

November 2024

Supreme Court of India holds that a simplicitor press release does not amount to 'law' for the purposes of change in law compensation

The Hon'ble Supreme Court of India ("Supreme Court") on November 5, 2024, rendered its judgment in *Nabha Power Ltd. and Anr. vs. Punjab State Power Corporation Ltd. and Anr.*¹ holding that a press release which by itself does not *proprio vigore* (by its own force) operate as law, cannot constitute 'law' for the purposes of 'change in law' compensation.

Brief facts

1. On March 1, 2002, a notification was issued under Section 25² of the Customs Act, 1962 granting certain exemptions from customs duty, on goods imported for setting up a Mega Power Project ("**2002 Notification**")³. Subsequently, in 2006, the Ministry of Power, Government of India ("**GoI**") issued the Mega Power Project Policy, ("**2006 Policy**"). In terms of the 2006 Policy, a 'Mega Power Project' had to be an inter-State project to avail of certain exemptions.
2. On June 10, 2009, the Punjab State Power Corporation Ltd. ("**Procurer**") issued a Request for Proposal ("**RFP**") under Section 63 of the Electricity Act, 2003 ("**Electricity Act**"), for developing and procuring power. L&T Power Development Limited emerged as the successful bidder ("**Successful Bidder**").
3. In terms of the RFP, the cut-off date for consideration of an event as a 'change in law' event, was October 2, 2009 ("**Cut-Off Date**") and the last date for seeking clarifications was September 25, 2009.
4. On October 1, 2009, the Union Cabinet decided to extend the benefits of the 2006 Policy to even intra-state thermal power projects of 1,000 (one thousand) Mega Watt or above. This decision was published by the Press Information Bureau, GoI ("**Press Release**").
5. On October 1, 2009, the Successful Bidder issued a letter to Nabha Power Limited ("**NPL**") (then owned by Punjab State Power Corporation Ltd. ("**PSPCL**") requesting for an extension of the bid deadline, to enable it to ascertain the impact of the Press Release on the bid. On October 6, 2009, the Successful Bidder issued another letter stating that it had taken into consideration the Press Release while submitting the bid.
6. On December 11, 2009, the Ministry of Finance, GoI, amended the 2002 Notification ("**2009 Amended Notification**"). Thereafter, on December 14, 2009, GoI issued an office memorandum⁴ titled 'Revised Mega Power

¹ 2024 INSC 833

² Section 25: Power to grant exemption from duty.

³ Customs Notification No. 21 / 2002 dated March 1, 2002.

⁴ Office Memorandum No. A – 118 / 2003 – IPC dated December 14, 2009.

Policy' ("**2009 Policy**") in line with the decision announced by way of the Press Release. In terms of the 2009 Policy, *inter alia*, the mandatory conditions of inter-State sale of power for getting 'mega power project' status, was removed. On January 18, 2010, NPL and PSPCL signed a power purchase agreement ("**PPA**").

7. On May 22, 2012, the appellant approached the Punjab State Electricity Regulatory Commission⁵ contending that it was the Press Release which was the 'change in law' event; and accordingly, the legal regime had been altered on October 1, 2009, itself. This was challenged before the Appellate Tribunal for Electricity, which dismissed the appeal. The Successful Bidder then approached the Supreme Court⁶.

Submissions before Supreme Court

1. Successful Bidder contended that with the issuance of the Press Release, a new legal regime commenced and that they had factored in this altered position in their bid.
2. Procurer contended that the Press Release only proposed a modification in 2006 Policy. However, this was implemented only by the 2009 Amended Notification and 2009 Policy. Therefore, the 'change in law' occurred on December 11, 2009/December 14, 2009, i.e., post the Cut-Off Date. Hence, any benefits that have accrued to the Successful Bidder, ought to be passed on to the Procurer.

Issue

The issue framed for consideration was whether the Press Release would amount to 'law' as defined in terms of article 1.1 of the RFP/PPA, and, if so, whether the extant regime underwent a change from the date of issuance of the Press Release?

Findings of the Supreme Court

The Supreme Court dismissed the civil appeal holding that:

1. the Press Release does not fulfil the meaning of the word 'order' as understood in legal parlance and is only in the nature of a 'proposal' and not 'law' within the meaning of article 1.1. of the PPA;
2. there was no repeal of the 2002 Notification or supersession of the 2006 Policy. The Press Release clearly mentioned as to what was envisaged and conditions that were to be replaced and removed. The Press Release did not alter/amend/repeal the existing law as on October 1, 2009, and was at best an announcement of a proposal, which had to be given shape after fulfilment of certain conditions. The Customs Act, 1962 requires that grant of an exemption would only be through a notification. It is only by way of the 2009 Amended Notification that the Press Release was implemented;
3. with regards to the appellants' contention that no notice for 'change in law' was issued, in terms of the PPA, article 13.3 of the PPA requires only the seller to issue a notice if it is beneficially affected by 'change in law', not the Procurer. Further, post the 'change in law' i.e., on December 11, 2009/December 14, 2009, there is a reduction in the customs duty which will inure to the benefit of the appellant-seller and in terms of article 13.1.1 of the PPA, such benefit ought to be passed on to the respondents;
4. interpreting article 1.1 and article 13 of the PPA, it is clear that the Press Release does not fall within the definition of the term 'law' for the purposes of 'change in law' compensation. Since the terms of the PPA are clear, there is no need to apply the test of 'business efficacy' in order to interpret the PPA; and

⁵ Petition No. 30 of 2012

⁶ C.A. No. 8478 of 2014

5. the doctrine of promissory estoppel is irrelevant since the Procurer is not a 'promisor'. Further, the Press Release is, at best, a promise by the Union of India and not any alteration of the law. Even if it is assumed that the Press Release is a promise, the Union of India has not been arrayed in any litigation to enforce the promise.

Conclusion

The Supreme Court has reiterated that PPAs, being commercial contracts agreed between parties, ought to be interpreted strictly. Further, it was clarified that press releases/cabinet decisions do not have the force of 'law', unless they have been implemented in terms of the prescribed procedure under applicable law. While the aspect of promissory estoppel regarding a press release was touched upon, it noted that the Procurer was not the promisor, and hence no 'change in law' against the Procurer is made out.

Power Sector

JSA is the leading national practice in the power sector – conventional and non-conventional. JSA provides legal services at all stages of the value chain in the sector - across the spectrum of contractual, commercial, policy, regulatory and legal issues. We represent clients in all segments: generation, transmission, distribution and trading. JSA serves its clients by transaction-specific integrated teams across various locations and practice areas (Banking & Finance, Mergers & Acquisition and Private Equity, Projects and project related contracting, Dispute Resolution, Taxation, Regulatory proceedings and Policy advisory).

JSA has been regularly engaged in; (a) providing policy advice to Governments of Bangladesh and Maldives, as also the Government of India besides various Indian states. Also, JSA partners have presented expert testimony to the Parliamentary Standing Committees and the Forum of Regulators on challenges faced by the power sector and proposed legislative and policy changes, development financial institutions like the World Bank, the Asian Development Bank, DfID, USAID regulatory authorities and industry bodies; (b) advising project developers, investors, suppliers and contractors on commercial / transactional issues and all aspects of licensing, market structures, competition, performance standards and tariffs; (c) advising financial institutions and borrowers in relation to financing transactions; (d) Advising clients on sustainable development issues like clean development mechanism and environmental compliances; and (e) specialised dispute resolution.

This Prism has been prepared by:



Abhishek Munot
Partner



Kunal Kaul
Partner



Samikrith Rao
Senior Associate



Purvi Shrivastava
Associate



18 Practices and
25 Ranked Lawyers

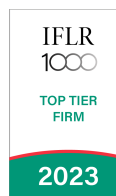


7 Ranked Practices,
16 Ranked Lawyers

Elite – Band 1 -
Corporate/ M&A Practice

3 Band 1 Practices

4 Band 1 Lawyers, 1 Eminent
Practitioner



12 Practices and
42 Ranked Partners
**IFLR1000 APAC
Rankings 2023**

Banking & Finance Team
of the Year

Fintech Team of the Year

Restructuring & Insolvency
Team of the Year



14 Practices and
38 Ranked Lawyers



20 Practices and
22 Ranked Lawyers



Ranked Among Top 5 Law Firms in
India for ESG Practice



Recognised in World's 100 best
competition practices of 2024



Among Top 7 Best Overall
Law Firms in India and
11 Ranked Practices

11 winning Deals in
IBLJ Deals of the Year

12 A List Lawyers in
IBLJ Top 100 Lawyer List

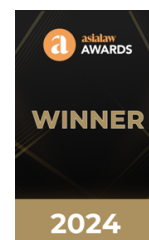


Asia M&A Ranking 2024 – Tier 1

Employer of Choice 2024

Energy and Resources Law Firm of
the Year 2024

Litigation Law Firm of the Year
2024



Energy - Law Firm of
the Year (APAC)



7 Practices and
3 Ranked Lawyers

For more details, please contact km@jsalaw.com

www.jsalaw.com



Ahmedabad | Bengaluru | Chennai | Gurugram | Hyderabad | Mumbai | New Delhi



This prism is not an advertisement or any form of solicitation and should not be construed as such. This prism has been prepared for general information purposes only. Nothing in this prism constitutes professional advice or a legal opinion. You should obtain appropriate professional advice before making any business, legal or other decisions. JSA and the authors of this prism disclaim all and any liability to any person who takes any decision based on this publication.