

COURT-I

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

APPEAL NO. 228 OF 2018

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APPEAL NO. 235 OF 2018

Dated: 9th May, 2019

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member**

In the matter of:

IN THE MATTER OF:

1. Raj West Power Limited)
Office No. 2 & 3, 7th Floor,)
Man Upasana Plaza, C-44,)
Sardar Patel Marg, C-Scheme,)
Jaipur -302001)Appellant(s)

Versus

1. Secretary,)
Rajasthan Electricity Regulatory)
Commission,)
Vidyut Viniyamak Bhawan,)
Near State Motor Garage,)
Sahakar Marg,)
Jaipur – 302 005 – (Rajasthan))
2. Managing Director)
Jaipur Vidyut Vitran Nigam Limited)
Vidyut Bhawan, Janpath,)
Jaipur – 302 005 (Rajasthan))
3. Managing Director,)
Ajmer Vidyut Vitran Nigam limited,)
Old Power House, Hathi Bhata,)
Ajmer – 305 001 (Rajasthan))

4. Managing Director,)
Jodhpur Vidyut Vitran Nigam Limited,)
New Power House, Industrial Estate,)
Jodhpur – 342 003 (Rajasthan)) ... Respondent(s)

Counsel for the Appellant(s) : Mr. Basava Prabhu Patil, Sr. Adv.
Mr. Aman Anand
Mr. Aman Dixit
Mr. Suraj Das G.
Mr. Shashikant Modi

Counsel for the Respondent(s) : Mr. P.N. Bhandari for R.2 to R.4

JUDGMENT

(PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON)

1. In these two appeals the grievance of the Appellant is non-consideration of claim of the Appellant by the Rajasthan Electricity Regulatory Commission (**Commission**) as regards carrying cost as change in law event in terms of Article 13 of the PPA. The change in law claim was in respect of VAT rate being increased from 5% to 5.5% and Clean Energy Cess revised from Rs.200/ton to Rs.400/ton w.e.f. 02.02.2016 and 01.03.2016, respectively (Appeal No. 228 of 2018).

2. According to the Appellant, though the Respondent-Commission allowed the above items as change in law events and directed for payment of compensation occurring, did not consider and appreciate the

time lag between the occurrence of the change in law event and its approval by the Commission and between the above period incurring of additional expenses for arranging excess working capital to cater to the requirement of change in law event. According to the Appellant, in spite of specific prayer for grant of interest/carrying cost on the change in law compensation, the Commission, totally ignoring the well established principles of restitution and the specific intent of Article 13.2.2 (c) of PPA to the effect that financial position of the seller shall remain unaffected by the change in law event, has not considered the said claim made by the Appellant, who was the Petitioner before the Commission. It is further contended that apart from not considering the claim of carrying cost, arbitrarily and unreasonably the Commission further granted three months time to Respondent-Discoms to pay the said amount. Therefore, the Appellant is before this Court.

3. In Appeal No. 235 of 2018, the grievance of the Appellant is non-consideration of carrying cost as change in law compensation in terms of Article 13 of the PPA so far as new levies imposed towards contributions of District Mineral Foundation Trust (DMFT) and National Mineral Exploration Trust (NMET) introduced by the legislatures. Raising similar contentions as raised in Appeal No. 228 of 2018, the

Appellant approached this Tribunal in this appeal on limited issue of non-consideration/grant of carrying cost as change in law event.

4. As against this, Respondent Nos. 2, 3 & 4 have filed serious objections wherein they contend that the Appellant not being an aggrieved party, is not entitled for the above claims, and at least the Appellant ought to have made BLMCL, an independent company exclusively involved in the mining activity of this project of the Appellant, a party to this appeal, since levies are exclusively imposed on BLMCL. Having clearly admitted that these payments are made by BLMCL, the Appellant ought not to have approached the Commission at the first instance and now this Tribunal claiming such amounts is their stand. They further contend that the independent company BLMCL ought to have directly claimed such amounts and not through the Appellant. Therefore they contend that since BLMCL was not even born when PPA came into existence, the claim of the Appellant has to be rejected. It is further contended that while PPA came into existence on 26.10.2006, the Joint Venture Agreement came to be entered into on 27.12.2006 between RSMM and Raj West Power, the Appellant, whereby an independent entity i.e., BLMCL was created to deal with mining part of the project. They also contend that no payment arising out of change in

law can be made directly, since the same has to be adjudicated and determined by the appropriate Commission and amounts could be made only in pursuance of the order of the Commission. They further contend that if at all payment of carrying cost or interest, if any arises only after adjudication by the Commission on the compensation to be paid after determination of the same on account of change in law. They also contend that there is no provision in the PPA for allowing carrying cost and therefore, the Respondent-Commission was justified in not considering the same, is the stand of Discoms. According to the Respondent-Discoms since huge amounts are involved, compensation can be ascertained only after proper scrutiny and adjudication. With these averments they have sought for dismissal of the appeals.

5. The point that would arise for consideration is:

“Whether the Appellant is entitled for interest/carrying cost on the amounts determined as compensation in respect of change in law in terms of PPA.”

6. It is not in dispute that PPA came to be executed between the Appellant and Respondent Nos. 2 to 4 on 26.10.2006. The impugned order pertains to Petition No. 1283 of 2017, where the Appellant had

sought adjudication of disputes arising out of non-payment of bills in respect of amounts due on account of change in law in terms of PPA i.e., in respect of four items, already mentioned above (VAT, Clean Energy Cess, DMFT & NMET). The Respondent-Discoms did raise before the Commission similar objection as raised in this Appeal that the change in law compensation, if at all payable in terms of PPA has to be paid only to BLMCL.

7. Before the Commission, BLMCL appeared and has submitted that VAT and Clean Energy Cess, similar to other two payments were deposited by BLMCL, and the said amounts were claimed by BLMCL from RWPL for ad-hoc transfer price of lignite vide letters dated 02.02.2016 and 29.02.2016 for the period between 02.02.2016 to 31.03.2016. Since both RWPL and BLMCL filed IAs in different petition Nos. 486 of 2014 and 487 of 2014 claiming benefit of change in law by enforcing the terms of Clause 13 of PPA, the Commission did not allow the reliefs though it took note of the said claim. Then Appeal No. 177 of 2014 came to be filed by Raj West Power, which came to be disposed of on 10.12.2015.

8. In compliance of the directions of this Tribunal, Respondent Commission passed the consequential order duly giving benefit of change in law to RWPL on 25.01.2016. Subsequently, one more petition came to be filed seeking compensation on account of change in Clean Energy Cess and increase in Clean Energy Cess etc. Same was not considered by the Commission. Again, in Appeal No. 289 of 2015, a direction was issued by this Tribunal allowing the appeal and directing the Commission to consider the claim of change in law. Then Clean Energy Cess came to be assessed. Observing these facts, the Commission opined that since the orders of this Tribunal have become final and binding on the parties including the Commission, the Commission proceeded to examine the claims towards change in law compensation in respect of four specific items mentioned at the beginning of the discussion. After referring to Article 13 of the PPA in terms of Clause 13.1.1, the Commission opined at paragraphs 21, 22,23 & 24, which read as under:

“21. Commission observes that increase in rate of Clean Energy Cess and VAT applicable on Lignite resulted in increase in the transfer price of Lignite and consequently, increased the Energy Charges which results in a material change in the cost of generation of RWPL.

22. Petitioner has stated that it has paid the increased transfer price on account of Change in Law to BLMCL under the Change in Law clause of Fuel Supply Agreement and accordingly has claimed the same from the Discoms under provisions of Change in Law in PPA

23. *Commission is of the view that change in rate of Clean Energy Cess and VAT which consequently increased the cost of generation of RWPL is covered under the definition of Change in Law as provided in the said PPA.*
24. *Further, issue relating payment of Clean Energy Cess under Change in Law Clause of the PPA, the same is no longer res-integra. The Hon'ble APTEL in the case referred to above has directed this Commission to allow the benefit of Change in Law with regard to Clean Energy Cess to the Petitioner."*

9. Similarly, at Paragraph Nos. 15 to 20, the Commission while allowing the new levies on lignite ie., DMFT and NMET observed as under.

"15. Against this order, the Petitioner filed an appeal before the Hon'ble APTEL in appeal no. 177 of 2014. The APTEL vide its order dated 10.12.2015 directed as follows:

"12.23 In view of the above discussions, we hold that the State Commission has committed gross illegality in passing the interim order, dated 31.3.2015(impugned order), whereby it simply extended the ad-hoc transfer price (inclusive of all statutory levies) applicable for FY 2014- 15, to the ad-hoc transfer price of lignite for next FY 2015-16 even without considering the increases in the statutory levies introduced by the Union Budget for FY 2015-16 because the State Commission was bound to consider the increase in statutory levies and allow the impact thereof to the Appellant while extending the ad-hoc transfer price of lignite to the next financial year.

12.24 We also hold that the State Commission, vide its subsequent order, dated 19.6.2015, has wrongly rejected the joint application filed by the Appellant and Respondent No.4 seeking modification of the order, dated 31.3.2015, to the limited extent of permitting the Appellant and the Respondent No.4 to reapportion the interim tariff between fixed and variable charges in the manner as provided in the said joint application because the whole adjustment were to be made between the mining entity (Appellant) and the Respondent No.4/power generation company without there being any increase in the tariff at the said moment.

12.25 In view of the above discussions, both the issues at Sl. No.12.23 and Sl. No. 12.24 above, are decided in favour of

the appellant and the impugned order dated 31.03.2015 and the following order dated 19.06.2015 are liable to be set aside. This appeal is liable to be partly allowed.

Order

The present Appeal, being Appeal No.177 of 2015, is hereby partly allowed to the extent indicated above. Both the orders, dated 31.3.2015 (impugned order) with respect to ad-hoc transfer price of lignite for FY 2015-16 and, the subsequent order, dated 19.6.2015, are hereby set-aside. The State Commission is directed to allow basic transfer price of lignite on ad-hoc basis passed by the State Commission in the Impugned Order dated 31.03.2015 and 19.06.2015 plus applicable taxes viz. the current rates of statutory levies applicable for FY 2015-16 and, pass a consequential order within three months from today based on our decision given at paragraph 12.23 & 12.24 above.

..... No order as to costs.” (emphasis supplied)

- 16. In compliance to above order Commission passed the consequential order on 25.01.2016 duly giving the benefit of ‘Change in Law’ to the Petitioner M/s RWPL.*
- 17. Further, Commission observes that M/s RWPL had filed one more petition no. 523/15 and had claimed the impact of ‘Change in Law’ on account of increase in Clean Energy Cess from Rs. 100/ton to Rs. 200/ton after adjusting reduction in diesel surcharge. This Commission did not consider the same and passed an order on 07.10.2015 rejecting the same for the reason that Commission is in the process of finalising the tariff. Petitioner aggrieved filed an appeal before Hon'ble APTEL in appeal no. 289/2015. The Hon'ble APTEL vide its order dt. 29.04.2016 allowed the appeal and directed to allow claim of Change in Law as follows:*

“Heard the rival parties, namely, Mr. M.G.Ramachandran, for the Appellant and Mr. P. N. Bhandari, appearing for Respondent Nos.1, 2 & 3/DISCOMs in this appeal. The Appellant submits that, it is a case fully covered by Change of Law. The benefit of Change in Law, with regard to clean energy cess should be allowed to the Appellant/Petitioner.

Mr. P.N.Bhandari, learned counsel for the DISCOMs, also admits that, this is a case where Change in Law with regard to seeking energy cess, should be allowed. Mr. P.N. Bhandari, for the DISCOMs, submits that, though, there was no counter claim or any petition before the State Commission, but facts regarding counter claim are mentioned by the State Commission in the Impugned Order. Mr. Bhandari, wants the matter to be remanded to the State Commission, with direction that, if, there was any counter claim on behalf of the DISCOMs, Respondents, herein, pending on date of passing of Impugned Order filed by the State Commission in Petition No.523 of 2015, the Commission should decide the same.

We allow the instant Appeal; being Appeal No.289 of 2015, and set aside the Impugned Order dated 07.10.2015 passed by the State Commission in Petition No.523 of 2015. We further direct the State Commission to allow the benefit of Change in Law with regard to clean energy cess to the Appellant. The State Commission is further directed to decide the counter claim of the DISCOMs, Respondent Nos.1, 2 & 3, if any, was pending before the State Commission on the date of passing the Impugned Order. (emphasis supplied)

We further, make it clear today that, if, there was no counter claim or counter demand of DISCOMs, pending at the time of passing the Impugned Order, the Commission cannot decide the same.

Mr. R.K.Mehta, learned counsel appearing for the State Commission, sincerely, states that, if there was any counter claim pending at the time of passing of the Impugned Order, the State Commission, shall consider it. Thus, instant Appeal, being Appeal No. 289 of 2015, is allowed to the extent, as indicated above. No costs."

18. *The above order of Hon'ble APTEL has become final and binding on Petitioner, Respondents and also this Commission.*
19. *Commission observes that PPA dt. 26.10.2006 has been executed between the Petitioner (M/s RWPL) and Respondent Discoms. The said PPA clause which deals with Change in Law reads as under:*

".....

13 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 as a result of, or 'in connection with, any action or inaction by any Legal authority after the date, which is seven (7) days prior to the date of this Agreement:

the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any statute, decree, ordinance or other law, regulation, notice, circular, code, rule or direction by any Governmental instrumentality or a change in its interpretation by a Competent Court of law, tribunal, government or statutory authority or any of the above regulations, taxes, duties charges, levies, etc. that in either of the above cases results in any change with respect to any tax or surcharge or case levied or similar charges by the Competent Government, which materially increases or decreases cost of generation or revenue (including in relation to construction, financing, return on equity, operation or maintenance of the Project) from sale of electricity;

20. *As per the above Article change in taxes, duties charges, levies etc. which materially increases or decreases cost of generation or revenue from sale of electricity is covered under Change in Law."*

10. It is noticed from the above two impugned orders that the amounts claimed by the Appellant though were paid by BLMCL, in fact the said amounts were already paid by Raj West Power, Appellant to BLMCL in terms of fuel supply agreement. It is pertinent to note that Respondent/Discoms have not filed any appeals challenging the direction of the Commission to pay compensation in respect of VAT, Clean Energy Cess, DMFT and NMET claims being paid to Appellants and not to BLMCL. Now it is not open to the Respondent/Discoms to raise such objection not to pay carrying cost/Interest to Appellant. Even otherwise, the Commission, after examining the change in law clause in FSA executed between Appellants and BLMCL, which can be considered as back to back agreement, has allowed the claim of the Appellants. In that view of the matter, we cannot appreciate the preliminary objection raised by the Respondent/Discoms that BLMCL ought to have claimed these amounts and not the Appellants as a third party.

11. Then coming to the issue of carrying cost on compensation determined under change in law events, the relevant Article 13.2.2 (c), reads as under:

“13.2.2

.....

(c) Subject to the approval of the Additional Capital Expenditure by the Procurers and the Commission, calculate equitable adjustments to the Fixed Charges and the Energy Charges to reflect such increase or decrease in cost or revenue and/or such Capital Expenditure with the intent that the financial position of the Seller shall remain unaffected by such circumstance.”

12. It is seen that subsequent to the impugned orders, this Tribunal had an occasion to consider the claim of carrying cost or interest payable on compensation arising out of change in law events in Appeal No. 210 of 2017, which was disposed of by this Tribunal by its Judgment dated 13.04.2018. This Tribunal opined that such claims for compensation by generators in terms of clauses of PPA do arise and should be paid, however observed that carrying cost or interest is admissible only after finalisation of amount payable and not before. Ultimately, at para Nos. (ix & x) at page 67 of the said Judgment in Appeal No. 210 of 2017, this Tribunal has observed as under:

ix. *In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial. As pointed out by the Central Commission that the Appellant is only eligible for surcharge if the payment is not made in time by the Respondent Nos. 2 to 4 after raising of the supplementary bill arising out of approved Change in Law event and in PPA there is no compensation mechanism for payment of interest or carrying cost for the period from when Change in Law becomes operational till the date of its approval by the Central Commission. We also observe that this Tribunal in SLS case after considering time value of the money has held that in case of re-determination of tariff the interest by a way of compensation is payable for the period for which tariff is re-determined till the date of such re-determination of the tariff. In the present case after perusal of the PPAs we find that the impact of Change in Law event is to be passed on to the Respondent Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA. The relevant extract is reproduced below:*

“13.4 Tariff Adjustment Payment on account of Change in Law

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

(a) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or

(b) the date of order/ judgement of the Competent Court or tribunal or Indian Government instrumentality, if the Change in Law is on account of a change in interpretation of Law.

(c) the date of impact resulting from the occurrence of Article 13.1.1.

From the above it can be seen that the impact of Change in Law is to be done in the form of adjustment to the tariff.

To our mind such adjustment in the tariff is nothing less than re-determination of the existing tariff.

- x. *Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of 'restitution' i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon'ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India &Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA."*

13. This Judgment of the Tribunal came for consideration before the Hon'ble Supreme Court in Civil Appeal No. 5865 of 2018. The Hon'ble Supreme Court after considering several Judgments relied upon by the

parties and the clauses of various Articles pertaining to change in law compensation opined that those clauses in Article 13, if read as a whole, lead to the position that subject to restitutionary principles contained in Article 13.2, the adjustment of compensation in monthly tariff payments has to be arrived at. They further opined that the claim of compensation relates to restitutionary amount, which is very much within the ambit of PPA and not outside PPA, since parties have to be put to same economic position. Therefore, from a reading of the said Judgment of the Hon'ble Supreme Court, it is clear that their lordships were of the opinion that carrying cost is relatable to Articles of PPA and therefore they approved the Judgment of the Tribunal. They had also referred to the observation in the case of **Energy Watch Dog vs. Central Electricity Regulatory Commission** (2017 (14) SCC 80) at Para 16, which reads as under:

*16. Lastly, the judgment of this Court in **Energy Watchdog v. Central Electricity Regulatory Commission and Ors.**, (2017) 14 SCC 80 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:*

“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 the CERC.”

14. We should also appreciate the fair submission of Mr. Bhandari, learned counsel that in terms of judgment of this Tribunal and the Apex Court, referred to above, carrying cost is to be paid, but the main objection was with regard to BLMCL not being the claimant before us, which aspect is already discussed and opined by us in the above paragraphs.

15. In the light of the above discussion and reasoning, we are of the opinion that these appeals deserve to be allowed by remanding the matters for fresh consideration only on the aspect of carrying cost payable on the compensation already determined on VAT, Clean Energy

Cess, DMFT and NMET. Accordingly, the appeals are allowed and remanded for fresh consideration on the aspect mentioned above. The pending IAs, if any, shall stand disposed of.

16. There shall be no order as to costs.

17. Pronounced in the open court on this the 9th May 2019.

S.D. Dubey
[Technical Member]

Justice Manjula Chellur
[Chairperson]

Dated: 9th May 2019

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