2025 INSC 1002

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8694 OF 2017

NABHA POWER LIMITED ... APPELLANT

VERSUS

PUNJAB STATE POWER CORPORATION LIMITED AND OTHERS ...RESPONDENTS

WITH

CIVIL APPEAL NO. 8739 OF 2017

J U D G M E N T

AUGUSTINE GEORGE MASIH, J.

1. These two appeals pertain to the following common questions of law:

   (i) Whether deemed export benefits under Para 8.3 of Foreign Trade Policy 2009-2014 (hereinafter "FTP") were legitimately available to the Appellants as of the bid cut-off date and would notifications by Directorate General of Foreign Trade (hereinafter, "DGFT") amount to "Change in Law"

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under the Power Purchase Agreement dated 18.01.2010 (hereinafter, "PPA");

(ii) Whether the Press Release of Cabinet Decision pertaining to change of threshold of so-deemed export benefits would constitute a "Change in Law" under the PPA; and

(iii) If so, whether Appellants are entitled to restitutionary relief in the form of compensation.

2. The Civil Appeal No. 8694 of 2017 as filed by the Nabha Power Limited (hereinafter, "NPL") under Section 125 of the Electricity Act, 2003 (hereinafter, "EA 2003"), arises from the Common Judgment dated 04.07.2017 (hereinafter, "Impugned Judgment") in Appeal No. 47 of 2015 passed by the Appellate Tribunal for Electricity, New Delhi (hereinafter, "APTEL") owing to rejection of the claim(s) moved by the NPL for relief under Article 13 of the PPA executed by it with the Punjab State Power Corporation Limited (hereinafter "PSPCL"), and primarily the challenge to the post-bid withdrawal of fiscal incentives which were allegedly available earlier under the FTP and their classification as a "Change in Law" event under the PPA.

3. Similarly, Civil Appeal No. 8739 of 2017, filed by the Talwandi Sabo Power Limited (hereinafter, "TSPL") also arises from the same Impugned Judgment in Appeal

No. 32 of 2015 by APTEL. Since both of the aforesaid appeals before the APTEL involved common issues, they were heard together. The prime grievance for both the Appellants therein was that the Punjab State Electricity Regulatory Commission at Chandigarh (hereinafter, "State Commission") had, although vide separate orders, held them to be not eligible for the aforementioned benefits and liable to pass on the same to PSPCL, Respondent No. 01 herein.

4. Both, NPL and TSPL, are Special Purpose Vehicles (hereinafter, "SPVs") which were formulated to develop the concerned power projects. This was done under Section 63 of the EA 2003 through Tariff-Based Competitive Bidding. PSPCL is one of the successors of the Punjab State Electricity Board (hereinafter, "PSEB") and is a state-owned generating and distributing company in Punjab.

5. Since both these appeals arise out of the same Impugned Judgment with issues being common, the same are being dealt with together. We shall refer and adopt facts from the Civil Appeal No. 8694 of 2017 as preferred by NPL, treating it to be the main appeal.

6. The NPL was incorporated on 25.09.2007 by PSEB to develop a dual 700 Mega Watt coal thermal power project at Rajpura in Punjab (hereinafter, "Project").

While the PSEB was unbundled, 100 percent of the shares of the NPL were acquired by the Respondent No. 03, being L&T Power Development Limited (hereinafter, "L&T") through the bidding process initiated on 10.06.2009, with final date of bid submission being 09.10.2009, and after an evaluation of the technical and financial bids by a committee chaired by the Principal Secretary, Department of Power, Government of Punjab. Thereby, NPL became a wholly owned subsidiary of L&T. Consequently, the PPA was executed between NPL and PSPCL.

7. In the interregnum, the Government of India, exercising its powers under Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 (hereinafter "FTP Act 1992") read with Paragraph 1.2 of the FTP, notified the Foreign Trade Policy, 2009-2014 (hereinafter, "FTP"), on 27.08.2009. Moreover, the Union Cabinet vide its Decision dated 01.10.2009 reduced the threshold qualification as a Mega Power Project to 500 Mega Watt from 1,000 Mega Watt for single location projects under the Mega Power Policy, 2006 (hereinafter, "MPP 2006"). On the same date, there was a press release by the Press Information Bureau that the Union Cabinet has taken a decision that it is not mandatory for an inter-state sale of power

from a project to be eligible under the MPP 2006 (hereinafter, "Press Release dated 01.10.2009").

8. This Decision dated 01.10.2009 led to two changes:

   (i) Amendment of the existing eligibility criteria of being a MPP as set out under Entry 400 of the Principal Customs Notification No. 21 of 2002 dated 01.03.2002 by the Department of Revenue, Ministry of Finance, Government of India through its powers under Section 25 of the Customs Act, 1962 (hereinafter, "CA 1962");

   (ii) Issuance of Memorandum No. A-118/2003-IPC modifying the MPP (hereinafter, "MPP 2009").

9. It is pertinent to note that it was only through Notifications Nos. 91/2009-Cus dated 11.12.2009 and 92/2009-Cus dated 14.12.2009 that the aforesaid benefits were brought into effect.

10. In pursuance of the same, NPL sought grant of status as a Mega Power Project from Ministry of Power, Government of India, which was granted to it on 30.07.2010.

11. For its application to obtain an Essentiality Certificate from the Department of Energy, Government of Punjab, NPL sought a recommendation from PSPCL to the effect

that Essentiality Certificate be issued to NPL for seeking concessions or exemption from payment of customs duty while importing capital goods. Against this, NPL gave an undertaking vide Affidavit dated 23.05.2011 that any benefits which shall accrue on NPL for its change of status to a Mega Power Project, shall be passed on to PSPCL. The Essentiality Certificate was thereafter issued on 13.06.2011.

12. Another agony came for the Appellant when the Directorate General of Foreign Trade (hereinafter, "DGFT") convened a Policy Interpretation Committee (hereinafter, "PIC") on 15.03.2011, which opined that Terminal Excise Duty exemptions under the FTP would not be available for the supplies made to a non-MPP (with cut-off date being 01.10.2009) and any such duty shall not be refunded in any manner including as a drawback under Paragraph 8.3(b) of the FTP. It further clarified that if a Bill of Entry is in the name of a project authority, the deemed export benefits would not be made available. To effectuate the same, Public Notices dated 27.04.2011 and 28.04.2011 were issued under the FTP Act 1992, amending the FTP.

13. Since the legalities had made NPL ineligible for the assumed benefits on their end, it moved Petition No. 30 of 2012 before the State Commission seeking (a) a declaration that the Mega Power benefits were factored

into the bid and hence did not warrant pass-through to PSPCL, and (b) compensation under Article 13.1.1(ii) of the PPA for the withdrawal of FTP benefits post the cut-off date of 02.10.2009, alternatively.

14. The State Commission, while dismissing the Petition vide Order dated 12.11.2012 (hereinafter, "First Order of Commission"), held that since the NPL had elected to avail benefits under the MPP 2009, it was precluded from claiming concurrent benefits under the FTP. Moreover, withdrawal of benefits by DGFT did not constitute as a "Change in Law" within the meaning of Article 13 of the PPA.

15. Assailing the findings of the State Commission, NPL moved Appeal No. 29 of 2013 before APTEL, which, in its Order dated 30.06.2014 (hereinafter, "First Order of APTEL"), remanded the matter to the State Commission for reconsideration of the issue on the FTP. It directed the State Commission to also ascertain and opine as to whether the benefits under the FTP were available to the NPL as on the cut-off date.

16. On remand, the State Commission vide its majority opinion culminating in its Order dated 16.12.2014 (hereinafter, "Second Order of Commission") in Petition No. 30 of 2012 reiterated its earlier conclusions, observing that the benefits of the FTP were neither

available to NPL as on the cut-off date nor their withdrawal attract the consequences of "Change in Law". It further went on to observe that NPL had not produced contemporaneous DGFT endorsements to substantiate its eligibility to claim FTP benefits under Para 8.3. Not only that, but as per their own Affidavit dated 23.05.2011, NPL was to mandatorily pass on the benefits accrued under the MPP 2009 to the PSPCL.

17. Aggrieved from the reaffirmation of the findings by the State Commission in Second Order of Commission, the NPL again moved APTEL in Appeal No. 47 of 2015. It asserted that at the time of bidding, deemed export benefits were not only in force but also factored into the financial modelling and tariff computation. Also, that the said benefits were not withdrawn until the Public Notices of April 2011 on behalf of DGFT, which postdated the bid submission and execution of the PPA. Furthermore, relying on the DGFT's Policy Circular No. 39 of 2000 and the minutes of the PIC meeting dated 15.03.2011, it asserted that it had a legitimate expectation that deemed export benefits under Para 8.3 of the FTP would be available. Accordingly, NPL contended that the sudden withdrawal of the said benefits arguably resulted in material escalation of project costs and thereby fell within the "Change of Law" clause of the PPA.

18. On the other hand, PSPCL, challenging the above contentions of the NPL, submitted that the benefits under FTP Para 8.3 were never intended for immovable infrastructure like thermal power plants and that the FTP, by its very nature, was framed to promote exports of manufactured goods and, accordingly, extended benefits to goods that were exported or supplied against foreign exchange earnings or to specified projects under International Competitive Bidding (hereinafter, "ICB"). Since a thermal power plant constructed *in-situ* did not meet the definitional threshold of "goods" or "manufacture" under the FTP or law(s) on central excise, therefore, NPL's reliance on deemed export provisions was misplaced. PSPCL further contended that the DGFT circulars did not carry the force of law and any withdrawal of benefits thereunder did not amount to legislative change warranting relief under Article 13 of the PPA.

19. The APTEL referred to the definitions of the terms "manufacture," "manufactured goods" and "deemed exports" under the FTP as well as the Central Excise Act, 1944 (hereinafter, "CEA 1944") and observed that the FTP was expressly designed to incentivize domestic production of movable goods for export or deemed export and the concept of "goods" under the statute denoted a tangible and movable property, subject to

classification under the Customs Tariff. Therefore, a generating station, as in the instant case, comprising of turbines, boilers, auxiliaries and associated civil works, was nevertheless an integrated, immovable asset assembled on-site and did not, as a whole, constitute a manufactured good capable of being exported under the FTP. An attempt to sever individual components to obtain the relief of deemed export is inconsistent with the scheme of the statute, requiring the final product shipped or deemed to be shipped to a buyer outside the jurisdiction of India. Observing that the NPL's reliance on Para 8.3 was based on misconstrued interpretation of the letter as well as the spirit of the regime, it held that said fiscal incentives were inherently inapplicable to an *in-situ* coal-based thermal power plant.

20. To examine whether the Public Notices dated 27.04.2011 and 28.04.2011 constituted a "Change in Law" under Article 13 of the PPA, APTEL while perusing the language of Article 13 clarified that Article 13.1.1(ii) extended to "any change in law" affecting "taxes, duties, cesses, levies, fees and charges" which altered the cost to the seller of performing its obligations. The NPL had contended that withdrawal of deemed export benefits, though effected by said Public Notices rather than a parliamentary enactment, was indisputably a change in the law or law-making process, and that the

resulting increase in capital cost which engaged the "Change in Law" provision was rejected by APTEL observing that the said clause had only envisioned a legislation and/or a statutory enactment in form of a regulation by a competent authority. Therefore, the said Public Notices were merely administrative policy instruments, not meeting the threshold of "Change in Law". It further opined that while the said Notices might have affected the cost of NPL, the remedy doesn't lie as a contractual relief under the PPA, but judicial review of the said administrative action.

21. Reviewing the satisfaction of the procedural thresholds by NPL under Article 13 of the PPA, namely, timely notice for the alleged "Change in Law" event, and quantification of the impact on tariff owing to the said event, APTEL observed that while NPL reserved its right vide the Affidavit dated 23.05.2011, it never pursued any reference to confirmation of the eligibility of said benefits under the FTP, either by the Central Government or by DGFT. Such a belated invocation of Article 13 of the PPA, without a binding interpretation, would ascertain that NPL failed to discharge the onus to demonstrate that a "Change in Law" event had occurred. Furthermore, it is to be considered that neither the claim for additional cost was substantiated nor PPA envisaged restoration of benefits.

22. Apparently being disconsolate from the concurrent findings against them, NPL moved the Civil Appeal No. 8694 of 2017 before this Court. NPL has reiterated its grievances.

23. Primarily, NPL has asserted that APTEL erred in holding that the deemed export benefits under Para 8.3 of the FTP were never available to a coal-based thermal power plant assembled *in-situ*. The grounds, as raised in the instant Civil Appeal plead that both the statutory text and DGFT circulars envisaged relief on individual capital-goods components, which collectively form the "goods" supplied to the project under ICB. It further submits that the APTEL's narrow reading of "manufactured goods" contravenes the plain language of the FTP and the FTP Act 1992, which defines "deemed exports" by reference to supply to specified end-users rather than physical shipment of entire power stations abroad.

24. It went on to further contend that APTEL misconstrued the "Change in Law" clause by restricting its scope to parliamentary enactments and delegated legislation. The grounds elaborate that Article 13.1.1(ii) expressly extends to "any change in any law," a phrase wide enough to include executive notifications issued under statutory authority, which alter duties, levies or

benefits. Moreover, the Public Notice dated 27.04.2011 and 28.04.2011, issued pursuant to powers under the FTP Act 1992, are thus argued to be legislative in character and binding, triggering contractual relief.

25. Additionally, NPL avers that Impugned Judgment overlooked its legitimate expectation, cultivated by DGFT practice and minutes of the PIC Meeting dated 15.03.2011, that deemed export benefits under Para 8.3 of the FTP would subsist until formally rescinded. By refusing to quantify loss on the basis of contemporaneous tariff models and the record of actual procurement, the State Commission is also said to have abdicated its duty to enforce the economic equilibrium principle fundamental to Article 13. It also faults the APTEL's finding on procedural non-compliance, pointing out that timely notice was given and that the quantification of incremental costs, derived from pre-bid financial schedules, was neither speculative nor premature.

26. Also, adopting their contentions before the State Commission and APTEL, NPL has put forth that while formulating its bid, it had factored in two critical streams of fiscal incentives available under distinct schemes: (i) the Mega Power Policy, which promised concessional customs duty and full exemption from excise duties for thermal power projects exceeding

1,000 Mega Watt; and (ii) the benefits under Para 8.3 of the FTP were applicable to deemed exports, including Advance Authorization, Deemed Export Drawback, and exemption from Terminal Excise Duty on procurement of domestically manufactured capital goods. While the former pertained specifically to recognized MPPs, the latter applied to non-Mega Projects executing contracts under ICB. As on the bid date, the Project did not have formal MPP status, and hence, the bid was premised on the availability of benefits under the FTP. Concluding, NPL, relying on the maxim *contemporanea expositio*, referred to the benefits granted to others, allegedly similarly placed Projects and contended that contemporary interpretation should be adopted.

27. In its Counter Affidavit dated 12.09.2017, PSPCL comprehensively refutes NPL's claim that the withdrawal of FTP Para 8.3 benefits constitutes a "Change in Law" event warranting contractual compensation. PSPCL first underscores that the FTP incentive scheme was designed exclusively for "goods", being tangible, movable items, as classifiable under the Customs Tariff Schedule, and not for immovable assets such as power plants. Referring to the legislative history of the FTP and definitions under the CEA 1944, which repeatedly distinguish between supply of goods for export and installation of infrastructure projects on-

site, it sought to demonstrate that policy makers never contemplated deemed export benefits for entire power stations. It further emphasized that any interpretation extending relief to generating assets would render incoherent the statutory regime of export-linked incentives.

28. Supplementing the aforesaid contentions, PSPCL asserts that NPL's invocation of Article 13 is both contractually and procedurally flawed, stressing that the PPA draws a clear line between benefits under the MPP and those under the FTP, and that NPL's election to opt for concessions under the MPP 2009, confirmed by its own Affidavit dated 23.05.2011, precludes a second bite at the cherry. The Counter Affidavit additionally characterizes NPL's protest reservation as mere lip service, asserting that no synchronous decision or order by the DGFT had ever recognized NPL's eligibility to benefits under Para 8.3 of the FTP.

29. On the "Change in Law" issue, PSPCL argues that only statutory enactments or delegated legislation under the FTP Act 1992 qualify, and that administrative notices, lacking the force of regulation, cannot be contractual triggers. Finally, PSPCL submits that NPL's cost-impact calculations are hypothetical, relying on benefit rates that were never certified by DGFT, and that benefits, if

any, must be sought through statutory appeals rather than by recourse to the PPA's "Change in Law" clause.

30. In its Rejoinder dated 15.11.2017, NPL insists that the Counter Affidavit dated 12.09.2017 misconceives both the factual matrix and the legal contours of the "Change in Law" provision. It reiterates that the statutory framework of the FTP contemplates deemed export treatment for capital goods supplied under ICB, irrespective of physical export, and that numerous circulars by DGFT and meetings of PIC had long signalled such availability. The Rejoinder emphasizes that the PIC meeting dated 15.03.2011 and the Public Notices dated 27.04.2011 and 28.04.2011 are legislative in character, having been issued under rule-making powers conferred by the Parliament, and thus squarely fall within the ambit of Article 13.

31. Addressing PSPCL's argument on estoppel, it asserts that its Affidavit dated 23.05.2011 was executed under protest and duress, simply to obtain MPP status, and cannot be construed as a waiver of separate FTP entitlements, further contending that it had repeatedly sought clarification from DGFT, within the period between bid submission and execution of the PPA, but was left in regulatory limbo until April 2011. Regarding quantification, NPL has provided detailed schedules showing incremental capital cost computed at the exact

FTP rates in force on the cut-off date, thereby demonstrating a concrete, non-speculative loss.

32. The Rejoinder dated 15.11.2017 also challenges PSPCL's attempt to assert a narrow interpretation of "law", arguing that executive notifications issued under statutory authority are binding legal instruments and that contractual remedies for their withdrawal are expressly provided in Article 13. Concluding, it also urged that the sanctity of competitive bidding and the doctrine of equitable adjustment demand that PSPCL bear the financial burden of a post-bid policy reversal for which NPL could not have planned.

33. Through detailed references, as raised by all the Senior Advocates before us, we have been able to peruse all the submissions at length, including all the material on record through their assistance, inclusive of the Impugned Judgment.

34. We shall first deal with the issue as to whether the notifications by Directorate General of Foreign Trade and Press Release of a Cabinet Decision pertaining to change of threshold so-deemed export benefits would constitute a "Change in Law" under the PPA.

35. Before we delve into the submission by the parties to this effect and the analysis thereof, it is critical to refer

the PPA as executed by the parties, especially Article 13 of the PPA, which reads as follows:

> ***"ARTICLE 13: CHANGE IN LAW***
> ***13.1 Definitions***
>
> *In this Article 13, the following terms shall have the following meanings:*
>
> ***13.1.1*** *"Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:*
>
> *(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement or (iv) any change in the (a) Declared Price of Land for the Project or (b) the cost of implementation of the resettlement and rehabilitation package of the land for the Project mentioned in the RfP or (c) the cost of implementing Environmental Management Plan for the Power Station (d) Deleted*
>
> *but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or*

frequency intervals by an Appropriate Commission.

13.1.2 'Competent Court' means:

The Supreme Court or any High Court or any tribunal or any similar judicial or quasi-judicial body in India that has jurisdiction to adjudicate upon issues relating to the Project.

13.2 Application and Principles for computing impact of Change in Law

While determining the consequence of Change in Law under this Article 13, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff payments, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such Change in Law has not occurred.

a) Construction Period

As a result of any Change in Law, the impact of increase/decrease of Capital Cost of the Project in the Tariff shall be governed by the formula given below:

For every cumulative increase/ decrease of each ***Rupees 16,50,00,000/- (Rupees Sixteen crore fifty lakhs)*** *in the Capital Cost over the term of this Agreement, the increase/decrease in Non Escalable Capacity Charges shall be an amount equal to* ***0.267% (percentage zero point two six seven)*** *of the Non Escalable Capacity Charges. Provided that the Seller provides to the Procurer documentary proof of such increase/ decrease in Capital Cost for establishing the impact of such Change in Law. Jn case of Dispute, Article 17 shall apply.*

It is clarified that the above mentioned compensation shall be payable to either Party, only with effect from the

date on which the total increase/decrease exceeds amount of ***Rupees 16,50,00,000/- (Rupees Sixteen crore fifty lakhs)****.*

b) Operation Period

As a result of Change in Law, the compensation for any increase/decrease in revenues or cost to the Seller shall be determined and effective from such date, as decided by the Appropriate Commission whose decision shall be final and binding on both the Parties, subject to rights of appeal provided under applicable Law.

Provided that the above mentioned compensation shall be payable only if and for increase/ decrease in revenues or cost to the Seller is in excess of an amount equivalent to 1% of the Letter of Credit in aggregate for a Contract Year.

13.3 Notification of Change in Law

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

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

the Procurer shall have the right to issue such notice to the Seller.

13.3.3 Any notice served pursuant to this Article 13.3.2 shall provide, amongst other things, precise details of:

(a) the Change in Law; and

(b) the effects on the Seller of the matters referred to in Article 13.2.

13.4 Tariff Adjustment Payment on account of Change in Law

13.4.1 Subject to Article 13.2, the adjustment in Monthly Tariff Payment shall be effective from:

(i) the date of adoption, promulgation, amendment re-enactment or repeal of the Law or Change in Law; or

(ii) the date of order/judgment of the Competent Court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law.

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

36. A contention is raised on behalf of the learned Senior Advocates for the Appellants that the Request for Proposal and the contractual framework between the parties as a whole clearly set a cut-off date for "Change in Law" under the Article 13 of the PPA and required them to deem all the prevailing laws, regulations, and

their interpretations thereof to have been factored in the bidding process and the price thereof. It is accordingly contended that "law" included not only the statutory texts from the wisdom of the legislature but also any such authoritative interpretations of the law by an "Indian Government Instrumentality", which they press DGFT to be one.

37. Moreover, arguing that similar benefits were given under FTP to MPP and non-MPP projects and to substantiate, reliance was placed on equivalent benefits being given to 144 other projects, implying settled nature of law. Alternatively, it is also argued that this interpretation was altered through the PIC dated 15.03.2011, and subsequently, led to withdrawing the benefits under Para 8.3(a) and (b) of the FTP for non-MPP altogether. Such an act would, the Appellants contend, constitute "Change in Law", owing to the modifications to the existing entitlements.

38. Assailing the orders of the State Commission as well as the APTEL, it is also pressed that those forums erroneously only dealt with whether the Appellants satisfied the conditions under the FTP as opposed to the legality as to whether the said benefits were available as on the cut-off date, thereby committing of a jurisdictional error on their part by expanding the scope of the remand, being in contradiction to the law

laid down in ***Shivshankara and Another v. H.P. Vedavyasa Char***[1]. Relying on the decision of this Court in ***Haryana Power Purchase Centre v. Sasan Power Limited and Others***[2], it is further argued that the best material to establish that whether a project was exempted from the concerned duties as on the cut-off would be instances of other similarly placed project where goods were also treated to be exempt under the instant FTP.

39. On the other hand, the Respondents had relied on decision of this Court in ***GMR Warora Energy Limited v. Central Electricity Regulatory Commission (CERC) and Others***[3] to substantiate their claim for "Change in Law" through withdrawal of deemed export benefits through circulars of Ministry of Commerce and Industry as well as the Notification dated 28.12.2011. This contention is also rebutted by the Appellants claiming that the same is not applicable in the present case for having a varied factual matrix.

40. Whether the Press Release of Cabinet Decision pertaining to change of threshold of so-deemed export benefits constitutes a "Change in Law" under the PPA, an issue-at-hand, has been substantively dealt as part of decision of this Court in ***Nabha Power Limited and***

[1] (2023) 13 SCC 1
[2] (2024) 1 SCC 247
[3] (2023) 10 SCC 401

Another v. Punjab State Power Corporation Limited and Another[4] wherein the question before this Court, arising from the same PPA and an equivalent dispute, was the juxtaposition of the MPP and the Press Release dated 01.10.2009. Therein, the 3-Judge Bench of this Court went on to observe that the fulcrum of the claim of the Appellant therein is anchored in the assertion that the Press Release dated 01.10.2009 was not merely a policy statement but a clear indication of an imminent shift in the regime of law governing the field. Appellant therein also claimed the said Press Release swayed its bid dated 09.10.2009 in terms of the incorporation of the deemed benefits and thereby created a legitimate expectation that the proposed exemptions would come into force, forming a vital part of the risk calculus vis-à-vis structuring of its bid amount. The Respondent therein went on to contend that no "Change in Law" occurred until the publication of Notification Nos. 91/2009-Cus and 92/2009-Cus dated 11.12.2009 and 14.12.2009 respectively, implying that no expectation raised by the Appellant therein could be said to have been crystallised.

41. Answering the query, the Bench while placing reliance on earlier decisions of this Court, observed that the golden rule, as applicable on contractual interpretation,

[4] (2025) 5 SCC 353

mandates that the words should be given their ordinary and grammatical meaning and should not depart from the mandate to avoid either absurdity or repugnancy, even the business efficacy test, for which the jurisprudence was reiterated and outlined in ***Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL) and Another***[5], cannot override an express term. While analysing the PPA, this Court elaborated that while Article 1.1 of the PPA elaborated "law" to include statutes, regulations, notifications, orders, and interpretations, the Article 13.1.1. defined "Change in Law" as an enactment, amendment or repeal after 02.10.2009. Therefore, contention of the Appellant therein that the Press Release dated 01.10.2009 amounts to an "order" was held to have failed, while also referring its meaning in the Black's Law Dictionary, which required a binding command. However, such notifications only emerged on 11.12.2009 and 14.12.2009.

42. Dealing with the subsequent questions of law, it also clarified that the contention of Appellant therein on failure of the Respondent to issue a notice as per the provisions of Article 13.3.1 and 13.3.2 would vitiate the provisions is misplaced owing to the fact that the PPA only obligates a seller, and not a buyer as was PSPCL

[5] (2018) 11 SCC 508

in the said case, to have notified in case the "Change in Law" when it is beneficial to it. The Bench also rejected the claims of the Appellant therein that the sub-clauses pertaining to changes in interpretation, licenses, land prices or rehabilitation costs are not applicable in the present case. Furthermore, placing reliance on ***Babu Verghese and Others v. Bar Council of Kerala and Others***[6] as well as Section 21 of the General Clauses Act, 1897, it held that CA 1962 required the concerned notification to have been issued in a certain manner and be duly published in the official gazette, and reiterated that law, whether parliamentary or subordinate, must be published to enable them to take effect.

43. The Bench additionally clarified that the claim for legitimate expectation or promissory estoppel arising from the Press Release dated 01.10.2009 would not survive as the Central Government was neither a party to the PPA nor was the same subject to any judicially enforceable promise and no order of any court gave the said Press Release a legal force. Concluding, the 3-Judge Bench, relying on numerous precedents, confirmed that only duly promulgated notifications, and not Press Releases or Communications, would constitute as "Change in Law". Accordingly, no "Change

[6] (1999) 3 SCC 422

in Law" had occurred until the Notifications dated 11.12.2009 and 14.12.2009, thereby implying that the benefits would have been deemed to be accrued only from the said dates.

44. Therefore, the aforesaid decision of 3-Judge Bench in ***Nabha Power Limited (supra)*** squarely covers the field of law in relation to the issue of determination of "Change in Law" in the instant case and same is answered accordingly, holding that the Press Release dated 01.10.2009 would neither amount to "law" within the meaning conceptualized in the PPA, as it would only be the Notifications dated 11.12.2009 and 14.12.2009 that would have amounted to "law", nor it would thereby amount to "Change in Law" as argued by Appellants in the instant Civil Appeals.

45. Having answered the issue pertaining to "Change in Law" we shall now deal with the issue as to whether deemed export benefits under Para 8.3 of the FTP were legitimately available to the Appellants as on the bid cut-off date. It is pertinent to also acknowledge that this issue shall also determine the contention of Appellants that withdrawal of deemed export benefits by notifications of DGFT dated 28.12.2011 and 21.03.2012 collectively constitutes "Change in Law" as per the PPA.

46. It appears that the learned Senior Advocates appearing for NPL before the APTEL and the learned counsel appearing for TSPL therein had argued to the effect that the conditions prescribed under the FTP have been unambiguously satisfied. On the legal aspect, it was submitted that the scheme of FTP clearly pertains to "goods" and not to any "services". Accordingly, contending that the whole power plant falls within the definition of "capital goods", thereby eligible for the deemed export benefits.

47. To substantiate the said claim, the counsels elaborated that as Para 9.12 of the FTP, "capital goods" encompasses any plant, machinery, equipment or accessories required, either directly or indirectly, for the production or rendering of services, including those necessary for replacement, modernisation, technological upgradation, and expansion, and also extends to machinery for packaging, power generating sets, instrumentations, and equipment(s) for various specialized functions. Placing reliance on the Minutes No. 01180 dated 15.04.2008 of the Norms Committee, it was contended that a power project was indeed recognised to fall within the ambit of "capital goods", reiterating that key components such as turbines and generators used within a plant are an integral input, enabling the project to be entitled to advanced

authorization benefits, which, as further contented, are akin to the duty drawback contemplated under Para 8.3(c) of the FTP.

48. It was further argued that the whole process of developing a power plant constitute as "manufacture" when placed in juxtaposition to the definition so provided under Para 9.36 of the FTP as it adopts a broader definition, including making, assembling, fabricating, processing, and bringing new product into existence. Such comprehensive scope, as contended, would also cover activities of construction where the imported and indigenous materials, such as the boilers, turbines, and generators are assembled on-site, resulting in a new, and functional power plant. This was further contented to be in line with the clarification issued by the DGFT on 05.12.2000, apparently stating that assembly and commissioning at site to constitute "manufactured in India" for the purpose of availing deemed export benefits under the FTP. As the said clarification was in force as on the bid date, the Appellants met the criterion for "manufactured in India", thereby fulfilling both the critical conditions for availing the aforesaid benefits.

49. Having failed on the said contentions before the APTEL, it appears that the Appellants have moulded the contentions before this Court to imply that the

aforesaid were not the asserted case before the APTEL and instead the APTEL had erred in determining the entitlement of deemed export benefits under the FTP based on the imports made after the grant of MPP status and alleged policy changes as opposed to assessing the position of the Appellants as it stood on the cut-off date vis-à-vis the FTP.

50. It is now further argued that APTEL had erred in concluding that the Appellants claimed entire plant as "capital goods", which is manifestly perverse and the contention was confined to the discrete components as supplied by both, the main contractor(s) and the sub-contractor(s). It is contended that numerous components were imported for the boiler, turbine, and generators which were then claimed to be assembled on-site into new products with distinct names, characteristics, and functions, meeting the stipulations under the FTP as these indigenous components, which were procured for the power plant would qualify as "goods" under the FTP as their importation was directly linked to the MPP.

51. Moreover, the APTEL ought not to have invoked the definition of "manufacture" under the CEA 1944, and such a disregard of the broader ambit of definition under Para 9.36 of the FTP, and the DGFT Circulars dated 05.12.2000 and 15.04.2008 recognising on-site

assembly, erection, and testing thereof as "manufacture". To support this, reliance is placed on decisions of this Court in ***Vadilal Chemicals Ltd. v. State of A.P. and Others***[7], ***MSCO. Pvt. Ltd. v. Union of India and Others***[8], ***Trutuf Safety Glass Industries v. Commissioner of Sales Tax, U.P.***[9] and ***P.C. Cheriyan v. Mst. Barfi Devi***[10]. APTEL could not have also observed the clarifications issued by the DGFT to be an incorrect interpretation of the FTP.

52. It is subsequently raised that all the goods were supplied by contractors is also acknowledged by the APTEL vide Impugned Judgment in Para 76(d). For this, it is contended that such importation would imply to squarely fall within the definition of "eligible supplier" under Para 8.2(f) of the FTP for the said goods are said to be procured from domestic manufacturers supplying against an process of ICB. It is pressed into service on part of the Appellants that on the mandate of ICB as per Para 8.4.4(iv) of the FTP, APTEL further erred in adopting a restrictive interpretation and the mandate was complied with at the stage of Independent Power Producer stage in light of the DGFT Clarification dated 14.08.2008. Subsequent arrangements made for stage of Engineering and Procurement, and

[7] (2005) 6 SCC 292
[8] (1985) 1 SCC 51
[9] (2007) 7 SCC 242
[10] (1980) 2 SCC 461

construction through sub-contracts does not dilute the aforesaid compliance.

53. Concluding, it is contended that the projects were duly certified as MPP and a subsequent refusal to extend such deemed export benefits would be in derogation of the mandate of the FTP.

54. Alternatively, the Appellants have also argued that as per a collective reference to the FTP and the MPP, if it is to be held that they were not entitled to the deemed export benefits under the FTP as MPP, owing to the same eligibility conditions for a non-MPP under the FTP, as on the cut-off date, they were equally entitled as a non-MPP.

55. Countering the aforesaid contentions raised on behalf of the Appellants, learned Senior Advocate on behalf of the opposing Respondent(s), while vehemently contesting the claims of the Appellants have reiterated their successful claims before the APTEL.

56. Before we delve into the submissions moved by the Appellants, it is pertinent to refer to Chapter 8 of the FTP, which reads as follows:

> ***"8.1 Deemed Exports***
>
> *'Deemed Exports' refer to those transactions in which goods supplied do not leave country, and*

payment for such supplies is received either in Indian rupees or in free foreign exchange.

8.2 Categories of Supply

Following categories of supply of goods by main / sub-contractors shall be regarded as 'Deemed Exports' under FTP, provided goods are manufactured in India:

> *(a) Supply of goods against Advance Authorisation / Advance Authorisation for annual requirement / DFIA;*
>
> *(b) Supply of goods to EOUs / STPs / EHTP / BTP;*
>
> *(c) Supply of capital goods to EPCG Authorisation holders;*
>
> *(d) Supply of goods to projects financed by multilateral or bilateral Agencies / Funds as notified by Department of Economic Affairs (DEA), MoF under International Competitive Bidding (ICB) in accordance with procedures of those Agencies / Funds, where legal agreements provide for tender evaluation without including customs duty;*
>
> *Supply and installation of goods and equipment (single responsibility of turnkey contracts) to projects financed by multilateral or bilateral Agencies / Funds as notified by DEA, MoF under ICB in accordance with procedures of those Agencies / Funds, which bids may have been invited and evaluated on the basis of Delivered Duty Paid (DDP) prices for goods manufactured abroad;*
>
> *(e) Supply of capital goods, including in unassembled / disassembled condition as well as plants, machinery, accessories, tools, dies and such goods which are used for installation purposes till stage of commercial production, and spares to extent of 10% of FOR value to fertilizer plants;*

(f) Supply of goods to any project or purpose in respect of which the MoF, by a notification, permits import of such goods at zero customs duty;

(g) Supply of goods to power projects and refineries not covered in (f) above;

(h) Supply of marine freight containers by 100% EOU (Domestic freight containers-manufacturers) provided said containers are exported out of India within 6 months or such further period as permitted by customs;

(i) Supply to projects funded by UN Agencies; and

(j) Supply of goods to nuclear power projects through competitive bidding as opposed to ICB.

Benefits of deemed exports shall be available under paragraphs (d), (e), (f) and (g) only if the supply is made under procedure of ICB.

8.3 Benefits for Deemed Exports

Deemed exports shall be eligible for any / all of following benefits in respect of manufacture and supply of goods qualifying as deemed exports subject to terms and conditions as in HBP v1:-

(a) Advance Authorisation / Advance Authorisation for annual requirement / DFIA.

(b) Deemed Export Drawback.

(c) Exemption from terminal excise duty where supplies are made against ICB. In other cases, refund of terminal excise duty will be given. Exemption from TED shall also be available for supplies made by an Advance Authorisation holder to a manufacturer holding another Advance Authorization if such manufacturer, in turn,

supplies the product(s) to an ultimate exporter.

Benefits to the Supplier

8.4.1 (i) In respect of supplies made against Advance Authorisation / DFIA in terms of paragraph 8.2(a) of FTP, supplier shall be entitled to Advance Authorisation / DFIA for intermediate supplies.

(ii) If supplies are made against Advance Release Order (ARO) or Back to Back Letter of Credit issued against Advance Authorisation / DFIA in terms of paragraphs 4.1.11 and 4.1.12 of FTP, suppliers shall be entitled to benefits listed in paragraphs 8.3(b) and (c) of FTP, wherever is applicable.

8.4.2 In respect of supply of goods to EOU / EHTP / STP / BTP in terms of paragraph 8.2(b) of FTP, supplier shall be entitled to benefits listed in paragraphs 8.3(a), (b) and (c) of FTP, whichever is applicable.

8.4.3 In respect of supplies made under paragraph 8.2(c) of FTP, supplier shall be entitled to the benefits listed in paragraphs 8.3(a), (b) and (c) of the Policy, whichever is applicable.

8.4.4 (i) In respect of supplies made under paragraphs 8.2(d), (f) and (g) of FTP, supplier shall be entitled to benefits listed in paragraphs 8.3(a), (b) and (c), whichever is applicable.

(ii) In respect of supplies mentioned in paragraph 8.2(d), supplies to projects funded by such Agencies alone, as may be notified by DEA, MoF, shall be eligible for deemed export benefits. A list of such Agencies / Funds is given in Appendix 13 of HBP v1.

(iii) Benefits of deemed exports under para 8.2(f) of FTP shall be applicable in respect of items, import of which is allowed by DoR at zero customs duty, subject to fulfillment of conditions specified under Notification No. 21/2002-Customs dated 1.3.2002, as amended from time to time.

(iv) Supply of Capital goods and spares upto 10% of FOR value of capital goods to power projects in terms of paragraph 8.2(g), shall be entitled for deemed export benefits provided the ICB procedures have been followed at Independent Power Producer (IPP) / Engineering and Procurement Contract (EPC) stage. Benefit of deemed exports shall also be available for renovation / modernization of power plants. Supplier shall be eligible for benefits listed in paragraph 8.3(a) and (b) of FTP, whichever is applicable. However, supply of goods required for setting up of any mega power projects as specified in S.No. 400 of DoR Notification No. 21/2002-Customs dated 1.3.2002, as amended, shall be eligible for deemed export benefits as mentioned in paragraph 8.3(a), (b) and (c) of FTP, whichever is applicable, if such mega power project complies with the threshold generation capacity specified therein, in Customs Notification.

(v) Supplies under paragraph 8.2(g) of FTP to new refineries being set up during Ninth Plan period and spilled over to Tenth Plan period, shall be entitled for deemed export benefits in respect of goods mentioned in list 17 specified in S.No. 228 of Notification No. 21/2002-Customs dated 1.3.2002,

as amended from time to time. Supplier shall be eligible for benefits listed in paragraphs 8.3(a) and (b) of FTP, whichever is applicable.

8.4.5 In respect of supplies made under paragraph 8.2(e) of FTP, supplier shall be eligible for benefits listed in paragraph 8.3(a) and (b) of FTP, whichever is applicable. Benefit of deemed exports shall be available in respect of supplies of capital goods and spares to Fertilizer Plants which are set up or expanded / revamped / retrofitted / modernized during Ninth Plan period. Benefit of deemed exports shall also be available on supplies made to Fertilizers Plants, which have started in the 8th / 9th Plan periods and spilled over to 10th Plan period.

8.4.6 Supplies of goods to projects funded by UN Agencies covered under para 8.2(i) of FTP are eligible for benefits listed in paragraph 8.3(a) and (b) of FTP, whichever is applicable.

8.4.7 In respect of supplies made to Nuclear Power Projects under para 8.2(j) of FTP, the supplier would be eligible for benefits given in para 8.3(a), (b) and (c) of FTP, whichever is applicable. Supply of only those goods required for setting up any Nuclear Power Poject specified in list 43 at S.No. 401 of Notification No. 21/2002-Customs dated 1.3.2002, as amended from time to time, having a capacity of 440MW or more as certified by an officer not below rank of Joint Secretary to Government of India in Department of Atomic Energy, shall be entitled for deemed exports benefits in cases where procedure of competitive bidding (and not ICB) has been followed.

8.5 Eligibility for refund of terminal excise duty / drawback

Supply of goods will be eligible for refund of terminal excise duty in terms of para 8.3(c) of FTP, provided recipient of goods does not avail CENVAT credit / rebate on such goods. Similarly, supplies will be eligible for deemed export drawback in terms of para 8.3(b) of FTP on Central Excise paid on inputs / components, provided CENVAT credit facility / rebate has not been availed by applicant. Such supplies will however be eligible for deemed export drawback on customs duty paid on inputs / components.

8.5.1 Simple interest @ 6% per annum will be payable on delay in refund of drawback and terminal excise duty under deemed export scheme, if the case is not settled within 30 days of receipt of complete application (as in paragraph 9.10.1 of HBP v1).

8.6.1 Supplies to be made by the main / sub-contractor

In all cases of deemed exports, supplies shall be made directly to designated Projects / Agencies / Units / Advance Authorisation / EPCG Authorisation holders. Sub-contractor may, however, make supplies to main contractor instead of supplying directly to designated projects / Agencies. Such supplies shall be eligible for deemed export benefits as per procedure laid down in paragraph 8.4 of HBP v1.

8.6.2 Supplies made by an Indian sub-contractor of an Indian or foreign main contractor directly to the designated projects / Agencies, shall also be eligible for deemed export benefits provided sub-contractor is indicated either originally or subsequently in the

contract, and payment certificate is issued by project authority in the name of sub-contractor as in Appendix 22C of HBP v1."

The following definitions within FTP also ought to be referred:

"*9.12 'Capital Goods' means any plant, machinery, equipment or accessories required for manufacture or production, either directly or indirectly, of goods or for rendering services, including those required for replacement, modernisation, technological upgradation or expansion. It also includes packaging machinery and equipment, refractories for initial lining, refrigeration equipment, power generating sets, machine tools, catalysts for initial charge, equipment and instruments for testing, research and development, quality and pollution control. Capital goods may be for use in manufacturing, mining, agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture and viticulture as well as for use in services sector.*

xxx xxx xxx

9.14 'Component' means one of the parts of a sub-assembly or assembly of which a manufactured product is made up and into which it may be resolved. A component includes an accessory or attachment to another component.

xxx xxx xxx

9.36 'Manufacture' means to make, produce, fabricate, assemble, process or bring into existence, by hand or by machine, a new product having a distinctive name, character or use and shall include

> *processes such as refrigeration, re-packing, polishing, labelling, Re-conditioning repair, remaking, refurbishing, testing, calibration, re-engineering. Manufacture, for the purpose of FTP, shall also include agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture, viticulture and mining.*"

57. From a perusal of the FTP, pleadings as well as submissions of the parties, as aforesaid, there are five essential prerequisites that ought to be satisfied by the Appellants in order to be eligible for the deemed export benefit(s). The said pre-conditions can be enumerated in the following manner:

(i) The claim for Deemed Export Benefits relates exclusively to "goods" and is inapplicable to any other thing which is not "goods". Such goods, though supplied, do not physically exit the territorial boundaries of the country.

(ii) The goods to be supplied must be "manufactured in India".

(iii) There must be an act constituting "supply of goods" to the power projects for the project to claim Deemed Export Benefits.

(iv) The act of "supply of goods" is either by the main contractor and/or the sub-contractor to the concerned power project.

(v) The supply is undertaken strictly in accordance with the procedural framework prescribed under ICB.

58. Now we would proceed to consider and deal with the above culled out essential ingredients for being eligible for claim of Deemed Export Benefits.

59. From the FTP, it is apparent that the foremost prerequisite to avail the deemed export benefits is limited to "goods", the definition for which is absent therein, despite there being an explicit reference to "capital goods" and "consumer goods". Accordingly, we may refer to the following references to define "goods". Firstly, in Fifth edition of P. Ramanatha Aiyar's Advanced Law Lexicon, wherein, goods has been defined as:

> "*'GOODS' means every kind of movable property other than actionable claims and money; and includes stocks and shares, growing crops, grass and things attached, to or forming part of the land which are agreed to be severed before sale or under the contract of sale. [Sale of Goods Act (3 of 1930), S. 2(7)]*
>
> *For the purposes of this clause, "goods" includes any article material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable. [Central Excise Act (1 of 1944), S. 2, Expln. as inserted by Finance Act (18 of 2008), S. 78]*

xxx xxx xxx

'Goods' means all kinds of movable property other than actionable claims, stocks, shares and securities, and includes all materials, articles and commodities including the goods (as goods or in some other form), involved in the execution of a works contract or those goods used or to be used in the construction, fitting out, improvement or repair of movable or immovable property and also includes all growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale and also includes motor spirit."[A.P. General Sales Tax Act (6 of 1957), S. 2(1)(h) as cited in Tata Consultancy Services v. State of A.P., (2005) 1 SCC 308, 316, para 7])

xxx xxx xxx

'GOODS' means all kinds of movable property (other than newspaper, actionable claims, stocks and shares and securities), and includes, all materials, commodities, and articles including the goods, as goods or in some other form) involved in the execution of a work-contract or, those goods to be used in the fitting out improvement or repair of moveable property and all growing crops, grass or things, attached to, or forming part of, the lands which are agreed to be severed before sale or under the contract of sale. [Karnataka Sales Tax Act (25 of 1957), S. 2(m) and T.N. General Sales Tax Act (1 of 1959), S. 2(j) ***as cited in*** *Vikas Sales Corpn v. Commr. of Commercial Taxes, (1996) 4 SCC 433, 441-42, pp. 15, 16: AIR 1996 SC 2082]*

'GOODS' means machinery, motor vehicles, equipment, furniture, articles of stationary, textiles raw materials, drugs, scientific instruments, chemical, food grains, oil and oil seeds or other commodity required for

> *consumption, use or distribution by a procurement entity in discharge of its public duties'. [Karnataka Transparency in Public Procurement Act (29 of 2000), S. 2(b) as cited in State of Karnataka v. Fisheries Welfare Co-operative Society Ltd., AIR 2012 Kar 132, para 2].*"

Secondly, in Third Edition of Supreme Court Words and Phrases by Surendra Malik and Sumit Malik, "goods" are defined to be as:

> "*'Goods'- Constitution of India - Sch. VII List II Entries 53 & 54 and Arts. 366(12) & (29-A)*
>
> *'Goods' may be tangible or intangible property. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of being transmitted, transferred, delivered, stored and possessed. (Para 151)*"

60. It is apparent from the aforesaid that in the common parlance, the term "goods" denotes movable items and shall exclude immovable items. To further elaborate, this Court in ***Quality Steel Tubes (P) Ltd v. Collector of Central Excise, U.P.***[11] went on to observe that for a good to qualify as "excisable", it must qualify as "goods" and should also be able to satisfy the "marketability test" which was established in ***Union of India and Another v. Delhi Cloth and General Mills Co. Ltd.***[12]

[11] (1995) 2 SCC 372
[12] 1962 SCC OnLine SC 148

and was reiterated in the subsequent decisions of this Court in ***Collector of Central Excise, Baroda v. Ambalal Sarabhai Enterprises (P) Ltd.***[13] and ***Union Carbide India Limited v. Union of India and Others***[14]. Therefore, it stands settled that an immovable property, especially a machinery embedded to earth, as in the instant case, would fail the aforesaid test.

61. It is also true that Captive Power Plants have been recognized as "capital goods" within the scope of subsequent FTP, but those importable products are movable and cannot be equated to the Project Plant in the instant case. The correct means to analyse and determine expression "capital goods" would be subject to the definition of the term "goods" especially when Para 9.12 of the FTP only encompasses movable items. It would not be possible within the given canvas to hold that an embedded power plant of hundreds of Mega Watts would be able to qualify as "capital goods" for entitlement of the Appellants under the FTP for the deemed export benefits.

62. The second prerequisite is derived from the opening paragraph of Para 8.2 of the FTP makes it obligatory that concerned goods as required to be supplied must

[13] (1989) 4 SCC 112
[14] (1986) 2 SCC 547

be manufactured in India. Para 9.36 of the FTP goes on to define "manufacture" as making, producing, fabricating, assembling, processing, or otherwise bringing into existence, by hand or machine, a new product with a distinctive name, character, or use, and goes on to include processes like refrigeration, repacking, polishing, labelling, reconditioning, repairing, remaking, refurbishing, testing, calibration, and re-engineering, as well as activities like agriculture, horticulture, floriculture, animal husbandry, pisciculture, poultry, sericulture, viticulture, and mining. Dealing further with "manufacture", we may refer to the Fifth edition of P. Ramanatha Aiyar's Advanced Law Lexicon wherein, the varied and relevant connotations of the word have been elaborated as:

> "*'MANUFACTURE' implies a change, but every change is not manufacture and yet every change of an article is the result of treatment labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use. [Words and Phrases, Permanent Edition, Vol XXVI,* ***as cited in*** *Union of India v. Ahmedabad Electricity Co. Ltd., AIR 2004 SC 11, 16, para 19]*
>
> *Conversion of raw materials into a finished product, e.g. converting iron ore into steel plate.*
>
> *Manufacture is: (1) The application, to material, of labour or skill, whereby the original article is changed to a new, different, and useful article, provided the*

process is of a kind popularly regarded as manufacture, or (2) the product of such process.

'Whatever is made by human labour, either directly or through the instrumentality of machinery.' (Abbott L. Dict.)

To constitute a manufacture, within the customs duty acts, there must be a transformation. Mere labour bestowed on an article, even if the labour is applied through machinery, will not make it a manufacture, unless it has progressed so far that a transformation ensues, and the article becomes commercially known as another and different article from that as which it began its existence.

Every alteration in an article does not confer on it a new character as a manufacture. To constitute a new and different article and a manufactured article, it must be so changed as to have a positive and specific use in its new state.

'The process of making a thing by art.' (Burrill)

The word 'manufacture' is a compound word of Latin origin derived from the words "manu," by hand and "facere," to do, to make, to form; but the meaning is not confined to that which is done by hand alone, but by machinery as well. (In re Tecopa Min, etc., Co., 110 Fed 120, 121. See also 110 IC 788: 29 Cr LJ 756: 1928 Pat 506)

xxx xxx xxx

Etymologically, 'manufacture' is a compound word from Latin "manu" meaning "hand" and "facere" which means "made". Thus, in its primary sense, 'manufacturing' is fashioning of a raw or wrought material by manual or mechanical manipulation, resulting in its transformation; a new and different article must emerge having a distinctive name, character or use. Raghbir

Chand Som Chand v. Excise & Taxn. Officer, (1960) 11 STC 149, 164-5 (Punj). Also see North Bengal Stores Ltd. v. Board of Revenue, (1938-50) 1 STC 157, 163-4 (Cal); State of Bihar v. Chrestien Mica Industries Ltd., (1956) 7 STC 626, 631 (Pat), ***affirmed*** *(1961) 12 STC 150 (SC); G.R. Kulkarni v. The State, (1957) 8 STC 294 (MP); CIT v. Casino (Pvt.) Ltd., (1973) 91 ITR 289 (Ker)*

xxx xxx xxx

'The word 'Manufacture',' said ABBOTT, C.J., in R. v. Wheeler, 2 B. & Ald. 349, has been generally understood to denote, either a thing made which is useful for its own sake and vendible as such, as a medicine, a stove, a telescope, and many others; or to mean an engine or instrument, or some part of an engine or instrument, to be employed either in the making of some previously known article, or in some other useful purpose, as a stocking frame, or a steam engine for raising water from mines; or, it may, perhaps, extend also to a new process to be carried on by known implements or elements acting upon known substances, and ultimately producing some other known substance but producing it in a cheaper or more expeditious manner, or of a better or more useful kind. No mere philosophical or abstract principle can answer to the word 'Manufactures.' Something of a corporeal and substantial nature,— something that can be made by man from the matters subjected to his art and skill, or at the least some new mode of employing practically his art and skill, is required to satisfy the word." (See also Gibson v. Brand, 4 M. & G. 199)

xxx xxx xxx

The expression 'manufacture' is normally related to movable articles and goods. It cannot be employed to denote construction

of a building or a dam or a bridge. [CIT v. Ceo Tech Foundation and Construction, (2000) 241 ITR 90 (Ker)]"

63. Even a 5-Judge Bench of this Court, in ***Delhi Cloth and General Mills (supra),*** while dealing with determination of excise duty on the Respondents therein under the Central Excise and Salt Act, 1944 observed that:

> *"16. This consideration of the meaning of the word 'goods' provides strong support for the view that "manufacture" which is liable to excise duty under the Central Excise and Salt Act, 1944 must be the 'bringing into existence of a new substance known to the market'. 'But,' says the learned counsel, "look at the definition of 'manufacture' in the definition clause of the Act and you will find that 'manufacture' is defined thus: 'Manufacture includes any process incidental or ancillary to the completion of a manufactured product.' [Section 2(f)]. We are unable to agree with the learned counsel that by inserting this definition of the word 'manufacture' in Section 2(f) the legislature intended to equate 'processing' to 'manufacture' and intended to make more 'processing' as distinct from 'manufacture' in the sense of bringing into existence of a new substance known to the market, liable to duty. The sole purpose of inserting this definition is to make it clear that at certain places in the Act the word 'manufacture' has been used to mean a process incidental to the manufacture of the article. Thus in the very item under which the excise duty is claimed in these cases, we find the words; 'in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power'. The definition of 'manufacture' as in Section 2(f) puts it beyond any possibility of controversy that if*

> *power is used for any of the numerous processes that are required to turn the raw material into a finished article known to the market the clause will be applicable; and an argument that power is not used in the whole process of manufacture using the word in its ordinary sense, will not be available. It is only with this limited purpose that the legislature, in our opinion, inserted this definition of the word 'manufacture' in the definition section and not with a view to make the mere 'processing' of goods as liable to excise duty.*"

64. While discussing the meaning of the word "production", a reference was made by this Court to the elaboration of "manufacture" as well in ***India Cine Agencies v. Commissioner of Income Tax, Madras***[15] in a dispute involving entitlement of benefits under Sections 32-AB, 80-HH, 80-I of Income Tax Act, 1961 as:

> "*5. In Words and Phrases, 2nd Edn. by Justice R.P. Sethi the expressions 'produce' and 'production' are described as under:*
>
> > *'In Webster's New International Dictionary, the word 'produce' means something that is brought forth either naturally or as a result of effort and work; a result produced. In Black's Law Dictionary, the meaning of the word 'produce' is to 'bring into view or notice; to bring to surface'. A reading of the aforesaid dictionary meanings of the word 'produce' does indicate that if a living creature is brought forth, it can be said that it is produced. [See CIT v. Venkateswara Hatcheries (P) Ltd. [(1999) 3 SCC 632] , CIT v. N.C.*

[15] (2008) 17 SCC 385

Budharaja and Co. [1994 Supp (1) SCC 280 : (1993) 204 ITR 412]]

Production or produce.—The word 'production' or 'produce' when used in juxtaposition with the word 'manufacture' takes in bringing into existence new goods by a process, which may or may not amount to manufacture. It also takes in all the by-products, intermediate products and residual products, which emerge in the course of manufacture of goods. The expressions 'manufacture' and 'produce' are normally associated with movable articles and goods, big and small but they are never employed to denote the construction activity of the nature involved in the construction of a dam or for that matter a bridge, a road and a building. [See Moti Laminates (P) Ltd. v. CCE [(1995) 3 SCC 23] .]'

6. *In Advanced Law Lexicon, 3rd Edn. by P. Ramanatha Aiyar, the expressions 'production' and 'manufacture' are described as under:*

' 'Production' with its grammatical variations and cognate expressions; includes—

(i) packing; labelling, re-labelling, of containers,

(ii) re-packing from bulk packages to retail packages, and

(iii) the adoption of any other method to render the product marketable.

'Production' in relation to a feature film, includes any of the activities in respect of the making thereof. [Cine Workers and Cinema Theatre Workers (Regulations of Employment) Act (50 of 1981), Section 2(i).]

***

> *The word 'production' may designate as well a thing produced as the operation of producing; (as) production of commodities or the production of a witness.*
>
> ***
>
> *'Manufacture' includes any art, process or manner of producing, preparing or making an article, and also any article prepared or produced by manufacture. [Patents and Designs Act (2 of 1911), Section 2(10).]*
>
> ***
>
> *'Manufacture' includes any process—*
>
> *(i) incidental or ancillary to the completion of a manufactured product; and*
>
> *(ii) which is specified in relation to any goods in the section or Chapter Notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture, or, and the word 'manufacturer' shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account;*
>
> *(iii) which is specified in relation to any goods by the Central Government, by notification in the Official Gazette, as amounting to manufacture. [Central Excise Act (1 of 1944), Section 2(f)]' "*

65. Placing reliance on this Court's decision in ***Commissioner of Income Tax, Orissa and Others v. M/s N.C. Budharaja and Company and Others***[16]**,**

[16] 1994 Supp (1) SCC 280

High Courts, such as that of Kerala, in ***Commissioner of Income-Tax v. Geo Tech Foundation & Constructions***[17] have also proceeded to hold that while "manufacture" and "produce" are, in the usual understanding, associated with movable articles and goods, the same can never be deemed to also include or to denote an activity amounting to construction.

66. Similarly, in ***Moti Laminates Pvt. Ltd. and Others v. Collector of Central Excise, Ahmedabad***[18], this Court observed that excise duty can only be applied to the produced goods which are usable, movable, saleable, and marketable. Also from the aforementioned decisions like the ***Union Carbide India (supra)***, ***Bhor Industries Limited, Bombay v. Collector of Central Excise, Bombay***[19], and ***Hindustan Polymers v. Collector of Central Excise***[20], it was reiterated that goods ought to be known in the market and should be capable of being sold.

67. Therefore, in the light of the above, the instant case, as projected and pressed before us by the Appellants, would fall foul of the essentiality when Para 9.36 of the FTP requires that the manufactured good should have

[17] (2000) 241 ITR 90 : 1999 SCC OnLine Ker 341
[18] (1995) 3 SCC 23
[19] (1989) 1 SCC 602
[20] (1989) 4 SCC 323

been brought into existence with a distinctive name, character, or use. Such a feasibility would be impossible when it comes to the concerned power plants in the instant set of Appeals.

68. The third essential criterion for availing the said deemed export benefits is "supply of goods" to a power plant, as is contemplated under Para 8.2(g) of the FTP. However, from the original pleadings of the Appellants before the APTEL, it is established that they had made an unsuccessful attempt to argue that the whole power plant under their concerned Project fell within the ambit of definition of supply of "goods". Contemplating their contention on the basis that the power plant falls within "capital goods", it would neither be permissible nor viable to supply a power plant to itself as per the mandate of the FTP and especially, in the light of Para 8.2(g) of the FTP contemplating categorization of "supply of goods" to power projects and refineries not covered in Para 8.2(f) which, in turn, deals with supply of goods to any project or purpose in respect of which the Ministry of Finance, by a notification, permits import of such goods at zero customs duty. Therefore, we are inclined to accept the contentions raised on behalf of PSPCL and observe this condition to remain unfulfilled.

69. The fourth foundational prerequisite to avail the deemed export benefits, as stipulated through Para 8.2, read with Para 8.6 of the FTP mandates that the supply of goods must be effected either by the main contractor or the sub-contractor to the concerned project. In the present factual matrix an entitlement to the deemed export benefits only accrue when the goods, as manufactured by the main contractor, are supplied to the Project, herein being either the NPL or TSPL, or in the alternative, the goods are manufactured by the sub-contractor and supplied directly to the project or through the main contractor. However, it appears that before the forums of law below, and even at the time of bidding, the to-be then constructed Power Plant itself was deemed as the concerned capital goods for the deemed export benefits, implying that there was no distinct supply of goods by either a main contractor or a sub-contractor thereof. Rather, a claim to seek the benefits in respect of the entire power plant was made. Such a situation of *suo moto* acclaimed manufacturing in the Project's own right shall not stand the instant test.

70. The fifth prerequisite for availing the aforementioned benefits under the FTP is a strict adherence to the necessity of procurement of goods through ICB, as stipulated in the latter part of the Para 8.2 and Para

8.4.4(iv) of the FTP. Herein, it is categorically made mandatory that the supplies as contemplated under clauses (d), (e), (f), and (g) of the Para 8.2 would qualify for the deemed export benefits only if the same is so effected through the mandate of ICB. Moreover, Para 8.4.4(iv) provides that the supply of capital goods and permissible spare up to 10% of the Free on Rail value to the concerned power projects under Para 8.2(g), subject to the condition that ICB has been adopted either at the stage of Independent Power Producer or Engineering Procurement Contract. The said benefit originally also extended to the MPPs, subject to the capacity thresholds as prescribed under Department of Revenue's Notification No. 21/2002-Customs. Therefore, it is an incorrect and misplaced contention subsequently raised by the Appellants before this Court that the proviso to Para 8.2 is applicable to all kinds of projects therein and that Para 8.4.4(iv) is a special provision and deals specifically with Para 8.2(g).

71. Moreover, by virtue of amendments dated 14.01.2010 and 08.02.2010 to the FTP, a limited relaxation was carved out exclusively for the MPPs wherein the mandate of ICB had been exempted if the required quantum of power had been tied up through adopting of Tariff-Based Competitive Bidding, or the project was awarded in the said manner. Clearly, as on the

concerned cut-off date, neither of the Appellants would have been able to plead that Tariff-Based Competitive Bidding was a permissible alternative under the FTP for either of the aforesaid stages. It is submitted on behalf of the Appellants that ICB was conducted at the Independent Power Producer stage, in tune with the mandate of Section 63 of the EA 2003 for selection of the power developer, therefore, having sufficed the condition under Para 8.4.4(iv) it was not required to conduct ICB at the Engineering Procurement Contract stage.

72. A perusal thereof, clarifies that the essence of deemed export benefits lay in the supply of goods to power projects, not in power procurement arrangements. A collective and comprehensive reading of Para 8.2, Para 8.4.4(iv) and Para 8.6 of the FTP establishes that the Independent Power Producer stage is in reference to the main contractor vis-à-vis supply of goods to the concerned project, while the Engineering Procurement Contract stage concerns the supply by a sub-contractor to the Engineering Procurement Contract contractor. Undoubtedly, and admittedly, mandate of ICB may be claimed, on behalf of the Appellants, to have been followed during their bidding process leading to the PPAs, but no evidence has been produced on record by the Appellants to determine whether such a mandate

i.e. ICB process was adopted by them for procurement of goods concerned and/or to be supplied as per Para 8.4.4(iv) of the FTP, which mandates ICB either at the stage of Independent Power Producer or Engineering Procurement Contract when in relation to a "supply of goods" as per Para 8.2(g) of the FTP. Reliance on Tariff-Based Competitive Bidding by the Appellants for selection of the power project developer cannot be equated with the mandate of the ICB for supply of goods and is, therefore, a misnomer and a misplaced plea raised on their part.

73. Considering the above contentions as raised before us albeit for the first time, the Appellants, have clearly failed to establish the procurement of "supply of goods" as per the mandate of ICB either at the stage of Independent Power Producer or Engineering Procurement Contract, owing to the fact that such procurement of the components was done through directly entering into contract(s) with their subsidiaries or joint venture or related companies, we do not find any reason to further deal with the contentions raised by the Appellants vis-à-vis other prerequisites as all the essential pre-conditions unless ticked would not render them eligible for the benefit claimed.

74. The instant issue is answered against the Appellants to the effect that they were not entitled to the deemed export benefits under Para 8.3 of the FTP.

75. Having answered in the negative as aforesaid with regard to the entitlement of the Appellants for the deemed export benefits under the FTP, we ought not delve into the plea as to the alleged withdrawal of the said benefits through notifications of the DGFT dated 28.12.2011 and 21.03.2012 collectively and whether that would amount to a "Change in Law" as per Article 13 of the PPA.

76. However, while placing reliance on our discussion above of the issue(s), the aforesaid notifications issued through DGFT were mere clarificatory in nature. As a matter of fact, no interpretation of law was undertaken prior to the cut-off date to the effect that a developer shall be able to import goods to be assembled into a power plant and also claim the deemed export benefits on those. Therefore, APTEL, while dealing with the said issue in detail, and correctly so, concluded that the aforesaid contended circulars to be merely clarificatory and not as something which has either changed or introduced something new, being allegedly oppressive towards the Appellants.

77. Hypothetically, even assuming the case of the Appellants to the said effect to be good in law and that notification(s) would indeed amount to a "Change in Law", it is merely an academic exercise without any impact on the legal position of the Appellants. They were, and still are not, entitled to any deemed export benefits under the FTP for their inability to fulfil the concerned prerequisites as discussed by us above.

78. Now, we shall proceed to consider the third issue in the instant Civil Appeals, which is subject to positive contemplation of the earlier issues as dealt by us and if so, whether Appellants are entitled to restitutionary relief in the form of compensation.

79. It is clear from the detailed analysis of the first and second issues raised in the instant Civil Appeals that the Appellants have not been able to establish those in their favour and accordingly, there cannot arise any question for compensation to the Appellants by the PSPCL as a means of restitutionary relief.

80. The Appellants have failed to impress this Court with their submissions in these Civil Appeals and we find no ground to interfere with the Impugned Judgment and order dated 04.07.2017 passed by the Appellate Tribunal for Electricity, New Delhi.

81. These Appeals are dismissed being devoid of merit.

82. There shall be no order as to costs.

83. Pending application(s), if any, also stand disposed of.

.....CJI.
[B. R. GAVAI]

.....J.
[AUGUSTINE GEORGE MASIH]

NEW DELHI;
AUGUST 19, 2025.