



नई दिल्ली  
NEW DELHI

याचिका संख्या./ Petition No. 228/MP/2021

कोरम/ Coram:

श्री जिष्णु बरुआ, अध्यक्ष/Shri Jishnu Barua, Chairperson  
श्री आई. एस. झा, सदस्य/ Shri I. S. Jha, Member  
श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member  
श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 16<sup>th</sup> of October , 2023

**IN THE MATTER OF:**

Petition under Section 79(1)(b), Section 79(1)(f) and Section 79(1)(k) of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreement(s) dated 28.12.2018 seeking issuance of appropriate order(s) / direction(s) / declaration from this Hon'ble Commission that the imposition of safeguard duty on the import of solar cells, whether or not assembled in modules or panels, vide Notification No. 1/2018-Customs (SG) dated 30.07.2018 Notification No. 2/2020-Customs (SG) dated 29.07.2020 issued by the Department of Revenue, Ministry of Finance (Government of India) are events of Change in Law and for seeking approval of the quantum and mechanism of compensation (along with interest / carrying cost) as submitted along with the present Petition in line with the methodology provided by this Hon'ble Commission vide its order dated 20.08.2021 in Petition No. 536/MP/2020.

**AND IN THE MATTER OF:**

**Mahindra Renewables Private Limited.**  
Mahindra Towers, Dr. G.M. Bhosale Marg,  
P.K. Kurne Chowk, Worli,  
Mumbai – 400018

...Petitioner

**VERSUS**

1. **M/s Solar Energy Corporation of India Limited,**  
06th Floor, Plate B NBCC Office,  
Block Tower-2, East Kidwai Nagar,  
New Delhi – 110023
  
2. **Chhattisgarh State Power Distribution Company Limited,**  
P.O. Sunder Nagar, Dangania, Raipur,  
Chhattisgarh – 492013

...Respondents

**Parties Present:**

Shri Hemant Sahai, Advocate, MRPL  
Shri Nitish Gupta, Advocate, MRPL  
Shri Nishant Talwar, Advocate, MRPL  
Ms. Tanya Sareen, Advocate, SECI  
Ms. Anushree Bardhan, Advocate, SECI  
Shri Aneesh Bajaj, Advocate, SECI  
Shri Ravi Sharma, Advocate, CSPDCL

### आदेश/ ORDER

The Petitioner, *M/s Mahindra Renewables Private Limited* (MRPL) is a project company of *M/s Mahindra Susten Private Limited*. Vide resolution dated 03.08.2017, the Ministry of Power issued Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar Power Projects (Guidelines). Under the aforesaid Guidelines, the Solar Energy Corporation of India Limited issued Request for Selection (RfS) No. SECI/C&P/SPD/RfS/2000MW/012018 dated 30/01/2018 for selection of SPDs for development of the cumulative capacity of 2000 MW. *M/s Mahindra Susten Private Limited* was declared as a successful bidder and issued a Letter of Award (LOA) dated 27.07.2018 for the development of the ISTS-connected Solar Power Project(s), generation and sale of solar power under the above RfS. *M/s Mahindra Susten Private Limited* formed a Project company *M/s Mahindra Renewables Private Limited* (the Petitioner) within the provisions of the RfS for the development of Solar Power Project, generation and sale of solar power under the above Guidelines. Pursuant to the issuance of LOA, MRPL agreed to set up the Solar Power Project based on Photo Voltaic technology of 250 MW capacity in the State of Rajasthan. MRPL executed Power Purchase Agreement (PPA) on 28.12.2018 and is seeking declaration that the imposition of safeguard duty (SGD) on the import of solar cells, whether or not assembled in modules or panels, vide Notification No. 1/2018-Customs (SG) dated 30.07.2018 Notification No. 2/2020-Customs (SG) dated 29.07.2020 issued by the

Department of Revenue, Ministry of Finance (Government of India) are events of Change in Law and for compensation (along with interest / carrying cost) thereof.

2. The Respondent No. 1, M/s Solar Energy Corporation of India Limited (SECI) is a Central Public Sector Undertaking under the administrative control of the Ministry of New and Renewable Energy, to facilitate the implementation of Jawaharlal Nehru National Solar Mission (JNNSM) for development, promotion and commercialization of solar energy technologies in the country and to achieve targets set out in the NSM.
3. The Respondent No. 2, M/s Chhattisgarh State Power Distribution Company Limited (CSPDCL) is the buying utility, purchasing power from SECI.
4. MRPL has made the following prayers:

**In the original petition:**

- a) *Declare imposition of safeguard duty by the Ministry of Finance vide its notification dated 29.07.2020 as a change in law event under Article 12 of the PPA;*
- b) *Declare and allow the Petitioner to claim additional cost of Rs. 88,30,19,737 (i.e. sum of Rs. 80,82,11,871 paid as safeguard duty to the Government plus the carrying cost calculated at the rate of 10.41% totalling to Rs. 7,48,07,866 considered from the date of payment to the date of COD) on account of the change in law event, i.e. imposition of safeguard duty by the Ministry of Finance vide its notification dated 29.07.2020;*
- c) *Direct the Respondent to pay total lump sum of Rs. 3,10,50,594.06 (assuming date of actual payment as 17.11.2021) or as calculated based on the date of actual payment, and to pay the remaining amount through equal monthly annuity of Rs. 1,03,50,198.02 spread throughout the remaining period of 13 years from the date of COD, as per the methodology prescribed by this Hon'ble Commission vide its order dated 20.08.2021 in Petition No. 536/MP/2020. The directions sought from this Hon'ble Commission is subject to assumption that the date of actual payment is 17.11.2021 and the claim shall stand revised / modified subject to the date of actual payment to be made by the Respondent;*
- d) *Pass such other orders that this Hon'ble Commission deems fit in the facts of this case.*

**Amended Prayers**

- a) *Declare imposition of safeguard duty by the Ministry of Finance vide its notification dated 30.07.2018 and notification dated 29.07.2020 are change in law events under Article 12 of the PPA;*
- b) *Declare and allow the Petitioner to claim additional cost of Rs. 88,30,19,737 [i.e. sum of Rs. 80,82,11,871 paid as safeguard duty to the Government plus the carrying cost calculated at the rate of 10.41% per annum totalling to Rs. 7,48,07,866 considered from the date of payment to the date of COD] on account of the change in law event, i.e., imposition of safeguard duty by the Ministry of Finance vide its notification dated 30.07.2018 & 29.07.2020;*
- c) *Declare and allow the Petitioner to claim carrying cost for SGD payments made against BOE Nos. 7376149 & 7293980 from the date of actual payment till 01.01.2021, on account of the change in law event, i.e., imposition of safeguard duty by the Ministry of Finance vide its notification dated 30.07.2018;*
- d) *Direct the Respondent to pay compensation along with carrying cost through lumpsum for the payment due from the date of incurrence till SCOD and remaining amount to be paid through monthly annuity as per the methodology prescribed by this Hon'ble Commission vide its order dated 20.08.2021 in Petition No. 536/MP/2020;*
- e) *Pass such other orders that this Hon'ble Commission deems fit in the facts of this case.*

5. The Department of Revenue, Ministry of Finance, Government of India notified the following Notifications: (i) No. 01/2018-Customs (SG) dated 30.07.2018 (2018 SGD Notification) and (ii) No. 2/2020-CUSTOMS (SG) dated 29.07.2020 (2020 SGD Notification). The government vide the aforesaid notifications, imposed SGD on the import of solar modules in the following manner:

**SGD 2018 Notification:**

- a) *twenty five percent ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30.07.2018 to 29.07.2019 (both days inclusive);*
- b) *twenty percent ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30.07.2019 to 29.01.2020 (both days inclusive);*  
*and*
- c) *fifteen percent ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30.01.2020 to 29.07.2020 (both days inclusive).*

**SGD 2020 Notification:**

- a) *fourteen point nine percent ad-valorem, minus anti-dumping duty, if any, when imported during the period from 30.07.2020 to 29.01.2021 (both days inclusive);*  
*and*

- b) *fourteen point five percent ad valorem, minus anti-dumping duty, if any, when imported during the period from 30.01.2021 to 29.07.2021 (both days inclusive).*

**Factual Matrix:**

6. The brief details of the Petition are as under:

Location of the project	Tehsil Bap, District Jodhpur, Rajasthan
Scheme	Setting up of 2000 MW (250 MW x 8) ISTS- Connected Solar Power Projects under Global Competitive Bidding
Project capacity	250 MW Solar Power Project
Request for Selection (RFS) was issued on	30.01.2018
Bid submitted on	15.06.2018
E-Reverse auction conducted on	02.07.2018
Letter of Award (LOA) issued on	27.07.2018
Tariff	Rs. 2.53/kWh
Power Sale Agreement (PSA) executed between SECI and CSPDCL on	03.08.2018
Date of notification of 2018 SGD Law	30.07.2018
Power Purchase Agreements (PPAs) executed on	28.12.2018
Date of Adoption of Tariff	28.02.2020
Module Supply Agreement was executed on	<u>12.03.2020</u> - Between Zhejiang Jinko Solar Co Ltd and MRPL <u>13.03.2021</u> - Between Canadian Solar International Limited and MRPL
Date of notification of 2020 SGD Law	29.07.2020
Scheduled commissioning date (SCoD) as per PPA.	25.10.2020
Extended SCoDs	27.03.2021; 27.09.2021
Commercial operation date (COD) of the Project	17.08.2021
Unamended Petition was filed on	22.10.2021
Additional affidavit along with Amended Petition was filed by the MRPL on	05.12.2022

7. The present petition was filed on 22.10.2021 and heard on 02.12.2021 wherein this Commission reserved the Order on admissibility. On 06.12.2021, this Commission in line with the Electricity (Timely Recovery of Costs due to Change in Law) Rules 2021 dated 22.10.2021 directed MRPL to approach the Respondents for settlement of Change in Law claims amongst themselves and accordingly disposed of the matter. The findings of this Commission were challenged before the Appellate Tribunal for Electricity (APTEL). APTEL vide judgement dated 05.04.2022 in O.P No. 1 of 2022 and Appeal Nos. 116, 74, 75 & 76 of 2022, set aside this Commissions Order dated 18.02.2022 and remanded the matter back to

the Commission to consider the cases on merits of the claims raised by the parties. Pursuant to the directions of the APTEL, the matter was again listed on 09.05.2022. The Commission vide Order dated 14.06.2022 in Petition No. 8/SM/2022 restored the present Petition at the same stage as existed prior to the disposal of the Petition and directed the parties to complete their pleadings within one month.

**Hearing dated 29.09.2022:**

8. During the hearing on 29.09.2022, MRPL sought liberty to file an additional affidavit making minor changes in the pleadings. The Commission after hearing, allowed time to file its additional affidavit.

**Submissions through amended petition filed by MRPL on 13.12.2022:**

9. MRPL has submitted as under:
  - a) The issuance of SGD Notification 2018, SGD Notification 2020 and the consequential imposition of safeguard duty on the import of solar cells has led to additional capital expenditure and has adversely impacted the business. Thus, MRPL should be allowed to claim additional compensation from the Respondents as a consequential relief.
  - b) The imposition of Safeguard Duty on modules vide SGD Notification 2018 was levied after the submission of the bid. MRPL at the time of submission of the bid could not have foreseen that safeguard duty would be imposed on the import of solar modules. Therefore, additional cost incurred by MRPL against the solar modules imported from China and Hong Kong is liable to be compensated on account of a change in law event.
  - c) Subsequent to the issuance of SGD Notification 2020, the imposition of SGD on the solar modules has also resulted in increased additional capital expenditure for the Petitioner and has adversely impacted the business of MRPL.
  - d) The imposition of safeguard duty by the Government of India is categorically covered as a change in law event under the PPA, and this Commission may accordingly grant relief to the Petitioner in terms of the PPA.
  - e) MRPL is in the process of reconciliation with the Respondent, and MRPL undertakes to submit to this Commission or to the Respondent all the necessary documents as directed by this Commission.
  - f) The solar modules were imported into India and MRPL in compliance with the SGD Notification 2018 and SGD Notification 2020 issued by the Ministry of Finance paid the safeguard duty (including IGST) amounting to Rs. 80,82,11,871/- (plus the interest rate /

carrying cost at 10.41% per annum payable from the date of actual payment till the COD).

- g) In line with the methodology settled by this Commission in Petition No. 536/MP/2020, MRPL by hypothetically assuming 17.11.2021 as the first date of payment by the Respondents, is entitled to receive lumpsum of Rs. 3,10,50,594.06 (i.e. total of 3 months annuity by assuming that date of actual payment as 17.11.2021) payable from the date of COD till the date of actual payment (assumed to be 17.11.2021), and remaining amount be paid in equal monthly annuity of Rs. 1,03,50,198.02 spread throughout the remaining period of 13 years (at interest rate of 10.41% per annum).
- h) The carrying cost from the date of actual payment till 01.01.2021 for BOE Nos 7376149 & 7293980 should also be paid in lumpsum.
- i) MRPL has procured majority of its modules in FY 2019-2020 and FY 2020 – 2021 (i.e. between 01.04.2019 to 31.03.2021) when the RE Tariff Order dated 11.01.2019, passed in Petition No. 01/SM/2019 for FY 2019-20 and RE Tariff Order dated 21.07.2020, passed in Petition No. 13/SM/2020 for FY 2020-21 were applicable. The said RE Tariff Order for FY 2019-2020 and FY 2020-21 provides for a normative rate of interest on debt at 10.41% p.a and 9.67% p.a respectively. Out of a total 51 batches of solar modules imported by MRPL, 2 batches have been imported in FY 2019-20 and 29 batches have been imported in FY 2020-21. Therefore, granting carrying cost / discounting factor @ 9% as provided under Order dated 31.03.2021 will lead to under recoveries to MRPL. The summary is as under:

<b>Particulars</b>	<b>Under Tariff Order 11.01.2019</b>	<b>Under Tariff Order 21.07.2020</b>	<b>Under Tariff Order 31.03.2021</b>
<b>Control Period (FY)</b>	2019-2020	2020 - 2021	2021 - 2022
<b>Rate of Interest on Debt (%)</b>	10.41%	9.67%	9%
<b>No. of batches of Solar Modules imported (Total batches - 67)</b>	2	29	20
<b>BOE Period</b>	19.03.2020 to 31.03.2020	01.09.2020 to 31.03.2021	01.04.2021 to 17.06.2021

- j) This Commission may issue appropriate directions for carrying cost and interest rate for the calculation of monthly annuities, both calculated at 9.67 % p.a. Further, MRPL

agrees for reimbursement to be spread over a period of 15 years from the date of commercial operation of the project.

k) Carrying Costs will have to be paid for the following two periods:

i. Period 1 - From when the MRPL incurred the additional cost on account of the introduction of safeguard duty by way of SGD Notification 2020 till the date of approval to such Change in Law event by this Commission; and

ii. Period 2 - From the date of approval of Change in Law over the period of amortisation, in the scenario if this Commission does not allow compensation by way of one-time upfront lumpsum payment.

l) Even otherwise, MRPL is entitled to carrying cost in the first scenario as it is an implied term in the PPA for payment of carrying cost for Period 1, whereas, in the second scenario, on the principles of quantum meruit as statutorily enshrined in Section 70 of the Indian Contract Act, 1872.

m) During the course of arguments on 23.03.2023, SECI raised the issue of non-issuance of Change in Law notice. The said issue is a non-issue, is misconceived and has no relevance in the facts and circumstances of the present case. Article 12 of the PPA has no such stipulation which requires MRPL to issue a change in law notice. MRPL issued a change in law notice to SECI on 14.07.2021. Further, a procedural requirement of change in law notice cannot scuttle the substantive rights of MRPL. It is settled that the rules of procedure are handmaids of justice. MRPL has placed its reliance on *State of Punjab v. Shamlal Murari, (1976)1 SCC 719*.

**Hearing dated 22.11.2022:**

10. The Commission directed the Respondents to file their replies. Subsequently, SECI filed its reply on 12.02.2023, and CSPDCL filed its reply on 21.02.2023.

**Hearing dated 21.03.2023:**

11. On 21.03.2023, the hearing was conducted through physical mode and the Commission after hearing the submissions of the parties, directed them to file their respective submissions and accordingly reserved the matters for orders. Subsequently, MRPL filed its rejoinder on 15.03.2023 against the reply filed by SECI and CSPDCL. MRPL and SECI filed their respective written submissions on 18.04.2023, and CSPDCL filed its reply on 19.04.2023.

**Submissions on behalf of SECI:**



12. SECI has submitted as under:

- a) The statement made by the counsel for MRPL as recorded in RoP dated 29.09.2022 namely *'The learned counsel submitted that the Petitioner has already carried out the reconciliation of its claims with SECI'* is factually incorrect. SECI stated that it is examining the change in law claims of MRPL and will communicate after examining and verification of the same.
- b) The 2018 SGD Notification was in force at the time of filing of the un-amended Petition i.e. on 20.10.2021. However, MRPL of its own volition did not seek declaration of the above notification as a Change in Law. The Commission may decide as to whether Notifications dated 30.07.2018 & 29.07.2020 constitute a Change in Law within the scope of Article 12 of the PPA read with the provisions of the PSA.
- c) If the imposition of Safeguard Duty vide Notifications dated 30.07.2018 and 29.07.2020 is considered as Change in Law, MRPL may be directed to furnish the relevant details to substantiate the impact of safeguard duty on the procurement of modules required for the solar power project. The above information is necessary for the purpose of deciding on the applicability of the 2022 SGD Notification. This Commission may clarify the cut-off date for considering the safeguard duty impact as the actual commercial operation date.
- d) The following parameters for making payment on an annuity basis may be considered by this Commission:
  - i. The change in law claims up to the cut-off date (date of commercial operation/commencement of power supply) as may be decided by the Commission in its order will be evaluated by SECI.
  - ii. The annuity rate may be considered as 9% which is the rate of interest for the loan component of the capital cost as provided in the Commission's RE Tariff order dated 31.03.2021 providing for the determination of levelised generic tariff for the Financial Year 2021-22 (Para 2.F. of the Order) read with Regulation 14 (2) (b) of Renewable Tariff Regulations, 2020.
  - iii. The period for payment of the claim amount on account of Safeguard Duty on an annuity basis may be considered as 15 years from the date of Commercial Operation Date. The same is consistent with Regulation 14 (1) of the RE Tariff Regulations 2020 providing that *"For the determination of generic tariff and project specific tariff, loan tenure of 15 years shall be considered"*

- iv. In cases, where the project of the Power Developer has already achieved COD, the amount of monthly annuity payment for the number of months lapsed since the COD till the date of payment may be paid on a lump-sum basis.
  - v. The remaining amount of the change in law reconciled amount (Total change in law claims payable minus the change in law claims paid on an upfront basis) may be payable to the SPD with the monthly annuity rate
- e) The Commission may clarify the following:
- i. where the projects of the Power Developers have already achieved COD, the monthly annuity payment starts from the Commercial Operation Date (COD), and the amount of monthly annuity payment for the number of months lapsed since the COD till the date of payment may be paid on lump-sum basis; and
  - ii. The remaining amount of the change in law reconciled amount (Total change in law claims payable minus the change in law claims paid on an upfront basis) will be payable to the solar power generator with the monthly annuity rate.

**Carrying Cost:**

- f) The PPA in the present case does not have any provision dealing with restitutionary principles of restoration to the same economic position and therefore, MRPL is not entitled to claim carrying costs.
- g) The principle of Quantum Meruit has no application where there is a specific agreement in operation. Instead, Quantum Meruit is applicable when the contract is held to be invalid or otherwise.
- h) In terms of Article 12 of the PPA, it is for MRPL to approach the Commission to seek approval of the Change in Law and the Commission to decide on the admissibility of the claim in the first instance. Accordingly, the amount due from SECI/Distribution Companies to MRPL under a change in law gets crystallized only upon the decision being passed by the Commission allowing the change in law, and therefore, there cannot be any carrying cost for the period prior to the decision of the Commission.
- i) The Commission may consider the decision of the Hon'ble Supreme Court (dated 12.12.2022 in Civil Appeal No. 8880 of 2022 and Civil Appeal bearing Diary No. 135 of 2023 dated 23.01.2023) to maintain parity between the cases pending before the Commission.

- j) The Commission may direct that enforcement of any order of the Commission passed on the aspects covered in the Parampujya case will take place after the decision of the Hon'ble Supreme Court to maintain such parity.

**Rejoinder against reply submitted by SECI:**

13. MRPL vide rejoinder dated 15.03.2021 has reiterated its submissions made in the plaint and as such the same are not reproduced herewith for the sake of brevity. Additionally, MRPL has submitted as under:

- a) As an industrial practice, the solar modules are imported at the time when commissioning is closer to be achieved. Also, it is a settled law that if the solar modules are left unused for a long time, the same gets degraded. Reliance is placed on the Commission order dated 13.12.2016 in the matter of *Subhash Infra engineers Pvt. Ltd. V. Haryana Electricity Regulatory Commission & Anr.*
- b) Procuring solar modules in the initial stage of development of the project will increase the cost of the project as MRPL would be required to start paying interest to the lenders despite the Project not being in operation. The bid was submitted by MRPL while taking into account all factors and that the solar modules will be imported after 29.07.2020 (as the original SCoD of the Project was 25.10.2020).
- c) This Commission has already held that SGD Notification 2020 qualifies as a change in law event vide its order dated 20.01.2023, passed in Petition Nos. 722/MP/2020 & 723/MP/2020.
- d) MRPL has already provided a copy of all the required invoices, BOEs, challans and certification from the auditors, which clearly shows the adverse financial impact suffered by MRPL due to the imposition of Safeguard Duty vide SGD Notification 2020.
- e) With respect to SECI's contention that MRPL has not provided the dates of Invoices for the BOEs dated 19.03.2020 and 31.03.2020, MRPL is agreeable to submit all the invoices / documents to SECI (along with one-to-one correlation of documents) as desired by SECI at the time of reconciliation.
- f) SECI's contention that no claim should be allowed against the solar modules imported after the COD of the project is of no merit. All the required solar modules were imported by MRPL from March 2020 to June 2021 as the COD of the project was 17.08.2021. Thus, all the solar modules were imported by MRPL before the COD of the project.

- g) The contention / clarification sought by SECI that the original SCoD shall be considered as the cut-off date for considering the impact of safeguard duty holds no merit. The SCoD of the Project was extended by SECI due to legitimate force majeure reasons. Once SECI itself has extended the SCoD of the Project and has acknowledged that the same is not due to any default on the part of MRPL, it cannot arbitrarily consider the date of the original SCoD as a cut-off date for computing any change in law impact. The contention raised by SECI to this extent is contrary to law and the merits of the case, and the same ought to be rejected.
- h) Restitution is an inherent part of change in law provision under an agreement and a party seeking change in law claims is also entitled to receive 'time value of money' / 'carrying cost' over and above the principle claim of change in law. Therefore, in order to reconstitute MRPL to the same economic position, MRPL should also be allowed to receive carrying cost (over and above the principle claim) from the date of incidence of the change in law event.

#### **Submissions on behalf of CSPDCL**

14. CSPDCL has submitted as under:

- a) In terms of clause 1.8 of LoI, MRPL was required to sign the PPA upon furnishing the Success Charges and total Performance Guarantee of the requisite value. Bid can only be crystallized upon signing of the PPA with SECI and back to back PSA with CSPDCL.
- b) MRPL had signed the PPA only on 28.12.2018 whereas the SGD Notification 2018 came into force only on 29.07.2018. Therefore, MRPL was fully aware of the SGD notification, 2018 before the crystallization of Bid and they could have taken mitigating measures such as placing an order for the solar modules supply from the manufacturer(s) / supplier(s) apart from China PR and Malaysia.
- c) MRPL have failed to provide the following details:
- i. What mitigating measures MRPL has taken to reduce the risk(s) associated with the enforcement and implementation of the SGD notification, 2018 and / or the SGD notification, 2020?
  - ii. What caused MRPL to wait till 12.03.2020 to sign a Module Supply Agreement with Zhejiang Jinko Solar Co Ltd., China supplying Solar Modules from its manufacturing facility in China and signed one more Module Supply Agreement dated 12.03.2020 with Canadian Solar International Limited Hong Kong supplying Solar Modules from its manufacturing facility at China?

- d) MRPL's approach was lethargic and inefficient while executing the Solar Power Development project as awarded to them vide PPA dated 28.12.2018 . MRPL has wilfully disobeyed the directions of Govt. of India and gone ahead with placing orders from the manufacturing companies from China despite clear prohibition.
- e) The Change in Law (CIL) is a genesis of contractual/ PPA and therefore, liability of CIL could not be imposed on CSPDCL before the crystallization of PPA *vis a vis* bid that too in a situation where MRPL's approach is lethargic and inefficient.
- f) MRPL was not able to crystalize the PPA with SECI before the issue of the SGD notification, 2018 and/or the SGD notification, 2020 and therefore, the claims of MRPL on account of issuance of the SGD notification, 2018 and/or the SGD notification, 2020 cannot be fastened on the answering Respondent and MRPL may be asked the bear the same.
- g) SGD notification, 2018 imposing the safeguard duty is prospective in its operation. If the solar modules had been or ought to have been imported before 30.07.2018 in the normal course, there was no incidence of any safeguard duty, even if such import is from the specified countries, namely, China PR, Malaysia and developed countries.
- h) MRPL had an option to decide on the import of Solar PV Module either from the countries where the import of solar modules was subjected to Safeguard Duty (like China etc.) or the countries from where the import would not be subjected to Safeguard Duty or use of domestic manufactured equipment, considering the price implications on the power project being established.
- i) Due to wilful disobedience, non-compliance of SGD notification, 2018 and SGD notification, 2020 and due to imprudent utility practice, MRPL has incurred an additional cost of Rs. 88,30,19,737 [i.e. sum of Rs. 80,82,11,871 which is paid as safeguard duty to the Government along with the carrying cost calculated at 10.41% per annum totalling to Rs. 7,48,07,866 considered from the date of payment to the date of COD] on account of the change in law event, i.e., imposition of safeguard duty by the Ministry of Finance vide its notification dated 30.07.2018 & 29.07.2020.
- j) MRPL was well aware of the SGD notification, 2018 even after the signing of PPA, despite the fact that MRPL had waited to place its order in March 2020 i.e. after the passing of 2 years from the date of the SGD Notification 2018 and placed its first purchase order only on 01.12.2020 i.e. after the lapse of 6 months from the date of issuance of the SGD notification, 2020. However, MRPL has failed to give any logical and reasonable explanation for this.

### **Carrying Cost**

- k) In the present case , the PPA/PSA does not have a provision dealing with restitution principles of restoration to the same economic position. Therefore, MRPL is not entitled to claim any relief for carrying cost as it is not provided for in the PSA/PPA.

### **Rejoinder on behalf of MRPL against reply filed by CSPDCL**

15. Major portion of MRPL's averments in the Rejoinder is already covered in the plaint. The same is not being reiterated. Additionally, MRPL has submitted as under:
- a) CSPDCL has wrongly contended that MRPL by procuring solar modules from China has disobeyed the directions of Government of India. At the time when modules were procured, there was no direction / order passed by Government of India prohibiting MRPL from procuring solar modules from China, and such an argument taken by CSPDCL is only an attempt to create confusion and the same is to be ignored.
  - b) The 2018 SGD Notification provided for a sun-set clause and no safeguard duty was applicable after 29.07.2020. Therefore, the safeguard duty imposed through a subsequent notification i.e. 2020 SGD Notification is a fresh change in law event under the PPA. Appropriate directions are required to be passed in order to compensate MRPL the additional cost it has incurred due to imposition of safeguard duty vide 2020 SGD Notification and to restitute MRPL to the same economic position as if no change in law event has incurred.
  - c) The PPA nowhere restricts MRPL from procuring solar modules / equipment for the project from the countries outside India (including China). MRPL is free to exercise its commercial prudence and act towards its best interest. Further, MRPL had placed its order with Chinese companies as the price offered by them was best available price in the market and the bid was submitted by MRPL while being conscious of this fact.
  - d) The law is well settled that the developer is free to procure modules / equipment for the project (even from China) and this Commission while considering similar facts in catena of judgments has allowed imposition of safeguard duty as change in law event. Therefore, the contention raised by CSPDCL to this extent is without any merit and is required to be ignored.
  - e) The procurement of solar modules from China being a commercial decision of MRPL and the same has been taken in the best interest of the Project. CSPDCL cannot deny the legitimate claim of MRPL by refusing to consider imposition of safeguard duty as a change in law event. CSPDCL while alleging that MRPL has procured modules at higher

price by sourcing the same from China has failed to submit any documentary evidence to establish such claims.

- f) Bid was submitted by MRPL on 15.06.2018 and the 2018 SGD Notification was issued on 30.07.2018. Therefore, MRPL could not be expected to procure solar modules just 1 month after submitting the bid (and even before signing the PPA). It is a settled law that if the solar modules are left unused for a long time it gets degraded as observed and held by APTEL in its order dated 13.12.2016 passed in *Subhash Infraengineers Pvt. Ltd. vs. Haryana Electricity Regulatory Commission & Anr.* (Petition No. 307 of 2016).
- g) MRPL had started importing solar modules in advance since March 2020. The Project was commissioned within the timelines allowed by SECI i.e., on 17.08.2021 (without any delay on its part). Therefore, MRPL has acted diligently and the contention raised by CSPDCL to this extent holds no merit and is required to be rejected.

### **Analysis and Decision**

16. We have heard the learned counsels for MRPL and Respondents and have carefully perused the records and considered the submissions of the parties.

17. On the basis of the submissions of the contracting parties, the following issues arise for adjudication:

**Issue No. I:** *Whether the introduction of Notification No. 01/2018- Custom (SG) dated 30.07.2018 and Notification No.02/2020- Custom (SG) dated 29.07.2020 issued by the Department of Revenue, Ministry of Finance, Government of India, amounts to Change in Law events under Article 12 of the Power Purchase Agreement dated 28.12.2018? AND Whether the Petitioner is entitled to compensation towards additional expenditure on account of a Change in Law event in terms of Article 12.2 of the PPA?*

**Issue No. II:** *What should be the discount rate for the calculation of Annuity for payment of compensation (if any) on account of Change in Law?*

**Issue No. III:** *Whether the Petitioner is entitled to carrying cost towards compensation for Change in Law?*

18. Now we proceed to discuss the above issues:

### **RE: Issue No. I**

19. MRPL has submitted that at the time of submission of the bid i.e. on 15.06.2018, the safeguard duty for the import of solar modules was zero. The 2020 SGD Notification was issued after the sunset clause of the 2018 SGD Notification and resulted in the introduction of safeguard duty beyond 30.07.2020 which had a direct impact on the project as it resulted in MRPL incurring additional expenditure. The SGD Notifications were issued after the last date of submission of the bid and as such the SGD notifications qualify as a change in law under Article 12 of the PPA and the Petitioner should be compensated accordingly. *Per Contra*, SECI has submitted that the onus is on the Petitioner to demonstrate that the aforesaid SGD Notifications have resulted in additional expenditure against the anticipated expenditure on the bid submission date.

20. We observe that Article 12 of the PPA stipulates as under:

***“12.1 Definitions***

*12.1.1 “Change in Law” means the occurrence of any of the following events after the last date of bid submission, resulting into any additional recurring/ non-recurring expenditure by the SPD or any income to the SPD:*

- the enactment coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*
- a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
- the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- a change in the terms and imposition prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the SPD;*
- any statutory change in tax structure, i.e. change in rates of taxes, duties and cess, or introduction of any new tax made applicable for setting up of Solar Power Project and supply of power from the Project by the SPD and has direct effect on the Project, shall be treated as per the terms of this Agreement.*

*but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the SPD, or (ii) any change on account of regulatory measures by the Appropriate Commission.*

***12.2 Relief for Change in Law***

*12.2.1 The aggrieved Party shall be required to approach the Appropriate Commission for seeking approval of Change in Law.*

*12.2.2 The decision of the Appropriate Commission to acknowledge a Change in Law and the date from which it will become effective, provide relief for the same, shall be final and governing on both the Parties.”*



21. As per the 2018 SGD Notification, the Central Government imposed safeguard duty as per the following rates on the import of “Solar Cells whether or not assembled in modules or panels”:
- a) 25% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2018 to 29th July 2019;
  - b) 20% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2019 to 29th January 2020;
  - c) 15% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th January 2020 to 29th July 2020.
22. The extract of the 2020 SGD Notification, is as under:
- ...
- (a) fourteen point nine per cent. ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th July, 2020 to 29th January, 2021 (both days inclusive); and
  - (b) fourteen point five per cent. ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th January, 2021 to 29th July, 2021 (both days inclusive).
23. From the above, we note that any application of a new tax or an amendment, modification or repeal of an existing law is covered as a ‘Change in Law’.
24. Further, we observe that the 2018 SGD Notification 2018 stipulates 25% ad valorem, minus anti-dumping duty payable for solar cells imported during the period from 30th July 2018 to 29th July 2019; 20% ad valorem, minus anti-dumping duty when imported during the period from 30th July 2019 to 29th January 2020 and 15% ad valorem, minus anti-dumping duty when imported during the period from 30th January 2020 to 29th July 2020.
25. We further observe that the 2020 SGD Notification stipulated fourteen point nine per cent (14.9%) ad valorem minus anti-dumping duty payable, on subject goods when imported during the period from 30.07.2020 to 29.01.2021 (both days inclusive); and fourteen point five per cent (14.5%) ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30.01.2021 to 29.07.2021 (both days inclusive). The 2020 SGD Notification provides for a diminishing ‘Safeguard Duty’ slab in the range of 14.9% to 14.5% applicable ad valorem on the imports from 30.07.2020 till 29.07.2021. We note that the impact of the ‘Safeguard Duty’ notification is on any portion of import whose point of taxation is on or after implementation of the Notification dated 29.07.2020 and the same will be subjected to the purview of ‘Safeguard Duty’.

26. The Commission is of the view that a fresh 'Safeguard Duty' became effective from 30.07.2018 and from 30.07.2020 and hence the notification/imposition of 'Safeguard Duty' will directly affect the projects where "solar cells whether or not assembled in modules or panels" were imported on or after 30.07.2018. The 2020 SGD Notification 2020 imposed a fresh Safeguard Duty till 29.07.2021 and has thereby increased the rate of the Safeguard Duty from 'zero' to 14.9% & 14.5% for the period- 30.07.2020 to 29.01.2021 and 30.01.2021 to 29.07.2021, respectively.
27. We observe that the last bullet of Article 12.1.1 of the PPA, in seriatim specifically stipulates that "*any statutory change in tax structure, i.e. change in rates of taxes, duties and cess, or introduction of any new tax made applicable for setting up of Solar Power Project and supply of power from the Project by the SPD and has direct effect on the Project, shall be treated as per the terms of this Agreement*". The introduction of Notification No. 1/2018 (SG) dated 30.07.2018 and Notification No. 02/2020 (SG) has been issued by the Ministry of Finance, Government of India. As such, the impugned notifications have been enacted by the Act of Parliament. The change in the rate of SGD vide the impugned notifications has resulted in a change in the cost of the inputs required for generation and the same is considered a 'Change in Law'. Hence, we hold that the impugned notifications viz. *2018 SGD Notification* and *2020 SGD Notification* are Change in Law events as per Article 12 of the PPA dated 28.12.2018.
28. In the instant petition, a bid was submitted by the Petitioner on 15.06.2018. The PPA was executed between the Petitioner and the SECI on 28.12.2018. As per PPA, the project was required to be commissioned on or before 25.10.2020. However, subsequently, SCoD was extended till 27.03.2021 and further extended up to 27.09.2021. The project was commissioned on 17.08.2021. We observe that a fresh safeguard duty was imposed on two separate instances viz. vide the 2018 SGD Notification dated 30.07.2018 and the 2020 SGD Notification dated 29.07.2020 w.e.f. 30.07.2020. Hence, the impugned 2018 SGD Notification and the 2020 SGD Notification were after the submission of the bid by MRPL and as such MRPL is entitled to compensation on account of a Change in Law as per the terms of Article 12 of the PPA due to impugned notifications viz. *the 2018 SGD Notification and the 2020 SGD Notification*.
29. The issue is decided accordingly.

***Issue No. II: What should the discount rate for the calculation of Annuity for payment of compensation (if any) on account of Change in Law?***

30. SECI has submitted that the methodology for payment of compensation should allow the discounting factor as 9% (which is the rate of interest for the loan component of the capital cost) and the tenure of payment as 15 years as provided in the RE Tariff order dated 31.03.2021 (providing for determination of tariff under Regulation 14 (2) (b) of the Renewable Tariff Regulations, 2020). *Per contra*, MRPL has submitted that the interest rate of 9.67% should be considered.
31. We observe that in our earlier order dated 20.08.2021 in Petition No. 536/MP/2020, we have already decided on the methodology of compensation due to Change in Law in the following manner:

65.

*.....Given the fact that it is not possible in case of competitive bidding projects to ascertain either the capital structuring (extent of debt and equity) of the projects, or the actual rate of interest of the debt component or the expected rate of return on equity, we consider it appropriate to use the normative rate of 10.41% as reference for the purpose of annuity payment. As the actual deployment of capital by way of debt or equity and their cost in terms of rate of interest or return, respectively, is unknown, the rate 10.41% can be taken as the uniform rate of compensation for the entire expenditure incurred on account of GST Laws or Safeguard Duty. The Commission is of the view that the compensation for change in law cannot be a source for earning profit, and therefore, there cannot be any higher rate of return than the prevailing normative cost of debt. Accordingly, we hold that 10.41% shall be the discount rate of annuity payments towards the expenditure incurred on GST or Safeguard Duty (as the case may be) by the Respondent SPDs on account of 'Change in Law'.*

*Commencement of 'Monthly Annuity Payments' and "Late Payment Surcharge"*

66. *Further, SPDs have submitted that the 'Monthly Annuity Payment' of GST claims ought to start from COD taking into consideration the provisions of applicable 'Late Payment Surcharge' in the PPAs in case of delayed payments*
67. *We observe that in the Petitions filed by the SPDs where claims under Change in Law were adjudicated, the Commission has directed SPDs to make available to SECI/ Discoms all relevant documents exhibiting clear and one to one correlation between the projects and the supply of goods or services, duly supported by the relevant invoices and Auditor's Certificate. SECI/ Discoms were further directed to reconcile the claims for Change in Law on receipt of the relevant documents and pay the amount so claimed to SPDs. It was also held that SECI is liable to pay to SPDs which is not conditional upon the payment to be made by the Discoms to SECI. However, SECI is eligible to claim the same from the Discoms on 'back to back' basis. The claim was directed to be paid within sixty days of the date of respective orders or from the date of submission of claims by SPDs whichever was later failing which it*

*will attract late payment surcharge as provided under PPAs/PSAs. Alternatively, SPDs and the SECI/ Discoms may mutually agree to a mechanism for the payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs.*

68. *In view of the above, the liability of SECI/ Discoms for 'Monthly Annuity Payment' starts from 60th (sixtieth) day from the date of orders in respective petitions or from the date of submission of claims by the Respondent (SPDs), whichever is later. In case of delay in the Monthly Annuity Payment beyond the 60th (sixtieth) day from the date of orders in respective petitions or from the date of submission of claims by the Respondent (SPDs), whichever is later, late payment surcharge shall be payable for the delayed period corresponding to each such delayed Monthly Annuity Payment(s), as per respective PPAs/PSAs.*

*Tenure of 'Annuity Period'*

69. *SPDs have submitted that the annuity period should be 13 years. It is observed that SECI has revised the proposal of annuity payments by considering the annuity period of 13 years instead of 25 years as proposed earlier. Further, SECI has stated that the payment shall be provisional and subject to final decision of this Commission in respective petitions. The period of 13 years is consistent with Regulation 14 of the RE Tariff Regulations, 2017 which stipulates as under:*

*"14. Loan and Finance Charges*

*Loan Tenure*

*For the purpose of determination of tariff, loan tenure of 13 years shall be considered."*

70. *We observe that as there seems to a general acceptance amongst SECI and the Respondent SPDs that the Annuity Period could be of 13 years, as such the same is approved by the Commission.*

32. From the above, it is apparent that this Commission has taken a view that in the case of competitive bidding projects, it is not possible to ascertain either the capital structuring (extent of debt and equity) of the projects or the actual rate of interest of the debt component or the expected rate of return on equity. As the actual deployment of capital by way of debt or equity and their cost in terms of rate of interest or return, *respectively*, is unknown, the normative rate can be taken as the uniform rate of compensation for the entire expenditure incurred on account of Change in Law. The compensation for change in law cannot be a source for earning profit, and therefore, there cannot be any higher rate of return than the prevailing normative cost of debt, which in the instant case, would be the rate of interest as stipulated by the Commission in the RE Tariff Order for the financial year in which the project has achieved COD.

33. We note that the Petitioner's project achieved actual commercial operation on 17.08.2021, that is during FY 2021-22. The Commission notified the RE Tariff Order dated 31.03.2021

for FY 2021-22 in pursuance of the CERC (*Terms and Conditions for Tariff determination from Renewable Energy Sources*) Regulations, 2020. In the said RE tariff Order the Commission considered the interest rate of 9% and the term of the loan repayment as 15 years. Thus, we hold that the discount rate of 9% and annuity period of 15 years shall be the appropriate methodology towards change in law compensation.

34. Further, the Commission holds that the liability of SECI/ Discoms for 'Monthly Annuity Payment' starts from the 60th (sixtieth) day from the date of this order or from the date of submission of claims by the Respondent whichever is later. In case of delay in the Monthly Annuity Payment beyond the 60th (sixtieth) day from the date of this order or from the date of submission of claims by the Respondent whichever is later, late payment surcharge shall be payable for the delayed period corresponding to each such delayed Monthly Annuity Payment(s), as per respective PPAs/PSAs.
35. The issue is decided accordingly.

**Issue No. III: Whether the Petitioner is entitled to carrying cost towards compensation for Change in Law?**

36. MRPL has submitted that it is entitled to carrying costs on account of the Change in Law event in terms of Article 12 of the PPA as per APTEL judgement dated 15.09.2022 in A.No. 256 of 2019 & Batch (*Parampujya Solar Energy Pvt. vs. CERC & Ors.*). Per contra, CSPDCL has submitted that in the present PPA/PSA, there is no provision of restitution dealing with restitution principles of restoration to the same economic position. Further, SECI has submitted that the judgment of the APTEL dated 15.09.2022 has been assailed before the Supreme Court in Civil Appeal no. 8880/2022 in the case of "*Telangana Northern Power Distribution Co. Ltd. & Anr. Vs. Parampujya Solar Energy Pvt. Ltd. & Ors.*". SECI has further submitted that the final order by this Commission in this matter shall not be enforced till further orders are passed by the Hon'ble Supreme Court.
37. We observe that the APTEL, vide judgment dated 15.09.2022 in A.No. 256 of 2019 & Batch titled as *Parampujya Solar Energy Private Limited & Ors. vs. CERC & Ors.* held as under:

.....

*109. The other captioned appeals – Appeal no. 256 of 2019 (Parampujya Solar Energy Pvt. Ltd & Anr. v. CERC & Ors.), Appeal no. 299 of 2019 (Parampujya Solar Energy Pvt. Ltd. v. CERC & Ors.), Appeal no. 427 of 2019 (Mahoba Solar (UP) Private Limited v. CERC & Ors.), Appeal no. 23 of 2022 (Prayatna Developers Pvt.*

*Ltd. v. CERC &Ors.) Appeal no. 131 of 2022 (Wardha Solar (Maharashtra) Private Ltd. &Anr. v. CERC &Ors.) and Appeal no. 275 of 2022 (Parampujya Solar Energy Pvt. Ltd. &Anr. v. CERC &Ors.) - deserve to be allowed. **We order accordingly directing the Central Electricity Regulatory Commission to take up the claim cases of the Solar Power Project Developers herein for further proceedings and for passing necessary orders consequent to the findings recorded by us in the preceding parts of this judgment, allowing Change in Law (CIL) compensation (on account of GST laws and Safeguard Duty on Imports, as the case may be) from the date(s) of enforcement of the new taxes for the entire period of its impact, including the period post Commercial Operation Date of the projects in question, as indeed towards Operation & Maintenance (O&M) expenses, along with carrying cost subject, however, to necessary prudence check.***

38. In view of the above, this Commission holds that MRPL shall be entitled to compensation (pre COD & post COD) towards additional expenditure on account of the Change in Law event in terms of Article 12 of the PPAs. MRPL, in the instant petition, shall be eligible for carrying costs starting from the date when the actual payments were made to the authorities until the date of issuance of this Order, at the actual rate of interest paid by MRPL for arranging funds (supported by Auditor's Certificate) or the rate of interest on working capital as per the applicable RE Tariff Regulations prevailing at that time or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by MRPL in terms of this order, the provision of Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within the due date.
39. The Commission further directs that the responding CSPDCL is liable to pay to SECI all the above reconciled claims that SECI has to pay to MRPL. However, payment to MRPL by SECI is not conditional upon the payment to be made by the responding CSPDCL to SECI.
40. The Hon'ble Supreme Court in its Order dated 12.12.2022, in Civil Appeal no. 8880/2022 in the case of "Telengana Northern Power Distribution Co. Limited & Anr. Vs. Parampujya Solar Energy Pvt. Limited & Ors." (and in similar Orders dated 03.01.2023 and 23.01.2023) has held as under:
- "Pending further orders, the Central Electricity Regulatory Commission (CERC) shall comply with the directions issued in paragraph 109 of the impugned order dated 15 September 2022 of the Appellate Tribunal for Electricity. However, the final order of the CERC shall not be enforced pending further orders."*
41. Therefore, the directions issued in this Order so far as they relate to compensation for the period post Commercial Operation Date of the project in question as also towards carrying cost shall not be enforced and shall be subject to further orders of the Hon'ble Supreme Court

in Civil Appeal No. 8880/2022 in *Telangana Northern Power Distribution Company Limited & Anr. V. Parampujya Solar Energy Pvt. Limited & Ors*, and connected matters.

42. The Petition No. 228/MP/2021 is disposed of in terms of the above.

Sd/-  
पी. के. सिंह  
सदस्य

Sd/-  
अरुण गोयल  
सदस्य

Sd/-  
आई. एस. झा  
सदस्य

Sd/-  
जिष्णु बरुआ  
अध्यक्ष