the claim for compensation gets adjudicated, then the final adjudication may get postponed in view of filing of Appeal before this Tribunal and thereafter Civil Appeal before the Hon'ble Supreme Court. Therefore, contention of Bihar Discom that carrying cost would be payable only after determination or adjudication of compensation cannot be appreciated.

183. Para 10.2 of the PPA contains restitutionary principle which is the basis for carrying cost. We agree with the contention of the GKEL that provision in Article 10.3.4 of PPA merely says that the decision of CERC with regard to determination of compensation and date from which such compensation shall be payable will be final and binding. At any stretch of imagination, it cannot be considered that the Article 10.3.4 provides that compensation shall be payable only when it is determined by CERC. **Therefore, we are of the opinion that the contention of the Appellant Bihar Discom with regard to the date from which carrying cost is payable cannot be the date when the Petition is filed or when the Petition is determined awarding compensation, but the carrying cost is payable when the event of change in law happens i.e., the impact of change in law occurs.**

Compensation for shortfall in coal

184. Then coming to the other contention i.e., **compensation for shortfall in coal** available under the FSA, according to Appellant, in the Remand Judgment, this Tribunal did not deal with the effect of shortage below 65%, 65%, 67% and 75%. In fact, the GKEL did not raise such issue on the shortage of coal below the above said percentage in the proceedings of Appeal No. 193 of 2017 which led to Remand Judgment.

185. According to Appellant Bihar Holding Company, the methodology for shortage of supply of coal ought to have been considered. The percentages are specified in the NCDP 2013 and the Ministry of Power letter dated 31.07.2013 as well as Ministry of Coal communication dated 22.05.2017. For the first time this aspect arose before the CERC after the Remand Judgment of this Tribunal. Therefore, the GKEL cannot contend that Bihar Discom is raising such issue which was not considered and decided by this Tribunal in Appeal No. 193 of 2017.

186. According to Appellant Bihar Discom, CERC has acted contrary to the decision already taken by CERC in the case of the GMR itself in Petition No. 79/MP/2013 dated 03.02.2016 relating to the same generating station. The

Bihar Holding Company was a party though no relief was sought against the Bihar Holding Company.

187. According to the Appellant Bihar Discom, CERC failed to appreciate that there is a valid reason and rationale for the decision in Petition No. 70/MP/2013. Therefore, according to Bihar Discom, even the methodology for calculation for shortage of supply of coal was wrongly assessed in the impugned order.

188. As against this, GKEL contends that principles of *res judicata* applies in the present case. Therefore, Bihar Discom cannot raise the said issue because by virtue of constructive *res judicata* the issues which could have been raised, but not raised are deemed to have been foregone or abandoned. According to GKEL, the said principle is applicable at two stages i.e., if an issue has been decided at an earlier stage against a party, it cannot be allowed to be re-agitated by such party at a subsequent stage in the same suit or proceedings. The other stage is if such issue was already decided between the same parties, in other proceedings it cannot be raised. Therefore, the compensation for shortfall in coal with the effect of shortage being below 65%, 65%, 67% and 75% could not have been raised for the first time by the Bihar Discom.

189. By raising this argument, the Bihar Discom is seeking that the percentage specified in NCDP 2013 should be considered for computing shortfall, but CERC has allowed shortfall against 100% assurance which is incorrect. It is well settled principle that if an issue has been decided at an earlier stage against a party, it cannot be re-agitated in the same proceedings between the parties. Reliance is placed on the Judgment in ***Hope Plantations vs. Taluk Land Board, Peermade & Anr.*** *[(1999) 5 SCC 590]*, relevant Paragraphs read as under:

> *"17. (...) This Court dismissed the appeal on the ground that the principle of constructive res judicata was applicable in the circumstances and referred to its earlier decision in Daryao v. State of U.P. [AIR 1961 SC 1457 : (1962) 1 SCR 574] holding that* ***the general principle underlying the doctrine of res judicata is ultimately based on considerations of public policy. One important consideration of public policy is that the decisions pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by appellate authorities; and the other principle is that no one should be made to face the same kind of litigation twice over, because such a process would be contrary to considerations of fair play and justice……***
>
> *19. In Y.B. Patil v. Y.L. Patil [(1976) 4 SCC 66 : AIR 1977 SC 392] this Court said that:*
>
> > *"It is well settled that principles of res judicata can be invoked not only in separate subsequent proceedings, they also get attracted in subsequent stage of the same proceedings. Once an order made in the course of a proceeding becomes final, it would be binding at the subsequent stage of that proceeding."*
>
> *31. Law on res judicata and estoppel is well understood in India and there are ample authoritative pronouncements by various courts on these subjects. As noted above, the plea of res judicata, though*

> *technical, is based on public policy in order to put an end to litigation. It is, however, different if an issue which had been decided in an earlier litigation again arises for determination between the same parties in a suit based on a fresh cause of action or where there is continuous cause of action. The parties then may not be bound by the determination made earlier if in the meanwhile, law has changed or has been interpreted differently by a higher forum. But that situation does not exist here.* ***Principles of constructive res judicata apply with full force. It is the subsequent stage of the same proceedings. If we refer to Order XLVII of the Code (Explanation to Rule 1) review is not permissible on the ground***
>
> *"that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment."*

190. It is also seen that the Remand Judgment was challenged before the Hon'ble Supreme Court wherein no such relief is pleaded but the same is pending adjudication. There is categorical statement of the GKEL that this ground was not contended in Civil Appeal No. 3123 of 2019 pending before the Hon'ble Supreme Court. Therefore, by virtue of the Remand Judgment, the issue which has become final i.e., 100% shortfall considered vis-à-vis 100% assurance cannot be allowed to be re-agitated by Bihar Discom.

191. According to GKEL, the assurance of supply of coal was up to 100% of normative requirement in terms of LOA. This Tribunal in the Remand Judgment placing reliance on Clause 2.2 of NCDP 2007 has opined that GKEL had assurance of 100% supply of coal. It is also seen that the bid of the GKEL was based on SLC-LT allocation and LOA. The FSA has come into existence much after cut-off date. We also place reliance on the Judgment dated 14.09.2020 in Appeal No. 182 of 2019 in the case of ***Adani Power Maharashtra Ltd. vs. MSEDCL and Ors.***. In this Judgment, this Tribunal had an occasion to consider the so-called percentage specified in NCDP 2013. In this Judgment, the Tribunal opined that the percentage specified in NCDP cannot be considered for computing compensation.

192. We also opined in Appeal No. 202 of 208 dated 14.09.2019 [(***Jaipur Vidyut Vitran Nigam Limited & Ors. vs. RERC & Ors.)*** **for short "Adani 202 Judgment]** referred to above that compensation for shortfall of coal has to be computed by taking assurance under NCDP 2007 vis-à-vis the actual supply of coal to the project. This ***Adani 202*** Judgment came to be challenged before the Hon'ble Apex Court. Civil Appeal came to be dismissed confirming the Judgment of this Tribunal including all directions regarding computation of compensation. Relevant Paragraphs of the Judgment in ***Jaipur Vidyut Vitran Nigam Ltd. & Ors. vs. Adani Power Rajasthan Ltd. & Anr.*** *[reported as 2020 SCC Online SC 697]* are as under:

> ***50.*** *Shri C. Aryama Sundaram argued that the FSA related approximately 61 per cent of the fuel requirement. Thus, the change in law claim may be confined to 35 to 40 per cent. The argument*

cannot be accepted as bidding was not based on dual fuel, but was evaluated on domestic coal. There was no such stipulation that evaluation of bidding was done on domestic basis; the tariff was to be worked out in the aforesaid ratio of 60 : 40 per cent of imported coal and domestic coal respectively. Apart from that, we find from the order of the APTEL, that change in law provision would be limited to a shortfall in the supply of domestic linkage coal. The finding recorded by the APTEL is extracted hereunder:

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

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

> ***"70.** It was argued that the RERC and the APTEL had not determined the amount. It is apparent that the principle has been worked out by the RERC as well as the APTEL. The quantification directions have been issued to Rajasthan Discoms to verify the documents submitted by APRL and make payment in terms of the judgment and order. Nothing further was required to be done by the RERC as well as the APTEL."*

193. Therefore, we are of the opinion that the shortfall of coal is to be computed vis-à-vis 100% assurance under NCDP 2007 vis-à-vis the actual supply received by GKEL. It cannot be limited to the percentage envisaged under NCDP 2013 as contended by the Bihar Discom. Once the proposition of law has been laid down and confirmed by the Hon'ble Supreme Court, any decision which is passed by any other authority cannot come to the assistance of the Appellant Bihar Discom. Therefore, the NCDP 2007 having promised 100% supply of coal, at this stage when the Appellant all along had the benefit of NCDP 2007 promise, there is no justification to apply NCDP 2013 as claimed by the Appellant Bihar Discom.

194. We are of the opinion that GKEL is entitled for the benefit for the assurance of 100% coal and not lesser percentage as envisaged in NCDP in 2013.

195. In light of our discussion in the foregoing paragraphs, we are of the opinion that the Appeal No. 423 of 2019 filed by GMR Kamalanga deserves to be allowed as prayed for. The Appeal No. 173 of 2021 filed by Bihar State Power (Holding) Company {Bihar Discom) deserves to be dismissed. Accordingly, we pass the following order:

O R D E R

(a) Appeal No. 423 of 2019 is allowed setting aside the impugned order to the extent it relates to the issues covered in Appeal No. 423 of 2019.

(b) Consequently, GKEL is entitled to recover expenditure involved in procurement of alternate coal due to shortfall in domestic coal supply corresponding to scheduled generation pertaining to Bihar PPA obligation in order to restore the Appellant to the same economic position as before as if no change in law event has occurred.

(c) Appeal No. 173 of 2021 stands dismissed upholding the impugned order partly to the extent the issues involved in the Appeal No. 173 of 2021.

(d) GKEL is entitled for carrying costs from the date of change in law events till the dues are paid.

(e) All the amounts due and payable to the generator, the GKEL by the Bihar Discom under various change in law events shall be paid along with carrying costs in accordance with law within six weeks from today.

196. All the pending IAs, if any, shall stand disposed of. There shall be no order as to costs.

Pronounced in the Virtual Court through video conferencing on this the **6th day of August, 2021**.

(Ravindra Kumar Verma) **Technical Member**	**(Justice Manjula Chellur)** **Chairperson**

REPORTABLE / ~~NON-REPORTABLE~~

ts/tpd