2023 LiveLaw (SC) 339

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
B.R. GAVAI; J., VIKRAM NATH; J.
CIVIL APPEAL NO. 2908 OF 2022; APRIL 20, 2023

UTTAR HARYANA BIJLI VITRAN NIGAM LIMITED AND ANOTHER
versus
ADANI POWER (MUNDRA) LIMITED AND ANOTHER

New Coal Distribution Policy (NCDP) - 'Change in Law' Relief - Policy of Inter-Plant Transfer (IPT) of coal by Coal India Ltd. (CIL) a "change in law" event - Finding of APTEL that the communication dated 19th June 2013 permitting IPT is not a 'Change in Law' would not be sustainable.

For Appellant(s) Mr. Shubham Arya, Adv. Ms. Poorva Saigal, Adv. Mr. Nikunj Dayal, AOR Ms. Pallavi Saigal, Adv. Ms. Shikha Sood, Adv. Ms. Reeha Singh, Adv. Ms. Anumeha Smiti, Adv. Mr. Ravi Nair, Adv.

For Respondent(s) Mr. Mahesh Agarwal, Adv. Ms. Poonam Sengupta, Adv. Mr. Arshit Anand, Adv. Mr. Saunak Rajguru, Adv. Mr. Nidhiram Sharma, Adv. Ms. Sakshi Kapoor, Adv. Mr. E.C. Agrawala, AOR

J U D G M E N T

B.R. GAVAI, J.

1. The present appeal challenges the judgment and order dated 21st December 2021 passed by the Appellate Tribunal for Electricity (hereinafter referred to as 'APTEL'), in Appeal No. 231 of 2021, filed by the appellants herein, thereby challenging the order dated 8th July 2019, passed by Central Electricity Regulatory Commission (hereinafter referred to as 'CERC') in Petition No. 269/MP/2018. The APTEL has held the communication dated 19th June 2013, issued by Coal India Limited (for short, "CIL") not to be a 'Change in Law' event.

2. The facts, in brief, giving rise to the present appeal are as under:

The respondent No.1 – Adani Power (Mundra) Limited (hereinafter referred to as "AP(M)L") had set up a generating station of capacity 4620 MW (Phase I & II – 4 x 330 MW, Phase III – 2 x 660 MW and Phase IV – 3 x 660 MW) at Mundra in the State of Gujarat. AP(M)L had entered into Power Project Agreements (hereinafter referred to as "PPA") dated 7th August 2008 with Uttar Haryana Bijli Vitran Nigam Limited and Dakshin Haryana Bijli Vidyut Nigam Limited (hereinafter referred to as "Haryana Utilities"), the appellants herein, for supply of 1424 MW power from Phase IV of the generating station.

3. CERC, vide its order dated 6th February 2017, allowed the compensation towards certain 'Change in Law' events claimed by AP(M)L in Petition No. 156/MP/2014. AP(M)L has submitted that Haryana Utilities were already making payments in terms of the supplementary invoices raised by AP(M)L. Subsequently, on account of the judgment of this Court in the case of *Energy Watchdog v. Central Electricity Regulatory Commission and Others*[1], AP(M)L filed another petition being Petition No. 97/MP/2017 claiming compensation on account of change in New Coal Distribution Policy, 2007 (for short, "NCDP 2007"). Subsequently, certain interim directions were issued by CERC. Haryana Utilities, thereafter, filed I.A. No. 21 of 2018 in Petition No. 97/MP/2017, stating therein that the compensation as claimed by AP(M)L was incorrect inasmuch as AP(M)L had not

[1] (2017) 14 SCC 80

taken into consideration the benefits accruing to them on account of Inter Plant Transfer (for short, "IPT") permitted under the communication dated 19th June 2013 issued by CIL.

4. Per contra, it was claimed by AP(M)L that the Haryana Utilities unilaterally revised a huge amount from the monthly bills on the ground of IPT. It was submitted by AP(M)L that the contention of the Haryana Utilities with regard to IPT has already been rejected by CERC in its order dated 31st May 2018.

5. In this background, AP(M)L filed Petition No. 269/MP/2018 before CERC claiming the following reliefs:

"(a) Clarify and declare that the findings of this Ld. Commission at paragraph 61 of the Order of the 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; and

(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."

6. CERC framed the following issues:

"Issue No.1: Whether the Petition is maintainable under Section 142 of the Act?

Issue No. 2: Whether our finding in respect of IPT coal at Para 61 of the 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 the order dated 6.2.2017 in Petition No. 156/MP/2014?

Issue No. 3: What should be the treatment of Inter Plant Transfer of Coal, if it is considered as change in law?

Issue No. 4: What should be the basis for calculating shortfall of domestic coal?"

7. Insofar as Issue No. 1 is concerned, CERC held the dispute to be maintainable.

8. Insofar as Issue No. 2 is concerned, CERC held that in view of its order dated 6th February 2017 in Petition No. 156/MP/2014, the coal supply, under Fuel Supply Agreement (for short, "FSA") dated 9th June 2012, to other plants has to be accounted for the generation and supply of power to Haryana Utilities from Units 7, 8 and 9 of Mundra TPP for all commercial purposes. It, therefore, rejected the contention of Haryana Utilities that it was liable to pay taxes and duties only for the coal that it has actually consumed and not for IPT coal.

9. Insofar as Issue No. 3 is concerned, CERC held that the transfer of coal by AP(M)L under IPT Policy also affects other generating stations that are consuming IPT coal and other distribution companies who are also supplied power by the generating stations that have used IPT coal. Since other distribution companies were not parties to the proceedings before CERC, it did not find it appropriate to deal with the issue.

10. Insofar as Issue No. 4 is concerned, CERC, in view of the judgment of this Court in the case of *Energy Watchdog* (supra), held that the quantum of shortfall has to be calculated taking into consideration the Assured Coal Quantity (for short, "ACQ") and the quantity actually supplied by the coal companies.

11. Being aggrieved thereby, Haryana Utilities filed an appeal before APTEL.

12. Insofar as Issue No. 4 is concerned, APTEL, vide its judgment and order dated 21st December 2021, relying on the judgment of this Court in the case of *Energy Watchdog* (supra), held that 'Change in Law' compensation needs to be calculated as ACQ – actual supply.

13. Insofar as the issue with regard to communication dated 19th June 2013 being 'Change in Law' is concerned, APTEL held the same not to be 'Change in Law'. Being aggrieved thereby, the present appeal.

14. We have heard Shri Shubham Arya, learned counsel appearing on behalf of the appellants and Dr. A.M. Singhvi, learned Senior Counsel appearing on behalf of the respondents.

15. Shri Arya submitted that, considering the definition of "Law" given in the PPA, the communication dated 19th June 2013 would squarely fall under the term "Law". He submitted that in any case, CERC had refused to answer the said issue in the absence of other distributors. It is submitted that APTEL has grossly erred in holding the same not to be a 'Change in Law' event.

16. Dr. Singhvi, on the other hand, submitted that the communication dated 19th June 2013 is an interdepartmental communication and the same cannot be held to be 'Change in Law'.

17. When we heard this batch of Electricity appeals, it was agreed between all the parties that this Court should first decide Civil Appeal No. 684 of 2021 (*Maharashtra State Electricity Distribution Company Limited v. Adani Power Maharashtra Limited and Others*[2]) ["*MSEDCL v. APML and Others*", for short] and Civil Appeal No. 6927 of 2021 (*Maharashtra State Electricity Distribution Company Limited v. GMR Warora Energy Ltd. and Others*) inasmuch as three of the issues involved in all the appeals in the batch were common. It was submitted that those two appeals could be decided by deciding the three common issues. However, insofar as the other appeals are concerned, it was submitted that, in addition to the three common issues, certain additional issues were also involved and it was agreed that after those two appeals are decided, the other appeals should be heard for considering these additional issues.

18. The said three common issues are thus:

(i) Whether 'Change in Law' relief on account of NCDP 2013 should be on 'actuals' viz. as against 100% of normative coal requirement assured in terms of NCDP 2007 OR restricted to trigger levels in NCDP 2013 viz. 65%, 65%, 67% and 75% of Assured Coal Quantity (ACQ)?

(ii) Whether for computing 'Change in Law' relief, the operating parameters be considered on 'actuals' OR as per technical information submitted in bid?

(iii) Whether 'Change in Law' relief compensation is to be granted from 1st April 2013 (start of Financial Year) or 31st July 2013 (date of NCDP 2013)?

19. After extensively hearing all the learned counsel for the parties, vide the judgment and order dated 3rd March 2023 in the case of *MSEDCL v. APML and Others* (supra), this Court decided those two appeals after considering the aforesaid three issues.

20. The first issue was answered by this Court, holding that the 'Change in Law' relief for domestic coal shortfall should be on 'actuals' i.e. as against 100% of normative coal

[2] 2023 SCC OnLine SC 233

requirement assured in terms of NCDP, 2007. Insofar as the second issue is concerned, it was held that the Station Heat Rate ("SHR" for short) and Auxiliary consumption should be considered as per the Regulations or actuals, whichever is lower. The third issue was answered holding that the Start date for the 'Change in Law' event for the NCDP, 2013 is 1st April 2013.

21. As such, Issue No. 4 stands squarely covered by our judgment dated 3rd March 2023 in the case of *MSEDCL v. APML and Others* (supra) so also by the earlier judgment of this Court in the case of *Energy Watchdog* (supra).

22. Insofar as Issue Nos. 2 and 3 are concerned, we find that the said issues are interlinked and the same would depend on the decision as to whether the communication dated 19th June 2013 providing for IPT would amount to 'Change in Law' or not.

23. It will be relevant to refer to the definition of "Law" as defined under the PPA, which reads thus:

"Law means, in relation to this Agreement, all taws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code; rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the Appropriate Commission."

24. It can, thus, clearly be seen that the definition of "Law" is wide enough to include all rules, regulations, orders, notifications by the Governmental instrumentalities.

25. It will be relevant to refer to the communication dated 19th June 2013, which reads thus:

"Sub: Modification in Model FSA applicable for New Power plants in respect of

"Interplant transfer of coal"

A proposal for allowing inter power plant transfer of coal from one Power Plant to another under the modified FSA applicable for New Power Plants (for both PSU/Govt. PUs and Private PUs) was placed before the 298th CIL Board in its Meeting held on 27.5.13.

The CIL Board while approving to the proposal allowed such dispensation subject to the following conditions which stand as below after legal vetting.

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 JV company of the Purchaser. The supply of coal, shall for all commercial purpose under the FSA remain 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 IPPs both the plants must have valid long term PPAs with DISCOMS.

c) In no case the transferred quantity to a plant together with 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.

A statement showing the modification in the FSA models applicable for New Power plants (for both PSU/ Govt. PUs and Private PUs) is enclosed."

26. It can thus be seen that the said communication refers to the decision of the CIL taken in its meeting held on 27th May 2013. A perusal thereof would reveal that the transfer of coal which was not allowed hitherto, has been allowed only between the power plants owned by the purchaser or its wholly owned subsidiary. It further provides that no transfer of coal shall be allowed for a JV Company of the purchaser. It 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. It further provides that 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. It further provides that in case of IPPs, both the plants must have valid long term PPAs with DISCOMS. It further provides that in no case the transferred quantity to a plant together with 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. It further provides that transfer of coal will not be allowed to those plants who are allotted coal blocks under this arrangement. It further provides that in case of change in the ownership and no environmental clearance of the plant, this facility shall stand withdrawn.

27. It could thus be seen that the said communication reflects the decision of CIL. The CIL is an instrumentality of the Government of India. As such, we find that APTEL erred in holding the said communication dated 19th June 2013 not to amount to 'Change in Law'.

28. APTEL has held that the said communication is an administrative instruction addressed to all the subsidiaries. It will be apposite to refer to the following findings of APTEL:

"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)."

29. We find that APTEL has failed to take into consideration that CERC had not decided the said issue, inasmuch as the decision on the said issue would have affected the other two DISCOMS, i.e., MSEDCL and Rajasthan DISCOMS. It will further be relevant to note that the very same Tribunal, immediately after three months, in the case of *Rattan India*

Power Limited v. Maharashtra Electricity Regulatory Commission and Another[3], has taken a totally contrary view. In the said case, it was sought to be argued on behalf of MSEDCL that the Evacuation Facility Charge (for short,"EFC") imposed by CIL vide its circular dated 19th December 2017 did not constitute 'Change in Law'. It will be apposite to refer to the following observations:

"9. It is incorrect to argue that to be covered as a change in law event under such contractual clauses as quoted earlier, the instrument whereby the law is claimed to have undergone a change must have been published in official gazette to have the force of law. In Energy Watchdog & Ors. (supra), for illustration, even a letter of the Ministry of Power in the Government of India was accepted as an instrument having the "force of law". Similarly, in Kusum Ingots & Alloys v. Union of India (2004) 6 SCC 254 executive instructions without any statutory backing were also considered as "law". That Coal India is Government instrumentality and the notifications, circulars, etc. issued by it have a force of law under Regulation 77(3) of the Constitution of India was accepted by this tribunal in GMR Kamalanga Energy Ltd. (supra)."

30. Vide judgment of even date, in Civil Appeal Nos. 5005 of 2022 and 4089 of 2022, we have upheld the concurrent view of Maharashtra Electricity Regulatory Commission (for short,"MERC") and APTEL holding the said EFC to be 'Change in Law'.

31. In that view of the matter, we are of the opinion that the finding of APTEL that the communication dated 19th June 2013 permitting IPT is not a 'Change in Law' would not be sustainable.

32. It is to be noted that, while submitting the bid, AP(M)L must have factored in the cost of transportation of linkage coal from MCL Coal Mine, Talcher to its plant at Mundra. As per the details given in the PPA, the mode of transportation is through railway. As such, prior to the IPT being permitted, AP(M)L was bound to utilize the linkage coal from MCL Coal Mine, Talcher, only for the purpose of its original power plant, i.e., AP(M)L. Only on account of the IPT would it be in a position to utilize the coal from MCL Coal Mine, Talcher either for its plant in Maharashtra or in Rajasthan. Similarly, it will be entitled to utilize the coal linkages for its plant in Maharashtra or in Rajasthan for production of energy in its other power plants. As such, there is bound to be a variance in the cost of transportation by railways. For example, if the coal is to be transported from MCL Coal Mine, Talcher to AP(M)L, the cost of railway transportation would be higher as compared to the cost of railway transportation from MCL Coal Mine, Talcher to Tiroda TPS. We are only giving this example as an illustration. We find that the savings made in the cost of transportation, i.e., the cost which would have been incurred for transporting the coal from MCL Coal Mine, Talcher to 'X' plant minus the actual cost of transportation has to be passed on to the DISCOMS, which, in turn, has to be passed on to the end consumers. For example, if the cost of transportation per ton from MCL Coal Mine, Talcher to AP(M)L is Rs.100/- and from MCL Coal Mine, Talcher to Tiroda TPS is Rs.50/- per ton, the benefit of Rs.50/- per ton will have to be passed on.

33. We, however, find that the changes occurring on account of permitting IPT would affect AP(M)L as well as the appellants and two other DISCOMS, i.e., MSEDCL and Rajasthan DISCOMS. This was also observed by the CERC in its order dated 8th July 2019. We do not possess any expertise for working out as to what benefit any of the parties would be entitled to on account of the said 'Change in Law'. However, we are of the considered view that cost of saving in the railway transportation on account of 'Change in Law' in the light of our observation in the aforesaid paragraph needs to be worked out

[3] Appeal Nos. 118 of 2021 and 40 of 2022 dated 22nd March 2022

and passed on to the appropriate DISCOMS, which can further be passed on to the consumers. CERC, which is a body of experts, is best suited to do so.

34. We, therefore, find that the present appeal deserves to be partly allowed. Though the issue with regard to allowing 'Change in Law' compensation on the basis of ACQ – actual supply deserves to be upheld, the issue with regard to IPT not being 'Change in Law' deserves to be set aside.

35. In the result, we partly allow the appeal and pass the following order:

(i) The finding of the APTEL to the effect that the communication dated 19th June 2013 providing for IPT does not amount to 'Change in Law' is set aside;

(ii) We hold that IPT amounts to 'Change in Law'.

36. In the light of our observations made in paragraphs 32 and 33, the matter is remitted to CERC for working out the effect of the aforesaid 'Change in Law' after giving notice to MSEDCL as well as Rajasthan DISCOMS and hearing all the parties including the appellants and the respondents herein.

37. However, since the said issue has been pending since a long time, we direct CERC to decide the said issue and calculate the benefits that would be accruable to any of the parties within a period of six months from today.

38. Pending application(s), if any, shall stand disposed. No costs.