COURT-1

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

IA No. 2411 OF 2023 IN APL No. 886 OF 2023

Dated: 22nd February, 2024

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

In the matter of:

Chhattisgarh State Power Distribution
Company Limited
Through Managing Director
Office of ED-(R.A. & p.m.),
4TH Floor Vidyut Sewa Bhawan Daganiya
Posunder Nagar, Raipur
Chhatisgarh – 492 013

Versus

1. Central Electricity Regulatory Commission
Through Secretary
36, Janpath Rd, Janpath, Connaught Place, … Respondent No.1
New Delhi, Delhi 110001

2. Mahindra Renewables Private Limited Through
Managing Director
Mahindra Towers, Dr. G. M. Bhosale Marg
P.K. Kurne Chowk, Worli Mumbai - 400018 … Respondent No.2

3. Solar Energy Corporation of India Limited
(SECI)
Through Secretary
6th Floor, Plate-B, NBCC Office Block Tower … Respondent No.3
2, East Kidwai Nagar, Kidwai Nagar, New
Delhi, Delhi 110023

Counsel on record for the Appellant(s) : Ravi Sharma for App. 1

Counsel on record for the Respondent(s)	:	Hemant Sahai Shryeshth Ramesh Sharma Nitish Gupta Molshree Bhatnagar Shubhi Sharma Neel Kandan Rahate Rishabh Sehgal Deepak Thakur Manpreet Singh Aanchal Seth Varnika Tyagi Shubham Singh for Res. 2 Shikha Ohri Kartik Sharma for Res. 3

ORDER

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

We had, in our earlier order dated 30.11.2023, noted the submission of Mr. Basava Prabhu S. Patil, learned Senior Counsel appearing on behalf of the 2nd Respondent, that, in the light of the order of the Supreme Court in the appeal preferred against the judgement of this Tribunal in "**Parampujya Solar Energy Private Limited and Another vs. Central Electricity Regulatory and Others (Order in Appeal No. 256 of 2019 dated 15.09.2022)"**, they would, for the time being, not insist on payment of carrying cost; and, in case the Appellant pays the principal amount along with the discounted factor as determined by the Commission, they would not take any coercive action during the pendency of the appeal. In the light of this submission of the learned Senior Counsel, we had observed that there was no reason to grant an *ex parte ad interim* stay. Time was granted to the respondents to file reply, and thereafter for the appellant to file rejoinder. After completion of pleadings, the IA for interim relief has been listed before us.

I.TESTS TO BE FULFILLED FOR BEING GRANTED INTERIM RELIEF:

In determining whether or not an interim order should be passed in the Appellant's favour, it must be borne in mind that the grant or refusal of interlocutory relief is covered by three well established principles viz., (1) whether the Appellant has made out a prima facie case, (2) whether the balance of convenience is in their favour i.e., whether it would cause greater inconvenience to them if interim relief is not granted than the inconvenience which the opposite party would be put to if it is granted, and (3) whether the Appellant would suffer irreparable injury. With the first condition as a sine quo non, at least two conditions should be satisfied by the Appellant conjunctively, and a mere proof of fulfilment of one of the three conditions does not entitle them to the grant of interlocutory relief in their favour. (***Nawab Mir Barkat Ali Khan* v. *Nawab Zulfiquar Jah Bahadur*, AIR 1975 AP 187; *Gone Rajamma* v. *Chennamaneni Mohan Rao*, (2010) 3 ALD 175; *Kishoresinh Ratansinh Jadeja* v. *Maruti Corpn*, (2009) 11 SCC 229; *Best Sellers Retail (India) Private Ltd.* v. *Aditya Birla Nuvo Ltd.*, (2012) 6 SCC 792; *State of Mizoram* v. *Pooja Fortune Private Limited*, 2019 SCC OnLine SC 1741; Tata Power Co. Ltd. v. Maharashtra ERC, 2023 SCC OnLine APTEL 23).**

II.HAS A PRIMA FACIE CASE BEEN MADE OUT?

The first of the three tests, to be satisfied for the grant of interlocutory relief, is whether the Appellant has made out a prima facie case. A prima facie case does not mean a case proved to the hilt, but a case which can be said to be established if the evidence which is led in support of the case were to be believed. While determining whether a prima facie case had been made out or not, the relevant consideration

is whether, on the evidence led, it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence. Prima facie case means that the assertions on these aspects are bona fide (***Nirmala J. Jhala* v. *State of Gujarat*, (2013) 4 SCC 301; *Vidya Drolia* v. *Durga Trading Corporation* - (2021) 2 SCC 1).** The burden is on the plaintiff by evidence aliunde, by affidavit or otherwise, to show that there is "a prima facie case" in his favour which needs adjudication. Prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. (**Tata Power Co. Ltd. v. Maharashtra ERC, 2023 SCC OnLine APTEL 23).** The interlocutory remedy is intended to preserve in status quo, the rights of parties which may appear on a prima facie case. (***Colgate Palmolive (India) Ltd.* v. *Hindustan Lever Ltd.*, (1999) 7 SCC 1).** A finding on "prima facie case" would be a finding of fact. While arriving at such a finding of fact, the court must arrive at a conclusion that a case for further examination has been made out (***M. Gurudas* v. *Rasaranjan*, (2006) 8 SCC 367)**.

Elaborate submissions were put forth, in the IA seeking interim relief, by Mr. Ravi Sharma, learned Counsel for the Appellant, Mr. Nitish Gupta, learned Counsel for the 2nd Respondent and Ms. Shikha Ohri, learned Counsel for the 3rd Respondent (SECI). It is convenient to examine the rival contentions, on whether or not a prima-facie case has been made out, under different heads.

Before considering the rival submissions, it is useful to take note of certain relevant facts and events. In the case on hand, the last date for submission of bids, under the Section 63 route, was 15.06.2018, and the 2nd Respondent submitted its bid on that date. The first Safeguard duty ("SGD" for short) notification was issued on 30.07.2018. It is only,

thereafter, that the Power Supply Agreement was entered into on 03.08.2018, and a Power Purchase Agreement was executed on 28.12.2018. On expiry of the first SGD notification on 29.07.2020, the second SGD notification was issued on the very same day. By the order, impugned in this appeal, the CERC granted the second Respondent the relief relating to their change in law claim. Aggrieved thereby the Chhattisgarh State Power Distribution Company Limited is in appeal before us.

Let us examine, albeit under distinct heads, the rival submissions put forth by Learned Counsel on either side, on whether or not a prima-facie case has been made out for the grant of interim relief.

III.DID THE CERC LACK JURISDICTION TO ENTERTAIN THIS DISPUTE?

In support of his submission that the impugned order should be stayed during the pendency of the appeal, Mr. Ravi Sharma, learned Counsel for the Appellant, would submit that, since the entire power generated by the 2nd Respondent is supplied to the Appellant, it is only the Chhattisgarh State Commission which could have exercised jurisdiction over the dispute between the 2nd Respondent and the Appellant, and not the Central Commission; though this plea, of absence of jurisdiction in the CERC to adjudicate this dispute, was not raised during the pendency of proceedings before the CERC, the Appellant can nonetheless raise this contention for the first time, in an appeal filed before this Tribunal, in the light of the Judgement of the Supreme Court in **Dr. Jagmittar Sain Bhagat vs. Director, Health Services, Haryana & Ors. (Civil Appeal No. 5476 of 2013 dated 07.11.2013)**.

Learned Counsel would rely on the Judgement of this Tribunal in **M/s. Lanco Budhil Hydro Power Private Limited vs. Haryana Electricity Regulatory Commission & Ors**. **(Appeal No. 188 of 2011 dated 09.08.2012)** in support of his submission that, where the entire quantum of power generated is supplied within one State alone, it is only the State Commission which has jurisdiction to adjudicate such disputes, and not the CERC. He would also rely on the Judgement of this Tribunal, in **Parampujya Solar Energy Private Limited,** to submit that the observations therein were made after taking note of the Judgement of the Supreme Court in **Energy Watchdog vs. Central Electricity Regulatory Commission,** and yet this Tribunal held that it is only where the electricity generated is supplied to more than one State, would CERC have jurisdiction to decide the dispute, and not in cases like the present where supply of electricity is only to one State.

On the other hand, Mr. Nitish Gupta, learned Counsel for the 2nd Respondent, would submit that the Appellant had acquiesced to the jurisdiction of the CERC, and had not raised this plea during the proceedings before the CERC, which culminated in the impugned order being passed; and, even otherwise, the law laid down in **Energy Watchdog** is that, where the generator is located in one State and supplies electricity to an entity in another State, it is only the CERC which has jurisdiction to adjudicate the dispute, and not the State Commission.

Ms. Shikha Ohri, learned Counsel for the 3rd Respondent (SECI), would submit that the CERC had, by its order in Petition No. 187/80/2019 dated 28.02.2020 wherein the Appellant herein was arrayed as the 12th Respondent, adopted the tariff of several solar power generators whose bid was accepted by SECI, including the 2nd Respondent; even at that stage, the Appellant herein did not question the jurisdiction of the CERC

to prescribe tariff; and this plea, of absence of jurisdiction in the CERC, is clearly an after-thought.

In **Energy Watchdog vs. Central Electricity Regulatory Commission and Others [(2017) 14 SCC 80], Judgement dated 11-04-2017**, the Supreme Court observed: -

> *"24. The scheme that emerges from these Sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in clauses (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression "within the State" in sub-clauses (a), (b), and (d), and "intra-State" in clause (c). This being the case,* ***it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission's jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act.*** *What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as*

argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. ***Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression "composite scheme" does not mean anything more than a scheme for generation and sale of electricity in more than one State……."*** ***(*emphasis supplied)**

In **M/s. Lanco Budhil Hydro Power Private Ltd. vs. Haryana Electricity Regulatory Commission and Others [Appeal No. 188 of 2011], Judgement dated 09.08.2012**, this Tribunal observed that -

"15. … …

(h) When the ultimate purchaser, i.e. the distribution licensee had been identified by the trader for sale of power from the project by the generating company in terms of the PPA, then it means that both the PSA and PPA are back to back arrangements as the PPA between generating company and the trader got firmed up with the execution of PSA entered into between the distribution licensee and the trader.

(i) If the Power supplied by the trader under PPA which identifies the purchaser at the time of execution of PPA, then the conduct of the generating company and the trader would reflect the intention to be bound to the purchaser and in that event the conclusion would be that there is nexus.

… …

38. ***We have already laid down the ratio earlier in several cases as quoted above, to the effect that even though distribution licensee was not a party to the PPA, if there is existence of nexus between the PPA and PSA, then the State Commission will have a jurisdiction to adjudicate upon the dispute between the generating company and a distribution licensee of the State. In other words, when there is no nexus or privity of contract between the PPA and PSA, the jurisdiction of the State Commission cannot be invoked. Thus, in order to decide about the issue of jurisdiction we have to first find out as to whether there is any nexus or privity in respect of the PPA between the Appellant and PTC and in respect of PSA between the PTC and the Haryana Power……..”*** **(emphasis supplied)**

In **Parampujya Solar Energy Pvt. Ltd. and Another vs. Central Electricity Regulatory Commission and Others [Appeal No. 256 of 2019 & Batch], Judgement dated 15.09.2022**, this Tribunal observed that -

“46. It is not in dispute that SECI has been granted inter-state trading license by CERC, it having been designated by MNRE as the Nodal Agency for implementation of MNRE Schemes. Thus, SECI has agreed to purchase such power from the SPDs. Parampujya has an intermediary in the form of SECI to sell it further to buying utilities on back-to-back basis……”

47. It is also pertinent to note here that Article 12.2.1 on the subject of relief for Change in Law expressly conferred the jurisdiction on the Central Commission:

48. ***Since the project in question was set up under a composite scheme envisaging supply of electricity thereby generated to more than one State, the objection to the jurisdiction exercised by the Central Commission is not correct,*** *it being inconsequential that the State of Chhattisgarh had eventually arranged to procure the entire generation capacity……..”* (emphasis supplied)

In the present case, electricity is generated in the State of Rajasthan but the entire electricity so generated is supplied in its entirety to the appellant in the State of Chattisgarh. While generation is in one State, which is distinct from the State to which it is supplied, the fact remains that supply of electricity is only to one State and not more.

It is no doubt true that this plea of absence of jurisdiction in the CERC has been raised for the first time at the appellate stage, and the appellant had participated in the proceedings before the CERC without demur or protest. Not only did the appellant participate in the proceedings before the CERC which resulted in the impugned order being passed, they also participated in the proceedings before the CERC, in Petition No. 187/AT/2019, where the tariff of solar power generators was determined by order dated 28.02.2020.

A.CERC’S ORDER IN PETITION NO. 187/AT/2019 DATED 28.02.2020

Petition No. 187/AT/2019 was filed before the CERC by Tata Power Delhi Distribution Limited and SECI, seeking approval of the tariff under Section 63 of the Electricity Act, 2003 along with Section 79(1)(k) of the Electricity Act for adoption of tariff for purchase of 100 MW solar power from Solar Energy Corporation of India Limited, which was discovered through a transparent process by way of competitive bidding conducted in terms of the competitive bidding guidelines issued by the Ministry of Power under Section 63 of the Electricity Act, 2003. The Appellant herein was arrayed as the 12th Respondent in the said petition. The CERC, by its order dated 28.02.2020, adopted the following tariff for the projects as agreed to by the successful bidders, which was to remain valid throughout the period covered in the PSAs and PPAs.

> *"18. The e-Reverse Auction for 2000 MW capacity was carried out on 2.7.2018 in the presence of members of BEC. The following were declared as successful bidders:*

Sr.	***Bidders***	***Bid Capacity (MW)***	***Tariff (INR/kWh)***	***Allotted Capacity (MW)***
1	*ACME Solar Holdings Limited*	*600*	*2.44*	*600*
2	*Shapoorji Pallonji Infrastructure Capital Company Private Limited*	*250*	*2.52*	*250*
3	*Hero Solar Energy Private Limited*	*250*	*2.53*	*250*
4	*Mahindra Susten Private Limited*	*250*	*2.53*	*250*
5	*Azure Power India Private Limited*	*600*	*2.53*	*600*
6	*Mahoba Solar (UP) Private Limited*	*500*	*2.54*	*50*
	Total			***2000***

19. On 27.7.2018, SECI issued Letters of Intent to the above selected bidders.

20. Based on request of Buying Utilities/Distribution Licensees, the capacities were allocated as under:

Sr.	***State/UT***	***Utility***	***Capacity (MW)***
1	*Delhi*	*BSES Yamuna Power Limited*	*150*
2		*BSES Rajdhani Power Limited*	*400*
3		*Tata Power Delhi Distribution Limited*	*100*
4	*Chhattisgarh*	*Chhattisgarh State Power Distribution Company Limited*	*250*
5	*Jharkhand*	*Jharkhand Bijli Vitran Nigam Limited*	*700*
6	*Haryana*	*Haryana Power Purchase Centre*	*100*
7	*Odisha*	*GRIDCO Limited*	*300*
		Total	***2000****"*

Rebutting the submission urged on behalf of respondents 2 and 3 that the appellant, having acquiesced to the jurisdiction of the CERC on more than one occasion, cannot turn around and question it at the appellate stage, Sri Ravi Sharma, Learned Counsel for the appellant, would contend that acquiescence or waiver would not confer jurisdiction of a Court or Tribunal which it has not been statutorily conferred.

In **Dr. Jagmittar Sain Bhagat vs. Director Health Services, Haryana & Ors [Civil Appeal No. 5476 of 2013], Order dated 11.07.2013**, the Supreme Court observed that -

"7. ***Indisputably, it is a settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties***

nor by a superior Court, and if the Court passes a decree having no jurisdiction over the matter, it would amount to nullity as the matter goes to the roots of the cause. Such an issue can be raised at any stage of the proceedings. The finding of a Court or Tribunal becomes irrelevant and unenforceable/ inexecutable once the forum is found to have no jurisdiction. Similarly, if a Court/Tribunal inherently lacks jurisdiction, acquiescence of party equally should not be permitted to perpetuate and perpetrate, defeating the legislative animation. The Court cannot derive jurisdiction apart from the Statute. In such eventuality the doctrine of waiver also does not apply. (Vide: United Commercial Bank Ltd. v. Their Workmen, AIR 1951 SC 230; Smt. Nai Bahu v. Lal Ramnarayan & Ors., AIR 1978 SC 22; Natraj Studios (P) Ltd. v. Navrang Studios & Anr., AIR 1981 SC 537; and Kondiba Dagadu Kadam v. Savitribai Sopan Gujar & Ors., AIR 1999 SC 2213).

8. In Sushil Kumar Mehta v. Gobind Ram Bohra (Dead) Thr. Lrs., (1990) 1 SCC 193, this Court, after placing reliance on large number of its earlier judgments particularly in Premier Automobiles Ltd. v. K.S. Wadke & Ors., (1976) 1 SCC 496; Kiran Singh v. Chaman Paswan, AIR 1954 SC 340; and Chandrika Misir & Anr. v. Bhaiyalal, AIR 1973 SC 2391 held, that a decree without jurisdiction is a nullity. It is a coram non judice; when a special statute gives a right and also provides for a forum for adjudication of rights, remedy has to be sought only under the provisions of that Act and the Common Law Court has no jurisdiction; where an Act creates an obligation

and enforces the performance in specified manner, "performance cannot be forced in any other manner."

9. ***Law does not permit any court/tribunal/authority/forum to usurp jurisdiction on any ground whatsoever, in case, such a authority does not have jurisdiction on the subject matter. For the reason that it is not an objection as to the place of suing;, "it is an objection going to the nullity of the order on the ground of want of jurisdiction". Thus, for assumption of jurisdiction by a court or a tribunal, existence of jurisdictional fact is a condition precedent.*** *But once such jurisdictional fact is found to exist, the court or tribunal has power to decide on the adjudicatory facts or facts in issue. (Vide: Setrucharlu Ramabhadra Raju Bahadur v. Maharaja of Jeypore, AIR 1919 PC 150; State of Gujarat v. Rajesh Kumar Chimanlal Barot & Anr., AIR 1996 SC 2664; Harshad Chiman Lal Modi v. D.L.F. Universal Ltd. & Anr., AIR 2005 SC 4446; and Carona Ltd. v. M/s. Parvathy Swaminathan & Sons, AIR 2008 SC 187)……"* (emphasis supplied)

The law declared by the Supreme Court, in **Dr. Jagmittar Sain Bhagat**, does support the submission, urged on behalf of the appellant, that the question of absence of jurisdiction in the CERC to adjudicate the present dispute can be raised at the appellate stage also. Prima facie, we find merit in this submission urged on behalf of the appellant, and are of the view that this jurisdictional issue necessitates further examination when the appeal is finally heard.

IV.DID THE RIGHTS OF PARTIES, WITH RESPECT TO THE CHANGE IN LAW CLAIM CRYSTALLIZE ONLY WHEN THE PSA WAS EXECUTED?

Mr. Ravi Sharma, learned Counsel for the Appellant, would submit that the rights of parties stood crystallized only when the PPA was executed on 28.08.2018, and not on the last date of submission of the bids ie 15.06.2018; consequently, the 2nd Respondent ought to have taken steps to mitigate the loss, which the Appellant may suffer on their procuring equipment from China and paying safeguard duty, and failure of the Appellant to do so is against prudent utility practices.

In support of his submission that the 2nd Respondent's claims, on account of a change in law, stood crystallized only on the date on which the PPA was executed, learned Counsel would rely on the judgement of the Gauhati High Court in **Premier Energies Ltd. Vs. Assam power Distribution Company Limited & Ors [Writ Petition (Civil) no. 6381/2021 & Batch dated 29.06.2022)**.

On the other hand, Mr. Nitish Gupta, learned Counsel for the 2nd Respondent, would draw our attention to Clause 12.1.1 of the PPA dated 28.12.2018 in support of his submission that the change in law event occurs after the last date of bid submission; consequently, any change in law, on or after 16.06.2018, would justify a change in law claim; admittedly, the first SGD notification was issued only thereafter on 30.07.2018; consequently, the CERC was justified in allowing the claim of the 2nd Respondent with respect to change in law; and the Appellant's contention, that crystallization of rights occurs only on the date of the PPA and not on the last date of submission of bids, is belied by Clause 12.1.1 of the PPA itself.

Ms. Shikha Ohri, learned Counsel for the 3rd Respondent (SECI), would submit that, akin to Clause 12.1.1 of the PPA dated 28.12.2018, Clause 8.1.1 of the PSA dated 03.08.2018 also provides for a change in law claim post the last date of the submission of the bid.

In **Premier Energies Ltd. vs. Assam Power Distribution Company Limited and Others [Writ Petition (Civil) No. 6381/2021], .Judgement dated 29.06.2022**, on which reliance is placed on behalf of the appellant, the Gauhati High Court observed: -

> *"21.4.* ***The issue whether a concluded contract had been arrived at by the parties is also dependent upon the terms and conditions of the Notice Inviting Tender [NIT] and the e-Tender Document herein, the Letter of Award [LoA] issued by the Employer [the APDCL] in favour of the petitioner as the successful bidder [L_1] and the conduct of the parties.*** *The Letter of Award [LoA] dated 12.11.2021 was issued stating that the LoA was issued to the petitioner for the Package no. 8 as per the rates, specifications, instructions and the terms and conditions stipulated in the LoA. The LoA mentioned the total Contract Price. By appending a 'Note' to the LoA wherein terms and conditions were set forth vide Annexure-A to Annexure-O, the respondent APDCL informed the successful bidder [L_1] that on unconditional acceptance within 3 [three] days from the date of issuance of the LoA, the petitioner would be required to submit Contract Performance Guarantee [PBG] for 3% of the Contract Price within 7 [seven] days from the date of the issuance of the LoA. The LoA further contained that in the event of non-submission of the PBG within the stipulated period, the Award might be terminated and*

the Bid Security [EMD] would be forfeited without any further notice. The LoA further contained the condition that the PBG would stand forfeited if 'the Contractor' was not able to commission the awarded work to the satisfaction of the Employer [the APDCL] within the scope of the work and also within the stipulated time frame. A reading of the LoA indicates that in the event the successful bidder [L_1] did not accept the LoA unconditionally within the stipulated time period, the Award notified by the LoA would be terminated and the Bid Security [EMD] submitted by the successful bidder [L_1] would be forfeited without any further notice. On the other hand, if the successful bidder [L_1] had accepted the LoA unconditionally, submitted the PBG and signed the Contract Agreement with the APDCL within the stipulated period from the date of the Award, the successful bidder [L_1] would become 'the Contractor'. If after execution of the Contract Agreement 'the Contractor' would fail to execute the awarded contract work as per the terms and conditions of the Contract Agreement the PBG of 'the Contractor' would entail forfeiture."

As held by the Gauhati High Court, in **Premier Energies Ltd,** the question whether a concluded contract had been arrived at by the parties depends, among others, upon the terms and conditions of the invitation to bid, the PSA and the PPA, and the conduct of the parties. The first SGD Notification, which constituted the basis for the change in law claim, was issued on 30.07.2018. It is only if the rights of parties had crystallized thereafter, could it have been contended that, since the change in law event had occurred prior thereto, the 2nd Respondent could not have put forth such a claim thereafter, and should have taken steps to mitigate any loss which the appellant may suffer as a result.

On the question whether the change in law claim crystallized on the last day of submission of the bid ie 15.06.2018, or only when a PSA was executed on 03.08.2018, or when the PPA was entered into on 28.12.2018, it is useful to take note of the change in law clauses in the PSA and the PPA.

A. ARTICLE 8: CHANGE IN LAW UNDER THE PSA DATED 03.08.2018 EXECUTED BETWEEN THE APPELLANT AND SECI:

"ARTICLE 8: CHANGE IN LAW

In this Article 8, the following terms shall have the following meanings:

8.1.1 "Change in Law" means the occurrence of any of the following events after the last date of bid submission, resulting into any additional recurring/nonrecurring expenditure by SECI/SPD or any income to the SECI/SPD:

- *the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*
- *a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
- *the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- *a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such*

Consents, Clearances and Permits; except due to any default of the SPD;

- *any statutory change in tax structure, i.e. change in rates of taxes, duties and cess, or introduction of any new tax made applicable for setting up of Solar Power Project and supply of power from the Project by the SPD and has direct effect on the Project, shall be treated as per the terms of this Agreement.*

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of SECI/SPD, or (ii) any change on account of regulatory measures by the Appropriate Commission including calculation of Availability.

8.2 Relief for Change in Law:

8.2.1 The aggrieved Party shall be required to approach the Appropriate Commission for seeking approval of Change in Law.

8.2.2 The decision of the Appropriate Commission to acknowledge a change in Law and the date from which it will become effective, provide relief for the same, shall be final and governing on both the Parties."

B.ARTICLE 12: CHANGE IN LAW UNDER THE PPA DATED 28.12.2018 EXECUTED BETWEEN THE 2ND RESPONDENT AND SECI:

"ARTICLE 12: CHANGE IN LAW

12.1 Definitions

In this Article 12, the following terms shall have the following meanings:

12.1.1 "Change in Law" means the occurrence of any of the following events after the last date of bid submission, resulting into any additional recurring/nonrecurring expenditure by the SPD or any income to the SPD:

- *the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*
- *a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
- *the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- *a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the SPD;*
- *any statutory change in tax structure, i.e. change in rates of taxes, duties and cess, or introduction of any new tax made applicable for setting up of Solar Power Project and supply of power from the Project by the SPD and has direct effect on the Project, shall be treated as per the terms of this Agreement.*

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the SPD,

or (ii) any change on account of regulatory measures by the Appropriate Commission."

While Clause 8.1.1 of the PSA dated 03.08.2018 defines "Change in Law" to mean the occurrence of any of the specified events after the last date of bid submission, resulting in additional recurring/nonrecurring expenditure by SECI/SPD or any income to the SECI/SPD, Clause 12.1.1 of the PPA dated 28.12.2018 defines "Change in Law" to mean the occurrence of any of the specified events after the last date of bid submission, resulting in additional recurring/nonrecurring expenditure by the SPD or any income to the SPD. As both clause 8.1.1 of the PSA dated 03.08.2018, and clause 12.1.1 of the PPA dated 28.12.2018, define "Change in Law" to mean the occurrence of any of the specified events after the last date of bid submission, resulting in additional recurring/nonrecurring expenditure by the SPD or any income to the SPD, it is only for a change in law event, which occurred prior to the last date of submission of the bid ie 15.06.2018, is the 2nd Respondent disentitled from making a claim for compensation.

The 2nd Respondent's entitlement for a change in law claim is with respect to a change in law which occurred after the last date of submission of the bid ie 15.06.2018. In the present case, the SGD Notification was issued on 30.07.2018, long after 15.06.2018. The fact that the PSA was executed on 03.08.2018, and the PPA on 28.12.2018, matters little, as the right of the 2nd Respondent, to put forth a change in law claim, stood crystallized on the last date of submission of the bid ie 15.06.2018, and the change in law event (ie issuance of the SGD Notification) occurred only thereafter on 30.07.2018.

V.PAYMENT OF COMPENSATION, ON ACCOUNT OF A CHANGE IN LAW, BY WAY OF ANNUITY:

Mr. Ravi Sharma, learned Counsel for the Appellant, would submit that payment of compensation, on account of a change in law, by adopting the annuity method is in violation of the interim order of the Supreme Court in Civil Appeal No. 8880 of 2022 dated 12.12.2022; payment of the amount, representing the change in law claim, by way of annuity is in effect payment towards the time value of money, which was considered by this Tribunal in **Parampujya Solar Energy Private Limited**; since the afore-said Judgement has been stayed by the Supreme Court, resort to the annuity method is illegal.

On the other hand, Mr. Nitish Gupta, learned Counsel for the 2nd Respondent, would submit that accepting the Appellant's contention, that payment of compensation towards the 2nd Respondent's claim on account of change in law by way of the annuity method is illegal, would, in effect, go against the Appellant's interests as they would be required to make payment in a lumpsum, and not spread the payment over a period of 15 years.

Ms. Shikha Ohri, learned Counsel for the 3rd Respondent (SECI), would submit that the annuity method has been prescribed mainly to ensure that the generator adheres to the conditions stipulated in the PSA, and to avoid the possibility of any breach of the conditions therein by the generator on receipt of the entire compensation, towards their change in law claim, in a lumpsum.

The appeal against the order of this Tribunal, in **Parampujya Solar Energy Private Limited**, was preferred in **Telangana Northern Power Distribution Company Ltd. & Anr. vs. Parampujya Solar Energy Pvt.**

Ltd. & Ors (Civil Appeal No. 8880 of 2022 dated 24.03.2023), wherein the Supreme Court observed: -

> *"3. Pending further orders, the Central Electricity Regulatory Commission (CERC) shall comply with the directions issued in paragraph 109 of the impugned order dated 15 September 2022 of the Appellate Tribunal for Electricity. However, the final order of the CERC shall not be enforced pending further orders……"*

While enforcement of the judgement of this Tribunal, in **Parampujya Solar Energy Private Limited**, (except for the directions issued in para 109 thereof), was stayed by the Supreme Court, it is unnecessary to dwell on this issue any further, as accepting the submission of Sri Ravi Sharma, Learned Counsel for the Appellant, that prescription of the annuity method for payment of change in law compensation is illegal, would require the entire compensation amount to be paid to the 2nd Respondent in a lump sum, instead of over a 15 year period in annual instalments.

The submission of SECI, that the annuity method was prescribed to ensure adherence by the generator to the conditions stipulated in the PSA, and to avoid the possibility of any breach thereof in the event the generator receives compensation towards their change in law claim in a lumpsum, appears prima facie to be justified.

VI.IS THE DIRECTION TO PAY CARRYING COST ILLEGAL?

Mr. Ravi Sharma, learned Counsel for the Appellant, would submit that the claim for payment of carrying cost, in terms of the impugned order, also falls foul of the afore-said interim order of the Supreme Court; the directions issued by the CERC, for payment of such amounts, is *ex facie*

illegal; and, consequently, the direction issued by the CERC necessitates being set aside.

On the other hand, Mr. Nitish Gupta, learned Counsel for the 2nd Respondent, would submit that, since the 2nd Respondent has already stated that they would not press their claim for carrying cost till the Supreme Court finally decides Civil Appeal No. 8880 of 2022, it is un-necessary for this Tribunal to adjudicate this particular issue.

In the light of the submission, urged on behalf of the 2nd Respondent, that they would not press their claim for carrying cost till the Supreme Court finally decides Civil Appeal No. 8880 of 2022, we see no reason to examine, at the interlocutory stage, whether or not carrying cost could have been imposed.

Suffice it to hold that the question, whether the CERC had the jurisdiction to entertain and examine the present dispute, necessitates further examination when the appeal is finally heard, and the Appellant must be held to have made out a prima facie case.

With the first condition, of a prima facie case being made out as a sine quo non, at least two of the three conditions should be satisfied by the Appellant conjunctively, (ie either the balance of convenience should be held to be in their favour or they must be held to suffer irreparable injury if interim relief is not granted), and a mere proof of fulfilment of one of the three conditions, of a prima-facie case being made out, would not entitle them to the grant of interlocutory relief.

VII.BALANCE OF CONVENIENCE: IN WHOSE FAVOUR DOES IT LIE?

Besides making out a prima-facie case, the "balance of convenience" must also be in favour of granting interim relief. The Court/Tribunal, while granting or refusing to grant interlocutory relief,

should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if interim relief is refused, and compare it with that which is likely to be caused to the other side if the interim relief is granted. If, on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the Appeal, status quo should be maintained, interim relief would be granted. (***Dalpat Kumar* v. *Prahlad Singh*, (1992) 1 SCC 719 : AIR 1993 SC 276)**. The Court/Tribunal must satisfy itself that the comparative hardship or mischief or inconvenience which is likely to occur from withholding grant of interim relief will be greater than that which would be likely to arise from granting it (***Dalpat Kumar* v. *Prahlad Singh*, (1992) 1 SCC 719 : AIR 1993 SC 276).**

The prayer for grant of interlocutory relief is at a stage when the existence of the legal right asserted by the Appellant, and its alleged violation, are both contested and uncertain, and remains uncertain till they are examined during the final hearing of the main appeal. The court/tribunal, at this stage, acts on certain well-settled principles of administration of this form of interlocutory remedy which is both temporary and discretionary. (***Colgate Palmolive (India) Ltd.* v. *Hindustan Lever Ltd.*, (1999) 7 SCC 1; *Gujarat Bottling Co. Ltd.* v. *Coca Cola Co*, (1995) 5 SCC 545).** The interlocutory remedy is intended to protect the Appellant, being the initiator of the action, against incursion of its rights. The basic principle for the grant of an interlocutory order is to assess the right and need of the Appellant, as against that of the Respondent, and it is a duty incumbent on to the law courts/tribunals to determine as to where the balance lies. (***Colgate Palmolive (India) Ltd.* v. *Hindustan Lever Ltd.*, (1999) 7 SCC 1)**. The court/tribunal also, in restraining the Respondent from exercising what it considers to be its

legal right but what the Appellant would like to be prevented, puts into the scales, as a relevant consideration, where the balance of convenience lies. (***Colgate Palmolive (India) Ltd.* v. *Hindustan Lever Ltd.*, (1999) 7 SCC 1).** Interlocutory relief is granted to mitigate the risk of injustice to the Appellant during the period before the uncertainty is resolved. (***Colgate Palmolive (India) Ltd.* v. *Hindustan Lever Ltd.*, (1999) 7 SCC 1; *Gujarat Bottling Co. Ltd.* v. *Coca Cola Co*, (1995) 5 SCC 545; *Wander Ltd.* v. *Antox India (P) Ltd*, 1990 Supp SCC 727).**

In the amended petition filed by them before the CERC on 13.12.2022, the second Respondent herein stated that the solar modules were imported into India and, in compliance with the SGD notification 2018 and SGD notification 2020 issued by the Ministry of Finance, they had paid the safeguard duty (including IGST) amounting to Rs.80,82,11,871/- (Rupees Eighty crores, Eighty-two Lakhs, Eleven thousand Eight hundred and Seventy one only). It is evident, therefore, that the compensation, sought by the second Respondent towards their change in law claim, is for the safeguard duty actually paid by them earlier. The amount, which the second Respondent had earlier paid towards safeguard duty, has now been directed by the CERC to be recovered by them from the appellant, not in one lump sum but over a period of fifteen years applying the annuity method.

Apart from a challenge to the jurisdiction of the CERC to adjudicate the subject dispute, the submissions, urged on behalf of the Appellant on merits, do not prima facie appear to be justified. Since the impugned order does not, prima facie appear to suffer from any infirmity on its merits, and the amount already paid by the 2nd Respondent towards safeguard duty has been permitted by the CERC to be recovered from the Appellant over a period of fifteen years and not in a lump sum, we are satisfied that the

balance of convenience lies in favour of the second Respondent, and not in favour of the Appellant herein.

VIII.TEST OF IRREPARABLE INJURY: IS IT SATISFIED:

As the grant of interim relief is discretionary, exercise thereof is subject to the court/tribunal satisfying itself that its interference is necessary to protect the party from the species of injury. In other words, irreparable injury would ensue before the legal right would be conclusively established. (***Dalpat Kumar* v. *Prahlad Singh*, (1992) 1 SCC 719). T**he Court/Tribunal should satisfy itself that non-interference would result in "irreparable injury" to the party seeking relief and that he needs protection from the consequences of apprehended injury. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages (***Dalpat Kumar* v. *Prahlad Singh*, (1992) 1 SCC 719 : AIR 1993 SC 276; *Mahadeo Savlaram Shelke* v. *Puna Municipal Corporation*, (1995) 3 SCC 33).**

The PPA, executed between the second and third Respondents on 28.12.2018, obligates the second Respondent to supply electricity for a period of twenty-five years. Clause 2.2 of the PPA contains the terms of the agreement, and Clause 2.2.1 thereunder stipulates that the agreement shall be valid for a term from the effective date until the expiry date. The effective date is the date on which the agreement came into effect ie 25.10.2018, and the expiry date is the date occurring twenty five years after the scheduled commissioning date. It is evident, therefore, that the second Respondent is obligated to supply electricity to the third Respondent for a period of twenty-five years from 25.10.2018 till October, 2043. The second Respondent is contractually obligated to supply

electricity to the third Respondent which, in turn, is required to supply electricity to the Appellant for the next nearly twenty years. As it is the Appellant which is required to make payment to the third Respondent which, in turn, is required to pay the second Respondent for the electricity supplied by them, it is not as if the Appellant would be unable to recover the amounts, paid by them towards change in law compensation, in case of their success in the main Appeal later. Further the compensation payable, towards change in law, is also spread over fifteen years, and it is not as if the Appellant would have to pay the entire amount before the main Appeal is taken up for final hearing. We are satisfied, therefore, that the Appellant would not suffer irreparable injury if the interim relief, sought by them, is not granted in their favour.

IX.CONCLUSION:

Viewed from any angle, we are satisfied that no further orders, apart from those passed by us earlier on 30.11.2023, need be passed in this IA. Needless to state that any payment made by the Appellant to the second Respondent during the pendency of this Appeal, towards their change in law claim, shall be subject to result of the main Appeal.

The IA stands disposed of accordingly.

Registry to verify and then include the appeal in the List of Finals, to be taken up from there in its turn.

Pronounced in the open court on this ***22nd day of February, 2024.***

(Seema Gupta)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson

tpd/dk