

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 265/MP/2021

Coram:

**Shri Jishnu Barua, Chairperson
Shri Ramesh Babu V, Member
Shri Harish Dudani, Member**

Date of Order: 30th May, 2025

In the Matter of:

Petition invoking Section 79(1)(c) and (f) of the Electricity Act, 2003 read with Regulation 111 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 seeking compensation/ relief for additional expenditure incurred by the Petitioner during the construction of the Project due to certain Change in Law and Force Majeure events, as per the applicable provisions of the Transmission Service Agreement dated 22.9.2015.

And

In the matter of:

**Alipurduar Transmission Limited,
101, Part-III, G.I.D.C Estate,
Sector – 28, Gandhinagar - 382028
Gujarat**

.....Petitioner

VERSUS

**1. South Bihar Power Distribution Company Limited,
Second Floor, Vidyut Bhawan,
Bailey Road, Patna- 800001**

**2. West Bengal State Electricity Distribution Company Limited,
Link Road, Hooghly, Near IDBI Bank,
Arambagh, West Bengal- 712601**

**3. Manipur State Power Distribution Company Limited,
NH 150, Paona Bazar, Imphal,
Manipur- 795004**

**4. Department of Power, Government of Nagaland,
Electricity House, A.G. Colony,**

Kohima, Nagaland- 797001

5. Assam Electricity Grid Corporation Limited,
Bijulee Bhawan (First Floor) Paltan Bazar,
Guwahati- 781001

6. North Bihar Power Distribution Company Limited,
Third Floor, Vidyut Bhawan,
Bailey Road, Patna- 800001

7. GRIDCO Limited,
Janpath, Bhubaneswar- 751022, Odisha

8. Energy and Power Department, Govt. of Sikkim,
Diesel Power House, Arithang,
Gangtok-737101, Sikkim

9. Jharkhand Bijli Vitran Nigam Limited,
Hazaribag Rd., Kokar Industrial Area, Kokar,
Ranchi, Jharkhand – 834001

10. Power Grid Corporation of India Limited,
Saudamini, Plot No. 2, Sector 29,
Near IFCO Chowk,
Gurgaon (Haryana)- 122001

11. Central Transmission Utility of India Limited,
Saudamini, Plot No. 2, Sector 29,
Near IFCO Chowk,
Gurgaon (Haryana)-122001

12. REC Transmission Projects Company Limited,
Core – 4, Scope Complex,
7, Lodhi Road,
New Delhi-110003

.... Respondents

Parties present:

Ms. Gayatri Aryan, Advocate, ATL
Ms. Priyakshi Bhatnagar, Advocate, ATL
Shri Pradyumn Sharma, Advocate, ATL
Shri Sunil Mittal, ATL
Shri Anant Shukla, ATL
Shri Janmali Manikala, Advocate, WBSEDCL
Shri Damodar Solnaki, Advocate, WBSEDCL
Shri Chiranjeev Singh Marwah, Advocate, Bihar Discoms

ORDER

The present Petition has been filed by the Petitioner (hereinafter referred to as 'ATL/Petitioner'), under Section 79 of the Electricity Act, 2003 (hereinafter referred to as 'the Act') seeking additional expenditure incurred on account of (i) force majeure, and (ii) Change in Law events. The Petitioner has made the following prayers:

- “(a) Allow the present Petition.*
- (b) Hold that the increase in the Entry Tax rate vide Notification No. SO 18, dated 06.11.2015 issued by the Commercial Taxes Department, Government of Bihar, in the state of Bihar amounts to Change in Law event.*
- (c) Hold that the introduction of GST laws, amounts to a Change in Law event.*
- (d) Hold that the notification of the MoP guidelines dated 15.10.2015 amounts to a Change in Law event.*
- (e) Grant relief to the Petitioner under Article 12.2.1 of the Transmission Service Agreement dated 22.9.2015 for the Change in Law events specified in the present Petition along with applicable carrying cost.*
- (f) Hold that the additional expenses for such Change in Law events shall be effective from the date when such Change in Law events were brought into force by the Indian Governmental Instrumentalities.*
- (g) Direct the Long-Term Transmission Customers of the Petitioner to compensate for the losses/ additional expenditure incurred by the Petitioner as specified in the present Petition on account of the delay in commissioning of the Project arising out of force majeure events.*
- (h) Pass such other and further order or orders as this Commission deems appropriate under the facts and circumstances of the present case”*

2. The Petitioner is a fully owned subsidiary of the Kalpataru Power Transmission Limited (hereinafter referred to as 'KPTL'), which was selected as a successful bidder through the tariff based competitive bidding under Section 63 of the Act to establish the 'Transmission system Strengthening in Indian transmission system for transfer of Power from new HEPs in Bhutan transmission system' on a Build, Own, Operate and Maintain (BOOM) basis comprising the following elements:

S. No.	Name of the Transmission Element	Completion target
1.	Alipurduar (POWERGRID)-Siliguri (POWERGRID) 400 kV D/c line (2 nd) with quad moose conductor	38 months
2.	Kishanganj (POWERGRID)-Darbhanga (DMTCL) 400 kV D/c line with quad moose conductor Sub-station Extn: - 2 nos. 400 kV line bays at Darbhanga for termination of Kishanganj-Dharbhanga 400 kV D/c (quad) line - 80 MVar switchable line reactors (with 400-ohm NGR) in each circuit at Darbhanga end of Kishanganj-Darbhanga 400kV D/c (quad) line	

3. The Petitioner was incorporated as a Special Purpose Vehicle (hereinafter referred to as 'the SPV') by the Bid Process Coordinator (hereinafter referred to as, 'BPC'), namely, REC Transmission Projects Company Limited (hereinafter referred to as 'RECTPCL') for the purpose of developing and implementing the Project under the Tariff Based Competitive Bidding route. KPTL participated in the competitive bidding process conducted by RECTPCL, and on emerging as the successful bidder, a Letter of Intent (hereinafter referred to as 'LOI') was issued by RECTPCL to KPTL on 29.10.2015. In accordance with the bidding documents, KPTL acquired 100% of the shareholding in the Petitioner Company by executing a Share Purchase Agreement with RECTPCL on 6.1.2016. KPTL also furnished the Contract Performance Guarantee of Rs. 40.50 crore on 4.1.2016, and accordingly, the TSA dated 6.1.2016 entered into between the Petitioner and the LTTCs became effective from 6.1.2016. The Commission, in its order dated 29.2.2016 in Petition No.6/TL/2016, granted a transmission licence to the Petitioner for inter-State transmission of electricity, and vide order dated 22.3.2016 in Petition No.4/ADP/2016, adopted the transmission charges of the Petitioner.

Submissions by the Petitioner

4. The Petitioner has submitted that due to the following Force Majeure and Change in Law events, it is entitled to an additional expenditure incurred by it:

Force Majeure

- (a) Additional cost incurred to meet excessively high demands for damages by landowners.
- (b) Additional expenditure due to time overrun;
- (c) Additional expenditure due to idling of resources, i.e., labour and machinery;
- (d) Additional expenditure due to reduction of output of resources deployed on a departmental basis for foundation, erection & stringing.

Change in Law

- (i) Increase in the Entry Tax rate in the State of Bihar.
- (ii) Increase in effective tax rate on goods and services due to the enactment of Central Goods and Services Tax and State Goods and Services Tax /Integrated Goods and Services Tax (**“GST laws”**) and the subsumption of Entry Tax in GST
- (iii) Notification dated 15.10.2015 issued by the Ministry of Power, Government of India, notifying new '*Guidelines for payment of compensation towards damages in regard to Right of Way for transmission lines*', which brought a shift in the existing right of way compensation regime in the country.
- (iv) The following compensation has been claimed by the Petitioner on account of the above Change in Law events:

S. No.	Change in Law Event	W.E.F.	Tax rate as on the Cut-off date i.e. 02.10.2015	Effective rate due Change in Law	% increase in tax rate	Govt. Notification	Financial Impact (Rs. in crores)
1.	Increase in the Entry Tax rate in the state of Bihar.	20.11.2016	8%	12%	4%	Commercial Taxes Department, Government of Bihar Notification No. S.O. 18 dated 6.11.2015 [Change in Law Notice dated 20.4.2020 and 14.10.2020]	2.65
2.	Increase in effective tax rate on goods and services due to the enactment of the GST Laws.	1.7.2017	0% to 28.25% [depending on the nature of goods and services]	5%, 18% and 28%	-0.12% to 28%	Govt. of India, Department of Revenue Notifications dated 28.6.2017. Finance Department, Government of West Bengal Notification dated 28.6.2017	27.23
3	With the introduction of GST Laws, the following Taxes stood subsumed in GST: (a) Entry Tax @ 1% in the state of West Bengal (b) Entry Tax @ 12% in the State of Bihar. The same has resulted in savings of Rs. 28,17,37, 829/- (-28.17 crore)					Commercial Taxation Department, Government of Bihar, Notification dated 8-May-2017 [Change in Law notice dated 25.8.2017, 20.4.2017 and 14.10.2020]	(- 28.17)
4.	Notification dated 15.10.2015 issued by the Ministry of Power, Government of India notifying new 'Guidelines for payment of compensation towards damages in regard to Right of Way for transmission lines'						188.48

5. Accordingly, the present Petition has been filed seeking relief for the above expenditure incurred by ATL on account of a Change in Law and force majeure events.

Hearing dated 12.7.2022

6. The matter was admitted on 12.7.2022, and the Respondents were directed to file their respective replies. Accordingly, the parties have filed their respective replies and rejoinders.

Reply to the Bihar Discoms dated 27.12.2022

7. Bihar Discoms, in their common reply, have submitted that ATL earlier filed Petition No. 470/MP/2019 seeking extension of the Scheduled Commercial Date of Operation till actual commissioning of the Project. In the Petition, ATL sought prayer to permit ATL to file a separate Petition to seek compensation on account of time and cost overrun, prolongation costs, and opportunity costs, etc., as claimed in the Petition. ATL had prayed leave to file the present Petition. Further, Petition No. 470/MP/2019 was heard on 24.11.2022, and the final orders were reserved. Pending final orders, ATL could not have filed the present Petition without leave of the Commission. Last, ATL ought to amend the present Petition or file a fresh Petition for raising Change in Law claims.

Petitioner's Rejoinder dated 17.1.2023 to Bihar Discom Reply

8. Petition No. 470/MP/2019 was filed only for the extension of SCOD, wherein it was stated that a separate Petition for claims will be preferred. Petition No. 470/MP/2019 was filed on 15.11.2019, i.e., before completion of the Petitioner's project at a point where claims for time and cost overrun could not have been ascertained by the Petitioner. It is only upon completion of the project that the determination of claims can be carried out. Prayers sought in Petition No. 470/MP/2019 are distinct from the relief sought in the present Petition. ATL has a vested right to approach the

Commission under Section 79 of the Act for adjudication of disputes and redressal of grievances. ATL has disclosed every fact necessary for adjudication of the present Petition. It is a matter of general practice to file a combined petition with Change in Law and Force Majeure claims, to avoid multiplicity of proceedings. Procedural hurdles cannot come in the way of justice. In this regard, reliance has been placed on the judgment of the Hon`ble Supreme Court in the case of *Sugandhi v. P. Rajkumar* [(2020) 10 SCC 706].

Reply of the WBSEDCL

9. WBSEDCL, in its reply dated 12.4.2023, has mainly submitted as under:

(a) Article 11.7 of the TSA does not provide for any monetary relief to the affected party impacted by an event of *Force Majeure*, except extension of SCOD for which ATL has already filed Petition No. 470/MP/2019. There is no provision in the TSA, such as Article 11.7.2, under which ATL has claimed compensation for *Force Majeure* events.

(b) The Petitioner is not entitled to claim the additional expenditure on account of RoW issues. The bidders were responsible for satisfying themselves with respect to all required information that may have any effect on their bids and factoring in all input costs, including the cost for the acquisition of land, before making their bids. The bidders were to inspect and examine the site conditions (including but not limited to its surroundings and its geological conditions) and other circumstances that may influence or affect the transmission of power. Section 70 of the Indian Contract Act is not applicable in the present case since the relief for *Force Majeure*, as provided under Article

11.7 of the TSA, does not envisage compensation payable to ATL on account of additional expenditure incurred due to events of *Force Majeure*. The LTTCs were only required to assist and support ATL in the implementation of the Project and appoint a maximum of three employees for the purpose of inspecting the Progress of the Project, respectively.

(c) Since the Change in Law notices cannot be said to have been issued within a 'reasonably practicable' period, ATL is not entitled to seek relief for any Change in Law event. A period of four years cannot be said to be a reasonable period insofar as the issuance of notice for a Change in Law is concerned. The MoP Guidelines dated 15.10.2015 were only recommendatory in nature; hence, issuance of the MoP Guidelines, on its own, will not constitute a Change in Law event under the TSA. It was upon the States/ UTs to adopt the said MoP Guidelines by formulating their own guidelines or by issuance of orders. MoP Guidelines have not been adopted by the State of West Bengal or Bihar, nor has the Indian Governmental Instrumentality. ATL is not entitled to any relief under the TSA for any excess compensation paid to the affected landowners. ATL's claim in the present Petition is not premised on the fact that the MoP Guidelines amount to a Change in Law as per the requirements of Article 12.1.1 of the TSA. Rather, ATL has claimed that in light of the MoP Guidelines, the landowners had sought additional compensation.

(d) ATL is only entitled to relief for a Change in Law in terms of the TSA. There is no provision that entitles ATL to be restored to the same economic position as if the Change in Law did not take place. Since ATL has filed this

Petition with a delay of 4-5 years from the date of notifications, carrying cost shall not be granted for the said period of delay.

Petitioner's Rejoinder to WBSEDCL's Reply

10. The Petitioner, in its rejoinder dated 19.4.2023, has mainly submitted as under:

(a) Article 11.7(b) neither restricts the 'relief' which can be claimed by an affected party to mere extension of SCOD nor subjects the applicability of this provision to any other clauses of the TSA. The words 'claim relief' encompass all appropriate reliefs which a party can claim from this Commission to negate the effect of a *Force Majeure* event. Article 11.7(b) of the TSA is of wide amplitude and allows an affected party to seek relief beyond extension of time or termination of the TSA. The dictionary meaning and judicial interpretation of the word "relief" denotes a remedy for a wrong for lightening or deliverance or removal of hardship, burden or grievance and includes providing for compensation/mitigation in the peculiar facts of the case *S. Ganapathraj Surana v. State of T.N.* [1993 Supp (2) SCC 565], *Sarsuti v. Kunj Behari Lal*, [1883 SCC OnLine All 85], *Santhamma v. Kerala State* [2019 SCC OnLine Ker 1265], *Commissioner of Income-Tax v. R.B. Jodhamal Kuthiala*, [1963 SCC OnLine Punj 403], *Dipti Aggarwal v. Ashish Chandra*, [2017 SCC OnLine Cal 8835], and *Mewar Sugar Mills Ltd. vs. Chairman Central Board of Direct Taxes and Ors.* [09.10.1998 - DELHI].

(b) Article 4.4.2 of the TSA provides for the grant of extension of SCOD. This is an additional right granted to TSP under the scope of Article 4 and does not mean that relief under Article 11.7(b) is limited to only the extension granted

under Article 4.4.2. Provisions of the TSA ought to be interpreted harmoniously in order to give business efficacy to the contract [*Adani Power (Mundra) Ltd. v. Gujarat Electricity Regulatory Commission & Ors.* 2019 SCC Online SC 813, *Nabha Power Ltd. v. Punjab State Power Corporation Ltd.*, (2018) 11 SCC 508, *Polymat India (P) Ltd. v. National Insurance Co. Ltd.*, (2005) 9 SCC 174].

(c) ATL has faced delays and losses due to *Force Majeure* events, including ROW issues, and delays in the grant of statutory clearance. ATL had earmarked approximately Rs. 20.80 crores towards RoW compensation based on the data available. This computation was done based on the prevailing law, which required compensation for "damages" to be paid as per the provisions of Sections 67 and 68 of the Act, read with Sections 10 and 16 of the Indian Telegraph Act, 1885. However, due to continuing delay and disruption in project activities due to hurdles created by landowners, ATL had no option but to bear an additional cost of approximately Rs. 188.48 crores over and above the estimated ROW compensation amount so that project work does not get hampered beyond the delay already suffered.

(d) The Payment of an additional amount to the landowners for expeditious completion of Project works was a non-gratuitous act on the part of ATL. Section 70 of the Contract Act states that if a person enjoys the benefit of a non-gratuitous act, the said person has to compensate the person performing the said non-gratuitous act [*State of West Bengal v. BK Mondal*, AIR 1962 SC 779].

(e) ATL issued Change in Law notices, i.e., for GST under Article 12 of the TSA on 25.8.2017, followed by other notices dated 29.1.2020, 20.4.2020, and

14.10.2020 giving specific details about various events leading to an additional cost, including GST, Entry Tax, MOP Guidelines dated 15.10.2015, etc. ATL duly kept the LTTCs informed about all the events impacting the project. Change in Law events had a continuous ongoing impact on ATL. In order to claim Change in Law relief, it was necessary for ATL to evaluate the impact of the events. Hence, the Change in Law notices were issued once the impact was clear and quantifiable. There is substantial compliance with the requirement of prior intimation/notice to LTTCs in terms of Article 12 of the TSA. It is, however, trite that the substantial rights of parties cannot be thwarted on grounds of procedural technicalities.

(f) The MoP Guidelines are a Change in Law event. After the issuance of Guidelines, farmers started demanding enhanced compensation, which led to an increase in ROW issues and also the cost of ROW compensation. In order to execute the project, ATL had to resolve the issues of ROW by paying high compensation to the agitating farmers. The progress of the project was also hampered by the landowner.

(g) In terms of Article 12 of the TSA, ATL is entitled to raise its claim for Change in Law by way of a Supplementary Bill as per Article 10. Pertinently, Article 10.9.7 categorically states that if a dispute regarding the Supplementary Bill is resolved by a dispute resolution mechanism, then the payment shall be made along with interest or Late Payment Surcharge from the date on which the payment was originally due. Carrying Cost is a compensation for the time value of money and forms part of the claim for Change in Law compensation [Judgment dated 15.9.2022 passed by the APTEL in *Parampujya Solar Energy*

Pvt. Ltd. v. Central Electricity Regulatory Commission Appeal no. 256 of 2019 & batch]. APTEL held that the burden of carrying cost is a consequence directly flowing from the Change in Law event. Thus, the relief in this regard cannot be complete unless this part of the additional expenditure is also allowed as pass-through. The Principle of restitution is now part of the regime on Change in Law, reflecting public policy in view of the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021. The Commission, in its order dated 15.02.2023, passed in *Sipat Transmission Limited v. Maharashtra State Electricity Distribution Company Limited and Others*, Petition No. 453/MP/2019, has granted carrying cost with Change in Law compensation.

(h) On 23.06.2023, the final order was passed in Petition No. 470/MP/2019 wherein the Commission granted extension of SCOD to the Petitioner for 308 days against 320 days as prayed for by the Petitioner. Extension was granted on the basis of the injunction/stay granted from 16.11.2018 up to 29.09.2019 against the Petitioner in suits/applications filed by various land owners. In the said duration, the Petitioner was restrained and severely marred from carrying out the construction works on one or the other locations due to injunction/stay, which continued beyond SCOD of 06.3.2019.

Hearing dated 12.7.2023

11. Vide Record of the Proceedings for the hearing dated 12.7.2023, the Petitioner was directed to file the following information/documents:

(i) To file an additional affidavit furnishing the additional/supporting documents in relation to its land compensation claim with a copy to the Respondents, and the Respondents may furnish their comments, if any, thereafter.

(ii) Copy of the order issued by the Government of Bihar in respect of the increase in State Entry Tax.

(iii) Copy of the order/Notification issued by the Government of West Bengal pursuant to MOP Guidelines dated 15.10.2015, if any.

(iv) Copy of the CEA clearance certificate for energization in respect of both transmission elements, i.e., Element-1 and Element-2.

(v) Copy of documents declaring COD of both transmission elements

12. The Petitioner, vide its affidavit dated 7.8.2023, submitted the information called for.

13. The Petitioner, vide its additional affidavit dated 7.8.2023, has placed on record the details of additional/supporting documents in relation to the Petitioner's land compensation claim, along with other information sought by the Commission. The Petitioner has mainly submitted as under:

(a) DM Jalpaiguri vide its order dated 22.1.2019, directed for valuation to be carried out by the Block Development Officer of both moveable and immoveable properties. Had the intention been for payment of the compensation as per applicable norms, DM would not have directed the valuation of immoveable properties. DM Alipurduar, in its order dated 19.08.2019, requested ATL to settle the case where compensation is sought by landowners, including land compensation. Vide Order dated 6.9.2019, DM directed I.C. police to survey and submit the report. Before that, DM had passed an order dated 20.8.2019 in ATL's Section 16 (1) application directing land survey to be carried out for the determination of compensation. This order was challenged by ATL seeking the Hon'ble High Court of Calcutta to direct the DM to grant protection so that ATL

may proceed with works. The Hon'ble High Court vide order dated 30.8.2019 directed DM to give police protection and set aside the order dated 20.08.2019 by holding that the District Judge could decide on the issue of compensation. This order was challenged by landowners before the Hon'ble Supreme Court. Meanwhile, despite the order of DM directing I.C. police to survey and submit the report, ATL continued to face resistance. Since ATL was developing its transmission project (which was time sensitive), ATL could not afford the time that would have been spent before the courts for adjudication on the aspect of compensation. ATL therefore paid the landowners higher compensation (than what was due as per prevailing norms). Further, landowners filed Section 16 applications wherein DM passed certain orders directing the calculation of compensation for land use. In order dated 04.06.2019, DM recorded ATL's objection that compensation has been calculated as per crop and damage due to the installation of four towers. ATL, however, offered compensation as per MoP Guidelines. DM ordered the parties to settle in terms of compensation for the use of land. DM did not dispose of the Section 16 application based on the crop compensation calculated by ATL. Upon ATL's submission on the offer of compensation as per MoP Guidelines, DM directed parties to settle, thereby impliedly directing ATL to pay the higher compensation.

(b) PGCIL in its inter-departmental Guidelines titled Right of Way (RoW) (Process and Compensation) Guidelines dated 6.6.2017, acknowledged that the implementation of the transmission projects was invariably getting affected due to severe RoW problems on account of resistance by the landowners and demand for enhanced compensation. The PGCIL RoW Guidelines *inter alia* laid

down the mechanism for compensation for the cost of land. In view of the aforesaid, PGCIL, being a Central Transmission Utility of India Limited and a 'Transmission Licensee', had formally adopted the same benchmarks for the land compensation as prescribed in the MoP Guidelines. The landowners in West Bengal and Bihar were aware of PGCIL's decision to pay the compensation as per MoP Guidelines since 2017 and demanded compensation with similar benchmark from ATL. More so, when ATL attempted to settle the matter with some landowners, the same had a cascading effect where other landowners demanded much higher sums and created major obstructions. Therefore, for the timely execution of the project, ATL was constrained to pay the compensation amount in accordance with the MoP Guidelines.

(c) The Petitioner with the additional affidavit has submitted other information, i.e., other DM orders, letters to DM/BDO, orders by District Judge, orders by executive magistrate, civil judge orders, letters by BDO, etc., and stated that the same is not exhaustive. As per the Petitioner, all documents demonstrate that various court proceedings were filed and were pending due to ROW issues, and none of the authorities directed the landowners to comply with the prevailing norms. Most authorities directed ATL and landowners to settle the matter after ATL had already paid compensation as per prevailing norms. As per the Petitioner, this demonstrates payment of higher compensation due to implied direction on the part of the authorities. Further, Petitioner placed on record some information regarding applications which were still pending or were dismissed in default. In this regard, Petitioner has submitted that the applications were pending since compensation had already been paid, and those that were

dismissed in default were not pursued by landowners due to adequate payment of compensation.

(d) MoP Guidelines are a Change in Law event. The Commission in Order dated 11.03.2023 in Petition No. 333/MP/2019 titled *Powergrid NM Transmission Ltd. v. IL&FS TNPCL & Ors.* has held that “...the recommendation of the Empowered Committee on Transmission constituted by the Ministry of Power under the provisions of the Guidelines and whose functions, inter alia, include identification of the projects to be developed under the bidding route and also to facilitate the development of such projects, would certainly amount to Change in Law and Force Majeure event...”. In the said case, the committee ‘recommended’ that the transmission scheme be kept on hold due to which the transmission licensee was prevented from performing its obligations under the TSA. The effect of this recommendation was the truncation of a period of construction, which was considered to be a Force Majeure event by CERC. However, the nature of the recommendation was considered a Change in Law event. The facts of the present case align with this CERC’s Order in Petition No. 333/MP/2019, and therefore, MoP Guidelines, despite being recommendatory, qualify as a Change in Law event.

Hearing dated 25.10.2023

14. During the course of the hearing, the learned counsel for the Petitioner submitted that the matter has already been argued at length by the parties on 12.7.2023, and subsequently, the Petitioner has also placed on record the additional documents/details as called for by way of an additional affidavit. Learned counsel

further submitted that in terms of the liberty granted by the Commission vide Record of Proceeding for the hearing dated 12.9.2023, Respondents, Bihar Discoms, have filed their joint reply wherein Bihar Discoms have mainly reiterated their submissions already covered during the course of the arguments and the Petitioner has also filed its rejoinder thereof. The learned counsel for the Respondent, WBSEDCL, argued at length. However, due to a paucity of time, it could not complete its arguments.

Hearing dated 21.2.2024

15. The learned counsel for Respondent No. 2, West Bengal State Electricity Distribution Company Limited (WBSEDCL) prayed for an adjournment on the ground of non-availability of the arguing counsel in the matter. In response, the learned counsel for the Petitioner, ATL, however, pointed out that the matter has already been argued at length by both sides. Even after the Petitioner having furnished additional details/information, including the details relating to its compensation claims towards Right of Way as per the direction of the Commission vide Record of Proceedings for the hearing dated 12.7.2023 by way of an additional affidavit dated 7.8.2023, number of opportunities of oral hearing have been given to the parties. Learned counsel accordingly requested that the matter not be listed for any further oral hearing and that the parties be permitted to file their respective submissions, if any, by way of written submissions. Learned counsel for Respondent No. 2, WBSEDCL, as such, did not oppose the submissions of the learned counsel for the Petitioner to dispense with the need of further oral hearing and requested that, in such event, Respondent No.2 may be permitted to file its written submissions in the matter. At the end of the Board, the learned counsel for the Bihar Discoms prayed for an adjournment on the grounds of the non-availability of the arguing counsel in the matter. However, the Commission did

not accept the request of the learned counsel for the Bihar Discoms and observed that the matter has been pending since 2021, and the parties have already been granted an opportunity to file their respective submissions. Considering the submissions made by the learned counsels for the Petitioner and Respondent No.2, the parties were directed to file their respective written submissions. Accordingly, the matter was reserved for order. The Parties have filed their written submissions, which have been taken into consideration in the succeeding paragraphs.

Written Submissions

16. Bihar Discoms in its written submissions dated 7.3.2024, has mainly submitted as under:

(a) The Petition seeking monetary compensation for alleged force majeure events is not maintainable under Order II Rule 2 of the Code of Civil Procedure, 1908. Order II Rule 2 of the CPC bars a party from filing a subsequent claim during the pendency of a claim arising out of the same cause of action, without first taking express leave of the court before which the claim is pending. [Reliance is placed on *Coffee Board v. Ramesh Exports Pvt. Ltd.*, [(2014) 6 SCC 424], Para nos. 8-12; *Kalani Industries Pvt. Ltd. v. RERC & Ors.*, [2018 SCC OnLine APTEL 110], Para no. 68; *Hari Ram v. Lichmaniya & Ors.*, [2003 SCC OnLine Raj 31, Para nos. 23-25]. The Petitioner had filed Petition No. 470/MP/2019 before this Commission seeking permission to "*file a separate Petition seeking compensation on account of time and cost over-run, prolongation costs, opportunity costs*". However, without obtaining the express leave of this Court and during the pendency of Petition No. 470/MP/2019, the

Petitioner filed the present Petition seeking the aforesaid reliefs on account of the same alleged cause of action.

(b) The TSA does not provide for payment of monetary compensation to the TSP upon the occurrence of a force majeure event. Without prejudice, the Petitioner is not entitled to monetary compensation. Articles 11.7 (d) and 4.4.2 of the TSA provide the only relief contemplated under the TSA for a force majeure event, i.e., extension of SCOD and not monetary compensation. The Petitioner has already been granted the relief provided for in the TSA, i.e., extension of SCOD for the alleged force majeure claim *vide* Order dated 23.6.2023 in Petition No. 470/MP/2019.

(c) Without prejudice to the fact that indirect loss cannot be claimed from LTTCs under Articles 14.5 and 18.12, the Petitioner is not entitled to monetary compensation for the amounts paid by it to various landowners. The TSA casts the responsibility of ensuring the suitability of the site upon the Petitioner. Articles 5.1.2 and 5.1.4 of the TSA expressly record that the Petitioner would not be entitled to any compensation on account of unsuitability of the site or transmission route and that it would be the Petitioner's responsibility to bear costs for any compensation that may be payable.

(d) By way of Order dated 23.6.2023, the Commission had not declared resistance faced by the Petitioner from various landowners as a force majeure event. The Order dated 23.6.2023 only considered delays on account of injunction/stay granted by the Court as justifying extension of the SCOD. In view

of the limited declaration passed in favour of the Petitioner by way of Order dated 23.06.2023, the Petitioner is not entitled to claim compensation for the alleged additional expenditure paid by it to various landowners.

(e) The Petitioner has not delineated the specific amounts alleged to have been paid by the Petitioner to various landowners as compensation in view of the limited declaration made in favour of the Petitioner by way of the Order dated 23.06.2023. The Petitioner has not duly corroborated its claim for amounts paid to various landowners. The Petitioner has not cogently corroborated its claim for the aforesaid alleged additional expenditure. The Petitioner has produced an auditor's certificate, which is vague and ambiguous. The Petitioner has filed settlement agreements allegedly executed between the Petitioner and landowners that reflect that only a mere sum of approximately Rs. 97 lakh has been paid to various landowners as compensation.

(f) The Petitioner is not entitled to compensation for time overrun, idling costs of resources, and reduction in output of resources. The Petitioner has failed to establish the nexus between the aforesaid claims and the delay of 308 days due to court injunctions/ stays as allowed by way of the Order dated 23.06.2023.

(g) The claims do not fall within the purview of force majeure as defined under the TSA. The alleged time overrun, idling costs of labour and machinery, and reduction in output of resources were well within the control of the Petitioner and, as such, ought to have been mitigated by the Petitioner.

(h) The Petition seeking a declaration of certain events as Change in Law events is time-barred. Entry 58 of the Schedule to the Limitation Act, 1963 stipulates that in a suit to obtain any declaration, the period of limitation would be three years from the date the right to sue first accrues. The Petitioner has sought a declaration of events occurring between 2015 and 2016 as Change in Law events, the period of limitation to file the Petition expired well before the filing of the present Petition. Delay on the part of the Petitioner in filing the Petition cannot be condoned as Section 5 of the Limitation Act, 1963, is not applicable to the present Petition. As such, the present Petition, to the extent that it seeks a declaration of the aforesaid alleged events as Change in Law events, is time-barred and therefore liable to be dismissed. (Reliance is placed on *Andhra Pradesh Power Coordination Committee & Ors. V. Lanco Kondapalli Power Ltd. & Ors.*, (2016) 3 SCC 468, Para nos. 28 - 31; *Sahasradhara Energy Pvt. Ltd. v. UPPCL & Anr.*, Judgement dated 23.06.2023 passed by the UPERC in Petition No. 1890/2022, Para nos. 20-25).

(i) The Notification of MoP Guidelines dated 15.10.2015 does not qualify as a Change in Law event. The MoP Guidelines are mere Guidelines that neither have the force of law nor have been adopted by the State Governments. As such, the MoP Guidelines do not fall within the purview of a Change in Law event under Article 12.1.1 of the TSA. The MoP Guidelines did not bring a new regime. The payment of compensation to the landowners is governed by Sections 10 and 16 of the Telegraph Act, 1885, and Sections 67 and 68 of the Act, wherein the landowners are required to be compensated for the “*damage*” sustained by them, including tree and crop damage. Given that the term

“damage” is not defined in either of the Acts, the MoP Guidelines were introduced to quantify the “*damage*” so that uniform compensation is given to landowners. (Reliance is placed on *K. Gnaniah Nadar v. The Power Grid Corporation & Ors.*, 2023 SCC OnLine Mad 1212, Para no. 32-34).

(j) The Petitioner is not entitled to relief for the alleged change in law events because of its failure to serve the Change in Law notice within the time period stipulated under the TSA.

(k) The Petitioner is not entitled to the full quantum of monetary compensation as claimed by it for the alleged Change in Law events. In this regard, Article 12.2.1 of the TSA provides the formula for the calculation of relief for a Change in Law occurring during the construction period of the Transmission Project.

17. The Petitioner vide its written submission dated 8.3.2024 has reiterated the submissions made in the Petition and rejoinder, and mainly has submitted under:

(a) The Commission, *vide* Order dated 23.6.2023 in Petition No. 470/MP/2019 read with corrigendum dated 5.7.2023, condoned 308 days out of 320 days and extended the SCOD. Since the above Petition for extension of SCOD was filed in November 2019 i.e. before the actual date of commissioning of the transmission project, the petition did not include the monetary claim for losses suffered/expenses incurred due to *force majeure* or Change in Law events as the claims were not ascertained before the date of actual commissioning. However, the Petitioner had sought liberty to file the monetary

claim as soon as possible. Hence, the present Petition was filed on 30.6.2021. It is to be noted that the final Order dated 23.6.2023 passed in Petition No. 470/MP/2019 records that ATL has filed Petition No. 265/MP/2021 seeking compensation/relief for the expenditure incurred during the construction of the Project due to certain Change in Law and Force Majeure events. In this view, the present Petition is claiming compensation on account of *force majeure* and Change in Law events.

(b) The MoP Guidelines were issued to the Chief Secretaries of all States, CEA, PGCIL, POSOCO, CERC, and CMD of State Power Utilities/SEBs. Upon issuance of these Guidelines, many States adopted the same. Even though West Bengal did not adopt the Guidelines until 2022 (03.11.2022), landowners of West Bengal (which were affected by the laying of the West Bengal Line) were fully aware of the MoP Guidelines stipulating a higher compensation and also the fact that high compensation was being paid in the nearby States as per the said MoP Guidelines.

(c) RoW issues worsened due to land compensation notifications issued by the neighbouring States in accordance with the MoP Guidelines. The Government of West Bengal, on 3.11.2022, issued a notification for land compensation in case of laying down transmission lines. This demonstrates that the State of West Bengal always intended to adopt the MoP Guidelines. More so, while the Guidelines were not adopted, affected landowners, being aware of the Guidelines, provided stiff resistance and demanded higher compensation, which obstructed the work severely until higher compensation was actually paid to the landowners by ATL. In this regard, various communications were issued

by ATL to various authorities conveying the problem. The said communication has been made a part of the present petition's record.

(d) PGCIL also implemented payment of compensation as per the MoP Guidelines dated 15.10.2015, which was allowed by the Commission. The MoP Guidelines constitute a Change in Law event as per the first and fourth bullet of Article 12.1.1, i.e., *coming into effect of any Law and change in terms and conditions prescribed for obtaining any consents, clearances, permits or inclusion of any term in such terms and conditions*. The MoP Guidelines brought into effect a 'Law', i.e., compensation payable for diminution in land value. This was brought in for the first time, and at the time of submission of the bid, i.e., 9.10.2015, compensation payable was only tree/crop compensation.

(e) MoP Guidelines were recognised by the District Magistrates and other authorities to which ATL consistently wrote for devising a remedy for RoW issues. There were six categories of proceedings initiated by/against ATL (which cumulatively resulted in initiation of more than 100 cases before DM, civil courts, Executive Magistrate, etc., and issuance of approximately 150 notices and complaints by and against ATL) related to the demand of land compensation.

(f) As per Section 16 (1) of the Telegraph Act, the District Magistrate is to pass appropriate orders in case of resistance/obstruction in the telegraph authority's exercise of power under Section 10. As per Section 16 (3) of the Telegraph Act, issues related to compensation are to be decided by a District Judge.

(g) As per Sections 164 and 68 of the Act, read with Section 10 of the Telegraph Act, ATL was to offer compensation to landowners for tree crop damages. ATL accordingly computed total compensation at the time of bidding, i.e., 9.10.2015 (*date of bid submission*), as per normal tree crop compensation to the tune of Rs. 20.80 crores. After writing more than a hundred letters to various authorities and yet not achieving any resolution to the RoW issues, ATL filed applications before the District Magistrate under Section 16 (1) of the Telegraph Act to obtain orders for the removal of restrictions at various locations of the Transmission Project. In addition to ATL's applications, other proceedings were initiated by landowners.

(h) In addition to Section 16 applications, some other applications/petitions were filed by landowners for the determination of adequate compensation/seeking restoration of peace on land owned by them, viz, before the District Judge under Section 16 (3) of the Telegraph Act for the determination of adequate compensation. The pleadings in the proceedings initiated by the landowners clearly show that the issue was related to payment of higher compensation, i.e., compensation based on land value. The above proceedings took considerable time to get decided. ATL was thus forced to settle the matter and pay higher compensation. In addition, CEA recognised that higher compensation was being demanded by landowners. In view of the MoP Guidelines bringing in the concept of land compensation beyond tree and crop compensation and DM's directions to ATL to pay the higher compensation, the MoP Guidelines qualify as a Change in Law.

(i) The Hon'ble Supreme Court's judgment in *Uttar Haryana Bijli Vitran Nigam Limited and Anr v. Adani Power (Mundra) Limited and Anr.*, 2023 SCC OnLine SC 459 settles the position *qua* notification/circular/letter issued by the Indian Govt. Instrumentality, especially having an industry-wide effect, is a Change in Law event. [Para 26] Hon'ble Supreme Court in *Energy Watchdog v. CERC & Ors.* (2017) 14 SCC 80 held a change in tariff policy and consequent issuance of a letter by the Ministry of Power, as a Change in Law event [Para 56, 57]. Further, the Hon'ble Supreme Court in *Power Grid Corporation of India Ltd. v. Century Textiles & Industries Ltd.*, (2017) 5 SCC 143 provided the cement manufacturer, i.e., Century Textiles, with an option to avail its remedy of compensation under the MoP Guidelines. [Para 28]. Therefore, there is a precedent where compensation has been paid pursuant to the MoP Guidelines. ATL is thus entitled to Change in Law compensation since the MoP Guidelines were issued after the cut-off date.

(j) ATL is entitled to monetary relief under the *force majeure* clause of the TSA. Article 11.7 (b) provides for TSP, i.e., ATL, to be 'entitled to claim relief' for force majeure events. Article 11.6 of the TSA imposes a 'duty to mitigate' upon the party affected by force majeure events. ATL tried its best to execute the Transmission Project by offering compensation as per prevailing norms, i.e., tree and crop compensation. However, ATL's efforts were of no avail as most of the landowners neither accepted such compensation nor permitted ATL to continue with its works. Landowners not only created resistance but also adopted extortionist measures such as life-threatening physical assaults on ATL's workers and attempts to sabotage ATL's equipment, in order to stop the

execution of the project until payment of higher compensation. [**Ref. BDO Dhupguri's letter dated 17.10.2019 to Inspector-in Charge, Dhupguri**]. ATL was, therefore, constrained to pay the higher compensation to the landowners to proceed with the execution of the Transmission Project. Timely completion of the Transmission Project was very important as the project is of national importance since it is a part of the national grid and was envisaged to strengthen the transmission system in the eastern part of India. The importance of the Transmission Project is evident from the fact that it was being directly monitored by the MoP and the Prime Minister's Office.

Hearing dated 20.2.2025

18. The instant Petition, which was reserved for order on 21.2.2024, was re-listed for the hearing, since the order could not be issued prior to one Member, who formed part of the Coram, demitting office. During the course of the hearing, the counsels for the parties prayed to file their written submissions.

Hearing dated 2.4.2025

19. During the course of the hearing, the learned counsels for the parties submitted that the written submissions have been filed and the order may be reserved in the matter. Considering the submissions of the learned counsels for the Parties, order was reserved in the matter.

Analysis and Decision

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

Issue No. 1: Whether the Petition is maintainable?

Issue No. 2: Whether the Petitioner has complied with the provisions of the TSA before approaching the Commission for claiming relief due to Force majeure and Change in Law event?

Issue No. 3: Whether the claims of the Petitioner are covered under Force Majeure events in terms of the TSA?

Issue No. 4: Whether the claims of the Petitioner are covered under Change in Law events in terms of the TSA?

Issue No. 5: What reliefs, if any, should be granted to the Petitioner in the light of the answers to the above issues?

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

Issue No. 1: Whether the Petition is maintainable?

22. The Bihar Discoms have objected that the claim of the Petitioner is barred by the principles contained in Order II Rule 2 of the Code of Civil Procedure (CPC). As per Order II 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 II 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.470/MP/2019, the Petitioner is barred from filing the present Petition seeking carrying cost for the said Change in Law events under Order II Rule 2 of the CPC. The purpose behind Order II Rule 2 of the CPC, as elucidated by the Hon'ble Supreme Court in the case of 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 the Rajasthan Electricity Regulatory Commission barring a party's claim for interest under Order II Rule 2 of the CPC on account of not raising the said claim at the time of filing of the main Petition. The Petitioner had previously submitted a Petition bearing a Petition No. 470/MP/2019 before this Commission praying therein, *"file a separate Petition seeking compensation on account of time and cost over-run, prolongation costs, opportunity costs "*. However, the Petitioner did not obtain express leave of the Commission to file a new Petition before the Commission seeking the aforesaid reliefs on account of the same alleged cause of action. Further, Entry 58 of the Schedule to the Limitation Act, 1963 stipulates that in a suit to obtain any declaration, the period of limitation would be three years from the date the right to sue first accrues. Since the Petitioner has sought a declaration of events occurring between 2015-2016 as Change in Law events, the period of limitation to file the Petition expired well before the filing of the present Petition.

23. *Per contra*, the Petitioner has submitted that the Petition was filed on 30.6.2021 and the same was listed for the hearing on 24.5.2022, i.e., after 11 months. The Petition was admitted on 12.7.2022, and with respect to the maintainability issue, the objections can only be raised before the admission of the Petition, not after. Bihar Discoms' absence at the time of the Petition's admission cannot be excused. In this regard, reliance has been placed on the judgment of the Hon'ble Supreme Court dated 8.5.2022 in the case of A.V.G.P. Chettiar & Sons v. T. Palanisamy Gounder, [(2002) 5 SCC 337] wherein it has been held that once a Court has heard preliminary arguments on 'admission' and admitted the Petition, no arguments can be raised on the maintainability. Further, the Petitioner has stated that it had filed Petition No. 470/MP/2019 on 15.11.2019 for an extension of the Scheduled Commercial Operation

Date due to delay the factors beyond ATL's control and therein the Petitioner could not seek time and cost overrun, so it was clarified in the SCOD Petition that the Petitioner still has the right to seek relief at a later stage, only after completing the project and determining claims. Accordingly, the present Petition has been filed seeking a Change in Law and compensation for time and cost overrun, which is distinct from the earlier Petition filed by ATL, i.e., the SCOD Petition, i.e., 470/MP/2019. And also, the Petitioner has a right to seek compensation for time and cost overrun not just under the TSA but also under Section 70 of the Indian Contract Act, 1872. Therefore, the cause of action for filing the present Petition is different and hence maintainable. Further, the Petition has been filed within three years of COD and is therefore maintainable.

24. We have considered the submissions of the parties. According to the Respondents i.e. Bihar Discoms, the Petitioner's claim is not maintainable in view of provisions of Order II Rule 2 of the CPC as the Petitioner did not obtain express leave of the Commission to file a new Petition before the Commission seeking relief on account of the same alleged cause of action which was already decided in the Petition No. 470/MP/2019. On the other hand, the Petitioner has submitted that the present Petition has been filed seeking compensation for time and cost overrun, which is distinct from the earlier petition filed by ATL, i.e., the SCOD Petition, 470/MP/2019.

25. Order II Rule 2 of the Code of Civil Procedure, 1908 stipulates as under:

"ORDER II- FRAME OF SUIT

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

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

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

26. From the above, we observe that 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 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. We observe that Section 11 of 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.

27. It is noticed that the Petitioner in Petition No. 470MP/2019 had made the following prayers:

“(a) Admit the present Petition;

(b) Hold and declare that the events pleaded in the Petition qualify as force majeure events which has obstructed, delayed and adversely affected the completion of the Transmission Project, for which Alipurduar Transmission Limited is entitled to the extension of SCOD as claimed for in the Petition until the adverse impact of the force majeure events has ceased to impede the work and the completion of the Transmission Project;

(c) Hold and declare that Alipurduar Transmission Limited is exempted from any financial liabilities due to delay in achieving SCOD due to force majeure;

(d) Accept plea of Alipurduar Transmission Limited to permit it to file a separate petition to seek compensation on account of time and cost-overrun, prolongation costs, opportunity costs etc., as claimed for in the Petition; and

(e) Pass such further or other Orders as this the Commission may deem just and proper in the facts and circumstances of the case.”

28. We observe that the cause of action for filing the present Petition is distinct and separate. In this regard, we adduce to a Judgment passed by the Privy Council which laid down the principle understanding of bar under Order II Rule 2, i.e., *Mohammad Khalil Khan v. Mehbub Ali Mian* [AIR (36) 1949 PC 87] viz:

(a) The correct test for Order II Rule 2 bar is “whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation of the former suit.

(b) The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to judgment.

(c) If the evidence to support the two claims is different, then the cause of action is also different.

(d) The causes of action in the two suits may be considered to be the same if, in substance, they are identical.

(e) The cause of action has no relation to the defense that may be set up by the defendant. It refers to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour.

29. In view of the above, the factor to be considered is whether ATL could have sought monetary relief in Petition No. 470/MP/2019 and whether the cause of action for Petition No. 470/MP/2019 is identical to the present petition. We are constrained to answer both in the negative. The Petitioner filed Petition No. 470/MP/2019 seeking relief of extension of SCOD for its transmission project. The Petition was filed before the transmission project achieved actual COD, i.e., the Petition was filed on

15.11.2019, whereas the actual COD for the transmission project was achieved on 20.1.2020. The final order has been passed in Petition No. 470/MP/2019, which demonstrates that till December 2019 (time of filing of Petition No. 470/MP/2019), the Petitioner was not only facing RoW issues but also had not received the statutory approvals. The Petitioner, therefore, could not have predicted the completion date of the transmission project. This means that in no way was the Petitioner in a position to compute the actual delays and to calculate the claim based on such delays. The cause of action of the present Petition is separate not only due to the final ascertainment of a period of delay, but also since the Petition includes a claim for a Change in Law as well.

30. The Commission vide its order dated 23.06.2023 in Petition No. 470/MP/2019 also observed as under:

“75. We have considered the submissions made by the parties. We observe that, during the pendency of the present Petition, the Petitioner has already filed Petition No. 265/MP/2021, inter alia, seeking compensation / relief for the additional expenditure incurred by the Petitioner during the construction of the Project due to certain Change in Law as well as Force Majeure events as per the applicable provisions of the TSA. Therefore, the question of granting a liberty in favour of the Petitioner no longer arises.”

31. Accordingly, the Commission has already taken note of the present Petition filed claiming compensation for the losses/ additional expenditure incurred by the Petitioner, while passing the final order in Petition No. 470/MP/2019. Technical hurdles cannot come in the way of justice. The objection of the Bihar Discoms that the claim of the Petitioner is barred by the principles contained in Order II Rule 2 of the CPC is not sustainable.

32. Respondents have further contended that the Petition is time-barred and, therefore, liable to be dismissed. Entry 58 of the Schedule to the Limitation Act, 1963 stipulates that in a suit to obtain any declaration, the period of limitation would be three years from the date the right to sue first accrues. In the present facts, given that the Petitioner has sought the declaration of the aforesaid events occurring between 2015 and 2017 as Change in Law events, the period of limitation to file the Petition expired on 14.10.2018 (for claim with respect to MoP Guidelines) and 19.1.2019 (for claim with respect to Entry Tax rate in Bihar). However, the Petitioner filed the Petition on 8.7.2021 after an undue, inordinate, and unexplained delay. Moreover, the aforesaid delay on the part of the Petitioner in filing the Petition cannot be condoned as Section 5 of the Limitation Act, 1963, is not applicable to the present Petition. As such, the Petitioner cannot be allowed to claim compensation for such time-barred claims by way of the Petition. Consequently, the Petition is liable to be dismissed.

33. Before going into the aspect of period of limitation, it is necessary to establish when the cause of action arose for the Petitioner to file the Change in Law claims. In this regard, Article 12 of the TSA provides as under:

“12.2 Relief for Change in Law 12.2.1 During Construction Period: During the Construction Period, the impact of increase/decrease in the cost of the Project in the Transmission Charges shall be governed by the formula given below:

For every cumulative increase/decrease of each Rupees Five Crore Sixty Six Lakh Twenty Thousand Only (Rs. 5.662 Cr.) in the cost of the Project up to the Scheduled COD of the Project, the increase/decrease in non-escalable Transmission Charges shall be an amount equal to Zero Point Three One Three percent (0.31332%) of the Non-Escalable Transmission Charges.

.....

12.2.3 For any claims made under Articles 12.2.1 and 12.2.2 above, the TSP shall provide to the Long Term Transmission Customers and the Appropriate Commission documentary proof of such increase/decrease in cost of the Project/revenue for establishing the impact of such Change in Law.

12.2.4 The decision of the Appropriate Commission, with regards to the determination of the compensation mentioned above in Article 12.2.1 and 12.2.2, and the date from which such compensation shall become effective, shall be final and binding on both the Parties subject to rights of appeal provided under applicable Law.”

34. We note that as per Article 12.2.1 of the TSA, the compensation for the impact of a cumulative increase/decrease in the cost of the Project is to be paid to the Petitioner by Respondents, LTTCs, in terms of an increase/decrease of transmission charges. Article 12.2.1 of the TSA provides that for every cumulative increase/decrease of Rs. 5.662 crores in the cost of the Project up to the scheduled COD of the Project, the non-escalable transmission charges shall be increased by 0.313%. We also note that the compensation to be paid to the Petitioner is qualified with the words ‘cumulative increase/decrease’. Thus, the clear intent of the provision is to consider the impact of all Change in Law events leading to a net increase or decrease of the cost of the Project on a cumulative basis up to the scheduled COD of the Project. Only after the net cumulative increase/decrease in the cost of the Project up to scheduled COD is crystalized, the transmission charges can be increased/decreased by 0.313% of non-escalable transmission charges for every cumulative increase/decrease of Rs.5.662 crore in the cost of the Project as per this provision. Even if each Change in Law event during the construction period is to be dealt with individually, the relief to the Petitioner needs to be considered on a cumulative basis, which can be crystalized only after COD of the Project.

35. Further, as per Article 12.2.3 of TSA, for claiming the Change in Law relief during the construction period, the Petitioner is required to provide documentary proof of an increase in the cost of the Project for establishing the impact of Change in Law beyond the threshold as specified in Article 12.2.1. Moreover, as per Article 12.2.4, the

Commission is also required to decide upon the compensation for Change in Law during the construction period, which as noted above, is to be in terms of increase/decrease in non-escalable transmission charges to a tune of 0.313% for the cumulative increase/decrease of Rs.5.662 crores in the Project cost up to the scheduled COD of the Project. Thus, even for the effective determination of Change in Law relief during the construction period, TSA provides for consideration of the cumulative increase/decrease in the cost of the Project up to the scheduled COD of the Project. Also, though with the occurrence of each Change in Law event, the Petitioner's right to seek compensation triggers under TSA, Article 12.2.1 of TSA requires that the cumulative increase in the cost of the Project up to the scheduled COD has to be considered for claiming the Change in Law relief. Therefore, the Petitioner could not have filed a Petition before the Commission with all the details as required in terms of Articles 12.2.1 and 12.2.3 of TSA until completion of the Project.

36. In the present case, the scheduled COD of the Project was 6.3.2019. The Project of the Petitioner had achieved COD on 20.1.2020, and the present Petition was filed on 8.7.2021. Therefore, the Petition has been filed within the limitation period of three years from the day the cause of action arose. A similar view has been taken by the Commission in its order dated 7.11.2021 in Petition No. 533/MP/2020 (Raipur Rajnandgaon Warora Transmission Ltd. v. MSEDCL and Ors.) and order dated 2.3.2023 in Petition No. 538/MP/2020 (Chhattisgarh WR Transmission Limited v. MSEDCL and Ors.). Therefore, the objection of the Bihar Discoms that the present Petition is barred by limitation is not sustainable.

37. The issue is answered accordingly.

Issue No. 2: Whether the Petitioner has complied with the provisions of the TSA before approaching the Commission for claiming relief due to Force majeure and Change in Law?

38. The Petitioner has claimed relief under Article 11 (Force Majeure) of the TSA.

Article 11.5.1 of the TSA provides as under:

“11.5 Notification of Force Majeure Event 11.5.1

The Affected Party shall give notice to the other Party of any event of Force Majeure as soon as reasonably practicable, but not later than seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in a breakdown of communications rendering it unreasonable to give notice within the applicable time limit specified herein, then the Party claiming Force Majeure shall give such notice as soon as reasonably practicable after reinstatement of communications, but not later than one (1) day after such reinstatement.

Provided that such notice shall be a pre-condition to the Affected Party's entitlement to claim relief under this Agreement. Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed. The Affected Party shall give the other Party regular reports on the progress of those remedial measures and such other information as the other Party may reasonably request about the Force Majeure.

11.5.2 The Affected Party shall give notice to the other Party of (i) the cessation of the relevant event of Force Majeure; and (ii) the cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this Agreement, as soon as practicable after becoming aware of each of these cessations.”

39. Under Article 11.5.1 of the TSA, an affected party shall give notice to the other party of any event of Force Majeure as soon as reasonably practicable, but not later than seven days after the date on which the party knew or should have reasonably known of the commencement of the event of Force Majeure. It further provides that such notice shall be a precondition to the affected party's entitlement to claim relief under the TSA.

40. The Petitioner has also claimed relief under Article 12 (Change in Law) of the TSA. Article 12.3.1 of the TSA provides as under;

“12.3 Notification of Change in Law Event

12.3.1 If the TSP is affected by a Change in Law in accordance with Article 12.1 and wishes to claim relief for such Change in Law under this Article 12, it shall give notice to Lead Long Term Transmission Customer of such Change in Law as soon as reasonably practicable after becoming aware of the same.

*12.3.2 The TSP shall also be obliged to serve a notice to Lead Long Term Transmission Customer even when it is beneficially affected by a Change in Law.
12.3.3 Any notice served pursuant to Articles 12.3.1 and 12.3.2 shall provide, amongst other things, precise details of the Change in Law and its effect on the TSP.”*

41. Article 12.3 of the TSA provides that if the TSP is affected by a Change in Law in accordance with Article 12.1 and wishes to claim relief for such Change in Law, it shall give a notice to the lead LTTC as soon as reasonably practicable after being aware of the same. It further provides that any notice served pursuant to Articles 12.3.1 and 12.3.2 of the TSA shall provide, amongst other things, precise details of the Change in Law and its effect on the TSP.

42. Insofar as the Change in Law is concerned, it is noticed that the Petitioner has placed on record the various Change in Law notices issued by it, intimating the lead LTTC/LTTCs about the occurrence of Change in Law events and the implication of such Change in Law events on the Petitioner. For the enactment of GST Laws, the Petitioner had issued the Change in Law notices on 25.8.2017, 20.4.2020 & 14.10.2020. For the notification(s) stipulating the entry tax, the Petitioner had issued the Change in Law notices to lead LTTC / LTTCs on 26.4.2016, 20.4.2020 & 16.20.2020. Moreover, the Petitioner vide its various letters starting from 25.6.2017 to 17.8.2019 informed the lead LTTC and other statutory authorities about the severe

resistance towards land compensation, and in continuation, vide letter dated 14.10.2020 had intimated the lead LTTC about the expenses to be incurred towards the land compensation requesting it to take note of the same and to consider the same for necessary compensation as per Article 12.2 of the TSA. Although, there appears to be a considerable delay in invocation of Article 12.2 of the TSA in respect of the MoP Guidelines dated 15.10.2015 by way of notice dated 14.10.2020, keeping in view that the Petitioner was statedly required to incur the additional expenditure in terms of the said Guidelines only at the time of implementation of Project during 2019-20, we are inclined to consider the said Change in Law claim on merit as well. In view of the above, we find that the Petitioner has complied with the requirement of prior notice of a Change in Law event in terms of Article 12.3 of the TSA.

43. Insofar as compliance of the TSA for Force Majeure events are concerned, the same has already been dealt with in the Order dated 23.06.2023 in Petition No. 470/MP/2019 wherein the Commission has held as follows:

“35. As per Article 11.5.1 of the TSA, it is clear that issuance of notice about the Force Majeure event is a pre-condition to the affected Party’s entitlement to claim relief under Force Majeure. In our view, before approaching the Commission, the Petitioner has complied with the requirement of TSA regarding prior notice to the LTTCs regarding occurrence of Force Majeure events relating to (i) Right of Way issues due to disputes and resistance by the local land owners, court proceedings and lack of administrative local support, etc.; (ii) delay due to heavy rainfall in the States of West Bengal and Bihar and (ii) delay in obtaining the statutory clearances.”

44. Since the above-said Order was passed in Petition No. 470/MP/2019 wherein not only the subject matter of the Petition, i.e., the Petitioner’s transmission project but also the parties involved, is same, the Order dated 23.06.2023 in Petition No. 470/MP/2019 squarely applies to the present case.

45. This issue is answered accordingly.

Issue No. 3: Whether the claims of the Petitioner are covered under Force Majeure events in terms of the TSA?

46. The Petitioner has submitted that it is entitled to monetary relief under the *force majeure* clause of the TSA, i.e., Article 11, and ‘relief for force majeure’ is provided under Article 11.7 (b) in particular. Article 11.6 of the TSA imposes a ‘duty to mitigate’ upon the party affected by force majeure events. ATL tried its best to execute the Transmission Project by offering compensation as per the prevailing norms, i.e., tree and crop compensation. However, ATL’s efforts were of no avail as most of the landowners neither accepted such compensation nor permitted ATL to continue with its works. The landowners not only created resistance but also adopted extortionist measures such as life-threatening physical assaults on ATL’s workers and attempts to sabotage ATL’s equipment, in order to stop the execution of the Project until payment of the higher compensation. ATL was, therefore, constrained to pay higher compensation to the landowners to proceed with the execution of the Project. Timely completion of the transmission Project was very important as the project is of national importance since the same is a part of the national grid and was envisaged to strengthen the transmission system in the Eastern part of India. The factor of timely completion of the project is more prominently demonstrated by the fact that ATL was mulcted with mismatch liability of payment of the transmission charges (for 6 months) to PGCIL for its interconnecting transmission assets [Order dated 29.8.2023 in Petition No. 113/TT/2021 titled as *PGCIL v. BSPC & Ors.*]. Had ATL not taken mitigating measures of settlement of landowners’ claims, the liability of payment of the transmission charges would have also increased manifold. In view of a barrage of litigation involving the Transmission Project, ATL was in a state of uncertainty where

ATL could have either spent valuable time embroiled in litigation or could have paid compensation as per the MoP Guidelines.

47. The Petitioner has stated that Article 11 of the TSA permits the project developer to claim the compensation in case of suffering a force majeure event. As per Article 11, 'relief for force majeure' is provided under Article 11.7 in the following manner:

“11.7 Available Relief for a Force Majeure Event

Subject to this Article 11

(a) no Party shall be in breach of its obligations pursuant to this Agreement to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event;

(b) every Party shall be entitled to claim relief for a Force Majeure Event affecting its performance in relation to its obligations under this Agreement.”

48. The Petitioner has submitted that Article 11.7 (b) provides for TSP, i.e., ATL to be 'entitled to claim relief' for force majeure events, and the interpretation of the word 'relief' has to be given the widest amplitude. Since relief means aid, assistance, redress, and benefit, etc., the same ought not to be restricted to relief or the extension of SCOD as submitted by the Respondents. The Petitioner has further submitted that the Law on purposive interpretation entitles the Petitioner to claim relief on account of the additional expenditure incurred due to force majeure events. Accordingly, the relief as per statutory provisions can be granted under Sections 61 and 79 of the Act for additional expenditure incurred. And also, where there is an ambiguity in terms of the contract, the court ought to apply the principle of *contra proferentem*, i.e., the ambiguity will be resolved by adopting the construction favourable to the party that has not drafted the contract.

49. *Per contra*, Respondents have submitted that Article 11 only provides for extension of SCOD and not any monetary relief. The Petitioner is explicitly prohibited from claiming compensation for the claims made with respect to the Force Majeure under Articles 14.5 and 18.12 of the TSA. And also, Articles 5.1.2 and 5.1.4 of the TSA expressly record that the Petitioner would not be entitled to any compensation on account of the unsuitability of the site or transmission route and that it would be the Petitioner's responsibility to bear costs for any compensation that may be payable. Also, the Commission did not declare resistance from landowners as a force majeure event in Petition No.470/MP/2019, as the court granted delays and no additional expenditure. Respondents have further submitted that according to the Petitioner, it has paid Rs. 188,47,94,106/- to the landowners between July 2018 and March 2020, but the Commission declared only 308 days from 16.11.2018 to 20.9.2019. The Petitioner has failed to correlate its claim with the period of delay condoned. Also, the Petitioner has not corroborated its entire claim for compensation. Lastly, the alleged time overrun, idling costs of labour and machinery, and reduction in output of resources were well within the control of the Petitioner. Therefore, the same does not fall within the purview of force majeure events as defined under Article 11.3 of the TSA. Thus, the Petitioner is not entitled to compensation.

50. We have considered the submissions of the Petitioner and Respondents. Earlier, the Petitioner had filed Petition No. 470/MP/2019, under Sections 79(1)(c) and 79(1)(f) of Act read with Article 4.4.2 (Extension of time), Article 11 (Force Majeure) and Article 16 (Dispute Resolution) of the TSA, seeking extension of the SCOD of its Project on account of the force majeure events. In the said Petition, the Petitioner had raised a plea of force majeure in respect of the events viz. (a) severe RoW issues on

account of (i) stiff resistance from local land owners during construction works, (ii) dispute with respect to the compensation payable to the land owners; (iii) dispute with respect to the multiple land owners claiming compensation for same land, (iv) manhandling of its personnel, (v) court proceedings and stay/interim injunction granted therein, (vi) pendency of applications made by it under Section 16(1) of the Telegraph Act, 1885, and (vii) lack of appropriate local administrative support, etc., (b) delay in obtaining statutory clearances, and (c) delay due to heavy flood in West Bengal and Bihar. By its order dated 23.6.2023, the Commission rejected all the force majeure pleas on all the grounds except the delay due to Court proceedings and stay/injunction granted by the Court in various proceedings, and consequently, granted the extension of 308 days for achieving the COD on the said count.

“54. Perusal of the above proceedings indicate that for the period from 16.11.2018 upto 20.09.2019 i.e. 308 days, the Petitioner was restrained and severely marred from carrying out the construction works on one or the other locations due to injunction/stay granted against the Petitioner in suits/applications filed by the various landowners. Some of these stays/injunctions continued beyond SCOD of 06.03.2019. This severely hampered the progress of the project at one or the other tower location. Thus, we are inclined to consider this period of 308 days during which the Petitioner was effectively restrained from carrying out the construction works at one or the other location as force majeure event and consequently, condone the delay in achieving the COD of the Project to the above effect.”

51. In the present Petition, the Petitioner has sought compensation for the following expenses, which arose due to ROW issues:

- (a) Additional working capital for time over run i.e. Rs. 12.88 crores, namely,
 - (i) net additional expenditure of Rs. 2,74,78,549/- incurred on West Bengal line for the period from March 2019 to January 2020 for ATL's manpower and administrative expenses including *inter alia* (i) operating expenses, (ii) salaries and wages, (iii) transportation charges, (iv) general administrative expenses

etc, and (ii) additional expenditure of Rs. 10.13 crores incurred on account of Kalpataru Power Transmission Ltd.'s (KPTL/EPC Contractor) claim due to time overrun from 7.3.2019 to 16.1.2020 for West Bengal line.

(b) Compensation paid to the landowners: ATL paid higher RoW compensation of about Rs. 188.48 crores for the land compensation, which was paid after issuance of the MoP Guidelines in order to prevent further delay in completion of the Project.

(c) Idling of resources: ATL suffered losses to the tune of Rs. 9,01,87,950/- (Rs. 9.01 crores) on account of idling of labour and machinery, etc. on West Bengal line due to the non-availability of continuous work fronts, viz (i) On account of severe RoW issues faced by ATL starting December 2017, the work force employed by ATL at the Project sites were time and again obstructed from carrying on the construction activities, (ii) CEA, which was consistently monitoring the progress of ATL's Project, also took note of the mobilization of ATL's resources and the subsequent hinderances faced by ATL due to the RoW issues which time and again led to a standstill in construction activities.

(d) Reduction in output: ATL suffered losses to the tune of Rs. 4,06,67,090/- (Rs. 4.06 crores) due to the reduction of output of resources deployed on a departmental basis for the foundation, erection, and stringing. Due to the limitation of/non-availability of continuous workable fronts for the reason of RoW issues, no subcontractor was ready to work without an increase in unit rates. ATL's contractor, therefore, raised a claim for idling costs.

52. The Petitioner has submitted two folds arguments for the abovesaid claims i.e.

(a) the claim ought to be granted to the Petitioner in view of Article 11.7 (b) which is an

open ended provision in the TSA and entitles affected party the 'relief' for a force majeure event, and (b) since the delay of 308 days has been condoned by the Commission in Petition No. 470/MP/2019 based on injunction granted by Courts due to ROW issues, the expenditure incurred on account of those ROW issues also ought to be allowed.

53. We observe that the aspect of the transmission licensee being entitled to a financial relief/compensation on account of the force majeure event has been considered by the Commission in its order dated 25.7.2022 in Petition No.210/MP/2017 in the matter of Kudgi Transmission Limited v. Bangalore Electricity Supply Co. Ltd. and Ors., wherein the Commission, *inter alia*, held as under:

"40. As per Article 11.7(a), the affected party shall not be in breach of its obligation pursuant to the agreement to the extent its performance of its obligations was prevented, hindered or delayed due to Force Majeure event and as per Article 11.7(b), the affected party shall be entitled to claim relief for Force Majeure event affecting its performance in relation to its obligations under the agreement. Under the TSA, the obligations of the licensee, among the others, include achieving the commercial operation of the Project/elements within the SCOD specified in the TSA. Further, in the event of performance of the said obligation is affected by Force Majeure event, Article 4.4.2 of the TSA provides as under:

41. Thus, the relief available to the licensee in the event its obligation to achieve the commercial operation of the Project within the stipulated time is affected by the occurrence of Force Majeure event is an extension of SCOD of the Project and consequently, non-applicability of liquidated damages for such delay under the TSA. As noted above, the Commission vide order dated 24.1.2019 has already held that the Petitioner is entitled to revision of SCOD in respect of Element 2 & Element 3 from 31.12.2015 till the date of actual COD of these elements and has also directed the lead LTTC to return the bank guarantee submitted by the Petitioner towards the claim of liquidated damage. The contention of the Petitioner that it is also entitled to IDC and IEDC for the extended construction period under Article 11.7(b) of the TSA, in our view, is misplaced. It is well settled that a party cannot claim anything more than what is covered by the terms of contract for the reason that the contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. The contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meaning unless there is some ambiguity. Moreover, the terms of the contract have to be construed strictly without altering the nature of the contract as it may affect the interest of either of the parties adversely. In our view, the clear language of the Article 11.7(b) of the TSA does not entitle the Petitioner to claims the financial reliefs in the form of IDC and IEDC for the Force Majeure event....."

The Petitioner has also placed reliance on the judgment of the APTEL dated 20.10.2020 in Appeal No. 208 of 2019 in the case of Bhopal Dhule Transmission Company Limited v. CERC and Ors. ('Bhopal Dhule Judgment') and the judgment dated 3.12.2021 in Appeal No. 129 of 2020 in the case of NRSS XXXI (B) Transmission Limited v. CERC and Ors. and Appeal No. 276 of 2021 in Darbhanga-Motihari Transmission Co. Ltd. v. CERC and Ors. ('NRSS Judgment') In support of its plea for financial relief/compensation for the force majeure events. However, it is pertinent to note that in the Bhopal Dhule Judgment, the APTEL observed that the denial of IDC on the admitted Change in Law by this Commission was in contravention of the provisions of the Article 12.1.1 of the TSA and consequently, held that the licensee is entitled for IDC on the admitted Change in Law events. Whereas, in the NRSS Judgment, the APTEL observed that this Commission erred in not allowing the IDC and IEDC, once having held the unforeseen requirement of forest clearance as a Change in Law, and having also granted extension of time for delay in obtaining such clearance as force majeure. Consequently, the APTEL therein held the licensee entitled to be fully compensated for the IDC and IEDC incurred on account of the Change in Law and force majeure events. However, in the present case, majority of the force majeure claims of the Petitioner stands rejected by the Commission vide order dated 23.6.2023 and even assuming that only force majeure plea in respect of delay due to court proceedings and stay/injunction granted by Court in various proceedings as allowed by the Commission has led to the additional expenditure as claimed by the Petitioner herein, no Change in Law claims including the MoP Guidelines, as the later part of this order would reveal, has been made out by the

Petitioner in respect thereof and consequently, no financial relief or compensation can be awarded to the Petitioner on the above count.

54. To buttress its claim, the Petitioner has also relied upon Section 70 of the Contract Act, 1872, to state that in case of enjoyment of the benefit of a non-gratuitous act, the recipient has to compensate the entity performing the said non-gratuitous act (ref. to judgments by the Hon'ble Supreme Court in the case of *State of West Bengal v. BK Mondal*, AIR 1962 SC 779- Para 14- and *Mulamchand vs. State of Madhya Pradesh* [(1968) 3 SCR 214 SC- Para 6], which lay down the conditions for invocation of Section 70. However, it is settled that Section 70 of the Indian Contract Act, 1872 cannot be invoked when the parties have an express contract, governing their respective rights and obligations [*Mahanagar Telephone Nigam Ltd. v. Tata Communication Ltd.*, 2019 (5) SCC 341)].

55. In view of the above, the claim of the Petitioner for compensation towards the higher compensation paid to the landowners, idling of machinery and manpower, reduction in output, and time overrun costs, etc., on the ground of force majeure event(s) stands rejected.

56. This issue is answered accordingly.

Issue No. 4: Whether the claims of the Petitioner are covered under Change in Law events in terms of the TSA?

57. The provisions of the TSA with regard to Change in Law are extracted as under:

“12.1 Change in Law

12.1.1 Change in Law means the occurrence of any of the following after the date, which is seven (7) days prior to the Bid Deadline, resulting into any additional recurring/non-recurring expenditure by the TSP or any income to the TSP:

The enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;

A change in the interpretation or application of any Law by Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;

- The imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier:
- A change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents Clearances and Permits;
- Any change in the licensing regulations of the Appropriate Commission, under which the Transmission License for the Project was granted if made applicable by such Appropriate Commission to the TSP: • any change in the Acquisition Price; or
- any change in tax or introduction of any tax made applicable for providing Transmission Service by the TSP as per the terms of this Agreement.”

58. Perusal of the above provisions of Article 12 in the TSA reveals that for an event to be declared as ‘Change in Law’, its occurrence has to be after seven days prior to the bid deadline and should result into any additional recurring/ non-recurring expenditure by the TSP or any income to the TSP.

59. The cut-off date for reckoning the Change in Law events - a date seven days prior to the bid deadline - was 2.10.2015. In light of the above provisions of the Change in Law, the claims of the Petitioner with regard to Change in Law events, which have occurred after the cut-off date during the construction period, have been examined in the subsequent paragraphs.

Change in Entry Tax rate in Bihar from 8% to 12% vide Notification No. S.O. 18 dated 20.1.2016

60. The Petitioner has submitted on 31.7.2008, in exercise of the power conferred under Section 3(1) of the Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale Therein Act, 1993, the Commercial Taxes Department, Government of Bihar vide its notification No. S.O. 95 specified the 8% rate of tax to be charged and collected on the entry of electrical goods into local areas for consumption, use or sale in the State of Bihar. Subsequently, the Commercial Taxes Department, Government of Bihar vide its notification No. S.O. 98 increased the rate of entry tax from 8% to 12%. The Petitioner has submitted that due to increase in the entry tax, it has incurred Rs. 2,65,80,130/- The Petitioner has submitted that the Commercial Taxes Department, Government of Bihar being a department of the Government of Bihar would squarely fall under the definition of Government Instrumentality in terms of Article 1.1 of the TSA. The Petitioner has submitted that the escalation of the entry tax rate for electrical goods in the State of Bihar, after the cut-off date, satisfies all requirements enumerated in Article 12 of the TSA and qualifies as a Change in Law event.

61. The Respondents have submitted that since the Petitioner served the copy of the Change in Law notice regarding the increase in entry tax on 26.04.2016, it is not entitled to the same.

62. We have considered the submissions of the Petitioner and Respondents. As on the cut-off date, i.e., 2.10.2015, the applicable tax on the entry of various goods in the State of Bihar was 8% in terms of the Notification dated 31.7.2008 issued by the

Commercial Taxes Department, Government of Bihar. Subsequently, the Commercial Taxes Department, Government of Bihar vide its Notification dated 20.1.2016 increased the entry tax from 8% to 12%. The Government of Bihar, being the State Government, is an Indian Governmental Instrumentality in terms of the TSA. Therefore, the Notification dated 20.1.2016 issued by the Commercial Taxes Department, Government of Bihar, being after the cut-off date, qualifies as a Change in Law event in terms of Article 12.1.1 of the TSA. So far as compliance with the TSA provisions is concerned, we have already held that the Petitioner has complied with the provisions by serving a notice for Change in Law dated 26.4.2016. Accordingly, the Petitioner is entitled to an increase in transmission charges on account of additional expenditure incurred towards an increase in entry tax on electricity goods in the State of Bihar in terms of the above order of the Government of Bihar.

64. The issue is decided accordingly.

Increase in effective tax rate on goods and services due to the enactment of the GST Laws

65. The Petitioner has submitted that the Goods and Service Tax Act, 2017 has been notified by the Ministry of Finance, Government of India with effect from 1.7.2017, which is after the cut-off date, i.e., 2.10.2015, and, therefore, constitutes a Change in Law event. The Petitioner has further submitted that the Commission, in its order dated 17.12.2018 in Petition No. 1/SM/2018, has held that the introduction of GST w.e.f. 1.7.2017 constitutes a Change in Law and that the differential between the taxes subsumed in GST and the rates of the GST on various items shall be admissible under Change in Law and also that the TSPs shall work out and provide the details of

increase/ decrease in the tax liability in respect of the introduction of GST to the LTTCs duly supported by the Auditor's certificate. The Petitioner has submitted that due to the introduction of the GST Laws, the Petitioner has incurred a total additional expenditure of Rs. 27.23 crores.

66. The Respondents have submitted that since the Petitioner served the copy of the Change in Law notice regarding the increase in taxes due to the enactment of GST on 14.10.2020, it is not entitled to the same.

67. We have considered the submissions made by the Petitioner and Respondent. The Commission, in its order dated 17.12.2018 in Petition No. 1/SM/2018, in the matter of additional tax burden on transmission licensees on introduction of Goods and Service Tax compensation cess, has held that the introduction of GST with effect from 1.7.2017 shall constitute a Change in Law event. The relevant extract of the order dated 17.12.2018 in Petition No. 1/SM/2018 is reproduced below:

"27. From the forgoing, it is observed that due to varied nature of such taxes, duties and cess etc. that have been subsumed/abolished on introduction of GST, it is not possible to quantify the resulting impact in a generic manner for all the TSPs. The abolition of taxes, duties, cess, etc. on the introduction of GST are "Change in Law" events and the savings arising out of such "Change in Law" should be passed to the beneficiaries of the TSPs. Similarly, the introduction of GST has also resulted in imposition of new or increase in existing taxes, duties, cess etc. which constitute "Change in Law" events and accordingly the additional impact due to introduction of GST shall be borne by the beneficiaries. The details of the increase or decrease in the taxes, duties, cess etc. shall be worked out by the TSPs and the beneficiaries. The TSPs should provide the details of increase or decrease in the taxes, duties, cess etc. supported by Auditor Certificate and relevant documents to the beneficiaries and refund or recover the amount from the TSPs due to the decrease or increase in the taxes, duties, cess etc. as the case maybe. Since the GST liveable on the transmission licensees pertain to the construction period, the impact of GST shall be disbursed by the beneficiaries to the transmission licensees in accordance with the provisions in the TSA regarding relief for Change in Law during construction period. In case of any dispute on any of the taxes, duties, cess etc., the beneficiaries may approach the Commission.

Summary

28. Summary of our decision in the order is as under:

(a) Introduction of GST with effect from 1.7.2017 shall constitute a Change in Law event if the cut-off date (7days prior to the bid deadline) as per the relevant TSA falls on or after 1.7.2017.

(b) The differential between the taxes subsumed in GST and the rates of GST on various items shall be admissible under Change in Law.

(c) The TSPs shall work out and provide the details of increase or decrease in the tax liability in respect of introduction of GST to the beneficiaries/Long Term Transmission Customers duly supported by Auditor's Certificate.

(d) The additional expenditure on account of GST shall be reimbursed by the beneficiaries/Long Term Transmission Customers as per the relevant provisions of the TSA regarding Change in Law during the construction period or operating period, as the case may be.

(e) In case of dispute, either party is at liberty to approach the Commission in accordance with law."

68. In the present case, as on the cut-off date, i.e., 2.10.2015, there was no GST. Subsequently, the Parliament and State Legislative Assemblies, in order to introduce a unified indirect tax structure, have introduced a fresh set of taxation laws, which have replaced various Central and State-level taxes, through various enactments collectively referred to as the GST Laws, which came into effect from 1.7.2017. Since the additional recurring and non-recurring expenditure, which has been incurred by the Petitioner, is on account of an Act of Parliament/ State Legislative Assemblies after the cut-off date, i.e., 3.2.2012, the same is covered under Change in Law provisions of the TSA under Article 12.1.1. The relief for any additional expenditure incurred by the Petitioner due to the introduction of the GST shall be admissible for the Project within the original scope of work. The Petitioner, vide Auditor Certificate, has placed on record the detailed break-up of the implication of the GST vis-à-vis taxes applicable prior to the introduction of the GST related to the various packages covered in the transmission Project implemented by the Petitioner. So far as the contention of the Respondent is concerned for issuance of a Change in Law notice, it has already been observed by us in the above paragraphs that the Petitioner has complied with the provisions of the TSA by issuing a Change in Law notice for GST on 25.8.2017. Thus,

the contention of the Respondents is rejected, and a Change in Law event of the enactment of GST is allowed.

With the introduction of GST Laws, the following Taxes stood subsumed in GST: (a) Entry Tax @ 1% in the state of West Bengal, (b) Entry Tax @ 12% in the State of Bihar. The same has resulted in savings of Rs. 28,17,37, 829/- (-28.17 crore)

69. The Petitioner has submitted that upon the enactment of the GST Laws on 1.7.2017, the entry tax was abolished in the States of Bihar and West Bengal. The abolition of entry tax resulted in savings to the Petitioner to the tune of Rs. 28.17 crore, which will be passed on to the LTTCs and, accordingly, be adjusted from the Change in Law claims of ATL.

70. We have considered the submissions of the Petitioner. Subsequent to the enactment of the GST Laws, the Governments of Bihar and West Bengal abolished the entry tax. Since we have already held that the entry tax is a Change in Law, the benefits accrued to the Petitioner due to the abolishment of the Entry Tax under the GST regime shall be passed on to the LTTCs.

Notification dated 15.10.2015 issued by the Ministry of Power, Government of India notifying new 'Guidelines for payment of compensation towards damages in regard to Right of Way for transmission lines'

71. The Petitioner has submitted that on 15.10.2015, the Government of India issued guidelines for payment of the compensation towards damages in Right of Way for transmission lines. Prior to the Order, the transmission licensees were only required to pay compensation towards normal crop and tree damages in terms of Section 68 of the Act, read with Sections 10 and 16 of the Indian Telegraph Act, 1885. The Guidelines for payment of the additional compensation introduced (i) compensation of

85% of land value as determined by the District Magistrate or any other authority based on circle rate/Stamp Act rates for tower based on circle rate/Guidelines value/Stamp Act rates for tower base area (between four legs) impacted severely due to installation of tower/pylon structure, (ii) compensation towards diminution of land value in the width of RoW corridor due to laying of transmission line imposing certain restriction would be decided by the State as per categorization/type of land in different places of the States, subject to a maximum of 15% land value as determined based on circular rate/Guidance value/Stamp Act rates. Therefore, Guidelines issued by the Ministry of Power would squarely fall under the definition of Indian Government Instrumentality in terms of Article 1.1 of the TSA. The Guidelines thus qualify as a Change in Law event. Guidelines were adopted by a number of States, including certain neighboring States of Bihar and West Bengal (states where the project was being constructed). The landowners in West Bengal, being aware of the Guidelines, started demanding very high land compensation. Moreover, PGCIL adopted the MOP Guidelines w.e.f. 6.6.2017. The Petitioner has adduced to the Guidelines issued by PGCIL, i.e., Right of Way (RoW) (Process and Compensation) Guidelines dated 6.6.2017, which acknowledge that the implementation of the transmission projects was invariably getting affected due to severe RoW problems on account of resistance by the landowners and demand for enhanced compensation. The RoW Guidelines *inter alia* laid down the mechanism for compensation for the cost of land in line with the MOP Guidelines.

72. In view of the above, the Petitioner has submitted that notification of the Guidelines, after the cut-off date i.e., 2.10.2015, satisfies all requirements enumerated in Article 12 of the TSA and qualifies as a Change in Law event. The Petitioner has

further submitted that the additional expenditure of Rs. 188.47 crores was incurred on account of payment of land compensation as per the MOP Guidelines, and the Petitioner is entitled to a Change in Law compensation for such expenditure.

73. The Respondents have submitted that the Notification of MoP Guidelines dated 15.10.2015 does not qualify as a Change in Law event. In this regard, it is submitted that only "enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without reenactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law" qualify as Change in Law events under Article 12.1.1 of the TSA. In the present facts, the MoP Guidelines dated 15.10.2015 are mere guidelines that do not have the force of law. Moreover, the MoP Guidelines dated 15.10.2015 require the States to adopt the same, absent which they would not have the force of law. Furthermore, the Petitioner has not adduced any material to corroborate that the Notification of MoP Guidelines dated 15.10.2015 has been adopted by the States of West Bengal or Bihar. Illustratively, from a reading of the Order dated 16.08.2019 passed by the District Magistrate, Jalpaiguri in W.P.A. 03/2019, it is manifest that the MoP Guidelines dated 15.10.2015 have not been adopted by the State of West Bengal nor has compensation been awarded to the landowners on the basis of the MoP Guidelines dated 15.10.2015. Further, the documents filed along with the additional affidavit dated 7.8.2023 clearly show that the various claims for compensation made against the Petitioner related to damage caused to trees and crops. Accordingly, it is incorrect on the part of the Petitioner to rely on such documents to assert that it was compelled to compensate the landowners as per the MoP Guidelines dated 15.10.2015. At any rate, the liability for compensating for loss and damage caused is governed by Section 10 of the Indian Telegraph Act,

1885, and Sections 67 and 68 of the Electricity Act, 2005 which do not in any manner restrict the liability for providing the compensation. The MoP Guidelines dated 15.10.2015 neither provide a new regime for payment of compensation to landowners nor provide for payment of compensation to landowners in excess of the pre-existing regime. Accordingly, the Petitioner cannot contend that the MoP Guidelines dated 15.10.2015 have prescribed compensation that was otherwise not contemplated. The Petitioner cannot claim relief for the MoP Guidelines dated 15.10.2015 as both a force majeure and a Change in Law event. In this regard, it is submitted that by way of the Petition, the Petitioner has sought monetary relief for compensation paid to the landowners as a result of a force majeure event, as well as monetary relief for the additional expenditure allegedly incurred due to the MoP Guidelines dated 15.10.2015 as a Change in Law event.

74. We have considered the submissions of the Petitioner and Respondents. The Ministry of Power, Government of India, vide its letter dated 15.10.2015, issued the Guidelines for payment of compensation towards damages in regard to the Right of Way for transmission lines. In the said Guidelines, the Ministry of Power *inter alia* also requested all the States/UTs to take suitable decisions regarding the adoption of the Guidelines for determining the compensation for land, considering that the acquisition of land is a “State” subject under the Indian Constitution. It is pertinent to note that the Commission, in its various decisions, has already held that the Guidelines dated 15.10.2015 issued by the Ministry of Power, Government of India, for payment of the compensation towards damages in regard to the RoW for transmission lines as such do not constitute a Change in Law event. It has been noted by the Commission that the said Guidelines were merely recommendatory in nature, and the acquisition of the

land being a State subject, the States/UTs were requested to take a suitable decision regarding the adoption of the said Guidelines. However, the adoption of the recommendations as provided in the Ministry of Power's Guidelines by the concerned State by way of order or notification in respect of the State, after the cut-off date and resulting into the additional compensation payable in terms of thereof, has been considered as a Change in Law and the licensees have been allowed to claim such expenditure after deducting the compensation payable as on the cut-off date, if any, under the Change in Law. The Commission, in its order dated 29.3.2019 in Petition No. 195/MP/2017, has held that the Guidelines issued by the Ministry of Power's letter dated 15.10.2015 cannot be considered as "Change in Law" as claimed by the Petitioner. The relevant portions of the said order dated 29.03.2019 are extracted as under:

"81. We have considered the claim of the Petitioner. We understand that the Petitioner had followed the process laid down under Section 164 of the Act for securing the RoW for building foundations and erecting towers. It is observed that the document quoted by the Petitioner is not a Notification as claimed by the Petitioner. It is general Order in guidelines issued by the Ministry of Power, Government of India for determining the compensation to be paid to the land owners. This letter of Ministry of Power cannot be considered as "Change in Law" as claimed by the Petitioner.

82. As regards the additional expenditure incurred by the Petitioner on account of right of way, we make it clear that the case at hand is a competitive bidding project and we are of the view that the Petitioner has quoted all-inclusive transmission charges and the Petitioner was also expected to factor all unforeseen and contingent expenditure on account of right of way settlement in the quoted transmission charges while submitting the bid. Therefore, the additional expenditure incurred by Petitioner to settle the issues of RoW with land owners does not constitute a Change in Law event and any claim under this is not admissible."

75. The above view has also been reiterated by this Commission in an order dated 29.1.2021 in Petition No. 264/MP/2020 in the matter of Powergrid Parli Transmission Ltd. v. MSEDCL and Ors., and order dated 7.5.2022 in Petition No. 13/MP/2021 in the matter of Powergrid Southern Interconnector Transmission System Ltd v. APSPDCL

and Ors. Admittedly, in the present case, the MoP Guidelines had not been adopted by the States of West Bengal or Bihar at the relevant point in time. The Petitioner has, however, also sought to rely upon the various orders passed by the Authorities under the provisions of the Telegraph Authority Act and/or the Act and has also placed on record the various proceedings therein. We have perused the said information and have also considered the submissions made by the Respondents thereon. As rightly pointed out by the Respondents, none of the orders/letters issued by the District Magistrate/District Judge contain any direction with respect to payment of the compensation as per the MoP Guidelines. Pertinently, the direction to the Petitioner to settle/resolve the issues with landowners and the Petitioner having paid the compensation to the respective landowners to settle the RoW issues, on its own volition, cannot come under the purview of the Change in Law enabling the Petitioner to pass on such expenditure upon the LTTCs/beneficiaries.

76. This issue is answered accordingly.

Carrying cost

77. The Petitioner has submitted that it is also entitled to the relief of the carrying cost incurred as a result of additional expenditure incurred on account of the Change in Law events/change in scope of work. The said carrying cost is required for the purpose of offsetting the impact of deferred recovery of the legitimate expenses incurred by the Petitioner. As per the Petitioner, the APTEL and the Hon'ble Supreme Court, in their judgments, have already upheld the concept of carrying cost whenever there is any deferred recovery of costs.

78. Respondents have opposed Petitioner's submissions by contending that the Petitioner has not submitted any supplementary bills to be entitled to carrying cost and that the provision in the TSA provides for specific computation for the Change in Law relief, which does not include the carrying cost.

79. We have considered the submissions made by the parties. In the instant case, the TSA between the Petitioner and the beneficiaries does not provide for the principle of restitution. However, vide order dated 11.3.2023 in Petition No. 333/MP/2019, the carrying cost has been considered by the Commission in light of APTEL and Hon'ble Supreme Court Orders. The relevant extract of the order dated 11.3.2023 in Petition No. 333/MP/2019 is quoted below:

"118. We have considered the submissions made by the Petitioner. The issue of entitlement of carrying cost in terms of the provisions of the TSA had been considered by the Commission vide its order dated 16.6.2021 in Petition No. 453/MP/2019, wherein the Commission disallowed carrying cost in absence of the restitutionary principle in the TSA. However, the said order was challenged by the licensee before the APTEL in Appeal No. 238 of 2021 wherein the APTEL vide its order dated 27.9.2022 remitted the said issue back to the Commission for re-examination/fresh visit in view of the law declared by the Hon'ble Supreme Court and by the APTEL on the subject matter including vide judgment dated 15.9.2022 in Appeal No. 256 of 2019 & batch in the case of Parampujya Solar Energy Private Ltd. v. CERC and Ors. ('Parampujya Case').

119. The Commission in Petition No. 453/MP/2019 had examined the matter after hearing the parties. The Commission vide its order dated 15.2.2023 allowed the carrying cost subject to outcome of the decision of the Hon'ble Supreme Court in Civil Appeal No. 8880 of 2022 in the case of Telangana Northern Power Distribution Company Ltd. & Anr. V. Parampujya Solar Energy Pvt. Ltd. & Ors. Relevant portion of the said order dated 15.2.2023 is extracted as under:

"31. We have considered the submissions made by the Petitioner and Respondents with regard to carrying cost. The Commission had denied carrying cost in the impugned order relying on judgement dated 13.4.2018 in Appeal No. 210 of 2017 in Adani Power Limited v. Central Electricity Regulatory Commission and Ors, wherein it was held that since Gujarat Bid-01 PPA had no provision for restoration to the same economic position, the decision of allowing carrying cost will not be applicable. However, the APTEL has differentiated its earlier judgment dated 13.4.2018 in the matter of Adani

Power Limited v. CERC & Ors. (Appeal No. 210 of 2017) in the case of Parampujya judgment to allow carrying cost in the following manner:

“51. The PPAs contain identical terms on the subject of “Relief for Change in Law” in the following form:

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

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

[Emphasis supplied]

71. Restitution is a principle of equity which is generally invoked by the adjudicatory authorities – Courts and Tribunals – to render substantial justice and, in this context, we may quote the following observations of Supreme Court in judgment reported as South Eastern Coalfields Ltd v. State of Madhya Pradesh & Ors. (2003) 8 SCC 648:

.....

72. As ruled in above mentioned case, absence of prohibition in law or contract against award of interest to recompense for delay in payment is also significant. As already quoted earlier, in the case of Uttar Haryana Bijli Vitran Nigam Ltd(supra), the Supreme Court has upheld the view that in terms of restitutionary principle, the affected party is to be given the benefit of restitution “as understood in civil law.

73. The claim arising out of change in law provisions, across all kinds of PPAs under bidding route, is essentially a claim for compensation, the objective being to relieve the affected party of the impact of change in law on its revenues or cost or by way of additional expenditure. The word “compensation” simply means anything given to make things equal in value, anything given as an equivalent, to make amends for loss or damage.

74. As has been pointed out, carrying cost, wherever allowed, has been granted generally at the rate of interest prescribed for Late Payment Surcharge (“LPS”) in as much as, it also relates to amount paid towards deferred payments. Hon’ble Supreme Court in a recent decision rendered on 24.08.2022 in Uttar Haryana Bijli Vitran Nigam Ltd. &Anr. v. Adani Power (Mundra) Ltd. &Anr. 2022 SCC OnLine SC 1068, has observed that since the funds arranged by the developer are based on interest rate framework followed by scheduled commercial banks, the affected developer ought to be compensated in the same way.

75. The cardinal rule of interpretation is that words have to be read and understood in ordinary, natural and grammatical meaning. [S. Ganapathraj Surana v. State of T.N. 1993 Supp (2) SCC 565]. The crucial words are “provide relief”. The word relief is defined by Black’s Law Dictionary as under:

“Deliverance from oppression, wrong, or injustice. In this sense it is used as a general designation of the assistance, redress, or benefit which a complainant seeks at the hands of a court, particularly in equity. It may be thus used of such

remedies as specific performance, or the reformation or rescission of a contract.”

76. The meaning of the expression “relief”, explained in *P Ramanatha Aiyar’s Advanced Law Lexicon* is similar:

“Relief:

(a) Deliverance from some hardship, burden or grievance; legal redress or remedy; the lightening or removal of any burden.

(b) Aid or assistance given to those in need, especially, financial aid provided by the state.

(c) The redress or benefit, especially equitable in nature (such as an injunction or specific performance), that a party asks of a Court. Also termed remedy. (Black, 7th Edn., 1999)

(d) Legal remedy for wrongs.

(e) “Relief” means the remedy which a Court of Justice may afford in relation to some actual or apprehended wrong or injury. [5 A. 345 (FB)]

(f) The word “relief” necessarily implies the pre-existence of a wrong. An action is not given to one who is not injured, ‘*actio non datur non dammi ficato*’. [33 Bom. 509 : 11 Bom LR 85 : 5 MLT 301 : 2 IC 701]”

77. *****

78. The use of the word “relief” in the context of adjudicatory process, simply means the remedy which the adjudicatory forum may afford “in regard to some actual or apprehended wrong or injury” or something which a party may claim as of right, or making the affected party “feel like easing out of ... hardship”. [Sarsuti v. Kunj Behari Lal, 1883 SCC On Line All 85; Santhamma v. Kerala State 2019 SCC On Line Ker 1265; Commissioner of Income-Tax v. R.B. Jodhamal Kuthiala, 1963 SCC On Line Punj 403; Dipti Aggarwal v. Ashish Chandra, 2017 SCC OnLine Cal 8835; Mewar Sugar Mills Ltd. v. Chairman Central Board of Direct Taxes and Ors. (09.10.1998 - DELHC)]. In *Kavita Trehen v. Balsara Hygiene Products Ltd* AIR (1995) SC 441, it was held by the Supreme court that jurisdiction to make restitution is inherent in every court and can be exercised whenever justice of the case demands.

79. While construing the contract, purposive interpretation of its terms is requisite [Nabha Power Limited vs. Punjab State Power Corporation Limited & Anr. (2018) 11 SCC 508]. This principle must be borne in mind while comprehending the scope and width of expression “provide relief” used in Article 12.2.2 in the PPA. For this, the statutory framework, as indeed the contractual clauses, will have to be kept in consideration.

80. The Central Commission is the sector regulator vested with wide powers to act in furtherance of the objectives enshrined in the Electricity Act, 2003. Section 61 of the said enactment guides its functions expecting the authorities established by this legislation to follow “commercial principles”, act so as to ensure optimum returns on the investments, promote generation from renewable sources of energy and, most

importantly, strike a balance between consumers' interest and recovery of cost of electricity in a reasonable manner.....

81. *It is in this light that Hon'ble Supreme Court in the case of Energy Watchdog (supra) ruled, albeit in the context of Section 63, that the Regulatory Commission must exercise its functions in accordance with law and guidelines and in situations where no such guidelines exist, it may avail of its "general regulatory powers" under Section 79(1)(b).*

82. *We have already noted that the PPAs which were subject matter of decisions in the case of Adani Power Ltd (supra) and GMR Warora Ltd (supra) contained change in law clauses structured differently from the shape in which they occur in the present PPAs, the words "provide relief" not having been used in the former. The judgment dated 13.04.2018 of this tribunal in Adani Power Ltd.(supra) did not even consider the question as to whether the principle of time value of money would apply in examining the impact of change in law once change in law had been approved. The said decision for present purpose is, thus, sub silentio. When the judgment in the said case was carried in appeal to the Hon'ble Supreme Court leading to decision reported as Uttar Haryana Bijli Vitran Nigam Ltd (UHBVNL) (supra), the challenge was not in relation to what had been denied by this tribunal as the first appellate forum and, therefore, it is not correct to say that the issue stands settled by the said judgment. We are, at the same time, conscious of the fact that while upholding the relief to the extent granted in the case of Adani Power Ltd (supra), the Supreme Court by judgment reported as UHBVNL (supra) had observed that it would be fallacious to say that the claim of restitution was being put forward "on some general principle of equity", the amount of carrying cost in that case being "relatable to Article 13 of the PPA" (the change in law clause).*

83. *In the present cases, the claim for compensation of SPPDs is primarily founded not on principles of equity but on the contractual clause stating that the affected party is entitled to approach the Commission which shall "provide relief" in relation to the impact of the change in law event if it has resulted in "any additional recurring /non-recurring expenditure". The purpose of the change in law clause in the PPAs is to relieve the SPPDs of the additional burden. Since the impact of the new tax (GST or Safeguard Duty on Imports, as the case may be) would come from the date of enforcement of the new laws, the relief intended to be afforded under the contracts cannot be complete unless the said burden is allowed to be given a pass through from the date of imposition of the levy. Unlike the PPA in UHBVNL (supra) wherein the phraseology of change-in-law provision was exhaustive, the words "provide relief" in present PPAs are open ended, not qualified in any manner so as to be given a restrictive meaning in order to treat the date of adjudication of the claim by the regulatory authority as the effective date or to justify denial of carrying cost burden for the period anterior thereto. In our reading, the expression "provide relief" is of widest amplitude and cannot be read to limit its scope the way the contesting respondents seek to propagate or the way the Central Commission has determined.*

84. *It is in the above context that we accept that the regulatory powers of the Central Commission ought to have been properly exercised to do complete justice to the claims for compensation it having been denied by depriving the SPPDs of their legitimate expectation of relief vis-à-vis the burden of carrying cost as well, rendering the dispensation partially unfair.*

85. There is one more justification for the view we are taking in the matter and that stems from the provision contained in Section 70 of Indian Contract Act, 1872 which relates to the obligation of person enjoying benefit of a non-gratuitous act.

86. It was pointed out, and there was no denial offered, that the respondent distribution licensees had been deriving benefit of non-payment of GST component during the period the claims of change in law were pending adjudication before the Central Commission. As noted earlier, it is the burden of the SPPDs to pay (to the revenue) the new levies from the date(s) of enforcement of the corresponding laws.

87. As pointed out by learned counsel for Mahoba, under the PPA there is an obligation on the part of SPPDs to ensure "continuance of supply of power throughout the term of Agreement". It is inherent in this that SPD, in order to continue to supply, must reconfigure or repower the plant, if so required, by installing additional modules after the COD since the contractual clause does not create any distinction as to expenditure pre or post COD, for purposes of change-in-law compensation. The plea for relief concerning post COD cannot be rejected, the expenditure incurred being not meant to be gratuitous, the intent instead being to discharge contractual responsibilities. We may quote the following passage from judgment of Hon'ble Supreme Court in State of West Bengal v. BK Mondal, AIR 1962 SC 779, in the context of Section 70 of the Indian Contract Act, 1872

88. The procurers cannot derive undue benefit on this account, not the least at the cost of the SPPDs who could never conceivably have intended to discharge their tax burden as a gratuitous act. Since the burden of carrying cost is a consequence directly flowing from the change in law event, the relief in such regard cannot be complete unless this part of the additional expenditure is also allowed as pass-through.

32. 33 & 34.*****

35. It is reiterated that the APTEL has directed the Commission to take a fresh view on the issue of carrying cost in light of the law developed on carrying cost based on the previous judgments including the Parampujya judgment dated 15.9.2022. While allowing the claim for carrying cost in the Parampujya judgment, the APTEL granted relief not on principles of equity but on the interpretation of contractual terms. Thus, this would be the binding principle for adjudication of the present issue as regards the issue of carrying cost is concerned. Accordingly, we proceed to deal with the present matter in terms of the provisions of the TSA.

36. Since the Change in Law claims in the present Petition pertain to Construction period, the relevant Article for relief is Article 12.2.1 ("During Construction Period"). It is noted that not only the word 'Relief' is used in the heading of Article 12.2 ("Relief for Change in Law"), Article 12.2.4 gives meaning to relief envisaged in the Article 12.2 by using the term 'compensation'. The text 'determination of the compensation mentioned above in Articles 12.2.1 and 12.2.2' used in Article 12.2.4 indicates that the relief envisaged in Article 12.2.1 and 12.2.2 is a compensatory relief for Change in Law.

37. Further, Article 12.2.1 prescribes compensation towards increase in project cost during construction period in terms of increase in non-escalable transmission charges. However, if the impact of Change in Law continues in the operating period or an event of Change in Law occurs in operating period, the responsibility of determination of 'compensation' rests with the Appropriate Commission under Article 12.2.2 of the TSA. It is for such situations that the APTEL in Parampujya judgment has observed that the Commission ought to

exercise its regulatory powers under Section 79(1)(b) to do complete justice to the claims for compensation.

38. *****

39. In light of the above, the question that arises is whether carrying cost can be granted in accordance with provisions of Article 12.2 of the TSA. The APTEL has observed in the Parampujya judgment that the judgment dated 13.4.2018 of the APTEL in Adani Power Ltd.(supra) did not consider the question as to whether the principle of time value of money would apply in examining the impact of Change in Law once Change in Law had been approved. However, the same needs to be considered for the present matter in light of the subsequent development of law on carrying cost, provisions of Article 12.2 of the TSA and, particularly, in accordance with the following guiding principles laid down in the Parampujya judgment.

(a) the use of the word “relief” in the context of adjudicatory process, simply means the remedy which the adjudicatory forum may afford “in regard to some actual or apprehended wrong or injury” or something which a party may claim as of right, or making the affected party “feel like easing out of ... hardship”. [Sarsuti v. Kunj Behari Lal, [1883 SCC OnLine All 85]; Dipti Aggarwal v. Ashish Chandra, [2017 SCC OnLine Cal 8835]. In Kavita Trehen v. Balsara Hygiene Products Ltd [AIR (1995) SC 441], it was held by the Supreme court that jurisdiction to make restitution is inherent in every court and can be exercised whenever justice of the case demands.

(b) the word ‘compensation’ simply means anything given to make things equal in value, anything given as an equivalent, to make amends for loss or damage.

(c) Grant of carrying cost is affording to the party affected the time value of money. [Indian Council of Enviro-Legal Action v. Union of India & Ors. (2011) 8 SCC 16; Torrent Power Limited v. GERC & Ors., [2019 SCC OnLine APTEL 110]; Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. v. Adani Power (Mundra) Ltd. & Anr. [2022 SCC OnLine SC 1068]. In Vidarbha Industries Power Limited v. Axis Bank Limited [2022 SCC OnLine SC 841], the Hon’ble Supreme Court held that “the law must ensure that time value of money is preserved, and that delaying tactics in these negotiations will not extend the time set for negotiations at the start”.

(d) Principle of restitution is now part of the regime on Change in Law reflecting public policy [Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021].

(e) Restitution is a principle of equity which is generally invoked by the adjudicatory authorities – Courts and Tribunals – to render substantial justice. Absence of prohibition in law or contract against award of interest to recompense for delay in payment is also significant [South Eastern Coalfields Ltd v. State of Madhya Pradesh & Ors. (2003) 8 SCC 648].

(f) In terms of restitutionary principle, the affected party is to be given the benefit of restitution “as understood in civil law” [Uttar Haryana Bijli Vitran Nigam Limited (UHBVNL) v. Adani Power Limited and Ors. (2019) 5 SCC 325].

(g) The claim arising out of Change in Law provisions, across all kinds of PPAs under bidding route, is essentially a claim for compensation, the objective being to

relieve the affected party of the impact of Change in Law on its revenues or cost or by way of additional expenditure.

(h) Jurisdiction to make restitution is inherent in every court and can be exercised whenever justice of the case demands. [Kavita Trehen v. Balsara Hygiene Products Ltd AIR (1995) SC 441].

40. Change in Law has been defined in the TSA dated 24.6.2015 as “occurrence of any of the following after the date, which is seven (7) days prior to the Bid Deadline resulting into any additional recurring / non-recurring expenditure by the TSP or any income to the TSP”. Accordingly, an event of Change in Law may result into additional recurring as well as non-recurring expenditure or income for the TSP. The Commission has allowed various Change in Law events to the Petitioner vide order dated 16.6.2021 and granted relief in terms of increase in non-escalable transmission charges under Article 12.2.1 of the TSA. As regards carrying cost, the APTEL in its judgment dated 13.4.2018 in Appeal No. 210 of 2017 observed that there could be substantial time lag between the occurrence of a Change in Law event and approval by the Commission during which the generator had to incur additional expenses during the period of adjudication of Change in Law in the form of working capital to cater to the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. The relevant extract of the judgment is as under:

“ix In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial.”

41. Similar observations regarding requirement of additional finances to meet the expenditure incurred on account of Change in Law have been made by Hon’ble Supreme Court of India in the judgment dated 24.8.2022 in Uttar Haryana Bijli Vitran Nigam Ltd. &Anr. v. Adani Power (Mundra) Ltd. &Anr. [2022 SCC OnLine SC 1068] as under:

“17. In the instant case, the respondent No. 1 – Adani Power had to incur expenses to purchase the FGD and install it in view of the terms and conditions of the Environment Clearance given by Ministry of Environment and Forests, Union of India, in the year 2010. For this, it had to arrange finances by borrowing from banks. The interest rate framework followed by Scheduled Commercial banks and regulated by the Reserve Bank of India mandates that interest shall be charged on all advances at monthly rests. In view of the matter, the respondent No. 1 – Adani Power is justified in stating that if the banks have charged it interest on monthly rest basis for giving loans to purchase the FGD, any restitution will be incomplete, if it is not fully compensated for the interest paid by it to the banks on compounding basis.”

42. Thus, the requirement of additional finance is a recurring expense during the operating period from the COD of the project till approval of Change in Law by the Commission. The said recurring expense, namely carrying cost flows directly out of Change in Law event and is nothing but time value of money. Article 12.2.2 is of wide amplitude which allows the Commission to determine compensation for Change in Law without any prohibition on

award of interest/carrying cost to recompense for delay in payment [South Eastern Coalfields Ltd v. State of Madhya Pradesh & Ors. [(2003) 8 SCC 648]. Denial of carrying cost would defeat the objective of compensatory relief envisaged in Article 12.2.2 read with Article 12.2.4 in the operating period.

43 & 44.....

45. We have considered the submission made by the Petitioner. We are of the considered opinion that since the carrying cost is allowed on the principle of compensation for the loss suffered by the Petitioner on account of time lag in adjudication of the Petition, the rate of carrying cost needs to be deliberated in light of rate of interest for the working capital arranged by the Petitioner.

46. In this regard, the Commission in its order dated 17.9.2018 in Petition No. 235/MP/2015 (AP(M)L v. UHBVNL & Ors.) had 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:

Period	Actual interest rate paid by the Petitioner	Working capital interest rate as per CERC Regulations	LPS Rate as per the PPA
2015-2016	10.68%	13.04%	16.29%
2016-2017	10.95%	12.97%	16.04%
2017-2018	10.97%	12.43%	15.68%

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 entitled for late payment surcharge on the outstanding amount.”

47. In line with above order of the Commission, in the instant case, the Petitioner shall be eligible for carrying cost at the actual rate of interest paid by the Petitioner for arranging funds (supported by Auditor's Certificate) or the rate of interest on working capital as per applicable CERC Tariff Regulations or the late payment surcharge rate as per the TSA, whichever is the lowest. Once a supplementary bill is raised by the Petitioner in terms of this order, the provision of Late Payment Surcharge in the TSA would kick in if the payment

is not made by the Respondents.”

120. In line with above, the Petitioner shall be eligible for carrying cost from COD till the date of this order at the actual rate of interest paid by the Petitioner for arranging funds (supported by Auditor's Certificate) or the rate of interest on working capital as per applicable CERC Tariff Regulations or the late payment surcharge rate as per the TSA, whichever is the lowest. Once a supplementary bill is raised by the Petitioner in terms of this order, the provision of Late Payment Surcharge in the TSA would kick in if the payment is not made by the Respondents.

121. It is pertinent to mention that in the Parampujya case, the Hon'ble Supreme Court vide Order dated 12.12.2022 in Civil Appeal No.8880 of 2022 in the case of Telangana Northern Power Distribution Company Ltd. & Anr. v. Parampujya Solar Energy Pvt. Ltd. & Ors. has held as under:

“2. Pending further orders, the Central Electricity Regulatory Commission (CERC) shall comply with the directions issued in paragraph 109 of the impugned order dated 15 September 2022 of the Appellate Tribunal for Electricity. However, the final order of the CERC shall not be enforced pending further orders.”

Thus, the directions with regard to carrying cost in this order which were issued in the light of the principles decided by APTEL in judgment dated 15.9.2022 in Appeal No.256 of 2019 (Parampujya Solar Energy Ltd Vs. CERC) & batch appeals shall not be enforced and will be subject to further orders of the Hon'ble Supreme Court in Civil Appeal No. 8880 of 2022 in the case of Telangana Northern Power Distribution Company Ltd. & Anr. V. Parampujya Solar Energy Pvt. Ltd. & Ors. Thus, the issue is answered accordingly.”

80. In line with the above, the Petitioner shall be eligible for the carrying cost on the approved Change in Law events from the COD till the date of this order at the actual rate of interest paid by the Petitioner for arranging funds (supported by Auditor's Certificate) or the rate of interest on working capital as per applicable CERC Tariff Regulations or the late payment surcharge rate as per the TSA, whichever is the lowest. Once a supplementary bill is raised by the Petitioner in terms of this order, the provision of the Late Payment Surcharge in the TSA would kick in if the payment is not made by the Respondents. However, this direction with regard to the carrying cost shall not be enforced and will be subject to further orders of the Hon'ble Supreme Court in Civil Appeal No. 8880 of 2022 in the case of Telangana Northern Power Distribution

Company Ltd. & Anr. V. Parampujya Solar Energy Pvt. Ltd. & Ors. Thus, the issue is answered accordingly.

Issue No. 4: What reliefs, if any, should be granted to the Petitioner in the light of the answers to the above issues?

81. Article 12.2 of the TSA provides for relief for a Change in Law as under:

“12.2 Relief for Change in Law 12.2.1 During Construction Period:

During the Construction Period, the impact of increase/decrease in the cost of the Project in the Transmission Charges shall be governed by the formula given below:

For every cumulative increase/decrease of each Rupees Five Crore Sixty-Six Lakh Twenty Thousand Only (Rs. 5.662 Cr.) in the cost of the Project up to the Scheduled COD of the Project, the increase/decrease in non-escalable Transmission Charges shall be an amount equal to Zero Point Three One Three percent (0.313%) of the Non-Escalable Transmission Charges.”

82. All reliefs on account of the Change in Law have been claimed by the Petitioner for the construction period. Accordingly, as per Article 12.2.1 of the TSA, for every cumulative increase/decrease of each Rupees Five Crore Sixty-Six Lakh Twenty Thousand Only (Rs. 5.662 crores) in the cost of the Project up to the Scheduled COD of the Project, the increase/decrease in Non-Escalable Transmission Charges shall be an amount equal to Zero Point Three One Three percent (0.313%) of the Non-Escalable Transmission Charges. However, in the present case, it is observed that the cumulative impact on the cost of the Project up to Scheduled COD on account of the Change in Law event allowed by the Commission does not either equal or exceed the threshold limit of Rs. 5.662 crores as the cumulative impact, as per the Petitioner's own calculations, works out to Rs. 1.71 crores only. Hence, no Change in Law relief can be awarded to the Petitioner for the allowed Change in Law events during the Construction Period.

Summary of Decision

83. The summary of our decision in terms of the foregoing paragraphs of this order is as under:

S.No.	Particulars	Decision
1	Change in Entry Tax rate in Bihar from 8% to 12% vide Notification No. S.O. 18 dated 20.01.2016	Allowed
2	Increase in effective tax rate on goods and services due to the enactment of the GST Laws	Allowed
3	With the introduction of GST Laws, the following Taxes stood subsumed in GST: (a) Entry Tax @ 1% in the state of West Bengal, (b) Entry Tax @ 12% in the State of Bihar.	Allowed
4	ROW Compensation as Change in Law and Force Majeure	Disallowed
5.	Carrying Cost	Allowed Subject to observation in Paragraph 80 above.

84. Petition No. 265/MP/2021, along with IA, if any, is disposed of in terms of the above findings.

sd/-
(Harish Dudani)
Member

sd/-
(Ramesh Babu V.)
Member

sd/-
(Jishnu Barua)
Chairperson