IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 231 OF 2021
&
IA NOS. 125 & 1108 OF 2020

Dated: **<u>21st December 2021</u>**

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

<u>In the matter of</u>:

1. **M/S UTTAR HARYANA BIJLI VITRAN NIGAM LTD.**
Vidyut Sadan, Plot No. C-16,
Sector 6, Panchkula,
Haryana- 134112

2. **DAKSHIN HARYANA BIJLI VITRAN NIGAM LTD,**
Vidyut Nagar, Vidyut Sadan,
Hissar,
Haryana- 125 005

[Through]
HARYANA POWER PURCHASE CENTRE
Shakti Bhawan, Sector 6,
Panchkula – 134108 (Haryana) ….. Appellant(s)

VERSUS

1. **ADANI POWER (MUNDRA) LIMITED**
[Through its Managing Director]
Shikar, Near Mubhakali Circle,
Navrangpura, Ahmedabad – 390 009

2. **CENTRAL ELECTRICITY REGULATORY COMMISSION**
[Through its Secretary]
3rd and 4th Floor, Chandralok Building,
36, Janpath,
New Delhi – 110 001 ….. Respondents

Counsel for the Appellant (s)	:	Mr. M.G. Ramachandran, Sr. Adv. Mr. Shubham Arya Ms. Poorva Saigal Ms. Srishti Khindaria Ms. Shikha Sood for A-1 & 2
Counsel for the Respondent (s)	:	Mr. Amit Kapur Ms. Poonam Verma

Mr. Saunak Rajguru
Mr. Ankitesh Ojha for R-1

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

PREFACE

1. The appellants – *Uttar Haryana Bijli Vitaran Nigam Limited* and *Dakshin Haryana Bijli Vitaran Nigam Limited* **–** are distribution licensees (hereinafter referred to variously as "*the Discoms*" or "*Haryana Utilities*" or "*the appellants*") engaged in the distribution and retail supply of electricity to the consumers at large in the State of Haryana, prosecuting their common interest in these proceedings through *Haryana Power Purchase Centre* ("*HPPC*"), the designated nodal agency dealing with the procurement of power from generating companies, seek to assail the Order dated 08.07.2019 passed by the second respondent *Central Electricity Regulatory Commission* (hereinafter referred to variously as "*the Central Commission*" or "*CERC*" or "*the Commission*") in Petition No. 269/MP/2018. The said petition had been filed by the first respondent – *Adani Power Mundra Limited* (hereinafter referred to variously as "*the generator*" or "*Adani*" or "*the first respondent*") for enforcing orders as to compensation from the appellants under *change in law* provision (Article 13) contained in the *Power Purchase Agreements* dated 07.08.2009 ("PPAs"). The grievances agitated by the appeal pertain to the conclusions of CERC to the extent they pertain to computation of shortfall in the domestic coal claimed by the generator; want of decision on the plea of impact of *change in law* in allowing *Inter-Plant Transfer* (for short, "IPT") of coal resulting in decrease or savings in cost to the generator; and propriety of computation for *change in law* in regard to taxes and duties.

2. The learned Counsel for the appellants submitted that the aspect of restricting the *change in law* impact to the extent up to 65%, 65% 67% and 75% and not to the extent of actual shortfall below the said percentage (as contended by the appellants), which incidentally arises in the present appeal, has been decided by this tribunal by judgment dated 03.11.2020 in appeal No. 168 of 2019 which has been challenged by Haryana Utilities in Civil Appeal No 4143 of 2020, pending before Hon'ble Supreme Court and so not pressed here.

FACTUAL MATRIX

3. The background facts, to the extent germane, may be noted at the outset.

4. On 18.10.2007, Government of India ("GoI") issued the *New Coal Distribution Policy* ("NCDP, 2007") whereunder 100% of the quantity of coal required as per the normative requirement of an independent power plant would be considered by *Coal India Ltd.* ("CIL") for the supply of coal through a *Fuel Supply Agreement* ("FSA") at a notified price including for future power plants. The NCDP, 2007, *inter alia*, provided (Paragraph 2.2) thus:

> "*<u>100% of the quantity as per the normative requirement of consumers would be considered for supply of coal, through Fuel Supply Agreement (FSA) by Coal India Limited (CIL) at fixed prices to be declared/notified by CIL.</u> The units/power plants, which are yet to be commissioned but whose coal requirements has already been assessed and accepted by the Ministry of Coal and linkage/Letter of Assurance (LOA) approved as well as future commitments would also be covered accordingly.*"
>
> (Emphasis supplied)

5. By NCDP, 2007, the Power utilities including Independent Power Producers ("*IPPs*") were assured supply of 100% of the fuel quantity as per normative requirement by Coal India Ltd. ("*CIL*"). The linkage system was replaced with a more transparent bilateral commercial arrangement of enforceable Fuel Supply Agreements (FSAs). Since 100% of the normative requirement was to be provided by CIL, it was CIL's responsibility to meet the full requirement of such coal under FSAs even by resorting to import of coal, if necessary. The FSA would also be executed for 100% of the normative coal requirement.

6. On 04.06.2007, Haryana Power Generation Company Ltd., the predecessor-in-interest of the appellants, had issued a Request for Proposal (RFP) to bidding companies which had qualified on the basis of their responses to RFQ. Adani Power Ltd., the predecessor-in-interest of the first respondent (the generator), had submitted on 24.11.2007 its bid, based on documents in respect of the coal to be used for generation, for supply of power to Haryana Power Generation Corporation Ltd. (Case-I bid) to the extent of 1424 MWs. The appellants entered into two PPAs, each dated 07.08.2008, with Adani Power Ltd. for procurement of an aggregate contracted capacity of 1424 MW (712 MWs x 2) from out of the installed capacity of 660 MWs x 3 Units (1980 MWs) i.e. generating units 7, 8 and 9 of (coal-fired) thermal power project established by the latter at Mundra in the State of Gujarat, the contracted capacity to be delivered at the Haryana periphery, the gross generation to be allocated in Phase-IV for Haryana Utilities to be 1565.67 MWs, accounting for the transmission loss 2.85% (41.77 MW) and auxiliary consumption of 6.38% (99.90 MW). The Article 13 of the

PPAs concededly deals with *change in law* and consequent change in cost or revenue to the generator to be adjusted as provided in Article 13.1.1.

7. Towards arrangement of fuel (coal) for generation, Adani had submitted application to Standing Linkage Committee (Long Term) for coal ("*SLC(LT)*") in January 2008 for grant of linkage coal. The SLC(LT), Ministry of Coal ("*MoC*") in Government of India ("*GoI*"), decided on 12.11.2008 to grant only 70% of the normative coal requirement to the coastal power stations, this also applicable to the plant of first respondent. The following part of the minutes of the SLC(LT) meeting is relevant:

"21(b). All the recommended projects considered as coastal projects as defined in this minutes will have an import component of 30% for which developer has to tie up sources directly. LOA will be for 70% of the recommended capacity only.

…

<u>21.</u>	*<u>Adani Power Limited of M/s Adani Power Limited</u>*	*<u>Adani Power SEZ, village Tunda and Biracha, Mundra, Kutch, Gujarat</u>*	*<u>MCL</u>*	*<u>4x330 MW-Phase-I, 2x660 MW Phase-II 3x660 MW Phase-III</u>*

<u>Recommendation of the Committee</u>: CEA informed that land and water for the project is available. It was noted that CEA has recommended LOA for Phase III only for a capacity of 1980 MW, as applicant intends to tie up different sources for meeting the coal requirements for Phase I and Phase II. Moreover, the project is considered as coastal project. Having regard to the recommendation of CEA/MoP, the <u>committee authorized issuance of LOA by CIL for capacity of 1366 MW (70% of 1980 MW) for Phase III in accordance with the provisions of New Coal Distribution Policy (NCDP). Remaining capacity was deferred and will</u>

<u>*be taken up by SLC(LT) in future for consideration based on recommendation of MoP and other relevant factors*</u>*.*"

(Emphasis supplied)

8. Clearly, SLC(LT), by its decision dated 12.11.2008, reduced linkage coal entitlement of Adani to 70% of installed capacity (coastal power plant), there being no option but to procure the rest from imports, leading to bifurcation of coal source into domestic coal and imported coal in the ratio of 70:30 corresponding to installed capacity of 1980 MW, a change from 100% assurance under NCDP 2007 (normative requirement).

9. Accordingly, a Letter of Assurance (LOA) was issued in favor of the generator on 25.06.2009 by *Mahanadi Coalfield Limited* (hereinafter "*MCL*") for supply of 6.405 MTPA of coal (Grade "F") for capacity equivalent to only 70% of 1980 MW (installed capacity) i.e. 1386 MW. A formal FSA was entered into by the generator with MCL on 09.06.2012 for 6.405 MTPA per year. Indisputably, a part of the contracted quantum of domestic coal to be made available under the FSA with MCL was transferred, in 2015, to be supplied by *South Eastern Coalfields Limited* (hereinafter "*SECL*"). As per Schedule VII of the FSA, the assured quantum under the FSA to Adani is 80% of the ACQ, this further reducing the entitlement of Adani to supply of coal as against the originally assured 100% of the normative requirement.

10. On 05.07.2012, the generator filed Petition No. 155/MP/2012 before CERC seeking, *inter alia*, relief on account of frustration and/or of occurrence of *force majeure* (Article 12) and/or change in law (Article 13) events under the PPAs, seeking increase in the tariff from the quoted tariff in the bid incorporated in the PPAs on various grounds, the primary claim being based on the impact of Indonesian Regulations on price of imported coal, it also being claimed that there was a shortage in the availability of domestic coal. The petition resulted in orders dated 02.04.2013 and 21.02.2014 whereby reliefs were granted to the generator. By order dated 02.04.2013 the claims under *Force Majeure* and *Change in Law* were rejected though the matter of hardships was referred to be examined by a Committee.

11. During the interregnum, on 05.02.2013, the Cabinet Committee on Economic Affairs ("*CCEA*") of the Government of India ("GoI"), *inter alia*, decided that CIL will provide imported coal on cost-plus basis to all producers willing to take such coal and that the higher cost of imported coal will be allowed as a *pass-through***.** On 09.05.2013, the Ministry of Power ("MoP") in the GoI referred the issue to CERC for statutory advice as to how to implement CCEA decision dated 05.02.2013 regarding adjustment in tariff of concluded PPAs to allow higher cost of imported coal as *pass through*. On 20.05.2013, the CERC issued its statutory advice *qua* requirement to make suitable changes to NCDP 2007 and other statutory documents so as to allow *pass through* of additional cost incurred by generators to meet balance coal requirement, acknowledging that "*it is the full responsibility of CIL to meet the full requirement of coal under FSAs even by resorting to import, if necessary*". On 21.06.2013, the CCEA, considering the overall domestic availability and actual requirements, decided that the FSAs "*be signed for domestic coal component for the levy of disincentive at the quantity of 65%, 65%, 67% and 75% of annual contracted quantity (ACQ)…"* and directed the MoC to issue (i) suitable orders supplementing NCDP, 2007 and (ii) directions to Electricity Regulatory Commissions ("ERCs").

12. On 17.07.2013, the GoI issued a Presidential directive to CIL to enter FSAs with power plants for a capacity of 78,000 MW, reiterating that considering the low domestic coal availability, FSAs are to be signed for domestic coal quantity of 65%, 65%, 67%, and 75% of ACQ for the remaining 4 years for the 12th five-year plan. On 26.07.2013, the MoC in GoI notified the *New Coal Distribution Policy* ("NCDP-2013"), changing the 100% assurance (normative requirement of coal) under the erstwhile NCDP 2007, *inter alia*, directing that FSAs will be signed for the remaining four years of 12th Five Year Plan for 65%, 65%, 67% and 75% of ACQ, providing as under:

> *"The Government has now approved a revised arrangement for supply of coal to the Identified Thermal Power Stations (TPPs) of 78,000 MW Capacity commissioned or likely to be commissioned during the period from 1.4.2009 to 31.3.2015, taking into account the overall domestic availability and the likely actual requirements of these TPPS…"*
>
> (Emphasis supplied)

13. In the wake of NCDP being notified, the MoP in GoI, addressed a communication to CERC on 31.07.2013, stating, *inter alia*, as under:

> *"After considering all aspects and the advice of CERC In this regard, Government has decided the following in June 2013:*
> *i) taking into account the overall domestic availability and actual requirements…*
>
> *ii) to meet its balance FSA obligations, CIL may import coal and supply the same to the willing TPPs on cost plus basis. TPPS may also import coal themselves if they so opt.*
>
> *iii) higher cost of imported coal to be considered for pass through as per modalities suggested by CERC.*
>
> *iv)…*

> *v) As per decision of the Government, the <u>higher cost of import/market based e-auction coal</u> <u>be considered</u> <u>for being made a pass through</u> on a case to case basis by CERC/SERC <u>to the extent of shortfall in the quantity indicated in the LOA/FSA and the CIL supply of domestic coal</u> …*
>
> *vi)…*
>
> *This issues with the approval of MOS(P)I/C"*
>
> (Emphasis supplied)

14. It is after the above developments that CERC, by its order dated 21.02.2014, granted compensatory tariff to Adani in exercise of its statutory powers under Section 79(1)(b) of the Act but confined it to the impact of Indonesian Regulation in Petition 155/MP/2012, also holding that Adani may approach the utilities under PPA, and the Commission if the matter was not amicably settled, for compensation on account of change in law.

15. On 28.01.2016, the Central Government, in exercise of its power and jurisdiction under Section 3 of the Electricity Act, 2003 notified the Tariff Policy, 2016 which, *inter alia*, provided thus:

> *"However, some of the competitively bid projects as per the guidelines dated 19th January, 2005 have experienced difficulties in getting the required quantity of coal from Coal India Limited (CIL). <u>In case of reduced quantity of domestic coal supplied by CIL, vis-à-vis the assured quantity or quantity indicated in Letter of Assurance/FSA the cost of imported/market based e-auction coal procured for making up the shortfall, shall be considered for being made a pass through</u> by Appropriate Commission on a case to case basis, as per advisory issued by Ministry of Power vide OM NO. FU-12/2011 IPC (Vol-III) dated 31.7.2013."*
>
> (Emphasis supplied)

16. Feeling aggrieved by the Orders dated 02.04.2013 and 21.02.2014 of CERC (in Petition No. 155/MP/2012), the Haryana Utilities, and certain other procurers and consumer representative, filed appeals (no. 100 of 2013 and batch) before this tribunal which were decided by a full bench, by judgment dated 07.04.2016, whereby compensatory tariff was granted to the generator under *force majeure* clause of PPA. The said decision was challenged before Supreme Court by Civil Appeal Nos. 5399-5400 of 2016 and batch which were decided by judgment dated 11.04.2017, reported as *Energy Watchdog v. Central Electricity Regulatory Commission and others* (2017) 14 SCC 80, granting restitutive relief to Adani under Change in Law *qua* shortfall in domestic coal and directing CERC to determine the extent of such relief. The ruling reads thus:

> *"53…This being so, it is clear that so far as the procurement of Indian coal is concerned, <u>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</u>.*
>
> *…*
>
> *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 <u>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</u>.

58. <u>However, Shri Ramachandran, learned senior counsel for the appellants, argued that the policy dated 18th October, 2007 was announced even before the effective date of the PPAs, and made it clear to all generators that coal may not be given to the extent of the entire quantity allocated. We are afraid that we cannot accede to this argument for the reason that the change in law has only taken place only in 2013, which modifies the 2007 policy and to the extent that it does so, relief is available under the PPA itself to persons who source supply of coal from indigenous sources.</u> It is to this limited extent that change in law is held in favour of the respondents. Certain other minor contentions that are raised on behalf of both sides are not being addressed by us for the reason that we find it unnecessary to go into the same. The Appellate Tribunal's judgment and the Commission's orders following the said judgment are set aside. <u>The Central Electricity Regulatory Commission will, as a result of this judgment, go into the matter afresh and determine what relief should be granted to those power generators who fall within clause 13 of the PPA as has been held by us in this judgment.</u> "

(Emphasis supplied)

17. The first respondent had filed Petition (no. 156/MP/2014) *Adani Power Mundra Limited* vs. *Uttar Haryana & Anr.* Before CERC claiming eighteen *change in law* events in relation to various taxes and duties related to domestic coal. The said petition was decided by CERC by Order dated 06.02.2017 (hereinafter referred to as "*Taxes and Duties Order*") allowing change in law with respect to various taxes and duties (*Rate of Royalty on coal, Central Excise Duty, Clean Energy Cess, Customs Duty, Service Tax on transportation of goods by Indian Railways, Swachh Bharat Cess, Payment to National Mineral Exploration Trust, Payment to District*

Mineral Foundation) related to domestic coal in favour of Adani. Para 106 (b) of the said decision dated 06.02.2017 (hereinafter referred to as "*Taxes and Duties Order*") reads thus:

> *"(b) The increase in royalty on coal, clean energy cess, excise duty on coal, National Mineral Exploration Trust, District Mineral Foundation and service tax (which also includes Swachh Bharat Cess) shall be computed based on actual subject to ceiling of coal consumed corresponding to scheduled generation and shall be payable by the beneficiaries on pro-rata based on their respective share in the scheduled generation. In case of reduction in royalty on coal, clean energy cess and excise duty on coal, the petitioner shall compensate the procurers on the basis of above principle."*
>
> (Emphasis supplied)

18. The Taxes and Duties Order was challenged by the appellants by Appeal No. 316 of 2017 but limited to applicability of levy of Customs Duty on electricity removed from SEZ to DTA, there being no challenge brought with regard to any other taxes and duties that are applicable for domestic coal that were allowed in the Taxes and Duties Order or *qua* the issue of IPT coal. It may be noted here itself that it is not contested that the appellants were paying Change in Law compensation in terms of the Supplementary invoices raised by Adani towards taxes and duties applicable to domestic coal until November 2017 but thereafter they stopped paying the same by raising the issue of utilization of IPT coal by Adani in terms of IPT scheme dated 19.06.2013, having unilaterally deducted the amount paid till then from the subsequent regular monthly bills raised by Adani for power supplied.

19. As would be set out at length in due course, in 2013, the Government of India adopted and notified a scheme whereunder *Inter-plant transfer* ("IPT") of coal was permitted. In the wake of the decision of Supreme Court in *Energy Watchdog* (supra), in May 2017, the generator herein had filed Petition No. 97/MP/2017 before the Central Commission for implementation of the said judgment (*Energy Watchdog*) seeking compensation on account of domestic coal shortfall due to changes in NCDP requesting it to determine the 'extent' to which Adani was affected due to domestic coal shortfall to compute the relief under Article 13 of the PPA.

20. On 31.05.2018, the Central Commission decided Petition No. 97/MP/2017 *Adani Power Mundra Limited* vs. *Uttar Haryana Bijli Vitran Nigam Ltd. & Anr*, allowing the relief to the first respondent herein in terms of *change in law*, holding that it (Adani) is entitled to compensation for any shortfall in supply of coal by MCL/SECL *vis-à-vis* quantity indicated in the FSA dated 09.06.2012 for the period between 01.04.2013 to 31.03.2017, also observing that the actual shortfall in supply of domestic coal with reference to the ACQ under the FSA needs to be considered in light of Article 13.2 of the PPAs and *Energy Watchdog* Judgment, concluding that Adani is entitled to claim compensation for all Change in Law events under the PPA dated 7.8.2008, after taking into account the coal utilized under IPT, and directed the Haryana Utilities to pay the same. The following part of the said order dated 31.05.2018 (hereinafter referred to as "the NCDP Order") has been referred during the hearing:

> *"28. … Therefore, in terms of the FSA and the MoU dated 3.7.2012 read with Schedule VII of the FSA, MCL was committed to supply 100% of ACQ quantity through domestic production and import of coal. Position of MCL in the MoU that supply of coal under FSA from domestic sources is not likely to exceed 80% of Annual Contract Quantity (ACQ) for the year 2012-13 which shall be subject to review by MCL every year and the balance quantity would be met through imports should not be construed that MCL had the commitment to supply 80%*

of the ACQ of coal under the FSA. Since MCL carries the commitment to supply 100% of ACQ through domestic supply and import and the Petitioner through the MoU has exercised its option to accept 20% supply through import, we are of the view that shortfall in supply of coal needs to be considered with reference to the entire quantum of coal committed as ACQ in the FSA dated 9.6.2012, and not with reference to 80% of the ACQ for giving effect to the change in law in terms of Article 13 of the PPAs.

…

33. According to Prayas, change in law is applicable only for the shortage of supply up to 65%, 65%, 67% and 75% of the ACQ during the years 2013-14, 2014-15, 2015-16 and 2016-17 respectively and actual supply of coal lower than these percentages is the subject matter of commercial contract with MCL under the FSA for which the Petitioner needs to seek compensation from MCL and the Procurers should not be burdened with such extra cost. In our view, the contention of Prayas is not correct. As per para 4.6 of the FSA, MCL is liable to pay compensation for the "failed quantity" (i.e. shortfall in supply of coal below 80% of the ACQ) at the rate of 0.01% calculated on the basis of the single average of base price as per schedule III of the FSA. Moreover, this provision is applicable after a period of three years from the date of signing of the FSA. In other words, the Petitioner is not entitled for compensation till 8.6.2015 (FSA being signed on 9.6.2012). Therefore, the compensation payable under the FSA for supply of coal for capacity lower than 65%, 65%, 67% and 75% for the years 2013-14, 2014-15, 2015-16 and 2016-17 respectively of the ACQ is too meagre to meet the expenditure for procurement of coal from alternate sources or through import. In this connection, Article 13.2 of the PPAs dated 7.8.2008 provides for the following principles of computing change in law:

…

Further, the relevant observations of the Hon`ble Supreme Court in the judgment dated 11.4.2017 in Energy Watchdog Case are extracted as under:

> *"53…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."

The compensation available under the FSA from MCL for the shortfall in supply below 80% of ACQ is not sufficient to put the Petitioner in the same economic position as if the Change in Law event has not occurred. In the light of the provisions of Article 13.2 of the PPAs dated 7.8.2008 and the observations of the Hon`ble Supreme Court in Energy Watchdog Case, the actual shortfall in supply of domestic coal with reference to the ACQ quantum under the FSA needs to be considered.

…

43. We have considered the submissions of the Petitioner, the Respondents and Prayas. We have already come to the conclusion that the Petitioner had got the coal linkage to the extent of normative availability for linked capacity of 70% of the installed capacity of 1980 MW and the entire coal received under the FSA shall be considered for generation and supply of power to Haryana Utilities. Therefore, any shortfall in the supply of domestic coal vis-à-vis quantity indicated in the FSA dated 9.6.2012 shall be admissible in relief under change in law in terms of the judgment of the Hon"ble Supreme Court. Accordingly, the formula given in GMR case has been modified to meet this requirement, and the same is given in para 46 of this Order"

…

47. The Petitioner is directed to work out the relief based on the formulation given at para 46 above for the period from 1.4.2013 to 31.3.2017. <u>Any compensation paid by MCL and SECL to the petitioner for shortfall in supply of coal below the minimum/ threshold quantity as per FSA shall be adjusted against the year-wise claims for compensation under change in law allowed in this petition</u>. It is further directed that the <u>Petitioner shall obtain and provide to the Haryana Utilities certificate from Mahanadi Coalfield Ltd about the actual availability and actual supply of domestic coal against the FSA</u> dated 9.6.2012 during each of the contract years, namely, 2013-

14, 2014-15, 2015-16 and 2016-17. It is clarified that the Petitioner is required to meet the generation above 1386 MW from other sources including imported coal.

…

55. Haryana Utilities have submitted that the Petitioner had concealed material details, data and documents from this Commission while alleging shortage in the supply of domestic coal and had deliberately not filed the certificates from MCL and SECL in regard to the total quantum of domestic coal which MCL and SECL were willing and in a position to supply to the Petitioner under the FSA dated 9.6.2012 in terms of the order dated 6.12.2016. Haryana Utilities have further placed on record a reconciliation statement at Annexure "L", stating that the Petitioner has admitted to have over charged for the coal. Haryana Utilities have submitted that the Petitioner had proceeded to claim the amounts under the interim order dated 28.9.2017 wrongly and therefore, the Commission should withdraw the directions for payment contained in the interim order dated 28.9.2017 and dismiss the Petition No. 97/MP/2017.

…

***58** (b) … In case the coal quantum is available from MCL/SECL but not requisitioned by the Petitioner, to the extent of such non-requisition of quantum the relief of law shall not be admissible under change in law. Further, the shortage of coal below the percentage specified under NCDP (65%, 65%, 67% and 75%) and the grade of GCV or quality slippage are matters to be dealt with by the Petitioner with MCL/SECL and cannot be passed on to Haryana Utilities. Accordingly, the methodology to be applied for determining whether the Petitioner is entitled to any compensation on account of shortage of domestic coal availability as per the provisions of the NCDP will necessarily involve consideration of the above aspects.*

(c)… Perusal of the domestic coal availability since August, 2015 onwards show that the Petitioner had not requisitioned the entire quantum made available by MCL/SECL, thereby establishing that there was no implication of shortage of domestic coal for considering the effect of NCDP…

61. The Petitioner has submitted that it has been carrying *out inter plant transfer of coal since August, 2013 pursuant to the CIL letter dated 19.6.2013. The Petitioner has compiled the quantum of diversion of coal from the certificates from MCL and SECL which have been placed on record by Haryana Utilities. The same is extracted as under:-*

…

The Petitioner has also submitted the said information particularly information in first three columns have been given in Para 11 of the main petition. The <u>inter plant transfer of coal has been allowed across the power sector through the CIL letter dated 19.6.2013</u>. As per the IPT policy, transfer of coal is allowed between two power plants which are wholly owned by or wholly owned subsidiaries of the purchaser of coal. The policy further provides that the <u>supply of coal shall for all commercial purpose under the FSA remain unchanged and on account of the original Power Plant</u>. Since the Mundra Power Project is owned by Adani Power and the projects at Maharashtra and Rajasthan are wholly owned subsidiaries of Adani Power, <u>inter plant transfer of coal has been allowed by CIL. Even though, the coal under the FSA dated 9.6.2012 is diverted to the plants at Maharashtra and Rajasthan, such supply shall be accounted for on account of the original power plant i.e. Units 7, 8 and 9 of Mundra</u>. In our view, <u>inter plant transfer of coal is permissible under the CIL policy</u> and therefore, the coal supplied under the FSA dated 9.6.2012 to other plants <u>has to be accounted for against the generation and supply of power to Haryana Utilities from Units 7, 8 and 9 of Mundra</u> and all claims for change in law with respect to the PPA dated 7.8.2008 with respect to Haryana Utilities shall be considered after taking into account the coal diverted under inter plant transfer. Therefore, <u>inter plant transfer of coal which is legally permissible cannot be the ground for withdrawal of compensation to the Petitioner in terms of the interim order dated 28.9.2017</u>. The Petitioner shall raise its claims for compensation as per the above clarification and the Haryana Utilities are directed to verify the claims before payment.

…"

(Emphasis supplied)

21. While the above-mentioned case (No. 97/MP/2017), leading to the order dated 31.05.2018 (NCDP Order) was pending decision of CERC, by interim order (in IA No. 57 of 2017) the Haryana Utilities had been directed by order dated 28.09.2017, to provisionally make payment of 75% of the compensation claimed by Adani towards domestic coal shortfall, the appellants having paid in compliance Rs. 639.69 Cr. After the decision had been reserved, the appellants moved CERC (by IA No. 21 of 2018) on 04.03.2018 praying for withdrawal of directions in the interim order dated 28.09.2017 with retrospective effect on the grounds relating to IPT. Subsequently, the appellants, having raised the issue of IPT of coal, deducted the payment of Rs. 895.41 Cr. (Rs. 566.83 Crores towards Domestic coal shortfall in addition to Rs. 328.29 Crores towards Taxes and Duties) from the monthly energy bills (for the period of January to March, 2018) as well as the supplementary bills, claiming it to be payment made in excess, and raised for Change in Law towards FGD, along with interest. The aforesaid IA No. 21 of 2018 was disposed of by CERC, along with the Petition 97/MP/2017, by order dated 31.05.2018, holding that Adani is entitled to claim compensation for all Change in Law events under the PPA dated 07.8.2008 after taking into account the coal transferred under IPT and directed the Haryana Utilities to pay the same, observing as under:

> "61. *The inter plant transfer of coal has been allowed across the power sector through the CIL letter dated 19.6.2013. As per the IPT policy, transfer of coal is allowed between two power plants which are wholly owned by or wholly owned subsidiaries of the purchaser of coal. The policy further provides that the supply of coal shall for all commercial purpose under the FSA remain*

unchanged and on account of the original Power Plant. Since the Mundra Power Project is owned by Adani Power and the projects at Maharashtra and Rajasthan are wholly owned subsidiaries of Adani Power, inter plant transfer of coal has been allowed by CIL. Even though, the coal under the FSA dated 9.6.2012 is diverted to the plants at Maharashtra and Rajasthan, such supply shall be accounted for on account of the original power plant i.e. Units 7, 8 and 9 of Mundra. In our view, inter plant transfer of coal is permissible under the CIL policy and therefore, the coal supplied under the FSA dated 9.6.2012 to other plants has to be accounted for against the generation and supply of power to Haryana Utilities from Units 7, 8 and 9 of Mundra and all claims for change in law with respect to the PPA dated 7.8.2008 with respect to Haryana Utilities shall be considered after taking into account the coal diverted under inter plant transfer. Therefore, inter plant transfer of coal which is legally permissible cannot be the ground for withdrawal of compensation to the Petitioner in terms of the interim order dated 28.9.2017..."

(Emphasis supplied)

22. The correctness and propriety of above-mentioned order dated 31.05.2018 ("NCDP Order") was questioned by Haryana Utilities filing (on 13.07.2018) a Review Petition (no. 24/RP/2018) and also challenging it (on 17.12.2018) by appeal no. 168 of 2019. Indisputably, no issue as regards IPT of coal was raised in the Review Petition which, even otherwise, was rejected by CERC by order dated 03.12.2018. The appeal (no. 168 of 2019) was decided by this tribunal, by judgment dated 03.11.2020, which has been challenged by the appellants herein (Haryana Utilities) by Civil Appeal No 4143 of 2020, pending before Hon'ble Supreme Court. Concededly, no stay order has been granted in favor of Haryana Utilities. Instead, by Order dated 16.02.2021, the Hon'ble Supreme Court has directed Haryana Utilities to pay 50% of the outstanding principal amount to Adani. In so far as Change in Law compensation towards domestic coal shortfall is concerned, Haryana Utilities are stated to have paid Rs. 553.75 Crores pursuant to the above direction issued by the Hon'ble Supreme Court.

23. Clearly, impugned decision having been rendered by CERC in the proceedings which were taken out to enforce the order upheld by this tribunal by judgment dated 03.11.2020, the decision on the appeal at hand would be subject to the result of the abovesaid Civil Appeal No 4143 of 2020 pending before Hon'ble Supreme Court.

24. In the wake of ruling in *Enrgy watchdog* (supra), the first respondent had filed Petition No. 251/MP/2018, *Adani Power Mundra Limited vs. Uttar Haryana Bijli Vitran Nigam Ltd. & Anr,* wherein the CERC, by its order dated 13.06.2019 (hereinafter referred to as "*the Shakti Order*"), held that any change in the assurance of supply of coal by amendment to NCDP 2007 is a Change in Law event, the first respondent having been granted the Change in Law relief till the period the shortfall continued including the period covered by NCDP, 2013, and subsequently continued by SHAKTI Scheme beyond 31.03.2017, determining that the methodology to compute the compensation on account of coal shortage shall be for the entire actual coal shortage and not to be restricted to 65%, 65%, 67% and 75% of the ACQ. The said Shakti Order of CERC was upheld by this tribunal by judgment dated 30.06.2021 in Appeal No. 358 of 2019 that had been filed by Haryana Utilities.

25. Meanwhile, the generator had raised, on 12.06.2018, a Provisional Supplementary Invoice in terms of Order dated 31.05.2018 of CERC and later (on 24.08.2018) filed the Petition (no. 269/MP/2018) under Section 142 of the Electricity Act, 2003 alleging non-compliance by Haryana Utilities of the Order dated 31.05.2018 based on the provisional invoice raised, seeking directions to Haryana Utilities to release the amount of Rs. 895.41 crore, which were alleged to have been unilaterally and wrongly deducted by them (Haryana Utilities) from the monthly/ supplementary bills, also claiming certain amounts under Order dated 06.02.2017 in Petition No. 156/MP/2014 as change in law compensation on domestic coal. The prayer clauses may be extracted as under:

> "*(a) Clarify and declare that the findings of this Ld. Commission at paragraph 61 of the Order of the Ld. Commission dated 31.05.2018 in Petition No. 97/MP/2017 and IA No. 21 of 2018, are applicable to the Change in Law compensation pertaining to taxes and duties approved under Order dated 06.02.2017 in Petition No. 156/MP/2014 as well.*
> *(b) Direct the Respondents to pay Rs. 895.41 Crores (Rs. 566.83 Crores related to Domestic Coal Shortfall + Rs. 328.58 Crores related to taxes and duties) unilaterally deducted from the monthly bills/supplementary invoices along with the applicable Late Payment Surcharge.*
> *(c) Pass such further orders or directions as this Ld. Commission may deem just and proper in the circumstances of the case."*

.

26. Pursuant to directions of CERC, in the course of hearing on case no. 269/MP/2018, the generator furnished letter dated 21.12.2018 summarizing the claim of compensation towards shortage of domestic coal and procurement of coal from alternative sources for the period from April 2013 to March 2017, submitting therewith a certificate of actual supply from MCL/SECL. The appellants herein, by their response submitted on 03.01.2019, alleged discrepancies in the invoices raised and the auditor certificate etc., further contending that the generator had not provided any input as to the compensation payable by MCL/SECL for short supply of coal which had to be passed on to the Haryana Utilities as per Order dated

31.05.2018, also raising the issue of the IPT of domestic coal being allowed arguing that it was a Policy decision of Ministry of Coal, Government of India taken in 2013 and, therefore, a change in law resulting in reduction in cost.

27. On 07.02.2019, the Central Commission, while hearing case no. 269/MP/2018, directed the generator to provide to the procurers the details of "*MCL certificates on coal availability, if any,*" and "*Compensation, if any, paid by coal companies for shortage of coal supply*". In compliance, the generator filed an affidavit dated 16.02.2019 placing on record facts concerning the quantum of coal supplied to or delivered or taken by it. The affidavit was accompanied by certificates given by MCL and SECL. It may be noted here that the Certificate given by MCL is to following effect:

> "*it is to certify that the quantity certified in the Letter No MCL/KOL/169 dated 18.09.2017, MCL/KOL/170 dated 18.09.2017, MCL/KOL/37 dated 02.05.2017 and MCL/SBP/GM (S&M)/RS/2016/1160 dated 03.06.2016 as issued for FY 2013-14 to FY 2016-17 is considered as <u>actual quantity supplied by MCL as per the actual availability of coal</u>*."
>
> (Emphasis supplied)

28. The appellants reiterated the issue of actual availability of coal and this resulted in the following order of CERC on 19.03.2019:

> *"3. After hearing the learned counsels for both the parties, the Commission observed that <u>despite the Commission's direction, Haryana Utilities have still not made payment to the Petitioner</u>. The Commission <u>directed the Haryana Utilities to obtain the desired certificate from the coal companies, on or before 27.3.2019 and process the case of the Petitioner to make payment of outstanding dues</u>. In case, Haryana Utilities fail to obtain the desired certificate from the Coal Companies by the above date, they shall make payments of atleast 50% of the outstanding dues*

based on the available certificate furnished by the Petitioner."

(Emphasis supplied)

29. In response to a request made by the appellants in terms of above order of CERC, the MCL responded by communication dated 25.03.2019, stating as under:

"… This has reference to your letter no. Ch-61/CE/HPPC/SE/C&R-I/LTP-II/APL-60 dated 22/25.03.2019 on the subject cited above. Point wise information as sought vide the said letter is given below:

1. In relation to the month wise quantum of linkage coal as mentioned under point no. 1, you are requested to refer to letter no. MCL/SBP/GM (S&M)/2018/2488 dated 14.02.2018 alongwith enclosures addressed to The Chief Engineer, HPPC and certificate ref. no. MCL/SBP/GM(M&S)/Sectt./2019/5631 dated 13.02.2019 issued by GM (M&S) alongwith enclosures (copy enclosed).

2. In respect to the information sought under point no. 2,3 & 4, it may kindly be noted that during the financial year 2013-14, 2014-15, 2015-16 & 2016-17, M/s. <u>Adani Power Limited was not entitled for any amount of compensation</u> since the level of delivery of coal by MCL was not below the respective trigger levels from domestic sources i.e. for 2013-14 & 2014-15-65% of ACQ, for 2015-16-67% of ACQ and for 2016-17-75% of ACQ as per the provisions of Fuel Supply Agreement.

3. As per the provisions of the Fuel Supply Agreement executed between M/s Adani Power Limited and MCL, <u>interplant transfer (IPT) of coal was allowed to M/s Adani Power Limited</u>.

The above informations as readily available are being provided urgently considering your request for providing the same by today itself as mentioned in your letter no. Ch-Spl/CE/HPPC/SE/C&R-I/LTP-II/APL-60 dated 25.03.2019."

(Emphasis supplied)

30. The enclosures to the above said communication of MCL furnished details as to the quantum of coal offered by MCL to the generator.

31. The appellants had also approached SECL which responded, by letter dated 27.03.2019, stating thus:

> *"… As the Level of Lifting, in terms of the Fuel Supply Agreement during the concerned periods was not less than the Trigger Level, hence <u>no compensation was paid</u> to M/s Adani Power Limited.*
>
> *As per the provision contained in the Fuel Supply Agreement executed between SECL & Adani Power Limited, <u>the quantity of coal delivered was allowed to be transferred under the Inter Plant Transfer Scheme</u>.*
>
> …
>
> *It is reiterated that the <u>total quantity of coal delivered to M/s Adani Power Limited from SECL was diverted</u> by the plant to their wholly owned subsidiary company M/s Adani Power Maharasthra Limited, Tiroda <u>under Inter Plant Transfer scheme</u>."*
>
> (Emphasis supplied)

32. The above communication was followed by another letter dated 04.04.2019 of SECL stating as under:

> "*…The matter regarding compensation paid to M/s Adani Power Ltd was also clarified in our letter no: SECL/BSP/S&M/Sales Coordination /3978 dated 27.03.2019. It is resubmitted that no compensation was paid to M/s Adani Power Limited for supplies below the trigger level of supplies in terms of the FSA.*
>
> *In the aforesaid letter dated 24.02.2018, the total mode-wise quantity delivered against the Monthly Scheduled Quantity has been mentioned from which the percentage supplies to the plant can be computed.*

Hence the alleged delay in submission of information by SECL is not justified and impleading SECL in the case cannot be appreciated. However the rail programme submitted by M/s Adani Power Ltd, the allotments made by SECL and the rakes supplied by SECR is appended below. It may kindly be noted that apart from the rail programmes, the plant has also lifted coal through other mode, the details of the which was already provided to your office.

In number of rakes

Period	*Rail programme submitted by APL*	*Offer made to SECR by SECL*	*Supplied by SECR*
Nov 2015 to March 2016	*226*	*193*	*174*
April 2016 to Mar 2017	*475*	*388*	*352*

…"

33. The above communications gathered from MCL and SECL were placed by the appellants before the CERC.

34. The Commission passed the impugned order on 08.07.2019. It was questioned by the appellants by Review Petition No. 19/RP/2019 which was rejected by order dated 09.12.2019.

35. The appellants also crave reference to letter dated 19.11.2019 from *Maharashtra State Electricity Distribution Company Limited* ("MSEDCL") to the generator arguing that it has a bearing on the issue of recovery of taxes & duties on the IPT coal, the communication reading thus:

"In response to the letter cited under Ref.(1), we would like to inform you that MSEDCL has made the payment of Rs.430 Crs. till June 2019 towards taxes and duties. approved by MERC vide its various orders under change

in law on normative basis for 22.51MMT IPT coal used in Tiroda power plant as per submission made by APML.

Further, from July 2019 onwards, taxes and duties for IPT coal are being processed considering taxes and duties applicable for alternate (imported) coal as per CERC order dated 08.07.2019 in case no.269/MP/2018.

However, the taxes and duties paid before July 2019 would be adjusted in the change in law compensation related to domestic coal shortfall considering IPT coal as alternate (imported) coal."

36. The import and effect of above shall be considered in due course.

CONTRACTUAL PROVISIONS

37. Before proceeding further, it is necessary to extract the relevant provisions of the PPA, as under:

*"*1.1 *<u>Fuel Supply Agreements</u> means the agreements entered into, between the Seller and the Fuel Supplier, for the purchase, transportation or handling of fuel required for the operation of the power station. <u>In case the transportation of fuel is not the responsibility of the fuel supplier then it shall also include the separate agreement between the Seller and the Fuel Transporter for the transportation of the fuel</u> in addition to the agreement between the Seller and the Fuel Supplier for the supply of fuel.*

…

11.3.2 All payments required to be made under the Agreement <u>shall only include any deduction or set off for</u>:

i. <u>deductions required by the Law</u>;

ii. amounts claimed by the Procurer from the Seller, through an invoice duly acknowledged by the Seller, to be payable by the Seller, <u>and not disputed by the Seller</u>

<u>within thirty (30) days of receipt of the said invoice and such deduction or set off shall be made to the extent of the amounts not disputed</u>. It is clarified that the Procurer shall be entitled to claim any set of or deduction under this Article, after expiry of the said 30 day period.

Provided further, the maximum amounts that can be deducted or set-off by the Procurer under this Article in a Contract Year shall not exceed Rs. 17,80,000,00 (Rupees seventeen crore eighty lakh only), except on account of payments under sub Article (i) above."

…

11.6.9 For the avoidance of doubt, it is clarified that <u>despite a Dispute regarding an Invoice, the concerned Procurer shall, without prejudice to its right to Dispute, be under an obligation to make payment</u>, of the lower of (a) an amount equal to simple average of last three (3) Months invoices (being the undisputed portion of such three Months invoices) and (b) Monthly Invoice which is being disputed, provided such Monthly Bill has been raised based on the REA and in accordance with this Agreemen".

…

13.1.1 "<u>Change in Law</u>" means the <u>occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline</u>:

(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or

(ii) a change In interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or

(ii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller,

<u>which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement</u>;

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 (applicable only in case the Seller envisaging supply from the Project awarded the status of "Mega Power Project" by Government of India)."

(Emphasis supplied)

38. Similarly, it is essential to also quote the relevant provisions of the FSA, dealing with subjects such as end use of coal, deemed delivery of quantum of coal, mode of supply, the method of order booking and delivery, transfer of title etc., as under:

" *4.2 End-use of Coal*
The total quantity of Coal supplied pursuant to this Agreement is meant for use at their Power Plant (Phase III, Unit-1,2&3 1980 MW) located at Mundra, Kutch, Gujarat as listed in Schedule I. The Purchaser shall not sell/divert and/or transfer the Coal to any third party for any purpose whatsoever and the same shall be treated as material breach of Agreement, for which the Purchaser shall be fully responsible and such act shall warrant suspension of coal supplies by the Seller.

…
4.4 *Quarterly Quantity (QQ)*
The Annual Contracted Quantities for the Year, as per Clause 4.1 shall be divided into Quarterly Quantities (QQ), expressed in tonnes, as follows:

I st Quarter (Apr – Jun)	25% of ACQ
II nd Quarter (Jul – Sep)	22% of ACQ
III rd Quarter (Oct – Dec)	25% of ACQ
IV th Quarter (Jan – Mar)	28% of ACQ

…

4.11 Deemed Delivered Quantity:
For the purpose of this Agreement, the aggregate of the following items provided under Clause 4.11.1 to 4.11.2 shall constitute the Deemed Delivered Quantity with respect to a Year.

4.11.1 For supply of Coal by rail:
(i) The quantity of Coal not supplied by the Seller owing to omission or failure on the part of Purchaser to submit in advance the designated rail programme (s) to the Seller as per agreed time-table with respect to the Schedule Quantity.
(ii) The quantity of Coal not supplied by the Seller owing to cancellation, withdrawal or modification of the rail programme(s) by the Purchaser after its submission whether before or allotment of wagon(s) by Railways.
(iii) The quantity of Coal not supplied by the Seller owing to Purchaser's failure to pay and/or submit/ maintain IRLC, as applicable, in accordance with Clause 12.1.2.
(iv) The quantity of Coal not supplied by the Seller owing to Seller exercising the right of suspension of supplies in terms of Clause 14.
(v) The quantity of Coal offered by Seller through imports in terms of Clause 4.3 which is not accepted by the Purchaser.
4.11.2 For Supply of Coal by road/ ropeways/MGR/belt conveyor:
(i) The quantity of Coal not supplied by the Seller owing to Purchaser's failure to pay and/or submit IRLC, as applicable, in accordance with Clause 12.1.2.
(ii) The quantity of Coal not supplied by the Seller owing to Seller exercising the right of suspension of supplied in terms of Clause 14.
(iii) The quantity of Coal not supplied by the Seller owing to Purchaser's failure to place the requisite number/ type of transport at the Delivery Point for delivery of Coal within the validity period of the sale order/delivery order.
(iv) The quantity of Coal not supplied by the Seller owing to imported coal in terms of Clause 4.3 not accepted by the Purchaser.

4.11.3 Deemed Delivered Quantity in terms of Clause 4.11.1 and 4.11.2 shall be calculated on communicated monthly basis during a Year.

…

7.0 METHOD OF ORDER BOOKING AND DELIVERY OF COAL

The Purchaser shall submit monthly programme(s) mode-wise for off-take of Coal against the monthly mode-wise Coal allocation made by the Seller. Notwithstanding, Clause 7.1 and Clause 7.2 shall be applicable in case of Coal off-take by rail and road respectively.

7.1 Order Booking by Rail:

7.1.1 At least seven (7) working days prior to the commencement of the month concerned, the <u>Purchaser shall submit a programme</u> in writing to the Seller, as per the applicable Railway rules and the Seller's notified procedure. Thereafter, the <u>Seller shall process for issuance of the consent of the programme</u>. The sanction of the consented rail programme shall be obtained accordingly. The validity period of the monthly programme for movement by rail for seeking allotment shall be till the last day of the month concerned. The consent of the programme to be listed by the Seller shall not remain valid after the above period. <u>Once the rake is allotted, it shall remain valid for supply as per the prevailing Railways rules</u>.

7.1.2 <u>Subject to fulfillment of payment obligation pursuant to Clause 12.1.2 by the Purchaser, the Seller shall thereupon submit specific indent/offer based on the valid rail programme</u>(s) to the Railways as per the extant Railway rules for the allotment and placement of wagons during the concerned month in conveniently spaced intervals.

7.1.3 The wagons shall be booked on "freight to pay" or "freight per paid" basis, as applicable based on the arrangements made by the Purchaser with Railways in this regard.

7.1.4 In case of formation of rakes with wagons loaded from different Delivery Points, the Seller shall make best efforts to complete documentation formalities as per Railway rules so as to enable the Purchaser to avail a trainload freight rate.

7.1.5 <u>In the event rail movement is declared / considered not feasible by Railways, review will be made jointly in the matter of mode of transport</u>.

7.2 Order Booking by Road:

7.2.1 The <u>seller shall intimate the Purchaser about the monthly Coal allocation for order booking seven (7) working days prior to the commencement of the month concerned</u>.

7.2.2 Based on the monthly colliery wise allocation done by the Seller in terms of Clause 7.2.1, the Purchaser shall place orders with the Seller for the Scheduled quantity.

7.2.3 Subject to fulfillment of payment obligations pursuant to Clause 12.1.2 by the Purchaser, the Seller shall arrange to issue sale order(s)/delivery, order(s) separately for each colliery and issue necessary loading programme / schedule from time to time. The <u>Purchaser shall arrange to place the required number / type of trucks to lift the Coal as per such loading programme / schedule</u>. The Seller shall ensure that the sale order / delivery order in favour of the Purchaser reaches the concerned colliery/ weigh bridge within five (5) working days of the last day of the period notified by the Seller for booking orders in terms of Clause 7.2.1.

7.2.4 The Seller shall ensure delivery and the Purchaser shall ensure lifting of Coal against sale order / delivery order of any month within the validity period, as mentioned in the sale order.

7.2.5 In the event of any quantity remaining undelivered / unlifted, the Purchaser shall be entitled to receive, once the validity period of the sale order/ delivery order expires, the refund of the proportionate value of such quantity.

<u>8.0 TRANSFER OF TITLE TO GOODS</u>

Once delivery of Coal have been effected at the Delivery Point by the Seller, the property title and risk of Coal so delivered shall stand transferred to the Purchaser in terms of this Agreement. Thereafter the Seller shall in no way be responsible or liable for the security or safeguard of the Coal so transferred. Seller shall have no liability, including towards increased freight or transportation costs, as regards missing/diversion of wagons / rakes or *road transport en-route, for whatever causes, by Railways, or road transporter or any other agency"*

(Emphasis supplied)

39. As noted earlier, in the year 2013, the GoI's Policy had changed and permitted the *Inter-Plant Transfer* of coal, decision having been taken to provide the end-use of the coal under the FSA as under**:**

"End-use of Coal

The total quantity of Coal supplied pursuant to this Agreement is meant for use at the _______ name & location of the Plant(s)] as listed in Schedule 1. The Purchase shall not sell/divert and/or transfer the Coal to any third party for any purpose whatsoever and the same shall be treated as material breach of Agreement, for which the Purchase shall be fully responsible and such act shall warrant suspension of coal supplies by the Seller. <u>However, interplant transfer of coal may be considered provided</u>:

a) <u>Transfer of coal shall be allowed only between the power plants wholly owned by the Purchaser or its wholly owned subsidiary</u>. No transfer of coal shall be allowed for a joint Venture (JV) company of the Purchaser. The supply of coal, shall for the commercial purpose under the FSA remain unchanged and on account of the original Power Plant.

b) <u>Both the Power Plants should have executed FSA in the modified FSA Model applicable for new power plants and not having any supplied linked to coal blocks</u>. In case of IPPS both the plants must have valid long term PPAS with DISCOMS.

c) In no case the transferred quantity to a plant together wit the quantity supplied under the applicable FSA shall exceed the ACQ of the transferee Plant for a particular year which is proportional to the long term PPA with DISCOMS.

d) Transfer of coal will not be allowed to those plants who are allotted coal blocks under this arrangement.

e) In case of change in the ownership and no environmental clearance of the plant this facility shall stand withdrawn, and

f) Penalty/Incentive under this arrangement would be considered in terms of (a) above."

(Emphasis supplied)

40. It is pointed out by the appellants that the issue concerning IPT scheme was raised in Pariament and the Minister of Coal had answered, on 03.12.2015, in *Lok Sabha*, the question (unstarred question no. 864) on liberalized coal linkages as under**:**

"*(a)&(b): The provision of allowing inter power plant transfer of coal under coal linkages from one Power Plant to another is already in place. Such dispensation is allowed subject to the following conditions:*

a) Transfer of coal is allowed only between the power plants wholly owned by the Purchaser or Its wholly owned subsidiary. No transfer of coal is allowed for a Joint Venture (JV) company of the Purchaser. The supply of coal, for all commercial purpose under the Fuel Supply Agreement (FSA) remains unchanged and on account of the original Power Plant.

b) Both the Power Plants should have executed FSA in the modified FSA Model applicable for new power plants and not having any supplies linked to coal blocks. In case of Independent Power Producers (IPPS) both the plants must have valid long term Power Purchase Agreements (PPAS) with DISCOMS.

c) In no case the transferred quantity to a plant together with the quantity supplied under the applicable FSA exceeds the Annual Contracted Quantity (ACQ) of the Transferee Plant for a

particular year which is proportional to the long term PPA with DISCOMS.
d) Transfer of coal is not allowed to those plants who are allotted coal blocks under this arrangement.
e) In case of change in ownership and no environmental clearance of the plant this facility stands withdrawn, and
f) Penalty/Incentive under this arrangement is considered in terms of (a) above..:"

41. We now proceed to deal with issues raised by the appellants, in the matter at hand, subject-wise.

SHORTFALL IN DOMESTIC COAL

42. The observations of CERC in the impugned order, as relevant to the captioned subject, read thus:

" …
30. The Respondents have submitted that for the purpose of computation of the shortfall in the domestic coal, the relevant aspect is the quantum of coal offered by MCL/ SECL and not the quantum of coal actually indented and taken delivery by the Petitioner. If the Petitioner sought for a certain quantum and if the same was supplied by Coal Company, there can be no shortfall. The shortfall has to be calculated as difference between coal actually requisitioned by the Petitioner and the coal actually offered by the MCL/ SECL and that shortfall cannot be compared with ACQ. The Respondents have further stated that in response to the direction of the Commission, the Petitioner submitted a certificate from MCL dated 13.2.2019 stating that `the quantity certified in the letter………..is considered as actual quantity supplied by MCL as per the actual availability of the coal". Whereas, the MCL/ SECL certificates obtained by

Haryana Utilities clarified that there was no shortage of coal availability from their end at least up to the trigger level of 65%, 65%, 67% and 75% and no compensation was, therefore, payable by MCL/ SECL to the Petitioner. The Respondents have submitted that since the coal was available from MCL/ SECL, there can no shortfall in coal and there can be no compensation to the Petitioner.

31. On the other hand, the Petitioner has relied on judgment of the Hon`ble Supreme Court in the Energy Watchdog Case; direction of Ministry of Power dated 31.7.2013; amended Tariff Policy dated 28.1.2016; and the Commission's order dated 31.5.2018 in Petition No. 97/MP/2017 to contend that the entitlement of the Petitioner for compensation for shortfall of coal supply is no longer res-integra. Thus, the shortfall ought to be computed as "ACQ minus Actual Supply‟.

32. The Petitioner has submitted that the "Program‟ and "Offer‟ referred to by the Haryana Utilities relates to supply of domestic linkage coal by rail and the certificate issued by MCL dated 25.3.2019 also clearly refers to linkage coal by rail only. 'Program' is submitted by the Petitioner to the Railways and CIL and then "Offer‟ is made by coal company to the Petitioner. Thereafter, the supply of coal is controlled and managed between the Railways and the coal company. MCL, in its certificate dated 13.2.2019 has categorically stated that the quantity certified vide its letters dated 18.9.2017, 2.5.2017 and 3.6.2017 as issued for the financial years 2013-14 to 2016-17 is considered as actual quantity supplied by MCL as per the actual availability of coal. MCL vide the above referred letters has certified the coal supplied to the Petitioner. The Petitioner has submitted that it cannot be held accountable for the lower throughput of the coal companies.

33. We have considered the submissions made by the Petitioner and the Respondents. The Commission in order dated 31.5.2018 in Petition No. 97/MP/2017 has already allowed computation of shortfall based on "actual *coal supply" as per the decision of the Hon'ble Supreme Court in Energy Watchdog judgment and has decided as under:*

> *"33. According to Prayas, change in law is applicable only for the shortage of supply up to 65%, 65%, 67% and 75% of the ACQ during the years 2013-14, 2014-15, 2015-16 and 2016-17 respectively and actual supply of coal lower than these percentages is the subject matter of commercial contract with MCL under the FSA for which the Petitioner needs to seek compensation from MCL and the Procurers should not be burdened with such extra cost. In our view, the contention of Prayas is not correct. As per para 4.6 of the FSA, MCL is liable to pay compensation for the "failed quantity" (i.e. shortfall in supply of coal below 80% of the ACQ) at the rate of 0.01% calculated on the basis of the single average of base price as per schedule III of the FSA. Moreover, this provision is applicable after a period of three years from the date of signing of the FSA. In other words, the Petitioner is not entitled for compensation till 8.6.2015 (FSA being signed on 9.6.2012). Therefore, the compensation payable under the FSA for supply of coal for capacity lower than 65%, 65%, 67% and 75% for the years 2013-14, 2014-15, 2015-16 and 2016-17 respectively of the ACQ is too meagre to meet the expenditure for procurement of coal from alternate sources or through import.*
>
> *…*
>
> *The compensation available under the FSA from MCL for the shortfall in supply below 80% of ACQ is not sufficient to put the Petitioner in the same economic position as if the Change in Law event has not occurred. In the light of the provisions of Article 13.2 of the PPAs dated 7.8.2008 and the observations of the Hon`ble Supreme Court in Energy Watchdog Case, the actual shortfall in supply*

of domestic coal with reference to the ACQ quantum under the FSA needs to be considered.

43. We have considered the submissions of the Petitioner, the Respondents and Prayas. We have already come to the conclusion that the Petitioner had got the coal linkage to the extent of normative availability for linked capacity of 70% of the installed capacity of 1980 MW and the entire coal received under the FSA shall be considered for generation and supply of power to Haryana Utilities. Therefore, any shortfall in the supply of domestic coal vis-à-vis quantity indicated in the FSA dated 9.6.2012 shall be admissible in relief under change in law in terms of the judgment of the Hon‟ble Supreme Court. Accordingly, the formula given in GMR case has been modified to meet this requirement, and the same is given in para 46 of this Order"

34. In terms of the above decision of the Commission, the shortfall has to be computed as "ACQ minus Actual Supply‟.

35. During proceeding of the present Petition, the learned senior counsel for the Respondents vociferously argued regarding non-submission of required documents/ certificates from coal companies. In fact, several hearings took place and series of documents were placed on record on this aspect by both the parties. On analysis of these documents, it is clear that the quantum of coal mentioned by the Petitioner in Petition No. 97/MP/2017 vis-a vis the coal quantity certified by MCL in its letter dated 31.5.2016 and SECL letter dated 24.2.2018 has remained the same.

36. On a direction from the Commission, the Petitioner had again procured a certificate from MCL on 13.2.2019 certifying that the quantity certified in letter No. MCL/KOL/169 dated 18.9.2017, MCL/KOL/170 dated 18.9.2017, MCL/KOL/37 dated 2.5.2017 and MCL/SBP/GM (S&M)/RS/2016/1160 dated 3.6.2016 as issued for the financial years 2013-14 to 2016-17 is *considered as actual quantity of coal supplied by MCL as per actual availability of coal.*

37. The Respondents submitted that the certificates were vague and wanted certificate specifying the actual quantum of coal made available to the Petitioner by MCL. To this, the Commission, during the hearing dated 19.3.2019, had directed the Respondents to obtain a certificate from MCL themselves as per their format. The Respondents obtained MCL certificate dated 25.3.2019 and SECL certificate dated 27.3.2019 and placed it on record.

…

40. As submitted by the learned counsel for the Petitioner, we note that the MCL and SECL certificates have been consistent and the quantity of actual supply mentioned in all the certificates, submitted both the Petitioner and the Respondents are the same. In view of above, it is evident that there is no infirmity in the quantity of coal actually supplied by MCL and SECL for claiming for domestic coal shortfall.

41. The <u>only issue is whether the quantum of coal made available by the coal companies, which the Petitioner for its own reasons might have chosen not to take, instead of actual supply</u> of coal at the plant as contended by the Respondents.

42. As per Schedule VII of the FSA and submission of the Petitioner, supply of coal from domestic sources has been restricted to 80% on account of shortage of domestic coal. Consequently, the supply of coal from domestic sources i.e. up to 80% of ACQ is being met through Rail mode. The balance coal supply of 20% is being met through imported coal. In the context of coal supply through Rail mode, it is imperative to refer to the clause 7 of the FSA dated 9.6.2012 as under:

…….

43. As per the above provision of the FSA, the Petitioner is required to submit "Programme" to the Railways and CIL. Then "Offer" is made by Coal Company to the Petitioner. Therefore, we find merit in the submission of the Petitioner that the supply of coal is controlled and *managed between the railways and the coal company thereafter. This is evident from clause 7.1.2 of the FSA, wherein it has been categorically stated that subject to fulfillment of payment obligation pursuant to Clause 12.1.2 of the FSA by the Purchaser/ generator, it is the Seller's (coal companies) responsibility to submit specific indent/ offer based on the valid rail programme (s) to the Railways as per the extant Railway rules for the allotment and placement of wagons during the concerned month in conveniently spaced intervals. In fact, perusal of Clause 12.1.2 reveals that the generator has to make advance payment each month for the coal quantities in three installments. Thus, the generator makes the payment in advance as per „Programme‟.*

44. Further, the Respondents have contended that as MCL/ SECL have not paid any compensation, there was no shortfall of coal. In this regard, <u>clause 4.7 of the FSA defines the "Level of Delivery‟</u> as under.

"Level of Delivery with respect to a Year shall be calculated in the form of percentages as per the following formula:

Level of Delivery (LD)= [(DQ+DDQ+FM+RF)Å~100]/ACQ

Where:

LD= Level of Delivery of Coal by the Seller during the Year.

DQ= Delivered Quantity, namely, aggregate actual quantities of Coal delivered by the Seller during the year.

DDQ= Deemed Delivered Quantity, reckoned in the manner stated in Clause 4.11

FM- Proportionate quantity of Coal which could not be delivered by the Seller in a Year due to occurrence of Force Majeure event effecting the Seller and/or the Purchaser, calculated as under:

……..

<u>RF= Quantity of Coal that could not be supplied by the Seller during the Year owing to the Railways not allotting wagons or not placing wagons for loading, in spite of specific valid indent/offer submitted by the Seller to the Railways against valid program(s) submitted by the Purchaser for the purpose.</u>"

45. It is observed that the quantity that could not be supplied by the Seller/ coal companies on account of Railways not allotting wagons or not placing wagons for loading, in spite of demand raised by the Seller/ coal companies shall be considered as delivered. This also indicates that the <u>Petitioner has no role as far as coal supply is concerned after the demand is raised through submission of "Programme"</u>. The Petitioner is <u>totally dependent on the extent of loading by coal companies and supply of rakes by Railways</u>. Further, non-allotment/ non-placement of wagons by Railways is considered as deemed delivered as per the aforementioned formula for "Level of Delivery". In such a scenario, compensation for shortfall in delivery compared to ACQ is not payable to the Petitioner by the coal companies even in case of supply lower than the trigger level. In view of the above, we are of the considered opinion that calculation of shortfall in supply of coal for the purpose of change in law on basis of compensation payable by the coal companies is not a valid proposition. Therefore, this proposition of Respondents is rejected.

…….

48. We note from above letter of the Ministry of Power and the provision in Tariff Policy that the principle is clearly laid down and the same requires calculation of shortfall to be done as regards quantity indicated in the ACQ and the quantity actually supplied by the coal companies. The same has been recognized in the Judgment of the Hon'ble Supreme Court in Energy Watchdog Case. In our view, the interpretation of shortfall proposed by the Respondents is not in line with the decision of CCEA nor does it conform to the Energy Watchdog Judgment. We also observe that <u>the Respondents have not submitted any documents substantiating that the Petitioner has not submitted "programme" up to its entitlement as per ACQ</u>."

(Emphasis supplied)

43. The contentions of the appellants in challenge to conclusions of CERC are that the contracted capacity for supply of electricity to the

Haryana Utilities is 1424 MW from Units 7, 8 and 9 of the Mundra Power Plant. The generator had entered into the FSA on 09.06.2012 with MCL for supply of 6.405 MTPA of coal, a part of the capacity under the FSA being provided by SECL since 2015, the obligation of MCL/SECL under the FSA being only to make available the coal at the mine end, it being the obligation of the generator to arrange for the transportation of the coal to the power project site at Mundra, the FSA stipulating the mode of transportation of coal, either by Rail or by Road. Arguing that the shortfall in the coal from MCL/SECL as per ruling in *Energy Watchdog* (supra) is to the extent of the coal quantum under the FSA not made available by MCL/SECL, the coal available from MCL/SECL but not requestioned or not taken delivery of cannot be considered as shortfall. It is submitted that the Central Commission has not considered the indisputable and clinching documents placed on record by the Haryana Utilities in regard to the coal quantum available from MCL/SECL under the FSA and has wrongly proceeded to decide the matter in favor of the generator on completely irrelevant and extraneous consideration such as non-availability of railway rakes.

44. It is the plea of the appellants that the generator, for its own reasons, had requisitioned coal at much lesser quantum than what was available from MCL/SECL and, therefore, cannot claim relief under Article 13 of the PPA for alleged shortfall in coal availability. Further, it is argued, if MCL/SECL make available the coal pursuant to the requisition but the coal delivery is not taken on plea of non-availability of railway rakes, when alternative road transportation is also envisaged in the FSA, the same cannot also be considered as non-availability of coal from MCL/SECL. It is argued that the onus was on the generator to establish the non-availability but it failed to produce the requisite documents in spite of direction by order dated 07.02.2009 of CERC, the latter (Commission) having ignored this and also glossing over the authenticated certificates furnished by the Haryana Utilities. It is stated that the disclosures by the generator through the Affidavit dated 16.02.2019 (referred to earlier) do not certify the quantum of actual availability of coal with MCL or SECL during the relevant time, the attempt being to claim that the actual supply was the actual availability of coal.

45. It is urged that on the basis of the certificates (by letters dated 25.03.2019 and 27.03.2019 / 04.04.2019), obtained by the appellants from MCL and SECL, it be found established that the claim of generator as to the shortfall in availability of domestic coal is wrong and unsustainable; the coal availability and coal supply are not the same, the availability is much higher than the supply claimed by the generator; and that substantially the program sought by generator for the rakes (of Railways) was duly offered by MCL/SECL and, thus, there was no shortfall in the offer by MCL/SECL and that if the generator did not seek the program, MCL/SECL could not have offered the same.

46. The appellants have vehemently argued that there was no shortage of coal supply on the part of MCL/SECL and there was no implication of NCDP 2013 in the matter. The issue of non-availability of railway rakes cannot be a reason for consideration of change in law and that the change in law had been allowed only due to NCDP 2013 and not for any other reason.

47. The appellants have presented the information gathered from MCL/SECL through above-mentioned certificates, in tabular form as under:

TABLE: Actual Availability as per coal companies

Year	MCL-Railways			SECL-Railways			Road (MCL+ SECL) (C)	Total Coal available from MCL/SECL (A+B+C)	% Of 6.405 MTPA
	Offer of rakes	Coal per rake	Offer of coal (A)	Offer of rakes	Coal per rake	Offer of coal (B)			
2013-14	1377	3737	5145592					5145592	80.34
2014-15	1377	3806	4990045					4990045	77.91
2015-16	1142	3926	4483343	193	4310	831792	125541	5440676	84.94
2016-17	764	3976	3037298	388	3895	1511152	471816	5020266	78.38

TABLE: Actual quantum of supply taken delivery by Adani

Year	MCL		SECL		Total	% of 6.405 MTPA
	Rail	Road	Rail	Road		
2013-14	2720400		0	0	2720400	42.47
2014-15	4076536		0	0	4076536	63.65
2015-16	4114311	13379.06	749906	112162	4989758	77.90
2016-17	2691428		1370942	471816	4534186	70.79

48. It is the plea of the appellants that the claim of the first respondent in the bills raised by it on them (Haryana Utilities) for the shortage of coal from MCL/SECL below 80.34%, 77.91%, 84.94% and 78.38% for the financial years the availability/supply being only 42.47%, 63.65%, 77.90% and 70.79% is a deliberate misstatement, concealment of relevant facts and an attempt to make unlawful gain at the cost of the appellants and the consumers at large.

49. It is argued that the above tables culling out the information made available by MCL/SECL illustrate the *Actual Availability* and the *quantum actually taken* by the generator. It is submitted that if the generator had requisitioned, or taken, the full delivery from MCL/SECL, there would have hardly been any shortage in the coal available from MCL/SECL. There is no reason given, the appellants argue, as to why the generator did not requisition and take full delivery of coal under the FSA, the CERC having *assumed* a reason and justification without any pleading or evidence to support the assumption. The error committed by CERC, in the argument of the appellants, lies in the fact that the Commission has held that the change in law has to be considered for shortfall in domestic coal based on difference between Annual Contracted Quantity and the coal actually supplied by the Coal Companies since it instead should have been considered on basis of the difference between, on one hand, the *quantum of coal sought* from the Coal Company (i.e., the Programme submitted or the Annual Contracted Quantity or the actual domestic coal requirement whichever is lower) and, on the other, the coal available from the Coal Company i.e. *offered quantum*.

50. It is submitted by the appellants that the number of railway rakes intended for the supply and number of railway rakes used for the actual supply shows that whatever was requestioned was more or less supplied by MCL/SECL, reliance being placed on the following statement:

Tentative Calculation of coal per rake

Year	MCL			SECL		
	MCL Rail Actual Supply	Rakes actually supplied	Coal per rake	SECL Rail Actual Supply	Rakes actually supplied	Coal per rake
2013-14	2720400	728	3737	0		
2014-15	4076536	1071	3806	0		
2015-16	4114311	1048	3926	749906	174	4310
2016-17	2691428	677	3976	1370942	352	3895

51. The appellants seek to point out that in the ruling of *Energy Watchdog* (supra), it was observed that while determining consequences of change in law and construing the case for compensation on such account, particularly against the backdrop of NCDP the test to be applied is "*the extent that the supply from Coal India and other Indian sources is cut down*" in procurement of Indian coal. It is the submission that shortage in supply can refer only to what is not made available by Coal India and/or its subsidiaries under the FSA but not the quantum of coal which MCL/SECL are duly making available but not taken by the generator.

52. Referring to the communication dated 31.07.2013 (quoted earlier) from MoP to CERC on the subject, it is submitted that what is crucial ("*overall domestic availability and actual requirements*") is the coal made available for supply by the Coal Company and not what the generator would actually take as supply. It is argued that if the coal company decides to import the coal for the shortfall and supply the same as alternative coal then the quantum would be restricted to the domestic linkage coal not made available, it being not open to the generator to opt for not taking part of the domestic linkage coal and instead demand the use of alternative or imported coal or to claim compensation on grounds that it is unable to transport the coal for any reason.

53. Reference is also made to the Tariff Policy, 2016 (relevant part quoted earlier) to argue that it pertains to the PPAs that are entered into after 2016 and cannot apply to the present case where the PPA was signed under the earlier Tariff Policy of 06.01.2006. It is added that even under the new policy (of 2016), the reduced quantity of domestic coal supply by CIL vis-à-vis assured quantity or quality indicated in the LoA - "*difficulties in getting the required quantity of* *coal from Coal India Limited (CIL). In case of reduced quantity of domestic coal supplied by CIL*" - refers to the availability of coal from MCL or the Coal Companies and not the quantum of coal which the generator decides to take when such quantum is less than the quantum of coal which the Coal Company has made available.

54. It is the argument of the appellants that the scheme is for the generator to first decide on the quantum of coal required and requisition the same, the details of the quantum of coal which was the subject matter of the programme by the first respondent and the offer of the MCL/SECL indicates that except for few months, the entire quantum of coal programme presented by it was offered by MCL/SECL.

55. It is the contention of the appellant that the first respondent had deliberately not given the computation details in spite of specific direction of the Commission. Reference is made to order dated 31.05.2018 (quoted earlier) and the proceedings in its wake, as already noted in the factual matrix. It is the plea of the appellants that the auditors' certificate submitted by the generator does not comply with the order dated 31.05.2018 of CERC since it is not based on verification of all the necessary details and is qualified by disclaimer limiting the responsibility of the auditors to confirm that the computation "*of weighted average landed cost of allocated imported coal consumed towards generation and supply of power under Haryana PPAs, as per the accompanying Statement (Annexure A), as extracted from the audited books of account of Mundra Thermal Power Undertaking*" was "*arithmetically accurate*".

56. The appellants contend that the transportation of coal by Railways or otherwise was not an issue under NCDP 2013 or in *Energy Watchdog* case (Supra) which was the basis of the claim of first respondent in Petition No. 97/MP/2017 leading to order dated 31.05.2018, the generator having persisted with the plea for consideration of actual supply. It is further the submission that if the coal was available but not supplied, the same is not due to any change in law but due to the factor attributable to the generator of not taking delivery of the same and transporting the coal by road or railways. Once the coal is offered by the Coal Company, it is up to the generator to take delivery.

57. The Central Commission, it is pleaded, has selectively read Clause 4.7 of the FSA and highlighted only non-allotment of railways being considered in the level of delivery, ignoring the fact that Clause 4.7 also refers to deemed delivery which refers to Clause 4.11 wherein the coal is offered by Coal Company but is not delivered due to purchaser (the generator). In the submission of the appellants, the Central Commission has also selectively read Clause 7.1 of the FSA in assuming that the FSA provided for transport of coal through rail only, overlooking that Clause 7.2 deals with order booking through road transportation and also ignoring the fact that the generator had in fact taken delivery of coal by road.

58. The kernel of the entire argument of the appellants is that the Change in Law compensation for shortfall in coal supply ought to be computed against the ‘program’ submitted by Adani instead of the ACQ under the FSA with coal companies, the CERC having erred in considering non-availability of railway wagons to transport coal as the basis for Change in Law relief due to domestic coal shortfall. *Per Contra,* it is the submission of the first respondent that the contentions urged by the appellants are misconceived, in the teeth of the law on the subject settled by decision in *Energy Watchdog*(supra) and previous judgments of this tribunal, almost all upheld by the Supreme Court, the challenge to judgment dated 03.11.2020 being pending before Supreme Court, the appellants having been bound by interim directions.

59. We have accorded consideration to the above submissions.

60. By the principle for computing the restitutive relief of compensation to a party affected by shortfall in supply of domestic coal settled in *Energy Watchdog* (supra)**,** the Supreme Court had clarified that "*the letter dated 31st July, 2013 and the revised tariff policy are statutory documents … and have the force of law*" and 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*", and further 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*". The argument that the policy dated 18th October, 2007 was announced even before the effective date of the PPAs or that it had made it clear to all generators that coal may not be given to the extent of the entire quantity allocated was repelled with observation that "*the change in law has taken place only in 2013, which modifies the 2007 policy and to the extent that it does so, relief is available under the PPA itself to persons who source supply of coal from indigenous sources***"**. The CERC was resultantly directed to "*determine what relief should be granted to those power generators who fall within clause 13 of the PPA*". In this view of the matter, any curtailment in coal supply to the generator entitles the generators to *complete restitution*. In this context, the following observations of Supreme

Court in *Uttar Haryana Bijli Vitran Nigam Ltd & Anr. vs. Adani Power Ltd. & Ors.* [(2019) 5 SCC 325] are also relevant and, thus, quoted:

> *"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.*"
>
> (Emphasis supplied)

61. As per NCDP, 2007, 100% of the normative coal requirement of an independent power plant is be considered by CIL for the supply. Therefore, as on cut-off date (17.11.2007), the entire domestic coal requirement for supply of power to appellants by Adani Power was assured under NCDP, 2007. This position has been upheld by the Supreme Court by its Judgment dated 31.08.2020 in *Jaipur Vidyut Vitaran Nigam Ltd. vs. Adani Power Rajasthan Limited & Anr*., 2020 SCC Online SC 697 thus**:**

> *"54 .... The Policy was revised, thus assurance given by the Government of India under the NCDP of 2007 was taken away. The provision of 100 per cent supply was taken away. …"*

62. From the chronology of events, statutory documents and executive instructions (NCDP 2013, decision of CCEA dated 21.6.2013, Ministry of Power's letter dated 31.07.2013 and the Tariff Policy, 2016), the regulatory (or judicial) orders, and the adjudication of the issues germane for the claims of the first respondent, as noted earlier, it is vivid that the shortfall has to be computed as the difference between the *quantity of coal assured under the concerned FSA/LOA* and the *actual coal supplied*. The first Respondent was entitled to supply of full ACQ and any shortfall in supply (which includes delivery) of coal by MCL/ SECL has to be computed against the assured coal supply. For such shortfall, it is entitled to be compensated by being restored to the same economic position as if there was no shortfall in linkage coal supply by CIL or its subsidiaries *vis-à-vis* the quantum assured. The actual shortfall in supply of domestic coal with reference to the ACQ (reduced from NCDP assurance) under the FSA needs to be considered for the Change in Law compensation in light of Article 13.2 of the PPAs and ruling in *Energy Watchdog* (supra).

63. The appellants have tried to mislead by mixing up the subject of compensation for Change in Law with compensation contemplated under the Clause 4.6.1 of the FSA for coal supply below the minimum threshold quantity i.e., 80%. Such compensation contemplated under the FSA for coal supply below the minimum threshold quantity (i.e., 80%), in nature of a contractual safeguard, is distinct from Change in Law compensation. Crucially, such clause *qua* compensation under FSA is applicable only three years after the coming into effect of the FSA and being a mere token amount, the grant of the same does not have the potential to restore the generator to its original economic position. We endorse the opinion expressed to this effect by CERC in the NCDP Order (*"compensation available under the FSA from MCL for the shortfall in supply below 80% of ACQ is not sufficient to put the Petitioner in the same economic position as if the Change in Law event has not occurred"*), this position having been already recognized by this tribunal by Judgment dated 03.11.2020 in Appeal No. 168 of 2019 filed by the appellants (Haryana Utilities) themselves against the NCDP Order, a view resonating in *Jaipur Vidyut Vitran Nigam Ltd. vs. RERC & Ors 2019 SCC OnLine APTEL 98*. We uphold the counter-argument of the first respondent that clause 4.6.1 read with Clause 4.8 of the FSA provides for compensation mechanism by defaulting party to other party for such shortfall in level of lifting computed by considering the deemed delivered quantity.

64. Upon careful scrutiny, we find that the impugned order allowing the first respondent to recover Change in Law compensation based on *actual cut-down in coal supply* is in line with the principle of restitution as envisaged in the PPA and settled by judgments of Hon'ble Supreme Court, as referred to above. The first respondent, not having paid any compensation to the coal company for short lifting of coal, it having taken delivery of entire coal which was made available including the deemed delivered quantity, in terms of Article 13.2 of the PPA the Change in Law compensation needs to be calculated as '*ACQ (reduced from NCDP assurance) - actual supply*' since the objective is to restore it to the same economic position as if such Change in Law had not taken place.

65. The first respondent presses in aid the provision contained in Order VII Rule 7 of the CPC ("*Plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for...*") to argue that since it had claimed the relief specifically for the shortfall in domestic coal supply, all contributing factors to such shortfall of coal - including unavailability of railway wagons to transport the requisite coal quantity - automatically became the subject matter of the claim.

66. We find merit in the above argument. It is trite that form cannot override the legitimate considerations of substance. Reference may be made to the decision in *Ram Sarup Gupta (Dead) by Lrs. vs. Bishun Narain Intern College & Ors*., 1987 SCC (2) 555 wherein it was held thus:

> *"4.2 <u>Whenever the question about lack of pleadings is raised, the enquiry should not be so much about the form of the pleadings; instead, the court must find out whether in substance the parties knew the case and the issues</u>. Once it is found that inspite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, it would not be open to a party to raise the question of absence of pleadings in appeal. In the instant case, the plaintiff knew the case he had to meet and for that purpose he produced the donor in evidence in support of his plea and that the license was a simple license and it was not irrevocable as pleaded by the defendants.*"
>
> (Emphasis supplied)

67. Since the parties were aware of the substantive issues (i. e. failure of MCL/SECL to supply assured quantity of coal), mere fact that reasons for such non-supply (i. e. unavailability of railway wagons) was not specifically pleaded, cannot come in the way of substantial rights. The findings returned by CERC as to non-availability of railway wagons to transport coal as one of the reasons for shortfall in domestic coal and consequent grant of Change in Law relief to the first respondent cannot be faulted on the ground of deficiency in pleadings.

68. We agree with the generator that the contentions of the appellants qua 'Program' and 'Offer' are untenable. As noted earlier, the prayers made by the Petition (no. 269/MP/2018) filed by Adani on 24.08.2018 leading to the impugned order, *inter alia*, taking exception to non-compliance and unilateral deduction, sought direction to Haryana Utilities to make payment as per the findings in the NCDP Order which had dealt with identical contention *qua* coal available with coal company but not requisitioned. The CERC had held that "*(i)n case the coal quantum is available from MCL/SECL but not requisitioned"* the relief of compensation "*to the extent of such non-requisition of quantum … shall not be admissible under change in law*". Pertinently, no contention *qua* methodology with respect to program and offer for computing Change in Law compensation was raised even by appeal (no. 168 of 2019) against the NCDP Order whereby compensation for shortfall in coal supply was allowed. In this view, it is not open to the appellants to re-agitate the said issue in the present appeal.

69. As is evident from clause 7.1.2 of the FSA, it is the coal companies' responsibility to "*submit specific indent/offer*", the supply of coal being controlled and managed between the railways and the coal company. The purchaser (the first respondent herein) under FSA is totally dependent on the extent of loading by coal companies and supply of rakes by Railways. Consequently, coal that could not be supplied by the coal companies on account of Railways not allotting wagons or not placing wagons for loading, in spite of demand raised by the Seller/coal companies, cannot be considered as *delivered to the purchaser* for computing the short supply under CIL compensation clause.

70. We endorse the submission of the first respondent that the contention of the appellants respecting methodology for computing Change in Law compensation payable to first respondent is contrary to the restitutive provision of the PPA, viz., Article 13 (Change in Law clause), as interpreted in *Energy Watchdog* (supra) read with *Uttar Haryana Bijli Vitran Nigam Ltd & Anr. vs. Adani Power Ltd. & Ors.* (supra). Adani is entitled to recover Change in Law compensation based on actual shortfall in supply of domestic coal with reference to the ACQ (reduced from NCDP assurance) under the FSA. NCDP Order has already allowed computation of shortfall based on "actual coal supply" as per decision in *Energy Watchdog*. Thus, the shortfall has to be computed as "ACQ minus Actual Supply".

71. We do not find any discrepancy in the invoices and certificates furnished by the first respondent. The allegations of the appellants in such regard are unfounded. After scrutiny, CERC has concluded that the quantum of coal mentioned by Adani in Petition No. 97/MP/2017 *vis-à-vis* the coal quantity certified by MCL vide letter dated 31.05.2016 and SECL vide letter dated 24.02.2018 has remained the same. It has also held that the certificates issued by MCL and SECL on13.02.2019 and 12.02.2019 respectively to the first respondent and the communications dated 25.03.2019 and 27.03.2019 respectively to the appellants were consistent, and the quantity of coal mentioned in all the said documents is the same. We find no reason to dissociate from the said findings. There is no infirmity or discrepancy noticed in the documents submitted by the first respondent.

72. The certificate from SECL confirms that the quantity issued for the period October, 2015 to March, 2017 is considered as actual quantity of coal supplied by SECL as per actual availability of coal. Likewise, the certificate from MCL confirms that the quantity issued for the financial years 2013-14 to 2016-17 is considered as actual quantity of coal supplied by MCL as per actual availability of coal. We find that the quantity of actual supply mentioned in the said certificates of MCL and SECL, as submitted by the first respondent, is same as the one mentioned in the documents secured by the appellants from the said coal companies. In this view of the matter, we do not find any infirmity in the basis of the claim of the first respondent on account of domestic coal shortfall. In these circumstances, nothing turns on the disclaimer in auditors' certificate.

73. The first respondent is right in contending that the Change in Law (restitutive) relief as settled in *Energy Watchdog* (supra) is wide enough to include shortfall on account of transportation failure to 'supply' coal. There can be several reasons for domestic coal shortfall. So long as the reason qualifies as Change in Law and is not attributable to the generator, it is entitled to restitution on account of domestic coal shortfall. In *Energy Watchdog* (supra) it was, *inter alia*, held that where supply of assured quantity of domestic coal is cut-down, such shortfall qualifies as a Change in Law event and the generator is entitled to compensation. The Court did not narrow down the Change in Law relief to any specific reason for shortfall of coal so long as it qualifies as Change in Law. The non-availability of railway wagons would be a valid ground to constitute shortfall in supply of coal under *Energy Watchdog* dispensation. The contention of the appellants based on transportation failure is designed to reopen the rule in *Energy Watchdog* which is impermissible.

74. The provision contained in Article 1.1 of the PPA has already been quoted. It envisages that the purpose of executing an FSA includes transportation of fuel. As required under the PPA, the first respondent executed the FSA with MCL for 'supply' of 64.05 lakh tonnes per year. Along-side the duty to supply coal, its transportation to Adani was responsibility of MCL/SECL in terms of the PPA read with the FSA. The FSA is one of the Project Documents in terms of Article 1.1. of the PPA and, therefore, intrinsic to the PPA. Thus, we uphold the view of CERC, that the generator had no role in, or obligation as to, coal supply after the demand had been raised by submission of the 'program'. The various clauses of FSA make it clear that it is the prerogative of CIL/Railways to allot the railway rakes and load the coal into the wagons and the purchaser has no role whatsoever in the same after it submits the program. Under Clause 7.1.1, it would submit the program to MCL/SECL at least seven working days prior to commencement of the month concerned, as per applicable Railway Rules and Coal Companies' notified procedures and, under Clause 7.1.2, it discharges its payment obligation in terms of Clause 12.1.2 of the FSA. On the other hand, under Clause 7.1.1, it is the coal company (MCL/SECL) which would process the request for issuance of the consent for the program and obtain the sanction for consented rail program accordingly followed by submission under Clause 7.1.2 of specific indent/offer based on the valid rail program to the Railways as per the extant Railway rules for the allotment and placement of wagons during the concerned month at conveniently spaced intervals. In case of formation of rakes with wagons loaded from different delivery points, under Clause 7.1.4, it is for the coal companies to make best efforts to complete the documentation formalities as per the Railway rules to ensure the availability of trainload freight rate to Adani. In terms of Clause 12.1.1, it is MCL/SECL's obligation to raise source-wise bills (raised on rake-to rake basis) for the coal supplied to the purchaser (Adani) on declared basis. The purchaser (Adani) is obliged under FSA (Clause 12.1.2) to make advance payment for a month in three instalments for availing coal supplies and, towards this end, maintain an irrevocable revolving letter of credit with the coal companies. The CERC has noted in the impugned order that *"… the generator has to make advance payment each month for the coal quantities in three installments*" and that accordingly "*the generator makes the payment in advance as per Programme*." Clearly, once a program is submitted by the purchaser (Adani), the supply is in the control of coal companies and Railways.

75. We draw strength from the ruling of Supreme Court in *Nabha Power Limited vs. CERC & Ors.* (2018) 11 SCC 508 while agreeing with the submission that applying the business efficacy standards, the duty of MCL/SECL to 'supply' coal must be read to inhere in it, the duty to 'deliver' coal to the purchaser (Adani). Without 'delivery' of coal being ensured, there cannot be any 'supply'. Any other interpretation of the word 'supply' would render the FSA meaningless.

76. The contention of the appellants that the first respondent could have opted for (but did not so opt) for Road route in absence of railway transportation is fallacious. As per Schedule I of the FSA, the mode of transport specified is Rail cum Sea Route. Indisputably, the preferred option for transportation of coal is Railways due to the cost being less as compared with Roadways. We see nothing remiss in the generator having opted for Railways as the ‘Method of Order Booking and Delivery of Coal’. Having regard to the scheme in FSA, once the Program is submitted and a particular mode of transport (say Railways) chosen, the purchaser ceases to exercise its discretion to opt for Road route. We uphold the plea of the first respondent that the FSA does not provide for any shifting mechanism from Railways to Roadways after submission of Program. There is no inter-connection between Clause 7.1 and Clause 7.2 of the FSA. There has been no communication, none having been shown, to the first respondent from MCL/SECL, or for that matter from Railways, about the non-availability of wagons as per the Program submitted by it (first respondent). In this view, it (first respondent) cannot be imputed with any knowledge qua availability or non-availability of railway wagons.

77. We appreciate that in order to deal comprehensively with the objections raised by the appellants, the CERC did direct the first respondent to submit the certificates on coal availability and compensation, if any, paid by MCL/SECL. In compliance, certificates from MCL and SECL were submitted. There is no material submitted to demonstrate that the first respondent had asked the coal companies to reduce the supply to any extent. The contention that the actual availability of coal is more than the actual supply is belied by the certificates of coal companies affirming that the *actual quantity supplied* is *as per actual availability* of coal. The data gathered and collated in tabular form by the appellants to show that actual supply is less than the actual availability neither takes into account the quantity of coal which is deemed to have been delivered under Clause 4.7 of the FSA nor the program submitted by the first respondent and, therefore, found by us to be foundation of an unfair argument of prejudice which must be rejected with contempt that it deserves.

78. There is no denial to the fact that as on the bid cut-off date, the generator was entitled to 100% of normative coal requirement under NCDP, 2007, the SLC(LT) by its decision dated 12.11.2008 having reduced its linkage coal entitlement to 70%. Further, as per schedule VII of the FSA, the assured quantum to Adani was again reduced to 80% of the ACQ. Subsequently, NCDP 2013 provided for trigger level of supply of coal as 65%, 67%, 67% and 75% of ACQ for the remaining part of the 12th five-year plan i. e. from 01.04.2013 till 31.03.2017. In our considered view, the program submitted by the generator to coal companies for supply and delivery of coal was as per Schedule VII of the FSA for each Financial Year ("FY") and, therefore, in view of the restriction contained in the Schedule VII of the FSA and the trigger level as per NCDP 2013 for supply of coal, the contention of the appellants that such program was for limited quantity of coal is incorrect and misleading. We find that the Central Commission has duly considered the facts that supply of coal from domestic sources is restricted to 80% under the FSA and, after analyzing Schedule VII of the FSA, rightly concluded that shortfall in supply of coal needs to be considered with reference to the entire quantum of coal committed as ACQ in the FSA. The certificates of coal companies demonstrate that the program submitted by Adani was throughout as per its eligibility which is more than the coal actually supplied.

Therefore, it is incorrect for the Haryana Utilities to say that it had given less program.

79. Though we have examined the merits of the issues raised by the appellants (vis-à-vis claim for compensation on shortfall in coal supply), it must also be observed that it was impermissible in the first place to agitate the same in the proceedings taken out essentially for implementation of the previous orders, the first respondent having invoked the jurisdiction of the Commission under Section 142 of the Electricity Act. We may add here that the views expressed in this regard would also apply, with equal force, to the other two issues (IPT and computation of taxes and duties) as well.

80. The provision contained in Section 142 of Electricity Act confers jurisdiction on the Electricity Regulatory Commission to deal with persons who may have "*contravened any of the provisions of this Act or the rules or regulations made thereunder, or any direction issued by the Commission*" by visiting them with penalty. The power to impose civil sanction is to give teeth to the regulator to enforce its orders. In exercising such jurisdiction, the Regulatory Commission acts as a statutory authority akin to an *executing court* under the civil jurisprudence. It is trite law that an executing forum cannot go behind the order (or decree) which it is expected to execute. There is no space or scope in such proceedings for issues decided by the order being enforced being reagitated or reopened.

81. Further, the provision contained in Order II Rule 2 CPC has to be borne in mind. It requires a party to raise all its claims in respect of a particular cause of action in one proceeding. It bars the party from claiming other reliefs based on the same cause of action in a separate proceeding. In *Hindalco Industries Ltd. v. Union of India,* (1994) 2 SCC 594, the Supreme Court held as under:

"6. *It is seen that the appellant sought for declaratory relief that the rates being charged are "wholly unjust and unreasonable" and for a direction to the railways to charge "reasonable rates" on the basis of actual distance of 568 km together with other consequential relief. It is to be remembered that the relief otherwise cognizable by civil court of competent jurisdiction under Section 9 of the CPC has been statutorily conferred on the Railway Rates Tribunal with powers of a civil court to decide the claims under the Act. Order VII Rule 7 CPC provides that every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the court may "think just" to the same extent as if it had been asked for, and the same rule shall apply to any relief claimed by the defendant in his written statement. <u>Order II Rule 2 enjoins to claim the relief in respect of a cause of action and under clause (3) of Order II Rule 2, if he omits to seek the relief, except with the leave of the court, he shall be precluded thereafter for any relief so omitted</u>.*"

(Emphasis supplied)

82. In *Alka Gupta v. Narender Kumar Gupta*, (2010) 10 SCC 141, the Supreme Court observed thus**:**

"12. The <u>object of Order 2 Rule 2 of the Code is twofold. First is to ensure that no defendant is sued and vexed twice in regard to the same cause of action. Second is to prevent a plaintiff from splitting of claims and remedies based on the same cause of action.</u> The effect of Order 2 Rule 2 of the Code is to bar a plaintiff who had earlier claimed certain remedies in regard to a cause of action, from filing a second suit in regard to other reliefs based on the same cause of action…"

(Emphasis supplied)

83. The appellants had filed Appeal no. 316 of 2017 on 12.05.2017 challenging the Taxes and Duties Order limited to applicability of levy of customs duty on electricity removed from SEZ to DTA. Similarly, Review Petition No. 24/RP/2018 seeking review of NCDP Order was limited to the issue of domestic coal shortfall and no issue *qua* IPT of coal was raised. The Review Petition was dismissed vide Ld. CERC's Order dated 03.12.2018. Further, by the Appeal No. 168 of 2019 assailing the NCDP Order the findings *qua* IPT of coal were not challenged by Haryana Utilities. We agree with the first Respondent that in view of the NCDP and Shakti Orders, the appellants are liable to pay Change in Law compensation on account of shortfall in supply of domestic coal against the ACQ (reduced from NCDP assurance) under FSA and taxes and duties on IPT coal on the basis of deemed consumption (attributed basis). The Impugned Order only seeks to implement the earlier Orders of CERC which have been upheld by this tribunal. It is not permissible for the appellants to re-open the issues which are already settled. As was observed by Hon'ble Supreme Court by order dated 09.03.2021 in *Nabha Power vs. PSPCL* in Contempt Petition Nos. 1174-1177 of 2019 arising out of Civil Appeal No. 179 of 2017, it is not permissible to "*open the chapters which have been closed*".

84. We reject the arguments of the appellants on the captioned subject finding no error in the view taken by CERC in the impugned order.

CLAIM FOR BENEFIT OF INTER-PLANT TRANSFER

85. The issue on the claim for benefit of Inter-Plant transfer ("IPT") raised by the appellants has been dealt with by CERC by the impugned order thus:

“27. The Respondents have submitted that in order dated 31.5.2018, the Petitioner has been held to be entitled to undertake the IPT of domestic coal procured from MCL/SECL as per Policy of Coal India Ltd. and that this Policy decision was made in the year 2013 which is after the cut-off date i.e. after 7 days prior to the Bid Deadline as the bidding was in the year 2007. It is, therefore, an event subsequent to the bid deadline and accordingly qualifies for Change in Law consideration. The Respondents have contended that on account of IPT, there has been substantial reduction in the cost of transportation of coal to the Petitioner resulting in the significant gain/ savings to the Petitioner. The benefit accruing are the savings on the transportation of coal from MCL/SECL Mines to Mundra in the State of Gujarat, savings on the transportation of the imported coal from Mundra Port to Tiroda in Maharashtra and Kawai in Rajasthan compared with the transportation charges incurred for transporting coal from MCL/SECL to Tiroda and Kawai. Accordingly, the Respondents have argued that the above also being covered under the Change in Law, benefit of the same should accrue to the Respondents.

28. We have considered the submissions of the Respondents for treating IPT Policy of Coal India Ltd. as change in law and its request for sharing of benefits accrued to the Petitioner on account of IPT. In Petition No. 97/MP/2017 and the instant Petition, we have given directions as to how IPT coal has to be considered for the purpose of calculation of coal shortfall as well for taxes and duties. Consideration of the IPT Policy of Coal India Ltd. as a change in law event has not been discussed by the Commission in its previous orders. <u>We note that transfer of coal by the Petitioner under IPT Policy also affects other generating stations (that are consuming the IPT coal) and other distribution companies (who are supplied power by the generating stations that have used IPT coal). Since, they are not parties to the present Petition, we do not find it appropriate to deal with the issue in the present Petition</u>.

29. Further, the Respondents have again raised the issue of computation of change in law compensation as the

> difference between landed cost of domestic linkage coal and landed cost of alternate coal and not energy charge. The Respondents had raised this issue in the Review Petition No. 24/RP/2018 against the order dated 31.5.2018 in Petition No. 97/MP/2017. Considering that the Commission has already rejected this contention in the order dated 3.12.2018 in Review Petition No. 24/RP/2018, we do not find the need to consider this issue again.*"*

86. The appellants point out that Article 13.1.1 of the PPA defines *Change in Law* to mean "… *occurrence of* … *events … which results in any change in any cost of or revenue from the business of selling electricity …".* Article 13.2(b) dealing with change in law during the operation period, *inter alia*, uses the expression *"(a)s a result of Change in Law, the compensation for any increase/decrease in revenues or cost of the Seller shall be determined…".* Similarly, Article 13.2(a) dealing with construction period also uses the expression "*… impact of increase/decrease of Capital Cost …"*.

87. It is submitted by the appellants that as on the cut-off date (viz. seven days before the bid deadline date as provided in Article 13 of the PPAs) and also at the time of the execution of the FSA on 09.06.2012, the coal provided by MCL/SECL was to be exclusively used at Mundra Power Plant Units 7, 8 and 9 and only for generation and supply of electricity to the appellants (Haryana Utilities) under the PPAs. At those points of time, there was a legal and complete prohibition on the use of such coal by the first respondent (generator) for any other purpose or at any other of its power plant or that of any of its group companies (per Clause 4.2 of the FSA, quoted earlier**).** The IPT of coal was allowed, for the first time, in 2013 by the Central Government/Coal India Limited (CIL) and its subsidiaries. It is pleaded that this constituted a *change in law*

("CIL") under Article 13 of the respective PPAs. It is contended that the consequent ability to use the coal under the FSA at other power plants of Adani Group (Kawai in Rajasthan and Tiroda in Maharashtra) resulted in substantial saving to Adani (first respondent) in the transportation cost of coal, such savings or decrease in the cost required to be accounted for the benefit of the procurer (Haryana Utilities) by way of reduction in the tariff as per Article 13 of the PPA**.**

88. In the wake of the decision of Supreme Court in *Energy Watchdog* (supra), in May 2017, the generator herein had filed Petition No. 97/MP/2017 before the Central Commission. It is pointed out that in the proceedings before CERC (in Petition No. 97/MP/2017), the Haryana Utilities had raised the issue (vide I.A. No. 21 of 2018) of inter-plant transfer. At that stage, the generator had stated that the inter-plant transfer was a policy of the Government that allowed it to transfer the domestic coal from Mahanadi Coalfields Limited/South Eastern Coalfields Limited to other power stations. The Commission had ruled thus on 31.05.2018:

> *"56.... Learned counsel for the Petitioner submitted that the Inter-plant transfer scheme is legitimate mechanism carried out under the Scheme announced by Government of India which is available in public domain.*
>
> *……………*
>
> *57(a).... The scheme is in existence since June 2013 as approved by Coal India Limited vide letter dated 19.6.2013 which is available in public domain.*
>
> *…………...*
>
> *57(b) Inter Plant Transfer Scheme is a legitimate and accepted arrangement as approved by CIL vide letter dated 19.6.2013 which allows transfer of coal between the power plants wholly owned by the Purchaser or its wholly owned subsidiary. Further, such supply of coal for*

all commercial purpose under the FSA remain unchanged and on account of original Power Plant. Accordingly, the Petitioner has carried out inter plant transfer since August 2013 and <u>even after diverting the coal to other plants, the supply of coal has been accounted against the original power plant only 1.e. Units 7, 8 and 9</u>."

(Emphsis supplied)

89. Placing reliance on the Notification of Goods Tariff No. 49 Pt.I (Vol. II) and Goods Tariff No. 49 (Part II) of Indian Railways, it is submitted that the rail transportation from Western Odisha to Tiroda is for a distance of 747 kms and would have involved a freight at the rate of Rs. 1558 per tonne and similarly, the rail transportation from Western Odisha to Kawai is of a distance of 1189 kms and would have involved a freight at the rate of Rs. 2343 per tonne (as in November 2018). It is also the submission that the cost of transportation of imported coal over a distance of 1427 kms from Mundra Port in Coastal Gujarat to Tiroda in the State of Maharashtra would have involved a freight at the rate of Rs. 2763 per tonne while the cost of transportation of imported coal over a distance of 1067 kms from Mundra Port in Coastal Gujarat to Kawai in the State of Rajasthan would have involved a freight at the rate of Rs. 2127 per tonne (as in November 2018). The contention is that the saving which has accrued to Adani by reasons of the above in terms of the Notification of Railway dated 31.10.2018 for the period from August 15 to March 17 works out to approximately Rs. 2560 per metric tonne. Similarly, the IPT gain for the coal transferred from SECL to Tiroda for the period November 15 to March 17 works out to Rs. 3774 per metric tonne. These savings, it is argued, need to be passed on to the benefit of Haryana Utilities.

90. It is submitted that Article 13.1 and 13.2 of the PPA provide for restoration of the generator/Seller (i.e., Adani) to the same economic position on cumulative basis of Increases or decreases and net annual effect has to be considered. The argument is that it is not permissible to consider only the increases or only the decreases, it being incumbent to ascertain the net of increases and decreases to determine the amount payable or receivable by Haryana Utilities-Procurers by way of tariff adjustment in the relevant Financial Year. Accordingly, the argument is, the inter-plant transfer implications of saving in cost of generation to Adani needs to be considered in each of the Financial Year namely from FY 2013-14 till date. The appellants contend that in the facts and circumstances, the Central Commission ought to have considered the full impact of IPT being allowed in resulting in substantial decrease/saving in cost to Adani, as a change in law Article 13.2 (b).

91. The appellants press for a decision by this tribunal on this claim agitated by them. In this view, it is necessary that we examine the foundation of the contention within the contours of the CIL compensation clause in the PPA. On close scrutiny, we find the claim of the appellants untenable.

92. It is well settled that the basic characteristics of 'law' are that it (i) "*… is the creation and promulgation of a general rule of conduct without reference to particular cases …*", (ii) is a binding rule of conduct as the expression of the will of the sovereign, (iii) does not derive its authority from mere consensus of mind between two parties entering into a bargain, (iv) "… *must follow the customary forms of law making and must be expressed as a binding rule of conduct"*, (v) is distinguishable from grant "*.. because in the case of a grant, the grantor and the grantee both agree about the making and the acceptance of the grant; not so in the case of law*" whereas law is "*command which has to be obeyed by the citizens whether they agree with it or not*". [*see, Maharaja Shree Umaid Mills Ltd. vs. Union of India*, 1963 Supp (2) SCR 515; *Bengal Nagpur Cotton Mills Ltd. vs. Board of Revenue*, (1964) 4 SCR 190*; Raj Kumar Narsingh Pratap Singh Deo vs. State of Orissa* AIR 1964 SC 1793*; Union of India vs. Cynamide India Ltd.* (1987) 2 SCC 720*;* and *Maharaj Dhiraj Himmatsinghji vs. State of Rajasthan,* (1987) 1 SCC 52]

93. The provision for IPT does not fulfill the basic characteristics of 'Law' and consequently cannot amount to a Change in Law event in terms of the PPA for the reasons it is neither in the nature of a statute, ordinance, regulation, notification, code or rule nor does it bind the conduct of parties by an absolute command or a general rule of conduct having universal applicability.

94. It cannot be ignored that IPT was allowed to its subsidiaries by CIL vide an internal communication dated 19.06.2013 based on which clause 3.2 of the FSA pertaining to "end use of coal" was amended so as to enable IPT of coal. There is no dispute as to the fact that for an event to qualify as Change in law, one of the necessary pre-conditions is that the instrument bringing into effect such change must have the element of **'***force of law'*. There is no circular/ notification or rule or regulation issued by CIL to 'implement' the IPT Scheme. The Letter dated 19.06.2013 is a communication from CIL to all its subsidiaries intimating the decision taken at the 298th board meeting of CIL allowing IPT of coal. It is neither an 'enactment', 'bringing into effect', 'adoption', 'promulgation', 'amendment', 'modification' nor 'repeal' of any law. At best, it is merely an administrative instruction addressed to all its subsidiaries.

95. Reliance is placed by the first respondent, and rightly so, on decision of Supreme Court in *Punit Rai vs. Dinesh Chaudhary*, (2003) 8 SCC 204, holding thus:

> "**42.** *The said circular letter has not been issued by the State in exercise of its power under Article 162 of the Constitution of India. It is not stated therein that the decision has been taken by the Cabinet or any authority authorized in this behalf in terms of Article 166(3) of the Constitution of India. <u>It is trite that a circular letter being an administrative instruction is not a law within the meaning of Article 13 of the Constitution of India.</u> (See Dwarka Nath Tewari v. State of Bihar [AIR 1959 SC 249] .)*"
>
> (Emphasis supplied)

96. Trite it is that the effect of any document ought to be ascertained on the basis of the document itself. No external aid can be used to give a different meaning to the document. Though no document to such effect has been submitted by the appellants, even if we were to assume it to be a policy decision of the MoC, such decision cannot form the basis of external aid interpretation. In this context, we may refer to the following observations in *Mohinder Singh Gill vs. Chief Election Commissioner*, (1978) 1 SCC 405:

> **"*8.*** *The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in Gordhandas Bhanji [Commr. of Police, Bombay v. Gordhandas Bhanji, AIR 1952 SC 16] :*

> ***"**<u>Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actions and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself</u>."*
>
> *Orders are not like old wine becoming better as they grow older*."
>
> (Emphasis supplied)

97. Reference may be made to the ruling of Supreme Court in *Jaipur Development Authority v. Vijay Kumar Data,* (2011) 12 SCC 94:

> *"49. It is trite to say that <u>all executive actions of the Government of India and the Government of a State are required to be taken in the name of the President or the Governor of the State concerned, as the case may be (Articles 77(1) and 166(1))</u>. Orders and other instruments made and executed in the name of the President or the Governor of a State, as the case may be, are required to be authenticated in such manner as may be specified in the rules to be made by the President or the Governor, as the case may be (Articles 77(2) and 166(2)).*
>
> *50. Article 77(3) lays down that:*
> *"77. (3) The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business."*
>
> *51. Likewise, Article 166(3) lays down that:*
> *"166. (3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business insofar as it is not business with respect to*

which the Governor is by or under this Constitution required to act in his discretion.”

…

53. It is thus clear that <u>unless an order is expressed in the name of the President or the Governor and is authenticated in the manner prescribed by the rules, the same cannot be treated as an order made on behalf of the Government</u>. A reading of the Letter dated 6-12-2001 shows that it was neither expressed in the name of the Governor nor was it authenticated in the manner prescribed by the rules. <u>That letter merely speaks of the discussion made by the Committee and the decision taken by it. By no stretch of imagination the same can be treated as a policy decision of the Government within the meaning of Article 166 of the Constitution</u>.”

(Emphasis supplied)

98. In *G.J. Fernandes v. State of Mysore*, AIR 1967 SC 1753, the Supreme Court held thus:

“12. …We are therefore of opinion that Article 162 does not confer any power on the State Government to frame rules and it only indicates the scope of the executive power of the State. Of course, under such executive power, the State can give administrative instructions to its servants how to act in certain circumstances; but that will not make such instructions statutory rules which are justiciable in certain circumstances. <u>In order that such executive instructions have the force of statutory rules it must be shown that they have been issued either under the authority conferred on the State Government by some statute or under some provision of the Constitution providing therefor.</u> It is not in dispute that there is no statute which confers any authority on the State Government to issue rules in matters with which the Code is concerned; nor has any provision of the Constitution been pointed out to us under which these instructions can be issued as statutory rules except Article 162.”

(Emphasis supplied)

99. In *Sukhdev Singh vs. Bhagatram Sardar Singh Raghuvanshi*, (1975) 1 SCC 421, the Supreme Court upheld the contention that for determination whether an action is backed by legal sanction, power to enforce compliance is a key factor. The relevant observations in the said decision read thus:

> "**36.** *The State itself is envisaged under Article 298 as having the right to carry on trade and business. The State as defined in Article 12 is comprehended to include bodies created for the purpose of promoting economic interests of the people. The circumstance that the statutory body is required to carry on some activities of the nature of trade or commerce does not indicate that the Board must be excluded from the scope of the word "State". The Electricity Supply Act showed that the Board had power to give directions, the disobedience of which is punishable as a criminal offence. The power to issue directions and to enforce compliance is an important aspect.*"
>
> (Emphasis supplied)

100. We accept the submission that letter dated 19.06.2013 of CIL is couched in a recommendatory language which provides an 'option' to power generators with wholly owned subsidiaries to adopt IPT of coal in consideration of prudent utility practices. The element of choice with power producers is evident from the use of the word '*may*' in the amended clause of the FSA enabling IPT of coal. Existence of such choice negates the claim of a binding mandate by CIL, particularly since CIL cannot force any eligible power producer to go for IPT of coal if the generator were to decline such option. In this view of the matter, there can be no quarrel with the proposition that adopting IPT Scheme is a pure commercial decision of the generating companies within the realm of FSA, a fact conceded on behalf of the appellants [*see* para 10 (d) of impugned order quoting submissions: "*Since IPT is a facility availed by the Petitioner for its commercial convenience, …*"].

101. We have already extracted the relevant part of the decision in *Energy Watchdog* (supra). It is "*the letter dated 31-7-2013 and the revised Tariff Policy*" which were accepted as "*statutory documents being issued under Section 3 of the Act*" *and having "the force of law.*" As noted above, a policy decision is expressed in the name of the President or the Governor and is authenticated in the manner prescribed by the relevant statute. However, IPT scheme was allowed by a letter issued by CIL and cannot be treated, by any stretch of reasoning, to be a policy decision of the Government. There is no notification by the MoC ratifying the decision taken by the CIL board or any notification published by the MoC in respect of any decision taken by CIL on IPT issue. The specific amended clause in the FSAs provides that '*supply of coal shall for all commercial purpose under the FSA remain unchanged and on account of the original Power Plant*.' It being a settled principle of law that an administrative instruction is not 'law', the letter dated 19.06.2013 of CIL permitting IPT cannot be elevated to the status of an instrument having the *'force of law'*, within the meaning of Article 13 of the PPA.

102. There is one more reason why this plea of appellants cannot be acceded to. As noted in context of previous issue, the appellants challenged both the Taxes and Duties Order (Order dated 06.02.2017 of CERC in Petition No. 156/MP/2014 *Adani Power Mundra Limited* vs. *Uttar Haryana & Anr.*) as well as the NCDP Order (Order dated 31.05.2018 of CERC in Petition No. 97/MP/2017 *Adani Power Mundra Limited* vs. *Uttar Haryana Bijli Vitran Nigam Ltd. & Anr*) but did not choose to assail in any of the said Appeals or Review petitions the findings pertaining to IPT of coal or payment of taxes and duties. As such, it is no longer open to the appellants to press a challenge in present proceedings on the issue of IPT of coal, in view of the bar under Order II Rule 2, CPC.

103. Thus, we reject the claim of the appellants with reference to IPT of coal.

CLAIM RELATING TO TAXES AND DUTIES

104. The issue which the CERC was called upon to answer was as to whether the finding returned by it in respect of IPT coal (at Para 61 – quoted earlier) in order dated 31.5.2018 (in Petition No. 97/MP/2017) is applicable for the compensation payable for various taxes and duties approved as change in law in order dated 6.2.2017 in Petition No. 156/MP/2014, particular reference being made to para 106(b) (also quoted earlier). The Commission has held by the Impugned Order as under:

> *"20. The Respondents have submitted that the Commission in paragraph 106(b) of the order dated 6.2.2017 allowed payment of taxes and duties based on the actuals subject to ceiling of coal consumed. Accordingly, it has pleaded that if the coal consumed is imported coal, the taxes and duties applicable to imported coal is payable and not the taxes and duties applicable to domestic coal. Further, it has been contended that if, on account of IPT, the Petitioner does not actually consume coal or does not make the actual payment towards change in law, it cannot claim such compensation from the Procurers. Accordingly, <u>since the IPT is a facility availed by the Petitioner for its commercial convenience, the obligation of the Haryana Utilities will be only to pay taxes and duties as applicable to imported coal or domestic coal, whichever is lower</u>.*
>
> *…*
>
> *22. On the other hand, the <u>Petitioner has contended that the issue of IPT has been conclusively determined by the Commission in its order dated 31.5.2018</u> in I.A. No. 21 of 2018 in Petition No. 97/MP/2017. Further, as per the <u>IPT</u>*

<u>Policy, for all commercial purposes under the FSA, the supply of coal shall remain unchanged and shall be on account of the original Power Plant</u>.

23. We have considered the submissions of the Petitioner and the Respondents. In respect of the change in law relief towards taxes and duties approved in the order dated 6.2.2017 in Petition No. 156/MP/2014, we note that a dispute arose between the Petitioner and the Respondents with regard to IPT coal. This is evident from the Minutes of Meeting (MoM) dated 1.3.2018 filed by the Respondents in IA No. 21 of 2018 in Petition No. 97/MP/2017. The dispute related to IPT coal has been dealt with by us and our findings are recorded at Para 61 of the order dated 31.05.2018 (quoted at paragraph 19 above) in Petition No. 97/MP/2017 whereby the said IA was dismissed.

…

25. The term "computed based on actual subject to ceiling of coal consumed" in the paragraph 106(b) of our order dated 6.2.2017 in Petition No. 156/MP/2014 has been construed by the Respondents to mean that the IPT coal has to be excluded from the calculation of taxes and duties since it has not consumed such coal and that the same has been used by the Petitioner (or its parent company) to supply power to other distribution companies through its power plants located in other parts of the country. In our view, <u>our order in Petition No. 97/MP/2017 (paragraph 61) leaves no room for doubt that treatment of IPT coal has to be as if the coal was consumed for supplying power to the Respondents</u>. We would like to point out that IPT is a scheme evolved by the Coal India Limited as a Policy to be allowed and a decision was taken to provide the end-use of the coal under the FSA as under:

> *"End-use of Coal*
> *The total quantity of Coal supplied pursuant to this Agreement is meant for use at the …………………….. name & location of the Plant(s)] as listed in Schedule I. The Purchase shall not sell/divert and/or transfer the Coal to any third party for any purpose whatsoever and the same shall be treated as material breach of Agreement, for which the Purchase shall be fully responsible and such act shall warrant suspension of coal supplies by the Seller.*

However, interplant transfer of coal may be considered provided:

a) Transfer of coal shall be allowed only between the power plants wholly owned by the Purchaser or its wholly owned subsidiary. No transfer of coal shall be allowed for a joint Venture (JV) company of the Purchaser. The supply of coal, shall for the commercial purpose under the FSA remain unchanged and on account of the original Power Plant."

26. Thus, there is a clear provision in the IPT Policy contemplating that supply of coal under the FSA shall remain unchanged for the commercial purpose and shall be on account of the original Power Plant. In view of the above paragraph in Order dated 6.2.2017 in Petition No. 156/MP/2014, it is evident that coal supply under FSA dated 9.6.2012 to other plants shall be accounted for generation and supply of power to Haryana Utilities from Units 7,8 and 9 of Mundra TPP for all commercial purposes. Therefore, the contention of the Respondents that it is liable to pay taxes and duties only for the coal that it has actually consumed and not for IPT coal, is not sustainable and is, therefore, rejected."

(Emphasis supplied)

105. It is the case of the appellants that the taxes and duties on coal on account of impact of *change in law* is required to be considered appropriately taking into account the benefit of inter-plant transfer of coal linkage (from MCL and SECL) being available with the first respondent (Adani). The appellants submit that there is no dispute raised by them as to change in law for taxes and duties, they having duly complied with the Order dated 06.02.2017 in Petition No. 156/MP/2014 by reimbursing the taxes and duties paid by the first respondent vis-à-vis the proportion of actual quantum of domestic and imported coal used for generation and supply of electricity to them (Haryana Utilities). The question raised is as to whether the taxes and duties are payable when the imported coal is used in place of domestic coal including on account of availing the Inter Plant Transfer of coal allowed since 2013. It is contended that this question has not been adjudicated by the Central Commission in the impugned order, or the Order dated 06.02.2017, or in any other proceedings. Reliance is placed on Order dated 06.02.2017 which, *inter alia*, held that the taxes and duties payable are based on the actuals subject to ceiling of *coal consumed***.** It is argued that as a sequitur, if the coal consumed is imported coal, the taxes and duties applicable to imported coal alone is payable and not taxes and duties applicable to domestic coal. The submission is that since the IPT is a facility taken by the generator for its commercial convenience, the obligation of the procurer (Haryana Utilities) towards taxes and duties will be only those applicable to imported coal or taxes applicable for domestic coal, whichever is lower. It is stated that the bills raised by the first respondent (Adani) on account of change in law relating to taxes and duties amounts to Rs. 1916 crores out of which the appellants (Haryana Utilities) have already paid Rs. 1636 crores which amounts to about 85% of the amount, the balance being the disputed claim.

106. As already observed, the issues in above nature could not have been raised in proceedings under section 142 of Electricity Act, also in view of the bar under Order II Rule 2 of CPC. Be that as it may, for complete adjudication we have examined the contentions urged on merits but find no substance therein. In our view, the CERC has appropriately considered the issue of taxes and duties on deemed consumption basis (attributed basis) under the IPT Scheme and has reached conclusions which cannot be faulted.

107. We have already quoted the relevant part (Para 61) of the CERC order dated 3.05.2018 (NCDP Order). To recapitulate, by the said dispensation, while noting that "*inter plant transfer of coal has been allowed across the power sector through the CIL letter dated 19.6.2013*" and that under the said scheme the "*supply of coal shall for all commercial purpose under the FSA remain unchanged and on account of the original Power Plant*", it was held in specific context of the first respondent that even though "*the coal under the FSA dated 9.6.2012 is diverted to the plants at Maharashtra and Rajasthan, such supply shall be accounted for on account of the original power plant i.e. Units 7, 8 and 9 of Mundra*" and further that "*the coal supplied under the FSA dated 9.6.2012 to other plants has to be accounted for against the generation and supply of power to Haryana Utilities from Units 7, 8 and 9 of Mundra and all claims for change in law with respect to the PPA dated 7.8.2008 with respect to Haryana Utilities shall be considered after taking into account the coal diverted under inter plant transfer*". By the impugned order, the Commission has clarified that by the previous order, the IPT Scheme approved by CIL was not considered as a change in law event, the directions given being only to determine "*as to how IPT coal has to be considered for the purpose of calculation of coal shortfall as well for taxes and duties*"

108. The first respondent has explained that though linkage coal under FSA for Mundra TPS is transferred to Tiroda TPS or Kawai TPS, no compensation towards domestic coal shortfall is claimed from Mundra beneficiaries *i.e*. Haryana Utilities (the appellants) to that extent. The generator illustrates this by submitting that if it requires 5 MT (assumed figure) domestic coal for the power supplied to Haryana Utilities and the domestic coal supply under the FSA is 3

MT (assumed figure) and the entire 3 MT was transferred to Tiroda TPS or Kawai TPS, the shortfall in domestic coal supply claimed from Haryana Utilities is only for 2 MT (5 MT - 3 MT). Having got this benefit (reduced domestic coal quantum associated with Change in Law compensation), Haryana Utilities must pay the associated taxes & duties on IPT coal on attributed basis to the extent of the 3 MT coal as well. The fallacy in the plea of the appellants is that for Change in Law compensation towards domestic coal shortfall, they (Haryana Utilities) are considering coal shortfall quantum as 2 MT (5-3 MT) and not 5 MT (5-0 MT) whereas for Change in Law compensation towards Taxes & Duties, 3 MT is not accounted. This apparently is inherently contradictory reflective of picking and choosing the applicability of IPT scheme to the extent it benefits the appellants and so cannot be countenanced.

109. There is no denial of the fact that the letter dated 19.06.2013 addressed by CIL intimating to all subsidiaries the decision taken at its 298th board meeting (27.05.2013), allowing IPT of coal was conditional upon *transfer* (of coal) to be *allowed only between the power plants wholly owned by the purchaser or its wholly owned subsidiary* and *supply of coal for all commercial purpose under the FSAs to remain unchanged and on account of original power plant*. In particular context of the first respondent, it follows as a sequitur that IPT of coal is allowable if Mundra TPS transfers its portion of linkage coal from MCL coal mine, Talcher to Tiroda TPS (both owned by Adani group) for utilization of such coal at Tiroda TPS and that even though linkage coal from MCL coal mine, Talcher of Mundra TPS (original power plant in terms of the FSA) was actually utilized at Tiroda TPS (transferee plant), it will be accounted as if it were consumed at Mundra TPS. To put it simply, the effect of IPT of coal is that IPT coal cost (linkage domestic coal) will continue to be booked in the account of Mundra TPS (original power plant in terms of the FSA/transferor plant under IPT scheme) and alternate coal cost (imported coal or market-based e-auction coal used in the absence of linkage coal) will continue to be booked on '*attributed cost*' basis in the accounts of Tiroda TPS (transferee plant under IPT scheme).

110. Pertinently, so far as the Taxes and Duties issue is concerned, the impugned Order has been abided by the appellants in part, the Change in Law compensation towards the Taxes and Duties on domestic coal being paid from June 2019 onwards. But the payments for the period August 2012 to May 2019, paid earlier, were unilaterally deducted through subsequent adjustments by Haryana Utilities, the first respondent herein seeking directions in that regard.

111. The prime justification proffered by the appellants for withholding the dues claimed by the generator in terms of the Taxes and Duties Order and NCDP Order is that the *IPT scheme will result into double recovery* for the latter. The plea is premised on unfounded assumption that taxes and duties, as applicable for domestic coal, on coal transferred to Tiroda TPS from the original Power Plant (Mundra) under IPT scheme, have already been paid to Adani by MSEDCL. In response to letter dated 04.10.2019 of Adani seeking clarification, MSEDCL by its reply dated 19.11.2019, confirmed that the claim of the latter for taxes and duties for IPT coal were processed considering taxes and duties applicable for alternate (imported) coal thereby ruling out possibility of double recovery, this response having been shared with appellants on 20.11.2019 and there is no contest to its correctness.

112. For the foregoing reasons, we find no substance in the contentions of the appellants. The impugned order on the captioned issue does not suffer from any infirmity and must be upheld.

CONCLUSION

113. In view of the findings recorded by us on the three issues urged by the appellants, the appeal must fail. However, that alone cannot be the end result. There is a question of rule of law and financial discipline that must also be addressed particularly against the backdrop of the prayer of the first respondent for relief of the protracted litigation on the subject to be secured.

114. The Electricity Act, 2003 has bought about reforms with the aim and objective, *inter alia*, of "*development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalisation of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies*". The National Electricity Policy and Plan, framed under Section 3, are expected to steer the sector towards "*development of the power system based on optimal utilisation of resources*". While creating the regulatory regime, the legislation has placed the Electricity Regulatory Commissions under a mandate (Section 61) to ensure, amongst others, "*safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner*". This philosophy has to pervade all action at the hand of not only statutory authorities but also the stakeholders including the distribution licensees. Experience has, however, shown that in the zeal and anxiety of keeping the cost for the end-consumer low, the obligation to ensure recovery of reasonable cost is jettisoned. This populist approach, a legacy of the past, is counter-productive since it discourages investment and growth of the industry.

115. The Standing Committee of Parliament in its Report (dated 07.03.2018) on Energy titled '*Stressed/ Non-Performing Assets in Electricity Sector*' has recognized the financial stress faced by generating companies on account of delay in recovery of Change in Law compensations and has recommended thus:

> *"The Committee, therefore, recommend that appropriate steps should be taken to ensure that there should be consistency and uniformity with regard to orders emanating from the status of change in law. Provisions should also be made for certain percentage of payments of regulatory dues to be paid by Discoms in case the orders of regulators are being taken to APTEL/ higher judiciary for their consideration and decision"*

116. The Report lays stress on the obligation of the distribution companies to pay the approved Change in Law compensation even while Regulatory Commission's orders are challenged. The Policy directive dated 27.08.2018 issued in terms of Section 107 of the Electricity Act, 2003 by the Ministry of Power (MoP) to the CERC emphasized on the need to ensure expeditious recovery of Change in Law compensation. The desirability of this was recognized by this tribunal in its judgment dated 14.09.2019 in *Jaipur Vidyut Vitran Nigam Limited vs. RERC & Ors*, 2019 SCC Online APTEL 98. It is against such backdrop that *Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021*, notified by MoP on 22.10.2021, providing for timely recovery of compensation on account of occurrence of Change in Law events have been framed. The MoP, vide notification dated 09.11.2021, put in public domain the policy directive on "*Automatic pass through of the fuel and power* *procurement cost in tariff for ensuring the viability of the power*" recognizing that in order to ensure that the power sector does not face any constraints in maintaining assured power supply to meet the demand, all the stakeholders in the value chain of power sector must ensure that there is timely recovery of cost. This involves the cost *pass through* by the generating companies to the distribution companies.

117. In sharp contrast, it is seen from the factual narrative of the events leading to the appeal at hand that the appellants (Haryana Utilities) have been adopting dilatory tactics which not only defeats the public policy but also has the undesirable fall-out of adding to the burden of the end-consumers they profess to serve on account of increasing Carrying Cost.

118. Concededly, in compliance with the Taxes and Duties Order dated 06.02.2017, the appellants paid to the generator the taxes and duties for certain period but, thereafter, unilaterally withheld such claims, raising issues (found merit-less) regarding IPT of coal for first time in January 2018. It is after the impugned order was passed that the appellants are stated to have started complying, to an extent, by making payments. It is the case of the first respondent that the appellants have withheld past payments including towards taxes and duties its entitlement to recover corresponding Late Payment Surcharge ("LPS") being over and above the same to be computed after discharge of the former liability. We agree that such withholding is in violation of Articles 11.3.2 and 11.6.9 of the PPAs (quoted earlier) which cast a specific mandate on the procurer (Haryana Utilities) to honor the invoices raised, irrespective of dispute, and impose a specific bar against unilateral deductions/setting off.

119. We find the dilatory conduct of the Haryana Utilities, to delay the implementation of the binding orders concerning compensation on account of coal shortfall and corresponding taxes and duties, detrimental to the interest of end consumers since it burdens the consumers with incremental LPS for delay in making payments to the generator. This cannot be countenanced, given the earlier dispensation on the subject by the statutory regulator and appellate forum(s), since it smacks of approach that is designed to frustrate the legislative command, and extant State policy, as indeed constitutes abject indiscipline infringing the rule of law. Borrowing the words of Hon'ble Supreme Court in *SEBI* vs. *Sahara India Real Estate Corpn. Ltd*., (2014) 5 SCC 429 "*non-compliance with the orders passed … shakes the very foundation of our judicial system and undermines the rule of law*" which this tribunal is also duty-bound to "*honour and protect*", so essential "*to maintain faith and confidence of the people of this country in the judiciary*".

120. We direct the appellants to discharge their liability unto the first respondent on the subject at hand forthwith and without further demur or delay.

121. The appeal and the pending applications are disposed of in above terms.

<u>PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING ON THIS 21st DAY OF DECEMBER, 2021.</u>

(Sandesh Kumar Sharma)
Technical Member

(Justice R.K. Gauba)
Judicial Member