REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.4143 OF 2020

UTTAR HARYANA BIJLI VITRAN NIGAM LTD. & ANR. **...APPELLANT (S)**

VERSUS

ADANI POWER (MUNDRA) LIMITED & ORS. **...RESPONDENT (S)**

J U D G M E N T

B.R. GAVAI, J.

1. The appellants challenge the judgment and order passed by the Appellate Tribunal for Electricity, New Delhi (hereinafter referred to as "APTEL") dated 3rd November 2020, thereby dismissing the appeal filed by them and maintaining the judgment and order dated 31st May 2018 passed by the Central Electricity Regulatory Commission ("CERC" for short) in Petition No. 97/MP/2017.

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

3. Uttar Haryana Bijli Vitran Nigam Ltd. and Dakshin Haryana Bijli Vitran Nigam Ltd. (hereinafter referred to as "Haryana Utilities"/"Appellants") are distribution licensees undertaking the distribution and retail supply of electricity to consumers in the State of Haryana. Haryana Utilities had entered into two Power Purchase Agreements ("PPAs" for short) on 7th August 2008 with Adani Power Mundra Limited (hereinafter referred to as "AP(M)L") for procurement of contracted capacity of 1424 MW from generating units 7, 8 and 9 established by AP(M)L at Mundra in the State of Gujarat.

4. The PPAs were entered into pursuant to a tariff based Competitive Bidding Process initiated by the Haryana Utilities under the provisions of Section 63 of the Electricity Act, 2003, as per the Standard Bidding Guidelines notified by the Central Government.

5. AP(M)L had filed Petition No. 155/MP/2012 on 5th July 2012 before the CERC seeking, *inter alia*, relief of increase in tariff on various grounds. One of the grounds was that the Indonesian Regulations, promulgated by the Government of

Indonesia, providing for the application of benchmark price for export of coal from Indonesia resulted in higher price of coal resulting in higher cost of generation of power.

6. AP(M)L had also claimed *Force Majeure* Event within the scope of Article 12 and Change in Law within the scope of Article 13 of the PPAs.

7. The orders dated 2nd April 2013 and 21st February 2014 passed by the CERC in the said Petition No.155/MP/2012 were challenged before the learned APTEL by way of a batch of appeals, the lead being Appeal No. 100 of 2013. The order dated 7th April 2016 passed by the learned APTEL in Appeal No. 100 of 2013 and the batch of appeals were challenged before this Court in the case of ***Energy Watchdog v. Central Electricity Regulatory Commission and others***[1]. This Court disposed of the said appeals on 11th April 2017 in terms of the following directions:

> "**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

1 **(2017) 14 SCC 80**

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

58. .....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."

8. It may be mentioned that this Court, in the case of ***Energy Watchdog*** (supra), specifically rejected the claim that the increase in price of coal due to change in Indonesian Regulations would also amount to Change in Law. This Court held that only Change in Law in India would entitle the Generator to the benefit of restitution on account of such Change in Law.

9. Pursuant to the orders passed by this Court in the case of ***Energy Watchdog*** (supra), AP(M)L filed Petition No.97/MP/2017 before the CERC. The CERC, vide order dated 31st May, 2018, allowed the Petition and directed the working out of the relief based on the formulation given in Paragraph 46 of its judgment for the period from 1st April 2013 to 31st March 2017. Subsequently, a Review Petition bearing No.24/RP/2018 also came to be filed. The same was rejected by the CERC vide order dated 3rd December 2018. Being aggrieved thereby, the appellants preferred appeal before the learned APTEL.

10. The learned APTEL framed the following four issues for consideration:

"**Issue No.1:-**

Whether the Central Commission was justified in holding that Adani Power's bid was based entirely on domestic coal availability and hence entitled to Change in Law relief on account of domestic coal shortfall?

Issue No.2:-

Whether shortfall in domestic coal was due to Change in Law and compensation should be limited to the difference between 100% of ACQ and 65%, 65%, 67% and 75% of ACQ as specified in NCDP 2013?

Issue No.3:-

Whether the start date of Change in Law compensation allowed by the Central Commission amounts to retrospective operation of Ministry of Power's letter dated 31.07.2013?

Issue No.4:-

Whether the Central Commission erred in ignoring the methodology for computation of Change in Law compensation laid down in its earlier Order in Petition No. 79/MP/2013 - GMR Kamalanga Energy Ltd. & Anr.

vs. DHBVNL &Ors. ("GMR Case")?

11. After hearing the learned counsel for the parties, the learned APTEL held all the issues in favour of the respondent No.1-Generator and dismissed the appeal. Being aggrieved thereby, the appellants have filed the present appeal.

12. We have heard Shri M.G. Ramachandran, learned Senior Counsel appearing on behalf of the appellants and Dr. A.M. Singhvi, learned Senior Counsel appearing on behalf of the respondent No.1- AP(M)L.

13. Shri Ramachandran submits that the CERC as well as the learned APTEL have grossly erred in granting Change in Law relief for the shortfall in the availability of 100% coal. He submits that AP(M)L's bid and the PPA were admittedly premised both on domestic coal and imported coal in the ratio of 70:30. As such, the relief could be granted only insofar as the shortfall in the 70% domestic coal is concerned. He submits that AP(M)L has submitted the bid on the premise that 30% of the coal would be imported, while 70% of the coal would

be procured indigenously. He submits that the effect of the orders passed by the CERC and the learned APTEL is that AP(M)L has been granted benefit on the consideration that its bid was premised on 100% domestic coal.

14. Shri Ramachandran further submits that a perusal of the various pleadings of AP(M)L would clearly reveal that AP(M)L's bid was premised on domestic and imported coal in the proportion of 70:30. However, all these documents have been ignored by the learned APTEL. Shri Ramachandran submits that the documents placed on record would reveal that AP(M)L had represented that it will use imported coal for generation of power. He submits that the Executive Summary of the bid submitted by AP(M)L would reveal that AP(M)L had represented therein that the strategic advantage of the Power Plant was its proximity to Mundra Port, where coal is being imported. Learned counsel submits that in view of the pleadings of AP(M)L, it was clear that it was its responsibility to procure 30% imported coal. He, therefore, submits that granting of relief for shortfall of 30% imported coal is nothing else but a perversity.

15. Shri Ramachandran further submits that the methodology of computation of compensation on account of the Change in Law event has also been erroneously applied by the CERC and affirmed by the learned APTEL. He submits that the methodology that ought to have been applied was the difference between landed cost of alternate coal on the one part and the prevalent landed cost of domestic coal or quoted energy charges, whichever was higher, on the other part. He submits that had there been no Change in Law and AP(M)L had received the entire quantum of domestic coal, it would have had to bear the prevalent price of landed domestic coal on its own, irrespective of whether such cost is below or above the quoted energy charges in the bid. He submits that if such landed cost of domestic coal is higher than the quoted energy charges, AP(M)L was not entitled to claim the difference between the landed cost of domestic coal and the quoted energy charges.

16. Shri Ramachandran further submits that the learned APTEL is wrong in proceeding on the basis that there was no objection by the appellants before the CERC on the

methodology for computation of Change in Law compensation laid down in its order in Petition No. 79/MP/2013-***GMR Kamalanga Energy Ltd. & Anr. v. DHBVNL & Ors.*** (hereinafter referred to as "***GMR Case***")

17. Shri Ramachandran further submitted that the appellants have no objection for giving benefit on account of Change in Law for shortfall in 70% of coal to be procured indigenously.

18. Dr. A.M. Singhvi, on the contrary, submits that the bid submitted by AP(M)L was on the basis of National Coal Distribution Policy, 2007 (for short, "NCDP 2007"). He submits that there was no bifurcation in the bid with regard to 70% domestic coal and 30% imported coal. Learned Senior Counsel submits that the cut-off date for Change in Law claim would be 17th November 2007, i.e. minus 7 days from the last date for submission of the bid, i.e. 24th November 2007. It is submitted that even in the PPAs signed with Haryana Utilities on 7th August 2008, there is no bifurcation of domestic and imported coal. He submits that though the Standing Linkage Committee (Long-Term) (hereinafter referred to as "SLC (LT)") has

considered AP(M)L's application for 100% coal of its total capacity, it has granted linkage only for 70% of 1980 MW, i.e. 1386 MW only. He submitted that linkage of balance 30% was deferred to the future.

19. Dr. Singhvi further submitted that the SLC (LT) is a statutory body and its decision would amount to Change in Law. In this respect, he relies on the judgment of this Court in the case of ***Ashoka Smokeless Coal India (P) Ltd. and others v. Union of India and others***[2]

20. 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***[3]) ["***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

2 **(2007) 2 SCC 640**

3 **2023 SCC OnLine SC 233**

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.

21. 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)?

22. 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.

23. 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" 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.

24. As such, Issue Nos. 2 and 3, which were framed by the learned APTEL in the impugned judgment and order dated 3rd November 2020 stand fully covered by the judgment of this Court in the case of ***MSEDCL v. APML and Others*** (supra). The remaining two issues that are required to be considered in the present appeal are thus:

"**Issue No.1:-** [as framed by the learned APTEL]	Whether the Central Commission was justified in holding that Adani Power's bid was based entirely on domestic coal availability and hence entitled to Change in Law relief on account of domestic coal shortfall?
Issue No.4:- [as framed by the learned APTEL]	Whether the Central Commission erred in ignoring the methodology for computation of Change in Law compensation laid down in its earlier Order in Petition No. 79/MP/2013 - GMR Kamalanga Energy Ltd. & Anr. vs. DHBVNL &Ors. ("GMR Case")?

25. Before we proceed to consider the aforesaid two issues, we may note that the present appeal arises out of the concurrent orders passed by the CERC and the learned APTEL.

26. 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 constitution of various expert bodies like 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."

27. Though the present appeal arises out of the concurrent orders passed by CERC as well as APTEL, in view of the submissions made, we will proceed to consider the rival submissions.

28. Insofar as the first issue with regard to the bifurcation of 70% domestic and 30% imported coal is concerned, we have examined the documents placed on record by the parties.

29. None of the documents placed on record would reveal that a representation was given by AP(M)L that its bid is based on 70% domestic and 30% imported coal. Insofar as the document on which Shri Ramachandran has relied i.e. the Executive Summary of the bid is concerned, the same reads thus:

> "Adani Enterprises Ltd., the promoter of APL, is the largest coal importing company of the country. The strategic advantage of the Power Plant is its proximity to MUNDRA PORT, where coal is being imported. Mundra Port possesses World Class Coal handling facilities with 17 meter deep draft permitting capsize vessels to berth alongside."

30. It could thus be seen that what has been stated in the Executive Summary by AP(M)L is that its Power Plant had a

strategic advantage inasmuch as it had proximity to Mundra Port. It further states that Mundra Port possesses World Class Coal handling facilities with 17 meter deep draft permitting capsize vessels to berth alongside. By the said document, it has proposed to supply 1425 MW to Haryana Power Generation Corporation Limited (HPGCL) from 1980 MW (3 x 660 MW) Phase IV extension of Mundra Project. The representation given is that it will use either imported or indigenous coal.

31. If the argument of the appellants is to be accepted that at the time of bid there was no assurance of domestic coal supply, then the contention of the appellants that AP(M)L is entitled to shortfall of 70% of the coal itself is contradictory.

32. In any case, even on facts, it is to be noted that the contention is without substance. AP(M)L has offered to supply 1425 MW of power from its Phase IV extension of Mundra Project, having a capacity of 1980 MW. The PPA entered into between Haryana Utilities and AP(M)L is for 1424 MW.

33. The SLC(LT), in its meeting dated 12th November 2008, based on the recommendation of the Central Electricity

Authority ("CEA" for short), Ministry of Power ("MoP" for short) had authorized the issuance of LoA for 1386 MW i.e. 70% of 1980 MW installed capacity of Phase IV extension of the Mundra Project. This was done in accordance with the provisions of the NCDP 2007. Insofar as the remaining capacity is concerned, the decision was deferred to be taken by the SLC (LT) in the future, based on the recommendation of MoP and other relevant factors.

34. It could thus be seen that AP(M)L would be entitled to benefit on account of the Change in Law if there was any shortfall of 70% of the domestic coal as was decided to be allotted by the SLC (LT) in its meeting dated 12th November 2008, culminating in the Ministry of Coal (for short, "MoC") issuing a LoA dated 25th June 2009 and the Fuel Supply Agreement (for short, "FSA") being signed by AP(M)L with CIL on 9th June 2012.

35. Undisputedly, the claim of AP(M)L is with regard to shortfall in the assured quantity of 70%, and not above that.

36. From the order passed by the learned APTEL, it is clear that it has been the consistent stand of the appellants that AP(M)L was in a position to generate and supply contracted capacity of 1424 MW out of the fuel linkage arising out of the FSA dated 9th June 2012 with Mahanadi Coal Field Limited ("MCL" for short). It has been its stand that AP(M)L should use the entire domestic coal availability towards the contracted capacity of the appellants first, and then use the imported coal for the deficit to reach the targeted PLF. It has further been its stand that the entire domestic coal available should be accounted towards 1424 MW contracted to Haryana Utilities.

37. In its reply dated 31st July 2017, Haryana Utilities have categorically stated thus:

> "Thus the actual coal received from MCL is required to be considered towards power supplied under Haryana PPAs for the purpose of relief under force majeure."

38. In its I.A. No.12 of 2018 dated 4th March 2018 in Petition No.97/MP/2017, the Haryana Utilities have reiterated thus:

> "It is submitted that the entire quantum of domestic coal available from MCL under the FSA dated 9.6.2012 was to be exclusively used for generation and supply of electricity to the Haryana Utilities under the PPA dated 7.8.2008.

39. It is further to be noted that the learned APTEL had, during the course of the hearing, put a pertinent query to the learned counsel appearing for Haryana Utilities, as to whether the entire actual coal received from MCL was used towards the power supplied under the Haryana PPAs. To this query, it was replied thus:

> "During the hearing, Mr. Ramachandran admitted that Adani Power has been using entire actual coal received from MCL towards the power supplied under the Haryana PPAs"

40. In view of this factual position that the entire domestic coal linkage came to be utilized for supplying power to Haryana Utilities, it is unjust, in our opinion, on the part of Haryana Utilities to say that 70% of the installed capacity should be further bifurcated and the Change in Law benefit should be restricted only to 70% of the 70% of the installed capacity which was allotted by the SLC (LT).

41. Even according to Haryana Utilities, the entire coal covered under FSA was required to be utilized for generating power to be supplied to it as per the Memorandum of Understanding ("MoU" for short). Therefore, denial of the benefit of shortfall of the coal assured under FSA, in our view, would be contrary to the restitutionary principle, as held by this Court in the cases of ***Energy Watchdog*** (supra) and ***Jaipur Vidyut Vitaran Nigam Ltd. and others v. Adani Power Rajasthan Limited and another***[4].

42. In any case, the learned APTEL has clarified that AP(M)L was neither claiming nor was entitled to claim any Change in Law compensation beyond the one which was covered by linkage coal, i.e. 1386 MW.

43. The other limb of argument in this regard is that AP(M)L had MoUs with foreign companies for import of coal.

44. To a specific query by the learned APTEL, it was fairly conceded by the learned counsel for Haryana Utilities that the MoUs were general in nature and not specific for Phase IV

4 **2020 SCC Online SC 697**

Mundra Power Plant. As such, the finding of the learned APTEL that the MoUs annexed with the bid were only to show its competence to participate in the bid, and that it cannot be stretched to hold that the bidder was to procure imported coal to the extent of 30% for the project, cannot be said to be perverse.

45. In the case of ***MSEDCL v. APML and Others*** (supra), this Court has elaborately referred to the earlier judgments of this Court and observed thus:

> "**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."

46. We are, therefore, of the considered view that no error could be found with the concurrent findings that AP(M)L was entitled to Change in Law relief for 100% of the contracted

capacity i.e. 1386 MW, which is 70% of the installed capacity of 1980 MW of the Phase IV extension of Mundra Project. In other words, the finding of the CERC and the learned APTEL is to the effect that AP(M)L would not be entitled to any benefit of Change in Law beyond 70% of the installed capacity i.e. 1386 MW. The said findings cannot be said to not be based on the material on record, or based on extraneous considerations.

47. We are now left with the second issue with regard to methodology.

48. The grievance of Haryana Utilities is that the methodology for granting benefit on account of the Change in Law adopted by the CERC and affirmed by the learned APTEL is contrary to the one which was previously arrived at in the earlier cases of GMR, DB Power etc.

49. Perusal of the order passed by the learned APTEL would reveal that AP(M)L had proposed a methodology based on the methodology approved by the CERC in the ***GMR Kamalanga Energy Limited and Another v. Dakshin Haryana Bijli***

Vitran Nigam Limited and Others[5] considering the quoted tariff under the PPAs as the base.

50. The learned APTEL had referred to the Record of Proceedings of the CERC dated 10th August, 2017, which read thus:

> "3. In response to the Commission's query as to whether the methodology adopted by the Petitioner in the light of the methodology given in GMR case is acceptable to the Haryana Utilities, learned counsel replied in the positive."

51. The learned APTEL had also referred to the order of the CERC dated 28th September 2017 in I.A. No.57 of 2017 in Petition No.97/MP/2017, which reads thus:

> "7…… Haryana Utilities who is the only respondent has not objected to the calculation made by the Applicant."

52. The learned APTEL had also referred to the order dated 3rd December 2018 passed by the CERC in Review Petition bearing No.24/RP/2018, which reads thus:

> "25… It is apparent from the above that the Commission, after due consideration of the submissions of the Adani Power

5 **Petition No. 79/MP/2013 dated 03.02.2016**

> and Prayas had consciously decided on the methodology for computation of relief due to shortage of domestic coal under change in law for the period from 1.4.2013 to 31.3.2017 in Para 46 of the impugned order. The Review Petitioners had not suggested any methodology of calculation of the relief due to shortage of domestic coal. On the other hand, the Review Petitioners in their reply dated 28.7.2017 in the Petition No. 97/MP/2017 had stated that "the reliance to the decision of GMR is wholly in appropriate". The Review Petitioners are now suggesting an alternative formula for computation of the relief under change in law. As already reiterated in the earlier part of the order, the review cannot be used for substitution of a view already taken with a new view. Therefore, the review on the ground is not maintainable."

53. We find that Haryana Utilities are indulging into approbation and reprobation. They cannot be permitted to blow hot and cold at the same time. After accepting before the CERC that they would adopt the methodology as given in the case of ***GMR Kamalanga Energy Limited*** (supra), it would not be appropriate, in our view, on the part of the appellants, which are, after all, instrumentalities of the State, to change its stand after final orders are passed by the CERC.

54. In the case of ***MSEDCL v. APML and Others*** (supra), this Court observed thus:

> "**150.** In spite of this legal position and the stand taken by the Union of India, the DISCOMS are taking a stand which is contrary to the stand of the Union of India. In *Energy Watchdog* (supra), it was also sought to be urged by DISCOMS that even on account of Change in Law, adjustments would not be permissible, which contention was outrightly rejected. We have come across a number of matters wherein concurrent orders passed by the Regulatory Body and the Appellate Forum are assailed. Such a litigation would, in fact, efface the purpose of the Electricity Act. As already discussed herein above, one of the major reasons for the enactment of the Electricity Act was the deterioration in performance of the State Electricity Boards."

55. In the present case also, we find that the concurrent findings of fact recorded by the two expert bodies could have been interfered with only if they failed to take into consideration the mandatory statutory provisions or if the decisions had been taken by them on extraneous considerations or that they were

ex facie arbitrary and illegal. Nothing of that sort can be found in the impugned judgment and order to warrant interference.

56. The appeal is, therefore, found to be without substance and the same is accordingly dismissed. No costs.

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

.....J.
[VIKRAM NATH]

NEW DELHI;
APRIL 20, 2023