

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI**

(APPELLATE JURISDICTION)

**APPEAL NO. 118 OF 2021
AND
APPEAL NO. 40 OF 2022**

Dated: 22nd March 2022

**Present: Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

APPEAL NO. 118 OF 2021

In the matter of:

RATTAN INDIA POWER LIMITED

[Through Its Authorized Signatory]

A-49, Ground Floor, Road No. 4,
Mahipalpur,
New Delhi – 110 037

... Appellant(s)

VERSUS

**1. MAHARASHTRA ELECTRICITY REGULATORY
COMMISSION**

[Through its Secretary]

World Trade Centre, Centre No.1, 13th Floor,
Cuffe Parade, Colaba,
Mumbai – 400 005

**2. MAHARASHTRA STATE ELECTRICITY DISTRIBUTION
COMPANY LTD.**

[Through its Chairman and Managing Director]

4th Floor, Prakashgadh,
Plot No. G-9, Anant Kanekar Marg,
Bandra (East)
Mumbai – 400 051

... Respondents

Counsel for the Appellant (s): Mr. Vishrov Kukherjee
Mr. Girik Bhalla
Ms. Priyanka Vyas

Counsel for the Respondent (s): Mr. K. Parameshwar
Mr. Anup Jain
Mr. Akshay Goel for R-2

APPEAL NO. 40 OF 2022

In the matter of:

ADANI POWER MAHARASHTRA LTD.

[Through Its Authorized Signatory]

Adani Corporate House,
Shantigram, Near Vaishnodevi Circle,
SG Highway,
Ahmedabad – 382 421

Email: tanmay.vyas@adani.com

... Appellant(s)

VERSUS

3. MAHARASHTRA ELECTRICITY REGULATORY COMMISSION

[Through its Secretary]

World Trade Centre, Centre No.1,
13th Floor, Cuffe Parade, Colaba,
Mumbai – 400 005

Email: secretary@merc.gov.in

4. MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LTD.

[Through its Chairman and Managing Director]

4th Floor, Prakashgad, h,
Plot No. G-9, Anant Kanekar Marg,
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Mumbai – 400 051

Email: cepp@mahadiscom.in

... Respondents

Counsel for the Appellant (s): Mr. Sanjay Sen, Sr. Adv.
Mr. Amit Kapur
Ms. Poonam Verma
Mr. Saunak Rajguru
Mr. Ankitesh Ojha
Ms. Mandakini Ghosh

Counsel for the Respondent (s): Mr. Sai Kumar
Mr. Rahul Sinha
Mr. Samir Malik
Ms. Nikita Choukse for R-2

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

1. These matters were taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.

2. The two captioned appeals have challenged two different orders of the respondent *Maharashtra Electricity Regulatory Commission* (hereinafter referred to as 'MERC' or 'State Commission') giving rise to a common question of law for consideration by this tribunal viz. as to whether the levy of "*Evacuation Facility Charges*" (for short, "EFC") imposed by *Coal India Limited* ("Coal India") by its Circular dated 19.12.2017 constitutes an event of "*Change in Law*" so as to give rise to a valid claim for compensation in favour of the generator of electricity under the relevant clauses of *Power Purchase Agreement* ("PPA") executed by it and the procurer of electricity (distribution licensee).

3. By Order dated 01.09.2019 in Case no. 227 of 2018 instituted by appellant *Rattan India Limited* (for short, "Rattan India") the claim in above nature was rejected by MERC. *Adani Power Maharashtra Ltd.* (for short, "APML"), the appellant in the other appeal, had also raised similar claim in Case no. 124 of 2018 which had been declined by earlier Order dated 03.08.2018. The two generators, Rattan India and APML, have come up by these appeals contending that the Commission has fallen in error by holding that levy of EFC imposed by Coal India is not a change in law event since all notifications and circulars of Coal India cannot be so included under the relevant clause of PPA, it not having been issued in exercise of any power under any Act, Ordinance, Regulations or Code, the levy being imposed on

commercial considerations and not by way of introduction of any tax. It is the contention of the appellants that the levy of EFC has led to incremental expenditure, the denial of compensation thereagainst being violative of Sections 61 and 86 of the Electricity Act, 2003 and contrary to the settled law on the subject, reference being made to rulings of Hon'ble Supreme Court in *Energy Watchdog & Ors vs. CERC & Ors.* (2017) 14 SCC 80 and *Uttar Haryana Bijli Vitran Nigam Ltd vs. CERC & Anr.* (2019) 5 SCC 325; besides a series of judgments of this tribunal including judgment in *Sasan Power Limited & Anr. vs. CERC & Ors.* 2017 ELR (APTEL) 0508; judgment dated 21.12.2018 in *GMR Kamalanga Energy Ltd vs. CERC & Ors.* 2018 SCC OnLine APTEL 151; and *Jaipur Vidyut Vitran Nigam Limited vs. RERC & Ors.* in Appeal Nos. 202 of 2018 and 305 of 2018 2019 SCC OnLine APTEL 98. Reliance is also placed on the orders of *Central Electricity Regulatory Commission* ("CERC") wherein Coal India Notification levying EFC has been held to be a change in law event viz. Order dated 02.04.2019 in *GMR Kamalanga Energy vs DHBVNL & Ors* (Petition no. 72/MP/2018); Order dated 19.08.2019 in *Adhunik Poer and Natural Resources Limited vs. TANGEDCO* (Petition no. 17/MP/2019); Order dated 03.12.2019 in *DB Power Limited vs. PTC India Limited* (Petition no. 213/MP/2018); and Order dated 12.06.2019 in *TRN Energy vs. Paschimanchal Vidyut Vitran Nigam Ltd.* (Petition no. 118/MP/2018).

4. The relevant clauses in the PPA governing the relationship of the parties are identical in each case and may be quoted as under:

“1.1 Definitions

...

“Change in Law” shall have the meaning ascribed thereto in Article 13.1.1 of this Agreement...

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

...ARTICLE 13: CHANGE IN LAW

13.1. Definitions

In this Article 13, the following terms shall have the following meanings:

13.1.1 “Change in Law” means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:

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

(ii) A change in interpretation of any law by a competent court of law, tribunal, or Indian Governmental Instrumentality provided such court of law, tribunal, or Indian Governmental Instrumentality is final authority under law for such interpretation.

But shall not include (i) any change in withholding tax on income or dividends distributed to the shareholder of the seller, or (ii) change in respect of UI charges or frequency interval by an Appropriate Commission.

13.1.2 “Competent Court” means:

The Supreme Court or any High Court, or any tribunal or any similar judicial or quasi-judicial body in India that has jurisdiction to adjudicate upon issues relating to the Project....

13.2 Application and Principles for computing impact of Change in Law:

While determining the consequences of Change in Law under this Article 13, the Parties shall have due regard to the principle that the purpose of compensating the party affected by such Change in Law, is to restore through Monthly Tariffs payments, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such Change in Law has not occurred.

...b) Operation Period:

As a result of Change in Law, the compensation shall be payable for any increase/ decrease in revenues or cost to the seller shall be determined by the Maharashtra State Electricity Regulatory Commission whose decision shall be final and binding on both the parties, subject to the rights of appeal provided under applicable law and effective from date specified in 13.4.1.

Provided that the above mentioned compensation shall be payable only if and for increase/ decrease in revenues or cost to the Seller is in excess of an amount equivalent to 1 % of the Letter of Credit in aggregate for a Contract Year.

13.3 Notification for Change in law:

13.3.1 If the seller is affected by a Change in Law in accordance with Article 13.2 and wishes to claim a Change in Law under this Article, it shall give notice to the Procurer of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.

13.3.2 Notwithstanding Article 13.3.1, the seller shall be obliged to serve a notice to the procurer under this Article

13.3.2 if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurer contained herein shall be material. Provided that in case the Seller has not provided such notice, the Procurer shall have the right to issue such notice to the Seller.

13.3.3 Any notice served pursuant to this Article 13.3.2 shall provide, amongst other things, precise details of:

(a) the Change in Law; and

(b) the effects on the Seller of the matters referred to in Article 13.2.

13.4 Tariff Adjustment Payment on account of Change in Law

13.4.1 Subject to Article 13.2, the adjustment in Monthly Tariff Payment shall be effective from:

- (i) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or*
- (ii) the date of order/judgment of the Competent Court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law.*

13.4.2 The payment for Changes in Law shall be through Supplementary Bill as mentioned in Article 11.8. However, in case of any change in Tariff by reason of Change in Law, as determined in accordance with this Agreement. The Monthly Invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed Tariff.”

(Emphasis supplied)

5. The prime contention of the respondent distribution licensee (MSEDCL), in defense of the impugned decisions is that the “Change” to qualify as “Change in Law” must primarily and necessarily have to be qualified and classified as “Law” in accordance with and under the specific scope and ambit of term “Law” as defined in Clause 1.1 of the PPA. It is the argument that the term includes only such promulgations as have a “Force of Law”.

6. The respondent refers to Section 2(46) of the Electricity Act, 2003 which defines the expression “notification” to mean a notification published in the Official Gazette. It argues that the PPAs entered between the respondent MSEDCL and the appellants have been executed and approved

under Section 63 and, therefore, a word not defined in the PPA (which includes the expression “notification”) will have to be understood in the same sense as provided under the Electricity Act. It submits that on a plain reading of the relevant clause on change in law as set out in the PPA, it is clear that a price notification of the kind issued by Coal India is not a “notification” issued pursuant to or under any law and nor can it be described as an “interpretation of law”. Reliance is placed on *Eera Vs. State (NCT of Delhi (2017) 15 SCC 133*; *Central Bank of India Vs. State of Kerala (2009) 4 SCC 94*; and *Bank of India Vs. K. Mohandas (2009) 5 SCC 313*, to argue that for true construction of the contractual clauses, only the plain and reasonable meaning emanating therefrom has to be adopted particularly when there is no ambiguity in contractual terms.

7. It is also the argument of the respondent distribution licensee that under the respective *Fuel Supply Agreement (FSA)*, the delivery price of coal is described as the sum of basic price, statutory charges and other charges as applicable at the time of delivery of coal. In terms of the relevant provisions in the FSA, other charges are also levied and include rapid loading charges and “any other charges” as notified by Coal India from time to time. It is submitted that the EFC which is the bone of contention in the present cases falls under the category of “other charges” imposed by Coal India on commercial basis and, thus, forming part of the base/basic price. The learned counsel argued that since delivery price of coal includes the basic

price as well as statutory or other charges, the same has always been known to the appellants to be anticipated in future “from time to time” and consequently the same are not envisaged to be covered as “change in law event” under the PPA.

8. In our considered opinion, the view taken by the respondent Commission on, and the opposition by the respondent distribution licensee to, the claim for compensation on account of levy of EFC as change in law event brought in by Coal India is unfair and unjust. It is well settled that Coal India manages coal mines in India in terms of Coal Mines (Nationalization) Act, 1973, it having been conferred with the statutory power to determine the prices of coal. Reference is rightly made in this context to Colliery Control Order 2000, Colliery Rules 2004 and decision of Hon’ble Supreme Court reported as *Ashok Smokeless Coal India (P) Ltd v Union of India (2007) 2 SCC 640*. By virtue of its position, Coal India enjoys monopoly over coal, it thus rightly having been referred to as an *alter ego* of the State.

9. It is incorrect to argue that to be covered as a change in law event under such contractual clauses as quoted earlier, the instrument whereby the law is claimed to have undergone a change must have been published in official gazette to have the force of law. In *Energy Watchdog & Ors.* (supra), for illustration, even a letter of the Ministry of Power in the Government of India was accepted as an instrument having the “force of

law". Similarly, in *Kusum Ingots & Alloys v. Union of India* (2004) 6 SCC 254 executive instructions without any statutory backing were also considered as "law". That Coal India is Government instrumentality and the notifications, circulars, etc. issued by it have a force of law under Regulation 77(3) of the Constitution of India was accepted by this tribunal in *GMR Kamalanga Energy Ltd.* (supra).

10. As observed earlier, the publication of notification or circular in gazette cannot be invariably a pre-requisite for an instrument to have a force of law. The trappings of law do not come by virtue of publication which facilitates only dissemination of knowledge of law, statutes, etc. [*Harla vs. The State of Rajasthan* (AIR 1951 SC 467)].

11. It is not correct to argue that EFC is a part of escalation index for coal notified by CERC. This has been so held even by CERC, which oversees the periodical review of escalation index, in its order reported as *GMR Kamalanga Energy Limited v. Dakshin Haryana Bijli Vitran Nigam Limited*, 2019 SCC OnLine CERC 211. In competitive bidding guidelines for purchase governed by Section 63 of the Electricity Act, 2003, the bidder only assumes the price of coal to the extent of its mitigation by escalation index. CERC having accepted that EFC is not part of escalation index has been consistently holding Coal India notification in question to be a change in law

event [*Adhunik Power and Natural Resources Limited v. West Bengal State Electricity Distribution Company Limited* (2021 SCC OnLine CERC 27)].

12. We do not have the least doubt that the Coal India circular on EFC fulfills all the requisite characteristics of “law” and, therefore, does have the “force of law” so as to be accepted as change in law event giving rise to a legitimate claim for compensation in favor of the appellants. The notification admittedly applies *in rem*, there being no element of mutuality. The price notification is issued by Coal India which is not a party to the PPA. It is a statutory levy. It binds the conduct of the parties nonetheless since it has been issued in mandatory terms, the binding nature of the instrument itself being sufficient to add the element of “force of law”. [*Gulf Goans Hotels Co. Ltd v. Union of India* (2014) 10 SCC 673; *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi* (1975) 1 SCC 421 and *Bengal Nagpur Cotton Mill Ltd v. Board of Revenue* (1964) 4 SCR 190].

13. In our considered view, the subject at hand is fully covered by a previous decision of this tribunal in the case of *GMR Kamalanga Energy Ltd* (supra), the relevant observations wherein to the following effect need to be quoted here:

“26. In the present appeal, we are concerned with the notifications and circulars issued by Coal India Limited and Ministry of Railways which are nothing but Indian Governmental Instrumentalities. Whether such notifications/ circulars are covered under the scope of law...

27. Similar contentions were raised in Appeal No. 119 of 2016 and Appeal No. 277 of 2016. After referring to Articles 298 and 77 of the Constitution, this Tribunal rightly opined that Article 298 and 77 of the Constitution are complementary to each other as far as the scheme of carrying out the business/ commercial activity by Government of India/ State Government is concerned. The Corporations/ companies which carry out business falling under various Ministries and Department of both Government of India and State Government are the creations of Government of India or creations of Parliament and State Assembly by making enactments. Their formations have force of law. The PPA in this case also defines the Indian Government Instrumentalities which includes all departments, corporations / companies like Coal India Limited or Indian Railways formed under different Statutes. Over and above this, various stipulations envisaged under RFP and PPA have to be considered before arriving at any event as a change in law event.

28. We do not find any reason to differ from the above opinion so far as the opinion of the Tribunal in Adani's case (Appeal Nos. 119 and 277 of 2016).

29. Therefore, the contention of the Respondents 2 & 3 that Corporations cannot be considered as executive bodies or Governmental instrumentalities to issue instructions cannot be accepted."

(Emphasis supplied)

14. It is pertinent to note here that the appellant APML had also pressed before the Regulatory Commission the grant of relief in the nature of carrying cost based on the claim for compensation arising out of the levy of EFC which was disallowed primarily because the Commission was not agreeable to accept the notification on EFC as a change in law event. But in the case of similar claim for Change in Law compensation on account of introduction of GST Laws, which was allowed, the MERC pegged it to the rate for computing the interest on working capital considering the prevalent Multi

Year Tariff (“MYT”) Regulations (which govern Section 62 PPA) instead of granting carrying cost at the rate of Late Payment Surcharge (“LPS”) as provided in PPAs.

15. We propose to direct the Commission to determine the amounts payable by the respondent distribution licensee in favor of each of these appellants to compensate them for restoring through monthly tariff payments to the same economic position as if such change in law event had not occurred. It would be appropriate to also direct the Commission to revisit the prayer for carrying cost bearing in mind the well settled principles on the said subject [e.g. *Energy Watchdog (supra)*; *Uttar Haryana & Anr. (supra)*; and *Jaipur Vidyut Vitran Nigam Ltd. & Ors. vs. Adani Power Rajasthan Ltd & Anr. 2020 SCC Online SC 697*].

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

17. In *Uttar Haryana & Anr. (supra)*, it was held thus:

“13. ...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.”

(Emphasis Supplied)

18. In *SLS Power Limited vs. Andhra Pradesh Electricity Regulatory Commission* 2012 SCC Online APTEL 209, this tribunal by judgment dated 20.12.2012 held as under:

“35.5 The principle of carrying cost has been well established in the various judgments of the Tribunal. The carrying cost is the compensation for time value of money or the monies denied at the appropriate time and paid after a lapse of time...”

(Emphasis Supplied)

19. The impugned orders denying the reliefs in favour of the appellants herein are thus set aside. The cases of each appellant are remitted to the Regulatory Commission for consequential orders to be passed in light of observations/directions recorded above. Needless to add the Commission will be expected to pass fresh orders in the wake of above directions

expeditiously, preferably not later than within two months of the date of this judgment.

20. The appeals are disposed of in above terms.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERENCING ON THIS 22ND DAY OF MARCH, 2022.**

(Sandesh Kumar Sharma)
Technical Member

Vt

(Justice R.K. Gauba)
Officiating Chairperson