

Supreme Court Finally Settles Issues Related to 'Change in Law' Provisions

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The Supreme Court in a judgement dated 20 April 2023 in *GMR Warora Energy Limited v CERC & Ors. (GMR Warora Judgement)* has settled the position regarding critical issues under 'Change in Law' provisions that were at the core of various disputes in the power sector.

The Supreme Court has held that notifications or circulars issued by Coal India Limited or Indian Railways qualify as 'Change in Law'. It has reiterated restitutive compensation and criticised the conduct of parties challenging concurrent findings by expert bodies such as Electricity Regulatory Commissions (ERCs) and Appellate Tribunal for Electricity (APTEL).

Also, noting the delay and associated costs involved due to unwarranted litigation and consequent impact on end-consumers, the Supreme Court requested the Ministry of Power to devise a mechanism to reduce such unwarranted litigation and ensure timely payment of dues to power generators by distribution companies (Discoms).

The Supreme Court in a recent judgement laid to rest critical disputes under the 'Change in Law' provision of power purchase agreements which had been contested in the power sector since the last decade. It also requested the Ministry of Power to devise a mechanism to reduce unwarranted litigation and ensure timely payment of dues to generators by power distribution companies.

1 Background

The GMR Warora Judgement decided a batch of 11 civil appeals challenging judgements of the APTEL wherein:

- a. levies/surcharges imposed by Coal India Limited and Indian Railways,
- b. increase in taxes/duties,
- c. notification on coal quality etc.

were allowed as 'Change in Law' under power purchase agreements and Discoms were directed to also pay carrying cost as part of the compensation payable to generators.

Notably, these claims pertained to disputes raised by generators as far back as 2013. Pursuant to the judgements by APTEL (which had reaffirmed the view taken by the ERCs), generators had sought payments which were delayed on account of pending civil appeals before the Supreme Court. As is common knowledge, delayed payments are a major pain point in the power sector, resulting in certain generators being categorised as stressed assets.

2 Supreme Court's ruling

The Supreme Court, while confirming APTEL's findings, has given finality to the position on 'Change in Law' disputes by holding that 'Law' as understood under power purchase agreements will include notifications and circulars issued by Coal India Limited or Indian Railways, which are instrumentalities of the State. It also held that the surcharge or levies in dispute had a direct impact on the cost of fuel which would have ultimately been passed on to the common consumers.

In addition to affirming the earlier position allowing shortfall of domestic coal as change in law, the Court has also permitted levies such as busy season surcharge, add on premium and evacuation facility charges as changes in law. The Supreme Court reiterated the objective of restitutive compensation and held that carrying cost is to be compounded monthly.

This judgement represents a watershed moment for 'Change in Law' disputes as certain critical issues have been settled. This is likely to provide much-needed relief to the private generators. Importantly, the Supreme Court has also emphasised the requirement to balance the interest of private generators (by ensuring reasonable margin of profit and return on capital) with that of end consumers.

The Court's finding that ordinarily there should be no interference with concurrent findings of expert bodies (such as ERCs and APTEL) will provide greater regulatory certainty. Further, the Court's observation that statutory appeals (including appeal under Electricity Act, 2003) be entertained only if the appeal raises a substantial question of law (as envisaged under Section 100 of the Code of Civil Procedure, 1908) will go a long way to deter parties from initiating unwarranted litigation.

The judgement should result in a more streamlined adjudicatory process and reduce delays in recovery of costs for private generators. It is also hoped that a wider cross-section of statutory and regulatory bodies, public sector enterprises and central and state governments will consider more seriously the implications of potential action by them that could lead to a greater costs on their contracting counterparties and therefore qualify as 'Change in Law'.

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