

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai 400005
Tel. 022 22163964/65/69 Fax 22163976
Email: mercindia@merc.gov.in
Website: www.merc.gov.in

Case No. 192 of 2022

Petition of M/s Avaada Sunce Energy Private Limited seeking compensation on account of Change in Law events with regard to Safeguard Duty and Goods & Service Tax along with the carrying Cost.

Avaada Sunce Energy Private Limited (ASEPL).....Petitioner

Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) Respondent

Coram

I.M. Bohari, Member
Mukesh Khullar, Member

Appearance in the Cases:

For the Petitioners: : Ms. Deepa Chawan (Adv.)
: Ms. Vaidehi Naik (Adv.)

For the Respondent : Mr. Ravi Prakash (Adv.)
: Mr. Rahul Sinha (Adv.)
: Mrs. Kavita Gharat (Rep.)

ORDER

Date: 6 April, 2023

1. M/s. Avaada Sunce Energy Private Limited (ASEPL) has filed this Petition on 11 October 2022 under the provisions of the Electricity Act, 2003 and more particularly under Sections 86 (e), (f), (k), of the Electricity Act, 2003 seeking compensation on account of Change in Law as provided under Power Purchase Agreement (PPA) dated 26 June 2019 signed with Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) due to the increase in

Safeguard Duty on imports of Solar Cells/ Modules and increase in Goods and Service Tax (GST) on Solar Panels/Modules.

2. Prayers of ASEPL are as follows:

- a) *Hold and declare that the imposition of Safeguard Duty on import of Solar Cells/ Modules by virtue of Ministry of Finance Notification dated 29.07.2020 bearing No. 02/2020-Customs (SG) is a 'Change in Law' event under Article 9 of the PPA dated 26.06.2019 and that the Petitioner is entitled to consequent relief thereunder;*
- b) *Hold and declare that the increase in GST rates on Solar Energy Devices and Parts by virtue of Ministry of Finance Notification dated 30.09.2021 bearing No. 8/2021-Central Tax (Rate) is a 'Change in Law' event under Article 9 of the PPA dated 26.06.2019 and that the Petitioner is entitled to consequent relief thereunder;*
- c) *Direct the Respondent to reconstitute the Petitioner by paying a one time compensation of Rs. 48,90,99012/- (Rupees Forty-Eight Crores Ninety Lakhs Ninety Nine Thousand Twelve Only) on account of introduction of GST Notification and Rs. 30,77,01,080/- (Rupees Thirty Crore Seventy-Seven Lakh One Thousand Eighty Only) on account of Levy and imposition of Safeguard duty and carrying cost @ 15% p.a. applicable on the Solar Project;*
- d) *Accordingly, provide a suitable mechanism to compensate the Petitioner for the adverse financial loss incurred by the Petitioner on account of said Change in Law events through a lumpsum payment or an incremental tariff;*
- e) *Grant carrying cost from the date of incurring of the additional costs by the Petitioner on account of the said Change in Law events till the date of disbursement of the compensation;*
- f) *Pass any such other and further reliefs as this Hon'ble Commission may deem fit in the facts and circumstances of the present case.*
....”

3. ASEPL in its Petition stated as follows:

- 3.1. MSEDCL issued Request for Selection (RfS) for procurement of 1000 MW power from Grid connected Solar PV Power Projects (Phase -II) through Competitive Bidding on 05 December, 2018. The last date of bid submission was 3 January, 2019.
- 3.2. After completing the competitive bidding process successfully, MSEDCL issued the letter of Award (LOA) to Avaada Energy Private Limited (AEPL) on 19 March, 2019 for development of the solar power project of 350 MW capacity located in the State of Rajasthan.

- 3.3. Avaada Sunce Energy Private Limited (ASEPL) was promoted and incorporated by Avaada Energy Private Limited (AEPL) as a Special Purpose Vehicle (SPV) for implementation of the project. The details of the solar power projects as mentioned in the LOA are given below:

Capacity Awarded	Project Location
350 MW (AC)	Village Noorsar Taluka Bikaner District- Bikaner , State – Rajasthan

- 3.4. MSEDCL and ASEPL has signed the PPA on 26 June, 2019. Under the PPA, the Financial Closure was to be obtained within ten months from the date of execution of the PPA, i.e., by 26 April 2020 and the Solar Project was to be commissioned within a period of twenty-four months from the date of execution of the PPA i.e., by 26 June 2021.
- 3.5. On account of the Covid-19 pandemic situation prevalent worldwide, certain delays were caused in achieving the Financial Closure (FC) and the Scheduled Commercial Operations Date (SCoD) had to be extended. With persistent efforts of ASEPL, the Financial Closure for the project was achieved on 27 October 2020 which was accepted by the MSEDCL vide its letter dated 13 November 2020.
- 3.6. Thereafter, ASEPL had approached the Commission on 4 February, 2022 in Case No. 33 of 2022 seeking extension of the SCoD up-to 31 May, 2022 for the balance 150 MW capacity which had remained to be commissioned. During the pendency of the proceedings in Case No. 33 of 2022, the balance 150 MW capacity was commissioned on 8 April, 2022. The Commission vide its Order dated 24 August, 2022 in Case No. 33 of 2022 allowed the extension of the SCoD to the actual commissioning date of the Solar Project i.e., 8 April, 2022.

Imposition of Safeguard Duty on import of solar modules:

- 3.7. On 15 June, 2020 ASEPL for ease of operation entered into two Agreements viz. (a) Agreement for Supply executed between the ASEPL and AEPL (“Supply Contract”); and (b) Agreement for Supply of Goods and Services for the Development of Solar Power Generating System executed between ASEPL and Avaada Clean Project Private Limited (ACEPL) (“Works Contract”). The Supply Contract as well as the Works Contract were entered into by ASEPL for the purchase of Solar Power Generating System (“SPGS”) with various integral components including equipment, spare parts and materials in relation to SPGS to be utilized at the solar project site.
- 3.8. After the conclusion of the bidding process and more than eighteen (18) months after the execution of the PPA dated 26 June, 2019, the Department of Revenue, Ministry of Finance issued a Notification dated 29 July, 2020, for imposition of Safeguard duty as under:

(a) fourteen point nine per cent. (14.9%) ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30.07.2020 to 29.01.2021 (both days inclusive); and

(b) 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).

- 3.9. Pursuant to achieving financial closure on 27 October 2020, ASEPL placed purchase Orders with the suppliers under the Supply Contract and the Works Contract for the import of Solar modules through thirty-six (36) Bills of Entry from China for the purpose of setting up the Solar Project. Despite the prevalent pandemic situation and the peak of the second wave of Covid-19, ASEPL ensured that the solar modules were imported in India by the supplier entities under the Supply Contract and the Works Contract between the period 14 April 2021 and 13 July 2021 so as to make best efforts to commission the Solar Project without any further delays.
- 3.10. Pursuant to the promulgation of the SGD Notification, ASEPL had to bear an additional cost of Rs. 29,30,48,648 plus IGST @ 5 % on the SGD aggregating to Rs. 30,77,01,080/- for the aforesaid (36) solar modules imported by its suppliers under the Supply Contract and the Works Contract. The payment of SGD resulted in a substantial increase in the capital expenditure of the Solar Project that could not have been foreseen and/or factored at the time of bidding or even at the time of execution of the PPA.
- 3.11. ASEPL craves leave to file the purchase orders, bills of entry, invoices and payment receipts in respect of the import of the solar modules at an appropriate stage if so directed by the Commission, which have not been filed at this stage so as to avoid overburdening the record of the Commission.

Increase in the rate of GST:

- 3.12. On the last date of bid submission i.e., 3 January, 2019, on the date of signing the PPA i.e., 26 June, 2019 and even on the date of execution of the Supply Contract and the Works Contract i.e., 15 June, 2020, the rates of GST applicable to the Supply Contract and the Works Contract were 5% and 8.9% respectively.
- 3.13. Ministry of Finance, vide Notification dated 30 September 2021 increased GST on the solar power devises from five percent (5%) to twelve percent (12%) and GST on works contract from 8.9 % to 13.8%.
- 3.14. Accordingly, the revised rates of GST applicable to the Supply Contract and the Works Contract pursuant to the promulgation of the GST Notification were 12% and 13.8%

respectively. The invoices issued under the Supply Contract and the Works Contract before the effective date of change in GST rates, i.e., 1 October, 2021 were raised at the rate of 5% and 8.9% on Supply Contract and Works Contract respectively and invoices issued after 1 October, 2021 under the Supply Contract and the Works Contract were raised at the rate of 12% and 13.8% respectively.

- 3.15. ASEPL has incurred an increased cost of Rs. 48,90,99,012 in respect of this Solar Project on account of the GST rate revision.

Sr. No.	Contract	Increase in cost on account of enhanced GST rates after 01.10.2021 pursuant to the GST Notification (in Rs.)
1	Supply Contract	44,04,39,095
2	Works Contract	4,86,59,917
Total:		48,90,99,012

- 3.16. The copy of the Certificate issued by M/s Shweta Bansal & Associates dated 20 September, 2022 certifying that ASEPL has incurred additional costs on account of increase in the GST rates due to the promulgation of the GST Notification is submitted with the Petition.
- 3.17. The financial implications on account of promulgation of the SGD and GST Notifications, have adversely affected the cost of the Solar Project envisaged by the ASEPL at the time of submitting the bid, the deadline for bid submission or even at the date of execution of the PPA.
- 3.18. ASEPL is well-entitled under the 'Change in Law' provisions of the PPA executed between the parties, to claim and be compensated by MSEDCL for the additional costs incurred towards imposition of SGD and the increase in the amount of GST paid due to enhanced GST rates.
- 3.19. ASEPL served Notices dated 20 September, 2022, 21 September, 2022 and 28 September, 2022 upon MSEDCL under Article 9.3.1 of the PPA to intimate the occurrence of the aforesaid Change in Law events.
- 3.20. Both the Change in Law events i.e., imposition of SGD on solar cells and increase in the GST rates on solar energy devices fall within the ambit of Article 9.1(ii) and (v). Further, as per Article 9.1, a Change in Law event has a direct bearing on the project.
- 3.21. It is relevant to highlight that MNRE vide its Office Memorandum (OM) dated 27 September, 2022 requested its renewable energy implementing agencies including SECI for the projects which fall under the below mentioned category, the hike in applicable GST from 5% to 12% effectuated by the GST Amendment Notifications is to be considered as a

‘Change in Law’ event unless the same is disallowed by specific provisions in the tender documents/contracts.

- 3.22. As a result of Change in Law events, ASEPL has incurred additional expenses of Rs. 79,68,00,092 of which Rs. 30,77,01,080 was incurred on account of imposition of SGD on solar cells and Rs. 48,90,99012 was incurred on account of increment of GST rates on solar energy devices and parts plus a carrying cost @ 15% p.a. applicable on the Solar Project.
- 3.23. As per Article 9.2.1 of the PPA, the quantum and mechanism of compensation payment shall be determined and shall be effective from such date as may be decided by the Commission. ASEPL shall be compensated by MSEDCL to reconstitute ASEPL to the same financial position as if there had no such Change in Law event occurred.
- 3.24. ASEPL prayed for due consideration of Article 9.2.1, for carrying costs for the expenses of the Solar Project.
- 3.25. There is a clear one to one correlation between the construction of the Project, the suppliers of goods or services and the invoices raised by the suppliers of goods and services to establish that the additional cost was incurred on account of the change in law events. It is submitted that ASEPL once again undertakes to furnish, as and when the Commission so requires/ directs, all details and documents to establish such correlation, including:
- (i) the Purchase order(s) which were placed either for procurement of goods and/or services;
 - (ii) the exact dates on which the goods were delivered to ASEPL or the services were rendered and;
 - (iii) the invoices that were raised;
 - (iv) the payment receipts for the goods or services purchased/availed by ASEPL; and
 - (v) in case of imported goods, the Bills of Entry and the date on which the goods were custom cleared either for own consumption or to be stored in the custom warehouse.
- 3.26. The present Petition is being filed within the period of limitation prescribed under the Law.

4. MSEDCL, in its submission dated 8 December, 2022 has stated as following:

- 4.1. MSEDCL has executed the Power Purchase Agreement with ASEPL on 26 June 2019 with the contracted capacity on 350 MW and with the applicable Tariff of Rs. 2.75 per unit.
- 4.2. The extended SCoD for the project was 8 February 2022. The SCoD was further extended vide Commission’s Order dated 24 August 2022 in Case No. 33 of 2022 from 8 February 2022 to 8 April 2022.

4.3. The SCoD of the 350 MW project is achieved on 8 April 2022. The details of the phase wise commissioning of the project are as under:

Location	Contracted Power (MW)	Rate per unit(Rs.)	Date of PPA	Extended SCoD	Commissioning Date
Bikaner, Rajasthan	350 MW	Rs. 2.75	26 Jun 2019	8 Apr 2022	3 Nov. 2021 (100 MW)
					7 Jan. 2022 (50 MW)
					4 Feb. 2022 (50 MW)
					25 Feb. 2022 (50 MW)
					17 Mar. 2022 (50 MW)
					8 Apr. 2022 (50 MW)

4.4. The PPA signed between ASEPL and MSEDCL on 26 June, 2019 provides for a specific procedure to be followed in case of claiming change in law event. The relevant Clause of the PPA is reproduced herein under:

“9.3.1 If the Seller is affected by a Change in Law in accordance with Article 9.1 and wishes to claim change in Law under this Article, it shall give notice to MSEDCL of such Change in Law within 7 days after becoming aware of the same or should reasonably have known of the Change in Law”

4.5. The Notice indicating the Change in Law must be issued within 7 days of becoming aware of the same. However, ASEPL has given notice to MSEDCL on 20 September, 2022, which considerably surpasses the mandatory requirement as provided under clause of 9.3.1 of PPA.

4.6. ASEPL was delayed by 26 months in issuing a Change in Law notice wherein the PPA specifically provides that the notice has to be issued within 7 days. Therefore, the claim of the ASEPL with respect of Safeguard Duty ought not to be considered by the Commission and thereby need to be dismissed.

4.7. ASEPL vide the present Petition has also claimed a compensation for increment of GST which was increased vide Notification dated 30 September 2021 and was effectuated by Ministry of Finance. It is imperative to consider here that ASEPL for the purpose of claiming the Change in Law has submitted the Notice for the same on 21 September 2022 which is over 12 months from the date of Notification.

4.8. Furthermore, it is submitted that assuming without admitting that ASEPL was aware on the said Change in Law on date of commissioning of the project i.e., 08 April 2022, even then ASEPL has submitted the Change in Law Notices on 20 & 21 September 2022 wherein there is a clear delay of more than five months.

- 4.9. These concerns and reason are already communicated to ASEPL when MSEDCL rejected the claim of ASEPL vide its letters dated 11 &12 October 2022.
- 4.10. The Appellate Tribunal for Electricity (APTEL) in the case of Maruti Clean Coal and Power Limited v. Power Grid Corporation of India Limited and Anr. [2017 SCC On-Line APTEL 70] has categorically held that a party claiming relaxation/compensation, citing an event under an agreement, is mandatorily required to fulfil such pre-requisite as mentioned in the corresponding Article of the respective agreement, being the subject PPA, in the instant matter.
- 4.11. The Clause 9.3.1 of PPA mandatorily and categorically requires ASEPL to give a notice within 7 days after becoming aware of the same or should reasonably have known of the Change in Law. However, the notice in respect of reimbursement of increase in Safe Guard Duty, being the change in law event due to the Notification dated 29 July, 2020, was given on 20 September, 2022 i. e., after 26 months, which substantially exceeds beyond the reasonable time contemplated under the said clause of the PPA and the notice regarding increment in GST was given on 21 September, 2022 wherein the notification was issued by Ministry of Finance on 30 September, 2021. Furthermore, ASEPL has failed to substantially or otherwise, establish or elaborate regarding the delay in sending a notice to MSEDCL for Change in Law events, in the notices or even in the present Petition.
- 4.12. ASEPL has failed to comply with the necessary and imperative pre-requisite for claiming the Change in Law events, therefore, the claim of ASEPL in respect of compensation for increment in SGD and that of the GST is not maintainable and consequently, ASEPL is not entitled to any amount as compensation for the same.
5. During the e-hearing held on 13 December 2022, parties reiterated their respective submissions. Both parties tendered their arguments on the requirement of giving the Notice indicating the Change in Law event. The Commission allowed MSEDCL to submit the written arguments within three days from the date of hearing, ASEPL was allowed to submit its rejoinder thereafter within three days.
6. **ASEPL in its additional submission dated 19 December, 2022 has stated the following:**
- 6.1. MSEDCL has raised only one objection i.e., delay in issuance of the notice by the ASEPL to MSEDCL.

- 6.2. It is submitted that the Contract has to be considered in its entirety to garner the understanding of the contracting parties and their intention to rely on specific terms thereunder.
- 6.3. In order to assess the intention of the parties with respect to the transaction it is critical to rely upon the strict interpretation of the contractual terms in its entirety and not on individual interpretation of each clause separately.
- 6.4. In this regard, attention of the Commission is specifically brought to the Article 8.1(c) of the PPA where a similar condition akin to Article 9.3 is made with respect to issuance of notice of a force majeure event within a period of 7 days. However, what is important to note is the proviso specifically carved out in Article 8.1 (d) of the PPA whereby it is categorically provided that notice shall be a precondition to the affected party's entitlement to claim relief under this agreement. Therefore, admittedly it was the intention of the parties while framing this clause that issuance of a notice would be a mandatory requirement to the affected party to claim relief under a Force Majeure event.
- 6.5. It is pertinent to note that the mandatory requirement of giving a notice under Sub-Article of Article 8.1 of the PPA is placed as a proviso in the PPA. Therefore, the said provision is in the nature of an exception to the preceding provisions referring to force majeure and giving of notice in seven (7) days. It makes, in a distinct manner, the providing of notice a mandatory condition for a claim of force majeure.
- 6.6. Interestingly, there is no such similar provision under Article 9.3 of the PPA. On the contrary, a bare perusal of Article 9.3.2 read with Article 9.3.3 of the PPA, would clarify that notification/intimation of a Change in Law event under Article 9 of the PPA was the responsibility of either party and not merely restricted to the affected party. ASEPL therefore states that, intimation/issuance of a notice under Article 9.3 to MSEDCL was a mere formality which has been complied with by ASEPL.
- 6.7. The Article 9.3.1 of the PPA cannot be read in isolation and has to be read along with Article 9.3.2 in order to understand the actual intent of the parties relating to flexibility in terms of issuance of notice in relation to change in law occasion. Further, Article 9.3.1 of the PPA cannot be read in isolation and has to be read along with Article 9.3.3 in order to understand the actual intent of the parties relating to being able to communicate the effect of change in law as contemplated by Article 9.2 which is titled as "Relief for change in law".

- 6.8. In common parlance, notice means to apprise/intimate the other party of a fact or an event to ensure that the other party is not unaware of the event and the possible effect such event is likely to have on it.
- 6.9. In the present case, it is an admitted fact that prior to ASEPL several affected generators have not only informed MSEDCL of the SGD Notification and GST Notification; but have also obtained favourable directions from the Commission with respect to compensation as sought by ASEPL.
- 6.10. Being in the business of distribution of electricity and on a daily basis dealing with various types of generators, MSEDCL would have a vast exposure and up to date knowledge or information of several legal/regulatory impositions which will have an impact/affect its day-to-day business activities. It is an admitted position that both SGD Notification and GST Notification promulgated by the Ministry of Finance, Government of India are ‘law’ not only in terms of the general understanding but also in terms of the definition set out under the PPA. It is a settled position of law that, ignorance of law cannot be pleaded. Thus, MSEDCL cannot plead that due to non-issuance of notice under Article 9.3 of the PPA, MSEDCL had no knowledge of the Change in Law events cited by ASEPL.
- 6.11. In this regard, reliance is placed on Rajasthan Housing Board versus New Pink City Nirman Sahkari Samiti Limited & Anr. [(2015) 7 SCC 601], where Hon’ble the Supreme Court held Constructive notice is a notice inferred by law, as distinguished from actual or formal notice; that which is held by law to amount to Notice.
- 6.12. Hon’ble the Supreme Court in Nilkantha Sidramappa Ningashetti versus Kashinath Somanna Ningashetti & Ors. [(1962) 2 SCR 551] observed that when the legislature used the word “notice” it must be presumed to have borne in mind that it means not only a formal intimation but also an informal one. Similarly, it must be deemed to have in mind the fact that service of a notice would include constructive or informal notice. If its intention were to exclude the latter sense of the words “notice” and “service” it would have said so explicitly.
- 6.13. It is submitted that the language set out in Article 9.3.1 to Article 9.3.3 of the PPA especially the proviso under Article 9.3.2, in ASEPL’s opinion is in the nature of a direction rather than a mandatory precondition as stipulated under Article 8 of the PPA.
- 6.14. Reliance is also placed on the Judgment passed by Hon’ble the APTEL on 30 June, 2021 in Uttar Haryana Bijli Vitran Nigam Limited & Anr. versus Adani Power (Mundra) Limited & Anr. [Appeal No.358 of 2019], where in the facts of the said case Adani Power had failed

to provide notice of change in law as contemplated under the PPA, however, Hon'ble the APTEL held that that no prejudice would be caused in the absence of a change in law notice.

- 6.15. MSEDCL in its reply has submitted that there was delay by ASEPL in issuing the notice for almost two (2) years for SGD Notification and one (1) year for GST Notification. It therefore seems that MSEDCL is calculating the time period from the date of the promulgation of these Notifications and not from the time it has affected ASEPL as is contemplated under Article 9 of the PPA.
- 6.16. There are several judicial precedents where the courts have held the law shall be applied to all equally. Accordingly, MSEDCL cannot selectively pick and choose its defence based on convenience and interests which is totally discriminatory on ASEPL and against the principles of natural justice.
- 6.17. MSEDCL has placed heavy reliance on Maruti Clean Coal Power Limited versus Power Grid Corporation of India Limited and Anr. [(2017) SCC Online APTEL 70] to support its argument on mandatory requirement to fulfil pre-requisite of issuing notice. However, MSEDCL has failed to place on record the complete observation of Hon'ble the APTEL, which is clearly not applicable in the present circumstances.
- 6.18. Hon'ble the APTEL has only considered the 'mandatory' requirements pursuant to the proviso categorically stipulated by the parties in the force majeure clause that is akin to Article 8 of the PPA in the present case. Hon'ble APTEL has not considered the broader perspective with respect to the rationale of a 'notice' in general, hence this Judgment cannot be relied upon while determining the present issue raised by ASEPL before the Commission.

7. MSEDCL, in its submission dated 19 December, 2022 has stated the following:

- 7.1. Hon'ble the Bombay High court in the matter of Anant Ulahalkar v. Chief Election Commissioner & Anr (2016) SCC OnLine Bom 9862, has held as under:

“36. Some of the well known tests to determine whether a provision is mandatory or directory are as follows:

(i) The use of expressions like “shall” or “may” are not conclusive and regard must be had to the true intent of the legislation. However, use of expressions like “shall” or “should” or “must” by the legislature at least prima facie, indicates mandatory nature. Similarly, the use of expressions like “may” or “as nearly as may be” by the legislature,

at least prima facie indicates directory nature. State of U.P. v. B.R. Upadhy, AIR 1961 SC 751;

(ii) The circumstance that the statute itself provides consequences of breach or noncompliance, normally suggests a mandatory nature; Maqbool Ahmad v. Onkar Pratap Narain Singh, AIR 1935 PC 85, p. 88, Manilal Shah v. Sardar Mahmud, AIR 1954 SC 349;

(iii) A provision couched in negative form, generally suggests mandatory nature; Affirmative words, simpliciter, generally suggest directory nature; M. Pentiah v. Muddla, AIR 1961 SC 1107; Dharamdeo Rai v. Ramnagina Rai, (1972) 1 SCC 460;

(iv) A procedural rule, should ordinarily, not be construed as mandatory, If a provision relates to performance of any public duty and the invalidation of any act done in disregard of that provision causes serious prejudice to those for whose benefit it is enacted and at the same time, who have no control over the performance of the duty, such provision should be treated as directory; Dattatraya Moreshwar (supra);

(v) If a statute confers a concession or privilege and prescribes a mode of acquiring it, the mode so prescribed must be adopted as even affirmative words in such cases are construed imperative; Edward Ramia Ltd. v. African Woods Ltd., 1960 (1) ALL ER 627;

(vi) Where a provision prescribes that a certain act has to be done in a particular manner by a person in order to acquire a right and it is coupled with another provision which confers an immunity on another when such act is not done in that manner, the former has to be regarded as mandatory one;

(vii) Provisions which impose private duties or obligations upon private parties are ordinarily to be regarded as mandatory; Kedamath Jute Mfg, Co. Ltd. v. Commercial Tax Officer, AIR 1966 SC 12;

(viii) If exceptions, exemptions or concessions are granted by a statute subject to fulfillment of certain conditions, then such conditions must be mandatorily fulfilled. Subject to fulfillment of conditions, the provision may be liberally construed;

(ix) The nature, design and consequences which would follow from construing the provision as “mandatory” or “directory”. Where construction of a provision as directory will render the provision or significant parts otiose, redundant or a surplusage. The principle is that the legislature does not use words in vain; and

(x) Where the construction of a provision as mandatory would result in absurdity, which could never have been intended by the legislature, the provision can be construed as directory.

- 7.2. It is most respectfully submitted the above-mentioned Judgment of Anant Ulahalkar v. Chief Election Commissioner & Anr (2016) SCC On-Line Bom 9862 has been affirmed by the Hon'ble the Supreme Court in Shankar v. State of Maharashtra, (2019) 3 SCC 220.
- 7.3. Further, Hon'ble the Bombay High court in the matter of MMRDA v. Unity Infraproject Ltd (2008) SCC On-Line Bom 190, has held as under:

Para 15. "In interpreting a contract, the Court cannot place emphasis on an isolated provision divorced from the context and unrelated to the other provisions which govern contractual obligations. Contracts represent business understandings between the parties. Commercial dealings between persons who are well versed in the transaction of business are regulated by contracts which parties opt to govern themselves. The law regulates those contracts and provides an ordered framework in which business dealings can be implemented. The duty of the Court when called upon to assess where the balance lies in a contractual dispute, is to read the contract as a whole in order to understand the business meaning which the parties attributed to their obligations. Interpretation in law must ensure in commercial matters that the view which the Court takes records the sense, which the parties to an arms length transaction attribute to the terms which they incorporate. The law is not divorced from business realities nor can the vision of the Judge who interprets the law be disjointed from the modern necessities to make business sense to business dealings."

- 7.4. Bare perusal of the above Judgement makes it clear that when a statute/contract uses an affirmative words along-with its consequences then such words must be construed as mandatory.
- 7.5. Stipulation of the notice within 7 days cannot be diluted. ASEPL has failed to comply with the necessary and imperative pre-requisite for claiming the Change in Law event, the claim of ASEPL in respect of compensation for increment in Safeguard Duty and that of the GST is not maintainable and consequently, ASEPL is not entitled to any amount as compensation for the same.
- 7.6. Furthermore, ASEPL has also failed to submit any documents before the Commission in support of its claim submitted vide the present Petition, amounting to Rs. 79.68 Crs.

8. ASEPL in its Rejoinder submission dated 23 December, 2022 has stated the following:

8.1. The citation for the Term ‘Shall’ to be read as ‘may’:

- a. Hon’ble the Supreme Court in the matter of State of U.P & Ors. versus Babu Ram Upadhya [AIR 1961 SC 751].
- b. Hon’ble the Supreme Court in Govindlal Chhaganlal Patel versus The Agricultural Produce Market Committee, Godhra & Ors. [(1975) 2 SCC 482],
- c. Hon’ble the Supreme Court in Municipal Corporation of Greater Mumbai versus The B.E.S.T Workers Union [(1973) 3 SCC 546.
- d. Hon’ble the Supreme Court in the matter of Salem Advocate Bar Association T.N versus Union of India [(2005) 6 SCC 344]

8.2. On a bare perusal of the above decisions, it would be clear that the legal position set by judicial precedents stipulates that the term ‘shall’ need not be strictly construed as is sought to be suggested by MSEDCL but can be relied upon as ‘may’ depending upon the intent of the parties. ASEPL in its Written Submissions has already elaborated that as per a holistic reading of the PPA especially Article 8 and Article 9 together clearly show that the parties did not intend to make the provision under Article 9 as a ‘mandatory’ requirement. Therefore, the term ‘shall’ cannot be strictly construed as is to be understood as ‘may’ in the present context. These reasons support the contention of ASEPL that the term “shall” in Article 9.3.1 shall be construed as directory and aptly as may.

8.3. In the Judgement in the matter of State of UP Vs. Baburam Upadhyay and other judgements relied upon; the word “shall” does not universally mean a mandatory intention.

8.4. The PPA dated 26 June, 2019 has to be considered in its entirety and therefore, the word “shall” in Article 9.3.1 cannot be inferred as being imperative as such a view is rebutted by the consideration, object, and scope of the intention of the parties expressed in the PPA.

Commission’s Analysis and Rulings:

9. ASEPL has filed the present Petition seeking compensation for the increase in costs on account of Change in Law due to increase in the Safeguard Duty on imports of Solar Cells/ Modules and increase in Goods & Service Tax on Solar Panels/Modules post submission of bid.

10. MSEDCL has objected to such claims of Change in Law on the ground that ASEPL has not complied with requirement of giving change in law notice within 7 days from date of Change in Law affecting ASEPL. Whereas, ASEPL has argued that non-issuance of notice within 7 days cannot preclude it from change in law claim under the PPA.
11. The Commission notes that PPA dated 26 June 2019 signed between parties have following provision related to Change in Law:

“9.1 Definitions

In this Article 9, the following terms shall have the following meanings:

“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 modifications to the prevailing conditions prescribed for obtaining an consent, permit or license, not owing to any default of the Solar Power Producer; or*
- v) any change in the rates of any Taxes, Duties and Cess 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.

9.2. Relief for Change in law:

9.2.1 In the event a Change in Law results in any adverse financial loss/ gain to the Power Producer then, in order to ensure that the Power Producer 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 Power Producer/ Procurer 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 MERC;

9.2.2 If a Change in Law results in the Power Producer’s costs directly attributable to the Project being decreased or increased by one percent (1%), of the estimated revenue from the Electricity for the Contract Year for which such adjustment becomes applicable

or more, during Operation Period, the Tariff Payment to the Power Producer shall be appropriately increased or decreased with due approval of MERC;

9.2.3. The Power Procurer/ MSEDCL or the Power Producer, as the case may be, shall provide the other Party with a certificate stating that the adjustment in the Tariff Payment is directly as a result of the change in Law and shall provide supporting documents to substantiate the same and such certificate shall correctly reflect the increase or decrease in costs;

9.2.4 The revised tariff shall be effective from the date of such Change in Law as approved by MERC, the Parties hereto have caused this Agreement to be executed by their fully authorized officers, and copies delivered to each Party, as of the day and year first above stated;

9.3 Notification of Change in Law:

*9.3.1 If the Seller is affected by a Change in Law in accordance with Article 9.1 and **wishes to claim change in Law under this Article, it shall give notice to MSEDCL of such Change in Law within 7 days after becoming aware of the same or should reasonably have known of the Change in Law.***

9.3.2 Notwithstanding Article 9.3.1, the Power Producer shall be obliged to serve a notice to MSEDCL if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurer contained herein shall be material. Provided that in case MSEDCL has not provided such notice, the Power Producer shall have the right to issue such notice to MSEDCL.

9.3.3 Any notice served pursuant to this Article 9.3.2 shall provide, amongst other things precise details of:

a) The Change in Law; and

b) The effect on MSEDCL of the matters referred to in Article 9.2

”

Thus, above Change in Law provisions of PPA requires that if ASEPL wishes to claim Change in Law it shall give notice to MSEDCL of such Change in Law within 7 days after becoming aware of the same or should reasonably have known of Change in Law.

12. The Commission notes that LOA was issued on 19 March, 2019 and PPA between parties was executed on 26 June, 2019. The Notifications relating to change in Safeguard Duty and the GST were notified on 29 July, 2020 and 30 September, 2021 respectively, i.e., after

execution of PPA. However, ASEPL has issued Change in Law notice in respect of these on 20 September 2022 and 21 September 2022, respectively which is beyond 7 days from date of notification of event causing Change in Law. Even if it is considered that ASEPL was not aware of such Change in Law at that point of time, it can be reasonably assumed that ASEPL must have known about such Change in Law event once its projects start commissioning as by that time bills of materials are received which clearly stipulates applicable Safeguard Duty and GST. ASEPL's project commissioned in phases starting from 3 November 2021 to 8 April 2022. If we consider these dates, then also ASEPL has substantially delayed Change in Law notices mandated under the PPA.

13. By relying on ATE Judgment dated 30 June, 2021 in *Uttar Haryana Bijli Vitran Nigam Limited & Anr. versus Adani Power (Mundra) Limited & Anr. [Appeal No.358 of 2019]*, ASEPL has contended that ATE has held that no prejudice would be caused in the absence of a change in law notice. In this regard, the Commission notes that factual aspect of the matter before the ATE was different from present matter. It can be seen from following paragraph of said ATE judgment:

“51. We also note that Haryana Utilities have admitted that Adani Power is entitled to carrying cost as a matter of principles, but have raised an objection only with regard to the procedure not being followed so far as the requirement of notice contemplated under the PPAs. Adani Power has submitted that substantial rights of parties cannot be thwarted on grounds of procedural technicalities. We agree with the submission of Adani Power that the Notification dated 22.05.2017 was a continuous cause of action as the notification continued supply of coal at 75% of ACQ for Adani Power beyond the period specified in NCDP 2013 i.e., 31.03.2017. The said notification merely continues the supply as committed under NCDP 2013. Therefore, we are of the opinion that there is no requirement to issue fresh notice for change in law in the present case. We opine, as stated above, because the Appellants have not suffered any prejudice by the absence of a fresh change in law notice after notification of the SHAKTI Scheme; accordingly, we decline to accept the contention of the Appellants on this count.”

In above matter of Change in Law related to coal shortage, ATE has found that Adani Power had given Change in Law notice under NCDP 2013 and hence rules that no fresh notice is required for SHAKTI Scheme which continues supply of coal as committed under NCDP 2013. Thus, in above referred matter, ATE has not diluted requirement of notice for Change in Law. Hence, above judgment of ATE will not support case of ASEPL.

14. The Commission notes that ASEPL has also relied upon Supreme Court Judgment on constructive notice. But same would not be applicable in present matter as PPA requires serving of notice within 7 days and ASEPL has served the same but with substantial delay.
15. ASEPL has also contended that MSEDCL was aware of such Change in Law events as many RE generators have already approached MSEDCL for the same and also got Change in Law dispensation from this Commission. In this regard, the Commission notes that although MSEDCL may be aware of such event of increase in Safeguard Duty and GST, but PPA provisions clearly stipulates that 'If seller is affected by Change in Law and wishes to claim' then Change in Law notice has to serve within 7 days. Thus, Change in Law provision kicks in only if seller wishes to claim such compensation and if so has to give notice within 7 days.
16. ASEPL has also contended that 'shall' can be interpreted as 'may'. In this regard, the Commission is of the opinion that shall used in clause 9.3.1 cannot be interpreted as may as it would vitiate purpose of this clause i.e., compulsory intimation of possibility of increase in cost to the procurer due to Change in Law events.
17. In view of above analysis, the Commission is of the opinion that mandatory condition of issuing notice within 7 days cannot be ignored by the Commission. As ASEPL has failed to comply with this mandatory condition of PPA, it is not eligible to claim Change in Law compensation on this account.
18. Hence, the following Order:

ORDER

- 1. Case No. 192 of 2022 is dismissed.**

**Sd/-
(Mukesh Khullar)
Member**

**Sd/-
(I.M. Bohari)
Member**

