

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

APPEAL NO. 243 OF 2021

Dated: **28.11.2022**

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

In the matter of:

ADANI POWER RAJASTHAN LIMITED

Through its Authorized Signatory

Having its Registered Office at

"Shikhar", Near Mithakhali Circle

Navrangpura, Ahmedabad-380009

.... Appellant(s)

VERSUS

**1. RAJASTHAN ELECTRICITY REGULATORY
COMMISSION**

Through its Secretary

Vidyut Viniyamak Bhawan,

Sahakar Marg, Near State Motor Garage,

Jaipur – 302001

2. JAIPUR VIDYUT VITARAN NIGAM LIMITED

Through its Managing Director

Vidyut Bhawan,

Jyoti Nagar, Jaipur – 302005

3. AJMER VIDYUT VITARAN NIGAM LIMITED

Through its Managing Director

Old Power House, Hathibhata, Jaipur Road,

Ajmer-305001

4. JODHPUR VIDYUT VITARAN NIGAM LIMITED

Through its Managing Director

Vidyut Bhawan,

Jyoti Nagar, Jaipur – 302005

.... Respondent(s)

Counsel for the Appellant (s)

:

Mr. Amit Kapur

Mr. Akshat Jain

Mr. Avdesh Mandloi

Mr. Shikhar Verma

Counsel for the Respondent(s) : Ms. Poorva Saigal
Mr. Shubham Arya
Ms. Reeha Singh for R-2,3&4

J U D G M E N T (Oral)

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

1. The claims of the appellant for compensation in terms of the Change in Law clause in the *Power Purchase Agreement* ("PPA") with the respondent beneficiaries on various subjects including busy season surcharge, development surcharge, port congestion surcharge, forex tax and carrying cost, were subject matter of appeal nos.119/2016 and 277/2016 which were decided by a common judgment of this tribunal rendered on 14.08.2018, the respondent *Rajasthan Electricity Regulatory Commission* ("the State Commission") having been directed to pass the consequential orders in its terms. The State Commission, in the said remand proceedings, heard the parties, particularly on the issue of carrying cost, the claim of the appellant being for such computation on "monthly compounding basis" the same having been disposed of by order dated 23.04.2019 which is under challenge by the appeal at hand.

2. The Commission's views on the claim of carrying cost as above are articulated in the impugned decision as under:

"8. Petitioner submitted that the Commission may grant Carrying Cost from the date the Change in Law events have come into effect to the date of order of the Commission, at the rate applicable for interest on working capital as prescribed under the RERC (Terms and Conditions for Determination of Tariff) Regulations, 2014 i.e.

Average Base Rate of State Bank of India prevalent during first six months of the previous year plus 250 basis points and may approve that the methodology for computation of Carrying Cost shall be the same methodology as applicable for LPS under the PPA.

9. Per contra Respondents submitted that principles of restitution cannot be applied to a case where a PPA is executed and the parties are strictly governed by the terms and conditions of the PPA. There cannot be any claim on equity or in restitution without there being any default on the part of the other party.

10. According to the Respondents interest or Carrying Cost under the PPA is payable only upon the delay in the payment of the supplementary bills. There is no provision in the PPA for payment of interest even for the period prior to the determination of the change in Law impact by the Commission.

11. Respondents further submitted that even if it is held that Carrying Cost is payable, the same should not be on the rates as claimed by the Petitioner. Reserve Bank of India has introduced MCLR which serves as a benchmark and was introduced to counter the base rate system. From April 2016, interest rates for every single loan, irrespective of the category, will be governed by the MCLR.

12. The only issue before the Commission in this application is to decide the Carrying Cost applicable to Change in Law events.

13. Petitioner has sought Carrying Cost at the rate applicable for interest on working capital as prescribed under the RERC (Terms and Conditions for Determination of Tariff) Regulations, 2014 i.e. average base rate of State Bank of India prevalent during first six months of the previous year plus 250 basis points.

14. Petitioner has also submitted the actual average interest rate for working capital for the period from FY 2013-14 to FY 2018-19 supported with Auditor's Certificate.

15. The Commission had asked Petitioner to submit actual rate of interest of which it arranged funds during the relevant period, duly supported by audited accounts but Petitioner instead of furnishing the same has submitted the average interest rate of working capital duly certified by the Chartered Accountants.

16. Commission observes that CERC vide its order dated 17.09.2018 passed in Petition No. 235/MP/2015 in the matter of Adani Power (Mundra) Limited Vs. Gujarat Urja Vikas Nigam Limited, has allowed the actual interest rate at which funds were arranged by the Petitioner as the Carrying Cost.

17. Commission also deems it appropriate to allow the actual interest rate paid by the Petitioner for raising the funds as certified by

Statutory Auditor based on audited accounts as the Carrying Cost for the payment of the claims under Change in Law.

18. The Petitioner shall work out the Carrying Cost in terms of this order and submit its claim to Discoms accordingly. The Carrying Cost shall cover the period starting with the date when the actual payments were made to the authorities till the date of issue of the relevant order.”

3. The appellant questions the above view taken by the State Commission submitting that it has not been duly compensated within the letter and spirit of the ruling reported as *Uttar Haryana Bijli Vitran Nigam Ltd. V. Adani Power Ltd.* (2019) 5 SCC 325, Hon’ble Supreme Court having, *inter alia*, held thus:

“10. Article 13.2 is an in-built restitutionary principle which compensates the party affected by such change in law and which must restore, through monthly tariff payments, the affected party to the same economic position as if such change in law has not occurred. This would mean that by this clause a fiction is created, and the party has to be put in the same economic position as if such change in law has not occurred, i.e., the party must be given the benefit of restitution as understood in civil law. Article 13.2, however, goes on to divide such restitution into two separate periods. The first period is the “construction period” in which increase/decrease of capital cost of the project in the tariff is to be governed by a certain formula. However, the seller has to provide to the procurer documentary proof of such increase/decrease in capital cost for establishing the impact of such change in law and in the case of dispute as to the same, a dispute resolution mechanism as per Article 17 of the PPA is to be resorted to. It is also made clear that compensation is only payable to either party only with effect from the date on which the total increase/decrease exceeds the amount stated therein.

13. 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 04.05.2017 that 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.

19. Lastly, the judgment of this Court in *Energy Watchdog v. CERC* also relied upon. In this judgment, three issues were set out and decided, one of which was concerned with a change in law provision of a PPA. In holding that change in Indonesian law would not qualify as a change in law under the guidelines read with the PPAs, this Court referred to Clause 13.2 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.”

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.”

4. The issue of proper calculation of the rate at which carrying cost is to be computed in such fact-situation came up before Hon'ble Supreme Court in subsequent appeal against judgment dated 12.08.2021 of this tribunal in appeal no.421/2019. The said civil appeal has since been decided by Hon'ble Supreme Court by judgment dated 24.08.2022

reported as *Uttar Haryana Bijli Vitran Ltd. & Anr. V. Adani Power (Mundra) Ltd. & Anr.* 2022 SCC OnLine SC 1068.

5. The following conclusions reached in the abovesaid judgment are relevant for present purposes:

“16. It is clear that the restitutionary principles encapsulated in Article 13.2 would take effect for computing the impact of Change in Law. We see no reason to interfere with the impugned judgment, wherein it has been held by the Appellate Tribunal that the respondent No. 1 – Adani Power had started claiming Change in Law event compensation in respect of installation of FGD along with carrying cost, right from the year 2012 and that it has approached several fora to get this claim settled. The respondent No. 1 – Adani Power finally succeeded in getting compensation towards FGD only on 28th March, 2018, but the carrying cost claim was denied. The relief relating to carrying cost was granted to the respondent No. 1 – Adani Power by the Appellate Tribunal vide order dated 13th April, 2018 which was duly tested by this Court and upheld on 25th February, 2019. Once carrying cost has been granted in favour of the respondent No. 1 – Adani Power, it cannot be urged by the appellants that interest on carrying cost should be calculated on simple interest basis instead of compound interest basis. Grant of compound interest on carrying cost and that too from the date of the occurrence of the Change in Law event is based on sound logic. The idea behind granting interest on carrying cost is not far to see, it is aimed at restituting a party that is adversely affected by a Change in Law event and restore it to its original economic position as if such a Change in Law event had not taken place.

17. In the instant case, the respondent No. 1 – Adani Power had to incur expenses to purchase the FGD and install it in view of the terms and conditions of the Environment Clearance given by the Ministry of Environment and Forests, Union of India, in the year 2010. For this, it had to arrange finances by borrowing from banks. The interest rate framework followed by Scheduled Commercial banks and regulated by the Reserve Bank of India mandates that interest shall be charged on all advances at monthly rests. In this view of the matter, the respondent No. 1 – Adani Power is justified in stating that if the banks have charged it interest on monthly rest basis for giving loans to purchase the FGD, any restitution will be incomplete, if it is not fully compensated for the interest paid by it to the banks on compounding basis. We are of the opinion that interest on carrying cost is nothing but time value for money and the only manner in which a party can be afforded the benefit of restitution in every which way. In the facts of the instant case, the Appellate Tribunal was justified in allowing interest on carrying cost in favour of the respondent No. 1 – Adani Power for the period between the year

2014, when the FGD was installed, till the year 2021. There was no justification for the Central Commission to have excluded the period between 2014 and 2018 and grant relief from the date of the passing of the order i.e., from 28th March, 2018 to 2021; nor is there any logic to such a segregation of time lines, particularly when the respondent No. 1 – Adani Power was prompt in raising a claim on the appellants and pursuing its legal remedies.

18. We are not persuaded by the submission made on behalf of the appellants that since no fault is attributable to them for the delay caused in determination of the amount, they cannot be saddled with the liability to pay interest on carrying cost; nor is there any substance in the argument sought to be advanced that there is no provision in the PPAs for payment of compound interest from the date when the Change in Law event had occurred.

19. The entire concept of restitutionary principles engrained in Article 13 of the PPAs has to be read in the correct perspective. The said principle that governs compensating a party for the time value for money, is the very same principle that would be invoked and applied for grant of interest on carrying cost on account of a Change in Law event. Therefore, reliance on Articles 11.3.4 r/w 11.8.3 on the part of the appellants cannot take their case further. Nor does the decision in Priya Vart's Case have any application to the facts of the present case as the said case relates to payment of compensation under the Land Acquisition Act and the interest that would be payable in case of delayed payment of compensation."

6. Having heard the learned counsel on both sides, we find the views expressed by the State Commission in the impugned order not correct when seen in light of above quoted judgment dated 24.08.2022 of the Supreme Court. We, thus, feel it just and proper to allow the appeal and set aside the impugned order of the State Commission directing it to pass the necessary order bearing in mind the subsequent decision dated 24.08.2022 of Hon'ble Supreme Court. We order accordingly.

7. Having regard to the fact that the issue has persisted for too long, it is desirable that the State Commission renders its fresh decision at the earliest. We request it to proceed with this remit expeditiously and pass

necessary order, in accordance with law, at an early date, preferably within two months from today.

8. The appeal is disposed of in above terms.

Pronounced in open court on this 28th Day of November, 2022

(Sandesh Kumar Sharma)
Technical Member

tp/ks

(Justice R.K. Gauba)
Officiating Chairperson