'REPORTABLE'

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 11826 OF 2018

HARYANA POWER PURCHASE CENTRE **Appellant(s)**

VERSUS

SASAN POWER LTD & ORS. **Respondent(s)**

WITH

CIVIL APPEAL NO. 11927 OF 2018

CIVIL APPEAL NO. 12190 OF 2018

CIVIL APPEAL NO. 1670 OF 2019

CIVIL APPEAL NO. 12232 OF 2018

CIVIL APPEAL NO. 1742 OF 2019

J U D G M E N T

K. M. JOSEPH, J.

(1) **The six appeals with which we are concerned have been filed under Section 125 of the Electricity Act, 2003 (hereinafter referred to as 'Act' for**

brevity). The appeals are directed against the order passed by the Appellate Tribunal for Electricity (hereinafter referred to as 'Tribunal' for brevity) in an appeal carried by the first respondent under Section 111 of the Act.

(2) **The appeal before the Tribunal, in turn, was lodged against the order passed by the Central Electricity Regulatory Commission (hereinafter referred to as 'Commission' for brevity). The Commission passed the order purporting to be one under Section 79(b) *inter alia* of the Act in a petition filed by the first respondent.**

F A C T S

(3) **It was decided to set up an Ultra Mega Power Project. Towards this end, the Power Finance Corporation Limited of India was to be the nodal agency. It incorporated a Special Purpose Vehicle, which is the first respondent. The idea was to set up the Ultra Mega Power Project which would be operated by the successful bidder selected through**

an international competitive bidding. The power generated by the successful bidder was to be supplied through procurers (the appellants before us), who can be described also as the distribution licensees under the Act. The appellants were to supply the power so procured finally to the consumers.

(4) **Since what was contemplated was seeking shelter under Section 63 of the Act, we must refer to the guidelines which have been issued by the Central Government purporting to act under Section 63. Guidelines were issued on 19.01.2005. We deem it appropriate to set out the following guidelines:**

> **"2.1 These guidelines are being issued under the provisions of Section 63 of the Electricity Act, 2003 for procurement of electricity by distribution licensees (Procurer) for:**
>
> **(a) long-term procurement of electricity for a period of 7 years and above;**
>
> **(b) Medium term procurement for a period of upto 7 years but exceeding 1 year.**
>
> **2.2 The guidelines shall apply for procurement of base-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).”

(5) **The guidelines are binding on the procurers. Guideline 3.2 which is related to preparation for the invitation of bids would assume relevance. It reads as follows:**

“3.2 For long-term procurement from hydro electric projects or for projects for which pre-identified sites are to be utilized (Case 2), the following activities should be completed by the procurer or authorized representative of the procurer, before commencing the bid process:

- Site identification and land acquisition required for the project
- Environmental clearance
- Fuel linkage, if required (may also be asked from bidder)
- Water linkage
- Requisite Hydrological, geological, meteorological and seismological data necessary for preparation of Detailed Project Report (DPR), where applicable.

The bidder shall be free to verify geological data through his own sources, as the geological risk would lie with the project developer.

The project site shall be transferred to the successful bidder at a declared price.

> **Provided that for the projects from which more than one distribution licensees located in different States intend to procure power and if the preparations for such projects are being facilitated by the Central Government, the activities referred to above shall be initiated before the bidding process and should be completed before signing the power purchase agreement with the selected bidder.**

(6) **Under the guidelines, tariff structure is contemplated which consists of capacity charges and energy charges which are dealt with in detail. It also deals with bidding process. The bidding process itself is divided into two stages, viz., a determination of the qualification by a pre-qualification system and thereafter submission and consideration of essentially what consists of the financial bid. There is a guideline which deals with arbitration and it was contained in guideline 5.17:**

> **"5.17 The procurer will establish an Amicable Dispute Resolution (ADR) mechanism in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996. The ADR shall be mandatory and time-bound to minimize disputes regarding the bid process and the documentation thereof.**
>
> **If the ADR fails to resolve the dispute, the same will be subject to jurisdiction of the appropriate Regulatory Commission under the**

provisions of the Electricity Act 2003."

(7) **It is, accordingly, purporting to act in terms of the guidelineS that a Request for Qualification (for short RFQ) came to be issued on 31.03.2006. Reliance Power Limited was one of the bidders which was pre-qualified in terms of the RFQ. On 18.08.2006, there was a change notified in the guidelines. It brought about the following changes in the guidelines 5.17 besides guideline No. 4.7. The unamended and the amended guidelines 4.7 and 5.17 read as follows:**

S. No.	CBG as on 19.01.2005	CBG as amended on 18.08.2006
1.	4.7 Any change in tax on generation or sale of electricity as a result of any change in Law with respect to that applicable on the date of bid submission shall be adjusted separately. *[Pg. 345,CC-I]*	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 of 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.**
2.	**Arbitration** 5.17 The procurer will establish an Amicable Dispute Resolution (ADR) mechanism in accordance with the provisions	**Arbitration** 5.17 **Where any dispute arises claiming any change in or regarding determination of the tariff or any tariff related matters,**

	of the Indian Arbitration and Conciliation Act, 1996. The ADR shall be mandatory and time-bound to minimize disputes regarding the bid process and the documentation thereof.	**or which partly or wholly could result in change in tariff, such dispute shall be adjudicated by the Appropriate Commission.** All other disputes shall be resolved by arbitration under the Indian Arbitration and Conciliation Act, 1996.

(8) **On 21.08.2006, a Request for Proposal, for short RFP, came to be issued. We deem it appropriate to refer to the following provisions of the RFP.**

> **"4. While this RFP has been prepared in good faith, neither the Procurers, Authorised Representative and Power Finance Corporation Limited (PFC) nor their directors or employees or advisors/consultants make any representation or warranty, express or implied, or accept any responsibility or liability, whatsoever, in respect of any statements or omissions herein, or the accuracy, completeness or reliability of information contained herein, and shall incur no liability under any law, statute, rules or regualations as to the accuracy, reliability or completeness of this RFP, even if any loss or damage is caused to the Bidder by any act or omission on their part.**
>
> **1.3 The objective of the bidding process is to select a SuccessfulBidder for development of the Project as per the terms of the RFP. The Project will have a Contracted Capactiy of minimum of 3500 MW and maximum of 3800 MW in accordance witht he terms of the PPA. The Selected Bidder shall purchase the entire shareholding of the Authorised Representative**

from PFC and its nominees in accordance with Share Purchase Agreement and cause the Seller to enter into the RFP Project Documents. The Selected Bidder shall be responsible for ensuring that the Seller undertakes development, finance, ownership, design, engineering procurement, construction, commissioning, operation and maintenance of the Project as per the terms of the RFP Project Documents. The Selected Bidder shall also ensure:

(i) All equipment and auxiliaries shall be suitable for continuous operation in the frequency range of 47.5 to 51.5 Hz (-5% to +3% of rated frequency of 50.0 Hz).

(ii)The plant shall be capable of delivering contracted capacity continously at 47.5 Hz grid frequency.

1.4 The Procurers through the Authorised Representative, have initiated development of the Project at Sasan, District Sidhi, Madhya Pradesh and shall complete the following tasks in this regard by such time as specified hereunder:

iv. Allocation of main Captive Coal Mine(s) and providing geological report (GR) for the same; at least ninety (90) days prior to Bid Deadline. Allocation of other Captive Coal Mine(s) and available information regarding quality and quantity of coal (GR related information) would be made available at least thirty (30) days prior to Bid Deadline. The Seller shall pay the final cost of geological reports (Grs). The Indicative Cost of geological reports (Grs), would be made available at least thirty (30) days prior to bid Deadline;

v. Tying up water linkage for the Project requirement along with approval of Central Water Commission, at least thirty (30) days prior to Bid Deadline;

Water intake study report and Project Report including geo-technical study, topographical survey, area drainage study, socio-economic study and EIA study (rapid) would be made available at least ninety (90) days prior to Bid Deadline;

vi. issue of certificate by Ministry of Power, Government of India extending the benefits to power generation projects under Mega Power Policy upto the Scheduled COD of the Power Station by Government of India at least thrity (30) days prior to Bid Deadline;

It may be noted that noe of the Procurers, Authorised Representative and PfC, nor their directors, employees or advisors/consultants make any representation or warranty, express or implied, or accept any responsibility or liability, whatsoever, in respect of any statements or omissions made in the water intake study report and Project Report, or the accuracy, completeness or reliablility of information contained therein, and shal incur no liability under any law, statute, rules or regualtions as to the accuracy, reliability or completeness of such water intake study report and Project Report, even if any loss or damage is caused to the Selected Bidder by any act or omission on their part. The Ministry of Power and the State Government of Madhya Pradesh have expressed their support to the Seller, on best endeavour basis, in enabling the Seller to develop the Project.

2.7.2.1 The Bidder shall make independent enquiry and satisfy itself with respect to all the required information, inputs, conditions and cirumstances and factors that may have any effect on his Bid. In assessing the Bid, it is deemed that the Bidder has inspected and examined the site conditions and its surroundings, examined the laws and regulations in force in India, the transportation facilities available in India, the grid conditions, the conditions of roads, bridges, ports, etc. For unloading and/or transporting heavy pieces of material and has based its design, equipment size and fixed its price taking into account all such relevant conditions and also the risks, contingencies and other circumstances which mayh influence or affect the supply of power.

2.7.2.2 In their own interest, the Bidders are requested to familiarize themselves with the Electricity Act, 2003, the Income Tax Act 1961, the Companies Act, 1956, the Customs Act, the Foreign Exchange Management Act, IEGC, the regulations framed by regulatory commissions and all other related acts, laws, rules and regulations prevalent in India. The procuers shall not entertain any request for clarifications from the Bidders regarding the same. Non-awareness of these laws or such information shall not be a reason for the Bidder to request for extension of the Bid Deadline. The Bidder undertakes and agrees that before submission of its Bid all such factors, as generally brought out above, have been fully investigated and considered while submitting the Bid.

ANNEXURE 5

SITE DETAILS ALONG WITH SITE MAP

The Site is located near Sasan village in Singrauli Tehsil in District Sidhi of Madhya

Pradesh. The nearest Railway Station is Shakti Nagar (18km) and nearest Airport is Varanasi (250 km). The site is situated at 23°58′30″N latitude and 82°37′03″E longtitue.

About 3500 acres of land has been identified for the project covering villages of Sidhikala, Harhawa, Tiara, Jhanjitola and Sidhikhud. Out of this, about 2000 acres of land has been identified for main plant, about 1100 acres for ash disposal/dyke and 400 acres for colony.

Water source for the project is Govind Ballabh Pant Sagar (Rihand Reservoir), which is about 6-7 km from the main plant site. Water will be brought to site by suitable pumping arrangement and pipelines.

Coal blocks (mines) in Singrauli area with reserves of about 700-800 million tons will be allocated as Captive Coal Blocks (mines) for this Project. The Project will require the development of a coalmine with production of 18-20 million tons per annum (MTPA) Vicinity map of Site is enclosed.

Further details are provided in the Project Report."

(9) **We may, at this juncture, notice also that the Special Purpose Vehicle which was put in place for carrying out the activities also, commissioned a study by WAPCOS (a public sector body of the Central Government). It was tasked with the project to**

ascertain about the availability of water *inter alia*. Water is an indispensable factor for the successful running of the power plant which was contemplated. WAPCOS made available its report on 03.08.2006.

(10) **Reliance Power Limited applied pursuant to the RFP. Though, initially, its bid was not the lowest, but on account of the fact that the lowest bidder was found to be not eligible, Reliance Power Limited emerged as the lowest bidder. In keeping with the conditions, Reliance Power Limited acquired 100 per cent share holding of the first respondent and it was favoured with the Letter of Intent on 01.08.2007. It entered into a Power Purchase Agreement (hereinafter referred to as 'PPA') on 07.08.2007. In the second week of December, 2007, it would appear that the first respondent which now stood transformed as a fully owned company of the successful bidder Reliance Power Limited, commissioned a new Study by WAPCOS. WAPCOS submitted its report on 04.04.2008. We must at this juncture notice that '21.07.2007' has been**

determined as the cut off date, the relevance of which will be unfolded in the later part of the judgment.

(11) **The PPA contemplated two phases. The first phase was the construction of the power plant. The second was the operation of the power plant. The PPA was to be enforced for a period of 25 years. Therefore, we can safely characterise it as a long term agreement to purchase power. Since this was a case of competitive bidding, leading to the finding out of the lowest bidder, but faced with the regime under Section 63 of the Act which stood attracted, after the PPA was entered into, a petition was moved before the Commission for adopting the rates as contemplated in the PPA. By order dated 17.10.2007, the Commission after considering the relevant matters, adopted the rates in accordance with the PPA. It is, thereafter, that the present petition was moved by the first respondent on 19.02.2013. It is relevant at this stage to set out certain portions of the petition. The petition has been filed under Section 79 of the Act read with the**

statutory framework governing procurement of power through competitive bidding and articles 13 and 17 of the PPA between the parties for compensation due to change in law 'during the construction period'. After setting out the facts which we do not consider relevant to advert to, the following is noticed.

> **"5. It is submitted that the following Changes in Law have occurred during the Construction Period of the Project which have caused the Capital Cost of the Project to increase substantially:**
>
> **a) Increase in Declared price of Land for the Project which includes the land for the Power Station, the Moher, Moher-Amlohri Extension and Chhatrasal captive coal blocks;**
>
> **b) Increase in cost of implementation of the Resettlement and Rehabilitation Plan ("R&R Plan") for the Moher, Moher-Amlohri Extension and Chhatrasal captive coal blocks;**
>
> **c) Increase in cost of Geological Reports for the Moher, Moher-Amlohri Extension and Chhatrasal captive coal blocks;**
>
> **d) Increase in cost of compensatory afforestation for the Moher, Moher-Amlohri Extension and Chhatrasal captive coal blocks;**
>
> **e) Increase in cost of Water Intake system due to an incorrect assessment of conditions in the original report supplied to the bidders at the RFP stage;**
>
> **f) Levy of excise duty on cement and steel used in the Project; and**
>
> **g) Levy of Customs Duty on mining equipment**

imported for the Project."

(12) **Since, in this case, we are concerned only with two aspects, namely claims under clause(e) and clause(g) we deem it appropriate only to refer to the pleadings of the first respondent in regard to the same.**

Increase in cost of Water Intake System

"65. As per Clause 1.4(v) of RFP for Sasan UMPP, the Procurers through the Authorized Representative had to provide water intake study report. WAPCOS (a premier Government of India agency) was appointed to conduct the water intake study. WAPCOS, as the expert agency identified the water intake pump house location and the pipeline route from the intake pump house to the power plant in its Report. This report was made available to all the bidders before bid submission so that the bidders could factor in the cost of the water intake system in preparation of their financial bid i.e., the tariff at which power would be supplied to the Procurers. The total estimated cost for the construction of water intake system for the location and route indicated in the report by WAPCOS was estimated to be approximately Rs.92 Crores. The WAPCOS Report along with the estimated cost are annexed herewith and marked as Annexure P-24 (Colly)."

"66. After RPower acquired the Petitioner, WAPCOS was appointed to confirm the

technical feasibility as part of detailed engineering exercise. During this process, it was discovered that the water intake location as finalized by WAPCOS before the bidding was not an appropriate location and does not ensure reliable supply of water to the power plant. It was also found that the water intake at the original location indicated by WAPCOS in the pre-bid report would have resulted in shutdown of power plant for a considerable period during the lean season."

"67. Thereafter, WAPCOS conducted detailed bathymetric studies and recommended a new location for water intake, which was 23 km from the power plant as against 12.5 km initially indicated at the time of bidding (original location). It was highlighted that new location would ensure reliable water supply to the power plant. Due to increase in distance, submergence area along the route and construction time, there has been considerable increase in the cost of the water intake system as detailed below. The report of WAPCOS recommending the revised location is annexed herewith and marked as Annexure p-25."

"68. The cost for the construction of water system for the new location is Rs. 244 Cr. Out of the aforesaid amount, a sum of Rs.185 Crores has already been incurred and balance of Rs. 59Crores is to be spent. The estimated increase in cost of the water intake system due to the change in location of the water intake system is Rs.152 Crores. Since this increase is directly attributable to the error in the WAPCOS report provided to the bidders at the pre-bid stage, the Petitioner is required to be compensated for the same. The cost break up

for the new/appropriate location which will ensure reliable water supply is annexed herewith and marked as Annexure P-26."

"75. It is submitted that the UMPP Policy envisages domestic coal based UMPPs as integrated projects where the power station and the captive coal mines are treated as an integrated unit. This is also recognized in the PPA as well as other project documents like the RFQ and the RFP."

"76. As per Notification 21 of 2002-Customs dated 01.03.2002 issued by the Ministry of Finance, Government of India, the customs duty on goods required for setting up mega power projects has been prescribed as nil meaning thereby that no customs duty will be levied on goods imported for setting up a mega power project. A copy of Notification 21 of 2002-Customs is annexed herewith and marked as Annexure P-32."

"77. Sasan UMPP was accorded in-principle mega power project status as per Ministry of Power's letter no. F.No. 12/18/2006-P&P dated 20.10.2006. The final certificate was issued on 21.09.2007."

"78. Sasan UMPP is an integrated power project with captive coal mines viz. Moher, Moher Amlohri Extension and Chhatrasal Coal Blocks. The captive coal mines allocated for Sasan UMPP form an integral and essential part of the Project and any equipment imported in relation to the captive coal mines would therefore be treated as goods imported for setting up the Project."

"79. The Petitioner was required to import mining equipment for setting up the captive coal mines from which coal will be sourced for the Project since the required mining equipments were not available in India."

"80. On 05.05.2011, the Petitioner applied to the Energy Department, Government of Madhya Pradesh for recommendation letter to import mining equipments for Sasan UMPP under nil custom duty as is applicable for the other equipment such as power plants of the Project. This application was premised on Notification 21 of 2002-Customs. However, vide an Office Memorandum dated 17.06.2011, the Ministry of Power has intimated that the exemption for customs duty for UMPPs is given only with respect to power equipment, which was forwarded to Petitioner by Government of Madhya Pradesh on 20.06.2011. Copies of letters dated 05.05.2011 and 17.06.2011 are annexed herewith and marked as Annexure P-33(Colly)"

"81. Based on Ministry of Power's Office Memorandum's, the Energy Department, Government of Madhya Pradesh declined to issue the recommendation letter which was required by the Petitioner to claim nil customs duty. In view of the refusal by Energy Department, Government of Madhya Pradesh and in the interest of the Project and power consumers, Petitioner had to seek recommendation letter from Energy Department, Government of Madhya Pradesh to import mining equipments at project import rate of 20.94%, which is now reduced to

16.85% with effect from 17.03.2012."

"82. The decision of the Ministry of Power detailed in its office memorandum dated 17.06.2011 and refusal by Energy Department, Goverment of Madhya Pradesh to provide recommendation letter to import mining equipments for Sasan UMPP under nil custom duty amounts to a Change in Law under Article 13.1 of the PPA and Petitioner is entitled to be compensated for the same."

"83. The total amount of customs duty paid by the Petitioner on mining equipments imported for Sasan UMPP is Rs. 361.47 Crores till date. The total custom duty for mining equipments is estimated to be about Rs. 531 Crores. The details of the custom duty paid on mining equipments and estimated to be paid in future are annexed herewith in Annexure P-34 (Colly)."

"84. It is submitted that the Petitioner has already surpassed the indicative costs provided by the Procurers and in certain instances as indicated hereinabove, the Petitioner will be required to pay the increased Capital Cost in the future. In this regard, the Petitioner is claiming the following reliefs:

(a) In relation to the Changes in Law where the additional Capital Cost has already been incurred, this Hon'ble Commission may direct the Procurers to compensate the Petitioner for such increase in Capital Cost; and

(b) In relation to the Changes in Law for

which the liability is yet to be incurred, the Petitioner is seeking a declaration from this Hon'ble Commission that the increased expenditure amounts to Change in Law. The actual payment will be claimed as and when it falls due."

"89. From the above discussions and facts, it is clear that:-

(a) One of the objectives of the National Electricity Policy and the Tariff Policy is to secure commercial viability of electricity sector while ensuring fair pricing and quality of supply.

(b) Power procurement under Section 63 of the Act is governed by the statutory framework comprising (i) Section 63 of the Act, (ii) Government of India's Guidelines and (iii) standard documents being RFP and PPA.

(c) In terms of Section 63 of the Act the successful bid must be selected consistent with the guiding principles under Section 61 of the Act meaning thereby that while adoption of tariff under Section 63 of the Act, the principles as laid down under Section 61 need to be complied.

(d) Power procurement pursuant to the statutory framework constitutes a statutory contract in terms of the pre-approved and finalized PPA governed by provisions of the Act as well as the Guidelines.

(e) The PPA envisages the adjustment of

tariff by this Hon'ble Commission to restore/restitute the party adversely affected (the Petitioner in the present case).”

“90. It is also pertinent to note that under Section 79(1)(b) of the Act, this Hon'ble Commission has been given the power to regulate the tariff of generating companies like the Petitioner which have a composite scheme for generation and sale of electricity in more than one state.”

“91. The present Petition has been filed for compensation on account of Changes in Law which have impacted the Capital Cost of the Project as well as for compensation for costs incurred in excess of the indicative costs provided by the Procurers, which were the basis for formulation of the financial bid of Rpower.”

“92. The Petitioner had approached the Procurers for an amicable resolution. However, all efforts made by the Petitioner to seek an amicable resolution to the unforeseen and undeserved commercial implication with the Procurers have proved fruitless. In this backdrop, it has become imperative and necessary for the Petitioner to invoke jurisdiction of this Hon’ble Commission to issue appropriate orders as prayed for in the Petition.”

“93. It is submitted that the present Petition has been filed invoking:-

(a) Section 79(1)b) of the Act under which

this Hon'ble Commission has the power to regulate the tariff of the Petitioner.

(b) Section 79(1)(f) of the Act which gives this Hon'ble Commission the power to adjudicate upon disputes involving the Petitioner.

(c) Regulations 82, 92 and 113 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999.

(d) Article 13 of the PPA read with Article 17 and Paragraph 5.17 of the Competitive Bidding Guidelines in terms of which this Hon'ble Commission has the power to adjudicate upon any dispute that arises claiming any change in or regarding determination of the tariff or any tariff related matters, or which partly or wholly could result in change in tariff."

"104. As detailed in Paragraphs 75-83 above, Notification 21 of 2002-Customs issued by the Ministry of Finance, Government of India granted 100% exemption from Customs duty to goods required for setting up mega power projects. The Petitioner was required to import equipment for operation of the coal mine which is an integral part of the Project."

"105. It is submitted that as per the said Notification, any entity which intended to claim the customs duty exemption was required to apply to the Sponsoring Authority for an exemption certificate. This was essential to claim the customs duty

exemption. In this regard, the Petitioner wrote to the Government of Madhya Pradesh to recommend the Petitioner's case to the Commissioner of Customs on 5.5.2011 for nil custom duty on mining equipments."

"106. It is submitted that vide an Office Memorandum dated 17.06.2011, the Ministry of Power intimated Government of Madhya Pradesh that the exemption for customs duty for UMPPs is given only with respect to power equipment. The total amount of customs duty paid by the Petitioner on mining equipments imported for Sasan UMPP is Rs.361.47 Crores till date. Total custom duty for mining equipments is estimated to be about Rs. 531 Crores."

"107. It is submitted that the decision of the Ministry of Power amounts to a Change in Law under Article 13.1 of the PPA and the Petitioner is entitled to be compensated for the same. It is further submitted that the Petitioner not being allowed to import mining equipment under nil customs duty as is granted for the other equipment such as power plants of the Project qualifies as Change in Law under Article 13.1 of the PPA."

"108. It is submitted that as per RFP for Sasan UMPP, the Procurers had to provide water intake study report. This study was conducted by WAPCOS and the report was made available to all the bidders before bid submission. The cost of the water intake system as per the report was approximately Rs.92 Crores. This estimation was factored

into the bid at the time of submission of the financial bid."

"109. It is submitted that after Rpower acquired the Petitioner, WAPCOS was tasked with confirming the technical feasibility during the detailed engineering exercise. During this process, it was discovered that the water intake location as intimated in the pre-bid report was not appropriate. After, conducting another detailed study, WAPCOS determined that a new location would be suitable. The new location is 23 km from the power plant as against 12.5 km initially indicated at the time of bidding (original location)."

"110. It is submitted that due to the increase in distance, submergence area along the route and construction time there has been considerable increase in cost of the water intake system. The cost for the construction of water system for the new location is Rs. 244 Cr. The estimated increase in cost of the water intake system due to the change in location of the water intake system is Rs.152 Crores."

"111. It is submitted that the increase in cost of the water intake system is on account of the errors in the report provided by the Procurers and therefore, the Procurers are obligated for compensating the Petitioner for the difference in cost. It is further submitted that since the water pipeline corridor is part of the Power Station Land and the water intake pipeline

is an integral part of the Power Station, any change in the indicative cost of the water intake system will be covered under Change in Law."

"120. Section 79 of the Act, *inter alia*, empowers the Hon'ble Commission to:-

(a) Regulate the tariff of generating companies other than those owned or controlled by the Central Government if such generating companies entered into or otherwise have a composite scheme for generation and sale of electricity in more than one State; and

(b) To adjudicate upon the disputes involving the distribution companies or transmission licensees with regard to the matters connected with regulation of tariff of generating companies."

"128. It is submitted that the present case involves a situation where the compensatory mechanism under the PPA for compensation for Change in Law has failed. It does not meet the objective of restoring an affected party to the same economic condition as if the change in law had not occurred. Therefore, this is a fit case for this Hon'ble Commission to exercise its powers under Section 79 and devise a mechanism to uphold the objective and purpose of Article 13 – to provide economic restitution."

"129. It is further submitted that PPA envisages a scenario where this Hon'ble

Commission can interfere with the issues relating to the claim made by a party for any change and/or determination of the tariff or any matter relating to the tariff or claims made by any party which partly or wholly related to any change in the tariff or determination of any such claim which can result in change in the tariff. In this context, Articles 13 and 17 are noteworthy. While Article 13 of the PPA envisages tariff adjustment in the event of "Change in Law", Article 17 of the PPA provides for dispute resolution, by the Hon'ble Commission in case of claim made by any party for any change in or determination of tariff or any matter related to tariff or claims made by any party, which partly or wholly relate to any change in the tariff or determination of any of such claims could result in change in tariff."

"142. The Petitioner therefore most humbly and respectfully prays that this Hon'ble Commission be pleased to adjudicate upon the present Petition to:-

(a) Declare that the items set out in Paragraph 5 above as Change in Law during Construction Period and/or changes which has led to an increase in the Capital Cost of the Project;

(b) Restitute the Petitioner to the same economic condition as if the said Changes in Law had not occurred and devise a mechanism by which the Petitioner is compensated for the aggregate financial impact and increase

in capital cost of account of the Changes in Law, the details of which are set out in Paragraph 113 above; and

(c) Pass any such other and further reliefs as this Hon'ble Commission deems just and proper in the nature and circumstances of the present case."

(13) **After exchange of pleadings, the Commission passed the order dated 04.02.2015. Since we are in these appeals to be detained only by two aspects, we notice the following findings:**

"30. The petitioner has submitted that as per Clause 1.4(V) of RFP for Sasan UMPP, the Procurers through the Authorized Representative had to provide water intake study report. WAPCOS (a premier Government of India agency) was appointed to conduct the water intake study. WAPCOS, as the expert agency identified the water intake pump house location and the pipeline route from the intake pump house to the power plant in its Report. This report was made available to all the bidders before bid submission so that the bidders could factor in the cost of the water intake system in preparation of their financial bid i.e. the tariff at which power would be supplied to the Procurers. The total estimated cost for the construction of water intake system for the location and route indicated in the report by WAPCOS was estimated to be approximately ₹92 Crore.

After RPower acquired the project, WAPCOS was appointed to confirm the technical feasibility as part of detailed engineering exercise. During this process, it was discovered that the water intake location as finalized by WAPCOS before the bidding was not an appropriate location and does not ensure reliable supply of water to the power plant. It was also found that the water intake at the original location indicated by WAPCOS in the pre-bid report would have resulted in shutdown of power plant for a considerable period during the lean season. Thereafter, WAPCOS conducted detailed bathymetric studies and recommended a new location for water intake, which was 23 km from the power plant as against 12.5 km initially indicated at the time of bidding (original location). It was highlighted that new location would ensure reliable water supply to the power plant. Due to increase in distance, submergence area along the route and construction time, there has been considerable increase in cost of the water intake system as per following details (Annexure P-26 of the petition) and as per the earlier report of WAPCOS:-

S. No.	Cost Item	As per earlier WAPCOS Report	Current estimate
		(₹ Crore)	(₹ Crore)
1	Cost of Pump House	21.00	62.97
2	Cost of Bridge	10.50	
3	Supply of Pipe line	30.50	73.91

4	Laying of pipe line	16.70	57.97
5	Mechanical	10.20	20.32
6	Electrical	3.50	4.02
7	Dredging for Pump House		25.13
8	Total	92.40	244.32

31. MPPMCL has submitted that it is an expense incurred by the petitioner but is not covered under "Change in Law" under Article 13.1.1 of the PPA. However, it is concluded that the cost has been incurred by the petitioner and exceeds the estimates given by the procurer's authorized representative prior to bid submission. HPCC has submitted that the price and other details given in the bidding document were by way of information and it was for the bidders to conduct independent enquiry and verify the information and details. There is no misrepresentation by the procurers or by the Bid Process Coordinators at the time of bidding in relation to water intake for the project. In view of the specific disclaimer and the requirement to conduct independent enquiry, the petitioner was required to make appropriate enquiries into the matter before bidding and the bidders were not entitled to proceed only on the basis indicative information given by the Bid Process Coordinator.

32. We have considered the submission of the petitioner and respondent. As against the indicative cost of ₹92.40 crore, the cost for the construction of water system for the new

location is ₹244 crore out of the aforesaid amount, a sum of ₹185 crore has already been incurred and balance of ₹59 crore is to be spent. The estimated increase in cost of the water intake system due to the change in location of the water intake system is ₹152 crore. The petitioner has submitted that since this increase is directly attributable to the error in the WAPCOS report provided to the bidders at the pre-bid stage, the petitioner is required to be compensated for the same.

33. In our view, the claim is not covered under any of the provisions of Article 13.1.1 of the PPA. The petitioner being aware that the cost of water intake system being indicative in nature and being not covered under the "Change in Law" under Article 13 should have informed itself fully with the actual site conditions before preparing the bid and accordingly factored the possible estimates of water intake system while quoting the bid instead of relying on the indicative cost. In this connection, para 2.7.2.1 of the RfP document provides as under:

> **"2.7.2.1 The Bidder shall make independent enquiry and satisfy itself with respect to all the required information, inputs, conditions and circumstances and factors that may have any effect on his Bid. In assessing the Bid, it is deemed that the Bidder has inspected and examined the site conditions of roads, bridges, ports etc. for**

> **unloading and/or transporting heavy pieces of material and has based its design, equipment size and fixed its price taking into account all such relevant conditions and also the risks, contingencies and other circumstances which may influence or affect supply of power."**

Further para 4 of the RfP document provides that the pricing and other details given in the bidding documents are by way of information only and it was for the bidders to conduct independent enquiry and verify the details and information. Para 4 are extracted as under:

> **"4. While the RFP has been prepared in good faith, neither the Procurers, Authorised Representative and Power Finance Corporation (PFC) nor their directors or employees or advisors/consultants make any representation or warranty, express or implied, or accept any responsibility or liability, whatsoever, in respect of any statements or omission herein, or the accuracy, completeness or reliability of information contained herein, and shall incur no liability under any law, statute, rules or regulations as to the accuracy, reliability or completeness of this RFP, even if any loss or damage is caused to the Bidder by any act or omission on their part."**

Therefore, it is the responsibility of the petitioner to verify the suitability of the location of water intake and ensure reliable water supply for the power plant and workout the relevant approximate cost of water intake system independently and factor in the estimates in the bid so that a realistic cost is reflected in the bid. The petitioner having failed to do so, the increase in cost on account of this head is not admissible."

(14) **As far as the question relating to imposition of customs duty on mining equipment is concerned, the same is dealt with in paragraphs 40 and 41.**

"40. We have considered the submission of the petitioner and respondents. The Notification No.49/2006 provides as under:

Notification No. 49/2006-Customs

In exercise of the powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 21/2002- Customs, dated the 1st March, 2002, which was published in the Gazette of India, Extraordinary vide number G.S.R. 118(E), dated the 1st March, 2002, namely:-

In the said notification,-

(I) in the Table, against S.No.400, for the entry in column (3), the following entry shall be substituted, namely:-

"Goods required for setting up of any Mega Power Project, so certified by an officer not below the rank of a Joint Secretary to the Government of India in the Ministry of Power, that is to say-

(a) an inter-state thermal power plant of a capacity of 700MW or more, located in the States of Jammu and Kashmir, Sikkim, Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura; or

(b) an inter-state thermal power plant of a capacity of 1000MW or more, located in States other than those specified in clause (a) above; or

(c) an inter-state hydel power plant of a capacity of 350MW or more, located in the States of Jammu and Kashmir, Sikkim, Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura; or

(d) an inter-state hydel power plant of a capacity of 500MW or more, located in States other than those specified in clause (c) above";

> **(II) in the Annexure, in Condition No. 86, for sub-clauses (ii) and (iii) of clause (a), the following shall be substituted, namely:-**
>
> **"(ii) the power purchasing State undertakes, in principle, to privatize distribution in all cities, in that State, each of which has a population of more than one million, within a period to be fixed by the Ministry of Power.".**
>
> **[F.No.354/104/2003-TRU]**

It is noticed that the revised policy guidelines issued by Government of India, Ministry of Power vide its letter No. A-118/2003-IPC dated 2.8.2006 has stated that an inter-State thermal power plant of a capacity of 1000 MW or more is eligible for grant of mega power status. It further states as under:

> **"Zero Customs Duty: In terms of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 21/2002-Customs dated 1.3.2002 read together with No. 49/2006-Customs dated 26.5.2006, the import of capital equipment would be free of customs duty for these projects."**

41. It is to be considered whether under the notification as stated above, mining equipments were exempted from customs duty. General Exemption No.122 under the Customs

Notification No.21/2002 as amended from time to time contains the list of items which are exempted from customs duty. It is observed that Notification 21 of 2002-Customs clearly demarcates the power projects and mining projects separately. It is seen that at Ser No.399 of the list, coal mining projects are liable to pay customs duty. Ser No. 400 only exempts the mega power project from payment of customs duty and there is no mention that it includes captive power plants. Therefore, it cannot be said that as on the cut-off date, there was exemption on mining equipment and the petitioner had taken into consideration such exemption while quoting the bids. Nothing has been produced in the petition which could indicate that any such impression was given by the procurers or their representative prior to bidding. In view of the foregoing discussion, the submission of the petitioner that the decision of the Ministry of Power detailed in its office memorandum dated 17.06.2011 and refusal by Energy Department, Government of Madhya Pradesh to provide recommendation letter to import mining equipments for Sasan UMPP under nil custom duty amounts to a "Change in Law" under Article 13.1 of the PPA and the petitioner is entitled to be compensated for the same is not acceptable and hence no compensation would be available in this regard."

THE APPEAL BEFORE THE TRIBUNAL

(15) **This led to the appeal being filed by the first respondent under Section 111 of the Act. It is**

apposite that we set out the exact case which has been set up by the first respondent before the Tribunal.

> **"9.5 The Report identified the water intake pump house location and pipeline route from the intake pump house to the power plant in its report. This report was made available to all the bidders before bid submission so that the bidders could factor in the cost of water intake system in preparation of their financial bids i.e., the tariff at which power be supplied to the Procurers. The total cost for the construction of water intake system for the location and route of indicated in the report by WAPCOS was estimated to be Rs.92 Crores. The water intake system is an integral part of the Project without with it is not possible to set up and operate the Project. The WAPCOS report along with estimated cost are annexed herewith and marked as Annexure A-14.**
>
> **9.6 After RPower was declared the successful bidder and the Appellant Company was transferred to RPower, WAPCOS was re-appointed to confirm the technical feasibility as part of the detailed engineering exercise. During this process, it emerged that the water intake location as finalized by WAPCOS vide its earlier report prepared for PFC/ Procurers and made available to all bidders prior to bid submission was not an appropriate location and does not ensure reliable supply of water to the power plant. It also emerged that the water intake at the original location indicated by WAPCOS in the pre-bid report would have resulted in shutdown of the power plant for a considerable period in a year**

during the lean season. Therefore, WAPCOS recommended a new location for water intake, which was 23 km from the power plant as against the 12.5 kms initially indicated at the time of bidding (original location). It was highlighted that the new location would ensure reliable water supply to the power plant. Due to increase in the distance, submergence area along the route and construction time, there has been considerable increase in the cost of water intake system due to change in location as detailed below. The report of WAPCOS recommending the revised location is annexed herewith and marked as Annexure A-15.

9.7 It is submitted that due to the change in location, cost for water intake system has increased on following counts:

(a) While the route length itself increased to 23 kms, the increase in piping length increased from 24 km (2 Pipe Lines each of 12 Kms) to 59.5 km (2 Pipe Lines each of 8 km & 3 Pipes each of 14.5 km)

(b) Increased cost due to deeper Pump House.

(c) Additional dredging for creation of intake channel for the offshore pump house.

(d) Additional cost due to HT transmission line.

There has been considerable increase of approximately Rs.176 Crores in cost of the water intake system, which now is estimated to be approximately Rs.268 Crores. The cost break-up for the new location for the water intake system is annexed herewith and marked as Annexure A-16.

9.8 It is submitted that the increase in cost of the water intake system is on account of the errors in the report provided

by the Procurers and therefore, the Procurers are required to compensate the Appellant for the difference in cost.

9.9 It is further submitted that since the water pipeline corridor is part of the Land for the Power Station and the water intake pipeline is an integral part of the Power Station, any change in the indicative cost of the water intake system is covered under Change in Law in terms of Article 13 of the PPA since it amounts to change in cost of land of the Project. In fact, the Ld. General Commission has noted in the impugned Order that the estimate for Declared Price of Land for the Power Station includes the Water Intake System. The operative part of the Impugned Order is reproduced below:

"19. Change in the declared price of land is covered under "Change in Law". The procurers have also agreed that this item of expenditure is admissible under "Change in Law". The declared price of land for the Power Station was stated to be 190.677 crore. This has been verified from the communication dated 23.10.2006 from the representative of the procurers to the bidders. This included the power plant area, the fuel transport system land, the water pipeline corridor and the ash pipeline corridor."

9.11 It is submitted that pre-bid site visit and project reports were prepared and made available by Authorized Representative (Power Finance Corporation) to all bidders. The disclaimer, if at all applicable, will only apply to such instances where the bidders were able to identify any issues or liability with reasonable diligence. Based on the information and material provided, there was no indication that the water

intake system proposed in the WAPCOS Report was unfeasible. Therefore, the disclaimer does not absolve the Procurers of their liability to compensate the Appellant for the increase in cost. It is submitted that due to the error in WAPCOS's report, the Appellant is faced with an additional burden of Rs.176 Crore which has adversely impacted the project economics. It is submitted that the disclaimers contained in Para 2.7.2.1 and Para 4 of the RFQ ought not to be considered absolute in nature so as to prevent loading of costs which are incurred by the Appellant as a direct result of omission or error on part of the Procurers in providing information during the pre-bid stage. This approach is counter-intuitive to ensuring that the Appellants Project is able to supply cheap and affordable power to over 42 million consumers in the Procurer States. It is further submitted that the disclaimers cannot act as an absolute bar to the liability of the Procurers. Any duty to independently verify inputs, information factors etc. require only a reasonable duty of care. The grave technical deficiencies and huge differences between actual cost and estimates provided to the bidders defeat the fundamental objective of providing information to the bidders especially when the nature of expense in this case was of buying a report from a Government Company which had carried out a detailed study. The Appellant had no other option but to rely on the information provided by the authorized representative of the Procurers. Therefore, Ld. Commission's reliance on the disclaimers contained in the bid documents to reject the claim of the Appellant is not sustainable."

(16) **In regard to the complaint about the notification issued by the Joint Secretary in the**

Ministry of Power having brought about a change in law, we find the following complaint, *inter alia*:

> **"9.20. It is submitted that as per Notification 21 of 2022- Customs dated 01.03.2002 issued by the Ministry of Finance, Government of India, the customs duty on goods required for setting up mega projects has been prescribed as nil meaning thereby that no customs duty will be levied on goods imported for setting up a mega power project. Notification 21/2022- Customs which provides as under:**
>
> "

S. No.	Chapter or Heading or sub-heading	Description of Goods	Standard Rate	Additional Duty Rate	Condition No.
(1)	(2)	(3)	(4)	(5)	(6)
	98.01	Goods required for setting up any Mega Power Project specified in List 42 if such Mega Power is (a) An inter-state thermal power plant of 1000 MW or more (b) an inter-state hydel power plant of a capacity of 500 MW or more As certified by an officer not below the rank of joint secretary to the Government of India in the Ministry of Power.			

> **9.22 It is submitted that captive Coal Blocks being an integral part of the Project, the mining equipment would be covered under this provision as well. It is submitted that RFP clearly stated that Procurers through the Appellant (which was a wholly-owned subsidiary of PFC at that time) will procure a certificate from the Ministry of Power that the benefits of the Mega Power Policy would**

be extended to the Project till scheduled Commercial Operations Date of the Power Station. As per definition, Project includes captive mine and hence, it was Procurer's obligation to provide for the exemption to the coal mining equipment.

9.24 It may also noted that:-

Xxx xxx xxx

(b) PPA defines Project as power plant along with captive coal mines.

9.35 It is submitted that the Appellant has set up an ultra-mega power project which comprises of captive coal mines. It is not separately indulging in mining activities. Moreover, the coal from the Project is being used only for the Project. The entire capital cost of the power project includes the cost of the coal mines. This is also evident from Article 13 of the PPA where increase in cost of land and R&R expenditure for the coal mines is included as change in law. Therefore, the finding that the captive coal mines are a separate activity and will fall under Serial No. 399 is incorrect and ought to be set aside.

FINDINGS OF THE TRIBUNAL

(17) **As far as the complaint about the increased costs on account of change in water intake system, the following is the finding of the Tribunal.**

"12.4 After due consideration of the rival contentions of both the parties, what emerges is that after being declared as the

successful bidder, the SPL with a view to affirm the technical suitability of the preliminary report of the WAPCOS on Water Intake System, re-engaged the same agency for finalization of the said report. It is not in dispute that the Consultant, WAPCOS reviewed its earlier report and came to a conclusion that the earlier location of Water Intake was not at proper place and would result in non-availability of water for the plant during lean period. It is relevant to note that based on the recommendations of WAPCOS, SPL decided to go ahead for selection of new location as recommended and got carried out the requisite design and engineering of the entire Water Intake System which resulted into longer piping system, increased submergence area along the route, additional construction period etc.. On account of these factors, the cost of Water Intake System went up by over Rs.176 crores. The learned counsel appearing for the Appellant pointed out that the judgment of this Tribunal in Nabha Power case is not applicable to the present case since no cost relating to seismic zone data was provided to Nabha whereas in the instant case, costs were provided to the bidders. The Appellant has further reiterated that para 2.7.2.1 and para 4 of RFP which were relied upon by the Respondent procurers cannot be taken as obsolute in nature so as to absolve procurers of their responsibility for providing grossly incorrect information leading to substantial increase in cost of Water Intake System.

12.5 After thoughtful consideration of the submissions made by the learned counsel for

the Appellant and the Respondents and the findings of the Central Commission, we find that while the responsibility of carrying out due diligence before bidding and verifying the correctness of information provided in the bid documents rested with the bidders, at the same time, Respondent procurers cannot justify providing grossly erroneous report on Water Intake System taking shelter under the disclaimer in the bid document. As a matter of fact, the water availability for a thermal power station of this magnitude on regular, reliable and uninterrupted basis is essential and is a vital input for successful operation of the plant. It is noticed that the report of WAPCOS supplied to bidders at the time of bidding was deficient in ensuring adequate water supplies throughout the year uninterrupted and if the same would have been taken for construction and implementation, the same could have resulted into huge loss to the Respondent procurers being deprived of power supply for some period of the year due to less/ non-availability of water during the lean period. It is not in dispute that Sasan UMPP is supplying power to the Respondent procurer at one of the most competitive tariff in the country. It is noted from the contentions of the Respondent procurers that such an issue has not been dealt with either in the PPA or in the competitive bidding guidelines issued by Ministry of Power under Section 63 of the Act, however, in view of the criticality of such situation, we opine that the matter needs afresh re-look for suitable redressal. While the Central Commission has correctly concluded that it does not qualify as change in law under

Articles 13.1.1 of the PPA, it, however, needs to be addressed on the basis of settled principles of law and equity also, in the light of the Hon'ble Supreme Court findings in its judgment at Para 19 in Energy Watchdog vs. CERC dated 11.04.2017. Thus, we are of the considered view that this issue involving substantial additional expenditure basically arising out of erroneous report of the consultants needs to be re-examined afresh by the Central Commission. Hence, this issue is answered in favour of the Appellant."

(18) **In regard to the complaint relating to the O.M. dated 17.06.2011 forming change in law, we note the following findings:**

"14.5 We have considered the submissions of the learned counsel for the Appellant and learned counsel for the Respondents along with the consideration of the Central Commission on this issue pertaining to the claims of the Appellant regarding compensation on account of additional payment towards custom duty on mining equipment. After careful consideration and critical evaluation of the same, the key question arises for consideration, whether the equipment required for captive coal mines allocated to UMPP should be considered at par with the equipment required for setting up the power plants as far as exemption from the custom duty is concerned. The contention of the Appellant that the captive coal mines allocated to Sasan UMPP are integral & essential part of the project as a whole and

as such, the exemption of custom duty was applicable to all equipments being imported for the entire project i.e. captive coal mines as well as power plants. It is not in dispute that the captive coal mines were allotted for UMPP for its exclusive use for power generation and in no way, meant for commercial utilization elsewhere.

14.6 In this regard, we also take the note of Hon'ble Supreme Court directions in judgment dated 24.08.2014 in Manohar Lal Sharma Vs. Principal Secy., in W.P.(CRL) 120 of 2012 (Para 158) that coal from captive coal mines is to be used for UMPP alone and no diversion of coal for commercial exploitation would be permitted. Keeping these facts in view, we notice the glowing difference between an independent coal mines up for exploitation and selling coal on commercial lines and a captive coal mine set up to meet requirement of UMPP only to generate power for the ultimate benefit of the Respondent procurers and in turn, consumers for obtaining electricity at cheaper rates. The actual positions purported the assumption made by the Appellant that the customs duty exemptions will be available for import of the equipment for the entire project including captive mines and power plants. We find force in the argument of the learned counsel for the Appellant that being the integral and inseparable part of the UMPP, the custom duty rates applicable for stand alone coal mining projects would not be applicable in the present case and the exemption would need to be given effect to. We, thus opine that the Central Commission

appears to have been mechanically guided by the mere description of the relevant entry (Sl.No.399 & 400) in the said custom duty notifications and has not appreciated that the captive coal mines being integral part of the UMPP cannot be equated to a stand alone coal mines, having commercial line of utilization. The Appellant was thus right in assuming that Custom Duty exemption will be available for the coal mining equipments. As such, this issue needs to be examined afresh in accordance with law and various provisions of the RFQ/RFP/PPA. Therefore, we answer this issue in favour of the Appellant."

(19) **On the basis of the aforesaid findings, the Tribunal remanded the matter back to the Commission. We may also notice the sequel to the impugned judgment. Pursuant to the remand, the Commission reconsidered the matter in regard to the water intake. The Commission ordered payment of sum of Rs.176 crores. As far as the claim for compensation on the basis that the issuance of the office memorandum by the Joint Secretary in the Ministry of Power having brought about a change in law, it was found that the goods in question had been imported not by the first respondent but by its parent company. This, in turn, has triggered two sets of**

appeals again before the Tribunal and they are still pending. Their fate, undoubtedly, will depend upon the decision which we will be rendering in these cases.

(20) **We have heard Mr. P. Chidambaram, Mr. Dhruv Mehta, Mr. Rana Mukherjee, Mr. M. G. Ramachandran, Mr. G. Umapathy, learned senior counsel, assisted by Mr. Nikunj Dayal and Ms. Pallavi Sehgal. We have also heard Mr. Shubham Arya, learned counsel appearing on behalf of the appellant in one of the appeals. On the other hand, we also heard Mr. Sajjan Poovayya, learned senior counsel assisted by Mr.Rahul Kinra, learned counsel and Mr. Amit Kapoor, learned counsel.**

SUBMISSION OF APPELLANTS

(21) **Shri P. Chidambaram, learned senior counsel appearing for the appellant, would submit that the Tribunal has clearly acted in error and illegally in passing the impugned order.**

(22) **He would submit that as far as the finding**

given by the Tribunal in regard to the water intake system being located at a different place, is concerned, the Tribunal agreed with the Commission that there was no change in law. Once, it was found that there was no change in law, there is no power with the Tribunal to do what it did. The PPA signifies an agreement between the parties. The PPA goes into meticulous details. It follows an internationally competitive bidding and the obligations of the parties have been carved out and articulated with great care. Once the party, viz., the first respondent went to the Commission complaining that there is a change in law and it was found that there is no change in law, there ended the jurisdiction of the Tribunal. Instead of terminating the *lis*, the Tribunal has clearly strayed outside its jurisdiction in granting relief on the basis that report of WAPCOS was grossly erroneous. In this regard, he enlisted in support of his contention, various clauses which unambiguously disclaimed any liability with the procurers on account of any inaccuracies which may

be reflected in the WAPCOS report. A report submitted by WAPCOS which is a public sector body was only by way of providing information. The bidders were provided with the report well before they decided to put in their bids. Having regard to the various disclaimer clauses, it did not lie in their mouth to thereafter seek to construct a case based on the report being erroneous. In this regard, it is pointed out that the clauses clearly indicate that the bidder was to satisfy itself by conducting a study of the site. Nothing prevented the first respondent from carrying out inspection of the site and verifying for itself the information which was provided through the report of the WAPCOS.

(23) **Mr. P. Chidambaram, learned senior counsel, further pointed out that a perusal of the second WAPCOS report, which is the sole basis for the huge claim raised by the first respondent, would show that the second report does not, in any manner, rubbish the first report. It is not in dispute, it is pointed out, that the procurers were in no way associated with the carrying out of the second**

WAPCOS report. Unilaterally, the first respondent without any basis gets the second report commissioned and it is on the said basis alone that the claim was made and what is more, allowed by the Tribunal. This is clearly impermissible. As regards the claim for compensation alleging change in law brought about by the Office Memorandum issued by the Joint Secretary is concerned, in the first place, it is pointed out that the proper thing for the first respondent to do would have been to take up the matter with the Department and claim a refund and he would submit it is strange instead of doing that the burden is sought to be passed on to the procurers and which, in turn, would necessarily be passed on to the ultimate consumers.

(24) **Further, it is pointed out that the Tribunal has actually proceeded to take into consideration the earlier notifications which prevailed at the time of the cut off date with reference to which alone change in law is projected. Thereafter, it has come to the conclusion that for the goods imported from abroad for the purpose of the captive**

mines, there was an exemption. Such an inquiry itself could not have been done. In other words, it is not a case where the first respondent had indisputable material on hand which established unambiguously that there was a change in law. This is for the reason that there is no material to establish that prior to the cut off date, the goods which are the subject matter of dispute, were exempt under the notification. On the other hand, our attention is drawn to the decision of the Advance ruling authority which has gone into the issue and found that goods in question were not exempt. In fact, it is the contention of the appellants that the office memorandum issued by the Joint Secretary, Ministry of Power, merely follows the advance ruling.

(25) **Another argument which is raised in this regard is that the Joint Secretary in the Ministry of Power is not the final Governmental authority within the meaning of clause 13.1.1. What we are concerned with is notification issued under Section 25 of the Customs Act. It is not as if any authority which is**

competent within the meaning of Article 13.1.1 has issued a notification or even an interpretation within the meaning of the said article which has resulted in a change in law within the meaning of Article 13.1.1.

(26) **We have also heard Shri Dhruv Mehta, as we have already stated. We have heard the other senior counsel who have essentially adopted the arguments which have been addressed by Mr. P.Chidambaram, learned senior counsel, and they are one in contending that the Tribunal has strayed outside the contours of its jurisdiction and this has resulted in an order which is clearly illegal and erroneous.**

SUBMISSIONS OF THE FIRST RESPONDENT

(27) ***Per contra*, Mr. Sajjan Poovayya, learned senior counsel for the first respondent, took us through the other side of the picture and projected a totally different scenario. He would point out, in the first place, that the Court may not view the PPA in question as an ordinary contract. He pointed out that what is at stake is the interpretation to be**

placed on a long term power procurement contract. It is not as if in such a contract, the matters are fixed with reference to the point of time when the contract is entered into. It is not cast in stone, in other words. It is open to change. More appropriately, it is open to regulation. We are invited to consider that the Act represents a paradigm shift from the previous regime under which the price of power was fixed essentially at the whims and caprice of the State Electricity Boards. There was a stagnation in the production and supply of power. It is realising the need for increasing private participation in the generation of power that the Act was enacted in the year 2003. Being the subject matter of regulations means that tariff was open to be revisited from time to time. It is precisely this regime which is reflected by Section 79 of the Act. It is further pointed out that the complaint of the appellants regarding the Tribunal in regard to the water intake system despite agreeing with the Commission that there was no change in law rendering the findings it did and

therefore, being unsustainable, the Court may consider that in fact there was a change in law. This argument is sought to be buttressed with reference to the provisions of clause (iii) of Article 13.1.1. It is contended, in other words, that a perusal of the various clauses of the PPA would show that the procurers (the appellants) were obliged under the contract to provide initial consent. One of the initial consents related to the water linkage for the project. He would submit that in view of the provisions of Schedule II to the PPA the initial consent also consisted of carrying out the task of making available land for the power plant and for the laying of the pipeline. Since as it turned out and as supported by the second report of the WAPCOS, there was clearly insufficient availability of water at the site supported by the first report, the first respondent was compelled to take water from a distant point of the reservoir in question. This led to the colossal increase in the expenditure towards laying of the pipeline *inter alia*. This constituted, therefore, a change in law.

(28) **As far as the contention based on the disclaimer clauses which are relied upon by the appellant is concerned, it is pointed out that the width of the disclaimer clause could not be stretched to the point that is canvassed by the appellants. We are dealing with a case where a public sector unit viz., WAPCOS has given its report. Not unnaturally, the first respondent relied upon the same. It is factored in its price and once it is found that the report was entirely fallacious, no shelter can be sought by the appellants under the disclaimer clauses. Our attention was drawn to various judgments. They include *Energy Watchdog* v. *Central Electricity Regulatory Commission and Others* (2017) 14 SCC 80, *Uttar Haryana Bijli Vitran Nigam Ltd. & Anr.* v. *Adani Power Limited & Ors.* (2019) 5 SCC 325, *Gujarat Urja Vikas Nigam Ltd.* v. *Essar Power* (2008) 4 SCC 755, *Skandia Insurance Co. Ltd.* v. *Kokilaben Chandravan & Ors.* (1987) 2 SCC 654, *DLF Universal Limited* v. *Director, Town and Country Planning Department, Haryana* (2010) 14 SCC 1 and *Sumitomo***

Heavy Industries **v.** ***Oil and Natural Gas Commission of India*** **(2010) 11 SCC 296,** ***Nabha Power Limited*** **v.** ***PSPCL*** **(2018) 11 SCC 508.**

(29) **The respondents have also relied upon the judgments of this Court which are detailed hereinafter essentially for the proposition that there is power under Order XLI Rule 22 and Rule 33:** ***Prahlad & Ors.*** **v.** ***State of Maharashtra & Anr.*** **(2010) 10 SCC 458,** ***State of Punjab & Ors.*** **v.** ***Bakshish Singh*** **(1998) 8 SCC 222,** ***Mahant Dhangir & Anr.*** **v.** ***Madan Mohan & Ors.*** **(1987) (Supp) SCC 528.**

(30) **It is contended by Mr. Sajjan Povayya, learned senior counsel that there is indeed power, at any rate, under the provisions of Section 79(1)(b) of the Act to revisit the fixation of tariff** ***de hors*** **even the specific relief which is contemplated under the contract. In this regard, emphasis is laid on the fact that clauses 4.7 and 5.1.17 of the guidelines came to be amended and it is the amended guidelines which apply to the facts of the case. That it is the amended guidelines which were applied can be perceived from the fact that the amended**

guidelines are seen reflected in the PPA. The amended provisions are found in 17.3.1 and 13.1.1

(31) **Amended Guideline 4.7 is reflected in 13.1.1 whereas amended guideline 5.17 is reflected in Article 17.3.1.**

(32) **With regard to 17.3.1, it is pointed out that a reading of the same, in particular, the opening limb of the provision would show that there is clearly general power for the purpose of changing determining or increasing the tariff. It is sought to be contrasted with specific instances which would notify the jurisdiction of the Commission which included Article 13.1 which deals with change in law. In other words, the contention is that *de hors* a change in law, it becomes the duty of the Commission and the Tribunal and of this Court to factor in the need to arm the Tribunal and the Commission with ample power in the interest of justice, to deal with situations which call out for a fair and equitable treatment to be meted out to the private player as well in a long term contract.**

(33) **Mr. Amit Kapoor, learned counsel, who supplemented the submissions of Mr.Sajjan Poovayya, learned senior counsel, would draw our attention to Section 61 of the Act. He would submit that Section 61 read with Sections 63 to 79(b) provided a statutory framework which enabled the Commission to devise an equitable tariff even in a PPA governed scenario having regard to the very nature of the services involved and the changed system evolved under the Act.**

(34) **Mr. Amit Kapoor, learned counsel, laid stress on the principle of contra proferentem. He would point out along with Mr. Sajjan Poovyya, learned senior counsel, that the Court must not be oblivious of the fact that this case represents a case 2 scenario under the RFP. This means that unlike a situation where the contractor is free to choose the site and the other facilities, in a case 2 situation which is the situation prevailing in this case, everything is dictated to by the employer viz., SPV. Expatiating the said point, it is pointed out that the bidders did not have a control over the water**

source from which water had to be taken. In other words, the water could not have been sourced from any other water body. This aspect is relevant for the purpose of considering the free play with the Commission in the matter of fixing tariff based on a situation which was created as are exemplified by two grounds which have been made out and which are the subject matter of the appeals. Another point which is projected is that in regard to geological matters, the bidders were warned that they would have to on their own make an assessment. But such a caveat was not entered with regard to pertinently the hydrological conditions. Since water intake system related to hydrology, it is not open to the appellants to ward off a just fixation of tariff based on the discovery of the fact that the first WAPCOS report was highly flawed. We are reminded that it was of the greatest importance for the first respondent that it ran the power plant on a yearly basis. The second report of the WAPCOS would clearly indicate that if the appellant had to take water in terms of the first WAPCOS report, during

the lean months, the first respondent would not get sufficient water supply to operate the plant. If such an eventuality had taken place, the result would be that the procurers would end up paying the charges towards capacity charge even though, it would not get power. The appellants would be compelled to buy power from outside and finally the end consumer would have to bear the brunt of the loss. It is to avoid all this that the first respondent has acted in a manner which was not only in tune with its best interest but also ensuring that the procurers and finally the consumers were best protected. It is further pointed out by the learned counsel that the Court must bear in mind that the contract in question permits the passing of the benefit not only to the contractor but also to the employer viz., the appellants. In other words, if it was a case where the first respondent were to be found to be making an unjust enrichment under the regulatory mechanism, the appellants could have moved the Commission for bringing down the rates. Therefore, the regulatory mechanism is meant to work

both ways, in both directions and the Court must bear in mind the unique nature of a regulated contract.

(35) **Shri Amit Kapoor also referred to the theory of incomplete contracts. This is explained as meaning that being a long term contact, the parties may not expect and factor in all possible developments which may take place. This also necessitates the Commission being endowed with sufficient power to reach the contractor as also the employer a just tariff bearing in mind the regime under Section 61 of the Act.**

(36) **Upon being queried as to what would be the position at law outside of the PPA and of the jurisdiction of the Commission and if the matter were to be considered with reference to the law of contract, Shri Amit Kapoor drew our attention to Sections 18 and 19 of the Indian Contract Act, 1872. He would point out that even an innocent representation within the meaning of Section 18 can result in the contact becoming voidable under Section 19. Section 19 contemplates that the party**

whose consent is obtained by misrepresentation within the meaning of Section 18 can insist upon the other side to perform the contact. But the wronged party retained the right to insist that it shall be put in the same position it would have occupied if there was no misrepresentation. Therefore, it is pointed out that there is foundation even in the law of contract for contending that the Commission armed with its powers under Section 79(b) could compensate the contractor in the situation we are concerned with.

(37) **The judgment of this Court reported in *Uttar Pradesh Power Corporation Limited* v. *National Thermal Power Corporation Limited and Others* (2009) 6 SCC 235 rendered by a Bench of three learned judges with Justice S. B. Sinha speaking for the Court had occasion to consider the impact of regulations made purporting to act under the Electricity Regulatory Commission Act, 1998. In the said judgment, it has been *inter alia* held that there is power under regulation 92, in particular, to revise the tariff (see para 35 read with 38 and**

40)

(38) **Noticing this aspect, when we sought assistance from the learned counsel. We heard the following submissions. Mr. M. G. Ramachandran, learned senior counsel, would point out that the observations relating to the power under Section 92 must be understood as confined to the situation obtaining under Section 61 read with Section 62 of the Act. The said power may not be available when the tariff is fixed under Section 63 of the Act. When we queried as to whether the provisions of Section 61 are totally unconnected with Section 63, Mr. M. G. Ramachandran, learned senior counsel, would submit that Section 61 may not be entirely inapplicable. He would submit that particular provisions of Section 61 may, in fact, apply. They include Section 61(b). He would submit that even the guidelines issued under Section 63 have their echo in Section 61 and, therefore, it cannot be said that Section 61 and 63 are strange bedfellows.**

(39) **He would, however, contend that in no circumstances can the power under regulation 92 of**

1999 regulations apply when parties have after competitive bidding and approval of the tariff under Section 63 become bound by a long term contract under the PPA. In a case where there is a determination of tariff within the meaning of Section 62, on the other hand, Regulations of 1999 may apply. He would further point out that the power under regulation 92 which provides for reviewing of tariff and which has been understood as power of revision of tariff as a whole must be subject to the rider that the revision of tariff can be done only strictly in accordance with the tariff regulations brought in the year 2001 and as subsequently, amended from time to time. In fact, he would draw our attention to the Regulations of 2014 which expressly excludes tariff determination done under Section 63 of the Act from the ambit of the said regulation. In this regard, Shri Sajjan Povayya, learned senior counsel, on the other hand, drew our attention to the judgment of this Court *Gujarat Urja Vikas Nigam Limited* v. *Tarini Infrastructure Limited and Others* (2016) 8 SCC 743

2022 SCC Online SC 1615 2023 SCC Online SC 233. He would on the strength of these judgments point out that there is regulatory power available even in a case covered by Section 63 of the Act.

ANALYSIS

(40) **We, in these cases, are concerned only with two issues. As we have noticed, the first respondent filed a petition before the Commission invoking its power *inter alia* under Section 79(b). The matter relates expressly to the construction period. It is at this point apposite to notice the relevant provisions under the PPA.**

(41) **Article 13 deals with change in law. Article 13.1.1. defines what a change in law is. It reads as follows:**

> **"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 the 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 of such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurers under the terms of this Agreement, or (iv) any change in the (a) Declared Price of Land for the Project or (b) the cost of implementation of the resettlement and rehabilitation package of the land for the Project mentioned in RFP or (c) the cost of implementing Environmental Management Plan for the Power Station mentioned in the RFP or (d) the cost of implementing compensatory afforestation for the Coal Mine, indicated under the RFP and the PPA;
but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission.

Provided that if Government of India does not extend the income tax holiday for power generation projects under Section 80 IA of the Income Tax Act, upto the Scheduled Commercial Operation Date of the Power Station, such non-extension shall be deemed to be a Change in Law."

(42) **Article 13.1.2 declares that the Supreme Court or High Court or a Tribunal or in similar judicial or quasi judicial body in India that has jurisdiction to adjudicate upon issues relating to the project will be treated as competent Court.**

(43) **Article 13.2 provides for the actual application and the principles for computing the impact of change in law. It reads as follows:**

> **"13.2 Application and Principles for computing impact of Change in Law.**
>
> **While determining the consequence 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 Tariff 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.**
>
> **a) Construction Period**
>
> **As a result of any Change in Law, the impact of increase/decrease of Capital Cost of the Project in the Tariff shall be governed by the formula given below:**
>
> **For every cumulative increase/decrease of each Rupees Fifty crores (Rs.50 crores) in the Capital Cost over the term of this Agreement, the increase/decrease in Non**

Escalable Capacity Charges shall be an amount equal to zero point two six seven (0.267%) of the Non Escalable Capacity Charges.

Provided that the Seller provides to the Procurers documentary proof of such increase/decrease in Capital cost for establishing the impact of such Change in Law. In case of Dispute, Article 17 shall apply.

It is clarified that the above mentioned compensation shall be payable to either Party, only with effect from the date on which the total increase/decrease exceeds amount of Rs. Fifty (50)crores.

b) Operation Period

As a result of Change in Law, the compensation for any increase/decrease in revenues or cost to the Seller shall be determined and effect from such date, as decided by the Central Electricity Regulatory Commission whose decision shall be final and binding on both the Parties, subject to rights of appeal provided under applicable Law.

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 Letter of Credit in aggregate for a Contact Year.

(44) **Article 13.4.2 provides for the manner in which**

the payment for changes in law is to be effected. It reads as follows:

> **"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."**

(45) **We may notice the other foundational articles relied upon by the first respondent. Article 17 relates to Governing law and Dispute resolution. Article 17.2.1 reads as follows:**

> **"17.2.1 Either Party is entitled to raise any claim, dispute or difference of whatever nature arising under, out of or in connection with this Agreement including its existence or validity or termination (collectively "Dispute") by giving a written notice to the other Party, which shall contain:**
>
> **(i) a description of the Dispute;**
>
> **(ii) the grounds for such Dispute; and**
>
> **(iii) all written material in support of its claim."**

(46) **The further articles which we need not capture contemplate that the claim may be met even with a counter claim and an attempt should be made to**

settle the dispute amicably (see Article 17.2.3). Failure to arrive at a settlement opens the doors of Article 17.3. It is justifiable as the caption is 'Dispute Resolution'.

(47) **Article 17.3.1 is the crucial article. It reads: -**

> **"Where any Dispute arises from a claim made by any Party for any change in or determination of the Tariff or any matter related to Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff or (ii) relates to any matter agreed to be referred to the Appropriate Commission under Articles 4.7.1, 13.2, 18.1 or clause 10.1.3 of Schedule 1 7 hereof, such Dispute shall be submitted to adjudication by the Appropriate Commission. Appeal against the decisions of the Appropriate Commission shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time.**
>
> **The obligations of the Procurers under this Agreement towards the Seller shall not be affected in any manner by reason of inter-se disputes amongst the Procurers."**

(48) **It is thereafter that as we have noticed, Article 17.3.2 appears which we are not setting out, deals with the settlement of disputes which are outside the ambit of Article 17.3.1.**

(49) **We may at the very beginning notice the change that is brought about in the guideline. True it is that as we have noticed that the earlier guidelines which were formulated on 19.01.2005 contemplated a different regime both as regards change in law and also dispute resolution. The question would however be the extent to which the first respondent can derive benefit out of the same. As far as Article 13.1.1 is concerned, clauses 1 and 2 are clearly an inapplicable in regard to the claim based on the change brought about in the water intake system.**

(50) **It is clause (iii) which is referred to and relied upon by Mr. Sajjan Povayya. It reads as follows:**

> **"(iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurers under the terms of this Agreement."**

(51) **It is the case of the first respondent that since in the schedule the initial consent which was,**

in fact, a deemed initial consent consisting of performing of the task of making available land for the power plant and for the pipeline and there is a change in the same in view of what transpired pursuant to the second report of the WAPCOS, the first respondent was entitled to relief. In regard to the said argument, we must notice the following obstacles which are indisputable. We notice that the pleadings which we have set out, position before the Commission and what is more, even before the Tribunal, do not reveal that the first respondent has taken such a stand. No express reference is found to Schedule 2 containing the alleged deemed initial consent being overridden by the subsequent consent as a foundation for the claim based on change in law.

(52) **The second obstacle which we must notice is that we are dealing with an appeal under Section 125 which is based on the existence of a substantial question of law. In this regard, indisputably both the Commission and the Tribunal have rendered the concurrent finding that the first respondent has**

failed to establish any change in law. Thus, the first respondent is up against concurrent findings which we cannot lightly disregard.

(53) **Thirdly, we may notice that the first respondent has not independently challenged the finding rendered by the Tribunal holding that there is no change in law. We have noticed that the Tribunal has proceeded to premise the grant of relief to the first respondent and remanding the matter on a totally different basis. Here, we may notice no doubt that treating it as a part of the power of appellate Court to correct errors in the findings in the impugned order passed may extend in appropriate cases by the principle of Order XLI Rule 22. However, objection is seen raised by the Appellants to permitting of the principle in Order XLI Rule 22 CPC to govern in the situation such as in an appeal under Section 125 of the Act. We proceed on the basis that there is power to permit the respondent to impugn a finding given by the Tribunal against the respondent even without filing any appeal or cross petition.**

(54) **Examining the claim on merits, we find that the first respondent would fail. It is categorically stated in para 68 of the petition that the increase in the cost is directly attributable to the error in the WAPCOS report provided to the bidders at the pre-bid stage. It is contended that the first respondent is required to be compensated for the same.**

(55) **In para 108, it is stated that as per the RFP, the procurers had to provide the water intake study report. As per the said report, the cost of water intake system was approximately Rs.92 crores. It is further stated in para 110 that there was considerable increase in the cost of water due to the water intake system. It is stated that it is on account of errors in the report. It is, however, no doubt, in para 111 stated that since water pipeline is part of the power station land and the water intake pipeline is an integral part of the power station, the indicative cost of the water intake system will be covered by change in law. In the appeal also, we have noticed the stand elaborately.**

(56) **Initial consent, has been defined in the PPA as meaning the consents listed in Schedule 2. Article 5.5 of the PPA reads as follows:**

> **"5.5 Consents**
>
> **The Seller shall be responsible for obtaining all Consents (other than those required for the Interconnection and Transmission Facilities and the Initial Consents) required for developing, financing, constructing, operating and maintenance of the Project and maintaining/renewing all such Consents in order to carry out its obligations under this Agreement in general and this Article 5 in particular and shall supply to the Lead Procurer promptly with copies of each application that it submits, and copy/ies of each consent/approval/license which it obtains. For the avoidance of doubt, it is clarified that the Seller shall also be responsible for maintaining/renewing the Initial Consents and for fulfilling all conditions specified therein."**

(57) **It is true that the procurers were to secure certain initial consents whereas the vast majority of the consents were to be procured by the seller. Whatever was to be procured by the procurers apparently has been described as initial consents. It is also not in dispute that though the word consent is used in Article 13.1.1, the initial consent would also qualify as consent. The**

contention of the appellants is that as far as the initial consent contemplated which was to be performed by the procurers it was to provide the water linkage. The water linkage consisted of making available the source of water which consisted of the Govind Ballabh Pant Sagar(Rihand Reservoir). There has been no change in the said consent. It is not a case of the first respondent, in other words, that the first respondent has been forced to take water from any other water source. In this regard by communication dated 23.10.2006, we find the following:

> **"6. Reference Clause: RFP 1.4(v) – regarding tying up water linkage for the Project requirement alongwith approval of Central Water Commissioner**
>
> **(i) This has already been provided on 12th October, 2006.**
>
> **(ii) The water intake study report and Project Report including geo-technical study, topographical survey, area drainage study, socio-economic study and EIA (rapid), were provided on 3rd August, 2006."**

(58) **While on this document, we may also notice the following in regard to the declared price of land contemplated in the RFP under clause 1.4 (ii):**

"2. Reference Clause: RFP 1.4(ii) – regarding Declared Price of Land for Power Station

Indicative Declared Price of Land for Power Station is as follows:

(i) Power Plant Area – Rs.110 Crores

(ii) MGR Land – Rs.80 Crores.

(iii) Water Pipeline Corridor– Rs.0.63 Crores

(iv) Ash Pipeline Corridor – Rs.0.047 Crores"

(59) **There is no dispute regarding this aspect. In this regard, we notice that under Schedule 1A to the PPA it has been clearly indicated that water source in the project is Govind Ballabh Pant Sagar(Rihand Reservoir).**

(60) **It is, thereafter, we must notice that under the caption initial consent in Schedule 2, on behalf of the procurers, the SPV was expected to issue the notification under Section 6 of the Land Acquisition Act, obtain necessarily environmental and forest clearance for the power stations, allocate captive coal mines and finally, give the water linkage for the reasonable project requirements. It is this water linkage for the reasonable project requirements which was contemplated to be fulfilled from the water source Govind Ballabh Pant**

Sagar(Rihand Reservoir). The communication dated 23.10.2006 would indicate that the Central Water Commission had given its approval for sourcing the water need from the water body in question. In the said sense, the procurers had fulfilled their obligation as contemplated in RFP.

(61) **The RFP which preceded the PPA provided for certain conditions which we have already indicated. Clause 1.4 *inter alia* contained undertaking for providing the water linkage for the project with the requisite approval of the Central Water Commission at least 30 days prior to Bid deadline. In the PPA, it is indicated that the procurers have completed the initial studies as contained in the project report and obtained initial consent required for the project which are set out in Part I of Schedule 2 and have been made available to the seller on the date of the PPA except two matters: (1) Forest clearance and the declaration under Section 6 of the Land Acquisition Act. It is in Part I Schedule 2 of the PPA stated that the notification under Section 6 of the Land Acquisition Act was an act to be**

performed by the procurers. It is this act which was not done initially at the stage of the PPA. Also forest clearance is mentioned in the Part I of Schedule 2. Even the said clearance was also apparently not obtained as is indicated at the beginning of the PPA. Thereafter, Part II of Schedule 2 contains the clause which is the fountainhead of the argument based on initial consent.

(62) **It contemplated performing of the task mentioned in Article 3.1.2A also shall be part of the initial consent on their completion within the time provided. Article 3.1.2A contemplated performance of the task with which we are concerned viz., making available the land for the power plant and for the water intake pipeline. This task was to be performed within a period of eight months from the date of the letter of intent being issued or six months from the PPA whichever is later. It is true that the task which was to be performed by the procurers in terms of Article 3.1.2A was performed belatedly by the procurers. In other words, the**

time limit was overshot by nearly 18 months. But this delay is not the basis for the claim based on change in law.

(63) **The question would then arise as to whether the delay in the performance of the task which has been characterised on its performance within the time as a deemed initial consent would lead to a change in law within the meaning of Article 13.1.1. We find that Article 3.3.3 of the PPA reads as follows:**

> **"3.3.3 In case of inability of the Seller to fulfil the conditions specified in Article 3.1.2 due to any Force Majeure event, the time period for fulfilment of the Condition Subsequent as mentioned in Article 3.1.2 and Article 3.1.2A, shall be extended for the period of such Force Majeure event, subject to a maximum extension period of ten (10) Months, continuous or non-continuous in aggregate. Thereafter, this Agreement may be terminated by either the Procurers (jointly) or the Seller by giving a notice of at least seven (7) days, in writing to the other Party.**
>
> **Similarly, in case of inability of the Procurers to fulfil the conditions specified in Article 3.1.2A due to any Force Majeure event, the time period for fulfillment of the Condition subsequent as mentioned in Article 3.1.2 and Article 3.1.2A, shall be extended period of ten (10) Months, continuous or non-continuous in aggregate. Thereafter, this Agreement may be terminated by either the Procurers (jointly) or the**

Seller by giving a notice of at least seven (7) days, in writing to the other Party."

(64) **We must next notice Article 3.3.3A which follows:**

"3.3.3A In case of inability of the Procurers to perform the activities specified in Article 3.1.2A within the time period specified therein, otherwise than for the reasons directly attributable to the Seller or Force Majeure event, the Condition Subsequent as mentioned in Article 3.1.2 would be extended on a 'day for day' basis, equal to the additional time which may be required by the Procurers to complete the activities mentioned in Article 3.1.2A, subject to a maximum additional time of six (6) Months. Thereafter, this Agreement may be terminated by the Seller at its option, by giving a notice of at least seven (7) days, in writing to the Procurers. If the Seller elects to terminate this Agreement, the Procurers shall, within a period of thirty days, purchase the entire shareholding in the Seller for the following amount. Provided such purchase of shares shall be undertaken by the Procurers in the ratio of their then existing Allocated Contracted Capacity:

a) total amount of purchase price paid by the Successful Bidder to the shareholders of the Seller acquire the equity shares of the Seller as per the RFP; plus

b) total amount of the Declared Price of Land and Geological Report (GR) to the extent already paid by the Seller after the acquisition of its 100% shareholding by the Selected Bidder; plus

c) an additional sum equal to ten percent (10%) of the sum total of the amounts

mentioned in sub-clauses (a) and (b).

In addition, the Performance Guarantee of the Seller shall also be released forthwith."

(65) **A perusal of the aforesaid articles would reveal that the parties have provided for the consequences of failure on the part of the procurers to make available land as contemplated in Article 3.1.2A. The long and short of it is that if a certain timelimit is crossed by the procurers in the performance of its obligations in this regard, the seller (the first respondent) has been given the right to repudiate the contract. What is more, it could insist on the procurers purchasing the entire share capital of the company viz., the first respondent as provided therein. It is not the case of the first respondent that by invoking the aforesaid articles, the first respondent purported to repudiate the contract. On the other hand, it is the common case that the contract continued to be alive and it has survived subject to the claims which have been raised thereunder. This would mean**

that as the consequences of failure to perform the task having been provided in the contract in the manner provided, we should not ordinarily tarry further to ask as to whether this would provide the premise for a change in law as contemplated under Article 13.1.1. We necessarily pose the question still, whether this would be change in law. Not that we are unmindful of the fact that the two bodies have concurrently found that there is no change in law and the attempt is to dislodge such a finding by a side wind in the manner of speaking by an attack lodged by the respondent in the appeal. This is not a case where the first respondent has made use of the land for the purpose of laying the pipeline through the corridor as contemplated and found that drawing water from the water intake system as contemplated would have resulted in water not being available in sufficient quantity through the length of the year. There is no such case.

(66) **The case of the first respondent, on the other hand, is that the PPA having been signed on 07.08.2007, in the second week of December of the**

very same year-2007, in order to confirm the availability of water through water intake system as contemplated in the first WAPCOS report, the second report was commissioned ironically through the very same consultant. There is no case, whatsoever, that having made attempts to draw water in terms of the first WAPCOS report and having found that such an effort failed, they were compelled to seek recourse to a second study *albeit* by the same body. No reasons are forthcoming as to what inspired the first respondent to commission the second study. Secondly, this is not a case where the procurers brought about any change in law in the study on their own or they persuaded or compelled the first respondent to change the corridor for the route for laying of the pipeline. The first respondent did not even involve the procurers in the second study. There is no intimation given that the first respondent was commissioning a new study. There is no basis forthcoming as to what prompted the first respondent to commission a fresh study. What is stated is only that it wished to confirm the

availability of water in terms of the first water intake study. In other words, we must sum up as follows:

(67) **Even in terms of the case built around Part II of Schedule 2 to the PPA under which the performing of the task mentioned in Article 3.1.2A within the time provided was to be treated as a deemed initial consent, the consequence of failure to do that have been expressly spelt out as we have already noticed. At best or at worst, it could have empowered the first respondent to rescind the contract. That apart, we are not in a position, for the reasons which we have indicated already, to come to the conclusion that it would amount to change in law. While on change in law, we may notice another aspect of the matter.**

(68) **Article 13.3.1 reads as follows:**

> **"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 Procurers 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."**

(69) **Thus, the PPA contemplates that if the seller is affected by change in law and wishes to claim change in law, it has to notify the procurers of the change in law as soon as is reasonably practicable after becoming aware of the same. It may be true that on the basis of the request made by the first respondent apparently based on the second WAPCOS report that the first respondent has taken steps for acquiring the land needed for laying the pipeline. It may be true that the said pipeline had to cross a greater distance. It is not as if it was on the basis that the procurers rendered themselves liable in law or held themselves liable in law to make good the escalation in cost. There is no such material made available indicating that the procurers have held out that they will be liable. It is not in dispute that the first unit from the power plant was in fact commissioned in August, 2012. In fact, when we asked as to whether a notice was given in terms of Article 13.3.1, Shri Amit Kapur, learned counsel, could not point out to any such notice except the notice which was given on 15.12.2012. In this regard**

also, we may notice the contents of the said notice:

> **"5.2 Additional expenditure incurred due to change in Declared Price of Land, cost of implementation of resettlement and rehabilitation package of land, change in customs duty on mining equipment, water intake system etc.**
>
> **(a) the actual expenditure incurred by SPL towards land, implementation of resettlement and rehabilitation package of land for the project, water intakes system, customs duty on mining equipment and excise duty on cement and steel."**

(70) **Therein all that is indicated is that for the water intake the original cost was put Rs.92 crores whereas the estimated cost has been Rs.238 crores Contemporaneous with the change in law alleged and in keeping with Article 13.3.1, there is no notice brought to our notice.**

(71) **No doubt, Shri Amit Kapur, learned counsel for the first respondent, did attempt to draw inspiration from the Minutes of the Meeting which took place on 20.03.2013 as per which the lead procurer appears to have agreed to the change. The case of Mr. Amit Kapur, learned counsel, that the lead procurer can bind the other procurers is**

contested by Shri M. G. Ramachandran, learned senior counsel.

(72) **We have noticed that a notice in terms of Article 13.3.1 notifying the change in law as claimed today before the Court was not given at the relevant time.**

(73) **The argument that the procurers agreed to the acquisition of the land through which the new route had to travel also does not appeal to us as firmly founding the claim of the first respondent in law. The matter must be viewed from the prism of the specific provisions defining the change in law and the actual change in law which is as we have explained above. In short, being awarded a contract and having entered into the PPA and without any basis as such in facts, the first respondent ventured to commission a new study and acting on the same, a new pipeline corridor came on the scene. Necessarily the cost may go up. But the question we are to decide is as to whether it is change in law and we are of the view that it could not be a change in law as contemplated in the agreement as it is not**

a change in initial consent which is the only case which has been argued in this regard.

(74) **The argument further is only that the estimated cost was Rs.92 crores and a further sum in excess of the same had to be spent. In this regard, we may notice the following clause in the PPA:**

> **"5.2 The Site**
>
> **The Seller acknowledges that, before entering into this Agreement, it has had sufficient opportunity to investigate the Site and accepts full responsibility for its condition (including but not limited to its geological condition, on the Site, the adequacy of the road and rail links to the Site and the availability of adequate supplies of water) and agrees that it shall not be relieved from any of its obligations under this Agreement or be entitled to any extension of time or financial compensation by reason of the unsuitability of the Site for whatever reason.**
>
> **The State Government authorities would be implementing the resettlement and rehabilitation package ("R&R") in respect of the Site for the Project, for which the costs is to be borne by the Seller. The Procurers shall endeavour to ensure that the State Government implements such R&R ensuring that land for different construction activities becomes available in time so as to ensure that the Power Station and each Unit is commissioned in a timely manner. Assistance of the Seller may be sought, which he will provide on best endeavour basis, in execution of those activities of the R&R package and as per estimated costs, if execution of such**

activities is in the interest of expeditious implementation of the package and is beneficial to the Project affected persons."

(75) **Moving on to the findings actually which have been rendered by the Tribunal, the Tribunal has, in the impugned order, found that the first report of the WAPCOS is grossly erroneous. We are at a loss to understand as to what was the basis for rendering such a finding. Without any material, it is a little inexplicable as to how the Tribunal could have rendered such a finding which has serious consequences as we have noticed. This is after finding undoubtedly that there is no change in law. Virtually, the Tribunal has brushed aside the disclaimer clauses. Before we go to the disclaimer clauses, we may also indicate that a perusal of the first WAPCOS report indicates that it is a fairly elaborate report. The second WAPCOS report apart from it being prepared without reference to the procurers as we have noticed does not appear to say anything which is critical of the first WAPCOS report. At least, there is, in fact, no express**

whisper about the first report. All that the second WAPCOS report seems to indicate is upon being awarded the work, WAPCOS has gone about preparing another report. At least we are unable to find as to how the Tribunal could on the basis of the second report find that the first WAPCOS report was grossly erroneous. The Tribunal has not undertaken a comparative study of the two reports. There is no discussion whatsoever of the two reports. Nor is there any other material provided to render such a finding. The only area where we find what could perhaps be understood as a reference to the first report is clause 4.2.2. It reads as follows:

> **"4.2.2. As intimated by project authority that and acquisition of pipeline corridor on the right side of Vallabhh Pant Sagar is in the final stages and other information gathered during site visit by WAPCOS/CWPRS team by local enquiry survey area 'A' was identified for detailed survey during detailed survey it is found that sufficient depth is not available for intake well as bed level of the reservoir is around 252.5 and this was also in a small patches. So, this area is discarded."**

(76) **It would appear that the word 'project**

authority' according to Shri M.G. Ramachandran is to be understood as the first respondent. All that even clause 4.2.2 indicates is that the first respondent intimated that the acquisition for the pipeline corridor was in its final stages and thereafter it is indicated that during the detailed survey, it was found sufficient depth is not available.

(77) **We do not think this can be the basis for acting upon the second report after describing the first report as grossly erroneous.**

(78) **Now we may consider the disclaimer clauses. The disclaimers have their genesis in the guidelines. Note 4 of the RFP indicates that the procurers apart from their Directors, employees must not be treated as having made any representation or warranting whatsoever in respect of any statements or omissions or the accuracy, completeness or reliability of information contained therein. They were not to incur any liability under any law *inter alia* even if any loss or damage is caused to the bidder by any act or omission on their part. Again**

clause 1.4 of the RFP clearly indicated to the bidders that the procurers *inter alia* do not make any representation or accept any responsibility or liability in respect of any statements or omissions made in the water intake study report and the project report. There is a specific disclaimer also about the accuracy, completeness or reliability of information contained therein. This is even if any loss or damage is caused to the selected bidder by any act or omission on their part. Thus, in respect of the water intake study report, the prospective seller or the bidders were specifically told in no uncertain terms that any statements or omissions in water intake study report would not result in the procurers being visited with liability even if there was loss or damage caused to the selected bidder. This must be borne in mind at this juncture for the following reasons.

(79) **The first respondent has a case that water intake system goes to hydrology whereas in relation to geology, the first respondent was duty bound to make its own inquiries. Since the connect between**

hydrology and water intake system is real and since in regard to conditions about hydrology, the first respondent relied on the procurers or the report prepared by a public sector unit, in particular, they should stand relieved of any obligation to conduct any further inquiry on their own, runs the argument.

(80) **We are afraid that this argument cannot hold water as the need for making more inquiry in relation to geology cannot relieve the bidder from the operation of other clauses. A just result in the matter of what a contract produces by way of a legal relationship must be viewed holistically on a harmonious survey of all the relevant clauses. In any other approach, the result would have the effect of rendering specific clauses dealing with the topic in question dead letter. In view of clause 1.4 of the RFP, in other words, the bidder was duty bound if it felt advised to check the correctness of the report made by the WAPCOS. It could have undertaken its own study. What it did four months after it was granted the contract and entered into the PPA, it**

could have done before it decided to make the bid and enter into the PPA. At least we are not shown anything which stood in the way of the bidder conducting its own study and being convinced by the correctness of the report. We say this for the reason that what is involved is an international competitive bid. The bidding process is the foundation for the determination of the price in terms of section 63 of the Act. The Commission approves the rates on being convinced that the rates are fair and competitive and arrived at on the basis of a fair bidding process. The provisions of the RFP must, therefore, be viewed from the perspective of it placing on alert the bidders about the imponderables which are inevitably involved in pricing process. This means that having regard to clause 1.4 of the RFP, no bidder could possibly come forward with the claim that the contents of the WAPCOS report must be treated as sacrosanct and infallible and that it should not be taken without a generous pinch of salt as it stands. At least this was the message which is writ large in the said

clause. He who acted disregarding the caveat about the report acted at his own peril.

(81) **Again, we do notice clause 2.7.2 of the RFP which we have indicated already. It contemplates the duty on the part of the bidder to make independent inquiry and to satisfy itself with regard to the required information, inputs, conditions, circumstances, which may affect the bid. This is apart from the site as referred to in the PPA in clause 5.2 which we have already referred to.**

(82) **With the wealth of disclaimer clauses which we have noticed, we are unable to subscribe to the reasoning adopted by the Tribunal. We are of the view that the Tribunal was wrong in brushing aside the specific and unambiguous disclaimers under which the procurers stood exonerated from liability.**

(83) **One argument which we must notice at this stage is the effect of Article 13.2. We have already adverted to Article 13.2. Article 13.2, no doubt, indicates that while determining the consequence of change in law, the parties shall have due regard to**

the principle that the purpose of compensating the party affected by any change in law is to restore through monthly tariff payments the affected party to the same economic position as if such change has not occurred. We have tested the hypothesis by deliberately omitting a crucial part in Article 13.2 which are the words 'to the extent contemplated in this Article 13'. When we read the words 'to the extent contemplated in this Article 13' as part of the Article 13.2, it necessarily brings in clause (a) and (b) of Article 13.2. In other words, what the parties have contemplated is that consequence of change in law would result in it being addressed through the mechanism of monthly tariff payments through supplementary bills(see Article 13.4.2). But it is to the extent as contemplated in Article 13. The question would arise as to whether the parties contemplated that it gave authority to the competent body viz., the Commission to discard the formula which is provided in Article 13.2(a) and (b). We are of the view that what the parties contemplated under Article 13.2 was that change in

law must be viewed through the specific provisions of clauses (a) and (b). In other words, a change in law may occur during the period of construction. Then it is to be treated as falling under Article 13.2(a). A change in law may occur during the period of its operation. It would then appear to be dealt with under clause (b). If a change in law takes place during the period of construction then its impact is to be measured with reference to the capital cost of the project. The word 'capital cost' understandably has been defined in PPA. A formula has been engrafted. The formula contemplates that for every increase/decrease of each Rs.50 crores in the capital cost as a result of the change in law, the increase/decrease in the non-escalable capacity charges is to be 0.267 per cent of the non-escalable capacity charges. No doubt, this is if the seller provides to the procurers documentary proof of such increase/decrease in establishing the impact of such change.

(84) **In other words, the effect of change in law during the construction period is captured by**

13.2(a). We must understand that this is a meticulously thought through contract which emerged after a long rigorous process. Parties were clear about how the change in law had to be compensated and methodology has been set out clearly. Therefore, any appeal made to the general part in Article 13.2 which speaks about the affected party being restored to the same economic condition as if such change in law had not occurred cannot result in departing from the specific formula which has been set in place. This meaning is inevitable from the words "to the extent contemplated in this Article 13, which precedes the general words. In this regard, we may refer to the judgment of this Court in *Uttar Haryana Bijli Vitran Nigam Ltd. & Anr.*[1]. In the said judgment, it has been relied upon understandably by the first respondent also and which also arose under the same clause (Article 13.2), this Court has held *inter alia* as follows:

> **"10. Article 13.2 is an in-built restitutionary principle which compensates**

1 Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. **v.** *Adani Power Limited & Ors.* **(2019) 5 SCC 325**

the party affected by such change in law and which must restore, through monthly tariff payments, the affected party to the same economic position as if such change in law has not occurred. This would mean that by this clause a fiction is created, and the party has to be put in the same economic position as if such change in law has not occurred i.e. the party must be given the benefit of restitution as understood in civil law. Article 13.2, however, goes on to divide such restitution into two separate periods. The first period is the "construction period" in which increase/decrease of capital cost of the project in the tariff is to be governed by a certain formula. However, the seller has to provide to the procurer documentary proof of such increase/decrease in capital cost for establishing the impact of such change in law and in the case of dispute as to the same, a dispute resolution mechanism as per Article 17 of the PPA is to be resorted to. It is also made clear that compensation is only payable to either party only with effect from the date on which the total increase/decrease exceeds the amount stated therein.

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.

19. Lastly, the judgment of this Court in *Energy Watchdog* v. *CERC* [*Energy Watchdog* v. *CERC*, (2017) 14 SCC 80 : (2018) 1 SCC (Civ) 133] was also relied upon. In this judgment, three issues were set out and decided, one of which was concerned with a change in law provision of a PPA. In holding that change in Indonesian law would not qualify as a change in law under the guidelines read with the PPAs, this Court referred to Clause 13.2 as follows : (SCC p. 131, para 57)

"*57.* … 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."**
>
> **There can be no doubt from this judgment that the restitutionary principle contained in Clause 13.2 must always be kept in mind even when compensation for increase/decrease in cost is determined by CERC."**
>
> **(Emphasis supplied)**

(85) **We are of the view that the view which we have taken does not in any way conflict with the view which has been laid down by this Court.**

(86) **No doubt, in *Energy Watchdog*[2] again a judgment which is relied upon by both the sides, the Court was dealing with a case under the Act and has expressed the following view:**

> **"19. The construction of Section 63, when read with the other provisions of this Act, is what comes up for decision in the present appeals. It may be noticed that Section 63 begins with a non obstante clause, but it is a non obstante clause covering only Section 62. Secondly, unlike Section 62 read with Sections 61 and 64, the appropriate Commission does not "determine" tariff but only "adopts" tariff already determined under Section 63. Thirdly, such "adoption" is only**

***2 Energy Watchdog* v. *Central Electricity Regulatory Commission and Others* (2017) 14 SCC 80**

if such tariff has been determined through a transparent process of bidding, and, fourthly, this transparent process of bidding must be in accordance with the guidelines issued by the Central Government. What has been argued before us is that Section 63 is a standalone provision and has to be construed on its own terms, and that, therefore, in the case of transparent bidding nothing can be looked at except the bid itself which must accord with guidelines issued by the Central Government. One thing is immediately clear, that the appropriate Commission does not act as a mere post office under Section 63. It must adopt the tariff which has been determined through a transparent process of bidding, but this can only be done in accordance with the guidelines issued by the Central Government. Guidelines have been issued under this section on 19-1-2005, which guidelines have been amended from time to time. Clause 4, in particular, deals with tariff and the appropriate Commission certainly has the jurisdiction to look into whether the tariff determined through the process of bidding accords with Clause 4.

20. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions dehors its general regulatory power under Section 79(1)(*b*). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to "regulate" tariff is completely done away with? According to us, this is not a correct way of reading the

aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various sections must be harmonised. Considering the fact that the non obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways — either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(*b*) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff. Whereas "determining" tariff for inter-State transmission of electricity is dealt with by Section 79(1)(*d*), Section 79(1)(*b*) is a wider source of power to "regulate" tariff. It is clear that 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, albeit under Section 79(1)(*b*), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory

> **powers under Section 79(1)(*b*) can then be used."**

(87) **It is true that as far as the said case is concerned, the case arose from claims which were made under the PPA on the basis that there were changes in law apart from the argument that a case of *Force Majeure* was made out. It is not a case which actually on facts involved the Court dealing with a case arising from the fixation of tariff under Section 63. In fact, it arose after a PPA was approved and the rates were fixed already under Section 63. However, if we notice the contents of para 19 and 20, the principle which the first respondent seeks to canvas before us does not appear to emerge. The argument of the first respondent is that even *de hors* the terms of the contract, there is general regulatory power available under Section 79 of the Act. There is an overarching authority with the Commission exercising power under Section 79 which would enable it and which would empower it to grant compensation even *de hors* the terms of the contract it is contended. The argument appears to**

be that unlike generality of contracts, a regulated contract which is a long term contract or an incomplete contract generates space for power with the appropriate regulatory body to revisit the rates and thereby vouchsafe a fair deal to both sides, be it a seller or the procurer.

(88) **What this Court has laid down in para 19 and 20 in Energy Watchdog[3] may be summarized as follows:**

(89) **In the case of fixation of tariff under Section 63 of the Act, what is contemplated is to begin with guidelines which have been issued under Section 63. When the Commission is asked to exercise power under Section 63, it is beholden to the guidelines as it cannot depart from the same. In a area where the guidelines do not occupy the field, undoubtedly, the Commission is clothed with power as a regulatory body to act in the best interest of all sides and to fix the tariff in a manner which is fair in the sense bearing in mind the paramount interest of increased generation of power, the interest of the**

3 Energy Watchdog **v.** *Central Electricity Regulatory Commission and Others* **(2017) 14 SCC 80**

consumer, as also ensuring of a fair return to the seller. So far so good. When the Commission exercises the power under Section 63, this power is not abridged when there are no guidelines holding the field.

(90) **We are not dealing with a case where the exercise of power of the Commission under Section 63 is under review. In a case where, however, the rates are approved under Section 63 and PPA is entered into, the question would undoubtedly arise as to whether there is a power which can be described in a manner of speaking to be plenary power with the Commission under Section 79? Can there be a power which can be christened as omnibus? Can the Tribunal, in other words, disregard the express words of the contract? Can it discover a new change in law which the parties have not contemplated as change in law? In short, can the Tribunal rewrite the contract and create a new bargain?**

(91) **We are of the view that the Tribunal cannot indeed make a new bargain for the parties. The**

Tribunal cannot rewrite a contract solemnly entered into. It cannot ink a new agreement. Such residuary powers to act which varies the written contract cannot be located in the power to regulate. The power cannot, at any rate, be exercised in the teeth of express provisions of the contract.

(92) **We notice this for the reason that the first respondent has a case that what is provided in Article 13.2(a) (since we are dealing with the case of alleged change in law during the construction period) does not do justice to the parties or that it is incapable of producing a fair result and therefore, the Tribunal would necessarily be clothed with power bearing in mind its regulatory nature. In a matter where the parties have entered into a contract with express provisions, we are unable to agree with the first respondent that the Tribunal would have power to disregard the express provisions of the contract on the score that as it turns out that with passage of time and even change in circumstances, it is found that the contract cannot be worked except at a loss for the contractor.**

(93) **We may, at this juncture, also notice an argument which has been raised by Shri Amit Kapur, learned counsel for the first respondent, when queried as to what would be the position if a claim of the nature were canvassed in a civil suit. The answer came that Section 18 and 19 of the Indian Contract Act, 1872 (hereinafter referred to as 'Contract Act' for brevity), provided the gateway. Section 18 of the Contract Act deals with the effect of representation or rather misrepresentation by a party made to another party to the contract. It, undoubtedly, includes a representation, however, innocent it may be. In other words, an innocent representation made to one party by another party which forms the basis for consent of the person can lead to the contract becoming voidable under Section 19. It is undoubtedly true that Section 19 also contemplates that the wronged party can insist upon the contract being performed and further, however, persevere in requiring that he be placed in the same position if he had not been led astray by the misrepresentation. There may be no dispute about**

this principle. However, we have noticed the various clauses as contained in the disclaimer clauses. When a party to the contract states that what is contained in the first WAPCOS report and anything else as contemplated in the RFP and the PPA does not amount to a representation, we are unable to agree with the contention that it would still be considered as a representation within the meaning of Section 18 and thereby leading to a claim under Section 19 of the Contract Act. Therefore, we find that the contentions which the first respondent seeks to raise under the provisions of Section 18 and 19 untenable.

(94) **Reliance was placed on the judgment of this Court *PTC India Limited* v. *Central Electricity Regulatory Commission* (2010) 4 SCC 603. In *PTC India Limited*[4], the actual question which arose was as to whether the appellate Tribunal under the Act has jurisdiction under Section 111 to examine the validity of regulations framed in exercise of power**

4 ***PTC India Limited* v. *Central Electricity Regulatory Commission* (2010) 4 SCC 603**

under Section 178 of the Act. The further question which arose was whether Parliament has conferred power of judicial review on the Tribunal under Section 121 of the Act. In the course of this judgment, the Court *inter alia* held as follows:

> **"53. Applying the abovementioned tests to the scheme of the 2003 Act, we find that under the Act, the Central Commission is a decision-making as well as regulation-making authority, simultaneously. Section 79 delineates the functions of the Central Commission broadly into two categories — mandatory functions and advisory functions. Tariff regulation, licensing (including inter-State trading licensing), adjudication upon disputes involving generating companies or transmission licensees fall under the head "mandatory functions" whereas advising the Central Government on formulation of National Electricity Policy and tariff policy would fall under the head "advisory functions". In this sense, the Central Commission is the decision-making authority. Such decision-making under Section 79(1) is not dependent upon making of regulations under Section 178 by the Central Commission. Therefore, functions of the Central Commission enumerated in Section 79 are separate and distinct from functions of the Central Commission under Section 178. The former are administrative/adjudicatory functions whereas the latter are legislative.**
>
> **55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a**

> **regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(*g*) the Central Commission is required to levy fees for the purpose of the 2003 Act. An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process. Making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(*g*). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(*g*) has to be in consonance with such regulation."**

(95) **We are unable to see how the said judgment can advance the case of the first respondent. The question which fell for consideration and the opinion which has been rendered do not in any way detract from the view which we have taken. Substantially, it was held that the making of regulation was not a pre condition for levying a regulatory fee under Section 79(1)(g). It is no doubt true that Commission has an adjudicatory function. It is also empowered to give opinions.**

Power to frame regulations indicates that it also has legislative powers. The point is that since in this case we are concerned with the adjudicatory function of the Commission, we are concerned with the trammels to which it is subject in the form of the express terms of the contract. All that we are holding is that in a case where the matter is governed by express terms of the contract, it may not be open to the Commission even donning the garb of a regulatory body to go beyond the express terms of the contract. It is apposite that we notice para 58 reads as follows:

> **"58. One must understand the reason why a regulation has been made in the matter of capping the trading margin under Section 178 of the Act. Instead of fixing a trading margin (including capping) on a case-to-case basis, the Central Commission thought it fit to make a regulation which has a general application to the entire trading activity which has been recognised, for the first time, under the 2003 Act. Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate legislation. Such subordinate legislation can even override the existing contracts**

including power purchase agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an order of the Central Commission under Section 79(1)(*j*).”

(96) **While it may be open as indicated therein for a regulation to extricate a party from its contractual obligations, in the course of its adjudicatory power it may not be open to the Commission by using the nomenclature regulation to *usurp* this power to disregard the terms of the contract.**

(97) **Another argument which has been raised on behalf of the first respondent is that the guidelines were framed on 19.01.2005. Clauses 4.7 and 5.17 came to be, however, modified before the PPA was entered into and even prior to the RFP and therefore, the PPA and Article 17.3 therein has been cast in the widest terms.**

(98) **We have already perused Article 17.3.1. Article 17.3 to begin with, speaks of specific instances which can trigger the dispute resolution mechanism. A case in point and close to facts is a dispute arising from a change in law, after a claim**

is denied and a resolution through settlement not being arrived at. There are other specific clauses which are part of the PPA which are adverted to in the later part of Article 17.3.1. Therefore, the argument is raised on behalf of the first respondent that the opening words of Article 17.3.1 are designedly broad to cater to situations such as are represented by the facts of this case. In other words, even irrespective of a situation being not governed by Article 13.1 in order that the restitutionary principle or the principle of an incomplete contract leading to a lifelong regulation assuring a fair return to the seller is observed, the power of revisiting of the rates is what is contemplated in the amended guideline which finds enshrinement in Article 17.3.1., it is contended.

(99) **In fact, when we notice the PPA, we find that apart from matters which are expressly referred to in Article 17.3.1, viz., Articles 4.7.1, Article 13.2, Article 18.1 or clause 10.1.3 of Schedule 17, there are other Articles in the PPA with which Article 17.3.1 can bear nexus with. They include**

apparently, Articles 4.5.2, 11.6.6 and 11.6.7. This is besides 12.7(e) which relates to enforcement of claims under *Force Majeure*. Therefore, it is not as if Article 17.3.1 is not to be understood without reference to the other parts of the contract. No Court should attempt to read a part of the contract in isolation. The draftsman of a contract of the nature we are dealing with would have not left any stone unturned in making the contract one to be construed with a great sense of harmony and care. Therefore, we do not accept the contention of the first respondent that the Commission, Tribunal and this Court must pour in meaning into the opening words of Article 17.3.1 so that in the facts, the first respondent can claim compensation on the basis that it has incurred expenditure acting on the first WAPCOS report.

(100) **Here, we must notice finally, that substantially, the claim in regard to the water intake system was founded on the reliance placed on the first WAPCOS report and on the strength of the second WAPCOS report.**

(101) **We also find reinforcement in our view from the following clauses 1.2.12:**

> **"1.2.12 Different parts of this Agreement are to be taken as mutually explanatory and supplementary to each other and if there is any inconsistency between or among the parts of this Agreement, they shall be interpreted in a harmonious manner so as to give effect to each part."**
>
> **(Emphasis supplied)**

(102) **An argument was raised by Shri Amit Kapur that the contract in the case calls for the application of the principle of *contra proferentem* rule.**

(103) **We are of the view that the principle of *contra proferentem* is ordinarily utilised in contracts of insurance and standard form contracts.**

(104) **The principle of contra proferentem apparently in substance is that in case of any doubt in its terms, the doubt should be resolved against the party who drafted the contract. We would not think in the facts of this case that the first respondent has been able to plant any serious doubt in regard to the clauses with which we are concerned with on a true understanding of the same.**

(105) **The second complaint- The Office Memorandum dated 17.06.2011.**

As far as the question relating to the OM dated 17.06.2011 providing the premise for change in law claim is concerned, we are of the view that the claim may not have merit in it. It is true that Article 13.1.1 *inter alia* provides that a change can be brought about by the issuance of a notification by an Indian Governmental authority. Also a change in interpretation of any law by an Indian Governmental instrumentality *inter alia* provided that it is final authority under law for such interpretation would constitute a change in law.

Indian Governmental Instrumentality is defined as follow: -

> **"Indian Governmental Instrumentality" means the GOI, Government of States where the Procurers and Project are located and any ministry or department of or board, agency or other regulatory or quasi-judicial authority controlled by GOI or Government of States where the Procurers and Project are located and includes the Appropriate**

Commission;"

(106) **Law as defined in the PPA is as follows:**

> **"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 any Indian Governmental Instrumentality and having force of law and shall further include all applicable rules, regulations, orders, notifications by an Indian Govermental Instrumentatlity pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the Appropriate Commission;**

(107) **While the word 'competent Court' which can also be the source of a change in interpretation of any law is expressly defined in Article 13.1.1., when it comes to the Indian Governmental instrumentality which is the final authority, is concerned, there is no definition in the PPA. The controversy is this.**

(108) **The first respondent allegedly imported goods for the purpose of construction of the captive mining plant. It is its case that the goods so imported were being used for construction of the mining plant which was in turn was utilised for the**

construction and operation of the ultra mega power plant project. Such goods according to the first respondent was expressly exempted from customs duty by virtue of the notification holding the field. The notifications holding the field it must be understood were the notifications holding the field before the cut off date. The cut off date admittedly is 21.07.2007. In other words, the said date is the date which is seven days before the bid deadline. The OM which is the premise for the argument has been issued by the Director no doubt with the approval of the Joint Secretary in the Ministry of Power. It reads as follows:

"No. 12/20/2009-UMPP
Government of India
Ministry of Power
Shram Shakti Bhawan, Rafi marg,
New Delhi, the 17th June, 2011

OFFICE MEMORANDUM

Sub: 3960 MW Sasan Ultra Mega Power Project, Distt. Singrauli - Exemption from Custom Duty under project Import - reg.

The undersigned is directed to refer to Govt. of Madhya Pradesh's letter No. 4468/13/2011/01 dated 24.05.2011 on the subject mentioned above and to say

that under Mega Power Policy, the Custom/Excise Duty exemption is given in respect of power equipment only.

This issues with the approval of JS (Thermal), Ministry of Power

(A.A. Tazir)
Director

Shri Mohd. Suleman
Secretary (Energy)
Govt. of Madhya Pradesh,
Bhopal"

(109) **It is the contention of the first respondent that when it imported the goods it had to pay customs duty on the same and it constituted a change in law as the OM issued by the Joint Secretary placing the interpretation constituted a change in interpretation.**

(110) **In other words, in contrast with the law as it stood before the cut off date, by the issuance of the OM by the Joint Secretary in the Ministry of Power, a change in interpretation of the law is brought about. This sufficed to found a claim of change in law within the meaning of Article 13.1.1**

(111) **The argument of the procurers, on the other hand, is as we have noticed is that the OM cannot be found to be issued by a Governmental instrumentality which can be treated as the final authority under law for such interpretation. It is for the reason that the notification granting exemption has been issued by the authority under the Customs Act and the Joint Secretary in the Ministry of Power is not such an authority. Secondly, it is the contention of the procurers that the matter should have been taken before the appropriate forum by the first respondent on the basis that in law, actually, the import of goods was exempt if it was exempt and it was not open to the first respondent to pass on the burden without taking recourse to law. Thirdly, it is contended that the fact of the matter is that the position even before the cut off date was that goods in question were not exempt.**

(112) **Since we are dealing with the notifications, we notice that the authority on Advance Ruling has gone into the history of the notifications and dealt with the same though in the context of the right to**

exemption in a mega power plant but not for an ultra mega power project. But we are of the view that as far as the history of the notifications go, it would continue to be relevant:

> **"7.1 The Entry corresponding to the present Entry was introduced for the first time in 1999. As pointed out by the learned Sr. counsel for the applicant, the introduction of this Entry in the Customs notification seems to be a follow up to the policy decision taken by the Central Government as set out in the communication dated 10.11.1995 addressed by the Secretary, Ministry of Power, Government of India and the revised policy/guidelines relating to Mega power projects issued in 1998. The policy formulated in 1995 was in relation to the "setting up of power plants of capacity of 1000 MW or more supplying power to more than one state". In that policy document, it is stated that the "project of capacity of 1000 MW and more and catering power to more than one state should be considered as a mega project. Projects which cater power to a single State, irrespective of size, would not come under this category". In the policy which has been recast in 1998, it was decided that inter-state and inter-regional mega power projects were to be set up both in the public and private sectors. The re-organization of the public sector corporations was also envisaged by the policy. The policy contemplates the beneficiary States constituting Regulatory Commissions with powers to fix tariff. Paragraph 5 of the guidelines is important. It says "the import of capital equipment would be free of custom duty for these projects". In order to ensure that domestic bidders were not adversely affected, certain safeguards were spelt out."**

7.2 Entry/ Sl.No. 288A of Ch. 98.01 inserted by Notification No. 63/1999 substantially gives effect to the 1995 policy read with revised policy of 1998. The same concept of mega power project is to be found in that Entry. The Entry reads:

SL. No.	Chapter/ heading/sub-head no.	Description of goods	Standard Rate	Additional Duty rate	Condition No.
288 A	9801	Goods required for setting up of any Mega Power Project specified in List33, if such Mega Power Project is- a. an inter-state thermal power plant of a capacity of 1500MW or more; or b. an inter-State hydel power plant of a capacity of 500MW or more……	Nil	Nil	82

Condition No. 82 is as follows: -

82. (a) If an officer not below the rank of a Joint Secretary to the Government of India in the Ministry of Power certifies that-

(i) the power purchasing state undertakes, in principle, to privatize distribution in all cities, in that State, each of which having a population of more than one million within a period to be fixed by the Ministry of Power; and

(ii) In the case of imports by a Central Public Sector Undertaking, the quantity, total value, description and specifications of the imported goods are certified by the Chairman and Managing Director of the said Central Public Sector Undertaking; and

(c) In the case of imports by a Private Sector Project, the quantity, total value, description and specifications of the imported goods are certified by the Chief Executive Officer of such project".

"7.3 List 33 specifies by name the thermal projects and hydel projects in respect of which exemption is made applicable. Then, under Customs Notification No. 100 of 99 dated 28/7/99, the capacity of thermal power project specified in the earlier notification was altered from 1500 to 1000 MW. As a result of this notification, 7 more thermal projects were added to the list."

"7.4 Then, the next notifications in succession are Customs Notification No. 16 of 2000 and 17 of 2001 which are substantially the same excepting that the number of thermal and hydel projects specified in List 33 has gone down."

"7.5 Then comes the Customs Notification No. 21 of 2002 dated 01.03.2002 which is material for

our purpose. It reads as follows: -

SL. No.	Chapter/ heading/sub-head no.	Description of goods	Standard Rate	Additional Duty rate	Condition No.
400	9801	Goods required for setting up of any Mega Power Project specified in List42, if such Mega Power Project is- a. an inter-state thermal power plant of a capacity of 1000MW or more; or b. an inter-State hydel power plant of a capacity of 500MW or more…… as certified by an officer not below	Nil	Nil	86

		the rank of a Joint Secretary to the Governmen t of India in the Ministry of Power			

"7.6 Entry 400 was amended by the Notification No. 26/2003. The said amendment was necessitated by reason of the policy decision taken by the Government as reflected in the Union budget speech of 203-04. The following extract from the budged speech is relevant:

"Simultaneous to the emphasis on improvement in power distribution, our attention on capacity addition remains. The Government had earlier, in 1999, notified 18 power projected as mega projects, conferring upon them various duty and licensing benefits. The Government now proposes to liberalise the mega power project policy further by extending all these benefits to any power project that fulfills the conditions already prescribed for mega power projects".

Pursuant to the above policy, Notification No. 26/2003-Cus. Was issued amending the notification no. 21/2002-Cus. Entry 400 as amended reads:

400	**9801**	**Goods required for setting up of any Mega Power Project that is to say -** **a. an inter-state thermal power plant of a capacity of 1000MW**	**Nil**	**Nil**	**86**

or more; or

b. an inter-State hydel power plant of a capacity of 500MW or more……

as certified by an officer not below the rank of a Joint Secretary to the Government of India in the Ministry of Power"

"7.7 The amended notification no. 21 of 2002 is almost in the same language as it stands now (vide para 3 supra). Thus, w.e.f. 1/4/2003, the list of specified power projects has been deleted in tune with the liberalized policy of the Government. Further, it is to be mentioned that Entry 400 of notification no.21 of 2002 was further amended keeping in view the revised policy guidelines issued in order to cater to the special requirements of power projects in Jammu and Kashmir and NE States. Entry 399 substantially remained the same from 1999 onwards excepting that there was change in the Sl. No. and the rate."

(113) **The order of the Advance Ruling Authority is dated 19.12.2008. No doubt, it is after the cut off date. The case of the first respondent is not based on the order of the Advance Ruling Authority. The case of the first respondent is specifically based only on the OM issued by the Joint Secretary in the Ministry of Power. We may notice that Joint**

Secretary in the Ministry of Power has a role in terms of the notification. The role assigned to him is contained in condition 82 to the notification 63/1999 and this condition has continued thereafter also. The condition as we have noticed is that it is stated that an officer not below the rank of a Joint Secretary is to certify the aspects which are mentioned in condition 82.

(114) **It is difficult, in fact, to describe the Joint Secretary in the Ministry of Power as the Governmental authority which is the final authority under the law. The final authority under the law would be the authority under the Customs Act which issues the exemption notification. But we would not wish to rest our findings on the said basis as we feel that the objection of the procurers can rest on surer foundations. The first respondent also relies upon no doubt, the notification dated 26.05.2006 wherein it is indicated as follows:**

"Notification No.49/2006-Customs

In exercise of the poowers conferred by sub-section (1) of Section 25 of the Customs Act,

1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest to do so, hereby makes the following further amendments in the notification of the Government of India in the Ministry of finance (Department of Revenue) No.21/2002- Customs, dated the 1st March, 2002, which was published in the Gazette of India, Extraordinary vide number G.S.R. 118(E), dated the 1st March, 2002, namely:-

(I) in the Table, against S.No.400, for the entry in column (3), the following entry shall be substituted,namely:-

"Goods required for setting up of any Mega Power Project, so certified by an officer not below the rank of Joint Secretary to the Government of India in the Ministry of Power, that is to say-

(a) an inter-state thermal power plant of a capacit of 700MW or more, located in the States of Jammu and Kashmir, Sikkim, Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura,or

(b) an inter-state thermal power plant of a capacity of 1000MW or more, located in States other than those specified in clause(a) above; or

(c) an inter-state hydel power plant of a capacity of 350MW or more, located in the States of Jammu and Kashmir, Sikkim, Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura,or

(d) an inter-state hydel power plant of a capacity of 500MW or more, located in States other than those specified in Clause(C) above",

(II) in the Annexure, in Condition No.86, for sub-clauses (ii) and (iii) of clause(A), the following shall be substituted, namely:-

"(ii) the power purchasing State

> **undertakes, in principle, privatize distribution in all cities, in that State, each of which has a population of more than one million, within a period to be fixed by the Ministry of Power."**

(115) **The Tribunal has, in fact, proceeded on the basis that the goods in question would fall under Entry 400 relating to power projects and therefore, they were exempted. The Tribunal proceeded further on the basis that the notification dated 17.06.2011 issued by the Joint Secretary amounted to an interpretation which constitutes a change in law.**

(116) **We are of the view that the approach of the Tribunal cannot be upheld. There is no material, whatsoever, apart from the notifications to indicate that the goods in question were being treated as exempt before the cut off date. In other words, it was incumbent upon the first respondent to produce incontestable material establishing that the goods were exempt and were being treated so before the cut off date. The best material would have been examples of similar cases where goods were being treated as exempt. Even though, it is pointed out**

that the first respondent was the only ultra mega power plant, even then power plants including mega power plants were operational. It is difficult to conceive that there would not be a single case where similar inputs by way of examples of other power projects even if it is not ultra mega power projects would not have operated for the first respondent to draw from.

(117) **The word law has been defined as we have noticed. While the expression 'Indian Governmental Instrumentality' is used in the definition of the word law in Article 13.1.1, the change in interpretation of any law by an Indian governmental authority must be the final authority under the law for such interpretation. It may be difficult to attribute to the Joint Secretary in the Ministry of Power the position of an Indian Governmental Authority who has the final authority under the law. But as we have indicated this must not be treated as the basis on which we disagree with the Tribunal.**

(118) **The perusal of the OM does not advance the case of the first respondent for yet another good reason.**

He does not in the OM indicate that the goods in question had been exempted before the cut off date and that the goods becoming exigible to duty on the date after the cut off date. The Authority for Advance Ruling has categorically affirmed that the goods of the type with which we are concerned may not qualify for exemption. The appellants have a case that, in fact, the Joint Secretary was essentially following the Advance Ruling. While it is true that the Advance Ruling may not bind the first respondent as it is not a party, and the respondent could not have sought a ruling under the law, it is undoubtedly an aspect which otherwise adds strength to the case of the appellants. There may be cases where placing the notification holding the field before the cut off date side by side to the subsequent notification or an interpretation issued after the said cut off date, the Commission or a Tribunal could find that there is change in law, which added to the cost to the seller. On the other hand, when the case of the first respondent involves interpretation of the terms of the

notification then particularly when two views are fairly competing for acceptance before the body, at best, we would think that the Tribunal has hazarded taking a perilous route in venturing to find that the OM issued by the Joint Secretary constituted the change in law. Though reliance has been placed on the judgment of this Court reported in *Manohar Lal Sharma* v. *Principal Secretary & Ors.* (2014) 9 SCC 516 and *Manohar Lal Sharma* v. *Principal Secretary & Ors.* (2014) 9 SCC 614 which decisions purported to exempt the mining leases which were captive leases operating for the purpose of the power projects including the power projects specifically in question from the purview of its decision, we do not think that that by itself can determine the question as to whether the goods which were imported for the purpose of the captive mining plant was ever exempt. What was exempt has been goods imported for the purpose of the Power project. In other words, as to whether the goods in question were goods which fell within one entry or the other is in this case a matter which is highly disputed and the premise of

the first respondent viz., the OM of the Joint Secretary cannot be treated as being a sound foundation for making such a claim.

(119) **The parties indeed contemplated a project to be constructed and operated. The word 'project' we find has been used in many clauses in the contract. The word 'project' has been defined as follows:**

> **""Project" means the Power Station and the Captive Coal Mine(s) undertaken for design, financing, engineering, procurement, construction, operation, maintenance, repair, refurbishment, development and insurance by the Seller in accordance with the terms and conditions of this Agreement;"**

(120) **Since the word 'power station' has been used in word 'project', it is apposite that we advert to the definition of the words 'power station':**

> **"Power Station" means the:**
>
> **(a) coal fired power generation facility comprising of any or all the Units;**
>
> **(b) any associated fuel handling, treatment or storage facilities of the power generation facility referred to above;**
>
> **(c) any water supply, treatment or storage facilities required for the operation of the power generation facility referred to above;**
>
> **(d) the ash disposal system including ash dyke;**

(e) township area for the staff colony; and

(f) bay/s for transmission system in the switchyard of the power station,

(g) all the other assets, buildings/structures, equipments, plant and machinery, facilities and related assets require for the efficient and economic operation of the power generation facility;

whether completed or at any stage of development and construction or intended to be developed and constructed as per the provisions of this Agreement."

(121) **Since the word 'captive coal mine' has also been referred to as part of the definition of the word 'project', it is only right that we advert to the definition:**

"Captive Coal Mine(s) means the captive coal mines as described in Schedule 1A and associated fuel transport system up to the Power Station;"

(122) **'Project Documents" again has been defined. We may also notice the definition of the words 'Prudent Utility Practices':**

"Project documents Mean

a) Construction Contracts;

b) Fuel mining agreements, including the Fuel Transportation Agreement, if any;

c) O&M contracts;

d) RFP and RFP Project Documents; and

e) any other agreements designated in writing as such, from time to time, jointly by the Procurers and the Seller;

"Prudent Utility Practices means the practices, methods and standards that are generally accepted internationally from time to time by electric utilities or coal mining entities for the purpose of ensuring the safe, efficient and economic design, construction, commissioning, operation and maintenance of coal mines and power generation equipment and mine of the type specified in this Agreement and which practices, methods and standards shall be adjusted as necessary, to take account of:

a) operation and maintenance guidelines recommended by the manufacturers of the plant and equipment to be incorporated in the Project;

b) the requirements of Indian Law; and

c) the physical conditions at the Site;"

(123) **We have set out the history of the notifications relating to grant of exemption for power projects. All of it began with the policy issued in the year 1995. The exemptions had their origin with the notification issued in the year 1999. Thereafter there is Notification 21/2002 which was issued on 01.03.2002. Entry 400 in the said notification reads as follows:**

S.No.	Chapter or Heading or Sub-Heading	Description of Goods	Standard rate	Additional Duty Rate	Condition no.
400	98.01	"Goods required for setting up of any Mega Power Project, so certified by an officer not below the rank of a Joint Secretary to the Government of India in the Ministry of Power, that is to say- a) an inter-state thermal power plant of a capacity of 700 MW or more, located in the States of Jammu and Kashmir, Sikkim, Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura; or b an inter-state thermal power plant of a capacity of 1000 MW or more, located	Nil	Nil	86

		in States other than those specified in clause (a) above; or **c an inter-state hydel power plant of a capacity of 350 MW or more, located in the States of Jammu and Kashmir, Sikkim, Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura; or** **d an inter-state hydel power plant of a capacity of 500 MW or more, located in States other than those specified in clause (c) above";**			

(124) **Thereafter another notification <u>namely Notification No. 26/03</u> which has given a final shape to it came to be issued which has been noticed also by the Authority of Advance Ruling. It reads as follows:**

400	**9801**	**Goods required for setting up of any Mega Power Project <u>that is to say</u> -** **a. an inter-state thermal power plant of a capacity of 1000MW or more; or** **b. an inter-State hydel power plant of a capacity of 500MW or more……** **as certified by an officer not below the rank of a Joint Secretary to the Government of India in the Ministry of Power**	**Nil**	**Nil**	**86**

(Emphasis supplied)

(125) **We may notice that with the issuance of the said notification what stands out is the following:**

(126) **While in the opening words of the Entry, there is reference to power project, it is conditioned by the words 'that is to say'. We can quite safely proceed on the basis that Entry 400 in the Notification No. 21/2002 which came into effect on 01.03.2002 as amended by Notification No. 46/2008 is the Entry which must be treated as holding the field as on the cut off date. It is thereafter, no doubt, that the first respondent has invoked the change in**

law clause by seeking to draw inspiration from the OM issued on 17.06.2011.

(127) **Change in law clause is sought to be invoked apparently contending that there has been a change in interpretation by Indian Governmental Authority which has the final say in terms of the law. The question which looms large before the Court is whether there has been a change in law in terms of 'change in interpretation' placed by the Governmental authority with reference to the position obtaining under the notifications issued under the Customs Act. Even the clauses in the PPA which we have referred to maintain a distinction between a power plant and a captive mine. A power plant cannot be treated as the same as captive mine. In fact, Schedule 1A which defines the site refers to the captive mines in terms of the coal blocks which are allotted. The definition of captive mine also indicates that it is the coal mines as described in Schedule 1A and the associated fuel transport system up to the power station. No doubt, the word 'site' has also been defined as the land**

over which the Project will be developed as provided in Annexure 1A.

(128) **Undoubtedly, in view of the very purpose of having a coal mine which is to supply the requisite fuel for the operation of the power plant, there would be a certain measure of geographical contiguity. But the question for the consideration before this Court is whether that would decide the fate of the contents of a notification issued under the Customs Act.**

(129) **We must notice that it is not as if the first respondent is the only person which had a right to claim the benefit of exemption on the basis that the goods which have been imported for the purpose of their captive mine must be treated as goods used in the power project. As the history of the notifications as captured in order of the Advance Ruling Authority would show over a period of time, there have been a number of power plants which have sprung up. All of them would also be using captive mines for the purpose of generating power. It is not as if there would be a dearth of examples of**

exemption being extended to imports made by them and claiming the benefit of exemption under the notification. Not a single instance of an exemption granted to any other project where goods imported for use in the captive mine has been produced before the Commission, the Tribunal or even this Court. This goes a long way to negate the claim of the first respondent that what was once exempt has ceased to be exempt only by virtue of the issuance of the OM dated 17.06.2011.

(130) **There is another very important circumstance which strikes us. The material which appeals to us is to be found undoubtedly in the order of the Advance Ruling Authority relied upon by the appellant. The application, no doubt, is filed in the year 2008. What impresses the Court the most is the stand of the customs authorities before the Advance Ruling Authority. We cannot proceed on the basis that the controversy which led to the seeking of the ruling and far more importantly the persistent stand of the customs authority before the Advance Ruling Authority would not shed light on how**

the Department viewed the matter. This is important as it is the customs department which has issued the exemption notification. Being the authors of the notification, they would be best placed to understand the width and purport of a notification granting exemption. They have stoutly opposed the application and laid out various grounds which, no doubt, has appealed also to the Advance Ruling Authority. This is an aspect which goes a long way to show that the view of the customs authority which in a manner of speaking can also be viewed as forming *contemporanea expositio* should not be ignored by this Court.

(131) **The first respondent also sought considerable reliance in this regard from the Mega Power Projects: Revised Policy Guidelines. The relevant portions reads as follows:**

> **"MEGA POWER PROJECTS: REVISED POLICY GUIDELINES**
>
> **The following conditions are required to be fulfilled by the developer for grant of mega project status:-**
>
> **a) an inter-state thermal power plant of a capacity of 700 MW or more, located in the**

States of Jammu and Kashmir, Sikkim, Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura; or

b) an inter-state thermal power plant of a capacity of 1000 MW or more, located in States other than those specified in clause (a) above; or

c) an inter-state hydel power plant of a capacity of 350 MW or more. located in the States of Jammu and Kashmir. Sikkim, Arunachal Pradesh, Assam, Meghalaya. Manipur, Mizoram, Nagaland and Tripura: or

d) an inter-state hydel power plant of a capacity of 500 MW or more, located in States other than those specified in clause (c) above'

Fiscal concessions/benefits available to the Mega Power Projects

Zero Customs Duty: In terms of the notification of the Government of India in the Ministry of Finance(Department of Revenue) No. 21/2002-Customs dated 18 March, 2002 read together with No. 49/2006-Customs dated 26 May, 2006. the import of capital equipment would be free of customs duty for these projects.”

(132) **The understanding of the Authority for Advance Ruling appears to be that as far as the entitlement to exemption under the notification is concerned a mega power project has to be understood as confined to what follows after the words ‘that is to say’. In**

other words, though the use of the words power project in entry 400 would appear to suggest that it is capable of embracing within its scope a captive mine from which the fuel is generated to run the power plant, when it came to the actual beneficiary of entry 400, the maker of the notification has confined the exemption to the goods for the purpose of the power plant. In other words, the word power project has been conflated with the power plant. This appears to be the soul of the reasoning of the Advance Ruling Authority. While we are aware that the first respondent is not bound by the said Ruling as it is not a party, we do not find it erroneous on our part in finding merit in the logic of the same or adopting the same for the purpose of deciding the question which squarely arises before this Court viz., whether there is a change in law.

(133) **There is also merit in the contention of the appellant that for article 13.1.1 to be successfully invoked by the seller, it must demonstrate that there was an interpretation earlier to or as on the date of the cut off date which was advantageous to**

the seller and there has been a change in the said interpretation after the cut off date.

(134) **In other words, the OM issued with the approval of the Joint Secretary in the Ministry of Power does not indicate that it is a case of a change in interpretation. He does not say that the position adumbrated in the OM represents a shift or a change from what the position was prior to the cut off date. This is apart from any material being available to show that there was an interpretation in favour of the first respondent prior to the cut off date.**

(135) **We reiterate that no instance of exemption to goods of similar nature being imported by any person for the captive mine as part of a power project be it mega or ultra mega plant is placed before the Commission. It is one thing to say that in a popular sense and it could be urged and it may be true that the word project has been defined in the PPA as power plant and the captive coal mine, but as we have noticed this is a matter to be determined on what was intended by the author of the notification**

under Section 25 of the Customs Act and the matter is to be further determined with reference to the express terms of the Notification. Even more importantly, the question must fall to be decided with reference to the interpretation available prior to the cut off date and after cut off date. The communication, which is the OM dated 17.06.2011 relied upon by the first respondent appears to have been issued on the basis of the request made by the first respondent to the State of Madhya Pradesh.

(136) **Shri Amit Kapur, learned counsel on behalf of the first respondent drew our attention to Entry 78 of notification No. 21/02 dated 1.3.2002. Entry 78 reads as follows:**

Sr. No.	Chapter or Heading or sub-heading	Description of goods	Standard rate	Additional rate	Condition No.
78.	2714.90	All goods, for the purpose of power generation	-	Nil	-

(137) **Shri Ramchandran, learned senior counsel, would point out that the said Entry relates to inputs for power generation. The case of the first respondent is also that Entry 399 actually specifically deals with the goods required for coal mining project under which the first respondent has been visited with customs duty.**

(138) **The argument of Shri Amit Kapur is that first of all, Entry 78 if contrasted with Entry 400 would show that all goods needed for a power project understood in a larger sense as including a captive coal mine would also come within four walls of Entry 400.**

(139) **Shri Amit Kapur, learned counsel, would point out that captive coal mine envisaged as such is one where the entire production of coal is to be utilised for the power plant in question which also would indicate that it is part of the power project. It is not in dispute that whatever may be the distinction which may exist between a mega power project, an ultra mega power project (we are concerned with latter), there is no separate**

notification under the Customs Act which deals with ultra mega power project.

(140) **The upshot of the above discussion is that we are of the view that the first respondent has not been able to demonstrate that there was a change in law as contemplated in Article 13.1.1 by issuance of the OM dated 17.06.2011.**

RELIEF

(141) **The three procurers who were respondents before the Tribunal have not chosen to file appearance before this Court. The lead procurer has filed an appeal before this Court. Further, there is only one PPA. Ironically, decisions relating to Order XLI Rule 21 and Rule 33 have been placed before this Court by the first respondent reminding this Court of the power available to it. No doubt, they placed this position in an attempt at salvaging the situation arising from no appeal have been filed by it challenging the finding relating to there being no change in law in regard to the water intake system.**

(142) **In the facts of this case, we also notice that the three non-filing parties are respondents in the appeals filed by the appellants. We also cannot be unmindful of the argument of Shri P. Chidambaram and others that if the first respondent had a case that they were entitled to an exemption under the situation extant prior to the cut off date then proper remedy would be to seek refund on the basis that they have been illegally visited with customs duty.**

(143) **In the facts of this case, we feel that the interest of justice do require that the impugned order be set aside not only as against the appellants but also as against the three non-appellants. In the nature of the litigation, we would think that the benefit of this order should be vouchsafed to the three respondents also, viz., (1) respondent No. 12(BSES Rajdhani Power Limited); (2) respondent No. 13 (BSES Yamuna Power Limited); and (3) respondent No. 15(Uttarakhand Power Corporation Limited). Apparently, these respondents have not contested the appeals.**

(144) **As we have noticed in the beginning as a sequel to the impugned order, the Commission has passed orders allowing the claim relating to the water intake system whereas it has rejected the prayer relating to change in law flowing from OM dated 17.06.2011. The affected parties have carried the matter to the Tribunal in appeals. It is brought to our notice that this Court passed an order of stay dated 25.11.2019. Since the appellants have challenged the order of the Tribunal, the subsequent order by the Commission can only be treated as a consequential order and therefore, it may not have any independent legs to stand on. The appellants must be given the fruits of the decision which ultimately is rendered in their favour, as we are rendering this judgment.**

(145) **Accordingly, the appeals are allowed. The impugned order is set aside. The order will enure to the benefit also of the three respondents also, viz., (1) respondent No. 12(BSES Rajdhani Power Limited); (2) respondent No. 13 (BSES Yamuna Power Limited); and (3) respondent No. 15(Uttrakhand Power**

Corporation Limited). Equally, the order passed by the Commission consequent upon the remand under the impugned order cannot survive. The appeals filed will also lose their force and it is for the appellants to do the needful to bring it to an end in the light of this judgment.

The parties will suffer their own costs.

……., J.
[K.M. JOSEPH]

……., J.
[B.V. NAGARATHNA]

New Delhi;
April 06, 2023.