REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.684 OF 2021

MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED ...APPELLANT (S)

VERSUS

ADANI POWER MAHARASHTRA LIMITED & ORS. ...RESPONDENT (S)

WITH

CIVIL APPEAL NO.6927 OF 2021

INDEX

List of abbreviations:

1.	ACQ	-	Annual Contracted Quantity
2.	APML	-	Adani Power Maharashtra Limited
3.	APTEL	-	Appellate Tribunal for Electricity
4.	C&AG	-	Comptroller and Auditor General of India
5.	CCEA	-	Cabinet Committee on Economic Affairs
6.	CERC	-	Central Electricity Regulatory Commission
7.	CIL	-	Coal India Limited
8.	CPP	-	Captive Power Plants
9.	DISCOMS	-	Distribution Companies
10.	FSA	-	Fuel Supply Agreement
11.	GCV	-	Gross Calorific Value
12.	GMR	-	GMR Warora Energy Ltd.
13.	GMRETL	-	GMR Energy Trading Limited
14.	IPPs	-	Independent Power Producers
15.	LoA	-	Letter of Assurance
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 Distributional Policy
21.	PLF	-	Plant Load Factor
22.	PPAs	-	Power Purchase Agreements
23.	PSA	-	Power Sale Agreement
24.	RFP	-	Request for Proposal
25.	SECL	-	South Eastern Coal Limited
26.	SHR	-	Station Heat Rate
27.	TPPs	-	Thermal Power Stations
28.	UHBVNL	-	Uttar Haryana Bijli Vitran Nigam Limited
29.	WCL	-	Western Coal Limited

J U D G M E N T

B.R. GAVAI, J.

INTRODUCTION

1. The questions involved in both these appeals, as in several other appeals, are common.

2. Three of the issues involved in the present appeals are also involved in the other appeals which were listed along with these two appeals. However, the other appeals also involve some other ancillary and incidental issues. As such, at the request of the learned counsel for the parties, we have heard the present appeals. We have also heard the learned counsel appearing in the other appeals on the three questions which are common.

FACTS IN CIVIL APPEAL NO. 684 OF 2021

3. The facts, in brief, which arise in Civil Appeal No.684 of 2021 are thus:

4. The appellant-Maharashtra State Electricity Distribution Company Limited (hereinafter referred to as "MSEDCL") has entered into a long-term Power Purchase Agreements ("PPAs" for

short) with Adani Power Maharashtra Limited (hereinafter referred to as "APML"). The first of the PPAs is dated 8th September 2008 for 1320 MW ("1320 MW PPA" for short); the second one is dated 31st March 2010 for 1200 MW ("1200 MW PPA" for short); the third one is dated 9th August 2010 for 125 MW ("125 MW PPA" for short); and the fourth one is dated 16th February 2013 for 440 MW ("440 MW PPA" for short). These PPAs were entered into in pursuance of the competitive bidding processes conducted by the appellant-MSEDCL under Section 63 of the Electricity Act, 2003 (hereinafter referred to as "the Electricity Act") read with the Standard Bidding Guidelines issued by the Ministry of Power ("MoP" for short).

5. Article 10 of the 1200 MW PPA dated 31st March 2010 entered into between the appellant-MSEDCL and respondent No.1-APML deals with "Change in Law".

6. Article 10.1.2 defines the term "Change in Law".

7. Article 10.2 deals with the application and principles for computing the impact of Change in Law. Article 10.2.1 provides

that while determining the consequence of a Change in Law under Article 10, due regard has to be given to the principle, that to compensate the Party affected by such Change in Law is to restore through monthly Tariff Payment, to the extent contemplated in Article 10, the affected Party to the same economic position as if such Change in Law has not occurred.

8. Article 10.3 deals with "Relief for Change in Law". Article 10.3.1 provides relief for Change in Law during the Construction Period, whereas Article 10.3.2 provides for compensation to be paid on account of Change in Law during Operating Period. For claiming relief on account of a Change in Law, the Party is required to approach the Appropriate Commission along with documentary proof of such increase/decrease in the cost of the Power Station or revenue/expense for establishing the impact of such Change in Law. Article 10.3.4 provides finality to the decision of the Appropriate Commission with regard to compensation determined under Articles 10.3.1 and 10.3.2.

9. On 18th October 2007, the Government of India, through the Ministry of Coal ("MoC" for short), issued the New Coal Distributional Policy, 2007 (hereinafter referred to as "the NCDP, 2007"). As per the NCDP 2007, 100% of the quantity as per the normative requirement of the consumers was to be considered for the supply of coal, through Fuel Supply Agreement ("FSA" for short) by Coal India Limited ("CIL" for short) at fixed prices to be declared/notified by CIL. The NCDP, 2007 also provided that to meet the domestic requirement of coal, CIL may have to import coal as may be required from time to time, if feasible. CIL was to adjust its overall price accordingly. It further provided that it was the responsibility of CIL/Coal Companies to meet the full requirement of coal under FSAs even by resorting to imports, if necessary.

10. It is not in dispute that in accordance with the NCDP, 2007, APML had applied for coal linkage to MoC. It is also not in dispute that Western Coal Limited ("WCL" for short) and South Eastern Coal Limited ("SECL" for short) issued two

Letters of Assurance (LoAs) in favour of APML and assured supply of coal.

11. Undisputedly, FSA was executed between APML and WCL for domestic coal linkage. Subsequently, the FSA was amended and the quantum of coal assured by WCL was transferred to SECL.

12. It is also not in dispute that subsequently, on 21st June 2013, the Cabinet Committee on Economic Affairs ("CCEA" for short), in view of the persistent shortage of domestic coal, approved a revised mechanism for coal supply to power producers.

13. Thereafter, the Government of India, through the Ministry of Coal, issued Office Memorandum dated 26th July 2013 (hereinafter referred to as "NCDP 2013"), thereby approving a revised arrangement for the supply of coal to the identified Thermal Power Stations ("TPPs" for short). The said Office Memorandum provided that FSAs will be signed for the domestic coal quantity of 65%, 65%, 67%, and 75% of Annual

Contracted Quantity ("ACQ" for short) for the remaining four years of the 12th Plan for the power plants having normal coal linkages. It further provided that to meet the balance FSA obligations towards the requirement of the said 78,000 MW TPPs, CIL may import coal and supply the same to the willing power plants on a cost-plus basis. It further provided that the power plants may also directly import coal themselves, if they so opt, in which case, the FSA obligations on the part of CIL to the extent of import component would be deemed to have been discharged.

14. On 31st July 2013, the MoP issued a letter to the Central Electricity Regulatory Commission ("CERC" for short) and State Electricity Regulatory Commissions to consider as pass-through in tariff the cost of alternate coal (procured to meet the shortfall in supply of domestic linkage coal) on a case to case basis.

15. Contending that on account of the Change in Law, APML was entitled to compensation, APML filed a Petition bearing Case No.189 of 2013 on 17th December 2013 before the

Maharashtra Electricity Regulatory Commission ("MERC" for short).

16. MERC, vide order dated 15th July 2014, disposed the said Petition (i.e. Case No. 189 of 2013) by approving a framework for determination of compensatory fuel charge, in view of the CCEA decision of 21st June 2013 and the MoP's advice dated 31st July 2013.

17. In compliance with the MERC's order dated 15th July 2014, APML filed another Petition before the MERC bearing Case No. 140 of 2014 on 23rd July 2014, *inter alia*, for approving a mechanism for the determination of compensatory tariff.

18. The MERC, vide its order dated 20th August 2014, formulated a mechanism for the pass-through in tariff of the compensatory fuel charge that had been allowed in Case No.189 of 2013.

19. Subsequently, APML filed a Review Petition before the MERC bearing Case No.159 of 2014. The same was disallowed

by the MERC as being devoid of merits except on the issue of the effectiveness of the compensatory fuel charge.

20. On 28th January 2016, the MoP issued the revised Tariff Policy. As per clause 6.1 of the revised Tariff Policy, the Appropriate Commission was required to consider the cost of imported/market-based e-auction coal procured for making up the shortfall in the domestic coal for pass-through in tariff of competitively bid projects.

21. Thereafter, on 9th March 2016, APML filed appeals before the Appellate Tribunal for Electricity (hereinafter referred to as "APTEL"), being Appeal Nos. 129 of 2016 and 130 of 2016, challenging the orders passed by the MERC in Case Nos.189 of 2013 and 140 of 2014. MSEDCL too filed cross-appeals against the MERC orders being Appeal Nos. 187 and 188 of 2016.

22. On 4th May 2017, the learned APTEL remanded the issues raised in the cross-appeals filed by APML and MSEDCL for fresh consideration by the MERC in the light of the judgment of this Court in the case of ***Energy Watchdog v. Central***

Electricity Regulatory Commission and others[1] which was decided on 11th April 2017.

23. By order dated 7th March 2018, the MERC decided Case No.189 of 2013 and 140 of 2014, wherein, while allowing the claims of APML for relief on account of a Change in Law for 1180 MW capacity, it restricted it to the extent of the minimum supply obligations specified for the CIL subsidiaries for the last four years of the 12th Five Year Plan period i.e. Financial Year 2013-14 to Financial Year 2016-17 as per the NCDP, 2013. It further held that the alternate coal quantity for meeting the domestic coal shortfall shall be computed based on the Station Heat Rate ("SHR" for short) mentioned by APML in the bid documents and the middle value of the Gross Calorific Value ("GCV" for short) range of assured coal grade for domestic coal as per the FSA/LoA/MoU.

---

1 **(2017) 14 SCC 80**

24. Being aggrieved thereby, APML preferred appeals before the learned APTEL. The learned APTEL framed the following three issues:

> "**Issue No. 1:** Whether the MERC was correct in holding that the net SHR submitted by the Appellant in its bid or SHR and Auxiliary Consumption norms specified for new generating stations under the MYT Regulations, 2011, whichever is superior shall form the basis for computing Change in Law compensation under the PPAs?
>
> **Issue No. 2:** Whether the MERC was correct in holding that the reference GCV of domestic coal supplied by CIL shall be the middle value of GCV range of assured coal grade in LoA/FSA/MoU and not the GCV as received?
>
> **Issue No. 3:** Whether the MERC was correct in holding that for the purpose of Change in Law compensation for 1180 MW capacity, shortfall in

domestic linkage coal shall be assessed by considering the coal supply as the maximum of (1) actual quantum of coal offered for offtake by CIL under the LoA/FSA and (2) the minimum assured quantum in NCDP 2013 for the respective year?"

25. On Issue No.1, the learned APTEL held that APML was entitled to compensation on the ground of Change in Law based on the SHR specified in the MERC MYT Regulations 2011 or the actual SHR achieved by APML, whichever is lower.

26. On Issue No.2, the learned APTEL held that the compensation for the Change in Law approved by the MERC shall be computed based on the actual GCV of coal received.

27. On Issue No.3, the learned APTEL held that under the NCDP, 2007, there was an assurance of 100% coal supply and as such, while granting compensation on the ground of Change in Law, it was not justified to restrict it to the maximum of 35% to 25% for the respective four years of the 12th Plan.

28. The learned APTEL held that the restitution principle has to be applied. It further held that to protect the interests of consumers, the Generators had itself indicated that the parameters which are more beneficial to the consumers i.e. the lower amongst the actual or as per the Regulations would protect the interests of the consumers.

29. Being aggrieved thereby, the MSEDCL has approached this Court by way of Civil Appeal No.684 of 2021.

FACTS IN CIVIL APPEAL NO.6927 OF 2021

30. In Civil Appeal No.6927 of 2021, the MSEDCL challenges the concurrent orders passed by the CERC dated 15th November 2018 and the order passed by the learned APTEL dated 16th July 2021.

31. MSEDCL issued a Request for Proposal (RFP) on 15th May 2009 and initiated the competitive bidding process for procurement of power on long-term basis. GMR Warora Energy Ltd. ("GMR" for short) submitted its bid on 7th August 2009 and emerged as one of the successful bidders with a levelized tariff

of Rs. 2.879/kWh. Accordingly, the PPA was executed for the procurement of 200 MW of power on 17th March 2010 by MSEDCL on long-term basis. Similarly in March 2012, Respondent No. 2-Union Territory of Dadra & Nagar Haveli ("DNH" for short) issued an RFP for the procurement of power through competitive bidding and GMR emerged as one of the successful bidders.

32. Consequently, respondent No. 1 in Civil Appeal No.6927 of 2021 i.e. GMR entered into the following long-term PPAs for the supply of power from the Project:

(a) Supply and sale of 200 MW of power on a long-term basis to MSEDCL in terms of PPA dated 17th March 2010. The cut-off date for this PPA is 31st July 2009. Supply of power in terms of the PPA commenced from 17th March 2014.

(b) Supply and sale of 200 MW of power on long term basis to Electricity Department, DNH in terms of PPA dated 21st March 2013. The cut-off date of this PPA is 1st June 2012. Supply of power in terms of the PPA commenced from 1st April 2013.

(c) Supply and sale of 150 MW of power on long term basis to TANGEDCO through back-to-back arrangements as follows:

(i) Power Sale Agreement (PSA) dated 1st March 2013 between GMR Energy Trading Limited (GMRETL) and GMR, based on which a bid was submitted to TANGEDCO;

(ii) PPA dated 27th November 2013 between GMRETL and TANGEDCO for the supply of power from GMR to TANGEDCO. The cut-off date of this PPA is 27th February 2013.

(iii) PPA dated 3rd May 2014 between GMR and GMRETL recording the terms and conditions in accordance with PPA between GMRETL and TANGEDCO. The supply of power under the PPA commenced on 22nd October 2015.

33. Petition No. 8/MP/2014 was filed by GMR claiming compensation on account of the impact of the Change in Law events during the Operation period and Construction period under MSEDCL and DNH PPAs. The Commission, by order dated 1st February 2017, had allowed some of the claims of GMR on the ground of Change in law. Vide the said order, it has also

disallowed some of the claims. Aggrieved by the said order, GMR filed Appeal No. 111 of 2017 before the learned APTEL in respect of the compensation claims disallowed by the Commission. Similarly, Appeal No. 290/2017 was filed by DNH Power Distribution Company Ltd against the said order dated 1st February 2017 disputing the compensation claims allowed to GMR under some Change in Law events.

34. During the pendency of the above said appeals, GMR has filed Petition (i.e. Petition No.88/MP/2018) seeking the following reliefs:

> "(a) Confirms that the following operational parameters which are imperative of calculation of compensation due to the Petitioner on account of change in law events, are to be considered on actuals:
>
> (i) Auxiliary Power Consumption
>
> (ii) Station Heat Rate
>
> (iii) Gross calorific Value
>
> (b) Confirm that levy of Service Tax & Swachh Bharat Cess on coal transportation is on all components as per rail invoice;

(c) Release of amounts due to the Petitioner from Respondent No. 1, MSEDCL in light of the Commission's order dated 1.2.2017 in Petition No. 8/MP/2014."

35. Two of the issues involved in the present appeals with regard to SHR and GCV also fell for consideration before the CERC.

36. The CERC found that the CERC norms applicable for the period 2009-14 and 2014-19 do not provide the norms for 300 MW units. It further found that the CERC norms provide for a degradation factor of 6.5% and 4.5% respectively towards Heat Rate over and above the Design Heat Rate. It found that since the Design Heat Rate is 2211 kcal/kWh, the gross Heat Rate works out to 2355 kcal/kWh and 2310 kcal/kWh for the period 2009-14 and 2014-19 respectively. It directed that the SHR of 2355 kcal/kWh during the period 2009-14 and 2310 kcal/kWh during the period 2014-19 or the actual SHR, whichever was lower, shall be considered for calculating the coal consumption for compensation under the Change in Law.

37. Insofar as the GCV is concerned, the CERC found that in the 2014 Tariff Regulations of the Commission, the measurement of GCV has been specified on "as received" basis. It, therefore, found that it would be appropriate if the GCV on "as received" basis is considered for computation of compensation for Change in Law.

38. Being aggrieved by the order passed by the CERC dated 15th November 2018, the MSEDCL preferred an appeal being Appeal No.342 of 2019 before the learned APTEL. The learned APTEL did not find merit in the submission of the MSEDCL and as such, dismissed the appeal by judgment and order dated 16th July 2021.

39. Being aggrieved thereby, MSEDCL has approached this Court by way of Civil Appeal No.6927 of 2021.

40. The arguments on behalf of the appellant-MSEDCL in Civil Appeal No.684 of 2021 were advanced by Shri Gopal Jain, learned Senior Counsel, whereas arguments in Civil Appeal

No.6927 of 2021 were advanced by Shri G. Sai Kumar, learned counsel.

41. We have also heard Shri Balbir Singh, learned Additional Solicitor General and Shri M.G. Ramachandran, learned Senior Counsel appearing for some of the State Electricity Distribution Companies, whose matters are not being decided by this judgment, but wherein the aforesaid three questions/issues are common.

42. On behalf of the respondent-APML as well as the respondent-GMR, Dr. Abhishek Manu Singhvi, learned Senior Counsel advanced the arguments. His arguments were supplemented by Shri Vishrov Mukherjee, learned Counsel.

SUBMISSIONS ON BEHALF OF THE DISCOMS

43. The main arguments that were advanced on behalf of the Distribution Companies (hereinafter referred to "DISCOMS") are as under:

(i) The SHR and GCV value are declared in the bid document and it is not permissible for the

Generating Companies to claim advantage on the basis of SHR value which is different than the one quoted i.e. the SHR value as provided in the Tariff Regulations or the actual. It is their submission that the declaration of operational parameters i.e. SHR and GCV were the mandate of the bid in case of Case-1 competitive bidding process. It is submitted that if deviation from such declared bid parameters for compensating the bidder/ Generating Companies/ Generators under the PPA on the ground of Change in Law is permitted, it will take away the very sanctity of the bid.

(ii) It is submitted that to ensure serious participation in the bid process and for timely completion of commencement of supply of power, the Competitive Bidding Guidelines 2005 itself mandates the

bidder/generator/Generating Companies to have a 'firm' fuel arrangement. It is their submission that it is mandatory for the bidder/generator to declare the 'quantity' of fuel required to generate power for the entire term of the PPA. The DISCOMS argued that the quantity of fuel can only be ascertained by applying the SHR and GCV components as declared in the bid.

(iii) It is submitted that the RFP itself mandated the participating bidders/generators to submit documentary evidence with regard to the 'quantity' of fuel required to generate power for the entire term of 25 years of the PPA.

(iv) It is submitted that for ascertaining the 'quantity', it was also necessary for the bidder/generator to provide 'supporting

computation' by declaring the SHR and GCV value applicable for the entire term of the PPA.

(v) It is the contention on behalf of the DISCOMS that the bidder/generator, while submitting his/its bids, is required to submit the bids by taking into consideration all factors, including risks regarding fluctuations, availability of fuel/coal, etc. It is submitted that if there is any change with regard to the availability of fuel or the rate at which a bidder/generator is required to procure the coal, then the bidder/generator has to suffer the consequences thereof as he/it has submitted his/its bid with eyes open.

(vi) The thrust of the argument of the DISCOMS is that in a competitive bid based PPA under Section 63 of the Electricity Act, the quoted tariff is sacrosanct and it is not open for the

respondent/generator to seek higher tariff or extra compensation under the PPA, except as per Article 13 of the PPA dealing with impact of Change in Law. It is submitted that the reliance placed by the learned APTEL on the judgment of this Court in the Case of ***Energy Watchdog*** (supra) is totally misconceived.

(vii) It is, therefore, submitted that the relief for the impact of NCDP 2013 is admissible only to the extent of the changes brought about by the NCDP 2013 and not in excess thereof. It is submitted that the Change in Law made by the Central Government on 31st July 2013 was vis-à-vis the NCDP 2007 which was in force as on the cut-off date provided in Article 13.1 of the PPA i.e. 7 days before the bid submission date. It is submitted that the very purpose of compensating the party affected by Change in

Law is to restore, through monthly tariff payments, the affected party to the same economic position as if the Change in Law had not occurred.

(viii) It is submitted that as per para 2.2 of the NCDP 2007 read with para 5.2, CIL was entitled to meet the shortfall in the availability of domestic coal by importing coal. In such event, the Generators were required to pay the higher cost of imported coal to CIL. It is submitted that while submitting the bids, the bidders/generators, therefore, had submitted their bids for supply of electricity to the DISCOMS knowing the position that they will not be compensated for higher cost of imported coal separately, over and above the quoted tariff /quoted energy charges, in the event of supply of imported coal by CIL.

(ix) It is contended that, if in the event the Generator could have procured the fuel/coal at a lesser price, then the benefit which would have occurred to him/it on account of such saving in procurement would have gone to him/it. On the same analogy, if the Generator is required to obtain the fuel/coal at a higher price then he/it cannot be heard to say that he/it should be compensated for the same.

(x) It is submitted that, as a matter of fact, till 31st July 2013 i.e. when the NCDP 2013 was brought into effect, there could have been no claims from the Generators for increase in tariff to be allowed for higher coal cost on account of imported coal supply. It is submitted that if the NCDP 2013 had not brought about a Change in Law, the position as prevalent before would have continued. It is submitted that this Court

has consistently held that an unprecedented increase in input cost cannot be a ground for a supplier not to perform the obligations under a binding contract or seek higher price or compensation for such performance.

(xi) It is the submission of the DISCOMS that the benefit on account of the Change in Law brought into effect by the NCDP 2013 has to be restricted only to the extent of shortfall as provided by the said policy. It is submitted that if it was the intention of the NCDP 2013 to provide for relief through the Change in Law/policy decision for the shortfall even below the specified percentages i.e. for entire shortfall on actual basis, then there was no rationale in specifying the percentages in the NCDP 2013.

(xii) It is further contended by the DISCOMS that the contention of the Generating Companies

that Shakti Policy 2017 was a continuation of NCDP 2013 is incorrect. It is submitted that the first part under (A) of the Shakti Policy 2017 deals with the old regime of LoA/FSA which is the NCDP aspect. The second part under (B) deals with the new transparent coal allocation policy called SHAKTI. It is submitted that, as a matter of fact, SHAKTI and allocation of coal thereunder was admissible only to Entities which did not have any LoA/FSA under the NCDP 2007 or the NCDP 2013. Reliance in this respect has been placed on the judgment of this Court in the case of ***Jaipur Vidyut Vitaran Nigam Ltd. and others v. Adani Power Rajasthan Limited and another***[2] (hereinafter referred to as "**Adani Rajasthan case**")

2 **2020 SCC Online SC 697**

(xiii) It is submitted that the law laid down by this Court in the case of ***Energy Watchdog*** (supra) has been applied by the learned APTEL in a patently erroneous and perverse manner.

(xiv) It is submitted that the total quantum of coal required is to be computed not in an abstract manner but is to be necessarily based on the SHR of the power station. It is submitted that the SHR has nothing to do with coal quality or GCV of coal. It is submitted that the SHR is the boiler and turbine characteristic of a thermal power station and, therefore, indicative of the quality and efficiency of the machine. It is submitted that the quantum of coal requirement is less with lower SHR and increases with higher SHR, inasmuch as it relates to the ability and efficiency of the machines to extract heat

energy from coal to produce per unit of electricity.

(xv) It is submitted that in Case 2 bidding, the net SHR is a bidding parameter as coal linkage is arranged by the entity inviting bids, and actual cost of coal is allowed as a pass-through in the tariff as per the formula specified. It is their submission that there are no quoted energy charges in Case 2 bidding but only quoted fixed charges. It is submitted that, whereas, in Case 1 bidding, SHR may not, as such, be the criteria for selection but is a necessary requirement/ condition to be given for identifying the quantum of coal required to generate electricity over the length of the PPA. While submitting his/its bid and quoting energy charges, the bidder/generator was required to take into consideration the quantum of coal requirement

which, in turn, is based on the SHR and auxiliary consumption parameters to be given by the bidder/generator. It is submitted that the coal Supply Agreement for quantum of coal is signed by CIL only for the quantum as determined above, based on the SHR and operating parameters provided by the bidder/generator. It is submitted that the view taken by the learned APTEL is contrary to the view taken by it between the same parties in its judgment dated 13th April 2018 in Appeal No. 210 of 2017.

(xvi) It is submitted that if the SHR which is higher than the one quoted by the bidder/generator is to be taken into consideration, then it will amount to granting premium to the Generator for its inefficiency. It is submitted that if the coal consumption increases on account of

highest SHR, the excess expenditure on quantum of coal is to be borne by the Generator.

(xvii) It is submitted that if the bid assumed SHR is 2200 kcal/kg and actual SHR is 2300 kcal/kg, when the quoted tariff is based on the SHR of 2200 kcal/kg, for Change in Law impact, SHR of 2300 kcal/kg cannot be permitted to be used for computation of compensation for Change in Law.

(xviii) It is submitted that the impugned judgment permitting the actual SHR or the SHR given in Tariff Regulations, whichever is lower, if upheld, would amount to converting the scope of Section 63 tariff determination into a Section 62 cost plus tariff determination. It is submitted that this is impermissible in a competitive bid based PPA.

(xix) It is further submitted that the MERC Tariff Regulations expressly provides that the Tariff Regulations will have no application to Section 63 tariff determination and the same is governed by the guidelines of the Central Government under Section 63 of the Electricity Act.

(xx) It is submitted that perusal of Regulation 2(2)(a) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2019 would reveal that they are not applicable where the tariff has been discovered through tariff based competitive bidding in accordance with the guidelines issued by the Central Government and adopted by the Commission under Section 63 of the Electricity Act.

(xxi) It is submitted that when admittedly there is bid assumed SHR as per bidding conditions, the learned APTEL cannot ignore the same on the purported ground of equity and provide for an alternate parameter for computational purpose of actual SHR with the ceiling as under the Tariff Regulations. It is submitted that this will result in changing the bidding terms and conditions after the bid was accepted and became final.

(xxii) It is further submitted that the finding that the GCV computation is to be made on 'as received' basis, is also patently erroneous. It is submitted that the real purpose behind relying on the said methodology of computation is to recover the grade slippage in the coal grade actually supplied as against the coal grade billed by the Coal Company and all the losses in

the heat value of the coal during the time period when the coal is taken delivery from the coal mines and transported to the Power Plant and unloading at the Power Plant site.

(xxiii) It is submitted that the evaluation of GCV on air dried basis by Coal Company was well known/existing even prior to bidding and the Generators were very much aware of it. Accordingly, the same has already been factored into while the Generators submitted their bids. As such, if the computation of GCV is permitted on 'as received' basis, the Generators will be doubly compensated. In any case, it is submitted that if the Generators had any issues with regard to the grade of coal i.e. GCV range and quantum, then that is an issue between the Generators and the respective Coal Companies, which is required to be resolved under the FSA

between them. The DISCOMS cannot be roped into for the resolution of such disputes between the Generators/Generating Companies and the Coal Companies.

(xxiv) Lastly, it is submitted that since the letter of the MoP, which has been considered as a Change in Law event, is dated 31st July 2013, the learned APTEL could not have given effect to the same from 1st April 2013. It is submitted that this would permit giving the benefit of compensation with retrospective effect.

(xxv) Insofar as the reliance placed by the Generating Companies on the judgment of this Court in **Adani Rajasthan case** is concerned, it is submitted that the said judgment would not be applicable to the facts of the present case. It is submitted that in the said case, there was no

FSA and the State Government had undertaken to supply the entire coal quantum.

(xxvi) It is further submitted that the judgment of this Court in the case of ***Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL) and another***[3] would also not be applicable to the facts of the present case inasmuch as the said case was under Case-2.

(xxvii) It is submitted that the inability of a Generator to seek sufficient relief from the Coal Companies cannot be a reason to claim relief from the Distribution Licensees/DISCOMS or the consumers. The DISCOMS cannot be penalized on account of failure by the Coal Companies of supplying sufficient coal.

(xxviii) An additional ground in Civil Appeal No.6927 of 2021 raised is that CERC has erred in holding

3 **(2018) 11 SCC 508**

that the principle of late payment surcharge envisaged in Articles 8.3.5 and 8.8.3 of the PPA is applicable towards payment of the balance amounts by MSEDCL in respect of the relief under Change in Law.

SUBMISSIONS ON BEHALF OF THE GENERATING COMPANIES

44. As against this, it is submitted on behalf of the Generating Companies as under:

(i) It is submitted that under the NCDP 2007, 100% normative coal requirement of Generating Companies was assured to be supplied by the CIL. However, by NCDP 2013, the responsibility of CIL to supply coal was reduced to 65%, 65%, 67% and 75% of ACQ for the remaining years of the 12th Five Year Plan i.e. Financial Year 2013-14 to Financial Year 2016-17.

(ii) It is submitted that the NCDP has been held to be a law for the purposes of the Electricity Act. It is, therefore, submitted that the Generating Companies are entitled to compensation for the shortfall of coal in terms of NCDP 2013 and the same has to be paid on actuals, i.e. to the extent the shortfall in coal supply actually exists.

(iii) It is submitted that the said issue is no more *res integra* and is covered by the judgment of this Court in the case of ***Energy Watchdog*** (supra) and in ***Adani Rajasthan case*** (supra).

(iv) It is submitted that, as per the guideless issued by the MoP, for Case-1 bidding, SHR and GCV are not bid parameters. The SHR and GCV mentioned in the bid is part of technical information and is not relevant for computing Change in Law compensation. It is submitted

that there are substantial distinctions between Case-1 and Case-2 bid. The first one is that in Case-1 bid, SHR and GCV are not bid parameters, whereas in Case-2, SHR and GCV are bid parameters. Secondly, in Case-1 bidding, energy charge is not computed since the energy charge forms part of quoted tariff, whereas in Case-2 bidding, energy charge is computed based on the net heat rate quoted in the financial bid. Thirdly, in Case-1 bidding, the PPA has no definition of quoted Net Heat Rate/SHR, whereas in Case-2 bid, the PPA defines quoted Net Heat Rate/SHR. It is, therefore, submitted that in Case-1 bid there is no consideration of SHR and GCV in the formula of energy charge, whereas in Case-2 bid, these two parameters provide the formula for computing energy charge.

(v) It is submitted that the learned APTEL in the case of ***Wardha Power v. Reliance Infrastructure & Ors.***[4] has held that if SHR and GCV as submitted in the bid are considered for Change in Law compensation, it may result in over or under recovery and should be considered only on 'actuals'. It is submitted that the said judgment in ***Wardha Power*** (supra) has not been challenged/appealed against and has thus attained finality.

(vi) The Generators further rely on the judgment of this Court in ***Adani Rajasthan case*** (supra). It is submitted that in the said case, the learned APTEL had held that operational parameters (like SHR and Auxiliary consumption) must be considered as per 'normative' value, and this view has been upheld by this Court.

---

4 **Appeal No.288 of 2013**

(vii) It is further submitted that the MERC in its order dated 7th March 2018 in Case No.123 of 2017 (***JSW v. MSEDCL***) has held that the lower of actual or normative parameter for Auxiliary consumption (an operational parameter like SHR) has to be considered for Change in Law compensation. It is submitted that the MSEDCL has not challenged the said judgment, which has thus attained finality.

(viii) It is submitted that the SHR is continuously being monitored and its actual value, as certified by Energy Auditors, is submitted to MSEDCL along with claims. As such, 'actuals' can be ascertained and verified for computation purposes.

(ix) It is submitted that, equally, the GCV of coal is certified by third party sampling agencies. A GCV certificate is submitted to MSEDCL for

each railway rake separately, along with claim. Such 'actuals' on 'as received' basis can be ascertained/verified for computational purposes.

(x) It is further submitted that some of the DISCOMS in the proceedings before the CERC have contended that the SHR shall be considered after ascertaining actual design heat rate and margin as per CERC Regulations from time to time. They have further taken a stand that Auxiliary Consumption shall be considered as per CERC Regulations. On affidavit, it is also stated that GCV of alternate coal shall be as certified by a Third Party Sampling Agency, for which the Commission should provide appropriate guideline. It is, however, submitted that now the DISCOMS are taking a U-turn by

contending that the SHR should be based on bid assumed parameters.

(xi) It is submitted that, in any case, to maintain balance, APML had itself offered for the benefit to be granted on the lower of 'actual' or 'normative' SHR as per Regulations. The same has been accepted by the learned APTEL. It is submitted that this will ensure that no inefficiency is passed on to consumers and, at the same time, the Generator is restituted.

(xii) It is submitted that had there been no occurrence of Change in Law event, i.e. there was no shortfall in coal supply, the tariff payment to the Generating Companies would have been based on quoted energy charge. In such a situation, SHR and GCV of coal would not have come into the picture. However, when there is an occurrence of Change in Law event,

the principle of 'Restitution' comes into play. It is submitted that 'restitution' can take place only with consideration of 'actual' parameters.

(xiii) It is submitted that taking this into consideration, expert bodies like the CERC and APTEL have allowed the SHR and GCV to be determined on 'actual' basis.

(xiv) It is submitted that the SHR indicated in the bid as part of technical information does not conform to the mandate of restitution as it cannot put the Generator back to the same economic position had Change in Law event not occurred.

(xv) It is submitted as per the NCDP 2007, 100% normative requirement of coal was to be supplied by the CIL. However, due to shortfall of coal in the country, the responsibility of CIL to supply coal was reduced to 65%, 65%, 67%

and 75% of the ACQ. The shortfall in coal was to be met either by the CIL or by the Generating Companies/Generators by importing coal. It is submitted that the higher cost of such imported coal was allowed to be a pass-through.

(xvi) It is submitted that a conjoint reading of CERC statutory advice dated 20th May 2013, CCEA decision dated 21st June 2013, MoP letter dated 31st July 2013, and clause 6.1 of the Tariff Policy 2016 issued by the MoP would reveal that pass-through of the higher cost of quantity of shortfall in coal procured from alternate sources was to be allowed. It is submitted that this position has been upheld by the judgments of this Court in the case of ***Energy Watchdog*** (supra) and ***Adani Rajasthan case*** (supra).

(xvii) It is submitted that this pass-through is by way of restitution due to shortfall in 100% assured

quantity of coal and it cannot be limited to the percentages/trigger levels specified in the NCDP 2013. It is submitted that the principle of restitution would require the pass-through to the extent the supply from CIL was cut down. It is submitted that an argument to the contrary has already been rejected by this Court in the case of ***Adani Rajasthan case*** (supra).

(xviii) In addition to the judgments of this Court in the cases of ***Energy Watchdog*** (supra) and ***Adani Rajasthan case*** (supra), the Generating Companies also rely on the judgment of this court in the case of ***Uttar Haryana Bijli Vitran Nigam Limited (UHBVNL) and another v. Adani Power Limited and others***[5].

(xix) It is also submitted that the contention on the part of the DISCOMS that ***Adani Rajasthan***

5 **(2019) 5 SCC 325**

case (supra) would not be applicable to the facts of the present case, inasmuch as there was no FSA scenario, is also factually incorrect.

45. In addition to the aforesaid submissions, the respondent in Civil Appeal No.6927 of 2021 i.e. GMR, the following submissions have been made.

(i) That Schedule 10 of the PPA executed between GMR and MSEDCL clearly mentions that the levelized tariff will be as per CERC Regulations.

(ii) It is submitted that the normative SHR as mentioned in the bid is computed assuming power plant is operating at 85% of the Plant Load Factor ("PLF" for short). It is, however, submitted that the PLF is at the sole discretion of the procurer-DISCOMS as they decide the quantum of power to off-take.

(iii) It is submitted that the SHR is a real-time operating parameter which varies from time to

time, and it is computed by working out the total electricity generated from the amount of coal consumed in heat value (kCal) terms.

(iv) It is further submitted that the GCV of coal actually delivered at site and fed to the boiler varies from wagon to wagon. It cannot be a homogeneous value.

(v) It is further submitted that the details given in the bid with regard to SHR and GCV were only indicative of the coal linkage to show that GMR had the necessary means to supply power on sustained basis and was a serious bidder, and to further demonstrate its meeting of the eligibility requirement prescribed under the RFP.

(vi) It is submitted that the supporting documents/information regarding fuel only provides the quantity of coal required for the

project at Normative PLF and SHR computed as per CERC norms, which is 2355 kCal/kWh. It is submitted that MSEDCL is now insisting on Design Gross Heat Rate of 2211 kCal/kWh, which was not considered even for computation of quantum of coal at the time of bid submission.

(vii) It is further submitted that the Central Electricity Authority, vide Notifications dated 17th October 2017 and 18th October 2017, has even allowed for loss in GCV from 'as received basis' to 'as fired basis' and as such, there is no reason as to why GCV could not be computed on 'as received basis'.

(viii) It is further submitted that the MSEDCL cannot be permitted to equate GMR's case with APML and Rattan India Power Limited inasmuch as GMR falls under the jurisdiction of CERC,

whereas the other two fall under the jurisdiction of MERC.

(ix) Insofar as late payment charges are concerned, it is submitted that MSEDCL had unilaterally deducted the amount, which is contrary to the provisions of the PPA and as such, both CERC and learned APTEL have rightly held that GMR was entitled to late payment surcharge in terms of Article 8.3.5. Reliance in this respect is placed on the judgment of this Court in the case of ***Maharashtra State Electricity Distribution Company Limited v. Maharashtra Electricity Regulatory Commission and others***[6] *and* ***Tamil Nadu Generation & Distribution Corporation***

6 **(2022) 4 SCC 657**

Limited v. PPN Power Generating Company Private Limited[7]

RELEVANT DOCUMENTS

46. For considering the rival submissions, it will be relevant to refer to certain documents placed on record.

47. The MoP notified the Competitive Bidding Guidelines, 2005 (hereinafter referred to as "the said Guidelines") on 19th January 2005. The said Guidelines were framed under Section 63 of the Electricity Act. It will be relevant to refer to the following part of the preamble of the said Guidelines.

> "**1. Preamble**
> .....
> These guidelines have been framed under the above provisions of section 63 of the Act. The specific objectives of these guidelines are as follows:
> 1. Promote competitive procurement of electricity by distribution licensees;
> 2. Facilitate transparency and fairness in procurement processes;
> 3. Facilitate reduction of information asymmetries for various bidders;

7 **(2014) 11 SCC 53**

4. Protect consumer interests by facilitating competitive conditions in procurement of electricity;
5. Enhance standardization and reduce ambiguity and hence time for materialization of projects;
6. Provide flexibility to suppliers on internal operations while ensuring certainty on availability of power and tariffs for buyers."

48. Paragraph 2 of the said Guidelines deals with the scope of the Guidelines. Para 2.2 of the said Guidelines reads thus:

> "**2.2.** The guidelines shall apply for procurement of base-load, peak-load and seasonal power requirements through competitive bidding, through the following mechanisms:
>
> (i) Where the location, technology, or fuel is not specified by the procurer (**Case 1**);
>
> (ii) For hydro-power projects, load center projects or other location specific projects with specific fuel allocation such as captive mines available, which the procurer intends to set up under tariff based bidding process (**Case 2**).

However separate RFP shall be used for procuring base load or peak load or seasonal load requirements as the case may be."

49. It can thus be seen that Para 2.2 distinguishes two types of cases, viz., Case-1 and Case-2. Case-1 deals with the case where the location, technology, or fuel is not specified by the procurer. Case-2 deals with hydro-power projects, load center projects or other location specific projects with specific fuel allocation such as captive mines available, which the procurer intends to set up under tariff based bidding process.

50. Paragraph 3 of the said Guidelines deals with preparation for inviting bids. Clause (I) of Para 3.2 deals with Case-2, whereas clause (II) of Para 3.2 deals with Case-1. Sub-clause (i) of clause (II) of Para 3.2 requires the bidder to undertake site identification and land acquisition. The bidder is required to submit a copy of notification issued for the land in question under Section 4 of the Land Acquisition Act, 1894. For the part of land excluding that which is to be acquired under the Land

Acquisition Act, 1894, the bidder is required to furnish documentary evidence to establish allotment/ lease/ ownership/ vesting of at least one-third area of the said land. Under sub-clause (ii), the bidder is required to submit environmental clearance for the power station. Under sub-clause (iii), the bidder is required to supply forest clearance, if applicable, for the land for the power station. Sub-clause (iv) is the most important for the resolution of the present dispute, which reads thus:

> "**3. <u>Preparation for inviting bids</u>**
>
> 3.1 .....
>
> 3.2 (I) .....
>
> (II) .....
> (i) .....
> (ii) .....
> (iii) .....
>
> iv) Fuel Arrangements: (a) In the following cases fuel arrangements shall have to be made for the quantity of fuel required to generate power from the phase of the power station from which power is proposed to be

supplied at Normative Availability for the term of the PPA.

- In case of domestic coal, the Bidder shall have made firm arrangements for fuel tie up either by way of coal block allocation or fuel linkage
- In case of domestic gas, the Bidder shall have made firm arrangements for fuel tie up by way of long term fuel supply agreement for the term & quantity as per Government of India gas allocation policy

b) Fuel arrangements in the following cases shall have to be made for the quantity of fuel required to generate power from the power station for the total installed capacity.

- In case of imported coal, the Bidder shall have either acquired mines having proven reserves for at least 50% of the quantity of coal required OR shall have a fuel supply agreement for at least 50% of the quantity of coal required for a term of at least five (5) years or the term of the PPA, whichever is less.
- In case of RLNG, the Bidder shall have made firm arrangements for fuel tie up by

way of fuel supply agreement for at least 50% of the quantity of fuel required for a term of at least five (5) years or the term of the PPA, whichever is less.

Blending of Imported and Domestic coal may be used in which case, criteria for imported and domestic coal shall be met separately in the ratio of blending."

51. It can thus be seen that in case of domestic coal, the bidder is required to make firm arrangements for fuel tie up either by way of coal block allocation or fuel linkage.

52. Clause (b) of sub-clause (iv) of clause (II) of Para 3.2 deals with imported coal, in which case the bidder shall have either acquired mines having proven reserves for at least 50% of the quantity of coal required OR shall have a fuel supply agreement for at least 50% of the quantity of coal required for a term of at least five years or the term of the PPA, whichever is less.

53. Paragraph 4 of the said Guidelines deals with Tariff Structure. It will be relevant to refer to Para 4.2, which reads thus:

> "**4. Tariff Structure**
>
> 4.1 ……..
>
> 4.2. In case of long term procurement with specific fuel allocation (Case 2), the procurer shall invite bids on the basis of capacity charge and net quoted heat rate. The net heat rate shall be ex-bus taking into account internal power consumption of the power station. The energy charges shall be payable as per the following formula:
>
> *Energy Charges = Net quoted heat rate X Scheduled Generation X Monthly Weighted Average Price of Fuel/Monthly Average Gross Calorific Value of Fuel*
>
> If the price of the fuel has not been determined by the Government of India, government approved mechanism or the Fuel Regulator, the same shall have to be approved by the appropriate Regulatory Commission.
>
> In case of coal/lignite fuel, the cost of secondary fuel oil shall be factored in the capacity charges."

54. It can thus be seen that insofar as Case-2 is concerned, the procurer is required to invite bids on the basis of capacity charge and net quoted heat rate. The net heat rate is required to be ex-bus taking into account internal power consumption of the power station. It further provides that if the price of the fuel is not determined by the Government of India, government approved mechanism or the Fuel Regulator, the same shall have to be approved by the appropriate Regulatory Commission.

55. Para 4.4 provides that the capacity charge shall be paid based on actual availability, as per charges quoted in Rs./kwh and shall be limited to the normative availability. It further provides that the normative availability for Case-1 and thermal stations under Case-2 shall be a maximum of 85%.

56. Para 4.7 is another important clause for the resolution of the present dispute, which reads thus:

> "4.7. Any change in law impacting cost or revenue from the business of selling electricity to the procurer with respect to

> the law applicable on the date which is 7 days before the last date for RFP bid submission shall be adjusted separately. In case of any dispute regarding the impact of any change in law, the decision of the Appropriate Commission shall apply."

57. It can thus be seen that any Change in Law impacting cost or revenue from the business of selling electricity to the procurer with respect to the law applicable on the date which is 7 days before the last date for RFP bid submission shall be adjusted separately. It provides that in case of any dispute regarding the impact of any Change in Law, the decision of the Appropriate Commission shall apply.

58. It will also be relevant to refer to Para 4.12, which reads thus:

> "4.12 No adjustment shall be provided for heat rate degradation of the generating stations. Even in case of bids based on net heat rate, the bidder shall factor in site conditions, loading conditions, frequency variations etc and no adjustment shall be allowed on the quoted net heat rate for the duration of the contract."

59. It can thus be seen that no adjustment is to be provided for heat rate degradation of the generating stations. Even in case of bids based on net heat rate, the bidder shall factor in site conditions, loading conditions, frequency variations etc. and no adjustment shall be allowed on the quoted net heat rate for the duration of the contract.

60. The NCDP 2007 would be of vital importance. Clause 2.2 thereof deals with Power Utilities including Independent Power Producers (IPPs)/Captive Power Plants (CPPs) and Fertilizer Sector. Clause 2.2 reads thus:

> "**2. Distribution and Pricing of coal to different consumers/sector(s):**
>
> **2.1.** .....
>
> **2.2 <u>Power Utilities including Independent Power Producers (IPPs)/Captive Power Plants(CPPs) and Fertilizer Sector</u>**
>
> 100% of the quantity as per the normative requirement of the consumers would be considered for supply of coal,

through Fuel Supply Agreement (FSA) by Coal India Limited (CIL) at fixed prices to be declared/notified by CIL. The units/power plants, which are yet to be commissioned but whose coal requirements has already been assessed and accepted by Ministry of Coal and linkage/Letter of Assurance (LoA) approved as well as future commitments would also be covered accordingly."

61. It can thus be seen that the NCDP 2007 assured 100% of the quantity as per the normative requirement of the consumers for supply of coal, through FSA by CIL at fixed prices to be declared/notified by CIL. It further provided that the units/power plants, which are yet to be commissioned but whose coal requirements has already been assessed and accepted by MoC and linkage/Letter of Assurance (LoA) approved as well as future commitments would also be covered in accordance therewith.

62. It will also be relevant to note the following part of clause 5.2 of the NCDP 2007.

"**5. Policy for New Consumers**

> 5.1. .....
>
> 5.2. ..... In order to meet the domestic requirement of coal, CIL may have to import coal as may be required from time to time, if feasible. CIL may adjust its overall price accordingly. Thus, it will be the responsibility of CIL/Coal companies to meet full requirement of coal under FSAs even by resorting to imports, if necessary."

63. It can thus be seen that clause 5.2 of the NCDP 2007 provides that in order to meet the domestic requirement of coal, CIL may have to import coal as may be required from time to time, if feasible. It further provided that CIL would adjust its overall price accordingly. The NCDP 2007 emphasizes the responsibility of CIL/Coal Companies to meet full requirement of coal under FSAs even by resorting to imports, if necessary.

64. It will also be relevant to refer to the communication addressed by the MoP dated 9th May 2013 to the Secretary, CERC.

"Subject: Impact on tariff on the concluded PPAs due to domestic coal availability.

Sir,

Coal linkages have been granted for power projects under the New Coal Distribution Policy 2007 (NCDP), which mandates that CIL will meet 100% of normative requirement of power sector. Para 5.2 of NCDP provides that "*In order to meet the domestic requirement of coal, CIL may have to import coal as may be required from time to time, if feasible. CIL may adjust its overall price accordingly. Thus, it will be the responsibility of CIL/Coal companies to meet full requirement of coal under FSAs even by resorting to imports, if necessary*". Post NCDP MoC granted linkages between 2008-2010 with the assumption that it would meet coal requirement at around 85% PLF. On this basis LoAs were issued by coal companies, after getting commitment guarantees in the form of Bank Guarantee from the developers thereby undertaking an explicit obligation to supply coal to the extent of the specified quantity to the power developer. Having obtained the LOA the developers would have proceeded on the assumption of getting the requisite quantity of domestic coal with the disincentive trigger of 90% of LoA

quantity prevailing under the then Fuel Supply Agreement (FSA) with a provision for CIL resorting to import of coal to bridge the gap, if any. It is assumed that the power producers would have factored this assurance regarding coal supply while submitting their bids in response to Case 1 and Case 2 competitive bidding for long term power purchase agreements. Thus, while the fuel price risk would have been taken into account and factored in the escalable component of energy charges, it is assumed that no fuel availability risk would have been taken into consideration on account of the LOAs given by CIL.

2. It now transpires that on account of the limited availability of coal Ministry of Col has indicated that CIL may not be in a position to supply more than 60 to 65% of ACQ to those power producers who had been earlier issued LOAs of normative quantities corresponding to 85% PLF. Simultaneously, it has been proposed that the disincentive trigger for coal supply would be brought down from 90% to 60 to 65% by CIL in the new fuel supply agreements to be signed with these power producers. This obviously would create a situation where the power producers would have to arrange fuel from open market including imports either through CIL or directly. In view of

this scenario, PPAs which are already concluded between the developers and discoms as a result of competitive bidding in the last few years based on domestic coal linkage (LOA) may have to use imported coal to bridge the shortage of domestic coal in order to fulfil that contractual obligations. The Association of Power Producers represented on this issue of shortage of domestic coal and its consequential effect on the concluded PPAs through competitive bidding route.

3. The Cabinet Committee on Economic Affairs (CCEA) has also considered the situation arising out of the inadequate availability of coal leading to this non-fulfilment of the LOA commitments on the part of CIL. CCEA has decided the following guidelines in its meeting held on 06.02.2013 in respect of generating plants commissioned/to be commissioned during the period 1.4.09 to 31.03.15:

i) CIL will provide imported coal on cost plus basis to all producers willing to take such cost;
ii) That the higher cost of imported coal will be allowed as a pass through.

3. In view of the circumstances stated above CERC is requested to advice the Government on the manner in which the

issue of fuel availability risk arising out of CIL's inability to meet its LOA commitments could be addressed with regard to power producers who have already entered into long term PPAs with distribution companies based on such commitments and the feasibility of passing on the additional cost of procuring market fuel incurred by the power developers on account of the circumstances stated in the aforesaid paras. CERC is also requested to suggest appropriate ways for issuing advisory to SERCs/State Governments which may necessitated to be issued by MoP for the implementation of the above.

4. CERC's considered advice is requested in this matter at the earliest.

5. This issues with the approval of MOSP (I/C)."

65. Perusal of the communication dated 9th May 2013 would clearly show that the NCDP 2007 mandates that CIL will meet 100% of normative requirement of power sector. It states that, post NCDP 2007, MoC has granted linkages between 2008-2010 with the assumption that it would meet coal requirement at around 85% of the PLF. On that basis, the LoAs were issued by

Coal Companies, after getting commitment guarantees in the form of Bank Guarantees from the developers, thereby undertaking an explicit obligation to supply coal to the extent of the specified quantify to the power developer. It further states that having obtained the LoA, the developers would have proceeded on the assumption of getting the requisite quantity of domestic coal with the disincentive trigger of 90% of LoA quantity prevailing under the then FSA with a provision for CIL resorting to import of coal to bridge the gap, if any. It specifically mentions that the power producers would have factored in this assurance regarding coal supply while submitting their bids in response to Case-1 and Case-2 competitive bidding for long-term PPAs.

66. The said communication further records that it now transpires that on account of the limited availability of coal, MoC has indicated that CIL may not be in a position to supply more than 60 to 65% of ACQ to those power producers who had been earlier issued LoAs of normative quantities corresponding

to 85% of the PLF. It was proposed that the disincentive trigger for coal supply would be brought down from 90% to 60 to 65% by CIL in the new FSAs to be signed with these power producers. It further states that in view of this scenario, PPAs which are already concluded between the developers and the DISCOMS as a result of competitive bidding in the last few years based on domestic coal linkage (LoA) may have to use imported coal to bridge the shortage of domestic coal in order to fulfil their contractual obligations.

67. The communication further records that the CCEA has also considered the situation arising out of the inadequate availability of coal leading to the non-fulfilment of its LOA commitments on the part of the CIL. The CCEA, therefore, in its meeting held on 6th February 2013 has decided the following guidelines in respect of generating plants commissioned/to be commissioned during the period 1st April 2009 to 31st March 2015:

ii) That CIL will provide imported coal on cost plus basis to all producers willing to take such cost;

iii) That the higher cost of imported coal will be allowed as a pass-through.

68. The communication therefore requested the CERC to advise the Government on the manner in which the issue of fuel availability risk, arising out of CIL's inability to meet its LOA commitments, could be addressed. The CERC was also requested to suggest appropriate ways for issuing advisories to SERCs/State Governments by the MoP, which may be necessitated for the implementation of the above.

69. In pursuance of the aforesaid Communication dated 9th May 2013, the CERC issued Statutory Advice on 20th May 2013 under Section 79(2) of the Electricity Act regarding impact on tariff of the concluded PPAs due to domestic coal availability. It will be relevant to refer to the following part of the said statutory advice.

> "2. The matter was considered in the Commission. The Commission appreciates the need for securing fuel supply for various projects in order to ensure optimum generation from the power plants in the country. Non-availability of adequate quantum of coal has posed serious challenge to power generation as reflected in the data compiled by the Central Electricity Authority (CEA): the Plant Load Factor (PLF) of the generating stations across the country has been severely affected for want of adequate coal supply by CIL/Coal Companies.
>
> 3. The proposal to make CIL supply imported coal on cost plus basis to all power projects commissioned or to be commissioned during the period 1.4.2009 to 31.3.2015 and willing to take such coal would require appropriate change in the NCDP, as at present it is the full responsibility of CIL to meet full requirement of coal under FSAs even by resorting to import; if necessary. As a follow up, the FSAs between the CIL/its subsidiaries and the power producers will have to be modified through Supplementary Agreements."

70. It can thus clearly be seen that the CERC has noted that the non-availability of adequate quantum of coal has posed serious challenge to power generation as reflected in the data compiled by the Central Electricity Authority (CEA). It further

noted that the PLF of the generating stations across the country has been severely affected for want of adequate coal supply by CIL/Coal Companies. It further records that to give effect to the proposal to make CIL supply imported coal on cost plus basis to all power projects commissioned or to be commissioned during the period from 1st April 2009 to 31st March 2015 and willing to take such coal, would require appropriate change in the NCDP, as at present it is the full responsibility of CIL to meet full requirement of coal under FSAs even by resorting to import, if necessary. It further states that as a follow up, the FSAs between the CIL/its subsidiaries and the power producers will have to be modified through Supplementary Agreements.

71. After referring to clause 10.1.1 of the Standard PPA for Procurement of Power under Case-1 Bidding Procedure, which deals with 'Change in Law', the statutory advice states thus:

> "For claiming any benefits under change in law, the Project Developer would have to move the appropriate Commission and the decision of that Commission in this regard would be final, in terms of the provisions

> of Articles 10.3.3 and 10.3.4 of the Standard PPA. The appropriate Commissions are expected to take decisions on the merits of each case including the claims of the Project Developers for compensation on account of imported coal after consultation with the stakeholders."

72. It can thus be seen that the CERC states that for claiming any benefits under the Change in Law, the Project Developer would have to move the appropriate Commission. It further records that the appropriate Commissions are expected to take decisions on the merits of each case including the claims of the Project Developers for compensation on account of imported coal after consultation with the stakeholders.

73. Subsequent to the aforesaid communication, the MoC issued a Press Release on 21st June 2013. It will be relevant to refer to the following part of the said Press Release.

> "The Cabinet Committee on Economic Affairs (CCEA) today approved the following mechanism for supply of coal to power producers:

(i) Coal India Ltd. (CIL) to sign Fuel Supply Agreements (FSA) for a total capacity of 78000 MW including cases of tapering linkage, which are likely to be commissioned by 31.03.2015. Actual coal supplies would however commence when long term Power Purchase Agreements (PPAs) are tied up.

(ii) Taking into account the overall domestic availability and actual requirements, FSAs to be signed for domestic coal quantity of 65 percent, 65 percent, 67 percent and 75 percent of Annual Contracted Quantity (ACQ) for the running four years of the 12th Five Year Plan.

(iii) To meet its balance FSA obligations, CIL may import coal and supply the same to the willing Thermal Power Plants (TPSs) on cost plus basis. TPPs may also import coal themselves. MoC to issue suitable instructions.

(iv) Higher cost of imported coal to be considered for pass through as per modalities suggested by CERC. MoC to issue suitable orders supplementing the New Coal Distribution Policy (NCDP). MoP to issue appropriate advisory to CERC/SERCs including modifications if any in the bidding guidelines to enable the appropriate Commissions to decide

the pass through of higher cost of imported coal on case to case basis."

74. It is thus clear that taking into account the overall domestic availability and actual requirements, FSAs were to be signed for domestic coal quantity of 65%, 65%, 67% and 75% of ACQ for the running/remaining four years of the 12th Five Year Plan. It can further be seen that the CCEA has also taken a decision that CIL may import coal to meet its balance FSA obligations and supply the same to the willing TPPs on cost plus basis. TPPs may also be permitted to import coal themselves. It further provided that the higher cost of imported coal was to be considered for pass-through as per the modalities suggested by the CERC.

75. In pursuance thereof, the Government of India, through MoC, issued Office Memorandum dated 26th July 2013. The said Office Memorandum reads thus:

"Sub: New Coal Distribution Policy - further instructions regarding implementation thereof.

The New Coal Distribution Policy (NCDP) was issued vide this Ministry's Office Memorandum NO. 23011/4/2007-CPD dated 18.10.2007, laying down the guidelines for distribution and pricing of coal to various sectors. As per para 2.2 of the said policy, Power Utilities including Independent Power Producer were to be supplied 100 per cent of the quantity as per their normative requirement through Fuel Supply Agreement(s) (FSAs) by Coal India Limited (CIL) at fixed prices to be declared/notified by CIL. As per para 5.2, in order to meet the domestic requirement, CIL was to import coal as required from time to time, if feasible and adjust the overall price accordingly.

2. Government has now approved a revised arrangement for supply of coal to the identified Thermal Power Stations (TPPs) of 78,000 MW capacity commissioned or likely to be commissioned during the period from 01.04.2009 to 31.03.2015. Taking into account the overall domestic availability and the likely actual requirements of these TPPs, it has been decided that FSAs will be signed for the domestic coal quantity of 65%, 65%, 67% and 75% of ACQ for the remaining four years of the 12th Plan for the power plants having normal coal linkages. Cases of tapering linkage would get coal supplies as per the Tapering

Linkage Police. To meet its balance FSA obligations towards the requirement of the said 78,000 MW TPPs, CIL may import coal and supply the same to the willing power plants on cost plus basis. Power plants may also directly import coal themselves, if they so opt, in which case, the FSA obligations on the part of CIL to the extent of import component would be deemed to have been discharged.

3. Para 2.2 and 5.2 of the New Coal Distribution Policy issued vide OM No. 23011/4/2007-CPD dated 18.10.2007 stand modified to the above extent.

4. The above guidelines will also be applicable to the distribution of coal from Singreni Collieries Company Limited (SCCL).

5. CIL and its subsidiaries and SCCL are advised to take further action accordingly."

76. It can thus be seen that the NCDP 2013 also specifically states that, as per NCDP 2007 and specifically paragraph 2.2 thereof, Power Utilities, including IPPs, were to be supplied 100% of the quantity as per their normative requirement through FSAs by CIL at fixed prices to be declared/notified by

CIL. It further reiterates that, as per para 5.2, in order to meet the domestic requirement, CIL was to import coal as required from time to time, if feasible, and adjust the overall price accordingly.

77. Para 2 of the NCDP 2013 states that the Government has now approved a revised arrangement for supply of coal to the identified TPPs of 78,000 MW capacity commissioned or likely to be commissioned during the period from 1st April 2009 to 31st March 2015. It states that, taking into account the overall domestic availability and the likely actual requirements of these TPPs, it was decided that FSAs will be signed for the domestic coal quantity of 65%, 65%, 67% and 75% of ACQ for the remaining four years of the 12th Plan for the power plants having normal coal linkages. It further states that to meet the balance FSA obligations towards the requirement of the said 78,000 MW TPPs, CIL may import coal and supply the same to the willing power plants on cost plus basis. It further states that the power plants may also directly import coal themselves,

if they so opt, in which case, the FSA obligations on the part of CIL to the extent of import component would be deemed to have been discharged.

78. Immediately thereafter, on 31st July 2013, the MoP addressed a communication to the Secretary, CERC. It will be relevant to refer to Para 2 of the said communication, which reads thus:

> "2. After considering all aspects and the advice of CERC in this regard, Government has decided the following in June, 2013:
>
> **i)** taking into account the overall domestic availability and actual requirements, FSAs to be signed for domestic coal component for the levy of disincentive at the quantity of 65%, 65%, 67% and 75% of Annual Contracted Quantity (ACQ) for the remaining four years of the 12th Plan.
>
> **ii)** to meet its balance FSA obligations, CIL may import coal and supply the same to the willing TPPs on cost plus basis.

TPPs may also import coal themselves if they so opt.

iii) higher cost of imported coal to be considered for pass through as per modalities suggested by CERC."

79. It can thus clearly be seen that the Government, after considering all aspects and the advice of CERC in this regard, decided that the higher cost of imported coal was to be considered for pass-through as per modalities suggested by the CERC.

80. It will also be relevant to refer to Para 4 of the said communication, which reads thus:

> "4. As per decision of the Government, the higher cost of import/market based e-auction coal be considered for being made a pass through on a case to case basis by CERC/SERC to the extent of shortfall in the quantity indicated in the LoA/FSA and the CIL supply of domestic coal which would be minimum of 65%, 65%, 67% and 75% of LoA for the remaining four years of the 12th Plan for the already concluded PPAs based on tariff based competitive bidding."

81. Perusal of para 4 would clearly reveal that the higher cost of import/market based e-auction coal was to be considered for being made a pass-through on a case to case basis by CERC/SERC to the extent of shortfall in the quantity indicated in the LoA/FSA. It further reiterates that CIL may supply domestic coal which would be minimum of 65%, 65%, 67% and 75% of LoA for the remaining four years of the 12th Plan for the already concluded PPAs based on tariff based competitive bidding.

82. The MoP thereafter vide Resolution dated 28th January 2016 notified the 'Tariff Policy'. It will be relevant to refer to clause 6.1 of the said Policy, which reads thus:

> "**6.0 GENERATION**
>
> .....
>
> **6.1 Procurement of power**
>
> As stipulated in para 5.1, power procurement for future requirements should be through a transparent competitive bidding mechanism using the guidelines issued by the Central Government from time to time. These guidelines provide for procurement of

> electricity separately for base load requirements and for peak load requirements. This would facilitate setting up of generation capacities specifically for meeting such requirements.
>
> However, some of the competitively bid projects as per the guidelines dated 19th January, 2005 have experienced difficulties in getting the required quantity of coal from Coal India Limited (CIL). In case of reduced quantity of domestic coal supplied by CIL, vis-a-vis the assured quantity or quantity indicated in Letter of Assurance/FSA the cost of imported/market based e-auction coal procured for making up the shortfall, shall be considered for being made a pass through by Appropriate Commission on a case to case basis, as per advisory issued by Ministry of Power vide OM No. FU-12/2011-IPC (Voi-IJI) dated 31.7.2013."

83. It is thus clear that the Tariff Policy dated 28th January 2016 provided that the power procurement for future requirements should be through a transparent competitive bidding mechanism using the guidelines issued by the Central Government from time to time. It further provides the guidelines for procurement of electricity separately for base load

requirements and for peak load requirements. It further notes that some of the competitively bid projects as per the guidelines dated 19th January, 2005 have experienced difficulties in getting the required quantity of coal from CIL. It further provides that in case of reduced quantity of domestic coal supplied by CIL vis-à-vis the assured quantity or quantity indicated in LoA/FSA, the cost of imported/market based e-auction coal procured for making up the shortfall shall be considered for being made a pass-through by Appropriate Commission on a case to case basis. This is in pursuance of the advisory issued by Ministry of Power dated 31st July 2013.

JUDGMENTS CITED

84. Having considered these documents, we will now consider the judgments which are relied on by both the parties.

85. In the case of ***Energy Watchdog*** (supra), after several rounds of litigation, the learned APTEL held that generation and sale of power by Adani Power to GUVNL and Haryana Utilities was a composite scheme within the meaning of Section 79(1)(b)

of the Electricity Act and, therefore, the CERC would have jurisdiction to proceed further in the matter. It further held that *force majeure* was made out on the facts of the said cases and reversed the CERC's/Commission's order on that score. It also held that the Change in Law provisions do not apply to foreign law and, therefore, changes in Indonesian law did not come within the scope of the provisions. Insofar as changes in Indian law were concerned, it held that the government policies that were relied upon did not constitute "law". The said decision of the learned APTEL was assailed before this Court. This Court while rejecting the argument on the ground of *force majeure* observed thus:

> "**42.** It is clear from the above that the doctrine of frustration cannot apply to these cases as the fundamental basis of the PPAs remains unaltered. Nowhere do the PPAs state that coal is to be procured only from Indonesia at a particular price. In fact, it is clear on a reading of the PPA as a whole that the price payable for the supply of coal is entirely for the person who sets up the power plant to bear. The fact that the fuel supply agreement has to

> be appended to the PPA is only to indicate that the raw material for the working of the plant is there and is in order. It is clear that an unexpected rise in the price of coal will not absolve the generating companies from performing their part of the contract for the very good reason that when they submitted their bids, this was a risk they knowingly took. We are of the view that the mere fact that the bid may be non-escalable does not mean that the respondents are precluded from raising the plea of frustration, if otherwise it is available in law and can be pleaded by them. But the fact that a non-escalable tariff has been paid for, for example, in the Adani case, is a factor which may be taken into account only to show that the risk of supplying electricity at the tariff indicated was upon the generating company."

86. This Court, thereafter, considered as to whether any Change in Law could be stretched to mean "all laws". This Court held that Clause 4.7 read with Clause 5.17 of the Guidelines would reveal that it would not include changes in Indonesian law, being foreign and not Indian law.

87. In ***Energy Watchdog*** (supra), this Court also had an occasion to consider the MoP communication dated 31st July

2013, the relevant part of which has already been reproduced by us herein above. This Court observed thus:

> "**56.** However, insofar as the applicability of Clause 13 to a change in Indian law is concerned, the respondents are on firm ground. It will be seen that under Clause 13.1.1 if there is a change in any consent, approval or licence available or obtained for the project, otherwise than for the default of the seller, which results in any change in any cost of the business of selling electricity, then the said seller will be governed under Clause 13.1.1. It is clear from a reading of the Resolution dated 21-6-2013, which resulted in the letter of 31-7-2013, issued by the Ministry of Power, that the earlier coal distribution policy contained in the letter dated 18-3-2007 stands modified as the Government has now approved a revised arrangement for supply of coal. It has been decided that, seeing the overall domestic availability and the likely requirement of power projects, the power projects will only be entitled to a certain percentage of what was earlier allowable. This being the case, on 31-7-2013....."

88. This Court, thereafter, referred to the Tariff Policy dated 28th January 2016, the relevant part of which has already been reproduced by us herein above. This Court 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."

89. It can thus clearly be seen that insofar as the arguments with regard to effect of the Change in Law being given on the basis of ACQ is concerned, the same stands specifically rejected.

90. A bench of three learned Judges of this Court in ***Adani Rajasthan case*** (supra) also had an occasion to consider a similar issue. An argument which is sought to be advanced before us that the Change in Law claim may be confined only to 35 to 40% was also advanced in the said case. Rejecting the said contention, this Court observed thus:

> "**50.** Shri C. Aryama Sundaram argued that the FSA related approximately 61 per cent of the fuel requirement. Thus, the change in law claim may be confined to 35 to 40 per cent. The argument cannot be accepted as bidding was not based on dual fuel, but was evaluated on domestic coal. There was no such stipulation that evaluation of bidding was done on domestic basis; the tariff was to be worked out in the aforesaid ratio of 60 : 40 per cent of imported coal and domestic coal respectively. Apart from that, we find from the order of the APTEL, that change in law provision would be limited to a shortfall in the supply of domestic linkage coal……
>
> **51.** It was clarified that APRL would be entitled to relief under the change in law provision to the extent of shortage in supply in domestic linkage coal. Thus, we find no merit in the submission raised. We find the

findings of the APTEL to be reasonable, proper, and unexceptional."

91. In the said case (i.e. **Adani Rajasthan case)** also, the provision with regard to the Change in Law was similar to the one that falls for consideration in the present case. This Court observed thus:

> "**59.** The change in policy and in the terms and conditions prescribed for obtaining any consents, clearances and permits or the inclusion of any new terms or conditions for obtaining such consents, clearances, and permits are also included. The submission raised on behalf of appellant that there is no question seeking benefit due to change in foreign law is based on wrong factual premise. The relief was not claimed on the basis of change in foreign law. Apart from that, admission has been relied upon change in law. The PPA was based on the domestic law and there was a change in domestic law. Thus, consequences must follow. The Government of Rajasthan entered into a MoU with APRL with respect to coal linkage in 2008 to provide coal linkage or coal from other sources.

> **60.** We find similarity in the present case as well as the *Energy Watchdog*. The factual matrix was similar with the present case. We find that the RERC and the APTEL have recorded the concurrent finding on facts. We find no ground to interfere. No substantial question of law is involved. It was held in *Energy Watchdog*, that change in law was brought about in the NCDP of 2007 by the decision of 26.7.2013. It is provided in Article 10.2.1 how the change in law is to be applied to compensate for the impact."

92. In the case of ***Uttar Haryana Bijli Vitran Nigam Limited (UHBVNL)*** (supra), this Court observed thus:

> "**13.** A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 6-4-2015 and 16-2-2016. The present case, therefore, falls within Article 13.4.1(*i*). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn. This being the case, monthly invoices to be

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

93. This Court specifically rejected the contention of the DISCOMS that the Generator was claiming the restitutionary amount on some general principle of equity outside the PPA. This Court held that the amount of carrying cost was relatable to Article 13 of the PPA.

STATUTORY PROVISIONS WITH REGARD TO REGULATORY MECHANISM

94. We will now consider the relevant provisions of the Electricity Act.

95. Section 70 of the Electricity Act deals with constitution of the Central Electricity Authority ("CEA"). The CEA shall consist of not more than 14 Members (including its Chairperson) of whom not more than 8 are required to be full-time Members to be appointed by the Central Government. It will be relevant to refer to sub-section (5) of Section 70 of the Electricity Act, which reads thus:

> "(5) The Members of the Authority shall be appointed from amongst persons of ability, integrity and standing who have knowledge of, and adequate experience and capacity in, dealing with problems relating to engineering, finance, commerce, economics or industrial matters, and at least one Member shall be appointed from each of the following categories, namely:—
>
> (*a*) engineering with specialisation in design, construction, operation

and maintenance of generating stations;

(*b*) engineering with specialisation in transmission and supply of electricity;

(*c*) applied research in the field of electricity;

(*d*) applied economics, accounting, commerce or finance."

96. It can thus clearly be seen that the Members of the CEA are required to be persons who have adequate experience and capacity in dealing with problems relating to engineering, finance, commerce, economics or industrial matters. Four of the Members are required to be from the categories as mentioned in clauses (a) to (d). One of them has to be an engineer with specialization in design, construction, operation and maintenance of generating stations. One of them has to be an engineer with specialization in transmission and supply of electricity; one has to be a person who is expert in applied research in the field of electricity; one of them has to be an expert in applied economics, accounting, commerce or finance.

97. Section 73 of the Electricity Act deals with functions and duties of the CEA. The CEA is required to advise the Central Government on various matters with regard to generation, transmission, trading, distribution and utilization of electricity. It is also required to advise the Central Government on any matter on which its advice is sought or make recommendation to that Government on any matter if, in the opinion of the CEA, the recommendation would help in improving the generation, transmission, trading, distribution and utilization of electricity.

98. Section 76 of the Electricity Act provides for constitution of the CERC. The CERC is a five member body which consists of a Chairperson and three other Members, and the Chairperson of the CEA who shall be the ex officio Member. A high-level Selection Committee consisting of 6 high officials selects the Members of the CERC and the learned APTEL.

99. Section 77 of the Electricity Act provides for qualifications for appointment of Members of the CERC. Sub-section (1) of Section 77 provides that Chairperson and the Members of the

CERC shall be persons having adequate knowledge of, or experience in, or shown capacity in, dealing with, problems relating to engineering, law, economics, commerce, finance or management. It further requires that one person to be appointed must be having qualifications and experience in the field of engineering with specialization in generation, transmission or distribution of electricity. One person to be appointed has the qualifications and experience in the field of finance. Clause (c) of sub-section (1) of Section 77 of the Electricity Act requires that two persons are required to have qualifications and experience in the field of economics, commerce, law or management. The proviso to sub-section (1) of the Section 77 of the Electricity Act provides that not more than one Member shall be appointed under the same category under clause (c).

100. Sub-section (2) of Section 77 of the Electricity Act, which is a non-obstante clause, empowers the Central Government to appoint any person as the Chairperson from amongst persons

who is, or has been, a Judge of the Supreme Court or the Chief Justice of a High Court notwithstanding anything contained in sub-section (1). However, such appointment cannot be made except after consultation with the Chief Justice of India.

101. Section 79 of the Electricity Act deals with the functions of the CERC. One of the functions of the CERC under clause (a) of sub-section (1) of Section 79 is to regulate the tariff of generating companies owned or controlled by the Central Government. Clause (b) requires it to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State.

102. Similarly, Section 82 of the Electricity Act deals with constitution of a State Commission. Section 83 of the Electricity Act permits a Joint Commission to be constituted by an agreement between two or more Governments of States. It

also permits the Central Government to constitute a Joint Commission in respect of one or more Union Territories, and one or more Governments of States. Under Section 84, the persons to be appointed as the Chairperson and the Members of the State Commission are required to have adequate knowledge of, and have shown capacity in, dealing with problems relating to engineering, finance, commerce, economics, law or management. Sub-section (2) of Section 84 of the Electricity Act permits the State Government to appoint any person as the Chairperson from amongst persons who is, or has been, a Judge of a High Court. However, such an appointment can be made only after consultation with the Chief Justice of that High Court. A high-level Selection Committee under the Chairmanship of a person who has been a Judge of the High Court, the Chief Secretary of the concerned State and the Chairperson of the CEA or the Chairperson of the CERC selects the Chairperson and the Members of the State Commission. Analogous to Section 79, Section 86 of the Electricity Act

defines the functions of the State Commission. Clause (b) of sub-section (1) of Section 86 of the Electricity Act requires the State Commission to regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State.

103. Section 110 of the Electricity Act provides for establishment of the Appellate Tribunal. Section 111 of the Electricity Act provides for appeal to Appellate Tribunal by any person aggrieved by an order made by an adjudicating officer under the said Act (except under Section 127) or an order made by the Appropriate Commission. Section 112 deals with composition of the Appellate Tribunal. It provides that it shall consist of a Chairperson and three other Members. Section 113 provides for qualifications for appointment of Chairperson and Members of Appellate Tribunal. Only a person who is, or has

been a Judge of the Supreme Court or the Chief Justice of a High Court is entitled to be the Chairperson of the Appellate Tribunal. For being a Member of the Appellate Tribunal, following three categories have been provided for:

(i) A person is, or has been, or is qualified to be, a Judge of a High Court; or

(ii) A person is, or has been, a Secretary for at least one year in the Ministry or Department of the Central Government dealing with economic affairs or matters or infrastructure; or

(iii) A person is, or has been, a person of ability and standing, having adequate knowledge or experience in dealing with the matters relating to electricity generation, transmission and distribution and regulation or economics, commerce, law or management.

104. It can thus be seen that the CEA, CERC and learned APTEL are bodies consisting of experts in the field.

CONSIDERATIONS

105. The issues with regard to SHR and GCV have been considered by the CERC in its order dated 15th November 2018 in the case of ***GMR Warora Energy Limited v. Maharashtra State Electricity Distribution Company Limited & Anr[8].*** It will be relevant to reproduce the relevant part of the CERC's order dated 15th November 2018, which reads thus:

> "29. The submissions regarding SHR and GCV have been considered. The APTEL in its judgement dated 12.9.2014 in Appeal No. 288 of 2013 (M/s Wardha Power Company Limited V Reliance Infrastructure Limited & anr) has ruled that compensation under Change in Law cannot be correlated with the price of coal computed from the energy charge and the technical parameters like the Heat Rate and gross GCV of coal given in the bid documents for establishing the coal requirement. The relevant observations of APTEL are extracted as under:
>
> > "26. The price bid given by the Seller for fixed and variable charges both escalable and non-escalable is based on the Appellant's perception of risks and estimates of expenditure at the time of

8 **Petition No.88/MP/2018**

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

30. In the light of the above observations, the technical parameters such as Heat Rate and GCV of coal as per the bidding document cannot be considered for deciding the coal requirement for the purpose of calculating the relief under Change in law. Therefore, the submissions of the Respondent, MSEDCL to consider the bid parameters are not acceptable. The Respondent has also

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

31. In the present case, the Petitioner has considered SHR of 2355 kcal/Kwh whereas, the Respondent MSEDCL has considered the Design Heat Rate of 2211 kcal/kWh as submitted in the RFP. It is pertinent to mention that the CERC norms applicable for the period 2009-14 and 2014-19 do not provide the norms for 300 MW units, but provide for a degradation factor of 6.5% and 4.5% respectively towards Heat Rate over and above the Design Heat Rate. As the Design Heat Rate is 2211 kcal/kWh, the gross Heat Rate works out to 2355 kcal/kWh (2211 x 1.065)and 2310 kcal/kWh (2211 x 1.045) for the period 2009- 14 and 2014-19 respectively. Accordingly, we direct that the

> SHR of 2355 kcal/kWh during the period 2009-14 and 2310 kcal/kwh during the period 2014- 19 or the actual SHR whichever is lower, shall be considered for calculating the coal consumption for the purpose of compensation under change in law. The Petitioner and the Respondent MSEDCL are directed to carry out reconciliation on account of these claims annually.
>
> 32. In case of GCV, the Respondent has submitted that it should be mid value of GCV band which should be applied on GCV measured on 'as billed' basis. In our view, on account of the grade slippage of the coal supplied by CIL, it would not be appropriate to consider GCV on 'as billed' basis. In the 2014 Tariff Regulations of the Commission, the measurement of GCV has been specified as on 'as received' basis. Therefore, it will be appropriate if the GCV on 'as received' basis is considered for computation of compensation for Change in law."

106. The CERC has referred to the judgment of the learned APTEL dated 12th September 2014 in Appeal No. 288 of 2013 in the case of ***M/s Wardha Power Company Limited v. Reliance Infrastructure Limited & anr.*** wherein the learned APTEL has held that it is not correct to co-relate the compensation on account of Change in Law due to change in cess/excise duty on

coal to the coal price computed from the quoted energy charges in the financial bid and the heat rate and GCV of coal given in the bidding documents by the bidder for the purpose of establishing the coal requirement. The learned APTEL has held that the coal price so calculated will not be equal to the actual price of coal and therefore, compensation for Change in Law computed on such price of coal will not restore the economic position of the seller to the same level as if such Change in Law had not occurred.

107. The CERC has further found that the SHR given in the bid are under test conditions and may vary from actual SHR. The CERC has specifically observed that after extensive stakeholders' consultation, the CERC has specified the SHR norms in the 2014 Tariff Regulations. It, therefore, found that it will be appropriate to take SHR specified in the Regulations as a reference point instead of other parameters as suggested by MSEDCL.

108. The CERC further found that the CERC norms applicable to the period 2009-14 and 2014-19 do not provide the norms for 300 MW units, but provide for a degradation factor of 6.5% and 4.5% respectively towards Heat Rate over and above the Design Heat Rate. The CERC found that since the Design Heat Rate was 2211 kcal/kWh, the gross Heat Rate worked out to 2355 kcal/kWh (2211 x 1.065) and 2310 kcal/kWh (2211 x 1.045) for the period 2009-14 and 2014-19 respectively. The CERC, therefore, directed that the SHR of 2355 kcal/kWh during the period 2009-14 and 2310 kcal/kwh during the period 2014-19 or the actual SHR, whichever is lower, shall be considered for calculating the coal consumption for the purpose of compensation under the Change in Law.

109. These findings of the CERC are affirmed by the learned APTEL in its Judgment dated 16th July 2021. The learned APTEL observed thus:

> "8.8 We are in agreement with the observations made by the CERC. Relegating the Appellant to the

> contractual remedy under the FSA when the genesis of the Appellant's claim is Change in Law under the PPA would not be appropriate. It is, however, made clear that if the Appellant were to receive any disincentive or compensation from the coal company on account of short supply or grade slippage, such compensation will be adjusted/credited against the Change in Law compensation payable by the Respondent, MSEDCL."

110. The learned APTEL in its judgment dated 14th September 2020 in Appeal No.182 of 2019 in the case of ***Adani Power Maharashtra Limited (APML) v. Maharashtra State Electricity Distribution Company Ltd.*** (impugned in Civil Appeal No. 684 of 2021) has referred to the order of MERC dated 7th March 2018 in Case No.123 of 2017 (***JSW Energy Ltd. v. MSEDCL***), wherein it held that Auxiliary Consumption has to be considered as lower of actual or MYT norms for the purpose of the Change in Law compensation. The learned APTEL held that in view of its earlier order, the State Commission, being MERC, ought to have followed the same approach for SHR in the present case also. It has been found

that there is no reason for the MERC to apply two different principles for Auxiliary Consumption and SHR, when both are operational parameters and the Commission was dealing with the same PPA in both cases.

111. The learned APTEL has also referred to the following observations of the CERC in its order dated 16th May 2019 in the case of ***GMR Warora Energy Limited v. MSEDCL and Anr.*** (Petition No.284/MP/2018):

> "52. It is pertinent to mention that similar submissions of the Respondent, MSEDCL were considered by the Commission in Petition No.88/MP/2018 and it was observed by order dated 15.11.2018 that SHR given in the bid is under test conditions and may vary from actual SHR. ***Therefore, it would only be correct to take SHR specified in the tariff Regulations as a reference point instead of other parameters suggested by MSEDCL***. It was also held that SHR as a bidding document cannot be considered for deciding the

coal requirement for the purpose of calculating relief under change in law…"

[emphasis supplied]

112. The learned APTEL thereafter held that the SHR submitted in the bid was not a bid parameter as per the bidding guidelines. It concurred with the findings of the CERC that the SHR specified in the Tariff Regulations was as a reference point. It held that it cannot be used as the basis for computing the coal shortfall requirement and, thereby, for computation of Change in Law compensation to be awarded to the generating company. It held that such linking of Change in Law compensation to the SHR mentioned in the bid documents would not restitute the affected party to the same economic position as if the approved Change in Law event had not occurred.

113. Insofar as the GCV is concerned, the CERC in the case of ***GMR Warora Energy Limited*** (supra) has specifically rejected the contention of the MSEDCL that the GCV should be taken at

the mid value of GCV band which should be applied on GCV measured on 'as billed' basis. The CERC held that, on account of the grade slippage of the coal supplied by CIL, it would not be appropriate to consider GCV on 'as billed' basis. It has been held that in the 2014 Tariff Regulations of the Commission, the measurement of GCV has been specified as on 'as received' basis. Therefore, it will be appropriate if the GCV on 'as received' basis is considered for computation of compensation for the Change in Law. This finding of the CERC is affirmed by the learned APTEL.

114. The learned APTEL in the case of ***Adani Power Maharashtra Limited (APML)*** (supra) has also considered the issue as to whether the reference GCV of domestic coal supplied by CIL for computing the Change in Law compensation should be "the middle value of GCV range of assured coal grade in LoA/FSA/MoU". The learned APTEL observed that it was a fact that there is no guidance in the PPAs or in the bidding Guidelines as to the reference GCV that should be applied in

case of the Change in Law claims in Case 1 bid projects where SHR or GCV is not a bid parameter. It, however, held that the overarching principle for Change in Law compensation was that the generating company should not be left with in a worse economic position. It held that the GCV 'as received' should be the appropriate basis to assess the quantum of shortfall in domestic coal and calculate the Change in Law compensation accordingly.

115. It is also relevant to note that the Comptroller and Auditor General of India ("C&AG" for short), in its Performance Audit Report on "Fuel Management of Coal Based Power Stations of NTPC Limited" submitted to MoP, had observed that the 'quality assessment of coal has inherent as well as manmade infirmities due to heterogeneous nature of coal and sampling errors'. The C&AG, therefore, recommended to the MoP that there was a need to appropriately review the methods for energy pricing and had requested the MoP to coordinate with CERC in light of the audit findings. The MoP, therefore, addressed a communication

dated 28th June 2017 to the CEA. In the said communication, the MoP had stated that the NTPC has highlighted the issues of sampling error on account of change of point of sampling for measurement of GCV from "as fired" to "as received" basis as per the 2014 Tariff Regulations, non-homogeneous nature of samples taken from the wagons, loss of GCV from point of "as received" to the point of "as fired", and difficulty with coal sampling through 'Augurs'. It further states that the MoP had also sought views of the CERC on the said issue. The CERC had, therefore, requested the MoP for consulting CEA in this regard and accordingly the matter was referred to CEA.

116. The CEA in its communication dated 17th October 2017 stated thus:

> "The issue has been examined in CEA. After preliminary discussions with NTPC on the issue on 05.09.2017, CEA has also taken views of other specialist agencies in the field of coal such as CIMFR and CPRI in the meeting held on 21.09.2017.
>
> It is acknowledged that there is a loss of GCV from point of "as received" to the point

of “as fired” inside a power plant mainly due to following factors:

(i) **Effect of Moisture in GCV of coal sample taken from Wagon Top**

As stated by C&AG, there are sampling errors on account of heterogeneous nature of coal. This issue was deliberated in detail with CIMFR and CPRI. Both CIMFR and CPRI acknowledged the difference in wagon top-bottom GCV due to heterogeneous nature of coal, tendency of moisture to settle at the bottom and exposure of top layer to atmosphere.

CEA is of the view that GCV measurement of wagon top coal will give comparatively higher GCV value due to steeling of moisture at the bottom of the wagon and loss of moisture from wagon top during transportation of coal, however, loss in GCV will vary as per seasonal variations.

(ii) **Loss in GCV during coal storage inside power plant**

CEA is of the view and also substantiated by many national

and international papers that there is a loss of GCV in the coal stock where coal is stored inside the power plant, mainly due to oxidation and weathering effect. Further, most of the losses in GCV during long storage of coal takes place in the initial period of storage, mostly due to loss in volatile content.

(iii) **Reduction in GCV during handling inside power plant**

C&AG in its Performance Audit Report has observed that GCV of coal progressively decreased from 'as billed' stage to 'as fired' stage.

It is acknowledged that there are minor unavoidable losses inside the power plant in handling the coal starting from unloading point to the point of bunkering. Loss in GCV may occur mainly due to dust suppression measures used around coal conveyors and transfer points, loss in volatile matter during crushing of the coal etc.

CEA has also examined the views taken by various state regulators for considering such loss for the purpose of tariff allowed to generators. However, as the margin would

> vary from plant to plant, season to season and varying coal characteristics, CEA is of the opinion that a 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."

117. Vide Corrigendum dated 18th October 2017, in the last sentence, after the words wagon top, the words "at unloading point" were added.

118. The aforesaid advice was given by the CEA after holding meeting on 21st September 2017 with specialist agencies in the field of coal such as CIMFR and CPRI. It has also examined the views taken by various state regulators for considering such loss for the purpose of tariff allowed to generators. While considering at what point of time the margin may be considered as a loss of GCV, the CEA considered the views of all the stakeholders. It, thereafter, opined that the loss of GCV should be measured at wagon top till the point of firing of coal in boiler.

119. As already discussed herein above, the CEA is an independent body having Members who are experts in various

fields related to electricity generation, transmission, finance, etc.

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 and others***[9].

> "**38.** MERC is an expert body which is entrusted with the duty and function to

9 **(2019) 3 SCC 352**

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."

122. As already discussed herein above, various expert bodies including the CERC and the learned APTEL, after taking into consideration various relevant factors, have decided the issue with regard to SHR and GCV. Not only that, but another expert body i.e. CEA has also advised that GCV value has to be taken not only on 'as received' but on 'as fired' basis.

123. Recently, the Constitution Bench of this Court in the case of ***Vivek Narayan Sharma v. Union of India***[10] has held that the Courts should be slow in interfering with the decisions

10 **2023 SCC OnLine SC 1**

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.

124. That leaves us with the third issue as to whether the MERC was correct in holding that, for the purpose of Change in Law compensation, shortfall in domestic linkage coal shall be assessed by considering the coal supply as the maximum of (1) actual quantum of coal offered for offtake by CIL under the LoA/FSA and (2) the minimum assured quantum in NCDP 2013 for the respective year.

125. Undisputedly, vide the NCDP 2007, insofar as the power utilities including IPPs/CPPs and Fertilizer Sector are concerned, the MoC had assured 100% of the quantity as per the normative requirement of the consumers for supply of coal, through FSA by CIL at fixed prices to be declared/notified by

CIL. The units/power plants, which were yet to be commissioned but whose coal requirements has already been assessed and accepted by the MoC and linkage/LoA approved as well as future commitments, were also to be covered by the said Policy. Para 5.2 of the NCDP 2007 also provided that in order to meet the domestic requirement of coal, CIL may have to import coal as may be required from time to time, if feasible. The CIL was to adjust its overall price accordingly. There was an unequivocal assurance given that it will be the responsibility of CIL/Coal Companies to meet full requirement of coal under FSAs even by resorting to imports, if necessary.

126. However, in 2013, on account of the limited availability of coal, the MoC had indicated that CIL may not be in a position to supply more than 60 to 65% of ACQ. The Union of India, therefore, realised that PPAs which are already concluded between the developers and the DISCOMS as a result of competitive bidding in the last few years based on domestic coal linkage (LoA) may have to use imported coal to bridge the

shortage of domestic coal in order to fulfill their contractual obligations.

127. The CCEA considered the issue and decided that the higher cost of imported coal will be allowed as a pass-through. This is evident from the communication dated 9th May 2013 addressed by the MoP to the CERC.

128. The CERC also considered the issue. It noted that it was the full responsibility of CIL to meet full requirement of coal under FSAs even by resorting to import, if necessary. After referring to the Change in Law clause, the CERC, in its advice dated 20th May 2013, stated that for claiming any benefit under Change in Law, the Project Developer would have to move the appropriate Commission and the appropriate Commissions are expected to take decisions on the merits of each case including the claims of the Project Developers for compensation on account of imported coal. Such decisions were required to be taken after consultation with the stakeholders.

129. The Government of India through MoP, in its Press Note dated 21st June 2013, published the decision of the CCEA which clearly provided that the higher cost of imported coal was to be considered for pass-through as per the modalities suggested by CERC.

130. The MoP, thereafter, addressed a communication dated 31st July 2013 to the Secretary, CERC specifically pointing out the decision of the CCEA to the effect that the higher cost of imported coal was to be considered for pass-through as per the modalities suggested by CERC. The communication states that, as per the decision of the Government, the higher cost of import/market based e-auction coal will have to be considered for being made a pass-through on a case to case basis by CERC/SERC to the extent of shortfall in the quantity indicated in the LoA/FSA.

131. The Tariff Policy dated 28th January 2016 issued by the MoP in paragraph 6.1 also specifically notes this position and states that, in case of reduced quantity of domestic coal

supplied by CIL vis-à-vis the assured quantity or quantity indicated in LoA/FSA, the cost of imported/market based e-auction coal procured for making up the shortfall shall be considered for being made a pass-through by the Appropriate Commission.

132. Undisputedly, in the case of ***Energy Watchdog*** (supra) as well as in ***Adani Rajasthan case*** (supra) this Court has held that on account of the Change in Law, the generating companies were entitled to compensation so as to restore the party to the same economic position as if such Change in Law had not occurred. Had the Change in Law not occurred, the generating companies would have been entitled to the supply as assured by the CIL/Coal Companies under the FSA.

133. It is contended by the DISCOMS that in the case of ***Energy Watchdog*** (supra), this Court has specifically held that the doctrine of *force majeure* was not applicable if there was an unexpected rise in the price of coal and, as such, it will not absolve the generating companies from performing their part of

the contract. It is submitted that when the bidders submitted their bids, this was a risk they knowingly took. We find the said submission to be without substance. The generators are not claiming compensation on the basis of rise in price of coal or on the ground of *force majeure.* Their claims, in fact, are on the basis of the Change in Law, which this Court, in the case of ***Energy Watchdog*** (supra) as well as in ***Adani Rajasthan case*** (supra), has upheld on the ground of Change in Law.

134. The contention of the DISCOMS that the ***Adani Rajasthan case*** (supra) is not applicable to the facts of the present case inasmuch as in ***Adani Rajasthan case*** (supra), the State of Rajasthan had assured 100% coal supply and that it was not a case of FSA, is, in our considered view, without substance. In the present case also, the NCDP 2007 had assured 100% fuel/coal supply of the normative value.

135. The restitutionary principle has been stated by this Court in the case of ***Uttar Haryana Bijli Vitran Nigam Limited (UHBVNL)*** (supra) thus:

> "**10.** Article 13.2 is an in-built restitutionary principle which compensates the party affected by such change in law and which must restore, through monthly tariff payments, the affected party to the same economic position as if such change in law has not occurred. This would mean that by this clause a fiction is created, and the party has to be put in the same economic position as if such change in law has not occurred i.e. the party must be given the benefit of restitution as understood in civil law. ....."

136. Undisputedly, the claim of APML stands on the basis of the Change in Law. The DISCOMS, which are instrumentalities of the State, cannot be expected to argue contrary to the stand of the Government, which clearly provides that the generators would be entitled to pass-through for the coal required to be imported or purchased from the open market on the ground of Change in Law.

137. Shri M.G. Ramachandran, learned Senior Counsel has also made a submission that though the Change in Law event is dated 31st July 2013, the learned APTEL has erred in giving

effect to the same from 1st April 2013. In this respect, it is to be noted that the Change in Law has been made applicable to the remaining four years of the 12th Plan for power plants. The MERC, in the case of APML, as well as the CERC, in the case of GMR, has given effect to the Change in Law for the last four financial years beginning from the Financial Year 2013-2014. The financial year begins from 1st of April of every year. Apart from that, from the perusal of the orders passed by the learned APTEL in both the matters, it is clear that no such challenge was made before the learned APTEL, and, even in the present appeals, there is ground to this effect in the Memo of Appeals. Only oral submissions have been sought to be made in that regard.

138. In view of the concurrent orders of the authorities with regard to the date on which the Change in Law compensation is to be given, we see no reason to entertain such a plea, which does not have a foundation in the pleadings.

139. Another contention raised on behalf of the DISCOMS is that if the generators are permitted to claim compensation on the basis of actual SHR or the SHR as per the Regulations, whichever is lower, it will permit them to take advantage of their inefficiency. It is submitted that lesser the SHR, greater the efficiency of the machine and, therefore, higher the generation of electricity. Per contra, when the machine is inefficient, the SHR is higher and the electricity generation is lower. The SHR is not only dependent on the efficiency of the machine but on various other factors. One of the other factors is the PLF. In this respect, it will be relevant to refer to the statutory advice issued by the CERC on 20th May 2013, the relevant part of which has already been reproduced hereinabove. It clearly states that for want of adequate coal supply by CIL/Coal Companies, the PLF of the generating stations across the country has been severely affected. As such, the contention in that regard, in our considered view, is without substance.

140. Apart from that, it appears that various DISCOMS are taking self-contradictory stands. In Petition No. 97 of 2017 between ***M/s Adani Power Limited v. Uttar Haryana Bijli Vitran Nigam Ltd. & Anr.***, the DISCOMS have filed an affidavit stating thus:

> "a. While deciding the relief on account of Change in Law under Article 13 of the PPA may be pleased to consider improved efficiency parameters in line with CERC Tariff Regulations such that the impact on consumers of the Respondents in minimal in nature.
>
> b. Any relief (if granted), may be passed after considering the following significant observations:
>
> (i) The actual impact of the said period should be calculated on the basis of various factors namely the quantum of requirement on normative procedures such as the following:
>
> ***i. Station Heat Rate shall be considered after ascertaining actual design heat rate and margin as per CERC regulations from time to time.***

ii. Similarly, Auxiliary Consumption shall be considered as per CERC regulations.

iii. GCV of alternate coal shall be as certified by Third Party Sampling Agency for which the Hon'ble Commission should provide appropriate the guideline.

iv. The targeted PLF;

v. The accurate date of actual coal utilized by the Petitioner on a monthly and yearly basis;

vi. The quantity of coal offered by the MCL which was rejected or not taken by the Petitioner;

vii. The quantum of actual of electricity generated by the Petitioner

Thus, it is submitted that the Petitioner's claim for relief in this regard requires to be computed in a categorical and systematic manner taking the above parameters into consideration. The Petitioner's computation as stated in its petition is therefore liable to be rejected as it is general and vague in nature.

(ii) Further, the Petitioner has indicated the impact limited to the past period

> only. However, the Respondents humbly request the Hon'ble Commission to only approve such claims for the past period, after considering the above along with a formula for the future period."
>
> *[emphasis supplied]*

141. It can thus be seen that the DISCOM-UHBVNL has itself stated that improved efficiency parameters in line with CERC Tariff Regulations should be considered for deciding the relief on account of Change in Law, such that the impact on consumers of the respondents is minimal in nature. It has also requested for any relief, if granted, to take into consideration the SHR after ascertaining actual design heat rate and margin as per CERC regulations from time to time. Similarly, it has also requested that Auxiliary Consumption be considered as per the CERC Regulations. Insofar as the GCV of alternate coal is concerned, it has further stated that it has to be certified by Third Party Sampling Agency.

142. It is not in dispute that the SHR is required to be audited continuously and the GCV has to be certified by a Third Party Sampling Agency.

143. It is further pertinent to note that the MERC itself in its order dated 7th March 2018 in Case No.123 of 2017 (***JSW v. MSEDCL***), has taken a totally contradictory stand. It will be relevant to refer to paragraph 19.11 of the said order dated 7th March 2013, which reads thus:

> "19.11 In view of the above, financial impact of Change in Law on the auxiliary consumption to restore the generator to the same economic position as if such Change in Law has not occurred is allowed. ***The Change in Law shall be applicable on auxiliary consumption of the Unit as per the Norms laid down by the Commission or actual, whichever is less since the tariff of the project is based on Competitive Bidding the auxiliary power consumption considered is not known. However this auxiliary consumption should be at a normative value corresponding***

> ***to Scheduled generation only. Moreover, this Change in Law with respect to auxiliary consumption shall not include power consumption for staff colonies of the generating station***."
>
> *[emphasis supplied]*

144. It is, thus, difficult to appreciate as to how the MERC, in one case, has taken a view that Change in Law on the Auxiliary Consumption has to be as per the Norms laid down by the Commission or actual, whichever is less, when it has rejected the same in the case of APML in the order dated 7th March 2018[11].

145. We may gainfully refer to the stand taken by the Union of India in the case of ***Energy Watchdog*** (supra), which reads thus:

> "**15.** The learned Attorney General appearing on behalf of the Union of India, submitted before us that he was not interested in the ultimate outcome of the

11 **Passed in Case Nos. 189 of 2013 and 140 of 2014**

appeals before us. ***He was only appearing in order to apprise us that the electricity sector, having been privatised, has largely fulfilled the object sought to be achieved by the 2003 Act, which is that electricity generation, being delicensed, should result in production of far greater electricity than was earlier produced. He urged us not to disturb the delicate balance sought to be achieved by the Act i.e. that 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.*** This must be consistent with competitiveness among them, which then translates itself into reasonable tariffs that are payable by consumers of electricity. For this purpose, he relied strongly upon Section 3 of the Electricity Act, which states that the Central Government, shall from time to time, prepare a National Electricity Policy and a tariff policy in consultation with the State Governments, and the authority for development of the power system, based on optimal utilisation of natural resources. ***According to him, the National Electricity Policy and Tariff Policy that are issued from time***

to time, being statutory in nature, are binding on all concerned. This is, in fact, further recognised by Section 61(*i*) by which the appropriate Commission, in specifying terms and conditions for determination of tariffs, shall be guided by the National Electricity Policy and Tariff Policy. ***The Central Government's role can further be seen even in Section 63, where guidelines that are binding on all are issued by the Central Government in cases where there is a transparent process of bidding.***

16. Further, according to the learned Attorney General, Section 79(4) also points in the same direction, stating that, in discharge of its functions, the Central Commission shall be guided by the National Electricity Policy, National Electricity Plan, and tariff policy published under Section 3. ***He also referred us to the Cabinet Committee for Economic Affairs recognising the overall shortfall in manufacture of domestic coal and the new coal distribution policy issued in July 2013 pursuant to the Cabinet Committee which, according to him, are in the nature of binding directions making it clear that as generators of electricity, who depend upon***

> ***indigenous coal, have been given less coal than was anticipated, should be allowed either to import the coal themselves, or purchase imported coal from Coal India Ltd., with the difference in price being passed through to them.*** He further referred to and relied upon the revised tariff policy of 28-1-2016 for the same purpose."
>
> *[emphasis supplied]*

146. The submissions made by the learned Attorney General have to be construed in reference to the purpose for which the Electricity Act came to be enacted. Prior to the Electricity Act coming into effect, matters with regard to generation, transmission, distribution and supply of electricity were governed by three enactments, viz., the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commission Act, 1998. The Electricity (Supply) Act, 1948 mandated the creation of a State Electricity Board. However, it was found that over a period of time, the performance of the said Electricity Boards had deteriorated on account of various factors. As such, it was found necessary to

enact a new legislation to meet various challenges. The statement of objects and reasons would reveal that one of the main features for enactment of the Electricity Act was delicensing of generation and freely permitting captive generation. As such, the learned Attorney General, in the case of ***Energy Watchdog*** (supra), stated that the electricity sector, having been privatized, had largely fulfilled the object sought to be achieved by the Electricity Act. After the enactment of the Electricity Act, 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 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.

147. It is further to be noted that, though it was sought to be contended in the case of ***Energy Watchdog*** (supra) that in a

case under Section 63 of the Electricity Act, the Commission was only to adopt a tariff as determined through a transparent process of bidding, this Court rejected the said contention. It held that, in fact, Sections 62 and 63 of the Electricity Act deal with 'determination' of tariff, which is part of 'regulating' tariff. It further held in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions.

148. It would be relevant to refer to clause 4.7 of the guidelines issued by the Union of India, which have been held to be binding in the case of ***Energy Watchdog*** (supra), which reads thus:

> "Clause 4.7. (amended)
>
> Any change in law impacting cost or revenue from the business of selling electricity to the procurer with respect to the law applicable on the date which is 7 days before the last date for RFP bid submission shall be adjusted separately. In case of any dispute regarding the impact of

any change in law, the decision of the appropriate Commission shall apply."

149. The judgment of this Court in the case of ***Energy Watchdog*** (supra) has been approved by a three Judge Bench of this Court in ***Adani Rajasthan case*** (supra).

150. In spite of this legal position and the stand taken by the Union of India, the DISCOMS are taking a stand which is contrary to the stand of the Union of India. In ***Energy Watchdog*** (supra), it was also sought to be urged by DISCOMS that even on account of Change in Law, adjustments would not be permissible, which contention was outrightly rejected. We have come across a number of matters wherein concurrent orders passed by the Regulatory Body and the Appellate Forum are assailed. Such a litigation would, in fact, efface the purpose of the Electricity Act. As already discussed herein above, one of the major reasons for the enactment of the Electricity Act was the deterioration in performance of the State Electricity Boards.

151. In that view of the matter, we find that the stand taken by the DISCOMS that, since the loss being sustained by the generating companies is on account of non-fulfillment of obligation by CIL/Coal Companies, they should be relegated to the remedy available to them in law against the CIL/Coal Companies, is totally unreasonable. The claim is based on change of NCDP 2007 by NCDP 2013, which, undisputedly, is covered by the term 'Change in Law'.

152. Recently, this Court, in the case of ***Central Warehousing Corporation v. Adani Ports Special Economic Zone Limited (APSEZL) and others***[12], has deprecated the practice of different instrumentalities of the State taking contradictory/different positions/stands on the same issue.

153. In the present case, the learned APTEL has also held that SHR and GCV has to be taken into consideration as per the 'actual' or the Tariff Regulations, whichever is lower and as

12 **2022 SCC OnLine SC 1398**

such, balanced the interests of generators as well as consumers.

154. That leaves us to deal with the additional point raised in the case of GMR (i.e. Civil Appeal No.6927 of 2021).

155. The CERC, apart from its finding on SHR and GCV, has also directed late payment surcharge to be paid. The same has been affirmed by the learned APTEL. The CERC as well as the learned APTEL, on the interpretation of Articles 8.3.5 and 8.8.3 of the PPA, have concurrently found that the procurer had delayed the payment by not making the payment within the due date and, as such, GMR was entitled to late payment surcharge. We find no reason to interfere with the said concurrent findings of fact.

156. We, therefore, find no merit in the appeals. The appeals are dismissed. There shall be no order as to costs. Pending application, if any, shall stand disposed of.

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

.....J.
[VIKRAM NATH]

NEW DELHI;
MARCH 03, 2023