

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 292/MP/2019**

**Coram:**

**Shri P. K. Pujari, Chairperson**

**Shri I. S. Jha, Member**

**Shri Arun Goyal, Member**

**Date of Order: 28th January, 2021**

**In the matter of**

Petition under Section 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 seeking compensation of carrying cost in respect of the Change in Law events allowed by the Commission under the Power Purchase Agreement dated 25.3.2011 executed between the Petitioner and the Respondent No.2 and the Power Purchase Supply Agreement dated 5.1.2011 executed between Respondent No.1 and Respondent No.2.

**And**

**In the matter of**

Adhunik Power and Natural Resources Limited  
9B, 9th Floor,  
Hansalaya Building  
15, Barakhamba Road, Connaught Place,  
New Delhi- 110001

**.....Petitioner**

**Vs**

1. West Bengal State Electricity Distribution Company Limited  
Vidyut Bhawan, Block DJ, Bidhannagar,  
Kolkata 700091

2. PTC India Limited  
2nd Floor, NBCC Tower  
15 Bhikaji Cama Place,  
New Delhi - 110066

**... Respondents**

**Parties Present:**

Shri Deepak Khurana, Advocate for the Petitioner

Shri Tejasv Anand, Advocate for the Petitioner

Shri Vishrov Mukerjee, Advocate for WBSEDCL

Shri Rohit Venkat, Advocate for WBSEDCL

Shri Ameya Vikram Mishra, Advocate for WBSEDCL

Shri S. Chattopodhyay, representative of the Petitioner

## ORDER

The Petitioner, Adhunik Power and Natural Resources Limited, has filed the present Petition under Sections 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 (hereinafter referred to be as "Act") read with Article 10 of the Power Sale Agreement (PSA) dated 5.1.2011 executed between West Bengal State Electricity Distribution Company Limited (WBSEDCL) and PTC India Limited (in short, PTC), the terms of which have been incorporated in the Power Purchase Agreement (PPA) dated 25.3.2011 executed between the Petitioner and PTC. The Petitioner has made the following prayers:

*"(a) Grant carrying cost @ 1.25% per month on the Change in Law events allowed by the Commission vide its Order dated 30.4.2019 passed in Petition No. 255/MP/2015, from the date(s) on which the said amount(s) became due to the Petitioner till the actual realization of the same by the Petitioner.*

*(b) In the interim pending final adjudication of the present Petition, direct the Respondents to make payment of Rs. 45.13 crore i.e. 90% of the already accrued carrying cost amount of Rs 50.149 crore up till 31.7.2019 ."*

2. The Petitioner has set up a 540 MW (2 x 270 MW) Thermal Power Project (hereinafter referred to as 'the Project') at Saraikela-Kharsawan District in the State of Jharkhand. The Petitioner has entered into Power Purchase Agreement (PPA) dated 25.3.2011 with PTC for supply of 100 MW for onward sale on long term basis. The said PPA was executed on the understanding that PTC has executed Power Supply Agreement (PSA) dated 5.1.2011 with WBSEDCL for sale and supply of 100 MW power to WBSEDCL through the generating station of the Petitioner. The Petitioner has submitted that both the PPA and the PSA are inter-related and the Petitioner has to fulfil the obligations of the seller, on behalf of PTC, with respect to the power supply obligations to the Respondent, WBSEDCL.

## **Background**

3. The Petitioner has submitted that during the Operating Period of the Project, it had incurred additional costs on account of certain Change in Law events and had, therefore, filed Petition No. 255/MP/2017 before the Commission seeking compensation on account of such Change in Law events in terms of the PPA/PSA. The said Petition was allowed by the Commission vide its order dated 30.4.2019. However, in the said Petition, a prayer for granting carrying cost was not sought on account of inadvertent error and accordingly, the Commission did not consider the aspect of carrying cost in the said order. Subsequently, on 14.6.2019, the Petitioner filed an Interlocutory Application (IA) No. 58/2019 in Petition No. 255/MP/2017 for modification of the order and grant of carrying cost on the Change in Law claims allowed vide order dated 30.4.2019. However, during the course of hearing of the said IA, the learned counsel for the Petitioner sought permission to withdraw the IA with liberty to file Miscellaneous Petition for grant of carrying cost, which was permitted by the Commission vide its order dated 22.7.2019. Accordingly, pursuant to the liberty granted by the Commission and in terms of the restitutionary principles as laid down in Article 10.2 of the PPA/PSA, which provide for restoration of the party affected by Change in Law event to the same economic position as if Change in Law had no occurred, the Petitioner has filed the present Petition seeking carrying cost on the Change in Law claims allowed by the Commission in its order dated 30.4.2019 in Petition No. 255/MP/2017.

4. The Petition was admitted on 29.10.2019 and notices were issued to the Respondents to file their reply to the Petition. Reply to the Petition has been filed by the Respondent, WBSEDCL and the Petitioner has filed its rejoinder thereto.

## **Reply of WBSEDCL**

5. WBSEDCL in its reply dated 23.1.2020 has submitted as under:

(a) PSA in the present case is under negotiated route as captured in the recital D of the PSA i.e. the parties have entered into negotiations for sale of power on round the clock basis for a period of 25 years as the Petitioner has not agreed to sell power as per tariff determined under Section 62 or Section 64(5) of the Act. Therefore, Change in Law principles including carrying cost relating to the PPAs under Section 63 of the Act will not be applicable in the present case.

(b) The present Petition is barred by Order 2, Rule 2 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the CPC') as the claim for carrying cost is part of same cause of action as the Change in Law events as considered and allowed by the Commission in Petition No. 255/MP/2017. Thus, the Petitioner cannot be permitted to claim carrying cost vide a subsequent Petition once it has expressly omitted to do so in Petition No. 255/MP/2017.

(c) Delay in filing the present Petition and Petition No. 255/MP/2017 by the Petitioner is on account of its own fault and thus no carrying cost for such period of delay can be allowed. Therefore, the Petitioner cannot claim carrying cost starting from July 2013 when Petition No. 255/MP/2017 itself was filed on 25.10.2017. This principle has been recognised by the Appellate Tribunal for Electricity (in short 'the APTEL') in its judgment dated 19.9.2007 in Appeal No. 70 of 2007 in the case of Maharashtra State Electricity Distribution Company Limited v Maharashtra Electricity Regulatory Commission as well as in its subsequent judgments (i) dated 30.4.2014 in Appeal Nos. 147, 148 and 150 of 2013 in the case of Torrent Power Limited v. GERC and Ors. and (ii) dated 4.12.2014 in Appeal No. 45 of 2014 in the case of Paschim Gujarat Vij Company Limited v. GERC and Ors.

(d) Compensation for Change in Law claims is to be determined with reference to a baseline cost both in terms of fuel cost as well as applicable taxes and duties. Since the issue of source of coal for the Petitioner's Project is pending before the Commission in Petition No. 305/MP/2015, it would not be

possible to determine the carrying cost for the Change in Law events till such time the said Petition is pending for decision.

(e) The Petitioner is seeking to make a profit in the guise of restitution by claiming carrying cost @1.25% per month. The Commission has been allowing the carrying cost as per the actual weighted average rate of interest or rate as per the Tariff Regulations or Late Payment Surcharge under the PPA/PSA, whichever is lower. Accordingly, the Petitioner ought to be directed to provide the information as certified by statutory auditor.

### **Rejoinder of the Petitioner**

6. The Petitioner in its rejoinder dated 24.2.2020 has submitted as under:

(a) Article 10 of the PPA/PSA provides for in-built restitutionary mechanism and the manner in which the parties are required to be compensated. Article 10.4 of the PPA/PSA specifically provides that monthly tariff adjustment shall be effective from the date of Change in Law event. Thus, since the claims of the Petitioner are as per the provisions of the PPA/PSA and not beyond the same, the fact that the present case is not a case of Section 63 PPA is not at all germane.

(b) The provisions of the CPC do not apply to adjudication of disputes under regulatory regime under the Act. The present Petition has been filed in terms of Articles 10.2 and 10.4 of the PPA/PSA and the carrying cost, which in itself being a different cause of action, can be claimed separately from other Change in Law claims. Merely because a party had an option to sue for more than one claims in its previous Petition, it cannot be precluded from filing a subsequent Petition to raise Change in Law claims. Since, the claim of carrying cost is continuous in nature and the same is applicable throughout the term of the PPA/PSA, for such continuing and subsisting cause of action, Order 2 Rule 2 of the CPC does not bar to file subsequent Petition.

(c) The entitlement of carrying cost to the Petitioner and the date from which carrying cost is to be awarded to the Petitioner is stipulated in the PPA/PSA between the parties. Article 10.4 of the PPA/PSA clearly provides for

mode and manner in which the tariff has to be adjusted in case of Change in Law event and the date from which the amounts towards Change in Law events become due. Therefore, the contention of WBSEDCL that the Petitioner is not entitled to carrying cost is misconceived in view of the express provisions of the PPA/PSA. Also, WBSEDCL had not raised any such objection of delay in filing of Petition No. 255/MP/2017 in the reply filed therein. Judgments of APTEL relied upon by WBSEDCL relate to issue of delay in filing of tariff Petition and consequent award of carrying cost on the same and have no application to the present case for award of compensation on account of Change in Law under the PPA/PSA.

(d) The outcome of Petition No. 305/MP/2015 has no bearing in the adjudication and decision of the present Petition. The very premise of the objection raised by WBSEDCL i.e. Change in Law is to be determined with reference to the baseline cost both in terms of fuel cost as well as applicable taxes and duties is erroneous. As per the settled position laid down by the APTEL in its judgment dated 12.9.2014 in Appeal No. 288 of 2013 (Wardha Power Company Limited v. Reliance Infrastructure Limited and Ors.) (hereinafter referred to as 'Wardha Judgment') compensation on account of increase in expenditure due to Change in Law events has to be allowed as per the actual cost of coal. Also, the said issue was also raised during the proceedings of Petition No. 255/MP/2017, which was rejected by the Commission.

(e) Article 8.3(vi) of the PPA/PSA provides that Late Payment Surcharge @1.25% per month shall be payable by WBSEDCL to the Petitioner for the delayed payments towards bills raised. Therefore, the Petitioner is entitled to carrying cost @1.25% per month.

7. The matter was heard on 20.8.2020. During the course of hearing, learned counsel for the Petitioner and the learned counsel for the Respondent, WBSEDCL advanced extensive arguments in support of their contentions by relying upon the orders/ decisions of the Hon'ble Supreme Court, APTEL and this Commission and reiterated the submissions made in their respective pleadings. Pursuant to the liberty

granted by the Commission, the Petitioner and WBSEDCL have also filed their respective written submissions wherein they have reiterated the submissions made during the hearing.

### **Analysis and Decision**

8. There are no objections with regard to jurisdiction of the Commission.

9. We have considered the submissions of parties. The present Petition has been filed for grant of carrying cost on the Change in Law events allowed by the Commission in its order dated 30.4.2019 in Petition No. 255/MP/2017 in terms of the restitution principles contained in Article 10.2 of the PPA/PSA. However, the Respondent, WBSEDCL has submitted that the present Petition is not maintainable and has raised the following objections:

(a) Change in Law principles applicable to PPAs under Section 63 of the Act are not applicable to the PPA/PSA in the present case as the same has been executed through negotiated route.

(b) The instant Petition is barred by the principles of *res judicata* and principles contained in Order 2 Rule 2 of the CPC.

(c) The Commission's order dated 21.1.2020 in Petition No. 43/MP/2019 is *per incuriam*.

(d) No carrying cost can be permitted for the delay caused by the Petitioner.

(e) The rate of carrying cost claimed is disproportionate.

The objections raised by WBSEDCL have been dealt in the succeeding paragraphs.

10. The first objection of WBSEDCL is that Change in Law principle under Section 63 of the Act is not applicable to the present case as the PSA has been executed under negotiated route. Therefore, the Petitioner's claim of compensation has to be examined strictly in the light of the provisions of the PSA.

11. *Per contra*, the Petitioner has submitted that WSBEDCL has failed to give any cogent reason as to why the principle of allowing Change in Law claims including the carrying cost relating to PPAs under Section 63 of the Act will not be applicable to the present case since the Change in Law provisions in the present case are similar to those contained in PPAs executed under Section 63 of the Act. It has, therefore, submitted that in terms of the PPA/PSA, it is entitled to be restored to the same economic position as if the Change in Law event had not occurred.

12. We have considered the submissions of the parties. It is observed that similar contention was raised by WBSEDCL in Petition No. 255/MP/2017 and the Commission in its order dated 30.4.2019 has dealt with the contention of WBSEDCL regarding non-applicability of Change in Law principles as applicable for PPAs executed under Section 63 of the Act as under:

*“9. WBSEDCL has submitted that the change in law principle relating to Power Purchase Agreements under Section 63 of the Electricity Act, 2003 will not be applicable in the present petition as the Petitioner has entered into PPA through negotiation route.*

.....

*12. Further, it is well settled principle that when the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licensee. The Hon`ble Appellate Tribunal for Electricity vide its judgment dated 4.11.2011 in Appeal No. 15 of 2011 has held as under:*

*“21. So, the combined reading of the above provisions brings out the scheme of the Act. A trader is treated as an intermediary. When the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licensee. When the trader is not functioning as merchant trader, i.e. without taking upon itself the financial and commercial risks but passing on the all the risks to the Purchaser under re-sale, there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company.*



.....

61. It cannot be debated that the whole scheme of the Act is that from the very generation of electricity to the ultimate consumption of electricity by the consumers is one interconnected transaction and is regulated at each level by the statutory Commissions in a manner so that the objective of the Act are fulfilled; the electricity industry is rationalized and also the interest of the consumer is protected. This whole scheme will be broken if the important link in the whole chain i.e. the sale from generator to a trading licensee is to be kept outside the regulatory purview of the Act. If such a plea of the Appellant is accepted, the same would result in the Act becoming completely ineffective and completely failing to serve the objective for which it was created”.

13. In the present case also, PTC is acting like an intermediary between the Petitioner and WBSEDCL. Since, West Bengal Electricity Regulatory Commission has recognised the contractual obligations i.e. purchase of 100 MW of power by WBSEDCL from the Petitioner's generating station through PTC under the PSA executed between the PTC and WBSEDCL, claims related to change in law are maintainable under the relevant provisions of the PSA.”

13. Thus, the above contention of WBSEDCL has already been considered and rejected by the Commission in its order dated 30.4.2019 in Petition No. 255/MP/2017. Besides, the Petitioner's entitlement to carrying cost would be examined by the Commission only in light of the provisions of the PPA/PSA executed between the parties and not on the basis of any general principles. Therefore, objection of WBSEDCL in this regard is not sustainable.

14. The second objection of WBSEDCL is that the claim of the Petitioner is barred by the principles of constructive *res judicata* and the principles contained in Order 2 Rule 2 of the CPC. As per Order 2 Rule 2(2) of the CPC, if a party omits to sue in respect of any portion of his claim, the said party cannot afterwards sue in respect of the portion so omitted and as per Order 2 Rule 2(3) of the CPC, if a party omits to claims a relief arising out of a cause of action, the said party will be barred from claiming such relief subsequently in a separate suit. Thus, having omitted to claim carrying cost, which is part of the Change in Law claims and arises out of the same cause of action, in Petition No.255/MP/2017, the Petitioner is barred from filing the present Petition seeking carrying cost for the said Change in Law events under

Order 2 Rule 2 of the CPC. The purpose behind Order 2 Rule 2 of the CPC as elucidated by the Hon'ble Supreme Court in *Coffee Board v. Ramesh Exports (P) Limited*, (2014) 6 SCC 424, is to ensure that no party is vexed twice for the same cause of action. APTEL in its judgment dated 25.10.2018 in Appeal No. 185 of 2015 in the case of *Kalani Industries Pvt. Ltd. v. Rajasthan Electricity Regulatory Commission and Ors.* (in short 'Kalani Judgment') has upheld the finding of Rajasthan Electricity Regulatory Commission barring a party's claim for interest under Order 2 Rule 2 of the CPC on account of not raising the said claim at the time of filing of the main Petition.

15. *Per contra*, the Petitioner has submitted that the present Petition has been filed pursuant to liberty granted by the Commission in its order dated 22.7.2019 in IA No.58/2019 in Petition No. 255/MP/2017 and it is settled law that the provisions of Order 2 Rule 2 of the CPC would not apply where a party has been granted liberty by the court. Pertinently, no objection was raised by WBSEDCL at the time of grant of liberty, though it was duly represented. The Petitioner has submitted that the present case is squarely covered by the Commission's order dated 21.1.2020 in Petition No. 43/MP/2019 wherein an identical objection/ issue has been rejected by the Commission and it has been held that the subsequent Petition for carrying cost was not barred by Order 2 Rule 2 of the CPC. The Petitioner has further submitted that the present Petition has been filed in terms of Article 10.2 and Article 10.4 of the PPA/PSA, under which the carrying cost can be claimed separately from other Change in Law claims. Every Change in Law event has a different cause of action and claim of carrying cost itself has a different cause of action based on the above provisions of the PPA/PSA. The Petitioner has submitted that the claim of carrying is a continuing cause of action, applicable throughout the term of the PPA/PSA (in

case there is a delay in paying the Change in Law claims to the Petitioner). Therefore, in view of the continuing and subsisting cause of action, Order 2 Rule 2 of the CPC cannot be a bar to file a subsequent Petition.

16. We have considered the submissions of the parties. According to the Respondent, WBSEDCL carrying cost claimed by the Petitioner in this Petition is not maintainable in view of provisions of Order 2 Rule 2 of the CPC. WBSEDCL has submitted that since the Petitioner omitted to claim carrying cost in the main Petition, the Petitioner cannot be allowed to file subsequent Petition to claim the relief so omitted. On the other hand, the Petitioner has submitted that the issue raised is squarely covered by the decision of the Commission dated 21.1.2020 in Petition No. 43/MP/2019, wherein a similar objection was raised and was rejected by the Commission. It has also been submitted by the Petitioner that since the claim of carrying cost is a continuing cause of action and is applicable throughout the terms of the PPA/PSA and that Order 2 Rule 2 of the CPC cannot be a bar to file a subsequent Petition.

17. It is observed that the issue as to whether a subsequent separate Petition for grant of carrying cost on the Change in Law compensation allowed by the Commission by a previous order would be barred by the principles of constructive res-judicata and Order 2 Rule 2 of the CPC was examined by the Commission in its order dated 21.1.2020 in Petition No.43/MP/2019. The relevant extract of the said order dated 21.1.2020 is reproduced below:

***“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?”***

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 a 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 Rule 2 of the CPC provides 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.”*

*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.*

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*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.”*

18. The present case is squarely covered by the above decision of the Commission. Both in the present case as well as in Petition No. 43/MP/2019, claim of carrying cost was not made and/or prayed in the original Petition and it was claimed in a subsequent separate Petition filed for grant of carrying cost. The Commission, after examining in detail, the provisions of Order 2 Rule of the CPC as well as Section 11 of the CPC came to a conclusion that the second Petition on carrying cost is maintainable. Therefore, the objection of WBSEDCL that the claim of the Petitioner is barred by the principles of *res judicata* and the principles contained in Order 2 Rule 2 of the CPC is rejected.

19. The third objection of WBSEDCL is that since the Commission's order dated 21.2.2020 in Petition No. 43/MP/2019 is *per incuriam*, it is not a valid judicial precedence. However, WBSEDCL has not disputed the applicability of the said order to the present case. WBSEDCL has submitted that Kalani Judgment of APTEL, wherein interest claimed through a subsequent separate Petition was held to be barred by Order 2 Rule 2 of the CPC, is binding on the Commission. Therefore, the order dated 21.2.2020 in Petition No. 43/MP/2019 which fails to take into account the finding of Kalani Judgment and insofar as it allows the claims of carrying cost raised in a separate Petition despite having omitted to claim in the earlier Petition is *per incuriam* and is therefore not binding as judicial precedent and has no bearing on the present proceedings. In this regard, reliance has been placed on the decisions of Hon'ble Supreme Court in the cases of Sundeep Kumar Bafna v. State of Maharashtra, [(2014) 16 SCC 623] and A. R. Antulay v. R. S. Nayak, [(1988) 2 SCC 602].



20. *Per contra*, the Petitioner has submitted that the contention of the Respondent, WBSEDCL that the Commission's order 21.1.2020 is *per incuriam*, is baseless, vague and unsubstantiated. In the said order, a specific issue on Order 2 Rule 2 and Section 11 of the CPC was framed and only after deliberating the legal provisions and law pertaining to Section 11 and Order 2 Rule 2 of the CPC in the factual matrix of the case, the Commission has held that the subsequent standalone Petition for carrying cost was not barred by Order 2 Rule 2 and principles of constructive res judicata contained in the CPC. Thus, since the said order has not been passed contrary to law or in ignorance of law, it is not *per incuriam*. It has also been submitted that WBSEDCL's reliance on Kalani Judgment is misplaced as the said judgment is clearly distinguishable on facts. The judgments of the Hon`ble Supreme Court in the case of Sundeep Kumar Bafna Vs. State of Maharashtra [(2014) 16 SCC 623] and A.R. Antulay Vs. R.S. Nayak [(1988) 2SCC 602] relied upon by WBSEDCL are distinguishable and are not applicable to the facts of the present case. As per the said judgments, a decision can be *per incuriam*, if any provision in a statute, rule or regulation was not brought to the notice of the court. However, since the order dated 21.1.2020 in Petition No. 43/MP/2019 discusses all the relevant statutory provisions, it cannot be held to be *per incuriam*. As per the law laid down by the Hon`ble Supreme Court, the principles of Order 2 Rule 2 of the CPC are applicable when the cause of action pleaded by the plaintiff in the former suit is same as the cause of action in the subsequent suit.

21. We have considered the submissions of the parties. WBSEDCL has contended that the Commission's decision dated 21.1.2020 in Petition No. 43/MP/2019 is *per incuriam* inasmuch as it fails to take into account the decision of APTEL in Kalani Judgment. It is observed that in Kalani Judgment, the generator

had preferred a Petition for determination of tariff, and not for any Change in Law claim. In the said Petition, prayer for interest was not made. In a subsequent proceeding, claim for interest was made and was rejected by the State Commission stating that Order 2 Rule 2 of the CPC barred such claim. This order of the State Commission was challenged in Appeal and was upheld by APTEL. Thus, clearly, the judgment of APTEL in Kalani Judgment was rendered in a tariff determination proceeding and not in Petition for Change in Law claim. The issue involved there clearly did not pertain to carrying cost applicable on the Change in Law claims on the basis of in-built restitution mechanism as provided in the PPA/PSA. Furthermore, a perusal of the said judgment would show that the APTEL has primarily held that Order 2 Rule 2 of the CPC is applicable to the proceedings of tariff determination before the Commission. The Commission has already considered the applicability of Order 2 Rule 2 of the CPC in Petition No. 43/MP/2019.

22. In so far as the judgments of the Hon'ble Supreme Court in Sundeep Kumar Bafna Vs. State of Maharashtra [(2014) 16 SCC 623] and A.R. Antulay Vs. R.S. Nayak [(1988) 2SCC 602] relied upon by WBSEDCL are concerned, the said judgments hold that a decision can be considered to be *per incuriam* in the event a provision in a statute, rule or regulation was not brought to the notice of the Court. The said principle does not apply to the case at hand inasmuch as in the order passed in Petition No. 43/MP/2019, the Commission, has noted, discussed and analysed the provisions relating to Order 2 Rule 2 of the CPC as well as Section 11 of the CPC. Therefore, the order in Petition No. 43/MP/2019 cannot be considered to have been passed in ignorance of any provision of law. In view of the above, the contention of WBSEDCL that the Commission's order dated 21.2.2020 in Petition No. 43/MP/2019 is *per incuriam* lacks merit.



23. At this juncture, it is also pertinent to refer to the decision of APTEL in the judgment rendered on 27.5.2019 in Appeal No. 195 of 2016 in the case of GMR Kamalanga Energy Limited v. Central Electricity Regulatory Commission and Ors. ('Kamalanga Judgment'). In the said case, claim of carrying cost was not made before the Commission originally. However, APTEL after observing that the principle of restitution being already settled, allowed the claim for carrying cost at the stage of appeal by moulding the relief in the interest of justice, even though the claim for carrying cost was not made in the original Petition filed before the Commission. The relevant extract of said judgment dated 27.5.2019 is reproduced as under:

*“64. In the case of Adani Power Limited’s case (Appeal No. 210 of 2017 dated 13.04.2018) this Tribunal recognised the concept of restitution by placing the parties to the same economic position. On that concept carrying cost came to be allowed in respect of change in law events. Of course, the carrying cost has to be on actual after ascertainment of actual amount but carrying cost is payable from the date of occurrence of the expenditure.*

*65. So also, the Apex Court in the latest judgment in Uttar Haryana BijliVitrان Nigam Ltd. & Anr. vs. Adani Power Limited &Ors., in Civil Appeal No. 5865 of 2018 approved the carrying cost being allowed and reiterated the principle that in terms of contract, parties must be put to same economic position which they enjoyed prior to the change in law occurrence.*

***66. The contention of the Respondent-Commission that this claim was originally not sought for, has been considered, and we are of the opinion that this Tribunal has wide discretionary powers to mould relief. In support of this, reliance can be placed on the Judgments in Bhagwati Prasad vs. Chandramaul reported in AIR 1966 SC 735 and Hindalco Industries Ltd. vs. Union of India reported in (1994) 2 SCC 594 wherein it was held that this Tribunal has wide discretionary powers to mould relief, if not specifically prayed for.***

***67. Similarly, the Appellate Authority has all the powers which the original authority may have in deciding the question before it.***

***68. Therefore, it is clear that this Tribunal being the Appellate Authority having regard to the facts and circumstances of the case can allow the prayer by moulding the relief to meet the ends of justice. If the terms of the contract provide that parties must be brought to same economic position, it would include that all additional costs, which occurs after the cut-off date in terms of the change in law event, have to be compensated and if there is any time gap between the date of spending and realising the said amount,***

***carrying cost/interest has to be paid then only the parties could be put to same economic position. Therefore, this claim of the Appellant is also allowed.”***

24. The fourth objection of WBSEDCL is that the present Petition seeking carrying cost for the Change in Law events allowed vide order dated 30.4.2019 in Petition No. 255/MP/2017 for the period starting from July, 2013 i.e. more than 4 years prior to filing of the Petition No. 255/MP/2017, has been filed only on 29.8.2019. Therefore, the carrying cost claim can only be considered with effect from 29.8.2019. WBSEDCL has also contended that since Petition No. 255/MP/2017 itself was filed only on 25.10.2017, the carrying cost claim, if at all, cannot be considered for the period prior to 25.10.2017. In support of its contention, WBSEDCL has relied upon the judgments of APTEL dated 19.9.2007 in Appeal No. 70 of 2007, dated 30.5.2014 in Appeal No. 147 of 2013 & batch and dated 4.12.2014 in Appeal No. 45 of 2014. WBSEDCL has submitted that since the Petitioner cannot be permitted to benefit from its own negligence causing inordinate delays, the carrying cost claim for the period from July 2013 to 25.10.2017 ought to be rejected.

25. *Per contra*, the Petitioner has submitted that the entitlement of carrying cost to the Petitioner and the date from which the carrying cost is to be awarded to the Petitioner is clearly stipulated in the PPA/PSA between the parties, more specifically Article 10.4 of the PPA/PSA. Article 10.4 of the PPA/PSA provides for mode and manner in which the tariff has to be adjusted in case of a Change in Law event and the date from which amounts towards the Change in Law events become due. The Petitioner has also submitted that WBSEDCL did not raise any such objection of delay in preferring Petition No. 255/MP/2017 in its reply filed to the said Petition and the said objection now being raised is only an afterthought. It has also been submitted that WBSEDCL is taking contradictory stands with an intent to deprive the

Petitioner of its legitimate dues as on one hand it averred that the Commission cannot decide the compensation to the Petitioner on account of Change in Law event on the ground of pendency of Petition No. 305/MP/2015 and on the other hand it averred that the Petitioner had filed Petition No. 255/MP/2017 belatedly. Various judgments of APTEL relied upon by WBSEDCL pertain to the issue of delay in filing the 'tariff Petition/true-up Petition' and consequent award of interest thereof. However, in the present case, the issue pertains to award of compensation on account of Change in Law events under the express and specific provisions of the PSA/PPA providing for in-built restitutionary mechanism.

26. We have considered the submission of the parties. Undisputedly, the entitlement of the Petitioner for carrying cost on the amounts towards Change in Law claims directly arises from Articles 10.3 and 10.4 of the PPA/PSA executed between the parties. The said provisions are similar to those contained in PPAs executed under Section 63 of the Act are based on restitutionary principle, which has been laid down by APTEL as well as by the Hon`ble Supreme Court. Moreover, the said provisions also clearly spell out the effective date for the tariff adjustment payment on account of Change in Law event. The said provisions are reproduced as under:

***“ARTICLE 10: CHANGE IN LAW***

***10.1 Definition***

*In this article 10, the following terms shall have the following meanings:*

...

***10.2 Application and Principles for computing impact of Change in Law***

*i. While determining the consequence of Change in Law under this Article, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff Payments, to the extent contemplated in this Article, the affected Party to the same economic position as if such Change in Law has not occurred.*

...

***10.4 Tariff Adjustment Payment on account of Change in Law***

*i. Subject to Article 10.2, the adjustment in Monthly Tariff Payment shall be effective from:*

*a) the date of adoption, promulgation, amendment, re-enactment or repeal of the Applicable Law or Change in Law;”*

*b) the date of order/judgment of the Competent Court or Indian Government Instrumentality, if the Change in Law is on account of a change in interpretation of Applicable Law.*

27. Article 10 above contains restitutionary principle which provides for compensating the party affected by such Change in Law and for restoring, through monthly tariff payments, the affected party to the same economic position as if such Change in Law had not occurred. The PPA/PSA provides for the mechanism for adjustment of tariff being effective from the date of Change in Law event i.e. it provides for the date from which amounts towards the Change in Law events become due. In view of this position, the objection of WBSEDCL that carrying cost should not be reckoned from the date of Change in Law event, is not tenable, as the same is contrary to the provisions of the PPA/PSA.

28. The Hon`ble Supreme Court in its judgment dated 25.2.2019 in Civil Appeal No. 5865 of 2018 with Civil Appeal No. 6190 of 2018 in the case of Uttar Haryana Bijli Vitran Nigam Limited & Anr. v. Adani Power Ltd. & Ors. ('UHBVNL Judgment') has laid down the principle of restitution as under:

*“6. It will be seen that Article 13.4.1 makes it clear that adjustment in monthly tariff payment on account of change in law shall be effected from the date of the change in law [see sub-clause (i) of clause 4.1], in case the change in law happens to be by way of adoption, promulgation, amendment, re-enactment or repeal of the law or change in law. As opposed to this, if the change in law is on account of a change in interpretation of law by a judgment of a Court or Tribunal. or governmental instrumentality, the case would fall under sub-clause (ii) of clause 4.1, in which case, the monthly tariff payment shall be effected from the date of the said order/judgment of the competent authority/Tribunal or the governmental instrumentality. What is important to notice is that Article 13.4.1 is subject to Article 13.2 of the PPAs.*

*7. Article 13.2 is an in-built restitutionary principle which compensates the party affected by such change in law and which must restore, through monthly tariff payments, the affected party to the same economic position as if such change in law has not occurred. This would mean that by this clause a fiction is created, and the party*

*has to be put in the same economic position as if such change in law has not occurred, i.e., the party must be given the benefit of restitution as understood in civil law....*

8. So far as the "operation period" is concerned, compensation for any increase/decrease in revenues or costs to the seller is to be determined and effected from such date as is decided by the appropriate Commission. Here again, this compensation is only payable for increase/decrease in revenue or cost to the seller if it is in excess of an amount equivalent to 1% of the Letter of Credit in aggregate for a contract year. What is clear, therefore, from a reading of Article 13.2, is that restitutionary principles apply in case a certain threshold limit is crossed in both sub-clauses (a) and (b). There is no dispute that the present case is covered by sub-clause (b) and that the aforesaid threshold has been crossed. The mechanism for claiming a change in law is then set out by Article 13.3 of the PPA.

10. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and 16.02.2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn. This being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective. This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 04.05.2017 that the CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 01.04.2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal.

16.....*There can be no doubt from this judgment that the restitutionary principle contained in Clause 13.2 must always be kept in mind even when compensation for increase/decrease in cost is determined by the CERC."*

29. In view of the provisions of the PPA/PSA, the principles of restitution and the judgment of the Hon'ble Supreme Court in UHBVNL Judgment, we are of the considered view that the Petitioner is eligible for carrying cost arising out of approved Change in Law events from the effective date of Change in Law till the actual payment to the Petitioner. It is also pertinent to note that WBSEDCL had not raised the contention that the Petition No. 255/MP/2017 seeking compensation for various Change in Law events starting from the year 2013 was filed by the Petitioner belatedly. Therefore, not having raised any objection regarding delay in filing of

Petition No. 255/MP/2017 during the proceedings therein, WBSEDCL cannot be permitted to raise such objection during the present proceedings.

30. As regards reliance placed by WBSEDCL on various judgments of the APTEL to contend that a generator is not entitled to carrying cost in case of delay in filing the Petition, it is to be noted that all of the said judgments relate to issue of delay in filing Petition for determination of tariff or true-up Petitions. In none of the said judgments, the issue relating to carrying cost based on restitutionary principle contained in the PPA/PSA was involved. As noted above, in the present case, the PPA/PSA provides for the date from which amounts towards the Change in Law events become due. Therefore, the claim of carrying cost is to be considered in view of the provisions of the PPA/PSA, i.e. from the date of Change in Law event. Consequently, the judgments of the APTEL relied upon by WBSEDCL, would have no application to the present case for Change in Law events and grant of carrying cost based on the restitution principles contained in the PPA/PSA.

31. However, having held that the claim of carrying cost is a separate claim, we are of the view that provisions related to limitation would apply for instant claims of the Petitioner. Hon'ble Supreme Court in the matter of Andhra Pradesh Power Corporation Committee and Others Vs Lanco Kondapalli Power Ltd and Others [2016(3)SCC468] has held that "*in the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of the nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular*

*proceedings such as arbitration, on account of limitation.*” In the light of the said judgement, the Limitation Act, 1963 is applicable in the case of the proceedings or claims before the Commission. The limitation period for instituting a suit to obtain any other declaration is three years from the date when the right to sue first accrues.

32. Therefore, only those claims of carrying cost would be payable which are due within a period of three years of raising the claim. We note that on 14.6.2019, the Petitioner filed an Interlocutory Application (IA) No. 58/2019 in Petition No. 255/MP/2017 for modification of the order and for grant of carrying cost on the Change in Law claims allowed vide order dated 30.4.2019. However, during the course of hearing of the said IA, the learned counsel for the Petitioner sought permission to withdraw the IA with liberty to file Miscellaneous Petition for grant of carrying cost, which was permitted by the Commission vide its order dated 22.7.2019. Therefore, the period of limitation would begin three years before filing IA No. 58/2019 in Petition No. 255/MP/2017.

33. The fifth objection of WBSEDCL is that the Petitioner is claiming carrying cost @1.25% per month which is the interest rate applicable for Late Payment Surcharge (LPS) under the PPA/PSA for delayed payment. The interest rate applicable for LPS cannot be used for carrying out as LPS is in nature of penal charges whereas the purpose of granting carrying cost is restitution. The principle of restitution is not intended to put the party in a better position than before but to restore it to the same economic position on the ground of equity and therefore, the Petitioner cannot be permitted to make profit in the guise of restitution by claiming the carrying cost @1.25% per month. WBSEDCL has also submitted that the Petitioner ought to be directed to provide information pertaining to the interest rate being charged by its



lenders as certified by statutory auditor and the proof of base bank rate of interest certified by auditor/ chartered accountant for comparison purposes.

34. *Per contra*, the Petitioner has submitted that in terms of Article 8.3(vi) of the PPA/PSA, LPS @1.25% per month is payable by WBSEDCL to the Petitioner for delayed payment towards the bills raised. In view of the stipulations under the PPA/PSA, the Petitioner is entitled to carrying cost @1.25% per month.

35. We have considered the submissions of the parties. In the foregoing paragraphs, we have already observed that the Petitioner is entitled to carrying cost in terms of the provisions of the PPA/PSA and as per the ratio laid down by the Hon'ble Supreme Court in UHBVNL judgment. As regards the applicable rate of carrying cost, the Commission in its order dated 17.9.2018 in Petition No.235/MP/2015 (AP(M)L v. UHBVNL & Ors.) has decided the issue of carrying cost as under:

*"24. After the bills are received by the Petitioner from the concerned authorities with regard to the imposition of new taxes, duties and cess, etc. or change in rates of existing taxes, duties and cess, etc., the Petitioner is required to make payment within a stipulated period. Therefore, the Petitioner has to arrange funds for such payments. The Petitioner has given the rates at which it arranged funds during the relevant period. The Petitioner has compared the same with the interest rates of IWC as per the Tariff Regulations of the Commission and late payment surcharge as per the PPA as under:-*

<i>Period</i>	<i>Actual interest rate paid by the Petitioner</i>	<i>Working capital interest rate as per CERC Regulations</i>	<i>LPS Rate as per the PPA</i>
<i>2015-16</i>	<i>10.68%</i>	<i>13.04%</i>	<i>16.29%</i>
<i>2016-17</i>	<i>10.95%</i>	<i>12.97%</i>	<i>16.04%</i>
<i>2017-18</i>	<i>10.97%</i>	<i>12.43%</i>	<i>15.68%</i>

*25. It is noted that the rates at which the Petitioner raised funds is lower than the interest rate of the working capital worked out as per the Regulations of the Commission during the relevant period and the LPS as per the PPA. Since, the actual interest rate paid by the Petitioner is lower, the same is accepted as the carrying cost for the payment of the claims under Change in Law.*



*26. The Petitioner shall work out the Change in Law claims and carrying cost in terms of this order. As regards the carrying cost, the same shall cover the period starting with the date when the actual payments were made to the authorities till the date of issue of this order. The Petitioner shall raise the bill in terms of the PPA supported by the calculation sheet and Auditor's Certificate within a period of 15 days from the date of this order. In case, delay in payment is beyond 30 days from the date of raising of bills, the Petitioner shall be liable for late payment surcharge on the outstanding amount."*

36. In line with above order of the Commission, in the instant case, the Petitioner shall be eligible for carrying cost at the actual interest rate paid by the Petitioner for arranging funds (supported by Auditor's Certificate) or the rate of interest on Working Capital as per the applicable CERC Tariff Regulations or the LPS as per the PPA, whichever is the lowest. The payment shall be made to the Petitioner within due date as per PPA/PSA failing which provisions of Late Payment Surcharge of the PPA/PSA would kick in.

37. The Petition No. 292/MP/2019 is disposed of in terms of above.

Sd/-  
**(Arun Goyal)**  
Member

sd/-  
**(I.S.Jha)**  
Member

sd/-  
**(P.K. Pujari)**  
Chairperson