



नई दिल्ली
NEW DELHI

याचिका संख्या /Petition No.: 43/MP/2019

कोरम/Coram:

श्री पी. के. पुजारी, अध्यक्ष/Shri P. K. Pujari, Chairperson

डॉ. एम. के. अय्यर, सदस्य/ Dr. M.K. Iyer, Member

श्री आई. एस. झा, सदस्य/ Sh. I.S. Jha, Member

आदेश दिनांक /Date of Order: 21st of January, 2020

IN THE MATTER OF:

Petition under Sections 79 of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreement dated 16.09.2016 claiming Carrying Cost on Change in Law compensation granted by the Order of the Commission dated 19.09.2018 in Petition No 50/MP/2018.

AND IN THE MATTER OF:

Prayatna Developers Private Ltd. (PDPL)
Represented by its Authorised Signatory 7B,
Sambhav House, Judges
Bungalow Road, Bodakdev, Ahmedabad - 380015, Gujarat

...Petitioner

VERSUS

1. National Thermal Power Corporation Ltd. (NTPC)
Core-7, SCOPE Complex, 7,
Institutional Area, Lodi Road,
New Delhi – 110003
2. Jaipur Vidyut Vitran Nigam Limited
Vidyut Bhawan, Jyoti Nagar,

Jaipur-30200S

3. Ajmer Vidyut Vitran Nigam Limited
Vidyut Bhawan, Panchsheel Nagar,
Makarwall Road, Ajmer-30S004
4. Jodhpur Vidyut Vitran Nigam Limited
New Power House, Industrial Area,
Jodhpur-342003, Rajasthan
5. The Ministry of New and Renewable Energy
Represented by its Secretary,
Block-14, CGO Complex,
Lodhi Road, New Delhi-110003

...Respondents

Parties Present: Shri Amit Kapur, Advocate, PDPL
Ms. Aparajita Upadhyay, Advocate, PDPL
Ms. Sakshi Kapoor, Advocate, PDPL
Shri Rakesh Shah, PDPL
Ms. Poorva Saigal, Advocate, NTPC
Ms. Tanya Sareen, Advocate, NTPC

आदेश /ORDER

1. The Petitioner, M/s Prayatna Developers Private Ltd. (PDPL) is a generating company primarily engaged in the business of setting up of solar power plants and generation of electricity.
2. The Respondent No.1, M/s NTPC Ltd. (hereinafter referred to as "NTPC") is engaged in the business of generation of electricity and allied activities. Under the State Specific Bundling Scheme of the National Solar Mission, NTPC is responsible for implementation of scheme of Ministry of New and Renewable Energy for setting up solar power plants.
3. The Respondents No. 2 to 4, M/s Jaipur Vidyut Vitran Nigam Limited, M/s Ajmer Vidyut Vitran Nigam Limited and M/s Jodhpur Vidyut Vitran Nigam Limited (hereinafter referred to as 'Rajasthan Discoms') respectively are the distribution licensees in the State of Rajasthan.
4. The Respondent No. 5, Ministry of New and Renewable Energy (hereinafter referred to as

“MNRE”) issued guidelines for implementation of Scheme for selection of 3000 MW Grid Connected Solar PV Power Projects under Phase-II, Batch-II, Tranche-I for “State Specific Bundling Scheme” under which NTPC was designated as the implementation agency.

5. The Petitioner has filed the petition under Sections 79 of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreement (hereinafter referred to as ‘PPA’) dated 16.09.2016 claiming Carrying Cost on Change in Law compensation granted by the Order of the Commission dated 19.09.2018 in Petition No 50/MP/2018. The Petitioner has made the following prayers :

(a) Grant carrying cost to the Petitioner.

(b) Restore the Petitioner to the same economic position as it were prior to the occurrence of the Change in Law event.

(c) Direct the Respondent to pay to the Petitioner the amount claimed under Change in Law in terms of Article 12 of the PPA along with carrying cost from the date the change in law event has come into effect.

(d) Pass such further orders or directions as this Commission may deem just and proper in the circumstances of the case.

Background

6. On 10.03.2015, MNRE issued guidelines for implementation of Scheme for selection of 3000 MW Grid Connected Solar PV Power Projects under Phase-II, Batch-II, Tranche-I for “State Specific Bundling Scheme”. Under the said State Specific Bundling Scheme, NTPC was made responsible for implementation. NTPC implemented the said scheme through its subsidiary NTPC Vidyut Vyapar Nigam Ltd., a trading licensee for inter-State trading in electricity in whole of India.
7. On 03.07.2015, NTPC invited proposals by a Request for Selection (hereinafter referred to as “RfS”) inviting proposals for setting up Grid Connected Solar-PV Power Projects (10 MW x 13 Projects) in the State of Rajasthan.
8. The Petitioner (PDPL) participated and after following the process of Reverse Auction conducted by NTPC, it was selected for setting up of two such Solar PV ground mount

Projects at Village Kanasar, Tehsil Baap, District Jodhpur, in the State of Rajasthan.

9. On 29.07.2016, NTPC issued a Letter of Intent vide its Ref No. NTPC/NSM/TI/NSPOPEN/RAJ-05/20MW/0027 (hereinafter referred to as “LoI”) to PDPL for development of two (2) grid connected, Solar PV Projects of 10 MW capacity each in the State of Rajasthan. PDPL was selected as the successful bidder under the National Solar Mission Phase-II Batch-II Tranche I State Specific Bidding Scheme conducted by NTPC Ltd. (Respondent No. 1).
10. On 16.09.2016, PDPL entered into two Power Purchase Agreements (hereinafter referred to as “PPAs”) with NTPC for setting up of 20 MW Solar PV ground mount Projects, located at Village Kanasar, Tehsil Baap, District Jodhpur, in the State of Rajasthan, for supply of power at a tariff of Rs. 4.36/kWh on long term basis.
11. On 12.04.2017, Government of India (hereinafter referred to as “GOI”) introduced the Goods and Services Tax, replacing multiple taxes levied by the Central and State Governments.
12. On 01.07.2017, the Central Goods and Services Tax Act, 2017; The Integrated Goods and Services Tax Act, 2017 for levy and collection of tax on inter-State supply of goods or services or both by the Central Government were enacted. The Rajasthan Goods and Services Tax Act, 2017 for levy and collection of tax on intra-State supply of goods or services or both by the State of Rajasthan was enacted.
13. On 15.07.2017, the Petitioner sent notice to the Respondents regarding Change in Law event that took place after applicability of Goods and Services Tax (hereinafter referred as “GST”) w.e.f. 01.07.2017. However, no response was received from the Respondents.
14. Further, 28.09.2017 was the Scheduled date of Commissioning (hereinafter referred to as “SCoD”) of both the projects of the PDPL. PDPL successfully commissioned its first 10 MW Project on 29.09.2017 and its second 10 MW Project on 11.10.2017.
15. On 01.02.2018, the Petitioner approached the Commission in Petition No. 50/MP/2018 for grant of Change in Law relief under Article 12 of the PPA on account of the introduction of

Goods and Services Tax resulting in a huge impact on the actual cost of the project vis-a-vis budgeted cost.

16. On 19.09.2018, the Commission while disposing of the Petition No. 50/MP/2018 allowed the relief regarding 'Change in law'. However, the Commission made an observation that the Petitioner in Petition no. 50/MP/2018 had neither made any claim regarding 'Carrying Cost' in its petition nor has filed any amendment application for amending the prayers of the Petition to include 'carrying cost'. Therefore, this claim of the Petitioner is beyond the scope of the petition and the prayers and the same cannot be entertained in Petition No. 50/MP/2018.

Submissions of the Petitioner

17. The Petitioner has submitted that, the PPA provides for extensive provisions for qualifying any event as Change in Law and granting relief from effective date i.e. the date on which the Change in Law event took effect. Relevant provision of the PPA is extracted herein below.

"12. CHANGE IN LA W

12.1 Definitions

In this Article 12, the following terms shall have the following meanings:

12. 1.1 "Change in Law" means the occurrence of any of the following events after the Effective Date, resulting into any additional recurring/ non-recurring expenditure by the SPD or any income to the SPD:

- (i) the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*
- (ii) a change in the interpretation or application of any' Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
- (iii) the imposition of a requirement for obtaining any Consents, Clearances and;*
- (iv) Permits which was not required earlier;*
- (v) a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the SPD;*
- (vi) any change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement.*

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the SPD, or (ii) any change on account of regulatory measures by an Appropriate Commission.

12.2 Relief for Change in law

12.2.1 The aggrieved Party shall be required to approach the Central Commission for seeking approval of Change in Law.

12.2.2. The decision of the Central Commission to acknowledge a Change in Law and the date from which it will become effective, provide relief for the same, shall be final and governing on both the parties”

18. The Petitioner has submitted that the mandate of ‘Change in Law’ provisions across all PPAs (standard documents drafted by the government) is restitution i.e. relief be granted in a manner so as to place an affected party in the same economic position as if a Change in Law had not occurred. Restitution is therefore inherent to compensation. In this regard, reference is made to the Ministry of Power's letter dated 27.08.2018 to the Commission wherein the Government has specifically recorded under Clause 2 of the letter, the difficulty faced by the Generating Companies in terms of 'considerable time' being consumed in the approval process resulting into severe cash flow problems to the Generating Companies, further leading to stress in the Power Sector. In view of the aforesaid, where the purpose is restoration to the same economic position, this Commission ought to consider the aggregate economic impact including carrying cost which is in the nature of compensation for time value of funds deployed on account of Change in Law events.
19. The Petitioner has submitted that, the Appellate Tribunal for Electricity (hereinafter referred to as ‘APTEL’) in its judgment dated 12.09.2014 in Appeal No. 288 of 2013 titled *Wardha Power Company Ltd. v. Reliance Infrastructure Ltd. & Ors.*, has recognized the principle that in order to 'restore the affected party to the same economic position', compensation for Change in Law claims has to be such, as to reimburse the affected party for the expense actually incurred. Thus, the same will include expenditure attributable towards carrying cost.
20. The Petitioner has submitted that the principle of recovery of carrying cost/interest and time value of money is well settled. The Petitioner has placed its reliance on the following Judgments: *Energy Watchdog v. CERC & Drs.* reported as (2017) SCC 14; *South Eastern Coalfield Limited v. State of Madhya Pradesh* reported as (2003) 8 SCC 648; *Judgment of*

APTEL dated 20.12.2012 in Appeal No. 150 of 2011, SLS Power Ltd v. Andhra Pradesh Electricity Regulatory Commission & Ors and Judgment dated 13.04.2018 in Appeal No. 210 of 2017, Adani Power Limited vs. Gujarat Electricity Regulatory Commission & Ors.

21. The Petitioner has submitted that Section 70 of the Indian Contract Act, 1872 must be read as part of applicable law even in the present PPA. It does not require express provision in the contract/PPA especially when the term 'relief for Change in Law' is appropriately used and inserted to cover the restitution part. The Petitioner is entitled to be compensated for time value of money as the supply of power is not a non-gratuitous act. In this regard, the Petitioner has placed reliance on *Piloo Dhunjishaw Sidhwa v. Municipal Corporation of the City of Poona* reported as (1970) 1 SCC 213.
22. The Petitioner has submitted that what is to be allowed as "Relief for Change in Law" is nothing but the impact of any Change in Law on the\ Petitioner's revenues and costs. In case of delay, the impact will also include carrying cost as an integral part of the cost on account of change in law since the Petitioner has to incur the financing cost to borrow the additional fund to be paid to the statutory authorities pending timely reimbursement from the Respondents. It is further submitted that in terms of Article 12 of the PPA, the affected party is to be restored to the same economic position as if the Change in Law event had not occurred. Therefore, any relief granted under Article 12.2 must conform to the primary principle of restoring the Petitioner to the same economic position. Failure to do so would defeat the underlying principle of restitution and render Article 12 of the PPA otiose. Article 12.2 of the PPA neither limits nor restricts the power of the Commission to grant carrying cost.
23. The Petitioner has submitted that the '*Relief for change in Law*' does not limit itself to a simple correlation of increased expenditure and a corresponding compensation amount but ought to include payment towards carrying costs in respect to the Change in Law events. The Hon'ble Supreme Court has in the case of *R.C. Cooper v. Union of India* reported as *AIR 1970 SC 564* noted that the dictionary meaning "compensation" means anything given to make things equal in value: anything given as an equivalent, to make amends for loss or damage". The aforesaid principle has also been recognized by the Hon'ble Supreme Court in

the case of *N.B.Jeejeebhoy v. Assistant Collector, Thana Prant, Thana reported as AIR 1965 SC 1096* in relation to Article 31 of the Constitution of India wherein it was held that “*the expression "compensation" in Art. 31(2) of the Constitution means 'Just equivalent" of what the owner has been deprived of.*” Further, compensation is a comprehensive term and is aimed at restoring a party to the same position as if no injury was caused to him, as held by the Hon'ble Supreme Court in the case of *Yadava Kumar v. The Divisional Manager National Insurance Co. Ltd. and Anr., reported as (2010) 10 SCC 341*.

24. The Petitioner has submitted that a Change in Law clause being a restitutive clause in the PPA, equity demands that the Petitioner should be compensated for all the necessary and reasonable extra costs including carrying cost and/or interest on the additional cost incurred on account of Change in Law event. In this regard, the Petitioner has placed reliance on the Hon'ble Supreme Court's Judgment in *Sumitomo Heavy Industries Limited v. ONGC Limited reported as (20.10) 11 SCC 296*.
25. The Petitioner submitted that unless there is an express provision prohibiting the grant of restitution, the affected party would be legally entitled to be restored to the same economic position that it would have been but for the Change in Law event.
26. The Petitioner submitted that the Hon'ble Supreme Court in the case of *Energy Watchdog v. CERC & Drs. reported as (2017) 14 SCC 80*, has held that where a situation arises which is not covered by the guidelines or the guidelines do not deal with a given situation, the Commission's general regulatory powers under Section 79(1)(b) can be used. This is a fit case where the Commission ought to exercise its power and devise a suitable mechanism to ensure that the Petitioner is restored to the same economic position. The Commission ought to recognise time-value of money and that the Petitioner is restored to the same economic position by allowing carrying cost for the period when the Petitioner pays the change in law amount and when the Respondent-Procurementers compensate the Petitioner.
27. The Petitioner has submitted that the Petitioner is entitled to compensation not only arising directly on account of the Change in Law events as claimed in the disposed of Petition No. 50/MP/2018 but also compensation on account of additional deployment of funds (carrying

costs) in relation to the Change in Law events, so as to effectively restore the Petitioner to the same economic position as if the Change in Law event had not taken place.

28. The Petitioner has submitted that carrying cost is also payable in terms of the principles of Equity, Business Efficacy and Unjust Enrichment as detailed hereunder:
- (a) **Principle of Equity** - Hon'ble Supreme Court in the SLS case has held that "*a party finally found to be entitled to a relief in terms of money, would be entitled to be compensated by award of interest which would also be payable in equity on the basis of principle of restitution which is recognized in Section 144 of Code of Civil Procedure*".
 - (b) **Principle of Business Efficacy**- In order to address a specific situation where the PPA is silent on the aspect of 'Change in Law', the power producing companies may resort to reading the PPA under the principle of "business efficacy" wherein the explicit terms of the contract are final with regard to the intention of the parties to the contract. The Petitioner has placed its reliance on the Hon'ble Supreme Court in the case of *Nabha Power Limited v. Punjab State Power Corporation Limited and Anr. reported as (2018) 11 SCC 508*.
 - (c) **Doctrine of Unjust Enrichment**- Alternatively, if carrying cost is not payable, then there will be an adverse incentive for the Procurer to delay the adjudication of Change in Law as it stands to gain in terms of time value of Money as he has to make payment of effect of Change in Law event (principle) only subsequent to adjudication of Change in Law as per the directions of the Commission. This in turn will lead to unjust enrichment of the Procurer at the cost of the Seller.

Submissions of the Respondent No. 1 (NTPC)

29. The Respondent No. 1 has submitted that the Petition filed is not maintainable and is liable to be dismissed in limine, inter alia, for the following reasons:
- (a) The present petition is barred by the principles of Constructive Res- Judicata in as much as at the time of filing of the substantive Petition claiming Change in Law (50/MP/2018) on account of promulgation of GST Laws, in February, 2018, the Petitioner did not claim the carrying cost and the same was rejected by this Commission in its Order dated

19.09.2018. Further, the Petitioner has not challenged the order dated 19.09.2018 passed by this Commission and the same has become final and binding between the parties.

- (b) Even otherwise, when the Petitioner filed Petition 50/MP/2018 and specifically did not claim carrying cost, the principles enshrined under Order 2 Rule 2 of the Code of Civil Procedure, 1908 prohibits the Petitioner from seeking the remedy by way of a subsequent separate petition. The Petitioner cannot claim directly or indirectly by way of the present Petition what it had failed to claim at the relevant time of filing Petition No. 50/MP/2018.
- (c) In any event, the issue of carrying cost already stands decided in light of the decision dated 13.04.2018 of the APTEL in Appeal No. 210 of 2017 in *Adani Power Limited –v- Central Electricity Regulatory Commission and Ors*, wherein it was held that if a PPA has no provision for restoration to the same economic position, then the carrying cost will not be applicable. There is no provision for restoration/restitution in the PPA dated 16.09.2016 entered into between NTPC and the Petitioner.
- (d) The aforementioned judgment of the APTEL has been upheld by the Hon’ble Supreme Court in the case of *Uttar Haryana Bijli Vitran Nigam Limited (UHBVNL) and Anr v Adani Power Limited and Ors* (judgment dated 25.02.2019 in Civil Appeal No. 5865 of 2018). In the present PPA, there is no such provision for restitution/restoration to the same economic position. Therefore, the Petitioner is not entitled to any carrying cost.
- (e) The issue of inadmissibility of carrying cost in similar circumstances and in terms of similar PPAs already stands settled by this Commission in its Order dated 09.10.2018 in Petition No. 188/MP/2018 and Batch in *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. Batch*, wherein this Commission had held that if the PPA does not have a provision for restitution, then carrying cost will not be granted.
- (f) The above decision was re-iterated by the Commission in its Order dated 5.02.2019 in Petition No. 187/MP/2018 and Batch in *M/s Renew Wind Energy (TN2) Private Limited –v- NTPC Limited and Ors and Batch*.
- (g) As in the case of the other PPAs examined by the Commission in the aforementioned cases, there is no provision in the PPA regarding carrying cost or interest apart from the Late Payment Surcharge applicable on the late payment of the invoices raised by the Petitioner.

- (h) The reference in Article 12.2.2 of the PPA to the Commission deciding on the date from which the change in law will be effective, refers to the date from which the principal amount is to be computed, namely, the date on which the change in law comes into force and not to the payment of interest and carrying cost; and
- (i) In the absence of the express provision in the PPA, it is not open for the Petitioner to claim relief under general principles of equity. Reference has been made to the judgment - *Alopi Parshad and Sons Ltd. v. Union of India*, (1960) 2 SCR 793 : AIR 1960 SC 588.

Submissions by the Petitioner in the Rejoinder

30. The Petitioner vide the Rejoinder dated 30.04.2019 has submitted that objections raised by the Respondent are denied on the following grounds:

Re: Petitioner's claim is not barred by constructive res judicata

31. The Petitioner has submitted that the principle of Constructive Res Judicata sets to bar any claims being raised in a later proceeding if the claim should have been raised and decided in an earlier proceeding. However, in the present case:

- (a) The Petitioner had in fact sought the relief of restoration to the same economic position, as if the Change in Law had not occurred. The prayer for carrying cost is inherent in the prayer for restitution.
- (b) The Commission has not rejected the Petitioner's claim for carrying cost in the earlier Petition No. 50/MP/2018. This Commission, in the absence of a prayer expressly seeking carrying cost, had observed that the same is outside the scope of Petition No. 50/MP/2018. Therefore, the present Petition has been filed expressly seeking payment of carrying cost, which has not been finally decided by the Commission for the Petitioner's case.

Re: Petitioner's claim is not barred by Order II, Rule 2 of CPC

32. The Petitioner has submitted that NTPC has contended that principles under Order II Rule 2 of the CPC require that every suit shall contain the whole claim with respect to one cause of action, and if a party intentionally relinquishes any portion of his claim, then the same cannot be sought afterwards. However, in Petition No. 50/MP/2018:
- (a) The Petitioner had sought its entire claim with respect to Change in Law by praying before this Commission to restore the Petitioner to the same economic position as if the Change in Law had not occurred. This includes payment of carrying cost, in addition to compensation for Change in Law.
 - (b) The Petitioner had, at no time relinquished its claim for restoration to the same economic position by payment of carrying cost. The same was also expressly sought by the Petitioner during oral arguments before this Commission.
 - (c) Therefore, the conditions set out in Order II, Rule 2 CPC have not been met, and consequently, Petitioner is not barred by seeking the same by way of the present Petition.
33. The petitioner has submitted that in any case, the proceedings before the Commission are not strictly subject to the rules of procedure laid down in CPC. The Commission has been inherently empowered by the Electricity Act, 2003 and the regulations framed by this Commission to pass orders in order to meet the ends of justice. In this context, Regulation 111 of the CERC (Conduct of Business) Regulations, 1999, is extracted herein below:

“111. Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for ends of justice or to prevent the abuse of the process of the Commission”

34. The petitioner further submitted that NTPC is precluded from taking such a hyper-technical objection to the present Petition as it is a settled position of law that procedure must serve as the handmaid of justice, which essentially means that rules of procedure are made to advance the cause of justice and not to defeat it. In this regard, the Petitioner has placed its reliance on the Hon'ble Supreme Court's judgment in: *Sushil Kumar Sen v. State of Bihar* reported as (1975) 1 SCC 774; *Salem Advocate Bar Assn. (II) v. Union of India* reported as (2005) 6 SCC 344; *State of Punjab v. Shamlal Murari* reported as (1976) 1 SCC 719.

Re: The issue of payment of carrying cost has not been settled by the Hon'ble Supreme Court

35. The Petitioner has submitted that NTPC has contended that it is precluded from seeking carrying cost in view of APTEL judgment dated 13.04.2018 in *Adani Power Ltd. v. CERC & Ors.* which was upheld by the Hon'ble Supreme Court in its judgment dated 25.02.2019 passed in *UHBVNL & Anr. v. Adani Power Ltd.* The contention of NTPC is wrong since the Hon'ble Supreme Court's judgment does not support NTPC's case at all. In fact, the Hon'ble Supreme Court has upheld the principle of restitution in terms of Article 13.2 of the relevant PPA therein. The judgment relied by NTPC deals with only one kind of PPA [which was based on model PPA issued by Ministry of Power for thermal power plants]. The Hon'ble Supreme Court did not have an occasion to consider the provisions of the PPAs, which are also based on model PPAs issued by Ministry of Power for renewable power plants.
36. The Petitioner has submitted that since the model PPAs are worded in a peculiar way, the intent of the provision must be considered. The meaning/interpretation of the Hon'ble Supreme Court's judgment (in thermal PPAs) cannot be read/used to restrict the rights of a private investor/generating company. The private company has no control over the terms of the provisions made part of the model PPAs. This is a settled position of law that in case there is any ambiguity in the interpretation of the agreement, the rule of *Contra Proferentem* will apply. The rule of *Contra Proferentem*, provides that in case of ambiguity or two possible interpretations, the Court will prefer that interpretation which is more favorable to the party who has not drafted the standard agreement. In this regard, the Petitioner has relied upon following Judgments of the Hon'ble Supreme Court: *Bank of India & Anr. Vs. K. Mohandas & Ors.*, reported as (2009) 5 SCC 313; *United India Insurance Co. Ltd. Vs. Pushpalaya Printers*, reported as (2004) 3 SCC 69;
37. In view of the above, the Petitioner is entitled to compensation not only arising directly on account of the Change in Law events as claimed in the disposed of Petition No. 50/MP/2018 but also compensation on account of additional deployment of funds (carrying costs) in relation to the Change in Law events, so as to effectively restore the Petitioner to the same economic position as if the Change in Law event had not taken place.

Re: Claim for carrying cost has to granted to restore Petitioner to the same economic

position as if the Change in Law had not occurred

38. The Petitioner has submitted that NTPC's contention that the Commission has already disallowed carrying cost to power producers with similar PPAs, in the absence of a provision for carrying cost, is wrong and denied. In this context the following submissions have been made:

- (a) The mandate of Change in Law provisions is restitution i.e. relief be granted in a manner so as to place an affected party in the same economic position as if a Change in Law had not occurred. Even if a PPA does not expressly provide for restoring parties to the same economic position, the principle of restitution is inherent in it and stays alive. It is submitted that:
 - (i) Interest is an implied term.
 - (ii) Restitution is inherent to compensation.
 - (iii) Carrying cost is the compensation for time value of money or the monies denied at the appropriate time and paid after a lapse of time.
 - (iv) Article 12 (Change in Law) of the PPAs is a restitutive provision and thus ought to be given a wide and purposive interpretation. Further, Article 12.2 of the PPA accords plenary powers to the Commission to determine the compensation to be awarded.
 - (v) Unless there is an express provision prohibiting the grant of restitution, the affected party would be legally entitled to be restored to the same economic position that it would have been but for the Change in Law event. Reliance in this regard is placed on *South Eastern Coalfield Limited v. State of Madhya Pradesh reported as (2003) 8 SCC 648*.
- (b) The MoP in its letter dated 27.08.2018 to the Commission has specifically recorded under clause 2 of the letter, the difficulty faced by the Generating Companies in terms of 'considerable time' being consumed in the approval process resulting into severe cash flow problems to the Generating Companies, further leading to stress in the Power Sector. From the said letter, it is evident that the purpose of granting relief for Change in Law is to restore the affected party to the same economic position as if the Change in Law had not occurred.

- (c) Section 70 of the Indian Contract Act, 1872, must be read as a part of the present PPA. Since in the present case, the procurer has been procuring power from the Petitioner (non-gratuitous act), the Petitioner is entitled to be compensated not only for Change in Law as approved by the Commission but also for time value of money.
- (d) Alternatively, if carrying cost is not allowed then there will be an adverse incentive for the Procurer to delay the adjudication of Change in Law as it stands to gain and as it has to make payment of effect of Change in Law event (principal) only subsequent to adjudication of Change in Law. This in turn will lead to unjust enrichment of the Procurer at the cost of the Seller.

Analysis and Decision

39. The Petition was filed on 21.02.2019, came up for hearing on 19.03.2019 and was reserved for Orders on 25.11.2019. We have heard the learned counsels for the Petitioner and the Respondent and have carefully perused the records.
40. The Central Goods and Services Tax Act, 2017, The Integrated Goods and Services Tax Act, 2017, and The Rajasthan Goods and Services Tax Act, 2017 are hereinafter collectively referred as “GST Laws”.
41. The brief facts of the case are that the Petitioner entered into PPA with NTPC. Subsequent to the Effective Date i.e. 29.08.2016, the “GST laws” were enacted on 01.07.2017. PDPL sent a notice to NTPC on 15.07.2017 regarding the “Change in Law” event that took place after applicability of GST w.e.f. 01.07.2017. On 01.02.2018, the Petitioner approached the Commission and filed Petition No. 50/MP/2018 for grant of Change in Law relief under Article 12 of the PPA on account of the introduction of GST Laws resulting in a huge impact on the actual cost of the project vis-a-vis budgeted cost. On 19.09.2018, the Commission while disposing of the Petition No. 50/MP/2018 allowed the relief regarding ‘Change in law’, with the following observation: *“We note that the Petitioner in Petition no. 50/MP/2018 has neither made any claim regarding ‘Carrying Cost’ in its petition nor has filed any amendment application for amending the prayers of the Petition to include ‘carrying cost’.*

Therefore, this claim of the Petitioner is beyond the scope of the petition and the prayers. The Commission is of the view that the same cannot be entertained in Petition No. 50/MP/2018.”

42. The Petitioner has submitted that it may be allowed ‘Carrying Cost’ on Change in Law compensation granted by the Order of the Commission dated 19.09.2018 in Petition No 50/MP/2018. **Per Contra**, the Respondent has submitted that the Petition filed is not maintainable and is liable to be dismissed since the same is barred by the principles of Constructive Res- Judicata and Order II Rule 2 of Code of Civil Procedure, 1908. Further, the Petitioner has not challenged the order dated 19.09.2018 passed by this Commission and the same has become final and binding between the parties.

43. From the submissions of the parties, the following issues arise before this Commission:

***Issue No. 1:** Whether the claim of amount under Change in Law in terms of Article 12 of the PPA along with carrying cost from the date the change in law event has come into effect by the Petitioner is barred by the Principles of Constructive Res-judicata and Order II Rule II of Code of Civil Procedure, 1908? And*

***Issue No. 2:** Whether the Respondent should be directed to pay to the Petitioner the amount claimed under Change in Law in terms of Article 12 of the PPA along with carrying cost from the date the change in law event has come into effect?*

44. Since issue no. 1 and 2 are interconnected, they are taken together for discussion. The Petitioner has submitted that the underlying purpose of Article 12 of the PPA is to provide compensation and restore a party affected by Change in Law events to a position as if such Change in Law had not taken place. The Petitioner can be brought to the position existing prior to the occurrence of the Change in Law event only if the Petitioner is also compensated for the additional expenditure incurred as a result of the Change in Law by paying carrying cost. In view of the above, the Petitioner has submitted that it may be allowed ‘Carrying Cost’ on Change in Law compensation granted by the Order of the Commission dated 19.09.2018 in Petition No 50/MP/2018. **Per Contra**, the Respondent has submitted that the Petition filed is not maintainable and is liable to be dismissed since the same is barred by the

principles of Constructive Res- Judicata and Order II Rule 2 of Code of Civil Procedure, 1908. Further, the Petitioner has not challenged the order dated 19.09.2018 passed by this Commission and the same has become final and binding between the parties. The Respondent has submitted that the PPA does not have a provision dealing with restitution principles of restoration to same economic position. Therefore, the Petitioner is not entitled to claim relief which is not provided for in the PPA.

45. The Commission observes that Section 11 of the Code of Civil Procedure, 1908 stipulates as under:

“11. Res judicata— No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I.—The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.—For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.—Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII.—The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the

execution of that decree.

Explanation VIII.—An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in as subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.

46. The Commission observes that Order II Rule 2 of the Code of Civil Procedure, 1908 stipulates as under:

“ORDER II- FRAME OF SUIT

...

2. Suit to include the whole claim—

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.”

47. From the above, the Commission observes that Section 11 of the Code of Civil Procedure, 1908 mandates that any suit or issue in which matter directly and substantially in issue has been heard and finally decided on merits by the competent Court, it cannot be tried again by any Court provided the matter directly and substantially in issue is same between the same parties to the suit. The Rule of constructive res judicata is engrafted under Explanation IV of Section 11 of the Civil Procedure Code, 1908. It is observed that whereas, res judicata basically prohibits suit which has already been decided by a competent court, constructive res judicata prohibits raising issues which ought to be raised in the previous suit. It provides that if a plea could have been taken by a party in a proceeding between him and his opponent, he should not be permitted to take that plea against the same party in a subsequent proceeding with reference to the same subject-matter. Further, Order II Rule 2 of the Code of Civil Procedure, 1908 mandates that the suit filed should include the whole claim.

48. The Commission observes that the object underlying Section 11 of the Code of Civil Procedure, 1908 is that if the proceeding originally instituted is proper, the decision given

therein is binding on all the persons on whom the right or interest may devolve. Further, it also prohibits raising issues which ought to be raised in the previous suit with reference to the same subject-matter. The doctrine of res-judicata is conceived in the larger public interest that all the litigation must, sooner than later come to an end. Similarly, the object of Order II Rule 2 of the Code of Civil Procedure, 1908 is to ensure that no defendant is sued or vexed twice with regard to the same cause of action and second to prevent a plaintiff from splitting claims and remedies based on the same cause of action. The effect of Order II Rule 2 of CPC is to bar a plaintiff who had earlier claimed certain remedies with regard to a cause of action, from filing a second suit with regard to other reliefs based on the same cause of action. The Commission observes that Section 11 the Code of Civil Procedure read with Order II Rule 2 of the Code of Civil Procedure bars the subsequent suit on the same cause of action but does not however bar a subsequent suit based on a different and distinct cause of action.

49. The Commission observes that in the Petition No. 50/MP/2018, the Petitioner made the following prayer:

“

- a. *Admit the Petition;*
- b. *Hold and declare that the imposition of the Integrated Goods and Services Tax, 2017, Central Goods and Services Tax, 2017 and Rajasthan Goods and Services Tax, 2017 is an event under ‘Change in Law’ under Article 12 of the PPA;*
- c. *Restore the Petitioners to the same economic condition prior to occurrence of the Changes in Law by way of adjustment in tariff in terms of Article 12 of the PPA by increasing the tariff as prayed for in the present Petition.*
- d. *To pass such other and further order or orders as the Commission deems appropriate under the facts and circumstances of the present case.”*

50. In Petition No. 50/MP/2018, the Commission held that:

“The Petitioners have submitted that they are entitled to the “Carrying Cost” for the costs incurred due to the “Change in Law” events. They have argued that the Carrying Cost is the compensation for time value of money and is an inherent provision in the PPA which has a provision for recognition of “Change in Law” event. However, the Respondents have submitted that there is no provision in the PPA regarding carrying cost or interest for the period till the determination of the relief amount on account of “Change in Law”. We note that the Petitioner in Petition no. 50/MP/2018 has neither made any claim regarding “Carrying Cost” in its petition nor has filed any amendment application for amending the prayers of the Petition to include “carrying cost”. Therefore, this claim of the Petitioner is beyond the scope of the petition and the prayers. The Commission is of the view that the same cannot be entertained in Petition No. 50/MP/2018. However, in the Petition No. 52/MP/2018 the Petitioner has sought relief regarding “Carrying Cost”. The

Commission observes that the issue regarding “Carrying Cost” has been argued before the Commission at great length in the eleven I.A.’s filed along with various other petitions (188/MP/2017 & Ors.). Therefore, the Commission is of the view that the issue regarding “Carrying Cost” will be dealt in the eleven I.A.’s filed along with various petitions (188/MP/2017 & Ors.) and accordingly the same will be applicable to the Petitioner in Petition No. 52/MP/2018. No other issue was pressed or claimed.”

51. From the above, the Commission observes that vide Order dated 19.09.2018 in *Petition No. 50/MP/2018 & Another*, it was held that claim of the ‘Carrying Cost’ qua the Petitioner in Petition No. 50/MP/2018, was beyond the scope of the petition since there was no prayer regarding the same. It was further held that the issue regarding “Carrying Cost” was to be adjudicated in Petition No. 188/MP/2017 & Ors. and the decision was to be applicable to the Petitioner in Petition No. 52/MP/2018 specifically and not to the Petitioner in Petition No. 50/MP/2018. As such the issue regarding ‘Carrying cost’ has not been decided qua the Petitioner in Petition No. 50/MP/2018. Therefore the argument that the claim of carrying cost from the date of ‘change in law’ event is barred by the Principles of Constructive Res-judicata and Order II Rule II of Code of Civil Procedure, 1908 is not tenable and does not sustain.
52. Now we proceed to discuss the issue regarding admissibility of payment to the Petitioner on account of ‘Carrying Cost’.
53. The Commission observes that in the judgment of the *Appellate Tribunal for Electricity dated 13.04.2018 in Appeal No. 210 of 2017 in Adani Power Limited v. Central Electricity Regulatory Commission and Ors.*, it was held that since Gujarat Bid-01 PPA has no provision for restoration to the same economic position, the decision of allowing carrying cost will not be applicable. The relevant extract of the Judgment dated 13.04.2018 reads as under:

“ISSUE NO.3: DENIAL OF CARRYING COST

x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of „restitution” i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon'ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India &Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate

authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA.

54. Relevant extracts of the judgment of the APTEL dated 14.08.2018 in Appeal No. 111 of 2017 in *M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors.* on the aspect of carrying cost reads as under:

“ix. In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial. As pointed out by the Central Commission that the Appellant is only eligible for surcharge if the payment is not made in time by the Respondents Nos. 2 to 4 after raising of the supplementary bill arising out of approved Change in Law event and in PPA there is no compensation mechanism for payment of interest or carrying cost for the period from when Change in Law becomes operational till the date of its approval by the Central Commission. We also observe that this Tribunal in SLS case after considering time value of the money has held that in case of redetermination of tariff the interest by a way of compensation is payable for the period for which tariff is re-determined till the date of such re-determination of the tariff. In the present case after perusal of the PPAs we find that the impact of Change in Law event is to be passed on to the Respondents Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA. The relevant extract is reproduced below:

13.4 Tariff Adjustment Payment on account of Change in Law 13.4.1 Subject to Article 13.2 the adjustment in Monthly Tariff Payment shall be effective from:

the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or

the date of order/ judgment of the Competent Court or tribunal or Indian Government instrumentality, if the Change in Law is on account of a change in interpretation of Law. (c) the date of impact resulting from the occurrence of Article 13.1.1.

From the above it can be seen that the impact of Change in Law is to be done in the form of adjustment to the tariff. To our mind such adjustment in the tariff is nothing less than re-determination of the existing tariff.

x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same

economic position as if Change in Law has not occurred is in consonance with the principle of 'restitution' i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgment of the Hon'ble Supreme Court in case of Indian Council for Enviro Legal Action vs. Union of India &Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority.

This Tribunal vide above judgment has decided that if there is a provision in the PPA for restoration of the Seller to the same economic position as if no Change in Law event has occurred, the Seller is eligible for carrying cost for such allowed Change in Law event (s) from the effective date of Change in Law event until the same is allowed by the appropriate authority by an order/ judgment.”

55. From the above judgements, the Commission observes that if there is a provision in the PPA for restoration of the Petitioner to the same economic position as if no Change in Law event has occurred, the Petitioner is eligible for “Carrying Cost” for such allowed “Change in Law” event(s) from the effective date of Change in Law event until the same is allowed by the Commission. The Commission observes that the PPA does not have a provision dealing with restitution principles of restoration to the same economic position as if no change in law event has occurred. Therefore, the Commission is of the view that the claim of the Petitioner regarding separate carrying cost is not admissible.

56. Accordingly, the Petition No. 43/MP/2019 stands disposed of.

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