ENERGY WATCHDOG

v.

CENTRAL ELECTRICITY REGULATORY COMMISSION AND ORS. ETC.

(Civil Appeal Nos. 5399-5400 of 2016)

APRIL 11, 2017

[PINAKI CHANDRA GHOSE AND R. F. NARIMAN, JJ.]

Electricity Act, 2003 – ss. 63, 79 – Determination of tariff by bidding process – Supply of power from power project – Power Purchase Agreement (PPA) between State Government Utilities and power generating companies – State Commission adopted tariff u/s. 63 for supply of power to State Government Utilities – However, few years later, change in Indonesian law which increased the export price of coal from Indonesia to international market – Petition by power generating companies before Central Electricity Regulatory Commission seeking relief due to change in Indonesian law – Commission held that the claim of power generating companies on the grounds of force majeure and/or change in law not admissible, however, in exercise of regulatory power u/s. 79 granted compensatory tariff – Tribunal set aside the order of the Commission – On appeal, held: PPA makes it clear that changes in the cost of fuel, or the agreement becoming onerous to perform, are not treated as force majeure events under the PPA itself – As such force majeure would not apply so as to enable the grant of compensatory tariff – PPAs does not state that coal is to be procured only from Indonesia at a particular price – Price payable for the supply of coal is entirely for the person who sets up the power plant to bear – Unexpected rise in the price of coal would not absolve the generating companies from performing their part of the contract since this was a risk they knowingly took – Also, expression 'any law' in Cl.13 of PPA refers to law of India – In view thereof, though change in Indonesian law would not qualify as a change in law under the guidelines read with the PPA, change in Indian law certainly would – CERC to go into the matter afresh and determine the relief to be granted to those power generators who fall within Cl.13 of the PPA.

s. 79 – Regulatory powers of Central Commission u/s. 79(1)(b)

A *– Interpretation of – Held: General regulatory power of the Commission u/s. 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff – In a situation where the guidelines issued by the Central Government u/s. 63 cover the situation, the Central Commission is bound by those guidelines* B *and must exercise its regulatory functions, only in accordance with those guidelines – It is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers u/s. 79(1)(b) can then be used.*

C *Power Purchase Agreement – Clause of force majeure – Application of.*

Disposing of the appeals, the Court

HELD: 1. The regulatory powers of the Central Commission, so far as tariff is concerned, are specifically D **mentioned in Section 79(1) of the Electricity Act, 2003. This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions *de hors* its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation** E **where there are no guidelines or in a situation which is not covered by the guidelines, the Commission's power to "regulate" tariff is completely done away with, is not a correct way of reading the said statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a** F **concomitant of that rule, it is also clear that all the discordant notes struck by the various Sections must be harmonized. Considering the fact that the non-obstante clause advisedly restricts itself to Section 62, there is no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take** G **place in one of two ways-either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act, (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already** H **determined by a transparent process of bidding. In either case,**

the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff. Whereas "determining" tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to "regulate" tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. It is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used. [Para 19][180-E-II; 181-A-D]

2.1 The scheme that emerges from Sections 25 and 30 is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It would be seen that Section 79(1) itself in sub-sections (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression "within the State" in sub-clauses (a), (b), and (d), and "intra-state" in sub-clause (c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, would either have to be governed by the State Commission or the Central Commission. The State Commission's jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. If the submission of the appellant is accepted and it is held in the AD's case that there is no composite scheme for generation and sale, it would be clear that neither Commission would have jurisdiction, something which would lead

A to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, it is observed that the expression "composite scheme" does not mean anything more than a scheme for generation and sale of electricity in more than one State. The dictionary definitions lead to the conclusion that the expression B "composite" only means "consisting of at least two elements". In the context of the instant case, generation and sale being in more than one State, this could be referred to as "composite". Even otherwise, the expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a C "composite scheme". This makes it clear that the expression "composite scheme" does not have some special meaning-it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State. [Paras 22-25][182-F-G; 183-A-C]

D *Dictionary of Scientific and Technical Terms by Mc-Graw-Hill* 6th Edn; *Advanced Law Lexicon* by *P. Ramanatha Aiyar* 3rd Edn – referred to.

2.2 The tariff policy dated 6th June, 2006 is the statutory policy which is enunciated under Section 3 of the Electricity Act. E The amendment of 28th January, 2016 throws considerable light on the expression "composite scheme". The definition of composite scheme in the Tariff Policy is an important aid to the construction of Section 79(1)(b) which cannot be doubted and, correctly brings out the meaning of this expression as meaning nothing more than a scheme by a generating company for F generation and sale of electricity in more than one State. Section 64(5) begins with a non-obstante clause which would indicate that in all cases involving inter-State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. Section 64(5) can only apply if, the jurisdiction otherwise being G with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. Therefore, the Central Commission had the necessary jurisdiction to embark upon the issues raised in the instant cases. [Paras 26,27][184-A-

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B, E-F, G-H; 185-A] A

3.1 In so far as a force majeure event occurs *de hors* the contract, it is dealt with by a rule of positive law under Section 56 of the Contract Act, 1872. The doctrine of frustration cannot apply to these cases as the fundamental basis of the PPAs remains unaltered. Nowhere do the PPAs state that coal is to be procured B only from Indonesia at a particular price. In fact, it is clear on a reading of the PPA as a whole that the price payable for the supply of coal is entirely for the person who sets up the power plant to bear. The fact that the fuel supply agreement has to be appended to the PPA is only to indicate that the raw material for the working of the plant is there and is in order. It is clear that an unexpected C rise in the price of coal will not absolve the generating companies from performing their part of the contract for the very good reason that when they submitted their bids, this was a risk they knowingly took. The mere fact that the bid may be non-escalable does not mean that the respondents are precluded from raising the plea of D frustration, if otherwise it is available in law and can be pleaded by them. But the fact that a non-escalable tariff has been paid for, for example, in the AD's case, is a factor which may be taken into account only to show that the risk of supplying electricity at the tariff indicated was upon the generating company. [Paras 32, 40][187-H;191-D-F] E

'*Chitty on* Contracts' 31st Edn., para 14-151; '*Treitel on Frustration and Force Majeure*' 3rd edn., para 12-034, 15-158 – referred to.

3.2 Given the fact that the PPA must be read as a whole, F and that clauses 12.3 and 12.7(a) are a part of the same scheme of force majeure under the contract, it is clear that the expression "hindered" in clause 12.7(a) really goes with the expression "partly prevents" in clause 12.3. Force majeure clauses are to be narrowly construed, and obviously the expression "prevents" in clause 12.3 is spoken of also in clause 12.7(a). When "prevent" G is preceded by the expression "wholly or partly", it is reasonable to assume that the expression "prevented" in clause 12.7(a) goes with the expression "wholly" in clause 12.3 and the expression "hindered" in clause 12.7(a) goes with the expression "partly". This being so, it is clear that there must be something which H

A **partly prevents the performance of the obligation under the agreement. Clause 12.04 of PPA makes it clear that changes in the cost of fuel, or the agreement becoming onerous to perform, are not treated as force majeure events under the PPA itself. Thus, neither was the fundamental basis of the contract dislodged nor was any frustrating event, except for a rise in the price of coal, excluded by clause 12.4. Alternative modes of performance were available, albeit at a higher price. This does not lead to the contract, as a whole, being frustrated. Consequently, neither clause 12.3 nor 12.7, referable to Section 32 of the Contract Act, would apply so as to enable the grant of compensatory tariff to the respondents. Having once held that clause 12.4 applies as a result of which rise in the price of fuel cannot be regarded as a force majeure event contractually, it is difficult to appreciate a submission that in the alternative Section 56 would apply. [Paras 43-45][196-E-H; 198-F-H; 199-A-C]**

Satyabrata Ghose v. Mugneeram Banger & Co. **[1954] SCR 310;** *M/s Alopi Parshad & Sons Ltd. v. Union of India* **[1960] 2 SCR 793;** *Naihati Jute Mills Ltd. v. Hyaliram Jagannath* **[1968] 1 SCR 821 – referred to.**

Taylor v. Caldwell **(1861-73) All ER Rep 24;** *Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH* **1961 (2) All ER 179;** *Sea Angel case* **2013 (1) Lloyds Law Report 569;** *Tenants (Lancashire) Ltd. v. G.S. Wilson and Co. Ltd.* **1917 Appeal Cases 495;** *Peter Dixon & Sons Ltd. v. Henderson, Craig & Co. Ltd.* **1919 (2) KB 778 – referred to.**

4.1 Both the guidelines and the model PPA, of which clause 13 is a part, have been drafted by the Central Government itself. It is, therefore, clear that the PPA only fleshes out what is mentioned in clause 4.7 of the guidelines, and goes on to explain what the expression "any change in law" means. This being the case, it is clear that the definition of "law" speaks of all laws including electricity laws in force in India. Electricity laws, as has been seen from the definition, means the Electricity Act, Rules and Regulations made thereunder from time to time, and any other law pertaining to electricity. This being so, it is clear that the expression "in force in India" in the definition of 'law' goes

with "all laws". This is for the reason that otherwise the said expression would become tautologous, as electricity laws that are in force in India are already referred to in the definition of "electricity laws" as contained in the PPA. Once this is clear, at least textually it is clear that "all laws" would have to be read with "in force in India" and would, therefore, refer only to Indian laws. Even otherwise, from a reading of clause 13, it is clear that clause 13.1.1 is in four different parts. The first part speaks of enacted laws; the second speaks of interpretation of such laws by Courts or other instrumentalities; the third speaks of changes in consents, approvals or licences which result in change in cost of the business of selling electricity; and the fourth refers to any change in the declared law of the land for the project, cost of implementation of re-settlement and rehabilitation or cost of implementing the environmental management plan. 'Competent Court' in clause 13.1.2 is defined as meaning only the judicial system of India. [Para 48][206-G-H; 207-A-D]

4.2 The expression "any law" occurs in both sub-section (1) and sub-section (2) of clause 13.1.1, which expression must be given the same meaning in both sub-sections. This being the case, as in sub-clause (2), this expression would refer only to Indian law, the same meaning will have to be given to the very same expression in sub-clause (1). Even otherwise, sub-clauses (1) and (2) form part of the same contractual scheme in that sub-clause (1) refers to the enactment of laws, whereas sub-clause (2) relates to interpretation of those very laws by a competent Court of law/Tribunal or Indian Government instrumentality. 'Competent Court', speaks only of the Indian judicial system and, therefore, the enactments spoken of in sub-clause (1) would necessarily refer only to Indian enactments. It is clear that if otherwise the expression "any law" in clause 13 when read with the definition of "law" and "Electricity Laws" leads unequivocally to the conclusion that it refers only to the law of India, it would be unsafe to rely upon the other clauses of the agreement where Indian law is specifically mentioned to negate this conclusion. [Paras 49, 51][207-E-G; 208-C]

4.3 The submission that a commercial contract is to be interpreted in a manner which gives business efficacy to such

A. contract, that the subject matter of the PPA being "imported coal", obviously the expression "any law" would refer to laws governing coal that is imported from other countries, cannot be accepted. There are many PPAs entered into with different generators. Some generators may source fuel only from India. Others, as is the case in the AD's matter, would source fuel to the extent of 70% from India and 30% from abroad, whereas other generators, as in the case of GA and the CS case, would source coal wholly from abroad. The meaning of the expression "change in law" in clause 13 cannot depend upon whether coal is sourced in a particular PPA from outside India or within India. The meaning would have to remain the same whether coal is sourced wholly in India, partly in India and partly from outside, or wholly from outside. The proposition that if performance of a contract is to be done in a foreign country, what would be relevant would be foreign law, this would be true as a general statement of law, but for the reason given, would not apply to the PPAs in the instant case. [Para 52][208-D-G]

4.4 It would be seen that under clause 13.1.1 if there is a change in any consent, approval or licence available or obtained for the project, otherwise than for the default of the seller, which results in any change in any cost of the business of selling electricity, then the said seller will be governed under clause 13.1.1. It is clear from a reading of the Resolution dated 21st June, 2013, which resulted in the letter of 31st July, 2013, issued by the Ministry of Power, that the earlier coal distribution policy contained in the letter dated 18th March, 2007 stands modified as the Government has now approved a revised arrangement for supply of coal. It has been decided that, seeing the overall domestic availability and the likely requirement of power projects, the power projects would only be entitled to a certain percentage of what was earlier allowable. [Para 53][208-H; 209-A-C]

4.5 Both the letter dated 31.07.2013 and the revised tariff policy are statutory documents being issued u/s. 3 and have the force of law. This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in clause 13.2 that while

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determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred. Further, for the operation period of the PPA, compensation for any increase/decrease in cost to the seller shall be determined and be effective from such date as decided by the CERC. Though change in Indonesian law would not qualify as a change in law under the guidelines read with the PPA, change in Indian law certainly would. The tribunal's judgment and the Commission's orders following the said judgment are set aside. CERC would go into the matter afresh and determine what relief should be granted to those power generators who fall within Cl. 13 of the PPA. [Paras 53, 54][212-B-D, G-H]

CCE v. National Tobacco Co. of India Ltd. **(1972) 2 SCC 560 : [1973] 1 SCR 822 – referred to.**

Case Law Reference

[1954] SCR 310	**referred to**	**Para 34**
[1960] 2 SCR 793	**referred to**	**Para 35**
[1968] 1 SCR 821	**referred to**	**Para 36**
[1973] 1 SCR 822	**referred to**	**Para 51**

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 5399-5400 of 2016.

From the Judgment and Order dated 07.04.2016 of the Appellate Tribunal for Electricity (APTEL) at New Delhi in Appeal No. 124 of 2014 and Appeal No. 125 of 2014

WITH

C. A. No. 9035 of 2014

C. A. Nos. 5347, 5348, 5364, 5346, 5351-5352, 5415 and 9635-9642 of 2016.

Mukul Rohtagi, Attorney General, Ranjit Kumar, Solicitor General, P. S. Narsimha, Tushar Mehta, ASGs, H. N. Salve, Dr. A.M. Singhvi, Vikram Nankani, Kapil Sibal, C. S. Vaidyanathan, Amit Sibal, Sr. Advs., Mahesh Agarwal, Saurabh Kirpal, Nakul Diwan, Ms. Neeha Nagpal, Ms. Poonam Verma, Ms. A. Zaidi, Ms. Aanchal Basul, Ms. Malay Deliwala, Aviskar Singhvi, Aditya Shankar, E.C. Agrawala,

A M.G. Ramachandran, K. V. Mohan, Ms. Ranjitha Ramachandran, Ms. Poorva Saigal, Ms. Anushree Bardhan, Shubham Arya, Nikhil Nayyar, N. Sai Vinod, Ms. Smriti Shah, Divyanshu Rai, Anand Ganesan, Nikunj Dayal, Pramod Dayal, Ms. Payal Dayal, Ms. Swapna Seshadri, Sanjai Kr. Pathak, R. Parameswaran, Dr. Nilesh Sharma, G. S. Makker, B G. Umapathy, Rakesh K. Sharma, Aditya Singh, M. A. Venkata Subramanian, Ms. Hemantika Wahi, Ms. Jesal Wahi, Amit Kapur, Ms. Apoorva Mishra, Kunal Kaul, V. Mukherjee, Rohit Venkat, Pukhrambam Ramesh Kumar, Abhishek Munot, Uday Manaktala, Ms. Raveena Dhamija, Ms. Ruby Singh Ahuja, Vishal Gehrana, Anupam Prakash, Harsh Trivedi, Mrs. Manik Karanjawala, (For M/s. Karanjawala C & Co.), Udit Gupta, Anup Jain, K. Parameshwar, Abhishek Baid, Sumit Kumar, Rajiv Srivastava, Ms. Garima Srivastava, Ms. Gargi Srivastava, Rajesh Pathak, Saurabh Mishra, Dhan Raj, Abhishek Singh, Raj Kumar Mehta, Elangbam Premjit Singh, Ms. Himanshi Andley, Ms. Udita Singh, Rahul Dhawan, Abhijeet Rastogi, Pradeep Misra, Alok Shankar, Vikas D Upadhyay, Anup Jain, Prashant Bhushan, Pranav Sachdeva, Ms. Neha Rathi, Sidharth Sethi, Chandra Prakash, Kumar Mihir, Tushar Bakshi, Guntur Prabhakar, Ms. Prerna Singh, Mrs. D. Bharathi Reddy, Ms. Vidyottama, Advs., with them for the appearing parties.

The Judgment of the Court was delivered by

E **R. F. NARIMAN, J.** 1. The present appeals arise from a judgment of the Appellate Tribunal for Electricity dated 7th April, 2016. The facts necessary to appreciate the issues which arise in the present case, which will cover all the cases before us, will be taken only from Civil Appeal No.5348 of 2016, namely Prayas (Energy) Group vs. Central Electricity Regulatory Commission.

F 2. Section 63 of the Electricity Act, 2003 provides for procurement of power and determination of tariff by a transparent competitive bidding process. Once this is done, the appropriate Commission is to "adopt" the tariff which is accepted in the competitive bid subject to guidelines that are made by the Central Government. On 19th January, 2005, the G Central Government issued detailed guidelines under this provision, which were amended from time to time. On 1st February, 2006, Gujarat Urja Vikas Nigam Limited (GUVNL) issued a public notice inviting proposals for supply of power on long term basis under three different competitive bid processes. The participating bidders were to decide on the tariff and quote such tariff after competing against each other. The bidders were H entitled to quote escalable or non-escalable tariff or partly escalable and

partly non-escalable tariff, as was considered appropriate by them to cover their respective risks so as to obtain whatever returns are available to them. The best levelised tariff as per certain pre-disclosed criteria was to be followed in order to arrive at the lowest tender. A

3. Haryana Utilities also initiated a separate competitive bidding process for purchase of 2000 MW on a long term basis. This was done on 25th May, 2006. The participating bidders were also entitled to quote bids on the lines of the GUVNL public notice. Both the Gujarat Electricity Regulatory Commission and the Haryana State Regulatory Commission approved the bid documents and the process proposed by GUVNL and the Haryana Utilities, after which Requests for Proposal were issued by both of them. On 2nd/4th January, 2007, Adani Enterprises Consortium submitted its bid for generation and supply of 1000 MW to GUVNL, quoting a levelised tariff of Rs.2.3495/kWh (Rs.1/kWh as the capacity charge and Rs.1.3495/kWh as non-escalable energy charge). In the bid, the Consortium indicated that the lead member, Adani Enterprises, had an arrangement for indigenous coal requirement of the project with Gujarat Mineral Development Corporation, as the said Corporation had been allotted a certain coal block in the State of Chhattisgarh. Also, a Memorandum of Understanding was entered into between Adani Enterprises Ltd. and a German Company for supply of non-coking coal of 3 to 5 million tons (imported coal) on a long term basis till the year 2032. A similar Memorandum of Understanding was also entered into between Adani Enterprises and a Japanese agent for supply of 3 to 5 million tons of coal again on a long term basis. The two Memoranda of Understanding were attached to the bid submitted by Adani Enterprises. B C D E

4. On 11th January, 2007, the Adani Enterprises Consortium was selected by GUVNL as the successful bidder for supply of 1000 MW of power and a Letter of Intent was issued in its favour. On 2nd February, 2007, a Power Purchase Agreement was entered into between GUVNL and Adani Power and this was for supply of power from a power project being set up at Korba in Chhattisgarh. This was changed to a Mundra Project in Gujarat. On 18th April, 2007, a supplementary PPA was signed to this effect. F G

5. As far as Haryana is concerned, Adani Power submitted their bid for supply of 1425 MW of power to Haryana Utilities on 24th November, 2007. This was at a levelised tariff of Rs.2.94/kWh from the Mundra Power Project. The energy charges quoted were H

non-escalable. Adani Power was declared as the successful bidder in Haryana for supply of 1424 MW contracted capacity on 17th July, 2008 and a Letter of Intent was issued. Two separate PPAs were executed by Adani Power with two Haryana entities for supply of 712 MW of power to each of them from the Mundra Power Project. The Haryana State Commission adopted the tariff under Section 63 of the Electricity Act on 31st July, 2008 (The Gujarat State Commission had adopted the tariff under Section 63 for supply of power to GUVNL on 20th December, 2007). An important part of the case on behalf of the respondents is that a change in law in Indonesia took place in 2010 and 2011, which aligned the export price of coal from Indonesia to international market prices instead of the price that was prevalent for the last 40 years.This being the case, in both the cases, Adani Power filed a petition before the Central Electricity Regulatory Commission being Petition No.155 of 2012 on 5th July, 2012 under Section 79 of the Electricity Act seeking relief on the score of the impact of the Indonesian Regulation to either discharge them from the performance of the PPA on account of frustration, or to evolve a mechanism to restore the petitioners to the same economic condition prior to occurrence of the change in law.

6. On 16th October, 2012, the Central Commission held that the Power Purchase Agreements entered into by Adani in both the cases constituted a composite scheme for generation and sale of electricity as envisaged under Section 79(1)(b) of the Electricity Act. This being so, it held that it was the appropriate Commission under the Act and not the respective State Commissions, which had jurisdiction in the matter. A review petition against this order was dismissed on 16th January, 2013.

7. On 2nd April, 2013, the Central Commission passed an order, whereby the claim of Adani Power on the grounds of force majeure and/or change in law was held not to be admissible. However, the Commission held that in exercise of the regulatory powers provided under Section 79 of the Act, the Central Commission can provide redressal of grievances to generating companies, considering the larger public interest, and hence constituted a committee to look into the alleged difficulties faced by Adani and to find an acceptable solution thereto.

8. On 16th August, 2013, pursuant to the order dated 2nd April, 2013, the Committee constituted by the Commission submitted a report. Based on the Committee's report, on 21st February, 2014, the Central Commission proceeded to grant compensatory tariff. Appeals and

cross-appeals were filed against this order, including cross objections. On 1st August, 2014, cross-objection filed by Adani Power was rejected by the Appellate Tribunal as not maintainable. On 31st October, 2014, the Appellate Tribunal rejected the prayer for condonation of delay and consequently Appeal No. 10016 of 2014 was filed by Adani Power. Against this order, Adani Power filed an appeal before the Supreme Court, and this Court, in its order dated 31st March, 2015 held :

> "the Appellant (Adani Power) is entitled to argue any proposition of law, be it "force majeure" or "change in law" in support of the order dated 21.2.2014 quantifying the compensatory tariff, the correctness of which is under challenge before the Appellate Tribunal in Appeal No.98 of 2014 and Appeal No.116 of 2014 preferred by the respondents, so long as such argument is based on the facts which are already pleaded before the Central Commission."

9. Finally, the Appellate Tribunal on 7th April, 2016, passed the impugned judgment in all the aforesaid cases before us. The Tribunal held, agreeing with the Commission, that generation and sale of power by Adani Power to GUVNL and Haryana Utilities was a composite scheme within the meaning of Section 79(1) (b) of the Act and that, therefore, the Central Commission would have jurisdiction to proceed further in the matter. The Appellate Tribunal considered the Supreme Court order dated 31st March, 2015 and felt that the argument of force majeure and change in law could be gone into by it. It ultimately concluded, having regard to the law on frustration contained in the Indian Contract Act, 1872 and the relevant provisions of the PPAs, that force majeure was made out on the facts of these cases and reversed the Commission on this score. It also reversed the Commission on exercise of regulatory powers under Section 79, stating that these powers could not be exercised once there was a PPA entered into under Section 63 of the Act. It also held that change in law provisions do not apply to foreign law and, therefore, changes in Indonesian law did not come within the scope of the provisions. Insofar as changes in Indian law were concerned, it held that the Government Policies that were relied upon, do not constitute 'law'. Accordingly, the matter was remanded to the Commission to find out the impact of the force majeure event to grant compensatory tariff. The Commission by its order dated 6.12.2016 has arrived at a certain determination as to compensatory tariff to be granted

A on account of force majeure.

10. We have heard learned counsel for the parties. On behalf of the appellants Senior Counsel Shri Ramachandran, and Shri Prashant Bhushan have argued that the liberty given to Adani Power by the order dated 31st March, 2015 of this Court was only limited to support the B quantification of compensatory tariff granted by the Central Commission by its order dated 21st February, 2014. Hence, Adani Power is not entitled to raise the issue of force majeure and change in law as a substantive issue, the force majeure claim and the change in law claim having been rejected by the Central Commission in its earlier order; and there being no valid appeal against the said order, force majeure and change in law C cannot be gone into. It is further argued, in the alternative, that in any case, force majeure either under Section 56 of the Indian Contract Act, 1872 or under clauses 12.3 and 7 of the respective PPAs make it clear that it must be an unforeseen event or circumstance that wholly or partly prevents the affected party in the performance of its obligations under D the agreement. According to learned counsel, Adani voluntarily decided to quote energy charges as non-escalable in order to be competitive and, therefore, get the award of the contract. It cannot now, in the guise of being affected by force majeure, convert this into an escalable tariff. They have further argued that the bid given by Adani Enterprises was not premised on the import of coal from Indonesia only and this being E the case it was open to them to get coal from any source. The price of coal is the price of raw material and if prices go up, a contract does not get frustrated merely because it becomes commercially onerous, as the PPA itself states in clause 12.4. In any event, the fundamental basis of the PPAs between the parties was not premised on the price of coal F imported from Indonesia.

11. On a true construction of the Act, learned counsel argued in support of the Tribunal judgment that Section 63 of the Electricity Act is a standalone provision and is notwithstanding anything contained in Section 62. It is obvious that under Section 62 read with Section 61 and G 64, the Commission has to "determine" tariff under the Act having regard to various factors, whereas under Section 63 of the Act, the Commission does not "determine" but only "adopts" tariff obtained through a transparent process of competitive bidding. This being the case, it is clear that there is no residuary source of power contained in the Commission either in Section 79 or otherwise to fix compensatory tariffs

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once the tariff is adopted under Section 63. If at all, such tariff can be modified only in accordance with the guidelines issued by the Central Government and not otherwise. They also argued that the Central Commission itself has no jurisdiction in view of the fact that on facts there is no composite scheme for the reason that the generation and sale of electricity from the power project of Adani, under independent PPAs to Gujarat and Haryana Utilities, with different tariffs, and from different generating units selected under different competitive bidding processes, would show that there is no one composite scheme containing uniform tariffs. This being the case, the State Commissions alone would have jurisdiction. It was further argued that there is no change in law, either for the very good reason stated by the Commission, viz. that change in law applies to Indian and not Indonesian law, and further, a change in the tariff policy in India will also not constitute change in law. They, therefore, supported the Tribunal judgment on this aspect.

12. Learned Senior counsel Shri Kapil Sibal, Shri Harish Salve, Dr. Abhishek Manu Singhvi, and Shri C.S. Vaidyanathan, on behalf of the respondents, on the other hand, countered each one of these submissions. According to learned counsel, first and foremost the Central Commission alone would have jurisdiction on the facts of these cases, inasmuch as Sections 79 and 86 form part of one scheme. It was argued by them that all cases fall within either Section 79 or Section 86. It is clear that under Section 86, the State Commissions have only to deal with generation and sale of electricity within the State. When generation and sale takes place outside the State, as is the case here, the State Commission would have no jurisdiction under Section 86, and consequently Section 79(1)(b) has to be read as part of a scheme in which the moment generation and sale of electricity is inter-State and not intra State, the Central Commission alone would have jurisdiction. Judged in this light, the expression "composite scheme" would only mean that generation and sale of electricity would be in more than one State. For this they also relied on the definition of "composite scheme" in the 2016 Central Government Policy.

13. They further argued that the scheme of the Act shows that neither 61 nor Section 79 are done away with when Section 63 applies. Section 63 does not use the expression "notwithstanding anything contained in this Act". It is clear, therefore, that all these Sections have to be harmoniously construed. Section 79 is without a doubt a repository

A of power to fix tariffs and/or modify fixation even when Section 63 applies. Indeed, Shri Sibal argued that if there were no guidelines or if a matter arose de hors the guidelines, then obviously there cannot be a gap in the law which remains unfilled. The residuary power of the Commission necessarily comes in under Section 79. In any event, they also argued that the guidelines, as amended, that are issued by the Central B Government under Section 63 clearly take care of the present situation in that any change in law that occurs and any dispute which relates to tariffs can both be resolved before the Central Commission.

14. They also countered the submissions on force majeure by stating that the fundamental basis of the contract was the fuel supply C agreement that was to be entered into, and pointed out various clauses in the PPAs to show that the fuel supply agreement and imported coal were both very important elements, both in the bid and the PPAs. Non-escalable tariffs do not lead to the conclusion that if a source of coal becomes unavailable in a manner that completely undermines the basis D of the bid, the tariff cannot be adjusted. If otherwise they fall within the change in law provision and/or force majeure provision, the mere fact that a non-escalable tariff has been quoted would make no difference. A large part of the argument was centered around the meaning of the expression "frustration" in the Contract Act and the correct construction of clause 12 of the PPA. A large number of authorities, both English and E Indian, were cited to show that the contract had become commercially impracticable, and that they would have to fold up operations, which would not be in public interest as the consumers would then have to obtain electricity at rates much higher than were quoted by them. According to them, a force majeure event in Clause 12 takes place the F moment performance is "hindered" and there can be no doubt that an astronomical rise in prices of Indonesian coal, thanks to a change in law, has certainly hindered performance. They also argued that in any event the change in law clause is very wide and since the PPA deals with imported coal, obviously change in law would cover foreign law. They also went on to add that when the PPA wanted to restrict a particular G clause to Indian law, it did so expressly. They also stated that it is significant that neither GUVNL nor Haryana Utilities had filed appeals in the present case, and the Government had in several policy decisions and statements made it clear that in cases like the present, where there is grave unforeseen hardship on account of non-allocation of Indian coal, the rise

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in cost should be adequately compensated. They, therefore, questioned the locus standi of the consumer groups, who are the only appellants before us, stating that on the estimation made by the respondents, the impact of increase in both cases on tariff would be extremely minimal as opposed to the huge accumulated losses suffered by these entities which would make them fold up. Ultimately, it was argued that even the Central Commission did not give them the entire benefit of rise in price in coal, and consequently in the final analysis the relief granted on the ground of force majeure by the Central Commission should not be disturbed, and relief on the ground of change in law should, in addition, have been given to them.

15. The learned Attorney General appearing on behalf of the Union of India, submitted before us that he was not interested in the ultimate outcome of the appeals before us. He was only appearing in order to apprise us that the electricity sector, having been privatized, has largely fulfilled the object sought to be achieved by the 2003 Act, which is that electricity generation, being delicenced, should result in production of far greater electricity than was earlier produced. He urged us not to disturb the delicate balance sought to achieved by the Act i.e. that producers or generators of electricity, in order that they set up power plants, be entitled to a reasonable margin of profit and a reasonable return on their capital, so that they are induced to set up more and more power plants. This must be consistent with competitiveness among them, which then translates itself into reasonable tariffs that are payable by consumers of electricity. For this purpose, he relied strongly upon Section 3 of the Electricity Act, which states that the Central Government, shall from time to time, prepare a National Electricity Policy and a tariff policy in consultation with the State Governments, and the authority for development of the power system, based on optimal utilization of natural resources. According to him, the National Electricity Policy and tariff policy that are issued from time to time, being statutory in nature, are binding on all concerned. This is, in fact, further recognized by Section 61(i) by which the appropriate Commission, in specifying terms and conditions for determination of tariffs, shall be guided by the National Electricity Policy and tariff policy. The Central Government's role can further be seen even in Section 63, where guidelines that are binding on all are issued by the Central Government in cases where there is a transparent process of bidding. Further, according to him, Section 79(4)

A also points in the same direction, stating that, in discharge of its functions, the Central Commission shall be guided by the National Electricity Policy, National Electricity Plan, and tariff policy published under Section 3. He also referred us to the Cabinet Committee for Economic Affairs recognizing the overall shortfall in manufacture of domestic coal and the new coal distribution policy issued in July, 2013 pursuant to the Cabinet B Committee which, according to him, are in the nature of binding directions making it clear that as generators of electricity, who depend upon indigenous coal, have been given less coal than was anticipated, should be allowed either to import the coal themselves, or purchase imported coal from Coal India Ltd., with the difference in price being passed C through to them. He further referred to and relied upon the revised tariff policy of 28th January, 2016 for the same purpose.

Relevant provisions of the Electricity Act, 2003

16. The 2003 Act did away with three earlier statutes in which a completely different regime for generating and supply of electricity was D provided for, namely, the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1928 and the Electricity Regulatory Commissions Act, 1998. The Statement of Objects of Reasons for this Act reads as follows:

> "The Electricity Supply Industry in India is presently governed by three enactments namely, the Indian Electricity Act, 1910, the E Electricity (Supply) Act, 1948, the Electricity Regulatory Commissions Act, 1998.
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> 1.1 The Indian Electricity Act, 1910 created the basic framework for electric supply industry in India which was then in its infancy. The Act envisaged growth of the electricity industry through F private licensees. Accordingly, it provided for licensees who could supply electricity in a specified area. It created the legal framework for laying down of wires and other works relating to the supply of electricity.
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> 1.2 The Electricity (Supply) Act, 1948 mandated the creation of a G State Electricity Board. The State Electricity Board has the responsibility of arranging the supply of electricity in the State. It was felt that electrification which was limited to cities needed to be extended rapidly and the State should step in to shoulder this responsibility through the State Electricity Boards. Accordingly the State Electricity Boards through the successive H

Five Year Plans undertook rapid growth expansion by utilizing Plan funds.

1.3 Over a period of time, however, the performance of SEBs has deteriorated substantially on account of various factors. For instance, though power to fix tariffs vests with the State Electricity Boards, they have generally been unable to take decisions on tariffs in a professional and independent manner and tariff determination in practice has been done by the State Governments. Cross-subsidies have reached unsustainable levels. To address this issue and to provide for distancing of government from determination of tariffs, the Electricity Regulatory Commissions Act, was enacted in 1998. It created the Central Electricity Regulatory Commission and has an enabling provision through which the State Governments can create a State Electricity Regulatory Commission. 16 States have so far notified/created State Electricity Regulatory Commissions either under the Central Act or under their own Reform Acts.

2. Starting with Orissa, some State Governments have been undertaking reforms through their own Reform Acts. These reforms have involved unbundling of the State Electricity Boards into separate Generation, Transmission and Distribution Companies through transfer schemes for the transfer of the assets and staff into successor Companies. Orissa, Haryana, Andhra Pradesh, Karnataka, Rajasthan and Uttar Pradesh have passed their Reform Acts and unbundled their State Electricity Boards into separate companies. Delhi and Madhya Pradesh have also enacted their Reforms Acts which, *inter alia*, envisage unbundling/ corporatisation of SEBs.

3. With the policy of encouraging private sector participation in generation, transmission and distribution and the objective of distancing the regulatory responsibilities from the Government to the Regulatory Commissions, the need for harmonizing and rationalizing the provisions in the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998 in a new self-contained comprehensive legislation arose. Accordingly, it became necessary to enact a new legislation for regulating the electricity supply industry in the

country which would replace the existing laws, preserve its core features other than those relating to the mandatory existence of the State Electricity Board and the responsibilities of the State Government and the State Electricity Board with respect to regulating licensees. There is also need to provide for newer concepts like power trading and open access. There is also need to obviate the requirement of each State Government to pass its own Reforms Act. The Bill has progressive features and endeavours to strike the right balance given the current realities of the power sector in India. It gives the State enough flexibility to develop their power sector in the manner they consider appropriate. The Electricity Bill, 2001 has been finalized after extensive discussions and consultations with the States and all other stake holders and experts.

4. The main features of the Bill are as follows:-

(i) Generation is being delicensed and captive generation is being freely permitted. Hydro projects would, however, need approval of the State Government and clearance from the Central Electricity Authority which would go into the issues of dam safety and optimal utilization of water resources.

(ii) There would be a Transmission Utility at the Central as well as State level, which would be a Government company and have the responsibility of ensuring that the transmission network is developed in a planned and coordinated manner to meet the requirements of the sector. The load dispatch function could be kept with the Transmission Utility or separated. In the case of separation the load dispatch function would have to remain with a State Government organization/company.

(iii) There is provision for private transmission licensees.

(iv) There would be open access in transmission from the outset with provision for surcharge for taking care of current level of cross subsidy with the surcharge being gradually phased out.

(v) Distribution licensees would be free to undertake generation and generating companies would be free to take up distribution licensees.

(vi) The State Electricity Regulatory Commissions may permit

open access in distribution in phases with surcharge for – A

(a) current level of cross subsidy to be gradually phased out along with cross subsidies; and

(b) obligation to supply.

(vii) For rural and remote areas stand alone systems for generation and distribution would be permitted. B

(viii) For rural areas decentralized management of distribution through Panchayats, Users Associations, Cooperatives or Franchisees would be permitted.

(ix)Trading as a distinct activity is being recognized with the safeguard of the Regulatory Commissions being authorized to fix ceilings on trading margins, if necessary. C

(x) Where there is direct commercial relationship between a consumer and a generating company or a trader the price of power would not be regulated and only the transmission and wheeling charges with surcharge would be regulated. D

(xi)There is provision for a transfer scheme by which company/ companies can be created by the State Governments from the State Electricity Boards. The State Governments have the option of continuing with the State Electricity Boards which under the new scheme of things would be a distribution licensee and the State Transmission Utility which would also be owning generation assets. The service conditions of the employees would as a result of restructuring not be inferior. E

(xii)An Appellate Tribunal has been created for disposal of appeals against the decision of the CERC and State Electricity Regulatory Commissions so that there is speedy disposal of such matters. The State Electricity Regulatory Commission is a mandatory requirement. F

(xiii)Provisions relating to theft of electricity have a revenue focus. G

5. The Bill seeks to replace the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998.

6. The Bill seeks to achieve the above objects."

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A 17. In the present case, we are concerned with the following Sections:

"Section 3. **National Electricity Policy and Plan.** — (1) The Central Government shall, from time to time, prepare the National Electricity Policy and tariff policy, in consultation with the State
B Governments and the Authority for development of the power system based on optimal utilisation of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy.

(2) The Central Government shall publish the National Electricity
C Policy and tariff policy from time to time.

(3) The Central Government may, from time to time in consultation with the State Governments, and the Authority, review or revise, the National Electricity Policy and tariff policy referred to in sub-section (1) .

D (4) The Authority shall prepare a National Electricity Plan in accordance with the National Electricity Policy and notify such plan once in five years:

Provided that the Authority while preparing the National Electricity Plan shall publish the draft National Electricity Plan and invite
E suggestions and objections thereon from licensees, generating companies and the public within such time as may be prescribed:

Provided further that the Authority shall –

(a) notify the plan after obtaining the approval of the Central
F Government;

(b) revise the plan incorporating therein the directions, if any, given by the Central Government while granting approval under clause (a).

(5) The Authority may review or revise the National Electricity
G Plan in accordance with the National Electricity Policy.

61. **Tariff Regulations.** The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

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(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;

(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;

(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

(e) the principles rewarding efficiency in performance;

(f) multi-year tariff principles;

(g) that the tariff progressively reflects the cost of supply of electricity and also reduces cross-subsidies in the manner specified by the Appropriate Commission;

(h) the promotion of co-generation and generation of electricity from renewable sources of energy;

(i) the National Electricity Policy and tariff policy:

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948, the Electricity Regulatory Commissions Act, 1998 and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier.

62. **Determination of Tariff.** (1) The Appropriate Commission shall determine the tariff in accordance with provisions of this Act for – (a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one

A year to ensure reasonable prices of electricity;

(b) transmission of electricity ;

(c) wheeling of electricity;

(d) retail sale of electricity:

B Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) The Appropriate Commission may require a licensee or a
C generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of
D electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

E (4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

(5) The Commission may require a licensee or a generating
F company to comply with such procedure as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the
G excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.

63. **Determination of tariff by bidding process.** Notwithstanding anything contained in section 62, the Appropriate

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Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.

64. **Procedure for tariff order.** (1) An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.

(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.

(3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public,-

(a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;

(b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force:

Provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application.

(4) The Appropriate Commission shall, within seven days of making the order, send a copy of the order to the Appropriate Government, the Authority, and the concerned licensees and to the person concerned.

(5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor.

(6) A tariff order shall, unless amended or revoked, shall continue

to be in force for such period as may be specified in the tariff order.

79. **Functions of Central Commission.** (1) The Central Commission shall discharge the following functions, namely:-

(a) to regulate the tariff of generating companies owned or controlled by the Central Government;

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;

(c) to regulate the inter-State transmission of electricity ;

(d) to determine tariff for inter-State transmission of electricity;

(e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;

(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;

(g) to levy fees for the purposes of this Act;

(h) to specify Grid Code having regard to Grid Standards;

(i) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees;

(j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;

(k) to discharge such other functions as may be assigned under this Act.

86. **Functions of State Commission.** – (1) The State Commission shall discharge the following functions, namely, -

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category

of consumers under Section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

(c) facilitate intra-state transmission and wheeling of electricity;

(d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;

(e) promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;

(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;

(g) levy fee for the purposes of this Act;

(h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;

(i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;

(j) fix the trading margin in the intra-State trading of electricity, if considered, necessary;

(k) discharge such other functions as may be assigned to it under this Act."

18. The construction of Section 63, when read with the other provisions of this Act, is what comes up for decision in the present appeals. It may be noticed that Section 63 begins with a non-obstante clause, but it is a non-obstante clause covering only Section 62. Secondly, unlike Section 62 read with Sections 61 and 64, the appropriate Commission

A does not "determine" tariff but only "adopts" tariff already determined under Section 63. Thirdly, such "adoption" is only if such tariff has been determined through a transparent process of bidding, and, fourthly, this transparent process of bidding must be in accordance with the guidelines issued by the Central Government. What has been argued before us is that Section 63 is a stand alone provision and has to be construed on its own terms, and that, therefore, in the case of transparent bidding nothing can be looked at except the bid itself which must accord with guidelines issued by the Central Government. One thing is immediately clear, that the appropriate Commission does not act as a mere post office under Section 63. It must adopt the tariff which has been determined through a transparent process of bidding, but this can only be done in accordance with the guidelines issued by the Central Government. Guidelines have been issued under this Section on 19th January, 2005, which guidelines have been amended from time to time. Clause 4, in particular, deals with tariff and the appropriate Commission certainly has the jurisdiction to look into whether the tariff determined through the process of bidding accords with clause 4.

19. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions de hors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to "regulate" tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various Sections must be harmonized. Considering the fact that the non-obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways – either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act, (after laying down the terms and conditions for determination

of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff. Whereas "determining" tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to "regulate" tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used.

Jurisdiction of the Central Commission

20. The appellants have argued before us that the expression "composite scheme" mentioned in Section 79(1) must necessarily be a scheme in which there is uniformity of tariff under a PPA where there is generation and sale of electricity in more than one State. It is not enough that generation and sale of electricity in more than one State be the subject matter of one or more PPAs, but that something more is necessary, namely, that there must be a composite scheme for the same.

21. In order to appreciate and deal with this submission, it is necessary to set out Section 2(5) of the Act which defines appropriate Government as follows:

"2. **Definitions.** In this Act, unless the context otherwise requires,

(5) "Appropriate Government" means, -

(a) the Central Government, -

(i) in respect of a generating company wholly or partly owned by it;

(ii) in relation to any inter-State generation, transmission, trading or supply of electricity and with respect to any mines, oil-fields, railways, national highways, airports, telegraphs, broadcasting

A stations and any works of defence, dockyard, nuclear power installations;

(iii) in respect of the National Load Despatch Centre; and Regional Load Despatch Centre;

B (iv) in relation to any works or electric installation belonging to it or under its control ;

(b) in any other case, the State Government, having jurisdiction under this Act;"

Sections 25 and 30 also have some bearing and are set out as C under:

"25. **Inter-State, regional and inter-regional transmission.** For the purposes of this Part, the Central Government may, make region-wise demarcation of the country, and, from time to time, make such modifications therein as it may consider necessary for D the efficient, economical and integrated transmission and supply of electricity, and in particular to facilitate voluntary interconnections and co-ordination of facilities for the inter-State, regional and inter-regional generation and transmission of electricity.

E 30. **Transmission within a State.** The State Commission shall facilitate and promote transmission, wheeling and inter-connection arrangements within its territorial jurisdiction for the transmission and supply of electricity by economical and efficient utilisation of the electricity."

F 22. The scheme that emerges from these Sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in sub-G sections (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression "within the State" in sub-clauses (a), (b), and (d), and "intra-state" in sub-clause (c). This being the case, it is clear that the PPA. which deals with generation and supply of electricity, will either have to be governed by H

the State Commission or the Central Commission. The State Commission's jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression "composite scheme" does not mean anything more than a scheme for generation and sale of electricity in more than one State.

23. This also follows from the dictionary meaning [(Mc-Graw-Hill Dictionary of Scientific and Technical Terms (6th Edition), and P.Ramanatha Aiyar's Advanced Law Lexicon (3rd Edition)] of the expression "composite":

> (a) 'Composite' – "A re-recording consisting of at least two elements. A material that results when two or more materials, each having its own, usually different characteristics, are combined, giving useful properties for specific applications. Also known as composite material."
>
> (b) 'Composite character' – "A character that is produced by two or more characters one on top of the other."
>
> (c) 'Composite unit" – "A unit made of diverse elements."

The aforesaid dictionary definitions lead to the conclusion that the expression "composite" only means "consisting of at least two elements". In the context of the present case, generation and sale being in more than one State, this could be referred to as "composite".

24. Even otherwise, the expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a "composite scheme". This makes it clear that the expression "composite scheme" does not have some special meaning – it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State.

A 25. We must also hasten to add that the appellant's argument that there must be commonality and uniformity in tariff for a "composite scheme" does not follow from the Section.

26. Another important facet of dealing with this argument is that the tariff policy dated 6th June, 2006 is the statutory policy which is B enunciated under Section 3 of the Electricity Act. The amendment of 28th January, 2016 throws considerable light on the expression "composite scheme", which has been defined for the first time as follows:

> *"5.11 (j)* ***Composite Scheme:*** Sub-section (b) of Section 79(1) of the Act provides that Central Commission shall regulate the C tariff of generating company, if such generating company enters into or otherwise have a composite scheme for generation and sale of electricity in more than one State.
>
> Explanation: The composite scheme as specified under section 791) of the Act shall mean a scheme by a generating company D for generation and sale of electricity in more than one State, having signed long-term or medium-term PPA prior to the date of commercial operation of the project (the COD of the last unit of the project will be deemed to be the date of commercial operation of the project) for sale of at least 10% of the capacity of the project to a distribution licensee outside the State in which such E project is located."

27. That this definition is an important aid to the construction of Section 79(1)(b) cannot be doubted and, according to us, correctly brings out the meaning of this expression as meaning nothing more than a scheme by a generating company for generation and sale of electricity in more F than one State. Section 64(5) has been relied upon by the Appellant as an indicator that the State Commission has jurisdiction even in cases where tariff for inter-State supply is involved. This provision begins with a non-obstante clause which would indicate that in all cases involving inter-State supply, transmission, or wheeling of electricity, the Central G Commission alone has jurisdiction. In fact this further supports the case of the Respondents. Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. We, therefore, hold that the Central

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Commission had the necessary jurisdiction to embark upon the issues raised in the present cases.

Force Majeure

28. A large part of the argument turned on the finding of the Appellate Tribunal that the rise in price of coal consequent to change in Indonesian law would be a force majeure event which would entitle the respondents to claim compensatory tariff. Before embarking on the merits of this claim, we must first advert to the argument of the appellant that force majeure can only be argued for a very restricted purpose, as has been pointed out in the Supreme Court judgment dated 31st March, 2015.

29. In order to appreciate this contention, it is first necessary to set out the relevant portion of this judgment. By the judgment dated 31st March, 2015, this Court held:

> "13. By order dated 1-8-2014, the Appellate Tribunal dismissed the cross-objections of the appellant herein as not maintainable. On 16-9-2014, the appellant preferred Appeal No. DFR No. 2355 of 2014 before the Appellate Tribunal against that part of the order dated 2-4-2013 which went against the appellant. Obviously, there was a delay in preferring that appeal. Therefore, the appellant filed an application bearing IA No. 380 of 2014 seeking condonation of delay in preferring the appeal which was rejected by the impugned order. Hence, the instant appeal.
>
> 14. The issue before this Court is limited. It is the correctness of the decision of the Appellate Tribunal in declining to condone the delay in preferring the appeal against the order dated 2-4-2013 of the Central Commission.
>
> 15. However, elaborate submissions were made regarding the scope of Order 41 Rule 22 of the Code of Civil Procedure, 1908 (for short "CPC"), and its applicability to an appeal under Section 111 of the Act by the appellant relying upon earlier decisions of this Court. The respondents submitted that such an enquiry is wholly uncalled for as the cross-objections of the appellant in Appeal No. 100 of 2013 stood rejected and became final.

16. Lastly, the learned counsel for the appellant submitted that even if this Court comes to the conclusion that the appellant has not made out a case for condonation of delay in preferring an appeal against the order dated 2-4-2013 of the Central Commission, the appellant is entitled to argue in the pending Appeals Nos. 98 and 116 of 2014 both the grounds of "*force majeure*" and "*change of law*" not for the purpose of seeking the relief of a declaration of the frustration of the contracts between the appellants and the respondents, thereby relieving the appellant of his obligations arising out of the contracts, but only for the purpose of seeking the alternative relief of compensatory tariff. In other words, the appellant's submission is that the facts which formed the basis of the submission of the frustration of contracts are also relevant for supporting the conclusion of the National Commission that the appellant is entitled for the relief of compensatory tariff.

17. We agree with the respondents that we are not required to go into the question of the applicability of Order 41 Rule 22 in the instant appeal as the decision of the Appellate Tribunal to reject the cross-objections of the appellant by its order dated 1-8-2014 has become final and no appeal against the said order is pending before us.

18. We are also not required to go into the question whether the order of the Central Commission dated 2-4-2013 by which it declined to grant a declaration of frustration of the contracts either on the ground of "*force majeure*" or on the ground of "*change of law*" is independently appealable, since no such appeal even if maintainable, is preferred by the appellant.

19. The question whether the appellant made out a case for condonation of delay in preferring the appeal before the Appellate Tribunal, in our opinion, need not also be examined by us in view of the last submission made by the appellant. If the appellant is not desirous of seeking a declaration that the appellant is relieved of the obligation to perform the contracts in question, the correctness of the decision of the Appellate Tribunal in rejecting the application to condone the delay in preferring the appeal would become purely academic. We are of the opinion that so long as the appellant does not seek a declaration, such as the one mentioned above, the appellant is entitled to argue any proposition of law, be

it "*force majeure*" or "*change of law*" in support of the order dated 21-2-2014 quantifying the compensatory tariff, the correctness of which is under challenge before the Appellate Tribunal in Appeal No. 98 of 2014 and Appeal No. 116 of 2014 preferred by the respondents, so long as such an argument is based on the facts which are already pleaded before the Central Commission." A B

30. This Court dealt with an appeal arising out of an order of the Appellate Tribunal dated 31st October, 2014, in which the Appellate Tribunal declined to condone a delay of 481 days in preferring an appeal against an order dated 2nd April, 2013. C

31. As has been stated by this Court, the issue before the Court was limited. This Court held that the appellant is entitled to argue force majeure and change in law in pending Appeals Nos.98 and 116 of 2014. This was because what was concluded by the Central Commission was force majeure and change of law for the purpose of seeking the relief of declaration of frustration of the contract between the appellant and the respondents, thereby relieving the appellant of its obligations arising out of the contract. Since the appellant was not desirous of seeking a declaration that the appellant is relieved of the obligation of performing the contract in question, the appellant is entitled to argue force majeure or change of law in support of the Commission's order of 21st February, 2014, which quantified compensatory tariff, the correctness of which is under challenge in Appeal Nos.98 and 116 of 2014. This being the case, it is clear that this Court did not give any truncated right to argue force majeure or change of law. This Court explicitly stated that both force majeure and change of law can be argued in all its plenitude to support an order quantifying compensatory tariff so long as the appellants do not claim that they are relieved of performance of the PPAs altogether. This being the case, we are of the view that the preliminary submission of the appellant before us is without any force. Accordingly, the Appellate Tribunal rightly went into force majeure and change of law. D E F

32. "Force majeure" is governed by the Indian Contract Act, 1872. In so far as it is relatable to an express or implied clause in a contract, such as the PPAs before us, it is governed by Chapter III dealing with the contingent contracts, and more particularly, Section 32 thereof. In so far as a force majeure event occurs de hors the contract, it is dealt with by a rule of positive law under Section 56 of the Contract. Sections G H

A 32 and 56 are set out herein:

> "32. **Enforcement of Contracts contingent on an event happening** - Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened. If the event becomes
B impossible, such contracts become void.
>
> 56. **Agreement to do impossible act** - An agreement to do an act impossible in itself is void.
>
> **Contract to do act afterwards becoming impossible or unlawful.** A contract to do an act which, after the contract made,
C becomes impossible or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
>
> **Compensation for loss through non-performance of act known to be impossible or unlawful.** Where one person has
D promised to do something which he knew or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promise for any loss which such promisee sustains through the non-performance of the promise."

E 33. Prior to the decision in **Taylor vs. Caldwell**, (1861-73) All ER Rep 24, the law in England was extremely rigid. A contract had to be performed, notwithstanding the fact that it had become impossible of performance, owing to some unforeseen event, after it was made, which was not the fault of either of the parties to the contract. This rigidity of
F the common law in which the absolute sanctity of contract was upheld was loosened somewhat by the decision in Taylor vs. Caldwell in which it was held that if some unforeseen event occurs during the performance of a contract which makes it impossible of performance, in the sense that the fundamental basis of the contract goes, it need not be further performed, as insisting upon such performance would be unjust.

G 34. The law in India has been laid down in the seminal decision of **Satyabrata Ghose v. Mugneeram Bangur & Co.**, 1954 SCR 310. The second paragraph of Section 56 has been adverted to, and it was stated that this is exhaustive of the law as it stands in India. What was held was that the word "impossible" has not been used in the Section in

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the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose of the parties. If an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement, it can be said that the promisor finds it impossible to do the act which he had promised to do. It was further held that where the Court finds that the contract itself either impliedly or expressly contains a term, according to which performance would stand discharged under certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be dealt with under Section 32 of the Act. If, however, frustration is to take place de hors the contract, it will be governed by Section 56.

35. In **M/s Alopi Parshad & Sons Ltd. v. Union of India**, 1960 (2) SCR 793, this Court, after setting out Section 56 of the Contract Act, held that the Act does not enable a party to a contract to ignore the express covenants thereof and to claim payment of consideration, for performance of the contract at rates different from the stipulated rates, on a vague plea of equity. Parties to an executable contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, for example, a wholly abnormal rise or fall in prices which is an unexpected obstacle to execution. This does not in itself get rid of the bargain they have made. It is only when a consideration of the terms of the contract, in the light of the circumstances existing when it was made, showed that they never agreed to be bound in a fundamentally different situation which had unexpectedly emerged, that the contract ceases to bind. It was further held that the performance of a contract is never discharged merely because it may become onerous to one of the parties.

36. Similarly, in **Naihati Jute Mills Ltd. v. Hyaliram Jagannath**, 1968 (1) SCR 821, this Court went into the English law on frustration in some detail, and then cited the celebrated judgment of **Satyabrata Ghose v. Mugneeram Bangur & Co**. Ultimately, this Court concluded that a contract is not frustrated merely because the circumstances in which it was made are altered. The Courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events.

A 37. It has also been held that applying the doctrine of frustration must always be within narrow limits. In an instructive English judgment namely, **Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH**, 1961 (2) All ER 179, despite the closure of the Suez canal, and despite the fact that the customary route for shipping the goods was only through the B Suez canal, it was held that the contract of sale of groundnuts in that case was not frustrated, even though it would have to be performed by an alternative mode of performance which was much more expensive, namely, that the ship would now have to go around the Cape of Good Hope, which is three times the distance from Hamburg to Port Sudan. The freight for such journey was also double. Despite this, the House of C Lords held that even though the contract had become more onerous to perform, it was not fundamentally altered. Where performance is otherwise possible, it is clear that a mere rise in freight price would not allow one of the parties to say that the contract was discharged by impossibility of performance.

D 38. This view of the law has been echoed in 'Chitty on Contracts', 31st edition. In paragraph 14-151 a rise in cost or expense has been stated not to frustrate a contract. Similarly, in 'Treitel on Frustration and Force Majeure', 3rd edition, the learned author has opined, at paragraph 12-034, that the cases provide many illustrations of the principle that a force majeure clause will not normally be construed to apply where the E contract provides for an alternative mode of performance. It is clear that a more onerous method of performance by itself would not amount to an frustrating event. The same learned author also states that a mere rise in price rendering the contract more expensive to perform does not constitute frustration. (See paragraph 15-158)

F 39. Indeed, in England, in the celebrated **Sea Angel** case, 2013 (1) Lloyds Law Report 569, the modern approach to frustration is well put, and the same reads as under:

> "111. In my judgment, the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have G to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations; in particular as to risk, as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' H reasonable and objectively ascertainable calculations as to the

possibilities of future performance in the new circumstances. Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as "the contemplation of the parties", the application of the doctrine can often be a difficult one. In such circumstances, the test of "radically different" is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances." A B C

40. It is clear from the above that the doctrine of frustration cannot apply to these cases as the fundamental basis of the PPAs remains unaltered. Nowhere do the PPAs state that coal is to be procured only from Indonesia at a particular price. In fact, it is clear on a reading of the PPA as a whole that the price payable for the supply of coal is entirely for the person who sets up the power plant to bear. The fact that the fuel supply agreement has to be appended to the PPA is only to indicate that the raw material for the working of the plant is there and is in order. It is clear that an unexpected rise in the price of coal will not absolve the generating companies from performing their part of the contract for the very good reason that when they submitted their bids, this was a risk they knowingly took. We are of the view that the mere fact that the bid may be non-escalable does not mean that the respondents are precluded from raising the plea of frustration, if otherwise it is available in law and can be pleaded by them. But the fact that a non-escalable tariff has been paid for, for example, in the Adani case, is a factor which may be taken into account only to show that the risk of supplying electricity at the tariff indicated was upon the generating company. D E F

41. Coming to the PPAs themselves, we find that the force majeure clause contained in all of them is in a standard form and is as follows: G

"12.3 ***Force Majeure***

'Force Majeure' means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an H

A Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:

B

i. **Natural Force Majeure Events:**

act of God, including, but not limited to lightning, drought. fire and explosion (to the extent originating from a source external to the Site), earthquake. volcanic eruption, landslide, food, cyclone,

C typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years,

ii.**Non-Natural Force Majeure Events:**

1. Direct Non-Natural Force Majeure Events

D

a) Nationalization or compulsory acquisition by any Indian Government Instrumentality or any material assets or rights of the Seller or the Seller's contractors; or

b) The unlawful, unreasonable or discriminatory revocation of, or

E refusal to renew, any Consent required by the Seller or any of the Seller's contractors to perform their obligations under the Project Documents or any unlawful, unreasonable or discriminatory refusal to grant any other consent required for the development/ operation of the Project, provided that an appropriate court of law declares the revocation or refusal to be unlawful, unreasonable

F and discriminatory and strikes the same down; or

c) Any other unlawful, unreasonable or discriminatory action on the part of an Indian Government Instrumentality which is directed against the Project, provided that an appropriate court of law declares the revocation or refusal to be unlawful, unreasonable

G and discriminatory and strikes the same down.

2. Indirect Non – Natural Force Majeure Events

a) Any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or

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b) Radio active contamination or ionising radiation originating from a source in India or resulting from another Indirect Non Natural Force Majeure Event excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the site by the affected party or those employed or engaged by the affected party; or

c) Industry wide strikes and labor disturbances having a nationwide impact in India.

12.7 **Available Relief for a Force Majeure Event**

Subject to this Article 12:

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

(b) Every Party shall be entitled to claim relief in relation to a Force Majeure Event in regard to its obligations, including but not limited to those specified under Article 4.5.

(c) For the avoidance of doubt, it is clarified that no Tariff shall be paid by the Procurers for the part of Contracted Capacity affected by a Natural Force Majeure Event affecting the Seller, for the duration of such Natural Force Majeure Event. For the balance part of the Contracted Capacity, the Procurer shall pay the Tariff to the Seller, provided during such period of Natural Force Majeure Event, the balance part of the Power Station is declared to be Available for scheduling and dispatch as per ABT for supply of power by the Seller to the Procurers.

(d) If the average Availability of the Power Station is reduced below sixty (60) percent for over two (2) consecutive months or for any non consecutive period of four (4) months both within any continuous period of sixty (60) months, as a result of an Indirect Non Natural Force Majeure, then, with effect from the end of that period and for so long as the daily average Availability of the Power Station continues to be reduced below sixty (60) percent as a result of an Indirect Non Natural Force Majeure of any kind, the Procurers shall make payments for Debt Service, relatable to such Unit, which are due under the Financing Agreements, subject to a maximum of Capacity Charges based on Normative

A Availability, and these amounts shall be paid from the date, being the later of a) the date of cessation of such Indirect Non Natural Force Majeure Event and b) the completion of sixty (60) days from the receipt of the Financing Agreements by the Procurer(s) from the Seller, in the form of an increase in Capacity Charge. Provided such Capacity Charge increase shall be determined by
B CERC on the basis of putting the Seller in the same economic position as the Seller would have been in case the Seller had been paid Debt Service in a situation when the Indirect Non Natural Force Majeure had not occurred.

Provided that the Procurers will have the above obligation to make
C payment for the Debt Service only (a) after the Unit(s) affected by such Indirect Non Natural Force Majeure Event has been Commissioned, and (b) only if in the absence of such Indirect Non Natural Force Majeure Event, the Availability of such Commissioned Unit(s) would have resulted in Capacity Charges
D equal to Debt Services.

e) If the average Availability of the Power Station is reduced below eighty (80) percent for over two (2) consecutive months or for any non consecutive period of four (4) months both within any continuous period of sixty (60) months, as a result of a Direct
E Non Natural Force Majeure, then, with effect from the end of that period and for so long as the daily average Availability of the Power Station continues to be reduced below eighty (80) percent as a result of a Direct Non Natural Force Majeure of any kind, the Seller may elect in a written notice to the Procurers, to deem the Availability of the Power Station to be eighty (80) percentage
F from the end of such period, regardless of its actual Available Capacity. In such a case, the Procurers shall be liable to make payment to the Seller of Capacity Charges calculated on such deemed Normative Availability, after the cessation of the effects of Non Natural Direct Force Majeure in the form of an increase
G in Capacity Charge. Provided such Capacity Charge increase shall be determined by CERC on the basis of putting the Seller in the same economic position as the Seller would have been in case the Seller had been paid Capacity Charges in a situation where the Direct Non Natural Force Majeure had not occurred.

H (f) For so long as the Seller is claiming relief due to any Non

Natural Force Majeure Event (or Natural Force Majeure Event affecting the Procurer/s) under this Agreement, the Procurers may from time to time on one (1) days notice inspect the Project and the Seller shall provide Procurer's personnel with access to the Project to carry out such inspections, subject to the Procurer's personnel complying with all reasonable safety precautions and standards. Provided further the Procurers shall be entitled at all times to request Repeat Performance Test, as per Article 8.1, of the Unit(s) Commissioned earlier and now affected by Direct or Indirect Non Natural Force Majeure Event (or Natural Force Majeure event affecting the Procurer/s), where such Testing is possible to be undertaken in spite of the Direct or Indirect Non Natural Force Majeure Event (or Natural Force Majeure Event affecting the Procurer/s), and the Independent Engineer accepts and issues a Final Test Certificate certifying such Unit(s) being capable of delivering the Contracted Capacity and being Available, had there been no such Direct or Indirect Non Natural Force Majeure Event (or Natural Force Majeure Event affecting the Procurer/s). In case, the Available Capacity as established by the said Repeat Performance Test (provided that such Repeat Performance Test, the limitation imposed by Article 8.1.1 shall not apply) and Final Test Certificate issued by the Independent Engineer is less than the Available Capacity corresponding to which the Seller would have been paid Capacity Charges equal to Debt Service in case of Indirect Non Natural Force Majeure Event (or Natural Force Majeure Event affecting the Procurer/s), then the Procurers shall make pro-rata payment of Debt Service but only with respect to such reduced Availability. For the avoidance of doubt, if Debt Service would have been payable at an Availability of 60% and pursuant to a Repeat Performance Test it is established that the Availability would have been 40%, then Procurers shall make payment equal to Debt Service multiplied by 40% and divided by 60%. Similarly, the payments in case of Direct Non Natural Force Majeure Event (and Natural Force Majeure Event affecting the Procurer/s) shall also be adjusted pro-rata for reduction in Available Capacity.

(g) In case of a Natural Force Majeure Event affecting the Procurer/s which adversely affects the performance obligations

A of the Seller under this Agreement, the provisions of sub-proviso (d) and (f) shall apply.

(h) For the avoidance of doubt, it is specified that the charges payable under this Article 12 shall be paid by the Procurers in proportion to their then existing Allocated Contracted Capacity."

B 42. It has strongly been contended by counsel for the respondents that, first and foremost, the force majeure clause is not exhaustive, but is only inclusive. Further, it may wholly or partly prevent an affected party from performance of obligations under the agreement. Rise in the price of Indonesian coal, according to them, was unforeseen inasmuch as the C PPAs have been entered into sometime in 2006 to 2008, and the rise in price took place only in 2010 and 2011. Such rise in price is also not within their control at all and, therefore, clause 12.3 read with clause 12.7 would apply. They further argued that the force majeure clause in the present case went further and stated that so long as performance of their obligation was "hindered" due to a force majeure event, they can D claim compensatory tariff.

43. First and foremost, the respondents are correct in stating that the force majeure clause does not exhaust the possibility of unforeseen events occurring outside natural and/or non-natural events. But the thrust of their argument was really that so long as their performance is hindered E by an unforeseen event, the clause applies. 'Chitty on Contracts', 31st edition at para 14-151 cites a number of judgments for the proposition that the expression "hindered" must be construed with regard to words which precede and follow it, and also with regard to the nature and general terms of the contract. Given the fact that the PPA must be read F as a whole, and that clauses 12.3 and 12.7(a) are a part of the same scheme of force majeure under the contract, it is clear that the expression "hindered" in clause 12.7(a) really goes with the expression "partly prevents" in clause 12.3. Force majeure clauses are to be narrowly construed, and obviously the expression "prevents" in clause 12.3 is spoken of also in clause 12.7(a). When "prevent" is preceded by the G expression "wholly or partly", it is reasonable to assume that the expression "prevented" in clause 12.7(a) goes with the expression "wholly" in clause 12.3 and the expression "hindered" in clause 12.7(a) goes with the expression "partly". This being so, it is clear that there must be something which partly prevents the performance of the obligation H under the agreement. Also, 'Treitel on Frustration and Force Majeure',

3rd edition, in paragraph 15-158 cites the English judgment of **Tennants (Lancashire) Ltd. v. G.S. Wilson and Co.** Ltd., 1917 Appeal Cases 495 for the proposition that a mere rise in price rendering the contract more expensive to perform will not constitute "hindrance". This is echoed in the celebrated judgment of **Peter Dixon & Sons Ltd. v. Henderson, Craig & Co. Ltd.**, 1919(2) KB 778 in which it was held that the expression "hinders the delivery" in a contract would only be attracted if there was not merely a question of rise in price, but a serious hindrance in performance of the contract as a whole. At the beginning of the First World War, British ships were no longer available, and although foreign shipping could be obtained at an increased freight, such foreign ships were liable to be captured by the enemy and destroyed through mines or sub-marines, and could be detained by British or allied warships. In the circumstances, the **Tennants (Lancashire) Ltd.** judgment was applied, and the Court of Appeals held:

> "Under the circumstances, can it be said that the sellers were not "hindered or prevented" within the meaning of the contract? It is not a question of price, merely an increase of freight. Tonnage had to be obtained to bring the pulp in Scandinavian ships, and although the difficulty in obtaining tonnage may be reflected in the increase of freight, it was not a mere matter of increase of freight; if so, there were standing contracts that ought to have been fulfilled. Counsel for the respondents urged that certain shipowners, for reasons of their own, chose not to fulfil standing contracts. It was not only shipowners but pulp buyers and sellers. The whole trade was dislocated, by reason of the difficulty that had arisen in tonnage. It seems to me that the language of Lord Dunedin in Tennants, Ld. v. Wilson & Co. is applicable to the present case: "Where I think, with deference to the learned judges, the majority of the Court below have gone wrong is that they have seemingly assumed that price was the only drawback. I do not think that price as price has anything to do with it. Price may be evidence, but it is only one of many kinds of evidence as to shortage. If the appellants had alleged nothing but advanced price they would have failed. But they have shown much more." That is exactly so here. Price, as price only, would not have affected it. They were all standing contracts, but the position has so changed by reason of the war that buyers and sellers and the whole trade

were hindered or prevented from carrying out those contracts."

44. As a matter of fact, clause 12.4 of the PPA, which deals with force majeure exclusions, reads as follows :

"**12.4 Force Majeure Exclusions**

Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure:

a. Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts, fuel or consumables for the Project;

b. Delay in the performance of any contractor, sub-contractors or their agents excluding the conditions as mentioned in Article 12.2;

c. Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;

d. Strikes or labour disturbance at the facilities of the Affected Party;

e. Insufficiency of finances or funds or the agreement becoming onerous to perform; and

f. Non-performance caused by, or connected with, the Affected Party's:

i. Negligent or intentional acts, errors or omissions;

ii. Failure to comply with an Indian Law; or

iii. Breach of, or default under this Agreement or any Project Documents."

This clause makes it clear that changes in the cost of fuel, or the agreement becoming onerous to perform, are not treated as force majeure events under the PPA itself.

45. We are, therefore, of the view that neither was the fundamental basis of the contract dislodged nor was any frustrating event, except for a rise in the price of coal, excluded by clause 12.4, pointed out. Alternative modes of performance were available, albeit at a higher price. This does not lead to the contract, as a whole, being frustrated.

Consequently, we are of the view that neither clause 12.3 nor 12.7, referable to Section 32 of the Contract Act, will apply so as to enable the grant of compensatory tariff to the respondents. Dr. Singhvi, however, argued that even if clause 12 is held inapplicable, the law laid down on frustration under Section 56 will apply so as to give the respondents the necessary relief on the ground of force majeure. Having once held that clause 12.4 applies as a result of which rise in the price of fuel cannot be regarded as a force majeure event contractually, it is difficult to appreciate a submission that in the alternative Section 56 will apply. As has been held in particular, in the **Satyabrata Ghose case**, when a contract contains a force majeure clause which on construction by the Court is held attracted to the facts of the case, Section 56 can have no application. On this short ground, this alternative submission stands disposed of.

Change in Law

46. It has been submitted on behalf of the counsel for the respondents, that the guidelines of 19th January, 2005, as amended by the 18th August, 2006 amendment, make it clear that any change in law, either abroad or in India, would result in the consequential rise in price of coal being given to the power generators. Since various provisions of the guidelines as well as the power purchase agreements are referred to, we set them out herein:

Guidelines

"Clause 2.3.

2.3 Unless explicitly specified in these guidelines, the provisions of these guidelines shall be binding on the procurer. The process to be adopted in event of any deviation proposed from these guidelines is specified later in these guidelines under para 5.16.

Clause 4.3

4.3. Tariffs shall be designated in Indian Rupees only. Foreign exchange risks, if any, shall be borne by the supplier. Transmission charges in all cases shall be borne by the procurer.

Provided that the foreign exchange rate variation would be permitted in the payment of energy charges [in the manner stipulated in para 4.11 (iii)] if the procurer mandates use of imported fuel for coastal power station in case-2.

A Clause 4.7. (unamended)

Any change in tax on generation or sale of electricity as a result of any change in Law with respect to that applicable on the date of bid submission shall be adjusted separately.

B Clause 4.7 (amended).

Any change in law impacting cost or revenue from the business of selling electricity to the procurer with respect to the law applicable on the date which is 7 days before the last date for RFP bid submission shall be adjusted separately. In case of any dispute regarding the impact of any change in law, the decision of

C the Appropriate Commission shall apply.

5.4. Standard documentation to be provided by the procurer in the RFQ shall include - (ii) Model PPA proposed to be entered into with the seller of electricity. The PPA shall include necessary details on:

D

- Risk allocation between parties;
- Technical requirements on minimum load conditions;
- Assured offtake levels;

E

- Force majeure clauses as per industry standards;
- Lead times for scheduling of power;
- Default conditions and cure thereof, and penalties;
- Payment security proposed to be offered by the procurer.

F Clause 5.6. Standard documentation to be provided by the procurer in the RFP shall include - (ii) PPA proposed to be entered with the selected bidder.

The model PPA proposed in the RFQ stage may be amended based on the inputs received from the interested parties, and shall

G be provided to all parties responding to the RFP. No further amendments shall be carried out beyond the RFP stage;

Clause 5.16 (old)

Deviation from process defined in the guidelines

Clause 5.16. In case there is any deviation from these guidelines,

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the same shall be subject to approval by the Appropriate Commission. The Appropriate Commission shall approve or require modification to the bid documents within a reasonable time not exceeding 90 days.

Clause 5.17 (old)

Arbitration

Clause 5.17. The procurer will establish an Amicable Dispute Resolution (ADR) mechanism in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996. The ADR shall be mandatory and time-bound to minimize disputes regarding the bid process and the documentation thereof.

If the ADR fails to resolve the dispute, the same will be subject to jurisdiction of the appropriate Regulatory Commission under the provisions of the Electricity Act, 2003.

Clause 5.16 (new)

Deviation from process defined in the guidelines

5.16 In case there is any deviation from these guidelines, the same shall be subject to approval by the Appropriate Commission. The Appropriate Commission shall approve or require modification to the bid documents within a reasonable time not exceeding 90 days.

Clause 5.17 (new)

Arbitration

Clause 5.17 Where any dispute arises claiming any change in or regarding determination of the tariff or any tariff related matters, or which partly or wholly could result in change in tariff, such dispute shall be adjudicated by the Appropriate Commission.

All other disputes shall be resolved by arbitration under the Indian Arbitration and Conciliation Act, 1996.

Power purchase agreement

"Bid Deadline" shall mean the last date for submission of the Bid in response to the RFP, specified in Clause 2.8 of the RFP;

A "Dispute" means any dispute or difference of any kind between a Procurer and the Seller or between the Procurers (jointly) and the Seller, in connection with or arising out of this Agreement including any issue on the interpretation and scope of the terms of this Agreement as provided in Article 17;

B "Electricity Laws" means the Electricity Act, 2003 and the rules and regulations made thereunder from time to time along with amendments thereto and replacements thereof and any other Law pertaining to electricity including regulations framed by the Appropriate Commission;

C "Fuel" means primary fuel used to generate electricity namely, _____",

"Fuel Supply Agreements" means the agreement(s) entered into between the Seller and the Fuel Supplier for the purchase, transportation and handling of the Fuel, required for the operation
D of the Power Station. In case the transportation of the Fuel is not the responsibility of the Fuel Supplier, the term shall also include the separate agreement between the Seller and the Fuel Transporter for the transportation of Fuel in addition to the agreement between the Seller and the Fuel Supplier for the supply of the Fuel;

E "Law" means, in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Government Instrumentality and having force of law and shall further include all applicable rules, regulations,
F orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the Appropriate Commission;

"Project Documents" mean

G a) Construction Contracts;

b) Fuel Supply Agreements, including the Fuel Transportation Agreement, if any;

c) O&M contacts;

d) RFP and RFP Project Documents; and

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e) Any other agreements designated in writing as such, from time to time, jointly by the Procurers and the Seller; A

13. ARTICLE 13: CHANGE IN LAW

13.1 Definitions

In this Article 13, the following terms shall have the following meanings: B

13.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:

(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurers under the terms of this Agreement, or (iv) any change in the (a) Declared value of Land for the Project or (b) the cost of implementation of resettlement and rehabilitation package of the land for the Project mentioned in the RFP or (c) the cost of implementing Environmental Management Plan for the Power Station mentioned in the RFP, indicated under the RFP and the PPA; C D E

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission. F

Provided that if Government of India does not extend the income tax holiday for power generation projects under Section 80 IA of the Income Tax Act, upto the Scheduled Commercial Operation Date of the Power Station, such non-extension shall be deemed to be a Change in Law. G

13.1.2 **"Competent Court"** means: H

A The Supreme Court or any High Court, or any tribunal or any similar judicial or quasi-judicial body in India that has jurisdiction to adjudicate upon issues relating to the Project.

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

B While determining the consequence of Change in Law under this Article 13, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 13, the affected Party to the C same economic position as if such Change in Law has not occurred.

a) **Construction Period**

As a result of any Change in Law, the impact of increase/decrease of Capital Cost of the Project in the Tariff shall be governed by the formula given below:

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For every cumulative increase/decrease of each Rupees Fifty crores (Rs.50 crores) in the Capital Cost over the term of this Agreement, the increase/decrease in Non Escalable Capacity Charges shall be an amount equal to zero point two six seven (0.267%) of the Non Escalable Capacity Charges. Provided that E the Seller provides to the Procurers documentary proof of such increase/decrease in Capital Cost for establishing the impact of such Change in Law. In case of Dispute, Article 17 shall apply.

It is clarified that the above mentioned compensation shall be payable to either Party, only with effect from the date on which F the total increase/decrease exceeds amount of Rs.fifty (50) crores.

Operation Period

As a result of Change in Law, the compensation for any increase/decrease in revenues or cost to the Seller shall be determined and effective from such date, as decided by the Central Electricity G Regulatory Commission whose decision shall be final and binding on both the Parties, subject to rights of appeal provided under applicable Law.

Provided that the above mentioned compensation shall be payable only if and for increase/decrease in revenues or cost to the Seller H

is in excess of an amount equivalent to 1% of Letter of Credit in aggregate for a Contract Year.

13.3 **Notification of Change in Law**

13.3.1 If the Seller is affected by a Change in Law in accordance with Article 13.2 and wishes to claim a Change in Law under this Article, it shall give notice to the Procurers of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.

13.3.2 Notwithstanding Article 13.3.1, the Seller shall be obliged to serve a notice to all the Procurers under this Article 13.3.2 if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurers contained herein shall be material. Provided that in case the Seller has not provided such notice, the Procurers shall jointly have the right to issue such notice to the Seller.

13.3.3 Any notice served pursuant to this Article 13.3.2 shall provide, amongst other things, precise details of:

(a) the Change in Law; and

(b) the effects on the Seller of the matters referred to in Article 13.2.

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

13.4.1 Subject to Article 13.2, the adjustment in Monthly Tariff Payment shall be effective from:

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

(ii) the date of order/judgment of the Competent Court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law.

13.4.2 The payment for Changes in Law shall be through Supplementary Bill as mentioned in Article 11.8. However, in case of any change in Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly

A Invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed Tariff.

17.3.1 Where any Dispute arises from a claim made by any Party for any change in or determination of the Tariff or any matter related to Tariff or claims made by any Party which partly or
B wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff or (ii) relates to any matter agreed to be referred to the Appropriate Commission under Articles 4.7.1, 13.2, 18.1 or clause 10.1.3 of Schedule 17 hereof, such Dispute shall be submitted to adjudication by the Appropriate Commission. Appeal against the decisions of the
C Appropriate Commission shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time.

18.1 Amendment

This Agreement may only be amended or supplemented by a
D written agreement between the Parties and after duly obtaining the approval of the Appropriate Commission, where necessary."

47. The respondents have argued before us that it is clear from the change made in clause 4.7 of the guidelines read with clause 5.17 that any change in law impacting cost or revenue from the business of
E selling electricity shall be adjusted separately. Learned counsel for the respondents have argued that "any change in law" is not qualified and, therefore, would include foreign law. According to them, the power purchase agreement is subservient to the guidelines and can never negate the terms of the guidelines. Under clauses 4.7 and 5.1.7 of the guidelines, these guidelines are binding on all parties including the procurers and
F any deviation therefrom has to be approved by the appropriate Commission. Therefore, according to them, the PPA must be read as including foreign laws as well. On the other hand, our attention was invited to the definition of "electricity laws" and it was argued that clause 13 would have to be read in the light of the PPA provisions and so read
G it would not include changes in Indonesian law, being foreign and not Indian Law.

48. Both the guidelines and the model PPA, of which clause 13 is a part, have been drafted by the Central Government itself. It is, therefore, clear that the PPA only fleshes out what is mentioned in clause
H 4.7 of the guidelines, and goes on to explain what the expression "any

change in law" means. This being the case, it is clear that the definition of "law" speaks of all laws including electricity laws in force in India. Electricity laws, as has been seen from the definition, means the Electricity Act, rules and regulations made thereunder from time to time, and any other law pertaining to electricity. This being so, it is clear that the expression "in force in India" in the definition of 'law' goes with "all laws". This is for the reason that otherwise the said expression would become tautologous, as electricity laws that are in force in India are already referred to in the definition of "electricity laws" as contained in the PPA. Once this is clear, at least textually it is clear that "all laws" would have to be read with "in force in India" and would, therefore, refer only to Indian laws. Even otherwise, from a reading of clause 13, it is clear that clause 13.1.1 is in four different parts. The first part speaks of enacted laws; the second speaks of interpretation of such laws by Courts or other instrumentalities; the third speaks of changes in consents, approvals or licences which result in change in cost of the business of selling electricity; and the fourth refers to any change in the declared law of the land for the project, cost of implementation of re-settlement and rehabilitation or cost of implementing the environmental management plan. 'Competent Court' in clause 13.1.2 is defined as meaning only the judicial system of India.

49. First and foremost, the expression "any law" occurs in both sub-section (1) and sub-section (2) of clause 13.1.1, which expression must be given the same meaning in both sub-sections. This being the case, as in sub-clause (2), this expression would refer only to Indian law, the same meaning will have to be given to the very same expression in sub-clause (1). Even otherwise, sub-clauses (1) and (2) form part of the same contractual scheme in that sub-clause (1) refers to the enactment of laws, whereas sub-clause (2) relates to interpretation of those very laws by a competent Court of law/Tribunal or Indian Government instrumentality. 'Competent Court', as we have seen above, speaks only of the Indian judicial system and, therefore, the enactments spoken of in sub-clause (1) would necessarily refer only to Indian enactments.

50. However, we were referred to other clauses in the PPA, for example, clauses 12.4(f)(ii), 4.1.1(a) and 17.1, all of which speak of Indian law. It was, therefore, argued that wherever the parties wanted to refer to Indian law, they did so explicitly, and from this it should be

A inferred that the expression "law" would otherwise include all laws whether Indian or otherwise.

51. This argument is based on the Latin maxim *expressio unius est exclusio alterius.* This maxim has been referred to in a number of judgments of this Court in which it has been described as a 'useful servant B but a dangerous master'. (See for example **CCE v. National Tobacco Co. of India Ltd.**, (1972) 2 SCC 560 at Para 30).

From a reading of the above, it is clear that if otherwise the expression "any law" in clause 13 when read with the definition of "law" and "Electricity Laws" leads unequivocally to the conclusion that it refers C only to the law of India, it would be unsafe to rely upon the other clauses of the agreement where Indian law is specifically mentioned to negate this conclusion.

52. It was also argued, placing reliance upon the fact that a commercial contract is to be interpreted in a manner which gives business D efficacy to such contract, that the subject matter of the PPA being "imported coal", obviously the expression "any law" would refer to laws governing coal that is imported from other countries. We are afraid, we cannot agree with this argument. There are many PPAs entered into with different generators. Some generators may source fuel only from India. Others, as is the case in the Adani Haryana matter, would source E fuel to the extent of 70% from India and 30% from abroad, whereas other generators, as in the case of Gujarat Adani and the Coastal case, would source coal wholly from abroad. The meaning of the expression "change in law" in clause 13 cannot depend upon whether coal is sourced in a particular PPA from outside India or within India. The meaning will F have to remain the same whether coal is sourced wholly in India, partly in India and partly from outside, or wholly from outside. This being the case, the meaning of the expression "any law" in clause 13 cannot possibly be interpreted in the manner suggested by the respondents. English judgments and authorities were cited for the proposition that if performance of a contract is to be done in a foreign country, what would G be relevant would be foreign law. This would be true as a general statement of law, but for the reason given above, would not apply to the PPAs in the present case.

53. However, in so far as the applicability of clause 13 to a change in Indian law is concerned, the respondents are on firm ground. It will

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be seen that under clause 13.1.1 if there is a change in any consent, approval or licence available or obtained for the project, otherwise than for the default of the seller, which results in any change in any cost of the business of selling electricity, then the said seller will be governed under clause 13.1.1. It is clear from a reading of the Resolution dated 21st June, 2013, which resulted in the letter of 31st July, 2013, issued by the Ministry of Power, that the earlier coal distribution policy contained in the letter dated 18th March, 2007 stands modified as the Government has now approved a revised arrangement for supply of coal. It has been decided that, seeing the overall domestic availability and the likely requirement of power projects, the power projects will only be entitled to a certain percentage of what was earlier allowable. This being the case, on 31st July, 2013, the following letter, which is set out in extenso states as follows :

FU-12/2011-IPC (Vol-III)
Government of India
Ministry of Power
Shram Shakti Bhawan, New Delhi
Dated 31st July, 2013

To,

The Secretary,
Central Electricity Regulatory Commission,
Chanderlok Building, Janpath,
New Delhi

Subject: Impact on tariff in the concluded PPAs due to shortage in domestic coal availability and consequent changes in NCDP.

Ref. CERC's D.O. No.10/5/2013-Statutory Advice/CERC dated 20.05.13

Sir,

In view of the demand for coal of power plants that were provided coal linkage by Govt. of India and CIL not signing any Fuel Supply Agreement (FSA) after March, 2009, several meetings at different levels in the Government were held to review the situation. In February 2012, it was decided that FSAs will be signed for full quantity of coal mentioned in the Letter of Assurance (LOAs) for a period of 20 years with a trigger level of 80% for levy of disincentive and 90% for levy of incentive. Subsequently,

A MOC indicated that CIL will not be able to supply domestic coal at 80% level of ACQ and coal will have to be imported by CIL to bridge the gap. The issue of increased cost of power due to import of coal/e-auction and its impact on the tariff of concluded PPAs were also discussed and CERC's advice sought.

B 2. After considering all aspects and the advice of CERC in this regard, Government has decided the following in June 2013:

i) taking into account the overall domestic availability and actual requirements, FSAs to be signed for domestic coal component for the levy of disincentive at the quantity of 65%, 65%, 67% and
C 75% of Annual Contracted Quantity (ACQ) for the remaining four years of the 12th Plan.

ii) to meet its balance FSA obligations, CIL may import coal and supply the same to the willing TPPs on cost plus basis. TPPs may also import coal themselves if they so opt.

D iii) higher cost of imported coal to be considered for pass through as per modalities suggested by CERC.

3. Ministry of Coal vide letter dated 26th July 2013 has notified the changes in the New Coal Distribution Policy (NCDP) as approved by the CCEA in relation to be coal supply for the next four years
E of the 12th Plan (copy enclosed).

4. As per decision of the Government, the higher cost of import/ market based e-auction coal be considered for being made a pass through on a case to case basis by CERC/SERC to the extent of shortfall in the quantity indicated in the LoA/FSA and the CIL
F supply of domestic coal which would be minimum of 65%, 65%, 67% and 75% of LOA for the remaining four years of the 12th Plan for the already concluded PPAs based on tariff based competitive bidding.

5. The ERCs are advised to consider the request of individual
G power producers in this regard as per due process on a case to case basis in public interest. The Appropriate Commissions are requested to take immediate steps for the implementation of the above decision of the Government.

This issues with the approval of MOS(P)I/C.

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Encl: as above

Yours faithfully,

Sd/-

(V.Apparao)

Director

This is further reflected in the revised tariff policy dated 28th January, 2016, which in paragraph 1.1 states as under :

1.1 In compliance with Section 3 of the Electricity Act 2003, the Central Government notified the Tariff Policy on 6th January, 2006. Further amendments to the Tariff Policy were notified on 31st March, 2008, 20th January, 2011 and 8th July, 2011. In exercise of powers conferred under Section 3(3) of Electricity Act, 2003, the Central Government hereby notifies the revised Tariff Policy to be effective from the date of publication of the resolution in the Gazette of India.

Notwithstanding anything done or any action taken or purported to have been done or taken under the provisions of the Tariff Policy notified on 6th January, 2006 and amendments made thereunder, shall, in so far as it is not inconsistent with this Policy, be deemed to have been done or taken under provisions of this revised policy.

Clause 6.1 states:

6.1 Procurement of Power

As stipulated in para 5.1, power procurement for future requirements should be through a transparent competitive bidding mechanism using the guidelines issued by the Central Government from time to time. These guidelines provide for procurement of electricity separately for base load requirements and for peak load requirements. This would facilitate setting up of generation capacities specifically for meeting such requirements.

However, some of the competitively bid projects as per the guidelines dated 19th January, 2005 have experienced difficulties in getting the required quantity of coal from Coal India Limited (CIL). In case of reduced quantity of domestic coal supplied by CIL, vis-à-vis the assured quantity or quantity indicated in Letter

A of Assurance/FSA the cost of imported/market based e-auction coal procured for making up the shortfall, shall be considered for being made a pass through by Appropriate Commission on a case to case basis, as per advisory issued by Ministry of Power vide OM NO.FU-12/2011-IPC (Vol-III) dated 31.7.2013.

B Both the letter dated 31st July, 2013 and the revised tariff policy are statutory documents being issued under Section 3 of the Act and have the force of law. This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in clause 13.2 that while determining the C consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred. Further, for the operation period of the PPA, compensation for any D increase/decrease in cost to the seller shall be determined and be effective from such date as decided by the Central Electricity Regulation Commission. This being the case, we are of the view that though change in Indonesian law would not qualify as a change in law under the guidelines read with the PPA, change in Indian law certainly would.

E 54. However, Shri Ramachandran, learned senior counsel for the appellants, argued that the policy dated 18th October, 2007 was announced even before the effective date of the PPAs, and made it clear to all generators that coal may not be given to the extent of the entire quantity allocated. We are afraid that we cannot accede to this argument for the reason that the change in law has only taken place only in 2013, which F modifies the 2007 policy and to the extent that it does so, relief is available under the PPA itself to persons who source supply of coal from indigenous sources. It is to this limited extent that change in law is held in favour of the respondents. Certain other minor contentions that are raised on behalf of both sides are not being addressed by us for the reason that we G find it unnecessary to go into the same. The Appellate Tribunal's judgment and the Commission's orders following the said judgment are set aside. The Central Electricity Regulatory Commission will, as a result of this judgment, go into the matter afresh and determine what relief should be granted to those power generators who fall within clause 13 of the PPA as has been held by us in this judgment.

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55. All the appeals are disposed of accordingly. A

Nidhi Jain Appeals disposed of.