COURT-1

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 237 OF 2023

Dated: 18th April, 2024

Present : Hon`ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon`ble Ms. Seema Gupta, Technical Member(Electricity)

In the matter of:

Adani Power Rajasthan Ltd. … Appellant(s)
Represented through its authorised signatory
"Shikhar", Near Mithakhali Circle
Navrangpura, Ahmedabad - 380 009

Versus

1 **Rajasthan Electricity Regulatory Commission**
Vidyut, Viniyamak Bhawan, Sahakar Marg,
near State Motor Garage,
Jaipur, Rajasthan 302 001 … Respondent No.1

2 **Jaipur Vidyut Vitran Nigam Ltd.**
Through its Managing Director
Vidyut Bhawan, Jyotinagar,
Jaipur – 302 005 … Respondent No.2

3 **Ajmer Vidyut Vitran Nigam Ltd.**
Through its Managing Director,
Vidyut Bhawan, Panchsheel Nagar,
Makarwali Road, Ajmer – 305 004 … Respondent No.3

4 **Jodhpur Vidyut Vitran Nigam Ltd.**
Through its Managing Director
New Power House, Industrial Area
Jodhpur – 352 001 … Respondent No.4

5 **Rajasthan Urja Vikas Nigam Ltd.**
Vidyut Bhawan, Janpath
Joti Nagar, Jaipur – 302 005 … Respondent No.5

Counsel on record for the Appellant(s) : Mr. Amit Kapur
Ms.Poonam Verma Sengupta
Mr. Saunak Kumar Rajguru
Mr. Sidhant Kaushik
Ms. Aparajita Upadhyay
Ms. Adishree Chakraborty
Ms. Sakshi Kapoor

Counsel on record for the Respondent(s) : Ms. Poorva Saigal
Mr. Shubham Arya
Ms.Tanya Sareen
Ms.Srishti Khindaria For R-, R-3, R-4 & R-5

JUDGMENT

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I.INTRODUCTION:

This Appeal is filed by Adani Power Rajasthan Ltd. (the "Appellant" for short), under Section 111 of the Electricity Act, 2003, aggrieved by the order passed by the Rajasthan Electricity Regulatory Commission ("RERC" for short) in Petition No. 1373/2018 dated 08.02.2019. The reliefs sought by the appellant, in this appeal, are (a) to set aside the impugned order dated 08.02.2019 passed by the RERC in Petition No. 1373/18 to the extent of the grounds set out in the appeal; (b) hold and declare that the levy of execution facility charges is a change in law event in terms of the PPAs, and grant compensation to the appellant from the date of such levy i.e. 20.12.2017; and (c) grant carrying cost qua the change in law reliefs at the rate of late payment surcharge (which is 2% in excess of SBI PLR) in terms of Article 8.3.5 of the PPA.

Before considering the rival submissions, urged by Learned Counsel on either side, it is useful to take note of the contents of the impugned Order passed by the RERC in Petition No. 1373/18 dated 08.02.2019.

II. CONTENTS OF THE IMPUGNED ORDER PASSED BY THE RERC:

Petition No. RERC-1373/18 was filed by M/s Adani Power Rajasthan Ltd, before the Rajasthan Electricity Regulatory Commission ("RERC" for short), seeking determination of compensation/tariff adjustment under Section 86 of the Electricity Act, 2003 read with Article 10 of the PPA executed with the Rajasthan Discoms.

In the impugned Order dated 08.02.2019, the RERC observed that, during the hearing, both the parties had agreed to the claims regarding levy of GST on Coal and levy of GST on transportation of goods by Rail; and therefore the claims, relating to levy of GST on coal and levy of GST on transportation of goods by Rail, were being allowed as they were not contested by the parties.

In the light of Article 10 of the PPA, the RERC proceeded to deal with each change in Law claim made by the Appellant With respect to levy of GST on transportation of goods by a vessel from a place outside India up to the customs station of clearance in India, the RERC held that to claim compensation for change in law event, the appellant, under the terms of the PPA, had to establish the actual impact along with precise details; in other words, compensation could not be claimed on a notional basis; this was clear from the language of Clause 10.2.1; what was contemplated under Clause 10 of the PPA was the compensation which pre-supposed incurring of expenditure; therefore, unless the appellant demonstrated that it had been actually affected by the change and, therefore, it was not allowing the claim made for the present; and the appellant was at liberty

to approach the Commission as and when it submitted the claim in actual to the Respondents.

On imposition of evacuation facility charges by Coal India Ltd with effect from 20.12.2017, the RERC, after noting that this Tribunal in Appeal No.119/2016 and 277/2016 had held that any change in the price of coal charged by Coal India Ltd gets covered in the CERC Escalation Rates for coal and therefore this was not a Change in Law event as per the PPA dated 28.01.2010, observed that the appellant's claim related to the cost of coal which was covered under the tariff quoted in the bid; the appellant was expected to take into account all costs relating to coal while quoting the tariff in the bid; once the claim is considered to be part of the tariff quoted, the appellant will not be entitled to anything more than the value calculated as per the escalation formula incorporated in the PPA; the appellant was not entitled to be compensated on this levy except through the escalation formula; and, therefore, they were disallowing the levy of Evacuation Facility Charges by Coal India Ltd.

On imposition of service tax with respect to services provided or agreed to be provided by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India, the RERC noted the contents of paragraphs 52 and 53 of its earlier order dated 08.06.2017, and then observed that, as per the respondents, the appellants had not yet submitted actual claims in this regard; therefore, unless the appellant demonstrated that it had been actually affected by the "Change in Law", it could not make any claim for compensating it; therefore, they were not allowing the claim for the present; and the appellant was at liberty to approach the Commission as and when it submitted the claim in actual to the respondents.

On Carrying Cost, the RERC held that the appellant had already raised its detailed claim regarding carrying cost in Petition No. 577/2015; the RERC had, vide its order dated 24.09.2018, directed the appellant /Respondents to furnish detailed submissions on carrying cost with documents to substantiate its claims regarding the rate at which carrying cost should be allowed, which shall be dealt with in accordance with law and provisions of the PPAs; and, therefore, the issue of carrying cost shall be decided in that Petition. The Petition was disposed of accordingly.

III.RIVAL CONTENTIONS:

Elaborate submissions, both oral and written, were put forth by Sri Amit Kapur, Learned Counsel for the appellant and Sri Subham Arya, Learned Counsel for Respondents 2 to 5. It is convenient to examine the rival contentions under different heads.

IV.LEVY OF EVACUATION FACILITY CHARGES:

Sri Amit Kapur, Learned Counsel appearing on behalf of the Appellant, would submit that, from out of the two issues raised in the present Appeal, the Respondent- Discoms have admitted Issue No. 1 (relating to levy of evacuation facility charges) while contesting Issue No. 2; and, in view of the above, the appellant is entitled for a declaration that the levy of evacuation facility charges is a change in law event in terms of the PPAs, and for grant of compensation from the date of such levy i.e. 20.12.2017.

Sri Subham Arya, Learned Counsel appearing on behalf of Respondents 2 to 5, would fairly state that the principal issue, ie levy of evacuation facility charges, is covered by the decision of the Supreme Court in **GMR Warora Energy Limited vs Central Electricity Regulatory Commission and Ors., 2023 SCC OnLine SC 464.**

In ***GMR Warora Energy Ltd. v. CERC*, (2023) 10 SCC 401,** the Supreme Court considered, among other appeals, Civil Appeal Nos. 5005 of 2022 and 4089 of 2022 also. These two Civil Appeals were filed before the Supreme Court challenging the common judgment and order passed by this Tribunal, in ***Rattan India Power Ltd.* v. *Maharashtra Electricity Regulatory Commission*, 2022 SCC OnLine APTEL 28 (**Order in Appeal Nos. 118 of 2021 and 40 of 2022 dated 22-3-2022), While Appeal Nos. 118 of 2021 was filed before this Tribunal by Rattan India Power Ltd, Appeal No. 40 of 2022 was filed before this Tribunal by Adani Power Maharashtra Ltd. Both Rattan India Power Ltd and Adani Power Maharashtra Ltd had filed petitions before the MERC claiming compensation on the ground of "change in law" occurring on account of the Circular dated 19-12-2017 issued by Coal India Ltd, by which it had levied evacuation facility charges (for short "EFC"). These claims were rejected by the MERC vide two separate orders.

On evacuation facility charges (EFC), the Supreme Court, in its judgement in ***GMR Warora Energy Ltd. v. CERC*, (2023) 10 SCC 401,** observed that, undisputedly, EFC was imposed by Coal India Limited vide its Circular dated 19-12-2017; Coal India Limited is an instrumentality of the State; on the cut-off date, there was no requirement of EFC, which had been brought into effect only on 19-12-2017; as such, the circular of Coal India Limited dated 19-12-2017 would also amount to "change in law".

As this issue is admittedly covered by the judgement of the Supreme Court, in ***GMR Warora Energy Ltd. v. CERC*, (2023) 10 SCC 401,** it is hereby declared that the levy of evacuation facility charges is a change in law event, and the appellant is entitled for grant of compensation for such

a change in law, from the date on which such levy was imposed on them by CIL.

V.CARRYING COST AT LPS RATES:

Sri Amit Kapur, Learned Counsel appearing on behalf of the Appellant, would submit that only issue that is germane for adjudication in the present Appeal is Issue No. 2 **–** '*Whether the appellant is entitled to carrying cost at the rate of LPS (on compounding basis) in terms of the PPA?*'; admittedly, the issues arising in the present Appeal are identical to the issues involved in Civil Appeal No. 5005 of 2022 (***MSEDCL vs. APML & Anr.***), and is settled/ covered' by virtue of the Judgment of the Supreme Court dated **20.04.2023** in ***GMR Warora Energy Ltd. vs. CERC & Ors.*** **2023 SCC OnLine SC 464** (*which includes findings reg.* ***Civil Appeal No. 5005 of 2022 (*MSEDCL vs. APML & Anr*)***; in the **GMR Warora *Energy Ltd*** Judgment, the Supreme Court did not interfere with this Tribunal's finding in its Judgment in **APML vs. MSEDCL** (Appeal. No. 40 of 2022 dated 22.03.2022) awarding carrying cost at the rate of LPS; while deciding the issue of carrying cost in the **GMR Warora *Energy Ltd*** Judgment, the Supreme Court relied upon its earlier judgments governing the principle of restitution and carrying cost *viz.*: - (i) **UHBVNL vs. Adani Power Limited** (2019) 5 SCC 325; (ii) **UHBVNL vs. Adani Power (Mundra) Limited** (2023) 2 SCC 624; and (iii) **MSEDCL vs. MERC & Ors**. (2022) 4 SCC 657; the provisions of the PPA, in the present Appeal, are similar to the provisions of the PPAs considered in **GMR Warora *Energy Ltd*** Judgment**;** accordingly, the present Appeal is squarely covered by the **GMR Warora *Energy Ltd*** Judgment; the appellant's claim of carrying cost at the rate of LPS (compounded on monthly basis) is borne out of Articles 8.3.5, 8.8.1(iii), 8.8.3, 10.2.1, 10.3.4, 10.5.1, and 10.5.2 of the PPA; restitution is an integral part of the compensation granted for change in

law in terms of Article 10.2 of the PPA (**Energy Watchdog & Ors. vs. CERC & Ors. (2017) 14 SCC 80)**; it is settled position of law that carrying cost is payable as per the provisions of the PPA to compensate the affected party for the time value of funds deployed on account of change in Law events (***UHBVNL & Anr. vs. Adani Power Limited & Ors*. (2019) 5 SCC 325**); the LPS provision in the PPA is also meant for compensation towards time value of money on account of delayed payments; therefore, the rate prescribed for LPS in Article 8.3.5 of the PPA (i.e. SBAR plus 2% p.a., calculated on day-to-day basis and compounded with monthly rest, for each day of the delay) ought to be considered for the recovery of carrying cost; the appellant cannot be restored to the same economic position, as it was prior to the change in law event, unless the rate prescribed for LPS in Article. 8.3.5 of the PPA is granted towards carrying cost; and recently, in **Rattan India Power Ltd. vs. MERC & Ors. (Judgment in Appeal No. 341 of 2023 dated 06.10.2023)**, this Tribunal allowed a generator to recover carrying cost at the rate of LPS by re-agitating the settled position of law before this Tribunal.

Sri Amit Kapur, Learned Counsel, would further submit that the Respondent-Discoms seek to distinguish the applicability of **GMR Warora SC Judgment** contending that it was passed assuming that the generator had already raised a supplementary invoice seeking carrying cost; this is a misleading submission as raising of supplementary invoice is not a pre-condition for the court to award carrying cost; the following is noteworthy: - (a) since the RERC rejected the appellant's Change in Law claim, no Supplementary Invoice could have been raised by the appellant either for the principal change in law claim or towards carrying cost; (b) the generator (i.e., Adani Maharashtra) involved in **GMR Warora** SC Judgment also faced a similar scenario where the MERC rejected their

change in law claim [see **Paras 84-85** of **GMR Warora** SC Judgment], and therefore, the appellant had not raised a supplementary Invoice seeking carrying cost; and, yet, the Supreme Court granted Carrying Cost at LPS rate (on compounding basis).

Sri Subham Arya, Learned Counsel appearing on behalf of Respondents 2 to 5, would submit that the appellant is seeking carrying cost at the rate of late payment surcharge ("LPS" for short) on compounding basis with monthly rests, placing reliance on (a) **GMR Warora *Energy Ltd*: 2023 SCC OnLine SC 464**; and (b) **Uttar Haryana Bijli Vitran -v- Adani Power (Mundra) Limited, (2023) 2 SCC 624**; the matter in issue relates to **(i)** the rate at which the carrying would be payable; and **(ii)** whether the carrying cost is to be allowed at compounding basis; the appellant has relied on **GMR Warora *Energy Ltd*: 2023 SCC OnLine SC 464** to claim carrying cost at LPS rates; the present case is distinguishable from **GMR Warora *Energy Ltd***, and the said judgement of the Supreme Court is not applicable; in **GMR Warora *Energy Ltd***, the Supreme Court had laid down and/or reiterated the following: (a) *Article 11.8 of the PPA deals with Payment of Supplementary Bill. It enables either party to raise a supplementary bill on the other party for payment on account of certain events.*; (b) *LPS cannot be equated with carrying cost or actual cost incurred for supply of power* **[Quoted Para 177 of the MSEDCL -v- MERC, (2022) 4 SCC 765]**; and (c) *Article 11.8.3 of the PPA specifically provides that, in the event of delay in payment of supplementary bill by either party beyond one month of the date of billing, a late payment surcharge shall be payable at the same terms applicable to the monthly bill in Article 11.3.4*; the Supreme Court, in **GMR Warora *Energy Ltd,*** has proceeded on the basis that delayed payment of a Supplementary Bill is the pre-requisite for LPS to be applicable (Article 11.8.3 read with Article 11.3.4 (GMR PPA) in terms of the PPA; in the

present case, the appellant has not raised any supplementary bill seeking payment of amounts on account of change in law; the scheme of the PPA, in regard to payment of supplementary bills, is as under (a) under Article 10.3.2, a supplementary bill can only be raised pursuant to the decision of the Appropriate Commission; (b) Article 10.5.2 provides that payment for change in law shall be through a supplementary bill as mentioned in Article 8.8; and (c) Article 8.8.3 provides that, in the event of delay in payment of supplementary bill, LPS shall be payable in terms of Article 8.3.5; in the facts of the present case, where a supplementary bill has not been raised till date, there arises no cause for levy of LPS on Respondent Nos. 2 to 5, and they cannot assess or pay for the impact, of a change in law event on the appellant, in the absence of a Supplementary Bill.

With respect to the appellant's claim to be paid carrying cost on compounding basis, Sri Shubam Arya, Learned Counsel for Respondents 2 to 5, would submit that, in **GMR Warora *Energy Ltd*: 2023 SCC OnLine SC 464**, the Supreme Court, while relying on **Uttar Haryana Bijli Vitran Nigam Ltd vs Adani power (Mundra) Limited: (2023) 2 SCC 624**, has re-iterated that carrying cost is to be allowed on compounding basis; in **Uttar Haryana Bijli Vitran Nigam Ltd,** carrying cost on compounding interest was allowed on the basis that, *if the banks have charged it interest on monthly rests basis for giving loans to purchase the FGD unit, any restitution will be incomplete, if it is not fully compensated for the interest paid by it to the banks on compounding basis*; in view of the above, it is incumbent upon the appellant to furnish proof of the loans taken by them for the purpose of costs incurred by them; and, in case the appellant has not availed any loans, carrying cost cannot be awarded on compounding basis.

Before examining the rival submissions under this head, it is useful to take note of the relevant provisions of the Power Purchase Agreement.

A.RELEVANT CLAUSES OF THE PPA:

Article 8.3: Payment of monthly bills

Article 8.3.5: In the event of delay in payment of a Monthly Bill by the Procurers beyond its Due Date, a Late Payment Surcharge shall be payable by such Procurers to the Seller at the rate of two percent (2%) in excess of the applicable SBAR per annum, on the amount of outstanding payment, calculated on a day-to-day basis (and compounded with monthly rest), for each day of the delay. The Late Payment Surcharge shall be claimed by the Seller through the Supplementary Bill.

Article 8.8: Payment of Supplementary Bill

Article 8.8.1: Either Party may raise a bill on the other

Party ("Supplementary Bill") for payment on account of:

i) Adjustments required by the Regional Energy Account (if applicable);

ii) Tariff Payment for change in parameters, pursuant to provisions in Schedule 4; or

iii) Change in Law as provided in Article 10, and such Supplementary Bill shall be paid by the other Party.

Article 8.8.3: In the event of delay in payment of a Supplementary Bill by either Party beyond its Duc Date, a Late Payment Surcharge shall be payable at the same terms applicable to the Monthly Bill in Article 8.3.5.

Article 10.2: Application and Principles for computing impact of Change in Law.

Article 10.2.1: While determining the consequence of Change in Law under this Article 10, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through monthly Tariff Payment, to the extent

contemplated in this Article 10, the affected Party to the same economic position as if such Change in Law has not occurred.

Article 10.3 Relief for Change in Law

Article 10.3.2: During Operating Period

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

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

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

Article 10.5: Tariff Adjustment Payment on account of Change in Law

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

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

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

Article 10.5.2: The payment for Change in Law shall be through Supplementary Bill as mentioned in Article 8.8. However, in case of any

change in Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed Tariff.

B. JUDGEMENTS RELIED UPON BY COUNSEL ON BOTH SIDES:

In **Rattan India Power Ltd. vs. MERC & Ors (Order in Appeal No. 341 of 2023 dated 06.10.2023),** on which reliance is placed on behalf of the appellant, this Tribunal observed that its earlier order, passed in Appeal No. 118 of 2021 dated 22.03.2022, was no doubt stayed by the Supreme Court, when MERC passed the order impugned in this appeal; the fact remained that, during the pendency of the present appeal, the Supreme Court had passed a final order affirming the order passed by this Tribunal in Appeal No. 118 of 2021 dated 22.03.2022; the Review Petition filed there-against by MSEDCL, in RP(C) No. 840 of 2023 in CA No. 4089 of 2022, was also dismissed by the order of the Supreme Court dated 26.07.2023; the remand order passed in Appeal No. 263 of 2018 dated 18.10.2022 was not only binding on the MERC, but also this Tribunal while hearing the appeal preferred against the order passed by the MERC consequent on remand; as the order of this Tribunal, in Appeal No. 263 of 2018 dated 18.10.2022, required MERC to follow the earlier order passed by this Tribunal in Appeal No. 118 of 2021 dated 22.03.2022, MERC was obligated in law to determine the amounts payable towards carrying cost strictly in terms of the order passed in Appeal No. 118 of 2021 dated 22.03.2022 which required it to compute and determine carrying cost, payable to the Appellant, at LPS rates; and both MERC and this Tribunal (in an appeal preferred against the said order of MERC) were bound by the said order in Appeal No. 263 of 2018 dated 18.10.2022 whereby MERC was required to compute and pay the Appellant carrying cost at LPS rates, whatever may have been the opinion expressed in other judgements, and even if the view taken in such judgements was contrary

to the opinion expressed by this Tribunal in Appeal No. 118 of 2021 dated 22.03.2022.

This Tribunal then observed that the submission that the Appellant was entitled to be paid carrying cost at LPS rates on compounding basis, also necessitated rejection for the very same reason; there was nothing in the order of remand, passed by this Tribunal in Appeal No. 263 of 2018 dated 18.10.2022, requiring MERC to compute carrying cost at LPS rates on a compounding basis; and, as the remand order passed by this Tribunal was binding on both the MERC and this Tribunal, the appellant, not having chosen to prefer an appeal to the Supreme Court thereagainst and having permitted the remand order passed by this Tribunal to attain finality, could not claim such a relief. This Tribunal, however, made it clear that it was always open to the MERC to pass consequential orders which fell within the ambit of the remand order passed by this Tribunal in Appeal No. 263 of 2018 dated 18.10.2022.

The question whether the generator was entitled to recover carrying cost at LPS rates was not decided by this Tribunal in the aforesaid judgement, and it was only held that the earlier order of remand passed by this Tribunal was binding on the Commission, and on this Tribunal in an appeal preferred against the order passed by the Commission consequent on remand. Reliance placed on behalf of the appellant, on **Rattan India Power Ltd,** is therefore misplaced.

After noting that both the letter dated 31-7-2013 and the revised Tariff Policy were statutory documents issued under Section 3 of the Electricity Act and had the force of law, the Supreme Court, in **Energy Watchdog v. CERC, (2017) 14 SCC 80**, observed that in so far as procurement of Indian coal was concerned, to the extent that the supply from Coal India Ltd and other Indian sources was cut down, the PPA read with these documents provided in Clause 13.2 that, while determining the

consequences of a change in law, parties should have due regard to the principle that the purpose of compensating the party affected by such change in law was to restore, through monthly tariff payments, the affected party to the economic position as if such change in law had not occurred; and, for the operation period of the PPA, compensation for any increase/decrease in cost to the seller should be determined and be effective from such date as decided by the Central Electricity Regulation Commission.

In **Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power Ltd., (2019) 5 SCC 325,** the Supreme Court held that Article 13.2 of the PPA was an in-built restitutionary principle which compensated 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 had not occurred; this would mean that, by this clause, a fiction was created, and the party had to be put in the same economic position as if such change in law had not occurred i.e. the party must be given the benefit of restitution as understood in civil law; Article 13.2 divided such restitution into two separate periods;

it was clear from a reading of Article 13.2 that restitutionary principles applied in case a certain threshold limit was crossed in both sub-clauses (*a*) and (*b*); and if the case was covered by sub-clause (*b*) and the threshold had been crossed, the mechanism for claiming a change in law was set out by Article 13.3 of the PPA.

The Supreme Court then observed that a reading of Article 13 as a whole, led 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, had to be from the date of withdrawal of exemption which was done by administrative orders dated 6-4-2015 and 16-2-2016; the present case, therefore, fell within Article 13.4.1(*i*); the adjustment in

monthly tariff payment had to be effected from the date on which the exemptions given were withdrawn; monthly invoices to be raised by the seller, after such change in tariff, were to appropriately reflect the changed tariff; on the facts of the present case, it was clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notification became effective; the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it was only after the order dated 4-5-2017, in ***Adani Power Ltd.*** **v.** ***Uttar Haryana Bijli Vitran Nigam Ltd.*****, 2017 SCC OnLine CERC 66**, that the CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 1-4-2015; it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA; and, since it was clear that this amount of carrying cost was only relatable to Article 13 of the PPA, there was no reason to interfere with the judgment of the Appellate Tribunal.

The relevant articles of the PPAs cited before the Supreme Court, in ***Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power (Mundra) Ltd.*****, (2023) 2 SCC 624,** were Article 11 which dealt with billing and payment, and Article 13 that dealt with change in law. The Supreme Court held that they were more specifically concerned with Articles 11.3.4, 11.8.1 and 11.8.3 that had been cited to urge that only late payment surcharge (LPS) was payable by the appellants (procurer) to the first Respondent Adani Power (seller) at the rate mentioned in Article 11.3.4, but not beyond.

After extracting Articles 11.3.4, 11.8.1 and 11.8.3 of the PPA, the Supreme Court extracted Articles 13.2 and 13.4 of the PPAs which were relied upon by Respondent-Adani Power, and then observed that Article 13 had been discussed threadbare by the Supreme Court in a previous litigation between the same parties decided on 25-2-2019 (ie ***Uttar***

Haryana Bijli Vitran Nigam Ltd. **v.** ***Adani Power Ltd.*****, (2019) 5 SCC 325);** it was clear that the restitutionary principles encapsulated in Article 13.2 would take effect for computing the impact of change in law; there was no reason to interfere with the impugned judgment (***Adani Power (Mundra) Ltd.*** **v.** ***CERC*****, 2021 SCC OnLine APTEL 67**), wherein it has been held by the Appellate Tribunal that Respondent-Adani Power had started claiming change in law event compensation in respect of installation of FGD unit along with carrying cost, right from the year 2012, and that it had approached several fora to get this claim settled; Respondent-Adani Power finally succeeded in getting compensation towards FGD unit only on 28-3-2018, but the carrying cost claim was denied; the relief relating to carrying cost was granted to Respondent-Adani Power by the Appellate Tribunal vide order dated 13-4-2018 (***Adani Power Ltd.*** **v.** ***CERC*****, 2018 SCC OnLine APTEL 5)** which was upheld by the Supreme Court on 25-2-2019 (***Uttar Haryana Bijli Vitran Nigam Ltd.*** **v.** ***Adani Power Ltd.*****, (2019) 5 SCC 325);** once carrying cost was granted in favour of Respondent-Adani Power, it could not 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 occurrence of the change in law event, was based on sound logic; the idea behind granting interest on carrying cost was not far to see; it was aimed at restituting a party that was adversely affected by a change in law event, and to restore it to its original economic position as if such a change in law event had not taken place.

The Supreme Court then observed that, in the instant case, Respondent-Adani Power had to incur expenses to purchase the FGD unit and instal 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 the banks; the interest rate framework followed by scheduled commercial banks and regulated by Reserve Bank of India mandated that interest shall be charged on all advances at monthly rests; Respondent-Adani Power was justified in stating that, if the banks had charged it interest on monthly rest basis for giving loans to purchase the FGD unit, any restitution would be incomplete, if it was not fully compensated for the interest paid by it to the banks on compounding basis; interest on carrying cost was nothing but the time value for money, and the only manner in which a party could be afforded the benefit of restitution; in the facts of the instant case, the Appellate Tribunal was justified in allowing interest on carrying cost in favour of Respondent-Adani Power for the period between the year 2014, when the FGD unit 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 passing of the order i.e. from 28-3-2018 (***Adani Power Ltd.*** **v.** ***Uttar Haryana Bijli Vitran Nigam Ltd.*****, 2018 SCC OnLine CERC 8**) till 2021; nor was there any logic in such a segregation of timelines, particularly when Respondent-Adani Power was prompt in raising a claim on the appellants and pursuing its legal remedies.

The Supreme Court then observed that they were not persuaded by the submission made on behalf of the appellants that, since no fault was attributable to them for the delay caused in determination of the amount, they could not be saddled with the liability to pay interest on carrying cost; nor was there any substance in the argument sought to be advanced that there was no provision in the PPAs for payment of compound interest from the date when the change in law event had occurred; the entire concept of restitutionary principles engrained in Article 13 of the PPAs had to be read in the correct perspective; the said principle that governed

compensating a party for the time value of money, was 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; and reliance on Article 11.3.4 read with Article 11.8.3, on the part of the appellants, was misplaced.

In ***APML vs. MSEDCL*** **(Order in Appeal No. 40 of 2022, dated 22.03.2022),** this Tribunal was of the view that the Commission should be directed to determine the amounts payable by the respondent distribution licensee in favor of each of the appellants to compensate them for restoring through monthly tariff payments to the same economic position as if such change in law event had not occurred; and to revisit the prayer for carrying cost bearing in mind the well settled principles on the said subject [e.g. ***Energy Watchdog*** **(supra);** ***Uttar Haryana & Anr. (supra);*** **and** ***Jaipur Vidyut Vitran Nigam Ltd. & Ors. vs. Adani Power Rajasthan Ltd & Anr. 2020 SCC Online SC 697***].

This Tribunal held that it was settled position of law that carrying cost is payable as per the provisions of the PPA to compensate the affected party for time value of funds deployed on account of Change in Law events; the LPS provision in the PPA was also meant for compensation towards time value of money on account of delayed payment; therefore, the rate prescribed for LPS in Article 11.3.4 of the PPA (i.e., SBI PLR plus 2%) ought to be considered for recovery of carrying cost; the appellants could not be restored to the same economic position, as it was prior to the occurrence of the Change in Law events, unless the rate of interest applicable for LPS was granted.

After referring to **Uttar Haryana & Anr,** wherein it was held that the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 4-5-2017 **(Adani Power Ltd. v. Uttar Haryana Bijli Vitran Nigam Ltd., 2017 SCC OnLine CERC 66)** that the CERC held that the respondents were entitled to claim added costs

on account of change in law *w.e.f. 1-4-2015,* and it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA**;** and to **SLS Power Limited vs. Andhra Pradesh Electricity Regulatory Commission 2012 SCC Online APTEL 209,** wherein it was held that carrying cost is the compensation for time value of money or the monies denied at the appropriate time and paid after a lapse of time; this Tribunal, in **ADANI POWER MAHARASHTRA LTD. V. MERC (Judgement in Appeal No. 40 of 2022 dated 22.03.2022),** set aside the impugned orders whereby reliefs, in favour of the appellants, were denied. The cases of each appellant was remitted to the Regulatory Commission for consequential orders to be passed in the light of the observations/directions recorded in the said order.

Among the appeals which were considered by the Supreme Court, in ***GMR Warora Energy Ltd. v. CERC*, (2023) 10 SCC 401**, included an appeal preferred against the order of this Tribunal in **ADANI POWER MAHARASHTRA LTD. V. MERC (Judgement in Appeal No. 40 of 2022 dated 22.03.2022).** On carrying cost, the Supreme Court, in ***GMR Warora Energy Ltd. v. CERC*, (2023) 10 SCC 401**, observed that in ***Uttar Haryana Bijli Vitran Nigam Ltd.* v. *Adani Power Ltd.*, (2019) 5 SCC 325,** after considering the provisions of Article 11 which dealt with "Billing", and Article 13 which dealt with "change in law", the Supreme Court had observed thus:

> *"9. It will be seen that Article 13.4.1 makes it clear that adjustment in monthly tariff payment on account of change in law shall be effected from the date of the change in law [see sub-clause (i) of Clause 4.1], in case the change in law happens to be by way of adoption, promulgation, amendment, re-enactment or repeal of the law or change in law. As opposed to this, if the change in law is on account of a change in interpretation of law by a judgment of a*

court or tribunal or governmental instrumentality, the case would fall under sub-clause (ii) of Clause 4.1, in which case, the monthly tariff payment shall be effected from the date of the said order/judgment of the competent authority/tribunal or the governmental instrumentality. What is important to notice is that Article 13.4.1 is subject to Article 13.2 of the PPAs.

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.***

11. So far as the "operation period" is concerned, compensation for any increase/decrease in revenues or costs to the seller is to be determined and effected from such date as is decided by the appropriate Commission. Here again, this compensation is only payable for increase/decrease in revenue or cost to the seller if it is in excess of an amount equivalent to 1% of the Letter of Credit in aggregate for a contract year. What is clear, therefore, from a reading of Article 13.2, is that restitutionary principles apply in case a certain threshold limit is crossed in both sub-clauses (a) and (b). There is no dispute that the present case is covered by sub-clause (b) and that the aforesaid threshold has been crossed. The mechanism for claiming a change in law is then set out by Article 13.3 of the PPA."

(emphasis in original)

The Supreme Court, in ***GMR Warora Energy Ltd***, thereafter observed that, in ***Maharashtra State Electricity Distribution Co. Ltd.* v. *Maharashtra Electricity Regulatory Commission*, (2022) 4 SCC 657**, it was held that the DISCOMS had a contractual obligation to make timely payment of the invoices raised by the power generating companies, subject to scrutiny and verification of the same; the contention, that the funding cost was much lesser than the rate of LPS, was rejected and the proposition, that the courts cannot rewrite a contract which is executed between the parties, was reiterated; it was emphasised that the court cannot substitute its own view of the presumed understanding of commercial terms by the parties, if the terms are explicitly expressed; and the explicit terms of a contract are always the final word with regard to the intention of the parties.

The Supreme Court, in ***GMR Warora Energy Ltd***, further observed that, recently in ***Uttar Haryana Bijli Vitran Nigam Ltd.* v. *Adani Power (Mundra) Ltd.*, (2023) 2 SCC 624**, a similar issue was considered and it was observed thus:-

> "*20*. 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 [*Adani Power (Mundra) Ltd.* v. *CERC*, 2021 SCC OnLine APTEL 67] , wherein it has been held by the Appellate Tribunal that Respondent 1 Adani Power had started claiming change in law event compensation in respect of installation of FGD unit along with carrying cost, right from the year 2012 and that it has approached several fora to get this claim settled. Respondent 1 Adani Power finally succeeded in getting compensation towards FGD unit only on 28-3-2018, but the carrying cost claim was denied. The relief relating to carrying cost was granted to Respondent 1 Adani Power by the Appellate Tribunal vide order dated 13-4-2018 [*Adani Power Ltd.* v. *CERC*, 2018 SCC OnLine APTEL 5] which was duly tested by this Court and upheld on 25-2-2019 [*Uttar Haryana Bijli Vitran*

Nigam Ltd. v. *Adani Power Ltd.*, (2019) 5 SCC 325 : (2019) 2 SCC (Civ) 657] . **Once carrying cost has been granted in favour of Respondent 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.**

23. 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.**

24. **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 Article 11.3.4 read with Article 11.8.3 on the part of the appellants cannot take their case further. Nor does the decision in *Priya Vart case* [*Priya Vart* v. *Union of India*, (1995) 5 SCC 437] 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."

(emphasis supplied)

The Supreme Court, in ***GMR Warora Energy Ltd***, then held that it is thus clear that it had been reiterated, in ***Uttar Haryana Bijli Vitran Nigam Ltd.* v. *Adani Power (Mundra) Ltd.*, (2023) 2 SCC 624,** that, once

carrying cost has been granted, it cannot be urged 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 occurrence of the “change in law” event, was based on sound logic; it was aimed at restituting a party that was adversely affected by a “change in law” event, and to restore it to its original economic position as if such a “change in law” event had not taken place; and the argument that there was no provision in the PPAs for payment of compound interest from the date when the “change in law” event had occurred, had been specifically rejected.

C.ANALYSIS:

In **GMR Warora Energy Limited,**, the Supreme Court relied on its earlier judgment in **Uttar Haryana Bijli Vitran Nigam Limited vs. Adani Power Limited (2023) 2 SCC 624** to hold that grant of compound interest on carrying cost, and that too from the date of occurrence of the change in law event, is based on sound logic; the idea behind granting interest on carrying cost was aimed at restituting a party that was affected by a change in law event, and to restore it to its original economic position as if such a change in law event had not taken place; the contention that there was no provision in the PPA, for payment of compound interest from the date when the change in law event occurred, necessitated rejection; the entire concept of restitutionary principles, engrained in the relevant Article of the PPA, was that a party should be compensated for the time value of money; and this principle would be required to be invoked for grant of interest on carrying cost on account of change in law event.

In the light of the law declared by the Supreme Court in **GMR Warora Energy Limited,** the party which has suffered an economic disadvantage,

as a result of the change in law event, is not only entitled to be restored to its original economic position it was in but for such change in law, but would also be entitled for compound interest on carrying cost from the date on which the change in law event occurred.

It is relevant to note that Article 13.4.1 of the PPA referred to in **GMR Warora** is in pari-materia with Article 5.1 of the PPA in the present case, and Article 13.2 of the PPA referred to in **GMR Warora** is in pari-materia with Article 10.2 and 10.3 of the PPA under consideration in the present Appeal.

Article 10.5 of the PPA, which is the subject matter of the present appeal, relates to tariff adjustment payment on account of change in law, and Article 10.5.1 stipulates that, subject to Article 10.2, the adjustment in monthly tariff payment shall be effective from (i) the date of adoption, promulgation, amendment, re-enactment or repeal of the law or change in law, and (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. Article 10.5.1 is subject to Article 10.2, which relates to the application and principles for computing impact of change in law. Article 10.2.1 provides that, while determining the consequence of a change in law under Article 10, the parties shall have due regard to the principle that the purpose, of compensating the party affected by such change in law, is to restore through monthly tariff payment, to the extent contemplated in Article 10, the affected party to the same economic position as if such change in law had not occurred.

To paraphrase the Judgment of the Supreme Court in **GMR Warora Energy Limited**, Article 10.2, of the PPA in the present case, is a complete restitutionary principle which compensates the party affected by such

change in law and which must restore, through monthly tariff payment, the affected party to the same economic position they would have been if such change in law had not occurred. The legal fiction created by Article 10.2 of the subject PPA would require the appellant to be put in the same economic position as if such change in law had not occurred i.e. the appellant should be given the benefit of restitution as understood in Civil Law.

In short, the requirement of Article 10.2.1, which is the application of the restitutionary principle, can only mean that the consequence of the change in law would relate back to the date on which the law was subjected to change as a result of which the party concerned would have suffered an economic disadvantage, requiring them to be restored to the same position they were in as on that date. This, in turn, would require them to be compensated for the loss, suffered on that account, from the date the change in law occurred, and not after a supplementary bill is raised.

In the present case, the Respondent Commission has negatived the Appellant's claim of a change in law having occurred with respect to the evacuation facility charges. It is by way of the present order, and as this issue regarding levy of evacuation facility charges is covered by the judgement of the Supreme Court in **GMR Warora Energy Limited,** that the circular of Coal India Limited dated 19.12.2017 is now being declared to amount to a change in law. The benefit of the change in law, which the Appellant would be entitled to, would relate back to the date on which the circular of Coal India Limited dated 19.12.2017 was applied in the Appellant's case, and not from the date of the present judgment which is being pronounced by this Tribunal more than six years after the afore-mentioned circular was issued.

The submission of Mr. Shubham Arya, learned Counsel for Respondent Nos. 2 to 5, placing reliance on certain Articles of the PPA does not merit acceptance. A supplementary bill, for payment of carrying cost on account of a change in law, can only be raised after a competent court or Tribunal declares the event to be a change in law, ie the judgement of this Tribunal in the present case. Since the Respondent-Commission had negatived the appellant's claim for evacuation facility charges to be treated as a change in law event, it is only after the judgement of this Tribunal that it is a change in law event, and it is only thereafter would the appellant be entitled to raise a supplementary bill. Accepting the submission of Mr. Shubham Arya, learned Counsel for Respondent Nos. 2 to 5, that the Appellant would be entitled to carrying cost only after the supplementary bill is raised, would result in the appellant being deprived of the benefit, of carrying cost, for a period of more than six years between the date on which the change in law event occurred ie 19.12.2017 and the date on which the present Judgment is delivered by this Tribunal, thereby defeating the very object sought to be served by application of the restitutionary principle.

As noted hereinabove, the Supreme Court in **GMR Warora Energy Limited,** has affirmed the judgement of this Tribunal in **Adani Power Maharashtra Limited vs. MERC** (Order in Appeal No. 40 of 2022 dated 22.03.2022), wherein the rate prescribed for LPS in the relevant Article of the PPA (i.e., SBI PLR plus 2%) was directed to be considered for recovery of carrying cost; and it was held that, unless the rate of interest applicable for LPS is granted, the Appellant cannot be restored to the same economic position it was in prior to the occurrence of the change in law event. In the light of the judgement of the Supreme Court in **GMR Warora Energy Limited,** affirming the Judgment of this Tribunal in **Adani**

Power Maharashtra Limited vs. MERC & Anr. (Appeal No. 40 of 2022 dated 22.03.2022), the Appellant is entitled for carrying cost at LPS rates.

VI.ARE SETTLED ISSUES SOUGHT TO BE REOPENED BY THE RESPONDENTS?

Sri Amit Kapur, Learned Counsel appearing on behalf of the Appellant, would submit that Rajasthan Discoms are seeking to re-open closed chapters, (a practice which has been repeatedly condemned by the Supreme Court) for causing undue interest/carrying cost/LPS burden on consumers; in this regard, reliance is placed on the following: - (a) Order dated **09.03.2021** in **Nabha Power vs. PSPCL** in Contempt Petition Nos. 1174-1177 of 2019 in Civil Appeal No. 179 of 2017; (b) **MSEDCL v. APML & Ors.** (2023) 7 SCC 401; and (c) **GMR Warora SC Judgment** {*Rajasthan Discoms were one of the Discoms involved in this batch*}; in compliance of the directions of the Supreme Court in **GMR Warora SC Judgment,** the Ministry of Power ("***MoP***"): - (a) On 21.06.2023, called upon all stakeholders of the power sector including Discoms to avoid unnecessary and unwarranted litigation; and (b) on 28.06.2023, MoP also notified draft Electricity (Amendment) Rules, 2023 wherein Rule 25 is proposed to be inserted mandating that if an Order of an Appropriate Commission is appealed, then the Appellant is required to pay at least 75% of the payable amount in case of matters related to Change in Law, and at least 50% of the payable amount in remaining matters; and Para 3(iv) underscores that the underlying intent to introduce proposed Rule 25 is to avoid unnecessary and unwarranted litigation.

A.JUDGEMENTS RELIED ON BEHALF OF THE APPELLANT:

In **Nabha Power vs. PSPCL (Order in Contempt Petition Nos. 1174-1177 of 2019 in Civil Appeal No. 179 of 2017 dated 09.03.2021),** the Supreme Court held that they were taking a very serious note as they

did not expect Public Sector Enterprises to play games of this kind; it would be for the authority to consider whether any of the claims sought to be preferred by the respondents could really be open to any fresh adjudication in view of the judgment rendered by the Supreme Court, and the orders passed by them; it was made clear that the liberty to approach the SERC arose from the contract itself, but that certainly cannot open the chapters which have been closed; and that would be taken care of by the SERC while adjudicating the claim sought to be raised by the respondents.

B.ANALYSIS:

While the submissions, urged on behalf of the appellant under this head, cannot be readily brushed aside, we deem it appropriate not to dwell on this aspect as the appeal, in the present case, is preferred not by the Respondent Discoms; and it is not as if all the contentions, raised by the appellant in the present appeal, are being accepted. Suffice it to add that draft rules do not have the force of law, and cannot be relied upon.

VII.IS THE JUDGEMENT OF THE SUPREME COURT IN GMR WARORA A BINDING PRECEDENT?

The submission of Mr. Shubham Arya, learned Counsel for Respondent Nos. 2 to 5, is that, since the Judgment of the two judge bench of the Supreme Court in **GMR Warora Energy Limited** is contrary to the three Judge bench of the Supreme Court in **Uttar Haryana,** the former does not constitute a binding precedent.

Sri Amit Kapur, Learned Counsel for the Appellant, would submit that the Respondents-Discoms' contention that the two judge bench in **GMR Warora** ignored the decision of the three judge bench of the Supreme Court in **UHBVNL vs. Adani Power (Mundra) Limited (2023) 2 SCC 624,**

while allowing the generator to recover carrying cost at the LPS rate, is factually incorrect; there is no inconsistency in the findings of the Supreme Court in **GMR Warora SC Judgment** and in **UHBVNL vs. Adani Power (Mundra) Limited (2023) 2 SCC 624**; and, in any case, the ratio of **GMR Warora SC Judgment** is a binding precedent for this Tribunal in view of the law laid down by the Full Bench of the High Court of Andhra Pradesh [**3J**] in ***Sakinala Harinath v. State of A.P.*, 1993 SCC OnLine AP 195.**

A.ANALYSIS:

The afore-said submission, urged on behalf of Respondent Nos.2 to 5, necessitates rejection, as the Supreme Court in **GMR Warora Energy Limited** has followed the law declared by it earlier in **Uttar Haryana**. Even otherwise, since the Judgment of the three judge bench in **Uttar Haryana** was considered by the two judge bench of the Supreme Court in **GMR Warora Energy Limited**, the decision rendered by the larger bench of the Supreme Court in **Uttar Haryana,** as understood by the subsequent smaller bench of the Supreme Court in **GMR Warora Energy Limited,** would require lower Courts/Tribunals in the hierarchy to follow the later decision (**Sakinala Hari Nath & Ors. Vs. State Of Andhra Pradesh & Ors. (1993) SCC OnLine AP 195**). Viewed from any angle, the judgement of the Supreme Court, in **GMR Warora Energy Limited,** is a precedent binding on this Tribunal.

VIII.IS THE APPELLANT ENTITLED FOR CARRYING COST FOR THE PERIOD OF DELAY IN INVOKING THE APPELLATE JURISDICTION OF THIS TRIBUNAL?

Sri Amit Kapur, Learned Counsel for the Appellant, would submit that the Respondents- Discoms' contention that the appellant is not entitled to carrying cost for the period of delay occasioned in filing the present Appeal

is incorrect, and deserves to be rejected in view of the following: - (a) the following table sets out the details of the appellant's claim of carrying cost [at LPS rate (compounding basis)] in the present Appeal:-

From	To	Claim (Rs. Cr.)
20.12.2017 (Date of Change in Law event)	**25.03.2019** (45 days + date of RERC Order	1.38
26.03.2019 [i.e., date from which limitation for filing Appeal started]	**20.02.2020** [Appeal filed with defects – **delay of 332 days**]	**4.42**
21.02.2020 [Period after filing of Appeal with defects]	**31.10.2023** [Till date when Carrying Cost could be last computed]	53.85
Total		**59.65**

Learned Counsel would submit that the Respondents-Discoms' are questioning the appellant's entitlement to Rs. 4.42 Crores, i.e the Carrying Cost for the period of delay occasioned in filing the present Appeal; (b) as per the judgments of the Supreme Court in (i) **Energy Watchdog & Ors. vs. CERC & Ors**. (2017) 14 SCC 80, (ii) **UHBVNL vs. Adani Power Limited** (2019) 5 SCC 325, and (iii) **UHBVNL vs. Adani Power (Mundra) Limited** (2023) 2 SCC 624, Change in Law provision in the PPA [here Article. 10.2.1] is an in-built restitutionary principle which mandates payment of Carrying Cost to the affected party from the date of Change in Law event; (c) in view thereof, the obligation of the Respondents-Discoms to pay Change in Law compensation along with Carrying Cost flows from

the date of the Change in Law event i.e., 19.12.2017; (d) while in case of a delay by a party for a general claim for damages may result in a party to lose out on interest over the principal claims, that treatment cannot be applied in case where the court has to grant restitution; (e) this Tribunal's Judgment in ***APML vs. MSEDCL***, (Judgement of this Tribunal in Appeal No. 40 of 2022 dated 22.03.2022) is noteworthy where, despite a delay of over 521 days in filing the Appeal, this Tribunal not only condoned the delay, but also granted carrying cost to Adani Maharashtra at the rate of LPS under the PPAs (now upheld by the Supreme Court); as such, grant of Carrying Cost even in cases where there is a delay in filing the Appeal is a 'covered issue' by the Judgment of this Tribunal, and as affirmed by Hon'ble Supreme Court; (f) and w*ithout prejudice,* if at all this Tribunal deems it fit to reduce any amount out of the appellant's entitlement to recover Rs. 4.42 Crores, it is most respectfully prayed that 5-10% of such entitlement may be reduced to balance the interest of parties.

With regards the time period to be excluded for payment of carrying cost, Sri Shubam Arya, Learned Counsel for Respondents 2 to 5, would submit that the appellant had approached this Tribunal with a delay of 332 days in filing the appeal; the said delay is solely attributable to the appellant, and they cannot be allowed to take advantage of their own wrong, thereby burdening consumers in the State of Rajasthan. In this regard reliance is placed by the Learned Counsel on the following judgements (a) **Nimna Dudhna Project v. State of Maharashtra, (2020) 3 SCC 255**; and (b) Order passed by this Tribunal in **DB Power Limited -v- Central Electricity Regulatory Commission and Ors** (Order in Appeal No. 253 of 2018 dated 25.07.2023); in view of the above, carrying cost, if any, be granted to the appellant from the date of notification of the change in law event till the decision of this Tribunal (excluding the period of delay in filing the appeal) on simple Interest basis considering the

lowest of: (a) actual interest rate paid by the appellant; or (b) working capital interest rate as per RERC Regulations; or (c) LPS rate as per the PPA; [the above principle of lowest of the three was formulated by the Central Commission in its Order in Petition No. 235/MP/2015 dated 17.09.2018 has been upheld by this Tribunal in **Adani Power (Mundra) Limited -v- Central Electricity Regulatory Commission and Ors.** (Order in Appeal No. 421 of 2021 dated 12.08.2021); without prejudice to the above, the calculation sheet handed over by the appellant is not admitted; and the calculation, if any, will have to be reconciled by the parties.

A.ORDER PASSED BY THIS TRIBUNAL IN THE APPLICATION TO CONDONE THE DELAY IN FILING THE PRESENT APPEAL:

The application, in IA NO. 310 OF 2020, was filed by the appellant seeking condonation of delay of 332 days in preferring the appeal. While the Regulatory Commission had passed the order (under challenge in this appeal) on 08.02.2019, the appeal came to be filed more than a year thereafter on 20.02.2020. The only reason stated, as constituting reasonable cause for the delay, was that a similar issue was decided by the Central Electricity Regulatory Commission in its order dated 03.12.2019 wherein the issue of evacuation facility was held to constitute a “change in law”; and the said order was passed in a petition filed against the very same Respondent herein.

It was contended, on behalf of the applicant-appellant, that not only did the CERC hold that the issue of evacuation facility constituted a change in law, a similar view was taken by this Tribunal also in its order dated 22.03.2022; since several other generators were extended this benefit, the Appellant should not be made to suffer for their failure to file the appeal on time; it is always open to this Tribunal to condone the

delay on terms, and on directing costs to be paid by the Appellant to the Respondents herein; against the order of this Tribunal dated 22.03.2022, an appeal was filed and the Supreme Court had granted conditional stay of the order of this Tribunal; and, as against the liability of Rs. 189 Crores fastened on the Respondent therein, the Appellant before the Supreme Court was directed to pay Rs. 100 Crores, pending adjudication of the Appeal.

The contention, urged on behalf of Respondents 2 to 5, was that a subsequent order of the CERC, that too in a petition unrelated to the Appellant herein, would not constitute sufficient cause justifying condonation of delay; on the Appellant's own showing, several orders were passed by the CERC in this regard during the period 02.04.2019 till 06.01.2020; even otherwise, the order of the CERC dated 03.12.2019 has not attained finality since Respondent No. 2 to 5 herein had preferred an appeal there against on 11.02.2020; and, if the present appeal were to be allowed later, it would result in a huge liability being fastened, on Respondents 2 to 5 in excess of Rs. 100 crores.

In its order dated 23.01.2023, this Tribunal held that it found force in the submission, put forth on behalf of Respondent Nos. 2 to 5, that the Appellant was sitting on the fence and chose not to question the order of the Rajasthan Commission till the CERC had passed an order against Respondent Nos. 2 to 5 in an unconnected appeal; the fact, however, remained that the very same issue had already been decided by this Tribunal against the Discoms; this Tribunal may not be justified, therefore, in denying the Appellant an opportunity of contesting this issue on its merits; this question of law was under consideration in the Appeal before the Supreme Court; and, in case the order of this Tribunal were to be

affirmed, the law declared by the Supreme Court would bind the Respondents herein also.

This Tribunal then held that, while the delay was no doubt of a period of around one year, taking note of the aforesaid facts, and since this Tribunal had decided the issue contrary to what the Rajasthan Commission has held in the present case, they considered it appropriate to condone the delay on terms. On condition that the Appellant paid the Rajasthan Urja Vikas Nigam Limited, (the holding company of Respondent No. 2 to 5), Rs. 5 lakhs as costs within one month, the delay in filing the appeal was condoned; and the application was disposed of.

B.JUDGEMENTS RELIED ON BEHALF OF THE RESPONDENTS:

In ***Nimna Dudhna Project v. State of Maharashtra*, (2020) 3 SCC 255,** the dispute was only with respect to award of statutory benefits and interest for the delayed period. It is in this context that the Supreme Court held that it was not in dispute that there was a huge delay in preferring the appeals before the High Court challenging the judgment and award passed by the Reference Court; however, considering the fact that, in other matters the delay was condoned, the High Court condoned the delay and entertained the appeals and enhanced the amount of compensation on par with other landowners/claimants whose lands were acquired for the same project vide the same notification; no fault could be found with the order passed by the High Court condoning the delay; and the issue which was required to be considered was whether, for the delayed period, the claimants shall be entitled to the statutory benefits and the interest under the Land Acquisition Act.

The Supreme Court then observed that the aforesaid issue was not res integra; in ***Dhiraj Singh* v. *State of Haryana*: (2014) 14 SCC 127**, while condoning the delay in preferring the appeal before the Supreme

Court, and while enhancing the amount of compensation on par with other similarly situated landowners, the Supreme Court had denied interest on the enhanced amount of compensation for the period of delay in approaching the High Court by way of LPAs; a similar view was expressed by the Supreme Court in ***K. Subbarayudu* v. *LAO*, (2017) 12 SCC 840** and, while condoning the delay in preferring the appeal, the Supreme Court had denied interest for the period of delay; merely because, at the time of condoning the delay, no such condition was imposed that the claimants shall not be entitled to the interest on the enhanced amount of compensation for the period of delay, the appellant cannot be saddled with the liability to pay interest for the period of delay, which is not at all attributed to them; and, under the circumstances, the common impugned judgment and order passed by the High Court awarding interest on the enhanced amount of compensation for the period of delay in preferring the appeals deserved to be quashed and set aside.

In **DB POWER V. CERC,** (Order in **Appeal No. 253 of 2019 dated 25.07.2023),** this Tribunal observed that, while the material placed on record did show that the Appellant had failed to produce the necessary information before the CERC, either along with their petition or at any time subsequent thereto till the order under Appeal was passed, it could not also be ignored that the Appellant had sought to place additional information on record before this Tribunal, by way of their application dated 25.01.2019; as the Appellant was entitled to be compensated towards the actual Station Heat Rate, subject to the statutory regulations governing the field, its computation need alone be considered by the CERC, and not the appellant's entitlement thereto; as the Appellant cannot take advantage of its own delay / failure to furnish information in support of its claim for compensation towards the Station Heat Rate, the compensation, which shall now be determined by the CERC, shall not be

entitled to carrying cost for the period from 29.04.2017, when the Appellant had earlier invoked the jurisdiction of the CERC by filing their petition, till 25.01.2019 when the application was filed before this Tribunal to receive additional evidence.

C.ANALYSIS:

The question whether or not carrying cost should be disallowed, for the period of delay in filing the appeal before this Tribunal, did not arise for consideration before this Tribunal in ***APML vs. MSEDCL***, (Judgement in Appeal No. 40 of 2022 dated 22.03.2022). Reliance placed on behalf of the appellant, on the afore-said judgement of this Tribunal is misplaced, for it is well settled that a judgment is only an authority for what it actually decides, and it cannot be quoted for a proposition that may seem to follow logically from it. What is of the essence in a decision is its ratio. (***State of Orissa* v. *Sudhansu Sekhar Misra*: AIR 1968 SC 647; *Quinn* v. *Leathem*; *Kanwar Amninder Singh* v. *High Court of Uttarakhand*, 2018 SCC OnLine UTT 1026).**

In considering the application filed by the appellant, to condone the delay of 332 days in filing the appeal, this Tribunal found force in the submission, urged on behalf of Respondent Nos. 2 to 5, that the Appellant was sitting on the fence, and had chosen not to question the order of the Rajasthan Commission till the CERC had passed an order against Respondent Nos. 2 to 5 in an un-connected Appeal. It is only because the very same issue had already been decided by this Tribunal against the Discoms, that this Tribunal considered it appropriate to grant the Appellant an opportunity of contesting the issue on merits, more so as the question of law was under consideration before the Supreme Court, and in case the order of this Tribunal was to be affirmed, the law declared by

the Supreme Court would bind Respondents 2 to 5 herein also. It is for this reason alone that the delay of 332 days in filing the Appeal was condoned on imposition of exemplary costs of Rs.5.00 Lakhs.

The law declared by the Supreme Court in **Nimna Dhudua Project**, relying on its earlier judgments in **Niraj Singh** and **K. Subbarayudu,** is that the Respondents cannot be saddled with the liability to pay interest for that part of the delay which is not attributable to them. A similar view was taken by this Tribunal in its judgement in **DB Power Limited**. Granting the Appellant carrying cost at LPS rates, for the period of delay of 332 days in invoking the appellate jurisdiction of this Tribunal, would not only result in Respondent Nos. 2 to 5 being mulcted with such a liability for not fault of theirs, but would also result in conferring on the Appellant an undue benefit despite their failure to invoke the appellate jurisdiction of this Tribunal within the prescribed period of limitation. It would also result in the said liability being passed on by Respondent Nos. 2 to 5 on to their consumers at large resulting in such consumers, for no fault of theirs, being forced to pay an enhanced tariff for this period of un-explained delay on the part of the Appellant in invoking the appellate jurisdiction of this Tribunal.

We consider it appropriate, in such circumstances, to hold that the Appellant is not entitled for carrying cost for the period from 26.03.2019 (i.e. the date from which the limitation of 45 days in filing the Appeal had expired) till 20.02.2020 when the Appellant eventually filed the Appeal with defects. As the Appellant has been denied the benefit of carrying cost for this period, it goes without saying that they are not also entitled to carrying cost at LPS rates for this period of delay in filing the appeal. Since we had earlier imposed costs of Rs.5 lakhs as a condition for condoning the inordinate delay in filing the appeal, the Respondent Commission shall

compute the amount of carrying cost, for the period of delay in filing the Appeal, and reduce the amount so computed from the carrying cost at LPS rates, which the Appellant is entitled to from the date of the change in law event till the date of payment. The appellant shall, however, be given credit for the costs of Rs.5 lakhs paid by them earlier, since they are now being denied carrying cost for the said period of delay. Suffice it to make it clear that, except for the afore-said period of delay in filing the present appeal, the Appellant shall be entitled for carrying cost at LPS rates from the date on which the change in law event occurred till the date of actual payment by Respondent Nos. 2 to 5.

IX. IS THE APPELLANT ENTITLED FOR CARRYING COST FOR THE PERIOD OF DELAY IN RE-FILING THE APPEAL BEFORE THIS TRIBUNAL?

Sri Amit Kapur, Learned Counsel for the Appellant, would submit that the Respondent-Discoms' contention that the appellant is not entitled to carrying cost for the period of delay occasioned in re-filing of the present Appeal is incorrect and deserves to be rejected; the following is noteworthy: -(a) The registry notified the defects in the Appeal by letter dated 27.02.2020, which was received on 11.03.2020; the due date for curing the defects was 18.03.2020. (b) starting 14.03.2020, COVID-19 created several hindrances including closure of the registry; the appellant could re-file the Appeal on 09.11.2020. [details captured at Para 2 of the appellant's IA seeking condonation of delay in re-filing of Appeal dated 09.11.2020]. (c) Rajasthan Discoms chose not to oppose such IA seeking condonation of delay in re-filing the Appeal at the relevant stage. (d) this Tribunal rightly allowed the appellant's IA by Order dated 23.01.2023 in view of the Supreme Court's Order dated 23.03.2020 in Suo Motu Writ Petition (Civil) No(s). 3/2020 holding that, in view of the COVID-19

pandemic, the period of limitation in all proceedings stands extended w.e.f 15.03.2020 till further orders. [applicable during the relevant period].

Sri Shubam Arya, Learned Counsel for Respondents 2 to 5, would submit that the appellant had approached this Tribunal with a delay of 226 days in re-filing the present appeal; the said delay is solely attributable to the appellant; and they cannot be allowed to take advantage of their own wrong.

A. APPLICATION FILED BY THE APPELLANT BEFORE THIS TRIBUNAL SEEKING CONDONATION OF DELAY IN REFILING THE APPEAL:

In their application, seeking condonation of delay in re-filing the appeal before this Tribunal, the Appellant stated that, in the present Appeal, the registry of this Tribunal had communicated the defects on 27.02.2020 (which was *received by them on 11.03.2020*); they were granted 7 days to cure the defects from the date of receipt of such notice; accordingly, the due date for curing the defects was *18.03.2020*; despite best efforts, it was not possible for the appellant to cure the defects till 09.11.2022 in view of the following: (a) the Registry was closed effective 14.03.2020 due to COVID-19 pandemic; (b) although the Registry re-opened on 25.05.2020, however, in view of the prevailing COVID-19 pandemic induced hindrances, the filings (including curing of defects) were limited to only urgent matters/part-heard matters which were being taken up through video-conferencing; and this was evident from this Tribunals' notification dated 25.05.2020. (c) such restrictions *qua* general filings and re-filings (for regular matters) were further extended up to (i) 31.07.2020 *vide* notification dated 30.06.2020; (ii) 31.08.2020 *vide* notification dated 31.07.2020; (iii) 30.09.2020 *vide* notification dated 30.08.2020 and (iv) 31.10.2020 *vide* notification dated 30.09.2020, and

(d) even on inquiry in the month of June, 2020, the Registry informed that it was not accepting any general filings/re-filings for the time being; therefore, the appellant was under the impression that general filings/re-filings would not be permitted as long as the Notification dated 25.05.2020 was being continued or extended; and as such, until 31.10.2020, it was not open for the appellant to have cured the defects since the present Appeal was not a part-heard matter to have qualified for listing/filings/re-filings in view of the afore-stated Notifications of this Tribunal.

It is further stated, without prejudice, that, even if the registry were to accept such filings in the previous months, due to the constraints faced during the COVID-19 pandemic, it would not have been possible for the appellant to have cured the defects; it was only on 30.10.2020 that this Tribunal issued a notification stating that, even regular matters *viz.* Fresh/Admission matters, I.A. hearings and matters for directions etc, would be now taken up in general course; noticing the said Notification, the appellant, on 31.10.2020, instructed its counsel to cure the defects in the present Appeal with immediate effect; and hence, by way of the present Application, it was being prayed to condone the delay in re-filing the Appeal.

It is also stated that the Hon'ble Supreme Court, by order dated 23.03.2020 in *Suo Motu* Writ Petition (Civil) No(s). 3/2020, held that in view of the pandemic*,* the period of limitation shall stand extended w.e.f. 15.03.2020 till further orders; as such, any limitation period applicable *qua* re-filing the present Application is required to be extended until further orders in this regard by the Hon'ble Supreme Court; the delay in re-filing the Appeal was not on account of any negligence on the part of the appellant or due to lack of *bonafide*s; and, hence, the same may be condoned by this Hon'ble Tribunal.

B. ORDER PASSED BY THIS TRIBUNAL IN THE APPLICATION TO CONDONE THE DELAY IN RE-FILING THE APPEAL:

IA NO. 1607 OF 2020 was filed by the appellant herein seeking condonation of the delay in refiling the appeal. In its Order dated 23.01.2023, this Tribunal, for the reasons stated in the application, condoned the delay of 236 days in refiling the appeal, and disposed of the application.

C. ANALYSIS:

Reliance is placed by the Appellant on the order of the Supreme Court in Suo Motu Writ Petition (Civil) No(s). 3/2020 dated 23.03.2020, wherein the Supreme Court observed thus:=

> "*This Court has taken Suo Motu cognizance of the situation arising out of the challenge faced by the country on account of* ***Covid-19 Virus and resultant difficulties that may be faced by litigants across the country in filing*** *their petitions/applications/suits/ appeals/all other proceedings within the period of limitation prescribed under the general law of limitation or under Special Laws (both Central and/or State). To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective Courts/Tribunals across the country including this Court,* ***it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s*** *to be passed by this Court in present proceedings.*"

We, however, see no reason to rely on the afore-said order of the Supreme Court, since the said order does not appear to apply to cases where a delay has occurred in re-filing the Appeal.

Unlike the delay in institution of the Appeal for which a period of limitation is prescribed under Section 111(2) of the Electricity Act, and with respect to which the proviso to Section 111(2) confers power on this Tribunal to condone the delay, the delay in re-filing the Appeal relates to the delay occasioned, on the failure of the Appellant to cure the defects pointed out by the Registry, after the Appeal is instituted. The delay in re-filing the Appeal does not fall within the ambit of Section 111(2), and is not governed by any other provision of the Electricity Act. Further, unlike the application to condone the delay in filing the Appeal, the application to condone the delay in re-filing the Appeal was not even seriously contested on behalf of the Respondents.

In any event, a perusal of the affidavit filed by the Appellant, to condone the delay in re-presenting the Appeal, makes it clear that the defects, in the appeal filed by them, was communicated to the Appellant by the Registry on 11.03.2020 granting them seven days' time to cure the defects; the Registry was closed effective from 14.03.2020 due to the Covid-19 pandemic; despite the Registry re-opening on 25-05-2020, filings including curing of defects were restricted only to urgent/part-heard matters which were being taken-up through video conferencing; these restrictions continued up to 31.10.2020; and the defects were cured, and the Appeal was re-filed after curing the defects, on 09.11.2020.

The circumstances, referred to in the application for condonation of delay in re-filing the Appeal, does not disclose either negligence or deliberate delay on the part of the Appellant in re-filing the Appeal, warranting denying them carrying cost with compound interest during the

said period.

X.CONCLUSION:

The Appellant shall, in terms of what has been indicated hereinabove, be entitled for the benefit of the change in law event on account of evacuation facility charges from the date on which the notification, issued by Coal India Limited, was made applicable to them. The sum representing this benefit shall be paid by Respondents 2 to 5 to the appellant along with carrying cost at LPS rates. While the Appellant shall not be entitled for carrying cost (much less at LPS rates), for the delay of 332 days in filing the Appeal, they shall be given credit for the sum of Rs.5 lakhs paid by them earlier as a condition for condoning the delay in filing the Appeal, since they are now being denied carrying cost for the said period of delay. The matter is remanded to the Respondent-Commission to compute the amounts which the Appellant is entitled to in terms of this Judgment. The Appeal is disposed of accordingly.

Pronounced in the open court on this ***18th day of April, 2024.***

Seema Gupta
Technical Member

Justice Ramesh Ranganathan
Chairperson

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REPORTABLE/NON-REPORTABLE

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