2024 INSC 833

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8478 OF 2014

NABHA POWER LIMITED & ANR. …Appellant (s)

Versus

PUNJAB STATE POWER
COROPORATION LIMITED & ANR. ...Respondent(s)

J U D G M E N T

K.V. Viswanathan, J.

1. The present appeal arises from the judgment dated 30.06.2014 of the Appellate Tribunal for Electricity (for short the "APTEL") in Appeal No. 29 of 2013. By the said judgement, the APTEL dismissed the appeal of the appellant and confirmed the order dated 12.11.2012 of the Punjab State Electricity Regulatory Commission (for short the "State Commission"), insofar as issue no. 1 discussed therein was concerned. That issue concerned the aspect of Mega

Power Policy and the effect of the Press Release of 01.10.2009. We are only concerned with the said issue in this Appeal.

FACTS OF THE CASE: -

A) Customs Notification No. 21/2002 dated 01.03.2002.

2. To appreciate the issues involved, certain background facts need to be set out. Goods imported for setting up a Mega Power Project had, under a notification issued under Section 25 of the Customs Act dated 01.03.2002, been granted certain exemptions from customs duty. It will be useful to set out the relevant part of the 01.03.2002 notification.

> "**Exemption and effective rates of basic and additional duty for specified goods of Chapters 1 to 99**. - In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and in supersession of the notification of the Government of India in the Ministry of Finance (Department
> of Revenue), No. 17 /2001- Customs, dated the 1st March, 2001 [G.S.R. 116(E), dated the 1st March, 2001], the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods of the description specified in column (3) of the Table below or column (3) of the said Table read with the relevant List appended hereto, as the case may be, and falling within the Chapter, heading or sub-heading of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as are specified in the corresponding entry in column (2) of the said Table, when imported into India, -

(a) from so much of the duty of customs leviable thereon under the said First Schedule as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the said Table;
(b) from so much of the additional duty leviable thereon under sub-section (1) of section 3 of the said Customs Tariff Act, as is in excess of the rate specified in the corresponding entry in column (5) of the said Table,
Subject to any of the conditions, specified in the Annexure to this notification, the condition No. of which is mentioned in the corresponding entry in column (6) of the said Table :

S.No.	Chapter or Heading No. or sub-heading No.	Description of goods	Standard rate	Additional duty rate	Condition no.
400	98.01	Goods required for setting up of any Mega Power Project specified in List 42, if such Mega Power Project is – (a) an inter-State thermal power plant of a capacity of 1000 MW or more; or (b) an inter-State hydel power plant of a capacity of 500 MW or more, as	Nil	Nil	86

		certified by an officer not below the rank of a Joint Secretary to the Government of India in the Ministry of Power			

86. (a) If an officer not below the rank of a Joint Secretary to the Government of India in the Ministry of Power certifies that-
(i) the power purchasing State has constituted the Regulatory Commission with full powers to fix tariffs; ·
(ii) the power purchasing State undertakes, in principle, to privatise distribution in all cities, in that State, each of which has a population of more than one million, within a period to be fixed by the Ministry of Power; and
(iii) the power purchasing State has agreed to provide recourse to that State's share of Central Plan allocations and other devolutions towards discharge of any outstanding payment in respect of purchase of power;
(b) In the case of imports by a Central Public Sector Undertaking, the quantity, total value, description and specifications of the imported goods are certified by the Chairman and Managing Director of the said Central Public Sector Undertaking; and
(c) In the case of imports by a Private Sector Project, the quantity, total value, description and specifications of the imported goods are certified by the Chief Executive Officer of such project."

B) <u>Mega Power Policy of 2006</u>

3. On 10.06.2009, when competitive bidding was initiated by the respondent, what was in vogue was the Mega Power Policy, 2006. If

a thermal plant was covered as a Mega Power Project under the Mega Power Policy of 2006, it was entitled to the benefit of certain exemptions under the customs notification dated 01.03.2002 extracted hereinabove.

4. The Mega Power Policy, 2006 prescribed the following conditions to be fulfilled by the developer for grant of mega power status:-

> "MEGA POWER PROJECTS: REVISED POLICY GUIDELINES
>
> The following conditions are required to be fulfilled by the developer for grant of mega project status:-
>
> (a) an inter-state thermal power plant of a capacity of 700 MW or more, located in the States of Jammu and Kashmir, Sikkim, Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura; or
>
> (b) an inter-state thermal power plant of a capacity of 1000 MW or more, located in States other than those specified in clause (a) above; or
>
> (c) an inter-state hydel power plant of a capacity of 350 MW or more, located in the States of Jammu and Kashmir, Sikkim, Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura; or
>
> (d) an inter-state hydel power plant of a capacity of 500 MW or more, located in States other than those specified in clause (a) above.
>
> Fiscal concessions/benefits available to the Mega Power Projects
>
> **Zero Customs Duty:** In terms of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No.21/2002-Customs dated 1st March, 2002 read

together with No.49/2006-Customs dated 26th May, 2006, the import of capital equipment would be free of customs duty for these projects.

Deemed Export Benefits: Under Chapter 8(f) of the Foreign Trade Policy, Deemed Export Benefits is available to domestic bidders for projects both under public and private sector on following the stipulations prescribed therein.

Pre-conditions for availing the benefits: Goods required for setting up of any mega power project, qualify for the above fiscal benefits after it is certified by an officer not below the rank of a Joint Secretary to the Govt. of India in the Ministry of Power that-

(i) the power purchasing States have constituted the Regulatory Commissions with full powers to fix tariffs;

(ii) the power purchasing States undertakes, in principle, to privatize distribution in all cities, in that State, each of which has a population of more than one million, within a period to be fixed by the Ministry of Power.

Price preference to domestic PSUs bidders: In order to ensure that domestic bidders are not adversely affected, price preference of 15% would be given for the projects under public sector. The domestic bidders would be allowed to quote in US Dollars or any other foreign currency of their choice.

Income Tax benefits: In addition, the income-tax holiday regime as per Section 80-IA of the Income Tax Act 1961 can also be availed."

What is important is the phrase "Inter-State Thermal Power Plant" employed in the policy.

C) <u>Request For Proposal</u>

5. It was when this legal regime was in force that on 10.06.2009, the erstwhile Punjab State Electricity Board [now

after unbundling-the distribution being known as Punjab State Power Corporation Limited (PSPCL)] through its then wholly owned subsidiary and a special purpose vehicle, appellant no. 1-Nabha Power Limited issued a Request For Proposal (RFP). The RFP was for selection of developers through tariff-based bidding process under Section 63 of the Electricity Act 2003, for procurement of power on long-term basis from the power station to be set up at village Nalash, near Rajpura, District Patiala, Punjab. This was as per the Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licencees issued by the Ministry of Power, Government of India. In terms of RFP, the bidders were required to quote the Capacity Charge (i.e. capital cost component) and Station Heat Rate (i.e. amount of heat required by the plant to generate one unit of electrical energy/efficiency of the plant) to convert the heat energy for the project and based on these components, a levelized tariff for each bidder was to be worked out. The bidder with the lowest levelized tariff was to be selected for the development of the project.

6. The term- "Successful Bidder or Selected Bidder" was to mean that the bidder selected pursuant to the RFP to set up the project and supply electrical output therefrom to the Procurer through the Seller as per the terms of the power purchase agreement (PPA) and other RFP project documents. Under Clause 2.7.2.1 and 2.7.2.2, the bidder was to make an independent enquiry and satisfy itself with respect to all the required information, inputs, conditions and circumstances and factors that may have any effect on the bid. Under the said clauses, it was deemed that while submitting the bid, the bidder was to have inspected and examined the site conditions, the laws and regulations in force. The bidder was to acknowledge that on being selected as the successful bidder and on acquisition of the special purpose vehicle (the seller) the seller shall not be relieved from any of its obligations under the RFP project documents nor shall the seller be entitled for any extension of time or financial compensation by reason of the unsuitability of the site. Clauses 2.7.2.1 and 2.7.2.2 read as under.

> "2.7.2.1 The Bidder shall make independent enquiry and satisfy itself with respect to all the required information, inputs, conditions and circumstances and factors that may have any effect on his Bid. While submitting the Bid the Bidder shall be

deemed to have inspected and examined the site conditions (including but not limited to its surroundings, its geological condition, the adequacy of the road and rail links to the Site and the availability of adequate supplies of water), examined the laws and regulations in force in India, the transportation facilities available in India, the grid conditions, the conditions of roads, bridges, ports, etc. for unloading and/or transporting heavy pieces of material and has based fts design, equipment size and fixed its price taking into account all such relevant conditions and also the risks, contingencies and other circumstances which may influence or affect the supply of power. Accordingly, the Bidder acknowledges that, on being selected as Successful Bidder and on acquisition of the Seller, the Seller shall not be relieved from any of its obligations under the RFP Project Documents nor shall the Seller be entitled to any extension of time or financial compensation by reason of the unsuitability of the Site for whatever reason.

2.7.2.2 In their own interest, the Bidders are requested to familiarize themselves with the Electricity Act, 2003, the Income Tax Act 1961, the Companies Act, 1956, the Customs Act, the Foreign Exchange Management Act, IEGC, the regulations framed by regulatory commissions and all other related acts, laws, rules and regulations prevalent in India. The Procurer/Authorised Representative shall not entertain any request for clarifications from the Bidders regarding the same. Non-awareness of these laws or such information shall not be a reason for the Bidder to request for extension of the Bid Deadline. The Bidder undertakes and agrees that before submission of its Bid all such factors, as generally brought out above, have been fully investigated and considered while submitting the Bid."

Press Release of 1.10.2009

7. When the matter stood thus, a Press Release was issued by the Press Information Bureau, Government of India under the heading "Modification of Mega Power Policy". It will be safer to extract the

entire Press Release as this is the fulcrum on which the entire case of the appellant revolves. The Press Release with certain portions emphasized by us, is extracted hereinbelow:

"PRESS INFORMATION BUREAU
GOVERNMENT OF INDIA

Press Release
Thursday, October 01,2009

Modification of Mega Power Policy

The Union Cabinet today approved modifications in the existing mega power policy. This would encourage setting up of mega power plants to take advantage of economies of scale and improve their viability. It will simplify the procedure for grant of mega certificate and encourage capacity addition. It will also encourage technology transfer and indigenous manufacturing in the field of super critical power equipments.

The mega Power Policy was introduced in November 1995 for providing impetus to development of large size power projects in the country and derive benefit from economies of scale. These guidelines were modified in 1998 and 2002 and was last amended in April 2006 to encourage power development in Jammu & Kashmir and the North Eastern region.

In order to rationalize the Mega Power Policy and bring it in consonance with the National Electricity Policy 2005 and Tariff Policy 2006, the following modifications of the existing Mega Power Policy have been envisaged:

(i) The existing condition of privatization of distribution by power purchasing states **would be replaced** by the condition that power purchasing states shall undertake to carry out distribution reforms as laid down by the Ministry of Power.

(ii) The conditions requiring inter-state sale of power for getting mega power status **would be removed**.

(iii) The present dispensation of 15% price preference available to the domestic bidders in case of cost plus projects of PSUs

would continue. However, the price preference will not apply to tariff based competitively bid projects of PSUs. A Committee would be set up under the Planning Commission, with DHI, MoP and DoR as members which would suggest options and modalities to take care of the disadvantages suffered by the domestic industry related to power sector keeping all factors in view.

(iv) The benefits of Mega Power Policy will also be extended to supercritical projects to be awarded through ICB with the mandatory condition of setting up indigenous manufacturing facility provided they meet the eligibility criteria.

(v) The requirement of undertaking international competitive bidding (ICB) by the developers for procurement of equipment for mega power projects would not be mandatory, if the requisite quantum of power has been tied up through tariff based competitive bidding or the project has been awarded through tariff based competitive bidding.

(vi) A basic custom duty of 2.5% only would be applicable on brown field expansion of existing mega projects. All other benefits under mega power policy available to Greenfield projects would also be available to expansion unit(s) (Brownfield projects) even if the total capacity of expansion unit(s) is less than the threshold qualifying capacity, provided the size of the unit(s) is not less than that provided in the earlier phase of the project granted mega power project certificate. All other conditions for grant to the mega power status shall remain the same.

(vii) Mega Power Projects would be required to tie up power supply to the distribution companies/utilities through long term PPA(s) and may also sell power outside long term PPA(s) in accordance with the National Electricity Policy 2005 and Tariff Policy 2006, as amended from time to time, of Government of India."

(Emphasis supplied)

The Cabinet decision, as such, is not on record and admittedly what is available is the Press Release issued by the Press Information Bureau.

8. The final bidding date was on 09.10.2009 and as per clause 13.1 from the Format-1 Annexure-3 annexed to the RFP, 02.10.2009 was the cutoff date for consideration of change in law. Equally, under clause 2.5.3, 25.09.2009 was the last date for seeking clarification. Law is defined in Clause 1.1.

D) <u>BID RESULTS</u>

9. The second appellant L&T Power Development Limited emerged as the successful bidder and a Letter of Intent was issued on 19.11.2009 and the L&T Power Development Limited acquired the first appellant. The appellant contends that on 02.10.2009, the second appellant had addressed a letter to Nabha (then owned by the respondent) requesting an extension of the bid deadline to enable them to go through the changes pursuant to the Press Release of 01.10.2009 and ascertain the impact of the bid. It was followed up with a letter of 06.10.2009 setting out that the appellant had taken into consideration the benefits associated with the mega power status

in evaluation of their project. According to the appellant, it was forced to withdraw the letter before submitting the bid. According to the respondent that letters were extraneous to the bid and were not entertained.

E) Developments in December, 2009

10. Certain rapid developments happened in December, 2009. On 3rd December, 2009, the Government of India in the Ministry of Power addressed a letter to all the Principal Secretary/Secretary Energy of all the States/Union Territories under the subject "Distribution reforms under the modified Mega Power Policy". It was set out in the letter that in order to further liberalize the Mega Power Policy as issued on 2nd August, 2006 and also remove such provisions which had lost relevance, Government has made modifications in the Mega Power Policy and the revised policy guideline was being issued separately. It set out that one of the decisions taken in this regard was that the existing condition of privatization of distribution by power purchasing States would be replaced by the condition that power purchasing States were to undertake to carry out distribution reforms as laid down by the

Ministry of Power. The letter proceeded to State that in this regard the matter was examined in the Ministry of Power and a follow up meeting was held on 28th October, 2009 with the representatives of State Power Departments. It was set out that in the said meeting various measures for distribution reforms that could be taken up by the State Governments were discussed in detail and the letter annexed the summary of the minutes of the meeting of 28.10.2009. An undertaking was to be taken from the States in a prescribed format and the operative portion of the letter, which is crucial, is extracted hereinbelow:

> "Accordingly, in pursuance of the Cabinet decision dated 1st October 2009 on the modification to the Mega Power Policy, following four distribution reform measures hereby laid down by the Ministry of Power required to be undertaken by the states purchasing power from the mega power projects:
> a) Timely release of subsidy as per Section 65 of Electricity Act 2003.
> b) Ensure that Discoms approach SERC for approval of annual revenue requirement/tariff determination in time according to the SERC regulations.
> c) Setting up special courts as provided in the Electricity Act 2003 to tackle related cases.
> d) Ring fencing of SLDCs.
>
> An undertaking in the enclosed format (Annexure- II) may be given to the Ministry of Power. The said undertaking needs to be given at least, once and would be considered in all the cases where the concerned State Distribution Utility ties up

procurement of power from a power project considered for grant of mega power state.

Receipt of this communication may please be acknowledged and the undertaking in the enclosed format may be sent to this Ministry at the earliest to facilitate processing of the Mega Power Policy case(s)."

F) Amendment to the Customs Notification dated 11.12.2009

11. Thereafter, on 11.12.2009, an amendment to the customs notification no. 21 of 2002 dated 01.03.2002 was issued. The notification is extracted hereinbelow.

"In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 21/2002-Customs, dated the 1st March, 2002, which was published in the Gazette of India, Extraordinary vide number G.S.R. 118(E), dated the 1st March, 2002, namely:-

In the said notification, -

A. in the Table,

(i) against S.No. 400, for the entry in column (3), the following entry shall be substituted namely:-

"Goods required for setting up of any Mega Power Project, so certified by an officer not below the rank of a Joint Secretary to the Government of India in the Ministry of Power, that is to say -

(a) a thermal power plant of a capacity of 700 MW or more, located in the States of Jammu and Kashmir, Sikkim, Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura: or

(b) a thermal power plant of a capacity of 1000 MWor more, located in States other than those specified in clause (a) above; or
(c) a hydel power plant of a capacity of 350MW or more, located in the States of Jammu and Kashmir, Sikkim, Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura; or
(d) a hydel power plant of a capacity of 500MW or more, located in States other than those specified in clause (c) above":
(ii) after S.No. 400 and the entries relating thereto, the following S.No. and entries shall be inserted, namely :-

1	2	3	4	5	6
400A.	9801	Goods required for the expansion of any existing Mega Power Project so certified by an officer not below the rank of a Joint Secretary to the Government of India in the Ministry of Power. Explanation: for the purposes of this exemption, Mega Power project means a project as defined in S. No. 400 above.	2.5%	Nil	86

B. in the Annexure, in Condition No. 86, for sub-clause (ii) of clause (a), the following shall be substituted namely:
(ii) the power purchasing states shall undertake to carry out distribution reforms as laid down by Ministry of Power."

(Emphasis supplied)

12. It will be noticed that entry 400 from the notification of 2002 was substituted and in the substituted clause there is no reference to the thermal plant being an inter-State thermal plant.

Mega Power Policy of 14.12.2009

13. Close on the heels, on 14.12.2009, the Government of India and the Ministry of Power issued an office memorandum under the subject "revised Mega Power Policy", which reads as under:-

"No. A-118/2003-IPC
Government of India
Ministry of Power
Shram Shakti Bhavan, New Delhi
Dated 14th December, 2009
OFFICE MEMORANDUM

Subject : Revised mega power project policy.

Policy guidelines for setting up of mega power projects were last revised and issued vide this Ministry's letter of even number dated 2nd August, 2006. The Government of India has modified the Mega Power Policy to smoothen the Procedures further. The modified Mega Power Policy is as follows:

(i) The power projects with the following threshold capacity shall be eligible for the benefit of mega power policy:

(a) A thermal power plant of capacity 1000 MW or more; or

(b) A thermal power plant of capacity of 700MW or more, located in the States of J & K, Sikkim, Arunachal· Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura; or

(c) A hydel power plant of capacity of 500 MW or more; or

(d) A hydel power plant of a capacity of 350 MW or more, located in the States of J&K, Sikkim, Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura;

(e) Government has decided to extend mega policy benefits to brownfield (expansion) projects also. In case of the brownfield (expansion) phase of the existing mega project, size of the expansion units would not be not less than that provided in the earlier phase of the project granted mega power project certificate.

(ii) Mandatory condition of Inter-State sale of power for getting mega power status has been removed.

(iii) Goods required for setting up a mega power project, would qualify for the fiscal benefits after it is certified by an officer not below the rank of a Joint Secretary to the Govt. of India in the Ministry of Power that (i) the power purchasing States have constituted the Regulatory Commissions with full powers to fix tariffs and (ii) power purchasing states shall undertake to carry out distribution reforms as laid down by Ministry of Power.

(iv) Mega Power Projects would be required to tie up power supply to the distribution companies/utilities through long term PPA(s) in accordance with the National Electricity Policy 2005 and Tariff Policy 2006, as amended from time to *time,* of Government of India.

(v) There shall be no further requirement of ICB for procurement of equipment for mega projects if the requisite quantum of power has been tied up or the project has been awarded through tariff based competitive bidding as the requirements of ICB for the purpose of availing deemed export benefits under Chapter 8 of the Foreign Trade Policy would· be presumed to have been satisfied. In all other cases, ICB for equipments shall be mandatory.

(vi) The present dispensation of 15% price preference available to the domestic bidders in case of cost-plus projects of PSUs would continue. However, the price preference will not apply to tariff based competitively bid projects of PSUs.

3. This issues with the approval of Secretary (Power).

Sd/-

(Puneet K Goel)

To

Principal Sectary/Secretary/ Energy of all States/UTs.

Copy to:
(i) Chairman, CEA,
(ii) CMDs of all PSUs of MOP
Copy for information to :-
PS to MOP/PS to MOS(P) / PS to Secretary(P) Sr. PPS to AS(AK)/ PPS to AS(GBP)/ All Joint Secretaries/ Directors in the Ministry of Power, Dir (PIB), MOP.
Copy also to Cabinet Secretariat, New Delhi
Copy for putting on website of Ministry of Power to NIC, MOP.

Sd/-
(Puneet K Goel)
Director (IPC)"
(Emphasis Supplied)

14. It will be noticed that the mandatory conditions of inter-State sale of power for getting mega power status was removed; it was decided that goods required for setting up a Mega Power Project would qualify for the fiscal benefits after it is certified by an officer not below the rank of a Joint Secretary to the Government of India in the Ministry of Power that (i) the Power purchasing States have constituted the Regulatory Commissions with full powers to fix tariffs and (ii) Power purchasing States shall undertake to carry out distribution reforms as laid down by Ministry of Power apart from certain other conditions.

Events Leading to the Dispute

15. The appellant no. 1 Nabha Power Limited, which was now owned by appellant no. 2, entered into a Power Purchase Agreement on 18.01.2010 with the respondent PSPCL.

16. According to the appellant, thereafter a series of correspondence ensued between appellant no. 1 and the respondent with regard to the issuance of Essentiality Certificate so that the customs authorities allow import at the concessional duty in terms of the amended entry 400, in the Notification of 11.12.2009. The appellant has a case that apart from the other documents the respondent asked for an affidavit indemnifying the respondent against adverse consequences arising out of wrong claim of benefits by the appellant and also an affidavit stating that the benefits of mega power status granted to the appellant project will be passed on to the respondent as per clause 13.3 of the PPA.

17. The appellant claims that while it furnished the other documents, with regard to the affidavit for passing on the benefits of the mega power status, it wrote to the respondent on 17.02.2011 stating that it had already factored in the benefits available in view of the Cabinet

decision dated 01.10.2009 and thereafter there is no basis for submission of the affidavit as called for.

18. The respondent replied by its letter of 04.03.2011 and insisted on the affidavit as sought for by setting out the following reasons:

> "(i) at the time of submission of bid, the Mega Policy 2006 was in vogue and therefore, the Project could not have qualified as a MPP;
> (ii) the Mega Policy 2009 was notified on 14.12.2009, post submission of the bids and therefore, the benefits could have only accrued post such notification;
> (iii) the mega power status is granted to a project subject to (a) project getting certified as a MPP from an officer not below the rank of Joint Secretary to the Ministry of Power; (b) the power purchasing States having constituted the Regulatory Commissions with full power to fix tariffs; (c) power purchasing States undertaking to carry out distribution reforms as laid down by the Ministry of Power;
> (iv) the distribution reforms took place in Punjab in April, 2010 and hence, the bidders could not have considered benefits available under the Mega Policy 2009 prior to the submission of the bid; and
> (v) in relation to the Project, the Petitioner No.1 had applied to the Ministry of Power for grant of mega power status to the Project on 11.05.2010 and the Ministry of Power had granted the said status vide its letter dated 30.07.2010."

19. Ultimately, after a lengthy exchange of correspondence with each party sticking to their respective position, the appellant no. 1 submitted an undertaking in the specified format (the factum of the

undertaking being under protest and without prejudice as claimed by the appellant is disputed by the respondent) in order to avoid further delay in the issuance of the Essentiality Certificate. The respondent replied by stating that the non-escalable capacity charge would stand reduced in terms of the Article 13 of PPA in proportion to the concession in custom duty on the consignment value of the imported goods. Ultimately, the appellant obtained the Essentiality Certificate on 16.06.2011. Similar affidavits were furnished for the further imports and the respondent granted Essentiality Certificate only on the condition that it would have the right to seek appropriate reduction in tariff on account of decrease in capital cost of the project.

20. On 22.05.2012, the appellants filed a Petition bearing Petition no. 30 of 2012 before the Punjab State Electricity Regulatory Commission, Chandigarh under Section 86(1)(f) of the Electricity Act, 2003, contending that appellant no. 2 had considered and factored the benefits available to the project under the Mega Power Policy of 2009, on 09.10.2009 when they submitted the bid and had passed on such benefits to the respondent by way of the tariff it

quoted. The appellant contended that no change in law occurred in view of the notification of 11.12.2009 and 14.12.2009 and whatever change was there, happened on 01.10.2009 itself with the press release of the Cabinet decision. The following prayers were made in the claim petition:

> "In light of the facts and circumstances as stated above, the Petitioners are respectfully praying before this Hon'ble Commission:
>
> (a) to declare that the Union Cabinet's decision dated 01.10.2009 modifying the Mega Policy 2006 reported vide Press Information Bureau on the same date does not amount to 'Change in Law' under Article 13 of the PPA;
>
> (b) following the declaratory relief sought by the Petitioners, to hold that consequential relief as set out under Article 13.2 of the PPA has not triggered and no consequential benefits under Article 13 have to be passed on to the Respondent by the Petitioner under the PPA on account of Union Cabinet's decision to change the Mega Policy 2006 dated 01.10.2009;
>
> (c) in alternative, if reliefs sought under para (a) and (b) above are not granted, then to direct and allow that the Petitioners shall be entitled to claim 'Change in Law' against the Respondent's claim on the basis of withdrawal of fiscal benefits which were available to the Project under the FTP on the date of bidding on standalone basis, without considering Mega Policy, 2009;
>
> (d) award cost in favour of the Petitioners;
>
> (e) pass such other and further orders / directions as the Hon'ble Commission may deem appropriate in the facts and circumstances of the case."

Though the prayer are not happily worded, the issue raised with regard to the Mega Power Policy issue, as understood by both parties, is whether the legal regime was altered on 01.10.2009 or on 11.12.2009 and 14.12.2009 respectively.

21. The appellant's claim before the Commission was founded on twin basis. The main relief was on the aspect of the Mega Power Policy, the contention of the appellant being that the legal regime was altered on 01.10.2009, with the Cabinet Decision, as noticed in the Press Release of 01.10.2009. The alternative plea was based on the Foreign Trade Policy (in short 'FTP') and the appellants contention was that in the alternative, the appellant was entitled to claim change in law against the respondent on the basis of withdrawal of fiscal benefits which were available to the project under the Foreign Trade Policy on the date of bidding, on a standalone basis without considering the Mega Power Policy of 2009.

Order of the State Commission

22. By its Order of 12.11.2012, the State Commission rejected both the prayers. The State Commission held that the mega power status was made available to a project only when the State in which the

project is being setup had undertaken the reforms mentioned in the Ministry of Power's letter dated 03.12.2009; that these reforms were undertaken by the Government of Punjab only on 16.04.2010 and intimated to the Central Government vide letter dated 30.04.2012; that the detailing in respect of the modified policy was not available in the press release dated 01.10.2009; that the same was covered only in the letter dated 03.12.2009 of the Ministry of Power addressed to the States and in the notification of the Ministry of Power dated 14.12.2009. The Commission further held that the benefit of mega power status cannot be granted with effect from 01.10.2009 considering the fact that it was only after a gazette notification that the public at large were informed of the decisions of the Government and which gazette notification was issued only in December, 2009. That the press release itself provided a disclaimer that though all efforts have been made to ensure the accuracy and the currency and the content of the website of the Press Information Bureau, the same should not be construed as a statement of law or used for any legal purpose. On the FTP issue, it was held that the benefits under the FTP were never available to the appellant and if identical benefits

were indeed available to them under the FTP, there was no need for them to claim the same benefit under the modified Mega Power Policy. It was further held that even if it was assumed for the sake of argument that the FTP benefits were available before the cutoff date, they have forfeited their right to these benefits by claiming similar benefits under the new Mega Power Policy.

Proceedings before APTEL

23. After the Order of the State Commission, the appellant filed Appeal No. 29 of 2013 in the APTEL. The APTEL in the impugned judgment denied benefits under the Mega Power Policy and confirmed the order of the State Commission on the said issue. Insofar as the FTP aspect was concerned, the issue was remanded to the Commission. According to the APTEL, the State Commission in the order impugned before it had not analyzed the question as to whether the benefits under the FTP were available to the appellant as on the cutoff date of 02.10.2009 and whether the subsequent withdrawal by the Government of India would amount to change in law.

24. Pursuant to the remand, the Commission revived petition No. 30 of 2012 and issued notice for rehearing on the appellant's alternative claim based on FTP. By its judgment of 16.12.2014, the Commission rejected the claim of the appellant based on the FTP by a majority order.

25. Aggrieved by the same, the appellants filed Appeal No. 47 of 2015 before APTEL. By a judgment of 04.07.2017, the APTEL dismissed the Appeal No. 47 of 2015 of the appellant. Against the said judgment of APTEL dated 04.07.2017, appellant has filed Civil Appeal No. 8694 of 2017. We have in this judgment not touched upon the issues in Civil Appeal No. 8694 of 2017.

26. Coming back to the order of the APTEL dated 30.06.2014, the APTEL while dismissing the appeal insofar as the first issue of the Mega Power Policy discussed therein was concerned held that the press release did not indicate the terms and conditions on which the Mega Power Status could be made available; that the press release cannot be construed as a statement of law in view of the disclaimer; that the notification dated 11.12.2009 modifying the customs duty and specifying the terms and conditions for Mega Power is what is

law under the definition in the power purchase agreement and that the Mega Power Status was received only on 30.07.2010. Certain other findings have also been recorded which are not directly germane in view of the decision that we have ultimately taken in this Appeal.

27. Aggrieved by the judgment of the APTEL on the issue of the Mega Power Policy, the appellants have filed Civil Appeal No. 8478 of 2014.

Contentions:

28. In support of the appeal, we have heard Mr. C.S. Vaidyanathan, learned Senior Advocate and in opposition thereof we have heard Mr. M.G. Ramachandran, learned Senior Advocate for the respondent no.1.

Submissions of the Appellant

29. Learned Senior Counsel for the appellant contends that the effect of the Cabinet Decision must be seen with respect to the contours of the definition of law in the Power Purchase Agreement; that the definition includes "any order" of any Indian Government instrumentality and hence it cannot be said that the decision of the

highest constitutionally entrusted body for formulating binding national policy is not law for the purpose of the PPA; that the appellant could not be expected to ignore the decision of the Cabinet dated 01.10.2009 announced through the press release being a prudent bidder/businessmen; that even the respondent concedes that the Cabinet Decision could lead to promissory estoppel against the Government; that clause 2.7.2.1 of the RFP deems that the bidders have factored in all "Required information/factors that may have any effect on the bid" and that the Cabinet Decision is at least an information/factor for bidding purposes.

30. Learned senior counsel contended that the appellant factored in the fiscal benefits accruing from the Mega Policy in view of the Cabinet Decision of 01.10.2009; that the appellant informed PSPCL by way of letters dated 02.10.2009 and 06.10.2009 about the factoring in of the benefits; that the Mega Power Policy 2006 amendments stood approved on 01.10.2009 and hence the same amounted to law; that the implementing actions that followed the Cabinet Decision also accord the same understanding as would be clear from the Ministry of Power letter dated 03.12.2009, the Minutes

of meeting dated 28.10.2009 annexed to the letter dated 03.12.2009, the Memorandum dated 14.12.2009 and the fact that each department was bound to carry out the policy in pursuance of the Cabinet Decision dated 01.10.2009.

31. Learned Senior Counsel further contended that to claim change in law (restitution), three essential ingredients are necessary namely (a) The event must be after the cutoff date (b) it must be an event stipulated in Article 13.1.1 (1 to 4) of the PPA and (c) it must result in change in cost of or revenue from the business of selling electricity under the PPA.

32. Learned Senior Counsel contends that the respondent to claim relief under, 'change in law' must establish with documentary proof that consequent to change in law there has been a decrease in capital cost and since the appellant in its bid submitted on 09.10.2009 had factored in the benefit derived from the Cabinet Decision in relation to Mega projects, it received no economic benefit and there was no change in the cost or revenue from the business of selling electricity under the PPA in view of the issuance of the notification on 11.12.2009.

33. Learned senior counsel contended that there was no notice for change in law issued by the respondent under Article 13.3.2; no proof of reduction in capital cost and no issuance of supplementary bill. Further, learned senior counsel contended that no petition claiming change in law or any counter claim to the same effect was filed by the respondent and it was the appellant which approached the State Commission contending that the Cabinet Decision dated 01.10.2009 is law as on the cutoff date and thus, there was no change in law event enuring to the advantage of the respondent. It is further contended for the appellant that the Mega Power Policy issued in 2006 was issued by way of an executive decision and that the present Cabinet Decision is also issued under Article 77 of the Constitution of India; that the requirement to place the Cabinet Decision before the President is only for information and on this aspect no Presidential assent is a prerequisite. Lastly, it is contended that as per Rule 50(13) of the Central Secretariat, Manual of Office Procedure, the Press Communique/Note is the approved formal procedure of communication. Learned senior counsel relied on a large number of precedents in support of his submissions.

Submission of the Respondent

34. While stoutly defending the orders of the fora below, learned senior counsel for the respondent contends that change in law for the purpose of customs duty insofar as the appellant is concerned was brought into force only on 11.12.2009 with the issuance of customs notification under Section 25 of the Customs Act 1962; that Section 25(1) of the said Act provides for exemption from the payment of customs duty to be by notification; that Sub-Section 4 of Section 25 inter alia provides that every notification unless otherwise provided shall come into force on the date of its issue by the Central Government for publication in the Official Gazette and that Cabinet Decision by itself cannot therefore effect such a change without a notification under Section 25 since if something is specified to be done in a particular manner it needs to be done in that manner and in no other. In view thereof, it was contended that it was the customs notification dated 11.12.2009 which brought into force the 'change in law'.

35. Learned senior counsel for the respondent contended that without prejudice to the above submissions, the Cabinet Decision

dated 01.10.2009 was only the intent or proposal to implement something in future and not to give effect to something on 01.10.2009 itself ; the Cabinet Decision does not also provide that the benefits therefrom will be effective from 01.10.2009; that the Cabinet Decision/Press release by no means can be said to be a regulation, notification, Code, Rule, or order having a force of law as specified in the definition of the term "Law" in the PPA; that under the Rules of Business of the Central Government, the decision taken in the Cabinet ought to get implemented in the manner provided or under the relevant statute such as by Notification, Rule, Regulation or Code in the case of the plenary legislation, such as the Customs Act; in the absence of any plenary legislation, the manner of implementation is provided under Article 77 by the issuance of an authenticated instrument in the manner provided thereon; that the definition of the term "Law" in the PPA and the expression "Decision" is limited only with regard to the decision by the Appropriate Commission and not an Indian Governmental instrumentality. Learned senior counsel contends that there is no scope for the argument of the promissory estoppel in *inter-partes*

disputes between the appellant and the respondent since the Union of India is not a party and the present proceeding is not a proceeding where a promise is sought to be enforced by a Court of law, against the promisor.

36. The learned senior counsel contends that the appellant under Clauses 2.7.2.1 and 2.7.2.2 ought to have considered only the applicable law. It is further contended that the Cabinet Decision of 01.10.2009 did not decide all the aspects of the distribution reforms to be undertaken by the concerned State Government to entitle the intra-state power projects in the State to be eligible for Mega Power benefits. To illustrate, it is contended that the Cabinet Decision stated that "Power Purchasing States" shall undertake to carry out distribution reforms as laid down by the Ministry of Power. Learned senior counsel contends that Ministry of Power laid down the conditions on 03.12.2009 including an undertaking to be given by the State Government to the Government of India as a pre-condition. In view of this, learned senior counsel contends that the Cabinet Decision was not in complete form and it was only after the conditions were laid down by the Ministry of Power on 03.12.2009

that the notification dated 11.12.2009 and office memorandum of 14.12.2009 was issued by the Central Government providing for exemption to Mega Power Projects specifically stating that "The Power Purchasing State shall undertake to carry out distribution reforms as laid down by the Ministry of Power". Learned senior counsel contends that the Mega Power Policy was issued only on 14.12.2009 with further additions. In view of the same, learned senior counsel for the respondents contend that there is no scope for interference with the concurrent judgments of the Courts below.

Question for consideration:

37. In the above background, the question that arises for consideration is: Whether the press release of 01.10.2009 announcing the decision of the Union Cabinet about approval of certain modifications envisaged in the then existing mega power policy, is covered within the meaning of the expression "law as defined in Clause 1.1 of the RFP/PPA and if so did the extant legal regime as on 01.10.2009 undergo a change from the said date"?

Analysis and reasons:

38. The appellant's case, as set out above, is that with the press release on 01.10.2009, a new legal regime commences and on that basis, it is contended that the appellant in its bid of 09.10.2009 factored the altered position including the fiscal benefits due to customs duty exemptions. The respondent's case is that the press release of 01.10.2009 only sets out the proposal for modification and the real modification happened on 11.12.2009 and 14.12.2009 (preceded by the letter of 03.12.2009). According to them, since the change of law having happened on 11.12.2009/14.12.2009 the benefits that have accrued to the appellant ought to be passed on. This is the simple issue to be resolved.

39. To answer this question, certain clauses from RFP needs to be set out. The RFP carried the format of the power purchase agreement as Format 1 Annexure 3. There is no dispute that the same clauses occurred in the power purchase agreement executed on 18.01.2010. Clause 1.1 defines law as under :

> "Law: means, in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian 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 Appropriate Commission."

40. The relevant Clauses read as under:-

"**13 ARTICLE 1.3 Change in Law**

13.1 Definitions

In this Article 13, the following terms shall have the following meanings.

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

(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any law or (ii) a change in interpretation of any law by a competent court of law, tribunal or Indian Governmental instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents approvals or licenses available or obtained for the project, otherwise than for default of the seller, which results in any change in any cost of or revenue from the business of selling electricity by the seller to the procurer under the terms of this agreement or (iv) any change in the (a) declared price of land for the project or (b) the cost of implementation of the resettlement and rehabilitation package of the land for the project mentioned in the RFP or (c) the cost of implementing environmental management plan for the power station (d) deleted.

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

13.1.2 “Competent Court” means:
The Supreme Court or any High Court, or any tribunal or any similar judicial or quasi-judicial body in India that has jurisdiction to adjudicate upon issues relating to the Project.

13.2 Application and Principles for computing impact of Change in Law
While determining the consequence of Change in Law under this Article 13, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff payments, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such Change in Law has not occurred.
a) Construction Period
As a result of any Change in Law, the impact of increase/decrease of Capital Cost of the Project in the Tariff shall be governed by the formula given below:
For every cumulative increase/decrease of each Rupees 16,50,00,000/-
(Rupees Sixteen crore fifty lakhs) in the Capital Cost over the term of this Agreement, the increase/decrease in Non Escalable Capacity Charges shall be an amount equal to 0.267% (percentage zero point two six seven) of the Non Escalable Capacity Charges. Provided that the Seller provides to the Procurer documentary proof of such increase/decrease in Capital Cost for establishing the impact of such Change in Law.
In case of Dispute, Article 17 shall apply:
It is clarified that the above mentioned compensation shall be payable to either Party, only with effect from the date on which the total increase/decrease exceeds amount of Rupees 16,50,00,000/- (Rupees Sixteen crore fifty lakhs).
b) Operation Period

As a result of Change in Law, the compensation for any increase/decrease in revenues or cost to the Seller shall be determined and effective from such date, as decided by the Appropriate Commission whose decision shall be final and binding on both the Parties, subject to rights of appeal provided under applicable Law.
Provided that the above mentioned compensation shall be payable only if and for increase/decrease in revenues or cost to the Seller is in excess of an amount equivalent to 1% of the Letter of Credit in aggregate for a Contract Year.

13.3 Notification of Change in Law

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

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

13.3.3 Any notice served pursuant to this Article 13.3.2 shall provide, amongst other things, precise details of:
(a) the Change in Law; and
(b) the effects on the Seller of the matters referred to in Article 13.2.

13.4. Tariff Adjustment Payment on account of Change in Law

13.4.1 Subject to Article 13.2., the adjustment in Monthly Tariff Payment shall be effective from:
(i) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or
(ii) the date of order/judgment of the Competent Court or tribunal of Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law.

13.4.2 The payment for Changes in Law shall be through Supplementary Bill as mentioned in Article 11.8. However, in case of any change in Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed Tariff."

41. The golden rule of interpretation is that the words of a contract should be construed in their grammatical and ordinary sense, except to the extent that some modification is necessary in order to avoid absurdity, inconsistency or repugnancy. (***See para 5.01 Kim Lewison, The interpretation of Contracts, 3rd Edition***). Similarly, any invocation of the business efficacy test as canvassed would arise only if the terms of the contract are not explicit and clear. The business efficacy test cannot contradict any express term of the contract and is invoked only if by a plain and literal interpretation of the term in the agreement or the contract, it is not possible to achieve

the result or the consequence intended by the parties acting as prudent businessmen. [See ***Nabha Power Limited (NPL)*** vs. ***Punjab State Power Corporation Limited (PSPCL) and Another***, (2018) 11 SCC 508, (para 49) and ***Adani Power (Mundra) Limited*** vs. ***Gujarat Electricity Regulatory Commission and Others***, (2019) 19 SCC 9 (para 24).

42. The law as defined in Clause 1.1 was validly promulgated vide the notification of 01.03.2002 and the policy document dated 07.08.2006. The appellant seeks to contend that the press release of 01.10.2009 announcing the Cabinet decision approving the modified Mega Power Policy as envisaged tantamounts to "law" as defined in Clause 1.1 of the Request For Proposal. The appellant contends that *qua* the Power Purchase Agreement (PPA), the press release of 01.10.2009 would be an order and covered by the phrase "*and shall include all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality*". We are unable to accept this submission. First of all, the commonly understood meaning of the word "**order**" as defined in **Black's Law Dictionary** is as follows:-

> "Order – A command, direction or instruction. See MANDATE (1) 2. a written direction or command delivered by a government official, esp. a court or judge."

43. The press release of 01.10.2009 certainly does not fulfil the meaning of the word "order" as understood in legal parlance. As explained earlier, the Press Release with all its future eventualities and conditionalities is only a proposal and it is only after the undertakings were agreed to be given by the State Government that a final shape was given in the form of a Section 25 customs notification on 11.12.2009 and by the policy document of 14.12.2009. The press release announcing the cabinet approval of certain modifications envisaged in the existing Mega Power Policy is not law as defined in Clause 1.1 of the PPA. Further, the press release does not enact, adopt, promulgate, amend, modify or repeal any existing law or bring into effect any law. This aspect has been elaborated hereinbelow. Hence, the appellant's would fail on the ground that the press release of 01.10.2009 is not law and as of 01.10.2009, the continuing legal regime was as per the notification of 01.03.2002 issued under Section 25 of the Customs Act and the Mega Power Policy of 07.08.2006 and there was no alteration of that

legal regime on 01.10.2009. The change in law occurred only on 11.12.2009/14.12.2009, and the respondent no. 1 has rightly been held by the fora below to be entitled to the benefits, which ultimately will go to the consumers.

44. The argument feebly advanced by the appellant that no notice of change of law was issued by the respondent under Clause 13.3.1 and 13.3.2 does not impress us. The said clause expressly deals only with a seller having to issue the notice if it is beneficially affected by the change of law. In this case, PSPCL is the buyer. Further, post the change in law on 11.12.2009/14.12.2009 there is a change in cost with the reduction of customs duty which will enure to the benefit the appellant-seller and under 13.1.1. the benefit ought to be passed on to the respondent.

45. The words of clause 13.1.1 read with the definition of law in Clause 1.1 are plain and clear. For a change in law to occur, the following events ought to have happened seven days prior to the bid deadline that is on 02.10.2009 in our case; (i) the enactment brining into effect, adoption, promulgation, amendment, modification or repeal of any law or (ii) a change in interpretation of any law by a

competent court of law, Tribunal or Indian Governmental instrumentality provided such court of law, Tribunal or Indian Governmental instrumentality is the final authority under law for such interpretation or (iii) change in any consents, approvals or licences available or obtained for the project, otherwise than for default of the seller, which results in any change in any cost or revenue from the business of selling electricity by the seller to the procurer under the terms of this agreement or (iv) any change in the (a) declared price of land for the project or (b) the cost of implementation of the resettlement and rehabilitation package of the land for the project mentioned in RFP or (c) the cost of implementing environmental management plan for the power station but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission.

46. Considering the facts of the case and the arguments, we are very clear that the case of the parties is not based on any change in interpretation or change in consent, approval or licence so these sub clauses of the opening part of 13.1.1 is ruled out. Equally, the latter

part dealing with price of land for the project and cost of implementation and rehabilitation package of land or cost of implementing environmental management plan is also not attracted.

47. The question that remains is the applicability of sub clause (i) of clause 13.1.1 namely, when did the change in law happen? For 13.1.1. (i) to be attracted there has to be an enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal of any law. Further, if there was a change in law the question would be, did it result in any change in any cost or revenue from the business of selling electricity by the seller to the procurer under the terms of the agreement.

48. It is important to keep in mind the definition of law which has been defined to mean in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule or any interpretation of any of them by an Indian Governmental instrumentality and having force of law and shall further include all applicable rules, regulations, orders, notification by an Indian Governmental instrumentality pursuant to or under any of them and shall include all rules, regulations,

decisions and orders of the Appropriate Commission. We are convinced that the words "shall include all rules, regulations, decisions and orders of the Appropriate Commission", only refer to the rules, regulations, decisions and orders of the Appropriate Commission.

49. It is important to bear in mind that 'law' is one thing and 'change in law' is another, in the sense that the two are two different concepts. For the case in question, we need to understand what the extant law was on 01.10.2009 and then decide whether there was a legal regime alteration as defined under 13.1.1 on the said date.

50. The law, as it stood prior to the press release of 01.10.2009 insofar as the financial implications for the matter is concerned, was the notification under Section 25 of the Customs Act issued on 01.03.2002 and entry 400 thereof, extracted in the earlier part of this judgment. That notification, subject to the conditions mentioned thereon in entry 400 granted exemption from customs duty for import of goods required for setting up of any Mega Power project if such Mega Power project was an inter-State power plant and if it fulfilled the other conditions mentioned in the notification. Section 25(1) of

the Customs Act under which the notification is issued reads as under:

> **"25. Power to grant exemption from duty.-** (1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance), as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon."

51. It will be very clear that for an exemption under the Customs Act to operate thereon there has to be a notification issued in the manner provided by the Customs Act and duly published in the official gazette. It is so well settled that if a certain thing has to be done in a certain manner, it shall be done in that manner or not at all. [See ***Babu Verghese and Others*** vs. ***Bar Council of Kerala and Others***, (1999) 3 SCC 422, relying on ***Taylor*** vs. ***Taylor***, (1875) 1 C h D 426 and ***Nazir Ahmad*** vs. ***King Emperor***, AIR 1936 PC 253]. Further, Section 21 of the General Clauses Act, 1897 clearly prescribes as under:-

> **"21. Power to issue, to include power to add to, amend, vary or rescind, notifications, orders, rules or bye-laws.—**Where, by any Central Act or Regulation, a power to issue notifications, orders, rules, or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like

sanction and conditions (if any) to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued."

(Emphasis Supplied)

There was no duly constituted amendment notification as on 01.10.2009.

52. The exemption notification has to be read with the then extant policy of 07.08.2006 under which Mega Power Policy, to obtain a Mega Power Status, the plant had to be an inter-State power plant of the prescribed dimensions and if it were so, certain financial concessions/benefits were to be available to it under the policy document. Admittedly, that policy of 07.08.2006 was duly promulgated by the Government of India through Ministry of Power and there is no dispute on this score.

53. What the appellant contends is that with the press release on 01.10.2009 and they having received no positive response to the letters of 02.10.2009 and 06.10.2009 (since withdrawn), they in their bid of 09.10.2009 factored in the benefits that would be available in view of the Cabinet decision as announced in the press release of 01.10.2009. According to the appellants, as such, when the notifications for amendment were issued on 11.12.2009 and when

the policy document was amended on 14.12.2009, there was no change in law because the legal regime stood altered on 01.10.2009 with the press release. Respondents contended that any clarification for the bid ought to have been sought before 25.09.2009 and independent of that they also contend that press release of 01.10.2009 does not tantamount to law and that the change in law happened only on 11.12.2009/14.12.2009.

54. The scenario that emerges is that there was a legal regime operating, which continued to have force since there was no repeal of the notification of 01.03.2002 or the supersession of the Mega Power Policy document of 07.08.2006 on 01.10.2009. The press release clearly mentioned as to what was envisaged and the conditions that were to be replaced and removed.

55. In our considered opinion, the press release did not alter/amend/repeal the existing law as on 01.10.2009. It was at best the announcement of a proposal approved by the Cabinet which had to be given shape after fulfilment of the conditions mentioned therein. Some of the conditions were that the power purchasing States were to undertake to carry out distribution reforms as laid

down by the Ministry of Power and admittedly in that regard there was a meeting held on 28.10.2009; an undertaking was sought from the States in the prescribed formats and the four distribution reform measures required to be undertaken were part of the undertaking. Those four measures are (a) timely release of subsidy as per Section 65 of the Electricity Act, 2003 (b) Ensure that discoms will approach SERC for approval of annual revenue requirement/tariff determination in time according to SERC regulations (c) Setting up of Special Courts as provided in the Electricity Act, 2003 to tackle the related cases and (d) ring fencing of SLDCs.

56. It was thereafter on 11.12.2009 in due compliance with the provisions of Section 25 of the Customs Act that the amendment notifications were issued which expressly specified the condition that the power purchasing States ought to have undertaken to carryout distribution reforms as laid out by the Ministry of Power. It is only with the promulgation of the 11.12.2009 notification that entry 400 of the 01.03.2002 notification issued earlier in 2002 was substituted to cover goods required for setting up of any Mega Power Project (as now defined and set out in the notification of 11.12.2009 and

elaborated in the policy document of 14.12.2009) did the 'change in law' happen.

57. Could the appellant has assumed that the Press Release of 01.10.2009 ordained a new legal regime? We think not and we hold accordingly. The press release is a summary of the Cabinet decision. Even the press release makes it clear that it was a proposal that was envisaged and which was to come into force in future.

58. Certainty is the hallmark of law. It is one of its essential attributes. It is an integral component of the rule of law. What was certain on 01.10.2009 in the context of our case was only the prevalent customs notification of 01.03.2002 issued under section 25, duly notified and gazetted as well as the Mega Power Policy document admittedly promulgated on 07.08.2006.

59. The press release summarizing the Cabinet decision and beset with several conditions created no vested rights on any party to the power purchase agreement vis-a-vis the other party on 01.10.2009. In fact, the press release itself contemplated certain contingencies. A right vests when all the facts have occurred which must by law occur in order for the person in question to have the right (**see Salmond on**

Jurisprudence, Twelfth Edition P.J. Fitzgeral page 245). It is only when the right vests will there be a corelative duty on the other as far as nature of the right involved in the present case is concerned.

60. Accepting the argument would also create tremendous uncertainties in the law. In the absence of any repeal of 01.03.2002 notification and the 07.08.2006 Mega Power Policy, between 01.10.2009 and 11.12.2009/14.12.2009 there will be two legal regime operating.

61. Lord Bingham of Cornhill in his locus classicus 'The Rule of Law' rightly identifies as one of the facets of rule of law, the following – "the law must be accessible and so far as possible intelligible, clear and predictable." The second and third reason given to support the principle makes for fascinating reading and are reproduced hereinbelow.

> "The second reason is rather similar, but not tied to the criminal law. If we are to claim the rights which the civil (that is, non-criminal) law gives us, or to perform the obligations which it imposes on us, it is important to know what our rights or obligations are. Otherwise we cannot claim the rights or perform the obligations. It is not much use being entitled to, for example, a winter fuel allowance if you cannot reasonably easily discover your entitlement, and how you set about claiming it. Equally, you can only perform a duty to recycle

different kinds of rubbish in different bags if you know what you are meant to do.

The third reason is rather less obvious, but extremely compelling. It is that the successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations. No one would choose to do business, perhaps involving large sums of money, in a country where the parties' rights and obligations were vague or undecided. This was a point recognized by Lord Mansfield, generally regarded as the father of English commercial law, around 250 years ago when he said: The daily negotiations and property of merchants ought not to depend upon subtleties and niceties; but upon rules easily learned and easily retained, because they are the dictates of common sense, drawn from the truth of the case."[1] In the same vein he said: 'In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators [meaning investors and businessmen] then know what ground to go upon."[2]

62. Explaining felicitously the said principle, O. Chinnappa Reddy, J. speaking for this Court in ***B.K. Srinivasan and Others*** vs. ***State of Karnataka and Others***, (1987) 1 SCC 658 ruled:-

> **"15.** There can be no doubt about the proposition that where a law, whether parliamentary or subordinate, demands compliance, those that are governed must be notified directly and reliably of the law and all changes and additions made to it by various processes. Whether law is viewed from the standpoint of the "conscientious good man" seeking to abide by the law or from the standpoint of Justice Holmes's "unconscientious bad man" seeking to avoid the law, law must be known, that is to say, it must be so made that it

[1] Hamilton vs. Mendes (1761) 3 Burr 1198, 1214
[2] Vallejo vs. Wheeler (1774) 1 Cowp 143, 153

> can be known. We know that delegated or subordinate legislation is all-pervasive and that there is hardly any field of activity where governance by delegated or subordinate legislative powers is not as important if not more important, than governance by parliamentary legislation. But unlike parliamentary legislation which is publicly made, delegated or subordinate legislation is often made unobtrusively in the chambers of a Minister, a Secretary to the Government or other official dignitary. It is, therefore, necessary that subordinate legislation, in order to take effect, must be published or promulgated in some suitable manner, whether such publication or promulgation is prescribed by the parent statute or not. It will then take effect from the date of such publication or promulgation. Where the parent statute prescribes the mode of publication or promulgation that mode must be followed.…"
>
> (Emphasis supplied)

63. The appellant has relied upon RFP to contend that the Press release of 01.10.2009 could not have been ignored by them. We do not find merit in this submission. Those clauses in the RFP obligate the bidder to satisfy itself about the extant legal regime and those clauses cannot operate as a crutch to elevate the press release of 01.10.2009 to the status of law under Clause 1.1. of the PPA.

64. We have also found that the terms of the contract to be clear and hence there is no scope for applying any business efficacy test to interpret the contract as was sought to be contended for the appellant.

65. One of the arguments advanced by the learned senior counsel for the appellants is based on the doctrine of promissory estoppel. The argument need not detain us since the respondent PSPCL which

is the party to power purchase agreement is not the promisor, even if we assume the press release of 01.10.2009 as holding out the promise. The Union of India has not been arrayed in any duly constituted litigation to enforce the promise. The argument also belies the primary contention of the appellant since even according to their understanding, it was at best a promise by the Union of India and not any alteration of the law *proprio vigore* (by its own force). In any case, no steps have been taken to enforce the so-called promise and there is no order of any court of law enforcing the promise as on 02.10.2009. The appellant contends that since the promise was duly complied with, there was no need to enforce the promise. This is also an argument which cuts at the root of appellants main submission. The notifications constituting change in law happened on 11.12.2009 and 14.12.2009 and hence there is no basis in the contention that on 01.10.2009 the old legal regime had given way.

66. The judgments cited by learned Senior Counsel for the appellant also do not in any manner support the case of the appellant. In ***GMR Warora Energy Limited*** vs. ***Central Electricity Regulatory Commission [CERC] and Others***, (2023) 10 SCC 401, this Court

found that busy season surcharge, development surcharge, and port congestion surcharge were increased by circular/notifications issued by the Ministry of Railways by virtue of the powers vested in them which were enforceable commands *proprio vigore*. Similarly, the letters carrying the decisions of Coal India on the aspect of charges for linkage coal and the direction to use beneficiated coal were held to be statutory documents having the force of law. The press release of 01.10.2009 does not enjoy the same legal characteristics for the reasons already set out hereinabove.

67. Equally, for the same reason, the judgment in ***Energy Watchdog*** vs. ***Central Electricity Regulatory Commission and Others***, (2017) 14 SCC 80 will also not help the appellant. The appellant's main reliance has been on ***Lloyd Electric and Engineering Limited*** vs. ***State of Himachal Pradesh and Others***, (2016) 1 SCC 560. In ***Lloyd Electric (supra),*** the appellant therein was already enjoying the concessional rate in CST @ 1% up to 31.03.2009. Not only this, after the Cabinet note, a policy decision was taken to extend the period of concession up to 31.03.2013 or till CST was phased out. The Department of Industries had issued a

notification extending concessions from 01.04.2009 to 31.03.2013 or till the time CST is phased out. The dispute arose because the Excise and Taxation Department issued a notification of 18.06.2009 granting benefit with immediate effect for the period ending 31.03.2013. It was in that context that this Court held that the State Government cannot speak in two voices and gave effect to the notification of the Industries Department so as to maintain continuity in exemption from 01.04.2009 and set aside the judgment of the High Court which denied exemption from 01.04.2009 till 18.06.2009 which was the date on which the Excise Department issued the notification. Unlike in ***Lloyd Electric (supra)***, in this case, there is only one voice of the government which has given the customs duty exemption for goods imported for use in thermal power plants, (without the requirement of the plant being an interstate power plant) with effect from 11.12.2009. The policy document also came on 14.12.2009. The press release of 01.10.2009 could not have been the basis for the appellant to have assumed that the notification of 01.03.2002 would stand amended and they would have the benefit from 01.10.2009 itself.

68. In ***Uttar Haryana Bijli Vitran Nigam Limited and Another*** vs. ***Adani Power (Mundra) Limited and Another***, (2023) 7 SCC 623, this Court held that the communication of 19.06.2013 in that case effected a modification to the mutual Fuel Supply Agreement and by force of the communication, transfer of coal, which was not allowed till then, was allowed between power plants. This Court held that the communication reflected the decision of the Coal India Limited which was an instrumentality of the Government of India. The said case has no application to the facts of the present case.

69. The judgment in ***Burn Standard Company Limited*** Vs. ***McDermott International INC and Anr.,*** (1991) 2 SCC 669 also does not advance the case of the appellant. That case dealt with permission granted to an individual entity and whether on the facts of that case there existed a valid permission by the Reserve Bank of India. The issue involved in the present case is vastly different and we find the judgment in ***Burn Standard (Supra)*** of no relevance to this case.

70. The judgment closer to our facts is ***Maharashtra State Electricity Distribution Company Limited*** vs. ***Adani Power***

Maharashtra Limited and Others, (2023) 7 SCC 401. In the said case, neither the decision of the Cabinet Committee on Economic Affairs dated 06.02.2013 nor the Press Release of 21.06.2013 was considered as the relevant date for change in law and only 26.07.2013 which was the date on which the Office Memorandum was issued providing further instructions regarding the implementation of the New Coal Distributional Policy [NCDP] was considered as the change in law event. Pursuant to the Office Memorandum of 26.07.2013, the Ministry of Power issued a communication of 31.07.2013 setting out the decision taken. This case clearly supports the case of the respondent that the press release of 01.10.2009 on the facts herein could not have been the basis for the appellant to assume that a new legal regime had commenced in with effect from that date.

71. Though several judgments were cited, including ***Bachhittar Singh*** vs. ***The State of Punjab***, [1962] Supp. 3 SCR 713, to contend that the press release of 01.10.2009 was not an "order", we do not propose to examine them as we are otherwise convinced for the reason set out above that the 01.10.2009 Press Release is not law under Clause 1.1. Equally, for that reason, we have not discussed the

cases on Article 77 of the Constitution of India, dealing with authentication of orders.

72. The State Commission while rejecting the contention of the appellant has rightly recorded the following operative findings:-

> "In view of the above findings, the Commission holds that since the Mega Power Status was granted to the Project under the Mega Power Policy by the Ministry of Power on 30.07.2010 on the application dated 11.05.2010 filed by the respondent no.1, having become eligible on 16.04.2010, the benefits, if any, accruing thereunder to the Project would be applicable only from 30.07.2010 and not from any prior date, notwithstanding that the decision for granting the Mega Power Status was taken/announced on 01.10.2009 or the notifications in respect of the said decision of the Union Cabinet were issued by the concerned Ministries of the Government of India on 11.12.2009 and14.12.2009."

73. For the reasons set out hereinabove, we find no reason to interfere with the concurrent judgments of the courts below. The Civil Appeal is dismissed. No order as to costs.

…….……J.
(B.R. Gavai)

……..……J.
(Prashant Kumar Mishra)

……..……J.
(K.V. Viswanathan)

New Delhi;
5th November, 2024.