IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 148 OF 2019

Dated: 21.10.2022

Present: Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

In the matter of:

ADANI POWER MAHARASHTRA LIMITED
"Adani" House,
Nr. Mithakhali Six Road
Navrangpura,
Ahmedabad – 380 009 ... Appellant(s)

VERSUS

1. MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
[Through its Secretary]
World Trade Centre, Centre No.1, 13th Floor,
Cuffe Parade, Colaba,
Mumbai – 400 005

2. MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LTD.
[Through its Chairman and Managing Director]
4th Floor, Prakashgadh,
Plot No. G-9, Anant Kanekar Marg,
Bandra (East)
Mumbai – 400 051 … Respondents

Counsel for the Appellant (s): Mr. Amit Kapur
Mr. Sourav Roy
Mr. Prabudh Singh
Mr. Kaushal Sharma
Mr. Akshat Jain
Mr. Avdesh Mandloi
Mr. Shikhar Vermath

Counsel for the Respondent (s): Mr. G. Saikumar
Mr. Anup Jain for R-2

J U D G M E N T *(Oral)*

PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

1. The appellant, a generator operating and maintaining coal fired thermal power plants, having contractual arrangements with the second respondent i.e. *Maharashtra State Electricity Distribution Company Limited* ("MSEDCL"), is aggrieved on account of denial of compensation claimed in relation to additional burden of transportation cost of fly ash arising out of Notification dated 21.01.2016 of the *Ministry of Environment, Forest and Climate Change* ("MOEF&CC") of the Government of India, by Order dated 26.01.2019 of first respondent i.e. *Maharashtra Electricity Regulatory Commission* ("MERC" or "the State Commission"), is in appeal assailing, *inter alia,* the view taken to the effect that the generator (the appellant) might first seek the transportation costs from the government agency executing the infrastructure projects utilizing the fly ash. The appellant rests its case for claim of compensation on the *Change in Law* ("CIL") clauses forming part of the *Power Purchase Agreements* ("PPAs") that bind the parties, invoking the restitutionary principle enshrined therein primarily on the strength of ruling of Hon'ble Supreme Court reported as *Energy Watchdog & Ors vs. CERC & Ors*. (2017) 14 SCC 80.

2. The background facts are admitted in entirety and may be taken note of at the outset. The power projects at Trioda were set up and the PPAs signed with the second respondent (MSEDCL), the appellant having been

selected through competitive bidding process under Section 63 of Electricity Act, 2003. There are, in all, four PPAs signed between the parties, they being dated 08.09.2008, 31.03.2010, 09.08.2010 and 26.02.2013 for capacity of 1320 MW, 1200 MW, 125 MW and 440 MW (aggregate contracted capacity being 3085 MW) respectively. The *Cut off Dates* (seven days prior to the bid deadline) in respect of the said PPAs are 14.02.2008, 31.07.2009, 31.07.2009 and 31.07.2009 respectively. Each PPA provides for compensation on account of occurrence of CIL events, it forming part of Article 13 of the first PPA (dated 14.02.2008), the corresponding clauses – Article 10 – of the other three PPAs being similar. We may note, Article 13 of PPA dated 08.09.2008, which should suffice for the other PPAs as well, the same reading as under:

> *"13.1 Definitions*
>
> *In this Article 13, the following terms shall have the following meanings:*
>
> *13.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:*
>
> *(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or*
>
> *(ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation*
>
> *but shall not include*
>
> *(i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or*
>
> *(ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission.*
>
> *13.1.2 "Competent Court" means:*

The Supreme Court or any High Court, or any tribunal or any similar judicial or quasi-judicial body in India that has jurisdiction to adjudicate upon issues relating to the Project.

13.2 Application and Principles for computing impact of Change in Law

While determining the consequence of Change in Law under this Article 13, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff payments, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such Change in Law has not occurred.

a) Construction Period

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

For every cumulative increase/decrease of each Rupees One lakh twenty five thousand (Rs 1.25 lakhs) in the per MW capital cost, in relation to the Installed Capacity over the term of this Agreement, the increase/decrease in Non Escalable Capacity Charges shall be an amount equal to -zero point two six seven percent (0.267%) of the Non Escalable Capacity Charges. Provided that the Seller provides to the Procurer documentary proof of such increase/ decrease in Capital Cost for establishing the impact of such Change in Law. In case of Dispute, Article 17 shall apply.

It is clarified that the above-mentioned compensation shall be payable to either Party, only with effect from the date on which the total increase/decrease exceeds amount of One lakh twenty five thousand (Rs 1.25 lakhs) in the per MW capital cost, in relation to the Installed Capacity

b) Operation Period

As a result of Change in Law, the compensation for any increase/decrease in revenues or cost to the Seller shall be determined by the Maharashtra State Electricity Regulatory Commission whose decision shall be final and binding on both the Parties, subject to rights of appeal provided under applicable Law and effective from date specified in 13.4.1.

Provided that the above-mentioned compensation shall be payable only if and for increase/ decrease in revenues or cost to the Seller is in excess of an amount equivalent to I % of the Letter of Credit in aggregate for a Contract Year.

13.3 Notification of Change in Law

13.3.1 If the Seller is affected by a Change in Law in accordance with Article 13.2 and wishes to claim a Change in Law under this Article, it shall give notice to the Procurer of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.

13.3.2 Notwithstanding Article 13.3.1, the Seller shall be obliged to serve a notice to the Procurer under this Article 13.3.2 if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurer contained herein shall be material. Provided that in case the Seller has not provided such notice, the Procurer shall have the right to issue such notice to the Seller.

13.3.3 Any notice served pursuant to this Article 13.3.2 shall provide, amongst other things, precise details of:

(a) the Change in Law; and

(b) the effects on the Seller of the matters referred to in Article 13.2.

13.4 Tariff Adjustment Payment on account of Change in Law

13.4.1 Subject to Article 13.2, the adjustment in Monthly Tariff Payment shall be effective from:

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

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

13.4.2 The payment for Changes in Law shall be through Supplementary Bill as mentioned in Article 11.8. However, in case of any change in Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed Tariff."

3. The Government of India through MOEF&CC, by its Notification no. S.O. 763(E)/1999, published on 14.09.1999, in exercise of its powers under the Environment (Protection) Act, 1986 had laid down certain guidelines and modalities for *"utilization"* of fly ash by thermal power plants. The relevant part of the said notification would read thus:

"Notification dated 14 September, 1999:

…

And, whereas, there is a need for restricting the excavation of top soil for manufacture of bricks and promoting the utilisation of fly ash in the manufacture of building materials and in construction activity within a specified radius of fifty kilometers from coal or lignite based thermal power plants;

2. Utilisation of ash by Thermal Power Plants.

All coal or lignite based thermal power plants shall utilise the ash generated in the power plants as follows: -

(1) Every coal or lignite based thermal power plant shall make available ash, for at least ten years from the date of publication of this notification, without any payment or any other consideration, for the purpose of manufacturing ash based products such as cement, concrete blocks; bricks, panels or any other material or for construction of roads, embankments, dams, dykes or for any other construction activity.

(2) Every coal or lignite based thermal power plant commissioned subject to environmental clearance conditions stipulating the submission of an action plan for full utilisation of fly ash shall, within a period of nine years from the publication of this notification, phase out the dumping and disposal of fly ash on land in accordance with the plan. Such an action plan shall provide for thirty per cent of the fly ash utilisation, within three years from the publication of this notification with further increase in utilisation by at/east ten per cent points every year progressively for the next six years to enable utilisation of the entire fly ash generated in the power plant at/east by the end of ninth year. Progress in this regard shall be reviewed after five years."

[Emphasis supplied]

4. The above-said notification of 1999 was partially modified by Notification no. S.O. 979(E)/2003 published on 27.08.2003, the relevant portion whereof may be taken note of as under:

"Notification dated 27 August, 2003:

…

1. In the said notification, in the preamble, for the words "fifty kilometers", the words "one hundred kilometer" shall be substituted.

…

3. In the said notification, in paragraph2.

(a) for the marginal heading Utilisation of ash by Thermal Power Plants", the marginal heading 'Responsibilities of Thermal Power Plants" shall be substituted;"

[Emphasis supplied]

5. The original notification of 1999 was further amended by Notification no. S.O.2804(E)/2009, published on 03.11.2009, the relevant portion reading thus:

"…

AND, WHEREAS, the representations of the brick kiln owners were considered with regard to transporting of fly ash over a long distance and also the logistics involved including the energy cost;

…

3. in the said notification, in paragraph 2, -

(a) For sub-paragraphs (1), (2) and (3), the following sub-paragraph shall be substituted namely:-

(1) All coal or lignite based thermal power stations would be free to sell fly ash to the user agencies subject to the following conditions, namely:-

(i) The pond ash should be made available free of any change on ' as is where basis' to manufacturers of bricks, blocks or tiles including clay fly ash producer manufacturing unit(s), farmers, the Central and the State road construction agencies, Public Work Department, and to agencies engaged in baclifilling or stowing of mines.

(ii) At least 20% of dry ESP fly ash shall be made available free of charge to unit manufacturing fly ash or clay-fly ash bricks, blocks and tiles on a priority basis over other users and if the demand from such agencies falls. short of 20% of

quantity, the balance quantity can be sold or disposed of by the power station as may be possible;

…

(3) New coal and, or lignite based thermal power stations and, or expansion units commissioned after this notification to achieve the target of fly ash utilization as per Table Ill given below:

Sr. No.	*Fly Ash utilization level*	*Target Date*
(1)	*(2)*	*(3)*
1	*At least 50% of fly ash generation*	*One year from the date of issue of commissioning*
2	*At least 70% of fly ash generation*	*Two year from the date of issue of commissioning*
3	*90% of fly ash generation*	*Three year from the date of issue of commissioning*
4	*100% of fly ash generation*	*Four year from the date of issue of commissioning*

The unutilised fly ash in relation to the target. during a year, if any, shall be utilized within next two years in addition to the targets stipulated for these years and the balance unutilized fly ash accumulated during first four years (the difference between the generation and utilization target) shall be utilized progressively over next five years in addition to 100% utilization of current generation o(fly ash. "

…

(6) The amount collected from sale of fly ash and fly ash based products by coal and or lignite based thermal power stations or their subsidiary or sister concern unit. as applicable should be kept in a separate account head and shall be utilized only for development of infrastructure or facilities, promotion and facilitation activities for use of(ly ash unit (100) percent fly ash utilization level is achieved; thereafter as long as 100% fly ash utilization levels are maintained. the thermal power station would be free to utilize the amount collected (or other development programmes also and in case. there is a reduction in the fly ash utilization levels in the subsequent year(s), the use o(financial return from fly ash shall get restricted to development of infrastructure or facilities and promotion or facilitation activities for fly ash utilization until 100 percent fly ash utilisation level is again achieved and maintained."

[Emphasis supplied]

6. The notification, on the basis of which the subject claim was pressed, was issued by the Government of India on 25.01.2016. The relevant part thereof may be quoted thus:

> *"15. Taking note. of the lower utilization of the ash despite demand in several infrastructure projects, Ministry of Environment issued more stringent notification to enforce the commitments given by thermal power plants as part of the environmental clearance. Subsequent to cutoff date, Notification dated 25 January, 2016 has been issued by the MoEF. Relevant part of the said notification is reproduced below:*
>
> *2. In the said notification, in paragraph 2:*
>
> *(a) after sub-paragraph (1), the following proviso shall be inserted, namely: -*
>
> *"provided further that the restriction to provide 20% o[dry ESP fly ash free o[cost shall not apply to those thermal power plants which are able to utilize 100 % fly ash in the prescribed manner. "*
>
> *(b) after sub-paragraph (7), the following sub-paragraphs shall be inserted, namely: -*
>
> *…*
>
> *10) The cost of transportation of ash for road construction projects or for manufacturing of ash based products or use as soil conditioner in agriculture activity within a radius of hundred kilometers from a coal or lignite based thermal power plant shall be borne by such coal or lignite based thermal power plant and the cost of transportation beyond the radius of hundred kilometers and up to three hundred kilometers shall be shared equally between the user and the coal or lignite based thermal power plant.*
>
> *(11) The coal or lignite based thermal power plants shall promote, adopt and set up (financial and other associated infrastructure) the ash based product manufacturing facilities within their premises or in the vicinity of their premises so as to reduce the transportation of ash.*
>
> *(12) The coal or lignite based thermal power plants in the vicinity of the cities shall promote. support and assist in setting up ofash based product manufacturing units so as to meet the requirements of bricks and other building construction materials and also to reduce the transportation.*

…

(14) The coal or lignite based thermal power plants shall within a radius of three hundred kilometers bear the entire cost of transportation of ash to the site of road construction projects under Pradhan Mantri Gramin Sadak Yojna and asset creation programmes of the Government involving construction of buildings, road. dams and embankments "

…

5. The time period to comply with the above provisions by all concerned authorities is 31st December, 2017. The coal or lignite based thermal power plants shall comply with the above provision in addition to 100 % utilization of fly ash generated by them before 31st December, 2017.

MoEF notification dated 25 January, 2016 has imposed further obligation on the coal based Thermal Power Plants to transport fly ash to the location of user within 100 km from the plant free of cost and to the user within 300 km from the plant at 50% cost of transportation so as to ensure full utilization of the ash."

[Emphasis supplied]

7. It has been the contention of the appellant that the amendment brought by Notification dated 21.01.2016, post the COD has entailed for the generator (the appellant) additional burden of expenditure on account of obligation to share/bear transportation costs of fly ash, this giving rise to a legitimate expectation of approval for pass-through by compensation in terms of the afore-quoted CIL clauses of the PPAs. On this basis, the appellant had issued CIL notices in terms of the requirements of PPA clauses on 01.09.2016 and, eventually, filed the claim before the State Commission which was registered as Case no. 301 of 2018, reliance being placed on relief having been granted in similar background by the *Central Electricity Regulatory Commission* ("CERC") by its various orders including

Order dated 19.12.2017 in Case no. 101/MP/2017, Order dated 16.03.2018 in Case no. 1/MP/2017 and Order dated 05.11.2018 in Case no. 172/MP/2018.

8. The claim of the appellant was resisted by respondent MSEDCL before MERC, *inter alia,* on the grounds that the 2016 notification does not bring about any change in the responsibility of the generator. It having failed to utilize 100% fly ash within the stipulated period, this having resulted in the burden of payment of transportation cost for distribution of the fly ash. It was the contention of the procurer (MSEDCL) that the generator had been throughout well aware of the time-lines set out in the various notifications, first being of 1999, whereunder it was obliged to utilize fly ash to the extent of 100% up to four years from the date of commissioning, the data shown having indicated utilization to have been achieved only to the extent of 60%, the subject Notification dated 25.01.2016, in the submission of MSEDCL, being a provision for "*deterrent and elaborate modalities for use of fly ash".*

9. The prayer made by the appellant before the State Commission was for following reliefs:

- *Declare that the MoEF&CC Notification dated 25.01.2016 is an event of Change in Law under the provisions· of the respective PPAs*
- *Declare that the Petitioner is entitled to actual transportation cost as per the methodology specified in Paragraph 16(/V)(b) in relation to Prayer (a) above in terms of PPAs provisions.*

- *Direct the Respondent to reimburse the Petitioner for actual transportation cost up - from FY 16-17 and FY 17-18 as per actual as specified at Para 16(/)(e)(i) along with carrying cost from the date of commencement of the change in law event till the date of this order at the interest rate as per the MYT Regulations notified by the Hon'ble Commission.*

- *Direct the Respondent to reimburse the Petitioner for actual transportation cost as per the methodology specified in Paragraph 16(/V)(b) for period of Apr 2018 and onwards in relation to Prayer (a) above in terms of PPAs provisions along with - carrying cost from the date of commencement of the change in law event till the date of this order at the interest rate as per the MYT Regulations notified by the Hon'ble Commission.*

10. The State Commission, by its impugned order, declined to grant any relief, thereby dismissing the petition seeking the above-mentioned reliefs observing, *inter alia,* as under:

> *"16. Thus, MSEDCL is right in its contention that this obligation is because most thermal power plants including APML had failed to utilize 100% of fly ash within stipulated period. The Commission is of the opinion that the objective of 'utilization of fly ash' referred in the MoEF notification has to be achieved by supplying fly ash to the users and also if necessary, it requires Thermal Power Plant to create productive assets within its premises for utilizing fly ash. Those assets cannot merely be advisory or in the nature of research work only. Such provision entails creating facility for the micro entrepreneurs for brick making and for other similar other manufacturing activities resulting in productive disposal of ash which would also create some revenue stream for TPPs while fulfilling the commitment relating to full utilization of ash.*
>
> *…*
>
> *18. The Commission notes that on account of obligations put in by same MoEF notification on certain industries for utilization of ash, following issues arise which needs serious consideration.*
>
> *18.1. The contract price of the material used in infrastructure projects includes the cost on account of transportation and royalty amount of soft rock or soil which is sought to be replaced by ash. If the contract price is not commensurately lowered on account of free transportation of ash by thermal plants and passing on the transportation cost on to*

electricity users as change in law would clearly amount to double payment for the material. Clearly such a scenario is neither envisaged nor there such intended consequences.

18.2. So, instead of making claim for change in law, thermal power generators could first seek the transportation claims from the Government agency executing the infrastructure project, the contract amount of which includes the transportation charges.

18.3. There is consequent saving to thermal stations on account of lower O&M costs for ash handling. Land which is part of the capital cost of the thermal station acquired for ash disposal would also be freed. Such a resource has an opportunity cost which would need to be computed, otherwise it would unduly benefit thermal stations not adhering to the terms of environmental clearance while claiming transportation charges from the electricity users as change in law.

19…

As per above provision of the PPAs, for claiming impact of any Change in Law event, Seller needs to provide documentary proof of increase / decrease in cost or revenue / expenses. In present Petition, APML has only submitted indicative figures of possible impact of MoEF notification dated 25 January, 2016. In the opinion of the Commission, relief for Change in Law cannot be decided on estimated impact especially when other related aspects of cost savings on account of O&M costs, land resource, revenue generated from productive assets created within the premises and promotional costs in developing ash utilizing industry in the vicinity have not been computed and included in the overall costs that include the additional transportation costs being claimed as change in law. Hence, present Petition of APML is premature.

…

21. The Commission rules that it is the primary responsibility of APML to fully utilize the fly ash as per its commitment and action plan submitted to environment ministry while setting up thermal power station in terms of governing notifications on the material date. Later notification dated 25 January 2016 is in the nature of ensuring stringent compliance for full utilization of fly ash in a sustained manner. APML will have to make its case for claims in change in law if it can clearly demonstrate the additional liability of Order _ Case No 301 of 2018 Page 27 transportation charges for ash utilization, which in the instant cases as discussed in the foregoing paragraphs does not seem so. …"

[Emphasis supplied]

11. While defending the impugned decision, the learned counsel for MSEDCL argued that the obligation to bear the transportation cost was inherent in all notifications on the subject starting with the notification issued in 1999. He submitted that the responsibility of the generator to *utilize* the fly ash itself meant that the proponent of the thermal power project would be duty bound to take out the fly ash from the project site and hand it over to the appropriate agencies for appropriate utilization by use in the manufacturing units engaged in manufacture of ash-based products or ash soil conditioner in agriculture or for road construction projects. It was argued that since the thermal power project developers had not taken the guidelines seriously, by way of amendment, introduced in 2003, the description was changed from "*utilization"* to the guidelines being in the nature of "*responsibilities".* It was also submitted that the amendment brought about in 2009 had permitted the thermal power stations to sell fly ash to the user agencies, subject to certain conditions, such provision made lending strength to the argument that it was the onus of the thermal power project developer to facilitate the transfer of the fly ash to the users, whether by sale or otherwise, it being impermissible to retain it within the power project premises and, therefore, transportation being part of the responsibilities of the former.

12. We are not impressed either with the reasoning set out in the impugned order or with its defence on above lines. In our considered view,

the State Commission has adopted an approach which was wholly misdirected and erroneous, glossing over the import and effect of the CIL clauses forming part of the contractual arrangement binding the parties and in the teeth of the settled law on the subject. We need to quote the following observations of the Hon'ble Supreme Court in *Energy Watchdog* (supra):

> *"53. However, in so far as the applicability of clause 13 to a change in Indian law is concerned, the respondents are on firm ground. It will be seen that under clause 13.1.1 if there is a change in any consent, approval or licence available or obtained for the project, otherwise than for the default of the seller, which results in any change in any cost of the business of selling electricity, then the said seller will be governed under clause 13.1.1. It is clear from a reading of the Resolution dated 21st June, 2013, which resulted in the letter of 31st July, 2013, issued by the Ministry of Power, that the earlier coal distribution policy contained in the letter dated 18th March, 2007 stands modified as the Government has now approved a revised arrangement for supply of coal. It has been decided that, seeing the overall domestic availability and the likely requirement of power projects, the power projects will only be entitled to a certain percentage of what was earlier allowable. This being the case, on 31st July, 2013, the following letter, which is set out in extenso states as follows :*
>
> > *FU-12/2011-IPC (Vol-III) Government of India Ministry of Power Shram Shakti Bhawan, New Delhi Dated 31st July, 2013 To, The Secretary, Central Electricity Regulatory Commission, Chanderlok Building, Janpath, New Delhi Subject: Impact on tariff in the concluded PPAs due to shortage in domestic coal availability and consequent changes in NCDP.*
> >
> > *Ref. CERC's D.O. No.10/5/2013-Statutory Advice/CERC dated 20.05.13 Sir, In view of the demand for coal of power plants that were provided coal linkage by Govt. of India and CIL not signing any Fuel Supply Agreement (FSA) after March, 2009, several meetings at different levels in the Government were held to review the situation. In February 2012, it was decided that FSAs will be signed for full quantity of coal mentioned in the Letter of Assurance (LOAs) for a period of 20 years with a trigger level of 80% for levy of disincentive and 90% for levy of incentive. Subsequently, MOC indicated that CIL will not be able to supply domestic coal at 80% level of ACQ and coal will have to be imported by CIL to bridge the gap. The issue of increased cost of power due to import of coal/e-auction and its impact on the tariff of concluded PPAs were also discussed and CERC's advice sought.*

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

i) taking into account the overall domestic availability and actual requirements, FSAs to be signed for domestic coal component for the levy of disincentive at the quantity of 65%, 65%, 67% and 75% of Annual Contracted Quantity (ACQ) for the remaining four years of the 12th Plan.

ii) to meet its balance FSA obligations, CIL may import coal and supply the same to the willing TPPs on cost plus basis. TPPs may also import coal themselves if they so opt.

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

3. Ministry of Coal vide letter dated 26th July 2013 has notified the changes in the New Coal Distribution Policy (NCDP) as approved by the CCEA in relation to be coal supply for the next four years of the 12th Plan (copy enclosed).

4. As per decision of the Government, the higher cost of import/market based e-auction coal be considered for being made a pass through on a case to case basis by CERC/SERC to the extent of shortfall in the quantity indicated in the LoA/FSA and the CIL supply of domestic coal which would be minimum of 65%, 65%, 67% and 75% of LOA for the remaining four years of the 12th Plan for the already concluded PPAs based on tariff based competitive bidding.

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

This issues with the approval of MOS(P)I/C.

Encl: as above Yours faithfully, Sd/-

(V.Apparao) Director

This is further reflected in the revised tariff policy dated 28th January, 2016, which in paragraph 1.1 states as under :

In compliance with Section 3 of the Electricity Act 2003, the Central Government notified the Tariff Policy on 6th January, 2006. Further amendments to the Tariff Policy were notified on 31st March, 2008, 20th January, 2011 and 8th July, 2011. In exercise of powers conferred under Section 3(3) of Electricity Act, 2003, the Central Government hereby notifies the revised Tariff Policy to be effective from the date of publication of the resolution in the Gazette of India.

Notwithstanding anything done or any action taken or purported to have been done or taken under the provisions of the Tariff Policy notified on 6th January, 2006 and amendments made thereunder, shall, in so far as it is not inconsistent with this Policy, be deemed to have been done or taken under provisions of this revised policy.

Clause 6.1 states:

6.1 Procurement of Power As stipulated in para 5.1, power procurement for future requirements should be through a transparent competitive bidding mechanism using the guidelines issued by the Central Government from time to time. These guidelines provide for procurement of electricity separately for base load requirements and for peak load requirements. This would facilitate setting up of generation capacities specifically for meeting such requirements. However, some of the competitively bid projects as per the guidelines dated 19th January, 2005 have experienced difficulties in getting the required quantity of coal from Coal India Limited (CIL). In case of reduced quantity of domestic coal supplied by CIL, vis-à-vis the assured quantity or quantity indicated in Letter of Assurance/FSA the cost of imported/market based e-auction coal procured for making up the shortfall, shall be considered for being made a pass through by Appropriate Commission on a case to case basis, as per advisory issued by Ministry of Power vide OM NO.FU-12/2011-IPC (Vol-III) dated 31.7.2013.

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

[Emphasis supplied]

13. There is no doubt in our mind that the responsibility to bear the burden of transportation cost cannot be read in any of the guidelines of MOEF&CC prior to the Notification dated 25.01.2016. The guidelines did oblige the thermal power project developer to ensure that fly ash which was not environment friendly by-product of its process, was properly utilized for purposes some of which have been mentioned earlier. The duty to so utilize meant either some proactive action on the part of the project developer to utilize the fly ash on its own or making it available to appropriate agencies. There may have been some defaults in full compliance with the obligations under 1999 notification. That might have been the reason why the original notification of 1999 underwent certain changes in 2003, 2009 and eventually in 2016. But then, the failure to abide by the said obligations in full was not the only reason for the subsequent modification. MOEF&CC also seems to have learnt from experience. The policy was evolving. What was introduced as duty to utilize was labelled, in 2003, as a responsibility. This only meant a more vigorous effort was expected to be made on the part of the generator. The 2009 amendment further facilitated the disposal by allowing certain commercial gain for the thermal power projects. But, since that does not seem to have given the desired results, the statutory authority came up with 2016 notification and, in larger public interest, created an express responsibility of the generator to share the burden of transportation expenditure. There can be no denial that it is not a matter of choice for the

power project to abide or not to abide by the directives in 2016 notification. Given the very nature of the said notification, it is nothing but a CIL event. In these circumstances, the declaration of the notification dated 25.01.2016 as an event of CIL under the provisions of the respective PPAs and further a declaration to the effect that the appellant was entitled to appropriate compensation on such basis could not have been denied.

14. The Commission has misdirected itself by recording observations *vis-à-vis* the failure of the thermal power plants to fulfill their obligations under the preceding notifications or that the 2016 notification is in the nature more of a penalty. Since the notification of MOEF&CC does not so envisage, it is meaningless to speculate that the thermal power generators could have first sought the transportation costs from the government agencies executing the infrastructure projects wherein fly ash is utilized. When the appellant had approached the State Commission for reliefs in the above nature, the entire impact on the expenditure could not have been accurately presented. That would be an exercise which would necessarily follow once the State Commission had acknowledged that the Notification dated 25.01.2016 constituted an event of CIL. Therefore, it was incorrect on the part of the State Commission to reject the claim outright holding it being immature or that it was founded on "*estimated impact".*

15. For the foregoing reasons, we find the impugned order to be incorrect, unjust and unfair. It is consequently set aside and vacated. We

declare that the Notification dated 25.01.2016 of MOEF&CC is an event of CIL within the meaning of relevant clauses (quoted earlier) of the PPAs binding the appellant and the second respondent herein. We declare that the appellant is entitled to compensation to the extent of additional burden resultantly suffered in expenditure on account of transportation cost under the said notification.

16. The case presented by the appellant would require further proceedings for determination of the actual amount of compensation which the appellant is entitled to receive from MSEDCL. The case is thus remitted for such purposes to the State Commission in light of above conclusions. The State Commission is directed to quantify the compensation that is payable, on the basis of data to be presented by the appellant, and issue necessary and consequential orders in such regard, in accordance with law.

17. The appeal is disposed of in above terms.

PRONOUNCED IN THE OPEN COURT ON THIS 21ST DAY OF OCTOBER, 2022.

(Sandesh Kumar Sharma) Technical Member	(Justice R.K. Gauba) Officiating Chairperson

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