

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 139/MP/2022**

**Coram:**

**Shri Jishnu Barua, Chairperson  
Shri Arun Goyal, Member  
Shri P.K. Singh, Member**

**Date of order: 17<sup>th</sup> May, 2024**

**In the matter of:**

Petition seeking execution of the Order dated 5.11.2018 read with corrigendum dated 3.12.2018 in Petition No. 159/MP/2017 and initiation of proceedings/action under Section 142, and Section 149 of the Electricity Act, 2003 read with Regulation 111 and Regulation 119 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 against Respondent No. 1 i.e., Brihan Mumbai Electric Supply and Transport Undertaking for the non-compliance of the aforesaid order dated 5.11.2018 read with corrigendum dated 3.12.2018 in Petition No. 159/MP/2017.

**And**

**In the matter of:**

**Jindal India Thermal Power Limited,**  
Habitat India, C-3 Qutab Industrial Area,  
Katwaria Sarai,  
New Delhi-110016

...Petitioner

**Vs**

**1. The Brihanmumbai Electric Supply and Transport Undertaking,**  
1st Floor, Multistoried Annex Building,  
BEST Marg, Colaba,  
Mumbai-400001

**2. Tata Power Trading Company Limited,**  
Corporate Centre, 34 Sant Tukaram Road,  
Carnac Bunder, Mumbai-400009

...Respondents

**Parties present:**

Shri Aniket Prasoon, Advocate, JITPL  
Shri Aman Shaikh, Advocate, JITPL  
Shri Paritosh Bisen, Advocate, JITPL  
Ms. Nikita Choukse, Advocate, BEST  
Shri Akash Lamba, Advocate, BEST

Shri Venkatesh, Advocate, TPTCL  
Shri Aditya Sharma, Advocate, TPTCL  
Shri Vedant Chowdhary, Advocate, TPTCL

### ORDER

The present Petition has been filed by the Petitioner, Jindal India Thermal Power Limited (hereinafter referred to as "JITPL") seeking execution of the order dated 5.11.2018 read with corrigendum dated 3.12.2018 (hereinafter referred to as "Final Orders") in Petition No. 159/MP/2017 and initiation of proceedings/action under Sections 142 and 149 of the Electricity Act, 2003 (the Act) read with Regulations 111 and 119 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 against Respondent No. 1, Brihan Mumbai Electric Supply and Transport Undertaking (hereinafter referred to as "BEST") for the non-compliance of the Commission's order dated 5.11.2018 and 3.12.2018. The Petitioner has made the following prayers:

- "(a) Direct the Respondent No. 1, i.e., BEST to comply with the orders dated 5.11.2018 passed by this Commission in Petition No. 159/MP/2017 and accordingly, forthwith pay the claimed amount of Rs. 1,99,02,018/- along with late payment surcharge of Rs. 2,37,32,203/- (as on 16.04.2022) in terms of applicable law including specifically Clause 7 of the Letter of Intent dated 14.01.2016 to the Petitioner as on date of release of payment;*
- (b) Initiate the proceeding under Section 142 of the Electricity Act,2003 against Respondent No. 1 for failure to comply with the directions of this Commission;*
- (c) In the interim, direct Respondent i.e., BEST to release payment of 75% of the amount due i.e., Rs. 3,27,25,665.75/- (being summation of Rs. 1,99,02,018/- and Rs. 2,37,32,203/-), against the invoices raised by Petitioner in terms of Order dated 05.11.2018 read with Corrigendum dated 03.12.2018 passed by this Commission in Petition No. 159/MP/2017;*
- (d) Award costs of these proceedings against the Respondent and in favour of the Petitioner; and*
- (e) Grant such order, further relief(s) in the facts and circumstances of the case as this Commission may deem just and equitable in favour of the Petitioner."*

## **Submissions of the Petitioner:**

2. The Petitioner has mainly submitted as under:

(a) BEST initiated a competitive bidding process, by the issuance of Expression of Interest (hereinafter referred to as "EOI") for External Power Purchase for the selection of a successful bidder to supply the power on a short-term basis for the period from February, 2016 to December, 2016.

(b) Tata Power Trading Company Limited (hereinafter referred to as "TPTCL") participated in the aforesaid competitive bid and was selected as the successful bidder to supply the power from JITPL's Project. Accordingly, a Letter of Intent dated 14.1.2016 (hereinafter referred to as "the Lol") was issued by the BEST to TPTCL. Clause 2 of the Lol stipulates that the source of supply of power will be Jindal India Thermal Power Limited's 1200 MW Thermal Power Station (2X600) at Derang, Angul District in the State of Odisha (hereinafter referred to as "the Project").

(c) Clause 17(E) of the Lol provides that no party (*i.e.*, BEST, TPTCL, and JITPL) will be in breach of its obligation on an occurrence of Force Majeure events, which includes a Change in Law event. Clause 7 of the Lol provides that for the delay in making payment beyond the due date, a Late Payment Surcharge (hereinafter referred to as "LPS") of 1.25% per month will be levied on the defaulting party, *i.e.*, BEST in the present case.

(d) Thereafter, the Ministry of Finance, vide its Notification dated 29.2.2016, renamed the erstwhile Clean Energy Cess to Clean Environment Cess (hereinafter referred to as "CEC") and also increased the levy of CEC from Rs. 200/ tonne to Rs. 400/ tonne to all dispatches/lifting of coal w.e.f. 00:00 hrs of 1.3.2016. The same was intimated by the Office of General Manager (S&M), Mahanadi Coal Fields ("MCL") to all the Area General Managers, including Area General Manager, Kaniha on 29.2.2016. The aforesaid revision was further intimated by the Area Sales Manager, Kaniha, to JITPL on 1.3.2016.

(e) Subsequently, JITPL/TPTCL, vide their multiple letters requested BEST to consider the increased levy of CEC from Rs. 200/ tonne to Rs. 400/ tonne as a Change in Law and sought compensation towards the same. However, the same was denied by BEST.

(f) Upon being aggrieved by the same, TPTCL and JITPL jointly filed Petition No. 159/MP/2017 before the Commission on 12.7.2017. Vide the Final Orders, the Commission had held the increase in the rate of CEC is a Change in Law event under Clause 17(E) of the Letter of Intent dated 14.1.2016 issued by BEST to Respondent No.2, TPTCL and that JITPL/TPTCL is entitled to recover from BEST the differential amount towards the CEC for the period from 1.3.2016 till 30.6.2017 within 60 days from the date of the order.

(g) Pursuant to the above order, JITPL, vide its letter dated 5.12.2018, informed the TPTCL that the differential amount recoverable from BEST towards the CEC came out to be Rs. 2,01,31,983/- as per actual coal consumption and Rs. 1,99,02,018/- as per operational parameters in accordance with applicable CERC Tariff Regulations i.e., the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 ("the Tariff Regulations, 2014") respectively. Accordingly, as directed by the Commission, the lower of the aforesaid two values was considered, i.e., Rs. 1,99,02,018/- and accordingly, JITPL requested TPTCL to recover payment of Rs. 1,99,02,018/- along with the applicable LPS from the BEST. The same was intimated by TPTCL to BEST vide letter dated 6.12.2018 and requested to pay Rs. 1,99,02,018/-, being the differential amount towards the CEC.

(h) However, despite clear and precise directions given to BEST in the Final Orders by the Commission to make payment of a differential amount towards an increase in the CEC within 60 days from the date of the order, BEST has wilfully and deliberately failed to honour the debit note raised by JITPL and TPTCL.

(i) On 18.12.2018, BEST filed an appeal before the Appellate Tribunal for Electricity (hereinafter referred to as “the APTEL”) bearing Appeal No. 3 of 2019 (“*BEST’s Appeal*”) seeking a stay on the implementation or operation of the Final Orders passed by this Commission. However, no stay was granted by the APTEL on the Final Orders passed by the Commission and Best’s Appeal has been pending.

(j) BEST, despite there being clear and precise direction stipulated in the Final Orders, i.e., to make payment of differential amount towards an increase in CEC within 60 days from the date of the Order, BEST has willfully and deliberately failed to honour the debit note raised by JITPL and TPTCL. Therefore, considering that the terms of Lol specifically provide that LPS of 1.25% per month will be applicable for delay in making payment beyond the due date, JITPL is entitled to claim of Rs. 2,37,32,203/- (as on 16.4.2022) towards LPS on account of delay by BEST in honouring the invoices raised by JITPL in terms of clear and precise directions incised in the Final Orders. In this regard, the APTEL in its Judgment dated 22.03.2022 in Appeal No. 118 of 2021 titled ‘Rattan India Power Limited v. MERC and Anr.’ has held that the LPS provision in the PPA is also meant for compensation towards time value of money on account of delayed payments.

(j) It is a trite principle of law that interest can also be awarded in lieu of compensation of damages on equitable grounds. In this regard, reliance has been placed upon the judgment of the Hon’ble Supreme Court in the case of *Sovintorg (India) Ltd. v. State Bank of India, New Delhi*, [reported as (1999) 6 SCC 406].

### **Hearing dated 29.7.2022**

3. The Petition was first heard on 29.7.2022, and after hearing the learned counsels for the parties, the Petition was admitted. Accordingly, notices were issued to parties to file their replies and rejoinders. Accordingly, BEST and TPTCL filed their replies

on 12.8.2022 and 22.8.2022 respectively. Thereafter, on 12.9.2022, JITPL filed its rejoinder to the reply filed by BEST.

### **Submissions of BEST**

4. Respondent, BEST, vide its reply dated 12.8.2022, has mainly submitted as under:

(a) There has not been a reconciliation between BEST on the one hand and JITPL and TPTCL on the other hand, on account of the claims alleged by JITPL and/or TPTCL, pursuant to the Final Orders.

(b) JITPL, vide its letter dated 5.12.2018 addressed to TPTCL (which, in turn, was forwarded by TPTCL's letter dated 6.12.2018 to BEST), has arbitrarily escalated the cost of change in per unit cost due to an increase in clean environment cess, by illegally including cost components such as an increase in VAT, cess, and entry tax, etc. BEST requested JITPL & TPTCL to produce copies of said letters dated 5.12.2018 and 6.12.2018 before the Commission, respectively. Such escalation is clearly beyond and/or not encompassed even by the impugned order dated 5.11.2018 of the Commission. Such claim alleged by JITPL, which includes such escalation, is mala-fide, misconceived, and dishonest and should be discredited and dismissed by the Commission.

(c) JITPL arbitrarily and/or illegally claimed a surcharge at the rate of 1.25% per month. Such a levy of surcharge is clearly beyond and/or not encompassed even by the impugned order dated 5.11.2018 of the Commission.

(d) By way of the present Petition, JITPL is basically seeking compliance or execution of the Final Orders passed by the Commission along with the levy of surcharge at the rate of 1.25% per month against BEST, as well as initiation of proceedings under Sections 142 and 149 of the Act against BEST for failure to comply with the directions of the Commission. The Commission lacks statutory power to execute its orders under the Act. This submission is borne out by a plain reading of Section 94 of the Act vis-à-vis Section 120 of the Act. The

petition seeking execution of the order of the Commission is misconceived and not maintainable in law, particularly under the Act.

(e) BEST has filed Appeal before the APTEL to challenge and seek setting aside of the Final Orders of the Commission. The APTEL vide order dated 8.1.2019 has admitted the BEST's Appeal. BEST is taking all necessary steps (including the filing of said I.A. Nos. 1088 and 1228 of 2022) to expedite the hearing and final disposal of the BEST's Appeal and more so in light of the petition. JITPL has waited for more than 3 years during the pendency of BEST's Appeal and can await a few more weeks for the hearing of said I.A. No. 21 of 2019 and I.A. Nos. 1088 and 1228 of 2022 by the APTEL.

### **Submissions of TPTCL**

5. Respondent, TPTCL, vide its reply dated 22.8.2022, has mainly submitted as under:

(a) Pursuant to the Final Orders passed by the Commission in Petition No. 159/MP/2017, JITPL vide its letter dated 5.12.2018 informed TPTCL that the differential amount recoverable from BEST towards the CEC worked out to Rs. 2,01,31,983/- as per actual coal consumption and Rs. 1,99,02,018/- as per operational parameters in accordance with the applicable Tariff Regulations respectively and accordingly, JITPL requested TPTCL to recover payment of Rs. 1,99,02,018/- (lower of the aforesaid two values considered as per the direction of the Commission) along with applicable LPS from BEST. Thereafter, TPTCL, vide its letter dated 6.12.2018, intimated the same to BEST and requested to pay Rs. 1,99,02,018/-, being the differential amount towards the CEC. However, despite the express directions of the Commission to BEST to make the payment of the differential amount towards an increase in CEC within 60 days from the date of the Order, BEST has wilfully and deliberately failed to comply with the said Order and failed to honour the debit note raised by JITPL and TPTCL.

(b) Despite clear and precise directions given to BEST in the Final Orders by the Commission, BEST has wilfully and deliberately failed to honour the debit note

raised by TPTCL and JITPL. The responsibility of payment of the differential amount for the increase in surcharge is upon BEST.

(c) TPTCL's role is to facilitate the process of supply of electricity. As an intermediary, JITPL, has made its claim from TPTCL, which has, in turn, made its claim from the BEST. Therefore, the role of TPTCL in this regard is minimal .

(d) The principle behind determining the consequence/compensation on account of a change in law event is to reconstitute the affected party (the Petitioner) to the same economic position as if the change in law events had not occurred. This neutralizes the effect of the changed circumstances that were not present when the Petitioner No. 1 submitted its bid and such changes could not have been factored in the said bid.

(e) The power plant of JITPL is situated in the State of Odisha and is selling power to more than one State. It has also signed long term PPAs for supplying power to the distribution licensees under DBFOO arrangement with KSEB and BSPHCL for contracted capacity of 100 MW and 300 MW, respectively, and signed Medium term PPAs with Railways for its 9 divisions in nine different states for contracted capacity of 577 MW. Hence, this Commission has the necessary jurisdiction under section 79(1) (b) of the 2003 Act to provide the reliefs sought in the Petition.

(f) Despite clear and precise directions given to BEST in the Final Orders by this Commission, BEST has willfully and deliberately failed to honour the debit note raised by the TPTCL and JITPL. Therefore, the responsibility of payment of the differential amount for an increase in surcharge is upon Respondent No.1.

### **JITPL`s rejoinder to the reply of BEST**

6. JITPL, vide its rejoinder dated 12.9.2022 to the reply filed by BEST, has mainly submitted as under:

(a) Pursuant to the issuance of the Final Orders, JITPL consistently followed up with TPTCL vide various letters intimating TPTCL of the additional cost incurred



by it on account of the increase in CEC and accordingly, requested it to reconcile with and recover from BEST the differential amount along with the applicable surcharge.

(b) Even after a lapse of 38 months since the passing of the Final Orders, BEST has failed to honour the claims raised by JITPL by way of debit notes/invoices, which were, in turn, raised by TPTCL on BEST.

(c) Instead of complying with the Final Orders, BEST has conveniently chosen to challenge the same before the APTEL vide the BEST's Appeal along with I.A. No. 21 of 2019. However, no stay has been granted by the APTEL against the operation of the Final Orders, meaning thereby that the Final Orders are very much in operation and binding and thus, are mandatorily required to be complied with by BEST.

(d) BEST's Appeal was listed before the APTEL for the hearing of the interlocutory applications filed therein on 2.9.2022. In the said hearing on 2.9.2022, the APTEL, keeping in view the fact that BEST has not complied with the directions passed by the Commission by way of the Final Orders for almost 4 years now, has rather than granted any stay against the Final Orders as sought by BEST, observed that BEST may release an amount of Rs. 1.81 crore (i.e., as payable according to BEST) subject to the outcome of the Appeal. Accordingly, the I.A. No. 21 of 2019 seeking interim relief has been disposed of.

(e) TPTCL in its reply categorically stated that despite clear and precise directions given to BEST in the Final Orders passed by the Commission, BEST has wilfully and deliberately failed to honour the debit note raised by TPTCL and JITPL.

(f) With regard to BEST's submission regarding the BEST's Appeal, it was highlighted that the mere filing of the Appeal by BEST cannot and should not operate as a bar against compliance with the unequivocal directions passed in the Final Orders, particularly when the same has not been stayed by the APTEL. The Hon'ble Supreme Court has time and again held that filing of an appeal does not automatically suspend the operation of an order appealed

unless the appellate court stays it or a statute conferring the right of appeal provides for such a stay.

(g) The Commission has consistently held that if a claim has not been made and/or prayed in the original petition, and if it was claimed in a subsequent separate Petition, the principles contained in Order 2 Rule 2 of CPC would not bar such subsequent Petition.

### **Hearing dated 15.9.2022**

7. During the course of the hearing on 15.9.2022, BEST apprised the Commission regarding the change in counsel and requested for a short adjournment, and in addition, sought time to file additional documents on record. Accordingly, the Commission granted BEST time to file additional documents, and further granted time to JITPL to file its response to the additional documents filed by BEST.

### **Submissions of BEST in its affidavit dated 27.9.2023**

8. BEST, vide its affidavit, mainly has submitted as under:

(a) The APTEL, vide its Order dated 2.9.2022, has refused to grant any stay against the Final Orders and directed BEST to deposit Rs. 1.81 crore subject to the decision of the BEST's Appeal.

(b) BEST filed Review Petition No. 9 of 2022 before the APTEL seeking a review of the Order dated 2.9.2022. The same was dismissed by the APTEL vide its Order dated 28.10.2022.

(c) The above Order dated 28.10.2022 passed by the APTEL in Review Petition No. 9 of 2022 was challenged by BEST before the Hon'ble Supreme Court by way of Civil Appeals No. 314-317 of 2023. The Hon'ble Supreme Court, vide its Order dated 1.2.2023, dismissed the said Civil Appeals.

(d) Thereafter, BEST filed I.A. No. 447 of 2023 before the APTEL seeking permission to deposit Rs. 1.81 crores by way of a demand draft, drawn in favour

of Pay and Accounts Officer, the Ministry of Power, New Delhi, with the APTEL or alternatively, with the Commission. However, the APTEL, *vide* its Order dated 17.4.2023 reaffirmed its earlier direction to BEST to deposit Rs. 1.81 crore with TPTCL. Accordingly, BEST deposited Rs. 1.81 crore with TPTCL on 3.5.2023.

**Hearing dated 5.12.2023**

9. During the course of the hearing, the learned counsel of JITPL *inter alia* submitted that the BEST had paid Rs. 1.81 crore on 3.5.2023. However, in terms of the directions given by the Commission in the Final Orders, to recover the differential amount due to the increase in the levy of CEC, JITPL was required to raise a revised bill in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per applicable tariff regulations or actuals, whichever is lower. Accordingly, JITPL has raised the revised bill for an amount of Rs. 1.99 crore in terms of the actual coal consumed which the BEST has denied to pay by contending that the initial claimed amount was Rs.1.81 crore. Accordingly, BEST is required to comply with the Final Orders and forthwith pay the differential amount of Rs. 18 lakh (in terms of the revised bill of Rs. 1.99 crore raised by the Petitioner) along with LPS of Rs. 2.37 crore in terms of the applicable law including specifically Clause 7 of the LOI.

10. The learned counsel for BEST submitted that in compliance with the Commission's orders and the order of the APTEL dated 2.9.2022 passed in I. A No. 21 of 2019, BEST has paid the entire differential amount of Rs. 1.81 crore as claimed by JITPL in its initial Petition. JITPL had not made any prayer for the payment of the LPS in its initial Petition, i.e., Petition No.159/MP/2017. Moreover, no claim of Rs.1.99 crore was reflected to be paid to JITPL in the said order of the APTEL dated 2.9.2022. Learned counsel further pointed out that JITPL is claiming

LPS with effect from 2016 and not from the date of the Commission's order, and the principal amount, as claimed by JITPL, has already been paid. JITPL cannot claim the LPS in the execution Petition as the same was not part of the initial Petition filed by JITPL.

11. *In rebuttal*, the learned counsel for JITPL submitted that from the date of orders of the Commission, the conduct of the Respondent, BEST, was not to pay the amount as claimed by the Petitioner. Initially, BEST refused to carry out the reconciliation and thereafter used dilatory tactics in order to wriggle out of its obligations ensuing out of the Final Orders, i.e., to make payment of a differential amount towards an increase in CEC to the Petitioner. Vide the Final Orders, the Commission had directed to carry out reconciliation on account of the said claims and make the payments within 60 days from the date of the order.

12. Based on the request, the parties were permitted to file their respective written submissions.

**Written Submissions dated 22.12.2023 filed by BEST**

13. BEST, in its Written Submissions dated 22.12.2023, has reiterated the submissions made in its reply, additional affidavit, and oral submissions made during the course of the hearings. BEST has further submitted that the issue of LPS, as alleged by JITPL, is a separate dispute that will have to be separately adjudicated by the Commission in a fresh petition so as to ascertain when the liability has crystallized and, accordingly, the due date for making the payments, if any.

**Written Submissions dated 3.1.2024 filed by JITPL**

14. JITPL, in its Written Submissions dated 3.1.2024, has reiterated the submissions made in its Petition, rejoinders, and oral submissions made during the course of the

hearings. JITPL has further submitted that JITPL's Change in Law claims were raised by t means of debit notes issued in the year 2016. However, the same was honoured by BEST much belatedly on 4.5.2023, i.e., after a delay of around 85 months. Therefore, in terms of Clause 7 of the Lol, JITPL is entitled to recover the Surcharge for Delayed Payment of Rs. 5,56,97,074/- (as on 3.1.2024). In this regard, reliance was placed on *Maharashtra State Electricity Distribution Company Limited V. Maharashtra Electricity Regulatory Commission and Ors.*, [(2022) 4 SCC 657], and *GMR Warora Energy Limited V. Central Electricity Regulatory Commission and Ors.*, [(2023) 10 SCC 401].

### **Analysis and Decision**

15. We have considered the submissions of the Petitioner and the Respondents and perused the documents available on the record. The following issues arise for our consideration:

**Issue No. 1: Whether Respondent BEST is liable to make payment of the balance of Rs. 17,14,081.60/- in terms of the Fnal Orders?**

**Issue No. 2: Whether there can be any direction to Respondent, BEST to make payment towards the Late Payment Surcharge on account of the delay in making the payment of the Petitioner's claim of an increase in Clean Energy Cess allowed vide order dated 5.11.2018 read with the corrigendum dated 3.12.2018?**

The above issues have been dealt with in the succeeding paragraphs.

**Issue No. 1: Whether Respondent BEST is liable to make the payment of the balance of Rs. 17,14,081.60/- in terms of the Final Orders?**

16. Tata Power Trading Company Limited (TPTCL) and Jindal India Thermal Power Limited had jointly filed a Petition seeking a declaration that the increase in Clean Energy Cess with effect from 1.3.2016 as communicated by Mahanadi Coalfields

Limited vide its notice dated 29.2.2016 is a Change in Law event. The Commission, after hearing the parties, vide its Final orders (i.e., order dated 5.11.2018 read with corrigendum dated 3.12.2018) in Petition No. 159/MP/2017 held that the increase in levy of Clean Energy Cess from Rs. 200/- per tonne to Rs. 400/- per tonne in terms of the Notification dated 29.02.2017, qualifies as a Change in Law event and accordingly, the Petitioner, JIPTL is entitled to recover from Respondent, BEST the differential amount towards Clean Energy Cess for the period from 1.3.2016 till 30.6.2016, in proportion to the coal consumed corresponding to scheduled generation at normative parameters as per applicable tariff regulations or actuals, whichever is lower. Moreover, the Commission also directed the Petitioners and Respondent, BEST, to carry out the reconciliation on account of these claims within 60 days from the date of the Final Orders i.e., by 4.1.2019. The relevant extracts of the Final Orders are reproduced hereinbelow:

*“32. The submissions have been considered. It is evident from clause 17 of Lol as quoted in para 30 above that “force majeure” can be invoked where “any event or circumstances or combination of events or circumstances adversely affects, prevents or delays any party in the performance of its obligations”. Further, Clause 17 provides an inclusive definition of Force Majeure. Clause 17(E) recognises “change in law” as an event of force majeure. Unlike in the case of standard PPAs, Change in Law in Clause 17(E) is neither defined nor has its scope been clearly delineated. In our view, an event would constitute a change in law, even though it may not qualify as a force majeure in terms of the Lol, if it meets the requirements of change in law in standard PPA. In the standard model PPA issued by Ministry of Power Government of India under Section 63 of the 2003 Act, the term “Law” inter alia includes any statute, ordinance, regulation, notification or code, rule or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law. The term „Change in Law” includes any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal of any law, occurrence of any of the events mentioned therein if the same has occurred after the cut-off date (which is seven days before the bid deadline) and has the effect of incurring of recurring or non-recurring expenditure by the Seller (Generating Company). In the present case, the Petitioners have claimed compensation for additional expenditure incurred by Petitioner No.1 due to increase rate of Clean Energy Cess on coal, after the cut-off date (31.12.2015) based on MOF, GOI notification dated 29.2.2016. Thus, the increase in levy of Clean Energy Cess, in our view, qualifies as a „change in law” event in terms of clause 17(E) of the Lol. It is pertinent to note that the Model PPA*

*provides for the award of compensation for Change in Law which occurred during the Construction Period and Operating Period. In the absence of any such provision for award of compensation for change in law in the Lol, it needs to be considered as to what relief should be admissible for Change in Law on account of change in rate of Clean Energy Cess.*

*35. In the present case, TPTCL had supplied firm power to BEST from the generating station of JITPL during the periods March, 2016, April, 2016, July, 2016 and December, 2016, in fulfillment of its contractual obligations even though it had to incur additional expenditure for generation and supply of power on account of change in rates of Clean Energy Cess which has occurred on account of Change in Law. BEST has enjoyed the benefit of firm supply of such power by JITPL through TPTCL during the relevant period. In such a situation, the Petitioners have the right to be compensated by BEST for the non-gratuitous act incurring additional expenditure on account of increase in rates of Clean Energy Cess for supply of power to BEST in terms of the Lol. We hold that the Petitioners are entitled to be compensated for the additional expenditure incurred by them for payment of differential amount of Clean Energy Cess on coal for supply of power to BEST.*

*36. The Clean Energy Cess applicable as on cut-off date is `200/ MT and the same was revised to `400/MT from 1.3.2016 to 30.6.2017. Accordingly, the Petitioners have sought compensation of `181,87,93,640/- as the differential amount due to the increase in levy of Clean Energy Cess on coal from `200/MT to `400/MT with effect from 1.3.2016. The Appellate Tribunal for Electricity in its judgment dated 12.9.2014 in Appeal No. 288 of 2013 (Wardha Power Company Limited Vs. Reliance Infrastructure Limited and anr) has held that the Commission is not expected to look into the various cost assumed by the bidder at the time of the bid while granting the relief under change in law. Accordingly, we have not gone into the bid assumption. We hold that the Petitioner is entitled to recover from the Respondent, BEST the differential amount towards Clean Energy Cess for the period from 1.3.2016 till 30.6.2016, in proportion to the coal consumed corresponding to scheduled generation at normative parameters as per applicable tariff regulations or actuals, whichever is lower. The Petitioners shall furnish, along with the bills, the proof of payment of Clean Energy Cess duly certified by the Statutory Auditors. **The Petitioners and the Respondent, BEST is directed to carry out reconciliation on account of these claims and make the payments within 60 days from the date of order.***

17. Pursuant to the Final Orders, JITPL/TPTCL, vide their letters dated 5.12.2018/ 6.12.2018, informed the BEST that the differential amount recoverable from the BEST towards the CEC came to be Rs. 2,01,31,983/- as per actual coal consumption and Rs. 1,99,02,018/- as per operational parameters in accordance



with applicable Tariff Regulations, 2014 respectively and thus as directed by the Commission, the lower of the aforesaid two values was considered i.e., Rs. 1,99,02,018/-. Accordingly, JITPL/TPTCL requested the BEST to pay Rs. 1,99,02,018/- along with the applicable LPS. However, as per the Petitioner, despite the clear and unequivocal directions stipulated in the Final Orders *inter alia* to carry out reconciliation of JITPL's Change in Law claim, BEST failed to comply with the same, despite the same being repeatedly highlighted by JITPL/TPTCL to the BEST.

18. It is noticed that on 3.5.2023, in compliance with the APTEL Order dated 2.9.2022, Respondent BEST paid an amount of Rs. 1.81 crore based on the claim submitted by JITPL/TPTCL in Petition No. 159/MP/2017 rather than in accordance with the revised debit note issued by JITPL/TPTCL as per the Final Orders. Additionally, Respondent BEST has failed to conduct any reconciliation, as mandated by the Commission in the Final Orders.

19. Accordingly, we are of the opinion that Respondent BEST has not fully adhered to our directives outlined in the Final Orders. Therefore, we direct JITPL to raise a revised invoice, aligning with the Final Orders, for the outstanding payment owed by BEST after considering the Rs. 1.81 crore already disbursed within 15 days of this order. We further direct the Petitioner and Respondents, TPTCL and BEST, to carry out the reconciliation regarding these claims and settle the payment within 30 days from the date of this order, failing which, the conduct of the Respondent, BEST would be treated as non-compliance of the specific direction of the Commission, and the proceedings under Sections 142 and 149 of the Act shall be initiated against Respondent, BEST. Needless to mention, the above payment is subject to the final outcome of the appeal filed by Respondent BEST before the APTEL.



20. The issue No. 1 is answered accordingly.

**Issue No. 2: Whether there can be any direction to Respondent BEST to make a payment towards the Late Payment Surcharge on account of the delay in making the payment of the Petitioner's claim of an increase in Clean Energy Cess allowed vide order dated 5.11.2018 read with the corrigendum dated 3.12.2018?**

21. The Petitioner has submitted that JITPL had issued its claim towards Change in Law by way of debit notes dated 9.4.2016, with its due date being 16.4.2016 (for the period 1.3.2016- 31.3.2016 and 1.4.2016- 8.4.2016), 17.5.2016, with its due date being 24.5.2016 (for the period 9.4.2016- 30.4.2016) and 21.9.2016, with its due date being 28.9.2016 (for the period of 1.7.2016-31.7.2016). However, the same was honored by BEST much belatedly on 4.5.2023, i.e., after a delay of around 85 months. Therefore, in terms of Clause 7 of the Lol, JIPTL is entitled to the LPS towards delay in payment beyond the due date at 1.25% per month. On the other hand, Respondent BEST has contended that the Petitioner's claim for the LPS is not covered by the Commission's Final Orders, namely the order dated 5.11.2018 read with the corrigendum dated 3.12.2018. The Respondent has further submitted that in any case, there can be no question of the Petitioner claiming LPS when it was not specifically ordered by the Commission vide Final orders.

22. We have considered the submissions made by the parties. Indisputably, the order dated 5.11.2018 read with the corrigendum dated 3.12.2018, for which the present execution proceedings have been initiated, as such, does not provide for the grant of LPS in the operative part, namely, paragraph 36 of the order. At the cost of repetition, the relevant extract of the said order dated 5.11.2018 is again reproduced hereunder:

*“36. Accordingly, we have not gone into the bid assumption. We hold that the Petitioner is entitled to recover from the Respondent, BEST the differential amount towards Clean Energy Cess for the period from 1.3.2016 till 30.6.2016, in proportion to the coal consumed corresponding to scheduled generation at normative parameters as per applicable tariff regulations or actuals, whichever is lower. The Petitioners shall furnish, along with the bills, the proof of payment of Clean Energy Cess duly certified by the Statutory Auditors. **The Petitioners and the Respondent, BEST is directed to carry out reconciliation on account of these claims and make the payments within 60 days from the date of order.**”*

23. It is pertinent to keep in mind that the scope of the present execution proceedings is limited to examining the entitlement of the Petitioner in terms of the findings rendered in the order dated 5.11.2018 read with the corrigendum dated 3.12.2018. In the present execution proceedings, we cannot venture into an independent inquiry to examine the Petitioner’s entitlement to LPS either under the Lol or de hors thereof. Therefore, , we have to restrict ourselves to the findings rendered in the order dated 5.11.2018 read with the corrigendum dated 3.12.2018, which, as we already noted above, as such do not provide or specify for the LPS to the Petitioner.

24. The Petitioner has placed reliance on the judgment of the Hon’ble Supreme Court in the case of GMR Warora Energy Limited V. Central Electricity Regulatory Commission and Ors., (2023) 10 SCC 401] and has submitted that all the distribution companies have the contractual obligation to make timely payment of the invoices and in cases of delay it shall be liable to pay the LPS. The Respondent has submitted that the above judgment as referred is not applicable to the present case, and it is a settled principle of law that the scope of the execution Petition is very limited, and it bars grant of any relief which falls beyond the relief granted in the order sought to be executed.

25. We have considered the submissions made by the Petitioner and the Respondent, BEST. It is a well-settled principle of law that in execution proceedings, the court cannot go beyond the decree. In this context, we may gainfully refer to the judgement of the Hon'ble Supreme Court in the case of Rameshwar Dass Gupta v. State of U.P. and Another [(1996) 5 SCC 728], wherein the Hon'ble Supreme Court in paragraph 4 has held as under:

*“4. It is well settled legal position that an executing Court cannot travel beyond the order or decree under execution. It gets jurisdiction only to execute the order in accordance with the procedure laid down under Order 21, CPC. In view of the fact that it is a money claim, what was to be computed is the arrears of the salary, gratuity and pension after computation of his promotional benefits in accordance with the service law. That having been done and the court having decided the entitlement of the decree-holder in a sum of Rs.1,97,000/- and odd, the question that arises is whether the executing Court could step out and grant a decree for interest which was not part of the decree for execution on the ground of delay in payment or for unreasonable stand taken in execution? In our view, the executing Court has exceeded its jurisdiction and the order is one without jurisdiction and is thereby a void order. It true that the High Court normally exercises its revisional jurisdiction under Section 115, CPC but once it is held that the executing Court has exceeded its jurisdiction, it is but the duty of the High Court to correct the same. Therefore, we do not find any illegality in the order passed by the High Court in interfering with and setting aside the order directing payment of interest.”*

26. In the aforesaid judgment, the Hon'ble Supreme Court has clearly held that the executing court cannot grant a decree for interest that was not part of the decree for execution on the ground of delay in payment or for an unreasonable stand taken in the execution.

27. Further, the Hon'ble Supreme Court in the cases of J&K Bank Ltd. v. Jagdish C. Gupta, [(2004) 10 SCC 568]; Gurdev Singh v. Narain Singh, [(2007) 14 SCC 173]] has held that the executing court cannot travel beyond the original *lis*, between the parties, to any subsequent cause of action. It is also not open to the Executing Court to add to a decree, of which execution is sought, a direction or injunction that was

neither prayed for nor formed part of the original *lis* between the parties, and the Executing Court cannot travel behind the decree to add or modify the directions contained therein.

28. In the present case also, the order under execution dated 5.11.2018 read with the corrigendum dated 3.12.2018, as already noted above, does not contain the grant of any LPS to the Petitioner herein, hence, it would not be appropriate to issue any direction awarding such relief at the stage of the present proceedings.

29. Since the grant of the LPS is clearly not covered under the order dated 5.11.2018 read with the corrigendum dated 3.12.2018, any direction for payment of the LPS, cannot be considered in the present execution proceedings. Needless to say, the matter is pending before the APTEL and the final order of the APTEL will enter into the shoes of the order of this Commission after attaining finality.

30. On a parting note, we strongly disapprove the conduct of the Respondent in not implementing the order of this Commission dated 5.11.2018 read with the corrigendum dated 3.12.2018 on one pretext or another. However, keeping in mind that Rs. 1.81 crore under the order dated 5.11.2018 read with the corrigendum dated 3.12.2018 has already been paid by Respondent BEST to the Petitioner during the pendency of the present proceedings, albeit pursuant only to the directions of the APTEL, we refrain from initiating any proceedings under Section 142 read with Section 149 of the Act against the Respondent as prayed for by the Petitioner. The Respondent is, however, cautioned to ensure that such conduct is not repeated in the future.

31. The Issue No. 2 is answered accordingly.

32. In light of the above discussion, Petition No. 139/MP/2022 is disposed of.

Sd/-  
**(P.K.Singh)**  
**Member**

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

sd/-  
**(Jishnu Barua)**  
**Chairperson**