

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CAV ON 19/12/2014

DATED: 24 / 02 /2015

CORAM

THE HONOURABLE MR.JUSTICE C.S.KARNAN

W.P.No.16008 of 2014

&

M.P.No.1 of 2014

M/s.Ind Barath Energy (Utkal) Limited,
Having its Corporate Office at
No.20 (Old No.129), Chamiers Road,
Nandanam,
Chennai - 600 035.
Rep. by its President
(Commercial & Legal)

...Petitioner

Vs.

1. M/s.Power Grid Corporation of India Ltd.,
Rep. by its Chairman & Managing Director,
"Saudamini" Plot No.2, Sector No.29,
Gurgaon - 122 001.
State of Haryana.
2. The Chief Operating Officer,
(Central Transmission Utility),
"Saudamini", Plot No.2, Sector No.29,
Gurgaon - 122 001.
State of Harayana.
3. The Tamil Nadu Generation and Distribution
Corporation Limited (TANGEDCO),
Rep. by its Chairman and Managing Director,
No.144, Anna Salai,
Chennai - 600 002.
4. K.S.K.Mahanadhi Power Co. Ltd.
8-2/293/82/A/431/A,
Road No.22, Jubilee Hills,
Hyderabad - 500 033.

5. M/s.Jindal Power,
Plot No.2, Tower-B,
Sector 32, Gurgaon,
Haryana - 122 001.
6. M/s.Bharath Aluminium Company Limited,
(BALCO),
Balco Nagar, Korba 495450,
Chattisgarh.
7. M/s.D.B.Power Ltd.,
No.813, Udhyog Vihar,
Phase V, Gurgaon - 122 016.
Haryana.
(R-4 to R-7 impleaded as per order
dated 18.11.2014
in M.P.No.2 of 2014 in W.P.No.16008 of 2014)

...Respondents

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India for a Writ of Mandamus, to direct the respondents 1 and 2 herein to forthwith enter into the Long Term Open Access Agreement and the Transmission Service Agreement with the petitioner for evacuation of 500 MW of Electrical Energy under Long Term Open Access for a period of 15 years from its Power Generation Station at Sahajbahal Village, Jharsuguda District, Orissa pursuant to the letter of approval dated 20.12.2013, to the drawl point of TANGEDCO within the State of Tamil Nadu.

For Petitioner : Mr.A.R.L.Sundaresan,
Senior Counsel &
M/s.A.L.Gandhimathi

For Respondents : Mr.R.Thiyagarajan,
Senior Counsel
for Mr.V.Kalyanaraman
for R1 and R2

Mr.R.Sankaranarayanan for R4

Mr.S.Silambanan, Senior Counsel
for Mr.V.Adhivaradhan for R7

O R D E R

The petitioner submits that the petitioner's company had been duly incorporated under the Companies Act, 1956. Inter-alia, it carries on business in generation of Electrical Energy. The petitioner has its coal based power generating plant at Sahajbahal

Village, Jharsuguda District, Orissa State with a generation capacity of 2 x 350 MW. Initially, on 24.02.2010, a Long Term Open Access Agreement was entered into between the petitioner herein and three other Long Term Transmission customers and the first respondent herein for Long Term Open Access for supply of energy to the Western Region and Northern Region of the country on the long term basis. The petitioner further submits that while the matter stood thus, the third respondent herein was in acute need of electrical energy for maintaining supply with the State of Tamil Nadu and called for Tenders from various independent Power Projects for supply of energy on long term basis. The petitioner participated in the Tender and ultimately, on 18.07.2013, the third respondent herein had issued Letter of Acceptance in favour of the petitioner to procure 500 MW of power for a period of 15 years with effect from 01.10.2013 with a grace period upto February 2014.

2. The petitioner further submits that immediately on receipt of the Letter of Acceptance dated 18.07.2013, petitioner herein applied to the second respondent herein on 31.07.2013 bringing to his notice that in spite of best efforts, petitioner could not establish Power Purchase Agreements with beneficiaries in Western Region and Northern Region and in the meanwhile, the third respondent had issued Letter of intent for procuring 500 MW of power for 15 years and hence, requested the respondents to consider evacuation / discharge of power generated by the petitioner to Southern Region, viz., to the third respondent herein without any commercial implication on the petitioner. The petitioner further submits that pursuant to the bidding procedure and the letter of intent on 08.08.2013, the power purchase agreement was entered into between the petitioner and the third respondent herein for supply of 500 MW of power for a period of 15 years and the said Power Purchase Agreement still continues in force. The petitioner further submits that on 12.08.2013, petitioner addressed a letter to the second respondent herein furnishing a copy of the said Power Purchase Agreement dated 08.08.2013 and requested the second respondent to consider the Long Term Open Access for the same. The second respondent, by letter dated 23.09.2013, stated that the commissioning of Solapur-Raichur 765 KV 2 x Single Circuit lines shall enable synchronizing operations of Southern Region with new grid and it will also enhance their original capacity and the transfer capability was determined with these lines and a meeting was proposed to be held on 03.10.2013 at New Delhi. The petitioner further submits that in the annexure to the notice of the said meeting, it was duly incorporated that applications had been received from the petitioner for Open Access for 500 MW at Jharsuguda Pooling Station Injection point for supply of Energy to the drawal by TANGEDCO and that the Jharsuguda District, Orissa was sought for from 01.02.2014 to 30.09.2028.

3. The petitioner further submits that another meeting was proposed to be held on 23.11.2013 by the second respondent herein and in the agenda for the said meeting also, the request of the petitioner for Long Term Open Access was included. The petitioner submits that under letter dated 03.12.2013 addressed to the first respondent herein had submitted another copy of the Long Term Power Purchase Agreement entered into by the third respondent and requested for shifting the target region from the Northern Region and Western Region to Southern Region. Even though, the petitioner had already applied for the same as early as 31.07.2013, to put it in the proper form, the application in the prescribed form was submitted by the petitioner under cover of the letter dated 03.12.2013 and petitioner requested the first respondent herein to grant the Long Term Access (LTA). The first respondent herein, on a consideration of the petitioner's application for grant of Long Term Open Access vide its proceedings dated 20.12.2013 stated that the request was examined by the Central Transmission Utility along with other such requests and studies were carried out for the same and it was agreed in the Joint Standing Committee that LTA may be granted after 6 months on synchronization of Southern Region with new grid, namely first August 2014 and that LTA of 500 MW from the petitioner to the third respondent would be granted subject to signing of the requisite LTA and signing of Transmission Service Agreement (TSA) and fulfillment of other conditions as mentioned in the enclosed intimation letter.

4. The petitioner further submits that the petitioner is ready and willing to sign the LTA Agreement and Transmission Service Agreement, but is awaiting the draft to be sent by the respondents 1 and 2 herein. All other conditions which have been stipulated by the respondents 1 and 2 are also either fulfilled or petitioner is ready to fulfill the same before signing the LTA Agreement. However, the petitioner has now come to understand that in the meetings which were held on 28.03.2014 and 21.05.2014 by the first respondent herein, issue had been raised as though petitioner had applied subsequent to certain other applications and hence, prorata evacuation access alone should be given to the petitioner. The petitioner further submits that first respondent herein, in spite of having given a firm letter of approval to the petitioner for the Long Term Access for 500 MW of power with effect from 01.08.2014, appears to be considering reduction of the sanctioned capacity to the petitioner. The petitioner further submits that if any reduction in the Long Term Access for the petitioner is done by the respondents 1 and 2 herein, grave prejudice and untold hardship would be caused to the petitioner as also to the third respondent herein.

5. The petitioner further submits that in the above circumstances, it does not have any other alternative efficacious remedy, except to approach this Court by way of writ petition under Article 226 of the Constitution of India seeking the aforesaid relief. The petitioner further submits that the application of the petitioner for Long Term Access in Southern Region for supply of electrical energy to the third respondent was submitted as early as on 31.07.2013 pursuant to the letter of intent granted by the third respondent on 18.07.2013 for procuring power to the tune of 500 MW for a period of 15 years. The Power Purchase Agreement was entered into between the petitioner and the third respondent herein on 08.08.2013. For the purpose of giving effect to the said Power Purchase Agreement which is in the larger interest of the third respondent herein and the industrial and residential population in the State of Tamil Nadu, necessary corridor for evacuation of power from the generation Station to TANGEDCO's drawal point is necessary. The respondents 1 and 2 herein are bound to take into consideration the interest of the third respondent as well. If there is any pro rata reduction in the quantum of access, the third respondent and the people in the State will be greatly affected.

6. The petitioner further submits that he had submitted a copy of the Power Purchase Agreement to the respondents 1 and 2 herein on 12.08.2013 itself. The request of the petitioner was duly considered in the meeting held by the first respondent herein on 03.10.2013 and 23.11.2013 and petitioner submitted the application in the prescribed form for the said purpose of satisfying the ministerial requirements to keep the application in the proper form. Considering all these facts and circumstances the available capacity, the respondents 1 and 2 herein had taken a firm decision to grant Long Term Access to the petitioner on 20.12.2013. Therefore, the proposed reduction is arbitrary, illegally unjust and unsustainable in law. Hence, the above writ petition has been filed to direct the respondents 1 and 2 to enter into a Long Term Open Access Agreement and the Transmission Service Agreement with the petitioner for evacuation of 500 MW of electrical energy under a Long Term Open Access for a period of 15 years from its Power Generation station at Sahajbahal Village, Jharsuguda District, Orissa pursuant to the letter of Approval dated 20.12.2013 to the drawal point of TANGEDCO within the state of Tamil Nadu.

7. The same petitioner has filed another writ petition in W.P.No.28024 of 2014 against the same respondents with a different prayer. Therefore, the respondents 1 and 2 have filed common counter affidavit for the above writ petition in W.P.No.16008 of 2014 and W.P.No.28024 of 2014. Hence, this Court is treating the common counter statement in the above writ petition also.

8. The Deputy General Manager, CTU of the first respondent has filed a common counter statement on behalf of the second respondent also. The respondent submits that the present writ petition is not maintainable in law in as much as the petitioner has not exhausted the efficacious and alternative remedy available to them by approaching the Central Regulatory Commission under Section 79 of the Electricity Act, 2003. On this ground alone, the writ petition is liable to be dismissed. It is pertinent to bring to the notice of this Court that the issue relating to grant of Long Term Open Access is sub judice on the file of the Central Electricity Regulatory Commission in respect of petitions filed by the sixth and seventh respondents, viz., M/s.Bharath Aluminium Company Limited and M/s.D.B.Power Ltd.

9. The respondents additionally stated that before traversing the various allegations contained in the affidavit filed in support of the writ petition, few facts are stated hereunder for proper appreciation of the case on hand. The respondents 1 and 2 further submit that a comprehensive transmission system was evolved by the Central Transmission Utility and Central Electricity Authority for direct evacuation / dispatch of power from the respective generating units to the pooling points through inter-state transmission system by way of Long Term Open Access (LTOA) to the Independent Power Producers (IPP) like the petitioner company. The respondents 1 and 2 further submit that the common transmission system to evacuate and dispatch of power to respective beneficiaries from the generating projects were finalized in consultation with the Central Electricity Authority, Constituents, State Transmission Utility, POSOCO and the concerned IPPs. The respondents 1 and 2 further submit that the petitioner company was granted Long Term Open Access for a period of 25 years for evacuation of 700 MW at Jharsguda, Orissa District for the target beneficiaries of Western Region and Northern Region. As per the LTOA Agreement, entered into between the petitioner and the respondent Corporation, the petitioner shall generate 350 MW of power in respect of Unit 1 by December 2011 and 350 MW of power in respect of Unit 2 by February 2012.

10. The highly competent senior counsel Mr.R.Thiyagarajan appearing for the respondents 1 and 2 submits that the third respondent herein floated tenders for purchase of 500 MW RTC power through long term tender for a period of 15 years with effect from 01.10.2013 to 30.09.2028. It is learnt that the petitioner's company bid was accepted by the third respondent. On 31.07.2013, the petitioner addressed a letter to the second respondent stating that the third respondent had issued a letter of acceptance in favour of the petitioner. The letter dated 31.07.2013 addressed by the petitioner cannot be treated as an application in

the eyes of law, but the application has to be submitted in the prescribed format along with necessary application fee and relinquishment charges in accordance with Regulation 12 read with Regulation 18 of Central Electricity Regulatory Commission (Grant of Connectivity, Long-Term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 (Connectivity Regulations, 2009). The application in the prescribed format was submitted under cover of letter dated 03.12.2013 is self serving and cannot be over looked. The petitioner cannot have any right to seek for an issuance of a Long Term Access for transfer of Region in the terms of letter dated 31.07.2013.

11. The highly competent senior counsel Mr.R.Thiyagarajan appearing for the respondents 1 and 2 further submits that the fifth respondent, viz., M/s.Jindal Power, was allotted 150 MW as against 400 MW. Likewise, the fourth respondent, viz., K.S.K.Mahanadhi Power Company Limited was allotted 179 MW as against 500 MW. The sixth respondent, viz., M/s.Bharath Aluminium Company Limited was allotted 36 MW as against 100 MW. These allotments were made on pro rata basis. Further more, these allotments were made to the eligible and qualified applicants. No allocation was made in favour of the seventh respondent, viz., M/s.D.B.Power Limited since their application was received in the month of January 2014. In the instant case, the application in the prescribed format was received on 03.12.2013 i.e., after November 2013. Further, as per the said Rule, the application shall be processed on "first-com-first-served basis". The respondents 4 to 6 have submitted in the prescribed format during the month of November 2013. Applying Rule 24.1.1, the respondents 4 to 6 were considered and allotment was made on pro rata basis on 22.09.2014. The petitioner's application was received only on 03.12.2013, therefore, it was not considered as per Rule. The petitioner stated that the application was made on 31.07.2013, which is factually incorrect. Further, the above writ petition was admitted by this Court and no interim order has been passed and as such, the respondents 1 and 2 are not prevented from passing the impugned order.

12. The highly competent senior counsel Mr.R.Thiyagarajan appearing for the respondents 1 and 2 further submits that aggrieved by the proceedings dated 22.09.2014, the seventh respondent had approached the Central Electricity Regulatory Commission by filing a petition and sought for a direction to grant Long Term Access to it on pro-rata basis . By an order dated 01.10.2014, the Commission directed that the Long Term Access granted by this respondent vide letter dated 22.09.2014 shall not be given effect to till further orders. Under these

circumstances, the Kerala State Electricity Board also filed an application before the Commission under petition No.92/MP/2014, alleging arbitrary denial of Medium Term Open Access in violation of the provisions of the Regulations. The highly competent counsel further submits that the petitions filed by the seventh respondent and the Kerala State Electricity Board were heard by the Commission and the Commission has reserved orders in the said petitions. Likewise, the petitioner ought to have approached the Commission for redressal of his grievance. Therefore, the above writ petition is not maintainable before this Court and also violating the Article 14 of the Constitution of India. Hence, the highly competent senior counsel for the respondents 1 and 2 entreats the Court to dismiss the above writ petition.

13. The highly competent counsel Mr.R.Sankaranarayanan appearing for the fourth respondent submits that the petitioner has put up a power generation plant and had applied for a long Term Open Access in Western and Northern Region, but later expressed its intention to seek a Long Term Open Access in the Southern Region for which, a letter was given on 31.07.2013, but their application was not considered by applying the principle "first-come-first-served-basis". The above writ petition is filed for a direction to direct the respondents 1 and 2 to enter into a Long Term Open Access Agreement with the petitioner for evacuating 500 MW of electrical energy. This Court was pleased to admit the writ petition, but declined to grant interim order restraining the respondents 1 and 2 since there is no prima facie case. As such, the respondents 1 and 2 have been permitted to proceed further on their proceedings, accordingly, the first respondent had passed an impugned order and giving direction on Long Term Open Access to the respondents 4, 5 and 6, which is valid. Further, the above writ petition is not maintainable. The highly competent counsel further submits that if the petitioner is aggrieved by the impugned order, their remedy is before an Appellate Authority i.e., the Central Electricity Regulatory Commission. Now, the seventh respondent had already approached the said Commission on the same issue. Now, the appellate authority posted the matter for orders. The first respondent empowers Central Transmission Utility to undertake transmission of electricity through inter-State Transmission System.

14. The highly competent counsel appearing for the fourth respondent submits that the fourth respondent participated in a tender floated by the third respondent inviting bids for supply of electrical energy to the State of Tamil Nadu. The fourth respondent had to seek the approval of Central Transmission Utility, from changing from one Region to another i.e., from Western Region to Southern Region. The fourth respondent had filed a an application

in the prescribed format on 29.11.2013, similarly application has been filed by the petitioner later and in point of time i.e., on 03.12.2013. The acceptance of a Long Term Open Access shall be only in accordance with the law. In the instant case, there can be no estoppel against the statute. The first respondent passed its order subject to the contents of the writ petition which does not add to the legitimacy to the claim of the petitioner, hence the highly competent counsel requests the Court to dismiss the above writ petition.

15. The highly competent senior counsel Mr.S.Silambanan appearing for the seventh respondent submits that the petitioner's application for grant of Long Term Open Access should be treated to have been submitted in the month of August 2013, when it had furnished a copy of the Power Purchase Agreement to the second respondent and requested the second respondent to consider the Long Term Open Access for the same. Therefore, the decision of the first and second respondents to treat the petitioner's application as having been received only in December 2013 is illegal and arbitrary in fashion. Further, the above writ petition is not maintainable since the Central Electricity Regulatory Commission constituted under the Electricity Act, has the jurisdiction to adjudicate on the issues and the reliefs prayed for in the present writ petition. The entire subject matter covered by Section 79 of the Electricity Act. The highly competent senior counsel further submits that the petitioner is a generating company and the first respondent is a transmission licensee and the dispute raised by the petitioner in the above writ petition i.e., non-allocation of Open Access is in connection with Inter-State Transmission of Electricity and thus the facts of the case covered under Section 79 of the Act. Therefore, the petitioner shall approach Central Electricity Regulatory Commission. Therefore, the writ petition is a misconceived one. The seventh respondent has approached the Central Electricity Regulatory Commission, New Delhi on this issue, now the matter is posted for orders. The petitioner has not sought any relief against the seventh respondent. Further, the first respondent had initially granted Long Term Access to the seventh respondent, on 01.10.2009 for a total quantum of 705 MW from the Power Plant with target beneficiaries in Western Region and Northern Region and also executed a Bulk Power Transmission Agreement with the seventh respondent on 24.02.2010. The seventh respondent has also executed a Long Term Power Purchase Agreement dated 19.08.2013 with the third respondent for supply of 208 MW for a continuous period of 15 years. The seventh respondent has sent a letter dated 23.08.2013 to the first respondent stating that since the seventh respondent already has Long Term Access for Western Region and Northern Region and the same may be changed to Southern Region, for which, the seventh respondent adhered to the prescribed

form. The relief prayed for by the petitioner for allocation for the entire grant of 500 MW would amount to taking an unfair advantage by the petitioner. Hence, the highly competent senior counsel entreats the Court to dismiss the above writ petition.

16. Considering the facts and circumstances of the case and arguments advanced by the highly competent counsels for their respective parties and on perusing the typed-set of papers, this Court is of the view that the writ petitioner has filed the above writ petition and sought for a direction to respondents 1 and 2 to enter into the Long Term Open Access Agreement and the Transmission Service Agreement with the petitioner's company for evacuation of 500 MW of Electrical Energy under Long Term Open Access for a period of 15 years from its Power Generation Station at Shajbahal Village, Jharsuguda District, Orissa. While the above writ petition is pending, the second respondent herein passed an impugned order dated 22.09.2014. The impugned order is a consequence of a previous course of action taken. Now, the impugned order dated 22.09.2014 passed by the second respondent is quashed as prayed for by the petitioner in the connected writ petition in W.P.No.28024 of 2014. Therefore, the above writ petition is not required since the petitioner has been granted relief in the connected writ petition in W.P.No.28024 of 2014. This Court's further view that the writ petitioner has filed the above writ petition along with miscellaneous petition in M.P.No.1 of 2014 in W.P.No.16008 of 2014, for interim injunction restraining the respondents 1 and 2, which is pending on the file of this Court. Under the circumstances, the second respondent, an Executive Officer passed an impugned order which is not fair and he has to await, until the disposal of the interim injunction petition, since he is an Executive Authority functioning under the Judiciary, which is the highest functional aspect via the Indian Constitutional make up.

17. In the result, the above writ petition is disposed. There is no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

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To

1. The Chairman & Managing Director,
M/s.Power Grid Corporation of India Ltd.,
"Chowdamani" Plot No.2, Sector No.29,
Gurgaon - 122 001.
State of Haryana.

2. The Chief Operating Officer,
(Central Transmission Utility),
Chowdamani Plot No.2, Sector No.29,
Gurgaon - 122 001.
State of Harayana.

3. The Chairman and Managing Director,
The Tamil Nadu Generation and Distribution
Corporation Limited (TANGEDCO),
No.144, Anna Salai,
Chennai - 600 002.

1 CC to Mr.R.Sankaranarayanan, Advocate SR.No. 10540

1 CC to M/s.A.L.Gandhimathi, Advocate SR.No. 10100

1 CC to M/s.Aiyar & Dolia, Advocate SR.No. 10017

1 CC to M/s. Seshadri, Advocate SR.No. 10147

W.P.No.16008 of 2014 &
M.P.No.1 of 2014

SSI (CO)
PSI (09.04.2015)

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