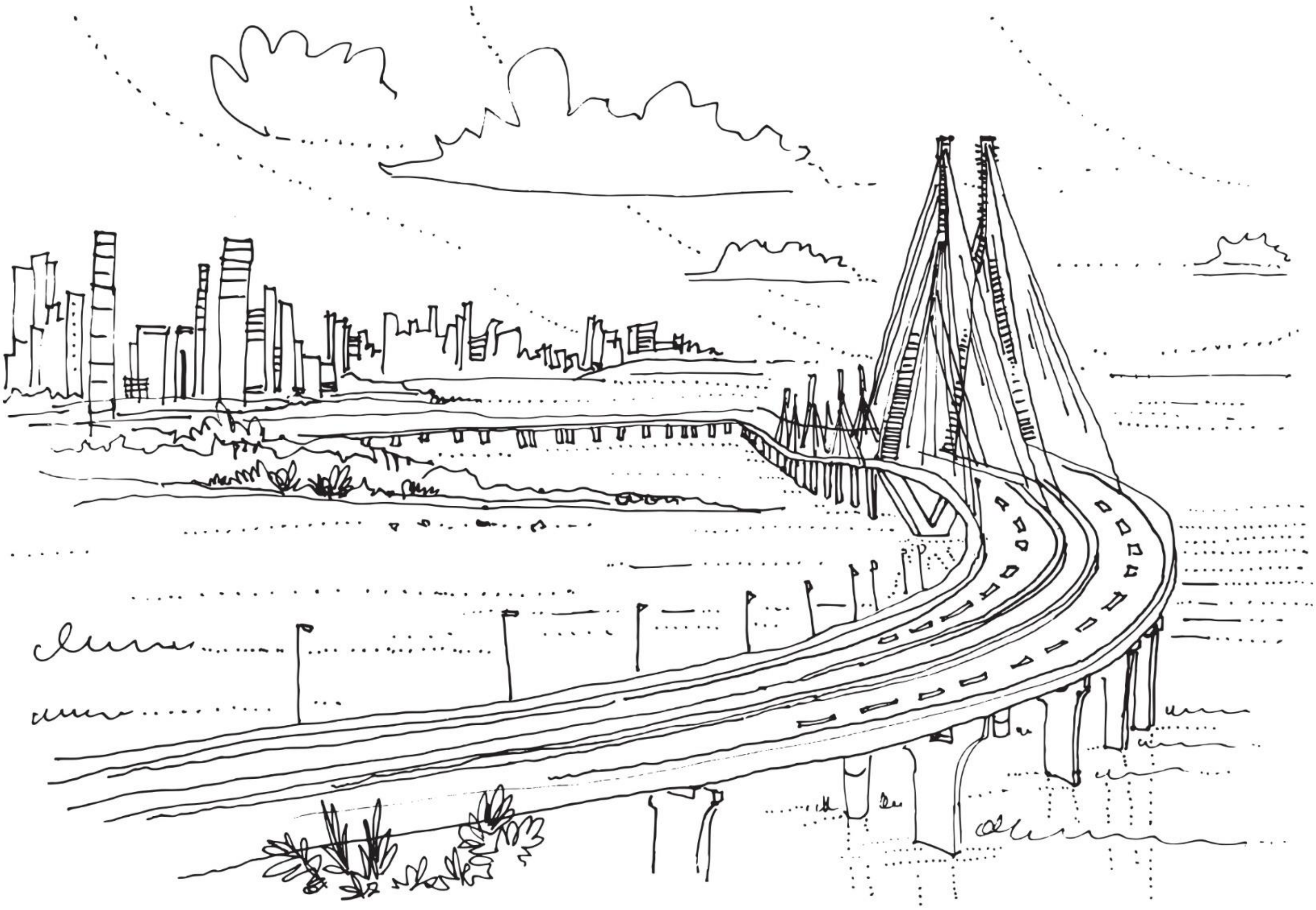
ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS

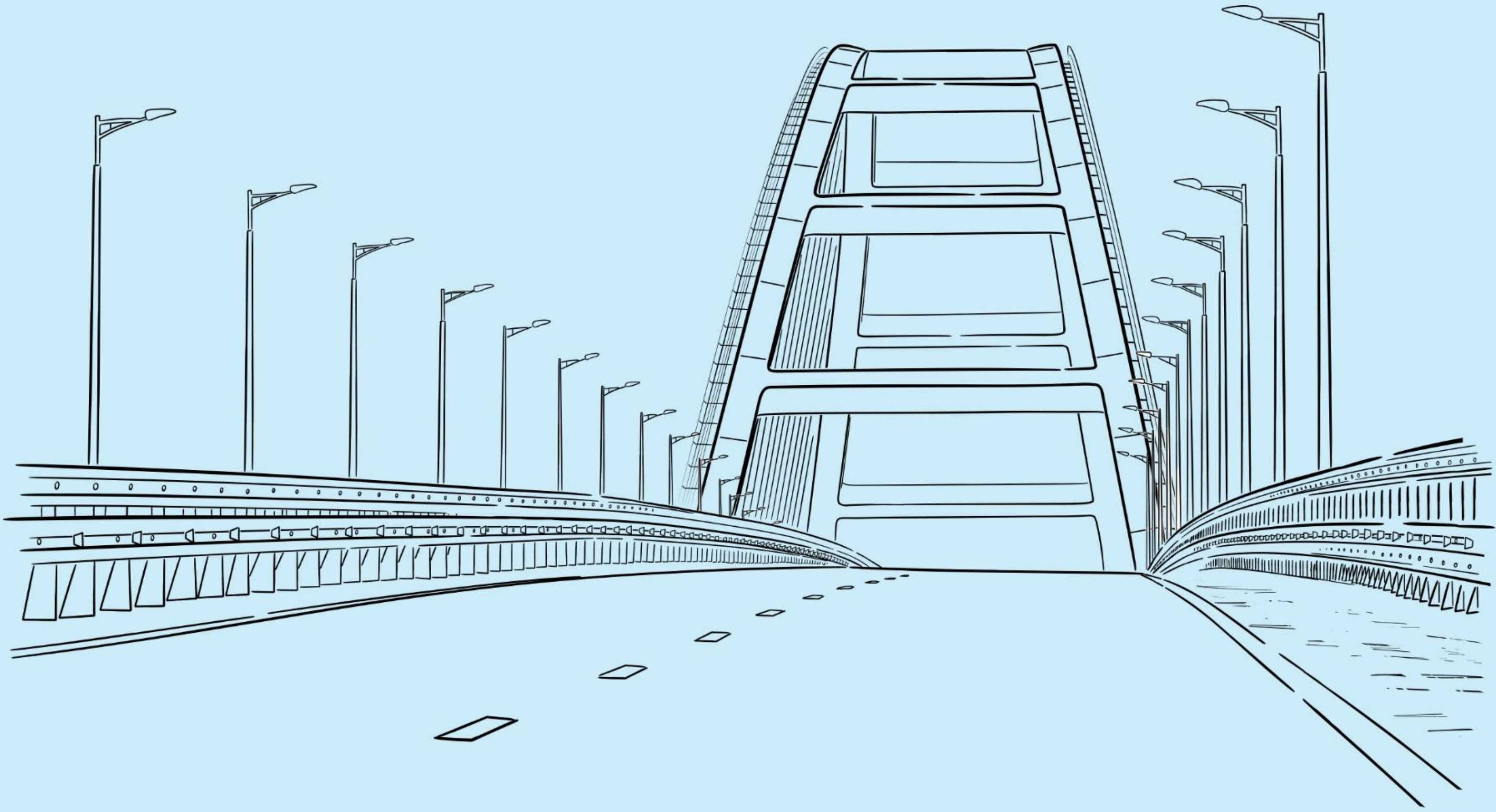


Infrastructure and Energy Digest

Overview of Legal and Regulatory Developments

April 2019

INFRASTRUCTURE



Madras High Court quashes land acquisition proceedings for Chennai-Salem expressway

In an important development, for the infrastructure sector, the Madras High Court quashed land acquisition proceedings for the Chennai-Salem Highway citing a number of issues. Details of the matters are given below:

Background

In this case (***P.V.Krishnamoorthy v. The Government of India and Ors***.), before the Madras High Court, the notification issued under the provisions of the National Highways Act, 1956 proposing to acquire lands for the INR 10,000 Crore, 276km long Chennai-Salem Eight Lane Highway Green Field Project (proposed in 2018) was challenged under Article 226 of the Constitution of India. The project is said to be a part of the 'Bharatmala Pariyojana', a project conceived by the Central Government, termed as the 'Green Field Project'.

Facts and Issues

The Petitioners in the case are of two categories:

- Those whose land is sought to be acquired (of which most are farmers) and
- Public Interest Litigants.

The proposed project was initially for a Highway between Chennai and Madurai, as accepted for the Bharatmala Pariyojana by the Central Government. However, subsequently the project was changed to a new Chennai-Salem Highway, even though three different highways connecting the two destinations already exist.

The Project Director of the National Highways Authority of India (**NHAI**) submitted the terms of reference to the Ministry of Environment and Forest and Climate Change (**MoEF**). The Expert Appraisal Committee of the MoEF considered the terms of reference relating to the proposed project and recommended the Environmental Impact Assessment with project specific and general terms of reference.

While environmental clearance was pending, the Central Government authorised the competent authorities who are the District Revenue Officers of the districts to initiate action under the provisions of the National Highways Act, 1956 (**Act**) for acquiring the lands. Accordingly, a notification under Section 3A(1) of the Act was published in the Gazette of India as well as in the dailies, notifying the lands owned by the petitioners which were proposed to be acquired for the project.

The Petitioners claimed that the project is designed by the authorities without any application of mind and filed their objections to the acquisitions, on the following grounds:

- The land acquisition cannot be initiated without prior environmental clearances as this could cause severe detriment to the environment, as the project would lead to the felling of various trees, in turn causing serious harm to the biodiversity, agriculture and water bodies
- The pre-requisite of holding a public hearing was not complied with prior to the land acquisition process
- The proposed project was neither viable, nor was it justifiable as necessary in comparison with roads connecting other destinations, for example Chennai-Madurai.

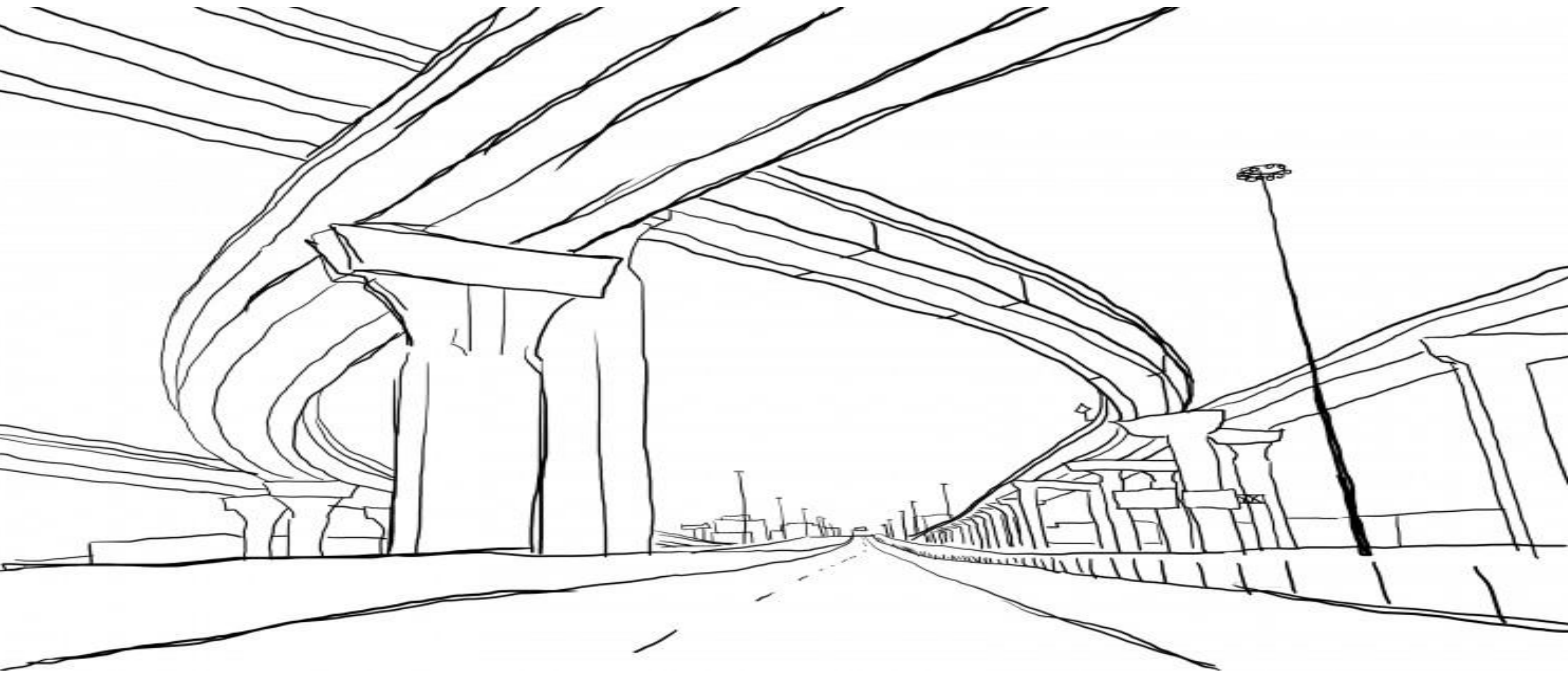
Findings and Observations of the Court

- For determining whether prior environmental clearances were required prior to the land acquisition, the Court considered the positions taken by the judiciary, in India[1] and the United States of America[2]. The Court held that the respondents, being a welfare State, while implementing the project which in the opinion of the Government, is in public interest, could not forget that protecting agriculture is equally in public interest. Therefore, if the project was allowed to be implemented without prior environmental clearance, it would be grossly in violation of the principles of sustainable development and would violate the provisions of Articles 19, 21, 46, 48A and 51A of the Constitution of India.

- Upholding the rights of the affected parties and in the interest of the principles of natural justice, the Court held that in order to understand the impact of the project vis-a-vis the object with which the NHAI is said to have conceived the project, it is essential that at least a number of the people who are likely to be affected should be heard in the matter. This procedure, if adopted, would ensure fairness and reasonableness, and this so called delay would not going to hamper the project, which even as per the report would be fully implemented in the year 2025. Therefore, before seeking prior environmental clearance, it is necessary that a public hearing be held.

- The question of the viability of the project also hinges upon quasi-technical data. The Bharatmala Policy evolved by the Union Government laid down detailed criteria for bringing a project into the Bharatmala Scheme, which specified a Passenger Car Units (PCUs) of 50,000 or greater for an expressway. The Chennai-Salem Project was not included in Bharatmala Program 2017. The route between Chennai and Salem has a daily vehicular traffic of between 16,000 -19,000 PCU in the existing 3 highways. On the contrary, the Chennai-Madurai highway has average vehicular traffic of 43, PCUs, and as such there was nothing placed on record by the respondents to justify why such a higher priority project should be dropped and a project which was never in the pipeline be included. A policy decision, such as the one of dropping of Chennai-Madurai plan for the Chennai-Salem project, is not always immune from challenge. If there has been arbitrariness in the decision making process, the Courts are entitled to exercise their power of judicial review.

- For all the above reasons, the project highway as conceived and sought to be implemented was vitiated on the grounds as mentioned above and consequently, the notifications issued for acquisition of lands under Section 3A(1) was liable to be quashed.



[1] *J.Parthiban & Ors., vs. State of Tamil Nadu [2008-2-L.W.989]; Karnataka Industrial Areas Development Board vs.C.Kenchappa & Ors, (2000) 6 SCC 371 (ASG TSP); and M.Velu vs. State of Tamil Nadu& Others, 2010 SCC Online Madras 2736.*

[1] *Commonwealth of Massachusetts vs. James G. Watt, 716 F.2d.946 (1983); Roosevelt Lathan and Pearline Lathan, his wife, vs. John A. Volpe, Secretary of the United States Department of Transportation, 455 F.2d 1111.*

ENERGY

GENERAL

Amendments for rehabilitation of stressed power assets upheld

The Central Electricity Regulatory Commission (**CERC**) has vide its order dated April 12, 2019 (**Order**) in Petition No. 374/MP/2018 approved the Supplemental Power Purchase Agreement (**Supplemental PPA**) in the case of Mundra Power Plant of Adani Power (Mundra) Limited (2000 MW). This Supplemental PPA (dated December 5, 2018) effects amendments to the original power purchase agreements entered into by Adani Power (Mundra) Limited with Gujarat Urja Vikas Nigam Limited.

The Order comes in the backdrop of recommendations of the High Power Committee constituted for rehabilitation of the stressed power projects dependent on imported coal.

The Order comes as a follow up to the order dated October 29, 2018 of the Supreme Court [in Misc. Application No. 2705-2706 of 2018 in CA No. 5399-5400 of 2016 (which we had covered in our edition of October 2018)] which inter alia allowed applications before the CERC for approval of certain proposed amendments to power purchase agreements for power projects.

This has given a much-needed breather to troubled coal based power plants in Gujarat, which were subject to an unforeseen hike in Indonesian coal prices thus rendering them financially unviable.

By approving the Supplemental PPA vide the Order, the CERC has allowed

- Hike in tariff for the Mundra Power Plant of Adani Power (Mundra) Limited with 2000 MW capacity
- Passing on of the cost of imported coal to consumers, subject to a ceiling of USD 110/tonne
- Extension of tenure of the original power purchase agreements (Power Purchase Agreements dated February 6, 2007 and February 2, 2007 under 1000 MW Bid-01 and 1000 MW Bid-02 respectively) by another period of 10 years after completion of its tenure of 25 years by 2032

Highlights of the Order of CERC

- Refuted contentions of the Consumer Groups, namely Energy Watchdog and Prayas and clarified that it had the power to decide whether the proposed amendments to the power purchase agreements meet the overall test of public interest and consumer interest.
- Approved the following proposed amendments:
  - The effective date of the proposed amendments is October 15, 2018
  - Normative plant availability at 80%
  - Formula for ceiling price for HBA Index and the mechanism to link to the domestic coal price
  - Floor price for sharing of mining profits as 5 paise/kWh
- Refuted contentions that it is not permissible for anyone to act or plead or seek or allow any amendment to the power purchase agreements which is contrary to the terms specified in the Guidelines notified by the Central Government under Section 63 of the Electricity Act, 2003. It upheld amendments to power purchase agreements permitting Foreign Exchange Rate Variation (**FERV**) pass through, citing the absence of any restriction.
- Upheld the provision on Exchange Rate by stating that since the entire profits being earned by the mining company on account of the coal committed for the power plant will be passed on to the procurer in the form of a discount, the mining profit would be converted into Indian Rupees, by applying the Exchange Rate.
- Upheld the capacity charge for the additional contracted capacity in the Supplemental PPA.
- Approved extension of the term of the Power Purchase Agreement by 10 years, clarifying that any extension beyond 35 years would only be with mutual consent of the parties and dependent on future diverse considerations.
- Concluded that
  - Non-rehabilitation of the projects would result in their closure becoming imminent and this would lead to a significant loss of generation capacity which would be difficult to compensate
  - Notwithstanding full pass through of the fuel prices, the projects would continue to be competitive and cheaper than alternate sources and would meet the long term energy requirement of consumers of Gujarat at a competitive price
  - It would be economically viable to keep the projects operational

The Order reinforces the clarification of the Supreme Court that its judgment dated April 11, 2017 in the Energy Watchdog Case [Energy Watchdog vs CERC & Ors., (2017) 14 SCC 80], which denied compensatory tariff to power plants, would not stand in the way of applications for amendment of power purchase agreements.

Our view: Considering the dismal financial performance of Adani's Mundra unit and the fate of other cash strapped power projects which hang in the balance, the Order which has upheld recommendations of the High Power Committee is a much needed positive step to salvage the distressed units. Also, in light of the Order, companies such as Tata Power Limited and Essar Power Limited are more confident of obtaining regulatory approvals for higher tariff for their loss making power projects.

No Additional Surcharge for Captive Power Projects, rules APTEL in Maharashtra

In a move aimed at alleviating the concerns of captive power projects on the issues of additional surcharge, the Appellate Tribunal for Electricity (**APTEL**) has ruled that no additional surcharge is to be levied on captive users (vide order dated April 3, 2019). This ruling that sets aside another order passed by Maharashtra Electricity Regulatory Commission (**MERC**) in September 2018. The order helps prevent contravention of the Electricity Act, 2003 and its rules.

Earlier, the petitioners in this case - JSW Steel Limited and Sai Wardha Power Generation Limited, had argued that the procedure with which the MERC levied the additional surcharge of INR 1.25/kWh on users of group captive projects was restricted to carrying out a mid-term performance review. As a result, the MERC should not have levied the aforementioned surcharge.

APTEL stated that the mid-term review was merely a comparison between the actual operational performance as compared to the approved forecast.

Hence, the MERC had ignored its regulations by levying the surcharge even though in the forum of regulators including the MERC, there was a mutual understanding that additional surcharge would not be leviable for captive users/consumers.

The appellants also argued that the levy of additional surcharge was in contravention of the provisions of the Electricity Act, 2003, as the MERC had drawn a distinction between captive users and group captive users, totally ignoring Rule 3 of the Electricity Rules, 2005 (Requirements of a Captive Generating Plant). APTEL stated that there cannot be any distinction between an individual captive consumer and group captive consumers or original captive consumers and converted captive consumers. Moreover, they cited the MERC's tariff order from 2016 where it had mentioned that captive users would not be liable to pay an additional surcharge. It was argued by the appellants that the essential condition for the sale of electricity, which requires the existence of a buyer and a purchaser, was absent in the case of group captive users.

Our view: The decision, coupled with the slowing down of investments in larger power projects and unreliability of state utilities could potentially add impetus to the demand for captive power projects, particularly smaller units which are used to meet the internal needs of businesses.

RENEWABLE ENERGY

CERC observes GST to be "Change in Law" yet again

The Central Electricity Regulatory Commission (**CERC**) has issued an order dated April 12, 2019 (Order) in a joint petition filed by Parampujya Solar Energy Pvt. Ltd. (**PSEPL**) and Wardha Solar (Maharashtra) Private Limited (**WSMPL**) seeking the declaration of imposition of the Integrated Goods and Service Tax, 2017, Central Goods and Services Tax, 2017 and Karnataka / Telangana / Maharashtra Goods and Services Act, 2017 as a "Change in Law" event under the power purchase agreements with National Thermal Power Corporation Limited and the Solar Energy Corporation of India Ltd.

Invoking the provisions of Article 12.2.1 of the power purchase agreements for solar power projects, the petitioners sought relief on account of "Change in Law" on the ground that they had not contemplated additional taxes/Goods and Services Tax (**GST**) at the time of submission of the bids for development of solar power projects and that the introduction of GST had impacted the overall project cost vis-à-vis the budgeted cost, by causing additional recurring and non-recurring expenditure for the petitioners. In support of their prayer, the petitioners contended that the "Change in Law" event as envisaged under the power purchase agreements was intended to restore an affected party to the same economic condition as if such Change in Law had not occurred.

Under the power purchase agreements, "Change in Law" was defined as follows:

""Change in Law" means the occurrence of any of the following events after the Effective Date resulting into any additional recurring/ non-recurring expenditure by the Solar Power Developer (**SPD**) or any income to the SPD:

- The enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;
- A change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;
- The imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;
- A change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the SPD;
- Any change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement.

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

The key takeaways from the Order are as follows:

- The CERC held that the enactment of 'GST Laws' is covered as "Change in Law" under Article 12 of the power purchase agreement.
- Relying upon the order of the Appellate Tribunal for Electricity which held that any tax levied through an Act of Parliament after the cut-off date and therefore, which results in additional expenditure, is "Change in Law", the CERC observed that 'GST Laws' have been enacted by the Act of Parliament and the State Legislative Assemblies.
- The CERC ordered that the relief for "Change in Law" is to be allowed as a separate element on a one-time basis in a time bound manner. The claims of up-front lump-sum payment were directed to be paid within 60 days of the date of the Order, failing which they would attract late payment surcharge as provided under the power purchase agreement(s).
- The CERC rejected the claim of the petitioners on account of additional tax burden on O&M expenses (if any).
- The CERC rejected the claim of the petitioners regarding :
  - separate carrying cost- in the absence of any provision in the power purchase agreements dealing with restitution principles of restoration of the petitioners to the same economic position as if no Change in Law event had occurred and
  - interest on incremental working capital at normative interest rate or otherwise - in the absence of concepts of interest on working capital or individual tariff elements in competitive bid processes which provide for all-inclusive tariffs.

Our view: Consistent with its earlier rulings on GST as Change in Law, the Order which categorizes any tax levied through an Act of Parliament and resulting in additional expenditure as "Change in Law" puts to rest any extant ambiguity on the scope of Change in Law in power purchase agreements executed or effective prior to the enactment of the GST regime. The Order also serves to safeguard the economic viability of solar power projects which would otherwise be adversely affected by increase in capital costs on account of the new tax regime.

No transmission charges for the use of ISTS Network by solar and wind projects for 25 Years

With a view to giving a further boost to the renewable energy sector, the Central Electricity Regulatory Commission (**CERC**) has issued a notification for an amendment in the regulation for sharing of the charges and losses of the inter-state transmission system (**ISTS**). The regulation was introduced in 2010 and has been amended 6 times.

The major changes brought about by the notification dated March 27, 2019, are as follows:

- No transmission charges and losses for the use of ISTS network are to be payable for the generation based on solar and wind power resources for a period of 25 years from the date of commercial operation of such generation projects if they fulfil the following conditions:
  - Such generation capacity has been awarded through the competitive bidding process in accordance with the guidelines issued by the Central Government
  - Such generation capacity has been declared under commercial operation between February 13, 2018 till March 31, 2022
  - Power Purchase Agreement(s) (**PPAs**) have been executed for sale of such generation capacity to all entities including Distribution Companies (**DISCOMs**) for compliance of their renewable purchase obligations (**RPOs**).

Our view: The Order is a very positive one in that, according to the earlier regulation, the waiver of transmission charges and losses for use of ISTS network only extended to DISCOMs but now this waiver is available to not just DISCOMs but all entities who need to fulfil RPOs, both private and government alike, where the generation capacity is awarded through competitive bidding and commercial operations have been achieved within the time specified.