2025 INSC 1079

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1929 OF 2020

HARYANA POWER PURCHASE CENTRE (HPPC) AND OTHERS ... **APPELLANTS**

versus

GMR KAMALANGA ENERGY LIMITED AND OTHERS ... **RESPONDENTS**

with

CIVIL APPEAL NO. 3429 OF 2020

J U D G M E N T

B.R.GAVAI, CJI.

FACTUAL ASPECTS

1. These appeals take exception to the judgment and final order dated 20th December 2019 passed by the Appellate Tribunal for Electricity, New Delhi[1] in Appeal No. 135 of 2018 along with Appeal No. 54 of 2019, whereby the learned APTEL *dismissed* the said appeals and upheld the order dated 20th March 2018 passed by the Central Electricity Regulatory Commission, New Delhi[2] in Petition No. 105/MP/2017[3].

[1] Hereinafter referred to as the 'APTEL'
[2] Hereinafter referred to as the 'CERC'
[33] Hereinafter referred to as 'Petition No. 105'

2. We have two appeals before us, both of which challenge the same judgment and final order of the learned APTEL. The first appeal being Civil Appeal No. 1929 of 2020 has been filed by Haryana Power Purchase Centre and two others[4] whereas the second appeal being Civil Appeal No. 3429 of 2020 has been filed by one GRID Corporation of Orissa Limited[5]. For the sake of clarity and to avoid any confusion, the parties will be referred to according to their positions in the first of the two civil appeals.

3. Before we proceed with the facts of the case, it would be apposite to give a brief overview of the parties before us.

3.1 HPCC (Appellant No.1) is the nodal agency for the procurement of power on behalf of the distribution licensees in the State of Haryana, being Dakshin Haryana Bijli Vitran Nigam Limited (Appellant No.2) and Uttar Haryana Bijli Vitran Nigam Limited (Appellant No.3). Haryana Power Generation Corporation Limited (Proforma Respondent No.6) is the body corporate that was responsible for the initiation of the competitive bid process on behalf of Appellant Nos. 2 and 3 for procurement of power in the

[4] Hereinafter referred to as the 'HPCC'
[5] Hereinafter referred to as 'GRIDCO'

State of Haryana. Together, the said parties may be referred to as the "Haryana Utilities".

3.2 GMR Kamalanga Energy Limited[6] (Respondent No.1) is a generating company within the meaning of the Electricity Act, 2003[7]. Notably, GKEL is a special purpose vehicle of GMR Energy Limited[8] which was the predecessor-in-interest of the Respondent No.1.

3.3 PTC India Limited[9] (Respondent No.2) is a trading licensee within the meaning of the 2003 Act. Respondent No. 2 had an arrangement with GKEL for the procurement of power.

3.4 CERC (Respondent No.3) is the regulatory commission under the 2003 Act.

3.5 GRIDCO (Respondent No.4) is a licensee under the 2003 Act which is responsible for procuring power for supply within the State of Odisha.

3.6 Similarly, Bihar State Power (Holding) Company[10] (Respondent No.5) is a licensee under the 2003 Act which is

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[6] Hereinafter referred to as 'GKEL'
[7] Hereinafter referred to as the '2003 Act'
[8] Hereinafter referred to as 'GEL'
[9] Hereinafter referred to as 'PTC'
[10] Hereinafter referred to as 'Bihar Utilities'

responsible for procuring power for supply within the State of Bihar.

4. Having given a brief overview of the parties in the civil appeals, we may now proceed to examine the facts which lead to the present appeals. The facts are as follows:-

4.1 With the intention to set up a thermal power plant of about 1,000 MW comprising of two units of about 500 MW each at village Kamalanga, Dhenkanal in the State of Odisha, GEL entered into a Memorandum of Understanding (MoU) with the Government of Odisha on 9th June 2006. Per the terms of the MoU, the power project as envisaged was to operate with coal as the primary fuel, for which purpose the State of Odisha was to either allot coal blocks upon receipt of sanction from the Government of India or allot long-term coal linkage of such quality and quantity as required for the project. The MoU further necessitated that a nominated agency authorized by the Government of Odisha would have the right to purchase up to 25% of power sent out from the thermal power plants. While initially, the MoU envisaged the setting up of thermal plants with an aggregate capacity of 1,000 MW (500 x 2), by way of alteration carried out subsequently, it was decided that GKEL would develop four power plants each

having a capacity of 350 MW. Three out of the four said units have been installed, however, the fourth unit of 350 MW is yet to be installed. Subsequently, this project was accorded the Mega Power Project status by the Ministry of Power, Government of India *vide* its letter dated 1st February 2012.

4.2 In terms of the MoU, on 28th September 2006, GKEL executed a Power Purchase Agreement with GRIDCO (Respondent No.4) being the nominated agency of the State of Odisha for the sale of 25% of the gross power generated by GKEL to GRIDCO, which came to 262.5 MW, upon the installed capacity reaching 1050 MW (350 MW x 3).

4.3 Thereafter, on 5th January 2007, GKEL addressed a letter to the Government of Odisha requesting the State Government for a recommendation to the Ministry of Coal, Government of India for the allotment of long-term coal linkage in favour of GKEL. Accordingly, the Department of Energy, Government of Odisha *vide* letters dated 19th December 2005 and 12th January 2007 pursued the matter with the Government of India.

4.4 While this was underway, on 1st March 2007, the Haryana Power Generation Corporation (Respondent No.6) issued a

Request for Proposal[11] on behalf of the Haryana Utilities for procurement of 2,000 MW power on a long-term basis. The said RfP envisaged the procurement of power by way of a tariff-based bidding process as provided for under Section 63 of the 2003 Act. In order to qualify for the bid, all the bidders were required to submit proof of fuel arrangements in terms of Clauses 2.1.5 and 2.1.5 A of the RfP which read thus: -

> "**2.1.5** All Bidders are required to submit copies of one or more of the following :-
>
> (a) Linkage letter from the fuel supplier; or
>
> (b) Fuel Supply Agreement between the Bidder and Fuel Supplier; or
>
> (c) Coal Block Allocation letter/In principle approval for allocation of captive block from Ministry of Coal; or
>
> (d) Other details submitted by Bidders subject to acceptance by the Procurer as sufficient proof for demonstration of ability,
>
> The above proof of fuel arrangement is not required in case the fuel to be used by the Bidder is imported fuel.
>
> **2.1.5 A** The Successful Bidder is required to show a firm fuel supply agreement/linkage by the time limit specified for fulfilment of Conditions Subsequent as mentioned in the PPA"

[11] Hereinafter referred to as 'RfP'

4.5 Subsequently, the Standing Linkage Committee (Long Term)[12] of the Government of India in a meeting dated 2nd August 2007 approved a firm coal linkage of 2.14 MTPA[13] for a 500 MW power plant as had been originally envisaged under the 1,000 MW (500 MW x 2) configuration.

4.6 In addition to the said approval, the Ministry of Coal, Government of India intimated its decision to allocate Rampia and Dip Side Rampia coal blocks in Odisha to a consortium of six generating companies including GEL. GEL's share was 4.6 MTPA which corresponded to the project capacity of 1,000 MW. The approval came to pass when the Ministry of Coal, Government of India confirmed the allotment of the said coal blocks to the aforementioned consortium *vide* letter dated 17th January 2008.

4.7 In the meanwhile, on 31st October 2007, GEL entered into an agreement with PTC in order to enable the latter to participate in the bidding process initiated by Haryana Power Generation Corporation (Respondent No. 6) by way of the RfP. In pursuit of the same, PTC submitted its bid for sale of 300 MW of power to the Haryana Utilities and the bid was accepted. Thereafter, *vide*

[12] Hereinafter referred to as 'SLC-LT'
[13] Short for 'million tonnes per annum'

an order dated 31st July 2008, the Haryana Electricity Regulatory Commission (HERC) adopted the tariff successful bidders including PTC under Section 63 of the 2003 Act.

4.8 Subsequently, upon the allocation of the Rampia and Dip Side Rampia coal blocks to GEL and the remaining allottees of the consortium, Mahanadi Coalfields Limited[14] issued a Letter of Assurance[15] dated 25th July 2008 in favour of GEL for providing firm linkage of 2.14 MPTA coal, being the normative requirement of one of the power plants having capacity of 500 MW.

4.9 Thereafter, on 7th August 2008, PTC executed two separate Power Purchase Agreements[16] with the Dakshin Haryana Bijli Vitran Nigam Limited (Appellant No.2) and Uttar Haryana Bijli Vitran Nigam Limited (Appellant No.3) for supply of 150 MW of power to each, aggregating to 300 MW with the Haryana STU-Inter Connection Point being the delivery point. Notably, the fuel type proposed to be utilized was Coal India Limited (CIL) coal linkage and it was proposed to be sourced from the MCL.

4.10 As the captive coal from Rampia and Dip Side Rampia had not become available, on 12th November 2008, the SLC-LT

[14] Hereinafter referred to as 'MCL'
[15] Hereinafter referred to as 'LoA'
[16] Hereinafter referred to as 'PPA'

approved the tapering coal linkage of 2.384 MTPA for 550 MW of the power project, against the coal block allocation to the concerned project. In view of the same, on 8th July 2009, MCL issued a LoA to GEL providing tapering linkage as aforementioned till captive coal blocks became available.

4.11 Subsequently, as aforementioned, GKEL and GRIDCO executed an amended and restated PPA on 4th January 2011 which altered the configuration of the thermal power plants and their output capacity, while keeping intact the entitlement of GRIDCO to 25% gross power generated by GKEL.

4.12 On 9th November 2011, GKEL entered into a PPA with Bihar State Electricity Board, being the predecessor to Bihar Utilities for supply of 260 MW of net power/282 MW of gross power. Per the said PPA, the fuel source proposed to be utilized was Coal India Limited (CIL) coal linkage and the coal was proposed to be sourced from MCL and the Rampia and Dip Side Rampia coal blocks allocated to GKEL.

4.13 Thereafter, on 26th March 2013, MCL signed a Fuel Supply Agreement[17] with GKEL for supply of coal to the power plants (3 x

[17] Hereinafter referred to as 'FSA'

350 MW) being 500 MW under normal linkage and 425 MW generation capacity covered under long term PPA i.e., an aggregate of 1.819 MTPA/18.19 lakh tonnes. The FSA was amended from time to time, initially to increase the quantum of coal supplied from 1.819 MTPA to 2.0009 MTPA for the same capacity of 425 MW and thereafter, the FSA was further amended on 18th September 2014 to increase the quantum of coal supplied to 2.14 MTPA on account of operationalization of the PPA with Bihar Utilities.

4.14 Subsequently, on 28th August 2013, GKEL entered into another independent FSA with MCL for tapering linkage.

4.15 In the meanwhile, on 23rd April 2013, GKEL preferred Petition No. 79/MP/2013[18] before the CERC against Haryana Utilities, being a petition under Section 79 of the 2003 Act *read with* the statutory framework governing the procurement of power through the competitive bidding process and Articles 12, 13 and 17 of the PPA dated 7th August 2008 executed between PTC and the Haryana Utilities and the back-to-back PPA dated 12th March 2009 executed between GEL and PTC for compensation due to

[18] Hereinafter referred to as 'Petition No. 79'

force majeure events and Change in Law during the operation period. In the said petition, the GKEL sought adjustment of tariff on account of events of Change in Law which affected the power project during the operation period in order to restore GKEL to the same economic position that it would have been in if the concerned events had never occurred. It is notable that GRIDCO was not made a party to this petition.

4.16 Soon thereafter, Unit I of the power project achieved commercial operation and GKEL began supplying power to GRIDCO w.e.f. 30th April 2013. Within a few months, Unit II of the power project achieved commercial operation and GKEL commenced the supply of power to Haryana Utilities w.e.f. 7th February 2014. Subsequently, Unit III of the power project achieved commercial operation on 25th March 2014 and thereafter GKEL began supplying power to Bihar Utilities w.e.f. 1st September 2014.

4.17 At this stage, it would be apposite to run through the quantum of power that was contracted to be delivered under each of the long-term PPAs, which are as follows:-

(a) Supply of 350 MW of gross power (Stage 1: 262.5 MW and Stage 2: 87.5 MW) to GRIDCO in terms of PPA dated 28th

September 2006 (as amended on 4th January 2011, with delivery point as Odisha STU Interconnection point).

(b) Supply of 350 MW of gross power (300 MW net of transmission losses and auxiliary consumption) to Haryana Utilities based on PPA dated 7th August 2008 and back-to-back PPA dated 12th March 2009 executed between GEL and PTC.

(c) Supply of 282 MW of gross power (260 MW net of auxiliary consumption) to Bihar State Electricity Board in term of PPA dated 9th November 2011, with delivery point as the Bihar STU Interconnection point.

4.18 The CERC *vide* order dated 3rd February 2016 disposed of the Petition No. 79 filed by GKEL in the following terms:-

(i) At the time of bid submission, the notified rate of royalty on coal was Rs. 55+5% of ROM price per tonne. This was subsequently increased to an *ad-valorem* rate of 14% on price of coal. The CERC held that GKEL would be entitled to compensation for the same from Haryana Utilities.

(ii) At the time of bid submission, there was no clean energy cess on coal. However, this was subsequently introduced by way of the Finance Act 2010 whereby statutory cess of Rs. 100

per tonne had been levied on coal. This was subsequently reduced to Rs. 50 per tonne. The CERC held that GKEL would be entitled to recover clean energy cess from Haryana Utilities in proportion to the coal consumed for generation and supply of electricity to the appellants.

(iii) At the time of bid submission, there was no excise duty on coal. Excise duty @ 6% on the determined sale price of coal was introduced by the Finance Act 2012. The CERC held that GKEL would be entitled to compensation through adjustment in tariff on account of the freshly applicable excise duty on coal.

(iv) Owing to shortfall in the linkage coal and also due to transfer of certain quantum of tapering linkage from MCL to Eastern Coalfields Limited, GKEL had to import coal and also source open market coal. This had led to an additional cost of Rs. 46.10 crores in the generation of power for the Haryana Utilities during the months of February and May to July 2014. The CERC held that GKEL would be entitled to compensation for the same and accordingly set out a mechanism for computing the actual additional cost incurred in a month to mitigate the shortfall in linkage coal.

The actual compensation payable was to be calculated and certified by the auditor in terms of the method laid down by the CERC.

(v) At the time of submission of the bid, the pricing of coal was based on the UHV[19] method which was Rs. 400 per tonne for F-grade, run-of-mine coal. Thereafter, the Government of India directed a switchover from UHV-based pricing system to GCV[20]-based pricing system. This led to a significant increase in price. The resultant impact of the change was an increase in cost of Rs. 10.76 crores for a full year. The CERC disallowed this claim, holding that any decision affecting the price of inputs for generating electricity including coal could not be covered under Change in Law.

(vi) GKEL had also raised claims for increase in rail freight charges owing to busy season surcharge and development surcharge. CERC disallowed this claim.

(vii) GKEL also raised claims towards compensation/payment for increase in MAT[21] rate from 11.33% to 20.01% as brought in by the Finance Act, 2012. This claim was also disallowed.

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[19] Short for 'Useful Heat Value'
[20] Short for 'Gross Calorific Value'
[21] Short for 'Minimum alternate tax'

(viii) A claim was raised by GKEL for payment towards the increase in VAT[22] from 4% to 5%. This claim was disallowed.

(ix) A claim was also raised for payment/compensation owing to increase in water charges, which was disallowed.

4.19 It is notable that GKEL had preferred a similar petition being Petition No. 112/MP/2015[23] against the Bihar Utilities with regard to the PPA executed between the said parties for compensation due to Change in Law which impacted revenues and costs during the operating period. *Vide* order dated 7th April 2017, the CERC disposed of the petition by allowing all such claims which fell within the parameters of Change in Law events.

4.20 Subsequently, in terms of the order dated 3rd February 2016 passed in Petition No. 79, GKEL raised supplementary bills towards compensation for 'Change in Law' events as approved by the CERC, by *pro-rating* coal received from various sources for the period commencing from February 2014 onwards. The bills were accompanied by Form 15, detailed annexures and calculations which clearly showed apportionment of firm linkage coal corresponding to respective PPA capacities.

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[22] Short for 'Value added tax'

[23] Hereinafter referred to as 'Petition No. 112'

4.21 Disputing the supplementary bills raised by GKEL, Haryana Utilities wrote to PTC on 22nd September 2016 seeking certain clarifications as to whether the bills were as per the order of the CERC dated 3rd February 2016. GKEL responded to the letter on 6th October 2016 wherein it contended that as per CERC's order, it was entitled to claim additional cost incurred during a month in respect of imported coal, open market coal and tapering coal or any other coal purchased to make up the shortfall in the firm linkage coal supplied by MCL.

4.22 Being dissatisfied with the response, Haryana Utilities refused to make payments. To resolve the issue, a meeting was held on 25th January 2017, however, the matter could not be resolved. In light of the same, it was decided by PTC that the supplementary bills raised by GKEL for the period between July 2016 to November 2016 would be considered to be disputed bills.

4.23 In order to resolve the issue, another meeting was convened between the parties on 24th April 2017 wherein it was jointly agreed that a clarificatory petition/review petition would be filed before the CERC.

4.24 Thereafter, GKEL preferred Petition No. 105 before the CERC under Section 79(1)(b) and (f) of the 2003 Act read with

Articles 11.6 and 17 of the PPA dated 7th August 2008 for the recovery of the outstanding amount from the Haryana Utilities raised vide supplementary bills.

4.25 The CERC *vide* order dated 20th March 2018 disposed of the said petition by directing the Haryana Utilities to pay the supplementary bills raised by GKEL for the period from July 2016 to March 2017 along with late payment surcharge as per the provisions of the PPA executed between the parties within one month. The CERC held, in terms of the previous order dated 3rd February 2017 as well as the decision of this Court in ***Energy Watchdog v. Central Electricity Regulatory Commission and Others***[24], GKEL would be eligible for relief for any shortfall in the firm linkage and tapering linkage met through import and open market coal. To avoid putting GRIDCO and Bihar Utilities at a disadvantage, the CERC further directed that the firm and tapering linkage coal supplied to GKEL would have to be apportioned on a *pro rata* basis to all the beneficiaries of the project and the cost of procurement of coal from alternate sources

[24] (2017) 14 SCC 80

to meet the shortfall would also be apportioned *pro rata* based on power supplied to beneficiaries.

4.26 Aggrieved thereby, Haryana Utilities preferred Appeal No. 135 of 2018 before the learned APTEL. Subsequently, GRIDCO preferred Appeal No. 54 of 2019 before the learned APTEL.

4.27 The learned APTEL *vide* the common judgment and final order dated 20th December 2019 dismissed both the appeals and upheld the order of the CERC.

4.28 Hence, these civil appeals under Section 125 of the 2003 Act.

SUBMISSIONS

5. We have heard Shri M.G. Ramachandran, learned Senior Counsel appearing for the appellants, Dr. Abhishek Manu Singhvi, learned Senior Counsel and Shri Vishrov Mukherjee, learned counsel appearing for Respondent No.1, Ms. Prerna Singh, learned counsel appearing for Respondent No.2, Shri Raj Kumar Mehta, learned counsel appearing for Respondent No. 4 and Shri S.B. Upadhyay, learned Senior Counsel appearing for Respondent No.5.

6. Shri Ramchandran, learned Senior Counsel appearing on behalf of the Haryana Utilities submitted that from the perusal of

the RfP issued by Haryana Utilities in March, 2007 and the bid submitted by GKEL on 23rd November 2007 through PTC, it is clear that the bidders were required to submit the details with regard to fuel arrangement, source of fuel among other particulars. It is equally clear that while submitting the bid, GKEL had shown the source of fuel to be firm linkage granted by way of SLC-LT meeting held on 2nd August 2007. It is further submitted that the perusal of PPA dated 7th August 2008 between Haryana Utilities and PTC would also show that the PPA was based on firm linkage coal from MCL. It is submitted that as against this, the PPA dated 9th November 2011, entered into by GKEL with Bihar Utilities clearly indicated the sources of fuel as firm linkage as well as Rampia and Dip Side of Rampia coal block allotment (tapering linkage).

7. Shri Ramchandran further submitted that FSA as well as the LoA in favour of GKEL for the first phase was unit specific. It is submitted that FSA becomes operational in proportion to the generation covered under long term PPAs. It is submitted that at the time when the FSA dated 26th March 2013 was signed, even though the linkage was for 500 MW, only 425 MW was considered as generation capacity. This was so since the PPAs with Haryana

Utilities for 300 MW as well as with GRIDCO for 125 MW were the only long term PPAs at that time. Shri Ramchandran further submitted that subsequently, when the Bihar PPA became operational, the capacity under the FSA *vis-à-vis* firm linkage was modified by specific additional 29.55 MW (out of a total Bihar PPA capacity of 260 MW).

8. Shri Ramchandran contended that the Haryana Utilities would be entitled to supply of 300 MW of energy from the firm linkage whereas GRIDCO would be entitled to supply of 125 MW energy produced using the coal available from the firm linkage. It is, therefore, submitted that the Haryana Utilities cannot be burdened with the additional cost incurred on account of production of coal from the MCL tapering linkage. Shri Ramchandran submitted that the difference on account of the use of fuel from tapering linkage will have to be borne only by the GRIDCO and Bihar Utilities inasmuch as the said coal was used for production of power for Unit II of 200 MW and Unit III of 350 MW. It is, therefore, submitted that both the CERC as well as the learned APTEL erred in putting the burden on the Haryana Utilities whereas the same should have been apportioned to Bihar Utilities and GRIDCO.

9. Shri Raj Kumar Mehta, learned counsel appearing on behalf of GRIDCO submitted that it was the PPA with GRIDCO which came to be operationalized first in April 2013. It is submitted that even though GRIDCO's share in the installed capacity of the thermal station of GKEL was 25%, the order dated 3rd February 2016 in Petition No. 79 and order dated 20th March, 2018 in Petition No. 105 were passed without impleading GRIDCO. It is submitted that GRIDCO was a necessary and proper party as its rights were adversely affected. It is submitted that GRIDCO was also not impleaded in the appeal being Appeal No. 135 of 2018 filed by the Haryana Utilities before the learned APTEL. It is submitted that on account of the order dated 28th November 2018 of the learned APTEL, GRIDCO came to be impleaded in the said appeal.

10. Shri Mehta further submitted that the reasoning given by the learned APTEL that since GRIDCO's PPA was Cost Plus Tariff PPA under Section 62 of the 2003 Act whereas the proceedings before the CERC and the learned APTEL were initiated seeking compensation on the grounds of Change in Law with regard to Haryana Utilities and Bihar Utilities which fell under Section 63 of the 2003 Act and therefore, GRIDCO was not necessary party,

is wholly unsustainable. It is submitted that GKEL had specifically prayed for *pro rating* of linkage coal amongst all the three utilities namely GRIDCO, Haryana Utilities and Bihar Utilities and as such GRIDCO was a necessary party.

11. It is submitted that the project sought to be installed by GKEL was at the instance of the Government of Odisha. It is submitted that the State of Odisha had provided all the necessary facilities to GKEL to install the project. It is therefore submitted that it is the GRIDCO which had the first right to the power generated from the coal made available from the firm linkage.

12. Dr. Abhishek Manu Singhvi appearing on behalf of the respondent No. 1 submitted that the appeals are liable to be dismissed on the short ground that they do not raise any substantial question of law as is required under Section 125 of the 2003 Act. It is further submitted that the order dated 20th March 2018 in Petition No. 105 is passed by the CERC on the basis of its earlier order dated 3rd February, 2016 in Petition No. 79. It is submitted that the CERC in Petition No. 79 had clearly held that coal supplied to GKEL under linkage by Government of India is to be apportioned on *pro rata* basis to all the three

Distribution Companies[25] i.e. Haryana Utilities, GRIDCO and Bihar Utilities. It is submitted that since the Haryana Utilities had not challenged the said order, it was not permissible for them to challenge the order passed in Petition No. 105. It is further submitted that supply of coal from all the modes of procurement has to be considered for the power project inasmuch as allocation by Government of India was for the whole project and not specific to any particular DISCOM.

13. Dr. Singhvi further submitted that the concurrent orders passed by the CERC and the learned APTEL are equitable orders inasmuch as it has been held that coal supplied under the linkage is to be apportioned on *pro rata* basis to all the DISCOMS. However, if the contentions of the Haryana Utilities are accepted, it will amount to burdening the consumers in the State of Odisha and Bihar. It is further submitted that if the contentions of both Haryana Utilities and GRIDCO are accepted, it will amount to putting the total burden on the consumers in the State of Bihar.

14. Dr. Singhvi further contended that the attitude of Haryana Utilities is of approbation and reprobation. It is submitted that in

[25] Hereinafter referred to as 'DISCOMS'

the case of ***Uttar Haryana Bijli Vitran Nigam Ltd. & Another v. Adani Power (Mundra) Limited and Others***[26], this Court noted that after accepting before the CERC that they would adopt the methodology as given in the case of ***GMR-Kamalanga Energy Limited v. Dakshin Haryana Bijli Vitran Nigam Ltd.***[27], Haryana Utilities changed their stand subsequently.

15. In the totality, Dr. Singhvi submitted that the appeals deserve to be dismissed.

16. Shri S.B. Upadhyay, learned Senior Counsel appearing on behalf of respondent No. 5 has supported the concurrent orders of the CERC and the learned APTEL.

DISCUSSION AND ANALYSIS

17. At the outset, it can be noticed that all three DISCOMS agree that GKEL is entitled to compensation on account of Change in Law event. However, the Haryana Utilities and GRIDCO argued that the said liability should not come to them but should instead be passed on to the other two. It is only the Bihar Utilities which agrees that the liability has to be equally shared by all three

[26] (2023) 14 SCC 736;
[27] (2016) SCC OnLine CERC 43

DISCOMS in proportion to the energy supplied to them. We find it appropriate to deal with both the appeals separately.

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18. Undisputedly, the present appeal filed by Haryana Utilities challenges the impugned judgment and final order passed by learned APTEL whereby the learned APTEL has upheld the order of the CERC. The appeal to this Court has been filed under Section 125 of the 2003 Act. The perusal of Section 125 shows that the appeal is tenable only on the grounds as available under Section 100 of the Code of Civil Procedure, 1908[28], as such, it could be seen that appeal would be tenable only on a substantial question of law.

19. One of us (B.R. Gavai, J, as he then was) had an occasion to deal with a large batch of electricity appeals pertaining to Change in Law event. This Court first decided the common issues involved in the said batch of appeals in ***Maharashtra State Electricity Distribution Company Limited v. Adani Power Maharashtra***

[28] Hereinafter referred to as "CPC"

Limited and Others[29]. It would be apposite to refer to following paragraphs of the said judgment:

> "**118.** It could thus be seen that two expert bodies i.e. CERC and the learned APTEL have concurrently held, after examining the material on record, that the factors of SHR and GCV should be considered as per the Regulations or actuals, whichever is lower. CERC as well as the State Regulatory bodies, after extensive consultation with the stakeholders, had specified SHR norms in the respective Tariff Regulations. In addition, insofar as GCV is concerned, the CEA has opined that the margin of 85-100 kcal/kg for a non-pit head station may be considered as a loss of GCV measured at wagon top till the point of firing of coal in boiler.
>
> **119.** In this respect, we may refer to the following observations of this Court in *Reliance Infrastructure Ltd.* v. *State of Maharashtra* [*Reliance Infrastructure Ltd.* v. *State of Maharashtra*, (2019) 3 SCC 352] : (SCC pp. 376-77, paras 38-39)
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> > "*38.* MERC is an expert body which is entrusted with the duty and function to frame regulations, including the terms and conditions for the determination of tariff. The Court, while exercising its power of judicial review, can step in where a case of manifest unreasonableness or arbitrariness is made out. Similarly, where the delegate of the legislature has failed to follow statutory procedures or to take into account factors which it is mandated by the statute to consider or has founded its determination of tariffs on

[29] (2023) 7 SCC 401, hereafter referred to as MSEDCL

extraneous considerations, the Court in the exercise of its power of judicial review will ensure that the statute is not breached. However, it is no part of the function of the Court to substitute its own determination for a determination which was made by an expert body after due consideration of material circumstances.

39. In *Assn. of Industrial Electricity Users* v. *State of A.P.* [*Assn. of Industrial Electricity Users* v. *State of A.P.*, (2002) 3 SCC 711] a three-Judge Bench of this Court dealt with the fixation of tariffs and held thus : (SCC p. 717, para 11)

> '*11*. We also agree with the High Court [*S. Bharat Kumar* v. *State of A.P.*, 2000 SCC OnLine AP 565 : (2000) 6 ALD 217] that the judicial review in a matter with regard to fixation of tariff has not to be as that of an appellate authority in exercise of its jurisdiction under Article 226 of the Constitution. All that the High Court has to be satisfied with is that the Commission has followed the proper procedure and unless it can be demonstrated that its decision is on the face of it arbitrary or illegal or contrary to the Act, the court will not interfere. Fixing a tariff and providing for cross-subsidy is essentially a matter of policy and normally a court would refrain from interfering with a policy decision unless the power exercised is arbitrary or ex facie bad in law.' "

**** **** ****

> **121.** Recently, the Constitution Bench of this Court in *Vivek Narayan Sharma (Demonetisation Case-5 J.)* v. *Union of India* [*Vivek Narayan Sharma (Demonetisation Case-5 J.)* v. *Union of India*, (2023) 3 SCC 1] 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."

20. It can thus be seen that this Court has held that when various expert bodies like the CERC, the APTEL and the Central Electricity Authority after considering the relevant material on record have taken a particular view, the Court should be slow in interfering with the decisions taken by them. It has been held that unless the Court finds that the expert bodies have failed to take into consideration the mandatory statutory provisions or if their decisions 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.

21. After deciding the common issues involved in the batch of electricity appeals in the case of ***MSEDCL*** (supra), this Court

considered various additional issues involved in individual matters pertaining to the question of Change in Law event. One such case was ***GMR Warora Energy Limited v. Central Electricity Regulatory Commission (CERC) and Others***[30]. This Court in the said case observed thus:

> **"VI. *Epilogue***
>
> **171.** Before we part with the judgment, we must note that we have come across several appeals in the present batch which arise out of concurrent findings of fact arrived at by two statutory bodies having expertise in the field. We have also found that in some of the matters, the appeals have been filed only for the sake of filing the same. We also find that several rounds of litigation have taken place in some of the proceedings.
>
> **172.** Recently, this Court in *Maharashtra State Electricity Distribution Co. Ltd.* v. *Adani Power Maharashtra Ltd.* [*Maharashtra State Electricity Distribution Co. Ltd.* v. *Adani Power Maharashtra Ltd.*, (2023) 7 SCC 401] has noted that one of the reasons for enacting the Electricity Act, 2003 was that the performance of the Electricity Boards had deteriorated on account of various factors. The Statement of Objects and Reasons of the Electricity Act, 2003 would reveal that one of the main features for enactment of the Electricity Act was delicensing of generation and freely permitting captive generation. In the said judgment, we have recorded the statement of the learned Attorney General made in *Energy Watchdog* [*Energy Watchdog* v. *CERC*,

[30] (2023) 10 SCC 401

(2017) 14 SCC 80 : (2018) 1 SCC (Civ) 133] that the electricity sector, having been privatised, had largely fulfilled the object sought to be achieved by the Electricity Act. He had stated that delicensed electricity generation resulted in production of far greater electricity than was earlier produced. The learned Attorney General had further urged the Court not to disturb the delicate balance sought to be achieved by the Electricity Act i.e. that the producers or generators of electricity, in order that they set up power plants, be entitled to a reasonable margin of profit and a reasonable return on their capital, so that they are induced to set up more and more power plants. At the same time, the interests of the end-consumers also need to be protected.

173. However, we find that, in spite of this position, litigations after litigations are pursued. Though the concurrent orders of statutory expert bodies cannot be said to be perverse, arbitrary or in violation of the statutory provisions, the same are challenged."

22. It will also be appropriate to refer to the following observations made by this Court in paragraph 181 of the said judgment:

181. It is further to be noted that the appeal to this Court under Section 125 of the Electricity Act, 2003 is only permissible on any of the grounds as specified in Section 100 of the Code of Civil Procedure, 1908. As such, the appeal to this Court would be permissible only on substantial questions of law. However, as already observed herein, even in cases where well-reasoned concurrent orders are passed by the Electricity Regulatory Commissions and the learned APTEL, the same are challenged by

> the DISCOMS as well as the generators. On account of pendency of litigation, which in some of the cases in this batch has been more than 5 years, non-payment of dues would entail paying of heavy carrying cost to the generators by the DISCOMS, which, in turn, will be passed over to the end-consumer. As a result, it will be the end-consumer who would be at sufferance. We are of the opinion that such unnecessary and unwarranted litigation needs to be curbed.

23. This Court in clear terms noted that the appeal under Section 125 of the 2003 Act is only permissible on any of the grounds as specified in Section 100 of the CPC. As such, it is permissible only on substantial questions of law. This Court observed that even in cases where well-reasoned concurrent orders are passed by the Electricity Regulatory Commissions and the learned APTEL, the same are challenged by DISCOMS as well as the generators. It has been observed that on account of pendency of litigation which in some of the cases in the said batch had been for more than 5 years, non-payment of dues would result in paying of heavy carrying cost to the generators by the DISCOMS. It was observed that, in turn, this heavy cost is passed over to the end-consumers who are the ultimate sufferers. The Court had in unequivocal terms observed that such unnecessary and unwarranted litigations need to be curbed. In spite of the

aforesaid observations, this Court is flooded with such kind of litigations.

24. In the present matter, there are concurrent findings of facts not only in the impugned judgment passed by the learned APTEL and the order passed by the CERC in Petition No. 105, but also in the order dated 3rd February 2016 passed by the CERC in Petition No. 79 during the first round of litigation. The Court will, therefore, have to be very slow in interfering with the said findings of fact. Unless it is found that the findings are perverse, arbitrary or in violation of the statutory provisions, it will not be permissible for this Court to interfere with the same.

25. Though, it was sought to be argued on behalf of the appellants that in the present case question of interpretation of the documents arises and the same question would fall in the category of substantial question of law, we do not find that any substantial question of law arises for consideration in the present appeal.

26. Be that as it may, since the present appeal is pending since 2020 having been admitted on 3rd June 2020, we propose to deal with the merits of the matter.

27. It will be relevant to refer to the Petition No. 79 filed by GKEL before the CERC. GKEL contended in the said petition that it had entered into three long term PPAs as under:

a) Supply of 350 MW gross power (Stage 1: 262.5 MW and Stage 2: 87.5 MW) to Grid Corporation of Odisha Limited (GRIDCO) in terms of PPA dated 28th September 2006 (as amended on 4th January 2011 with delivery point as Odisha STU interconnection point).

b) Supply of 282 MW gross power (260 MW net of auxiliary consumption) to Bihar State Electricity Board in terms of PPA dated 9th November 2011, with delivery point as the Bihar STU interconnection point.

c) Supply of 350 MW gross power (300 MW net of transmission losses and auxiliary consumption) to Haryana Discoms based on the competitive bidding through back-to-back arrangements:

   (i) The PPAs dated 7th August, 2008 entered into between PTC India Limited and Haryana Discoms with delivery point as Haryana STU bus bar;

(ii) Back-to-back PPA dated 12th March, 2009 between GMR Energy Limited (holding company of GKEL) and PTC India Limited.

28. The petition was filed by GKEL seeking relief on account of Change in Law on various grounds. One of the grounds was with regard to deviations from the New Coal Distribution Policy, 2007 (the NCDP) and changes in coal distribution policy of the Government of India and Coal India Limited.

29. The issue with regard to firm linkage and tapering linkage in favour of GKEL and allocation of captive coal mines in favour of a consortium of six companies including GKEL also fell for consideration in the said petition. It will also be relevant to refer to the following submissions of GKEL recorded by the CERC:

> "**6**.....
>
> (a) As regards the firm linkage, the Standing Linkage Committee (Long Term) (SLC-LT) approved a coal linkage for the project on 2.8.2007 which was communicated to the petitioner on 24.9.2007. Letter of Assurance (LOA) was issued in favour of GEL on 25.7.2008 for 2.14 MTPA of coal for 500 MW capacity of the Power Project. LOA was transferred in the name of GEKL by Ministry of Coal on 17.2.2011.
>
> (b) On 6.11.2007, Ministry of Coal conveyed its decision to allocate Rampia and Dip Side Rampia

coal blocks in Odisha to a consortium comprising of GEL and five other companies (M/s Sterlite Energy Ltd, M/s Mittal Steel India Limited, M/s Lanco Group Limited, M/s Navbharat Power Private Ltd, and M/s Reliance Energy Ltd). Ministry of Coal *vide* its letter dated 17.1.2008 made the allocation under Section 3(3)(a) (iii) of the Coal Mines (Nationalisation) Act, 1973 for captive use in the specified end use projects by the allocatees. A joint venture company in the name of Rampia Coal Mine and Energy Private Limited was formed by the allocattees to carry out coal mining in early 2008.

(c) On 12.11.2008, SLC-LT approved tapering coal linkage for the power project based on the recommendation of CEA that development of coal block allocated to GEL alongwith others was likely to take time. On 8.7.2009, LOA was issued for tapering coal linkage of 2.384 MTPA for 550 MW capacity in favour of GEL till coal from Rampia coal block was available. LOA was transferred in the name of GEKL by Ministry of Coal on 17.2.2011.

(d) On 26.3.2013, Mahanadi Coalfield Limited (MCL) signed the Fuel Supply Agreement with GEKL for supply of 1.819 MTPA of coal per annum.

7. According to the petitioners, the financial closure of the power project was achieved on 29.5.2009 and the petitioners went ahead with execution of the project with the expected COD of Unit 1 as 25.4.2013 as on the date of filing the present petition.

30. In the said petition, the Haryana Utilities had raised a preliminary objection on the ground that impact of Change in Law can be ascertained only during the operation period, i.e. after the power project has been declared under commercial operation. The CERC with following observations rejected the said preliminary objection:

> "17. According to the Haryana Discoms, the present petition is premature since the impact of "Change in Law" can be ascertained only during the operation period, that is, after the power project has been declared under commercial operation. In this regard, it is noted that 1st Unit of the power project was commissioned on 30.4.2013 and has been taken note of by the Haryana Power Purchase Centre (which is responsible for purchase of power on behalf of the Haryana Discoms) in its letter dated 20.5.2013. Subsequently, in its letter dated 8.8.2013, HPCC in response to the petitioner's offer contained in the letter dated 4.7.2013, consented for scheduling of power from the Project. The 2nd Unit achieved COD on 12.11.2013 and supply to the Haryana Discoms commenced on 7.2.2014. 3rd Unit achieved COD on 25.3.2014. Since all units of the power project have achieved COD, the operating period has already commenced, making the petitioners eligible for compensation under Change in Law during the operating period. The objections of Haryana Discoms on this count are disposed of accordingly."

31. The perusal of paragraphs 54, 55 and 73 of the order passed by the CERC dated 3rd February 2016 would reveal that it devised a formula for computing the Energy Charge Rate[31] which required *pro rata* allocation of coal among all three DISCOMS. It is pertinent to note that the Haryana Utilities did not challenge the said order and paid the amounts due in terms of the said order till June 2016. The Haryana Utilities had accepted the bills which were submitted in pursuance to the order passed in Petition No. 79 and a total of about Rs. 140 crores were paid till June, 2016. However, in September 2016, the Haryana Utilities raised the issue of *pro rata* allocation of coal. After due deliberations, Haryana Utilities and GKEL agreed that the latter would approach the CERC for clarification in this regard. As such, GKEL filed Petition No. 105. The argument of Haryana Utilities in the said petition was that coal received under FSA dated 26th March 2013 should be considered for Haryana Utilities only and shortfall in supply thereof should be met through imported, open market or tapering coal. However, it was submitted on behalf of GKEL that the allocation of coal was made for the entire plant of GKEL and

[31] Hereinafter referred to as 'ECR'

therefore, coal shall be used proportionately for generation and supply of power to all beneficiaries namely GRIDCO, Haryana Utilities and Bihar Utilities.

32. The CERC *vide* order dated 20th March 2018 passed in Petition No. 105 considered the rival submissions as under:

> "**31.** On perusal of the documents on record, it emerges that the Petitioner was granted firm linkage of 500 MW and linkage from captive coal mine for 550 MW for its plant which was envisaged to have capacity of 1050 MW(3x350 MW), Subsequently, LOA dated 25.7.2008 was issued for firm linkage of 2.14 MTPA for 500 MW and LOA dated 8.7.2009 was issued for tapering linkage of 2.384 MTPA for 550 MW by Ministry of Coal. Perusal of the Standing Linkage Committee (SLC) Minutes of Meeting dated 14.2.2012 reveals that the tapering linkage of 2.384 MTPA was allocated to the Petitioner for all three beneficiaries i.e. GRIDCO, Bihar Discoms and Haryana Discoms. The Committee noted that in some cases like GMR Kamalanga Energy Ltd., two separate LoAs were recommended by the SLC (LT) in different meetings, due to change in the configuration/capacity of the unit. The 2nd LoA was recommended by the SLC (LT) for the remaining capacity arising out of the changed configuration. On the recommendation of SLC (LT), the LoAs dated 25.7.2008 and 8.7.2009 were issued to the Petitioner for 500 MW and 550 MW respectively to meet the coal requirement for the entire capacity of 1050 MW.

32. FSA dated 26.3.2013 was entered into by the Petitioner with Mahanadi Coalfield Limited for 500 MW of firm linkage coal. The Tapering Linkage FSA with MCL was signed on 20.5.2014 and Tapering linkage FSA with ECL was signed on 29.5.2014. Paras 4.1.1 and 4.2 of the FSA dated 26.3.2013 provide as under:

> "4.1.1 The Annual Contracted Quantity of Coal agreed to be supplied by the Seller and undertaken to be purchased by the Purchaser, shall be 18.19 lakh Tes. Per Year from the Seller's mines and/or from import, as per Schedule I. For part of Year, the ACQ shall be prorated accordingly. The ACQ shall be in proportion of the percentage of Generation covered under long term Power Purchase Agreements executed by the Purchaser with the DISCOMs either directly or through PTC(s) who has/have signed the back to back long term PPA(s) with DISCOMs. Whenever, there is any change in the percentage of PPA(s), corresponding change in ACQ shall be effected through a side agreement. Such changes shall be allowed to be made only once in a year and shall be made effective only from the beginning of the next quarter. However, in no case ACQ should exceed the LOA quantity as mentioned in Schedule I.
>
> 4.2. The total quantity of coal supplied pursuant to this Agreement is meant for use at Power Plant (3X350 MW), 500 MW under Normal Linkage (425 MW generation capacity covered under long term PPA). Located at Village-Kamalanga, Dt.

Dhenkanal, Odhisha 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 each act shall warrant suspension of coal supplies by the Seller in terms of Clause 14.1 (b)."

It is evident from the above provisions of the FSA that the total quantum of coal supplied pursuant to the FSA is meant for use at the power plant (3x350 MW) of the Petitioner. Further, ACQ would be in proportion to the percentage of generation covered under long term PPAs either with the DISCOMs directly or through PTC which have been signed by the Petitioner. Therefore, the FSA cannot be for a particular PPA as contended by HPPC. As on the date of the FSA, only 425 MW were to be operationalised under long term PPAs with PTC/Haryana DISCOMs and GRIDCO and accordingly, only 425 MW covered under the long term PPAs was mentioned in the FSA. The FSA further provides that whenever there is any change in the percentage of PPAs, corresponding changes in the ACQ shall be effected through side agreements. The FSAs for the tapering linkage were signed with MCL on 20.5.2014 and with ECL on 29.5.2014. These FSAs were signed before the commencement of supply under Bihar PPA. The Petitioner was receiving 2.58 MTPA of coal from both firm and tapering linkage to meet the requirement for 618 MW and after operationalization of Bihar PPA, the Petitioner received 3.63 MTPA of coal to meet the requirement of 905 MW. Therefore, any shortfall

in the firm linkage as well as tapering linkage met through import and open market coal shall be eligible for relief under the Change in law in the light of the order dated 3.2.2016 and the Hon'ble Supreme Court's judgment in Energy Watchdog case.

33. In the light of the above discussion, it cannot be inferred from the language of para 48 of the order dated 3.2.2016 that the requirement of Haryana PPA shall be met from the firm linkage under the FSA dated 26.3.2013 and shortfall thereof shall be met through import and open market coal. Such an interpretation goes against the coal allocation by Ministry of Coal to power plant of the Petitioner as a whole and will put the GRIDCO PPA and Bihar PPA at a disadvantage *vis-a-vis* Haryana PPA. In fact, the Commission in para 73 (b) of the order dated 3.2.2016 in Petition No. 79/MP/2013 had observed as under:

> "73……
> (b) The additional cost incurred in a month due to shortage of linkage coal shall be computed on ex-bus scheduled energy and shall be pro-rated corresponding to the scheduled generation for Haryana Discoms as per methodology given in para 56 above."

Therefore, in light of the allocation of firm as well as tapering linkage for all three beneficiaries and our order dated 3.2.2016 in Petition No. 79/MP/2013, the firm and tapering linkage coal supplied to the Petitioner has to be apportioned on

pro rata basis to all beneficiaries of the project and the cost of procurement of coal from alternate sources to meet the shortfall of firm and tapering linkage coal has also to be apportioned pro rata based on power supplied to these beneficiaries. Accordingly, the contention of Haryana Discoms to appropriate the coal supplied under firm linkage towards the capacity being supplied to them instead of pro-rata apportionment to all the beneficiaries is not correct. The order dated 3.2.2016 has to be read in its entirety and HPPC is not correct to pick up an observation in para 48 of the said order to claim that Its liability is limited to imported/open market coal for the shortage in firm linkage coal only. In our view, the Petitioner has correctly apportioned the linkage coal to Haryana Discoms proportionate to the capacity being supplied to them and has issued Supplementary Bills in accordance with the formula devised in order dated 3.2.2016 in Petition No. 79/MP/2013. Accordingly, we direct the respondents to pay the supplementary bills raised by the Petitioner for the period from July, 2016 to March, 2017 along with late payment surcharge as per the provisions of the PPA within one month from the date of issue of the order."

33. The said order came to be challenged by the Haryana Utilities. However, at the instance of the learned APTEL, GRIDCO came to be impleaded as party respondent in the appeal filed by the Haryana Utilities. Subsequently, GRIDCO also filed its own appeal before the learned APTEL. It was sought to be contended

on behalf of the Haryana Utilities that the order passed in Petition No. 105 was beyond the order dated 3rd February 2016. Rejecting the said contention, the learned APTEL by a well-reasoned judgment and order observed thus:

> "8.16 The Appellants contention that the Impugned Order has gone beyond Order dated 03.02.2016 is incorrect. It is evident from Paragraph 33 of the Impugned Order that CERC has merely reiterated its earlier Order and upheld the bills raised by GKEL in terms of Order dated 03.02.2016 in Petition No. 79/MP/2013.
>
> **Coal supply to Plant as whole and not Procurer Specific**
>
> 8.17 GKEL had quoted tariff for Haryana PPAs considering coal availability for the Project from linkage coal and its own Captive Coal blocks based on
>
> (a) SLC-LT approval dated 02.08.2007 for 500 MW; and
>
> (b) Ministry of Coal decision dated 06.11.2007 to allocate Rampia and Dip side Rampia coal blocks to GKEL.
>
> 8.18 At the time of bid submission for Haryana, the SBD did not permit inclusion of different sources of coal - linkage, captive etc. Therefore, GKEL had cited linkage from CIL/MCL. Use of coal from the Captive Coal block was envisaged for the entire Plant as evident from the allocation letter dated 17.01.2008 wherein GKEL share of coal reserves is 138 MT @ 4.6

MT for 30 years to meet coal requirement of the Project as a whole.

8.19 Coal supply was to the Project as a whole and not Procurer Specific is supported by:-

(a) The SLC minutes dated 14.02.2012 clearly state that the tapering linkage coal of 2.384 MTPA is to be utilized for all three PPAs with GRIDCO, Haryana and Bihar Discoms.

(b) Clause 4.2 of the FSA dated 26.03.2013 signed with MCL clearly states that:-

> "the total quantity of coal supplied pursuant to this Agreement is meant for use at Power Plant (3x350 MW), 500 MW under Normal Linkage (425 MW generation capacity covered under long term PPA)."

8.20 It is submitted that LoA and FSA are for the station and never for a particular PPA as contended by the Appellants. Further, the Appellant's contention that the apportionment of coal (from firm linkage) is to be done proportionally between the Appellants (300 MW), GRIDCO (150 MW) and Bihar (29.55 MW) is erroneous. It is submitted that the end-use stated in these documents is for the Station/ Plant. This was confirmed by MCL in terms of letter dated 02.05.2018 which stated that the Coal is released for the total PPA capacity and not bifurcated on the basis of individual PPAs.

8.21 In terms of Clause 4.1 of the FSA, the ACQ shall be in proportion of the percentage generation covered under long term PPAs with Discoms. The relevant portion of Clause 4.1 is reproduced below:-

"4.1.1... The ACQ shall be in proportion of the percentage of Generation covered under long term Power Purchase Agreements executed by the Purchaser with the DISCOMs either directly or through PTC(s) who has/ have signed the back to back long term PPA(s) with DISCOMS."

It is only commencement of supply of coal which is linked to commencement of supply under the PPA. For example, if supply of power to Bihar commenced before Haryana, the ACQ would have been allocated/operationalized similarly.

8.22 In view of the above, contention of Haryana that the tapering linkage granted in relation to coal block cannot be linked to 300 MW is wrong. In fact, the linkage coal/ coal block or tapering linkage are allocated for the station and to be utilized for all three PPAs. In fact, allocating coal under the FSA to Haryana Discoms to the exclusion of Bihar and GRIDCO will be contrary to the provisions of the FSA.

8.23 As brought out above, the allocation of coal was for the Project as a whole and not Procurer/PPA wise. This is evident from the following:-

(a) LOAs dated 25.07.2008 and 08.07.2009 were for the plant as a whole.

(b) Allocation letter dated 17.01.2008 for the Captive Coal mine is for 4.6 MT which is sufficient for 1050 MW, being the installed capacity of the Project.

(c) Minutes of the SLC-LT dated 14.02.2012 note that the entire linkage (firm and tapering) is for all the 3 PPAs.

(d) Letter dated 02.05.2018 issued by Mahanadi Coalfields Limited ("MCL") states that CIL and its subsidiaries had allocated coal to the Project on pro-rata basis vis-à-vis the operational capacities and not on basis of procurers. The letter specifically states that "in case of multiple PPAs, coal is released to the IPPs considering the total PPA capacity and not bifurcated on the basis of individual PPAs". The aforesaid only confirms the provision of clause 4.1.1 of the FSAs which also talks of allocation of coal on pro-rata basis to long term PPAs executed by the Discoms directly through PTC.

8.24 If the Appellant's contention is upheld, it will lead to an anomalous situation wherein GRIDCO and Bihar Discoms will end up cross-subsidizing supply of power to Haryana Discoms. It is submitted that the Ld. Central Commission has rightly allowed pro-rata allocation of linkage and alternate coal so as to ensure that the impact is equally apportioned.

8.25 Since the allocation is not PPA specific, allocation of coal to one procurer to the exclusion of others will be contrary to the terms of such allocation.

8.26 Further, such action will also be contrary to Article 14 of the Constitution of India since it will result in equals being treated unequally."

34. It could thus be seen that the present appeal challenges the concurrent findings arrived at by the CERC on two different occasions and the learned APTEL in the impugned judgment. The perusal of the aforesaid judgment and orders would reveal that they are based upon interpretation of various documents and

considering the following factual aspects with respect to fuel arrangements for the Project:

(i) The original SLC-LT allocation dated 2nd August 2007 for firm linkage was made prior to the Haryana PPA;

(ii) Letter dated 6th November 2007 issued by Ministry of Coal intimating its decision to allocate Rampia and Dip Side Rampia coal blocks in Odisha to a consortium comprising of GKEL and five other allotees;

(iii) Allocation letter dated 17th January 2008 for the captive coal mine is for 4.6 MT which is sufficient for 1050 MW, being the installed capacity of the Project; and

(iv) SLC-LT minutes dated 14th February 2012 noted that the firm linkage capacity was intended for Odisha, Bihar and Haryana.

35. It will also be relevant to refer to letter dated 7th February 2022 issued by MCL in response to the clarification sought by GKEL on the letters dated 2nd May 2018 and 22nd June 2021 of MCL with regard to supply of coal to GKEL under FSA dated 26th February 2013. The relevant extracts of the said letter are as under:

> "As per the provision of FSA dated 26/03/2013, Annual Contracted Quantity (ACQ) under FSA is in proportion to the percentage of Generation covered under long term Power Purchase Agreement(s) executed by the Purchaser (IPP) with DISCOMs against the total LOA quantity. In case of multiple PPAs, coal is allocated/ released as per the ACQ against the total PPA capacity and not segregated on the basis of any specific PPA. The same was clarified *vide* MCL's letter dated 02.05.2018.
>
> It is pertinent to mention that letter dated of 22/06/2021 of MCL was issued to all concerned DISCOMs, with whom M/s GKEL has signed PPA, for the purpose of intimating the DISCOMs the quantum of coal procured by M/s GKEL under FSA from the sources of MCL to ensure proper utilization of coal. The said letter indicates the overall, quantity of coal supplied for all the PPAs."

36. As mentioned earlier, after deciding the common issues involved in a batch of electricity appeals in the case of ***MSEDCL*** (supra), this Court decided various individual matters involving additional issues. Another such matter was ***Uttar Haryana Bijli Vitran*** (supra)**.** It would be pertinent to note that the Haryana Utilities had approached this Court challenging the concurrent judgment and order passed by learned APTEL dated 3rd November 2020[32] and CERC dated 31st May 2018[33].

[32] 2020 SCC OnLine APTEL 92
[33] 2018 SCC OnLine CERC 411

37. In the said proceedings Adani Power (Mundra) Ltd.[34] had filed Petition No. 97/MP/2017[35] before the CERC pursuant to the orders passed by this court in ***Energy Watchdog*** (supra). The CERC *vide* order dated 31st May 2018 had allowed the said petition and directed the working out of the relief. It will be relevant to refer to the following paragraphs of the ***Uttar Haryana Bijli Vitran*** (supra):

> **48.** The grievance of Haryana Utilities is that the methodology for granting benefit on account of the change in law adopted by 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 CERC in the *GMR-Kamalanga Energy Ltd.* v. *Dakshin Haryana Bijli Vitran Nigam Ltd.* [*GMR-Kamalanga Energy Ltd.* v. *Dakshin Haryana Bijli Vitran Nigam Ltd.*, 2016 SCC OnLine CERC 43] considering the quoted tariff under the PPAs as the base.
>
> **50.** The learned APTEL had referred to the record of proceedings of CERC dated 10-8-2017, which read thus : (*Uttar Haryana Bijli Vitran Nigam case* [*Uttar Haryana Bijli Vitran Nigam Ltd.* v. *Adani Power (Mundra) Ltd.*, 2020 SCC OnLine APTEL 92] , SCC OnLine APTEL para 7.3)

[34] Hereinafter referred to as AP(M)L
[35] Hereinafter referred to as 'Petition No. 97'

"*7.3.* … (*a*) … '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* [*GMR-Kamalanga Energy Ltd.* v. *Dakshin Haryana Bijli Vitran Nigam Ltd.*, 2016 SCC OnLine CERC 43] *is acceptable to Haryana Utilities*, learned counsel replied in the positive.' "

(emphasis in original)

51. The learned APTEL had also referred to the order of CERC dated 28-9-2017 [*Adani Power Ltd.* v. *Uttar Haryana Bijli Vitaran Nigam Ltd.*, 2017 SCC OnLine CERC 305] in IA No. 57 of 2017 in Petition No. 97/MP/2017, which reads thus : (*Uttar Haryana Bijli Vitran Nigam case* [*Uttar Haryana Bijli Vitran Nigam Ltd.* v. *Adani Power (Mundra) Ltd.*, 2020 SCC OnLine APTEL 92] , SCC OnLine APTEL para 7.3)

"*7.3.* … (*b*) … '*7.* … Haryana Utilities who is the only respondent *has not objected to the calculation* made by the applicant.' "

(emphasis in original)

52. The learned APTEL had also referred to the order dated 3-12-2018 [*Uttar Haryana Bijli Vitran Nigam Ltd.* v. *Adani Power (Mundra) Ltd.*, 2018 SCC OnLine CERC 237] passed by CERC in review petition bearing No. 24/RP/2018, which reads thus : (*Uttar Haryana Bijli Vitran Nigam case* [*Uttar Haryana Bijli Vitran Nigam Ltd.* v. *Adani Power (Mundra) Ltd.*, 2020 SCC OnLine APTEL 92] , SCC OnLine APTEL para 7.4)

"*7.4.* … '*25.* … It is apparent from the above that the Commission, after due consideration of the submissions of the Adani Power 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 [*Adani Power (Mundra) Ltd.* v. *Uttar Haryana Bijli Vitran Nigam Ltd.*, 2018 SCC OnLine CERC 411] . *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 Petition No. 97/MP/2017 had stated that "the reliance to the decision of GMR is wholly inappropriate". 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 CERC that they would adopt the methodology as given in *GMR-Kamalanga Energy* [*GMR-Kamalanga Energy Ltd.* v. *Dakshin Haryana Bijli Vitran Nigam Ltd.*, 2016 SCC OnLine CERC 43] , 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 CERC."

38. It could thus clearly be seen that the learned APTEL had referred to the record of proceedings of the CERC dated 10th August 2017 wherein to the Commission's query as to whether the methodology adopted by the petitioner in the light of the methodology given in ***GMR Kamalanga*** (supra) was acceptable to Haryana Utilities, learned counsel replied in the positive. The learned APTEL also referred to the order of the CERC dated 28th September 2017[36] in IA No. 57 of 2017 in Petition No. 97 wherein Haryana Utilities had not objected to the calculation made by the applicant. It could further be seen that the learned APTEL had also referred to the order dated 3rd December 2018[37] passed by the CERC in Review Petition No. 24/RP/2018 filed by the Haryana Utilities against the order dated 31st May 2018 of the CERC. The CERC in the said review petition referred to the affidavit filed by the Haryana Utilities stating that *'the reliance to the decision of GMR is wholly inappropriate"*. The learned APTEL, observing that the Review Petitioners are now suggesting an alternative formula for computation of the relief under change in law, rejected the review petition.

[36] (2017) SCC OnLine CERC 305
[37] (2018) SCC OnLine CERC 237

39. This Court in ***Uttar Haryana Bijli Vitran*** (supra) had observed that the Haryana Utilities are indulging in approbation and reprobation. It has been observed that they cannot be permitted to blow hot and cold at the same time. It has further been observed that after accepting before the CERC that they would adopt the methodology as given in ***GMR Kamalanga*** (supra), it would not be appropriate on the part of Haryana Utilities to change its stand after final orders were passed by the CERC. This Court had therefore dismissed the appeal of the Haryana Utilities observing that the interference would be warranted only if the concurrent findings have failed to take into consideration the mandatory statutory provisions or if the decision had been taken by them on extraneous consideration or that they were *ex facie* arbitrary and illegal. As a matter of fact, this Court in the said case had approved the methodology applied by the CERC and affirmed by the learned APTEL which was based on the decision of the CERC in the case of ***GMR Kamalanga*** (supra).

40. In that view of the matter and considering the concurrent findings of fact by the CERC on two different occasions and the learned APTEL in impugned order and also taking into note of the communication dated 2nd February 2022 issued by MCL, we see

no merit in the appeal of Haryana Utilities and the same is liable to be dismissed.

Civil Appeal No. 3429 of 2020

41. Insofar as the appeal by GRIDCO is concerned, the main contention of GRIDCO is that the order dated 3rd February 2016 in Petition No. 79 and order dated 20th March 2018 in Petition No. 105 were passed without impleading GRIDCO. It will be relevant to note that the PPA with GRIDCO is under Section 62 of the 2003 Act whereas the PPAs with the Haryana Utilities and Bihar Utilities are under Section 63 of the 2003 Act. As such there was no occasion for GKEL to implead GRIDCO as a party to the said petitions.

42. It is further to be noted that the petitions filed by GKEL before the CERC were filed seeking compensation on account of Change in Law events affecting Haryana and Bihar PPAs which were concluded by following provisions prescribed under Section 63 of the 2003 Act. Section 63 of the 2003 Act provides for the determination of tariff by bidding process whereas under Section 62, the tariff is determined on Cost Plus basis. It can thus be seen that proceedings under Sections 62 and 63 of the 2003 Act are entirely different.

43. It is also relevant to note that GKEL had filed a petition being Petition No. 77/GT/2013[38] for approval of the tariff for supply of electricity to the GRIDCO. The CERC *vide* order dated 12th November 2015 had determined the tariff payable by the GRIDCO to GKEL for the period of 1st April 2013 to 1st March 2014. Being aggrieved by the said order, GRIDCO filed Appeal No. 45 of 2016 before the learned APTEL. The learned APTEL *vide* judgment and order dated 1st August 2017 did not find any merit in the methodology adopted by CERC for determining the tariff. The learned APTEL found that the CERC had calculated ECR in accordance with the CERC (Terms and Conditions of Tariff) Regulations, 2009. The methodology adopted by the CERC for determining the tariff payable by GRIDCO to GKEL has been duly approved by the learned APTEL. In that view of the matter, we find that GRIDCO was neither a necessary nor a proper party to the proceedings initiated by GKEL by way of Petition Nos. 79 and 105.

44. On merits, it is the contention of the GRIDCO that it was its PPA which was executed first on 28th September 2006 and was operationalized in April 2013. It is therefore contended that

[38] Hereinafter referred to as 'Petition No. 77'

GRIDCO has the first right over the firm linkage FSA dated 26th March 2013. GRIDCO further contended that allocation under SLC-LT meeting dated 2nd August 2007 and LOA dated 25th July 2008 was against long term PPAs and the only PPA at that time was with GRIDCO, therefore, the firm linkage was for GRIDCO. While considering GRIDCO's appeal, the learned APTEL found that the supply of coal from all modes of procurement has to be considered for the power plant as a whole and not for specific PPAs as prayed by the appellants.

45. In the foregoing paragraphs, while considering the appeal of Haryana Utilities, we have already upheld the concurrent findings of the CERC and the learned APTEL that the coal supply from all the sources has to be apportioned amongst all the three DISCOMS in proportion to the energy supplied to them. None of the DISCOMS can claim a priority for supply of power based either on the prior date of agreement or the recital as to the source of coal. In view of the findings given by us while discussing the appeal of the Haryana DISCOMS, we find no merit in the present appeal as well. The same is therefore liable to be dismissed.

CONCLUSION

46. In the result, we pass the following orders:

I. Civil Appeal No. 1929 of 2020 filed by Haryana Utilities and Civil Appeal No. 3429 of 2020 filed by GRIDCO are dismissed *sans* merit; and

II. The impugned judgment and order dated 20th December 2019 passed by the Appellate Tribunal for Electricity, New Delhi in Appeal No. 135 of 2018 along with Appeal No. 54 of 2019 is upheld.

47. Pending application(s), if any, shall stand disposed of.

.....CJI.
(B.R.GAVAI)

.....J.
(K. VINOD CHANDRAN)

NEW DELHI;
SEPTEMBER 8, 2025