



नई दिल्ली  
NEW DELHI

याचिका संख्या./ Petition No. 176/MP/2019

कोरम/ Coram:

श्री जिष्णु बरुआ, अध्यक्ष/Shri Jishnu Barua, Chairperson  
श्री आई. एस. झा, सदस्य/ Shri I. S. Jha, Member  
श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member  
श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 01<sup>st</sup> of January, 2024

**IN THE MATTER OF:**

Petition under Section 79 of the Electricity Act, 2003 and Article 12 read with Article 16.3.1 of the Power Purchase Agreement dated 07.02.2018 between the Petitioner and NTPC Limited seeking relief on account of Change in Law event, viz., the imposition of Safeguard Duty by Notification No. 01/2018 Customs (SG) dated 30.07.2018 issued by the Department of Revenue, Ministry of Finance, Government of India.

**AND IN THE MATTER OF:**

**Solairepro Urja Private Limited**  
Office No. 203, Level-2, Pentagon-3,  
Magarpatta City, Hadapsar,  
Pune – 411 013

.....Petitioner

**VERSUS**

1. **NTPC Limited**  
NTPC Bhawan, SCOPE Complex,  
7 Institutional Area,  
Lodhi Road, New Delhi - 110003

2. **NTPC Vidyut Vyapar Nigam Limited**

NTPC Bhawan, Core 7, SCOPE Complex  
7 Institutional Area, Lodhi Road,  
New Delhi – 110 003

3. **Southern Power Distribution Company of Andhra Pradesh Ltd (APSPDCL)**  
#19-13-65/A  
Srinivasapuram Tiruchanoor Road  
Tirupati-517503  
Chittoor District, Andhra Pradesh
4. **Eastern Power Distribution Company of Andhra Pradesh Ltd (APEPDCL)**  
P&T Colony,  
Seethammadhra, Visakhapatnam  
Andhra Pradesh

**Parties Present:**

Shri Sanjay Sen, Sr. Advocate, SUPL  
Ms. Ruth Elwin, Advocate, SUPL  
Ms. Molshree Bhatnagar, Advocate, SUPL  
Shri Rishabh Sehgal, Advocate, SUPL  
Shri Sidhant Kumar, Advocate, AP Discoms  
Shri Shivankar Rao, Advocate, AP Discoms  
Shri Venkatesh, Advocate, NTPC  
Shri Nihal Bhardwaj, Advocate, NTPC  
Shri Aashwyn Singh, Advocate, NTPC  
Shri Siddharth Nigotia, Advocate, NTPC

**आदेश/ ORDER**

The Petitioner, Solairepro Urja Private Limited, is developing a 250 MW Solar Power Generating System in Kadapa Ultra Mega Solar Park based on the photo voltaic technology in the State of Andhra Pradesh. The Petitioner is seeking relief on account of a Change in Law event, viz., the imposition of Safeguard Duty by Notification No. 01/2018 Customs (SG) dated 30.07.2018 (*2018 SGD Notification*) issued by the Department of Revenue, Ministry of Finance, Government of India.

2. Respondent No.1, NTPC Ltd. (NTPC), was appointed as the nodal agency for facilitating the purchase and sale of solar power under the Government of India's National Solar Mission, Phase II, Batch II, Tranche I Bidding Guidelines
3. Respondent No.2, NTPC Vidyut Vyapar Nigam Limited (NVTN), is a wholly-owned subsidiary of NTPC and an inter-state trading licensee. As per the NSM Guidelines and the

Power Purchase Agreement, NTPC purchases solar power from the Petitioner through NVVN and, after bundling with thermal power generated at NTPC's generating stations in the manner allocated by the Ministry of Power, the Government of India, sells the same to various distribution licensees located in various States in India.

4. Respondent No. 3, Southern Power Distribution Company of A.P. Limited (APSPDCL) and Respondent No. 4, Eastern Power Distribution Company of AP Limited (APEPDCL), are the distribution companies of Andhra Pradesh.
5. The Petitioner had filed the petition on 01.07.2019 under Section 79 of the Electricity Act, 2003 and Article 12 read with Article 16.3.1 of the Power Purchase Agreement (PPA) dated 07.02.2018 seeking relief on account of Change in Law event, viz., the imposition of Safeguard Duty by 2018 SGD Notification issued by the Department of Revenue, Ministry of Finance, Government of India.
6. The Commission after perusing the submissions of the parties, disposed of the petition vide order dated 05.02.2020 (*Impugned order*). While the claims of the Petitioner for declaration of 2018 SGD Notification as a change in law event was allowed, the claims for carrying cost were disallowed. It was held as under:

*5. The Petitioner has filed the petition under Section 79 of the Electricity Act, 2003 and Article 12 read with Article 16.3.1 of the Power Purchase Agreement (hereinafter referred to as 'PPA') dated 07.02.2018 seeking relief on account of 'Change in Law' event, viz., the imposition of Safeguard Duty by Notification No. 01/2018 Customs (SG) dated 30.07.2018 issued by the Department of Revenue, Ministry of Finance, Government of India. The Petitioner has made the following prayers:*

- a) Declare that the issuance of Notification No. 01/2018-Customs (SG) dated 30.07.2018 by the Department of Revenue, Ministry of Finance, Government of India is a Change in Law under Article 12 of the Power Purchase Agreement executed between the Petitioner and NTPC Limited;*
- b) Direct the Respondent to pay a lump sum compensation of Rs. 154,67,13,701/- (Rupees One Hundred and Fifty Four Crore Sixty Seven Lacs Thirteen Thousand Seven Hundred and One Only) as relief for the Change in Law effected by notification no. 01/2018-Customs (SG) dated 30.07.2018 by the Department of Revenue, Ministry of Finance, Government of India as elaborated in the instant Petition, along with carrying costs and income tax implications, if any, at actuals, as elaborated in detail in the instant Petition;*
- c) Direct the Respondent to additionally compensate the Petitioner for the Goods & Services Tax in the amount of Rs. 7,73,35,685/- (Rupees Seven Crore Seventy Three Lacs Thirty Five Thousand Six Hundred and Eighty Five Only) levied on the Safeguard Duty paid by the Petitioner, as relief under Article 12 of the PPA;*
- d) Direct the Respondent to reimburse the legal and administrative costs incurred by the Petitioner in pursuing the instant Petition; and*

e) Pass such other orders that this Commission deems fit in the interest of justice.

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35. From the submissions of the parties, the following issues arise before this Commission:

*Issue No. 1: Whether the issuance of Notification No. 01/2018-Customs (SG) dated 30.07.2018 by the Department of Revenue, Ministry of Finance, Government of India is a Change in Law under Article 12 of the Power Purchase Agreement executed between the Petitioner and NTPC Limited? And Whether the Respondent should be directed to pay compensation as relief for the Change in Law effected 'Safeguard Duty Notification'?*

*Issue No. 2: Whether the Respondent should be directed to additionally compensate the Petitioner on account of the Goods & Services Tax levied on the Safeguard Duty paid by the Petitioner, as relief under Article 12 of the Power Purchase Agreement? AND*

*Issue No. 3: Whether the Petitioner may be restored to the same economic condition prior to occurrence of the Change in Law And Whether the claim of Petitioners regarding 'Carrying Cost' by the Respondents is sustainable?*

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65. Our decisions in this Order are summed up as under:

a. Issue No. 1 and Issue No. 2: The imposition of the 'Safeguard Duty' vide Notification No. 1/2018 (SG) dated 30.07.2018 is squarely covered as the event classified as 'Change in Law' under Article 17 of the PPAs. The IGST on Safeguard duty amount is allowed as discussed in para 49. The Commission directs the Petitioner to make available to the Respondents all relevant documents exhibiting clear and one to one correlation between the projects and the supply of imported goods, duly supported by relevant invoices and Auditor's Certificate as discussed in para 50 above. The Respondent NTPC is liable to pay to the Petitioner and it is not conditional upon the payment to be made by the Respondent Discoms to Respondent NTPC. However, the Respondent NTPC is eligible to claim the same from the Respondent Discoms on 'back to back' basis as discussed in para 57 above. The claim based on discussions in para 50 above of this Order shall be paid within sixty days of the date of this Order or from the date of submission of claims by the Petitioner whichever is later failing which it will attract late payment surcharge as provided under PPAs/PSAs. Alternatively, the Petitioner and the Respondents may mutually agree to a mechanism for payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs.

b. Issue No. 3: The claim regarding restoration to same economic condition prior to occurrence of change in law and separate 'Carrying Cost' is not admissible.

7. APSPDCL, being aggrieved by the impugned order dated 05.02.2020, filed a writ of certiorari (W.P. No. 5212 of 2020) before the Hon'ble Andhra Pradesh High Court (Hon'ble AP High Court) to quash the impugned order as illegal, arbitrary, discriminating and without jurisdiction and contrary to the provisions of the Electricity Act and agreement entered into by the parties. APSPDCL submitted that on receiving the notice, APSPDCL and APEPDCL

filed vakalatnama on 09.10.2019 and thereafter another notice was received by them on 23.11.2019 for the filing of their response on or before 25.11.2019. However, due to the communication gap between them and their Advocate and due to paucity of time they could not file counter. Meanwhile, the matter was reserved, and the impugned order was passed on 05.02.2020.

8. Hon'ble AP High Court qua its order dated 06.01.2023 (Remand Order) in W.P. No. 5212 of 2020 in the matter of *Southern Power Distribution Company of Andhra Pradesh Ltd. Vs. CERC & Ors.* held that the *impugned order is set aside* and remanded the matter back to this Commission with the directions to *hear all the parties and consider their submissions and pass an appropriate order afresh.* It was held as under:

*“30. The above contentions raised by the petitioners involve certain factual and technical aspects besides legal issues. Be that as it may, a perusal of the impugned order in the light of above respective arguments shows that the order contain certain findings which effect the petitioners herein as well. The CERC, has held that PPA and PSA are inter-connected and inextricable link to each other and as such there is a privity between the claim petitioners and respondents i.e., DISCOMs before it. It ultimately held the NTPC is liable to pay the petitioner and is eligible to claim the same from the DISCOMs on back to back basis. Needless to say the petitioners are vehemently opposing the aforesaid findings. Be that as it may, the impugned order though a vivid and detailed one, however is an ex parte order so far as the writ petitioners are concerned who are the respondents 3 and 4 in the petition No.176/MP/2019. In Prakash Chander Manchanda v. Janki Manchanda Hon'ble Apex Court held that if on a date fixed in a suit or proceedings, one of the parties remain absent and for that party no evidence has been examined up to that date, the Court has no option but to dispose of the matter in accordance with Order XVII Rule 2 CPC, in any one of the modes prescribed under Order IX of the CPC. In the instant case the petitioners submission is that on receiving the notice, the petitioners' counsel filed vakalath on 09.10.2019 and thereafter another notice was received on 23.11.2019 for the filing of their response on or before 25.11.2019 but due to the communication gap between the petitioners and their Advocate and due to paucity of time they could not file counter and in the meanwhile the matter was reserved and impugned order was passed. **Having regard to the fact that crucial issues are involved in the matter and depending upon the result, the petitioners may have to pay heavy amount, learned CERC, in my view, ought to have afforded further reasonable time to the petitioners to submit their counter and to address arguments. Unfortunately, that was not done and the impugned order is silent as to the reason for not according further time.** In a matter of this nature which involves crucial factual and technical aspects, the principle in Executive Engineer v. Seetaram Rice Mill's case (supra 8) suggests that **matter needs to be remitted to concerned authority for consideration on merits.***

*31. **In the result, without expressing any opinion on the merits of the respective contentions of the parties, this Writ Petition is allowed and the impugned order dated 05.02.2020 in petition No.176/MP/2019 passed by the 1st respondent is hereby set aside and matter is remitted back with a direction to the 1st respondent to afford***

**sufficient opportunity to the petitioners herein to file their counters and hear all the parties and consider their submissions and pass an appropriate order afresh in accordance with governing law and rules without being influenced by its earlier findings in the impugned order. No costs.**

9. Pursuant to the directions of the Hon'ble AP High Court, hearings were conducted on 16.02.2023, 11.04.2023, 25.05.2023 and 30.05.2023. The Commission after hearing the submissions of the parties, reserved the matter for order.

**Hearing dated 25.05.2023:**

10. During the course of the hearing, learned senior counsel for the Petitioner made detailed submissions in the matter.

*Learned senior counsel inter-alia submitted the following:*

*(a) The matter has been re-listed in terms of the order of Hon'ble High Court of Andhra Pradesh dated 6.1.2023 in WP No. 5212 of 2020 wherein the Hon'ble High Court set-aside the Commission's order dated 5.2.2020 and remitted the matter back with a direction to the Commission to afford another opportunity to AP Discoms to file their response/counter and to pass the order afresh after hearing all the parties and considering their submissions and without being influenced by the earlier findings in the order dated 5.2.2020.*

*(b) AP Discoms, in their reply, have raised the issue of jurisdiction of the Commission on the ground that they have already surrendered the bundled thermal power (of NTPC) w.e.f. 16.10.2020 and hence, the entire supply of power is from the Petitioner's Project, which is located within the State of Andhra Pradesh. **However, letter of CEA dated 15.10.2020 as enclosed along with the Respondents' reply indicates that even after the withdrawal of 125 MW w.e.f. 16.10.2020, power to the tune of 75 MW still continued to be allocated to them.** Also, as per the Tariff Order for Retail Supply of Electricity for financial year 2021-22 dated 25.3.2021, they had been purchasing bundled power of 39.27 MW under the JNNSM Phase-I.*

*(c) Regardless, surrendering of bundled thermal power by AP Discoms does not take away the composite 'scheme' as envisaged in the RfS & PPA and as explained by the Hon'ble Supreme Court in Energy Watchdog judgement. In this regard, reliance was placed on the definition of the term 'Scheme' as provided in Black's Law dictionary and Oxford English Dictionary.*

*(d) AP Discoms in their affidavit in the aforesaid Writ Petition before the Hon'ble High Court had stated that APERC has the jurisdiction by virtue of Section 64(5) of the Electricity Act, 2003 ('the Act'). However, the said Section can only apply if the jurisdiction otherwise vests with this Commission alone.*

*(e) **In the present case, however, AP Discoms are contending that jurisdiction lies with APERC under Section 86(1)(b) read with Section 63 of the Act as APERC had adopted the tariff discovered and approved the PSA between NTPC and AP Discoms. Thus, there is a clear shifting of stand on the part of AP Discoms. Also, despite AP Discoms having raised the issue of jurisdiction of this Commission in the WP, the Hon'ble High Court has remitted the matter back to this Commission for deciding on merits.***

*(f) **Originally vide order dated 5.2.2020, the Commission did not allow the prayer of the Petitioner for carrying cost. However, the said aspect now being squarely covered***

by the judgment of Appellate Tribunal for Electricity dated 15.9.2022 in Appeal No. 256 of 2019 and Ors., the Commission may allow the carrying cost on the Change in Law claims of the Petitioner.

2. Learned counsel for the Respondents, AP Discoms made detailed submissions in the matter. Learned counsel inter alia submitted the following:

(a) The jurisdiction is a question of law and the party cannot be estopped from raising such question. (b) In the present case, APERC, since by exercising its jurisdiction under Section 86(1)(b) read with Section 63 of the Act had adopted the tariff & also approved the PSA entered into between AP Discoms and NTPC, any dispute between the parties has to be referred to and adjudicated by APERC and as such the Appropriate Commission under the PSA is also APERC.

(c) In the order dated 6.1.2023, the Hon'ble High Court of Andhra Pradesh has nowhere stated that this Commission is the Appropriate Commission as sought to be put forth by the Petitioner. Therefore, the Commission has to also consider the jurisdiction issue as raised by the Respondents. (d) As to the reference to the CEA's letter and the Tariff Order regarding purchase of the bundled power after 16.10.2020, liberty may be granted to take necessary instructions in this regard.

3. Learned counsel for the Respondent, NTPC submitted that NTPC had approached this Commission for adoption of tariff under Section 63 of the Act in Petition No. 549/AT/2020, whereas the Respondents, AP Discoms approached the APERC, under Section 86(1)(b) of the Act, for approval of the power procurement process and the PSA.

4. The Commission directed the parties to file their respective written submissions (not exceeding 3 pages) before next date of hearing. 5. The matter remained part-heard for submissions on behalf of the respondents. The Petition shall be listed for hearing on 30.5.2023.

### **Submissions of APSPDCL & APEPDCL (APDISCOMS)**

11. Briefly, APDISCOMS has submitted as under:

- a) This Commission lacks the jurisdiction to adjudicate the present dispute as the entire capacity of the Petitioner is within the State of Andhra Pradesh. The Petitioner is not selling power to any other entity or in the open market. There is no element of bundled power in the present case. Further, parties at the time of entering PSA had contemplated a situation where, if the sale and supply of the energy is entirely within the State, then the State Commission and not the Central Commission shall have jurisdiction. In terms of the PSA, the answering respondents are to surrender thermal power at any point in time. With effect from 16.10.2020, they had already surrendered the bundled thermal power, and hence, the entire supply of power from the Petitioner's project is within the State of Andhra Pradesh.
- b) The purported liability incurred by the Petitioner on account of the 2018 SGD Notification was never brought before Andhra Pradesh Electricity Regulatory Commission (APERC). The Petitioner deliberately and with a malafide intention

chose not to appear before APERC and without impleading it in order to suppress the fact of its purported additional expenditure.

- c) The Petitioner failed to adduce any documents towards the additional expenditure incurred as a result of the *2018 SGD Notification*, and the Petitioner is under an obligation to mitigate the losses incurred, if any, by taking recourse to alternative options. So, the Petitioner is not entitled to relief towards carrying costs. The decision rendered by APTEL in the Parampujya judgement will not be applicable as the Hon'ble Supreme Court vide order dated 12.12.2022 in Civil Appeal No. 8880/2022 has stayed the operation of the Parampujya judgement.
- d) The Petitioner is under an obligation to mitigate the losses incurred by taking recourse to alternative options.

**Submissions of the Petitioner:**

12. The Petitioner has submitted as under:

- a) The combination of sources of power has no defined source since thermal power is being aggregated by NTPC and bundled with renewable energy. Therefore, power being supplied by NTPC is from various thermal power plants operated by NTPC, and thus, the transaction qualifies the threshold of the composite scheme as enunciated under the Electricity Act, 2003. In terms of the scheme of RfS along with provisions of PPA and PSA, the solar power is being bundled with surplus thermal power in the ratio of 2:1 and then supplied to APDISCOMs through NTPC acting as an intermediary procurer. Even, clause 2.3 (v) of the Guidelines for Selection of 3000 MW Grid-Connected Solar PV Power Projects under Phase II Batch-II of the National Solar Mission (NSM Guidelines 2015) provides for bundling of power in the ratio of 2:1, which qualifies as a composite scheme. Hence, the contention of APDISCOMs is misplaced and deserves to be rejected.
- b) PSA was executed only between NTPC and APDISCOMS, and the Petitioner is not a party to it. Therefore, it was not essential to raise the said claim before the Ld. APERC at all. It is apposite to highlight that the Petitioner has nothing to do with the approval of PSA, as the Petitioner was never a necessary party qua the said proceedings before APERC.
- c) The Petitioner had provided bills of entry evidencing the payment of Safeguard Duty on a sample basis in order to avoid burdening this Commission's record with voluminous pleadings. It is in possession of all the bills of entry along with the



corresponding challans in support of its claim, and the Petitioner craves leave to file the said documentary evidence as and when directed by this Commission.

- d) During the implementation of solar projects, the solar modules are procured at the end of the project implementation, since keeping the modules idle at the project site degrades it substantially. Therefore, even under the original scheme of the PPA, where the SCOD was 10.02.2019, the modules would have been scheduled for receipt at the project site only a few months prior to SCOD. Hence, by no stretch of the imagination, the modules could have been scheduled to be imported prior to 30.07.2018 (the date of imposition of SGD). The imposition of SGD was notified on 30.07.2018; therefore, expecting the Petitioner to mitigate its impact prior to such time is practically impossible.
- e) Restitution is an integral part of the compensation granted under the change in law. Carrying cost is inherent to any compensation that may be granted under the ambit of change in law provisions. Further, in terms of the APTEL judgement dated 15.09.2022 in A.No. 256 of 2019 & Batch in case title *Parampujya Solar Energy Pvt. Limited & Ors. vs. CERC & Ors.*, dated 15.09.2022 (Parampujya judgement), the Petitioner is entitled to be restituted to the same economic position as prior to the occurrence of a change in law event

### **Submissions of NTPC:**

13. NTPC has submitted as under:

- a) If the present Petition is allowed and the relief sought by the Petitioner is granted, then that relief/compensation shall be paid by the ultimate beneficiaries as NTPC is merely a trader in the instant Petition.
- b) The Petitioner has failed to demonstrate any action taken to mitigate the increase in cost by continuing to procure the solar cells from China even after the safeguard duty was imposed, leading to the increase in the landed cost of the equipment. Hence, this Commission may disallow higher costs without taking mitigating measures and should not be passed on to AP Discoms or NTPC and the consumers at large.
- c) The Petitioner has omitted to place on record the relevant details of its EPC Contract to ascertain the impact of *2018 SGD Notifications*, in the absence of which the relief sought by the Petitioner cannot be granted. The *2018 SGD Notification* would qualify as a change in law event subject to the Petitioner demonstrating through documentary evidence with a one-to-one correlation that the impact has been borne by the

Petitioner.

- d) In the absence of any provision with regard to restoration to the same economic position in the PPA, the Petitioner is not entitled to claim any relief which is not provided for in the PPA

**Analysis and decision:**

14. We have heard the learned counsels for the Petitioner and Respondents and have carefully perused the records and considered the submissions of the parties.
15. Before going to the main issues, it is pertinent to mention here that APDISCOMS have alleged before the Hon'ble AP High Court that the Commission *ought to have afforded reasonable time to submit counter and to address arguments.*
16. Very briefly, we note the following chronological events of the case. The Petition No. 176/MP/2019 was filed before the Commission on 01.07.2019. The matter was admitted after hearing the parties on 22.08.2019. During the hearing held on 22.08.2019, it was held by the Commission as follows: *"The Commission directed the Respondent, NTPC to submit the list of distribution companies to whom power would be or is being supplied by the Petitioner, by 27.08.2019. The Commission directed the Petitioner to implead the distribution companies as parties to the Petition and to file revised memo of parties by 31.08.2019."* The Petitioner filed the amended Memo of Parties on 31.10.2019, impleading the distribution companies as parties to the Petition, and a Notice of the further hearing was issued to the parties on 19.11.2019, giving the parties ample time for submissions before the final hearing and reserving the matter for orders on 25.11.2019. The request letter from APDISCOMs for allowing them time to file their reply was filed on 07.12.2019, i.e. after 25.11.2019 (the date of reserving the matter for orders). We note that the parties ought to have been present during the hearing dated 25.11.2019, for which prior notice was already sent. In view of the above we observe that APDISCOMs have made a pretext that the Commission did not afford reasonable time to submit counter and to address arguments to the contracting parties.
17. Pursuant to the Remand order dated 06.01.2023, and upon perusing the submissions of the parties, the limited issues that arise for our adjudication are as under:

*Issue No. I: Whether this Commission has the jurisdiction under Section 79 of the Electricity Act, 2003 to adjudicate the present matter?*

*Issue No. II: Whether the issuance of Notification No. 01/2018-Customs (SG) dated 30.07.2018 by the Department of Revenue, Ministry of Finance, Government of India is a Change in Law under Article 12 of the Power Purchase Agreement executed between the Petitioner and NTPC Limited? And Whether the Respondent should be directed to pay compensation as relief for the Change in Law effected by the 'Safeguard Duty Notification'?*

*Issue No. III: Whether the Respondent should be directed to additionally compensate the Petitioner on account of the Goods & Services Tax levied on the Safeguard Duty paid by the Petitioner, as relief under Article 12 of the Power Purchase Agreement? AND*

*Issue No. IV: Whether the Petitioner may be restored to the same economic condition prior to occurrence of the Change in Law And Whether the claim of Petitioner regarding 'Carrying Cost' by the Respondents is sustainable?*

**Re: Issue No. I:**

***Whether this Commission has the jurisdiction under Section 79 of the Electricity Act, 2003 to adjudicate the present matter?***

18. APDISCOMS have submitted that this Commission lacks the jurisdiction to adjudicate the present dispute as the entire capacity of the Petitioner is within the State of Andhra Pradesh. The Petitioner is not selling power to any other entity or in the open market. There is no element of bundled power in the present case. They have already surrendered the bundled thermal power, and hence, the entire supply of power from the Petitioner's project is within the State of Andhra Pradesh. Further, parties at the time of entering PSA had contemplated a situation where, in the event that the sale and supply of the energy is entirely within the State, then the State Commission and not the Central Commission shall have jurisdiction.
19. We observe that the brief facts are as under

<b>Events</b>	<b>Dates</b>
Project	250MW Solar PV
Location	Kadapa Ultra Mega Solar Park, Andhra Pradesh
MNRE issued NSM Guidelines, 2015	March 2015
RfS was issued on	27.10.2016
Bid was submitted on	14.12.2016
e-Reverse Auction was held on	11.04.2017
PSA was executed between NTPC and APDISCOMS	11.12.2017
Letter of Intent (LoI) was issued	11.12.2017
PPA was executed between the Petitioner and NTPC	07.02.2018

Scheduled Commercial Operation date (SCoD) of the project	09.02.2019
Petition No. 176/MP/2019 was filed	18.06.2019
APERC approved the Power Sale Agreement (PSA)	05.10.2019
Petitioner filed Amended Memo of Parties (impleading APDISCOMS)	31.10.2019
Impugned order in Petition No. 176/MP/2019 was passed on	05.02.2020
APDISCOMS surrendered the bundled power with effect from	16.10.2020
CERC passed Tariff Adoption order in Petition No. 549/AT/2020	01.03.2021
Hon'ble AP High Court passed an order in W.P. No. 5212 of 2020	06.01.2023

20. Clause 2.3 (5) of the National Solar Mission Guidelines 2015 states as under:

*2.3. Mechanism of Operation*

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*NVVN will purchase the Solar Power generated from the selected Solar PV plants at the quoted tariffs and Thermal Power at the Tariff as determined by CERC as per Regulations from time to time for power from the respective Thermal Power Plant from which power is allocated. **NVVN will bundle the Solar Power with unallocated Thermal Power from Coal based stations of NTPC on 2:1 basis (2 MW of Solar with 1 MW of Thermal), and sell the Bundled Power to willing State Utilities under 25 years Power Sale Agreements (PSAs), at Weighted Average Tariff of the Solar and Thermal components plus Trading Margin of Paisa Seven (7) per kWh.***

**3.4. Solar Parks:**

*Solar Parks are being developed under MNRE scheme for development of 25 solar parks. The bidder will approach the solar park implementation agency for allotment of land and connectivity. The implementation agency will indicate the cost of land, annual charges etc. which the developers must take into account while bidding.*

*The first choice will be to locate all projects in solar parks coming up in the state for which bids are issued. NVVN will indicate the name of the park and the plot sizes as well as other details in the tender document. If the total capacity of solar power projects in the bid is higher than the capacity available in the park, the developers will be given choice to locate the project in the park or out-side on the basis the bid price i.e. the lowest bidder gets first choice followed by the next and so on & till such time as park capacity is exhausted or all remaining can be located in the park.*

*After the PPA is signed, it will be the duty of solar park implementation agency to provide land and connectivity as promised in writing. SPDs shall enter into an Implementation Support Agreement with SPIA / State Agency for Land & associated infrastructure for development of the Project inside the Solar Park, Connectivity with the STU / CTU System and all clearances related thereto shall be the responsibility of the SPIA / State Agency / SPD. SPIA will hand over land to developer within 3 months of signing of PPA. The developers will be given extra time if there is any delay in giving possession of land and connectivity equivalent to delay. There will however, be*

*no compensation or L.D or deemed generation for any delay in Solar park. NVVN will have freedom to extend time by up to 3 months in case of delay in land allotment, transmission facility, Infrastructure facilities etc. Extension shall be subject to certification from Solar Park Implementing Agency (SPIA) or respective State Implementing Agency justifying reasons for delay. If extension is required to be given beyond 3 months due to delay in park development or evacuation, NVVN will approach MNRE, who will be authorized to decide on further extension with the approval of Secretary, MNRE*

21. MNRE vide notification dated 12.12.2014, floated the scheme for the development of Solar Parks and Ultra Mega Solar Power Projects in the country commencing from 2014-15 and onwards. Relevant excerpts of the aforesaid notification are reproduced below:

*“Scheme for development of Solar Parks and Ultra Mega Solar Power Projects:*

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*2. Proposal*

*MNRE through this scheme plans to set up 25 solar parks, each with a capacity of 500 MW and above; thereby targeting around 20000 MW of solar power installed capacity. These solar parks will be set up within in a span of 5 years commencing from 2014-15 and the solar projects may then come up as per demand and interest shown by developers.*

*At the State level, the solar parks will enable the States to bring in significant investment from project developers, meet its Solar Renewable Purchase Obligation (RPO) mandate and provide employment opportunities to local population. The State will also reduce its carbon footprint by avoiding emissions equivalent to the solar park's installed capacity and generation. Further, the State will also avoid procuring expensive fossil fuels to power conventional power plants.*

*The solar park will provide a huge impetus to solar energy generation by acting as a flagship demonstration facility to encourage project developers and investors, prompting additional projects of similar nature, triggering economies of scale for cost-reductions, technical improvements and achieving large scale reductions in GHG emissions. Some Ultra Mega Solar Power Projects may be set up in these Parks or the entire park may individually be an Ultra Mega Solar Power Project.*

*2.1 Applicability: All the States and Union Territories are eligible for benefits under the scheme.*

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*.8. Transmission and evacuation of power from solar park: Interconnection of each plot with pooling stations through 66 KV lother suitable voltage underground or overhead cable will be the responsibility of the solar project developer. The designated nodal agency will set up the pooling stations (with 400/220. 220/66 KV or as may be suitable switchyard and respective transformers) inside the solar park and will also draw transmission to transmit power to 220 KV/400 KV substation. The responsibility of setting up a sub-station nearby the solar park to take power from one or more pooling stations will lie with the Central Transmission Utility (CTU) or the State Transmission Utility (STU). After following necessary technical and commercial procedures as stipulated in the various regulations notified by the*

*Central/State Commission.*

*If the State Government is willing to buy over 50% of the power generated in the solar park, preference will be given to STU, which will ensure setting up of substation and development of necessary infrastructure for transmission of power from substation to load centres. The designated implementing agency will intimate POWERGRID and CEA at least 6 months before so that the planning and execution can be carried out in time.*

*If the state is not willing to buy at least 50% of the power generated in the solar park, then CTU may be entrusted with the responsibility of setting up 400 KV or bigger substation right next to the solar park and its connectivity with the CTU. For setting up of this transmission & evacuation infrastructure, Power Grid may prepare a separate project to be funded from NCEF I external funds I Green Corridor project, if the cost is very high. The system would be planned in such a manner so that there is no wheeling charge applicable on solar power in accordance with the CERC Regulation or reduce the wheeling charges to affordable level.*

*To build this infrastructure using the highest possible standards, the whole solar power evacuation network scheme may be designed using latest technologies like SCADA, GIS, Bay controller, online monitoring equipment for dissolved gas analysis, OPGW, PLCC etc.*

*9. Power Sale Arrangement:*

*Acceptance for development of solar park under the Scheme does not guarantee power purchase agreement (PPA) or tariff for the power to be produced. The project developers need to have their own arrangement for a PPA or get selected in any Government of India or State Government Scheme. The developer will be free to set up projects under any scheme or for third party sale.”*

22. We observe that as per the above provisions of the “Scheme for development of Solar Parks and Ultra Mega Solar Power Projects”, MNRE planned to set up 25 solar parks, each with a capacity of 500 MW and above. Interconnection of each plot with pooling stations through 66 KV/ other suitable voltage underground or overhead cable was the responsibility of the solar project developer. The designated nodal agency was to set up the pooling stations (with 400/220, 220/66 KV or as may be suitable switchyard and respective transformers) inside the solar park. The responsibility of setting up a substation near the solar park to take power from one or more pooling stations was with the Central Transmission Utility (CTU) or the State Transmission Utility (STU). If the State Government was willing to buy over 50% of the power generated, preference was to be given to STU. However, in case the State was not willing to buy at least 50% of the power generated in the solar park, then CTU was entrusted with the responsibility of setting up 400 KV or a bigger substation right next to the solar park and its connectivity with the CTU.

23. We further observe that APDISCOMS, in their reply, have raised the issue of jurisdiction of the Commission on the ground that they have already surrendered the bundled thermal power (of NTPC) w.e.f. 16.10.2020, and hence, the entire supply of power is from the Petitioner's Project, which is located within the State of Andhra Pradesh. However, during the course of the hearing held on 25.05.2023, the Petitioner submitted that the letter of CEA dated 15.10.2020, as enclosed along with the Respondents' reply, indicates that even after the withdrawal of 125 MW w.e.f. 16.10.2020, power to the tune of 75 MW still continued to be allocated to them. Further, NTPC, in its submissions stated that on 15.10.2020, upon the request of APDISCOMs, CEA decided to revert the 125 MW coal power to the unallocated quota/pool of the Western Region.

24. Section 79 (1)(b) of the Electricity Act, 2003 stipulates as under:

**Section 79. (Functions of Central Commission):** --- (1) The Central Commission shall discharge the following functions, namely:-

....

**(b) 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 the generation and sale of electricity in more than one State;**

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25. We note that Section 79(1)(b) of the Electricity Act, 2003 fastens jurisdiction on this Commission to adjudicate upon matters having a composite scheme for the purchase and sale of electricity. The Hon'ble Supreme Court vide judgement dated 11.04.2017 in the matter of *Energy Watchdog v. CERC & Ors. (2017) 14 SCC 80* has already clarified the expression *composite scheme* and jurisdiction of this Commission. Hon'ble Supreme Court qua the aforesaid judgment held as under:

*“24. The scheme that emerges from these sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in clauses (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in clauses (a), (b) and (d), and “intra-State” in clause (c). This being the case, **it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission's jurisdiction is only where***

**generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act.** What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. **This being the case, we are constrained to observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State.**

...  
26. Even otherwise, the expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a “composite scheme”. This makes it clear that **the expression “composite scheme” does not have some special meaning — it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State.**

26. We observe that the Hon’ble Supreme Court has held that the expression “composite scheme” does not mean anything more than a scheme for the generation and sale of electricity in more than one State. The expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a “composite scheme”. This makes it clear that it is enough that generating companies have, in any manner, a scheme for the generation and sale of electricity, which must be in more than one State.

27. In the instant case, we observe that the Phase-II Batch-II State Specific Bundling in the JNNSM Scheme envisage that NRVN will bundle the Solar Power with un-allocated Thermal Power from Coal based stations of NTPC on a 2:1 basis (2 MW of Solar with 1 MW of Thermal). Further, the provisions of the “Scheme for development of Solar Parks and Ultra Mega Solar Power Projects” also envisage a situation when a state might not be willing to buy at least 50% of the power generated in the solar park, and in such an event the CTU shall set up a substation to facilitate interstate sale of power. Therefore, the JNNSM Scheme has an inherent element of a Composite Scheme. Accordingly, we hold that the Commission has the jurisdiction to adjudicate in the matter. It is pertinent to mention here that the view taken in the instant Petition is consistent with the view taken in Order dated 09.10.2018 in Petition No. 188/MP/2017 & Ors.

28. Further, APDISCOMs, in their submissions, have stated that as PSA contemplated a situation where, in the event, that the sale and supply of the energy is entirely within the State, then the State Commission and not the Central Commission shall have jurisdiction. We note that it is a



well-settled principle of law that the parties, by their agreement, can neither confer jurisdiction upon a Forum which does not have the jurisdiction under the law nor can the parties, by their agreement, oust the jurisdiction of the Forum vested under the law. In this context, reliance is placed on the following judgments of the Hon'ble Supreme Court:

a) *A.B.C Laminart Pvt. Ltd. & Anr. vs. A.P. Agencies*, (1989) 2 SCC 163 has held as under:

**“...where the parties to a contract agreed to submit the disputes arising from it to a particular jurisdiction which would otherwise also be a proper jurisdiction under the law their agreement to the extent they agreed not to submit to other jurisdictions cannot be said to be void as against public policy. If on the other hand the jurisdiction they agreed to submit to would not otherwise be proper jurisdiction to decide disputes arising out of the contract it must be declared void being against public policy.”**

b) We also observe that the Hon'ble Supreme Court judgement dated 23.04.2004 in the matter of *New Moga Transport Co. vs. United India Insurance Co. Ltd. & Ors.* (2004) 4 SCC 677 has held as under:

**“By a long series of decisions it has been held that where two Courts or more have under the CPC jurisdiction to try a suit or proceeding an agreement between the parties that the dispute between them shall be tried in any one of such Courts is not contrary to public policy and in no way contravenes Section 28 of the Indian Contract Act, 1872. Therefore, if on the facts of a given case more than one Court has jurisdiction, parties by their consent may limit the jurisdiction to one of the two Courts. But by an agreement parties cannot confer jurisdiction to a Court which otherwise does not have jurisdiction to deal with a matter.”**

29. In terms of the above-stated statutory provisions and the judicial precedents, we observe that even if parties have agreed for adjudication of disputes by a particular Forum, this does not oust the jurisdiction of this Commission, which flows from the provisions of the Electricity Act, 2003.

30. From the discussions in the preceding paragraphs, we hold that this Commission has the jurisdiction under the Electricity Act, 2003 to adjudicate the instant matter.

### **Re: Issue No. II & III**

***Whether the issuance of Notification No. 01/2018-Customs (SG) dated 30.07.2018 by the Department of Revenue, Ministry of Finance, Government of India is a Change in Law under Article 12 of the Power Purchase Agreement executed between the Petitioner and NTPC Limited? And Whether the Respondent should be directed to pay compensation as relief for the Change in Law effected by 'Safeguard Duty Notification'?***

AND

***Whether the Respondent should be directed to additionally compensate the Petitioner on account of the Goods & Services Tax levied on the Safeguard Duty paid by the Petitioner, as relief under Article 12 of the Power Purchase Agreement?***

31. The Petitioner has submitted that the issuance of Notification No. 01/2018-Customs (SG) dated 30.07.2018 (2018 SGD Notification) is an event of Change in Law under Article 12 of the Power Purchase Agreement dated 07.02.2018.
32. We observe that various provisions of the PPAs provide for 'Change in Law', which stipulates as under: -

*"Law' shall mean 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 Government Instrumentality and having force of law and shall further include without limitation all applicable rules, regulations, orders, notifications by an Indian Government Instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the Appropriate Commissions;"*

*"ARTICLE 12: CHANGE IN LAW*

*12.1 Definitions*

*12.1.1 "Change in Law" means the occurrence of any of the following events after the Effective Date resulting into any additional recurring/ non-recurring expenditure by the SPD or any income to the SPD:*

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

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

*12.2 Relief for Change in Law*

*12.2.1 The aggrieved Party shall be required to approach the Central Commission for seeking approval of Change in Law.*

*12.2.2 The decision of the Central Commission to acknowledge a Change in Law and the date from which it will become effective, provide relief for the same, shall*

*be final and governing on both the Parties.”*

33. The Commission observes that vide Notification No. 1/2018 (SG) dated 30.07.2018, the Central Government imposed safeguard duty as per the following rates on the import of ‘Solar Cells whether or not assembled in modules or panels’:-
- a. *25% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2018 to 29th July 2019;*
  - b. *20% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2019 to 29th January 2020;*
  - c. *15% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th January 2020 to 29th July 2020.*
34. From the above, the Commission notes that any application of new tax is covered as ‘Change in Law’. The ‘Safeguard Duty Notification’ stipulates that “a safeguard duty at twenty-five per cent to fifteen per cent ad valorem minus anti-dumping duty payable” has been levied on solar cells whether or not assembled in modules or panels” when imported into India “during the period from 30th July 2018 to 29th July 2020 (both days inclusive)”. The notification provides for a ‘Safeguard Duty’ applicable ad valorem on the imports from 30.07.2018 till 29.07.2020. The impact of the ‘Safeguard Duty’ notification is on/any portion of import whose point of taxation is on or after implementation of the notification dated 30.07.2018, and the same will be subjected to the purview of ‘Safeguard Duty’.
35. We observe that in the instant petition, the bid was submitted on 14.12.2016 by the Petitioner. The online e-Reverse Auction was held on 11.04.2017, and the ‘Letter of Intent’ was issued on 11.12.2017. Further, the PPA was executed on 07.02.2018. The safeguard duty was levied vide *2018 SGD Notification* on 30.07.2018 i.e. after submission of the bid by the Petitioner (on 14.12.2016) and before the SCoD of the project, which is 09.02.2019. As such, in view of the principles decided in the preceding para, we hold that the protection under the clause of ‘Change in Law’ as contained in Article 12 of the PPAs is available to the Petitioner.
36. The Directorate General of Taxpayer Services, Central Board of Excise & Customs, on its official website, [www.cbic.gov.in](http://www.cbic.gov.in) has clarified as under:

*“In cases where imported goods are liable to Anti-Dumping Duty or Safeguard Duty, calculation of Anti-Dumping Duty or Safeguard duty would be as per the respective notification issued for levy of such duty. It is also clarified that value for calculation of IGST as well as Compensation Cess shall also include Anti-Dumping Duty amount and Safeguard duty amount.”*

37. We observe that IGST has been levied by the competent authority in compliance with the various directions issued by the Government of India. Accordingly, the Commission is of the view that in cases, where imported goods are liable to Safeguard Duty, the value for calculation of IGST includes the Safeguard duty amount, and the same has to be allowed. It is pertinent to mention here that the view taken is consistent with similar orders taken by the Commission, viz. Order dated 24.08.2020 in Petition No. 47/MP/2019.
38. Another issue raised by NTPC is that the Petitioner was duty-bound to employ a cost-effective approach as it was under an obligation to mitigate and procure the solar cells from such countries where the import is not subject to Safeguard Duty and the Petitioner was required to place on record its procurement contract/ EPC Contract to demonstrate whether it is obligated under the said Agreement to discharge the obligation of 'Safeguard Duty Notification'.
39. We observe that the tariff has been discovered under a transparent e-bidding process in accordance with the NSM guidelines issued by the Central Government. In the Competitive Bidding Scenario, the SPDs bid levellised tariff without disclosing the details of the calculations of the project cost, including capital expenditure. The component-wise details of the capital employed are not required to be declared by the bidders. The design of the bid levellised tariff is solely a decision of the SPDs. The Commission is of the view that the commercial decisions taken by the Petitioner for project implementation including the mode of procurement of solar modules, were taken by Petitioner prior to the implementation of 'Safeguard Duty Notification'. Therefore, it would not be appropriate to question the rationale of such commercial decisions on the basis of the differential rates which may be prevailing in countries where the import of Solar Modules was not subject to 'Safeguard Duty Notification'. The Commission further observes that the actual amount of the 'Safeguard Duty' imposed by the competent authority and paid by the Petitioner needs to be compensated.

40. In view of the discussions in the preceding paragraphs, the Commission directs the Petitioner to make available to the Respondents all relevant documents exhibiting clear and one-to-one correlation between the projects and the supply of imported goods, duly supported by relevant invoices and Auditor's Certificate. The Respondents are further directed to reconcile the claims for 'Change in Law' on receipt of the relevant documents and pay the amount so claimed to the Petitioner.
41. The Commission is of the view that the compensation on account of imposition of 'Safeguard Duty' w.e.f. 30.07.2018 should be discharged by the Petitioner and the Respondents as a one-time payment in a time-bound manner within sixty days from the date of issue of this Order or from the date of submission of claims by the Petitioner, whichever is later, failing which it shall attract late payment surcharge in terms of the PPAs. Alternatively, the parties may mutually agree to a mechanism for the payment of such compensation on an annuity basis spread over such period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs.
42. Further, in case parties opt for 'Monthly Annuity Payment', then the liability of NTPC/ Discoms for 'Monthly Annuity Payment' starts from the 60th (sixtieth) day from the date of this order or from the date of submission of claims by the Petitioner whichever is later. In case of delay in the Monthly Annuity Payment beyond the 60th (sixtieth) day from the date of this order or from the date of submission of claims by the Respondent, whichever is later, a late payment surcharge shall be payable for the delayed period corresponding to each such delayed Monthly Annuity Payment(s), as per respective PPAs/PSAs. The contracting parties are further directed that the responding Discoms are liable to pay NTPC all the above-reconciled claims that NTPC has to pay to the Petitioner. However, payment to the Petitioner by NTPC is not conditional upon the payment to be made by the responding Discoms to NTPC.
43. The issue is decided accordingly.

**Re: Issue No. IV**

***Whether the Petitioner may be restored to the same economic condition prior to the occurrence of the Change in Law And Whether the claim of Petitioner regarding 'Carrying Cost' by the Respondents is sustainable?***

44. The Petitioner has submitted that Article 12 of the PPA sets out the scope and extent of the change in law events for which the Petitioner can claim compensatory and restitutive relief. The Petitioner has submitted that it is entitled to carrying costs on account of the Change in Law event in terms of Article 12 of the PPA as per APTEL judgement dated 15.09.2022 in A.No. 256 of 2019 & Batch (*Parampujya Solar Energy Pvt. vs. CERC & Ors.*). *Per contra*, NTPC has submitted that the Judgment of the APTEL dated 15.09.2022 has been assailed before the Supreme Court in Civil Appeal no. 8880/2022 in the case of “*Telengana Northern Power Distribution Co. Ltd. & Anr. Vs. Parampujya Solar Energy Pvt. Ltd. & Ors.*”. NTPC has further submitted that the final order by this Commission on this behalf shall not be enforced till further orders are passed by the Hon’ble Supreme Court.
45. We observe that APTEL judgement dated 15.09.2022 in A.No. 256 of 2019 & Batch (*Parampujya Solar Energy Pvt. vs. CERC & Ors.*), it was held as under:

*CONCLUSION*

...

*109. The other captioned appeals – Appeal no. 256 of 2019 (Parampujya Solar Energy Pvt. Ltd & Anr. v. CERC & Ors.), Appeal no. 299 of 2019 (Parampujya Solar Energy Pvt. Ltd. v. CERC & Ors.), Appeal no. 427 of 2019 (Mahoba Solar (UP) Private Limited v. CERC & Ors.), Appeal no. 23 of 2022 (Prayatna Developers Pvt. Ltd. v. CERC & Ors.) Appeal no. 131 of 2022 (Wardha Solar (Maharashtra) Private Ltd. & Anr. v. CERC & Ors.) and Appeal no. 275 of 2022 (Parampujya Solar Energy Pvt. Ltd. & Anr. v. CERC & Ors.) - deserve to be allowed. We order accordingly directing the Central Electricity Regulatory Commission to take up the claim cases of the Solar Power Project Developers herein for further proceedings and for passing necessary orders consequent to the findings recorded by us in the preceding parts of this judgment, allowing Change in Law (CIL) compensation (on account of GST laws and Safeguard Duty on Imports, as the case may be) from the date(s) of enforcement of the new taxes for the entire period of its impact, including the period post Commercial Operation Date of the projects in question, as indeed towards Operation & Maintenance (O&M) expenses, along with carrying cost subject, however, to necessary prudence check.”*

...

46. The Petitioner, in the instant petitions, shall be eligible for carrying cost starting from the date when the actual payments were made to the Authorities till the date of issuance of this Order, at the actual rate of interest paid by the Petitioner for arranging funds (supported by Auditor’s Certificate) or the rate of interest on working capital as per applicable RE Tariff Regulations prevailing at that time or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by the Petitioner in terms of this

order, the provision of a Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within the due date.

47. Accordingly, the Commission hereby directs the contracting parties to carry out the reconciliation of additional expenditure along with carrying cost by exhibiting clear and one-to-one correlation with the projects and the invoices raised supported with an auditor certificate. The Commission further directs that the responding APDISCOMS is liable to pay NTPC all the above-reconciled claims that NTPC has to pay to the Petitioner. However, payment to the Petitioner by NTPC is not conditional upon the payment to be made by the responding APDISCOMS to NTPC.

48. We observe that the Hon'ble Supreme Court, in its Order dated 12.12.2022, in Civil Appeal no. 8880/2022 in the case of "*Telangana Northern Power Distribution Co. Ltd. & Anr. Vs. Parampujya Solar Energy Pvt. Ltd. & Ors.*" (and in similar Orders dated 03.01.2023 and 23.01.2023) has held as under:

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

49. Therefore, the directions issued in this Order so far as they relate to compensation for the period post-Commercial Operation Date of the projects in question as also towards carrying cost (pre-COD & post-COD) shall not be enforced and shall be subject to further orders of the Hon'ble Supreme Court in Civil Appeal No. 8880/2022 in *Telangana Northern Power Distribution Company Ltd. & Anr. V. Parampujya Solar Energy Pvt. Ltd. & Ors.*, and connected matters.

### **Summary**

50. The summary of our findings is as follows:

**Issue No. I:** The Central Commission has the jurisdiction under the Electricity Act, 2003 to adjudicate the instant matter.

**Issue No. II & III:** The Petitioner is entitled to compensation on account of a Change in Law as per the terms of Article 12 of the PPA due to the impugned *2018 SGD Notification*. Where imported goods are liable to Safeguard Duty, the value for calculation of IGST includes the Safeguard duty amount and the same is allowed. Only the actual amount of the

‘Safeguard Duty’ imposed by the competent authority and paid by the Petitioner needs to be compensated.

The liability of ‘Monthly Annuity Payment’ will start from the 60th (sixtieth) day from the date of the order or from the date of submission of claims, whichever is later. Late Payment Surcharge shall be payable if the payment is not made within the due date.

**Issue No. IV:** The Petitioner, in the instant petitions, shall be eligible for carrying cost starting from the date when the actual payments were made to the Authorities till the date of issuance of this Order, at the actual rate of interest paid by the Petitioner for arranging funds (supported by Auditor’s Certificate) or the rate of interest on working capital as per applicable RE Tariff Regulations prevailing at that time or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by the Petitioner in terms of this order, the provision of a Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within the due date.

The directions issued in this Order so far as they relate to compensation for the period post Commercial Operation Date of the projects in question as also towards carrying cost (pre-COD & post-COD) shall not be enforced and shall be subject to further orders of the Hon’ble Supreme Court in Civil Appeal No. 8880/2022 in *Telangana Northern Power Distribution Company Ltd. & Anr. V. Parampujya Solar Energy Pvt. Ltd. & Ors.*, and connected matters.

51. The Petition No. 176/MP/2019 is disposed of in terms of the above.

Sd/-	Sd/-	Sd/-	Sd/-
पी. के. सिंह (सदस्य)	अरुण गोयल (सदस्य)	आई. एस. झा (सदस्य)	जिष्णु बरुआ (अध्यक्ष)