APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 77 OF 2016,
APPEAL NO. 136 OF 2016
AND
APPEAL NO. 324 OF 2016

Dated : 13TH NOVEMBER, 2019.

PRESENT: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

APPEAL NO. 77 OF 2016

In the matter of:

Sasan Power Limited
C/o Reliance Power Ltd
3rd Floor, Reliance Energy Centre
Santa Cruz East,
Mumbai-400 055 **…. Appellant**

VERSUS

1. **Central Electricity Regulatory Commission**
   3rd & 4th Floor, Chanderlok Building
   36, Janpath,
   New Delhi – 110001

2. **The Managing Director**
   M. P. Power Management Company Ltd
   Shakti Bhawan, Jabalpur – 482008
   Madhya Pradesh

3. **The Managing Director**
   Paschimanchal Vidyut Vitran Nigam Limited
   Victoria Park, Meerut-250001,
   Uttar Pradesh

4. **The Managing Director**
   Purvanchal Vidyut Vitran Nigam Limited
   Hydel Colony,
   Varnasi-221004
   Uttar Pradesh

5. The Managing Director
Madhyanchal Vidyut Vitran Nigam Limited
4-A-Gokhale Marg,
Lucknow-226 001
Uttar Pradesh

6. The Managing Director
Dakshinanchal Vidyut Vitran Nigam Limited
220 kV Vidyut Sub-station,
Mathura Agra By-Pass Road,
Sikandra, Agra-282 007
Uttar Pradesh

7. The Chairman and Managing Director
Ajmer Vidyut Vitran Nigam Limited
Hathi Bhata, City Power House,
Ajmer-305 001, Rajasthan

8. The Chairman and Managing Director
Jaipur Vidyut Vitran Nigam Limited
Vidyut Bhawan, Jaipur-302 005,
Rajasthan

9. The Chairman and Managing Director
Jodhpur Vidyut Vitran Nigam Limited
New Power House, Industrial Area,
Jodhpur-342 003
Rajasthan

Also at:
Chief Engineer (Power Trading)
Shed No.5, Room No. 6, Vidyut Bhavan,
Vidyut Marg, Lal Kothi, Jaipur-302005
Rajasthan

10. The Managing Director
Tata Power Delhi Distribution Limited
Grid Sub-station Building, Hudson lines,
Kingsway Camp,
New Delhi-110 009

11. Chief Executive Officer
BSES Rajdhani Power Limited
BSES Bhawan, Nehru Place,
New Delhi-110 019

12. Chief Executive Officer
BSES Yamuna Power Limited
BSES Bhawan, Nehru Place,
New Delhi-110 019

13. The Secretary
Punjab State Electricity Board,
The Mall, Patiala – 147 001
Punjab

Also at:
The Chief Engineer (PP&R)
Punjab State Power Corporation Limited
Shed C-3, Shakti Vihar,
Patiala-147 001
Punjab

14. The Chief Engineer/PPM
Haryana Power Generation Corporation Limited
Shakti Bhawan, Panchkula-134109
Haryana

Also at:
The Chief Engineer
Haryana Power Purchase Centre (HPPC)
Sector-6, Shakti Bhawan,
Panchkula-134 109
Haryana

15. The Chairman and Managing Director
Uttarakhand Power Corporation Limited
Urja Bhawan, Kanwali Road,
Dehradun-248 001
Uttarakhand **…. Respondents**

APPEAL NO. 136 OF 2016

In the matter of:

Sasan Power Limited
C/o Reliance Power Ltd
3rd Floor, Reliance Energy Centre
Santa Cruz East,
Mumbai-400 055 **…. Appellant**

VERSUS

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Vidyut Bhawan, Jaipur-302 005,
Rajasthan

9. The Chairman and Managing Director
Jodhpur Vidyut Vitran Nigam Limited
New Power House, Industrial Area,
Jodhpur-342 003, Rajasthan

Also at:
Chief Engineer (Power Trading)
Shed No.5, Room No. 6, Vidyut Bhavan,
Vidyut Marg, Lal Kothi, Jaipur-302005
Rajasthan
[for procures above at S.No.7 to 9]

10. The Managing Director
Tata Power Delhi Distribution Limited
Grid Sub-station Building, Hudson lines,
Kingsway Camp,
New Delhi-110 009

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Panchkula-134 109
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15. The Chairman and Managing Director
Uttarakhand Power Corporation Limited
Urja Bhawan, Kanwali Road,
Dehradun-248 001
Uttarakhand **.... Respondents**

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Mr. Anand K. Ganesan
Ms. Parichia Chowdhury
Mr. Ashwin Ramanathan for R-13

APPEAL NO. 324 OF 2016

In the matter of:

1. Jaipur Vidyut Vitran Nigam Limited
Vidyut Bhawan, Jaipur-302 005,
Rajasthan

2. Ajmer Vidyut Vitran Nigam Limited
Hathi Bhata, City Power House,
Ajmer-305 001
Rajasthan

3. Jodhpur Vidyut Vitran Nigam Limited
New Power House, Industrial Area,
Jodhpur-342 003
Rajasthan **.... Appellants**

VERSUS

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13. The Secretary
Central Electricity Regulatory Commission
3rd & 4th Floor, Chanderlok Building
36, Janpath,
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Counsel for the Appellant(s): Mr. M.G. Ramachandran, Sr. Adv.
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Ms. Anushree Bardhan
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Mr. G. Umapathy
Mr. Aditya Singh
Ms. R. Mekhala for R-2

Mr. Rajiv Srivastava
Ms. Gargi Srivastava
Ms. Garima Srivastava for R-3 to 6

Ms. Swapna Seshadri
Mr. Anand K. Ganesan
Ms. Parichia Chowdhury
Mr. Ashwin Ramanathan for R-13

J U D G M E N T

[PER HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER]

1. These Appeals being Appeal Nos. 77 of 2016 & 136 of No.2016 have been filed by Sasan Power Limited, Mumbai (in short, the *"**Appellant**"*) under Section 111 of the Electricity Act, 2003 (*"**Electricity Act**"*) challenging the impugned Order dated 30.12.2015 and dated 19.02.2016 passed by Central Electricity Regulatory Commission, New Delhi (in short, ***"Central Commission"***) wherein the Central Commission has inter-alia disallowed

the various claims of the Appellant arising out of change in law events.

2. The impugned order dated 30.12.2015 has been passed in Petition No.118/MP/2015 and the order dated 19.02.2016 in Petition No. 153/MP/2015. The Appellant is aggrieved by the findings of the Central Commission in both the orders rejecting its various claims and hence these appeals.

3. Brief facts of the Appeals:

3.1 The Appellant/Sasan Power Limited, a special purpose vehicle, was incorporated by M/s Power Finance Corporation Limited ("***PFC***"), the nodal agency of Government of India for implementation of its Ultra Mega Power Project initiative on 10.02.2006 for the development and implementation of a coal fired, ultra mega power project based on linked captive coal mine using super-critical technology with an installed capacity of 4000 MW (plus/minus 10%) at Sasan, District Singrauli, Madhya Pradesh. The Project was conceived by Government of India to be implemented by a developer selected through a tariff based competitive bidding process.

3.2 Respondent Central Commission is the regulatory commission under the Electricity Act, 2003 for resolution of disputes relating to the Composite Schemes for sale of power by Generator (Sasan Power) to the Procurers and the order impugned has been passed by the Central

Commission.

3.3 Other respondents in the instant Appeals are the distribution companies in the States of Madhya Pradesh, Uttar Pradesh, Punjab, Haryana, Uttarakhand and Delhi. These Respondents are the Procurers of power from the above Ultra Mega Power Project (Sasan Power).

4. The Appellant, aggrieved by the impugned Orders passed by the Central Commission has preferred the instant Appeals before this Tribunal on the following questions of law:

(A) Whether the Central Commission has erred in allowing recovery of royalty, clean energy cess and excise duty on the basis of coal consumption instead of coal despatched when the latter forms the basis for payment of the aforesaid levies?

(B) Whether the Central Commission's interpretation of Article 13 and what constitutes Change in Law is erroneous and contrary to settled principles of interpretation as well as the provisions of the PPA?

(C) Whether the Central Commission has erred in holding that (i) the imposition of one time water allocation fee brought about by notification dated 22.05.2013 amending the Madhya Pradesh Irrigation Rules, 1974 and (ii) increase in water charges as per the various notifications issued by Government of Madhya Pradesh does not amount to Change in Law in terms of the PPA?

(D) Whether the Central Commission erred in limiting the Auxiliary Consumption of the Project to 6% of the total installed capacity of the Project instead of granting compensation on actuals contrary to the provisions of the PPA?

(E) Whether the Central Commission erred in limiting the compensation payable on Change in Law events impacting coal corresponding to scheduled generation based on Station Heat Rate of 2241 kCal/kWh instead of granting compensation on actuals contrary to the provisions of the PPA?

5. Written submissions filed by the learned counsel, Mr. Vishrov Mukherjee, appearing for the Appellant/Sasan Power in Appeal Nos. 77 of 2016 and 136 of 2016 are as under:

5.1 The present Appeals have been filed by the Appellant/Sasan Power Ltd challenging the Order dated 30.12.2015 passed by the Central Commission in Petition No. 118/MP/2013 and Order dated 19.02.2016 passed by the Central Commission in Petition No. 153/MP/2015 on the ground that the Central Commission has *inter-alia* disallowed Appellant's various claims for computation of the impact of change in law events.

5.2 The Impugned Order is being challenged on the following grounds:

(a) The Central Commission has rejected Appellant's claim for determination of compensation on the basis of despatched

quantity of coal even though royalty, clean energy cess and excise duty are computed and deposited on the basis of despatched quantity of coal. The Central Commission has computed coal consumption on the basis of coal utilized by the Project.

(b) Levy of one time water-allocation fee and increase in water charges do not amount to Change in Law events in terms of Article 13 of the PPA since the same are an input cost for the Project.

(c) Limiting auxiliary power consumption at 6% of the installed capacity instead of actual auxiliary power consumption in the computation of compensation on account of Change in Law

(d) Limiting compensation payable on Change in Law events impacting cost of coal consumed corresponding to scheduled generation based on Station Heat Rate of 2241 kCal/kWh instead of actual heat rate

(e) Appellant is not entitled to carrying costs on expenditure incurred on account of Change in Law.

(a) Quantity of Coal – Dispatched vs Utilized:

5.3 Regarding compensation for Change in Law events impacting coal ought to be on the basis of despatch and not consumption, the Central Commission erred in computing compensation for royalty, clean energy cess and excise duty based on actual coal consumption and not on coal despatched from the mine.

5.4 Compensation for change in law events impacting coal i.e. increase in royalty, clean energy cess and excise duty on coal ought to be computed on the basis of despatched quantity of coal and not on the quantity of coal utilized for generating power at the Project, since the aforesaid levies are imposed on the quantity of coal despatched in accordance with applicable laws. The same is evident in terms of the following:-

5.4.1 Royalty: In terms of Section 9 of the Mines and Minerals (Development and Regulations) Act, 1957 ("MMRD Act"), the Appellant is required to make payments towards royalty on the coal extracted from the Moher and Moher Amlohri Extension Coal Block at the time of removal of the coal from the mining lease area i.e. at the time of despatch of coal. The relevant extracts of Section 9 of the MMRD Act are reproduced below:

> *"Royalties in respect of mining leases*
> *9. (1) The holder of a mining lease granted before the commencement of this Act shall, notwithstanding anything contained in the instrument of lease or in any law in force at such commencement, pay royalty in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area after such commencement, at the rate for the time being specified in the Second Schedule in respect of that mineral.*
> *(2) The holder of a mining lease granted on or after the commencement of this Act shall pay royalty in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area at the rate for the time being specified in the Second Schedule in respect of that mineral"*

***5.4.2 Clean Energy Cess*:** In terms of the Ministry of Finance notification dated 24.06.2010, the imposition of Clean Energy Cess is on the quantity of coal 'raised and dispatched' from the coal mine. Further, the due date for payment of Clean Energy Cess is fixed as the 6th (for e-payment)/ 5th (for payment in any other manner) of the Month following the month to which removals relate.

5.4.3 Excise Duty: In accordance with Rule 4 of the Central Excise Valuation (Determination of Price of Excise Goods) Rules, 2000, the value of excisable goods is to be based on the value of goods sold by the assesse for delivery at any other time nearest to the time of removal of goods under assessment.

5.4.4 The Hon'ble Supreme Court of India has in the case of Union of India vs Bombay Tyre International Ltd reported as 1983 (14) ELT 1896 (S.C) held that excise duty is imposed with respect to manufacture or production of an article. Excise duty payable is not determined with respect to the point of collection of the said duty which is merely for administrative convenience but is attracted by the manufacture of the product in question.

5.4.5 In terms of the above, it may be surmised that the Appellant's liability to make payment for the aforesaid levies crystallizes at the time of despatch of coal from the mine. Therefore, the compensation due to Appellant ought to be correlated to the payment of royalty, clean energy cess

and excise duty paid in respect of despatch of coal and not utilization of coal. The aforesaid would be necessary to restore Appellant to the same economic position as if the Change in Law event had not occurred. The Appellant is using coal to supply power to the Procurers only. Limiting the Appellant to claim compensation on the basis of coal utilized not only delays recovery of amounts actually expended by the Appellant but also entails carrying cost due to delay between actual payment by the Appellant and compensation paid by the Procurers.

5.4.6 The Central Commission summarily concluded that the compensation will be based on utilization of coal without assigning any reasons thereto. Therefore, the aforesaid is contrary to the provisions of the PPA and ought to be set aside.

5.4.7 Moreover, the absence of reasons by the Central Commission for limiting compensation to utilization of coal renders the Impugned Order bad in law. The Hon'ble Supreme Court has in the case of The Secretary and Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity and Ors., reported as (2010) 3 SCC 732 held that reason is the heartbeat of every order and that a judicial order must be supported by reasons.

5.4.8 Further, any compensation for Change in Law ought to be such that the Affected Party is restored to the same economic position as if such Change in Law event had not occurred. Any mechanism which results in

under-recovery/non-restoration of the affected party will be contrary to the provisions of the PPAs. The said position has also been confirmed by this Tribunal in terms of Judgment dated 20.11.2018 in Appeal No. 121 of 2018 titled Sasan Power Limited vs. CERC &Ors. The operative portion of the Sasan Power Judgment is reproduced hereunder:

> "*15.7 We also take note that the intended objective underlined the stated principle is restoration of the party to the same economic position and thus, the same needs to be interpreted in the right perspective with the main governing principles and not by a formula limiting to the said objective and yielding different reliefs to different generators as recorded by the CEA in its meeting held on 8.7.2013. In fact, the formula is essentially a vehicle to give effect to the guiding principle of economic restoration and the same needs to be read down to the extent it is inconsistent with the principle it seeks to serve."*

In view of the above, in absence of reasons, the Impugned Order cannot be sustained.

(b) Water Charges:

5.5 Regarding Appellant's claim that one time water allocation fee and increase in water charges are Change in Law events, the Central Commission erred in holding that imposition of one time water allocation fee and increase in water charges do not constitute change in law events. On the Cut-Off Date there was no requirement for payment of water allocation fee. Pursuant to the amendment dated 22.06.2013 issued by the Government of Madhya Pradesh to the then prevailing MP Irrigation Rules (under the

Madhya Pradesh Irrigation Act, 1931), the Appellant was required to pay a one-time water allocation fee equivalent to one month water tax and cess on the annual allocated water quantity. Accordingly, the water allocation fee payable by the Appellant is Rs 7.12 Cr.

5.6 On the Cut-Off Date, the applicable water charges were Rs 1.80/Cu. M in terms of notification dated 27.07.2003. Subsequently, vide notification dated 21.04.2010, Government of Madhya Pradesh revised the water charges for the years starting 1.1.2010, 1.1.2011, 1.1.2012 and 1.1.2013 to Rs 4.00 /Cu.M., Rs 4.50/Cu.M., Rs 5.00/Cu.M. and Rs 5.50/Cu.M. respectively. Accordingly, in terms of Paragraph 2 of the Water Supply Agreement dated 05.01.2013, the Appellant was required to pay Government of Madhya Pradesh revised water charges for the water drawn by it. The impact on account of increase in water charges ranges between 54.40 crores to 63.90 crores.

5.7 The imposition of one time water allocation fee and increase in water charges are change in law events in terms of the following:-

a) The imposition of one-time water allocation fee and the increase in water charges were pursuant to the amendment dated 22.06.2013 issued by the Government of Madhya Pradesh to the M.P Irrigation Rules and Government of Madhya Pradesh Notification dated 21.04.2010.

b) The amendment to the M.P. Irrigation Rules and the Notification dated 21.04.2010 were issued by the Government of Madhya Pradesh which is an Indian Governmental Instrumentality.

c) The aforesaid fee and increase in water charges occurred after the Cut-Off Date.

d) The aforesaid amendment and notification have led to an increase in cost to the Appellant.

5.8 The Central Commission erroneously relied on Clause 2.7.1.4.3 and 2.7.2.1 of the RFP to hold that the Appellant was required to quote an inclusive bid taking into account all input costs. The aforesaid reasoning has been rejected by this Tribunal vide its judgment dated 19.04.2017 in Appeal No. 161 of 2015 - *Sasan Power v. CERC and Ors*., reported as 2017 ELR (APTEL) 508. Further, any increase in cost subsequent to the Cut-off Date on account of a Change in Law event is required to be allowed in terms of Article 13 of the PPA. It is submitted that SPL's claim is not premised on increase in input cost on account of inflation or a general increase in prices. It is premised on issuance of notifications and amendments by an Indian Governmental Instrumentality, in this case, the Government of Madhya Pradesh resulting in the increase in water charges.

5.9 It is also pertinent to note that the Central Commission has in the Statement of Objects and Reasons to the CERC Tariff Regulation, 2014, noted that water charges are determined by State agencies and are beyond the control of the generating company. The operative part of the Statement of Reasons issued by the Central Commission is reproduced below:-

> *"Commission's Views*
>
> *29.21 In response to the suggestion that the O&M expenses should be partly normative and partly on the basis of actual according to controllable and uncontrollable items, the Commission observes that O&M expenses are controllable in nature and a generating station is expected to limit these expenses within the norms specified. Further, the Commission has already provided for payment of water charges, which is determined by the State agencies and over which generator has no direct control. In case there is an impact on such expenses on account of Force Majeure events as defined in the Tariff Regulations, 2014, the Commission may consider such events on being approached by the generating company or transmission licensee. Therefore, the Commission is of the view that the approach followed for determining the O&M norm is appropriate and doesn't need any review."*

5.10 The Central Commission's reliance on the judgment dated 12.09.2014 of this Tribunal in Appeal No. 288 of 2013 titled Wardha Power Company Limited v. Reliance Infrastructure Limited & Another ("Wardha Judgment") to hold that only new taxes and levies would be allowed as Change in Law, is erroneous. The Central Commission has proceeded on the erroneous understanding that since Wardha did not claim increase in base price of the input, SPL is also not entitled to claim the same. It is pertinent to

note that the issue of whether increase in input costs can be allowed as Change in Law was not even considered in the Wardha Judgment since the input cost therein (coal) was not being regulated by notifications or orders which would qualify as change in law. In the present case, the cost of water is regulated by way of government notifications which are covered under the definition of 'Law'. Therefore, the Appellant is entitled to be compensated for the same.

(c) Auxiliary Consumption

5.11 The Central Commission has erred in limiting auxiliary power consumption at 6% of the installed capacity instead of actual auxiliary power consumption in the computation of the impact on account of change in law events. The relevant portion of the Impugned Order is reproduced below:

> "*42. The Commission has specified a mechanism herein considering the fact that compensation for such Change in Law shall be paid in subsequent contract years also. To approach the Commission every year for computation and allowance of compensation for such Change in Law is a time consuming process which results in time lag between the amount paid by Seller and actual reimbursement by the Procurers which may result in payment of carrying cost to the amount actually paid by the Seller. Accordingly, the following mechanism shall be adopted for payment of compensation due to Change in Law events as per Article 13.4.2 of PPA in the subsequent years of the Contracted Period:*
>
> *…*
>
> *(d) Increase in electricity duty and energy development cess on APC of the generating station and coal mine shall be computed corresponding*

to the schedule energy and shall be payable by all beneficiaries/procurers of the generating station in proportional to their scheduled energy. APC shall be actual or 6% whichever is lower, including mine consumption."

5.12 Further, Central Commission has in the Impugned Orders, categorically held that increase in electricity duty payable on the auxiliary power and the imposition of cess on auxiliary power are change in law events for which SPL is entitled for compensation. In terms of Article 13.2 of the PPA, compensation for change in law events is to be paid to the Appellant on actuals and not on normative basis so as to restore Appellant to the same economic position as if the change in law event did not take place. The Central Commission by limiting the compensation payable on account of change in law events impacting auxiliary power consumption to only 6% of the total installed capacity of the Project has acted contrary to the underlying principle of Article 13.2 of the PPA and failed to give effect to said provision.

5.13 The compensation for increase in electricity duty payable on the auxiliary power and the imposition of cess on auxiliary power has to be determined on actuals since the PPA does not limit or stipulate auxiliary consumption to be normative. The aforesaid position has been confirmed by this Tribunal in judgment dated 22.08.2016 in Appeal No. 34 of 2016 in the case of *Jaiprakash Power Ventures Ltd vs Madhya Pradesh Electricity Regulatory Commission* wherein it has been held that since the power

purchase agreement did not contain any mention of minimum technical requirement of the generator for scheduling of power by the beneficiary, the generator cannot enforce the same against the beneficiary. Thus, auxiliary consumption cannot be restricted when there is no such restriction contained in the PPA.

5.14 Moreover, this Tribunal in the judgment dated 12.09.2014 in Appeal No. 288 of 2013 titled *Wardha Power Company Limited v. Reliance Infrastructure Limited & Another* has laid down principles based on which compensation for Change in Law events may be granted. The relevant extracts of the said Judgment are reproduced below:

> *"26. The price bid given by the Seller for fixed and variable charges both escalable and non-escalable is based on the Appellant's perception of risks and estimates of expenditure at the time of submitting the bid. The energy charge as quoted in the bid may not match with the actual energy charge corresponding to the actual landed price of fuel. The seller in its bid has also not quoted the price of coal. Therefore, it is not correct to co-relate the compensation on account of Change in Law due to change in cess/excise duty on coal, to the coal price computed from the quoted energy charges in the Financial bid and the heat rate and Gross Calorific value of Coal given in the bidding documents by the bidder for the purpose of establishing the coal requirement. The coal price so calculated will not be equal to the actual price of coal and therefore, compensation for Change in Law computed on such price of coal will not restore the economic position of the Seller to the same level as if such Change in Law has not occurred.*

> *27. For example, if the price of coal calculated on the same base as used in the bid is more than the prevalent price of coal, then using the base price of coal for computing the compensation for Change in Law will result in over compensation to the Seller. Similarly, if the coal price calculated on the same base as used in bid is less than the actual price of coal, it will result in under compensation to the Seller. In both these cases, the affected party will not be restored to the same economic position as if such Change in Law has not occurred, as intended in the PPA."*
>
> *....*
>
> *"31. In view of above, we set aside the findings of the State Commission regarding calculation of compensation on the same base as given in the bid and hold that the compensation has to be computed with respect to prevalent price of coal."*

In terms of the above, compensation for Change in Law events is to be paid on the basis of actuals.

5.15 It is pertinent to note that several bidders offered varying gross and net capacity and it would be incorrect to assume the difference between the two as auxiliary power consumption. In respect of some bidders, the gap is as high as 10%. Accordingly, the Ld. Commission has erred in applying normative parameters to determine the impact of Change in Law events.

5.16 Without prejudice to the foregoing, it is submitted that the auxiliary power consumption of similarly sized generating stations which do not have a captive coal mine, approved by Ld. Commission is as under:

Sl	Plant	Unit Capacity (in MW)	Aux. Consumption	Commissioning	Original Equipment Manufacturer	Reference
1	Sipat – Stage I	660	6.5%	June'12	BHEL, India	CERC Petition No: 28/2011 Order dated : 22.08.2013
2	Adani Mundra	660	6.5%	Mar'12	Boiler : Harbin Boiler Co. Ltd., China TG : Dongfang Machinery Co. Ltd., China	CERC Petition No: 155/MP/2012 Order dated : 21.02.2014

5.17 The Central Commission has approved auxiliary power consumption for similar sized units as 6.5%. It is noteworthy that SPL's project is an integrated project i.e. it also includes coal mine and over land conveyor for coal transportation. The captive coal mines have been held to be an integral part of the Project. In view of the above, any restriction on auxiliary power consumption up to 6% in the present case (which involves a captive coal mine) is not only contrary to law but also impractical.

5.18 Further, any compensation for Change in Law ought to be such that the Affected Party is restored to the same economic position as if such Change in Law event had not occurred. Any mechanism which results in under-recovery/non-restoration of the affected party will be contrary to the provisions of the PPAs. The said position has also been confirmed by this Tribunal in terms of Judgment dated 20.11.2018 in Appeal No. 121 of 2018 titled *Sasan Power Limited vs. CERC & Ors.* ("*Sasan Power Judgment*"). The operative portion of the Sasan Power Judgment is reproduced hereunder:

> "*15.7 We also take note that the intended objective underlined the stated principle is restoration of the party to the same economic position and thus, the same needs to be interpreted in the right perspective with the main governing principles and not by a formula limiting to the said objective and yielding different reliefs to different generators as recorded by the CEA in its meeting held on 8.7.2013. In fact, the formula is essentially a vehicle to give effect to the guiding principle of economic restoration and the same needs to be read down to the extent it is inconsistent with the principle it seeks to serve."*

In light of the above, the Appellant is entitled to compensation based on actuals.

(d) Station Heat Rate:

5.19 Regarding Compensation for Change in Law impacting Coal ought not to be limited to coal consumption corresponding to Station Heat Rate of 2241 kCal/kWh, it is submitted that the Central Commission has erred in limiting the compensation payable to the Appellant on account of Change in Law events impacting coal consumed for corresponding SHR of 2241 kCal/kWh. The compensation for Change in Law events impacting coal cannot be restricted to quantum of coal required for operating the Project at 2241 kWh/kCal and must be allowed at actuals in accordance with the principle of Article 13 of the PPA, which is restoration of the affected party to the same economic position as if the change in law event never occurred. This Tribunal in the Jaiprakash Judgment has held that in the absence of a technical requirement/condition in the PPA, the same cannot be read into the

PPA. Further, it is submitted that this Tribunal in the Wardha Judgment, has clearly held that compensation for change in law events is to be paid on the basis of actuals. Imposition of normative parameters in computation which are not part of the PPA is contrary to law.

5.20 Compensation for Change in Law, which restricts or precludes the Appellant from recovering the actual cost incurred due to said Change in Law event, is contrary to the PPAs and judgments of the Hon'ble Supreme Court and this Tribunal. Accordingly, compensation for Change in Law event ought to consider the actual SHR so that the Appellant is restored to the same economic position.

5.21 Further, in terms of Order dated 15.11.2018 in Petition No. 88/MP/2018 titled GMR Warora Energy Limited vs. MSEDCL & Anr., the Central Commission has observed that SHR given in the bid is under test conditions and may vary from actual SHR. Therefore, it would only be correct to take the SHR specified in the Regulations as a reference point instead of other parameters, given that the SHR as per the bidding document cannot be considered for deciding the coal requirement for the purpose of calculating the relief under Change in law. The Central Commission has in terms of Order 15.11.2018, recognised that technical parameters such as Heat Rate and GCV as per bidding documents cannot be considered for deciding coal requirement for the purpose of calculating relief under Change in Law. The

normative SHR allowed by the Central Commission is lower than the normative parameters under the Tariff Regulations as well as actual SHR of similar sized generating stations.

5.22 This Tribunal has in its judgment dated 13.04.2018 in Case No. 210 of 2017 in the case of Adani Power Ltd. v. CERC &Ors held that SHR would have to be determined on case to case basis.

In view of the foregoing, it is submitted that the computation ought to be on actual and not normative SHR

(e) Carrying Cost:

5.23 Regarding Carrying Cost, the Central Commission had disallowed Appellant's claim for the same in the Impugned Order. However, the Central Commission had observed that the Appellant had filed Review Petition No. 1/RP/2016 in Petition No. 402/MP/2014 claiming carrying cost and that final order in the aforesaid Review Petition would be applicable in the present case.

5.24 The Central Commission vide its Order dated 16.02.2017 in Petition No. 1/RP/2016 in Petition No. 402/MP/2014, had disallowed carrying cost. The Appellant has challenged the aforesaid order by way of Appeal No. 149 of 2017. The said appeal was admitted by this Tribunal on 23.05.2017. Since

the disallowance of carrying cost will be applicable in the present case as well, the same has been impugned herein.

5.25 The Central Commission, in the Order dated 16.02.2017 in Review Petition No. 1/RP/2016 in Petition No. 402/MP/2014, had disallowed the claim for carrying cost for the following reasons:-

(a) There is no provision for carrying cost in the PPA;

(b) Change in Law claims crystallize only upon their determination by the Central Commission;

(c) This Tribunal's judgment dated 20.12.2012 in Appeal No. 150 and batch appeals titled SLS Power Ltd v. Andhra Pradesh Electricity Regulatory Commission is not applicable in the present case, since the said case dealt with redetermination of tariff.

5.26 The aforesaid reasons have been categorically rejected by this Tribunal in the Adani Carrying Cost Tribunal Judgment, wherein this Tribunal recognized the concept of restitution and allowed carrying costs in respect of the allowed change in law events which has been upheld by the Hon'ble Supreme Court in judgment dated 25.02.2019 passed in Civil Appeal No. 5865 of 2018 vide which the Hon'ble Supreme Court has dismissed the Appeal filed against the Adani Carrying Cost Judgment of this Tribunal and

upheld that compensation for Change in Law includes compensation for Carrying Cost. Therefore, the principle of carrying cost has been settled by the Hon'ble Supreme Court and shall apply to the present Appeal as well. Thus, this Tribunal ought to allow the claim for carrying cost to SPL for change in law events.

6. *Per-contra*, written note/reply filed by learned counsel, Mr. K.S. Dhingra, appearing for the Central Commission/CERC are as under:

6.1 The appellant was incorporated as a Special Purpose Vehicle to build, own and operate the coal-fired super critical, Ultra Mega Power Project (the Power Project), with linked captive coal mine at Sasan in the State of Madhya Pradesh. The appellant executed the Power Purchase Agreement dated 07.08.2007 with the beneficiaries of the Power Project and established the Power Project with total capacity of 3960 MW (6 X 660 MW), its first unit was declared under commercial operation on 16.08.2013 and the second unit on 28.01.2014, as evidenced through the records of the Central Commission.

6.2 The appellant filed a petition (Petition No 118/MP/2015) under clause (f) of subsection (1) of Section 79 of the Electricity Act, 2003 seeking certain reliefs in accordance with Article 13 (Change in Law clause) of the PPA during the operating period, which includes offsetting of impact of increase in rate of Electricity Duty on Auxiliary Power Consumption (APC) at the Power Project along with captive Coal Mines and imposition of Energy

Development Cess on (i) sale of power to MP Power Management Company Limited and (ii) auxiliary power consumed by the appellant.

6.3 The appellant submitted that as per Section 3 of the Madhya Pradesh Electricity Duty Act, 1949, the applicable rate of Electricity Duty on Auxiliary Power Consumption was 8% of the tariff applicable if the electricity was supplied by the distribution licensee at the time of submission of bid. The rate of Electricity Duty on the Auxiliary Power Consumption by the generating companies was increased to 15% under the Madhya Pradesh Vidyut Shulk Adhiniyam, 2012. The appellant worked out the financial impact on account of the change in Electricity Duty on Auxiliary Power Consumption in the following manner:

(a) **Electricity Duty on Auxiliary Power Consumption in Power Project:**

Impact (in Rs.) = (Actual Electricity Duty paid on auxiliary power consumed in Power plant at the rate of 15% of prevailing DISCOM electricity tariff (including FCA) under the provisions of the Electricity Duty Act, 2012) *LESS* (Electricity Duty on auxiliary power consumed in Power plant calculated at the rate of 8% of the prevailing DISCOM tariff under the provisions of the MP Electricity Duty Act, 1949)

(b) **Electricity Duty on Auxiliary Power Consumption on Captive Coal Mine**

Impact (in Rs.) = (Actual Electricity Duty paid on auxiliary power consumed in coal mine at the rate of 40% of prevailing DISCOM electricity tariff (including FCA) under the provisions of the Electricity Duty Act, 2012 LESS (Electricity Duty on auxiliary power consumed in coal mine calculated at the rate of 40% of the prevailing DISCOM tariff under the provisions of the MP Electricity Duty Act, 1949)

Based on the above methodology, the appellant calculated the total financial impact of Rs. 85.5 crore per annum on account of increase in Electricity Duty on electricity consumed for the Power Project auxiliaries and the captive coal mine

6.4 The appellant submitted that Energy Development Cess was not payable at the time of submission of the bid. However, as per clause (1) of sub-section (1) of Section 3 of the Madhya Pradesh Upkar (Sanshodhan) Adhiniyam, 2012, the appellant was required to pay Energy Development Cess at the rate of Rs. 0.15 per unit on the electricity supplied to a distribution licensee or consumer in the State of Madhya Pradesh and power consumed by the appellant or its employees.

6.5 The petition was disposed of by the Central Commission in its order dated 30.12.2015 wherein the Central Commission upheld the appellant's plea that the events based on which the relief was sought were covered under the Change in Law clause (Article 13) of the PPA. The Central Commission, however, did not give the full relief, as claimed, on two issues, increase in Electricity Duty and imposition of Energy Development Cess.

6.6 The percentage of Auxiliary Power Consumption for the years 2013-14, 2014-15 and 2015-16 (up to July 2015) works out to 8.65%, 6.78% and 6.34% respectively of actual generation at generator terminal. Under the PPA

the appellant agreed to sell the capacity of 3722.4 MW to the beneficiaries as seen from the definition of the term 'Contracted Capacity' under the PPA. Thus, against the installed capacity of 3960 MW, the appellant has contracted a capacity of 3722.4 MW to the beneficiaries, which works out to 94% of the total installed capacity of the Power Project (3722.4 X 100/3960). As such, auxiliary consumption for the Plant is 6%.

6.7 The sale of the contracted capacity to the beneficiaries is the net capacity after consuming 6% of the total installed capacity as the Auxiliary Power Consumption of the generating station and the dedicated coal mine. Accordingly, the Central Commission in the impugned order considered Auxiliary Power Consumption of 6% of the total installed capacity for the Power Project inclusive of consumption of coal mine for computing the increased Electricity Duty and Energy Development Cess on auxiliary power consumed, which is payable by the beneficiaries. The Central Commission noted that energy scheduled by the beneficiaries of the Power Project is ex-bus energy actually supplied to the beneficiaries. Therefore, actual power at generator terminal required to be generated including 6% Auxiliary Power Consumption would be scheduled energy divided by 0.94.

6.8 Based on this actual generation at generator terminal (including 6% Auxiliary Power Consumption), increase in Electricity Duty in the years 2013-14, 2014-15 and 2015-16 has been computed and, accordingly, the appellant

was found to be entitled to recover the amount of Rs. 86.2942 crore for the increase in Electricity Duty from the beneficiaries in proportion to the Scheduled Generation. As per the Amendment Act, the generating company is required to pay Energy Development Cess to the State Government at the rate of 15 paise/unit on the electrical energy sold to a distribution company or consumer within the State or for electrical energy used for self-consumption. While recovery of Energy Development Cess on sale of power to the State of Madhya Pradesh has been permitted as claimed by the appellant, the same on Auxiliary Power Consumption has been permitted as considered for computation of Electricity Duty.

6.9 As regards the appellant's claim for compensation on account of increase in Water Charges under Change in Law provision, the Central Commission in the order dated 30.3.2015 did not express any specific opinion and granted liberty to the appellant to approach the Central Commission along with the information called for to enable examination of the claim. The Central Commission in the order dated 30.3.2015 in Petition No 6/MP/2013 directed that compensation on the accepted Change in Law events was to be restricted to the quantum of coal used for generation of contracted supply, to the exclusion of coal extracted from the captive mines for other uses elsewhere. The appellant did not take any further proceedings against the Central Commission's directions extracted under Para 9 above and thus

these decisions have acquired finality. Therefore, the appellant's claim in the impugned order for compensation on account of above Change in Law events was considered by the Central Commission based on the directions in the said order dated 30.3.2015.

6.10 The appellant had argued that its liability to pay Royalty, Clean Energy Cess and Excise Duty crystallized when coal was dispatched and therefore it is entitled to reliefs based on the quantity of coal dispatched. The Central Commission, however, allowed adjustments on account of increase in Royalty, imposition of Clean Energy Cess and Excise Duty on net requirement of coal corresponding to scheduled generation, as already decided in Petition No 6/MP/2013. Accordingly, the appellant's claim in the present appeal for relief on the basis of coal dispatched from the captive mines for other uses elsewhere is primarily barred by limitation.

6.11 Further, regarding Water Charges, the appellant urged that while submitting the bid, the rate of Rs.1.80/M^3 (Cubic Metre) applicable on the cut-off date for water was factored in accordance with the notification dated 25.07.2003. The appellant pointed out that by notification dated 21.4.2010, the State Government revised per M^3 rates of water for the years 2010, 2011, 2012 and 2013 to Rs.4.00, Rs.4.50, Rs.5.00 and Rs.5.50 respectively.

6.12 After the notification dated 21.4.2010, the appellant executed an agreement dated 5.1.2013 with Water Resource Department of the State Government.

6.13 Further, Madhya Pradesh Irrigation Rules, 1974, were amended vide notification dated 22.6.2013, according to which the appellant was required to pay a one-time water allocation fee equivalent to one month water tax and cess on the annual allocated water quantity. The appellant worked out the one-time water allocation fee of Rs.7.12 crore. The appellant in the petition before the Central Commission claimed compensation on account of increase in water charges as also the one-time water allocation fee calculated by it. The appellant's claim was resisted by the beneficiaries and, inter-alia, submitted that the notification issued by the State Government on 21.4.2010 revising the water charges could not be treated as the Change in Law event as the increase caused the price variation which is not covered under Article 13 of the PPA. The Central Commission in the impugned order held that the notification dated 21.4.2010 whereby rates of water supply were increased is not 'law' in terms of the definition under the PPA. The genesis of recovery of water charges by the State Government rests in the agreement executed between the appellant and the State Government and not under any law as manifested by the provisions of Madhya Pradesh Irrigation Act, 1931 wherein Section 37 of the Act reads thus:

"37. Purpose for which water may be supplied,

(1) Water may be supplied from a canal:

(a) Under an irrigation agreement, in accordance with the provisions of Chapter VI;

(b) On demand, for the irrigation of specified areas;

(c) To supplement a village tank;

(d) For Industrial, urban or other purposes not connected with agriculture;

(e) For the irrigation of a compulsorily assessed area.

(2) Charges for the supply of water under clause (a), (b), (c) or (e) of sub-section (1) shall be paid at such rates as may be fixed by the State Government in accordance with rules made under this Act."

6.14 Under Section 40 of the Act, extracted below, the charges etc for supply of water for industrial, urban and other non-agricultural purposes are to be fixed under the agreement:

> *"40. Supply or water for industrial, urban or other purposes.-*
> *The conditions for the supply of water for industrial, urban or other purposes not connected with agriculture and the charges there for, shall be as agreed upon between the State Government and the company, firm, private person or local body concerned and fixed in accordance with rules made under this Act*."

6.15 The agreement dated 5.1.2013 based on which water is being supplied to the appellant is a commercial arrangement worked out by the parties and the water charges are not being paid *per se* under the notification dated 21.04.2010, even if the rates decided under the notification are adopted in the agreement. Further, on analysis of the available data for the period from 1.4.1991 to 1.11.2013, extracted under Para 41 of the impugned order, the Central Commission noted that year after year increase in water charges

was being ordered by the State Government which fact needed to be realistically assessed and factored in the bid for the entire contract period and the appellant's failure to do so cannot burden the beneficiaries at later stage.

6.16 The Central Commission also examined the appellant's claim in the light of judgment of the Appellate Tribunal dated 12.09.2014 in Appeal No 288/2013 (Wardha Power Company Ltd Vs Reliance Infrastructure Ltd and another) on which reliance was placed by the appellant before it and also in the appeal. The Central Commission observed that ratio of the said judgment did not have any application to the appellant's claim since in that case the question involved was of adjustment of imposition of taxes, levies and cess whereas the appellant's claim in the petition before the Central Commission was based on increase in water charges and was not on account of imposition or increase of taxes, levies and cess.

6.17 The Central Commission further found that one time water allocation fee levied under the notification dated 22.6.2013by the State Government did not fall under the Change in Law provisions of the PPA, as below:

> *"46. The petitioner has submitted that Government of Madhya Pradesh vide notification dated 22.6.2013 has amended the Madhya Pradesh Irrigation Rules, 1974 in terms of which the petitioner is required to pay onetime fee for water allocation equivalent to one month water tax and cess on the annual allocated water quantity. The petitioner has submitted that water allocation fees payable by the petitioner is Rs.7.12crore (172.71 MCM xRs.5.5 x 90% x 1/12). It is noticed that the*

petitioner has taken the water rate as equivalent to water tax and cess whereas as per the agreement tax and cess are in addition to water charges. In our view, one time water allocation fees cannot be covered under any of the provisions of Change in Law under the PPA and hence the claim is disallowed."

6.18 It is also noted that the appellant is supplied water under the agreement dated 05.01.2013, effective since 01.01.2013 but it has laid claim to the one time water allocation fee based on the notification dated 22.06.2013, which came into force from the date of its publication and is thus prospective in application.

6.19 The appellant has also claimed that in the bid the rate of Rs.1.80/M^3 notified by the State Government under notification dated 25.07.2003 was factored and has claimed compensation accordingly. The plea of the appellant is preposterous and seems to be false since in the same notification dated 25.07.2003 the State Government had notified the rate of Rs.2.00/M^3 applicable from 1.11.2007. For the fact that the notification dated 25.07.2003, on which the bidder is said to have relied upon at the time of submission of bid shows increase in water charges every year from 01.11.2003 to 01.11.2007, in all probability the bidder would have factored future increase in water charges in the bid. In the facts and circumstances, the appellant's claim for adjustment of increased water charges appears to be only an afterthought

6.20 Regarding auxiliary water consumption, it is submitted that the Central Commission in the impugned order considered Auxiliary Power Consumption of 6% for computing quantity of coal required corresponding to the scheduled generation, which is another cause for the appellant's grievance. The reason for considering 6% APC given in the Central Commission's order dated 30.12.2015 in Petition No.118/MP/2015, which is the subject matter of linked Appeal No 77/2016, was adopted in the impugned order. Under the PPA the appellant agreed to sell the capacity of 3722.4 MW to the beneficiaries as seen from the definition of the term 'Contracted Capacity' given under the PPA. Thus, against the installed capacity of 3960 MW, the appellant is thus selling the contracted capacity of 3722.4 MW to the beneficiaries, which work out to 94% of the total installed capacity of the Power Project. After sale of the contracted capacity to the beneficiaries, the residual capacity, that is, 6% is the Auxiliary Power Consumption of the Power Project and the dedicated coal mine. Accordingly, the Central Commission in the impugned order has considered Auxiliary Power Consumption of 6% for computing the coal requirement corresponding to the scheduled generation for which the beneficiaries are liable to pay.

6.21 The appellant's reliance on normative Auxiliary Power Consumption of 6.5% specified under the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 notified under Section 61

of the Electricity Act is misplaced since those regulations are applicable in case of tariff determined under cost-plus regime whereas the Power Project is competitively bid.

6.22 The appellant has brought on record the Station Heat Rate of the power stations of NTPC and Adani and the normative Station Heat Rate specified by the Central Commission in the terms and conditions for determination of tariff specified under Section 61 of the Electricity Act applicable to the generation stations whose tariff is determined on cost-plus basis, which are higher than Station Heat Rate of 2241 kCal/kWh considered by the Central Commission. Thus, the appellant's claim is based on the actual Station Heat Rate but in the Memo of Appeal it has not brought the actual Station Heat Rate. It is, therefore, understandable that the Station Heat Rate of 2241 kCal/kWh given in the earlier proceedings is the actual Station Heat Rate. By virtue of its admission before the Central Commission in the proceedings in Petition No 14/MP/2013, the appellant is estopped from claiming the Station Heat Rate other than the Station Heat Rate of 2241 kCal/kWh.

6.23 The Central Commission in the impugned order did not allow interest/carrying cost on the additional amount payable as there was no specific provision to that effect in the PPA. The Central Commission, however, noted that in the order dated 18.11.2015 in Petition

No.402/MP/2014 the appellant was not allowed interest/carrying cost on the Change in Law events accepted therein and further noted that against its decision in Petition No.402/MP/2014, the appellant had filed a Review Petition, 1/RP/2016, which was then pending. Therefore, the Central Commission observed in the impugned order that the decision arrived at in the said Review Petition would be applicable in the present case also and after due consideration, the Review Petition has been dismissed vide order dated 16.02.2017. Accordingly, the appellant is not entitled to interest/carrying cost for the expenditure incurred on account of change in law events allowed by the Central Commission in the order dated 30.03.2015 in Petition No 6/MP/2013 till such time the order of the Central Commission in RP/1/2016 stands and is not overruled by the appropriate higher forum.

7. Written submissions filed by learned counsel, Mr. G. Umapathy, appearing for the Respondent No.2/ M.P. Power Management Company Ltd. are as under:

7.1 The above appeals, being Appeal Nos. 77 of 2016 & 136 of 2016, are directed against the impugned orders dated 30.12.2015 and 19.02.2016 passed by CERC regarding compensation due to change in law impacting revenues and costs during the operating period.

7.2 The relevant consideration under the PPA for the Tariff is the consumption of coal in generation and supply of electricity. The Procurers are

liable to pay tariff only for the electricity generated and supplied and not for any other activity. Article 11 of the PPA deals with Billing and payment. The compensation is payable only on generation of electricity. If the electricity is not generated, then no charges are payable in respect of fuel/coal and this would include the royalty (not part of change in law) as well as royalty which are part of change in law. Similarly, for excise duty and clean energy cess on coal, there can be no payment when there is no electricity generated. Further, change in law is also related to generation and sale of electricity. Article 13.1.1 defines change in law as changes in cost or revenue from selling electricity. Thus, until there is generation and sale of electricity, there can be no impact of change in law. This has also been held by this Tribunal in the case of Sasan Power itself in Appeal No. 161 of 2015 dated 11.04.2017.

7.3 The time and quantity of coal to be mined is the internal operation and decision of appellant and the same cannot create a liability on the Procurers until the coal is utilized for generation of electricity. In regard to the tariff determination prevalent, the cost incurred by the generating company prior to invoicing for the generated unit cannot be a part of the claim independent of the interest on working capital. This Tribunal has already held that the interest on working capital cannot be increased on account of the Change in Law. Reference in this regard is made to the judgment and Order dated 14.08.2018 passed in Appeal No. 111 of 2017 being GMR Warora

Energy Limited v. Central Electricity Regulatory Commission and Others, wherein the Generator relied on the principles of restoration of economic position to claim that it is entitled to the compensation for increase in working capital, which is the same contention as sought to be raised by appellant, which was expressly rejected by this Tribunal.

7.4 The Appellant is seeking compensation for increase in water charges on actual basis. The compensation for change in law events is to be granted in terms of Article 13.2 of the PPA. Article 13.2 of the PPA contemplates payment of compensation for change in law events on actual basis and not normative basis.

7.5 The Notification dated 21.04.2010 issued by Govt of Madhya Pradesh is considered to be a law within the provisions of PPA and, further, if the notification results in increase in the cost in the business of generation of electricity for supply to the procurers within the meaning of Article 13, the actual impact can be considered. The water charges paid by the appellants are in the nature of the operating costs incurred for procuring water during operating period. Further, the Appellant was required to quote an all-inclusive tariff including capital costs, operating cost, taxes, cess etc., after taking into account all relevant factors. Article 2.7.2.1 of the PPA requires the bidder to make independent enquiry and satisfy itself with respect to the required information, inputs, conditions and circumstances and factors that may have

effect on its bid. Thus, the appellant was expected to quote the water charges by taking into account the laws and regulations in force and make a realistic assessment of the water charges for a contract period of 25 years.

7.6 Further, the water charges are to be paid in accordance with the decision of the State Government at the rate specified from time to time. Moreover, on the cut off date there was no representation by the government that the water charges will not be increased and would therefore remain constant. The water allocation fees is the quantum of water charges to be paid for arrangement of water and is not a statutory levy to be considered under the provisions of the change in law. Further, the applicable rate pertained to 1.8/Cu.M on the cut off-date and the notification provided for a rate of Rs. 2/Cu.M effective from 01.11.2007.

7.7 The Judgment rendered by this Tribunal in Wardha's case would not be applicable to the facts of the present case. In the said judgment, MERC allowed change in excise duty, clean energy cess and customs duty, etc. under change in law but directed that compensation shall be calculated with the same base as used for the bid and will be effective from the date of Government Circular/Ordinance. The grievance of Wardha Power is captured in Para 7(e) and (i) of the judgment which is extracted as under:

"(e) that while a generator quotes a tariff in a bid, it is free to quote escalable and non-escalable energy or capacity charges. When a generator quotes non-escalable energy charges, as in the present case, it means that the generator has locked its risk for that particular base price of coal, in which event the generator cannot later on seek an enhanced payment for any increased base price of fuel/coal. In case a generator quoting escalable energy charges, then the said generator is eligible for claiming compensation under a different mechanism in accordance with the annual escalation index issued by the Central Commission. The said compensation is not part of the present Appeal. Hence, the escalable/non-escalable energy charges are not for calculating compensation under Article 10 of the PPA.

(i) that the Appellant is not demanding the increased base price of coal since the same is not the intent of the Article 10 of the PPA. What the Appellant is asking, is only the tax component, which it is actually incurring for "supply of power"

Thus, claim of Wardha Power before this Tribunal was that having quoted a non-escalable energy charges, it was not entitled to seek relief for any increase in the base price of coal or fuel. But Wardha Power was entitled to claim the tax component on coal which it had actually incurred for supply of power.

7.8 In the light of the above, the actual water charges are not admissible under the change in law in accordance with the ratio of the judgment of this Tribunal in Wardha case. The case of the appellant that they have paid the one time fee for water allocation equivalent to one month water tax and cess on the annual allocated water quantity amounting to Rs. 7.12 crores is wholly

untenable. The one time allocation fee cannot be covered under any of the provisions of change in law under the PPA.

7.9 The Central Commission rightly held that the Appellant is entitled to compensation for change in law events which was computed on normative basis subject to ceiling of coal consumed corresponding to scheduled generation on station heat rate of 2241 kCal/kWh. The increase in royalty on coal, clean energy cess and excise duty on coal shall be computed based on actuals subject to ceiling of coal consumed according to scheduled generation based on SHR 2241 kCal/kWh and shall be payable by the beneficiaries on pro rata based on their respective share in the scheduled generation. Further, it is not open for the appellants to enhance and claim any higher SHR for coal computation resulting in changing the bid terms. The computation of royalty, clean energy cess and excise duty which are required to be reimbursed is related to the units generated by use of coal and not the coal dispatched from the mines. In the present case, appellant itself submitted the norm of 2241 kcal/Kwh. Therefore, the issue is whether there is a change in law or not. The RFP requires the Bidders to account for various expenditure including the possible changes in the price of inputs etc. The Bidder cannot claim that every change in the price of any input is a change in law as this would negate the purpose of competitive bidding. The Bidder has to take the risk and reward of the quoted price.

7.10 The reliance on Tariff Regulations, 2014 is misplaced as the said Regulations refer to cost plus determination and not to a competitive bid project. In a competitive bid, the Generator has to consider all factors and quote a tariff. This Tribunal has already held in the case of GMR Warora Energy Limited dated 14.08.2018 in Appeal No. 111 of 2017 that the change in law in a competitive bid cannot be considered based on component wise as in Section 62 tariff determination.

7.11 Regarding Auxiliary Consumption, it is submitted that it is the consumption of electricity in the process of generation of electricity and depends inter-alia upon various factors like efficiency of generator, and subject to prudence check as the Respondent ought not to be required to bear the burden of the inefficiency of the Appellant as in the present case. The Appellant cannot claim that it should not be subjected to prudence check or reasonableness or efficiencies merely because it is claiming change in law.

7.12 The Procurers cannot be made to bear additional costs because the Appellant is unable to conform to the normative or bid parameters. The Appellant had the freedom to bid for contracted capacity after taking into account the auxiliary consumption required for the Appellant and bid only for 3722.4 MW. Having been selected on the basis of the above bid, it is not open to the Appellant to now claim that its actual auxiliary consumption is

more than the bid parameters. Central Commission has rightly computed the change in law events on the normative basis rather than the actual basis. The submission of appellants that the normative computation is not part of the PPA is wholly untenable. However, the case of the appellants that the computation should have been done in accordance with actual basis does not find place in the PPA.

7.13 The Central Commission has rightly considered the auxiliary consumption of 6%, as per PPA, which is binding on the parties. The more the auxiliary consumption, less the efficiency of the plant. The objective of Government of India in conceptualizing UMPPs is large capacity addition with efficient supercritical technology. The UMPP would use Super Critical Technology with a view to achieve higher levels of fuel efficiency, which results in fuel saving and lower greenhouse gas emissions. As per PPA, "unit" has been defined as:

> *"Means one steam generator, steam turbine, generator and associated auxiliaries of the Power Station based on Supercritical Technology;"*
>
> *(Emphasis added)*

7.14 The contracted capacity at the injection point for which PPA was signed by procurers with the appellant is the net capacity after deducting 6% auxiliary consumption from installed capacity of generating station. As per PPA, one unit of 660 MW installed capacity, the contracted capacity is 620.4 MW. Thus the normative parameters are limiting parameters in calculating all

issues including tariff calculations. Suppose, a generating station of 660 MW has auxiliary consumption of 7% would mean the net capacity which would be supplied to procurers shall be 613.8 MW and for 6x660 MW UMPP the net capacity would be 3682.8 MW. Thus if the generating station is inefficient and having more auxiliary consumptions, would result in lesser power to the procurers. In the present example, it leads to around 40 MW lesser power supply. This will deprive procurers from getting their allocated contracted capacity as per PPA. Thus any relief beyond the normative parameters should not be allowed to appellant. Assuming without admitting that the Appellant has incurred additional expenditure due to higher auxiliary consumption, the same cannot be passed on to procurers. Merely because the Appellant is seeking compensation for change in law would not entitle the Appellant to claim expenditure incurred due to its own inefficiencies or due to the Appellant exceeding the bid parameters. The appellant is not entitled to any relief on this account.

7.15 Regarding carrying cost, it is submitted that this issue has to be considered in the light of the judgment decision of the Hon'ble Supreme Court in 5865 of 2018 dated 25.02.2019. However, it is submitted that any delay in furnishing of the information and details is to account of Sasan Power and cannot be passed on to the Procurers and consumers at large.

7.16 In view of the above, it is submitted that the Appellant is not entitled to any reliefs and the appeal is liable to be dismissed.

8. Written submissions filed by learned counsel, Mr. Rajiv Srivastava, appearing for the Respondent Nos. 3 to 6/Discoms UPPCL are as under:

8.1 The Central Commission has rightly rejected the claim of the appellant under 'Change of Law' on auxiliary power consumption on an actual basis. The Central Commission has rightly explained as to why auxiliary power consumption calculated at 6% of the installed capacity of the project was justifiably admissible as against the claim of the appellant on the basis of actual auxiliary power consumption. Article 13.2 of the PPA providing for restoration to the same economic position "as if such change in law has not occurred" is the follow up stage only after the claim under 'change in law' has been established. Auxiliary power consumption, fixed at normative 6% would not undergo any change when considering the claim of the appellant under 'Change in Law' on account of in position of Electricity duty.

8.2 The Central Commission has correctly held, by giving cogent reasons in its order that only 6% Auxiliary power consumption would be factored in computing the claim of the appellant under 'Change in Law' on account of in position of Electricity duty by the State of Madhya Pradesh. It is settled law that decision of a Court/Tribunal rendered in a particular case on the basis of facts of that case is always distinguishable from another case, if

the facts of the other case are different from the case sought to be cited. What is decided in a case is relevant only for that particular case. The claim of the appellant for being compensated on account of 'change of law' under Article 13 of the PPA to the same economic position as if, no 'change in law' had taken place has rightly being examined by the Central Commission in the context of imposition of Electricity duty. There is no 'change in law' with respect to Auxiliary power consumption for power plant worked out at 6%. Central Commission has rightly given a finding in its order under appeal that the actual Auxiliary power consumption in respect of Sasan Project was not known as the tariff of the project was based on competitive bedding. The Auxiliary power consumption worked out to 6% of the installed capacity and the contracted capacity of the plant.

8.3 The Central Commission has given its decision under Appeal, considering the 'change in law' on account of imposition of Electricity duty by the Madhya Pradesh Govt. whereas, there was no change in the installed and contracted capacities of the project to warrant consideration under 'change in law' in respect of Auxiliary power consumption allowed at 6%. In any case, Auxiliary power consumption if, allowed in excess of normative 6%, on the basis of so called actual Auxiliary power consumption, the same would amount to violating the provision contained in section 63 of the Electricity Act, for learned CERC has rightly based its decision on the fact that "Since the

tariff of project is based on competitive bidding, the auxiliary power consumption considered is not known.", therefore, the learned commission has considered the installed capacity at 3960 MW and the contracted capacity of 3722.40 MW, for calculating the auxiliary power consumption of the project at 6%. Therefore, the reliefs sought in the appeal are liable to be rejected.

9. Written submissions filed by learned counsel, Ms. Ranjitha Ramachandran, appearing for the Respondent Nos. 7 to 9 & 14/Rajasthan Discoms are as under:

9.1 Appellant's contention is that auxiliary consumption should be considered based on actual expenditure despite the PPA terms and bid assumed parameters as well as without any prudence check or test of reasonableness. In fact, the auxiliary consumption is the consumption of electricity in the process of generation of electricity. The auxiliary consumption depends on various factors and is dependent on the efficiency of the generator such as the Appellant in operating the station. Therefore, the Appellant cannot simply claim auxiliary consumption on the basis of its actuals. The electricity duty or cess imposed on auxiliary consumption has been allowed as Change in Law. However, the compensation cannot be simply based on actual expenditure incurred by the Appellant. It has to be subject to prudence check as the Procurer-Respondents should not be required to bear the burden of inefficiencies of the Appellant. Only reasonable

prudent expenditure incurred due to the Change in Law event has to be allowed.

9.2 The Procurers had called for bids for 4000 MW (+/- 10%) power plant and had specifically sought for bids for contracted capacity of minimum of 3500 MW and maximum of 3800 MW. The difference between the gross capacity and the contracted capacity is Auxiliary Consumption i.e. the consumption of electricity within the power project, including for the township and the coal mines. The finalized PPA was circulated with the RFP and the bidders were well aware of the Change in Law clause in the PPA. By participating in the bidding process and executing the PPA, Reliance Power, the bidder duly accepted all the bidding conditions and the terms of the PPA and submitted its bid for gross capacity of 660 MW for each unit, totally 3960 MW (660 X 6) and contracted capacity of 620.4 MW for each unit, totally 3722.4 MW (620.4 X 6). Therefore, the bid was for the quantum that out of the total gross generation of 3960 MW, the contracted quantum/capacity is 3722.4 MW being the net capacity. The Appellant had been selected on the basis of the above bid. It is not open to the Appellant to claim that the auxiliary consumption is higher than the above.

9.3 As per the bid, the gross capacity of each unit is 660 MW whereas the net capacity (contracted capacity) is 620.4 MW i.e. for the power station, gross capacity is 3960 MW and net capacity is 3722.4 MW. Therefore the

auxiliary consumption contractually agreed to is 39.6 MW for each unit or 237.6 MW for the power station i.e. 6%. Therefore, the Appellant is wrongly claiming that there is no legal basis for the auxiliary consumption of 6% which is clearly evident from the Appellant's bid and the PPA. The project being Case II bid, the Appellant is not entitled to sell power to person other than the Procurers who together procure 100% of the energy generated in the Sasan Power Project. The bid having been submitted on the basis of 6% auxiliary consumption, the Appellant cannot now be permitted to seek a higher auxiliary consumption. There has been no Change in Law resulting in higher auxiliary consumption for the Appellant. Once the auxiliary consumption is accepted at 6%, any taxes or duties to be allowed to the Appellant either by way of Change in Law or as Force Majeure would be as per the bid assumption or actuals whichever is lower. There cannot be any compensation in respect of auxiliary consumption which is in excess of the bid. In view of above, the electricity duty or cess has to be confined to actual auxiliary consumption or 6% (Bid Assumed) of the actual generated units whichever is lower.

9.4 The Appellant has sought to rely on the auxiliary power consumption approved of other generating units, which is not relevant. The Appellant has been selected in a competitive bid process based on the Appellant's bid and the Appellant cannot now seek to go beyond its bid on the basis of what has

been granted to other generating units. The Reliance Power had knowingly and willingly participated in the competitive bid process and had bid for contracted capacity of 3722.4 MW out of gross capacity of 3960 MW. The Reliance Power was aware that the electricity generated from the power project would be required for consumption in the power plant, townships and coal mine. Despite the above, the Appellant bid for contracted capacity of 3722.4 MW, thereby restricting only 237.6 MW (i.e. 6%) for consumption within the power project, township and mines. The Appellant cannot now at this stage claim that the above quantum is insufficient or impracticable for the requirements of the power project, township and mines. The Appellant cannot be permitted to burden the Procurer-Respondents for the above after Reliance Power having got selected in the competitive bid process with specific stipulation on the extent of auxiliary consumption. Any extra quantum on of auxiliary consumption shall be to the account of the Appellant.

9.5 Further, it is always open for a generator to agree to an improved norm and if the generator had agreed to it, then the generator cannot claim otherwise. The Tariff Regulations of the Central Commission relating to determination of Tariff under section 62 of the Electricity Act, 2003 recognize the norms of operation are ceiling norms and shall not preclude the generating company from agreeing to improved norms of operation and such norms would then be applicable for determination of tariff. In this regard

reference is craved to Regulation 3 of the Tariff Regulations, 2004; Regulation 37 of the Tariff Regulations, 2009; and Regulation 47 of the Tariff Regulations, 2014. In the present case, not only has the Appellant agreed to such norm but the Appellant has been selected in a competitive bid process on the basis of the bid of 6% as auxiliary consumption and the Appellant cannot now be permitted to claim a higher auxiliary consumption. The approval of auxiliary consumption of 6.5% for Adani Power is also based on the bid assumption parameters of Adani (though the order has been set aside by this Tribunal on other grounds). Therefore, the Central Commission has consistently considered the bid assumption parameters for determination of relief.

9.6 Regarding compensation for auxiliary consumption of 6%, it is submitted that the compensation for change in law can be allowed to the Appellant only to the extent it is reasonable, prudent and what has been agreed to by the Appellant and in case the Appellant's actual auxiliary consumption is greater than 6%, the compensation payable to the Appellant on account of increase in electricity duty and cess would be limited to 6% auxiliary consumption. The electricity duty and cess paid on the auxiliary consumption in excess to 6% is to the account of the Appellant. If the Appellant has incurred additional expenditure due to higher auxiliary consumption, this cannot be passed on to the procurers. Merely because the

Appellant is seeking compensation for change in law would not entitle the Appellant to claim expenditure incurred due to its own inefficiencies or due to the Appellant exceeding the bid parameters.

9.7 The principle of Article 13.2 would not allow the Appellant to claim compensation for expenditure which has been incurred which is unreasonable, imprudent or beyond the bid submitted by the Appellant. Any alleged under-recovery is due to the fact that the Appellant has not been able to conform to the bid parameters and has incurred additional expenditure. The Procurer-Respondents and therefore the consumers at large cannot be burdened by the amount claimed by the Appellant. If the Appellant is allowed the entire actual expenditure, then this would result in passing on of the inefficiencies of the Appellant to the Procurer-Respondent and the consumers at large.

9.8 The Procurer-Respondents cannot be made to bear additional costs because the Appellant is unable to conform to the normative or bid parameters. The Appellant had the freedom to bid for contracted capacity after taking into account the auxiliary consumption required for the Appellant and the Appellant bid only for 3722.4 MW. Having been selected on the basis of the above bid, it is not open to the Appellant to now claim that its actual auxiliary consumption is more than the bid parameters.

9.9 The Appellant has relied on the judgment of this Tribunal in Wardha Power Company Limited v. Reliance Infrastructure Limited and Another which is not applicable to the present case. The said judgment is related to base price of coal being calculated on the basis of the bid submitted. This is not relevant for considerations of normative quantum of auxiliary consumption to be considered for the impact of Change in Law. The parameters of the power plant such as Auxiliary Consumption are based on the efficiency or actions of the Appellant unlike the price of coal. In any event, this Tribunal had therein specifically observed that '*seller in its bid had also not quoted the price of coal.*' In view of the same, this Tribunal in the above decision had held that it is not correct to correlate the tax or duty on coal to the coal price derived from the bid. In the present case, the Appellant has specifically bid on the basis of auxiliary consumption of 6% as is clear from its bid for gross and contracted capacity. Therefore, the Appellant is required to conform to its bid and cannot claim relief in excess of its bid.

9.10 Regarding compensation for quantum of coal used for generation and sale of electricity, it is submitted that the Central Commission has rightly rejected the claim of the Appellant/SPL for determination of the compensation for the coal consumed on the basis of dispatched quantity of coal, namely, the claim such as Royalty, Clean Energy Cess and Excise Duty. These claims have been allowed by the Central Commission based on the actual

quantum of coal consumed based on the parameters i.e. coal utilized for generation and supply of electricity. The relevant consideration under the PPA for the Tariff is the consumption of coal in generation of electricity and supply of electricity. The Procurers are liable to pay tariff only for the electricity generated and supplied and not for any other activity. The Tariff is payable by the Procurers to the Appellant/SPL on a monthly basis based on electricity generated for the previous month. Admittedly, even as per the Appellant/SPL, the royalty (to the extent it was applicable on cut-off date and hence is not a change in law) is to be compensated only by monthly tariff payments i.e on scheduled energy basis. However, for royalty which is part of change in law, the Appellant/SPL seeks a differential treatment of payment without any energy being generated. The compensation is payable only on generation of electricity. If the electricity is not generated, then no charges are payable in respect of fuel/coal and this would include the royalty (not part of change in law) as well as royalty which are part of change in law. Similarly, for excise duty and clean energy cess on coal, there can be no payment when there is no electricity generated.

9.11 It is further submitted that the change in law is also related to generation and sale of electricity. Therefore, until there is generation and sale of electricity, there can be no impact of change in law. This has also been held by this Tribunal in the case of Sasan Power itself in Appeal No.

161 of 2015 dated 11.04.2017. The dispatch of coal from coal mine itself is not relevant until and unless it is utilized for generation of electricity.

9.12 In terms of Article 13.2 of the PPA, the Change in Law is to be considered with reference to the position which would have been prevalent if the Change in Law had not occurred and additional cost which Sasan Power is required to incur on account of Change in Law. Accordingly, if the Change in Law had not occurred, The Appellant/SPL would not be entitled to the consideration of any Royalty (or Clean Energy Cess and Excise Duty if the same had been applicable on cut-off date) on the basis of the dispatched quantity of coal. The Appellant/SPL would have been entitled to the computation only with reference to the quantum of coal actually utilized for generation and supply of electricity. In the circumstances, by virtue of the Change in Law, the Appellant/SPL is not entitled to have a different methodology for computation of the Change in Law Event. Therefore, it is submitted that the change in law compensation has to be paid in the same manner as other claims being serviced through tariff i.e. on a monthly basis based on the energy scheduled/generated.

9.13 The basic principle accepted for generating companies even under Section 62 of the Electricity Act is that the payment is for electricity and there is no tariff payment till there is generation and supply of electricity. If it is so under Section 62 which is based on actual cost, there is all the more reason

that under Section 63 - adopted Tariff, the generated and supplied energy should be the reference point for payment of coal cost. The Generator cannot claim any payment without generation of electricity. The time and quantity of coal to be mined is the internal operation and decision of the Appellant and the same cannot create a liability on the Procurers until the coal is utilized for generation of electricity.

9.14 In regard to the tariff determination prevalent, the cost incurred by the generating company prior to invoicing for the generated unit cannot be a part of the claim independent of the interest on working capital. Further, it is submitted that the above contention of Appellant/SPL also seeks to claim compensation for coal which is due to inefficiencies of Appellant/SPL i.e. if it consumes more coal than necessary for generation of electricity, it is to the account of the Appellant and cannot be paid for by the Procurers. The Appellant cannot incur unreasonable or imprudent costs and then claim such higher costs from the Procurers. If the Appellant has incurred additional expenditure due to higher parameters than is prudent or agreed upon, this cannot be passed on to the procurers. Merely because the Appellant is seeking compensation for change in law would not entitle the Appellant to claim expenditure incurred due to its own inefficiencies or due to the Appellant exceeding the bid parameters.

9.15 The principle of Article 13.2 of the PPA would not allow the Appellant/SPL to claim compensation for expenditure which has been incurred which is beyond the assumed parameters based on which the bid was submitted by Reliance Power. Any alleged under-recovery is due to the fact that Appellant/SPL has not been able to conform to the bid parameters and has incurred additional expenditure. The Procurer and therefore the consumers at large cannot be burdened by the amount claimed by Appellant/SPL. If Appellant/SPL is allowed the entire actual expenditure, then this would result in destroying the sanctity of bidding process and selection of developer based on Tariff based competitive bidding under Section 63 of the Act. If the change in law had not occurred, the Appellant/SPL would not have been entitled to any higher tariff on the basis that it could not achieve the bid parameters or that its assumptions were erroneous. If the Appellant/SPL is not entitled to higher compensation for not achieving the norms/parameters when there is no change in law, there is no rationale for allowing such higher compensation beyond the parameters when there is change in law. The change in law has to be restricted to actual or based on parameters whichever is lower. There is no nexus to the higher liberal parameters claimed by the Appellant/SPL and the Change in law provisions in the PPA.

9.16 The Procurer cannot be made to bear additional costs because the Appellant/SPL is unable to conform to the normative or bid parameters. In

this regard, even the Appellant/SPL has submitted that the parameters should be applied as Tariff Regulations (as applicable to Section 62 generators) as against the bid parameters. There is no rationale for applying Tariff Regulations, if the bid parameters are improved norms. If the Appellant/SPL had participated in the bid on the basis of certain parameters and is then unable to meet the said parameters, the consequences of its own failures or inability cannot be passed on to the consumers.

9.17 In any case, even as per the Tariff Regulations issued by the Central Commission, it is always open for a generator to agree to an improved norm and if the generator had agreed to it, then the generator cannot claim otherwise. The Tariff Regulations relating to determination of Tariff under section 62 of the Electricity Act, 2003 recognize the norms of operation are ceiling norms and shall not preclude the generating company from agreeing to improved norms of operation and such norms would then be applicable for determination of tariff. In this regard reference is craved to Regulation 3 of the Tariff Regulations, 2004; Regulation 37 of the Tariff Regulations, 2009 and Regulation 47 of the Tariff Regulations, 2014. Therefore, if the Appellant/SPL has agreed to a norm which is better than the Tariff Regulations, the same would be applicable. The Appellant/SPL is a super critical power station with six units of 660 MW each (6X660 MW) and was an Ultra Mega Power Project for which bidding was invited. the Appellant/SPL had participated on the basis

of certain parameters and same were also stated by the Appellant/SPL itself. Once the Appellant/SPL has made a submission on such parameters, it has agreed to such parameters and it cannot then claim the norm under the Tariff Regulation.

9.18 Regarding Station Heat Rate of 2241 Kcal/Kwh, it is submitted that the Central Commission in the Impugned Order has considered the Station Heat Rate of 2241 Kcal/Kwh based on the submission of the Appellant/SPL itself in an earlier Petition being Petition No. 14/MP/2013. The figure of 2241 Kcal/kwh is not any assumed parameter of the Procurer or even Central Commission but a submission made by the Appellant/SPL itself in the proceedings before Central Commission. Thus, as per the Appellant itself, the parameter to be considered was 2241 Kcal/Kwh. It is not open for the Appellant/SPL to now claim that the said figure of Station Heat Rate is of no value or that the said figure should be ignored. It is significant that even in the Appeal, no explanation has been given by the Appellant/SPL for its own submission of 2241 kcal/Kwh. The fact that the Station Heat Rate was based on submission of the Appellant/SPL has not been disputed or challenged by the Appellant in its Appeal. Therefore, the decision in Jaiprakash Case is not applicable in the present case wherein the Appellant itself has submitted certain parameters on the basis of which the relief has to be considered.

9.19 The Appellant/SPL has sought to rely on the decision of Central Commission in GMR Warora Energy Limited in Petition No. 88/MP/2018 dated 15.11.2018 wherein the Central Commission has applied parameters as per Tariff Regulations as opposed to the bid parameters. At the outset, the above decision of Central Commission to vary from the past practice is not appropriate. The Central Commission has ignored its own earlier decisions to allow the computation based on such parameters. In the case of GMR Warora itself, the Central Commission in Petition No. 1/MP/2017 dated 16.03.2018 has upheld the computation of compensation for change in law based on parameters. In fact the Central Commission had considered the computation based on lower of Tariff Regulations or bid parameters. In any case, this change cannot be a reason to reconsider the issue for the Appellant/SPL which is in fact an ultra mega power project and had by itself made the submission of Station Heat Rate of 2241 Kcal/KWh. As per the Tariff Regulations of Central Commission itself, the generators can agree to an improved norm and once the Appellant/SPL itself agrees to 2241 kcal/kwh, it cannot then claim higher norm as per Tariff Regulations.

9.20 It is also significant that the reason for Central Commission to not consider bid assumed parameters in Petition No. 88/MP/2018 was that the Station Heat Rate therein was “under test conditions” and which may vary from actual Station Heat Rate. However, in the present case, the Station Heat

Rate was provided by the Appellant/SPL to Central Commission during consideration of the parameters and at no point did the Appellant/SPL qualify the said submission on the basis that it was only under test conditions. The Appellant had not made such qualification either in Petition No. 14/MP/2013 when it submitted the parameters, nor before Central Commission in the present proceedings being Petition No. 153/MP/2015 or even in the Memorandum of Appeal. Thus, it was never Appellant's case that the Station Heat Rate of 2241 kcal/kwh was only a test condition Station Heat Rate. The Appellant/SPL cannot now claim otherwise.

9.21 With regard to reliance on the Station Heat Rate approved by Central Commission for other generating stations, it is submitted that the Appellant/SPL has wrongly claimed the Station Heat Rate for Adani power as 2354 kcal/kwh (which even in Petition No. 155/MP/2012 was based on submission of Adani Power) – the said Order was set aside in view of the Energy Watchdog decision. The Central Commission has approved the Station Heat Rate for Adani Power at 2150 kcal/kwh for Gujarat PPA and 2206 kcal/kwh for Haryana PPA in Order dated 04.05.2017which is less than 2241 kcal/kwh of the Appellant. The above Station Heat Rate was challenged by Adani Power before this Tribunal but the Order of the Central Commission was upheld in Appeal No. 210 of 2017 dated 13.04.2018 wherein this Tribunal has approved the consideration of Station Heat Rate on the norms

and rejected the contention of Adani Power to claim the Station Heat Rate on actuals or Tariff Regulations.

9.22 Further, the Appellant/SPL has relied on decision dated 13.04.2018 in Appeal No. 210 of 2017 to claim that the Station Heat Rate has to be determined on case on case basis. The Appellant has not quoted the relevant part of the Order which may state the above proposition. However as submitted hereinbefore, this Tribunal in the said case had upheld the consideration of a normative Station Heat Rate based on submission of Adani Power itself which was in fact lower than 2241 kcal/kwh considered in the case of the Appellant. In the present case also, Central Commission has proceeded on the basis of the submission of the Appellant/SPL and therefore there is infirmity in the Impugned Order to that extent. In any case, even as per the Appellant, if the Station Heat Rate has to be decided on case to case basis, this does not mean that whatever is the actual irrespective of inefficiencies of the Appellant/SPL would have to be considered. The Appellant itself had made a submission about Station Heat Rate to be considered and which was accepted by Central Commission. Further, the Appellant cannot ignore its own case specific submission of Station Heat Rate of 2241 kcal/kwh and seek the higher Station Heat Rate based on other power plants.

9.23 It is submitted that Rajasthan Utility has filed an appeal being Appeal No. 324 of 2016 seeking applicability of the ceiling of the parameters of Station Heat Rate of 2241 Kcal/Kwh to computation of the quantum of coal for the period 2013-14 to 2015-16.

9.24 Regarding changes in Water Rates are not change in law, it is submitted that admittedly, the water rates are costs involved in procuring inputs (i.e. water) for running of the power station. The rates payable for such inputs have to assessed and estimated by the bidders and provided for in the quoted tariff including any possible changes in the price for such inputs. There was no law as on cutoff date that there would be no change in the water rates. In fact as can be seen from the rates as applicable, the water rates have been increasing year on year. This was also noted by the Central Commission in the Impugned Order at Para 41 wherein the rates from 1990s are noted. Therefore, the Appellant/SPL could not have assumed that there would be no change in the water rates. In any long term contract, it is anticipated that the prices of inputs required would change and the same has to be accounted for in the competitive bid. The purpose of a competitive bid is precisely to freeze the price for the distribution company against any such possible changes. The bidders take the risk and reward of any such price fluctuations.

9.25 In the present case, the Appellant is required to enter into an Agreement with the Water Resource Department for supply of water and therefore the supply of water is under a contract. The said Agreement recognizes two categories of payments – water rates for supply of water and in addition to the above, taxes, cess etc. This was also recognized by the Central Commission in the Impugned Order. There is a difference between the basic price of input and taxes and duties as applicable on such basic price.

9.26 The Appellant/SPL has wrongly relied on the decision of this Tribunal in GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Others dated 14.08.2018 in Appeal No. 111 of 2017 wherein the busy season surcharge and development surcharge imposed by the Railways was held to be change in law. In this case, there was no contract between Railways and GMR Warora and further said surcharges were considered as being not within the base price of coal/transportation. In the same judgment, this Tribunal had upheld the Order of Central Commission in regard to charges of the Coal Company on the basis that the Generator was required to incorporate the said changes in price of coal in its bid. Thus, this Tribunal had held the charges in busy season surcharge and development surcharge to be change in law whereas the changes in crushing and sizing charges as well as surface transportation charges as not change in law.

9.27 Further, this Tribunal in its judgment and Order dated 14.08.2018 in Appeal No. 111 of 2017, drawn the basic distinction that where the charges are part of basic price, the same are to be incorporated in the bid and any change in the price cannot be considered as change in law. However, if the charges are in nature of taxes and duties which are not included in the base price, the same are change in law. This is also clear from the judgment of this Tribunal in GMR Kamalanga Energy Limited v. Central Electricity Regulatory Commission and Others in Appeal No. 193 of 2017 dated 21.12.2018 wherein this Tribunal has referred to the Order in GMR Warora case. Further, this Tribunal relied on the Letter dated 27.08.2018 issued by Ministry of Power under Section 107 which related to pass through of changes in domestic duties, levies, cess and taxes:

> *"36. Reading of the above paragraphs, it is clear that escalation price pertains to increase in base price and it does not cover increase in taxes and duties. This fact was reaffirmed by Tribunal in Adani judgment so also GMR Warora (mentioned above) wherein they have held as under:*
>
> "*From the above discussions it is clear that the CERC escalation index for transportation covers only the basic freight charges. The Bidder was required to suitably incorporate the other taxes, duties, levies etc. existing at the time of bidding. The Bidder cannot envisage any changes happening regarding taxes, levies, duties etc. in future date. As such, any increase in surcharges or imposition of new surcharge after the cut-off date i.e. 30.7.2009 in the present case cannot be said to be covered under CERC Escalation Rates for Transportation Charges, which is indexed*

for basic freight rate only. Accordingly, any such change by Indian Governmental Instrumentality herein Indian Railways has to be necessarily considered under Change in Law event and need to be passed on to APRL. In terms of the PPA, such changes in the surcharges and levy of new Port Congestion Surcharge which do not exist at the time of cut-off date falls under 1st bullet of Article 10.1.1 of the PPA read with the definitions of the 'Law' and 'Indian Government Instrumentality' under the PPA'

37. It is relevant to mention the letter issued by Ministry of Power dated 27-8-2018 which reads as under:

….."

In the light of above discussion, we are of the opinion, Appellant GKEL is entitled for increase in the freight on account of levying of development surcharge and busy season surcharge which were not part of basic price of coal." (Emphasis Supplied)

Thus, this Tribunal has not allowed changes in basic price to be change in law but has allowed taxes and duties etc as change in law as they are not part of basic price.

9.28 In the same Order dated 21.12.2018 in GMR Kamalanga, this Tribunal had also rejected other claims of change in law involving changes in cost due to change in source of coal or transportation of coal on the basis that the same were part of the agreement between the Generator and the Fuel Supplier. Thus, what is contractual and what is in the nature of price of input (as against taxes and duties) cannot be considered as change in law.

9.29 In view of the above, it is evident that water rates are payable for supply of water and are basic price payable for the input and therefore the changes in such prices are to be reflected in the bid and cannot be considered as change in law. Similarly, the water allocation fee is also not a tax or levy.

9.30 The Central Commission has also proceeded on the same basis that the water rates are price for inputs and the changes in the price should have been assessed by the Appellant/SPL and reflected in the bid. This Order is, therefore, not contrary or inconsistent with the decision of this Tribunal in the GMR Warora and GMR Kamalanga Case.

9.31 The reliance by the Appellant/SPL on the judgment of this Tribunal in Sasan Power Limited v. Central Electricity Regulatory Commission in Appeal No. 161 of 2015 is misconceived. In the said decision, it was held that if there is a change in law as per the PPA, the clause in the RFP would not override the right under change in law. In the said case, the issue was of taxes and duties which were admittedly change in law. The taxes and duties introduced or changed subsequent to the cutoff date were held to be change in law and to that extent the clause in the RFP would not apply. However, the same was in the facts of the said case. It was specifically observed as under:

> *"44…But this will of course depend on facts and circumstances of each case. Facts of each case will have to carefully studied before granting such a relief….."*

The Appellant/SPL cannot rely on the observation of this Tribunal de hors of the facts of the present case. In fact in the subsequent cases of GMR Warora Energy Limited in Appeal No. 111 of 2017, this Tribunal had relied on decision in Adani Power Rajasthan Limited which in turn referred to the RFP provisions wherein the bidder was supposed to consider all the cost inputs, to decide that the Generator was required to incorporate the price in its bid. Therefore, the issue is whether there is a change in law or not. The RFP requires the Bidders to account for various expenditure including the possible changes in the price of inputs etc. The Bidder cannot claim that every change in the price of any input is a change in law as this would negate the purpose of competitive bidding. The Bidder has to take the risk and reward of the quoted price.

9.32 The reliance on Tariff Regulations, 2014 is misplaced as the said Regulations refer to cost plus determination and not a competitive bid. In a competitive bid, the Generator has to consider all factors and quote a tariff. This Tribunal has already held in the case of GMR Warora Energy Limited dated 14.08.2018 in Appeal No. 111 of 2017 that the change in law in a competitive bid cannot be considered based on component wise as in Section 62 tariff determination.

9.33 Though the changes in rates are not change in law, it is further submitted that in any case the Appellant/SPL has made an erroneous contention that the rate on cutoff date was only Rs. 1.80/ Cu.M. In the same notification as being relied on by the Appellant, the rate has been shown to be increased to Rs. 2/ Cu.M. Sasan Power could not have assumed Rs. 1.80/Cu.M.

9.34 The Appellant/SPL has not produced the original Rules, the amendment of which the Appellant has claimed as Change in law for levy of water allocation fee. Therefore, the contention of the Appellant/SPL that there was no water allocation fee at cut off date is not admitted. The Appellant/SPL had not filed the all the relevant documents before the Central Commission despite objections raised by the Procurers. Similarly, even in the present Appeal, the Appellant has not produced the law as existing on cutoff date. Despite the issue being raised in Reply, the Appellant still has not filed the same. Therefore, even considering that allocation fee can be a change in law, there cannot be any consideration of the impact, if any, of any amendments or changes in law without the law as applicable on cutoff date. Mere statement by the Appellant/SPL that there was no levy without any proof is not sufficient.

9.35 Without prejudice to the contention that the change in water rates etc are not change in law, it is submitted that the Procurers had made submissions before the Central Commission on the compensation to be considered which were not considered in the Impugned Order since the claim for change in law had been rejected. The said submissions are not being repeated herein but would have to be considered for any determination of impact of change in law.

9.36 Regarding carrying cost, this issue has to be considered in accordance with the decision of the Hon'ble Supreme Court in 5865 of 2018 dated 25.02.2019. However, it is submitted that any delay in furnishing of the information and details is to account of the Appellant/SPL and cannot be passed on to the Procurers and consumers at large.

10. The submissions filed by learned counsel, Ms. Vasudha Sen, appearing for the Respondent No. 10/Tata Power Delhi Distribution Ltd. (TPDDL) are as under:

10.1 The Appellant/Sasan Power Limited (SPL) had applied to the Central Commission for compensation of the cost incurred by it due to change in law events during the operating period. The Central Commission, after considering the submissions of the parties, in 118/MP/2015 dated 30.12.2015 allowed the compensation to the Appellant for change in Law Events. However, the Central Commission disallowed the claim of the

Appellant seeking compensation for impact of change in law on the basis of actual auxiliary power consumption of the project that was capped by the Central Commission at 6% derived through the data provided by the Appellant only. Accordingly, the Appellant filed the present appeal against the Impugned Order passed by the Central Commission.

10.2 The Central Commission has rightly considered auxiliary consumption as 6% to compute actual generation required at generator terminal to deliver schedule energy to beneficiaries. This has been done considering the fact that the same was considered by the appellate while submitted the bid. As per the REP documents, the appellant was expected to submit the bid after making due diligence. The Central Commission in its Order dated 30.12.2015 in 118/MP/2015 has been correctly arrived at the conclusion of auxiliary power consumption being calculated at 6%. Furthermore, that some electricity duty or cess is to be confined to the actual auxiliary consumption (in proportion to the various procurers) or 6% of actual gross generated units whatever is lower. The power purchase agreement defines the contracted capacity as rated net capacity.

10.3 The gross capacity of each unit is 620MW whereas the net contracted capacity is 660.4 MW. Therefore, the auxiliary consumption is anticipated to be 39.6 MW for each Unit 237.6 MW for the generating station @ 6 % which is inclusive of the consumption of electricity in the project,

township and coal mines. In case the actual auxiliary power consumption of the Project is more than 6% of the gross power generated , the compensation payable on account of increase in duty and cess should be limited to 6% auxiliary power consumption. Therefore, the electricity duty and cess paid on the auxiliary consumption in excess to 6% is to the account of the Appellant. Electricity Duty or cess is to be confined to the actual auxiliary power consumption which is 6% and not more than that.

10.4 Further, it is submitted that Auxiliary Power Consumption if, allowed on excess of normative 6% , on the basis of so called actual Auxiliary Power Consumption, the same would amount to violating the provision contained in Section 63 of the Electricity Act.

10.5 Under Article 13 of the Power Purchase Agreement the compensation for change in law event during the operating period is payable only if and for increase / decrease in revenues or cost to the seller is in excess of an amount equivalent to 1% of the letter of credit in aggregate for the contract year. Under Article 13.2 of the PPA providing for restoration to the same economic position “as if change in law has not occurred” is the follow up stage only after the claim under ‘change in law’ has been established. Auxiliary Power Consumption, fixed at normative 6% would not undergo any change when considering the claim of the Appellant under the head of ‘Change in Law’ pm account of imposition of Electricity duty.

10.6 The Central Commission has rightly ruled that in case of competitive bidding, the auxiliary power consumption considered by the bidders is not known. Therefore, the Central Commission has considered the installed capacity at 3960 MW and the contracted capacity of 3722.40 MW, for calculating the auxiliary power consumption of the project at 6 %.

10.7 The reliance put on the judgment of this Tribunal in Wardha Power Company Ltd v Reliance Infrastructure Ltd & MERC is untenable since the judgment is related to base price of coal being calculated on the basis of the bid submitted and is not relevant for consideration of normative quantum for the impact of change in law.

10.8 The Central Commission in its Order had rightly pointed out that the actual Auxiliary Power consumption in respect to the Appellant/SPL was not known as the tariff of the project was based on competitive bidding and therefore the Auxiliary Power consumption was worked out of 6% of the installed capacity and the contracted capacity of the plant. It is out of place to mention here the auxiliary power consumption if, allowed on excess of normative 6%, on the basis of so called actual auxiliary power consumption, the same would amount to violating the provisions contained in Section 63 of the Electricity Act, for the Central Commission has rightly based its decision on the facts that since the tariff of project is based on competitive bidding, the

auxiliary power consumption considered is not known, therefore, the Central Commission has considered the installed capacity at 3960 MW and the contracted the capacity of 3722.40 MW, for calculating the auxiliary power consumption of the project at 6%.

APPEAL NO. 324 OF 2016

11. ***In Appeal No. 324 of 2016****, Distribution Licensees in the State of Rajasthan i.e. Jaipur Vidyut Vitran Nigam Limited, Ajmer Vidyut Vitran Nigam Limited and Jodhpur Vidyut Vitran Nigam Limited* (in short, the *"**Appellants**"*) have filed the present Appeal, under Section 111 of the Electricity Act, 2003 (*"**Electricity Act**"*) challenging the impugned Order dated 22.09.2016 passed by Central Electricity Regulatory Commission, New Delhi (in short, ***"Central Commission"***) in Review Petition No. 19/RP/2016 whereby the Central Commission had reviewed and modified the Order dated 19.02.2016 in Petition No. 153/MP/2015.In the circumstances, the Order dated 19.02.2016 passed by the State Commission has got merged with the Order dated 22.09.2016 passed in Review Petition and in terms of the settled principles laid down by the Hon'ble Supreme Court, the appeal is maintainable only against the Order dated 22.09.2016 and not as such against the Order dated 19.02.2016. Further a Corrigendum dated 04.10.2016 has been issued.

12. In Appeal No. 324 of 2016, the Appellants/Distribution Companies, aggrieved by the said impugned Order passed by the Central Commission

have preferred the instant appeal before this Tribunal on the following questions of law:

(A) Whether the Central Commission is right in law in not applying the same principle for calculation of quantum of coal to be considered for determination of impact of change in law on normative parameters for the past period 2013-14 to 2015-16 when it had duly considered and directed the said methodology for the future computations?

(B) Whether the Central Commission erred in considering the actual coal consumption per kWh for the past period even though the said consumption could be more than the consumption as per normative parameters resulting in higher payments by the Procurers?

(C) Whether the Central Commission failed to consider the extent of double recovery to the Respondent No. 1/SPL of the increase in royalty and levy of excise duty?

13. Written submissions filed by the learned counsel, Ms. Ranjitha Ramachandran, appearing for the Appellants/Distribution Companies are as under:

13.1 The Appellants have challenged the Order dated 22.09.2016 of Central Commission in so far as it allows the claim of the first Respondent for compensation of royalty, excise duty and clean energy cess based on quantum of coal on actual basis but without considering the ceiling of Station

Heat Rate of 2241 Kcal/kWh for the period from 2013-14 to 2015-16 despite accepting the principle of computation for the future period i.e. from 2016-17.

13.2 The Central Commission has rightly considered the compensation based on the actual quantum of coal consumed related to energy generated i.e. coal utilized for generation and supply of electricity. Further the Central Commission has rightly considered the quantum of coal based on the ceiling of the coal to be consumed as per the Station Heat Rate of 2241 kcal/kwh and Auxiliary Consumption of 6%.

13.3 The Appeal filed by the Rajasthan Utilities is on limited aspect of applicability of the ceiling of the parameters of Station Heat Rate of 2241 Kcal/Kwh to computation of the quantum of coal for the period 2013-14 to 2015-16. The Central Commission in the Impugned Order has considered the above ceiling for the mechanism to be adopted in subsequent years i.e. 2016-17 onwards but has failed to apply the same parameter while calculating the quantum of coal for 2013-14 to 2015-16 in the Impugned Order. What is applicable for the future is equally applicable for the past. Once it is accepted that the ceiling of the parameter of Station Heat Rate is applicable, it should also be applicable for the past period. The Central Commission has accepted the parameter of auxiliary consumption of 6% for the past period of 2013-14 and 2015-16 but has failed to apply the parameter of Station Heat Rate even though the same has been held to be considered for computation.

13.4 The compensation for change in law can be allowed to first Respondent/Sasan Power only to the extent it is reasonable, prudent and what has been agreed to by the first Respondent/Sasan Power. Respondent No.1 cannot incur unreasonable or imprudent costs and then claim such higher costs from the Procurers. If Respondent No.1 has incurred additional expenditure due to higher parameters than is prudent or agreed upon, this cannot be passed on to the procurers. Merely because the Respondent No.1 is seeking compensation for change in law would not entitle Respondent No.1 to claim expenditure incurred due to its own inefficiencies or due to Respondent No.1 exceeding the bid parameters. The principle of Article 13.2 would not allow Respondent No.1 to claim compensation for expenditure which has been incurred which is unreasonable, imprudent or beyond the bid submitted by Respondent No.1. Any alleged under-recovery is due to the fact that Respondent No.1 has not been able to conform to the bid parameters and has incurred additional expenditure. The Procurer and, therefore, the consumers at large cannot be burdened by the amount claimed by Respondent No.1. If Respondent No.1 is allowed the entire actual expenditure, then this would result in passing on of the inefficiencies of Respondent No.1 to the Procurer and the consumers at large. In this regard, detailed submissions have been made in Appeal No. 136 of 2016 and which are not repeated herein for the sake of brevity.

13.5 In regard to admissibility of the Appeal No. 324 of 2016, it is submitted that the Appeal has been filed against the Order dated 22.09.2016 passed in Review Petition No 19/RP/2015 filed by Respondent No.1 against the Order dated 19.02.2016 in Petition No. 153/MP/2015. The Review Petition was allowed on account of error apparent on the face of the Order and the Order has been modified and the compensation due to Respondent No.1 has been modified and re-determined by the Order dated 22.09.2016. In the circumstances, the Order dated 19.02.2016 passed by the Central Commission has got merged with the Order dated 22.09.2016 passed in Review Petition and in terms of the settled principles laid down by the Hon'ble Supreme Court, the appeal is maintainable only against the Order dated 22.09.2016 and not as such against the Order dated 19.02.2016. Further a Corrigendum dated 04.10.2016 has been issued.

13.6 It is settled principle that when a decree or order is even modified by the review order there is a new decree or order and the appeal is maintainable only against the new decree or new order. In this regard the relevant authorities are as under:

(a) Sushil Kumar Sen v State of Bihar AIR 1975 SC 1185 (Para 2, 3 & 4)

2. It is well settled that the effect of allowing an application for review of a decree is to vacate the decree passed. The decree that is subsequently passed on review, whether it modifies, reverses or confirms the decree originally passed, is a new decree superseding the original one (see Nibaran Chandra Sikdar v. Abdul Hakim [AIR 1928

Cal 418], Kanhaiya Lal v. Baldeo Prasad [ILR (1906) 28 All 240], Brijbasi Lal v. Salig Ram [ILR (1912) 34 All 282] and Pyari Mohan Kundu v. Kalu Khan [ILR (1917) 44 Cal 1011 : 41 IC 497]).

3. The respondent did not file any appeal from the decree dated August 18, 1961 awarding compensation for the land acquired at the rate of Rs 200 per katha. On the other hand, it sought for a review of that decree and succeeded in getting the decree vacated. When it filed Appeal No. 81 of 1962, before the High Court, it could not have filed an appeal against the decree dated August 18, 1961 passed by the Additional District Judge as at that time that decree had already been superseded by the decree dated September 26, 1961 passed after review. So the appeal filed by the respondent before the High Court could only be an appeal against the decree passed after review. When the High Court came to the conclusion that the Additional District Judge went wrong in allowing the review, it should have allowed the cross-appeal. Since no appeal was preferred by the respondent against the decree passed on August 18, 1961 awarding compensation for the land at the rate of Rs 200 per katha, that decree became final. The respondent made no attempt to file an appeal against that decree when the High Court found that the review was wrongly allowed on the basis that the decree revived and came into life again.

4. The High Court should have allowed the cross-appeal; and dismissed the appeal, which was, and could only be against the decree passed on September 26, 1961, after the review. We therefore set aside the judgment and decree passed by the High Court and allow the appeal. The effect of this judgment would be to restore the decree passed by the Additional District Judge on August 18, 1961. We make no order as to costs

(b) DSR Steel Pvt. Ltd. vs. State of Rajasthan (2012) 6 SCC 782 (Paras 24-26)

24. So also the question whether an order passed by the Tribunal in appeal merges with an order by which the Tribunal has dismissed an application for review of the said order was argued before us at some length. The learned counsel for the appellants contended that since a

review petition had been filed by two of the appellants, namely, J.K. Industries Ltd. (now known as J.K. Tyres and Industries Ltd.) and J.K. Laxmi Cement Ltd. In this case, the orders made by the Tribunal dismissing the appeals merged with the orders passed by it in the said review applications so that it is only the order dismissing the review application that was appealable before this Court. If that were so the period of limitation could be reckoned only from the date of the order passed in the review applications.

25. Different situations may arise in relation to review petitions filed before a court or tribunal.

25.1. One of the situations could be where the review application is allowed, the decree or order passed by the court or tribunal is vacated and the appeal/proceedings in which the same is made are reheard and a fresh decree or order passed in the same. It is manifest that in such a situation the subsequent decree alone is appealable not because it is an order in review but because it is a decree that is passed in a proceeding after the earlier decree passed in the very same proceedings has been vacated by the court hearing the review petition.

25.2. The second situation that one can conceive of is where a court or tribunal makes an order in a review petition by which the review petition is allowed and the decree/order under review is reversed or modified. Such an order shall then be a composite order whereby the court not only vacates the earlier decree or order but simultaneous with such vacation of the earlier decree or order, passes another decree or order or modifies the one made earlier. The decree so vacated reversed or modified is then the decree that is effective for the purposes of a further appeal, if any, maintainable under law.

25.3. The third situation with which we are concerned in the instant case is where the revision petition is filed before the Tribunal but the Tribunal refuses to interfere with the decree or order earlier made. It simply dismisses the review petition. The decree in such a case suffers neither any reversal nor an alteration or modification. It is an order by which the review petition is dismissed thereby affirming the decree or order. In such a contingency there is no question of any merger and

> *anyone aggrieved by the decree or order of the Tribunal or court shall have to challenge within the time stipulated by law, the original decree and not the order dismissing the review petition. Time taken by a party in diligently pursing the remedy by way of review may in appropriate cases be excluded from consideration while condoning the delay in the filing of the appeal, but such exclusion or condonation would not imply that there is a merger of the original decree and the order dismissing the review petition.*
>
> *26. The decision of this Court in Manohar v. Jaipalsing[(2008)1SCC 520 : (2008) 1 SCC (Civ) 325] in our view, correctly settles the legal position. The view taken in Sushil Kumar Sen v. State of Bihar [(1975) 1 SCC 774] and Kunhayammedv. State of Kerala [(2000) 6 SCC 359], wherein the former decision has been noted, shall also have to be understood in that light only.*

13.7 The most important aspect in the judgment of the Hon'ble Supreme Court in the case of DSR Steel Pvt Ltd v State of Rajasthan (2012) 6 SCC 782 is relevant for the present issue which states that if the review petition is allowed and the decree/order and the review is reversed or modified, the principle of merger would apply.

13.8 The term `decree' or `order' referred to in the judgment in DSR Steel case is the final effective decree or order. For the purpose of appeal, an order or decree cannot be split as being a multiple decree or multiple order. There is always only one order in one decree as held in the case of Tirumala Chetti Rajaram v Tirumalachetti Radhakrishnayya Chetty 1962 (2) SCR 452. The format of the appeal under Section 111 provided under the Electricity

Act, 2003 also provides for an appeal only in regard to the order or decree and not in regard to any issue or reasoning given in the decision.

13.9 In terms of the above, the review petition can be considered as rejected for the application of the provisions of Order 47 Rule 7 of the CPC only if the review petition is dismissed in toto. If the review petition is partly allowed and as a consequence thereof there is necessarily a modification to the tariff allowed in the earlier order, the same amounts to modification of the Order or Decree and the case would fall squarely within the second decision considered in DSR Steel case.

13.10 There need not be vacation of the main order in all respects for the merger to apply. The vacation of main order is covered by para 25.1, and a partial reversal or modification is covered by para 25.2. The principle for application of merger in case of Review by the same Court is laid down in Sushil Kumar Sen's case (supra) where the expression used is "whether it modifies, reverse or confirms the decree" wherein the term modification would apply to partial interference to the main order. The term conformation would apply, when in a Review Petition, additional reasons are given to maintain the original order.

13.11 The merger occurs not only when the review is allowed by setting aside the order or reversing the impugned order, but also when the main

order is modified or confirmed as held in Sushil Kumar's case and followed in number of judgments. The decision of the Hon'ble Supreme Court in this regard are clear and categorical. This is consistent with the principles laid down by the Hon'ble Courts that there can be only one decree or one order.

13.12 Even, this Tribunal has also taken the similar view with regard to merger of a review order with the initial order, in case the review is allowed, in the following cases:

(i) New Bombay IspatYog Limited –v- Maharasthra State Electricity Distribution Company Limited 2010 ELR (APTEL) 653: The Appellate Tribunal held that if the review order modifies the main order, then the main order merges with the review order and the limitation period will be reckoned from the date of the review order;

(ii) NHDC Limited V. CERC and others Appeal No. 30 of 2013 decided on 7.3.2014: The Appellate Tribunal has held that the main order got merged with the review order and that the appeal is maintainable against the review order for the reasons that "Central Commission had reviewed certain parameters which resulted in modification of the interest on loan and other parameters and re determined the annual fixed charges in the review order. Thus, the main order got merged with the review order"

(iii) *Powergrid Corporation of India limited v. CERC and others, Appeal No. 167 of 2013 dated 5.3.2014: In this case also the Appellate Tribunal decided that the main order merged with the review order on account of review being partly allowed which would automatically modify the transmission charges determined in the main order.*

13.13 In view of the above, the instant appeal, being Appeal No. 324 of 2016, is to be allowed and the compensation for 2013-14 to 2015-16 has to be recalculated.

14. Written submissions filed by the learned counsel, Mr. Vishrov Mukherjee, appearing for the Respondent No.1/Sasan Power Limited (SPL) are as under:

14.1 The instant Appeal has been filed by the Appellants against the Order dated 22.09.2016 passed by the Central Commission in Review Petition No. 19/RP/2016 ("*Impugned Order*"), wherein the Central Commission held that there was no basis to review the Order dated 19.02.2016 passed in Petition 153/MP/2015 ***("Principal Order")***, to include royalty and stowing excise duty under the excisable value for the purpose of calculating the excise duty on coal and there is an inadvertent clerical/ arithmetic error in the calculation of coal consumed. Accordingly, in exercise of powers under Regulation 103A of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, the said error is rectified.

14.2 Respondent No.1/SPL had filed Review Petition No. 19/RP/2016 seeking review of the Principal Order on the ground of apparent error i.e. erroneous exclusion of royalty and stowing excise duty from the excisable value of coal; and double deduction of coal consumed for commissioning

activities in computation of the total quantity of coal due to erroneous computation of coal consumption figures mentioned in the Principal Order for which Respondent No.1/SPL is entitled to be compensated.

14.3 The Appeal is not maintainable for the following reasons:

(A) Doctrine of merger is not applicable in the present case since the Impugned Order has not been passed by the Central Commission in exercise of its review jurisdiction. The Impugned Order only rectifies certain arithmetical errors in the Principal Order in exercise of its powers under Regulation 103(A) of the Conduct of Business Regulations. The power of the Court to correct clerical or arithmetical mistakes in judgments/orders is separate and distinct from review jurisdiction. In this regard, reliance is placed on the Hon'ble Supreme Court's judgment in *Srihari (Dead) Through Legal Representative Ch. Niveditha Reddy v. Syed Maqdoom Shah &Ors.*, reported as (2015) 1 SCC 607 (Para 13);

(B) No Appeal has been filed by the Appellant against the Principal Order. The Impugned Order cannot be challenged without challenging the Principal Order. The Appellants have not filed any Appeal against the Principal Order which deals with the issue of ceiling of 6% of auxiliary consumption and SHR of 2241kCal/kWh as ceiling for calculation of quantum of coal consumed. The aforesaid

issue in respect of coal consumption by the Central Commission for the period 2013-2014 to 2015-2016 (till 31.8.2015) on account of non-consideration of the ceiling of SHR of 2241kCal/kWh was only raised by the Appellants in their reply to Review Petition filed by Respondent No.1/SPL. Further, no formal application was filed for the same.

(C) The Impugned Order has impliedly rejected the claims in the present Appeal. Although the Central Commission had recorded the contention of the Appellants regarding principles for calculation of quantum of coal for the past period i.e. 2013-2014 to 2015-2016 in the Impugned Order, the Central Commission did not grant relief sought by the Appellants. It is settled law that where a relief has been claimed but not granted by the Court then it is deemed to be rejected. In this regard reliance is placed on the Hon'ble Supreme Court judgment in the case of *State Bank of India v. Ram Chandra Dubey & Ors.*, reported as (2001) 1 SCC 73 [Para 8]. As per settled law, in case claims are rejected in review proceedings, the order of rejection cannot be challenged.

14.4 The Central Commission had held in its Order dated 30.03.2015 in Petition No. 06/MP/2013 that SPL was entitled to compensation for Change in Law events impacting coal. Once the Central Commission has held that SPL

is entitled to compensation for Change in Law events, the computation of the same has to be applied on actuals in accordance with the principle of Article 13 of the PPA. This Tribunal in Appeal No. 288 of 2013 titled *Wardha Power Company Ltd vs Reliance Infrastructure Ltd* vide its judgment dated 12.09.2014, has held that compensation for Change in Law events is to be paid on the basis of actuals.

14.5 In terms of Article 13 of the PPA, a party affected by a Change in Law is to be compensated, such that the party is restored to the same economic position as if such Change in Law event had not occurred. Article 13.2 (a) and 13.2 (b) ought to conform to the aforesaid principle. Moreover, there is no stipulation or condition in the PPA which limits recovery to normative parameters. This Tribunal has in the judgment dated 22.08.2016 in Appeal No. 34 of 2016 titled *Jaiprakash Power Ventures Ltd vs Madhya Pradesh Electricity Regulatory Commission* held that in the absence of a technical requirement/condition in the PPA, the same cannot be read into the PPA. Thus, the compensation for Change in Law events impacting coal cannot be restricted to quantum of coal required for operating the Project at 2241 kWh/kCal and must be allowed at actuals.

14.6 Further, any compensation for Change in Law ought to be such that the Affected Party is restored to the same economic position as if such Change in Law event had not occurred. Any mechanism which results in

under-recovery/non-restoration of the affected party will be contrary to the provisions of the PPAs. The said position has also been confirmed by this Tribunal in terms of Judgment dated 20.11.2018 in Appeal No. 121 of 2018 titled *Sasan Power Limited vs. CERC &Ors.* ("*Sasan Power Judgment*"). The operative portion of the Sasan Power Judgment is reproduced hereunder:

> "*15.7 We also take note that the intended objective underlined the stated principle is restoration of the party to the same economic position and thus, the same needs to be interpreted in the right perspective with the main governing principles and not by a formula limiting to the said objective and yielding different reliefs to different generators as recorded by the CEA in its meeting held on 8.7.2013. In fact, the formula is essentially a vehicle to give effect to the guiding principle of economic restoration and the same needs to be read down to the extent it is inconsistent with the principle it seeks to serve."*

14.7 In terms of Order dated 15.11.2018 in Petition No. 88/MP/2018 titled *GMR Warora Energy Limited vs. MSEDCL &Anr.* ("*Order dated 15.11.2018*"), the CERC has observed that SHR given in the bid is under test conditions and may vary from actual SHR. Therefore, it would only be correct to take the SHR specified in the Regulations as *a reference point instead of* other parameters, given that the SHR *as per the bidding document cannot be considered for deciding the coal requirement for the purpose of calculating the relief under Change in law.* The operative portion of Order dated 15.11.2018 is extracted hereunder:

"29. The submissions regarding SHR and GCV have been considered. The APTEL in its judgement dated 12.9.2014 in Appeal No. 288 of 2013 (M/sWardha Power Company Limited V Reliance Infrastructure Limited &anr) has ruled that compensation under Change in Law cannot be correlated with the price of coal computed from the energy charge and the technical parameters like the Heat Rate and gross GCV of coal given in the bid documents for establishing the coal requirement. The relevant observations of APTEL are extracted as under:

> *"26. The price bid given by the Seller for fixed and variable charges both escalable and non-escalable is based on the Appellant's perception of risks and estimates of expenditure at the time of submitting the bid. The energy charge as quoted in the bid may not match with the actual energy charge corresponding to the actual landed price of fuel. The seller in its bid has also not quoted the price of coal. Therefore, it is not correct to co-relate the compensation on account of Change in Law due to change in cess/excise duty on coal, to the coal price computed from the quoted energy charges in the Financial bid and the heat rate and Gross Calorific value of Coal given in the bidding documents by the bidder for the purpose of establishing the coal requirement. The coal price so calculated will not be equal to the actual price of coal and therefore, compensation for Change in Law computed on such price of coal will not restore the economic position of the Seller to the same level as if such Change in Law has not occurred."*

30. In the light of the above observations, the technical parameters such as Heat Rate and GCV of coal as per the bidding document cannot be considered for deciding the coal requirement for the purpose of calculating the relief under Change in law. Therefore, the submissions of the Respondent, MSEDCL to consider the bid parameters are not acceptable. The Respondent has also relied on MERC order with regard to GCV. As regards SHR, it was also suggested by MERC that net SHR as submitted in the bid or SHR

norms specified for new thermal stations as per MYT Regulations, whichever is superior, shall be applicable. In our view, the decision in the said order has been given in the facts of the case and does not have any binding effect in case of the projects regulated by this Commission. Moreover, the SHR given in the bid are under test conditions and may vary from actual SHR. The Commission after extensive stakeholders? consultation has specified the SHR norms in the 2014 Tariff Regulations. Therefore, it would be appropriate to take SHR specified in the Regulations as a reference point instead of other parameters as suggested by MSEDCL.

31. In the present case, the Petitioner has considered SHR of 2355 kcal/Kwh whereas, the Respondent MSEDCL has considered the Design Heat Rate of 2211 kcal/kWh as submitted in the RFP. It is pertinent to mention that the CERC norms applicable for the period 2009-14 and 2014-19 do not provide the norms for 300 MW units, but provide for a degradation factor of 6.5% and 4.5% respectively towards Heat Rate over and above the Design Heat Rate. As the Design Heat Rate is 2211 kcal/kWh, the gross Heat Rate works out to 2355 kcal/kWh (2211 x 1.065) and 2310 kcal/kWh (2211 x 1.045) for the period 2009-14 and 2014-19 respectively. Accordingly, we direct that the SHR of 2355 kcal/kWh during the period 2009-14 and 2310 kcal/kwh during the period 2014-19 or the actual SHR whichever is lower, shall be considered for calculating the coal consumption for the purpose of compensation under change in law. The Petitioner and the Respondent MSEDCL are directed to carry out reconciliation on account of these claims annually."

14.8 In view of the above, it is submitted that the Central Commission has, in terms of Order 15.11.2018, recognized that technical parameters such as Heat Rate and GCV as per bidding documents cannot be considered for

deciding coal requirement for the purpose of calculating relief under Change in Law.

14.9 Without prejudice to the aforesaid, it is submitted that the Central Commission has approved Station Heat Rate greater than 2241 kWh/kCal of similarly sized generating stations.

15. We have heard learned Counsel appearing for the Appellant and the learned Counsel appearing for the Respondents in all the appeals at length and gone through the written submissions filed by both the parties carefully. After thorough critical evaluation of the relevant material available on records, the following issues arise for our consideration in the instant appeals :

Appeal No. 77 of 2016 & 136 of 2016

(A) Whether the claim for compensation for change in law towards increase in royalty, clean energy cess and excise duty on coal is admissible on the basis of dispatched quantity of coal or utilized quantity of coal?

(B) Whether levy of one time water-allocation fee and increase in water charges amount to Change in Law in terms of Article 13 of the PPA or not?

(C) Whether auxiliary power consumption is justified to be limited at 6% of the installed capacity instead of actual auxiliary power consumption in the computation of compensation on account of Change in Law?

(D) Whether the compensation payable on Change in Law events impacting cost of coal consumed corresponding to scheduled generation is to be allowed based on Station Heat Rate (SHR) at normative level or actual SHR?

(E) Whether the Appellant is entitled to carrying costs on expenditure incurred on account of Change in Law?

Appeal No. 324 of 2016

(F) Whether the appeal is maintainable or not?

(G) Whether the principle to be adopted for the future, i.e. FY 2016-17 onwards, for calculation of quantum of coal due to change in law could be applied for the past period, i.e. 2013-14 to 2015-16, or not?

OUR CONSIDERATION & ANALYSIS:

16. ISSUE NO. (A):

Whether the claim for compensation for change in law towards increase in royalty, clean energy cess and excise duty on coal is admissible on the basis of dispatched quantity of coal or utilized quantity of coal?

16.1 Learned counsel for the Appellant submitted that the Central Commission has erred in computing compensation for royalty, clean energy cess and excise duty based on actual coal consumption and not on coal despatched from the mine without considering the fact that the aforesaid levies are imposed on the quantity of coal despatched in accordance with applicable laws. Learned counsel, to substantiate his submissions, placed reliance on the judgment of the Hon'ble Supreme Court in the case of Union

of India vs Bombay Tyre International Ltd reported in 1983 (14) ELT 1896 (S.C) which held that excise duty is imposed with respect to manufacture or production of an article and the excise duty payable is not determined with respect to the point of collection of the said duty which is merely for administrative convenience but is attracted by the manufacture of the product in question.

16.2 Learned counsel further submitted that in terms of the above rulings, it may be surmised that the Appellant's liability to make payment for the aforesaid levies crystalizes at the time of dispatch of coal from the mine and, therefore, the compensation due to Appellant ought to be correlated accordingly.

16.3 Learned counsel was quick to point out that the Central Commission summarily concluded that the compensation will be based on utilization of coal without assigning any reasons thereto and, as such, the impugned Order is bad in law in terms of various judgments of the Hon'ble Apex Court wherein it is categorically held that reason is the heartbeat of every order and that a judicial order must be supported by the reasons.

16.4 Learned counsel vehemently submitted that any compensation for Change in Law ought to be such that the Affected Party is restored to the same economic position as if such Change in Law event had not occurred.

Therefore, a mechanism which results in under-recovery/non-restoration of the affected party to the same economic position is contrary to the provisions of the PPAs and the said position has also been confirmed by this Tribunal in terms of Judgment dated 20.11.2018 in Appeal No. 121 of 2018 in the case of Sasan Power Limited vs. CERC & Ors. Learned counsel reiterated that in view of the fact cited above, the Appellant is required to be compensated for payment for these levies on the basis of dispatched quantity of coal from the mine instead of actual consumption quantities by the project.

16.5 ***Per-contra,*** **l**earned counsel for the Respondents contended that the time and quantity of coal to be mined is the internal operation and decision of appellant and the same cannot create a liability on the Procurers until the coal is utilized for generation of electricity.

16.6 Learned counsel for the Respondents further submitted that in regard to the tariff determination prevalent, the cost incurred by the generating company prior to invoicing for the generated unit cannot be a part of the claim independent of the interest on working capital and to strengthen their arguments, learned counsel placed reliance on the judgment of this Tribunal dated 14.08.2018 passed in Appeal No. 111 of 2017 in the case of GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Others, wherein this Tribunal held that the interest on working capital

cannot be increased on account of change in law and in the case in hand, the Appellant has contended on the similar lines.

16.7 Admittedly, even as per the Appellant, the royalty is to be compensated only by monthly tariff payments i.e on scheduled energy basis whereas, the Appellant seeks a differential treatment of payment without any energy being generated. Learned counsel for the Respondents emphasis that if the electricity is not generated, then no charges are payable in respect of fuel/coal and this would include the royalty which are part of change in law and, similarly, for excise duty and clean energy cess on coal also.

16.8 Our Findings:

16.8.1 We have critically analyzed the rival contentions of learned counsel for the Appellant and learned counsel for the Respondents and also taken note of the judgments cited/relied upon by the parties.

16.8.2 It is not in dispute that compensation for change in law events impacting coal i.e. increase in royalty, clean energy cess and excise duty on coal is required to be made to the generating companies in order to restore it to the same economic position as if the change in law event had not occurred.

16.8.3 The Appellant contends that as the Appellant's liability to make payment for the aforesaid levies crystallizes at the time of dispatch of coal

from the mine, it should be compensated by correlating the dispatch quantity of coal and not the utilized quantity of coal. On the other hand, Respondents contend that the liability of the beneficiaries/procurers under the PPA is towards the payment of tariff for the scheduled generation and not the actual generation, hence, the change in law events impacting royalty, clean energy cess and excise duty on coal should be computed based on the actual consumption of coal and not the dispatched/mined quantity of coal as claimed by the Appellant.

16.8.4 We have perused the impugned Order of the Central Commission and also analyzed the submissions of the Appellant and the Respondents. It is the case of the Appellant that it should be compensated for increase in various levies based on despatched quantity of coal from the mines and not actual utilization of coal, keeping in mind the restitutionary principle of the change in law under the PPA. We do not agree with the contention of Appellant that Central Commission concluded that the compensation will be based on utilization of coal without assigning any reasons thereto. In fact, the Central Commission has stated that the liability of the beneficiaries/procurers under the PPA is towards the payment of tariff for the scheduled generation and not actual generation. Therefore, we find force in the findings of the Central Commission that the Procurers cannot be saddled with payment of compensation for the change in law for quantum of coal which may not be

utilized for supplying energy to the procurers. Hence, we decide that the change in law compensation should be based on quantum of coal consumed as opposed to coal dispatched. **Therefore, this issue, i.e. Issue (A) is decided against the Appellant.**

17. ISSUE NO. (B):

Whether levy of one time water-allocation fee and increase in water charges amount to Change in Law in terms of Article 13 of the PPA or not?

17.1 Learned counsel for the Appellant submitted that the Central Commission has erroneously held that imposition of one time water allocation fee and increase in water charges do not constitute change in law events.

17.2 Learned counsel further submitted that on the Cut-Off Date, there was no requirement for payment of water allocation fee and pursuant to the Amendment dated 22.06.2013 issued by the Government of Madhya Pradesh to the then prevailing MP Irrigation Rules (under the Madhya Pradesh Irrigation Act, 1931), the Appellant was required to pay a one-time water allocation fee equivalent to one month water tax and cess on the annual allocated water quantity. Further, on the Cut-Off Date, the applicable water charges were Rs 1.80/Cu. M in terms of notification dated 27.07.2003 and, subsequently, vide notification dated 21.04.2010, Government of Madhya Pradesh revised the water charges for the years starting 01.01.2010,

01.01.2011, 01.01.2012 and 01.01.2013 to Rs 4.00 /Cu.M., Rs 4.50/Cu.M., Rs 5.00/Cu.M. and Rs 5.50/Cu.M respectively. Accordingly, in terms of Paragraph 2 of the Water Supply Agreement dated 05.01.2013, the Appellant was required to pay revised water charges for the water drawn by it.

17.3 Learned counsel vehemently submitted that imposition of one time water allocation fee and considerable increase in water charges are change in law events as the amendment/notification have been issued by an Indian Government instrumentality and the aforesaid fee and increase in water charges occurred after the Cut-Off Date and the aforesaid amendment and notification have led to an increase in cost of producing electricity by the Appellant.

17.4 Learned counsel for the Appellant was quick to submit that the Central Commission has erroneously relied on Clause 2.7.1.4.3 and 2.7.2.1 of the RFP to hold that the Appellant was required to quote an inclusive bid taking into account all input costs. Learned counsel further submitted that the aforesaid reasoning has been rejected by this Tribunal vide its judgment dated 19.04.2017 in Appeal No. 161 of 2015 - *Sasan Power v. CERC and Ors*. Learned counsel emphasized that the Central Commission has, in the Statement of Objects and Reasons to the CERC Tariff Regulation, 2014, noted that water charges are determined by State agencies and are beyond the control of the generating company.

17.5 Learned counsel contended that the Central Commission's reliance on the the judgment dated 12.09.2014 of this Tribunal in Appeal No. 288 of 2013 in Wardha Power Company Limited v. Reliance Infrastructure Limited & Another case to hold that only new taxes and levies or change in existing taxes or levies would be allowed as Change in Law, but change in base price of input would not be allowed as Change in Law is totally erroneous. Learned counsel clarified that Wardha case is entirely distinguishable from the present case as the issue of whether increase in input cost can be allowed as Change in Law was not even considered in Wardha judgment. As such, the Central Commission has proceeded on the erroneous understanding that since Wardha did not claim increase in base price of the input, the Appellant is also not entitled to claim the same.

17.6 Learned counsel further submitted that following three-point test ought to be considered while adjudicating upon a claim for compensation for a Change in Law event:

(i) Whether there is a Change in Law, i.e. enactment, amendment, modification of a Statute, Rule or Regulation etc.;

(ii) Whether the said Change in Law was brought about by an Indian Governmental Instrumentality; and

(iii) Whether such Change in Law impacts the cost/revenue and fulfils the threshold provided under the PPA.

17.7 Learned counsel highlighted that evidently, all characteristics mentioned above of a Change in Law event are borne out for increase in water charges as well as imposition of the one-time water allocation fee and, hence, the same needs to be compensated to the Appellant.

17.8 ***Per-contra,*** learned counsel for the Respondents submitted that the Central Commission in the impugned order held that Notification dated 21.04.2010 and 22.06.2013 whereby rates of water supply were increased and one time water allocation fee was imposed are not 'Law' in terms of the definition under the PPA. Learned counsel further submitted that the genesis of recovery of water charges by the State Government rests in the agreement executed between the appellant and the State Government and not under any law as manifested by the provisions of Madhya Pradesh Irrigation Act, 1931 wherein Section 37 of the Act reads thus:

> ***"37. Purpose for which water may be supplied,***
> *(1) Water may be supplied from a canal:*
> *(a) Under an irrigation agreement, in accordance with the provisions of Chapter VI;*
> *(b) On demand, for the irrigation of specified areas;*
> *(c) To supplement a village tank;*
> *(d) For Industrial, urban or other purposes not connected with agriculture;*
> *(e) For the irrigation of a compulsorily assessed area.*

(2) Charges for the supply of water under clause (a), (b), (c) or (e) of sub-section (1) shall be paid at such rates as may be fixed by the State Government in accordance with rules made under this Act."

17.9 Further, under Section 40 of the Act, extracted below, the charges etc for supply of water for industrial, urban and other non-agricultural purposes are to be fixed under the agreement:

"40. Supply or water for industrial, urban or other purposes.-
The conditions for the supply of water for industrial, urban or other purposes not connected with agriculture and the charges there for, shall be as agreed upon between the State Government and the company, firm, private person or local body concerned and fixed in accordance with rules made under this Act."

17.10 Learned counsel for the Respondents vehemently submitted that on analysis of the available data for the period from 01.04.1991 to 01.11.2013, extracted under Para 41 of the impugned Order, the Central Commission noted that year after year increase in water charges was being ordered by the State Government which fact needed to be realistically assessed and factored in the bid for the entire contract period and the Appellant's failure to do so cannot burden the beneficiaries at later stage. Further, the Central Commission has also examined Appellant's claim in the light of judgment of this Tribunal in Wardha case on which reliance was placed by the Appellant before it and also in the instant appeal. The Central Commission observed that ratio of the said judgment did not have any application to the Appellant's claim since in that case the question involved was of adjustment of imposition

of taxes, levies and cess whereas the Appellant's claim in the petition before the Central Commission was based on increase in water charges and was not on account of imposition or increase of taxes, levies and cess.

17.11 Learned counsel for the Respondents further submitted that Appellant cannot rely on the observation of this Tribunal de hors of the facts of the present case. In fact, in the subsequent cases of GMR Warora Energy Limited in Appeal No. 111 of 2017, this Tribunal had relied on decision in Adani Power Rajasthan Limited, which in turn referred to the RFP provisions wherein the bidder was supposed to consider all the cost inputs, to decide that the Generator was required to incorporate the price in its bid. The Bidder cannot claim that every change in the price of any input is a Change in Law as this would negate the very purpose of competitive bidding. Learned counsel for the Respondents, accordingly, summed up their submissions to reiterate that one time water allocation fee as well as enhancement of water charges from time to time cannot be considered as Change in Law event and the claim of the Appellant on these accounts is not at all justified.

17.12 Our Findings:

17.12.1 We have critically analyzed the rival contentions of learned counsel for the Appellant and learned counsel for the Respondents and also perused the findings in various judgments relied upon by the parties. Based

on the same, and the impugned Order of the Central Commission, following issues arise before us for consideration:

(a) Whether change in law can be claimed for only taxes and levies or change in base amount is also liable to be compensated if it falls within the definition of change in law?

(b) Whether increase in water charges and levy of one time water allocation fee satisfies the test of change in law under the PPA?

17.12.2 Before analyzing these issues further, we refer Article 13.1.1 of the PPA 'Change in law means the occurrence of any of the following events after the date, which is seven days prior to the bid deadline:

(i) The enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any law…."

17.12.3 Further, as per Article 1.1 definitions, the word 'Law' and 'Indian Governmental Instrumentality' have been defined. Under Article 13.2(b) Application and Principles for computing impact of Change in Law during operation period provides as under:

> *"As a result of change in law, the compensation for any increase/decrease in revenues or cost to the Seller shall be determined and effective from such date, as decided by the Central Electricity Regulatory Commission whose decision shall be final and binding on both the parties"*

17.12.4 From the above, it is relevant to note that after the cut-off date, any enactment, amendment or modification of any law, which includes

notification by a State Government where the project is located and which results in any increase/decrease in revenues or cost to the seller qualifies as a Change in Law under the PPA and compensation is liable to paid.

17.12.5 In the present case, imposition of one time water allocation fee and increase in water charges for year on year basis have been notified by the State Government which is an Indian Governmental Instrumentality.

17.12.6 We are inclined to agree with the views of the Central Commission that change in base prices are not eligible for compensation under change in law and only the new taxes and/or levies or changes in existing in taxes and/or levies applicable on the base price of inputs are allowed for compensation under Change in Law.

17.12.7 In a host of judgments of this Tribunal in various cases, it has been held that the increase in input cost cannot be allowed as Change in Law and, hence, we hold that changes in water charges are not eligible for compensation under Change in Law. However, as on the cut-off date, there was no water allocation fee to be paid by the Appellant to the Government of Madhya Pradesh and has been imposed subsequently by an amendment dated 22.06.2013, the same amounts to be a change in law event and as per Energy Watchdog judgment of the Hon'ble Supreme Court, the Appellant

needs to be compensated to this account so as to restore it to the same economic position.

17.12.8 We also agree with the analysis of the Central Commission that the water charges have shown increasing trend over the years and Appellant should have realistically assessed and factored in the bid such increase in water charges over the contract period. We are of the view that a prudent bidder would address the risk in increase of input cost by suitably quoting an escalable component of capacity charge. A similar case came up before this Tribunal in Appeal No.195 of 2016 and decided vide its judgment dated 27.05.2019 that there cannot be any compensation on account of increase in rate of water charges. **Therefore, this issue, i.e. Issue (B) is partially decided against the Appellant i.e. increase in water charges, being input cost, not allowed as compensation to the Appellant. However, levy of one time water allocation fee, being held to be a change in law event, the same needs to be compensated to the Appellant.**

18. ISSUE NO. (C):

Whether auxiliary power consumption is justified to be limited at 6% of the installed capacity instead of actual auxiliary power consumption in the computation of compensation on account of Change in Law?

18.1 Learned counsel for the Appellant submitted that the Central Commission has erroneously limited the auxiliary power consumption at 6%

of the installed capacity instead of actual auxiliary power consumption in the computation of the impact on account of change in law events. However, the Central Commission has in the impugned Order, categorically held that increase in electricity duty payable on the auxiliary power and the imposition of cess on auxiliary power are change in law events for which the Appellant is entitled for compensation.

18.2 Learned counsel vehemently submitted that in terms of Article 13.2 of the PPA, compensation for change in law events is to be paid to the Appellant on actuals and not on normative basis so as to restore Appellant to the same economic position as if the change in law event did not take place. Learned counsel alleged that by limiting the compensation payable on account of change in law events impacting auxiliary power consumption to only 6% of the total installed capacity of the Project, the Central Commission has acted contrary to the underlying principle of Article 13.2 of the PPA.

18.3 Learned counsel further submitted that compensation for increase in electricity duty payable on the auxiliary power and the imposition of cess on auxiliary power has to be determined on actual basis since the PPA does not limit or stipulate auxiliary consumption to be normative. Learned counsel cited that the aforesaid position has been confirmed by this Tribunal in its judgment dated 22.08.2016 in Appeal No. 34 of 2016 in the case of *Jaiprakash Power Ventures Ltd vs Madhya Pradesh Electricity Regulatory Commission* wherein

it has been held that since the power purchase agreement did not contain any mention of minimum technical requirement of the generator for scheduling of power by the beneficiary, the generator cannot enforce the same against the beneficiary. Learned counsel contended that based on the same, auxiliary consumption cannot be restricted as there is no such restriction contained in the PPA.

18.4 Learned counsel also placed reliance on the judgment of this Tribunal dated 12.09.2014 in Appeal No. 288 of 2013 in the case of *Wardha Power Company Limited v. Reliance Infrastructure Limited & Another* which has laid down principles based on which compensation for Change in Law events may be granted.

18.5 Learned counsel for the Appellant was quick to submit that several bidders offered varying gross and net capacity and it would be incorrect to assume the difference between the two as auxiliary power consumption. He, further, pointed out that in respect of some bidders, the gap is as high as 10%. And, accordingly, the Central Commission has erred in applying normative parameters to determine the impact of change in law events.

18.6 Learned counsel further submitted that the auxiliary power consumption of similarly sized generating stations which do not have a captive coal mine, the Central Commission has approved auxiliary power

consumption to the tune of 6.5%. It is pertinent to note that the Appellant's project is an integrated project i.e. it also includes coal mine and over land conveyor for coal transportation and, therefore, any restriction on auxiliary power consumption up to 6% in the present case, involving a captive coal mine, is impractical and also contrary to law.

18.7 Learned counsel highlighted that any compensation for change in law ought to be such that the affected party is restored to the same economic position and, therefore, the findings of the Central Commission are nor in line with the rulings of various judgments of the Hon'ble Apex Court as well as this Tribunal.

18.8 ***Per-contra,*** learned counsel for the Respondents contended that under the PPA, the Appellant agreed to sell the capacity of 3722.4 MW to the beneficiaries out of its total installed capacity of 3960 MW which in turn, works out to an auxiliary consumption of 6%.

18.9 Learned counsel for the Respondents further submitted that the Central Commission noted that energy scheduled by the beneficiaries of the Appellant's Project is ex-bus energy actually supplied to the beneficiaries. Therefore, actual power at generator terminal required to be generated (including 6% Auxiliary Power Consumption) would be scheduled energy divided by 0.94.

18.10 Respondents' learned counsel further contended that Appellant's reliance on normative Auxiliary Power Consumption of 6.5% notified under Section 61 of the Electricity Act is misplaced since these Regulations are applicable in case of tariff determined under cost-plus regime whereas the present Power Project is a competitively bid.

18.11 Further, learned counsel for the Respondents were quick to submit that there cannot be any compensation in respect of auxiliary consumption which is in excess of the bid as the Appellant cannot be permitted to burden the Procurer-Respondents for its inefficiency after the Appellant having got selected in the competitive bid process with specific stipulation on the extent of auxiliary consumption. Accordingly, any extra quantum towards auxiliary consumption should be to the account of the Appellant.

18.12 While summing up their arguments, learned counsel for the Respondents reiterated that the compensation to the Appellant in respect of change in law should therefore be limited to auxiliary consumption at 6% only and any loss due to its own inefficiency or due to the Appellant exceeding the bid parameters would need to be borne by the Appellant itself.

18.13 Our Findings:

18.13.1 We have carefully considered the submissions of the Appellant and the Respondents on this issue and also perused the findings of the Central Commission in this regard in its impugned Order.

18.13.2 It is the case of the Appellant that the procurers have erroneously contended that the Appellant's bid was accepted on the premise that it would be supplying power from generating station to the tune of 3722.4 MWs out of its total capacity of 3960 MWs by virtue of which auxiliary power consumption works out to 6%. It is relevant to note from the Order dated 30.12.2015 in Petition No. 118 of 2015 in which the Central Commission itself noted that "since the tariff of the project is based on competitive bidding, the auxiliary power consumption is not known". In other words, auxiliary power consumption has not been considered at all for evaluation of the bid.

18.13.3 We also noticed that the Central Commission has passed subsequent Orders where it has held that bid assumptions cannot be the basis for compensation under Change in Law (Order dated 15.10.2018 in Petition No. 88/MP/2018 in case of GMR Warora Energy Ltd v MSEDCL). The objective of change in law provision under Article 13 is restoration to the same economic position and the same has been highlighted and accepted by the Hon'ble Supreme Court as well as this Tribunal in various cases such as

Energy Watchdog and Adani Carrying Cost judgments of the Hon'ble Apex Court and Sasan 161 and GMR 193 judgments of this Tribunal.

18.13.4 In view of the facts, as stated supra, we are of the opinion that while compensation of various levies on coal cannot be linked to the dispatched quantity, we do not see merit in the Central Commission's view that the compensation should be restricted to bid auxiliary consumption (at 6%). It is also noticed that the Central Commission has in subsequent orders taken a position that compensation for Change in Law events cannot be restricted to bid parameters.

18.13.5 Having decided that the change in law compensation shall be based on the quantum of coal consumed as opposed to coal dispatched, we hold that for determination of coal consumption for scheduled generation, the auxiliary consumption should be based on actual. However, to adequately protect the interest of the consumers/procurers, the auxiliary consumption shall be capped to the applicable normative levels contained in the CERC Tariff Regulations, 2009. **Hence, this issue, i.e. Issue (C) is partially decided in favour of the Appellant.**

19. ISSUE NO. (D):

Whether the compensation payable on Change in Law events impacting cost of coal consumed corresponding to scheduled generation is to be

allowed based on Station Heat Rate (SHR) at normative level or actual SHR?

19.1 Learned counsel for the Appellant submitted that the Central Commission has wrongfully limited the compensation payable to the Appellant on account of Change in Law events corresponding to SHR of 2241 kCal/kWh instead of allowing the same at actual in accordance with the principle of Article 13 of the PPA. Learned counsel, to substantiate his submissions, placed reliance on the judgment of this Tribunal in Jaiprakash Power Ventures vs MPERC case, in which, it is held that in the absence of a technical minimum requirement/condition in the PPA, the same cannot be read into the PPA. Further, this Tribunal in Wardha Judgment, has clearly held that compensation for change in law events is to be paid on the basis of actual and not limiting the same on normative parameters.

19.2 Learned counsel further cited Order dated 15.11.2018 passed by the Central Commission in Petition No. 88/MP/2018 in the case of GMR Warora Energy Limited vs. MSEDCL & Anr., wherein the Central Commission has observed that SHR given in the bid is under test conditions and may vary from actual SHR. Therefore, it would only be correct to take the SHR specified in the Regulations as a reference point instead adopting other parameters including SHR. The Central Commission has ruled that SHR as per bidding documents cannot be considered for deciding coal requirement

for the purpose of calculating relief under Change in Law. Learned counsel also placed reliance on this Tribunal's judgment dated 13.04.2018 in Case No. 210 of 2017 in the case of Adani Power Ltd. v. CERC & Ors which held that SHR would have to be determined on case to case basis.

19.3 Learned counsel further submitted that in view of the facts, as stated supra, computation have to be on actual and not normative SHR.

19.4 ***Per-contra,*** learned counsel for the Respondents contended that in support of its claim, the Appellant has brought on record the Station Heat Rate of the power stations of NTPC and Adani and the normative Station Heat Rate specified by the Central Commission in the terms and conditions for determination of tariff specified under Section 61 of the Electricity Act applicable to the generating stations whose tariff is determined on cost-plus basis, which are higher than Station Heat Rate of 2241 kCal/kWh considered by the Central Commission for computation of compensation to the Appellant.

19.5 Learned counsel for the Respondents were quick to submit that by virtue of its admission before the Central Commission in the proceedings in Petition No 14/MP/2013, the Appellant is estopped from claiming the Station Heat Rate other than the Station Heat Rate of 2241 kCal/kWh. Learned counsel, further, brought out that it is not open for the Appellants to claim any higher SHR for coal computation resulting in changing the bid terms. Further,

reliance on Tariff Regulations, 2014 is misplaced as the said Regulations refer to cost plus determination and not to a competitive bid project.

19.6 Regarding the contention of the Appellant that SHR for other generating stations has been approved by the Central Commission to higher value than 2241 Kcal/Kwh, learned counsel for the Respondents indicated that subsequent to the Energy Watchdog judgment, the Central Commission has approved SHR for Adani Power at 2150 kcal/kwh for Gujarat PPA and 2206 kcal/kwh for Haryana PPA in its Order dated 04.05.2017 which is less than the SHR considered for the Appellant (2241 kcal/kwh).

19.7 Learned counsel for the Respondents, further, submitted that the above Station Heat Rate was challenged by Adani Power before this Tribunal but the above Order of the Central Commission was upheld by this Tribunal in its judgment dated 13.04.2018.

19.8 Our Findings:

19.8.1 We have carefully considered the rival contentions of both the parties and also taken note of various judgments relied upon by the parties. It is the main contention of the Appellant that principle of change in law provisions of PPA is restoration to the same economic position. On the other hand, the Respondents contend that SHR as quoted in the bid should be

considered for computation of coal quantity to arrive at actual compensation to be made to the Appellant.

19.8.2 Having regard to the contentions of the Appellant and the Respondents and after critical analysis of the issue, we are of the opinion that while we have held that compensation of various levies cannot be linked to the dispatched quantity of coal, the compensation should not be restricted to bid SHR. It is also relevant to note that the Central Commission has in subsequent orders taken a position that compensation for Change in Law events cannot be restricted to bid parameters.

19.8.3 In light of the above, we are of the opinion that for determination of coal consumption for scheduled generation, SHR should be based on the actual instead of bid SHR. However, to adequately protect the interest of the procurers and consumers at large, the SHR is required to be capped to the applicable normative levels contained in the CERC Tariff Regulations, 2009. **Hence, this issue, i.e. Issue (D) is partially decided in favour of the Appellant.**

20. ***ISSUE NO. (E):***

Whether the Appellant is entitled to carrying costs on expenditure incurred on account of Change in Law?

20.1 Learned counsel for the Appellant submitted that the Central Commission, vide its Order dated 16.02.2017 in Petition No. 1/RP/2016 in Petition No. 402/MP/2014, had disallowed carrying cost for the reasons that there is no provision for carrying cost in the PPA and this Tribunal's judgment dated 20.12.2012 in Appeal No. 150 & batch is not applicable in the present case. Since, the said case dealt with redetermination of tariff.

20.2 Learned counsel, further, submitted that the aforesaid reasons have been categorically rejected by this Tribunal in Adani Carrying Cost judgment. This has further been upheld by the Hon'ble Supreme Court in its judgment dated 25.02.2019 passed in Civil Appeal No. 5865 of 2018. Learned counsel, accordingly, reiterated that the Appellant should be granted carrying cost which has been settled by the Hon'ble Supreme Court and, consequentially, apply to the present Appeal as well.

20.3 ***Per-contra,*** learned counsel for the Respondents contended that the issue of carrying cost had to be considered in the light of the judgment of the Hon'ble Supreme Court dated 25.02.2019. However, learned counsel for the Respondents submitted that any delay in furnishing any information and details is to the account of the Appellant and cannot be passed on to the procurers and consumers at large.

20.4 Our Findings:

20.4.1 We have noted the submissions of both the parties and we are of the opinion that after a series of litigation, the matter relating to carrying cost has finally been settled by the Hon'ble Supreme Court vide its judgment dated 25.02.2019 passed in Civil Appeal No. 5865 of 2018. The Hon'ble Supreme Court, while dismissing the appeal filed against Adani carrying cost judgment of this Tribunal, upheld that compensation for change in law includes compensation for carrying cost. Hence, the principle of carrying cost so laid down by the Hon'ble Apex Court, shall apply to the present Appeal as well. **Therefore, this issue, i.e. Issue (E) is decided in favour of the Appellant.**

21. ISSUE NO. (F) (In Appeal No. 324 of 2016):

Whether the appeal is maintainable or not?

21.1 With regard to admissibility of the Appeal (Appeal No. 324 of 2016), learned counsel for the Appellants/Discoms submitted that the Appeal has been filed against the Order dated 22.09.2016 passed by Central Commission in Review Petition No. 19/RP/2016 filed by the first Respondent against the Order dated 19.02.2016 in Petition No. 153/MP/2015. The Review Petition was allowed on account of error apparent on the face of the order and the main order has been modified and the compensation due to the first Respondent has been modified and determined by the order dated

22.09.2016 and in terms of the settled principles laid down by the Hon'ble Supreme Court, the appeal is maintainable only against the Order dated 22.09.2016 and not as such against the Order dated 19.02.2016.

21.2 Learned counsel further submitted that it is a settled principle of law that when a decree or order is even modified by the review order there is a new decree or order and the appeal is maintainable only against the new decree or new order.

21.3 To substantiate her submissions, learned counsel placed reliance on the judgment of Hon'ble Supreme Court in the case of (a) Sushil Kumar Sen v State of Bihar AIR 1975 SC 1185 (para 2, 3 & 4) and (b) DSR Steel Pvt. Ltd vs State of Rajasthan (2012) 6 SCC 782 (Para 24-26).

21.4 Learned counsel highlighted that in view of the above judgments, there need not be vacation of the main order in all respects for the merger to apply. The merger occurs not only when the review is allowed by setting aside the order or reversing the impugned order, but also when the main order is modified or confirmed as held in Sushil Kumar's case (as stated supra) and followed in number of judgments. Learned counsel further submitted that even this Tribunal has also taken the similar view with regard to merger of a review order with the initial order, in case the review is allowed, in catena of judgments, such as:

a. New Bombay Ispat Yog Limited vs Maharashtra State Electricity Distribution Company Limited 2010 ELR (APTEL) 653:

b. NHDC Limited vs CERC and others Appeal No. 30 of 2013 decided on 07.03.2014:

c. Powergrid Corporation of India limited vs CERC and others, Appeal No. 167 of 2013 dated 05.03.2014*:*

21.5 Learned counsel, further, reiterated that in view of the above judgments and orders, the Appeal is maintainable and deserves to be allowed.

21.6 ***Per-contra,*** learned counsel for the Respondent/SPL submitted that the review petition was filed by it seeking review of the Principal Order on the ground of apparent error i.e. erroneous exclusion of royalty and stowing excise duty from the excisable value of coal; and double deduction of coal consumed for commissioning activities, etc.

21.7 Learned counsel vehemently submitted that the appeal is not maintainable due to the following:

(A) Doctrine of merger is not applicable in the present case since the Impugned Order has not been passed by the Central Commission in exercise of its review jurisdiction;

(B) No Appeal has been filed by the Appellant against the Principal Order and the Impugned Order cannot be challenged without challenging the Principal Order; and

(C) The impugned Order has impliedly rejected the claims in the present Appeal. As the Central Commission had recorded the contention of the Appellants regarding principles for calculation of quantum of coal for the past period i.e. 2013-2014 to 2015-2016 in the Impugned Order, the Central Commission did not grant any relief sought by the Appellants.

21.8 Our Findings:

21.8.1 We have carefully considered the rival contentions of the Appellants and the Respondents regarding maintainability of appeal. We also perused the judgment of the Hon'ble Supreme Court as well as this Tribunal relating to the cases for maintainability of the appeals. What thus transpires from these judgments and orders is when a decree or order is even modified by the review order, there is a new decree or order and the appeal is maintainable only against the new decree or new order.

21.8.2 In the instant case, the main Order dated 19.02.2016 passed by the Central Commission has got merged with the Order dated 22.09.2016 passed in review petition and in terms of the settled principles laid down by the Hon'ble Apex Court and this Tribunal also, the Appeal is maintainable only against the Order dated 22.09.2016. We do not find force in the arguments of learned counsel for the first Respondent/SPL that appeal is not maintainable because of Doctrine of merger is not applicable and no appeal has been filed against the Principal Order. **In view of these facts, we are of**

the opinion that the appeal is maintainable and, thus, allowed for consideration to meet the ends of justice.

22. ISSUE NO. (G)

(In Appeal No. 324 of 2016):

Whether the principle to be adopted for the future, i.e. FY 2016-17 onwards, for calculation of quantum of coal due to change in law would be applied for the past period, i.e. 2013-14 to 2015-16, or not?

22.1 Learned counsel for the Appellants submitted that the Appellants/Discoms have challenged the Order dated 22.09.2016 of Central Commission in so far as it allows the claim of the first Respondent for compensation of royalty, excise duty and clean energy cess based on quantum of coal on actual basis but without considering the ceiling of Station Heat Rate of 2241 Kcal/kWh for the period from 2013-14 to 2015-16 despite accepting the principle of such computation for the future period i.e. from 2016-17.

22.2 Learned counsel for the Appellants alleged that the Central Commission in its Impugned Order has considered the above ceiling for the mechanism to be adopted in subsequent years i.e. 2016-17 onwards but has failed to apply the same parameter while calculating the quantum of coal for the past period i.e. 2013-14 to 2015-16. It is the contention of the Appellants that what is applicable for the future is equally applicable for the past too.

22.3 Learned counsel for the Appellants was quick to point out that the Central Commission has accepted the parameter of auxiliary consumption of 6% for the past period but has failed to apply SHR parameter on the same ground.

22.4 Learned counsel further submitted that the compensation for change in law can be allowed to the first Respondent/SPL only to the extent it is reasonable, prudent and what has been agreed-to by the first Respondent/SPL. Learned counsel emphasized that if the first Respondent/SPL has incurred additional expenditure due to higher parameters of SHR than his agreed upon SHR, the same cannot be passed on to the procurers. Further, principle of Article 13.2 would not allow the first Respondent/SPL to claim compensation for expenditure which has been incurred by it in unreasonable and imprudent manner. Learned counsel contended that any alleged under-recovery is due to the fact that the first Respondent/SPL has not been able to conform to the bid parameters and has incurred additional expenditure due to its own inefficiency. Learned counsel reiterated that the consumers at large cannot be burdened by such compensation claimed by the first Respondent/SPL.

22.5 ***Per-contra,*** learned counsel for the Respondent/SPL submitted that the Central Commission has held in its Order dated 30.03.2015 in Petition No. 06/MP/2013 that Respondent/SPL was entitled to compensation for

Change in Law events impacting coal, and, accordingly, SPL is entitled to compensation for change in law events. Learned counsel, further, submitted that computation of such compensation on account of Change in Law events has to be applied on actuals in accordance with the principle of Article 13 of the PPA. To substantiate his submissions, learned counsel for Respondent/SPL placed reliance on the judgment of this Tribunal 12.09.2014 in Appeal No. 288 of 2013 in case of *Wardha Power Company Ltd vs Reliance Infrastructure Ltd* in which it has been held that compensation for Change in Law events is to be paid on the basis of actuals.

22.6 Further, in terms of Article 13 of the PPA, a party affected by a Change in Law is to be compensated in such a way that the party is restored to the same economic position as if such Change in Law event had not occurred. Learned counsel was quick to point out that there is no stipulation or condition in the PPA which limits recovery to normative parameters. Learned counsel referred to the judgment of this Tribunal dated 22.08.2016 in Appeal No. 34 of 2016 titled *Jaiprakash Power Ventures Ltd vs Madhya Pradesh Electricity Regulatory Commission* wherein it is held that in the absence of a technical minimum requirement/condition in the PPA, the same cannot be read into the PPA and, accordingly, compensation for Change in Law events impacting coal cannot be restricted to quantum of coal required for operating the Project at 2241 kWh/kCal and must be allowed at actuals.

22.7 Further, learned counsel for the Respondent/SPL emphasizes that any compensation for Change in Law ought to be such that the affected party is restored to the same economic position as if such Change in Law event had not occurred. Any mechanism which results in under-recovery/non-restoration will be contrary to the provisions of the PPAs. In this regard, learned counsel relied upon the judgment of this Tribunal dated 20.11.2018 in Appeal No. 121 of 2018 titled *Sasan Power Limited vs. CERC & Ors.*

22.8 Learned counsel, further, contended that in terms of Order dated 15.11.2018 in Petition No. 88/MP/2018 titled *GMR Warora Energy Limited vs. MSEDCL & Anr.*, CERC has observed that SHR given in the bid is under test conditions and may vary from actual SHR. Therefore, it would only be correct to take the SHR specified in the Regulations as a reference point instead of other parameters, given that the SHR as per the bidding document cannot be considered for deciding the coal requirement for the purpose of calculating the relief under Change in law.

22.9 Learned counsel for the Respondent/SPL reiterated that in view of the above facts, the technical parameters such as Heat Rate and GCV as per bidding documents cannot be considered for deciding coal requirement for the purpose of calculating the relief under Change in Law.

22.10 Our Findings:

22.10.1 We have carefully considered the submissions of learned counsel for the Appellants and learned counsel for the Respondent/SPL and also taken note of various judgments of this Tribunal as well as orders of the Central Commission relating to this issue.

22.10.2 It is the case of the Appellants that the compensation for Change in Law events can be allowed to the Respondent/SPL only to the extent it is reasonable, prudent and what has been agreed to by the generator. Appellants submit that merely because the Respondent/SPL is seeking compensation for change in law would not entitle it to claim expenditure incurred due to its own inefficiency or due to Respondent/SPL exceeding the bid parameters. Appellants pointed out that any alleged under-recovery is only due to the fact that the Respondent/SPL has not been able to conform to the bid parameters and have incurred additional expenditure due to this.

22.10.3 Learned counsel for the Appellants emphasized that the procurers and, therefore, the consumers at large cannot be burdened by the amount so claimed by the Respondent/Generator. The Appellants contend that if Respondent/SPL is allowed the entire actual expenditure then this would result in passing on the inefficiencies of the generator to the procurers and the consumers at large and, hence, argued that the compensation should be limited to the bid parameters for computation of coal and

associated compensation. On the other hand, Respondent/SPL contends that once decided that it is entitled to compensation for Change in Law event impacting coal, the computation of the same has to be applied on actuals in accordance with the principles of Article 13 of the PPA.

22.10.4 We have perused the rulings in various judgments of this Tribunal relied upon by the Respondent/SPL to note that compensation for Change in Law event is to be paid on the basis of actuals in line with the provisions of Article 13 of the PPA which requires the affected party to be restored to the same economic position as if such Change in Law event had not occurred.

22.10.5 This Tribunal, while examining a similar case, has confirmed the said position in its judgment dated 20.11.2018 in Appeal No. 121 of 2018 in the case of Sasan Power Limited v CERC & Ors. The operative portion of the said judgment is reads as under:

> "*15.7 We also take note that the intended objective underlined the stated principle is restoration of the party to the same economic position and thus, the same needs to be interpreted in the right perspective with the main governing principles and not by a formula limiting to the said objective and yielding different reliefs to different generators as recorded by the CEA in its meeting held on 8.7.2013. In fact, the formula is essentially a vehicle to give effect to the guiding principle of economic restoration and the same needs to be read down to the extent it is inconsistent with the principle it seeks to serve."*

22.10.6 It is also relevant to note from another Order of the Central Commission dated 15.11.2018 in Petition No. 88/MP/2018 in the case of *GMR Warora Energy Limited vs. MSEDCL & Anr.*, wherein CERC has observed that SHR given in the bid is under test conditions and may vary from actual SHR. Therefore, it would only be correct to take the SHR specified in the Regulations as a reference point instead of other parameters, given that the SHR as per the bidding document cannot be considered for deciding the coal requirement for the purpose of calculating the relief under Change in law.

22.10.7 In the light of above, we are of the opinion that the technical parameters such as SHR and GCV quoted in the bidding documents cannot be considered for deciding the coal requirement for the purpose of calculating relief under Change in Law. **Accordingly, we hold that the Central Commission has analyzed this issue in detail and passed the impugned Order in a judicious manner. Hence, any interference by this Tribunal is not called for**.

23. SUMMARY OF OUR FINDINGS:

23.1 In view of the analysis and our findings on various issues in the abovementioned paras, we summarize our findings as under:

Appeal No. 77 of 2016 and Appeal No. 136 of 2016:

23.1.1 We hold that the liability of beneficiaries/procurers under the PPA is towards payment of tariff for the scheduled generation and, accordingly, we agree with the view of the Central Commission that the procurers cannot be saddled with payment of compensation for quantum of coal which may not be utilized for supplying energy to the procurers. **Hence, Change in Law compensation for royalty, clean energy cess & excise duty shall be based on quantum of coal consumed as opposed to coal dispatched. The issue as such stands decided against the Appellant.**

23.1.2 Having decided that compensation for various coal levies cannot be linked to the dispatched quantity of coal, we are of the view that for determination of coal consumption for scheduled generation, the auxiliary consumption should be based on actuals. **However, to adequately protect the interest of procurers and consumers at large, the auxiliary consumption shall be capped to the applicable normative levels contained in the CERC Tariff Regulations, 2009.**

23.1.3 It is decided that the quantum of coal consumed shall be determined based on SHR at actuals. **However, to adequately protect the interest of procurers, and in turn consumers, the SHR shall be capped to the applicable normative levels contained in the CERC Tariff Regulations, 2009.**

23.1.4 (a) Regarding one time water allocation fee, we decide that it constitutes a Change in Law event. **Accordingly, the Appellant needs to be compensated with the payment already made by it as per the Amendment dated 22.06.2013 issued by the Government of Madhya Pradesh.**

(b) Regarding increase in water charges on account of Notification dated 21.04.2010 issued by the Government of Madhya Pradesh, we are of the opinion that the same falls under input costs category. **Therefore, no compensation shall be entitled to the Appellant on this account.**

23.1.5 In line with the judgment of the Hon'ble Supreme Court dated 25th February, 2019, the Appellant is entitled to carrying cost on expenditure incurred on account of Change in Law.

Appeal No. 324 of 2016:

23.1.6 While Appeal No. 324 of 2016 is held maintainable but is devoid of merits. Hence, deserves to be dismissed.

O R D E R

For the forgoing reasons, as stated supra, we are of the considered view that some issues raised in Appeal Nos. 77 of 2016 and 136 of 2016 have merits and, hence, these appeals are partly allowed.

The Appeal No. 324 of 2016 is dismissed as devoid of merits.

Accordingly, the impugned Orders dated 30.12.2015,19.02.2016 and dated 22.09.2016 in Review Petition No. 19/RP/2016 passed by Central Electricity Regulatory Commission are hereby upheld/set aside to the extent of our findings set out in **para 23** of this judgment.(supra)

The matters stand remitted back to the Central Commission with the direction that consequential order may be passed in view of our findings/ directions, as stated supra, as expeditiously as possible, but not later than three months from the date of issue of this judgment and order.

Parties to bear their own costs.

PRONOUNCED IN THE OPEN COURT ON THIS 13TH DAY OF NOVEMBER, 2019.

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

√ **REPORTABLE**

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