

**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

S.B. Civil Writ Petition No. 11242/2023

Bhansali Dyeing, Proprietorship/partner Ravi Mehta S/o
Mahaveer Raj Mehta, Age About 60 Yrs. Located At 370, Mandiya
Road, Industrial Area, District Pali, Rajasthan.

-----Petitioner

Versus

1. State Of Rajasthan, Through Principal Secretary,
Department Of Energy, Government Of Rajasthan, It
Centre, Chambal Power House Campus, Hawa Sarak,
Jaipur-302006.
2. Rajasthan Electricity Regulatory Commission, Through Its
Chairman, Vidhyut Viniyamak Bhawan, Sahakar Marg,
Near State Motor Garage, Jaipur Rajasthan-302001.
3. Jodhpur Vidhyut Vitaran Nigam Ltd., Through Its
Managing Director, New Power House, Jodhpur, Rajasthan
342003.
4. The Chief Engineer (M And P-It), Jodhpur Vidhyut Vitaran
Nigam Ltd., New Power House, Jodhpur, Rajasthan
342003.
5. The Superintending Engineer (Ra And C), Jodhpur Vidhyut
Vitaran Nigam Ltd., New Power House, Jodhpur, Rajasthan
342003.

-----Respondents

WITH

S.B. Civil Writ Petition No. 7738/2023
S.B. Civil Writ Petition No. 8901/2023
S.B. Civil Writ Petition No. 8936/2023
S.B. Civil Writ Petition No. 8939/2023
S.B. Civil Writ Petition No. 9049/2023
S.B. Civil Writ Petition No. 9065/2023
S.B. Civil Writ Petition No. 9147/2023
S.B. Civil Writ Petition No. 9168/2023
S.B. Civil Writ Petition No. 9228/2023
S.B. Civil Writ Petition No. 9230/2023
S.B. Civil Writ Petition No. 9254/2023

S.B. Civil Writ Petition No. 9439/2023
S.B. Civil Writ Petition No. 9507/2023
S.B. Civil Writ Petition No. 9736/2023
S.B. Civil Writ Petition No. 9765/2023
S.B. Civil Writ Petition No. 9774/2023
S.B. Civil Writ Petition No. 9838/2023
S.B. Civil Writ Petition No. 9852/2023
S.B. Civil Writ Petition No. 9859/2023
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S.B. Civil Writ Petition No. 10174/2023
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S.B. Civil Writ Petition No. 9823/2023

For Petitioner(s) : Mr. Vikas Balia, Sr. Adv. assisted by
Mr. Aditya K. Shah, Ms. Anukriti Jain
& Mr. Himanshu.
Mr. Ramit Mehta with Mr. Saurabh
Maheshwari & Tarun Dudia.
Mr. Abhishek Singh Rathore.
Mr. Tushar Moad with Ms. Aditi Moad.
Mr. Naman Mohnot.
Mr. Arvind Vyas with Mr. Amit Vyas.
Mr. Vijay Bishnoi.
Mr. Sharad Kothari.
Mr. Mukesh Kachhwaha.
Mr. Ayush Goyal.
Mr. Shreyansh Mehta.
Mr. Deependra Singh Shekhawat.
Ms. Sonu Rathore.
Mr. Anirudh Singh Shekhawat.
Mr. Ramkishore Suthar for
Mr. Akshat Verma.
Mr. Chain Singh.
Mr. Kuldeep Bishnoi.
Mr. Shridhar Mehta.
Mr. Keshav Bhati.
Mr. Vivek Firoda.

For Respondent(s) : Mr. Pankaj Sharma, AAG assisted by
Mr. Rishi Soni, AAAG, Mr. Deepak
Chandak, AGC & Mr. Dhairyaditya
Rathore.
Mr. Bipin Gupta.
Mr. Manish Tak, Dy.G.C.
Mr. Vinay Kothari with
Ms. Kumkum Shah.
Mr. Abhishek Mehta.
Mr. Pradeep Sharma.
Mr. Vikram Choudhary.
Mr. Dheerendra Singh Sodha.
Mr. Suniel Purohit.

HON'BLE DR. JUSTICE PUSHPENDRA SINGH BHATI

Judgment

Reportable

**Reserved on 17/10/2023, 18/10/2023, 19/10/2023,
20/10/2023, 30/10/2023 & 03/11/2023.**

Pronounced on 09/11/2023

1. Since all the instant petitions involve a common controversy though with marginal variation in the contextual facts, therefore, for the purposes of the present analogous adjudication, the facts are being taken from the above-numbered S.B. Civil Writ Petition No.8901/2023, while treating the same as a lead case; thus, the rival submissions of the parties and the observations of the Court, in the present order, would also be based, particularly, on the factual matrix of the lead case.

1.1 The prayer clauses of SBCWP Nos.8901/2023 & 18588/2019 read as under:-

CW No.8901/2023:

"It is, therefore, humbly and respectfully prayed that this writ petition of the petitioner may kindly be allowed and:-

a) By an appropriate writ, order or direction, the order dated 01.09.2022 in Petition Number 2024/2022 (Annexure-1) and 23.06.2023 in Petition Number 2060/2023 (Annexure-2) passed by Rajasthan Electricity Regulatory Commission (Respondent No 01) may kindly be quashed and set aside.

b) By an appropriate writ, order or direction, the consequential order passed by the Ajmer Vidyut Vitran Nigam Limited on 20.09.2022 (Annexure-3) and any order passed by Ajmer Vidyut Vitran Nigam Limited or its officials including Chief Engineer (Comm.) in compliance of the order dated 01.09.2022 in Petition Number 2024/2022 may kindly be quashed and set aside.

c) By an appropriate writ, order or direction, the Respondent No.01 may kindly be directed to Rajasthan Electricity Regulatory Commission to conduct public hearing in the Petition No.2024/2022 filed by the Rajasthan Discoms for recovery of liability through special Fuel Surcharge Arrangement, giving an opportunity of hearing to the affected consumers including the Petitioner.

d) Pass any such further Order(s) as this Hon'ble Court may deem fit in the facts and circumstances of the present case."

CW No.18588/2019:

"It is, therefore, most humbly prayed that this Hon'ble Court may kindly be pleased to accept and allow this writ

petition of the petitioner and by an appropriate writ, order or direction:-

i. The impugned order dated 13006.2019 (Ann-5) passed by respondent No.3 may kindly be quashed and set aside.

ii. The levy of fuel special surcharge on permanently disconnected connection is illegal, arbitrary and without jurisdiction and impugned letter dated 27.11.2019 (Ann-7) issued by the respondent no.2 may kindly be quashed and set aside.

iii. The petition under section 62(4) of the Electricity Act, 2003 and Regulation 88 of R.E.R.C. Tariff Regulation 2014 filed by respondent No.1 and JVVNL may kindly be held to be not maintainable for recovery of weighted average variable cost of all sources of power purchased during period prior to 2013 for permanently disconnected and active connections.

iv. The respondents may kindly be prohibited from taking any further action for levy of fuel special surcharge for further period on the basis of regulation 88 of R.E.R.C. Tariff Regulation 2014 and 2019.

v. It may kindly be held that the regulation 88 of R.E.R.C. Tariff Regulation 2014 and 2019 are prospective in operation and cannot be applied retrospectively for recovery of weighted average variable cost of power purchased during period prior to previous quarter and as approved under tariff order for the year under operation.

vi. Refund the amount of the fuel Special surcharge if any recovered from the petitioner alongwith interest @ 18% per annum.

vi. Any other relief deemed just and proper in the facts and circumstances of the case may also be passed in favour of the petitioner.

vii. Costs be quantified in favour of the petitioner."

2. Brief facts of the case, as placed before this Court by learned counsel of the petitioner, are that M/s.Adani Powers Rajasthan Ltd. (APRL), a power generating Company entered into a Memorandum of Understanding (MOU) with the Government of Rajasthan to implement a coal based thermal power plant at Kawai, District Baran; whereafter, a Power Purchase Agreement was executed

between the APRL and DISCOMS. After the said agreement, the respondent-State was unable to get the coal block allotted or allocated to the APRL, and therefore, the APRL imported the coal from Indonesia for its entire capacity for Kawai Project. Due to increase in the cost of the said coal, the APRL requested for revision of the tariff.

2.1. Thereafter, since such request for revision of the tariff was turned down by the concerned authority, the APRL filed a petition before the respondent-Rajasthan Electricity Regulatory Commission (RERC) (Petition No. RERC-392/13) for adjudication of dispute and award of suitable compensation to offset the increased commercial burden caused on account of import of coal. The respondent-RERC vide order 17.05.2018 allowed the said application and directed the respondents to pay the claim amount to the APRL after duly verifying and determining the same.

2.2. Aggrieved by the aforementioned order, the respondents filed an appeal before the learned Appellate Tribunal for Electricity (APTEL) (Appeal No.202 of 2018), whereupon the learned APTEL vide order 24.09.2018 dismissed the stay application and until pendency of the appeal, the respondents were directed to pay 70% of the compensation amount to the APRL.

2.3. Being dissatisfied with the aforementioned order of the learned APTEL, the respondent-Jaipur Vidyut Vitran Nigam Limited filed an appeal before the Hon'ble Apex Court (**Civil Appeal No (S). 10188/2018, - Jaipur Vidyut Vitran Nigam Ltd Ors. Vs M/s Adani Power Rajasthan Ltd. & Anr**), whereupon the Hon'ble Apex Court vide order dated 29.10.2018, modified the

learned APTEL's order and directed the respondents to pay 50% of the claimed amount to the APRL.

2.4. During the pendency of the aforesaid appeal before the learned APTEL, the respondents filed a petition before the RERC (Petition No. 1464/19) for recovery of additional power purchase cost through special fuel surcharge and the same was allowed on 13.06.2019. Thereafter, the aforementioned appeal filed by the respondents before the APTEL was dismissed on 14.09.2019. The respondent-Jaipur Vidyut Vitran Nigam Ltd. filed an appeal before the Hon'ble Apex Court **(Civil Appeal No (S). 8625-8626/2019, - Jaipur Vidyut Vitran Nigam Ltd Ors. Vs M/s Adani Power Rajasthan Ltd. & Anr)**; the Hon'ble Apex Court vide order dated 31.08.2020 partly allowed the said appeal. Thereafter, the respondent filed a review petition (Review Petition (Civil) Nos. 1811-1812 of 2020) and the said review was dismissed on 02.03.2021.

2.5. Thereafter, the APRL filed a contempt petition (Contempt Petition (C) Nos. 877-878/2021) before the Hon'ble Apex Court for compliance of the order dated 31.08.2020, and the Hon'ble Apex Court passed the order dated 19.04.2022. Relevant portion of the said order is reproduced as hereunder:-

"We have heard learned counsel for the parties at length and perused the record.

With regard to the first question it may only be observed that by order dated 25.02.2022 passed in these contempt petitions, this Court, in paragraph no. 9, has observed as under:

"The further claim of late payment surcharge, amounting to Rs. 2477.70 crores, as per the

petitioner, would be a subject matter which the petitioner, if so advised, can claim before the appropriate forum, as the same is not the subject in question in the present proceedings, regarding which no directions have also been issued by this Court.”

As such, since according to the respondent(s) the payment made is only towards the principal amount plus 9% interest per annum, we are not inclined to pass any further orders as we have already left the question of late payment surcharge open, which the petitioner, if so advised, can claim before the appropriate forum.

As regards the second question of the alleged noncompliance, by the respondents after November, 2021, of the judgment and order dated 31.08.2020, we would not like to make any observation as there is neither any material before us with regard to that nor the same was in question when the contempt petitions were filed. As such, we leave this question open to be agitated by the petitioner, of it is so advised.

With regard to the last issue raised by the respondents, which is to the effect that the claim of the Rajasthan Utilities against the petitioner outside the judgment dated 31.08.2020 be permitted to be made, we would only like to observe that the same cannot be a matter to be considered in a contempt petition and as such neither we are inclined to grant any such relief nor stop them from raising any such issue, if the respondents are so advised and found entitled under the law.

With the aforesaid observations, we close these contempt petitions.”

2.6. Thereafter, the respondent-DISCOMS filed a petition (Petition No. RERC-2024/2022) under Section 62 (4) of the Electricity Act, 2003 (*hereinafter referred to as 'Act of 2003'*) read with Regulation 88 of the RERC (Term and Conditions for Determination of Tariff) Regulations, 2019 (*hereinafter referred to as 'Tariff*

Regulations, 2019 before the RERC to recognize the Additional Power Purchase Cost incurred in order to comply with the orders of the Hon'ble Apex Court and for directions to allow recovery of additional power purchase cost through Special Fuel Surcharge. The learned RERC vide impugned order 01.09.2022 allowed the said petition and permitted recovery of the amount from the consumers as special fuel surcharge.

Relevant portion of the order dated 01.09.2022 is reproduced as hereunder:-

"14. Accordingly, the Commission, based on the material placed on record, orders as under:

i. Considering the financial hardship of the Discoms and at the same time to avoid tariff shock to the consumers, Commission deems it appropriate to consider 5 years repayment period to allow Discoms to recover the amount of Rs.7438.58 Crores (5996.40 Cr principal amount & 1442.18 Cr interest component), on account of special FSA at the rate of Rs.0.14/unit from the consumers being billed on bimonthly basis in 30 equal installments and at the rate of Rs.0.07/unit from the consumers being billed on monthly basis in 60 equal installments. The FSA over this period will be recoverable on the consumption of Last Quarter of FY 2021-22 for all categories of consumers.

ii. The Discoms are directed to utilize the receipt on account of special FSA for repayment of loan taken by them for the purpose. Discoms are also directed to create a separate account head for this purpose and report the status of amount recovered as well as repayment of loan in each True up petition for consideration of the Commission. At the end of five years' period the Discoms shall file a detailed statement showing under recovery/over recovery from the special FSA, if any, which will be appropriately adjusted in true up of that year.

iii. In case recovery of special FSA including variation in variable cost on account of other power stations exceeds

the ceiling prescribed in the relevant Regulations, the Petitioners are at liberty to approach Commission through separate petition at appropriate time.”

2.7. In pursuance of the order dated 01.09.2022, the respondents passed the impugned order dated 20.09.2022 to recover the additional power purchase cost by charging Special Fuel Surcharge. The petitioner being aggrieved by the impugned orders, filed a review petition (2060/2022 connected with 2059/2022 and 2062/2022) before the RERC, but the same were dismissed vide the impugned order dated 23.06.2023.

2.8. Thus, being aggrieved by the orders dated 13.06.2019 & 01.09.2022 and the proceedings and orders consequential thereto, passed by the respondents, the present petitions have been preferred claiming the afore-quoted reliefs.

3. Mr. Vikas Balia, learned Senior Counsel assisted by Mr. Aditya K. Shah, Ms. Anukriti Jain & Mr. Himanshu; Mr. Ramit Mehta with Mr. Saurabh Maheshwari & Tarun Dudia; Mr. Abhishek Singh Rathore; Mr. Tushar Moad with Ms. Aditi Moad; and Mr. Naman Mohnot, Mr. Arvind Vyas with Mr. Amit Vyas; Mr. Vijay Bishnoi; Mr. Sharad Kothari; Mr. Mukesh Kachhwaha; Mr. Ayush Goyal; Mr. Shreyansh Mehta; Mr. Deependra Singh Shekhawat; Ms. Sonu Rathore; Mr. Anirudh Singh Shekhawat; Mr. Ramkishore Suthar for Mr. Akshat Verma; Mr. Chain Singh; Mr. Kuldeep Bishnoi; Mr. Shridhar Mehta; Mr. Keshav Bhati; and Mr. Vivek Firoda, appearing on behalf of the petitioner(s) submitted that there are three components of the alleged recovery amount, namely, (i) Total Principal amount of Rs.3048.64 Crores; (ii) Interest/carrying

costs amount of Rs.2,947.81 Crores paid to the APRL and; (iii) Alleged additional interest burden due to lending from financial institutions, to the tune of Rs. 1442 Crores.

3.1. It was further submitted that the respondents continued to litigate the change in law dispute, instead of making some arrangements for payment with respect to the principal amount ordered by the Hon'ble Apex Court, as a consequence whereof, the liability of the interest/carrying costs is substantially more than the principal amount; now the entire liability was imposed on the consumers by way of special fuel surcharge, which is nothing but an arbitrary action on the part of the respondents.

3.2. It was also submitted that despite the aforesaid negligence on the part of the respondents, which led to the liability of interest/carrying costs becoming substantially more than the principal amount, the learned RERC, before passing the impugned orders, did not even raise any query regarding the liability of interest/carrying costs. In support of such submissions, reliance was placed upon the judgment rendered by the Hon'ble Apex Court in the case of **GMR Warora Energy Ltd Vs Central Electricity Regulatory Commission & Ors. (Civil Appeal No. 11095 of 2018 decided on 20.04.2023)**; relevant portion whereof reads as under:

"169. Before we part with the judgment, we must note that we have come across several appeals in the present batch which arise out of concurrent findings of fact arrived at by two statutory bodies having expertise in the field. We have also found that in some of the matters, the appeals have been filed only for the sake of filing the same. We also find

that several rounds of litigation have taken place in some of the proceedings.

170. Recently, this Court, in the case of MSEDCL v. APML & Ors. (supra), has noted that one of the reasons for enacting the Electricity Act, 2003 was that the performance of the Electricity Boards had deteriorated on account of various factors. The Statement of Objects and Reasons of the Electricity Act, 2003 would reveal that one of the main features for enactment of the Electricity Act was delicensing of generation and freely permitting captive generation. In the said judgment, we have recorded the statement of the learned Attorney General made in the case of Energy Watchdog (supra) that the electricity sector, having been privatized, had largely fulfilled the object sought to be achieved by the Electricity Act. He had stated that delicensed electricity generation resulted in production of far greater electricity than was earlier produced. The learned Attorney General had further urged the Court not to disturb the delicate balance sought to be achieved by the Electricity Act, i.e. that the 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. At the same time, the interests of the end consumers also need to be protected.

171. However, we find that, in spite of this position, litigations after litigations are pursued. Though the concurrent orders of statutory expert bodies cannot be said to be perverse, arbitrary or in violation of the statutory provisions, the same are challenged.

172. It will be relevant to note the following observations of the CERC in its judgment and order dated 16th May 2019, passed in Petition No. 8/MP/2014, which falls for consideration in Civil Appeal No. 39 of 2021 before this Court:

"(d) Approaching the Commission every year for allowance of compensation for such Change in Law is a time-consuming process. Accordingly, the mechanism prescribed

above may be adopted for payment of compensation due to Change in Law events allowed as per PPA for the subsequent period as well."

173. It will also be relevant to refer to some of the observations of the learned APTEL in its order dated 21st December 2021, which falls for consideration in Civil Appeal No.2908 of 2022 before this Court, which read thus:

"115. The Standing Committee of Parliament in its Report (dated 07.03.2018) on Energy titled 'Stressed/ Non-Performing Assets in Electricity Sector' has recognized the financial stress faced by generating companies on account of delay in recovery of Change in Law compensations and has recommended thus:

"The Committee, therefore, recommend that appropriate steps should be taken to ensure that **there should be consistency and uniformity with regard to orders emanating from the status of change in law. Provisions should also be made for certain percentage of payments of regulatory dues to be paid by Discoms in case the orders of regulators are being taken to APTEL/ higher judiciary for their consideration and decision**"

116. The Report lays stress on the obligation of the distribution companies to pay the approved Change in Law compensation even while Regulatory Commission's orders are challenged. **The Policy directive dated 27.08.2018 issued in terms of Section 107 of the Electricity Act, 2003 by the Ministry of Power (MoP) to the CERC emphasized on the need to ensure expeditious recovery of Change in Law compensation. The desirability of this was recognized by this tribunal in its judgment dated 14.09.2019 in Jaipur Vidyut Vitran Nigam Limited vs. RERC & Ors, 2019 SCC Online APTEL 98. It is against such backdrop that Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021, notified by MoP on 22.10.2021, providing for timely recovery of compensation on account of occurrence of Change in Law events have**

been framed. The MoP, vide notification dated 09.11.2021, put in public domain the policy directive on "Automatic pass through of the fuel and power procurement cost in tariff for ensuring the viability of the power" recognizing that in order to ensure that the power sector does not face any constraints in maintaining assured power supply to meet the demand, all the stakeholders in the value chain of power sector must ensure that there is timely recovery of cost. This involves the cost pass through by the generating companies to the distribution companies. 117. In sharp contrast, it is seen from the factual narrative of the events leading to the appeal at hand that the appellants (Haryana Utilities) have been adopting dilatory tactics which not only defeats the public policy but also has the undesirable fall-out of adding to the burden of the end-consumers they profess to serve on account of increasing Carrying Cost.

118. Concededly, in compliance with the Taxes and Duties Order dated 06.02.2017, the appellants paid to the generator the taxes and duties for certain period but, thereafter, unilaterally withheld such claims, raising issues (found merit-less) regarding IPT of coal for first time in January 2018. It is after the impugned order was passed that the appellants are stated to have started complying, to an extent, by making payments. It is the case of the first respondent that the appellants have withheld past payments including towards taxes and duties its entitlement to recover corresponding Late Payment Surcharge ("LPS") being over and above the same to be computed after discharge of the former liability. **We agree that such withholding is in violation of Articles 11.3.2 and 11.6.9 of the PPAs (quoted earlier) which cast a specific mandate on the procurer (Haryana Utilities) to honor the invoices raised, irrespective of dispute, and impose a specific bar against unilateral deductions/setting off.**

119. We find the dilatory conduct of the Haryana Utilities, to delay the implementation of the binding orders concerning compensation on account of coal shortfall and

corresponding taxes and duties, detrimental to the interest of end consumers since it burdens the consumers with incremental LPS for delay in making payments to the generator. This cannot be countenanced, given the earlier dispensation on the subject by the statutory regulator and appellate forum(s), since it smacks of approach that is designed to frustrate the legislative command, and extant State policy, as indeed constitutes abject indiscipline infringing the rule of law. Borrowing THE WORDS OF Hon'ble Supreme Court in SEBI vs. Sahara India Real Estate Corpn. Ltd., (2014) 5 SCC 429 "non-compliance with the orders passed ... shakes the very foundation of our judicial system and undermines the rule of law" which this tribunal is also duty-bound to "honour and protect", so essential "to maintain faith and confidence of the people of this country in the judiciary".

[emphasis supplied]

174. It could thus be seen that even the Standing Committee of Parliament, in its report, has recommended that there should be consistency and uniformity with regard to orders emanating from the status of 'Change in Law'. It has also recommended that the provisions should also be made for certain percentage of payments of regulatory dues to be paid by DISCOMS in case the orders of regulators are being taken to learned APTEL/higher judiciary for their consideration and decision. The learned APTEL has also referred to the Policy Directive dated 27th August 2018 issued in terms of Section 107 of the Electricity Act, 2003 by the MoP to the CERC, where it emphasized the need to ensure expeditious recovery of 'Change in Law' compensation. The learned APTEL has also referred to the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021, notified by MoP on 22nd October 2021, which provide for timely recovery of compensation on account of occurrence of 'Change in Law' events. The learned APTEL found that the Haryana Utilities have been adopting dilatory tactics, which not only defeat the public policy but also have the undesirable fallout of

adding to the burden of the end-consumers they profess to serve on account of increasing 'Carrying Cost'. The learned APTEL further found that withholding of past payments, including towards taxes and duties by the DISCOMS, is in violation of the provisions of the PPAs, which casts a specific mandate on the procurer to honour the invoices raised, irrespective of dispute, and impose a specific bar against unilateral deductions/setting off.

175. It is further to be noted that this Court, in the case of Uttar Haryana Bijli Vitran Nigam Limited (UNHVNL) and another v. Adani Power Limited and others¹², has specifically observed that the 'Change in Law' events will have to accrue from the date on which Rules, Orders, Notifications are issued by the instrumentalities of the State. Even in spite of this finding, the DISCOMS are pursuing litigations after litigations.

176. We find that, when the PPA itself provides a mechanism for payment of compensation on the ground of 'Change in Law', unwarranted litigation, which wastes the time of the Court as well as adds to the ultimate cost of electricity consumed by the end consumer, ought to be avoided. Ultimately, the huge cost of litigation on the part of DISCOMS as well as the Generators adds to the cost of electricity that is supplied to the end consumers.

177. We further find that non-quantification of the dues by the Electricity Regulatory Commissions and the untimely payment of the dues by the DISCOMS is also detrimental to the interests of the end consumers. If timely payment is not made by DISCOMS, under the clauses in the PPA, they are required to pay late payment surcharges, which are much higher. Even in case of 'Change in Law' claims, the same procedure is required to be followed.

178. Ultimately, these late payment surcharges are added to the cost of electricity supplied to the end consumers. It is, thus, the end consumers who suffer by paying higher charges on account of the DISCOMS not making timely payment to the Generators.

179. It is further to be noted that the appeal to this Court under Section 125 of the Electricity Act, 2003 is only

permissible on any of the grounds as specified in Section 100 of the Code of Civil Procedure, 1908. As such, the appeal to this Court would be permissible only on substantial questions of law. However, as already observed herein, even in cases where well-reasoned concurrent orders are passed by the Electricity Regulatory Commissions and the learned APTEL, the same are challenged by the DISCOMS as well as the Generators. On account of pendency of litigation, which in some of the cases in this batch has been more than 5 years, non-payment of dues would entail paying of heavy carrying cost to the Generators by the DISCOMS, which, in turn, will be passed over to the end consumer. As a result, it will be the end consumer who would be at sufferance. We are of the opinion that such unnecessary and unwarranted litigation needs to be curbed.”

3.3. It was further submitted that as per Clause 3 of Regulation 88 of the Tariff Regulations, 2019, the fuel surcharge per unit, to be recovered, for any quarter shall not exceed 15% of weighted average power purchase cost per unit approved by the Commission; but in the present case, the learned RERC vide the impugned order allowed the recovery, excess of the upper limit of 15%, as provided in the Regulations.

3.4. It was also submitted that the liability in question is unnecessarily burdening not only the existing consumers, but also the future consumers who have not consumed electricity during the time period in respect of which the alleged payment to generators were being made, and that, there is no provision in any of the Regulations to pass on the burden for previous quarters to future quarters.

3.5. It was further submitted that due determination of the tariff warrants the prudence check, and such prudence check requires scrutiny of reasonableness of the expenditure incurred or proposed to be incurred by the respondents, and such factor was to be necessarily dealt with by the learned RERC, but the learned RERC has not undertaken judicious exercise to ascertain the claimed expenses as controlled or uncontrolled expenses of the respondents. Such prudence check is mandatory to be followed as per the Regulations 16, 17 and 73 of the Tariff Regulations, 2019.

3.6. It was also submitted that the Special Fuel Surcharge in question was levied without following the statutory provision and ignoring the principles of natural justice because as per Section 64 of the Act of 2003 while determining the tariff as provided under Section 62 of the Act of 2003, there must be publication to invite the public, so that an adequate opportunity of hearing to make suggestions and raise objections can be afforded to the public before the RERC. It was further submitted that Regulation 11 of the Tariff Regulations, 2019 provides for procedure for approval of ARR and determination of tariff, as per which public notice for hearing should have been issued.

The said Section 62 and the relevant portion of Regulation 11 are reproduced as hereunder:-

"Section 62. (Determination of tariff): ---

(1) The Appropriate Commission shall determine the tariff in accordance with the 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 year to ensure reasonable prices of electricity;

(b) transmission of electricity ;

(c) wheeling of electricity;

(d) retail sale of electricity:

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 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 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.

(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 company to comply with such procedures 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 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.”

“Regulation 11. Petition for approval of ARR and determination of tariff

(1) The applicant shall submit the forecast of Aggregate Revenue Requirement, expected revenue from existing tariff and proposed tariff accompanied by fees applicable. The format for furnishing information for calculating expected revenue and expenditure and for determining tariff shall be as laid down by the Commission from time to time by a separate order:

(2) The applicant shall develop the forecast of Aggregate Revenue Requirement using assumptions relating to the behaviour of individual variables that comprise the Aggregate Revenue Requirement during the year.”

3.7. In Support of such submissions, reliance was placed upon the judgment rendered by the Hon’ble Apex Court in the case of ***Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing Kota Vs Shukla and Brothers (2010) 4 SCC 785.***

3.8. It was further submitted that power has been conferred upon the learned RERC under the Tariff Regulations, 2019 to deviate from any of the provision of the regulations suo moto, but it is settled that the same is to remove trivial difficulties in the enforcement of regulation, which does not include the power to amend.

3.9. It was also submitted that one of the principles for tariff determination is consideration of gain and losses on account of uncontrollable and controllable factors, and Regulation 9 of the

Tariff Regulations, 2019 lays down the inclusions for uncontrollable factors.

3.9.1. Therefore, even if the principal cost on account of compensation paid for change in law is considered as an uncontrollable factor; however, interest/carrying costs payment on account of delay on the part of respondents is not an inclusion in the category of uncontrollable factor, therefore the impugned order is contrary to the provisions of law. It was further submitted that the respondents undertook a loan from financial institutions to make the payments in terms of the order passed by the Hon'ble Apex Court i.e. to pay the change in law compensation, instead of creating an equity fund.

3.10. Mr. Ramit Mehta, learned counsel representing the respective petitioner(s) submitted that the term 'special fuel surcharge' is not even recognized either by the statute or by the Regulations, and that there is no formula prescribed for calculating "Special Fuel Surcharge" and the formula prescribed under Regulation 88 of the Tariff Regulations, 2019 is only for Fuel Surcharge, and therefore, the Special Fuel Surcharge levied by the respondents is highly illegal and violative of the provisions of law.

3.10.1. It was further submitted that as per Note No. (ii) of Regulation 88 of the Tariff Regulations, 2019, the unapproved purchases of the respondents will not form part of the fuel surcharge adjustment. It was also submitted that the Special Fuel Surcharge which has been already recovered earlier for 3 years

from the petitioners is again retrospectively revised, which is not justified in law.

3.10.2. It was further submitted that the respondent-DISCOMS does not distribute its profit to its consumers so in the same way it cannot burden the consumers with its losses caused on account of its failure in performance of contract. It was also submitted that the learned RERC, as per Section 86 of the Act of 2003, is duty bound to ensure transparency, but the learned RERC while passing the impugned orders clearly failed to comply with the said provision of law.

3.10.3. It was further submitted that the writ jurisdiction of the Hon'ble High Court can be invoked when there is a violation of the principles of natural justice, and thus, the alternative remedy by itself does not divest the Hon'ble High Court of its power under Article 226 of the Constitution of India. It was also submitted that in the present case, the question involved is purely a question of law, and therefore, the Hon'ble High Court has the discretion to decide the same.

3.10.4. In Support of such submissions, reliance was placed upon the following judgments:-

(a) Whirlpool Corporation Vs Registrar of Trademarks Mumbai and Ors (1998) 8 SCC 1;

(b) Radha Krishna Industries Vs State of Himachal Pradesh & Ors. (2021) 6 SCC 771;

(c) M/s Godrej Sara Lee Ltd. Vs The Excise and Taxation Officer-cum-Assessing Authority & Ors (2023) SCC OnLine SC 95;

(d) Chief Information Commissioner & Ors. Vs State of Manipur & Ors. (2011) 15 SCC 1;

(e) Delhi Airport Metro Express (P) Ltd. Vs Delhi Metro Rail Corporation (2022) 9 SCC 286;

4. On the other hand, Mr. Pankaj Sharma, learned Additional Advocate General assisted by Mr. Rishi Soni, AAAG, Mr. Deepak Chandak, AGC & Mr. Dhairyaditya Rathore; Mr. Bipin Gupta; Mr. Manish Tak, Dy.G.C.; Mr. Vinay Kothari with Ms. Kumkum Shah; Mr. Abhishek Mehta; Mr. Pradeep Sharma; Mr. Vikram Choudhary; Mr. Dheerendra Singh Sodha; and Mr. Suniel Purohit, appearing on behalf of the respondents, while opposing the aforesaid submissions made on behalf of the petitioners, submitted that the present petitions are not maintainable because the petitioners directly approached this Hon'ble Court without availing the alternative remedy as provided under the Section 111 of the Act of 2003. It was further submitted that in a case where an alternative remedy is available, the writ jurisdiction of the Hon'ble High Court cannot be invoked. The said Section 111 is reproduced as hereunder:-

Section 111. (Appeal to Appellate Tribunal): ---

(1) Any person aggrieved by an order made by an adjudicating officer under this Act (except under section 127) or an order made by the Appropriate Commission under this Act may prefer an appeal to the Appellate Tribunal for Electricity:

Provided that any person appealing against the order of the adjudicating officer levying any penalty shall, while filing the appeal, deposit the amount of such penalty:

Provided further that wherein any particular case, the Appellate Tribunal is of the opinion that the deposit of such

penalty would cause undue hardship to such person, it may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the realisation of penalty.

(2) Every appeal under sub-section (1) shall be filed within a period of fortyfive days from the date on which a copy of the order made by the adjudicating officer or the Appropriate Commission is received by the aggrieved person and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(4) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned adjudicating officer or the Appropriate Commission, as the case may be.

(5) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within one hundred and eighty days from the date of receipt of the appeal:

Provided that where any appeal could not be disposed of within the said period of one hundred and eighty days, the Appellate Tribunal shall record its reasons in writing for not disposing of the appeal within the said period.

(6) The Appellate Tribunal may, for the purpose of examining the legality, propriety or correctness of any order made by the adjudicating officer or the Appropriate Commission under this Act, as the case may be, in relation to any proceeding, on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit.”

4.1. It was further submitted that the impugned orders were passed in exercise of the power conferred under the Act of 2003 and it is applicable to all the consumers of the DISCOMS and not against any specific consumer, and therefore the impugned orders are justified in law.

4.2. It was also submitted that the respondent-DISCOMS availed all the legal remedies and thereafter, the order was passed by the Hon'ble Apex Court to pay the claim amount to APRL, which certainly was an uncontrollable factor for the respondent-DISCOMS, and therefore, the learned RERC vide the impugned orders allowed to recover the Special Fuel Surcharge over the period of five years with a view to balance the interests of both the respondent-DISCOMS as well as the petitioners.

4.3. It was further submitted that Section 61 of the Act of 2003 empowers the learned RERC to specify the tariff regulation and the same was guided by the National Tariff Policy in framing the tariff regulations. It was also submitted that the National Tariff Policy 2006 was further amended in years of 2011 and 2016, which clearly provided that the appropriate Commission shall specify an appropriate price adjustment formula for recovery of the cost arising on account of variation in the price of fuel, power purchase etc.

4.4. It was further submitted that Section 62 clause 4 of the Act of 2003 allows changes under the tariff more than once a year, under the term of Fuel Surcharge as per the formula prescribed under the Regulation 88 of the Tariff Regulation, 2019 and the

limit prescribed under the said regulation depends on case to case basis, and therefore, the impugned orders are justified in law.

4.5. It was also submitted that the respondent-DISCOMS have no control over the price increase in variable cost of generators, and the learned RERC allowed such increased expenses to be satisfied through fuel surcharge. In the present case, the increase in cost has occurred on account of compensation claim paid to APRL, and the respondent-DISCOMS do not have any source of the income other than the sale of power to the consumers at tariff decided by the learned RERC.

4.6. It was further submitted that the terms and conditions for supply of electricity under Clause 10.9 provides for electricity charges and prices and Clause 12 of the power supply agreement for electrical energy supply clearly states that the consumers shall be bound to pay the fixed charge and tariff as approved by the Commission. Therefore, the petitioners are bound by the power supply agreement as well as Clause 17 of the said agreement and cannot contend that they would not pay the additional liability in question. The said Clauses 12 & 17 of the power supply agreement are reproduced as hereunder:-

“Clause-12-Tariff and Payment of Electricity Charges

From the date this agreement comes into force, the Consumer shall be bound by, and shall pay the Nigam, fixed charges, energy charges, rentals if any and additional security deposit in accordance with the charges and tariffs approved by the Commission from time to time for the appropriate class of consumers. The Consumer shall pay the Nigam the tax and levies as determined by the State Government from time to time. In case even after disconnection, if the dues remains unpaid, then the Nigam

shall be entitled to take recourse to the provisions stipulated in the Regulations and other laws for the time being in force to recover the arrears.”

Clause-17- APPLICATION OF THE PROVISIONS OF THE ACT AND THE RERC REGULATIONS: *In all matters not herein specifically provided for, the provisions of the Act, the RERC REGULATIONS and other laws for the time being in force shall apply.”*

4.7. It was also submitted that the Commission was constituted under Section 82 of the Act of 2003 to discharge its functions under Section 86 of the Act of 2003 and the issue regarding imposition of the Special Fuel Surcharge in question has already been settled by the Hon’ble Apex Court, and therefore, the impugned orders are justified in law. In support of such submission, reliance was placed upon the judgment rendered by the Hon’ble Apex Court in the case of ***Bihar State Electricity Board Vs Pulak Enterprises & Ors (2009) 5 SCC 641.***

4.8. It was further submitted that the respondent-DISCOMS can lawfully recover the fuel surcharge from its consumers for any quarter as per formula prescribed under Section 62 (4) of the Act of 2003 and Regulation 88 of the Tariff Regulation, 2019, and thus, looking into the financial hardship of the respondent-DISCOMS, the learned RERC allowed recovery of the amount of Rs. 7438.58 Crores in the form of Special Fuel Surcharge from the consumers. Therefore, as per learned counsel, the entire impugned action of the respondents cannot be said to be violation of any of the provisions of law.

4.9. It was also submitted that there is no provision in the Regulations for publication of the petition/application before

recovery of the fuel surcharge so calculated, rather only true up petition shall be published and objection/suggestions of the stakeholder shall be invited and considered, and therefore at this stage, for the approval of the fuel surcharge in question, no public hearing is required, and thus, the respondents' action impugned herein is neither violative of the principles of natural justice, nor any other provisions of law.

4.10. It was further submitted that some of the persons have challenged Regulation 88 of the Tariff Regulation, 2019 and order dated 01.09.2022 before the Division Bench of this Hon'ble Court in D.B. Civil Writ Petition No. 12031/2023, which is still pending.

4.11. It was also submitted that the learned RERC has the power and jurisdiction under the Act of 2003 and Tariff Regulations, 2019 to approve the fuel surcharge beyond the ceiling limit, and therefore, the impugned orders are justified in law.

4.12. It was further submitted that the learned RERC and the learned APTEL had not duly determined the amount, which submission has been recorded in the judgment rendered by the Hon'ble Apex Court in the case ***Jaipur Vidyut Vitran Nigam Ltd. Ors. Vs Adani Power Rajasthan Ltd. Anr (Review Petition (Civil) Nos. 1811-1812 of 2020, decided on 02.03.2021)***. It was also submitted that after passing of the order by the Hon'ble Apex Court, the respondent-DISCOMS immediately paid the liability amount to APRL, and therefore, there is no error on the part of the respondents in taking the impugned action.

4.13. In support of such submissions, reliance was placed upon the judgment rendered by the Hon'ble Apex Court in the case of ***Sai***

Bhaskar Iron Ltd. Vs A.P. Electricity Regulatory Commission & Ors. (2016) 9 SCC 134.

4.14. Learned counsel also placed reliance on the following judgments:

(a) Thansingh Nathmal & Ors. Vs. A.Majid , AIR 1964 SC 1419;

(b) Titaghur Paper Mills Co. Ltd. & Ors. Vs. State of Orissa & Ors., (1983) 2 SCC 433;

(c) Assistant Collector of Central Excise Vs. Dunlop India Ltd. & Ors., (1985) 1 SCC 260;

(d) South Indian Bank Ltd. & Ors. Vs. Naveen Mathew Philip & Ors., (Civil Appeal No.2861-2862 of 2023, decided by the Hon'ble Apex Court on 17.04.2023);

(e) Vijendra Kumar Verma Vs. Public Service Commission, Uttarakhand & Ors., (2011) 1 SCC 150;

(f) Ashok Kumar & Ors. Vs. State of Bihar & Ors., (2017) 4 SCC 357; and

(g) Vivek Narayan Sharma Vs. Union of India, (2023) 3 SCC 1.

5. Heard learned counsel for the parties as well as perused the record of the case alongwith the judgments cited at the Bar.

6. This Court observes that that the APRL entered into an MOU with the Government of Rajasthan to implement a coal based thermal power plant at Kawai, District Baran. After the said agreement, the respondent-State was unable to get the coal block allotted or allocated to the APRL. Therefore, the APRL imported the coal from Indonesia for its entire capacity for Kawai Project. Due to increase in the cost of the said coal, the APRL requested for revision of the tariff. The APRL filed a petition before learned

RERC and same was allowed. The respondents filed an appeal before the learned APTEL, learned APTEL vide order dated 24.09.2018 dismissed the stay application and until pendency of the appeal, the respondents were directed to pay 70% of the compensation to the APRL.

6.1. Against the aforementioned order the respondent-Jaipur Vidyut Vitran Nigam Limited filed an appeal before the Hon'ble Apex Court whereupon the Hon'ble Apex Court vide order dated 29.10.2018, modified the learned APTEL's order and directed the said respondent to pay 50% of the claim to the APRL. Thereafter, the review petition and contempt petition was also dismissed by the Hon'ble Apex Court.

6.2. During the pendency of the aforesaid appeal before the learned APTEL, the respondents filed a petition before the RERC (Petition No. 1464/19) for recovery of additional power purchase cost through special fuel surcharge and the same was allowed vide the impugned order dated 13.06.2019. In pursuance of the said impugned order, the respondent-DISCOMS passed the subsequent orders impugned herein.

6.3. In the year 2022, the respondent-DISCOMS filed a petition before the RERC to recognize the Additional Power Purchase Cost and for directions to allow recovery of additional power purchase cost through Special Fuel Surcharge. The learned RERC vide impugned order dated 01.09.2022 allowed the said petition and permitted recovery of the amount from the consumers as special fuel surcharge. In pursuance of the said impugned order also, the

respondent-DISCOMS passed the subsequent orders impugned herein.

7. This Court, firstly, deals with the issue that the petitioners have not availed the alternative remedy as provided under Section 111 of the Act of 2003. For said purpose, this Court deems it appropriate to reproduce the relevant portions of the judgments rendered by the Hon'ble Apex Court in the cases of **Whirlpool Corporation (Supra)** and **Radha Krishna Industries (Supra)**, as hereunder:

"15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

20. Much water has since flown under the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation."

Radha Krishna Industries (Supra)

"26. Following the dictum of this Court in Whirlpool [Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1], in Harbanslal Sahnia v. Indian Oil Corpn. Ltd. [Harbanslal Sahnia v. Indian Oil Corpn. Ltd., (2003) 2 SCC 107] , this Court noted that: (Harbanslal Sahnia case [Harbanslal Sahnia v. Indian Oil Corpn. Ltd., (2003) 2 SCC 107] , SCC p. 110, para 7)

"7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. **In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.** (See Whirlpool Corpn.v. Registrar of Trade Marks [Whirlpool Corpn.v. Registrar of Trade Marks, (1998) 8 SCC 1].) The present case attracts applicability of the first two contingencies. Moreover, as noted, the appellants' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings."

(emphasis supplied)

7.1. This Court considers it appropriate to reproduce the relevant portion of the judgment rendered by the Hon'ble Apex Court in case of ***The Assistant Commissioner of State Tax Appellant(s) and Others (Civil Appeal No 5121 of 2021 decided on 03.09.2021)***, as hereunder:-

*"The existence of an alternate remedy is not an absolute bar to the maintainability of a writ petition under Article 226 of the Constitution. **But a writ petition can be entertained in exceptional circumstances where there is:***

(i) a breach of fundamental rights;

(ii) a violation of the principles of natural justice;

(iii) an excess of jurisdiction; or

(iv) a challenge to the vires of the statute or delegated legislation."

7.2. This Court further observes that the issue involved in present cases are that the learned RERC passed the impugned orders, approving and allowing the respondent-DISCOMS to recover the additional power purchase cost through Special Fuel Surcharge against the liability so arose to the respondent-DISCOMS, including the liability occurred due to certain non-payments, that too, without giving any opportunity of hearing to the petitioners herein. This Court also observes that such issue needs to be examined under the writ jurisdiction.

7.3. This Court further observes that even if the alternative remedy may be available to the petitioners under the Act of 2003, but the present cases fall under the aforementioned parameters laid down in the precedent law by the Hon'ble Apex Court, and therefore, there is no bar to entertain the Writ petitions and exercise the extraordinary jurisdiction conferred by

Article 226 of the Constitution of India. This Court also observes that the present writ petitions are maintainable as per the aforementioned parameters laid down in the precedent law by the Hon'ble Apex Court.

8. This Court further observes that the liability occurred to the respondent-DISCOMS due to change in law, and the principle of the change in law has already been settled by the Hon'ble Apex Court in the case of ***Energy Watchdog v. Central Electricity Regulatory Commission and others (2017) 14 SCC 80.***

9. This Court also observes that the word Tariff was defined under Clause 64 of the Tariff Regulations, 2019; the said Clause is reproduced as hereunder-:

"(64) "Tariff" means the schedule of charges for generation, transmission, wheeling and supply of electricity together with terms and conditions for application thereof; "

9.1. This Court further observes that Regulation of the Tariff was provided under the afore-quoted Section 61 of the Act of 2003 and the Determination of the Tariff was provided under the afore-quoted Section 62 of the Act of 2003, and as per clause 4 of Section 62 of the Act of the Act of 2003, the tariff may be amended under the terms of any fuel surcharge formula. This Court also observes that the Fuel surcharge is provided under Regulation 88 of the Tariff Regulations, 2019.

9.2. This Court also observes that after the liability occurred to the respondent-DISCOMS, the respondent-DISCOMS filed the

petitions before learned RERC for recovery of additional cost in name of special fuel surcharge and the same was allowed; the learned RERC came to the conclusion that the liability shall be recovered from the consumers in the name of special fuel surcharge as per the Regulation 88 of the Tariff Regulations, 2019.

Relevant portion of the said Regulation 88 is reproduced as hereunder:-

"88. Fuel Surcharge -

(1) The Fuel Surcharge (FS) chargeable by the Distribution Licensee from its consumers for any quarter, shall be computed as per the following formula:

$$FS = C + Ip \text{ (Rs./ kWh) } E$$

Where

C (in Rs. Lakh) = {(Weighted Average Variable Cost of all sources of power purchase during previous quarter in Rs/kWh – Base Weighted Average Variable Cost of all sources of power purchase as approved under Tariff Order for the year under operation in Rs/kWh) x Corresponding Power Purchase from all sources during previous quarter in LU} E (in Lakh Units) = Energy sold (metered plus estimated) during previous quarter. Ip (In Rs. Lakh) = Under-recovery of fuel surcharge in the previous quarter.

Note:

(i) Quarter referred under this formula shall correspond to financial quarter (s) viz. Q1 (Apr. to Jun), Q2 (Jul to Sept), Q3 (Oct to Dec), and Q4 (Jan to Mar).

(ii) The variation in power purchase cost due to Charges for Deviations incurred by Distribution Licensee as per Central Electricity Regulatory Commission (Deviation Settlement Mechanism and related matters) Regulations, 2014 as amended from time to time and Hydro based generation and other unapproved purchases shall not be

covered under fuel surcharge adjustment.

(iv) For the generation stations/power purchase sources, which have single part tariff, 1/3 of the tariff shall be considered as fixed charge and 2/3 of the tariff shall be considered as energy charge for adjustment under this formula.

(v) The cost and quantum of power purchase shall be based on bills paid/credits received during the previous quarter irrespective of period to which it pertains and shall include arrears or refunds, if any, for previous period, not considered earlier.

(2) The rate of Fuel Surcharge shall be worked out in Rs./kWh rounded off to the next second decimal place.

(3) The Fuel Surcharge per unit for any quarter shall not exceed 15% of weighted average power purchase cost per unit approved by the Commission, or such other ceiling as may be stipulated by the Commission from time to time: Provided that Distribution Licensee may file a separate Petition before the Commission for approval of recovery of the Fuel Surcharge over and above ceiling limit as specified above.

(4) The total Fuel Surcharge recoverable, as per the formula specified above, shall be recovered from the actual sales and in case of un-metered consumers, it shall be recoverable based on estimated sales to such consumers, calculated in accordance with such methodology as may be stipulated by the Commission."

10. This Court further observes that the APRL filed a contempt petition (Contempt Petition (C) Nos. 877-878/2021) before the Hon'ble Apex Court, wherein vide order 25.02.2022 it was directed that the respondents shall pay to the petitioner therein the principal amount (as per the terms/norms laid down in the judgment dated 31.08.2020) minus Rs.2426.81 crores deposited by the respondents in terms of the interim order dated

29.10.2018 (which as per the petitioner, the balance payable amount would be Rs.3048.63 Crores) alongwith interest/carrying costs as per the applicable SBAR for the relevant years, which should not exceed 9% per annum (to be compounded annually), from the date the amount became due till the date of actual payment. In pursuance of the said directions, an amount of Rs.5996.44 Crores was paid to the APRL towards the principal amount of Rs.3,048.63 Crores and interest/carrying cost on principal amount of Rs.2947.81 Crores calculating at SBAR rate not exceeding 9% and annual compounding.

Relevant portion of the Hon'ble Apex Court's order dated 25.02.2022 is reproduced as hereunder:-

"10. As such, considering the totality of facts and circumstances of this case, prima facie we are of the opinion that the respondents are liable for contempt for not complying this Court's order dated 31.08.2020. We, thus, direct the respondents to pay to the petitioner, the principal amount (as per the terms/norms laid down in the judgment of this Court dated 31.08.2020) minus Rs.2426.81 crores deposited by the respondents in terms of the interim order dated 29.10.2018 (which, as per the petitioner, the balance payable amount would be Rs.3048.63 crores) along with interest as per the applicable SBAR for the relevant years, which should not exceed 9% per annum (to be compounded annually),....."

10.1. This Court also observes that there is no dispute regarding the liability of the respondent-DISCOMS and the same was settled by the Hon'ble Apex Court. The issue in question is

regarding the shifting of the liability on the consumers on that amount. In this regard, the Special Fuel Surcharge was imposed by the respondent-DISCOMS and approved by the learned RERC. This Court further observes that as an extraordinary liability, the Fuel Surcharge was levied upon the Consumers and the respondents have power to impose the Special Fuel Surcharge to meet the original liability, after calculating/formulating the Special Fuel Surcharge as per Regulation 88 of the Tariff Regulations, 2019. This Court also observes that the Fuel Surcharge can be levied to meet the increased price and the same was settled by the Hon'ble Apex Court in case of ***Sai Bhaskar Iron Limited (Supra)***, relevant portion of the said judgment is reproduced as hereunder-:

"The law laid down is that the nomenclature given to the levy as fuel surcharge is really a surcharge levied to meet the increased cost of generation and purchase of electricity. Thus the submission has no merit to sustain. This Court has clearly laid down that the increased cost of generation and purchase of electricity can be realized under the head of fuel surcharge".

10.2. This Court further observes that the Special Fuel Surcharge was imposed upon the consumers by the respondents, totalling an amount of Rs.7,438.58 Crores (3,048.64/- Crores Principal Amount + 2,947.81/- Crores interest/carrying cost on principal amount+ additional interest amount of Rs. 1,442/- due to lending from financial institutions). The liability in the form of original principal amount in question arose to the respondent-DISCOMS as Uncontrollable Factor due to change in law, and

thus, the respondent-DISCOMS became entitled to meet such liability, as per Regulation 9 of the Tariff Regulation, 2019.

10.3. This Court also observes that the aforementioned interest/carrying costs payment arose due to the non-payment of the principal amount by the respondent-DISCOMS, and therefore, as per Regulation 9 of the Tariff Regulations, 2019, the same, in the present factual matrix, cannot be construed as an uncontrollable factor.

Said Regulation 9 is reproduced as hereunder:-

"9. Gains and Losses on account of Uncontrollable and Controllable factors

(1) The "uncontrollable factors" shall comprise the following factors which were beyond the control of, and could not be mitigated by, the applicant, as determined by the Commission:

- a) Force Majeure events;*
- b) Change in law, judicial pronouncements and Orders of the Central Government, State Government or Commission;*
- c) Economy wide influences such as unforeseen changes in inflation rate, taxes and statutory levies;*
- d) Variation in fuel cost on account of variation in coal, oil and all primary-secondary fuel prices;*
- e) Variation in power purchase expenses for the Distribution Licensees;*
- f) Variation in freight rates; and*
- g) Variation in number of consumers or mix of consumers or quantities of electricity supplied to the consumers.*

(2) Some illustrative variations or expected variations in the performance of the applicant which may be attributed by the Commission to controllable factors include, but are not limited to, the following:

- a) Variations in transmission losses, distribution losses*

and collection efficiency;

b) Variations in performance parameters such as Station Heat Rate, Coal Transit Losses, Auxiliary Consumption, Secondary Fuel Oil consumption, etc;

c) Variation in Rate of Interest on working capital requirement; and

d) Variation in operation & maintenance expenses. The approved aggregate gain or loss to the Generating Company or Licensee or SLDC on account of uncontrollable factors shall be allowed as an adjustment in the tariff of the Generating Company or Licensee or SLDC over such period as may be stipulated in the Order of the Commission passed under these Regulations.

(3) Gain or loss to the Generating Company or Licensee or SLDC on account of controllable factors shall be retained or borne by the Generating Company or Licensee, as the case may be, except in case of the following:

a) Interest on working capital, which shall be as per Regulation 27;

b) Station Heat Rate, Auxiliary Consumption, and Secondary fuel oil consumption, which shall be as per Regulation 56 and

c) Distribution loss, which shall be as per Regulation 75.

(4) Nothing contained in sub-Regulation (3) above shall apply in respect of any gain or loss arising out of variations in the price of fuel and/or rate of power purchase, which shall be dealt with as specified in Regulation 88."

10.4. This Court further observes that the extra burden on the respondent-DISCOMS as liability being arisen due to change in law, the respondent-DISCOMS did not discharge the liability within the stipulated period, and thereafter, the interest/carrying costs amount got increased day by day and became a huge liability, thus, to meet the same, the Special Fuel Surcharge is

levied upon the consumers, which is not permissible in the eye of law, and the same was observed by the Hon'ble Apex Court in the case of **GMR Wagor Energy Limited (Supra)**. Relevant portion of said judgment is reproduced as hereunder:-

*175. It is further to be noted that this Court, in the case of Uttar Haryana Bijli Vitran Nigam Limited (UNHVNL) and another v. Adani Power Limited and others, **has specifically observed that the 'Change in Law' events will have to accrue from the date on which Rules, Orders, Notifications are issued by the instrumentalities of the State. Even in spite of this finding, the DISCOMS are pursuing litigations after litigations.***

176. We find that, when the PPA itself provides a mechanism for payment of compensation on the ground of 'Change in Law', unwarranted litigation, which wastes the time of the Court as well as adds to the ultimate cost of electricity consumed by the end consumer, ought to be avoided. Ultimately, the huge cost of litigation on the part of DISCOMS as well as the Generators adds to the cost of electricity that is supplied to the end consumers.

177. We further find that non-quantification of the dues by the Electricity Regulatory Commissions and the untimely payment of the dues by the DISCOMS is also detrimental to the interests of the end consumers. If timely payment is not made by DISCOMS, under the clauses in the PPA, they are required to pay late payment surcharges, which are much higher. Even in case of 'Change in Law' claims, the same procedure is required to be followed.

178. Ultimately, these late payment surcharges are added to the cost of electricity supplied to the end consumers. It is, thus, the end consumers who suffer by paying higher charges on account of the DISCOMS not making timely payment to the Generators.

"However, as already observed herein, even in cases where well-reasoned concurrent orders are passed by

the Electricity Regulatory Commissions and the learned APTEL, the same are challenged by the DISCOMS as well as the Generators. On account of pendency of litigation, which in some of the cases in this batch has been more than 5 years, non-payment of dues would entail paying of heavy carrying cost to the Generators by the DISCOMS, which, in turn, will be passed over to the end consumer. As a result, it will be the end consumer who would be at sufferance. We are of the opinion that such unnecessary and unwarranted litigation needs to be curbed."

10.5. This Court also observes that in the present case, the original principal amount was only Rs.3,048.64/- Crores, and remaining payable amount arose due to the delay in discharge of the liability by the respondent-DISCOMS, and therefore, now the said interest/carrying costs amount has been levied upon the consumers in the form of Special Fuel Surcharge. The respondent-DISCOMS continued with consecutive litigations, and now the interest/carrying costs amount was almost equal to the original principal amount, and the said amount being recovered from the Consumers as Special Fuel Surcharge is not justified to the extent of the Special Fuel Surcharge on the aforementioned interest/carrying costs amount.

10.6. This Court further observes that the State Commission (RERC) was constituted as per Section 82 of the Act of 2003 and functions of the said Commission have been provided under Section 86 of the Act of 2003; the relevant portion of the said Section 86 is reproduced as hereunder-:

"(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;

(3) The State Commission shall ensure transparency while exercising its powers and discharging its functions."

However, the learned RERC has power to approve the recovery of the additional cost in the name of Special Fuel Surcharge, and at the same time, the learned RERC has maintained the transparency and fairness in the proceedings.

10.7. This Court also observes that the respondent-DISCOMS are the bodies of the State Government and fall under the definition of 'State' as contained in Article 12 of the Constitution of India, and therefore, it is the duty of the State to protect the interests of the consumers; but despite the same, the respondents levied the additional cost in the name of Special Fuel Surcharge. The Special Fuel Surcharge would have been justified had it been only on the aforementioned original principal amount i.e. Rs.3,048.63/- Crores, but the Special Fuel Surcharge as imposed herein is not justified in law.

10.8. This Court further observes that for lack of discharge of the liability in time by the respondent-DISCOMS, the consumers cannot be compelled to bear the consequences thereof in the form of levy of special fuel surcharge. The aforementioned interest/carrying costs does not even come under Regulation 9

of the Tariff Regulations, 2019, because the said interest/carrying costs amount arose for lack of discharge of the liability in time, and therefore, it cannot be considered as an Uncontrollable Factor. This Court also observes that the legislative intent and purpose of the Act of 2003 includes protection of the interests of the consumers, and therefore, the Special Fuel Surcharge as levied against the aforementioned interest/carrying costs amount is arbitrary and not justified in law.

11. Thus, in view of the aforesaid discussion and the observations made hereinabove, the present petitions are ***partly allowed***.

11.1. Accordingly, the impugned order dated 01.09.2022, alongwith the entire proceedings and orders pursuant thereto, only to the extent of levy of interest/carrying costs on the original principal amount of Rs.3,048.64 Crores, so also the interest/carrying costs amount payable towards other heads and categories, are quashed and set aside. Needless to say that the amount to be charged towards special fuel surcharge can be recovered from the consumers only to the extent of original principal amount to the tune of Rs.3,048.64/- Crores.

11.2. This Court observes that the aforesaid order has already covered almost all the issues in the present litigation, however, in some of the instant writ petitions, the order dated 13.06.2019 has been challenged and the said order is also hereby quashed and set aside, only to the extent of the interest/carrying costs amount payable on the original principal amount as on the date

of passing of the said order; thus, recovery of special fuel surcharge to be made only to the extent of the original principal amount in pursuance of the said impugned order on the same analogy as discussed above for quashing the order dated 01.09.2022. During the process of making such recovery, amount, if any, already recovered towards special fuel surcharge from the consumers by the respondents, the same shall be duly adjusted. Except for recovery of the original principal amount, the entire proceedings and orders in pursuance of the said impugned order are also quashed and set aside.

11.3. Thus, the respondent-DISCOMS shall be accordingly free to proceed to recover the respective original principal amounts from the consumers under the head of special fuel surcharge, strictly in accordance with this judgment.

12. All pending applications stand disposed of.

(DR.PUSHPENDRA SINGH BHATI), J.

Skant/-