**CENTRAL ELECTRICITY REGULATORY COMMISSION**
**NEW DELHI**

**Petition No. 338/MP/2022**
**Alongwith I.A. No. 57/2023**

**Coram:**

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

**Date of Order: 22nd March, 2025**

**In the matter of**

Petition under Section 79(1)(b) and Section 79(1)(f) of the Electricity Act, 2003 read with Article 14.3.1 of the Case-1 long term Power Purchase Agreement dated 27.11.2013 read with Addendum No. 1 dated 20.12.2013, seeking refund of the amount wrongfully deducted by Tamil Nadu Generation and Distribution Corporation Limited along with the applicable Carrying Cost, towards the 'Change in Law' compensation payable to Dhariwal Infrastructure Limited for supplying 100 MW Contracted Capacity from Unit 2 of its 2 x 300 MW Coal based thermal generating station located at Tadali, Chandrapur in the State of Maharashtra to Tamil Nadu Generation and Distribution Corporation Limited.

**And**
**In the matter of**

**Dhariwal Infrastructure Limited,**
CESC House, Chowringhee Square,
Kolkata – 700001, West Bengal

**……Petitioner**

**Vs**

**Tamil Nadu Generation and Distribution Corporation Limited,**
6th Floor, Eastern Wing,
144, Anna Salai
Chennai – 600002 **……Respondent**

**Parties Present:**

Shri Sanjay Sen, Sr. Advocate, DIL
Ms. Divya Chaturvedi, Advocate, DIL
Ms. Mandakini Ghosh, Advocate, DIL
Ms. Srishti Rai, Advocate, DIL
Shri Jai Dhanani, Advocate, DIL
Ms. Neha Dabral, Advocate, DIL
Shri Aveek Chatterjee, DIL

Ms. Anusha Nagarajan, Advocate, TANGEDCO
Shri Rahul Ranjan, Advocate, TANGEDCO

**ORDER**

The Petitioner, Dhariwal Infrastructure Limited (hereinafter referred to as 'DIL'), has filed the present Petition under Section 79(1)(b) and Section 79(1)(f) of the Electricity Act, 2003 (hereinafter referred to as 'the Act') read with Article 14.3.1 of the Case-1 long-term Power Purchase Agreement dated 27.11.2013 read with Addendum No. 1 dated 20.12.2013 (hereinafter collectively referred to as the "TANGEDCO PPA") entered into between the Petitioner and the Respondent, Tamil Nadu Generation and Distribution Corporation Limited (hereinafter referred to as 'TANGEDCO'), seeking a refund of the amount wrongfully deducted by the Respondent, TANGEDCO along with the applicable carrying cost to the tune of Rs. 35.98 crores towards compensation under Change in Law events payable to the Petitioner in respect of the supply of the 100 MW contracted capacity to the Respondent for the period between December 2015 and March 2022. The Petitioner has made the following prayers:

*"a) Allow the instant Petition;*

*b) Declare the specific condition mentioned in Paragraph 3 of the Agreement for Provisional Reconciliation dated 21.01.2021 and Paragraphs 3 and 4 of the Undertaking dated 05.04.2021 executed between the Petitioner and Respondent for the period December, 2015 to September 2020, as null and void, to the extent the same stipulates for deduction of the amount escalated by the Escalation Indices on taxes and duties from the compensation towards 'Change in Law' events due and payable to the Petitioner;*

*c) Direct the Respondent to refund the amount wrongfully deducted towards the compensation under 'Change in Law' events amounting to ₹ 21.57 Crores including the Carrying Cost of ₹ 2.13 Crores till 29.03.2020 for the period of December, 2015 to September, 2020, as per Table 3 above, in line with the BALCO Judgment issued by the APTEL;*

*d) Direct the Respondent to refund the amount wrongfully deducted towards the compensation under 'Change in Law' events amounting to ₹ 14.41*

*Crores for the period of October, 2020 to March, 2022, as per the Table 3 above, in line with the BALCO Judgment issued by the APTEL;*

*e) Direct the Respondent to pay the Late Payment Surcharge in terms of the TANGEDCO PPA on the aforesaid amount as stipulated in prayers (c) and (d) above, to the Petitioner with respect to Supplementary Invoices raised till the date of actual payment by the Respondent;*

*f) Condone any inadvertent omission/errors/shortcomings and permit the Petitioner to add/change/modify/alter the present pleading/petition and may also grant leave to the Petitioner to make appropriate submissions at any future date in regard to the present proceedings; and*

*g) Pass such other order(s) which the Commission deems fit in the facts and circumstances of the instant case."*

2. Subsequently, the Petitioner filed Interlocutory Application No. 57/2023 along with the following prayers:

*"(a) Allow the present Application and issue directions to the Respondent to refund an amount of Rs. 24.23 Crores wrongfully deducted by the Respondent towards the compensation under 'Change in Law' events payable to the Petitioner/Applicant for the period post September 2020 i.e., (i) an amount to the tune of Rs. 14.41 Crores for the period between October 2020 to March 2022 as per Table 3 of the Petition (Refer CERC Pg. 24); and (ii) an amount to the tune of Rs. 9.82 Crores for the period between April 2022 to March 2023, during pendency of the Petition;*

(b) Direct the Respondent not to make any further deductions towards the compensation under 'Change in Law' events payable to the Petitioner/Applicant for the period post March 2023;"

## Submission of the Petitioner

**Factual Matrix**

| S. No. | Particulars | Details |
|---|---|---|
| 1. | Location of the Project (s) | Tadali, Chandrapur, Maharashtra |
| 2. | Project Details | Total Capacity: 600 MW (2 x 300 MW);<br>(TANGEDCO PPA from Unit-I: 100 MW)<br>COD: Unit I - 11.2.2014; Unit II - 2.8.2014; |
| 3. | Power Supplied to | (i) TANGEDCO (100 MW)<br>(ii) Noida Power Company Limited ('NPCL') (187 MW) |
| 4. | PPA details | TANGEDCO PPA dated 27.11.2013 from Unit-II<br>NPCL PPA dated 26.9.2014 from Unit-II |
| 5. | Previous Petition, if any | Petition No. 327/MP/2018 was filed by the Petitioner seeking compensation on account of Change in Law events in terms of PPA dated 27.11.2013 read with Addendum No.1 dated 20.12.2013 entered into with TANGEDCO, for supply of 100 |

| | | |
|---|---|---|
| | | MW power from the Petitioners' generating station. The said Petition was decided by the Commission vide Order dated 29.3.2020 wherein the Commission had allowed the majority claims of the Petitioner regarding Change in Law and disallowed three such claims. |

3. The Petitioner has mainly submitted as under:

(a) The Petitioner has set up a 600 MW coal-based thermal generating station consisting of two units of 300 MW each (hereinafter referred to as 'the generating station') located at Tadali, Chandrapur, in the State of Maharashtra. Unit-1 of the generating station, connected with the State Transmission Utility, achieved commercial operation on 11.2.2014, and Unit-2 of the generating station, connected with the Central Transmission Utility, achieved commercial operation on 2.8.2014. Pursuant to the Case-1 competitive bidding conducted by TANGEDCO, the Petitioner and TANGEDCO entered into a Power Purchase Agreement (hereinafter referred to as the 'TANGEDCO-PPA') dated 27.11.2013 for the supply of the 100 MW (net) capacity from Unit-2 of its generating station. The Petitioner and TANGEDCO also executed Addendum No.1 to the said PPA on 20.12.2013, which became an integral part of the TANGEDCO-PPA dated 27.11.2013. The Petitioner has entered into two long-term Power Purchase Agreements ('PPAs') with (i) TANGEDCO for 100 MW and (ii) Noida Power Company Limited, Uttar Pradesh (hereinafter referred to as 'NPCL') for the 187 MW, for the supply of power from Unit-2 of the generating station.

(b) The Petitioner had filed Petition No. 327/MP/2018 seeking compensation on account of various Change in Law events in terms of Article 10.1.1 of the TANGEDCO PPA for the period between 16.12.2015 to 30.6.2018, which have resulted in additional financial impact on the Petitioner for the supply of power to TANGEDCO. The Commission, vide order dated 29.3.2020, disposed of the said Petition, allowing the majority Change in Law claims of the Petitioner, including 'Carrying Cost' while rejecting three such claims. The Respondent has not challenged the said order dated 29.3.2020 passed by the Commission in Petition No. 327/MP/2018 and has thus accepted the said Order dated 29.3.2020. The Commission had also specified a mechanism in the Order dated 29.3.2020 for payment of the compensation for 'Change in Law' events

as allowed under the TANGEDCO PPA for the subsequent years of the contract period.

(c) Pursuant to the said order of the Commission passed in Petition No. 327/MP/2018, the Petitioner, vide its supplementary invoice dated 31.7.2020, had raised a claim of ₹ 150.29 crores, including Carrying Cost of ₹ 34.41 crores for the period from 16.12.2015 to 31.03.2020. Further, the Petitioner, vide another supplementary invoice dated 18.12.2020, had raised a claim of ₹ 10.34 crores for the period between 1.4.2020 and 30.9.2020. The total amount claimed by the Petitioner for the period between 16.12.2015 and 30.09.2020 was ₹ 160.63 crores. However, the said amount was reduced to ₹ 148.95 crores, including the Carrying Cost of ₹ 33.23 crores, during the reconciliation process with the Respondent. The claims of the Petitioner were duly supported with all the relevant documents, including the Auditor's Certificate in terms of the aforementioned directions of the Commission in Order dated 29.3.2020. However, the Respondent did not make the payment of the above claim within the due date.

(d) On further pursuing, the Respondent for the payment against the above supplementary invoices dated 31.7.2020 and 18.12.2020, the Respondent had eventually, during December 2020, agreed to discuss the methodology for computation of the compensation payable to the Petitioner. However, during the discussion(s) with the Petitioner, the Respondent had insisted that an incremental part of the taxes and duties allowed under the 'Change in Law' events has already been recovered by the Petitioner through the applicable Escalation Indices notified by this Commission. Based on the aforesaid understanding by the Respondent and to enable the release of the amount towards the compensation on account of claims under 'Change in Law' events due and payable to the Petitioner, the Respondent had proposed and insisted an Agreement for Provisional Reconciliation. In view of the above and on (a) mistaken belief that the Respondent was correct in its assertion of facts; (b) the payment is/was based on a provisional computation in terms of Clause 6 of the Agreement; and (c) the insurmountable financial hardship faced by the

Petitioner due to withholding of such one-time settlement of compensation under 'Change in Law' events payable by the Respondent for the period between December 2015 and September 2020, the Petitioner had on 21.01.2021 executed an Agreement ("Agreement for Provisional Reconciliation") for the compensation due and payable towards its claims under 'Change in Law' events, as per the terms dictated by the Respondent. In the said Agreement for Provisional Reconciliation, it was *inter-alia* recorded that the Respondent will provisionally make the payment towards the claims under 'Change in Law' events for the period between December 2015 and September 2020 after deducting the amount towards the incremental part of taxes and duties which is purportedly covered under the Escalation Indices.

(e) On 5.4.2021, the Petitioner, on a mistake of fact, gave its Undertaking ("Undertaking") that it will not make any further claims in the future for the said period, i.e., the period between December 2015 and September, 2020 only. The Petitioner executed the Agreement and provided its Undertaking as per the terms dictated by the Respondent. Accordingly, the Respondent had released the payment to the Petitioner as per the Undertaking towards the compensation under the 'Change in Law' events. On the above premise, the Respondent had deducted the difference on account of the application of the Escalation Indices on the 'Change in Law' components from the compensation amount derived as per the Order dated 29.3.2020.

(f) Subsequently, the APTEL, vide its judgment dated 12.8.2021, in Appeal No. 22 of 2019: *TANGEDCO vs. CERC & Ors.* and Appeal No. 58 of 2019: *BALCO vs. CERC & Ors.* (hereinafter collectively referred to as the "BALCO Judgment"), which was later also implemented by this Commission vide its Order dated 16.9.2021 in Petition No. 126/MP/2016: *BALCO vs. TANGEDCO & Ors*., *inter-alia* settled the factual position with regard to the methodology for calculation of the compensation on 'Change in Law' events (taxes and duties components) and the said BALCO judgment is binding on all the parties, including the Respondent. The APTEL in the BALCO judgment has unambiguously clarified and laid down that (a) there is no link between the compensation payable as per the Escalation Indices and the compensation

payable as per the 'Change in Law' provision under the PPA; (b) both these compensations are distinct and mutually exclusive; and (c) the Escalation Indices do not factor in, at all, any component of taxes/ duties/ cess. Further, the TANGEDCO PPA and the PPA entered into between BALCO and the Respondent (TANGEDCO) are identical and have been executed pursuant to the long-term tender floated by the Respondent under Section 63 of the Act. In view of the aforementioned findings of the APTEL in the BALCO judgment, the deduction of the effect of the Escalation Indices on taxes and duties from the claims under the 'Change in Law' events are contrary to the existing legal and regulatory framework.

(g) The Petitioner, due to its then prevailing stressed financial condition and based on a mistaken fact, had signed the Agreement for Provisional Reconciliation and given an Undertaking to the Respondent for deduction to the effect of the Escalation Indices on taxes and duties from its claims under 'Change in Law' events for the period between December 2015 to September 2020. It is a well-settled legal position that where both the parties to an Agreement are under a mistake, as to a matter of fact essential to the Agreement, such Agreement is void. In line with the applicable legal framework, i.e., aforementioned findings of the APTEL in the BALCO Judgment, as also duly implemented by this Commission in its subsequent Order dated 16.9.2021, the Petitioner, vide its letter dated 03.11.2021, had requested the Respondent to reimburse and/or refund the amount to the tune of ₹ 21.57 crores (including Carrying Cost up to the date of the Order, i.e., 29.03.2020), which was wrongfully deducted towards the compensation under 'Change in Law' events payable to the Petitioner for the period between December 2015 to September 2020. Pertinently, while the Respondent has, on one hand, conveniently chosen not to respond and/or object to the aforesaid letter dated 3.11.2021 issued by the Petitioner, on the other hand, the Respondent has applied the same methodology/principle for calculation of the 'Change in Law' compensation payable to the Petitioner for the period post September 2020 also, i.e., for the period between October 2020 and March 2022 and has deducted an amount to the tune of ₹ 14.41 crores from Petitioner's 'Change in Law' claim for the said

period, i.e., between October 2020 to March, 2022. Further, the Respondent, in its letter dated 3.8.2022, had *inter-alia* stipulated that the compensation under 'Change in Law' events payable to the Petitioner for the period between October 2020 to March 2022 is only ₹ 12.85 crores [comprising of (i) ₹ 12.12 crores towards 'Change in Law' events; plus (ii) ₹ 0.35 crore towards Grade Slippage of Coal; plus (iii) ₹ 0.39 crore towards Late Payment Surcharge for 'Change in Law' events] as against a claim of ₹ 26.58 crores towards compensation under 'Change in Law' events raised by the Petitioner vide its supplementary invoice(s) dated 29.4.2022.

(h) The methodology for compensation under 'Change in Law' events for the period between December 2015 to September 2020, as stipulated under the Agreement for Provisional Reconciliation and the Undertaking given by the Petitioner under a mistake of fact, is void. The same was a one-time settlement between the Petitioner and the Respondent. In any event, the said principle/methodology cannot be continued by the Respondent for the period beyond September 2020, i.e., October 2020 to March 2022. Pursuant to the issuance of the aforesaid letter dated 3.11.2021 and in the absence of any response from the Respondent to the said letter dated 3.11.2021, the Petitioner further sent two reminders vide its letters dated 8.8.2022 and 27.8.2022 and again requested the Petitioner to implement the BALCO Judgment issued by the APTEL and reimburse and/or refund the amount wrongfully deducted by the Respondent towards the compensation payable to the Petitioner in respect of its claims under the 'Change in Law' events for the period between December 2015 and September 2020 as well as October 2020 and March 2022. In response, the Respondent, vide its letter dated 1.9.2022, once again reiterated that the escalable tariff quoted by the Petitioner is inclusive of taxes and duties components, which is escalated every month by virtue of the Escalation Indices, and thus, the Respondent has deducted the amount of taxes and duties already paid through monthly tariff. Further, the Respondent vide its letter dated 15.10.2022 reiterated the same contention as above and reconciled the amount payable on account of the 'Change in Law' events for the period from October 2020 to March 2022 at ₹ 12.85 crores against the amount ₹ 30.17 crores,

claimed by the Petitioner. In the said letter dated 1.9.2022, it was further stipulated that the Respondent, aggrieved by the decision of the APTEL in BALCO Judgment, approached the Hon'ble Supreme Court of India by way of a Civil Appeal viz. C.A. No. 4058 of 2022, and thus, the deducted amount is yet to be paid to BALCO, and the same will be decided based on the outcome of the aforesaid Civil Appeal pending before the Hon'ble Supreme Court. In view of the above, the Respondent has taken a stand that the Petitioner's claim for compensation towards 'Change in Law' events is not feasible for compliance.

(i) The Agreement for Provisional Reconciliation and Undertaking dated 5.4.2021, to that extent of deduction of the effect of Escalation Indices on taxes and duties in the compensation under 'Change in Law' events, being contrary to the applicable legal framework and based on a mistake of fact, is void and liable to be rejected. Since the deduction made by the Respondent due to an incremental increase of taxes and duties for the period December 2015 to September 2020 due to the application of the Escalation Indices is wrong and the same has to be reimbursed and/or refunded, the Respondent is now liable to reimburse and/or refund the amount wrongfully deducted by it for the aforesaid period along-with the applicable Carrying Cost. The delay on the part of the Respondent on account of the refund of the amount wrongfully deducted by the Respondent, along with the applicable Carrying Cost, has caused irreparable harm to the Petitioner, and hence, the Petitioner hereby seeks appropriate directions of this Commission to the Respondent for clearing the outstanding legitimate dues based on the applicable provisions of the TANGEDCO PPA amounting to ₹ 35.98 crores, including the Carrying Cost of ₹ 2.13 crores till the issuance of the Order dated 29.3.2020 by the Commission in Petition No. 327/MP/2018. The Petitioner is also entitled to the Late Payment Surcharge in terms of the TANGEDCO PPA on the aforesaid amount of ₹ 35.98 crores.

**IA No. 57/2023 dated 17.7.2023**

4. The Petitioner, vide IA No. 57/2023 dated 17.7.2023, has prayed to consider a refund of an amount of Rs. 24.23 crores wrongfully deducted by the Respondent

towards the compensation under the 'Change in Law' events payable to the Petitioner/Applicant for the period post September 2020, during the pendency of the Petition, and direction upon the Respondent not to make any further deductions towards the compensation under 'Change in Law' events payable to the Petitioner/Applicant for the period post-March 2023.

**Proceedings before the Commission**

**Hearing dated 13.4.2023**

5. During the course of the hearing on 13.4.2023, the learned senior counsel for the Petitioner, DIL, reiterated the submissions made in the pleadings and briefly narrated the issues involved in the matter. Considering the submissions made by the learned senior counsel for the Petitioner, notice was issued in the matter permitting the Respondents to file their respective replies and rejoinder.

**Reply of the Respondent TANGEDCO**

6. Pursuant to the liberty granted, the Respondent TANGEDCO, vide its affidavit dated 6.5.2023, has mainly submitted as under:

(a) The Petitioner's claim in the present Petition is wholly untenable, being without any legal basis. No amount as claimed by the Petitioner is due from the Respondent as the Respondent has already made a full and complete payment towards the claims of the Petitioner under the 'Change in Law' events for the period between December 2015 and September 2020 as per the Agreement for Provisional Reconciliation ("Agreement") dated 21.01.2021 and for the period between October 2020 and March 2022.

*Agreement forms part of the PPA*

(b) The PPA under Article 15.3 contains provisions for its amendment. The methodology for computation of the Change in Law compensation, after factoring in, and deduction of the impact of escalation on the increased cost

resulting from Change in Law, was agreed upon between the parties in writing. The Agreement meets the requisite conditions under Article 15.3 of the PPA and effectively constitutes an amendment thereof. The Undertaking, which was executed pursuant to the Agreement and forms an integral part thereof, clearly states that it forms part and parcel of the PPA. The revised methodology for the computation of compensation for Change in Law has been duly agreed upon between the parties. The Petitioner cannot seek to depart from or resile from such agreement unilaterally. The Agreement was executed after due discussion, negotiation, and deliberations between the parties. It was pursuant to such agreement that the parties jointly reconciled the eligible compensation amount to the tune of Rs. 119.19 crores for the period between December 2015 and September 2020. It is, therefore, not open to the Petitioner to assert any claim for Change in Law contrary to the agreed amended terms of the PPA.

*The Petitioner's claims hit by Waiver, Estoppel, and principles of Approbate and Reprobate*

(c) Article 15.5 of the PPA provides for waiver. The Agreement and the Undertaking are in writing. No case has been made out by the Petitioner that the said documents have either not been duly executed or that they have not been executed by an authorised representative of the Petitioner. Accordingly, the requisite conditions under Article 15.5.1 of the PPA have been met. Assuming without admitting that the Petitioner is entitled to seek Change in Law compensation under the PPA without adjustment or reduction to the extent that the increase in costs arising out of Change in Law is offset by the increase resulting from escalation, the Petitioner has clearly waived such right. The Agreement and the Undertaking constitute an express and unequivocal waiver to this effect. The claims of the Petitioner are also barred by the well-established principles of estoppel, approbate, and reprobate. The Petitioner and the Respondent have acted upon the Agreement and the Undertaking. The Respondent has paid Rs. 119.19 crores pursuant thereto towards Change in Law compensation and within the timelines stipulated therein. The Petitioner has derived benefits out of the Agreement and, hence, cannot be permitted to turn around and dispute the validity of the said Agreement or the Undertaking. It is not open for the Petitioner to blow hot and cold and approbate and

reprobate. The Petitioner cannot be allowed to accept and derive benefits out of an instrument and then also reject the same instrument. The Petitioner knowingly accepted and appropriated the amounts for his benefit under the Agreement and is now estopped from denying the validity or binding effect of the Agreement. Therefore, he cannot resile from the same. In this regard, reliance has been placed on the Hon'ble Supreme Court's judgment in the case of *Cauvery Coffee Traders, Mangalore vs. Hornor Resources (Intern.) Company Ltd., [reported at (2011) 10 SCC 420].*

*The Petitioner cannot seek to avoid the agreement under the pretext of a 'Mistake of Fact'.*

(d) The Petitioner's contention that it had entered into the Agreement and given the Undertaking on a mistaken belief/assumption that such incremental increase has already been recovered through the Escalation Indices and thus the Agreement is rendered void is wholly incorrect. The Agreement and the Undertaking were entered into after mutual discussions between the Petitioner and the Respondent. The Petitioner entered into the agreement with complete knowledge and understanding as to the terms being agreed upon by the parties. The Petitioner, being a company, cannot be expected to enter into agreements without undergoing due diligence. The plea of the Petitioner that there was a mistake and that the increase in cost due to the Change in Law was offset by the escalation provision is also factually unsubstantiated. The Petitioner has neither averred nor placed any material to suggest that no part of the increase in cost had been recovered through the Escalation index. Therefore, the said plea is without basis and does not merit any indulgence. The plea of the Petitioner, while couched as a mistake of fact, is that in law the Petitioner is nevertheless entitled to seek Change in Law compensation, notwithstanding the effect of escalation. For this, the Petitioner has sought to rely upon the BALCO Judgment. Therefore, the plea of the Petitioner is one of the mistakes in law, if at all, but not of a mistake in fact. In any event, as admitted by the Petitioner, the order of this Commission dated 29.03.2020 in Petition No. 327/ MP/2018, which dealt with the specific Change in Law claims that are the subject matter of the present Petition, had already rejected the Respondent's

contention with respect to offsetting the benefit of escalation index. Therefore, the BALCO judgment has no bearing upon the effect and purport of the Agreement and Undertaking and is only being referred to by the Petitioner as a bogey to reside from its committed position. The Petitioner was thus under no mistake of fact or law while expressly agreeing to the methodology proposed by the respondent.

(e) It is a clear case of amendment of the PPA, or at the very least, waiver by the Petitioner, after being fully aware and conscious of the factual and legal position. As per Section 22 of the Indian Contract Act, 1872, "*A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact*". The Hon'ble Supreme Court, in the case of *Tarsem Singh v. Sukhminder Singh, [reported at (1998) 3 SCC 471]*, clarified that a unilateral mistake would not render a contract void under Indian contract law. It is not open to any party to the contract to unilaterally set up a case there is a mistake in one or more terms of the contract. It is well-settled that a party cannot seek unilateral modification of an agreed position, alleging that the Agreement was entered into due to a mistake. Any such attempt would be nothing but an attempt to impose terms and conditions that were not part of the Agreement between the parties. The Petitioner also runs contrary to the well-established principle that substitution, rescission, or alteration to a contract cannot be done unilaterally. This principle, which is statutorily recognised in Section 62 of the Indian Contract Act, 1872, bars the plea of the Petitioner, whereby the Petitioner effectively seeks to rescind the Agreement, which has been entered into by both parties. Therefore, the Petitioner cannot unilaterally seek changes in the Agreement and is bound by the terms agreed upon by the parties in the Agreement.

(f) The Agreement was followed by execution of the Undertaking, where applying the methodology agreed upon, the compensation for Change in Law was duly computed, and the amount arrived at was expressly agreed to constitute a full and final settlement of the claims for compensation. In any event, the expression "provisional" can only pertain to any arithmetical errors in

the computation of the amount and cannot constitute a premise for dislodging the very basis of the Agreement.

*Claims for 2015-2020 discharged by accord and satisfaction; agreed methodology applies to future claims*

(g) By way of the Agreement and Undertaking, the Petitioner and the Respondent *inter-alia* sought to fully and finally settle the claims of the Petitioner for the period between December 2015 and September 2020. The said Agreement read with the Undertaking constituted the accord, which stands satisfied by virtue of the payment made by the Respondent of the entire sum agreed, as reflected in the Agreement and Undertaking. Thus, the outstanding claims of the Petitioner for the period between December 2015 and September 2020 stand settled and to that extent, the contract between the parties stands discharged by accord and satisfaction. By way of the said Agreement and Undertaking, the Petitioner and the Respondent also mutually agreed on the methodology for the calculation of compensation arising out of Change in Law under the PPA. The said principle/ methodology was agreed upon without any qualification. The Petitioner and the Respondent have not only agreed on the compensation amount payable between December 2015 to September 2020 but also on the principle of the methodology to be followed while undertaking such computation. Therefore, the Respondent has rightly adopted the same methodology for calculation of the 'Change in Law' compensation payable to the Petitioner for the period post-September 2020 also, i.e., for the period between October 2020 and March 2022. Thus, the deduction of the amount to the tune of Rs. 14.41 crores from the Petitioner's 'Change in Law' claims for the period between October 2020 and March 2022 was in accordance with the agreed principle/ methodology. Therefore, the Petitioner has not made out any case for relief that the provisions of the Agreement or the Undertaking are null and void. In any event, such relief is not maintainable before this Commission and the Commission has no jurisdiction to and/or cannot grant any such declaration in respect of the Agreement or the Undertaking entered into between the Petitioner and the Respondent. All other prayers, including for

payment of sums in excess of the amounts already paid, are accordingly misconceived.

**Rejoinder of the Petitioner**

7. In response, the Petitioner, vide its affidavit dated 29.5.2023, has mainly submitted as under:

*Re. Respondent's contention that the Agreement forms part of the PPA and that the Petitioner's claim is hit by Waiver, Estoppel, and Principles of approbate and reprobate*

(a) The APTEL, vide its judgment in Appeal No. 22 of 2019 (TANGEDCO vs. CERC & Ors.) and Appeal No. 58 of 2019 (BALCO vs. CERC & Ors.) (hereinafter collectively referred to as the "BALCO Judgment"), which was later implemented by this Commission vide its Order dated 16.9.2021 in Petition No. 126/MP/2016 (BALCO vs. TANGEDCO & Ors.), *inter-alia* settled the factual position with regard to the methodology for calculation of the compensation on 'Change in Law' events (taxes and duties components) and the said BALCO Judgment is binding on all the parties, including the Respondent. The aforesaid Judgment unambiguously clarified and laid down that (i) there is no link between the compensation payable as per the Escalation Indices and the compensation payable as per the provisions of the 'Change in Law' events under the PPA; (ii) both these compensations are distinct and mutually exclusive; and (iii) the Escalation Indices do not factor in, at all, any component of taxes/duties/cess. Pertinently, this was the first instance when the Petitioner became aware of the fact that the Respondent had misled the Petitioner and made to agree on a contentious issue without disclosing the full details during the negotiations and misused its dominant position to exert undue economic duress on the Petitioner. In the case of the Petitioner, it was not free consent to enter into such terms and conditions of the Agreement, given the fact that the Petitioner was under immense financial stress on account of the coercion employed by the Respondent. Despite such concurrent findings by two competent courts of law, the Respondent has once again raised the very same issue before the Hon'ble Supreme Court and is yet to make payment to the generator(s) involved in the said matters. This, in turn, is delaying the legitimate

payment to be made by the Respondent to the generators. Owing to the dominant position enjoyed by the Respondent and the financial hardships of the generating companies like the Petitioner, it becomes very difficult to negotiate with the Respondent for the release of legitimate payment or even take any further legal steps as such legitimate payment would be on hold for a long time. In this regard, the Hon'ble Supreme Court, vide its recent judgment dated 20.04.2023 in Civil Appeal No. 11095 of 2018 (*GMR Warora Energy Ltd. vs. CERC & Ors*. and batch matters) *inter-alia* has held that in cases where well-reasoned concurrent orders are passed by the Electricity Regulatory Commissions and the APTEL, the same is challenged by the Discoms as well as the generators. As a result, it will be the end consumer who would suffer, and hence, such unnecessary and unwarranted litigation needs to be curbed.

(b) Similarly, the Respondent, in the present case, is also taking a similar legal recourse to delay the payment to the generators or employ coercion or abuse its dominant position for the generators to agree to such terms/conditions/interpretation, which have already been dismissed by well-reasoned concurrent orders by this Commission as well as by the APTEL. If the Respondents' argument is to be accepted, then every distribution company in the country would adopt such a 'modus operandi' and delay/evade legitimate payment to the generating companies. Thus, the consent obtained through 'financial duress' does not qualify as valid consent under Section 15 of the Indian Contract Act, 1872.

(c) The Petitioner has executed the Agreement and provided its Undertaking as per the terms dictated by the Respondent based on a mistake of fact. The Hon'ble Supreme Court, in its various judgments, has held that any undertaking given by a party to another party who is in a dominant position would not hold good and/or be binding on the weaker party. In this regard, the Petitioner has placed reliance on the Hon'ble Supreme Court's Judgment passed in *Central Inland Water Transport Corporation. Ltd. v. Brojo Nath Ganguly [(1986) 3 SCC 156].* The Courts must judge each case based on its own facts and circumstances and protect the interest of the weaker from the

strong and should not sit back and watch supinely while the strong trample under-foot the rights of the weaker. Further, the said Judgment has also recognised that the inequality of bargaining power results from the great disparity in the economic strength of the contracting parties. The Petitioner has further placed reliance on the Hon'ble Supreme Court's Judgment passed in *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd [(2009) 1 SCC 267]* and submitted that a construction company, hard pressed for funds and keen to get the admitted amounts released, might execute a final document, but such discharge is under “economic duress/compulsion.”

(d) With respect to the Respondent’s contention that the Petitioner’s claim is hit by the principles of waiver, the legitimate claim of the Petitioner cannot be said to have been waived off since the Petitioner, on a mistake of fact, had executed the Agreement and given its Undertaking, which is contrary to *inter-alia* the terms and conditions of the TANGEDCO PPA, prevalent legal and regulatory framework and the principles of natural justice.

*Re. Respondent’s contention that the Petitioner cannot seek to avoid the agreement under the pretext of a ‘Mistake of Fact’.*

(e) As per Section 10 of the Contract Act, the free consent of parties is an essential element of any contract. Further, Section 14 of the Contract Act states that ‘Free consent means consent not caused by coercion, undue influence, fraud, misrepresentation, and mistake.’ However, the influence was undue in as much as the interpretation adopted by the Respondent in giving effect to the legitimate dues of the Petitioner on the components of ‘Change in Law’ events was contrary to the orders of this Commission as well as the APTEL. Further, the consent provided by the Petitioner was under a mistaken belief since the Respondent had deliberately concealed the pertinent fact regarding the said contention being under challenge before a higher court of law, and therefore, such consent cannot be construed as a free consent, which otherwise is an essential element for any contract to be legally tenable. The Respondent has contended that as per Section 22 of the Contract Act, for a contract to be void, the mistake has to be bilateral/multi-lateral and not unilateral. The fact that the

Respondent has not given effect to the settled principles/Orders of the regulatory fora/Court for disbursal of the payment towards the 'Change in Law' claims could arguably qualify as a mistake of fact at the Respondent's end. Therefore, the mistake being made by both the parties, the Agreement and the Undertaking should be rendered null and void. The methodology for compensation under 'Change in Law' events for the period between December 2015 and September 2020, as stipulated under the Agreement and the Undertaking given by the Petitioner under a mistake of fact, is void and liable to be ignored and rejected as the same is against the applicable legal framework i.e., aforementioned findings of the APTEL in the BALCO Judgment, as also duly implemented by this Commission in its Order dated 16.9.2021 in Petition No. 126/MP/2016.

(f) With regard to the Respondent's contention that the word 'provisional' in Clause 6 of the Agreement refers to the computation and not the principles, it is noteworthy that the calculation itself flows from the methodology/principle adopted and therefore, any change in such principle/methodology would also result in the change of calculation. Further, to make it amply clear that both the calculation as well as the methodology are provisional, the Petitioner had suggested/proposed for the same to be included vide its e-mail dated 14.01.2021. However, the Respondent chose not to include the same in the Agreement and is raising absurd contentions at this stage, stating that the calculations were provisional only to the extent of variables, such as the outcome of the Writ Petition before the Hon'ble High Court of Delhi. There is no doubt regarding the fact that the calculations were jointly reconciled between the Petitioner and the Respondent. It has not been clarified in the Agreement that both the calculation as well as the methodology are provisional at the behest of the Respondent. The Respondent, at its own discretion, did not incorporate any such words of clarity in the Agreement, despite being requested by the Petitioner vide its e-mail dated 14.01.2021. Arguendo, without prejudice to the submissions hereinabove, even if it is considered that the submission of Respondent is correct, the Respondent has itself admitted that calculations were provisional only to the extent of variables, which could not be factored in

since the matters were sub-judice. In similar lines, the calculations should not have included any such variables which were sub-judice at the time of signing of the Agreement. The principle regarding the correctness of deducting the impact of Escalation Indices on the 'Change in Law' components was pending before the APTEL as on 21.01.2021 (by virtue of Appeal No. 22 of 2019) i.e., the date of signing the Agreement and therefore, this should also not be considered as a part of the calculation jointly reconciled between the Petitioner and the Respondent. The Respondent cannot selectively give effect to the contentions/variables which are sub-judice at the time of signing of the Agreement. It is also a settled position of law that based on subsequent Orders of the regulatory fora, bringing about a change in methodology/principle, bills raised earlier ought to be revised by giving effect to the revised principle adopted by the regulatory forums. Therefore, to construe that the word 'provisional' is linked only to the computation and not to the principles holds no merit.

*Respondent's contention that the Petitioner's claims for 2015-2020 are discharged by accord and satisfaction, and the agreed methodology applies to future claims*

(g) The Petitioner had, under a mistake of fact, provided an Undertaking that it would not make any further claims in the future for the said period for which payment was being made, i.e., the period between December 2015 and September 2020 and not for the period post September 2020. There was no reference whatsoever that such a methodology of reconciliation, which was provisional in itself, would continue to be applicable for the forthcoming period. Such afterthought of the Respondent is once again a reflection of its undue exertion of pressure on account of its dominant position. Clause 10 of its Undertaking dated 5.4.2021 clearly states that the Petitioner would not make any further claims for the above period towards the 'Change in Law' components which have been allowed by this Commission. Pertinently, the deducted amount of ₹ 21.57 crores was already a part of the claims raised by the Petitioner vide its supplementary bills, and accordingly, no further or new

claims have been raised by the Petitioner thereafter. The Petitioner is only claiming the amount which has been wrongfully deducted by the Respondent.

(h) The entire Agreement and the Undertaking deal with the period from December 2015 to September 2020. Hence, no reference to such Agreement or Undertaking can be drawn upon by the Respondent to justify its illegal act of deducting the legitimate payment of the Petitioner for the period from October 2020 to March 2022. Therefore, such averments made by the Respondent are inconsistent with law. The APTEL, in its Judgment dated 28.04.2021, in Appeal No. 246 of 2019 in similar facts and circumstances, albeit in the context of a different generator, observed that (i) the terms of an agreement or the nature of compromise only refers to the period covered in such agreement; and (ii) such compromise should not come in the way of future 'Change in Law' claims or the regular energy bills.

**IA No.57/2023 dated 17.7.2023**

8. The Petitioner, vide its IA No. 57/2023 dated 17.7.2023, has prayed before the Commission for interim relief and for the present application to be allowed, and also to issue directions to the Respondent to refund an amount of Rs. 24.23 crores wrongfully deducted by the Respondent towards the compensation under 'Change in Law' events payable to the Petitioner/Applicant for the period post September 2020, i.e., (i) an amount to the tune of Rs. 14.41 crores for the period between October 2020 and March 2022 as per Table 3 of the Petition; and (ii) an amount to the tune of Rs. 9.82 crores for the period between April 2022 to March 2023, during the pendency of the Petition, and (b) direct the Respondent not to make any further deductions towards the compensation under 'Change in Law' events payable to the Petitioner/Applicant for the period post-March 2023.

**Hearing dated 19.7.2023**

9. During the course of the hearing, the learned counsel for the Petitioner submitted that subsequent to the filing of the Petition, there have been certain additional deductions by the Respondent, TANGEDCO. for the last financial year, and the Petitioner may be permitted to place on record these developments by way of an additional affidavit. Learned counsel for the Respondent, TANGEDCO, submitted that by way of an additional affidavit, the Petitioner ought not to be permitted to bring out any new issue or extension of the prayers already made in the petition. In response, learned counsel for the Petitioner clarified that the Petitioner would not be bringing out any new issue in the present case. Considering the request of the learned counsel for the Petitioner, Petitioner was permitted to file an additional affidavit to bring on record the subsequent developments along with supporting documents, if any. However, the Commission also clarified that in the event these developments, as sought to be brought out by the Petitioner, have any impact/effect on the prayers made in the main Petition, the Petitioner will file a proper application for amendment to the pleadings instead of an additional affidavit within the timelines as already specified above. The Respondent was also permitted to file its response, if any, to the said additional affidavit to be filed by the Petitioner.

**Hearing dated 10.11.2023**

10. During the course of the hearing, the learned senior counsel for the Petitioner submitted that one of the objections/contentions of the Respondent, TANGEDCO, with regard to the Change in Law claims had been - a portion of tax, duties, and cess component as already inbuilt in the quoted tariff gets escalated by virtue of the escalation index and that any further compensation on account of the Change in Law

can be allowed only after adjusting the amount of such taxes, duties and cess which have already been paid to the generator. Learned senior counsel submitted that while the aforesaid objection/contention of TANGEDCO has been rejected by this Commission as well as APTEL in its recent judgment dated 12.8.2021 in Appeal No. 22 of 2019 and batch, the Hon'ble Supreme Court has stayed the said judgment of the APTEL by an order dated 20.10.2023 in Civil Appeal No. 4058 of 2022 filed by TANGEDCO against the judgment of the APTEL in the said appeal. In addition, the learned senior counsel submitted that in the present case, the Petitioner had been required to enter into an agreement with TANGEDCO on the above lines for the release of its legitimate Change in Law claims as allowed by the Commission by its order dated 29.3.2020 in Petition No. 327/MP/2018. The learned counsel for the Petitioner further submitted that while the Petitioner has also challenged such agreement on account of it having been coerced to enter into it, the outcome of the Civil Appeal No. 4058 of 2022 before the Hon'ble Supreme Court will have some bearing on the present case and keeping in view that the said appeal is proposed to be listed for the hearing in the month of March 2024, the hearing in the present matter may be deferred for such time. Learned counsel for the Respondent, TANGEDCO, also agreed to the aforesaid submissions of the learned senior counsel for the Petitioner. Considering the submissions made by the learned senior counsel and learned counsel for the parties, the matter was adjourned.

**Hearing dated 20.3.2024**

11. During the course of the hearing, the learned counsel for the Petitioner submitted that the Petitioner had moved a letter for the adjournment of the present Petition on account of the pendency of Civil Appeal No. 4058 of 2022, TANGEDCO vs.

BALCO & Ors. (Civil Appeal) before the Hon'ble Supreme Court, the outcome of which will have a bearing on the present case. Learned counsel further submitted that the said Civil Appeal was listed before the Hon'ble Supreme Court on 18.3.2024. However, the same was adjourned and was directed to be listed after the completion of the pleadings. Considering the submissions made by the learned counsel for the Petitioner, the matter was adjourned by the Commission.

**Additional Affidavit by the Petitioner**

12. The Petitioner, vide its additional affidavit dated 8.7.2024, has mainly submitted as under:

(a) During the pendency of the Petition wherein this Commission is/was seized of the issue qua the methodology for compensation under 'Change in Law' events, the Respondent once again vide its bill dispute notice dated 30.05.2023 and letter dated 12.06.2023, wrongfully deducted an amount to the tune of approximately Rs. 9.82 crores, i.e., against the Petitioner's claim of approximately Rs. 25.44 crores in its supplementary invoice dated 25.4.2023 and stated that it would pay only approximately Rs. 15.62 crores towards the compensation under the 'Change in Law' events payable for the period between April 2022 and March 2023.

(b) Due to the aforesaid continued deductions by the Respondent during the pendency of the Petition, the Petitioner was constrained to file an Application i.e., I.A. No. 57 of 2023 ("IA") before this Commission on 2.8.2023, *inter alia* seeking certain reliefs, namely (a) refund an amount of approximately Rs. 24.23 crores, wrongfully deducted on the same ground from the compensation under 'Change in Law' events payable to the Petitioner for the period between October 2020 to March 2023, during the pendency of the Petition; and (b) not make any further deductions towards the compensation under the 'Change in Law' events payable to the Petitioner for the period post-March, 2023. In the meanwhile, the Respondent, once again, vide its bill dispute notice dated 31.8.2023, wrongfully deducted an amount to the tune of approximately Rs. 2.38 crores, i.e., against

the Petitioner's claim of approximately Rs. 5.11 crores in its Supplementary Invoice dated 24.7.2023 and stated that it would pay only approximately Rs. 2.73 crores towards the compensation under the 'Change in Law' events payable for the period between April 2023 and June 2023.

(c) Pursuant thereto, the Petition was listed for hearing before this Commission on 10.11.2023, wherein this Commission directed to list the matter on 20.03.2024 on account of the pendency of a similar issue before the Hon'ble Supreme Court in Civil Appeal No. 4058 of 2022 (BALCO Case). On 20.10.2023, the Hon'ble Supreme Court, vide its interim Order in the BALCO Case inter-alia, issued directions to the Respondent to release 25% of the disputed amount payable to the generator involved in the said matter. i.e., BALCO, towards the compensation under the 'Change in Law' events.

(d) In the meanwhile, despite the issue being sub-judice before the Hon'ble Supreme Court as well as this Commission, the Respondent once again, vide its afore-mentioned bill dispute notice dated 23.11.2023, wrongfully deducted an amount to the tune of approximately Rs. 2.74 crores, i.e., against the Petitioner's claim of approximately Rs. 6.02 crores in its supplementary invoice dated 19.10.2023 and stated that it would pay only approximately Rs. 3.28 crores towards the compensation under 'Change in Law' events payable for the period between July 2023 to September 2023. In view of the interim Order dated 20.10.2023 issued by the Hon'ble Supreme Court in the BALCO Case, the Petitioner, vide its letter dated 28.11.2023, requested the Respondent to release 25% of the disputed amount towards the compensation under the 'Change in Law' events for the period between December 2015 to June 2023, subject to the outcome of the present Petition. However, the Respondent has failed to release/disburse 25% of the disputed amount as per the directions of the Hon'ble Supreme Court vide its interim Order dated 20.10.2023.

(e) Thereafter, despite the issue being sub-judice before the Hon'ble Supreme Court as well as this Commission, the Respondent has once again, vide its bill dispute notice dated 10.6.2024, wrongfully deducted an amount to the tune of approximately Rs. 4.14 crores, i.e., against the Petitioner's claim of

approximately Rs. 7.77 crores in its Supplementary Invoice dated 23.4.2024 and stated that it will pay only approximately Rs. 3.63 crores towards the compensation under the 'Change in Law' events payable for the period between October, 2023 to March, 2024.

(f) The above additional documents, i.e., letters/bill dispute notices dated 23.11.2023 and 10.6.2024 issued by the Respondent, as well as the letter dated 28.11.2023 issued by the Petitioner, being filed along with the present affidavit are subsequent events/letters, which are not a part of the record. Thus, this Commission may be pleased to kindly take the same on record and consider the instant submission as part and parcel of the present Petition as well as the accompanying Application. The Petitioner further craves leave of this Commission to rely upon the said documents at the time of filing of any other subsequent pleadings and during the course of proceedings in the present Petition.

**Hearing dated 22.8.2024**

13. During the course of the hearing on 22.8.2024, the learned counsel for the Respondent, TANGEDCO, sought liberty to file its response to the additional affidavit dated 8.7.2024 filed by the Petitioner on 18.7.2024. The learned senior counsel for the Petitioner recapitulated the issues involved in the matter and submitted that vide its aforesaid affidavit, the Petitioner has sought to place on record certain subsequent documents/details demonstrating the continued wrongful deduction by TANGEDCO of an amount escalated by Escalation Indices on taxes and duties from the supplementary invoices raised by the Petitioner towards the Change in Law compensation. Considering the request of the learned counsel for the Respondent, TANGEDCO, the Commission permitted TANGEDCO to file its response to the Petitioner's additional affidavit.

**TANGEDCO's response to the additional affidavit of the Petitioner**

14. The Respondent, TANGEDCO, vide its affidavit dated 6.9.2024, has mainly submitted as under:

(a) No amount as claimed by the Petitioner is due from the Respondent as the Respondent has already made a full and complete payment of all dues in respect of 'Change in Law' events for the period between December 2015 and September 2020 dated 21.01.2021, and October 2020 and March 2022 (as claimed in the main Petition); between April 2022 and March 2023 (as claimed by the Petitioner in the Interlocutory Application for Interim Relief, i.e., I.A. No. 57 of 2023) and July 2023 and March 2024 (as claimed by the Petitioner in the present additional affidavit dated 18.7.2024).

(b) The captioned Petition was filed by the Petitioner on 28.10.2022, challenging the validity of the Agreement dated 21.1.2021 entered into between the parties and the Undertaking dated 5.4.2021 furnished by the Petitioner. The period originally under dispute at the time of filing of the captioned Petition was up to the financial year 2021-2022. On 2.8.2023, the Petitioner, instead of seeking an amendment to the Petition, filed an Interlocutory Application No. 57 of 2023 seeking interim relief/directions and prayed for a refund of the amount allegedly wrongfully deducted by TANGEDCO during the financial year 2022-23, i.e., beyond the period for which prayers were made in the main Petition.

(c) The Petitioner did not seek amendment of the main Petition and instead expressly stated in the Interlocutory Application No. 57 of 2023 that "the reliefs/ prayers sought for in the instant Application are well within the scope of the original reliefs/ prayers sought for in the Petition and therefore, there is no requirement for filing an application seeking an amendment to the Petition." TANGEDCO has already filed a comprehensive response to Interlocutory Application No. 57 of 2023, contesting the same both on maintainability and merits. For the sake of brevity, the details of this response are not repeated here.

(d) The averments and reliefs sought in the additional affidavit filed on 18.7.2024 also travel beyond the main Petition filed by the Petitioner. Having been specifically directed by this Commission that if there were any impact on the prayers or the main Petition, the Petitioner would have to move an application for amendment of the Petition, the Petitioner has nevertheless chosen not to move any such application and seek liberty to amend the Petition.

(e) In the original Petition, the Petitioner had claimed a refund of alleged wrongful deduction towards compensation under "Change in Law" and claimed a refund of Rs. 23.70 crores for the period December 2015 to September 2020 and Rs. 14.41 crores for the period October 2020 to March 2022. As was attempted to be done by the Petitioner in I.A. No. 57 of 2023, the relief sought in the additional affidavit indirectly seeks to expand the scope of relief sought by the Petitioner in the main Petition and effectively seeks to amend the same by seeking to include the Petitioner's claim for the FY 2023-2024.

(f) The Petitioner relied on the Order dated 12.8.2021 passed by the APTEL in the BALCO case as the basis for the present Petition before the Commission. The Petitioner's reliance upon the judgment in BALCO's case is wholly erroneous and misplaced. Without prejudice, clearly, the Petitioner has based its entire case on the judgment passed in APL No. 22 of 2019. However, the said judgment passed by the APTEL in the BALCO case has been challenged before the Hon'ble Supreme Court in Civil Appeal No. 4058 of 2022. On 20.10.2023, the Hon'ble Supreme Court passed an Order staying the operation of APTEL's judgment in BALCO's case, subject to payment of 25% of the disputed amount.

(g) The operation of the judgment of the APTEL in BALCO's case having been stayed, the Petitioner cannot seek any benefit on the basis of the said judgment. The Petitioner equally cannot claim 25% of the disputed amount on the basis of the interim order which has been passed by the Hon'ble Supreme Court, as the said Order directs TANGEDCO to pay 25% of the disputed amount to BALCO, so as to balance the convenience in that case. There is no such direction passed in favour of the Petitioner herein.

**Hearing dated 8.10.2024, 13.12.2024 & 21.1.2025**

15. During the course of the hearings on 8.10.2024 and 13.12.2024, the matter was adjourned with the consent of learned counsel for the parties. During the course of the hearing on 21.1.2025, the learned senior counsel for the Petitioner and the learned counsel for the Respondent, TANGEDCO, made detailed submissions and concluded their respective arguments in the matter. After hearing the learned senior counsel and learned counsel for the parties, the matter was reserved for order by permitting the parties to file their respective written submissions, if any.

**Written Submissions by Parties**

16. The Petitioner and the Respondent, in their written submissions dated 6.2.2025 & 14.2.2025, respectively, have reiterated their submissions, and the same are not repeated here for the sake of brevity.

**Analysis and Decision**

17. After considering the submissions of the parties and perusal of the documents placed on record, the following issues arise for consideration:

**Issue No.1: Whether the Reconciliation Agreement and the subsequent Undertaking or the specific conditions contained therein, be declared as null and void?**

**Issue No.2. Whether the scope of the Reconciliation Agreement extends beyond the period of September, 2020 insofar as the Petitioner's Change in Law claims are concerned?**

We now proceed to discuss the above issues and examine the claims of the Petitioner.

**Issue No.1: Whether the Reconciliation Agreement and the subsequent Undertaking or the specific conditions contained therein, be declared as null and void?**

18. The Petitioner has submitted that the Petitioner had filed Petition No. 327/MP/2018 (*DIL vs. TANGEDCO*) before this Commission under Section 79(1)(f) of the Electricity Act seeking compensation on account of various 'Change in Law' events in terms of Article 10.1.1 of the TANGEDCO PPA for the period between 16.12.2015 to 30.6.2018. This Commission, vide its order dated 29.3.2020 in Petition No. 327/MP/2018, allowed the majority of the Petitioner's 'Change in Law' claims, including 'Carrying Cost' and had disallowed three of the Petitioner's 'Change in Law' claims. Pursuant to the order dated 29.3.2020, the Petitioner had raised Change in Law compensation bills of ₹ 160.63 crores for the period from 16.12.2015 to 31.03.2020. However, the Respondent, TANGEDCO, worked out the compensation for an amount of ₹ 148.95 crores, including Carrying Cost. The claims of the Petitioner were duly supported with all the relevant documents, including the Auditor's Certificate in terms of the aforementioned directions of this Commission in Order dated 29.3.2020. However, the Respondent did not make the payment of the above claim within the due date. On further pursuing the Respondent for payment against the above supplementary invoices dated 31.7.2020 and 18.12.2020, on (a) a mistaken belief that the Respondent was correct on its assertion of facts; (b) the payments are/were based on a provisional computation in terms of Clause 6 of the Agreement; and (c) the insurmountable financial hardship faced by the Petitioner due to withholding of such one-time settlement of compensation under 'Change in Law' events payable by the Respondent for the period between December 2015 and September 2020, the Petitioner had on 21.1.2021 executed an Agreement for Provisional Reconciliation for the compensation due and payable towards its claims under the 'Change in Law' events, as per the terms dictated by the Respondent. In the said Agreement for Provisional Reconciliation, it was *inter-alia* recorded that the Respondent will

provisionally make the payment towards the claims under the 'Change in Law' events for the period between December 2015 and September 2020 after deducting the amount towards the incremental part of taxes and duties which is purportedly covered under the Escalation Indices. Further, on 5.4.2021, the Petitioner, on a mistake of fact, gave its Undertaking ("Undertaking") that it will not make any further claims in the future for the said period, i.e., the period between December 2015 and September 2020 only. The Petitioner has submitted that it executed the Agreement and provided its Undertaking as per the terms dictated by the Respondent. Accordingly, the Respondent had released the payment to the Petitioner as per the Undertaking towards the compensation under the 'Change in Law' events. On the above premise, the Respondent had deducted the difference on account of the application of the Escalation Indices on the 'Change in Law' components from the compensation amount derived as per the Order dated 29.3.2020 passed by this Commission in Petition No. 327/MP/2018. Subsequently, on 12.8.2021, the APTEL, vide its judgment dated 12.8.2021 in Appeal No. 22 of 2019 in BALCO Judgment, which was later also implemented by this Commission vide its Order dated 16.9.2021 in Petition No. 126/MP/2016 (BALCO vs. TANGEDCO & Ors.), *inter-alia* settled the factual position with regard to the methodology for calculation of the compensation on the 'Change in Law' events (taxes and duties components) and the said BALCO Judgment is binding on all the parties, including the Respondent. In the said BALCO Judgment, the APTEL has unambiguously clarified and laid down that (a) there is no link between the compensation payable as per the Escalation Indices and the compensation payable as per the 'Change in Law' provision under the PPA; (b) both these compensations are distinct and mutually exclusive; and (c) the Escalation Indices do not factor in, at all, any component of taxes/ duties/ cess. The Petitioner, due to its then prevailing

stressed financial condition and based on a mistaken fact, had signed the Agreement for Provisional Reconciliation and given the Undertaking to the Respondent for deduction of the effect of the Escalation Indices on taxes and duties from its claims under 'Change in Law' events for the period between December 2015 and September 2020.

19. The Petitioner has further submitted that it was coerced to enter into the reconciliation agreement and to give its undertaking by abuse of dominant position by the Respondent. The consent obtained through 'financial duress' does not qualify as valid consent under Section 15 of the Indian Contract Act, 1872 ("Contract Act"), which defines coercion as "…*any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.*" As per Section 10 of the Contract Act, the free consent of parties is an essential element of any contract.

20. *Per Contra*, the Respondent, TANGEDCO has contended that the Agreement and the Undertaking were entered into after mutual discussions between the Petitioner and the Respondent. The Petitioner entered into the agreement with complete knowledge and understanding as to the terms being agreed upon by the parties. The Petitioner, being a commercial entity, cannot be expected to enter into agreements without undergoing due diligence. Before execution of the Agreement, both the parties deliberated upon the draft agreement as evident from the draft agreement shared by the Petitioner on 14.1.2021. Despite some disagreements, the Petitioner went ahead and executed the Agreement dated 21.1.2021 for the period from December 2015 to September 2020 without any objection, protest, or reservation. The Petitioner

continued to follow the terms of the Agreement even after the BALCO judgment on 12.8.2021 and only filed the present Petition on 28.10.2022, 22 months later. The transaction was concluded between the parties, not on account of any unintentional error, but after extensive and exhaustive bilateral deliberations with a clear intention to bring about a quietus to the dispute. These negotiations, therefore, are self-explanatory steps of the intent and conduct of the parties to end the dispute and not to carry it further. The plea of the Petitioner that there was a mistake, that the increase in cost due to a Change in Law was offset by the escalation provision, is also factually unsubstantiated. The Petitioner has neither averred nor placed any material to suggest that no part of the increase in cost had been recovered through the Escalation index. Therefore, the said plea is without basis and does not merit any indulgence. The plea of the Petitioner, while couched as a mistake of fact, is that in law, the Petitioner is nevertheless entitled to seek Change in Law compensation, notwithstanding the effect of escalation. For this, the Petitioner has sought to rely upon the BALCO Judgment. Therefore, the plea of the Petitioner is one of the mistakes in law, if at all, but not of a mistake in fact. The Agreement meets the requisite conditions under Article 15.3 of the PPA and effectively constitutes an amendment thereof. In this context, it is also pertinent that the Undertaking, which was executed pursuant to the Agreement and forms an integral part thereof, clearly states that it forms part and parcel of the PPA. Therefore, the revised methodology for the computation of compensation for Change in Law has been duly agreed upon between the parties. The Petitioner cannot seek to depart from or resile from such agreement unilaterally. It is, therefore, a clear case of amendment of the PPA, or at the very least, waiver by the Petitioner after being fully aware and conscious of the factual and legal position. The Respondent has further submitted that as per Section 22 of the Contract Act, "*A contract is not voidable merely*

*because it was caused by one of the parties to it being under a mistake as to a matter of fact*." It is not open to any party to the contract to unilaterally set up a case there is a mistake in one or more terms of the contract. It is well-settled that a party cannot seek unilateral modification of an agreed position, alleging that the Agreement was entered into due to a mistake. Any such attempt would be nothing but an attempt to impose terms and conditions that were not part of the Agreement between the parties. The pleas of the Petitioner also run contrary to the well-established principle that substitution, rescission, or alteration to a contract cannot be done unilaterally. This principle, which is statutorily recognised in Section 62 of the Contract Act, bars the plea of the Petitioner, whereby the Petitioner effectively seeks to rescind the Agreement, which has been entered into by both parties. Therefore, the Petitioner cannot unilaterally seek changes in the Agreement and is bound by the terms agreed upon by the parties in the Agreement.

21. The Respondent has further submitted that the Petitioner, by way of Interlocutory Application No. 57 of 2023 dated 2.8.2023, has alleged coercion, undue influence, and use of dominant position for the first time after the execution of the Agreement dated 21.01.2021 and as a complete afterthought. The basis of the original Petition was that the Petitioner entered into an agreement with the Respondent regarding the methodology for Change in Law compensation under a mistaken belief and due to financial hardship. However, in IA No. 57 of 2023, filed on 2.8.2023, the Petitioner has alleged coercion and undue influence by the Respondent. It is important to note that these two pleas are fundamentally different in terms of their elements, scope, and legal consequences. In fact, these pleas are mutually inconsistent and contradictory, as (i) coercion or undue influence would not have occurred if the

Petitioner was under a mistaken belief, and (ii) an agreement made under a mistake of fact is void, while an agreement made under a lack of free consent is voidable. Therefore, such inconsistent or contradictory factual allegations are impermissible, even though an amendment of pleadings. Allegations of coercion or undue influence have to be demonstrated with specific pleadings and sufficient proof. Firstly, there are no facts on record, much less supported by any documentary or any other evidence, to sustain the plea that the Agreement dated 21.1.2021 and Undertaking dated 5.4.2021 are a result of undue influence or dominant position by TANGEDCO. Secondly, the Petitioner has already taken benefit of the Agreement which was based on mutual negotiation and communications. Having acted upon such agreement and benefitted therefrom, it is evident that the pleas of coercion, undue influence, and use of dominant position have been raised in a dishonest attempt to renege from the same. Furthermore, the Petitioner's allegation of coercion is both vague and unsubstantiated, as it is evident from the record that there are no evidentiary documents or credible proof to support such claims. The Petitioner has failed to provide any concrete evidence, such as communications, documents, or testimony, that would substantiate the claim of coercion. In the absence of such proof, the allegation remains unfounded and does not meet the necessary legal threshold required for it to be considered valid. Additionally, the plea of coercion put forth by the Petitioner does not satisfy the criteria of "coercion" as defined under Section 15 of the Indian Contract Act, 1872. According to this Section, coercion is defined as committing or threatening to commit any act forbidden by the Indian Penal Code or unlawfully detaining or threatening to detain any property to the prejudice of any person's rights. To successfully claim coercion, the Petitioner would need to establish that it was forced into entering into the contract through unlawful threats or actions that would have placed it under duress. However,

since no such evidence has been presented, the Petitioner's plea does not meet the legal definition of coercion under the Contract Act. Without fulfilling the necessary criteria or presenting substantive evidence, the allegation of coercion cannot be sustained, and the Petitioner's reliance on this argument is legally untenable. It is well settled that it is not open to any party to the contract to unilaterally set up a case of mistake/coercion/unequal bargaining power after an agreement has been entered into pursuant to negotiation. Alleged financial hardship alone is not a basis to allege coercion or undue influence.

22. We have considered the submissions made by the parties. The Petitioner has sought the declaration of the conditions contained in the Reconciliation Agreement (particularly in paragraph 3) and the subsequent Undertaking (particularly in paragraphs 3 & 4) as null and void, mainly on the pleas of (i) coercion and economic duress, and (ii) mistake of fact. Accordingly, we shall examine the issue on both the above grounds.

***Coercion and Economic Duress***

23. Unquestionably, free consent is an essential element of any valid contract. As per Section 14 of the Indian Contract Act, 1872, the consent is said to be free when it is not caused by (i) coercion, as defined in Section 15, (ii) undue influence, as defined in Section 16, (iii) fraud, as defined in Section 17, (iv) misrepresentation, as defined in Section 18, or (v) mistake, subject to the provisions of Sections 20, 21 and 22. Section 19 of the Contract Act further provides that when the consent to an agreement is caused by coercion, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

24. Further, in the context of the plea of coercion and duress, ***the Hon'ble Supreme Court in the case of Transmission Corporation of Andhra Pradesh Limited v. Sai Renewable Power Pvt. Ltd. & Ors., [(2010) 8 SCR 636]***, has held as follows:

> *"42. …… To frustrate a contract on the ground of duress or coercion, there have to be definite pleadings which have to be substantiated normally by leading cogent and proper evidence. However, in the case where summary procedure is adopted like the present one, at least some documentary evidence or affidavit ought to have been filed raising this plea of duress specifically. …..….."*

25. It is now, thus, a settled position in law that a bald plea of coercion or duress is not enough, and the party who sets up such a plea must establish the same by placing the relevant material before the Court. Further, such material has to set forth the full particulars of such plea with a high degree of precision, and mere general allegations are insufficient even to amount to an averment of coercion or duress, however strong the language in which they are couched. Prior to examining the relevant material as relied upon by the Petitioner to advance its plea of coercion and economic duress in signing of the Settlement Agreement and Undertaking, we may also gainfully refer to the judgment of the ***Hon'ble High Court of Delhi in the case of Unikol Bottlers v. Dhillon Kol Drinks, [(1994) 28 DRJ 482]***, wherein the Hon'ble High Court has laid down four factors to ascertain the whether any duress or coercion has been played upon any party in a commercial contact. The relevant extract of the said judgment reads as under:

> *"32. …While dealing with the question of duress/coercion and unequal bargaining power one is really concerned with the question of free will, i.e. did the parties enter into the agreement with a free will? It is the plaintiff who has raised the question of its will being dominated by the defendants and, therefore, not being a free agent. Therefore, the plaintiff is on test. It has to be ascertained whether the plaintiff exercised a free will or not while entering into the Supplemental Agreement. For this purpose, there are several factors which need to be looked into. They are –*

*1. Did the plaintiff protest before or soon after the agreement?*

*2. Did the plaintiff take any steps to avoid the contract?*

*3. Did the plaintiff have an alternative course of action or remedy? If so, did the plaintiff pursue or attempt to pursue the same?*

*4. Did the plaintiff convey benefit of independent advice?*

26. Adverting to the particulars of the present case, it is an undisputed position that by order dated 29.3.2020 in Petition No. 327/MP/2018, the Commission had allowed the various Change in Law claims made by the Petitioner herein and also held the Petitioner entitled to the Change in Law compensation in terms of methodology prescribed therein. Further, in the said order, the Commission also did not find any favour with the contention of TANGEDCO that the components of taxes, duties & levies, as already included in the quoted tariff, already escalated by virtue of escalation indices notified by the Commission and therefore, the Petitioner cannot avail the benefit of both, i.e., escalation indices and increase/introduction of taxes, levies and duties under Change in Law and consequently, the Commission ruled in favour of the Petitioner on this aspect. Pursuant to the order dated 29.3.2020, the Petitioner went on to raise its supplementary invoices dated 31.7.2020 and 18.12.2020 for the Change in Law compensation for the period December 2015 to September 2020. It is also stated that the parties thereafter agreed to discuss the methodology for computation of compensation payable for the Change in Law allowed under the aforesaid order, which ultimately culminated in the signing of the impugned Reconciliation Agreement dated 21.1.2021 and the Undertaking dated 5.4.2021.

27. Insofar as the protest by the Petitioner before the signing of the Reconciliation Agreement and furnishing of the Undertaking is concerned, the Petitioner has relied upon its e-mails dated 14.1.2021 and 20.1.2021. While both of these e-mails do

mention the Petitioner's strained financial position and/or insurmountable financial difficulties, they neither substantiate these averments nor in any way protest the aspect of entering into the Reconciliation Agreement. Even in the present proceedings, nothing has been placed on record by the Petitioner to substantiate its dire financial position at the relevant point in time. As already noted above, such a plea has to be substantiated with the relevant materials, and mere assertions to this effect, without any supporting material, are not sufficient to maintain the plea of coercion or the economic duress as raised by the Petitioner. In the context of the nature of material required to support the plea of economic coercion, **the Hon'ble High Court of Delhi in the case of *National Highway Authority of India v. IRB Pathankot Amritsar Toll Road Ltd.,[ 2023 DHC 4352-DB]***, has observed as under:

> *86….It was IRB's case that pressure from the banks were mounting and therefore, it had succumbed to the blackmailing tactics of NHAI. According to IRB it was essential that it commenced collection of the toll in order to meet the mounting liabilities. However, there is no material whatsoever to indicate that IRB's financial position was precarious and that it was not in a position to service its liabilities without immediately commencing collection of toll. In all cases, where funds due to a party are withheld or where it is put to peril of a loss by the counter party, it is implicit that there are adverse economic implications. The quintessential question is whether threat of such adverse implications is heightened to a degree so as to coerce the party to execute a waiver of its rights or enter into a settlement agreement contrary to its free will. It is difficult to accept that such a plea can be addressed in absence of any material to establish the financial predicament of the party raising the plea of economic coercion, or any material to establish the crushing nature of the adverse economic implication."*

28. The Petitioner has also sought to point out that a few suggestions/changes proposed by the Petitioner by its e-mail dated 14.1.2021 in order to safeguard its interest were specifically rejected by the Respondent, TANGEDCO and this also reflects its high-handed approach, and the fact that the Petitioner was compelled/coerced to enter into/agree to the terms and conditions of the Reconciliation Agreement. We are, however, not impressed by the said averments, and in fact, it appears that the Petitioner was actively bargaining the terms of the Settlement

Agreement, and as its e-mail dated 14.1.2021 would suggest, it was mainly concerned with not being treated differently from other similarly placed generators where appeals filed by TANGEDCO were currently pending. TANGEDCO, not having accepted a few suggestions/modifications proposed by the Petitioner, as such, it cannot lead to a conclusion that the Petitioner was, in turn, coerced into the signing of the Reconciliation Agreement. In none of the relevant communications, the Petitioner appeared to have lodged its protest before the signing of the Reconciliation Agreement or even furnishing the Undertaking. Insofar as lodging of protest soon after the entering into the Reconciliation Agreement and furnishing of the Undertaking is concerned, the Petitioner has sought to rely upon its letters dated 3.11.2021, 8.8.2022 and 27.8.2022. Thus, the very first letter after the signing of the Reconciliation Agreement and the furnishing of the Undertaking was issued by the Petitioner only after the period of approximately 10 months and 7 months, respectively. In fact, not only these letters were issued after the judgment of the APTEL dated 12.8.2021 in Appeal Nos. 22 of 2019 and 58 of 2019 in BALCO's case but also appear to be premised on the said judgment, wherein the APTEL also rejected TANGEDCO's averment regarding the escalation indices in the BALCO case. Thus, these letters issued by the Petitioner appear to be nothing but belated attempts to resile from the Reconciliation Agreement and the Undertaking furnished, perhaps after becoming wiser on basis of the judgment of the APTEL dated 12.8.2021 in the BALCO case. Besides the grounds of coercion and financial difficulties, these letters also go on to aver that the Settlement Agreement and the Undertaking furnished by the Petitioner was on the basis of a mistaken belief that TANGEDCO was correct in its assertion of facts. While its plea of mistake has been examined in the latter part of this order, the conduct of the Petitioner in raising the plea of coercion and economic duress clearly reeks of an afterthought.

29. On the counts of steps to avoid such Reconciliation Agreement & Undertaking and the alternative course of action or remedy also, the Petitioner's plea of coercion and economic duress fails to hold the ground. As noted above, at no point in time prior to the passing of APTEL's Judgment in the BALCO case had the Petitioner protested the signing of the Reconciliation Agreement and furnishing of the Undertaking. Despite having an order of this Commission in its favour, the Petitioner did not choose to seek the enforcement of the said order nor the initiation of non-compliance proceedings against TANGEDCO – a statutory remedy provided to the Petitioner under the Electricity Act, 2003 itself. *Per contra*, the Petitioner chose to settle the issue by entering into the Reconciliation Agreement and by furnishing the Undertaking, and the present Petition came to be filed only in October 2022, i.e. approximately 22 months after having entered into the Reconciliation Agreement. Insofar as the fourth factor, i.e., did the Petitioner convey the benefit of independent advice, is concerned, this aspect is not clearly discernible from the record of the present case, but we find it suffice to note the following observations of the ***Hon'ble Supreme Court in the case of Gujarat Urja Vikas Nigam Ltd v. ReNew Wind Energy (Rajkot) Private Limited & Ors. [(2023) SCC OnlIne SC 411],*** while dealing with a similar plea of coercion:

> *"71. In the present case, this salutary rule was thrown to the wind, by the State Commission. In this court's opinion, APTEL, in the most cavalier fashion, virtually rubber stamped the State Commission's findings on coercion, in regard to the entering into the PPA by the parties. There was no shred of evidence, nor any particularity of pleadings, beyond a bare allegation of coercion, alleged against Gujarat Urja. It is incomprehensible how such an allegation could have been entertained and incorporated as a finding, given that the respondents are established companies, who enter into negotiations and have the support of experts, including legal advisers, when contracts are finalized. The findings regarding coercion are, therefore, wholly untenable. This court is also of the opinion that the casual approach of APTEL, in not reasoning how such findings could be rendered, cannot be countenanced. As a judicial tribunal, dealing with contracts and bargains, which are entered into by parties with equal bargaining power, APTEL is not expected to casually render findings of coercion, or fraud, without proper pleadings or proof, or without probing into evidence. The findings of coercion are therefore, set aside."*

30. The above observations squarely apply to the present case wherein the Petitioner is also an established company not having any dearth of technical, legal, and financial advisers at its disposal when the agreements are finalized. Therefore, there is no cogent reason to assume that the Petitioner did not have either the resources or the means to have independent legal advice to ascertain the effects of the Settlement Agreement and the Undertaking and that it was coerced to enter into such Agreement or to furnish such Undertaking.

31. In fact, perusal of the relevant clauses of the Undertaking clearly indicates that the present case is of accord and satisfaction. By way of the said Undertaking, the Petitioner waived an amount of Rs. 47.09 crores subject to TANGEDCO clearing the pending dues of Rs. 354.39 crores, which *inter alia* also included the Change in Law compensation for the period from December 2015 to September 2020, as stood reconciled by way of the Reconciliation Agreement, on or before 9th April 2021. In the said Undertaking, the Petitioner, consequently, undertook that it shall not make any further claims for the above period towards Change in Law compensation, which has been allowed by the Commission, vide order dated 29.3.2020 in Petition No. 327/MP/2018. The relevant extract of the Undertaking reads as under:

> *"2. Pursuant to the joint reconciliation of DIL's outstanding dues from TANGEDCO conducted in March, 2021, a sum of Rs.354.39 Crore (Rupees Three Hundred Fifty-i Four Crore and Thirty-Nine Lacs only) has been ascertained to be payable by TANGEDCO to OIL as on 31st March, 2021. The said amount comprises of energy supply bill upto February, 2021, claims pertaining to 'change in law' events including carrying cost as settled jointly on 21st January, 2021, reimbursement of transmission charges and related late payment surcharge as computed upto 31st March, 2021*
>
> *3. Given that DIL is currently under insurmountable financial difficulties and in consideration of TANGEDCO agreeing to settle the entire amount as above, DIL has agreed to offer a waiver of Rs.47.09 Crore (Rupees Forty-Seven Crore and Nine Lacs only) as an one-time dispensation only, provided the entire amount will be paid by TANGEDCO on or before 9th April, 2021.*
>
> *4. DIL submits that it shall not make any further claims in future for the above component and period for the waiver offered in Para 3 above.*
>
> *……..*

*9. This waiver is offered as an one-time settlement. This Undertaking may be taken as part and parcel of PPA and DIL will not raise any claim against the waiver so offered above.*

*10. DIL shall not make any further claims for the above period towards the 'Change in Law' components which have been allowed by the Hon'ble Central Electricity Regulatory Commission vide its Order dated 29.03.2020 in Petition NO.327/MP/2018.*

32. Thus, after having agreed to a calculation methodology for its Change in Law compensation claims for the period December 2015 to September 2020 and having further offered a waiver of approximately Rs.47.09 crores against the clearance of pending dues of Rs. 354.39 crores (inclusive of Change in Law claims reconciled under the Reconciliation Agreement) by TANGEDCO by 9.4.2021, the Petitioner cannot renege on the Reconciliation Agreement and the subsequent Undertaking on the pleas of coercion and economic duress, without being substantiating such pleas basis any relevant materials as already noted above.

33. In view of the foregoing observations, we do not find any merit in the plea of coercion and/or economic duress as raised by the Petitioner seeking a declaration to the effect that the Reconciliation Agreement and the Undertaking or any part thereof are null and void.

***Plea of mistake of fact***

34. Another plea raised by the Petitioner is that of a mistake of a fact. The Petitioner has claimed that it entered into the Reconciliation Agreement and, consequently, furnished an Undertaking owing to the mistake of a fact. It is also submitted that the Petitioner entered into the Reconciliation Agreement on a mistaken belief that TANGEDCO was correct in its assertion of facts. However, this plea of the Petitioner does not require much deliberation as it clearly demonstrates a case of unilateral mistake. As held by the Hon'ble Supreme Court in the case of ***Tarsem Singh v.***

***Sukhminder Singh, [(1998) 3 SCC 471]***, Section 20 of the Indian Contract Act renders only those contracts void where both the parties are under mistake as to the matter of fact. A unilateral mistake would not render a contract void unless the mistake about the terms and conditions of the contract is so serious as to undermine the entire bargain. The present case does not fall within the exception carved out for the unilateral mistake of a fact. As already discussed above, the Commission, vide order dated 29.3.2020 in Petition No. 327/MP/2018, had already ruled in favour of the Petitioner on the aspect of escalation indices, and the Petitioner, being an established commercial entity, cannot be heard saying it did not fully understand the findings of this Commission and believed the assertions being made by TANGEDCO to be correct. In our view, the conduct of the Petitioner clearly reflects the plea of mistake of fact being raised as an afterthought and a ruse to wriggle out of the Reconciliation Agreement and the Undertaking willingly entered into by it to settle its outstanding dues with TANGEDCO.

35. In view of the foregoing observations, we do not find any merit in the pleas of coercion, economic duress, or the mistake of fact as raised by the Petitioner, and as such, there cannot be any declaration to the effect that the Reconciliation Agreement and the Undertaking or any part thereof are null and void as prayed for by the Petitioner.

36. This issue is answered accordingly.

**Issue No.2. Whether the scope of the Reconciliation Agreement extends beyond the period of September, 2020 insofar as the Petitioner's Change in Law claims are concerned?**

37. The Respondent has submitted that by way of the Agreement, the Petitioner and the Respondent also mutually agreed on the methodology for calculation of the

compensation arising out of the Change in Law under the PPA. The said principle/ methodology was agreed upon without any qualification. It is, therefore, the Petitioner and the Respondent who have not only agreed on the compensation amount payable between December 2015 to September 2020 but also on the principle of the methodology to be followed while undertaking such computation for the future period.

38. *Per contra*, the Petitioner has submitted that it had, under a mistake of fact, provided an Undertaking that it will not make any further claims in the future for the said period for which payments were being made, i.e., the period between December 2015 and September, 2020 and not for the period post September 2020. There was no reference whatsoever that such a methodology of reconciliation, which was provisional in itself, would continue to be applicable for the forthcoming period.

39. We have considered the submissions made by the parties. In order to examine the scope of the Reconciliation Agreement, we may refer to the relevant extracts, which are reproduced as under:

> *"1. A Meeting was held at TANGEOCO's office between officials of DIL and TANGEDCO to reconcile the Change in Law claim amount submitted by DIL for the period from Dec-2015 to Sep-2020 in view of order in petition 327/MP/2018 and SM 13 of 2017 by Hon'ble Central Electricity Regulatory Commission and settled the differences amicably.*
>
> *2. Amount claimed by DIL for the period Dec-15 to Sep-2020 is as below:*

| S No. | Description | Period | DIL Claim in Cr | DIL Revised Claim in Cr |
|---|---|---|---|---|
| 1 | Amount claimed by DIL towards Change in law | Oct-15 to Sep-20 | 126.22 | 115.72 |
| 2 | Amount Claimed by DIL towards Carrying Cost | Dec-15 to July-20 | 34.41 | 33.23 |
| | Total | | 160.63 | 148.95 |

> *3. DIL & TANGEDCO agreed on the methodology of calculation of compensation arising out of Change in Law and thus jointly reconciled the eligible compensation amount. Such eligible compensation amount has been calculated, agreed and reconciled after deduction of the amount which got escalated by CERC coal and transport escalation index on the tariff components including the taxes & duties subsumed in view of the CERC order dated 14.03.2018 in the petition no 13/SM/2017,*

*which were allowed by the CERC for compensation under change in law in petition 327/MP/2018 and for the components if any allowed in future in any of the orders .*

*4. Based on the agreed calculation methodology and consequent reconciliation, DIL and TANGEDCO agreed for the following compensation for Change in Law payable by TANGEDCO to DIL. The detailed calculation after reconciliation worked out as follows.*

| S.No | Description | Period | Amount in Cr |
|---|---|---|---|
| 1 | Amount allowed by TANGEDCO towards Change in law | Dec-15 to Sep-20 | 94.00 |
| 2 | Amount allowed by TANGEDCO towards Carrying Cost | Dec-15 to Mar-20 | 26.20 |
| 3 | Grade Slippage | Up to 2017-18 | -1.01 |
| | **Total** | | **119.19** |

*5. If tariff is revised due to CERC escalation index notification dated 08-12-2017 which is pending at High court of Delhi in petition no WPC 5785/2018, then the escalation deduction will be revised subject to the payment of energy charges as per tariff revision.*

*6. The calculations are provisional….."*

40. The first paragraph of the above Reconciliation Agreement throws that light on the meeting held by the officials of the TANGEDCO and the Petitioner to reconcile the Change in Law claim amount submitted by the Petitioner for the period from December 2015 to September 2020 in view of the order passed in Petition No. 327/MP/2018 and Suo Motu Petition No. 13 of 2017 by this Commission and settlement of the differences amicably. Thereafter, paragraph 2 contains the amount claimed by the Petitioner for the period from December 2015 to September 2015. Whereas paragraph 3 records the agreement between the Petitioner and TANGEDCO on the methodology of calculation of compensation arising out of Change in Law and a joint reconciliation of compensation amount, it further records that such eligible compensation amount has been calculated, agreed and reconciled after the deduction of the amount which got escalated by CERC coal and transport escalation index on tariff components including the taxes & duties subsumed in view of the order dated 14.3.2018 in Petition No. 13/SM/2017, which were allowed by the Commission for compensation under Change

in Law in Petition No. 327/MP/2018 and for the components, if any, allowed in the future in any other orders. Paragraph 4 of the Reconciliation Agreement records that based on the agreed calculation methodology and consequent reconciliation, the Petitioner and TANGEDCO have agreed upon the Change in Law compensation payable by the latter, and the paragraph also provides the detailed of the amount payable by TANGEDCO as worked out after the reconciliation, which again relates to the Change in Law compensation for the period from December 2015 to September 2020. Paragraph 5 further records that if a tariff is revised due to the CERC escalation index notification dated 8.12.2017, which is pending before the Hon`ble High Court of Delhi in WP(C) No. 5785/2028, then the escalation deduction will be revised subject to the payment of energy charges as per the tariff revision. Paragraph 6 records that the calculations are provisional, whereas paragraph 7 indicates the schedule of disbursement of the total amount of Rs. 119.19 crores in two instalments from PFC/REC loans under process and to be released in two tranches.

41. Having regard to the Reconciliation Agreement in its entirety, it is clear to us that the said Agreement only relates to the Change in Law compensation claims for the period from December 2015 to September 2020 and not beyond. The entire exercise of the reconciliation, as well as the methodology agreed upon by the parties in paragraph 3 of the said Agreement, are only in the context of the Change in Law claims submitted by the Petitioner for the aforesaid period and cannot in any way extend to the claims beyond the aforesaid period as covered under the Agreement. The contention of the Respondent that by way of the said Agreement, the Parties have agreed to the calculation methodology *dehors* the compensation period is, in our view, based on the skewed and selective reading of paragraph 3 of the Agreement, which

cannot be accepted. It is well settled that every contract is to be considered with reference to its object and the whole of its terms, and accordingly, the whole context must be considered in endeavouring to collect the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated clause. Even ascribing the widest meaning to the wordings *"…. for the components if any allowed in future in any other orders.*" as appearing at the end of paragraph 3, the compensation period for components cannot be anything but December 2015 to September 2020 for which the entire exercise of reconciliation and the calculation methodology was agreed upon. Nowhere from the plain reading of the Reconciliation Agreement, it appears to us that the Parties had agreed upon the calculation methodology for the claims relating to the period beyond September 2020.

42. In view of the above, the contention of TANGEDCO that the calculation methodology as agreed between the Parties in the Reconciliation Agreement extends beyond the period of September 2020 cannot sustain, and consequently, the deductions made by TANGEDCO from the Petitioner's Change in Law compensation claims for the period beyond September 2020, on the pretext of the calculation methodology as agreed to in the Reconciliation Agreement, also cannot sustain and it is liable to refund such deductions along with interest at applicable Late Payment Surcharge as prescribed in the PPA and/or in the LPSC Rules, within a period of sixty days from the date of this order. At this juncture, we may also address another objection raised by TANGEDCO to the effect that no relief beyond pleadings can be granted. TANGEDCO has sought to point out that in the Petition, the Petitioner, on this count, has only prayed for a refund for the period from October 2020 to March 2022, and only by way of IA No. 57/2023, the Petitioner sought to broaden the scope of

dispute beyond the period of March 2022 under the guise of subsequent developments without any amendment to the prayers made in the Petition. We are, however, not impressed by the aforesaid argument(s) of the TANGEDCO. Having held that the calculation methodology as agreed to therein only applies in respect of Change in Law compensation claims for the period December 2015 to September 2020 and consequently, the deduction made by TANGEDCO for the period beyond September 2020 is not in accordance with the Reconciliation Agreement and the Undertaking, all the resultant consequences must follow.

43. This issue is answered accordingly.

44. Petition No. 338/MP/2022 is disposed of in terms of the above.

| | | |
|---|---|---|
| **Sd/-** | **sd/-** | **sd/-** |
| **(Harish Dudani)** | **(Ramesh Babu V.)** | **(Jishnu Barua)** |
| **Member** | **Member** | **Chairperson** |