2023 INSC 400

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 677-678 OF 2021

MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED ...APPELLANT(S)

VERSUS

ADANI POWER MAHARASHTRA LIMITED AND ANOTHER ...RESPONDENT(S)

J U D G M E N T

B.R. GAVAI, J.

1. The present appeals challenge the judgment and order dated 28th September 2020 passed by the Appellate Tribunal for Electricity (hereinafter referred to as 'APTEL'), in cross appeals being Appeal No. 116 of 2019, filed by Maharashtra State Electricity Distribution Company Limited (hereinafter referred to as 'MSEDCL'), the appellant herein, and Appeal No. 155 of 2019, filed by ADANI Power Maharashtra Limited (hereinafter referred to as 'APML'), respondent No. 1 herein, thereby challenging the order dated 7th February 2019,

passed by Maharashtra Electricity Regulatory Commission (hereinafter referred to as 'MERC').

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

APML and MSEDCL had entered into four long term Power Project Agreements (hereinafter referred to as 'PPA') dated (a) 8th September, 2008 for 1320 MW (hereinafter referred to as '1320 MW PPA'); (b) 31st March, 2010 for 1200 MW (hereinafter referred to as '1200 MW PPA'); (c) 9th August, 2010 for 120 MW (hereinafter referred to as '120 MW PPA') and (d)16th February, 2013 for 440 MW (hereinafter referred to as '440 MW PPA'), pursuant to the competitive bidding process conducted by MSEDCL.

3. APML, being aggrieved by the Change in Law on account of the Ministry of Coal bringing into force the New Coal Distribution Policy, 2013 (hereinafter referred to as 'NCDP, 2013'), which revised the arrangements prescribed under New Coal Distribution Policy, 2007 (hereinafter referred to as 'NCDP, 2007') for supply of coal, had filed a petition being Case No. 189 of 2013, seeking compensation

in Tariff on account of Change in Law under the PPAs before MERC. Finally, in the light of the judgment of this Court in the case of ***Energy Watchdog v. Central Electricity Regulatory Commission and Others***[1], the said petition, after being remanded by the APTEL, was heard afresh by the MERC.

4. Vide order dated 7th March, 2018, the MERC allowed the claims of APML on account of Change in Law due to changes brought about by NCDP, 2013. APML, thereafter, preferred a review petition, being Review Petition No. 167 of 2018 seeking extension of Change in Law relief for domestic coal shortfall beyond March, 2017 on account of changes introduced by the Scheme for Harnessing and Allocating Koyala (Coal) Transparently in India (hereinafter referred to as 'SHAKTI Policy') which had been released by the Ministry of Power on 22nd May, 2017. As per Clause 6.1 of the SHAKTI Policy, the Appropriate Commission was required to consider the cost of imported/market based e-auction coal procured for making up the shortfall in the domestic coal for pass-through.

1 **(2017) 14 SCC 80**

5. The MERC dismissed the said review petition. However, liberty was granted to APML to file a fresh petition to seek extension of Change in Law relief for domestic coal shortfall beyond March, 2017 in view of the introduction of the SHAKTI Policy. Subsequently, APML filed a fresh petition, being Case No. 290 of 2018, before the MERC seeking relief in support of Change of Law under the respective PPAs for non-availability/short supply of domestic coal under SHAKTI Policy after March, 2017.

6. The MERC, vide its order dated 7th February 2019, allowed the petition and granted relief for Change in Law due to the promulgation of SHAKTI Policy. However, the relief was directed to be computed on the same methodology and parameters as approved by the MERC vide its order dated 7th March, 2018. Cross appeals were filed before the APTEL by APML and MSEDCL against the aforesaid order.

7. The learned APTEL framed the following five issues for adjudication :

> "**Issue No.1:-** Whether introduction SHAKTI Policy does not amount to Change in Law under the PPAs entered into between APML and MSEDCL and

whether APML has not provided notice of such Change in Law to the Respondent MSEDCL.

Issue No.2:- Whether the MERC is correct in holding that for the purpose of Change in Law compensation, shortfall in domestic coal shall be limited to a maximum of 25% of ACQ after the introduction of SHAKTI Policy.

Issue No.3:- (a) whether the MERC was correct in holding that the SHR submitted by the Appellant in its bid or SHR and Auxiliary Consumption norms specified for new generating stations under the MYT Regulations, 2011, whichever is superior shall form the basis for computing Change in Law compensation under the PPAs?

(b) Whether the MERC was correct in holding that the reference GCV of domestic coal supplied by CIL shall be the middle value of GCV range of assured coal grade in LoA/PSA/MoU and not the GCV as received?

Issue No.4:- Whether the MERC was justified in directing APML to provide advance intimation of impact on energy charge by using alternate coal for the purpose of Merit Order Despatch?

Issue No.5:- Whether the Respondent MSEDCL is justified in contesting APML's entitlement to Carrying Cost."

8. The APTEL, vide judgment and order dated 28th September 2020, answered the issues as under:

"15.1 **Issue No.1:-**We hold that the introduction of SHAKTI POLICY amounts to change in law and all the ingredients of change in law are:, duly met under the respective PPAs. The impugned order is therefore affirmed on this issue.

15.2 **Issue No.2:-** We hold that findings in the impugned order relating to the issue of restricting the quantum of shortfall in domestic coal to a maximum of 25% are against the basic principles of restitution I under the change in law provisions of the PPAs.

15.3 **Issue No.3:-** In line with our judgment dated 14.09.2020 in Appeal No.182 of 2019, we hold that the change in law compensation shall be calculated based on the SHR specified in the MERC MYT Regulations, 2011 or the actual SHR whichever is lower and actual GCV of coal as received as the plant site.

15.4 **Issue No.4:-** We find that the directions issued by the State Commission regarding advance intimation requirement is not consistent with normal Rules of MOD preparation and also does not provide a level playing field for IPPs.

15.5 **Issue No.5:-** We find that allowance of carrying cost is a settled position of law and the State Commission has already allowed the same to the Appellant, APML."

9. Consequently, the APTEL dismissed the appeal preferred by MSEDCL and allowed the appeal preferred by APML. Hence, MSEDCL has preferred the present appeals.

10. We have heard Shri Gopal Jain, learned Senior Counsel appearing on behalf of the appellant-MSEDCL and Dr.

Abhishek Manu Singhvi, learned Senior Counsel appearing on behalf of respondent No. 1–APML.

11. Shri Jain submitted that the SHAKTI Policy (Part-B) restores the position as covered by NCDP 2007. He, therefore, submits that, since under the SHAKTI Policy there is 100% assured coal supply, then there is no question of APML being compensated on account of shortfall in coal supply. He submits that SHAKTI Policy is in continuation of NCDP 2007. However, this has not been taken into consideration by the learned APTEL.

12. Shri Jain further submits that both APTEL and MERC have failed to take into consideration that APML had not complied with the condition of serving a mandatory notice to MSEDCL for Change in Law under Article 13.3.2 of the 1320 MW PPA.

13. Dr. Singhvi, on the contrary, submits that undisputedly, SHAKTI Policy would amount to Change in Law. He submits that there is a concurrent finding of fact by both APTEL and MERC that SHAKTI Policy is a Change in Law event.

14. Dr. Singhvi further submits that there is also a concurrent finding by APTEL and MERC on the issue of mandatory notice. He submits that unless these findings are found to be perverse or are based on extraneous consideration, it will not be permissible for this Court to interfere with the same.

15. When the batch of appeals was being heard, 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 (MSEDCL) v. ADANI Power Maharashtra Limited (APML) and Others***[2]) and Civil Appeal No. 6927 of 2021 (***MSEDCL v. GMR Warora Energy Ltd. and Others***) inasmuch as three of the issues involved in all the appeals 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, in addition to the three common issues, certain additional issues were also involved.

16. The said three common issues are thus:

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2 **2023 SCC OnLine 233**

(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 to be granted from 1st April 2013 (start of Financial Year) or 31st July 2013 (date of NCDP 2013)?

17. 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.

18. 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 requirement assured in terms of NCDP, 2007. Insofar as the

second issue is concerned, it was held that the Station Heat Rate (SHR) and Auxiliary consumption should be considered as per the Regulations or actual, whichever is lower. The third issue was answered by holding that the Start date for the Change in Law event for the NCDP, 2013 is 1st April 2013.

19. Insofar as Issue Nos. 2 and 3 as framed by the APTEL are concerned, the same stand squarely covered by the judgment of this Court in the case of ***MSEDCL v. APML and Others*** (supra). The remaining three issues, which are required to be considered in the present appeals, are thus:

> "**Issue No.1:-** Whether introduction SHAKTI Policy does not amount to Change in Law under the PPAs entered into between APML and MSEDCL and whether APML has not provided notice of such Change in Law to the Respondent MSEDCL.
>
> **Issue No. 2:-** .....
>
> **Issue No. 3:-** .....
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> **Issue No. 4:-** Whether the MERC was justified in directing APML to provide advance intimation of impact on energy charge by using alternate coal for the purpose of Merit Order Despatch?
>
> **Issue No. 5:-** Whether the Respondent MSEDCL is justified in contesting APML's entitlement to Carrying cost."

20. We will first consider the question as to whether the SHAKTI Policy would amount to Change in Law.

21. It will be apposite to refer to some relevant parts of the judgment of this Court in the case of ***Energy Watchdog*** (supra), which read thus:

> "**50.** ……Even otherwise, from a reading of Clause 13, it is clear that Clause 13.1.1 is in four different parts. The first part speaks of enacted laws; the second speaks of interpretation of such laws by courts or other instrumentalities; the third speaks of changes in consents, approvals or licences which result in change in cost of the business of selling electricity; and the fourth refers to any change in the declared law of the land for the project, cost of implementation of resettlement and rehabilitation or cost of implementing the environmental management plan. "Competent court" in Clause 13.1.2 is defined as meaning only the judicial system of India.
> ……
> **56.** However, insofar as the applicability of Clause 13 to a change in Indian law is concerned, the respondents are on firm ground. It will be seen that under Clause 13.1.1 if there is a change in any consent, approval or licence available or obtained for the project, otherwise than for the default of the seller, which results in any change in any cost of the business of selling electricity, then the said seller will be governed under Clause 13.1.1. It is clear from a reading of the Resolution dated 21-6-2013, which resulted in the letter of 31-7-2013, issued by the Ministry of Power, that the earlier coal distribution policy contained in the letter dated 18-3-2007 stands modified as the Government has now approved a revised arrangement for supply of coal.

> It has been decided that, seeing the overall domestic availability and the likely requirement of power projects, the power projects will only be entitled to a certain percentage of what was earlier allowable……"

22. It can thus be seen that this Court has held that if there is a Change in any consent, approval or licence available or obtained for the project, otherwise than for the default of the seller, which results in any change in any cost of the business of selling electricity, then the said seller will be governed under Clause 13.1.1 of the PPA. As already discussed hereinabove, this Court has consistently held that modification to NCDP 2007 by the communication dated 31st July 2013 would amount to Change in Law and the generating companies would be entitled to compensation on account of such Change in Law. Undisputedly, SHAKTI Policy also reduces the ACQ as was assured under the 2007 NCDP. Consequently, SHAKTI Policy will also have to be held to be Change in Law.

23. A three-Judges Bench of this Court in the case of ***Jaipur Vidyut Vitaran Nigam Limited and Others v.***

ADANI Power Rajasthan Limited and Another[3], has also considered the effect of SHAKTI Policy and held that the seller would be entitled to the benefit occurring on account of SHAKTI Policy. As such, the contention that SHAKTI Policy does not amount to Change in Law is without substance.

24. Following the judgments in the case of ***Energy Watchdog*** (supra) and ***ADANI Power Rajasthan Limited*** (supra), this Court, in the case of ***MSEDCL v. APML and Others*** (supra), observed thus:

> "**130.** The MoP, thereafter, addressed a communication dated 31st July 2013 to the Secretary, CERC specifically pointing out the decision of the CCEA to the effect that the higher cost of imported coal was to be considered for pass-through as per the modalities suggested by CERC. The communication states that, as per the decision of the Government, the higher cost of import/market based e-auction coal will have to be considered for being made a pass-through on a case to case basis by CERC/SERC to the extent of shortfall in the quantity indicated in the LoA/FSA.
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> **131.** The Tariff Policy dated 28th January 2016 issued by the MoP in paragraph 6.1 also specifically notes this position and states that, in case of reduced quantity of domestic coal supplied by CIL vis-à-vis the assured quantity or quantity indicated in LoA/FSA, the cost of imported/market based e-auction coal procured for making up the shortfall

3 **2020 SCC OnLine SC 697**

shall be considered for being made a pass-through by the Appropriate Commission.

132. Undisputedly, in the case of *Energy Watchdog* (supra) as well as in *Adani Rajasthan case* (supra) this Court has held that on account of the Change in Law, the generating companies were entitled to compensation so as to restore the party to the same economic position as if such Change in Law had not occurred. Had the Change in Law not occurred, the generating companies would have been entitled to the supply as assured by the CIL/Coal Companies under the FSA.

133. It is contended by the DISCOMS that in the case of *Energy Watchdog* (supra), this Court has specifically held that the doctrine of *force majeure* was not applicable if there was an unexpected rise in the price of coal and, as such, it will not absolve the generating companies from performing their part of the contract. It is submitted that when the bidders submitted their bids, this was a risk they knowingly took. We find the said submission to be without substance. The generators are not claiming compensation on the basis of rise in price of coal or on the ground of *force majeure.* Their claims, in fact, are on the basis of the Change in Law, which this Court, in the case of *Energy Watchdog* (supra) as well as in *Adani Rajasthan case* (supra), has upheld on the ground of Change in Law.

134. The contention of the DISCOMS that the *Adani Rajasthan case* (supra) is not applicable to the facts of the present case inasmuch as in *Adani Rajasthan case* (supra), the State of Rajasthan had assured 100% coal supply and that it was not a case of FSA, is, in our considered view, without substance. In the present case also, the NCDP 2007 had assured 100% fuel/coal supply of the normative value.

> **135.** The restitutionary principle has been stated by this Court in the case of *Uttar Haryana Bijli Vitran Nigam Limited (UHBVNL)* (supra) thus:
>
> > "**10.** 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. ……""

25. As such the restitution principle, as has been consistently applied by this Court on account of Change in Law, will also be applicable on account of change occurring due to the introduction of SHAKTI Policy.

26. The contention of the appellant that the SHAKTI Policy brings back the position of NCDP 2007 and assures 100% coal supply, is not factually correct. A perusal of the SHAKTI Policy would reveal that SHAKTI Policy assures 70% of ACQ as against 100% in 2007 NCDP.

27. In that view of the matter, we find that the contention that SHAKTI Policy restores the position of 2007 NCDP is factually incorrect.

28. Insofar as Change in Law Notice is concerned, the APTEL, in its judgment and order, observed thus:

> "**13.7** We have considered the submissions made by APML vis-a-vis the findings in the impugned order. It is relevant to note that no submission to the contrary has been advanced by the Respondent, MSEDCL on this issue. In the Impugned Order, MERC appears to have expanded the intent of Change in Law notice as a means of intimation to the buyer of power that on account of intended use of alternate coal, the cost of power is likely to increase and then the distribution licensee may decide to not schedule such costly power. Firstly, no such intent can be deciphered from the provisions of the PPA which require a change in law notice to be given to the procurers. MERC has not deliberated upon how this regime will impact the implementation of change in law provision in other scenarios. For example, if there is a change in rates of taxes or duties, which entitles the generator to seek change in law relief, can it still be said that the procurer should be intimated about the impact of such changes in taxes or duties to enable them to decide whether to schedule power or not. In our view, this does not appear to be the intent of change in law notice to the procurers under the PPAs. This is for the simple reason that whether there will be impact on MSEDCL would be known only after MERC decides the change in law claim. Until such time notice given by sellers merely to intimate the occurrence of change in law event, in our view, will

not influence decisions related to scheduling of power on merit order principles. In any event in far as preparation of MOD stack is concerned, the normal practice is to prepare MOD on the basis of the energy charge bill of (n-1)th or (n-2)th month is taken into account in the order of precedence. Therefore, the impact of a regular or consistent usage of alternate coal will in anyway be reflected in the MOD stack, albeit with the lag of one or two months."

29. The aforesaid finding of APTEL cannot be said to be perverse or based on extraneous consideration or in contravention of any of the statutory provisions.

30. That leaves us with the issue with regard to Carrying Cost.

31. In the case of ***ADANI Power Limited v. Central Electricity Regulatory Commission***[4], the CERC had come to a conclusion that there was no provision in the PPA for payment of Carrying Cost for the period from the date of the Change in Law event till the date of approval by the Commission. As such, the Commission had rejected the prayer of the generating company to grant carrying Cost on restitutionary principles from the date of Change in Law till

4 **2018 SCC OnLine APTEL 5**

the date of decision. The APTEL, while reversing the judgment of the CERC and allowing the Carrying Cost, had observed thus:

> "**29.** To our mind such adjustment in the tariff is nothing less then re-determination of the existing tariff.
>
> x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of 'restitution' i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon'ble Supreme Court in case of *Indian Council for Enviro-Legal Action* v. *Union of India*, we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA."

32. The same came to be challenged before this Court in the case of ***Uttar Haryana Bijli Vitran Nigam Limited (UHBVNL) and another v. Adani Power Limited and***

Others[5]. The court rejected the same and upheld the order of APTEL. As such, the contention in this regard needs to be rejected.

33. This Court, in the case of ***MSEDCL v. APML and Others*** (supra), after considering the relevant provisions under the Electricity Act, 2003 with regard to appointment, qualifications and Members of the CEA, CERC and the learned APTEL, held that these bodies are bodies consisting of experts in the field. After considering various judgments on the issue, this Court observed thus:

> "**123.** Recently, the Constitution Bench of this Court in the case of *Vivek Narayan Sharma* v. *Union of India* has held that the Courts should be slow in interfering with the decisions taken by the experts in the field and unless it is found that the expert bodies have failed to take into consideration the mandatory statutory provisions or the decisions taken are based on extraneous considerations or they are *ex facie* arbitrary and illegal, it will not be appropriate for this Court to substitute its views with that of the expert bodies."

34. In our view, the view taken by the APTEL cannot be said to be a view taken in ignorance of the mandatory statutory

5 (2019) 5 SCC 325

provisions nor can it be said that it is based on extraneous considerations. The view also cannot be said to be ex-facie arbitrary or illegal. As such, in our view, no interference would be warranted in the present appeals.

35. In the result, the appeals are dismissed. Pending application(s), if any, shall stand disposed of. No costs.

.....J.
[B.R. GAVAI]

.....J.
[VIKRAM NATH]

NEW DELHI;
APRIL 20, 2023.