2025 INSC 770

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4336 OF 2025
(Arising out of CIVIL APPEAL DIARY NO. 26876 OF 2024)

JAIPUR VIDYUT VITRAN NIGAM
LTD. & ORS. …APPELLANT(S)

VERSUS

ADANI POWER RAJASTHAN LTD. & ANR. … RESPONDENT(S)

J U D G M E N T

M. M. Sundresh, J.

1. Admit.

2. We have heard the learned Senior Counsel, Mr. Shyam Divan and learned Counsel, Mr. Karthik Seth appearing for the appellants and the learned Senior Counsel, Dr. Abhishek Manu Singhvi appearing for the respondent No. 1, at length. All the relevant documents, including the written submissions of the parties, have been perused.

3. In pursuance of the Letter of Intent issued to Adani Power Rajasthan Ltd. (respondent No.1-Power Generator), on 17.12.2009, a Power Purchase Agreement (hereinafter referred to as the "**PPA**") dated 28.01.2010 was entered into between appellant Nos.1, 2 and 3, who are the Rajasthan Discoms engaged in the distribution and supply of electricity, on one side and respondent No.1 on the other, for the supply of 1200 MW Aggregate Contracted Capacity at a levelized tariff of Rs.3.238 per unit. The same was duly approved by respondent No.2.

4. While the agreement was in operation, a Notification came to be issued at the instance of M/s. Coal India Limited (hereinafter referred to as "**CIL**"), dated 19.12.2017, imposing a levy of Evacuation Facility Charges (hereinafter referred to as the "**EFC**") with effect from 20.12.2017. Immediately, on the very next day i.e. 20.12.2017, respondent No.1 informed appellant No. 4 that the Notification dated 19.12.2017 constituted a 'change in law' event. The Notification dated 19.12.2017 is extracted below:

"COAL INDIA LIMITED

A Maharatna Company

(A Govt. of India Enterprise)

COAL BHAWAN

Sales & Marketing Division

Ground & Floor, Premises No, 04 MAR, Plot No. AF-III, Action Area -1A

Rajarhat, New Town, Kolkata - 700156

Phone: 033-71104143, Fax: 033-23244229, Website:
……

CIN: L23 L09WB1973GO1028844

PRICE NOTIFICATION: CIL:S&M: GM(F)Pricing 2017/ 1005 dated 19th Dec. 2017

Charge of Rs. 50 (Fifty) per tonne shall be levied as 'Evacuation Facility Charges' on all despatches except despatch through rapid loading arrangement. This is effective from 00:00 hour of 20" Dec. 2017. This issues with the approval of the competent authority.

General Manager (M&S)
Marketing & Sales**"**

5. On its failure in eliciting a suitable reply, respondent No.1 filed a Petition bearing No.1373/2018 before the Rajasthan Electricity Regulatory Commission (hereinafter referred to as the "**RERC**"), invoking Section 86 of the Electricity Act, 2003 (hereinafter referred to as the "**2003 Act**") read with Article 10 of the PPA. While rejecting some of the reliefs, the RERC did allow some of the other prayers sought for by respondent No.1. Against

the refusal of some of the claims, the respondent No. 1 filed an appeal before the Appellate Tribunal for Electricity (hereinafter referred to as the "**APTEL**").

6. The appeal under Section 111 of the 2003 Act was so made along with an application seeking condonation of delay of 332 days in filing. Another application was filed seeking to condone the delay of 236 days in re-filing the appeal. Upon hearing both sides, the aforesaid applications were allowed and, thereafter, the appeal was decided on merits. It is pertinent to note that the common order by the APTEL, dated 23.01.2023, condoning the delay on both counts, has attained finality for want of further challenge.

7. The APTEL, *inter alia,* held by its judgment dated 18.04.2024, after elaborately considering the submissions made by both sides, that the Notification dated 19.12.2017 would amount to a change in law, and the respondent No. 1 would be entitled to the grant of compensation from the date of the Notification, by taking note of the decision rendered by this Court in **GMR Warora Energy Ltd. v. CERC (2023) 10 SCC 401** (hereinafter referred to as "**GMR Warora**") which, in turn, also placed

reliance upon the earlier decisions of this Court. While doing so, it also took into consideration, the fair submission made on behalf of the appellants that the principal issue of levy of EFC, and consequently, the date from which the respondent No. 1 would be entitled to the grant of compensation, is covered by the aforementioned judgement. Further reliance was placed on the said decision by the APTEL, for the purpose of granting carrying cost at the rate of Late Payment Surcharge (hereinafter referred to as "**LPS**"), on a compounding basis, which is to be reckoned from the date of the Notification. The submission made by the appellants before the APTEL that a supplementary bill is mandatory before seeking relief for the LPS was also considered and rejected. Once again, the impact of delay was argued and considered with specific reference to carrying cost. Accordingly, the following conclusion was arrived at:

> **"X.CONCLUSION**:
>
> The Appellant shall, in terms of what has been indicated hereinabove, be entitled for the benefit of the change in law event on account of evacuation facility charges from the date on which the notification, issued by Coal India Limited, was made applicable to them. The sum representing this benefit shall be paid by Respondents 2 to 5 to the appellant along with carrying cost at LPS rates. While the Appellant shall not be entitled for carrying cost (much less at LPS rates), for the delay of 332 days in filing the Appeal, they shall be given

credit for the sum of Rs.5 lakhs paid by them earlier as a condition for condoning the delay in filing the Appeal, since they are now being denied carrying cost for the said period of delay. The matter is remanded to the Respondent-Commission to compute the amounts which the Appellant is entitled to in terms of this Judgment. The Appeal is disposed of accordingly.**"**

8. When the appeal was filed before this Court, it was entertained, limiting its scope only to the interpretation of Article 10.2.1 vis-à-vis 10.5 of the PPA, with specific reference to 10.5.1 (ii). The following is the order passed by this Court on 09.09.2024:

"We have heard learned senior counsel for the parties at length.

Most of the issues raised in the present matter are covered by earlier decisions of this Court in 'GMR Warora Energy Ltd. v. CERC & Ors.', (2023) 10 SCC 401, 'UHBVNL v. Adani Power (Mundra) Limited', (2023) 2 SCC 624, 'UHBVNL v. Adani Power Limited', (2019) 5 SCC 325 and 'MSEDCL v. MERC & Ors.', (2022) 4 SCC 657. We may note that the delay in refiling has been duly considered earlier by the APTEL while condoning it. The said order has attained finality.

The only issue which might arise for consideration in this appeal pertains to the interpretation of Article 10.2.1 vis-à-vis Article 10.5 of the PPA with specific reference to 10.5.1 (ii).

Learned senior counsel for the respondents seeks and is granted two weeks' time to file a counter affidavit.

Rejoinder affidavit shall be filed within a period of two weeks thereafter.

List on 26.11.2024."

(emphasis supplied)

SUBMISSIONS ON BEHALF OF THE APPELLANTS

9. Notwithstanding the aforesaid order passed on 09.09.2024, the learned Senior Counsel and learned Counsel appearing for the appellants, made elaborate submissions on the other issues as well. It is submitted that the delay has occasioned only due to the fault of respondent No.1 through the litigation process and, therefore, what is to be applied is Article 10.5.1 (ii). The APTEL was wrong in condoning the delay by allowing the applications filed by respondent No.1. There is no basis for awarding carrying cost at the rate of LPS, and the APTEL ought not to have awarded the same as the LPS is granted only when there is a delay in the payment of a supplementary bill. The learned Senior Counsel placed substantial reliance on the PPA to contend that it is respondent No.1 who did not raise the supplementary bill at the earliest point of time, as mandated under Article 8 of the PPA. The decision rendered by this Court in **GMR Warora (*supra*)** does not apply to the case of respondent No.1, considering that in the said case, a supplementary bill was indeed raised. Unless a demand is raised, there is no question of payment that would arise, as there is a clear

distinction between the liability to pay, as against an obligation to pay. In support of his contention, the learned Senior Counsel has also placed reliance upon the decision of this Court in **Prem Cottex v. Uttar Haryana Bijli Vitran Nigam Ltd., (2021) 20 SCC 200.**

SUBMISSIONS ON BEHALF OF THE RESPONDENTS

10. The learned Senior Counsel Dr. Abhishek Manu Singhvi appearing for the respondent No. 1, submits that there exists a preliminary objection as arguments have been made by the appellants beyond the scope of not only the present appeal but also the order, dated 09.09.2024, of this Court. The issues sought to be raised by the appellants have already been settled by this Court in not only **GMR Warora (*supra*)** but also in two other decisions of this Court in **Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power Ltd., (2019) 5 SCC 325** (hereinafter referred to as "**UHBVNL 2019**") and **Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power (Mundra) Ltd., (2023) 2 SCC 624** (hereinafter referred to as "**UHBVNL 2023**").

11. There is no question of raising a supplementary bill earlier, in view of the definite stand taken by the appellants on the notification made by respondent No.1 on 20.12.2017. It is nobody's case that the appellants were going to honour the bill if raised at the earliest point of time, as contended by them. The APTEL itself has held that respondent No.1 is not entitled to carrying cost for the period of delay in filing the appeal. The orders passed on that count have attained finality. The appellants are making a futile attempt at reopening the issues which are closed. Thus, it is a fit case where the appeal has to be dismissed with costs, particularly when appropriate orders have been passed by the RERC in pursuance of the order of remand made by the APTEL.

12. Before we deal with the submissions made by the parties, we deem it appropriate to discuss and elaborate on the scope of appeals under the 2003 Act.

SCOPE OF APPEALS UNDER THE ELECTRICITY ACT, 2003

13. Whenever a statute provides for an appeal, a Court is expected to restrain itself to the contours of the powers conferred under it. The nature and status

of the Court loses its significance as it only draws its powers from the statute alone, and not beyond. After all, judicial restraint and sobriety, when consciously restricted by the Legislature, forms an integral part of the duties and functions of the Court.

Section 111 of the 2003 Act

> **"111. Appeal to Appellate Tribunal**.— (1) Any person aggrieved by an order made by an adjudicating officer under this Act (except under Section 127) or an order made by the Appropriate Commission under this Act may prefer an appeal to the Appellate Tribunal for Electricity:
>
> Provided that any person appealing against the order of the adjudicating officer levying any penalty shall, while filing the appeal, deposit the amount of such penalty:
>
> Provided further that where in any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, it may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the realisation of penalty.
>
> (2) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made by the adjudicating officer or the Appropriate Commission is received by the aggrieved person and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed:
>
> Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.
>
> (3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(4) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned adjudicating officer or the Appropriate Commission, as the case may be.

(5) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within one hundred and eighty days from the date of receipt of the appeal:

Provided that where any appeal could not be disposed of within the said period of one hundred and eighty days, the Appellate Tribunal shall record its reasons in writing for not disposing of the appeal within the said period.

(6) The Appellate Tribunal may, for the purpose of examining the legality, propriety or correctness of any order made by the adjudicating officer or the Appropriate Commission under this Act, as the case may be, in relation to any proceeding, on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit.**"**

Section 125 of the 2003 Act

"125. Appeal to Supreme Court.—Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal to the Supreme Court, within sixty days from the date of communication of the decision or order of the Appellate Tribunal, to him, on any one or more of the grounds specified in Section 100 of the Code of Civil Procedure, 1908 (5 of 1908):

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.**"**

Section 100 of the Code of Civil Procedure, 1908

"100. Second appeal.— (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed *ex-parte*.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.**"**

14. Under Section 111 of the 2003 Act, the APTEL is vested with all the powers that can possibly be exercised by the Regulatory Commission. In other words, it is the final Court of fact and law.

15. However, under Section 125 of the 2003 Act, the powers expected to be exercised by this Court is circumscribed and controlled by the *pari materia* provision contained under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as "**the CPC**"). Thus, it is axiomatic that an appellant has to raise a substantial question of law, which if the Court finds to be in existence, shall accordingly frame it in whatever manner it deems fit and proper, and put it to the other side to respond. It is for this Court to

ultimately consider the existence of a substantial question of law and if it does so, answer it accordingly. We will only clarify that there is no bar for this Court to add any number of substantial questions of law even after framing one earlier, in which case the respondents will have to be given due notice of the same.

16. Section 100 of the CPC, after its amendment in the year 1978, consciously concerns itself with a question of law which shall be substantial in nature. Therefore, a mere question of law would not be sufficient enough to entertain an appeal under Section 125 of the 2003 Act. Added to that, it should be such that the substantial question of law, if answered in the affirmative in favour of the appellant, shall have the effect of reversing the decision of the APTEL. While deciding a substantial question of law, this Court shall do so, based upon the findings of fact rendered by the APTEL, unless by way of an exception, a perversity is found thereunder. In a case where a finding is rendered contrary to the records, without assigning any reason, and/or on a total misconception of the fact seen apparently on the face of the record, may in a given case, give rise to a substantial question

of law. Suffice it is to state that a substantial question of law has to be framed by this Court in exercise of the power under Section 125 of the 2003 Act and, thereafter, to be answered accordingly.

17. In the facts of the instant case, we have indeed framed only one substantial question of law vide order dated 09.09.2024, as aforementioned. Though we did permit the appellants to raise all the other issues and considered them as not feasible, the fact remains that they do not constitute substantial questions of law.

DISCUSSION

18. The issue with respect to change in law over a notification issued by a public authority and the resultant date to be reckoned has indeed attained finality pursuant to the judgments delivered by this Court in **GMR Warora Energy Ltd. (*supra*), UHBVNL 2019 (*supra*) and UHBVNL 2023 *(supra)***.

GMR Warora Energy Ltd. v. CERC (2023) 10 SCC 401

> **"95.** For appreciating the rival submissions, we will have to construe the term "Law", which has been defined in the PPAs, which reads thus:
>
> **" "Law" means, in relation to this Agreement, all laws including Electricity laws in force in India and any statute, ordinance,**

regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of CERC and MERC."

96. Perusal of the definition of the term "Law" itself would clearly show that the term "Law" would mean all laws including Electricity laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian governmental instrumentality and having force of law. **It would further reveal that the term "Law" shall also include all applicable rules, regulations, orders, notifications by an Indian governmental instrumentality and shall also include all rules, regulations, decisions and orders of CERC and MERC.**

97. In any case, the issue as to what would amount to "Law" is no more res integra. This Court, in *Energy Watchdog* [*Energy Watchdog* v. *CERC*, (2017) 14 SCC 80 : (2018) 1 SCC (Civ) 133] , has observed thus : (SCC p. 131, para 57)

> "*57*. Both the letter dated 31-7-2013 and the revised Tariff Policy are statutory documents being issued under Section 3 of the Act and have the force of law. This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in Clause 13.2 **that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred.** Further, for the operation period of the PPA, compensation for any increase/decrease in cost to the seller shall be determined and be effective from such date as decided by the Central Electricity Regulation Commission. This being the case, we are of the view that though change in Indonesian law would not qualify as a change in law under the guidelines read with the PPA, change in Indian law certainly would."

98. The aforesaid view of this Court taken in *Energy Watchdog* [*Energy Watchdog* v. *CERC*, (2017) 14 SCC 80 : (2018) 1 SCC (Civ) 133] has been approved by a Bench of three learned Judges of this Court in *Adani Rajasthan*

case [*Jaipur Vidyut Vitaran Nigam Ltd.* v. *Adani Power Rajasthan Ltd.*, (2021) 18 SCC 478] and also followed by this Court when the two linked matters out of this batch of appeals were decided by this Court in *Maharashtra State Electricity Distribution Co. Ltd.* v. *Adani Power Maharashtra Ltd.* [(2023) 7 SCC 401] **It cannot be denied that CIL is an instrumentality of the Government of India and its orders, insofar as price of fuel is concerned, are binding on all its subsidiaries.**

***

100. As discussed hereinabove, the term "Law" would also include all applicable rules, regulations, orders, notifications issued by an Indian governmental instrumentality.

101. It would thus be clear that all such additional charges which are payable on account of orders, directions, notifications, regulations, etc. issued by the instrumentalities of the State, after the cut-off date, will have to be considered to be "change in law" events. The generators would be entitled to compensation on the restitutionary principle on such changes occurring after the cut-off date.

***

111. Undisputedly, EFC was imposed by CIL vide its Circular dated 19-12-2017.

112. As already discussed hereinabove, CIL is an instrumentality of the State. It is thus clear that, on the cut-off date, there was no requirement of EFC, which has been brought into effect only on 19-12-2017. As such, the circular of CIL dated 19-12-2017 would also amount to "change in law".

***

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

"11. *Billing and payment*.—

***

11.3. *Payment of monthly bills*.—

***

11.3.4. In the event of delay in payment of a monthly bill by any procurer beyond its due date, a late payment surcharge shall be payable by the procurer to the seller at the rate of two (2) per cent in excess of the applicable

SBAR per annum, on the amount of outstanding payment, calculated on a day-to-day basis (and compounded with monthly rest), for each day of the delay.

***

11.8. *Payment of supplementary bill*.—

11.8.1. Either party may raise a bill on the other party ("supplementary bill") for payment on account of:

(*i*) Adjustments required by the Regional Energy Account (if applicable);

(*ii*) Tariff payment for change in parameters, pursuant to provisions in Schedule 5; or

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

***

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

118. A perusal of Article 11.3.4 of the PPA would reveal that in the event of delay in payment of a monthly bill by any procurer beyond its due date, a late payment surcharge shall be payable by the procurer to the seller @ of 2% in excess of the applicable State Bank Advance Rate ("SBAR" for short) per annum, on the amount of outstanding payment, calculated on a day-to-day basis (and compounded with monthly rest), for each day of the delay. Article 11.8 of the PPA deals with payment of supplementary bill. It enables either party to raise a supplementary bill on the other party for payment on account of certain events. Clause (*iii*) of Article 11.8.1 of the PPA deals with "change in law" as provided in Article 13. It requires the bill to be paid by the other party. Article 11.8.3 of the PPA also provides that in the event of delay in payment of a supplementary bill by either party beyond one month from the date of billing, a late payment surcharge shall be payable at same terms applicable to the monthly bill in Article 11.3.4.

***

120. It could thus be seen that this Court in *Adani Power* [*Uttar Haryana Bijli Vitran Nigam Ltd.* v. *Adani Power Ltd.*, (2019) 5 SCC 325 : (2019) 2 SCC (Civ)

657] has held that insofar as the "operation period" is concerned, compensation for any increase/decrease in revenues or costs to the seller is to be determined and effected from such date as is decided by the appropriate Commission. It has further been held that the compensation is only payable for increase/decrease in revenue or cost to the seller if it is in excess of an amount equivalent to 1% of the letter of credit in aggregate for a contract year. **It has been held that restitutionary principles apply in case a certain threshold limit is crossed. It has been held that an inbuilt restitutionary principle compensates the party affected by such "change in law" and the affected party must be restored through monthly tariff payment to the same economic position as if such "change in law" had not occurred.**

121. From the perusal of para 9 of *Adani Power* [*Uttar Haryana Bijli Vitran Nigam Ltd.* v. *Adani Power Ltd.*, (2019) 5 SCC 325 : (2019) 2 SCC (Civ) 657], **it would also be clear that in case the "change in law" happens to be by way of adoption, promulgation, amendment, re-enactment or repeal of the law or "change in law", it has to be effected from the date on which such change occurs.**

122. In this respect, it will also be apposite to refer to the following observations of this Court in *Maharashtra State Electricity Distribution Co. Ltd.* v. *Maharashtra Electricity Regulatory Commission* [(2022) 4 SCC 657] : (SCC pp. 719-20, paras 173-78)

"*173*. APTEL correctly found that: (*Maharashtra Pradesh Electricity Regulatory Commission case* [*Maharashtra State Electricity Distribution Co. Ltd.* v. *Maharashtra Pradesh Electricity Regulatory Commission*, 2021 SCC OnLine APTEL 13], SCC OnLine APTEL para 13)

> '*13*. … On the contrary, there is *a conscious exclusion regarding any suo motu change in the rate to be applied while calculating LPS*, it being incorrect to argue on the assumption that the contract permits automatic change in system.'

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

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

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

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

***178*. The proposition that courts cannot rewrite a contract mutually executed between the parties, is well settled. The Court cannot, through its interpretative process, rewrite or create a new contract between the parties.** The Court has to simply apply the terms and conditions of the agreement as agreed between the parties, as observed by this Court in *Shree Ambica Medical Stores* v. *Surat People's Coop. Bank* [(2020) 13 SCC 564] , para 20, cited by Ms Divya Anand. This appeal is an attempt to renegotiate the terms of the PPA, as argued by Ms Divya Anand as also other counsel. It is well settled that courts cannot substitute their own view of the presumed understanding of commercial terms by the parties, if the terms are explicitly expressed. The explicit terms of a contract are always the final word with regard to the intention of the parties, as held by this Court in *Nabha Power Ltd.* v. *Punjab SPCL* [(2018) 11 SCC 508 : (2018) 5 SCC (Civ) 1] , paras 45 & 72, cited by Ms Anand."

(emphasis in original)

123. This Court has clearly held in *Maharashtra State Electricity Distribution Co.* [*Maharashtra State Electricity Distribution Co. Ltd.* v. *Maharashtra*

Electricity Regulatory Commission, (2022) 4 SCC 657] **that the DISCOMS have a contractual obligation to make timely payment of the invoices raised by the power generating companies, subject to scrutiny and verification of the same.** This Court has rejected the contention that the funding cost was much lesser than the rate of LPS. This Court has reiterated the proposition that the courts cannot rewrite a contract which is executed between the parties. This Court has emphasised that it cannot substitute its own view of the presumed understanding of commercial terms by the parties, if the terms are explicitly expressed. It has been held that the explicit terms of a contract are always the final word with regard to the intention of the parties.

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

***

126. It is thus clear that this Court has reiterated in *Adani Power (Mundra)* [*Uttar Haryana Bijli Vitran Nigam Ltd.* v. *Adani Power (Mundra) Ltd.*, (2023) 2 SCC 624 : (2023) 1 SCC (Civ) 31] that once carrying cost has been granted, it cannot be urged that interest on carrying cost should be calculated on simple interest basis instead of compound interest basis. It has been held that grant of compound interest on carrying cost and that too from the date of the occurrence of the "change in law" event is based on sound logic. It has been held that it is aimed at restituting a party that is adversely affected by a "change in law" event and restore it to its original economic position as if such a "change in law" event had not taken place.

127. The argument that there is no provision in the PPAs for payment of compound interest from the date when the "change in law" event had occurred, has been specifically rejected by this Court.

128. In view of this consistent position of law and application of restitutionary principles and privity of contractual obligations between the parties as

contained in the PPAs, we do not find that the view taken by the learned APTEL with regard to carrying cost warrants interference.

***

177. It is further to be noted that this Court in *Uttar Haryana Bijli Vitran Nigam Ltd.* v. *Adani Power Ltd.* [(2019) 5 SCC 325 : (2019) 2 SCC (Civ) 657], **has specifically observed that the "change in law" events will have to accrue from the date on which rules, orders, notifications are issued by the instrumentalities of the State. Even in spite of this finding, the DISCOMS are pursuing litigations after litigations.**

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

(emphasis supplied)

Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power (Mundra) Ltd. (2023) 2 SCC 624

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

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

21. In the instant case, Respondent 1 Adani Power had to incur expenses to purchase the FGD unit and install it in view of the terms and conditions of the environment clearance given by the Ministry of Environment and Forests, Union of India, in the year 2010. For this, it had to arrange finances by borrowing from banks. The interest rate framework followed by scheduled commercial banks and regulated by Reserve Bank of India mandates that interest shall be charged on all advances at monthly rests. **In this view of the matter, Respondent 1 Adani Power is justified in stating that if the banks have charged it interest on monthly rest basis for giving loans to purchase the FGD unit, any restitution will be incomplete, if it is not fully compensated for the interest paid by it to the banks on compounding basis.**

22. We are of the opinion that interest on carrying cost is nothing but time value for money and the only manner in which a party can be afforded the benefit of restitution in every which way. In the facts of the instant case, the Appellate Tribunal was justified in allowing interest on carrying cost in favour of Respondent 1 Adani Power for the period between the year 2014, when the FGD unit was installed, till the year 2021. **There was no justification for the Central Commission to have excluded the period between 2014 and 2018 and grant relief from the date of the passing of the order i.e. from 28-3-2018** [*Adani Power Ltd.* v. *Uttar Haryana Bijli Vitran Nigam Ltd.*, 2018 SCC OnLine CERC 8] **to 2021**; nor is there any logic to such a segregation of timelines, particularly when Respondent 1 Adani Power was prompt in raising a claim on the appellants and pursuing its legal remedies.

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

24. <u>The entire concept of restitutionary principles engrained in Article 13 of the PPAs has to be read in the correct perspective. The said principle that governs compensating a party for the time value for money, is the very same principle that would be invoked and applied for grant of interest on carrying cost on account of a change in law event.</u> Therefore, reliance on Article 11.3.4 read with Article 11.8.3 on the part of the appellants cannot take their case further. Nor does the decision in *Priya Vart case* [*Priya Vart* v. *Union of India*, (1995) 5 SCC 437] have any application to the facts of the present case as the said case relates to payment of compensation under the Land Acquisition Act and the interest that would be payable in case of delayed payment of compensation."

(emphasis supplied)

Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power Ltd. (2019) 5 SCC 325

"9. <u>It will be seen that Article 13.4.1 makes it clear that adjustment in monthly tariff payment on account of change in law shall be effected from the date of the change in law</u> [*see* sub-clause (*i*) of clause 4.1]**, <u>in case the change in law happens to be by way of adoption, promulgation, *amendment*, re-enactment or repeal of the law or change in law. As opposed to this, if the change in law is on account of *a change in interpretation of law* by a judgment of a Court or Tribunal or governmental instrumentality, the case would fall under sub-clause (*ii*) of clause 4.1, in which case, the monthly tariff payment shall be effected from the date of the said order/judgment of the competent authority/Tribunal or the governmental instrumentality.</u>** What is important to notice is that Article 13.4.1 is subject to Article 13.2 of the PPAs.

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

of the project in the tariff is to be governed by a certain formula. However, the seller has to provide to the procurer documentary proof of such increase/decrease in capital cost for establishing the impact of such change in law and in the case of dispute as to the same, a dispute resolution mechanism as per Article 17 of the PPA is to be resorted to. It is also made clear that compensation is only payable to either party only with effect from the date on which the total increase/decrease exceeds the amount stated therein.

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

***

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.**"**

(emphasis supplied)

19. Notwithstanding the aforesaid clear pronouncements of this Court, we would like to throw a little more light on what constitutes a 'change in law' event, in view of the persuasive submissions made by Mr. Shyam Divan, the learned Senior Counsel appearing for the appellants.

20. While Article 10 of the PPA, with specific reference to Article 10.2, deals with application and principles for computing impact of change in law, Article 10.5, being a facet of Article 10.2 of the PPA, concerns itself with tariff adjustment payment on account of change in law. Article 10.2 and Article 10.5 of the PPA are extracted as below:

"10.2 *Application and Principles for computing impact of Change in Law*

10.2.1 While determining the consequence of Change in Law under this Article 10, 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 Payment, to the extent contemplated in this Article 10, the affected Party to the same economic position as if such Change in Law has not occurred.

***

10.5 *Tariff Adjustment Payment on account of Change in Law*

l0.5.1 Subject to Article 10.2, the adjustment in monthly Tariff Payment shall be effective from:
(i) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or
(ii) the date of order/ judgment of the Competent Court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law.

10.5.2 The payment for Change in Law shall be through Supplementary Bill as mentioned in Article 8.8. 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 the Seller after such change in Tariff shall appropriately reflect the changed Tariff.**"**

21. As held by this Court in the decisions referred to *supra*, Article 10.2.1 in the instant PPA was incorporated based on the principle of restitution. The idea of this principle is to compensate the affected party in order to restore it to the same economic position, but for the change in law. This particular provision is a substantive one, which in a normal circumstance, has to be given effect to in letter and spirit.

22. Article 10.5 of the PPA deals with tariff adjustment payment occasioned on account of change in law. Under Article 10.5.1 (i) of the PPA, the adjustment would start from the date of change in law. Therefore, as a matter of course, the adjustment in monthly tariff payment shall become effective from the date notified in the change in law.

23. Article 10.5.1 (ii) of the PPA might emerge in a factual scenario where there is an adjudication by way of an order/judgment of a competent Court or Tribunal or an Indian Governmental Instrumentality, as the case may be. Rendering of an order/judgement would require an interpretation of law. When there is a change in the interpretation of law in rendering the order/judgement, the date of such an order/judgment would constitute a 'change in law' under Article 10.5.1 (ii) of the PPA.

24. Hence, a mere difference in the understanding of a 'change in law' by one party to the PPA, does not, by itself, preclude the other party from deriving a benefit by invoking Article 10.5.1 (i) of the PPA. In other words, a different understanding would not result in a different interpretation of law, that would bar entitlement under Article 10.5.1 (i) of the PPA and, therefore, such a situation would not fall within the purview of Article 10.5.1 (ii) of the PPA.

25. To make this position clear, Article 10.5.1 (ii) of the PPA is not applicable to the facts of the instant case since there is no change in law which has occasioned by way of an interpretation given by a Court or a Tribunal or

an Indian Governmental Instrumentality. Recognising a change in law is different from interpreting a notification as the one applicable to the parties. We are only clarifying the position that there is no change in the interpretation of law involved in the case at hand, particularly when the said issue was not before the APTEL, for which the author of the change in law should have been made a party to the proceedings, in order to defend it. The Notification, dated 19.12.2017, and its application are not in dispute. What is in dispute is whether it constitutes a change in law or not. So long as there is no interpretation on the Notification with respect to its applicability to the parties before us, Clause (ii) of Article 10.5.1 of the PPA will have no application.

26. Article 10.5.2 of the PPA kicks in thereafter. Hence, a supplementary bill has to be raised only after due adjudication by the competent forum. Our view is fortified on a proper reading of Article 8 of the PPA.

> "ARTICLE 8: BILLING AND PAYMENT
>
> ***
>
> 8.3 *Payment of Monthly Bills*

8.3.1 The Procurers shall pay the amount payable under the Monthly Bill on the Due Date to such account of the Seller, as shall have been previously notified by the Seller in accordance with Article 8.3.4 below.

8.3.2 All payments made by the Procurer(s) shall be appropriated by the Seller in the following order of priority:
i) towards Late Payment Surcharge, if any;
ii) towards the earlier unpaid Monthly Bill(s), if any; and
iii) towards the then current Monthly Bill.

***

8.3.5 In the event of delay in payment of a Monthly Bill by the Procurers beyond its Due Date, a Late Payment Surcharge shall be payable by such Procurers to the Seller at the rate of two percent (2%) in excess of the applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with monthly rest), for each day of the delay. The Late Payment Surcharge shall be claimed by the Seller through the Supplementary Bill.

***

8.6 *Disputed Bill*

8.6.1 If a Party does not dispute a Monthly Bill, Provisional Bill or a Supplementary Bill raised by the other Party by the Due Date, such Bill shall be taken as conclusive.

8.6.2 If a Party disputes the amount payable under a Monthly Bill, Provisional Bill or a Supplementary Bill, as the case may be, that Party shall, within thirty (30) days of receiving such Bill, issue a notice (the "Bill Dispute Notice") to the invoicing Party setting out:
i) the details of the disputed amount;
ii) its estimate of what the correct amount should be; and
iii) all written material in support of its claim.

***

8.8 *Payment of Supplementary Bill*

8.8.l Either Party may raise a bill on the other Party ("Supplementary Bill") for payment on account of:
i) Adjustments required by the Regional Energy Account (if applicable);
ii) Tariff Payment for change in parameters, pursuant to provisions in Schedule 4; or
iii) Change in Law as provided in Article 10,
and such Supplementary Bill shall be paid by the other Party.

***

8.8.3 In the event of delay in payment of a Supplementary Bill by either Party beyond its Due Date, a Late Payment Surcharge shall be payable at the same terms applicable to the Monthly Bill in· Article 8.3.5."

It is not in dispute that a supplementary bill is not a monthly bill. Article 8 of the PPA deals with billing and payment alone. Under Article 8.8, the other party is duty-bound to make the payment when a supplementary bill is raised due to a change in law event having occurred, as provided under Article 10 of the PPA. This can happen only after due adjudication by the competent forum, has taken place. For more clarity, one has to read Article 10.5.2 along with Article 8.8 of the PPA. It is only thereafter that Article 8.6 of the PPA might come into the picture when there exists a dispute on the quantum of amount claimed in the supplementary bill raised after the completion of due adjudication by the competent forum, on the issue pertaining to the change in law.

27. The incidental issue raised with respect to carrying cost at the rate of LPS has also been dealt with in the decisions referred to in **GMR Warora Energy Ltd. (*supra*)**, **UHBVNL 2019 (*supra*) and UHBVNL 2023 *(supra)*** and, therefore, any fresh consideration would only be an academic exercise. We also find that the decision relied upon by the learned Senior Counsel appearing on behalf of the appellants, have no application to the facts of the case.

28. For the aforesaid reasons, we find absolutely no reason to interfere with the impugned judgment. Liability has been fastened upon the appellants under the agreement. The contention that the supplementary bill ought to have been raised earlier and, therefore, the payment can only be made thereafter has neither a factual basis nor a legal one. We would only point out the fact that respondent No.1 did notify the change in law event immediately on the very next day of the notification having been issued. In any case, we have been informed that in pursuance of the order of remand made by the APTEL, further orders have been passed by the RERC on 19.06.2024, which has not been challenged before this Court.

29. In view of the aforesaid analysis, we find no merit in this appeal. The appeal stands dismissed, accordingly.

30. Pending application(s), if any, shall stand disposed of.

.....…….. J.
(M. M. SUNDRESH)

…….. J.
(RAJESH BINDAL)

NEW DELHI;
MAY 23, 2025