A MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED

v.

ADANI POWER MAHARASHTRA LIMITED AND OTHERS

B (Civil Appeal Nos. 687-688 of 2021)

APRIL 20, 2023

[B. R. GAVAI AND VIKRAM NATH, JJ.]

Electricity – 'Change in Law' event – Deallocation of Lohara *Coal Blocks, if a 'Change in Law' event – Held: Yes – Deallocation of* Lohara *Coal Blocks would amount to 'Change in Law' event as defined under the Power Project Agreements – No interference warranted with the concurrent findings of MERC and APTEL – Methodology of arriving at the compensation payable on account of 'Change in Law' event also not interfered with – Wild Life (Protection) Act, 1972 – s.38(V) – Principle of Restitution.*

Dismissing the appeals, the Court

HELD: 1.1 In the case of *MSEDCL v. APML and Others,* this Court held that the 'Change in Law' relief for domestic coal shortfall should be on 'actuals' i.e. as against 100% of normative coal requirement assured in terms of NCDP, 2007. The Station Heat Rate ("SHR") and Auxiliary consumption should be considered as per the Regulations or actuals, whichever is lower. The Start date for the 'Change in Law' event for the NCDP, 2013 was held to be 1st April 2013. Compensation for shortfall of domestic coal on account of 'Change in Law' on account of amendment to the SHAKTI Policy stands covered by the judgment dated 3rd March 2023 in the case of *MSEDCL v. APML and Others.* [Paras 31-33][661-C-F]

Maharashtra State Electricity Distribution Company Limited v. Adani Power Maharashtra Limited and Others **2023 SCC OnLine SC 233 – relied on.**

1.2 The issue with regard to SHAKTI Policy is concerned, the same is considered by this Court in judgments of even date, in Civil Appeal Nos. 677-678 of 2021 and Civil Appeal No. 5684

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of 2021, holding therein that the restitutionary principle, as has been applied by this Court on account of 'Change in Law', will also be applicable on account of change occurring due to introduction of SHAKTI Policy. As such, no interference would be warranted with the findings of APTEL in light of the view taken by this Court in the aforesaid three judgments. [Paras 34][661-F-H]

1.3 A perusal of the impugned judgment and order would reveal that MSEDCL itself had sought the carrying cost prescribed in the MYT Tariff Regulations before the State Commission. APTEL has rightly held that MSEDCL could not be permitted to raise its claim contrary to what was sought before the State Commission. As such, interference would not be warranted with the said issue also. [Para 35][662-A-B]

1.4 In the case of *MSEDCL v. APML and Others,* this Court has upheld the view taken by CERC as well as APTEL, holding that the actual GCV of coal 'as received' at the plant site has to be taken into consideration. As such, no interference would be warranted with regard to the said issue also. [Para 38][662-F-G]

1.5 The only issue that is required to be considered is as to whether deallocation of Lohara Coal Blocks would amount to 'Change in Law' and as to whether APML would be entitled to restitution on account of the same. The same is concurrently held in favour of APML by both the MERC and the APTEL, thereby declaring the event of deallocation of Lohara Coal Blocks as 'Change in Law'. Unless the said issue is found to be perverse or in ignorance of the mandatory statutory provisions or is based on extraneous considerations, it will not be permissible for this Court to interfere with the same. A perusal of the definition of 'Law' as found in Article 1.1 of the PPA would reveal that any order or notification, rule or regulation by an Indian Governmental Instrumentality would constitute 'Law'. It cannot be disputed that Government of Maharashtra, Government of India and various statutory authorities would fall under the term 'Governmental Instrumentalities'. In the present case, the cutoff date under the PPA was 14th August 2008. It is to be noted that the power to notify a Tiger Reserve as a Buffer Zone is vested with the State

Government under Section 38V of the Wildlife (Protection) Act. For consideration and creation of Buffer Zone, three statutory requirements have to be complied with. From the material placed on record, it is clear that prior to 14th August 2008, the area where Lohara Coal Block is situated was not even proposed to be notified as a Buffer Zone. It is only seven days after the cut-off date, i.e., 21st February 2008, that the Chief Conservator, Forests gave approval for constitution of an Expert Committee for creating the Buffer Zone surrounding the core area. Thereafter, on 7th March 2008, the Conservator, TATR submitted the proposed demarcation to the Chief Conservator of Forest for creating the Buffer Zone surrounding the core area of TATR. The consultation of the Gram Sabha happened only between May 2008 and November 2008, i.e., much after the cut-off date. Subsequently, on 8th October 2008, the Conservator, TATR submitted the revised proposal for Buffer Zone to TATR. After numerous other deliberations, including the one with National Tiger Conservation Authority (NTCA), the Government of Maharashtra issued a notification on 5th May 2010 notifying 1101.7711 sq. km. as the Buffer Zone of TATR. As such, the notification dated 5th May 2010, which included the area where Lohara Coal Blocks were situated, will have to be construed to be a 'Change in Law'. It is only because of issuance of the said notification, the coal block, which would have otherwise been available to APML, was not available to it. [Paras 40, 42-45][663-A-B; C-H; 664-A-F]

1.6 MoC had allocated Lohara Coal Blocks vide allocation letter dated 6th November 2007 and MoEF granted the ToR for Lohara Coal Blocks on 16th May 2008 pursuant to EAC's recommendation in the meeting dated 28th April 2008. A perusal of the said letter of MoC dated 6th November 2007 would clearly reveal that allocation of Lohara West and Lohara Extension Coal Block to APML has been specifically made to meet the coal requirements of their 1000 MW power plant in District Gondia, Maharashtra. It is, thus, clear that the bid submitted by the appellant on the cut-off date was on the basis of the assurance that the coal would be available to it from Lohara Coal Blocks. Had the notification dated 5th May 2010 not been issued, APML could have utilized the coal from Lohara Coal Blocks which was

allotted to it by MoC. Apart from that, it is to be noted that MSEDCL was a part of the Expert Committee which was constituted by MERC vide its order dated 21st August 2013. Having participated in the proceedings of the meeting of the Expert Committee, MSEDCL cannot be permitted to take a stand contrary to the decision of the said Expert Committee. Deallocation of Lohara Coal Blocks was not on account of any fault of APML and this is recognized by CIL itself, inasmuch as it has returned the Bank Guarantee which was furnished by APML. No interference would be warranted with the concurrent findings of MERC and APTEL that deallocation of Lohara Coal Blocks would amount to 'Change in Law' event as defined under the PPA. [Paras 46-48][664-F-H; 665-A-C]

1.7 Insofar as methodology is concerned, APTEL has referred to the report of the Expert Committee appointed by MERC, which recommended determination of the price of coal from Lohara Coal Blocks using "transfer pricing method" which is one of the commonly used methods. It has accepted the report of the Expert Committee which provided a reasonable methodology to arrive at the cost of mining from Lohara Coal Blocks. the finding of APTEL is based on the report of the Expert Committee, which was ignored by MERC. The Expert Committee had found that APML had entered into a PPA based on the assurance of an instrumentality of the Government of India that coal would be provided to it from the Lohara Coal Blocks. However, on account of the reasons that have been elaborately discussed, Lohara Coal Blocks, which was allocated to APML, came to be deallocated for no fault on the part of APML. It is to be noted that the Expert Committee, while arriving at its finding, had also appointed external industry experts, i.e. legal consultant, financial experts and independent auditors. It is worthwhile to mention that one of the Members of the said Expert Committee was a representative of MSEDCL. What has been granted under the said methodology is the additional cost of transport which APML would be required to incur for transporting the coal from other locations on account of deallocation of Lohara Coal Blocks. We, therefore, find no reason to interfere with the said finding

A **with regard to methodology of arriving at the compensation payable on account of 'Change in Law' event. [Paras 49 and 50][665-D-F; 668-F-H; 669-A;]**

Manohar Lal Sharma v. The Principal Secretary and Others **(2014) 9 SCC 516 : [2014] 8 SCR 446;** *Energy Watchdog v. Central Electricity Regulatory Commission and Others* **(2017) 14 SCC 80 : [2017] 3 SCR 153** *Tata Power Company Limited Transmission v. Maharashtra Electricity Regulatory Commission* **2022 SCC OnLine SC 1615;** *Maharashtra State Electricity Distribution Company Limited v. GMR Warora Energy Ltd. and Others in* **Civil Appeal No. 6927 of 2021 – referred to.**

Case Law Reference

[2014] 8 SCR 446	**referred to**	**Para 15**
(2017) 3 SCR 153	**referred to**	**Para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos.687-688 of 2021.

From the Judgment and Order dated 05.10.2020 of the Appellate Tribunal for Electricity in Appeal Nos.340 and 354 of 2019.

M. G. Ramachandran, G. Umapathy, Niranjan Reddy, Dr. A.M. Singhvi, Darius J. Khambata, Sajan Poovayya, Vikram Nankani, Sr. Advs., Ms. Poorva Saigal, Shubham Arya, Nikunj Dayal, Ms. Pallavi Saigal, Ravi Nair, Ms. Shikha Sood, Ms. Reeha Singh, Ms. Anumeha Smiti, Aneesh Bajaj, Anup Jain, Udit Gupta for M/s. Udit Kishan and Associates, Vishrov Mukherjee, Pukhrambam Ramesh Kumar, Yashaswi Kant, Karun Sharma, Ms. Juhi Senguttuvan, Mahesh Agarwal, Amit Kapur, Ms. Poonam Sengupta, Avishkar Singhvi, Arshit Anand, Saunak Rajguru, Aman Sharma, Ms. Aparajita, Ms. Deepshikha Mishra, Ankitesh Ojha, Karan Rukhana, E. C. Agrawala, Ms. Pallavi Sharma, Advs. for the appearing parties.

The Judgment of the Court was delivered by

B. R. GAVAI, J.

1. The present appeals challenge the judgment and order dated 5th October 2020 passed by the Appellate Tribunal for Electricity (hereinafter referred to as 'APTEL'), in cross appeals being Appeal

No. 340 of 2019, filed by Maharashtra State Electricity Distribution Company Limited (hereinafter referred to as 'MSEDCL'), the appellant herein, and Appeal No. 354 of 2019, filed by Adani Power Maharashtra Limited (hereinafter referred to as 'APML'), respondent No. 1 herein, thereby challenging the order dated 6th September 2019, passed by Maharashtra Electricity Regulatory Commission (hereinafter referred to as 'MERC').

2. APML and MSEDCL had entered into four long term Power Project Agreements (hereinafter referred to as 'PPA') dated (a) 8th September, 2008 for 1230 MW (hereinafter referred to as '1230 MW PPA'); (b) 21st March, 2010 for 1200 MW (hereinafter referred to as '1200 MW PPA'); (c) 9th August, 2010 for 120 MW (hereinafter referred to as '120 MW PPA') and (d)16th February, 2013 for 440 MW (hereinafter referred to as '440 MW PPA'), pursuant to the competitive bidding process conducted by MSEDCL.

3. Prior to the signing of the PPAs between the parties, APML had applied to the Ministry of Coal, Government of India (for short, "MoC") for allotment of Lohara Coal Blocks on 10th January 2007. Thereafter, on 6th November 2007, the MoC issued a Letter of Allocation (LoA) to APML conveying the allocation of Lohara (West) and Lohara Extension (E) Coal Blocks as the allocated source of fuel. Subsequently, on 23rd November 2007, APML applied to the Standing Linkage Committee (Long-Term) (hereinafter referred to as "SLC (LT)") for grant of coal linkage for balance capacity to cover the coal requirement of Units 1, 2 and 3 of the Tiroda Thermal Power Station (TPS).

4. On 27th December 2007, the Government of Maharashtra issued a statutory Notification under Section 38 (V) of the Wild Life (Protection) Act, 1972, classifying 625.82 sq. km. of the Tadoba National Park and Andheri Wildlife Sanctuary as a Critical Tiger Habitat (CTH). It is pertinent to note that, at this point in time, the area demarcating the CTH, did not include the area of Lohara Coal Blocks and as such, there were no restrictions on coal mining in the allotted mining lease area. As per the revised Request for Proposal (RFP), the bid deadline was 21st February 2008 and the cut-off date was 14th February 2008, being seven days before the deadline. APML submitted its bid for supply of 1320 MW Power to MSEDCL, wherein it specified that the fuel source for a portion of the contracted capacity, viz. 800 MW capacity out of 1320

A MW, would be the Lohara Coal Blocks. A copy of the MoC's allocation letter dated 6th November 2007 was appended to the bid, as per the bid requirements.

5. Thereafter, on 21st February 2008, i.e., seven days after the bid cut-off date, the Conservator of the Tadoba Andheri Tiger Reserve (for B short, "TATR") approved the constitution of an Expert Committee for the creation of a Buffer Zone surrounding the core area of TATR under Section 38(V) of the Wildlife (Protection) Act.

6. Twenty-four days after the bid cut-off date, the Conservator, TATR submitted a proposal to the Chief Conservator of Forest, C Maharashtra for creation of the aforesaid Buffer Zone. During the pendency of this proposal, the Ministry of Environment, Forests and Climate Change, Government of India (for short, "MoEF"), in exercise of its powers in terms of Regulation 7 of MoEF's Notification dated 14th September 2006, granted the Terms of Reference (ToR), to APML for mining in the Lohara Coal Blocks, on the basis of the recommendation D made by the Expert Appraisal Committee, MoEF (for short, "EAC") in its 21st Meeting.

7. Thereafter, the 1320 MW PPA was executed between the parties on 8th September 2008, for supply of the contracted capacity from Units 2 and 3 of the Tiroda TPS. In pursuance of APML's E application for coal linkage, the SLC(LT) issued a Letter of Assurance (LoA) dated 12th November 2008, authorising the coal linkage sought, whilst at the same time, acknowledging that the Lohara Coal Blocks catered to the requirement for generation of a portion of APML's contracted capacity, i.e. 800 MW to MSEDCL.

F 8. In the meanwhile, on 8th October 2008, the Conservator, TATR submitted a revised proposal for creating the aforesaid Buffer Zone, which, for the first time, included the mining lease area of about 176 hectares of the Lohara Coal Blocks. These proposals were discussed in a meeting of the EAC, where an area of 1067.21 sq. km. was proposed G to be the Buffer Zone of TATR. Thereafter, in its 59th Meeting held on 24-25 November 2009, the EAC decided to withdraw the ToR issued to the Lohara Coal Blocks since the proposed mining lease areas were falling in the proposed Buffer Zone, which included a tiger corridor in the midst of a rich forest. Thereafter, vide notification dated 5th May 2010, the Government of Maharashtra notified 1101.7 sq. km. as the H Buffer Zone of TATR.

9. Since the Lohara Coal Blocks could not be utilized to meet the requirements under the 1320 MW PPA, APML first informed MSEDCL of its inability to supply power, vide letter dated 22nd May 2010 and, thereafter, issued a termination notice to MSEDCL dated 16th February 2011 due to the occurrence of *force majeure,* on account of cancellation of Lohara Coal Blocks, in terms of Article 12 of the 1320 MW PPA.

10. On 22nd May 2010, APML informed MSEDCL regarding its inability to supply power under the PPA from Units II and III at the PPA-agreed tariff due to cancellation of Lohara Coal Blocks. On 14th June 2010, APML also informed MSEDCL regarding the occurrence of a *force majeure* event in terms of Article 12 of the PPA. Consequently, a termination notice dated 16th February 2011was issued to MSEDCL.

11. On 17th July 2012, APML filed a petition, being Case No. 68 of 2012 before MERC, claiming 'Change in Law' and '*force majeure'* reliefs on account of cancellation of Lohara Coal Blocks. On 21st August 2013, MERC passed an order in the said petition directing for a meeting of the Expert Committee to be constituted to evaluate the impact of withdrawal of the ToR on Units II and III of Tiroda TPS and determine a compensatory charge to be paid to APML. MERC also worked out an interim relief at Rs.3.124 per KWH, which would be applicable only for sale of power above the initial 520 MW from the date of commercial operation. However, the claim of APML's with regard to *force majeure* was rejected by the said order.

12. Being aggrieved by the said order dated 21st August 2013, M/s Prayas Energy Group, the consumer representative (hereinafter referred to as "Prayas") filed an appeal being Appeal No. 296 of 2013 challenging the order passed by MERC. A cross-appeal also came to be filed by APML being Appeal No. 241 of 2016 challenging the rejection of plea of *force majeure*.

13. In pursuance of the order passed by MERC dated 21st August 2013, the Government of Maharashtra constituted a High-Level Expert Committee on 9th December 2013. The said High-Level Expert Committee filed its report on 17th February 2014 recommending grant of compensatory tariff to APML for 800 MW capacity which was entirely dependent on coal from Lohara Coal Blocks.

14. On 17th February 2014, MoC cancelled and deallocated Lohara Coal Blocks on the ground that Environmental Clearance (EC) and Forest

A Clearance (FC) were not given to the said coal blocks. Vide order dated 5th May 2014, MERC, in Suo Motu Case No. 63 of 2014, devised a mechanism for calculating the compensatory fuel charges payable to APML by MSEDCL. The said order was challenged by MSEDCL and Prayas in Appeal No. 166 of 2014 and Appeal No. 218 of 2014 respectively.

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15. On 25th August 2014, this Court, in its judgment in the case of ***Manohar Lal Sharma v. The Principal Secretary and Others***[1], held the allocation of coal blocks made by the Screening Committee from 14th July 1993 onwards to be illegal. On 16th April 2015, Ministry of Power (for short, "MoP") issued a policy direction under Section 107 of the Electricity Act, 2003 to treat allocation of coal block under Coal Mine (Special Provisions) Ordinance, 2014 as a 'Change in Law' event. On 28th January 2016, the MoP notified the revised Tariff Policy.

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16. On 11th May 2016, APTEL partly allowed Appeal No. 296 of 2013 filed by Prayas setting aside the order of MERC dated 21st August 2013, except on the issue of ToR cancellation not being a *force majeure* event. Vide the said order dated 11th May 2016, APTEL also allowed the appeals filed by MSEDCL and Prayas against the MERC's order dated 5th May 2014. APTEL held that MERC cannot exercise regulatory powers, thereby setting aside the award of compensatory fuel charge to APML by MERC in exercise of its regulatory power. APTEL, however, kept the *force majeure* issue open for the decision on the issue of withdrawal of ToR.

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17. In the meantime, on 11th April 2017, this Court delivered a judgment in the case of ***Energy Watchdog v. Central Electricity Regulatory Commission and Others***[2], wherein the Court held that change in policies of the Government affecting availability of domestic coal to the generating companies qualifies as a 'Change in Law' event as defined in the PPAs. Consequently, vide order dated 31st May 2019, APTEL allowed the appeal filed by APML being Appeal No. 241 of 2016 and set aside the order of the MERC dated 21st August 2013 and remanded the matter to MERC for fresh consideration in the light of judgment of this Court in the case of ***Energy Watchdog*** (supra).

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18. Being aggrieved thereby, MSEDCL preferred an appeal, being Appeal No. 340 of 2019, on the ground that MERC erred in declaring

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[1] **(2014) 9 SCC 516**
[2] **(2017) 14 SCC 80**

the event of deallocation of Lohara Coal Blocks as 'Change in Law' event under the PPA. APML preferred a cross-appeal, being Appeal No. 354 of 2019, on the ground that, while granting relief on account of 'Change in Law', MERC had adopted an erroneous methodology which does not restore it to the same economic position as if no 'Change in Law' had occurred.

19. The APTEL framed the following issues for consideration:

(1) "Whether MERC was justified in declaring the event of de-allocation of the Lohara Coal Blocks as a change in law event?

(2) Whether MERC was justified in considering the landed cost of linkage coal as the basis for computing change in law compensation to Adani when Lohara Coal Blocks were the bid-identified source of coal?

(3) Whether MERC was justified in pegging the carrying cost to the rate specified in prevalent Multi Year Tariff ("MYT") Regulations?

(4) Whether MERC was justified in restricting the change in law relief to the difference between 100% assurance in New Coal Distribution Policy ("NCDP"), 2007 and 75% assurance under the SHAKTI Policy based on the Fuel Supply Agreement ("FSA") dated 29.03.2018 being signed under the SHAKTI Policy?

(5) Whether MERC was justified in linking NCDP 2007 with allotment of the Lohara Coal Blocks?

(6) Whether deallocation of the Lohara Coal Blocks was a foreseeable risk for Adani and whether the same has any implication on change in law relief allowed to Adani?

(7) Whether MERC adopted the correct methodology regarding Station Heat Rate ("SHR") and Gross Calorific Value ("GCV') in the Impugned Order while computing the change in law relief allowed to Adani? Whether such methodology adheres to the principle of restitution?"

20. The APTEL, vide the impugned judgment and order dated 5th October 2020, answered the issues as under:

A "14.1 **Issue No.1:-** We hold that the Appellant was affected by change in law on account of the de-allocation of Lohara Coal Blocks. **Accordingly, the impugned order is upheld on this issue.**

14.2 **Issue No.2:-** We hold that the Appellant is entitled to be
B paid Lohara Coal cost including transportation cost as base while computing the compensations for the change in law events. **The issue is decided in favour of the Appellant.**

14.3 **Issue No.3:-** As the Appellant itself had sought the carrying cost at the rate prescribed in the MYT Tariff Regulations
C in its petition before the State Commission, we see no reason to interfere with the impugned order on this issue. Hence, the Appellant cannot raise its claim contrary to what has been sought before the State Commission. **The issue is decided against the Appellant.**

D 14.4 **Issue No.4:-** ln line with our judgment dated 28.9.2020 in A.No.116 of 2019 & batch, we hold that findings in the impugned order relating to the issue of restricting the quantum of shortfall in domestic coal to a maximum of 25% are against the principles of restitution under the change in law provisions of the PPA. **The issue is decided in favour**
E **of the Appellant.**

14.5 **Issue No.5:-** Since this issue was not pressed during the proceedings, we do not find it necessary to return a finding on this issue. **No decision required.**

F 14.6 **Issue No.6:-** We hold that the Appellant's rights and obligation in the PPA cannot be thwarted based on omissions on part of Government instrumentalities and hence, the de-allocation of the Lohara Coal Blocks was not a feaseable risk for the Appellant. **The issue is decided in favour of the Appellant.**

G 14.7 **Issue No.7:-** In line with our judgment dated 28.9.2020 in A.No.116 of 2019 & batch, we hold that the change in law compensation shall be calculated based on the SHR specified in the MERC MYT Regulations, 2011 or the actual SHR **whichever is lower** and actual GCV of coal as

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received at the plant site. **The issue is decided in favour of the Appellant."**

21. Consequently, the APTEL allowed the appeal filed by APML, while rejecting the appeal preferred by MSEDCL. Aggrieved thereby, MSEDCL has preferred the present appeals.

22. We have heard Shri M.G. Ramchandran, learned Senior Counsel appearing on behalf of the appellant-MSEDCL and Shri Sajjan Poovayya, learned Senior Counsel appearing on behalf of respondent No. 1–APML.

23. Shri Ramchandran submitted that both the MERC and APTEL have grossly erred in holding the deallocation of Lohara Coal Blocks to be a 'Change in Law' event. It is submitted that deallocation of coal blocks is a matter between APML and Coal India Limited (for short, "CIL") and the MSEDCL has nothing to do with the same. It is further submitted that any change to clearances/consents cannot be regarded as 'Change in Law'. It is submitted that Clause 4.1.1 of the PPA devolves an obligation and responsibility on APML to obtain and maintain all consents required under the PPA and, as such, mere deallocation of Lohara Coal Blocks could not be treated as 'Change in Law'. It is further submitted that in Case-1 bidding, the arrangement of fuel was the responsibility of the bidder and, as such, APTEL is not concerned as to from what sources APML would obtain the coal. It is further submitted that as per the PPA, it was APML's sole responsibility to transport the coal and, as such, APTEL erred in granting compensation by factoring the additional cost of transportation.

24. As against this, Shri Poovayya submitted that, as consistently held by this Court in the cases of ***Energy Watchdog*** (supra), ***Adani Rajasthan*** and ***Maharashtra State Electricity Distribution Company Limited v. Adani Power Maharashtra Limited and Others***[3] ["***MSEDCL v. APML and Others***", for short], since the deallocation of Lohara Coal Blocks was on account of inclusion of the said area into Buffer Zone of TATR vide notification of Government of Maharashtra dated 5th May 2010, which was much after the cut-off date, both MERC and APTEL have correctly held that the said event would amount to 'Change in Law'. It is submitted that the bid of the appellant was submitted on the basis that Lohara Coal Blocks was allotted to it.

[3] **2023 SCC OnLine SC 233**

A However, much after the cut-off date, on account of the notification issued by the State of Maharashtra, the coal block was deallocated and, as such, APML was required to obtain the coal from other sources which incurred additional costs.

25. Shri Poovayya further submitted that in view of the judgment B of this Court in the case of ***Tata Power Company Limited Transmission v. Maharashtra Electricity Regulatory Commission***[4]and ***MSEDCL v. APML and Others*** (supra), an interference in the concurrent findings of fact would not be warranted.

26. It is further submitted by Shri Poovayya that the Bank C Guarantee furnished by APML was also returned by CIL, finding no fault on the part of APML thereby fortifying its claim for Change in Law benefit.

27. It is further submitted by Shri Poovayya that MSEDCL was a part of the Expert Committee, which was constituted by the MERC vide D its order dated 21st August 2013. Having participated in the said meeting in which the Expert Committee held that APML was entitled for compensation on account of deallocation of Lohara Coal Blocks, it does not lie in the mouth of MSEDCL to contend that APML is not entitled to 'Change in Law' compensation.

E 28. Out of the seven issues framed by APTEL, the 5th issue was not pressed before the APTEL.

29. When we heard this batch of Electricity appeals, it was agreed between all the parties that this Court should first decide Civil Appeal No. 684 of 2021 (***MSEDCL v. APML and Others*** (supra)) and Civil F Appeal No. 6927 of 2021 (***Maharashtra State Electricity Distribution Company Limited v. GMR Warora Energy Ltd. and Others***) inasmuch as three of the issues involved in all the appeals in the batch were common. It was submitted that those two appeals could be decided by deciding the three common issues. However, insofar as the other appeals are concerned, it was submitted that, in addition to the three common issues, G certain additional issues were also involved and it was agreed that after those two appeals are decided, the other appeals should be heard for considering these additional issues.

30. The said three common issues are thus:

H [4] **2022 SCC OnLine SC 1615**

(i) Whether 'Change in Law' relief on account of NCDP 2013 should be on 'actuals' viz. as against 100% of normative coal requirement assured in terms of NCDP 2007 OR restricted to trigger levels in NCDP 2013 viz. 65%, 65%, 67% and 75% of Assured Coal Quantity (ACQ)?

(ii) Whether for computing 'Change in Law' relief, the operating parameters be considered on 'actuals' OR as per technical information submitted in bid?

(iii) Whether 'Change in Law' relief compensation is to be granted from 1st April 2013 (start of Financial Year) or 31st July 2013 (date of NCDP 2013)?

31. After extensively hearing all the learned counsel for the parties, vide the judgment and order dated 3rd March 2023 in the case of ***MSEDCL v. APML and Others*** (supra), this Court decided those two appeals after considering the aforesaid three issues.

32. The first issue was answered by this Court, holding that the 'Change in Law' relief for domestic coal shortfall should be on 'actuals' i.e. as against 100% of normative coal requirement assured in terms of NCDP, 2007. Insofar as the second issue is concerned, it was held that the Station Heat Rate ("SHR" for short) and Auxiliary consumption should be considered as per the Regulations or actuals, whichever is lower. The third issue was answered holding that the Start date for the 'Change in Law' event for the NCDP, 2013 is 1st April 2013.

33. As such, Issue No. 4 with regard to compensation for shortfall of domestic coal on account of 'Change in Law' on account of amendment to the SHAKTI Policy stands covered by our judgment dated 3rd March 2023 in the case of ***MSEDCL v. APML and Others*** (supra).

34. Insofar as the issue with regard to SHAKTI Policy is concerned, the same is considered by us in our judgments of even date, in Civil Appeal Nos. 677-678 of 2021 and Civil Appeal No. 5684 of 2021, holding therein that the restitutionary principle, as has been applied by this Court on account of 'Change in Law', will also be applicable on account of change occurring due to introduction of SHAKTI Policy. As such, no interference would be warranted with the findings of APTEL on Issue No. 4 in light of the view taken by us in the aforesaid three judgments.

35. Insofar as Issue No. 3 is concerned, a perusal of the impugned judgment and order would reveal that MSEDCL itself had sought the carrying cost prescribed in the MYT Tariff Regulations before the State Commission. We, therefore, find that APTEL has rightly held that MSEDCL could not be permitted to raise its claim contrary to what was sought before the State Commission. As such, interference would not be warranted with the said issue also.

36. Insofar as Issue No. 7 is concerned, in the judgment of this Court in the case of ***MSEDCL v. APML and Others*** (supra), we have already held that 'Change in Law' compensation shall be calculated based on the SHR specified in the MERC MYT Regulations or the actual SHR whichever is lower.

37. This Court, in the case of ***MSEDCL v. APML and Others***(supra), after considering the relevant provisions under the Electricity Act, 2003 with regard to constitution of various expert bodies like the CEA, CERC and the learned APTEL, has held that these bodies are bodies consisting of experts in the field. After considering various judgments on the issue, this Court observed thus:

> "**123.** Recently, the Constitution Bench of this Court in the case of *Vivek Narayan Sharma* v. *Union of India* has held that the Courts should be slow in interfering with the decisions taken by the experts in the field and unless it is found that the expert bodies have failed to take into consideration the mandatory statutory provisions or the decisions taken are based on extraneous considerations or they are *ex facie* arbitrary and illegal, it will not be appropriate for this Court to substitute its views with that of the expert bodies."

38. In the case of ***MSEDCL v. APML and Others*** (supra), we have upheld the view taken by CERC as well as APTEL, holding that the actual GCV of coal 'as received' at the plant site has to be taken into consideration. As such, no interference would be warranted with regard to the said issue also.

39. The other three issues, in our view, are interlinked. We find that the only issue that is required to be considered is as to whether deallocation of Lohara Coal Blocks would amount to 'Change in Law' and as to whether APML would be entitled to restitution on account of the same.

40. Insofar as the said issue is concerned, the same is concurrently held in favour of APML by both the MERC and the APTEL, thereby declaring the event of deallocation of Lohara Coal Blocks as 'Change in Law'. Unless the said issue is found to be perverse or in ignorance of the mandatory statutory provisions or is based on extraneous considerations, it will not be permissible for this Court to interfere with the same.

41. We will, therefore, have to examine the concurrent findings of MERC as well as APTEL, guided by these factors.

42. It will be relevant to refer to the definition of 'Law' as found in Article 1.1 of the PPA, which reads thus:

> ""Law" - means, in relation to this Agreement, all laws including Electricity Law in force in India and any statute, ordinance, regulation, Notification or code, rule. or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and **shall further include all applicable rules. regulations. 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 CERC and the MERC**.
>
> "Indian Governmental Instrumentality" means the GOI, Government of Maharashtra and any ministry or, department of or, board, agency or other regulatory or quasi-judicial authority controlled by GOI or Government of States where the Procurer and Project are located and includes the CERC and MERC."
>
> [*Emphasis supplied*]

43. A perusal of the said definition would reveal that any order or notification, rule or regulation by an Indian Governmental Instrumentality would constitute 'Law'. It cannot be disputed that Government of Maharashtra, Government of India and various statutory authorities would fall under the term 'Governmental Instrumentalities'.

44. It cannot be disputed that in the present case, the cut-off date under the PPA was 14th August 2008. It is to be noted that the power to notify a Tiger Reserve as a Buffer Zone is vested with the State Government under Section 38V of the Wildlife (Protection) Act. For consideration and creation of Buffer Zone, three statutory requirements have to be complied with, which are thus:

A (i) "an Expert Committee must be constituted for identifying and establishing a Buffer Zone;

(ii) Gram Sabha should be consulted before any such notification and

B (iii) the identification and establishment of a Buffer Zone shall be based on scientific and objective criteria."

45. From the material placed on record, it is clear that prior to 14th August 2008, the area where Lohara Coal Block is situated was not even proposed to be notified as a Buffer Zone. It is only seven days after the cut-off date, i.e., 21st February 2008, that the Chief Conservator, C Forests gave approval for constitution of an Expert Committee for creating the Buffer Zone surrounding the core area. Thereafter, on 7th March 2008, the Conservator, TATR submitted the proposed demarcation to the Chief Conservator of Forest for creating the Buffer Zone surrounding the core area of TATR. The consultation of the Gram Sabha D happened only between May 2008 and November 2008, i.e., much after the cut-off date. Subsequently, on 8th October 2008, the Conservator, TATR submitted the revised proposal for Buffer Zone to TATR. After numerous other deliberations, including the one with National Tiger Conservation Authority (NTCA), the Government of Maharashtra issued a notification on 5th May 2010 notifying 1101.7711 sq. km. as the Buffer E Zone of TATR. As such, the notification dated 5th May 2010, which included the area where Lohara Coal Blocks were situated, will have to be construed to be a 'Change in Law'. It is only because of issuance of the said notification, the coal block, which would have otherwise been available to APML, was not available to it.

F 46. It is further clear from the record that MoC had allocated Lohara Coal Blocks vide allocation letter dated 6th November 2007 and MoEF granted the ToR for Lohara Coal Blocks on 16th May 2008 pursuant to EAC's recommendation in the meeting dated 28th April 2008. A perusal of the said letter of MoC dated 6th November 2007 would G clearly reveal that allocation of Lohara West and Lohara Extension Coal Block to APML has been specifically made to meet the coal requirements of their 1000 MW power plant in District Gondia, Maharashtra. It is, thus, clear that the bid submitted by the appellant on the cut-off date was on the basis of the assurance that the coal would be available to it from Lohara Coal Blocks. Had the notification dated 5th May 2010 not H been issued, APML could have utilized the coal from Lohara Coal Blocks

which was allotted to it by MoC. Apart from that, it is to be noted that MSEDCL was a part of the Expert Committee which was constituted by MERC vide its order dated 21st August 2013. Having participated in the proceedings of the meeting of the Expert Committee, MSEDCL cannot be permitted to take a stand contrary to the decision of the said Expert Committee.

47. It is further to be noted that deallocation of Lohara Coal Blocks was not on account of any fault of APML and this is recognized by CIL itself, inasmuch as it has returned the Bank Guarantee which was furnished by APML.

48. We find that no interference would be warranted with the concurrent findings of MERC and APTEL that deallocation of Lohara Coal Blocks would amount to 'Change in Law' event as defined under the PPA.

49. Insofar as methodology is concerned, APTEL has referred to the report of the Expert Committee appointed by MERC, which recommended determination of the price of coal from Lohara Coal Blocks using "transfer pricing method" which is one of the commonly used methods. It has accepted the report of the Expert Committee which provided a reasonable methodology to arrive at the cost of mining from Lohara Coal Blocks. It will be relevant to refer to the following paragraphs of the impugned judgment and order:

> "8.9 We also observe that MSEDCL ought not to cast aspersions on such use of methodology of transfer pricing to deduce/determine the coal cost. Expert Committee Report was furnished after carrying out a detailed exercise of analysing all relevant technical, commercial, and financial aspects through a consultative process. The Expert Committee had also appointed external industry experts i.e. legal consultant, financial experts and independent auditors. Admittedly, the Expert Committee took cognizance of view of all the stakeholders (including MSEDCL) and it is not the case of MSEDCL that it was not heard before submission of the Report to MERC. In fact, we are mindful of the fact that the cover letter submitted to MERC records MSEDCL representative being one of the members which submitted the Report. As such, we see no reason why the recommendations of the Expert Committee cannot be relied upon.

8.10 It is also not a case where MSEDCL produced any document to contradict such determination of Lohara coal cost by Expert Committee. We therefore hold that MERC ought to have conducted a prudence check to arrive at a conclusion regarding the correctness of the figures so derived/determined towards coal costs by the Expert Committee. Prudence check, however, does not mean taking linkage coal cost as the base to grant or determine change in law compensation to Adani. The MERC clearly fell in error on this issue.

8.11 The MERC's erroneous approach erodes the restitutionary principle enshrined under Article 13 of the PPA. In fact, Adani submitted that the Lohara coal cost cross-subsidizes fuel cost from Linkage portion, which has also been noted by the Expert Committee in its Report, but ignored by MERC. MSEDCL has not disputed this fact.

8.12 The Expert Committee Report further notes that based on the said cost parameters, Adani had arrived at two different bid streams for each of the fuel source (i.e. captive coal and linkage coal). The overall bid numbers were based on a weighted average of the individual bid streams. Observing thus, in Chapter 7, the Expert Committee suggested MERC to consider the Lohara coal cost to be considered as the base for restituting Adani. Expert Committee gave the following rationale for the recommended methodology:

> "7.1 ... The company had entered into a PPA based on the assurance of one of the instrumentality of GoI to provide the coal mine. Therefore, other instrumentality of a state government may need to consider the fact of subsequent non-availability of coal mine. This fact has been acknowledged by MERC…."

8.13 We are in agreement with this rationale. This rationale conforms to the Tribunal's findings in the judgment dated 14.09.2019 (Appeal No 202 of 2018 & 305 of 2018) (Adani Rajasthan judgment) wherein it was held that:

> "11.13. The purpose of change in law relief/compensation is to restore the affected party to the same economic position as if the change in law had not occurred. In the instant case, this

would involve compensating Adani Rajasthan for the cost incurred in purchasing alternate coal to meet the non-availability of domestic coal promised under the NCDP 2007. The MoP letter of 31.07.2013 as well as the Revised Tariff Policy of 2016 support the principle of compensation to the generators for the additional cost incurred in procuring alternate coal. The methodology proposed by Adani Rajasthan prima facie appears to be consistent with the principle/basis of compensation for shortfall/non-availability of domestic coal given by the MoP and we do not find any reason to interfere with the same."

8.13 In the aforesaid case, the principle which was considered by us is that to restore the affected party to the same economic position as prevailing at the time of bid submission, the affected party shall be compensated for any additional cost incurred in procuring alternate coal to mitigate the nonavailability/shortfall of coal from the bid-identified source. Since the bid identified source of coal in the aforesaid case was linkage coal, the compensation allowed by the Tribunal was the difference between alternate coal cost and linkage coal cost. The formula for such computation is: Compensation = A - B [where 'A' is cost of alternate coal and 'B' is cost of coal from the bid-identified source of fuel i.e. linkage coal.] Here, we find it important to note that the methodology approved in Adani Rajasthan Judgment has not been interfered with by the Hon'ble Supreme Court in its order dated 31.08.2020 in Jaipur Vidyut Vitran Nigam v. Adani Power Rajasthan Limited and Anr. (Civil Appeal No. 8625-8626 of 2019).

8.14 Applying the same ratio as held in Adani Rajasthan Judgment, the formula for compensation for non-availability of coal from Lohara Coal Blocks should have been Compensation = A - B [where, 'A' is cost of alternate coal and 'B' is cost of coal from the bid-identified source of fuel i.e. Lohara Coal Blocks.] Considering linkage coal cost as base will not restitute Adani to the same economic position as if no change in law had occurred and thus runs contrary to the mandate laid down by the Energy Watchdog Judgment, the Uttar Haryana Judgment and the revised Tariff Policy 2016.

8.15 Adani further prayed before to direct MSEDCL that in so far as the costs incurred towards transportation of coal from the

A Lohara Coal Blocks to Tiroda TPS is concerned the same may be considered based on applicable Railway Freight with applicable taxes and duties, while determining the landed cost of coal from the Lohara Coal Blocks. We are in agreement with this contention. It is no longer res integra that landed cost of coal includes transportation costs. Supreme Court's judgment in *Nabha Power Ltd. vs. Punjab State Power Corp. Ltd.* (2018) 11 SCC 508 is locus classicus on the subject wherein it was held that landed costs cannot exclude transportation costs viz.:-

> "64. We fail to appreciate as to how these costs can be excluded, as the transportation costs to the project site have to be compensated to the appellant. It is not qualified by the methodology of transfer, i.e., railways or road. It is also a matter of necessity, since the railway siding had not reached the project site due to some complications in acquisition of land. It is really the transportation cost from point to point which would be involved and the mere mention in the RFP under project related activity/milestone about Railway siding and the Railway lines from nearby station to site cannot imply that the Railways is the only mode of transportation when the siding has not been made, albeit on account of land acquisition problems."

E 8.16 We, therefore, hold that MSEDCL ought to pay Lohara coal cost as base (including transportation costs) while compensating Adani for the change in law events. This issue is decided accordingly and the Impugned Order on this issue is set aside."

50. It could thus be seen that the finding of APTEL is based on the report of the Expert Committee, which was ignored by MERC. The Expert Committee had found that APML had entered into a PPA based on the assurance of an instrumentality of the Government of India that coal would be provided to it from the Lohara Coal Blocks. However, on account of the reasons that have been elaborately discussed, Lohara Coal Blocks, which was allocated to APML, came to be deallocated for no fault on the part of APML. It is to be noted that the Expert Committee, while arriving at its finding, had also appointed external industry experts, i.e. legal consultant, financial experts and independent auditors. It is worthwhile to mention that one of the Members of the said Expert Committee was a representative of MSEDCL. What has been granted under the said methodology is the additional cost of transport which

APML would be required to incur for transporting the coal from other locations on account of deallocation of Lohara Coal Blocks. We, therefore, find no reason to interfere with the said finding with regard to methodology of arriving at the compensation payable on account of 'Change in Law' event. A

51. The appeals are, therefore found to be without merit and, as such, are dismissed. B

52. Pending application(s), if any, shall stand disposed of. No costs.

Divya Pandey
(Assisted by : Roopanshi Virang, LCRA)

Appeals dismissed.