REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.11095 OF 2018

GMR WARORA ENERGY LIMITED ...APPELLANT (S)

VERSUS

CENTRAL ELECTRICITY REGULATORY COMMISSION (CERC) & ORS. ...RESPONDENT (S)

WITH

CIVIL APPEAL NOS.11910-11911 OF 2018

CIVIL APPEAL NOS.12055-12056 OF 2018

CIVIL APPEAL NO.3123 OF 2019

CIVIL APPEAL NO.5372 OF 2019

CIVIL APPEAL NO. 6641 OF 2019

CIVIL APPEAL NOS. 2935-2936 OF 2020

CIVIL APPEAL NOS. 4628-4629 OF 2021

CIVIL APPEAL NOS. 5583-5584 OF 2021

CIVIL APPEAL NO. 39 OF 2021

CIVIL APPEAL NO. 5005 OF 2022

CIVIL APPEAL NO. 4089 OF 2022

Index

I.	INTRODUCTION.....	Paras 1 to 5
II.	BRIEF FACTS AND SUBMISSIONS.....	Paras 6 to 91
III.	ADDITIONAL ISSUES.....	Para 92
IV.	CONSIDERATION.....	Paras 93 to 130
V.	CONCLUSION.....	Paras 131 to 168
VI.	EPILOGUE.....	Paras 169 to 184

List of abbreviations:

1.	APTEL	-	Appellate Tribunal for Electricity
2.	CEA	-	Central Electricity Authority
3.	CERC	-	Central Electricity Regulatory Commission
4.	CIL	-	Coal India Limited
5.	COD	-	Commercial Operation Date
6.	CSA	-	Coal Supply Agreement
7.	DISCOMS	-	Distribution Companies
8.	ECL	-	Eastern Coalfield Limited
9.	EFC	-	Evacuation Facility Charges
10.	FSA	-	Fuel Supply Agreement
11.	GCV	-	Gross Calorific Value
12.	LoA	-	Letter of Assurance
13.	LPS	-	Late Payment Surcharge
14.	MAT	-	Minimum Alternate Tax
15.	MCL	-	Mahanadi Coalfield Limited
16.	MERC	-	Maharashtra Electricity Regulatory Commission
17.	MoC	-	Ministry of Coal
18.	MoP	-	Ministry of Power
19.	MSEDCL	-	Maharashtra State Electricity Distribution Company Limited
20.	NCDP	-	New Coal Distribution Policy
21.	PPAs	-	Power Purchase Agreements
22.	RFP	-	Request for Proposal
23.	SBAR	-	State Bank Advance Rate
24.	SECL	-	South Eastern Coal Limited
25.	SHAKTI	-	Scheme for Harnessing and Allocating Koyala (Coal) Transparently in India
26.	SHR	-	Station Heat Rate
27.	TANGEDCO	-	Tamil Nadu Generation and Distribution Corporation
28.	UHV	-	Useful Heat Value

J U D G M E N T

B.R. GAVAI, J.

I. INTRODUCTION

1. When we heard this batch of Electricity appeals, it was agreed between all the parties that this Court should first decide Civil Appeal No. 684 of 2021 (**Maharashtra State Electricity Distribution Company Limited v. Adani Power Maharashtra Limited & Ors.**[1]) ["***MSEDCL v. APML & Ors.***" for short] and Civil Appeal No. 6927 of 2021 (**Maharashtra State Electricity Distribution Company Limited v. GMR Warora Energy Ltd. & ors.**), inasmuch as three of the issues involved in all the appeals in the batch were common. It was submitted that those two appeals could be decided by deciding the three common issues. However, insofar as the other appeals are concerned, it was submitted that, in addition to the three common issues, certain

[1] **2023 SCC OnLine 233**

additional issues were also involved and it was agreed that after those two appeals are decided, the other appeals should be heard for considering these additional issues.

2. The said three common issues are thus:

(i) Whether 'Change in Law' relief on account of New Coal Distribution Policy, 2013 ("NCDP 2013" for short) should be on 'actuals' viz. as against 100% of normative coal requirement assured in terms of New Coal Distribution Policy, 2007 ("NCDP 2007" for short) OR restricted to trigger levels in NCDP 2013 viz. 65%, 65%, 67% and 75% of ACQ?

(ii) Whether for computing 'Change in Law' relief, the operating parameters should be considered on 'actuals' OR as per technical information submitted in bid?

(iii) Whether 'Change in Law' relief compensation is to be granted from 1st April 2013 (start of Financial Year) or 31st July 2013 (date of NCDP 2013)?

3. After extensively hearing all the learned counsel for the parties, vide the judgment and order dated 3rd March 2023 in the case of ***MSEDCL v. APML & Ors.*** (supra), this Court decided those two appeals after considering the aforesaid three issues.

4. The first issue was answered by this Court, holding that the 'Change in Law' relief for domestic coal shortfall should be on 'actuals', i.e. as against 100% of normative coal requirement assured in terms of the NCDP, 2007. Insofar as the second issue is concerned, it was held that the Station Heat Rate ("SHR" for short) and Auxiliary consumption should be considered as per the Regulations or actuals, whichever is lower. The third issue was answered holding that the Start date for the 'Change in Law' event for the NCDP, 2013 is 1st April 2013.

5. After we decided those appeals, we have heard the present appeals in which some of the issues which were decided by us vide the said judgment in the case of ***MSEDCL v. APML & Ors.*** (supra) also arose for consideration along with other issues. However, most of the issues in all these appeals are overlapping

and, therefore, we propose to decide these appeals by this common judgment.

II. BRIEF FACTS AND SUBMISSIONS

Civil Appeal No. 11095 of 2018 and Civil Appeal Nos. 11910-11911 of 2018

6. These cross appeals challenge the common judgment and order dated 14th August 2018 passed by the learned Appellate Tribunal for Electricity, New Delhi (hereinafter referred to as "APTEL") in Appeal No. 111 of 2017 & I.A. No.450 of 2018 and in Appeal No.290 of 2017 & I.A. No.519 of 2017.

7. Civil Appeal No.11095 of 2018 is filed by GMR Warora Energy Ltd. (hereinafter referred to as "GWEL"/"Generator") to the extent it was denied compensatory benefits on certain components on the ground of 'Change in Law'.

8. Civil Appeal Nos. 11910-11911 of 2018 have been filed by DNH Power Distribution Co. Ltd. (DPDCL) (hereinafter referred to as "DNH-DISCOM"), being aggrieved by the order of the learned

APTEL accepting the claim of GWEL on certain issues and holding the same to be 'Change in Law'.

9. The facts, in brief, giving rise to these appeals are as under:

10. GWEL had set up a Thermal Power Station at Warora, District Chandrapur in the State of Maharashtra with an installed capacity of 600 MW (2 x 300 MW). The Commercial Operation Date ("COD" for short) of Unit 1 was 19th March 2013 and that of Unit 2 was 1st September 2013.

11. GWEL had entered into long term Power Purchase Agreements ("PPAs" for short) with DNH-DISCOM for supply of 200 MW power to Maharastra State Electricity Distribution Company Limited ("MSEDCL" for short) on 17th March 2010 ["MSEDCL PPA") and for supply of 200 MW power on 21st March 2013 ("DNH PPA"), after it emerged as the successful bidder for supply of power to MSEDCL/ DNH-DISCOM. The Scheduled delivery date under the MSEDCL PPA was 17th March 2014, whereas under the DNH PPA, it was 1st April 2013. GWEL is also supplying 150 MW power from its power plant to Tamil Nadu

Generation and Distribution Corporation ("TANGEDCO" for short) by way of back-to-back arrangement with trading company GMR Energy Trading Limited, for which purpose, a PPA was signed on 27th November 2013 ("TANGEDCO PPA").

12. In terms of the PPAs, the cut-off date, which is 7 days prior to the bid deadline, is to be considered for the purpose of claims under 'Change in Law'. Following are the cut-off dates under the said PPAs.

	DNH PPA	MSEDCL PPA	TANGEDCO PPA
Cut-off date	1.6.2012	31.7.2009	27.2.2013

13. Certain 'Change in Law' events occurred with regard to MSEDCL PPA and DNH PPA after the cut-off date. The same were notified by GWEL to MSEDCL/ DNH-DISCOM.

14. GWEL filed Petition No. 8/MP/2014 before the Central Electricity Regulatory Commission (hereinafter referred to as "CERC") seeking relief for 'Change in Law'.

15. Vide Order dated 1st February 2017, certain claims were allowed and certain claims were disallowed by the CERC.

16. The claims which were allowed by the CERC are thus:

> "i. Increase in CVD from 8% to 10% and 10% to 12%;
>
> ii. Increase in Excise Duty;
>
> iii. Increase in Service Tax;
>
> iv. Increase in other taxes [Work Contract Tax (WCT), VAT, CST];
>
> v. Change in Excise Duty on coal;
>
> vi. Increase in the rate of Royalty on coal;
>
> vii. Levy of Clean Energy Cess by Government of India (GoI);
>
> viii. Increase in service tax on transportation of goods by IR;
>
> ix. Levy of Swachh Bharat Cess."

17. The claims which were disallowed by the CERC are thus:

> "i. Withdrawal of deemed export benefit by DGFT;

ii. Design changes in Coal Handling Plant (CHP);

iii. Increase in the rate of Minimum Alternate Tax (MAT);

iv. Increase in Busy Season Surcharge and Development surcharge on transportation of coal by Indian Railways (IR);

v. Increase in sizing charges and surface transportation charges by Coal India Ltd. (CIL);

vi. Increase in operating cost on account of specification of coal quality to be used for the TPS;

vii. Change from UHV to GCV based pricing of coal;

viii. Incremental increase in Interest on Working Capital (IWC) on account of increase in Project costs."

18. Being aggrieved by the judgment and order passed by the CERC, cross-appeals were filed by both GWEL and DNH-DISCOM.

19. Vide the impugned judgment, the learned APTEL, while concurring with the view of CERC on the claims allowed by it,

further allowed the claims on the ground of 'Change in Law' on the following components:

(i) Busy Season Surcharge and Development Surcharge;

(ii) Ministry of Environment and Forest ("MoEF") Notification on coal quality; and

(iii) Change in NCDP and Carrying Cost.

20. However, the rest of the claims were disallowed by the learned APTEL, concurring with the view taken by the CERC. Insofar as the appeal filed by DNH-DISCOM is concerned, the same was dismissed by the learned APTEL. Hence, these cross-appeals.

21. We have heard Mr. Vishrov Mukherjee, learned counsel appearing on behalf of the GWEL and Mr. Samir Malik, learned counsel appearing on behalf of MSEDCL and Mr. M.G. Ramachandran, learned Senior Counsel appearing on behalf of the DNH-DISCOM.

22. Mr. Vishrov Mukherjee submits that the learned APTEL has erred in disallowing the claim on the following items:

(i) Withdrawal of Deemed Export Benefit by way of Circular dated 28th December 2011 and Notification dated 28th December 2011 issued by the Directorate General of Foreign Trade ("DGFT") and amendment to the Foreign Trade Policy dated 21st March 2012;

(ii) Imposition of Crushing/Sizing charges and Surface Transportation Charges by Notification dated 15th October 2009;

(iii) Change in system of classification of coal by Coal India Limited ("CIL" for short) from Useful Heat Value ("UHV" for short) to Gross Calorific Value ("GCV" for short) system of pricing by way of Notification dated 30th December 2011;

(iv) Increase in levy of Minimum Alternate Tax ("MAT" for short) pursuant to amendment of Section 115JB of the Income Tax Act, 2012;

(v) Design changes in Coal Handling Plant in terms of letter issued by the Central Electricity Authority ("CEA" for short) dated 19th April 2011;

(vi) Increase in working capital.

23. It is submitted that all these changes have taken place on account of the Notifications/Orders/Circulars issued by the instrumentalities of the State and as such, the learned APTEL ought to have allowed the claim for compensation on account of 'Change in Law' on the aforesaid items also.

24. It is submitted that the compensation on account of the 'Change in Law' is based on the principle of restitution so as to put back the party to the same economic position it was in, had the 'Change in Law' event not taken place. However, this has not been considered in the correct perspective by the learned APTEL.

25. Learned counsel appearing on behalf of the DNH-DISCOM and MSEDCL, on the contrary, submit that the learned APTEL has erred in considering the Busy Season Surcharge and

Development Surcharge, MoEF Notification on coal quality, Change in NCDP and Carrying Cost as 'Change in Law' events. He submits that when the Generator had submitted its bid, it was aware that there was a likelihood of variations on certain payments to be made and the same were factored in while submitting the bid. It is, therefore, submitted that the learned APTEL erred in granting 'Change in Law' benefits on the said issues.

Civil Appeal Nos. 4628-4629 of 2021

26. These appeals have been filed by Uttar Haryana Bijli Vitran Nigam Limited and Dakshin Haryana Bijli Vitran Nigam Limited (hereinafter referred to as "Haryana Discoms") challenging the common judgment and order dated 7th June 2021 passed by the learned APTEL in Appeal No.158 of 2017 & I.A. No.575 of 2018 and Appeal No. 316 of 2017. Appeal No.158 of 2017 & I.A. No.575 of 2018 were filed by Adani Power (Mundra) Limited (hereinafter referred to as "AP(M)L"), being aggrieved by the order passed by the CERC dated 6th February 2017, whereby the CERC

had denied certain claims for compensation on certain components on account of 'Change in Law', whereas Appeal No.316 of 2017 was filed by Haryana Discoms challenging grant of claim of compensation on certain components on the ground of 'Change in Law'.

27. The Chart of claims which were allowed and disallowed by the CERC is as under:

> "107. Based on the above analysis and decisions, the summary of our decision under the Change in Law during the operating period of the project is as under:

Components	**Change in Law Event**
Change in Rate of Royalty	Allowed
Levy of Central Excise Duty subject to directions in para 32 of the order	Allowed
Levy of Clean Energy Cess	Allowed
Levy of Customs Duty on energy removed from SEZ to DTA	Allowed
Increase in Busy Season Surcharge on transportation of coal	Not Allowed

Increase in Development Surcharge on transportation of coal	Not Allowed
Levy of Service Tax on transportation of coal	Allowed
Levy of Green Energy Cess in Gujarat	Liberty granted to approach after Hon`ble Supreme Court's Decision
Increase in Sizing Charges of coal	Not Allowed
Increase in Surface Transportation	Not Allowed
Change in pricing of coal from UHV to GCV basis	Not Allowed
Change in class from 140 to 150 for Railway freight for coal for trainload movement	Not Allowed
Levy of Minimum Alternate Tax on plants situated in SEZ	Not Allowed
Linking railway tariff revision with movement in cost of fuel	Not Allowed
Imposition of Swachh Bharat Cess	Allowed
Payment to National Mineral Exploration Trust	Allowed

Payment to District Mineral Foundation	Allowed
Installation of FGD as per Environmental clearance dated 20.5.2010 Auxiliary consumption due to FGD installation affecting capacity charges Additional operating expenditure on FGD	Not decided and liberty granted
Carrying cost	Not Allowed

."

28. Being aggrieved by the order of the CERC, cross-appeals were filed by AP(M)L so also by Haryana Discoms before the learned APTEL. The Haryana Discoms challenged that part of the order of the CERC which allowed claim on components on the ground of 'Change in Law', whereas AP(M)L challenged that part of the order of the CERC which disallowed its claim on various components.

29. Though AP(M)L had sought 'Change in Law' compensation on various components, the same was allowed by the learned APTEL by the impugned order only on the ground of:

(i) 'Busy Season Surcharge and Developmental Surcharge on transportation of coal', and

(ii) 'Carrying Cost'.

30. The claim of AP(M)L pertaining to increase in Surface Transportation Charges so also Sizing Charges of coal were denied by the learned APTEL, concurring with the view taken by the CERC.

31. Being aggrieved by the orders passed by the CERC and the learned APTEL allowing 'Change in Law' on certain components, the Haryana Discoms have approached this Court.

32. We have heard Ms. Poorva Saigal, learned counsel appearing on behalf of the Haryana Discoms and Dr. A.M. Singhvi, learned Senior Counsel appearing on behalf of AP(M)L.

33. Ms. Poorva Saigal submits that the learned APTEL grossly erred in reversing the well-reasoned findings of the CERC on the issue of Busy Season Surcharge and Developmental Surcharge on transportation of coal. She, therefore, submits that the finding of the learned APTEL with regard to the same needs to be set aside.

34. Dr. A.M. Singhvi, on the contrary, submits that the Busy Season Surcharge as well as the Developmental Surcharge are revised as per the Notifications/Circulars issued by the Ministry of Railways and as such, they would come within the definition of 'Change in Law'.

Civil Appeal Nos. 12055-12056 of 2018

35. These appeals, filed by Jaipur Vidyut Vitran Nigam Ltd., Ajmer Vidyut Vitaran Nigam Ltd. and Jodhpur Vidhyut Vitaran Nigam Ltd. (hereafter referred to as "Rajasthan Discoms"), challenge the common judgment and order dated 14th August 2018, passed by the learned APTEL in Appeal No. 119 of 2016 &

I.A. Nos. 668 and 674 of 2016 and in Appeal No.277 of 2016 & I.A. No.572 of 2016.

36. Appeal No. 119 of 2016 & I.A. Nos. 668 & 674 of 2016 were filed by M/s Adani Power Rajasthan Ltd. ("APRL" for short), being aggrieved by the judgment and order dated 15th March 2016, passed by the Rajasthan Electricity Regulatory Commission (hereinafter referred to as "State Commission") thereby disallowing some of its claims on account of 'Change in Law', whereas Appeal No. 277 of 2016 and I.A. No.572 of 2016 were filed by the Rajasthan Discoms, being aggrieved by the order of the State Commission of the same date vide which some of the 'Change in Law' claims were allowed by the CERC.

37. The 'Change in Law' claims which were allowed by the State Commission are as under:

i. Change in Rate of Royalty Payable on Domestic Coal;

ii. Levy of Service Tax on Transportation of Goods by Indian Railways (IR); and

iii. Increase in Fee for 'Consent to Operate'.

38. The 'Change in Law' claims which were not allowed by the State Commission are thus:

1.	Change in Pricing Mechanism of Coal from Useful Heat Value (UHV) Basis to Gross Calorific Value Basis (GCV)
2.	Increase in Sizing Charges for coal charged by Coal India Ltd. (CIL)
3.	Increase in Surface Transportation Charges
4.	Increase in Busy Season Surcharge on Transportation of Coal by Indian Railways
5.	Increase in Development Surcharge levied on Transportation of Coal by Railways
6.	Levy of Fuel Adjustment Component
7.	Levy of Port Congestion Surcharge
8.	Levy of Forest Tax
9.	Change in Classification of Coal for Train Load Movement

39. Vide the impugned judgment, the learned APTEL dismissed the appeal of the Rajasthan Discoms and partly allowed the appeal of APRL allowing its claims on the ground of 'Busy Season

Surcharge', 'Development Surcharge', 'Port Congestion Surcharge, 'Forest Tax' and 'Carrying Cost'. Being aggrieved thereby, the Rajasthan Discoms have approached this Court.

40. We have heard Mr. V. Giri, learned Senior Counsel appearing on behalf of the Rajasthan Discoms and Dr. A.M. Singhvi, learned Senior Counsel appearing on behalf of the APRL.

41. Mr. V. Giri submits that clause 10 in the PPA is referable only to taxes under Article 268 of the Constitution of India. He submits that the learned APTEL has, therefore, erred in allowing 'Change in Law' benefits on the issues related to Busy Season Surcharge, Development Surcharge, Port Congestion Charges, Forest Tax and Carrying Cost which are not taxes referable to Article 268 of the Constitution.

42. Dr. Singhvi made arguments on similar lines as have been made in the other appeals.

Civil Appeal Nos. 2935-2936 of 2020

43. These appeals have been filed by the Rajasthan Discoms and Rajasthan Urja Vikas Nigam Ltd. challenging the common

judgment and order dated 29th January 2020, passed by the learned APTEL in Appeal no.284 of 2017 and Appeal No. 09 of 2018.

44. Appeal No. 284 of 2017 was filed by APRL challenging the order dated 8th June 2017 passed by the State Commission, being aggrieved by the disallowance of its claim on some components on the ground of 'Change in Law' and carrying cost, whereas Appeal No.9 of 2018 was filed by Rajasthan Discoms being aggrieved by the claims which were allowed by the State Commission.

45. The list of the components which were allowed and which were not allowed on the ground of 'Change in Law' is thus:

"Sr. No.	Change in Law's items	Decision of the Commission
A	Levies on Royalty (i) National Mineral Exploration Trust effective from 14.08.2015 (ii) District Mineral Foundation effective from 12.01.2015	Allowed
B	Levy of Swachh Bharat Cess (SBC) along with Service Tax for rail	Allowed

	transportation effective from 15.11.2015	
C	Levy of Swachh Bharat Cess @0.5% along with Service Tax - Operation Period effective from 15.11.2015	Not Allowed
D	Levy of Krishi Kalyan Cess (KKC) along with Service Tax and Swachh Bharat Cess for rail transportation from lst June 2016	Allowed
E	Levy of Krishi Kalyan Cess @0.5% along with Service Tax and Swachh Bharat Cess - Operation Period from 1st June 2016.	Not Allowed
F	Amendment to Environmental (Protection) Rules 1986	Not Allowed
G	Levy of Coal Terminal Surcharge (CTS) effective from 22.08.2016	Not Allowed
H	Utilization of Fly Ash generated from coal and lignite based thermal power projects	Not Allowed
I	CG Paryavaran Upkar	Not Allowed
J	CG Vikas Upkar	Not Allowed
K	Service Tax on transportation of goods by a vessel from a place outside India up to the custom station of clearance in India	Not Allowed

L	Carrying Cost	Not Allowed”

46. As stated above, being aggrieved by that part of the order which disallowed its claim, APRL preferred the aforesaid Appeal before the learned APTEL, whereas the Rajasthan Discoms, being aggrieved by that part of the order which allowed claims on certain components, also filed an Appeal before the learned APTEL.

47. The learned APTEL, while dismissing the appeal of the Rajasthan Discoms, partly allowed the appeal of the APRL by allowing compensation on certain other components on the ground of ‘Change in Law’.

48. The components on which ‘Change in Law’ benefits were granted by the learned APTEL are thus:

(i) Coal Terminal Surcharge;

(ii) Chhattisgarh Paryavaran Upkar;

(iii) Chhattisgarh Vikas Upkar;

(iv) Change in Swacch Bharat Cess at the rare of 0.5% on Service Tax for Operation Period;

(v) Change in Krishi Kalyan Cess at the rate 5% on Service Tax for Operation Period;

49. In addition to grant of relief on the ground of 'Change in Law', the learned APTEL also granted 'Carrying Cost'.

50. Arguments similar to the ones advanced in Civil Appeal No. 12055-12056 of 2018 were advanced by Mr. V. Giri, learned Senior Counsel appearing on behalf of the Rajasthan Discoms, as well as by the learned counsel for the respondents.

Civil Appeal No. 3123 of 2019 and Civil Appeal No.5372 of 2019

51. These are cross appeals. Civil Appeal No.3123 of 2019 has been filed by Bihar State Power (Holding) Company Ltd. (hereinafter referred to as "Bihar Discoms") and Civil Appeal No.5372 of 2019 has been filed by GMR Kamalanga Energy Limited and GMR Energy Limited (hereinafter referred to as "GKEL"), challenging the judgment and order dated 21st

December 2018 passed by the learned APTEL in Appeal No.193 of 2017 & I.A. No. 449 of 2018.

52. Appeal No.193 of 2017 & I.A. No.449 of 2018 were filed by GKEL challenging the order of the CERC dated 7th April 2017, aggrieved by the denial of its claims on certain components on the ground of 'Change in Law'. The Bihar Discoms have challenged that part of the order of the learned APTEL which allowed claims of GKEL on the ground of 'Change in Law'.

53. By the impugned order, the learned APTEL granted claims on the ground of:

(i) Change in NCDP (cancellation of Captive Block vis-à-vis tapering linkage),

(ii) busy season surcharge and developmental surcharge,

(iii) carrying cost; and

(iv) add on premium price.

54. We have heard Mr. Vishrov Mukerjee, learned counsel appearing on behalf of the GKEL/Generator and Ms. Anushree

Bardhan, learned Counsel appearing on behalf of the Bihar Discoms.

55. Mr. Vishrov Mukerjee submits that the learned APTEL as well as the CERC have grossly erred in rejecting the claim for compensation on the ground of:

(i) change in source of coal from Mahanadi Coalfields Ltd. ("MCL" for short) to Eastern Coalfields Ltd. ("ECL" for short) vide Notification dated 26th February 2014 issued by the CIL;

(ii) change in mode of transportation from rail to road vide Notification dated 29th September 2014 issued by MCL;

(iii) increase in levy of Minimum Alternate Tax ("MAT" for short); and

(iv) interest on working capital.

56. Learned counsel submitted that change in source of coal from MCL to ECL was on account of the notification issued by the CIL, which is an instrumentality of the State. Similarly, he

submitted that the change in mode of transportation from rail to road was on account of the notification issued by the MCL. Learned counsel submits that, since, on account of these notifications, the cost of transportation of coal increased, applying the restitutionary principle, the CERC as well as the learned APTEL ought to have granted claims on the basis of 'Change in Law'. He further submits that increase in levy of MAT has also been increased by the Union of India and, as such, the same would also amount to 'Change in Law'. It is further submitted that interest on working capital was also increased on account of the orders of the instrumentalities of the State and, as such, compensation also ought to have been granted for the same.

57. Learned counsel for the Bihar Discoms submits that the CERC as well as the learned APTEL have grossly erred in allowing claims on certain components on the ground of 'Change in Law'.

Civil Appeal No. 6641 of 2019

58. This appeal filed by GKEL arises out of the judgment and order dated 27th May 2019, passed by the learned APTEL in Appeal No.195 of 2016, thereby partly allowing the appeal.

59. GKEL filed Petition No.79/MP/2013 before the CERC claiming compensation on various component on the ground of 'Change in Law' events.

60. The CERC, vide order dated 3rd February 2016, disallowed compensation for the following components:

(a) Change from UHV to GCV based pricing of coal pursuant to notification issued by the Government of India;

(b) Increase/revision in the railway freight charges pursuant to notifications issued by Ministry of Railways and Ministry of Finance;

(c) Increase in the rate of Minimum Alternate Tax ("MAT") rates;

(d) Increase in Value Added Tax in the State of Odisha;

(e) Increase in water charges pursuant to notifications issued by the Government of Odisha;

(f) Incremental increase in interest on working capital on account of increase in costs during the operating period.

61. Being aggrieved thereby, Appeal No.195 of 2016. was preferred by GKEL. As stated above, the learned APTEL partly allowed the appeal and held that GKEL was entitled to compensation on following grounds.

(i) Increase/revision in the railway freight charges in terms of notifications issued by the Ministry of Railways and Ministry of Finance on account of imposition of development surcharge, busy season surcharge and service tax;

(ii) VAT rate enhancement from 4% to 5% from 30.03.2012 onwards;

(iii) Carrying cost/interest on compensation on the above items after ascertainment of the same by computation, which shall be assessed from the date of respective notification/circular/order from the concerned Ministry/Department/Governmental instrumentality till payment is made.

62. Appellant-GKEL, being unsatisfied with the same, has approached this Court praying for a direction that it is also entitled to compensation on various other components, viz.,

(i) Increase in Water Charges;

(ii) Shift from UHV to GCV methodology of pricing of coal;

(iii) Increase in rate of MAT; and

(iv) Interest on working capital.

63. Arguments similar to the ones advanced in Civil Appeal No. 3123 of 2019 and Civil Appeal No.5372 of 2019 were advanced by the learned counsel for the parties.

Civil Appeal Nos. 5583-5584 of 2021

64. These appeals, filed by Bihar Discoms, arise out of the judgment and order dated 6th August 2021, passed by the learned APTEL in Appeal No. 423 of 2019 and in Appeal No.173 of 2021.

65. In the said case, the learned APTEL, vide order dated 21st December 2018, had allowed the following claims as 'Change in Law' and remanded the matter back to the CERC to determine compensation due to GKEL:

(a) Shortfall in linkage coal and deviation in NCDP;

(b) Cancellation of captive coal block;

(c) Imposition of Busy Season Surcharge and Development Surcharge;

(d) Levy of Add-On Premium over and above the notified price of coal; and

(e) Carrying Cost.

66. Upon remand, the CERC passed order dated 16th September 2019, thereby granting compensation on certain components on the ground of 'Change in Law' including carrying cost.

67. Contending that the order passed by the CERC did not give effect to the 'Change in Law' components as directed by the learned APTEL, an appeal being Appeal No. 423 of 2019 came to be preferred by GKEL before the learned APTEL.

68. Bihar Discoms had also filed an appeal being Appeal No.173 of 2021, before the learned APTEL, being aggrieved by the benefits which were granted by the CERC.

69. By the impugned order, the learned APTEL held that the GKEL was entitled to recover expenditure involved in procurement of alternate coal due to shortfall in domestic coal supply corresponding to scheduled generation pertaining to the obligations under the Bihar PPA. The learned APTEL held that this was required to be done in order to restore the appellant-GKEL to the same economic position as before as if no 'Change in Law' event had occurred.

70. We have heard Ms. Anushree Bardhan, learned counsel appearing on behalf of the appellant-Bihar Discoms and Mr. Maninder Singh, learned Senior Counsel appearing on behalf of GKEL.

71. Ms. Anushree Bardhan submits that the learned APTEL ought to have granted benefit of 'Change in Law' restricting it to shortfall for only 894.5 MW, which was the amount specified in the PPA, and not for the entire 1050 MW, which is the installed capacity. She further submits that the learned APTEL had also erred in granting add on premium on account of extension of tapering linkage by three years.

72. Shri Maninder Singh, learned Senior Counsel submits that insofar as the first issue with regard to shortfall of coal supply is concerned, the same is squarely covered by the judgments of this Court in the cases of ***Energy Watchdog v. Central Electricity Regulatory Commission and others***[2], ***Jaipur Vidyut Vitaran***

[2] **(2017) 14 SCC 80**

Nigam Ltd. and others v. Adani Power Rajasthan Limited and another[3] (hereinafter referred to as "**Adani Rajasthan case**") and ***MSEDCL v. APML & Ors.*** (supra).

73. He further submits that the delay in operationalization of the captive mines was not on account of any reason attributable to GKEL**.** He submits that, since the allotment of coal blocks was cancelled on account of the judgment of this Court in the case of ***Manohar Lal Sharma v. The Principal Secretary & Ors.***[4], GKEL was also entitled for the benefit for the said period.

74. Insofar as Busy Season Surcharge is concerned, he submits that there is a concurrent finding of fact. He submits that, in any case, the said charges are issued by the Railway Board by issuing Notifications/Circulars. He submits that since the Railway is an instrumentality of the State, both the CERC and the learned APTEL have concurrently held that the Generator would be entitled to compensation on the ground of 'Change in Law'.

---

[3] **2020 SCC Online SC 697**
[4] **(2014) 9 SCC 516 and 2014 (9) SCC 614**

Civil Appeal No. 39 of 2021

75. This appeal filed by the DNH-DISCOM arises out of the judgment and order dated 13th October 2020, passed by the learned APTEL in Appeal No.283 of 2019 & I.A. Nos. 2188 & 1229 of 2019, thereby dismissing the said appeal arising out of the judgment and order passed by the CERC dated 16th May 2019.

76. The DNH-DISCOM had initiated a competitive bidding process through issuance of a Request for Proposal ("RFP" for short) in March 2012 for procurement of power on Long Term Basis under Case-1 bidding procedure. As per the RFP, the cut-off date was 1st June 2012.

77. The respondent-GWEL emerged as the successful bidder for supplying Aggregated Contracted Capacity of 200 MW at a levelized tariff of Rs.4.618 per Unit.

78. Accordingly, Letter of Intent (LoI) was issued by DNH-DISCOM on 14th August 2012. An application/petition being Petition No.87/2012 came to be filed before the Joint Electricity Regulatory Commission (hereinafter referred to as "Joint

Commission") for approval of the PPA and adoption of tariff. GWEL was also joined as a co-petitioner in the said Petition. The Joint Commission, vide order dated 19th February 2013, approved the PPA. Accordingly, the PPA came to be executed on 21st March 2013.

79. GWEL filed Petition No. 8/MP/2014 before the CERC seeking compensation on certain components on the ground of 'Change in Law'. The same was decided by the CERC vide order dated 1st February 2017. Aggrieved thereby, both the appellant-DNH-DISCOM and the respondent-GWEL filed appeals before the learned APTEL. In appeal, the learned APTEL remanded the matter to the CERC vide order dated 14th August 2018 for considering certain issues. Being aggrieved by the order dated 14th August 2018, the appellant-DNH-DISCOM filed an appeal, being Civil Appeal No.11910 of 2018, before this Court. The said appeal is also being decided in the present batch of appeals, by this common judgment.

80. On remand, the CERC passed an order dated 16th May 2019 and allowed the claim of GWEL/Generator on the ground of 'Change in Law' occurring on account of the enforcement of the 'Scheme for Harnessing and Allocating Koyala (Coal) Transparently in India' ("SHAKTI Policy" for short). Being aggrieved thereby, DNH-DISCOM had filed an appeal before the learned APTEL. As stated herein above, the same was dismissed by the learned APTEL vide the impugned judgment.

81. We have heard Mr. C.A. Sundaram, learned Senior Counsel appearing on behalf of the DNH-DISCOM and Mr. Niranjan Reddy, learned Senior Counsel appearing on behalf of the respondent-GWEL.

82. Mr. C.A. Sundaram submits that, from the presentation which was given by the GWEL, it was apparent that it was given on the basis that coal supply would be restricted only to 65%. He submits that, as such, the grant of benefit on account of 'Change in Law' on the ground that there was 100% assurance by CIL is

not permissible. He, therefore, submits that the judgment and order of the learned APTEL deserves to be set aside to that extent.

83. Mr. Niranjan Reddy, on the contrary, submits that the bid of GWEL was submitted on 8th June 2012, on which date NCDP 2007 was in force. He submits that, subsequently, the NCDP 2007 was modified on 31st July 2013 and thereafter SHAKTI Policy has come into effect on 22nd May 2017 and, as such, judgment and order of the learned APTEL warrants no interference.

Civil Appeal No. 5005 of 2022 and Civil Appeal No. 4089 of 2022

84. These appeals challenge the common judgment and order dated 22nd March 2022 passed by the learned APTEL in Appeal No. 118 of 2021 and 40 of 2022, filed by Rattan India Power Limited (hereinafter referred to as "Rattan India") and Adani Power Maharashtra Limited (for short, "APML") respectively, thereby challenging the orders dated 1st January 2019 and 3rd August 2018, passed by Maharashtra Electricity Regulatory

Commission (hereinafter referred to as 'MERC') in Case No. 227 of 2018 and Case No. 124 of 2018 respectively.

85. The facts in brief giving rise to the present appeals are as under:

Rattan India has entered into PPAs dated 22nd April 2010 and 5th June 2010 with MSEDCL for supply of 1200 MW aggregate power at levelized tariff of Rs.3.260 KWH for a period of 25 years. It filed a petition before MERC, being Case No. 227 of 2018, claiming compensation on the ground of 'Change in Law' occurring on account of the circular dated 19th December 2017 issued by CIL, vide which it levied the Evacuation Facility Charges (for short, "EFC"). The same was rejected by MERC, vide order dated 1st January 2019. A similar petition being Case No. 124 of 2018 was also filed by APML, raising a similar claim before MERC, which was also rejected by MERC, vide its earlier order dated 3rd August 2018.

86. Being aggrieved thereby, Rattan India had filed an Appeal No. 118 of 2021 and APML had preferred an Appeal No. 40 of

2022. By the impugned order, the learned APTEL had held EFC imposed by CIL vide Circular dated 19th December 2017 to be a 'Change in Law' event and, accordingly, held the Generators to be entitled to compensation on the said ground. Being aggrieved thereby, the MSEDCL has preferred these appeals.

87. We have heard Shri Balbir Singh, learned Additional Solicitor General (for short, "ASG") and Shri G. Saikumar, learned counsel appearing on behalf of the appellant and Shri Sajan Poovayya, learned Senior Counsel for the respondents in Civil Appeal No. 5005 of 2022 and Shri Vishrov Mukherjee, learned counsel appearing on behalf of the respondents in Civil Appeal No. 4089 of 2022.

88. Shri Balbir Singh, relying on Clause 9.1 of the Coal Supply Agreement (for short, "CSA") dated 28th December 2012 entered into between Southeastern Coalfields Limited and APML, submitted that CSA defines as to what shall be the base price of coal. He submitted that Clause 9.2 of the said CSA specifically provides for other charges which are permissible. Relying on

Clause 9.4 of the CSA, he submitted that in all cases, the entire freight charges, irrespective of the mode of transportation of coal supplied, shall be borne by the purchaser. The learned ASG submitted that the EFC does not partake the character of a statutory levy. However, he submitted that, in any case, it does not have the force of law. He, therefore, submitted that APTEL has grossly erred in holding the circular of CIL dated 19th December 2017 to qualify as 'Change in Law'.

89. Shri Singh further submitted that the direction to pay the carrying cost at the rate provided for Late Payment Surcharge (for short, "LPS") is also not permissible in law. He submitted that this Court, in ***Adani Rajasthan case*** (supra), has directed the carrying cost to be paid at the rate of 9% and as such, in the present case, it ought to have been directed to be paid at the same rate.

90. Shri Singh also relies on the judgment of this Court in the case of ***Ashoka Smokeless Coal India (P) Limited and Others***

v. Union of India and Others[5] in support of the proposition that CIL is free to fix the price of coal and that the Union of India has no control over it.

91. Shri Poovayya, on the contrary, submitted that the levy is mandatory in nature. Unless the said levies are paid, the coal would not be supplied. He further submitted that since the CIL is an instrumentality of the Government, the order issued by it would amount to a law within the definition of "Law" as defined in the PPA. He further submitted that insofar as the carrying cost is concerned, there is a specific provision in the PPA in Article 11.8.3, which is binding on the parties. He submitted that on account of non-payment of the dues of the generating companies by DISCOMS, the generating companies are required to borrow the funds at the market rate and as such, applying the restitutionary principle, it is entitled to carrying cost as provided under the agreement.

[5] **(2007) 2 SCC 640**

III. ADDITIONAL ISSUES

92. After hearing the learned counsel for the parties at length, we find that, apart from the three issues that were already decided by this Court in the case of ***MSEDCL v. APML & Ors.*** (supra), the issues as to whether the following components could be considered as 'Change in Law' events fall for consideration herein:

(i) Busy Season Surcharge & Development Surcharge and Port Congestion Surcharge;

(ii) MoEF Notification on coal quality;

(iii) Shortfall in linkage coal due to Change in NCDP;

(iv) Forest Tax;

(v) Add on Premium price.

(vi) Evacuation Facility Charges (EFC).

Apart from that, another question that requires consideration is, as to whether various taxes/charges imposed

by various State Governments would also fall under 'Change in Law' events or not.

The other question that requires considerations is, as to whether at what rate the Generators would be entitled to 'carrying cost'.

IV. CONSIDERATION

93. For appreciating the rival submissions, we will have to construe the term "Law", which has been defined in the PPAs, which reads thus:

> ""Law" means, in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, Notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include all applicable rules, regulations, orders, Notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the CERC and the MERC."

94. Perusal of the definition of the term "Law" itself would clearly show that the term "Law" would mean all laws including

Electricity Laws in force in India and any statute, ordinance, regulation, Notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law. It would further reveal that the term "Law" shall also include all applicable rules, regulations, orders, Notifications by an Indian Governmental Instrumentality and shall also include all rules, regulations, decisions and orders of the CERC and the MERC.

95. In any case, the issue as to what would amount to "Law" is no more *res integra*. This Court, in the case of ***Energy Watchdog*** (supra), has observed thus:

> "**57.** Both the letter dated 31-7-2013 and the revised Tariff Policy are statutory documents being issued under Section 3 of the Act and have the force of law. This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in Clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such

> change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred. Further, for the operation period of the PPA, compensation for any increase/decrease in cost to the seller shall be determined and be effective from such date as decided by the Central Electricity Regulation Commission. This being the case, we are of the view that though change in Indonesian law would not qualify as a change in law under the guidelines read with the PPA, change in Indian law certainly would."

96. The aforesaid view of this Court taken in the case of ***Energy Watchdog*** (supra) has been approved by a Bench of three learned Judges of this Court in ***Adani Rajasthan case*** (supra) and also followed by this Court when the two linked matters out of this batch of appeals were decided by this Court in the case of ***MSEDCL v. APML & Ors.*** (supra). It cannot be denied that CIL is an instrumentality of the Government of India and its orders, insofar as price of fuel are concerned, are binding on all its subsidiaries.

97. It will further be relevant to refer to Clause 9.0 of the CSA, which reads thus:

"**9.0 PRICE OF COAL:**

> The "As Delivered Price of Coal" for the Coal supplies pursuant to this Agreement shall be the sum of Base Price, Other Charges and Statutory Charges, as applicable at the time of delivery of Coal."

It is thus clear that price of coal includes the sum of base price, other charges and statutory charges as applicable at the time of delivery of coal.

98. As discussed herein above, the term 'Law' would also include all applicable rules, regulations, orders, Notifications issued by an Indian Governmental Instrumentality.

99. It would thus be clear that all such additional charges which are payable on account of orders, directions, Notifications, Regulations, etc., issued by the instrumentalities of the State, after the cut-off date, will have to be considered to be 'Change in Law' events. The Generators would be entitled to compensation on the restitutionary principle on such changes occurring after the cut-off date.

100. Having held thus, we will now consider some of the components which are common in most of these appeals.

Busy Season Surcharge, Development Surcharge And Port Congestion Surcharge

101. Insofar as increase in Busy Season Surcharge, Development Surcharge on transportation of coal, and Port Congestion Surcharge by the Indian Railways are concerned, the learned APTEL had found that the Indian Railways is an instrumentality of the State. It has been found that the Busy Season Surcharge, Development Surcharge and Port Congestion Surcharge were increased from time to time vide Circulars/Notifications issued by the Ministry of Railways, through the Railway Board.

102. A Constitution Bench of this Court, in the case of ***Railway Board, Government of India v. M/s Observer Publications (P) Ltd.***[6], has held the Railway Board to be a State within the meaning of Article 12 of the Constitution of India.

[6] **(1972) 2 SCC 266**

103. As such, no error could be found in the finding of the learned APTEL that the revision of charges to be paid on Busy Season Surcharge, Development Surcharge and Port Congestion Charges from time to time by the 'Railway Board' would come within the ambit of 'Change in Law'.

MoEF Notification on Coal Quality

104. Insofar as MoEF notification on coal quality is concerned, the MoEF, vide Notification dated 2nd January 2014, i.e. subsequent to the particular cut-off date, i.e. 1st June 2012, has mandated power projects to use beneficiated coal with ash content lower than 34%. The draft notification of MoEF dated 11th July 2012 culminated into the final Notification dated 2nd January 2014. By no stretch of imagination, can it be said that MoEF is not an instrumentality of the State.

105. By the said Notification, MoEF has mandated power projects to use beneficiated coal with ash content lower than 34%. Admittedly, prior to the cut-off date, the same was not a requirement. It is thus clear that the said Notifications dated 11th

July 2012 and 2nd January 2014 would amount to "Change in Law'. As such, no fault can be found with the finding of the learned APTEL that the same would amount to 'Change in Law'.

Shortfall in Linkage Coal due to Change in NCDP

106. Insofar as shortfall in linkage coal due to changes in the NCDP issued by the Ministry of Coal ("MoC" for short) is concerned, the issue is no more *res integra*. This Court in the case of ***Energy Watchdog*** (supra) so also in ***Adani Rajasthan case*** (supra) and recently in ***MSEDCL v. APML & Ors.*** (Supra) has held that the change in NCDP would amount to 'Change in Law'.

Forest Tax

107. Insofar as Forest Tax is concerned, perusal of the material placed on record would reveal that, as on the cut-off date, there was no Forest Tax applicable on coal mined and transported from South Eastern Coalfields Limited ("SECL" for short) mines located in Forest area. For the first time, vide Notification of the Chhattisgarh State Government, Department of Forest, under

the provisions of Chhattisgarh Transit (Forest Produce Rule) 2001, a fee at the rate of Rs.7 per ton was levied. Undisputedly, the said Notification is issued by the Forest Department of the Government of Chhattisgarh, which is an instrumentality of the State. As such, no error can be found with the finding of the learned APTEL in that regard.

Add on Premium Price

108. Insofar as 'Add on premium price' is concerned, undisputedly, 'add on premium' was required to be paid on account of cancellation of captive coal blocks and inordinate delay on account of Go-No-Go policy. As such, it cannot be said that the reasoning adopted by the learned APTEL is perverse and arbitrary.

Evacuation Facility Charges (EFC)

109. Undisputedly, EFC was imposed by CIL vide its Circular dated 19th December 2017.

110. As already discussed herein above, CIL is an instrumentality of the State. It is thus clear that, on the cut-off

date, there was no requirement of EFC, which has been brought into effect only on 19th December 2017. As such, the circular of CIL dated 19th December 2017 would also amount to 'Change in Law'.

111. As discussed herein above, it is also not in dispute that EFC has been paid by the generators while paying the base price, other charges and statutory charges at the time of delivery of coal. As such, no interference would be warranted with the said finding.

112. That leaves us with the issue with regard to carrying cost.

Carrying Cost

113. This is the issue on which there is a serious contest between the DISCOMS and the Generators.

114. On one hand, it is the submission of the DISCOMS that since there is no description of the same in the PPAs, the rate for granting carrying cost should be a reasonable rate. On the contrary, it is the submission of the Generators that there is a specific provision in the PPAs, which provides that the carrying

cost has to be paid at the rate as per the rate specified for late payment surcharge. It is submitted that this is provided in the PPA so as to give effect to the restitutionary principle.

115. For considering the rival submissions, it will be apposite to refer to the following Articles, which are almost common in most of the PPAs.

> "**11.** ***Billing and payment***.—
>
> ***
>
> **11.3.** ***Payment of monthly bills***.—
>
> ***
>
> **11.3.4.** In the event of delay in payment of a monthly bill by any procurer beyond its due date, a late payment surcharge shall be payable by the procurer to the seller at the rate of two (2) per cent in excess of the applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with monthly rest), for each day of the delay.
>
> ***
>
> **11.8.** ***Payment of supplementary bill***.—
>
> **11.8.1.** Either party may raise a bill on the other party ("supplementary bill") for payment on account of:
>
> (*i*) Adjustments required by the Regional Energy Account (if applicable);
>
> (*ii*) Tariff payment for change in parameters, pursuant to provisions in Schedule 5; or

(*iii*) Change in law as provided in Article 13 and such Bill shall be paid by the other party.

***

11.8.3. In the event of delay in payment of a supplementary bill by either party beyond one month from the date of billing, a late payment surcharge shall be payable at same terms applicable to the monthly bill in Article 11.3.4."

116. A perusal of Article 11.3.4 of the PPA would reveal that in the event of delay in payment of a monthly bill by any procurer beyond its due date, a late payment surcharge shall be payable by the procurer to the seller at the rate of 2% in excess of the applicable State Bank Advance Rate ("SBAR" for short) per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with monthly rest), for each day of the delay. Article 11.8 of the PPA deals with Payment of Supplementary Bill. It enables either party to raise a supplementary bill on the other party for payment on account of certain events. Clause (iii) of Article 11.8.1 of the PPA deals with 'Change in Law' as provided in Article 13. It requires the bill to

be paid by the other party. Article 11.8.3 of the PPA also provides that in the event of delay in payment of a supplementary bill by either party beyond one month from the date of billing, a late payment surcharge shall be payable at same terms applicable to the monthly bill in Article 11.3.4.

117. This Court in the case of ***Uttar Haryana Bijli Vitran Nigam Limited (UNHVNL) and another v. Adani Power Limited and others***[7], after considering the provisions of Article 11, which deals with 'Billing' and Article 13, which deals with 'Change in Law', has observed thus:

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

[7] **(2019) 5 SCC 325**

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

10. Article 13.2 is an in-built restitutionary principle which compensates the party affected by such change in law and which must restore, through monthly tariff payments, the affected party to the same economic position as if such change in law has not occurred. This would mean that by this clause a fiction is created, and the party has to be put in the same economic position as if such change in law has not occurred i.e. the party must be given the benefit of restitution as understood in civil law. Article 13.2, however, goes on to divide such restitution into two separate periods. The first period is the "construction period" in which increase/decrease of capital cost of the project in the tariff is to be governed by a certain formula. However, the seller has to provide to the procurer documentary proof of such increase/decrease in capital

cost for establishing the impact of such change in law and in the case of dispute as to the same, a dispute resolution mechanism as per Article 17 of the PPA is to be resorted to. It is also made clear that compensation is only payable to either party only with effect from the date on which the total increase/decrease exceeds the amount stated therein.

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

118. It could thus be seen that this Court has held that insofar as the "operation period" is concerned, compensation for any increase/decrease in revenues or costs to the seller is to be determined and effected from such date as is decided by the appropriate Commission. It has further been held that the compensation is only payable for increase/decrease in revenue or cost to the seller if it is in excess of an amount equivalent to 1% of the Letter of Credit in aggregate for a contract year. It has been held that restitutionary principles apply in case a certain threshold limit is crossed. It has been held that an in-built restitutionary principle compensates the party affected by such 'Change in Law' and the affected party must be restored through monthly tariff payment to the same economic position as if such 'Change in Law' had not occurred.

119. From the perusal of paragraph 9, it would also be clear that in case the 'Change in Law' happens to be by way of adoption, promulgation, amendment, re-enactment or repeal of the law or

'Change in Law', it has to be effected from the date on which such change occurs.

120. In this respect, it will also be apposite to refer to the following observations of this Court in the case of ***Maharashtra State Electricity Distribution Company Limited v. Maharashtra Electricity Regulatory Commission and Others***[8]:

> "**173.** The APTEL correctly found that: (*Maharashtra Pradesh Electricity Regulatory Commission case* [*Maharashtra State Electricity Distribution Co. Ltd.* v. *Maharashtra Pradesh Electricity Regulatory Commission*, 2021 SCC OnLine APTEL 13] , SCC OnLine APTEL para 13)
>
> > "*13*. … On the contrary, there is a *conscious exclusion regarding any suo motu change in the rate to be applied while calculating LPS*, it being incorrect to argue on the assumption that the contract permits automatic change in system."
> >
> > (emphasis supplied)

[8] **(2022) 4 SCC 657**

174. This Court is unable to accept Mr Singh's submission that the conclusion of APTEL that LPS is not tariff is erroneous. The meaning of the expression tariff has to be considered, and has rightly been considered by APTEL in the context of the relevant provision of the power purchase agreements. The dictionary meaning of tariff may be charge. However, in Article 13 of the Stage 1 and Article 10 of the Stage 2 power purchase agreements, tariff means monthly tariff and tariff adjustment consequential to change in law, is of monthly tariff in respect of supply of electricity.

175. As argued by the respondent power generating companies appearing through Mr Rohatgi, Mr Singhvi, Mr Mukherjee and Ms Anand respectively, LPS is only payable when payment against monthly bills is delayed and not otherwise.

176. The object of LPS is to enforce and/or encourage timely payment of charges by the procurer i.e. the appellant. In other words, LPS dissuades the procurer from delaying payment of charges. The rate of LPS has no bearing or impact on tariff. Changes in the basis of the rates of LPS do not affect the rate at which power was agreed to be sold and purchased under the power purchase agreements. The principle of restitution

under the change in law provisions of the power purchase agreements are attracted in respect of tariff.

177. LPS cannot be equated with carrying cost or actual cost incurred for the supply of power. The appellant has a contractual obligation to make timely payment of the invoices raised by the power generating companies, subject, of course, to scrutiny and verification of the same. Mr Mukul Rohatgi has a point that if the funding cost was so much lesser than the rate of LPS, as contended by the appellant, the appellant could have raised funds at a lower rate of interest, made timely payment of the invoices raised by the power generating companies, and avoided LPS.

178. The proposition that courts cannot rewrite a contract mutually executed between the parties, is well settled. The Court cannot, through its interpretative process, rewrite or create a new contract between the parties. The Court has to simply apply the terms and conditions of the agreement as agreed between the parties, as observed by this Court in *Shree Ambica Medical Stores* v. *Surat People's Coop. Bank* [*Shree Ambica Medical Stores* v. *Surat People's Coop. Bank Ltd.*, (2020) 13 SCC 564, para 20] , cited by Ms Divya Anand. This

> appeal is an attempt to renegotiate the terms of the PPA, as argued by Ms Divya Anand as also other counsel. It is well settled that courts cannot substitute their own view of the presumed understanding of commercial terms by the parties, if the terms are explicitly expressed. The explicit terms of a contract are always the final word with regard to the intention of the parties, as held by this Court in *Nabha Power Ltd.* v. *Punjab SPCL* [*Nabha Power Ltd.* v. *Punjab SPCL*, (2018) 11 SCC 508, paras 45 and 72 : (2018) 5 SCC (Civ) 1], cited by Ms Anand."

121. This Court has clearly held that the DISCOMS have a contractual obligation to make timely payment of the invoices raised by the power generating companies, subject to scrutiny and verification of the same. This Court has rejected the contention that the funding cost was much lesser than the rate of LPS. This Court has reiterated the proposition that the courts cannot rewrite a contract which is executed between the parties. This Court has emphasized that it cannot substitute its own view of the presumed understanding of commercial terms by the parties, if the terms are explicitly expressed. It has been held that

the explicit terms of a contract are always the final word with regard to the intention of the parties.

122. As already discussed hereinabove, Article 11.8 of the PPA entitles either party to raise a supplementary bill on the other party on account of 'Change in Law' as provided in Article 13 and such bills are required to be paid by the either party. Article 11.8.3 of the PPA specifically provides that in the event of delay in payment of a supplementary bill by either party beyond one month from the date of billing, a late payment surcharge shall be payable at the same terms applicable to the monthly bill in Article 11.3.4. Article 11.3.4 of the PPA specifically provides a late payment surcharge to be paid by the procurer to the seller at the rate of 2% in excess of the applicable SBAR per annum on the amount of outstanding payment calculated on day to day basis (and compounded with monthly rest), for each day of the delay.

123. Recently, this Court, in the case of ***Uttar Haryana Bijli Vitran Nigam Limited and Another v. Adani Power (Mundra)***

Limited and Another*[9]*, had an occasion to consider the similar issue. The Court observed thus:

> "**20.** It is clear that the restitutionary principles encapsulated in Article 13.2 would take effect for computing the impact of change in law. We see no reason to interfere with the impugned judgment [*Adani Power (Mundra) Ltd.* v. *CERC*, 2021 SCC OnLine APTEL 67] , wherein it has been held by the Appellate Tribunal that Respondent 1 Adani Power had started claiming change in law event compensation in respect of installation of FGD unit along with carrying cost, right from the year 2012 and that it has approached several fora to get this claim settled. Respondent 1 Adani Power finally succeeded in getting compensation towards FGD unit only on 28-3-2018, but the carrying cost claim was denied. The relief relating to carrying cost was granted to Respondent 1 Adani Power by the Appellate Tribunal vide order dated 13-4-2018 [*Adani Power Ltd.* v. *CERC*, 2018 SCC OnLine APTEL 5] which was duly tested by this Court and upheld on 25-2-2019 [*Uttar Haryana Bijli Vitran Nigam Ltd.* v. *Adani Power Ltd.*, (2019) 5 SCC 325 : (2019) 2 SCC (Civ) 657] . Once carrying cost has been granted in favour of Respondent 1 Adani Power, it cannot be urged by the appellants that interest on carrying cost should be calculated on simple interest basis instead of

[9] **(2023) 2 SCC 624**

compound interest basis. Grant of compound interest on carrying cost and that too from the date of the occurrence of the change in law event is based on sound logic. The idea behind granting interest on carrying cost is not far to see, it is aimed at restituting a party that is adversely affected by a change in law event and restore it to its original economic position as if such a change in law event had not taken place.

xxx xxx xxx

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

24. The entire concept of restitutionary principles engrained in Article 13 of the PPAs has to be read in the correct perspective. The said principle that governs compensating a party for the time value for money, is the very same principle that would be invoked and applied for grant of interest on carrying cost on account of a change in law event. Therefore, reliance on Article 11.3.4 read with Article 11.8.3 on the part of the

> appellants cannot take their case further. Nor does the decision in *Priya Vart case* [*Priya Vart* v. *Union of India*, (1995) 5 SCC 437] have any application to the facts of the present case as the said case relates to payment of compensation under the Land Acquisition Act and the interest that would be payable in case of delayed payment of compensation."

124. It is thus clear that this Court has reiterated that once carrying cost has been granted, it cannot be urged that interest on carrying cost should be calculated on simple interest basis instead of compound interest basis. It has been held that grant of compound interest on carrying cost and that too from the date of the occurrence of the 'Change in Law' event is based on sound logic. It has been held that it is aimed at restituting a party that is adversely affected by a 'Change in Law' event and restore it to its original economic position as if such a 'Change in Law' event had not taken place.

125. The argument that there is no provision in the PPAs for payment of compound interest from the date when the 'Change

in Law' event had occurred, has been specifically rejected by this Court.

126. In view of this consistent position of law and application of restitutionary principles and privity of contractual obligations between the parties as contained in the PPAs, we do not find that the view taken by the learned APTEL with regard to carrying cost warrants interference.

Concurrent Finding of Fact

127. Apart from the aforesaid issues, there is one another common thread in all these appeals. Many of these appeals arise out of concurrent findings recorded by the Central/State Electricity Regulatory Commissions and the learned APTEL.

128. This Court, in the case of ***MSEDCL v. APML & Ors.*** (supra), after considering the statutory provisions in the Electricity Act, 2003, held that the CERC, SERCs and the learned APTEL are bodies consisting of experts in the field.

129. This Court, in the said case, observed thus:

"**120.** It could thus be seen that two expert bodies i.e. the CERC and the learned APTEL have concurrently held, after examining the material on record, that the factors of SHR and GCV should be considered as per the Regulations or actuals, whichever is lower. The CERC as well as the State Regulatory bodies, after extensive consultation with the stakeholders, had specified the SHR norms in respective Tariff Regulations. In addition, insofar as GCV is concerned, the CEA has opined that the margin of 85-100 kcal/kg for a non-pit head station may be considered as a loss of GCV measured at wagon top till the point of firing of coal in boiler.

121. In this respect, we may refer to the following observations of this Court in the case of *Reliance Infrastructure Limited* v. *State of Maharashtra* [(2019) 3 SCC 352].

> "**38.** MERC is an expert body which is entrusted with the duty and function to frame regulations, including the terms and conditions for the determination of tariff. The Court, while exercising its power of judicial review, can step in where a case of manifest unreasonableness or arbitrariness is made out. Similarly, where the delegate of the legislature has

failed to follow statutory procedures or to take into account factors which it is mandated by the statute to consider or has founded its determination of tariffs on extraneous considerations, the Court in the exercise of its power of judicial review will ensure that the statute is not breached. However, it is no part of the function of the Court to substitute its own determination for a determination which was made by an expert body after due consideration of material circumstances.

39. In *Assn. of Industrial Electricity Users* v. *State of A.P.* [*Assn. of Industrial Electricity Users* v. *State of A.P.*, (2002) 3 SCC 711] a three-Judge Bench of this Court dealt with the fixation of tariffs and held thus : (SCC p. 717, para 11)

> "*11*. We also agree with the High Court [*S. Bharat Kumar* v. *State of A.P.*, 2000 SCC OnLine AP 565 : (2000) 6 ALD 217] that the judicial review in a matter with regard to fixation of tariff has not to be as that of an appellate authority in exercise of its jurisdiction under Article 226 of the Constitution. All that the High Court has to be satisfied with is that the Commission has followed the proper procedure and

> unless it can be demonstrated that its decision is on the face of it arbitrary or illegal or contrary to the Act, the court will not interfere. Fixing a tariff and providing for cross-subsidy is essentially a matter of policy and normally a court would refrain from interfering with a policy decision unless the power exercised is arbitrary or ex facie bad in law."
>
> **xxx xxx xxx**
>
> **123.** Recently, the Constitution Bench of this Court in the case of *Vivek Narayan Sharma* v. *Union of India* [2023 SCC OnLine SC 1] has held that the Courts should be slow in interfering with the decisions taken by the experts in the field and unless it is found that the expert bodies have failed to take into consideration the mandatory statutory provisions or the decisions taken are based on extraneous considerations or they are *ex facie* arbitrary and illegal, it will not be appropriate for this Court to substitute its views with that of the expert bodies."

130. As is indicated in the aforesaid judgments, this Court should be slow in interfering with the concurrent findings of fact

unless they are found to be perverse, arbitrary and either in ignorance of or contrary to the statutory provisions.

V. CONCLUSION

131. In the light of our aforesaid findings, we will now consider each of the appeals independently.

Civil Appeal No. 11095 of 2018 and Civil Appeal Nos. 11910-11911 of 2018

132. In these batch of appeals, insofar as the appeal of DNH-DISCOM is concerned, they are aggrieved by the order of the learned APTEL allowing Busy Season Surcharge and Development Surcharge, MoEF Notification on coal quality and Change in NCDP. They are also aggrieved by the finding of the learned APTEL with regard to carrying cost.

133. Insofar as the compensation on the ground of Change in NCDP is concerned, as already discussed, the same is squarely covered by the judgment of this Court in the case of ***MSEDCL v. APML & Ors.*** (supra)

134. Insofar as the Busy Season Surcharge and Development Surcharge are concerned, they are issued under the Circulars/Notifications of Indian Railways. The notification on coal quality is issued by MoEF. All these are the instrumentalities of the State, and these would, therefore, amount to 'Change in Law'.

135. Insofar as rest of the claims, which are concurrently allowed and disallowed by both the CERC and the learned APTEL, are concerned, in view of the judgments of this Court on this issue, as stated above, we do not find any reason to interfere with the same, not noticing any perversity, arbitrariness and/or any contravention of the statutory provisions. The appeals of both the Generator and the DNH-DISCOM are, therefore, liable to be dismissed.

Civil Appeal Nos.4628-4629 of 2021

136. The learned APTEL allowed the claim of the Generator only on the ground of Busy Season Surcharge and Development Surcharge on transportation of coal, and the Carrying Cost.

137. In view of our finding on the issues as above, no error can be found with the finding of the learned APTEL in that regard. We find no merit in the appeals. The appeals are, accordingly, liable to be dismissed.

Civil Appeal Nos. 12055-12056 of 2018

138. The issue of Busy Season Surcharge, Development Surcharge and Port Congestion Surcharge have already been considered by us herein above. All these are charges under the Notifications issued by the Indian Railways, through the Railway Board. As such, no error can be found with the finding of the learned APTEL that they would amount to 'Change in Law' events.

139. Insofar as levy of 'Forest Tax' is concerned, the same is levied by the State Government under the statutory provisions.

140. The issue with regard to 'Carrying Cost' has also been discussed by us herein above.

141. In that view of the matter, we do not find any reason to interfere with the order of the learned APTEL. The appeals are, accordingly, liable to be dismissed.

Civil Appeal Nos. 2935-2936 of 2020

142. In addition to the 'Change in Law' benefits granted by the State Commission, 'Coal Terminal Surcharge', 'Chhattisgarh Paryavaran Upkar' and 'Chhattisgarh Vikas Upkar' were also considered to be 'Change in Law' events by the learned APTEL.

143. The 'Coal Terminal Surcharge' was levied by the Indian Railways subsequent to the cut-off date. Similarly, the Government of Chhattisgarh, under Section 8 of the Chhattisgarh Adhosanrachna Vikas Evam Paryavaran Upkar Adhiniyam, 2005, vide Notification dated 16th June 2015, which is admittedly after the cut-off date, introduced 'Chhattisgarh Paryavaran Upkar' and 'Chhattisgarh Vikas Upkar'. Even the Change in Swacch Bharat Cess at the rate of 0.5% on Service Tax for Operation Period and Change in Krishi Kalyan Cess at the rate of 5% on Service Tax for Operation Period, which had been

granted concurrently by the State Commission and the learned APTEL, were notified by the Union of India after the cut-off date.

144. It could thus be seen that all these additional taxes or cesses were introduced by the instrumentalities of the Government of India or by the Government of Chhattisgarh. The same are issued under the provisions of the concerned statutes, rules, notifications, orders, etc. It is thus clear that they would amount to 'Law' within the meaning of the term 'Law' as defined in the PPAs. As such, no error can be found with the order of the learned APTEL.

145. We, therefore, find no merit in the appeals. The appeals are, accordingly, liable to be dismissed.

Civil Appeal No. 3123 of 2019 and Civil Appeal No.5372 of 2019

146. In the present matter, in addition to the claims granted by the CERC, the learned APTEL also granted the following claims:

(i) Change in NCDP (cancellation of Captive Block vis-à-vis tapering linkage),

(ii) Busy Season Surcharge and Developmental Surcharge,

(iii) Carrying Cost; and

(iv) Add on Premium Price.

147. Insofar as the issue with regard to change in NCDP is concerned, this Court in the case of ***Energy Watchdog*** *(supra)* so also in **Adani Rajasthan case** (supra) and recently in ***MSEDCL v. APML & Ors.*** (Supra) has held that the change in NCDP would amount to 'Change in Law'. As such, the finding in that regard warrants no interference.

148. Insofar as Busy Season Surcharge and Development Surcharge are concerned, we have already discussed hereinabove as to how it would amount to 'Change in Law'.

149. Insofar as 'Add on premium price' is concerned, undisputedly, 'add on premium' was required to be paid on account of cancellation of captive coal blocks and inordinate delay on account of Go-No-Go policy. As such, it cannot be said that the reasoning adopted by the learned APTEL is perverse and arbitrary.

150. Insofar as the issue with regard to 'carrying cost' is concerned, we have already discussed the issue at length in the foregoing paragraphs. As such, no interference is warranted on that finding also.

151. Insofar as other claims which were concurrently allowed and disallowed by the CERC and the learned APTEL are concerned, in view of the concurrent findings, we are not inclined to interfere with the same.

152. The appeals of both DISCOMS as well as Generating Companies are, therefore, liable to be dismissed.

Civil Appeal No. 6641 of 2019

153. This appeal is filed by GKEL, being aggrieved by the concurrent denial of benefits on certain components.

154. As already discussed herein above by us, in view of the concurrent findings recorded by the CERC as well as the learned APTEL for disallowing the claims, we are not inclined to interfere with the same. The appeal is, accordingly, liable to be dismissed.

Civil Appeal Nos. 5583-5584 of 2021

155. In the present case, the benefit is granted on following grounds:

(i) Shortfall in domestic coal on account of Change in NCDP;

(ii) Add on premium on account of existing tapering linkage by three years;

(iii) Busy Season Surcharge

156. The first issue sands covered by the judgments of this Court in the cases of ***Energy Watchdog*** (supra), ***Adani Rajasthan case*** (supra) and ***MSEDCL v. APML & Ors.*** (supra) and as such, no interference is warranted.

157. Insofar as Busy Season Surcharge is concerned, apart from there being concurrent findings of facts, we have already given reasons herein above as to how the same would amount to 'Change in Law'.

158. We do not find any merit in the appeals. The same are, accordingly, liable to be dismissed.

Civil Appeal No. 39 of 2021

159. The CERC has granted benefit on the following grounds.

i. Shortfall in linkage coal on account of NCDP 2013 and SHAKTI Policy;

ii. Change in coal quality pursuant to amendment of the Environment (Protection) Rules, 1986;

iii. Increase in Busy Season Surcharge and Development Surcharge on transportation of coal by Indian Railways; and

iv. Carrying cost on allowed 'Change in Law' claims.

160. The view taken by the CERC has been affirmed by the learned APTEL. As such, the appeal arises out of the concurrent findings of fact.

161. Insofar as first issue with regard to benefit of 'Change in Law' event on account of NCDP 2013 is concerned, the same is squarely covered by the judgments of this Court in the cases of

Energy Watchdog (supra), ***Adani Rajasthan case*** (supra) and ***MSEDCL v. APML & Ors.*** (supra).

162. Insofar as the benefit of 'Change in Law' on account of SHAKTI Policy is concerned, it is covered by the judgment and order of the even date of this Court in the case of Civil Appeal No. 5684 of 2021[10] and in the case of Civil Appeal Nos. 677-678 of 2021[11].

163. The other components, i.e. change in coal quality pursuant to amendment of the Environment (Protection) Rules, 1986, and increase in Busy Season Surcharge and Development Surcharge on transportation of coal by Indian Railways, have already been considered by us herein to amount to 'Change in Law' events. We have also considered the issue regarding 'Carrying Cost'. As such, no interference is warranted in the concurrent findings by the learned APTEL, especially in view of the judgments of this Court. The appeal is, accordingly, liable to be dismissed.

---

[10] **Uttar Haryana Bijli Vitran Nigam Limited and another v. Adana Power (Mundra) Limited and another**
[11] **Maharashtra State Electricity Distribution Company Limited v. Adani Power Maharashtra Limited and another**

Civil Appeal No. 5005 of 2022 and Civil Appeal No. 4089 of 2022

164. The appeals are filed being aggrieved by the order of the learned APTEL granting compensation on account of 'EFC' and 'carrying cost'.

165. Undisputedly, the EFC was imposed by CIL vide its Circular dated 19th December 2017.

166. As discussed herein above, it is not in dispute that EFC has been paid by the Generators while paying the base price, other charges and statutory charges at the time of delivery of coal. As such, no interference is warranted with the said finding.

167. Insofar as 'carrying cost' is concerned, we have elaborately discussed the said issue herein above. As such, no interference, therefore, is warranted on the said issue also.

168. We do not find any merit in the appeals. The same are, accordingly, liable to be dismissed.

VI. EPILOGUE

169. Before we part with the judgment, we must note that we have come across several appeals in the present batch which arise out of concurrent findings of fact arrived at by two statutory bodies having expertise in the field. We have also found that in some of the matters, the appeals have been filed only for the sake of filing the same. We also find that several rounds of litigation have taken place in some of the proceedings.

170. Recently, this Court, in the case of ***MSEDCL v. APML & Ors.*** (supra), has noted that one of the reasons for enacting the Electricity Act, 2003 was that the performance of the Electricity Boards had deteriorated on account of various factors. The Statement of Objects and Reasons of the Electricity Act, 2003 would reveal that one of the main features for enactment of the Electricity Act was delicensing of generation and freely permitting captive generation. In the said judgment, we have recorded the statement of the learned Attorney General made in the case of ***Energy Watchdog*** (supra) that the electricity sector, having been

privatized, had largely fulfilled the object sought to be achieved by the Electricity Act. He had stated that delicensed electricity generation resulted in production of far greater electricity than was earlier produced. The learned Attorney General had further urged the Court not to disturb the delicate balance sought to be achieved by the Electricity Act, i.e. that the producers or generators of electricity, in order that they set up power plants, be entitled to a reasonable margin of profit and a reasonable return on their capital, so that they are induced to set up more and more power plants. At the same time, the interests of the end consumers also need to be protected.

171. However, we find that, in spite of this position, litigations after litigations are pursued. Though the concurrent orders of statutory expert bodies cannot be said to be perverse, arbitrary or in violation of the statutory provisions, the same are challenged.

172. It will be relevant to note the following observations of the CERC in its judgment and order dated 16th May 2019, passed in

Petition No. 8/MP/2014, which falls for consideration in Civil Appeal No. 39 of 2021 before this Court:

> "(d) Approaching the Commission every year for allowance of compensation for such Change in Law is a time-consuming process. Accordingly, the mechanism prescribed above may be adopted for payment of compensation due to Change in Law events allowed as per PPA for the subsequent period as well."

173. It will also be relevant to refer to some of the observations of the learned APTEL in its order dated 21st December 2021, which falls for consideration in Civil Appeal No.2908 of 2022 before this Court, which read thus:

> "115. The Standing Committee of Parliament in its Report (dated 07.03.2018) on Energy titled '*Stressed/ Non-Performing Assets in Electricity Sector*' has recognized the financial stress faced by generating companies on account of delay in recovery of Change in Law compensations and has recommended thus:
>
> "*The Committee, therefore, recommend that appropriate steps should be taken to ensure that* **there should be consistency and uniformity with**

regard to orders emanating from the status of change in law. Provisions should also be made for certain percentage of payments of regulatory dues to be paid by Discoms in case the orders of regulators are being taken to APTEL/ higher judiciary for their consideration and decision"

116. The Report lays stress on the obligation of the distribution companies to pay the approved Change in Law compensation even while Regulatory Commission's orders are challenged. ***The Policy directive dated 27.08.2018 issued in terms of Section 107 of the Electricity Act, 2003 by the Ministry of Power (MoP) to the CERC emphasized on the need to ensure expeditious recovery of Change in Law compensation. The desirability of this was recognized by this tribunal in its judgment dated 14.09.2019 in Jaipur Vidyut Vitran Nigam Limited vs. RERC & Ors, 2019 SCC Online APTEL 98. It is against such backdrop that Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021, notified by MoP on 22.10.2021, providing for timely recovery of compensation on account of occurrence of Change in Law events have been framed.*** The MoP, vide notification dated 09.11.2021, put in public domain the policy directive

on "*Automatic pass through of the fuel and power procurement cost in tariff for ensuring the viability of the power*" recognizing that in order to ensure that the power sector does not face any constraints in maintaining assured power supply to meet the demand, all the stakeholders in the value chain of power sector must ensure that there is timely recovery of cost. This involves the cost *pass through* by the generating companies to the distribution companies.

117. In sharp contrast, it is seen from the factual narrative of the events leading to the appeal at hand that the appellants (Haryana Utilities) have been adopting dilatory tactics which not only defeats the public policy but also has the undesirable fall-out of adding to the burden of the end-consumers they profess to serve on account of increasing Carrying Cost.

118. Concededly, in compliance with the Taxes and Duties Order dated 06.02.2017, the appellants paid to the generator the taxes and duties for certain period but, thereafter, unilaterally withheld such claims, raising issues (found merit-less) regarding IPT of coal for first time in January 2018. It is after the impugned order was passed that the appellants are stated to have started complying, to an

extent, by making payments. It is the case of the first respondent that the appellants have withheld past payments including towards taxes and duties its entitlement to recover corresponding Late Payment Surchage ("LPS") being over and above the same to be computed after discharge of the former liability. ***We agree that such withholding is in violation of Articles 11.3.2 and 11.6.9 of the PPAs (quoted earlier) which cast a specific mandate on the procurer (Haryana Utilities) to honor the invoices raised, irrespective of dispute, and impose a specific bar against unilateral deductions/setting off.***

119. We find the dilatory conduct of the Haryana Utilities, to delay the implementation of the binding orders concerning compensation on account of coal shortfall and corresponding taxes and duties, detrimental to the interest of end consumers since it burdens the consumers with incremental LPS for delay in making payments to the generator. This cannot be countenanced, given the earlier dispensation on the subject by the statutory regulator and appellate forum(s), since it smacks of approach that is designed to frustrate the legislative command, and extant State policy, as indeed constitutes abject indiscipline infringing the rule of law.

> Borrowing THE WORDS OF Hon'ble Supreme Court in SEBI vs. *Sahara India Real Estate Corpn. Ltd.*, (2014) 5 SCC 429 "*non-compliance with the orders passed … shakes the very foundation of our judicial system and undermines the rule of law" which this tribunal is also duty-bound to "honour and protect", so essential "to maintain faith and confidence of the people of this country in the judiciary*"."
>
> *[emphasis supplied]*

174. It could thus be seen that even the Standing Committee of Parliament, in its report, has recommended that there should be consistency and uniformity with regard to orders emanating from the status of 'Change in Law'. It has also recommended that the provisions should also be made for certain percentage of payments of regulatory dues to be paid by DISCOMS in case the orders of regulators are being taken to learned APTEL/higher judiciary for their consideration and decision. The learned APTEL has also referred to the Policy Directive dated 27th August 2018 issued in terms of Section 107 of the Electricity Act, 2003 by the MoP to the CERC, where it emphasized the need to ensure

expeditious recovery of 'Change in Law' compensation. The learned APTEL has also referred to the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021, notified by MoP on 22nd October 2021, which provide for timely recovery of compensation on account of occurrence of 'Change in Law' events. The learned APTEL found that the Haryana Utilities have been adopting dilatory tactics, which not only defeat the public policy but also have the undesirable fallout of adding to the burden of the end-consumers they profess to serve on account of increasing 'Carrying Cost'. The learned APTEL further found that withholding of past payments, including towards taxes and duties by the DISCOMS, is in violation of the provisions of the PPAs, which casts a specific mandate on the procurer to honour the invoices raised, irrespective of dispute, and impose a specific bar against unilateral deductions/setting off.

175. It is further to be noted that this Court, in the case of ***Uttar Haryana Bijli Vitran Nigam Limited (UNHVNL) and another***

v. Adani Power Limited and others[12], has specifically observed that the 'Change in Law' events will have to accrue from the date on which Rules, Orders, Notifications are issued by the instrumentalities of the State. Even in spite of this finding, the DISCOMS are pursuing litigations after litigations.

176. We find that, when the PPA itself provides a mechanism for payment of compensation on the ground of 'Change in Law', unwarranted litigation, which wastes the time of the Court as well as adds to the ultimate cost of electricity consumed by the end consumer, ought to be avoided. Ultimately, the huge cost of litigation on the part of DISCOMS as well as the Generators adds to the cost of electricity that is supplied to the end consumers.

177. We further find that non-quantification of the dues by the Electricity Regulatory Commissions and the untimely payment of the dues by the DISCOMS is also detrimental to the interests of the end consumers. If timely payment is not made by DISCOMS,

[12] **(2019) 5 SCC 325**

under the clauses in the PPA, they are required to pay late payment surcharges, which are much higher. Even in case of 'Change in Law' claims, the same procedure is required to be followed.

178. Ultimately, these late payment surcharges are added to the cost of electricity supplied to the end consumers. It is, thus, the end consumers who suffer by paying higher charges on account of the DISCOMS not making timely payment to the Generators.

179. It is further to be noted that the appeal to this Court under Section 125 of the Electricity Act, 2003 is only permissible on any of the grounds as specified in Section 100 of the Code of Civil Procedure, 1908. As such, the appeal to this Court would be permissible only on substantial questions of law. However, as already observed herein, even in cases where well-reasoned concurrent orders are passed by the Electricity Regulatory Commissions and the learned APTEL, the same are challenged by the DISCOMS as well as the Generators. On account of pendency of litigation, which in some of the cases in this batch

has been more than 5 years, non-payment of dues would entail paying of heavy carrying cost to the Generators by the DISCOMS, which, in turn, will be passed over to the end consumer. As a result, it will be the end consumer who would be at sufferance. We are of the opinion that such unnecessary and unwarranted litigation needs to be curbed.

180. To a pointed query, the learned counsel for the DISCOMS fairly conceded the position that the prices at which the electricity is purchased from the 'Independent Power Producers' is substantially lesser than the power purchased from the 'State Generating Companies'.

181. We, therefore, appeal to the Union of India through Ministry of Power ("MoP" for short) to evolve a mechanism so as to ensure timely payment by the DISCOMS to the Generating Companies, which would avoid huge carrying cost to be passed over to the end consumers.

182. The Union of India, through MoP, may also evolve a mechanism to avoid unnecessary and unwarranted litigation, the cost of which is also passed on to the ultimate consumer.

183. Before we part with the judgment, we place on record our appreciation for the valuable assistance rendered by Mr. Balbir Singh, learned Additional Solicitor General, Dr. A. M. Singhvi, Mr. V. Giri, Mr. M.G. Ramachandran, Mr. C.A. Sundaram, Mr. Maninder Singh, Mr. Sajan Poovayya and Mr. Niranjan Reddy, learned Senior Counsel, and Mr. Vishrov Mukerjee, Ms. Poorva Saigal, Ms. Anushree Bardhan, and Ms. Poonam Sengupta, learned counsel.

184. In view of the above, all the appeals are dismissed. No costs.

.....J.
[B.R. GAVAI]

.....J.
[VIKRAM NATH]

NEW DELHI;
APRIL 20, 2023