



ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION

4thFloor, Singareni Bhavan, Red Hills, Hyderabad 500004

TUESDAY, THE TWENTY-EIGHTH DAY OF MARCH
TWO THOUSAND AND TWENTY THREE

:Present:

Justice C.V. Nagarjuna Reddy, Chairman
Sri P. Rajagopal Reddy, Member
Sri Thakur Rama Singh, Member

OP No.23, 24 & 25 of 2022

O.P.No.23 of 2022 & IA No 1 of 2022:

Between:

M/s Ayana Anathapuramu Solar Private Limited,
S 2904, 29th Floor, World Trade Centre,
Brigade Gateway Campus,# 26/1,
Dr. Rajkumar Road, Rajajinagar, Bangalore-560055

...Petitioner

And:

1. NTPC Limited

Through its Managing Director, NTPC Bhawan,
SCOPE Complex, 7 Institutional Area,
Lodhi Road, New Delhi-110003

2. Southern Power Distribution Company of Andhra Pradesh Limited, Through its Chairman & Managing Director and Chief General Manager, 19-13-65/A, Srinivasapuram, Tiruchanur Road, Tirupati.

3. Eastern Power Distribution Company of Andhra Pradesh Limited, Through its Chairman & Managing Director and Chief General Manager, P&T Colony, Seethammadhara, Visakhapatnam-530013

....Respondents

O.P.No.24 of 2022:

Between:

M/s Adani Solar Energy AP Seven Pvt Ltd.,

Adani Corporate House, 4 Floor, South Wing, Shantigram,
near Vaishnodevi Circle, SG Highway, Ahmedabad 382421

(Name of the petitioner was amended as per the Order of the Commission dated 27-07-2022 in
IA No. 2 of 2022 i.e., from SB Energy Solar Private Limited to M/s Adani Solar Energy AP Seven Pvt. Ltd)

...Petitioner.

And:

1. NTPC Limited

Through its Managing Director, NTPC Bhawan,
SCOPE Complex, 7 Institutional Area,
Lodhi Road, New Delhi-110003

2. Andhra Pradesh Eastern Power Distribution Company Limited,

Through its Managing Director, P&T Colony, Seethammadhara,
Visakhapatnam, Andhra Pradesh 530013

3. Andhra Pradesh Southern Power Distribution Company

Limited, Through its Managing Director, Kesavayanagunta,
Tiruchanoor Road, Tirupathi, Andhra Pradesh – 517501.

... Respondents.

O.P.No.25 of 2022

Between:

M/s SPRNG AGNITRA Pvt. Ltd.,

A-001, P-5 Pentagon Tower, Magarpatta City,
Hadapasar, Pune – 411013.

...Petitioner.

And:

1. NTPC Limited,

Through its Managing Director, NTPC Bhawan,
SCOPE Complex, 7 Institutional Area, Lodhi Road,
New Delhi-110003.

2. Andhra Pradesh Southern Power Distribution Company

Limited, Through its Managing Director, Kesavayanagunta,
Tiruchanoor Road, Tirupathi, Andhra Pradesh – 517501

3. Andhra Pradesh Eastern Power Distribution Company Limited,

Through its Managing Director, P&T Colony, Seethammadhara,
Visakhapatnam, Andhra Pradesh-530050.

...Respondents.

These three Original Petitions have come up for final hearing before us on 08-02-2023 in the presence of Sri S.Ravi, learned Senior Counsel for the petitioners in all the OPs - assisted by Ms. Priya Dhankar, counsel representing Sri Aniket Prasoon-learned counsel for the petitioner in OP No.23 of 2022; Sri Saahil Kaul, counsel representing Sri Jafar Alam-learned counsel for the petitioner in OP No.24 of 2022; Ms. Parichita Chowdhary and Sri Puneeth Upadhyay, counsel representing Sri Hemanth Sahai-learned counsel for the petitioner in OP No.25 of 2022 - Ms. Sakie Jakharia, learned counsel for Respondent No.1-NTPC and Sri P.Shiva Rao, learned Standing Counsel for Respondents 2 & 3 in all the OPs; that after hearing the arguments of the learned counsel for both parties after carefully considering the material available on record, the Commission passed the following:

COMMON ORDER

These three Original Petitions, filed by three independent Solar Power Developers, claimed identical reliefs. The reliefs claimed by the petitioners, include declaration that levy of Safe Guard Duty (for short “SGD”), by way of Notification No.01/2018-Customs (SG), dated 30-7-2018 and Notification No.02/2020-Customs (SG), dated 29-7-2020 on the import of Solar PV Modules for the Projects, is a “Change in Law” Event under Articles 12.1.1 of the Power Purchase Agreements (for short “the PPAs”) read with Clause 5.7 of the Solar Bidding Guidelines dated 03-8-2017. The petitioners also sought for a declaration that they are entitled to be paid certain amounts (amounts vary from petition to petition) as Change in Law Compensation along with Carrying Cost and Late Payment Surcharge (for short “the LPS”). Instead of reproducing the prayers herein, it would be appropriate to treat the prayer portions of this petition as part of this order.

Though the relief of payment of SGD was claimed against respondent No.1, during the hearing of the case, Sri P.Shiva Rao, learned Standing Counsel for respondents 2 and 3, fairly accepted that in view of Clause-XII in the Power Sale Agreements (for short the “PSAs”) between respondent No.1 on the one side and respondents 2 and 3 on the other side, various terms contained in the NTPC-Developer’s PPAs, including Change in Law, shall *mutatis mutandis* apply to the PSAs entered between respondent No.1 and respondents 2 and 3; and that respondents 2 and 3 will be eventually liable to discharge those liabilities on behalf of respondent No.1, as may be adjudicated by this Commission. As regards jurisdiction, learned counsel for both parties are agreed that since only intrastate supply is involved, this Commission alone has jurisdiction to entertain and adjudicate these OPs.

Instead of ritualistic recitation of respective pleadings, we find it more useful to first refer to the undisputed chronology of events before dwelling into the controversial aspects of the cases and the parties’ respective stands thereon.

On 03-8-2017 the Ministry of Power, Government of India, notified Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid connected Solar Projects. For brevity the Guidelines are hereinafter referred to as “MOP Guidelines”). On 09-3-2018 respondent No.1-NTPC, as an intermediary for respondents 2 and 3-AP DISCOMs, has issued a request for selection for procurement of Solar

Power, stipulating 17-4-2018 as the last date for submission of bids. All the petitioners have submitted their bids within the stipulated time and they were declared as successful bidders. On 04-6-2018 three separate Power Supply Agreements (for short "PSAs") were entered into between respondent No.1 and respondents 2 and 3. Following the said PSAs, respondent No.1 has entered into separate PPAs on 5-7-2018 with the petitioners in OP Nos.24 and 25 of 2022 for purchase of Solar power from them with a tariff of Rs.2.73 ps., and 2.72 ps., per unit respectively. On 17-7-2018 respondent No.1 entered into a PPA with the petitioner in OP No.23 of 2022 with a tariff of Rs.2.73 ps., per unit. The parties approached this Commission seeking approval for procurement of power by respondents 2 and 3. After hearing the parties, this Commission by order dated 05-10-2019, *inter alia*, granted approval for procurement of solar power from the three petitioners by respondents 2 and 3 at the tariffs discovered through competitive bidding process. While granting such approval, the Commission, however, added a rider that adoption of tariff shall be subject to consideration of the amendments to the PSAs/PPAs, as suggested by two Objectors (named in the Commission's Order), by the respondents. The Commission directed the parties to report back within two months with their views on the proposed amendments; so that the Commission would examine whether such amendments were incorporated in the PSAs/PPAs. Feeling aggrieved by the said order of this Commission, to the extent that it has directed the parties to consider the

views of the two Objectors, the petitioners have filed Appeal Nos.368, 369 and 372 of 2019 before the Appellate Tribunal for Electricity (for short” the APTEL”). By its order dated 27-2-2020 the APTEL has set aside the impugned part of the Commission’s order. Appeals filed by respondent Nos.2 and 3 were admitted as Civil Appeal Nos.6433-6435 of 2021 and the same are pending before the Honourable Supreme Court. Meanwhile, the petitioners filed the present petitions, which, as aforesaid, claimed the relief of payment of SGD as per Articles 12.1.1 of the PPAs, read with Clause 5.7 of the MOP Guidelines dated 03-8-2017.

Basis for the Petitioners’ Claims:

The petitioners mainly relied on Clause 5.7 of the MOP Guidelines for Tariff Based Competitive Bidding Process for procurement of power from the Grid connected Solar PV Power Projects issued by Ministry of Power on 03-8-2017 and Articles 12.1.1 of the PPAs, which deals with Change in Law and relief to be granted for such Change in Law.

The sheet anchor of the petitioners’ case is that they have submitted their bids before 17-4-2018 i.e., the last date stipulated for such submission; and entered into PPAs by 17-7-2018; while the Government of India has issued Notification dated 30-7-2018 imposing SGD at 25%. The petitioners, accordingly, claimed that in terms of the Clauses in the Bidding Guidelines and the PPAs, they are entitled to the relief of payment of SGD. In support of their cases, they have relied upon the Judgments of the APTEL in ***Nisagra Renewable Energy Private Limited Vs. Maharashtra***

Electricity Regulatory Commission and another¹; Coastal Gujarat Power Limited Vs. Central Electricity Regulatory Commission & others²; Parampujya Solar Energy Pvt Ltd Vs. Central Electricity Regulatory Commission & others³ and Juniper Green Energy Pvt. Ltd., Vs. Maharashtra State Electricity Distribution Company⁴ apart from the Judgement of the Supreme Court in **Alok Shanker Pandey Vs. Union of India⁵**. The petitioners also relied upon the orders of the Electricity Regulatory Commissions of the States, such as, Karnataka and Maharashtra.

Case of Respondent No.1:

The case of respondent No.1 is that Article-12 of the PPA does not have a restitutive provision requiring the affected party to be restored to the same economic position as if the Change in Law Event had not occurred; that without prejudice, the relief for Change in Law under Article-12 is restricted, at the most, only to the actual cost incurred by the affected party in terms of the PPA and duly raised in invoices may be allowed subject to meeting and other necessary conditions; that the petitioners are duty bound to employ a cost effective approach as it was an obligation to mitigate and procure Solar cells from such countries where it is cost effective; whereas the cost of procurement of solar cells from China, inclusive of the cost of the SGD, is more than the cost of

¹) 2022 SCC OnLine APTEL 81

²) 2021 SCC OnLine APTEL 10

³) 2022 SCC OnLine APTEL 80

⁴) Order dt.23-7-2020 in Case No.61 of 2020

⁵) (2007) 3 SCC 545.

procurement of Solar Cells from those countries where the import of Solar Cells is not subject to imposition of SGD. This respondent has requested the Commission to consider whether the claim amount was prudently expended by the petitioners. Respondent No.1 further averred that as it has entered into a back to back agreements with respondents 2 and 3, in the eventuality of the present petitions being allowed and the reliefs sought by the petitioners are granted, then the compensation/relief shall be paid by the ultimate beneficiaries, i.e., AP DISCOMs, subject to submission of relevant documents with regard to the entire details relating to the contracting of modules and actual payment of SGD in terms of the PPAs with regard to the Solar Cells by the petitioners demonstrating one to one correlation between the projects and the supply of imported goods. Respondent No.1 has also refuted the petitioners' claim for compensation on the installed DC capacity and also their right to claim interest/Carrying Cost.

Stand of Respondents 2 and 3:

Initially, in their counter affidavits, while denying their liability to pay SGD, respondents 2 and 3 have mainly relied upon the conduct of the petitioners in not raising the aspect of additional SGD liability during the proceedings before this Commission for approval of the PPAs. These respondents have also pleaded that the petitioners did not submit their expected Capital Cost arrived at while submitting their bids quoting Rs.2.72/2.73 ps., per unit; and that there is no material to establish that

the petitioners have incurred more Capital Cost than what was calculated and considered by them in their financial bids on account of paying the SGD to the Government. Respondents 2 and 3 have also joined issue on the claim of SGD on DC capacity in excess of the contracted AC capacity. They have also questioned the propriety of the petitioners in importing the solar modules from the countries, for which SGD is made applicable.

Before the cases were taken up for hearing, respondents 2 and 3 have filed common written submissions dated 07-2-2023, wherein a new stand was taken; which, if accepted, changes the whole complexion of the cases. It is stated therein that by 17-4-2018 all the petitioners have submitted their bids; that much before the said date, the Director General (Safeguard), (for short "DGSG") appointed under the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 (for short "Customs Tariff Rules, 1997"), issued a notification on 19-12-2017 at the request of the Indian Solar Manufacturers' Association, wherein it was, *prima facie*, opined that the increased imports of the Products Under Consideration (for short "PUC") i.e., Solar Panels, have caused and are threatening to cause serious injury to the Domestic Industry (for short "DI") of products; and that, accordingly, the DGSG has decided to initiate an investigation through the issue of the said notice. Respondents 2 and 3 have also relied upon the DGSG's Notification dated 05-01-2018, *inter alia*, recommending imposition of a provisional SGD at the rate of 70% *ad valorem* on the import of PUC viz., "Solar Cells, whether or not assembled

in modules or panels” for a period of 200 days, which is considered to be the minimum period of time required to protect the interest of the DI. Based on these Notifications, respondents 2 and 3 have submitted that the petitioners would have definitely factored the additional liability likely to be imposed on the import of solar panels by way of SGD at 70%, which was subsequently brought down to 25% by the Government of India in its Notification dated 16-7-2018.

Submissions of the learned counsel for the petitioners:

Sri S.Ravi, learned Senior Counsel for the petitioners, made the following submissions:

That in terms of Articles 12.1.1(e) of the PPAs between the Solar Power Developers and respondent No.1, introduction of SGD made applicable for setting up of a project after the date of submission of the bids is the Change in Law event, for which the petitioners are entitled to relief under Article 12.2 of the PPA; that the petitioners have submitted their bids on or before 17-4-2018, while SGD Notification was issued levying SGD on 30-7-2018; and that, therefore, the petitioners are entitled to the relief based on Change in Law; that Notification dated 05-01-2018 recommending imposition of SGD at 70% is only a provisional order, which has not resulted in issuing Notification by the Government of India, and that, therefore, the provisional order of the DGSG, which was not per se enforceable, does not constitute “Law” and, consequently, the said Notification cannot be termed as Change in Law. The petitioners are also

entitled to, contends the learned Senior Counsel, Late Payment Surcharge and Carrying Cost.

Submissions of Ms.Sakie Jakharia, learned counsel for Respondent No.1-NTPC:

That the PPAs and PSAs are back to back contracts; whatever is the liability that may be adjudicated by this Commission must be passed on to respondents 2 and 3, who are ultimate beneficiaries under the contracts; that the petitioners are duty bound to place before the Commission the computations and calculations regarding the SGD in order to claim the benefit under the Change of Law. Reiterating the same, she filed her written submissions.

Submissions of Sri P.Shiva Rao, Standing Counsel for respondents 2 and 3:

That though Notification dated 05-1-2018 contains preliminary findings, the provisional duty imposed under the said Notification is liveable and recoverable under Rule 10 of the Customs Tariff Rules, 1997; that though the Madras High Court has granted stay, the said stay lasted only for 90 days, whereas the provisional order remained in force for 200 days, which means that when the bids were filed by the petitioners in April, 2018, the said provisional order was very much in force and the petitioners were expected to take note of existence of such order, which recommended imposition of SGD at 70%. The learned counsel further submitted that from these undeniable facts it is clear that the petitioners not only had knowledge of the proposed liability of levy of SGD, but also

would have factored the same while submitting the bids. He further submitted that had the petitioners disclosed the liability to SGD during the proceedings for approval of PPAs before this Commission, the Commission would have had an opportunity of deciding whether to approve the PPAs or not, for as held in ***Energy Watchdog and others Vs. Central Electricity Regulatory Commission and others***⁶ the Commission, while adopting the tariff discovered during the transparent bidding process under Section 63 of the Electricity Act, 2003, will not act as a mere post office and this Commission might, as well, have declined to approve the PPAs, as imposition of SGD would increase the tariff, which would be against the interest of the consumers; and that as the petitioners are not entitled to payment of SGD in view of the peculiar facts as pleaded above, the question of payment of LPS and Carrying Cost does not arise.

Written submissions:

On behalf of the petitioners, brief written submissions were filed, wherein they have replied to the stand taken by respondents 2 and 3 based on Notification dated 05-1-2018, under which provisional SGD was recommended.

Having regard to the respective pleadings and submissions of the learned counsel for the parties, the following points arise for adjudication:

1. Whether imposition of SGD constitutes Change in law?; and
2. Whether on the facts of the present case, the petitioners are entitled to the reliefs as claimed in the petitions?

⁶) (2017) 14 SCC 80

Re-Point No.1: Whether imposition of SGD constitutes Change in law?

Respondent No.1, on behalf of respondents 2 and 3, has issued Tender Notification inviting bids for sale of Solar Energy of certain capacities. This Notification was issued based on the MOP Guidelines. MOP Guidelines were notified by the Ministry of Power, vide: Resolution No.23/27/2017-R&R, dated 03-8-2017. The petitioners offered their bids. Clause 5.7 pertains to Change in Law. Sub-Clauses (1) and (2) of Clause 5.7 read as follows:

“5.7. CHANGE IN LAW:

5.7.1. In the event a Change in Law results in any adverse financial loss/gain to the Solar Power Generator then, in order to ensure that the Solar Power Generator is placed in the same financial position as it would have been had it not been for the occurrence of the Change in Law, the Solar Power Generator/Procuree shall be entitled to compensation by the other party, as the case may be, subject to the condition that the quantum and mechanism of compensation payment shall be determined and shall be effective from such date as may be decided by the Appropriate Commission.

5.7.2. In these Guidelines, the term Change in Law shall refer to the occurrence of any of the following events after the last date of the bid submission, including (i) the enactment of any new law; or (ii) an amendment, modification or repeal of an existing law; or (iii) the requirement to obtain a new consent, permit or license; or (iv) any modification to the prevailing conditions prescribed for obtaining a consent, permit or license, not owing to any default of the Solar Power Generator; or (v) any change in the rates of any Taxes which have a direct effect on the Project. However, Change in Law shall not include any change in taxes on corporate income or any change in any withholding tax on income or dividends”.

Article 12 of the PPAs executed between the petitioners and respondent No.1 incorporated the essence of Clause 5.7 of the MOP Guidelines dated 03-8-2017. Though in form it varies, in content, it is similar to Clause 5.7 of MOP the Guidelines. The purport of both these Clauses is that after the

last date of the bid submission, if there be any additional liability imposed by way of taxes, duties, cess or by introduction of any new tax etc., on the Solar Power Developers, which has a direct bearing on setting up of the Solar Power Projects; such liability is to be reimbursed.

In the instant case, the petitioners have claimed relief based on the Notification of the Union Ministry of Finance, Government of India, dated 30-7-2018 imposing SGD at different percentages for different periods as under:

- “(a) twenty five per cent, *ad valorem* minus anti-dumping duty payable, if any, when imported during the period from 30th July, 2018 to 29th July, 2019 (both days inclusive);
- (b) twenty per cent, *ad valorem* minus anti-dumping duty payable, if any, when imported during the period from 30th July, 2019 to 29th January, 2020 (both days inclusive); and
- (c) fifteen per cent, *ad valorem* minus anti-dumping duty payable, if any, when imported during the period from 30th January, 2020 to 29th July, 2020 (both days inclusive)”.

The petitioners claim that levy of SGD falls within the ambit of Articles 12.1 of the PPAs, read with Clause 5.7 of the MOP Guidelines. In support of this plea, the petitioners have heavily relied upon the Judgments of the APTEL in ***Coastal Gujarat Power Limited (2 supra)*** and ***Parampujya Solar Energy Pvt Ltd (3 supra)***. We have carefully gone through the said Judgments and we are satisfied that imposition of SGD falls within the ambit of Change in Law. The learned counsel for respondent No.1 and the learned Standing Counsel for respondents 2 and 3 also did not dispute to this extent. However, further crucial question is, whether, on the facts of these cases, the petitioners are entitled to the

relief on the ground of Change in Law. This aspect is proposed to be considered under Point No.2 infra.

Point No.2: Whether on the facts of the present case, the petitioners are entitled to the reliefs as claimed in the petition?

Though respondents 2 and 3 have not specifically pleaded in their pleadings filed by way of counters, as noted hereinabove, they have specifically taken the stand in their written submissions to the effect that, much before the petitioners filed their bids, the Notification issued by the DGSG containing the provisional order for levy of SGD at 70% was in force; and that in the light of this undeniable fact the petitioners must necessarily have factored the additional liability while offering their bids. To verify whether the contemplated additional liability by way of SGD was duly factored in their bid calculations, the petitioners were requested to furnish those calculations, but they have declined the said request. Countering the said stand of respondents 2 and 3, the petitioners in their written submissions asserted that the DGSG's Notification was not an enforceable Law and that for the first time SGD was imposed on 03-7-2018 by way of a Notification, which alone constitutes Law and that the said Notification having been issued much after the submission of the bids by the petitioners, the said Notification alone constitutes Change in Law within the meaning of Article 12 of the PPAs; that they are entitled to compensation for Change in Law is sought to be fortified by various decisions of different State Electricity Regulatory Commissions, as

referred to in Annexure-2 of the written submissions filed in O.P.No.23 of 2022. The petitioners also placed heavy reliance on the judgment of the APTEL in ***Coastal Gujarat Power Limited (2 supra)***.

Before discussing the respective stands of the parties, it would be appropriate to refer to the relevant Notifications relating to SGD.

In exercise of its powers under sub-Section (5) of Section 8-B of the Customs Tariff Act, 1975, the Central Government framed the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1977. These Rules, *inter alia*, provide for imposition of a Duty to avoid “serious injury” or “threat of serious injury” to DI as a consequence of increased import of an article into India. Under the said Rules, the DGSG is appointed. He is authorised to initiate investigation to determine the existence of “serious injury” or “threat of serious injury” to the DI caused by the import of an article in such increased quantities, absolute or relative to domestic production, on receipt of a written application by or on behalf of a domestic producer.

Under Rule 8, the DGSG shall determine the serious injury or threat of serious injury to the DI taking into account, *inter alia*, the principles laid down in the Annexure to the said Rules.

Under Rule 9, the DGSG shall proceed expeditiously with the conduct of the investigation and in critical circumstances, he may record a preliminary findings regarding serious injury or threat of serious injury. The DGSG shall issue a public notice regarding his preliminary findings and

shall send a copy of the public notice to the Central Government in the Ministry of Commerce and in the Ministry of Finance.

Under Rule 10, the Central Government may in accordance with the provisions of sub-section (2) of Section 8-B of the Customs Tariff Act, 1975 impose a provisional duty on the basis of the preliminary findings of the DGSG. However, such duty shall remain in force only for a period not exceeding two hundred days from the date on which it was imposed.

Under Rule 11, the DGSG shall, within 8 months from the date of initiation of investigation or within such extended period, which the Central Government may allow, *inter alia*, make his recommendations regarding the amount of Duty, which, if levied, would be adequate to prevent or remedy serious injury and to facilitate positive adjustment. He shall also make his recommendations regarding the duration of levy of Duty. The DGSG shall issue a public notice regarding his final findings and send a copy of the same to the Central Government in the Ministry of Commerce and in the Ministry of Finance.

Under Rule 12, based on the final findings of the DGSG, the Central Government may impose, by a Notification in the Official Gazette, SGD not exceeding the amount which has been found adequate to prevent or remedy serious injury and to facilitate positive adjustment.

The DGSG issued a Notification dated 19-12-2017, wherein he has initiated Safeguard investigation concerning imports of “Solar Cells whether or not assembled modules or panels” into India. It is, *inter alia*,

mentioned therein that the investigation was initiated on an application dated 28-11-2017 filed in the DGSG's Office on 05-12-2017 by the Indian Solar Manufacturers' Association on behalf of five Indian Producers. It is further stated in the Notification that the application was examined and it was, *prima facie*, found that the increased imports of the PUC have caused and/or threatening to cause serious injury to the DI Products; that it was decided to initiate an investigation through issue of the said Notice; and that all the interested parties were allowed to file their views within 30 days. After analysing the data for the relevant period, the DGSG has rendered preliminary findings, which were briefly summed up as under:

"7.2. In view of the above, my preliminary findings are that there is a direct correlation between the increase in imports and serious injury already suffered by the DI. Pertinently, all indicators exist to lead to the finding that the increased imports, which show no sign of abating and on the contrary are further increasing significantly, threaten to cause serious injury to the DI in the coming days. Thus, critical circumstances exist requiring imposition of provisional Safeguard Duty immediately in order to save the DI from further serious injury which would be difficult to repair, if the application of this Safeguard measure is delayed. These are, of course, preliminary findings on the basis of the documents and information on record and if any other factors that have a material bearing come to light during the course of investigation, they would be examined in detail in due course".

The DGSF made the following recommendations:

"10. In view of the aforementioned analyses and findings, I find that the product under consideration viz. "Solar Cells whether or not assembled in modules or panels" is being imported into India in such increased quantities and under such conditions so as to cause or threaten to cause serious injury to the DI manufacturing like or directly competitive products. I also find that existing critical circumstances justify the immediate imposition of a provisional Safeguard Duty in order to save the DI from further serious injury, which would be difficult to repair, if the application of the recommended Safeguard measure is delayed. Accordingly, I make the following recommendations:

- (i) I recommend that pending a final determination, considering the average cost of sales by the Domestic Industry arrived at on the basis of import quantity ratio of Solar cells and Solar modules (confidential), a reasonable return on the cost of sales excluding interest, the

present level of import duties, and the present average import prices, a provisional Safeguard Duty be imposed at the rate of 70% (Seventy percent) *ad valorem* on the imports of the PUC viz. "Solar Cells whether or not assembled in modules or panels" falling under Customs Tariff Item 85414011 of the Customs Tariff Act, 1975 from all countries with the exception of the developing countries indicated in clause (iii) below. The Tariff Item mentioned herein is indicative only and the description of the imported goods will determine the applicability of the recommended Safeguard Duty.

- (ii) I also recommend that the provisional Safeguard Duty on the import of the said product, as above, be levied for a period of 200 days (two hundred days), which is considered to be the minimum period of time required to protect the interests of the Domestic Industry.
- (iii) As the imports from the developing countries listed in Notification No.19/2016-Custom (NT), dated 5th February, 2016, other than China PR and Malaysia, do not exceed 3% individually and 9% collectively, the imports of "Solar Cells whether or not assembled in modules or panels" originating from such developing countries (other than China PR and Malaysia) will not attract the recommended provisional Safeguard Duty in terms of proviso to Section 8B(1) of the Customs Tariff Act, 1975".

After final investigation, the DGSG has issued his final findings, which were notified on 16-7-2018 recommending different percentages of SGD for different periods varying between 25% and 15% *ad valorem*. These recommendations were accepted by the Government of India, Ministry of Finance, Department of Revenue, and a Notification was issued on 30-7-2018 imposing SGD for the periods from 30-7-2018 to 29-7-2020 at different percentages".

To recapitulate, the stand of the petitioners that it is only the final Notification dated 30-7-2018 of the Government of India, which qualifies for being considered as "Law" and not the DGSG's Notifications rendering preliminary and final findings.

The PPAs between the petitioners and respondent No.1 defined the word "Law" as under:

“Law shall mean in relation to this Agreement, all laws in force in India including Electricity Laws of 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 without limitation all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the Appropriate Commissions”

The above reproduced definition encompasses wide range of legal instruments. Interestingly, the definition contains two limbs. The first limb embraces all Laws in India, including Electricity Laws of India, and any statute, Ordinance, Regulation, Notification etc., and having force of Law. The second limb again includes within its ambit all applicable Rules, Regulations, Orders, Notifications issued by an Indian Governmental Instrumentality pursuant to or under any of them. Thus, the expression “Notification” occurs at two places in the definition – in the former, reference of the word “Notification” was qualified by the words “having force of Law”; and the latter’s reference was without any such qualification. It appears, the latter category of instruments may be consequential ones issued in pursuance of those issued under the first limb. Undisputedly, the preliminary finding recommending levy of SGD by DGSG is a Gazette Notification. We are, however, conscious of the position that an instrument sans its enforceability is not generally treated as “Law”, especially, in the matter of imposition of fiscal liability. From the scheme of the Rules it is evident that even the preliminary findings rendered under Rule 9 may lead to levy of provisional duty under Rule 10. However, there is an intermediate step between the two, and that is, issue of Notification under

sub-Section (2) of Section 8-B of the Customs Tariff Act, 1975. Thus, technically the DGSG's Notification may not qualify to be termed as "Law" within the definition in the PPA. However, contextually the impact the DGCG's Notification must have created is required to be considered. Anticipating enforcement of preliminary findings of provisional SGD Notification issued under Rule 9(2) of the Customs Tariff Rules, 1997, certain aggrieved parties have challenged the said preliminary findings; and the Notification was stayed for a period of three months by Madras High Court. The stay was later vacated. It could, thus, be seen from these facts that, barring for a period of three months, the preliminary findings were operative, though were not specifically enforced by Government of India Notification, for the rest of the period of 200 days, for which those findings were rendered. Whether the Notification dated 05-1-2018 qualifies to be termed as "Law" as defined under the PPAs or not, the fact, however, remains that it was staring at everyone's face, including that of the petitioners. To be fair to the petitioners, they have not denied knowledge of existence of the said Notification.

The question then is whether the petitioners would not have factored the potential liability while submitting their bids. We feel this test needs to be applied on the unique facts of these cases where a statutory authority, as high as the DGSG, having held preliminary investigations, issued a provisional order making recommendations for levy of as much as 70% *ad valorem* as SGD. Is it possible for entrepreneurs, such as the

petitioners involved in generation of Solar Power by making investments running into several hundreds of crores, to ignore the possibility of their suffering huge additional liability and still exhibit their naivety by not factoring this additional liability while offering their bids. Business expediency requires that such a liability, which is hanging on head like a Damocles Sword, is factored while calculating Capital Cost. No entrepreneur is expected to take a high risk of ignoring such liability on the expectation that it can be claimed under Change in Law clause. Ordinarily, there would not have been any necessity for this Commission to embark upon such an enquiry. But, when in the face of the fact that there was every possibility for imposition of SGD consequent on the DGSG's Notification dated 05-01-2018, there is an implied obligation on the Developer to prove that he has indeed not factored such liability. For discharging this obligation, the Developer must not only raise an unequivocal plea that he has not factored the future liability, but also substantiate the same by producing relevant material, such as, his working sheet pertaining to his Capital Cost. After all, the ultimate object in incorporating a term, such as, Article 12.1.1, is to compensate the Developer for unexpected future levy of taxes, duties etc. However, in the face of the admitted facts situation, where the recommendations having the potential of their enforceability were in existence, it is reasonable to presume that commercial expediency warrants factoring such liability while computing their Capital Cost. If they have really included such additional

liability in the Capital Cost, allowing additional payment, once over, would definitely amount to unjust enrichment. It certainly gives a double advantage for the Developers and causes serious prejudice to the end-consumers, to whom the additional burden would be passed on by respondents 2 and 3-Power Procurers.

When respondents 2 and 3 sought for working of their Capital Cost estimates, the petitioners declined to furnish the same. Withholding of such information would give rise to an inference that the petitioners might have factored the additional liability at least partially, if not at 70%, as recommended in the preliminary recommendations by the DGSG. Even in the written submissions, there is no categorical denial of the assertion of respondents 2 and 3 that the petitioners would have factored the additional liability while offering their bids. All that the petitioners have stated is that as the provisional recommendations were not enforceable, there was no scope for factoring the additional liability.

Respondents 2 and 3 heavily emphasized on another fact, viz., that in the proceedings for approval of the PPAs and PSAs before this Commission, the petitioners have not raised any whisper about the additional liability, though, by that time, the Notification dated 30-7-2018 issued by the Government of India, was very much in force. They have contended that had this fact been brought to the notice of this Commission, the Commission might, as well, not have approved the PPAs

and PSAs as the tariff with additional liability towards SGD would be very high.

We find some force in this submission. Even though under Section 63 of the Electricity Act, 2003 the Commission's role is limited as regards fixation of tariff as it has to simply adopt the tariff discovered, subject, however, to its satisfaction that the bidding was transparent and it was held in accordance with the Government of India Guidelines, however, as held by the Apex Court in ***Energy Watchdog and others (5 supra)***, the Commission would not act as a mere post office while discharging its functions under Section 63 of the Act. As submitted by the learned Standing Counsel for respondents 2 and 3, had the fact of additional liability payable by respondents 2 and 3 been brought to the notice of this Commission, there would have been a possibility of the PPAs and PSAs not being approved, as, admittedly, there would be an additional liability and it is always within the realm of the Commission to refuse to approve the PPAs if such approval is not in consumers' interests. On a holistic consideration of the facts, the Commission is of the view that the petitioners ought to have disclosed the additional liability, which would have been a relevant factor while adjudicating whether the PPAs or PSAs have to be approved or not. The fact that the petitioners have not raised such an issue also gives rise to a reasonable presumption that having already factored the potential liability, there was no occasion for them to

raise the same before this Commission in the proceedings held for approval of PPAs and PSAs.

We have gone through the gist of the orders of different State Regulatory Commissions as cited in Annexure-2 to the Written Submissions filed in OP No.23 of 2022 on behalf of the petitioners. All these orders pertain to imposition of SDG/Additional GST. It has been held in all these cases that imposition of SGD/Additional GST after last date for submission of bids amounts to Change in Law and reliefs were, accordingly, granted.

The learned counsel for the petitioners has not specifically argued that in any of these cases the specific contention, as raised by the respondents 2 and 3 in these cases, viz., the impact of preliminary findings/provisional order of DGSG, has been raised and considered. These cases would be relevant to the limited extent of rendering findings on Point No.1 framed in these cases. For deciding Point No.2, these cases have no relevance.

In conclusion, this Commission is of the considered view that on the peculiar facts of these cases, the petitioners are not entitled to any relief under Article 12 of the PPAs. In the result, the OPs are dismissed.

Sd/-
Thakur Rama Singh
Member

Sd/-
Justice C.V. Nagarjuna Reddy
Chairman

Sd/-
P. Rajagopal Reddy
Member