

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.28024 of 2014 &
M.P.Nos.1 and 2 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)
Mr.R.Jarard Kishore ... Petitioner

Vs.

1. M/s.Power Grid Corporation of India Ltd.,
Rep. by its Chairman & Managing Director,
"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 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, Udhog Vihar,
Phase V, Gurgaon - 122 016.
Haryana.

... Respondents

(R-5 to R-7 impleaded as per order
dated 18.11.2014
in M.P.No.3 of 2014 in W.P.No.28024 of 2014)

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India for a Writ of Certiorarified Mandamus, to call for the records of the second respondent herein relating to the proceedings dated 22.09.2014 and quash the same in so far as it relates to treating the letter dated 20.12.2013 in favour of the petitioner as null and void and allocate 500 MW capacity of evacuation to the petitioner for supply of Electrical Energy to the third respondent herein pursuant to the letter dated 20.12.2013.

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 short facts of the case are as follows:-

The petitioner, viz., Mr.R.Jarard Kishore, who is the President (Commercial & Legal), of M/s.Ind Barath Energy (Utkal) Limited, stating that the petitioner's company was duly incorporated under the Companies Act. Inter-alia, it carries on business in generation of Electrical Energy. It has one of its Plants 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. 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 that erection of balance 16 Towers in the said Regions were also pending and in the meanwhile, the third respondent had issued Letter of intent for procuring 500 MW of power for 15 year 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 in 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. Accordingly, Transmission Service Agreement (TSA) was signed by the petitioner with the first respondent on 19.08.2014.

4. The petitioner further submits that while petitioner was always ready and willing to sign the Transmission Service Agreement and was awaiting the final allotment order from the second respondent herein, petitioner came 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 on 20.02.2013 for long term access for 500 MW of power with effect from 01.08.2014, appears to have been considering reduction of the sanctioned capacity to the petitioner. As any such reduction of the sanctioned capacity for the long term access for the petitioner would cause grave prejudice and hardship and jeopardy to the petitioner as well as the third respondent herein, which was the recipient of the energy which was to be supplied by the petitioner under the Power Purchase Agreement which had been entered into by the petitioner on 08.08.2013. Petitioner was constrained to file a writ petition in W.P.No.16008 of 2014 before this Court praying for a writ of mandamus directing the respondents 1 and 2 to enter into the Long Term Open Access Agreement and Transmission Services Agreement with the petitioner in terms of the letter of approval dated 20.02.2013 for evacuation of 500 MW of Electrical Energy under Long Term Open Access for a period of 15 years from the Power Generation Station at Sahajbahal Village, Jharsuguda District, Orissa to the State of Tamil Nadu. The petitioner also filed a petition for interim injunction to restrain the respondents 1 and 2 herein from in any manner reducing the

sanctioned Long Term Open Access for the petitioner pursuant to the letter of approval dated 20.02.2013.

5. The petitioner further submits that the standing counsel for the respondents had taken notice in the said writ petition and the writ petition was adjourned from time to time and is still pending in this Court. While matter stands thus, to the shock and surprise of the petitioner, the second respondent herein held proceedings dated 22.09.2014 purporting to consider the applications received in November 2013 for long Term Access from new grid to Southern Region, has allocated 150 MW in favour of M.s.Jindal Power Ltd., 179 MW in favour of KSK Mahanadhi Power Ltd. and 36 MW in favour of M/s.BALCO. In paragraph 7 of the said proceedings, the second respondent has stated the earlier two letters of intimation dated 20.12.2013 and 07.03.2014 issued for Long Term Access to M/s.DB Power Limited, M/s.Indbarath Energy (Utkal) Ltd, BALCO and Jindal stands null and void. It was further stated that the petitioner has approached this Court with regard to the Long Term Access to the Southern Region. Therefore, this may undergo changes of its final output. As such, the second respondent was fully aware of the fact that the writ petition was still pending before this Court and the notice had been taken on behalf of the second respondent and decision of this Court will have an impact on the allocation of capacity to be made, yet went ahead to allocate the capacity available in favour of others without considering the application of the petitioner and on the other hand, treating the letter dated 20.02.2013 issued in favour of the petitioner as null and void. The same is clearly an abuse of power by the second respondent herein and a clear case of interference with the administration of justice.

6. The petitioner further submits that on account of the subsequent proceedings dated 22.09.2014, petitioner is constrained to file the present writ petition before this Court. In the statement of reasons annexed to the said order, the second respondent has stated that as per the amended Regulation 12 of CERC Regulations provided "that a Generating company after firming up the beneficiaries through signing of Long Term Power Purchase Agreement(s) shall be required to notify the same to the nodal agency along with copy of PPA" petitioner herein notified the second respondent that it has signed the Power Purchase Agreement with Tamil Nadu in the month of August 2013 and as such, the petitioner's application was in order for being considered and processed. However, the second respondent purporting to place reliance on the proviso to Regulation 12 of CERC Regulations "Provided also that in cases where there is no material change in location of the applicant or change by more than 100 MW in the quantum of power to be interchanged using the Inter State Transmission system or change in the region from which electricity is to be procured or to which supplied, a fresh application shall be made, which shall be considered in accordance with these regulations", has sought to treat the petitioner's application as having been received in December 2013 and hence, cannot be considered

as an application for first-cum-first-served basis for the month of November 2013 and as a consequence, has made allotment in favour of the fourth respondent herein, while it should have been granted in favour of the petitioner herein. The petitioner further submits that the letter dated 20.12.2013 was given in favour of the petitioner by the second respondent herein after examining the request of the petitioner along with such other request which were pending with them and studies carried out for the same. While the letter itself was granted in favour of the petitioner for allotment of Long Term access to the petitioner on 20.12.2013, by no stretch of imagination, petitioner can be considered as having submitted the application itself only in December 2013. Petitioner further submits that the impugned order treating the letter dated 20.12.2013 in favour of the petitioner as null and void, is arbitrary, illegally unjust, unsustainable in law and vitiated and has been passed only to enable an allotment in favour of the fourth respondent. It is a clear abuse of process of power. The same is violative of Article 14 of the Constitution of India. Hence, the petitioner has filed the above writ petition.

7. The respondents 1 and 2 have filed a common counter statement and resisted the above writ petition. The Deputy Manager, who is attached to the first respondent herein has filed this counter statement on behalf of both the respondents. He submits that the present writ petition is not maintainable in law as the petitioner has not exhausted the efficacious and alternative remedy available to them by approaching the Central Electricity 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 files of the Central Electricity Regulatory Commission in respect of petitions filed by sixth and seventh respondents. The respondents 1 and 2 further submit 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.

8. The respondents 1 and 2 further submit that as the matter stood thus, the third respondent herein floated tenders for purchase of 500 MW RTC power through long term tender for a period of 15 years 01.10.2013 to 30.09.2028. It is learnt that the petitioner company participated in the tender process and the offer made by the petitioner-Company in the financial bid was accepted by the third respondent. By the proceedings dated 18.07.2013, as could be seen from the typed-set of papers filed by the petitioner Company, while accepting to procure 500 MW RTC Power from it, the third respondent called upon the petitioner to accept the Letter of Intent. The respondents 1 and 2 further submit that on 31.07.2013, the petitioner addressed a letter to this respondent stating that the third respondent has issued letter of acceptance in its favour to obtain 500 MW power for 15 years and in that behalf requested for evacuation / dispatch of power to Southern Grid without any implication to it. He further submits that the letter dated 31.07.2013 addressed by the petitioner cannot be treated as an application in the eyes of law. The respondents 1 and 2 further submit that the application has to be submitted in the prescribed format along with necessary application fees and relinquishment charges, in accordance with Regulation 12 read with Regulation 18 of General 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). In para 11 of the affidavit, the petitioner had candidly admitted that the application in the prescribed form was submitted only on 03.12.2013 requesting for grant of Long Term Access. When such is the position it is incorrect on the part of the petitioner to allege that application for change in target region was submitted on 31.07.2013. The averment that application in the prescribed format was submitted under the cover of the letter dated 03.12.2013 is self serving and cannot be overlooked. Therefore, what is contained in para 11 of the affidavit to the extent that it had already submitted application on 31.07.2013 is hereby factually incorrect and the petitioner is put to strict proof of the same. In as much as the letter dated 31.07.2013 and 12.08.2013 cannot be construed as an application in the eye of law, the petitioner cannot have any right to seek for issuance of Long Term Access for transfer of Region in terms of the letter dated 31.07.2013. Further, the petitioner is well aware of the fact that its earlier application for granting long Term Open Access for Northern Region and Western Region was considered and others were also issued in favour.

9. The respondents 1 and 2 further submit that reference to Transmission Service Agreement dated 19.08.2014 in para 11 of the affidavit has nothing to do with the present claim and the same was executed with all the ISTS Licensees, Deemed ISTS Licensees, other

non-ISTS Licensees whose assets were certified as being used for interstate transmission by the Regional Power Committee and the Designated ISTS customers to govern the provisions of inter-state transmission service including sharing of transmission charges and losses amongst the DICs' and disbursing the transmission charges collected by CTU to respective ISTS licensees and other non-ISTS licensees as per the revenue sharing agreement. It is further submitted that the same was executed pursuant to the notification of the Sharing of Inter State Transmission Charges and Losses Regulation, 2010 which was notified by CERC in exercise of power conferred under Section 178 read with Part V of the Electricity Act, 2003. Hence, it is submitted that the said transmission service agreement does not pertain to evacuation of power from Eastern Region to Southern Region. The respondents 1 and 2 further submit that the respondents 4 to 7 participated in the tender invited by the State of Tamil Nadu for supply of electricity. In that behalf, on 29.11.2013, the fourth respondent submitted an application for grant of LTOA for evacuating 500 MW in the prescribed format for changing from Western Region to Southern Region with the necessary applicable fees during November 2013. Likewise, the fifth and sixth respondents submitted application for grant of LTOA for evacuating 500 MW and 100 MW respectively during the month of November 2013. The seventh respondent also submitted application for grant of LTOA for evacuating 208 MW in the prescribed format during that time. The respondents 1 and 2 further submit that at the meeting of the constituents held on 21.05.2014, it was decided that the date of submission of fresh application shall be considered while deciding priority of application and accordingly the applications received in November 2013 were considered. It is a fact that applications were submitted by respondents 4 to 6 during the month of November 2013 and their applications were considered and allocation was made to them on pro-rata basis. Admittedly, no application was made by the petitioner during the month of November 2013. Since the petitioner applied only in the month of December 2013, the intimation letter was withdrawn and fresh orders were issued to the eligible and qualified applicants. Therefore, the averments made in para 15 of the affidavit are hereby denied.

10. The respondents 1 and 2 further submit that the fifth respondent was allotted 150 MW as against 400 MW. Likewise, the fourth respondent was allotted 179 MW as against 500 MW. The sixth respondent was allotted 36 MW against 100 MW. The above said allotments were made on pro-rata basis. The respondents 1 and 2 further submit that no allocation was in favour of the seventh respondent because the application fees was received by this respondent only in the month of January 2014. The respondents 1 and 2 further submit that as far as the petitioner is concerned, the application in the prescribed format was received only on 03.12.2013. The respondents further submit that the applications submitted by the Independent Power Producers in prescribed format with necessary fees till November 2013 alone were taken into consideration for the

purpose of granting of LTOA from NEW Grid to Southern Region in terms of Rule 24 of the Procedure for making application for grant of connectivity in ISTS. As per the said Rule, the applications shall be processed on first come first served basis. As per Rule 24.1.1, the applications received during a month and upto the last date of the month shall be construed to have arrived concurrently. In the instant case, the applications in the prescribed format with necessary fees were submitted by respondents 4 to 6 during the month of November 2013. Applying the above said Rule, the applications of the respondents 4 to 6 were considered and allotment was made on pro-rata basis on 22.09.2014. The respondents further submit that the relevant Rule is extracted hereunder for better appreciation of the case on hand.

"24. PROCESSING OF APPLICATIONS

24.1 Assessing the adequacy of transmission capacity system strengthening requirement

24.1.1 The applications shall be processed on first-come-first-served basis. The applications received during a month and upto the last day of the month shall be construed to have arrived concurrently. In case of applications received by post, the date of receipt of application at POWERGRID office shall be considered as the date of application."

The respondents 1 and 2 further submit that paragraph 3 of the proceedings dated 22.09.2014 clearly spells out as to the allocation of power to LTOA and MTOA customers and the same justifies allocation of power to respondents 4 to 6 on pro-rata basis. Admittedly, the application of the petitioner in the prescribed format with requisite fee was received only on 03.12.2013. Therefore, the application of the petitioner was not considered in terms of the above said Rule. In para 11 of the affidavit, the petitioner has stated that the application was made on 31.07.2013, which is factually incorrect and the petitioner is put to strict proof of the same. The respondents further submit that there was no LTA application submitted by the petitioner-company on 31.07.2013 as claimed by it. The respondents further submit that when W.P.No.16008 of 2014 was moved for admission, notice was taken on behalf of this respondent and time was sought for filing counter. This Hon'ble Court was not inclined to grant any interim order which the petitioner sought for and insisted upon. Therefore, the petitioner cannot allege that merely because the writ petition is pending this respondent is prohibited from passing the impugned order. The averment of the petitioner that the present allocation in favour of the respondents 4 to 6 will have an impact on W.P.No.16008 of 2014 is false and denied. Further, allegation of the petitioner that treating the letter dated 20.12.2013 issued in its favour as null and void is an abuse of power by the second respondent and a clear case of interference with the administration of justice is incorrect and misleading. The respondents further

submit that the order dated 22.09.2014 has been issued in conformity with various Regulations and detailed procedures notified by the Central Regulatory Commission and the order of the Commission dated 08.08.2014 and 05.09.2014 in 92/MP/2014. Therefore, the allegations to the contrary are hereby emphatically denied.

11. The respondents 1 and 2 further submit that aggrieved by the proceedings dated 22.09.2014, the seventh respondent had approached Central Electricity Regulatory Commission under Section 79 (1)(c) of the Electricity Act, 2003 by filing petition No.376/MP/2014 and sought for a direction to grant Long Term Access to it on pro-rata basis out of the declared available transmission capacity that the Long Term Access granted by this respondent vide letter dated 22.09.2014, shall not be given effect to till further orders. It is also pertinent to point out here that Kerala State Electricity Board also filed an application before the Commission under Petition No.92/MP/2014 under Section 79(1)(c) of the Electricity Act, 2003 alleging arbitrary denial of Medium Term Open Access in violation of the provisions of the Regulations. The respondents further submit that the petitions filed by the seventh respondent and the Kerala State Electricity Board were heard by the Commission and the Commission has reversed orders in the said petitions. The respondents further submit that the issue relating to the proceedings dated 22.09.2014 is sub-judice before the Central Electricity Regulatory Commission. The petitioner ought to have approached the Commission for redressal of his grievance. The observation made in para 7 of the proceedings dated 22.09.2014 cannot be a ground for the petitioner to invoke the writ jurisdiction of this Court. The petitioner ought to have exhausted the alternative and efficacious remedy by approaching the Commission under Section 79 of the Electricity Act, 2003 and as such, cannot maintain the present writ petition. The respondents further submit that the filing of the present writ petition is hit by principles of Res Judicata.

12. The respondents 1 and 2 further submit that the averments contained in para 18 are the reasons for denial of Long Term Access to the petitioner and these accepts the contents placed on record pertaining to the statement of reasons dated 22.09.2014. As already stated in the meeting of the Constituents held on 28.03.2014 and 21.05.2014 it was decided that date of submission of fresh application shall be considered while deciding priority of application. Consequent upon the same, orders were issued to withdraw the intimations. The respondents further submit that the petitioner has averred that it had notified the second respondent that has signed the Power Purchase Agreement with Tamil Nadu in the month of August 2013 and as such, its application was an order in for being considered and processed. Such an averment is wholly incorrect. As already stated that the petitioner's application for transfer of Region was received only on 03.12.2013 and when such is the position, the averment that its application was in order for being considered and processed is misleading and incorrect. The respondents further

submit that already consequent upon the decision taken in the meeting of the Constituents held on 28.03.2014 and 21.05.2014 that the date of submission of fresh application shall be considered while deciding priority of application in granting Long Term Access, letter dated 20.12.2013 issued in favour of the petitioner was withdrawn. In this regard, the respondents further submit that the decision taken in the meeting held on 21.05.2014 is in conformity with 4th proviso to Rule 12 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. The same is extracted hereunder for perusal of this Court.

"Provided also that in cases where there is any material change in location of the applicant or change by more than 100 MW in the quantum of power to be interchanged suing the inter-State transmission system or change in the region from which electricity is to be procured or to be supplied, a fresh application shall be made, which shall be considered in accordance with these regulations."

The respondents further submit that a cursory reading of the letter dated 20.12.2013 is conditional in the sense that the Long Term Access may be granted after six months of synchronization of Southern Region Grid with New Grid and payment of necessary relinquishment charges under regulation 18 of the Connectivity Regulations, 2009. In this regard, the respondents submit that some elements in the Western and Southern Regions are yet to complete to enable scheduling of power on firm basis upto 1250 MW. The respondents further submit that the question of allotment of 500 MW to the petitioner-company is subject to completion of aforesaid mentioned transmission elements in Western and Southern Region to facilitate evacuation of power supply and payment of necessary relinquishment charges as mentioned above. The relief sought for by the petitioner is premature and is not entitled for the same. The respondents further submit that the impugned order is violative of Article 14 of the Constitution of India is hereby denied and the petitioner is put to strict proof of the same. As already stated, the application of the petitioner in the prescribed format for transfer of Region was received only on 03.12.2013 and the letter dated 31.07.2013 cannot be construed as an application in the eyes of law. The respondents further submit that the petitioner is making for grant of relief for allocating 500 MW capacity of evacuation for the supply of the electrical energy on the basis of the letter dated 20.12.2013 addressed by this respondent. The respondents further submit that the petitioner has suppressed material facts in the affidavit filed in support of the writ petition. A mere perusal of the letter dated 03.12.2013 would demonstrate that the petitioner had given a fresh application seeking transfer of Region (along with applicable fee for 500 MW of power supply) from Norther Region and Western Region to Southern Region for the period 01.02.2014 to 30.09.2028. Hence, the respondents 1 and 2 entreat the Court to dismiss the above writ petition.

13. The fourth respondent, viz., K.S.K.Mahanadhi Power Co. Ltd., has filed a counter statement and refuted the above writ petition. The fourth respondent submits that the petitioner seeks to quash the order of the second respondent dated 22.09.2014 in so far as it relates to treating the letter dated 20.12.2013 as null and void and to proceed to act in terms of the said letter. There is an effective and efficacious alternative remedy available to the petitioner to appeal before the Central Electricity Regulatory Commission ("CERC") New Delhi, which is a special body empowered under Section 79 of the Electricity Act, 2003 to regulate "inter-state transmission of power, to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-state operations". In fact, the order of CERC is subjected to an appeal before Appellate Tribunal for Electricity ("APTEL") and such order can be questioned only before the Hon'ble Supreme Court. The fourth respondent further submits that the writ petition is liable to be dismissed as the availability of an alternative remedy is suppressed in the affidavit filed in support of the petition and paragraph 19 of the said affidavit states that there is no alternative remedy. The fourth respondent further submits that the impugned order considers grant of open access to certain persons other than the fourth respondent and these persons have not been arraigned in this writ petition. The petition is therefore bad for non-joinder of necessary parties. The fourth respondent further submits that the Kerala State Electricity Board (KSEB) had objected to the consideration of the application for open access by following the earlier application even in the case of shifting of region. This objection is found in the meeting held on 28.03.2014. In paragraph 7 of the minutes of the meeting held on 28.03.2014, it is recorded that fresh LTA application alone should be considered and that LTA request from persons like the petitioner considered in continuation of the earlier granted LTA should be disregarded and that the first respondent should ask them to furnish fresh application. Reliance was placed on Fifth proviso to the Regulation 12(1) of Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Access and Medium Term Open Access in inter-state transmission and related matter) Regulations, 2009 (Regulations). This was considered by the first respondent. It is a matter of fact that KSEB was a party to these minutes and non-joinder of KSEB is fatal and writ petition deserves to be dismissed.

14. The fourth respondent further submits that the impugned order also dis-entitled another power generator, viz., DB Power Limited and the said company has filed an appeal before CERC and CERC has granted stay of the impugned order and the hearing is in progress. The filing of the instant writ petition has led to an anomalous situation where the impugned order is subjected to judicial review under the extraordinary jurisdiction of this Court and it is also subjected to scrutiny by another expert statutory body created specifically to hear the appeal and there is a possibility of

conflict of decisions. Even though the power of this Court is wide enough to entertain a writ petition normally in the back drop of the fact of this case, this Court would not entertain the writ petition based on principles of maintaining judicial comity. The prayer in this writ petition and the prayer in W.P.No.16008 of 2014 are similar and therefore, there are two writ petitions on the same subject. The fourth respondent further submits that their company incorporated under the Companies Act, 1956 with the object of generating power and it belongs to KSK Group of Companies. The respondent No.4 has gained enough experience, skill and expertise in the matter of generation of power and evacuating the same in accordance with law. The respondent No.4 has set up two units of 600 MW each in Chattisgarh and has proposal to set up further four units of 600 MW each. These two units have completely established, duly synchronized and the units have entered into commercial operation. The respondent No.4 has therefore filed necessary declarations and assurances before the authorities declaring that they are ready and willing to evacuate power on grant of open access. The fourth respondent originally planned to supply power in the Western region and had intimated the Central Transmission Utility (CTU) accordingly. The fourth respondent participated in a tender floated by the third respondent inviting bids for supply of electricity to the State of Tamil Nadu. The fourth respondent had to seek the approval of CTU for changing from one region to another, viz., from Western Region to Southern Region. The respondent filed on 29.11.2013, an application for grant of LTA in the prescribed form Format-LTA-2 along with requisite fees. The application in the required format with requisite fees was filed by the petitioner on 03.12.2013 i.e., later in point of time.

15. The fourth respondent further submits that the facts of this case can be understood better by considering the sequence of events commencing from September, 2013. The first respondent, by letter dated 23.09.2013 convened a meeting relating to synchronization of Southern Region with New grid. The meeting scheduled to be held on 23.11.2013. Item No.5 of the said agenda recorded that the second respondent had received requests for regularization of LTA by the petitioner and three other persons. It referred to a meeting held on 03.10.2013. As per item No.6, the LTA of the petitioner and three others, was agreed to be considered and the effective date of open access was proposed to be from 01.08.2014 to 30.09.2028. By letter dated 13.03.2014, grant of the LTA was again scheduled to be considered in a meeting to be held on 28.03.2014. In the said meeting, the application of this respondent, KSEB and two other persons were also agreed to be considered. The minutes of the meeting held on 28.03.2014, points out that KSEB objected to grant of open access to the petitioner and three others and the objections were based on true and proper construction of Regulation 12. The first respondent informed all concerned that they had sought clarification from CERC on the construction of Regulation 12. The fourth respondent further submits CERC was concerned in petition No.92/MP/2014 on the construction of CERC Regulations and its nature.

In the order passed on 08.08.2014, CERC held at paragraph 41 that the consideration of the application for grant of open access should ensure that proper documents are annexed to the application. In other words, CERC held that prescription of application format and payment of requisite fee was not an empty formality but one that is mandatory. The above petition was filed by KSEB questioning the grant of medium term open access and the law applicable is the same. The fourth respondent further submits that the first respondent woke up to the reality on hearing the arguments before CERC in the above matter persuaded by the decision of CERC in the same matter. The second respondent understood the nature of CERC regulation and thereafter insisted that a letter in an ordinary form without compliance of Regulation 12 would be in violation of the Regulations and it may be corrected by CERC in any appeal that may be preferred by the aggrieved party. It is in this background that the second respondent thought it fit to declare that the grant of open accesses to the petitioner and three others were contrary to law and held the same as null and void in the impugned order.

16. The fourth respondent further submits that in this context, it is relevant to deal with some of the provisions of the Electricity Act, 2003 and certain regulations framed thereunder. The Electricity Act, 2003 (Act) was introduced and the earlier laws were repealed as there was a paradigm shift in the power policy. The Act envisaged growth of electricity industry through private licensees. The new law contemplated establishment of utility at the centre as well as at State level and such utility would be a Government company having the responsibility of ensuring that the transmission network is developed in a planned and co-ordinated manner. It also provided for private transmission licensees. The Act provided for inter-state transmission and also intra-state transmission. The fourth respondent further submits that the supply of electricity generated by the respondent No.4 in Chattisgarh and to be supplied to respondent No.3 in Tamil Nadu, would fall under the category of Inter-State transmission. Such transmission would fall under Section 38 of the Act. Section 38 empowers the Central Government to notify any Government company as CTU. The first respondent is a Government company and it has been notified as the CTU. CTU should not engage in the business of generating of electricity or trading in electricity. Section 38(2) deals with the functions of CTU. Section 38(2)(a) empowers CTU to undertake transmission of electricity through inter-state transmission system. Section 38(2)(d) requires CTU to provide non-discriminatory open access to its transmission system for use by any licensees or generating companies on payment of transmission charge. The fourth respondent further submits that Electricity once generated at the power plant is injected into a power grid. This power grid is established by CTU or State Transmission Utility, as the case may be. The CTU provides transmission lines from the place of generation namely, the injecting point and connects with the delivery point, which may be in another state, if it is inter-state transmission. The transmission lines are provided based on the

demand. This issue becomes relevant because a change in the region of supply of power by a private generator from the one, originally envisaged is embedded with certain financial, administrative and national policy issues. In other words, if a power company originally informs that they would supply or their delivery point would be Western region but later on shifts to the Southern region, such a shift is of great consequence to CTU. This fact has a great bearing in the instant case.

17. The fourth respondent further submits that Section 76 of the Act deals with the constitution of CERC. Section 79 deals with the functions of CERC. Section 79(1)(c) requires CERC to regulate the inter-state transmission of electricity. Section 79(1)(f) empowers CERC to adjudicate upon disputes involving generating companies or transmission licensees in the matter of inter-state transmission of electricity amongst other items. The fourth respondent further submits that a transmission licensee as per Section 2(73) means a licensee authorized to establish or operate transmission lines. A licensee as per Section 2(39) is a person who has been granted license under Section 14. Respondent No.1, amongst its other activities, is a transmission licensee. The petitioner or for that matter respondent No.4 is a generating company. The dispute between the petitioner and the first respondent is therefore one that falls under Section 79(1)(f) of the Act. Section 178 of the Act empowers CERC to make regulations for the matters mentioned in Section 178 of the Act. CERC by notification dated 07.08.2009 framed Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Access and Medium Term Open Access in inter-state transmission and related matter) Regulation, 2009. Regulation 4 deals with nodal agencies. It states that the nodal agencies for the grant of connectivity, long term access and medium term open access to the inter-state transmission system is CTU. Regulation 5 contemplates filing of application for grant of connectivity and such application shall be made to the nodal agency. Regulation 6 postulates that the application referred to in Regulation 5 shall be accompanied by non-refundable application fee specified in the regulation. There is yet another provision of the above Regulations that should be considered, namely, Regulation 12, which deals with application for long term open. The Regulation 12(1) stipulates that the application for grant of long term open access should contain particulars and uses the word "and" the states that the application should contain such other details as may be laid down by CTU in the detailed procedure. There are several provisions to the said regulations. Fifth proviso to Regulation 12(1) deals with cases where there is any material change in the location of the applicant or change by more than 100 MW in the quantum of power to be inter changed using the inter-state transmission system or change in the region from which the electricity to be procured or supply. In such cases, a fresh application has to be made and same shall be considered in accordance with the Regulations. A change in the region to which the power is to be supplied comes under Fifth proviso. In the instant case, the

petitioner has in the case of the fourth respondent changed from Western Region to the Southern Region.

18. The fourth respondent further submits that in tune with Regulation 12(1), the other details referred to in Regulation 12(1) are set out in the detailed procedure laid down by CERC. CERC has thus prescribed the procedure for making application for grant of Long Term Open Access to inter-state transmission. The said procedure contains a format known as Format LTA-2. The said format consists of seven columns to be filled up. The sixth column calls for particulars of DD or cheque drawn for the purpose of complying Regulation 6 of the above regulations. The other columns are very relevant for the purpose of taking an informed decision on the application made by a generating company for grant of open access. In other words, the particulars are essential for the purpose of taking a decision. In the circumstances, it need not be over emphasized that Regulations 5 and 6 and Format LTA-2 are mandatory in nature. A simple letter seeking open access without furnishing the above particulars and without paying the application money is of no legal consequence. The fourth respondent further submits that a combined reading of all the above provisions would disclose that in the case of a change of region, where the power is to be supplied, has to be considered on a fresh application. The expression "application" occurring in the Fifth proviso to Regulation 12(1) has to be understood in the same manner as stated in Regulation 12(1). The application should contain the particulars referred to in Regulation 12(1) and also contain the other particulars set out in the detailed procedure namely, Form LTA-2. In the circumstances, it would be a misnomer to construe that a simple letter without containing any particulars and without complying Regulations 5 and 6 is but an apology to the application referred to in Regulation 12. It is trite law that when a statute prescribes that a matter should be done in a particular manner then it shall be done only in that manner and in no other manner. The fourth respondent further submits that the request dated 31.07.2013 was a simple letter of request and the petitioner, realizing that it does not conform to the legal requirements, filed proper application on 03.12.2013 together with required fee. The decision taken on 20.12.2013 was contrary to law and the second respondent did not consider the true width and scope of Regulation 12 while deciding on 20.12.2013. The second respondent after considering the decision of CERC and after hearing the objection of KSEB found merit in the contention and decided that the decision taken on 20.12.2013 was null and void. The fourth respondent further submits that the present writ petition cannot be maintained during the pendency of the earlier writ petition and both the writ petitions ignored the appeal provided under Section 79 of the Electricity Act, 2003. In fact, an aggrieved party by the impugned order filed an appeal before CERC and an interim stay of the impugned order was granted. The appeal was listed before CERC on 10.11.2014 and CERC has directed all the parties to file their pleadings and also written submissions within one week. CERC is very likely to reserve the case for the order in the next

week. In the circumstances, the present writ petition is likely to hamper an alternate remedy invoked by another aggrieved person placed similarly like the petitioner. The writ petition is therefore liable to be dismissed.

19. The fourth respondent further submits that the said order virtually renders W.P.No.16008 of 2014 infructuous. CTU cannot in its order pass any observation or even a view on the pending writ petition and it is in this back drop that their order is subject to the writ petition. There was no order of stay and the parties who would be affected by the order in the writ petition were not made parties to the writ petition. The fourth respondent further submits that the petitioner has conveniently ignored the provision relating to making of applications for change in region and is relying upon a proviso that was added. Both the provisions are to be harmoniously construed so that no proviso is rendered otiose. The fourth respondent further submits that there is an effective alternative remedy and the petitioner has willfully and deliberately ignored the same, while the other person aggrieved by the impugned order has invoked the appeal provisions and the appeal is right for disposal. It is inequitable to render the appeal proceedings in a nugatory. It is not an abuse of process of law as contended. It does not violate Article 14. The fourth respondent further submits that they filed a proper application in the prescribed manner under law and it takes precedence over an application made ignoring the prescribed procedure. The fourth respondent further submits that the coal blocks were never allotted to this respondent. In fact, even the petitioner is not allotted any coal block. In any event, this respondent has synchronized its plant and has necessary fuel to run the plant. This respondent verily believes that the petitioner is yet to enter into commercial operation. The petitioner is put to strict proof its entering into commercial operations. It is submitted that availability of coal block is neither a condition precedent nor a condition subsequent to the grant of open access. The fourth respondent further submits that the balance of convenience is not in favour of the petitioner, which is yet to enter into commercial operations and is in favour of this respondent, which is ready to supply power immediately. Hence, the fourth respondent entreats the Court to dismiss the above writ petition.

20. The seventh respondent, viz., M/s.D.B.Power Ltd., has filed a counter statement and refuted the above writ petition. The seventh respondent submits that a perusal of the writ petition reveals that the petitioner is aggrieved by the decision of the first respondent dated 22.09.2014 in so far as it relates to treating the letter dated 20.12.2013 issued in favour of the petitioner by the first respondent as null and void. In a nutshell, the petitioner has contended that on interpretation of Regulations 10 and 12 and proviso to Regulation 12 of the CERC (Grant of Connectivity, Long-term matters) Regulations, 2009, the petitioner's application for grant of Long Term Open Access should be treated to have been submitted in

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 Terms Open Access for the same and 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. The seventh respondent further submits that the present writ petition is not maintainable in as much as the Central Electricity Regulatory Commission (CERC) constituted under Electricity Act, 2003 has the jurisdiction to adjudicate on the issues raised and the reliefs prayed for in the present writ petition and therefore, the writ petition ought to be dismissed at the threshold stage itself. A bare perusal of the writ petition would show that the entire subject matter of the petition is squarely covered by section 79 of the Electricity Act, 2003. Section 79 reads as under:-

" Section 79 (1) The Central Commission shall discharge the following functions, namely:--

- (a) to regulate the tariff of generating companies owned or by the Central Government;
- (b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;
- (c) to regulate the inter-State transmission of electricity;
- (d) to determine tariff for inter-State transmission of electricity;
- (e) to issue licences to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;
- (f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;
- (g) to levy fees for the purposes of this Act;
- (h) to specify Grid Code having regard to Grid Standards;
- (i) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees;
- (j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;
- (k) to discharge such other functions as may be assigned under this Act.

Section 79(1)(c) of the Act confers jurisdiction on the CERC to regulate the "Inter-State Transmission" of Electricity. In this regard, the following definitions contained in the Act are relevant to note:-

"Section 2 (74) "transmit" means conveyance of electricity by means of transmission lines and the expression "transmission" shall be construed accordingly;

Section 2(36) "Inter-State transmission system" includes:-

(i) any system for the conveyance of electricity by means of main transmission line from the territory of one State to another State;

(ii) the conveyance of electricity across the territory of an intervening State as well as conveyance within the State which is incidental to such inter-state transmission of electricity;

(iii) the transmission of electricity within the territory of a State on a system built, owned operated, maintained or controlled by a Central Transmission Utility.

Further the term "Long Term Access" is defined in Regulation 2(1) of the CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009, as under:-

Regulation 2(1) "long-term access" means the right to use the inter-State transmission system for a period exceeding 12 years but not exceeding 25 years."

21. The seventh respondent further submits that admittedly, the present writ petition pertains to non-allocation of long term access i.e., right to use the "Inter-State Transmission System" to the petitioner by the first respondent. Therefore, it is evident that the subject matter of the petition is squarely covered by Section 79 (1)(b) of the Act. i.e., "to regulate Inter-State Transmission of Electricity" and therefore, the CERC is the designated forum to adjudicate on the issue raised by the petitioner in the present petition. The seventh respondent further submits that Section 79(1) (f) of the Act provides for adjudication of disputes involving a generating company or a transmission licensee in regard to matters connected with clause (a) to (d) of Section 79(1). The petitioner is a generating company and the first respondent is a transmission licensee and admittedly the dispute sought to be raised by the petitioner in the present writ petition i.e., non-allocation of Long Term Open Access is in connection with "Inter-State Transmission of Electricity" and is thus squarely covered under Section 79 of the Act and can only be agitated before the specifically constituted statutory body i.e., the CERC. The petitioner has an alternative efficacious remedy to approach the CERC and therefore the writ petition filed by the petitioner is misconceived and not

maintainable. In fact, this respondent who has been similarly situated like the petitioner has approached the appropriate forum, namely, CERC, New Delhi and the CERC after hearing the parties at length has reserved orders in the matter. Any orders and observations made in these writ petitions would likely to prejudice the statutory course properly adopted by this respondent. Without prejudice to the foregoing, the fourth respondent submits that a bare perusal of the petition reveals that neither any allegation is made against this seventh respondent nor any cause of action has arisen against the seventh respondent nor any relief is sought by the petitioner qua the seventh respondent. Therefore, the seventh respondent is filing a limited affidavit for the purpose of placing on record certain facts pertaining to the seventh respondent. The seventh respondent craves leave to file a detailed affidavit, if required.

22. The seventh respondent further submits that the seventh respondent is a company incorporated under the provisions of the Companies Act, 1956. The seventh respondent is a generating company within the meaning of Section 2(28) of the Electricity Act, 2003 and is setting up a 1200 MW (2 x 600) thermal power plant at Village Badadarha in District Champa, Chhattisgarh. The seventh respondent further submits that the first respondent (PGCIL) had initially granted LTA to the seventh respondent on 01.10.2009 for a total quantum of 705 MW from the above power plant with target beneficiaries in Western Region and Northern Region and had also executed a bulk Power Transmission Agreement with seventh respondent on 24.02.2010. The seventh respondent further submits that pursuant to competitive bidding process conducted by the Tamil Nadu Generation and Distribution Corporation Ltd., (the third respondent herein), the seventh respondent executed a long term Power Purchase Agreement dated 19.08.2013 with the third respondent for supply of 208 MWs starting 01.02.2014 for a period of 15 years. The seventh respondent further submits that a copy of the above referred PPA to the first respondent under cover of its letter dated 23.08.2013 and requested for allocation of LTA of 208 MWs to the Southern Region with effect from 01.02.2014 till 30.09.2028. The seventh respondent by its subsequent letter dated 28.08.2013 to the first respondent had stated that since the seventh respondent already has LTA for WR and NR, the same may be changed to SR. Hereto filed in the typed set are copies of the said letters dated 23.08.2013 and 28.08.2013 respectively. However, on insistence of the first respondent, the seventh respondent made a formal application as per the Detailed Procedure in the prescribed form on 25.11.2013 for allocation of LTA to Southern Region. The seventh respondent further submits that the first respondent vide letter dated 20.12.2013 granted LTA for 208 MWs in favour of the seventh respondent. The LTA was granted for the full quantum of 208 MWs from 01.08.2014 to the seventh respondent on the ground that the CTU was commissioning the newly built 765 KW Solapur-Raichur D/c line, and as a result of which there was an additional Available Transmission Capacity (ATC) of 1250 MWs from the New Grid to the Southern Grid. The grant of LTA in favour of the seventh

respondent has been acknowledged and recognized by the first respondent on numerous occasions and recorded in the agenda notes and minutes of meeting conducted by the first respondent. The seventh respondent further submits that in terms of first proviso to Regulation 10(1) of the CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in Inter-State Transmission and related matters) Regulations, 2009, the applications for long term received during a month are deemed to have arrived concurrently and therefore to that extent are accorded same treatment. Regulation 10(1) reads as under:-

"Regulation 10. Relative priority

(i) Applications for long-term access or medium-term open access shall be processed on first-come-first-served basis separately for each of the aforesaid types of access:

Provided that applications received during a month shall be construed to have arrived concurrently."

23. The seventh respondent further submits that the petitioner has alleged in the present writ petition that it had submitted an application in the prescribed form to the first respondent under cover of its letter dated 03.12.2013 for grant of LTA. It is further alleged that on consideration of the application, the first respondent in its proceedings dated 20.12.2013 had stated that LTA would be granted subject to signing of requisite LTA and signing of Transmission Service Agreement and fulfillment of other conditions as mentioned in the enclosed intimation letter. The seventh respondent further submits that under the CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in Inter-State Transmission and related matters) Regulations, 2009 grant of LTA is different from allocation of LTA. LTA is allocated on the basis of Available Transmission Capacity from time to time, in accordance with the said Regulations. Hence, this seventh respondent humbly submits that the prayer of the petitioner to allocate all the 500 MW in its favour is misconceived and in any event, would result in the petitioner seeking to get an unfair advantage over similarly placed contenders like this respondent. Even if the contentions of the writ petitioner regarding validity of the proceedings dated 20.12.2013 is accepted, the petitioner cannot claim that the 500 MW granted in its favour would be fully allocated to it. Allocation is contingent upon availability and can only be given pro rata among all the grantees and not exclusively to the petitioner. The seventh respondent further submits that the first respondent issued letter dated 22.09.2014 for allocation of LTA to the eligible applications received in the month of November, 2013 for transfer of power from NEW Grid to SR Grid. In the said communication, the first respondent erroneously observed that though application from the petitioner was received in the month of November 2013, as per CERC Regulations, the requisite application fee was submitted in the month of January 2014. Therefore, the first respondent treated the application of the

seventh respondent to have been filed in the month of January 2014. The seventh respondent further submits that being aggrieved by the above referred communication dated 22.09.2014 of the first respondent whereby the application of the seventh respondent has been wrongly treated to have been filed in the month of January, 2014, the seventh respondent has challenged the same by filing a petition (Petition No.376/MP/2014) under Section 79 of the Electricity Act, 2003, before the Central Electricity Regulatory Commission, New Delhi. Arguments have been heard on the said petition on 15.10.2014 and the commission has reserved orders. In view of the above stated preliminary objection as to maintainability of the present petition and the fact that the relief prayed for by the petitioner for allocation of the entire grant of 500 MW would amount to taking an unfair advantage by the petitioner over entitlement of similarly situated persons like this respondent for pro rata allocation, it is prayed that this Court may be pleased to dismiss the writ petition.

24. The highly competent senior counsel Mr.A.R.L.Sundaresan appearing for the petitioner argued the case vehemently and he has filed a common written submissions which are as follows:-

(24.1) The highly competent senior counsel appearing for the petitioner submits that Bulk Power Transmission Agreement (BBTA) was entered into between the petitioner and the first respondent herein on 24.02.2010 for 616 MW with 350 MW to Western Region and 266 MW to Northern Region for evacuation. He further submits that a letter of Intent was issued on 18.07.2013 by the Chief Engineer, Private Projects, TANGEDCO to the petitioner herein to procure 500 MW Round The Clock (RTC) Power for the period of 15 years from 01.10.2013 to 30.09.2028. He further submits that on account of the need of TANGEDCO for Electrical Energy to help the starving State of Tamil Nadu for Electrical Energy and since there was no demand in the Western Region and Northern Region, petitioner herein applied on 31.07.2013 to the second respondent herein for amendment of its application for evacuation to Southern Region (SR) instead of Northern Region and Western Region. It was duly intimated that TANGEDCO has given Letter of Intent to the petitioner on 31.07.2013. He further submits that Power Purchase Agreement was entered between the petitioner and TANGEDCO on 08.08.2013 for 500 MW of Power for a period of 15 years. He further submits that the petitioner, in continuation of its earlier letter dated 31.07.2013, had submitted copy of the Power Purchase Agreement dated 08.08.2013, which was entered into between the petitioner and TANGEDCO and requested the second respondent to provide Long Term Open Access for evacuation of power on 12.08.2013.

(24.2) The highly competent senior counsel appearing for the petitioner further submits that the subject of grant of allocation of capacity was taken up for consideration by the second respondent herein on 23.09.2013. It was discussed about grant of allocation of capacity to the petitioner by the second respondent herein on

18.11.2013. He further submits that since it was informed that the fee payable for Long Term Access application should be paid, petitioner submitted a letter dated 03.12.2013 to the first respondent herein along with an application which the first respondent wanted to be filled in a form prepared by them. He further submits that the respondents 1 and 2, on a consideration of the application of the petitioner dated 13.08.2013 for Long Term Access to Southern Region by diversion of the sanctioned capacities from the Western and Northern Regions, stated that the request of the petitioner was examined by the Central Transmission Utility along with other such requests and studies carried out for the same and it was agreed in the Joint Standing Committee meeting that the LTA may be granted after six months of synchronization of Southern Region with the new grid i.e., 01.08.2014 and that Long Term Access of 500 MW from the petitioner to TANGEDCO was granted subject to signing the requisite Long Term Access Agreement, Transmission Service Agreement and fulfillment of other conditions mentioned in the enclosed intimation letter. Thus, the application of the petitioner was treated to be in proper shape and was considered along with other similar requests and was granted LTA with effect from 01.08.2014. All that remained to be granted was only signing of the Long Term Access Agreement and Transmission Service Agreement on 20.12.2013. He further submits that since the respondents 1 and 2 herein did not enter into the statutory LTA Agreement and Transmission Service Agreement pursuant to the firm letter of grant dated 20.12.2013, but was contemplating to treat the petitioner's application as relatable to subsequent month rather than application of August 2013 and thereby, deny the genuine rights of the petitioner, petitioner was constrained to file a writ petition in W.P.No.16008 of 2014 before this Court praying for a writ of mandamus. Notice was issued in the said writ petition to the respondents authorities and the respondents authorities had repeatedly taken time for filing counter at least on 8 or 9 occasions.

(24.3) The highly competent senior counsel appearing for the petitioner further submits that Transmission Service Agreement was signed between the petitioner and the first respondent on 19.08.2014. He further submits that the respondents 1 and 2 issued the impugned proceedings on 22.09.2014, granting Long Term Access of the available 365 MW as follows:-

	Applied for (in MW)	Allocated (in MW)
Ms.Jindal Power	400	150
M/s.KSK Mahanadhi Power	500	179
M/s.BALCO	100	36

The highly competent senior counsel appearing for the petitioner further submits that the petitioner was not allotted any capacity for

evacuation in spite of the letter of grant dated 20.12.2013. However, in paragraph 7 of the impugned proceedings, it was stated that the two earlier letters of intimation dated 20.12.2013 and 07.03.2014 issued for LTA to M/s.D.B.Power Limited and M/s.Indbarath Energy (Utkal) Ltd., stand null and void. It was also stated that the petitioner has approached this Court with regard to LTA to Southern Region and therefore, the allocation may undergo a change on its final outcome, thereby recognizing the pendency of the present writ petition as a ground for challenging the allocations subject to the orders of this Court that may be passed. He further submits that the petitioner was not allotted any capacity for evacuation. But, strangely, the lame reason which was given for not allocating any capacity to the petitioner, is contained in paragraph 7 of the statement of reasons at Page No.238 of the typed-set of papers in W.P.No.28024 of 2014. It is stated that the petitioner's application could not be treated as an application received even in November 2013, but could be treated as an application received only in December 2013 and the application of D.B. power can be considered as having been given only in January 2014. He further submits that challenging the impugned proceedings dated 22.09.2014, the writ petition has been filed by the petitioner for the relief of Certiorarified Mandamus.

(24.4) The highly competent senior counsel appearing for the petitioner has submitted brief submissions on the part of the petitioner are as follows:-

Petitioner had a sanctioned evacuation capacity of 616 MW (350 MW for Western Region and 266 MW for Northern Region). The State of Tamil Nadu was in need of Electrical Energy. A letter of intent was given by TANGEDCO on 18.07.2013 and Power Purchase Agreement was entered into between the petitioner and TANGEDCO on 08.08.2013 for a period of 15 years. He further submits that as early as on 31.07.2013, petitioner had applied in the form of a letter to the second respondent herein for application of Long Term Access for Southern Region in respect of Western Region and Northern Region. On 12.08.2013, petitioner had submitted a copy of the Power Purchase Agreement and reiterated its request. He further submits that the request of the petitioner was examined by the second respondent herein along with other similar requests and a firm Letter of Grant was issued by the respondents 1 and 2 under their letter dated 20.12.2013. The respondents 1 and 2 did not have any opinion that the petitioner's application was defective in any form or could not be treated as an application to be considered for grant for any reason. It is pertinent in this context to state that prior to 20.12.2013, petitioner had remitted the fees on 03.12.2013. He further submits that the remittance of fees on 03.12.2013 will date back to the date of initial application for capacity allocation for Southern Region, viz., 31.07.2013 and 12.08.2013. He further submits that the respondents had not intimated the petitioner that the letters cannot be treated as an application nor they had intimated

that the application will be given seniority only after payment of the fees. He further submits that had it been brought to the notice at any point of time by the respondents 1 and 2 herein that the application will be taken cognizance of and seniority will be assigned only on payment of fees, the same would have been paid earlier. He further submits that having treated the petitioner's application as complete and having processed the same without informing the same to the petitioner of the alleged defects, it is arbitrary and illegal on the part of the respondents 1 and 2 in September 2014 to state that the application was complete in shape only on 03.12.2013 and hence, could be considered only in the quota available in December 2013.

The highly competent senior counsel appearing for the petitioner further submits that the State Statutory Regulations, viz., the Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Access and Medium Term Option Access in any other State Transmission and related matters) Regulations, 2009, hereinafter referred to as the "Regulations", does not prescribe any prescribed form of application. Rule 5 only refers to filing of application. There is no prescribed form as per the statutory regulations. Hence, the contention of the respondents that petitioner has not filed the application in prescribed form before 03.12.2013 and hence, petitioner's application could be considered only after 03.12.2013, is misconceived and untenable.

(24.5) The highly competent senior counsel appearing for the petitioner has submitted the following alternative remedies:-

Petitioner submits that the first writ petition is for a writ of mandamus to direct the respondents 1 and 2 to give effect to the Letter of Grant dated 20.12.2013. For this, petitioner has approached only this Court. There is no alternative remedy for a writ of mandamus. So far as the writ of Certiorari in W.P.No.28024 of 2014 is concerned, alternative remedy is not a bar for the following reasons:-

(a) The remedy of appeal which is available before the Central Electricity Regulatory Commission is not an efficacious remedy. As per the provision of Section 77(2) of the Electricity Act, 2003, notwithstanding anything contained in Section 77 (1) of the Act, the Central Government may appoint any person as Chair Person from amongst persons who is or has been a Judge of the Supreme Court or Chief Justice of a High Court, provided that no appointment under the said Sub Section shall be made only after consultation with the Chief Justice of India. The Central Electricity Regulatory Commission is now preside over by a Chairman who has not been a Chief Justice of a High Court or a sitting or retired Judge of the Supreme Court nor any appointment has been made in the consultation with the Chief Justice of India. Section 77(2) starts with non-obstante clause that the said provision is notwithstanding anything contained in Sub Section 1. Hence, Section 77(2) will prevail. Since no Judicial Officer of the cadre mentioned in Section 77(2) has been appointed by

the Central Government, the Central Electricity Regulatory Commission is not an effective authority for providing an effective Alternative Remedy. The Supreme Court of India in the judgment in TANGEDCO vs. P.P.N.Powergen. Co.Pvt. Ltd. (Civil Appeal No.4126 of 2013) has clearly held that the Tamil Nadu Electricity Regulatory Commission is not presided over by the Judge of the High Court and hence, is not an effective authority. Section 84 of the Electricity Act, 2003 dealing with TNERC is similar to Section 77 of the Electricity Act, 2003 dealing with Central Electricity Regulatory Commission. Hence, there is no effective authority for any Alternative Remedy.

(b) The letter dated 20.12.2013 granted in favour of the petitioner is treated as null and void under the impugned order by the second respondent without any notice or opportunity to the petitioner. Hence, there is violation of principles of natural justice. When Principles of Natural Justice has been violated, alternative remedy is not a bar. (1998 (1) SCC 1; 2003 (1) CTC, 189 etc.)

(c) Even the impugned order dated 22.09.2014 refers to the pendency of the writ petition filed by the petitioner before this Court in paragraph 7 at page No.235 of the typed-set of papers filed in W.P.No.28024 of 2014. The impugned order also states that the allocation is likely to be changed depending upon the final outcome of the writ petition. When the writ petition for mandamus is pending before this Court, it will not be effective or beneficial for the petitioner to approach any other authority for quashing the impugned proceedings dated 22.09.2014. Since the said order was admittedly passed during the pendency of the writ petition in W.P.No.16008 of 2014, the approach by the petitioner to this Court for writ of Certiorarified Mandamus is only an effective remedy which is available. Availability of Alternative Remedy is not a bar for entertaining the writ petition under Article 226 of the Constitution of India. It is only a self-imposed restriction by this Court. However, in the interest of justice, in the facts and circumstances of the present case, the Alternative Remedy is neither effective nor sufficient and hence, the writ petition is maintainable in this Court.

(24.6) The highly competent senior counsel appearing for the petitioner submitted the following contentions on the part of the respondents 1 and 2:-

(a) There is an alternative remedy before Central Electricity Regulatory Commission and hence, the writ petition is not maintainable.

(b) As per Regulation 10, the allocations are made on "First-cum-First-served basis. Petitioner has remitted the fees and applied for in the prescribed form only on 03.12.2013 and hence, its application can be considered only on or after December 2013.

(c) Petitioner has not remitted the necessary fees for diversion of the region from Western and Northern Regions to Southern Region.

(d) It is the power of the Central Electricity Regulatory Commission to decide on allocation of evacuation capacity.

(24.7) The highly competent senior counsel appearing for the petitioner has submitted the following response of the petitioner to the contentions of the respondents 1 and 2:-

Petitioner submits that the contentions of the respondents are all misconceived and untenable and if accepted, it will amount to approving an arbitrary and illegal action of the respondents 1 and 2 in allocating the available capacity. As such, the contentions deserve to be rejected for the following reasons:-

(a) Even applying the principles of "First-cum-First-served" basis, the application by D.B. Power Ltd., is only in November 2013, complied with in December 2013 and treated as an application of January 2014.

(b) The application of K.S.K.Mahanadhi Power Co. Ltd., is admittedly only of November 2013.

(c) Whereas the application by the petitioner, be that as it may, in the form of a letter for Southern Region, is on 31.07.2013. On 12.08.2013, the Power Purchase Agreement which was entered into between the TANGEDCO and petitioner has also been submitted. No questions were raised with regard to any deficiency in the form of application or with regard to the fees of deficiency of fees. The remittance of fees on 03.12.2013 should date back to the petitioner's application dated 31.07.2013. The respondents 1 and 2 have actually accepted the application dated 31.07.2013 and 12.08.2013, processed the same and considered along with similar requests of other Power Generation Units (respondents 5 to 7 herein) and issued the letter dated 20.12.2013. Hence, the letter of approval was rightly issued. Treated the said letter as null and void under the impugned proceedings dated 22.09.2014 is therefore arbitrary, illegal and unjust.

(d) Whatever the details as required as per the Regulations, viz., name of the application, place of generation, place of distribution, capacity etc., are all fully available by receipt of the letters dated 31.07.2013 and 12.08.2013. The condition precedent of entering into of the Power Purchase Agreement with the beneficiary of the supply has also been complied with by the petitioner. Hence, all the requirements as per the Regulations are complied with by the petitioner.

(e) The Rules and Regulations do not prescribe any form as a statutory form. Regulation 5 of the Regulations only refers to the application. It does not prescribe any application form as the

prescribed form. Even otherwise, substantial compliance is sufficient rather than full compliance of the procedural requirements. Substantial justice should be done rather than rejecting any application on procedural aspects. The same has been correctly done by the respondents 1 and 2 upto 20.12.2013. The subsequent change in stand by the respondents 1 and 2 is arbitrary and illegal.

(f) Treating the application of K.S.K. Mahanadhi Power as an application of November 2013 and giving priority to the same ahead of the petitioner is violative of Article 14 of the Constitution of India and is discriminatory since the petitioner is already before the respondents asking for evacuation capacity from July 2013 onwards for Southern Region.

(g) So far as the plea with regard to Alternative Remedy is concerned, it is a lame argument. The case has been argued by the parties on merits. Hence, the writ petition may be decided on merits. Further, in the earlier part of this written submissions, petitioner has submitted in detail that the Alternative Remedy is not an effective remedy in the present case.

(24.8) The highly competent senior counsel appearing for the petitioner has cited the following judgments in support of his contentions:-

(i) (Civil Appeal No.4126 of 2013, dated 04.04.2014)

"(i) This statutory appeal under Section 125 of the Electricity Act, 2003 (hereinafter referred to as the "Act") is directed against the final judgment and order dated 22nd February 2013 passed by the Appellate Tribunal for Electricity (hereinafter referred to as "APTEL" or "Appellate Tribunal"), at New Delhi in Appeal No.176 of 2011, whereby it has dismissed the appeal preferred by the appellant against the final judgment and order dated 17th June, 2011 of Tamil Nadu Electricity Regulatory Commission (hereinafter referred to as the "State commission") in D.R.P.No.12 of 2009. The facts have been noticed in detail both by the State Commission and the APTEL, therefore, we, shall make a reference only to the very essential facts necessary for deciding this appeal.

59. The respondents in a common counter statement to the applications have submitted that the applications are not maintainable. The applications have been evidently preferred purely as dilatory tactics, to delay and deny substantial payments that are due and payable to the respondent pursuant to the orders passed by the State Commission which have been upheld by 'APTEL'. We are not inclined to entertain either of the applications at this stage. This issue sought to be raised in both the applications ought to have been raised by the appellant at

the relevant time. Time applications, are therefore, accordingly dismissed."

(ii) Union of India v. Mangal Textile Mills (I)(P) LTD reported in (2010) 14 Supreme Court Cases 553

"A. Excise - Exigibility to excise duty - Investment in production capacity as basis - In instant case, since question involved valuation of assets of assessee and disclosure or non-inclusion of some machines for purpose of claiming benefit of special procedure for payment of excise duty, held these being questions of fact, exercise of writ jurisdiction by High Court was unwarranted - High Court's order set aside - However, assessee permitted to prefer appeals to appropriate authority CESTAT against Commissioner's orders who shall condone delay, if appeals filed within six weeks - Central Excise Rules, 1944 - R. 96 - ZNA - Writ remedy - Questions of fact.

B. Constitution of India - Article 226 - Maintainability - Alternative remedy / Exhaustion of remedies - Powers of High Court - Restrictions - Held, are self-imposed - Power of High Court to issue prerogative writs under Article 226 is plenary in nature and cannot be curtailed by other provisions of Constitution or a statute - However, High Courts have imposed upon themselves certain restrictions on exercise of such power - If an effective and efficacious remedy is available, High Court would not normally exercise its jurisdiction under Article 226 of Constitution - This rule of exclusion of writ jurisdiction on account of availability of an alternative remedy does not operate as an absolute bar to entertaining a writ petition but is a rule of discretion to be exercised depending on facts of each case."

(iii) Harbanslal Sahnia Vs. Indian Oil Corporation Ltd., reported in 2003(1) CTC 189

"Constitution of India, Article 226 - Availability of Alternative Remedy - Whether bars exercise of Writ Jurisdiction - Dealership in Petroleum Products terminated on ground that sample drawn from outlet did not satisfy and match standard specification in regard to automatic viscosity - Writ petition challenging Order of Termination dismissed by High Court on ground that Relationship between Indian Oil Corporation and its Dealer is contractual and Dealership Agreement contained Arbitration Clause - Rule of Exclusion of Jurisdiction by availability of alternate remedy is Rule of discretion and not one of Compulsion - High Court may exercise Writ Jurisdiction in spite of availability of alternative remedy in at least three

contingencies (i) where Writ Petition seeks enforcement of any Fundamental Right (ii) where there is failure of Principles of Natural Justice (iii) Where orders or proceedings are wholly without jurisdiction or vires of Act is challenged - Present case attracts application of first two contingencies - No need to drive appellant to Arbitration Proceedings - Order terminating Dealership is quashed and set-aside."

(iv) SATWATI DESWAL v. STATE OF HARYANA reported in (2010) 1 Supreme Court Cases 126

"A. Constitution of India - Art. 226 - Maintainability - Alternative remedy / Exhaustion of remedies - When not to be insisted upon - Principles reiterated - Violation of Principles of natural justice - On facts held, High Court ought not to have insisted on availing of alternative remedy where termination was ordered in violation of principles of natural justice - Service Law - Termination of service - Writ remedy - Availability of "

(v) Rajasthan State Electricity Board Vs. Union of India reported in (2008) 5 Supreme Court Cases 632

"A. Railway Claims Tribunal Act, 1987 - Ss.13 and 16 - Refund from Railways - Parties not at issue / admitted liability - Appellant's entitlement to refund of excess collection admitted by Union of India (respondents) - High Court relegating the matter for statutory remedies, held, unwarranted - Constitution of India - Art. 226 - Maintainability - Exhaustion of remedies - Liability admitted - Inapplicability of the rule.

B. Constitution of India - Art. 226 - Maintainability - Exhaustion of remedies - Reiterated, availability of alternative remedy is not an absolute bar for granting relief."

Hence, the highly competent senior counsel appearing for the petitioner entreats this Court to allow the above writ petition.

25. The highly competent senior counsel Mr.R.Thiyagarajan, appearing for the first and second respondents argued the case in detail and in addition to the same arguments narrated by way of a common written submissions which are as follows:-

(25.1) The issue for consideration in this writ petition relates to the grant of Long Term Open Access (LTOA) to the petitioner for the purpose of transmission of power to the Southern Grid. The Central Transmission Utility and the Central Electricity Authority have evolved a comprehensive scheme for evacuating /

dispatching of power from the generating units beyond the pooling points. This evacuation is done through Interstate Transmission System by way of LTOA. This is how the system of Long Term Open Access (LTOA) operates. In other words, it is transmission system from the generating units to pooling points. This common Transmission System to evacuate power is finalized in consultation with (a) Central Electricity Authority; (b) Constituents (c) State Transmission Utility (d) Concerned Independent Power Producers. The petitioner was granted Long Term Open Access (LTOA) for 25 years for evacuation of power from Orissa to the beneficiaries in the Western Region and Northern Region. The TANGEDCO, viz., the third respondent floated tenders for the purchase of power through Long Term Tender for 15 years from 2013 to 2028. It appears that the petitioner was the successful tenderer and was called upon to accept the Letter of intent.

(25.2) The highly competent senior counsel further submits that consequent upon the acceptance of offer by the third respondent to supply power, the petitioner addressed a letter dated 31.07.2013 to this respondent requesting for evacuation / dispatch of power to Southern Grid. This request is only for a change of Region. This is not an application for evacuation of power from a generating unit to the pooling point as contemplated under the Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Access and Medium Term Open Access in Inter-State Transmission and related matters) Regulations, 2009. Regulations 12 and 18 of the said Regulations provided for necessary application in the prescribed format along with the payment of necessary charges for granting LTOA to the Region concerned. Such an application was made by the petitioner only on 03.12.2013. As already stated, the Common Transmission System to evacuate power from generating projects to beneficiaries finalized in consultation with certain authorities including constituents. The Regulations referred to above provide for the method of processing the application for grant of LTOA. The applications are processed on first come first served basis. The applications received during a month and upto the last date of a month shall be construed to be arrived concurrently.

(25.3) The highly competent senior counsel has further submitted that in the meeting held on 28.03.2014 and 21.05.2014, it was decided that the date of submission of fresh application shall be considered while deciding priority of application for granting LTOA when the applications received upto November 2013 were considered, the application of the petitioner was not among them. Its letter dated 31.07.2013 as already stated was only for change of Region and not an application as required under Regulations 12 and 18 of the Regulations 2009. Hence, the non-consideration of the application submitted by the petitioner on 03.12.2013 for grant of LTOA for the month of November 2013 is clearly in order and justified. Apart from the above, since the subject matter of the petitioner's application dated 03.12.2013 relates to Regulation of Interstate Transmission of

Electricity and adjudication of disputes involving generating companies or Transmission Licensee in regard to matters connected with clauses (a) to (d) of Section 79(1) of the Electricity Act, 2003, the petitioner has an effective alternative remedy before the Central Electricity Regulatory Commission. In fact, the seventh respondent aggrieved by the proceedings dated 22.09.2014 which is impugned in W.P.No.28024 of 2014 has approached the Central Electricity Regulatory Commission under Section 79(1)(c) of the Electricity Act, 2003 by filing necessary petition. Similarly, the Kerala State Electricity Board also approached the Central Electricity Regulatory Commission alleging arbitrary denial of Medium Term Open Access.

(25.4) The highly competent counsel further submits that even otherwise, the petitioner cannot seek a mandamus in the first writ petition in W.P.No.16008 of 2004 directing this respondents to enter into LTOA Agreement since the petitioner cannot compel the statutory bodies to enter into an agreement with him as held by the Hon'ble Supreme Court of India in the decision reported in 1979 (3) SCC 489 (Ramana Dayaram Shetty Vs. International Airport Authority of India). The second writ petition viz., W.P.No.28024 of 2014, challenging the order dated 22.09.2014 is equally unsustainable since the allotment has been made in favour of persons whose applications were available with the authorities when they were considered the applications received upto November 2013. The reasons for denial of LTOA to the petitioner are contained in the impugned order itself. Hence, the petitioner is not entitled to the relief sought for in W.P.No.28024 of 2014. Hence, the highly competent senior counsel entreats the Court to dismiss the above writ petition.

26. The highly competent counsel Mr.R.Sankaranarayanan appearing for the fourth respondent vehemently argued the case and in addition to that he had filed a common written submissions which are as follows:-

(26.1) The writ petition No.28024 of 2014 has been filed to quash the proceedings dated 22.09.2014 and also direct the first respondent to allocate 500 MW capacity of evacuation to the petitioner. The brief facts are that the petitioner has put up a Power Generation Plant and had applied for Long Term Open access (LTOA) in Western and Northern Region but later expressed its intentions to seek LTOA in Southern Region and that the letter expressing such intentions was given on 31.07.2013 and yet their application was not considered by applying the principle of "first come first serve". The petitioner initially filed W.P.No.16008 of 2014 seeking a direction directing first and second respondents are to enter into a LTOA agreement with the petitioner for evacuating 500 MW of electrical energy. The said writ petition was taken up and notice was ordered to the respondents and subsequently, the petitioner impleaded this respondent as a party to the said writ

petition. No interim orders had been granted in the said writ. The first respondent passed an order on 22.09.2014 giving direction on LTOA and granted such access to this respondent and two others, viz., Jindal Power and Balco. In the said order, there is a reference to W.P.No.16008 of 2014. Both the writ petitions were taken up for final disposal. Counters have been filed and arguments have been advanced. The sum and substance of the argument of the respondent is that the writ is not maintainable as the petitioner if aggrieved has an appellate remedy and that a person similarly situate namely, respondent No.7, already approached the appellate authority and the arguments in appeal are over and orders have been reserved. It is not a mere case of availability of appellate remedy but one where on aggrieved party has filed an appeal against the impugned order and the order is likely to be pronounced at any time. The conduct of the petitioner in refusing to pursue the appellate remedy which is an effective alternative remedy should entail in the dismissal of the writ petition.

(26.2) The highly competent counsel appearing for the fourth respondent has submitted the alternate remedies. The first respondent is a Central Transmission Utility (CTU). Section 38 of the Electricity Act deals with CTU. Section 38(1) empowers the Central Government to notify any Government company as CTU. Respondent No.1 is also notified. Section 38(2)(a) empowers CTU to undertake transmission of electricity through interstate transmission system. The power is to be generated by the petitioner outside the State of Tamil Nadu and so is the case of the respondent and respondent No.7. Hence, there is evacuation of power from outside the state and delivery of power is to be in the State of Tamil Nadu. The case therefore falls under transmission of electricity through interstate transmission system. Section 76 of the Electricity Act deals with constitution of Central Commission. The Central Electricity Regulatory Commission (CERC) is the Central Commission and it discharges such functions as are assigned to it. Section 79 of the Electricity Act deals with the functions of CERC. Section 79(1)(c) deals with regulations of Interstate Transmission of electricity. Section 79(1)(f) deals with adjudication of the dispute involving generating company or Transmission Licensees and refer the parties to arbitration. Regulation of interstate transmission of electricity comes within Section 79(1)(f). The highly competent counsel appearing for the fourth respondent further submits that licensee is defined under Section 2(39) and it means a person who has been granted license under Section 14. Under Section 14 license can be granted to any person to transmit electricity as a Transmission Licensee. Section 2(73) defines Transmission Licensee to mean a Licensee authorized to establish or operate transmission lines. The present dispute is the one where there is a dispute involving the generating company i.e., petitioner, respondent No.4 and respondent No.7 and also respondent No.1. This dispute therefore falls under Section 79(1)(f) and appeal is pending there. The writ petition therefore is not maintainable.

(26.3) The highly competent counsel appearing for the fourth respondent has further submitted that the fourth respondent originally planned to supply power in the Western region and had intimated the Central Transmission Utility (CTU) accordingly. The fourth respondent participated in a tender floated by the third respondent inviting bids for supply of electricity to the State of Tamil Nadu. The fourth respondent had to seek the approval of CTU for changing from one region to another, viz., from Western Region to Southern Region. This respondent filed on 29.11.2013, an application for grant of LTA in the prescribed Format LTA-2 along with requisite fees. The application in the required format with requisite fees was filed by the petitioner on 03.12.2013 i.e., later in point of time. The highly competent counsel appearing for the fourth respondent further submits that the first respondent, by letter dated 23.09.2013 convened a meeting relating to synchronization of Southern Region with New Grid. The meeting was accordingly held on 03.10.2013. By letter dated 18.11.2013, agenda was circulated for meeting scheduled to be held on 23.11.2013. Item No.5 of the said agenda recorded that the second respondent had received requests for regularization of LTA by the petitioner and three other persons. It referred to a meeting held on 03.10.2013. As per item No.6, the LTA of the petitioner and three others was agreed to be considered and the effective date of open access was proposed to be from 01.08.2014 to 30.09.2028. By letter dated 13.03.2014, grant of LTA was again scheduled to be considered in a meeting to be held on 28.03.2014. In the said meeting, the application of this respondent, KSEB and two other persons were also agreed to be considered. The minutes of the meeting held on 28.03.2014, points out that KSEB objected to grant of open access to the petitioner and three others and the objections were based on true and proper construction of Regulation 12. The first respondent informed all concerned that they had sought clarification from CERC on the construction of Regulation 12.

(26.4) The highly competent counsel appearing for the fourth respondent further submits that CERC was concerned in petition No.92/MP/2014 on the construction of CERC regulations and its nature. In the order passed on 08.08.2014, CERC held at paragraph 41 that the formulation of the application for grant of open access should ensure that proper documents are annexed to the application. In other words, CERC held that prescription of application format and payment of requisite fee was not an empty formality but one that is mandatory. The above petition was filed by KSEB questioning the grant of medium term open access and the law application is the same. The first respondent woke up to the reality on hearing arguments before CERC in the above matter and persuaded by the decision of CERC in the same manner. The second respondent understood the nature of CERC regulation and thereafter insisted that a letter in an ordinary form without compliance of Regulation 12 would be in violation of Regulations and it may be corrected by CERC in any appeal that may preferred by the aggrieved party. It is in this background that the

second respondent thought it fit to declare that the grant of open access to the petitioner and three others were contrary to law and held the same as null and void in the impugned order. Section 178 of the Electricity Act empowers CERC to make regulations for matters mentioned in Section 178 of the Electricity Act. The highly competent counsel further submits that CERC by notification dated 07.08.2009 framed Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Access and Medium Term Open Access in inter-state transmission and related matter) Regulations, 2009. Regulation 4 deals with nodal agencies. It states that the nodal agencies for the grant of connectivity, long term access and medium term open access to the inter-state transmission system is CTU. Regulation 5 contemplates filing of application for grant of connectivity and such application shall be made to the nodal agency. Regulation 6 postulates that the application referred to in Regulation 5 shall be accompanied by non-refundable application fee specified in the regulation.

(26.5) The highly competent counsel appearing for the fourth respondent further submits that there is yet another provision of the above Regulations that should be considered, viz., Regulation 12, which deals with application for long term open. The Regulation 12(1) stipulates that the application for grant of long term open access should contain particulars referred to in Regulation 12(1). The said regulation after setting out one or two particulars uses the word "and" and states that the application should contain such other details as may be laid down by CTU in the detailed procedure. There are several provisos to the said regulations. Fourth proviso to Regulation 12(1) deals with cases where there is any material change in the location of the applicant or change by more than 100 MW in the quantum of power to the inter changed using the inter-state transmission system or change in the region from which the electricity to be procured or supply. In such cases, a fresh application has to be made and same shall be considered in accordance with the Regulations. A change in the region to which the power is to be supplied comes under Fourth proviso. In the instant case, the petitioner has in the case of the fourth respondent changed like Western Region to the Southern Region. The highly competent counsel further submits that in tune with Regulation 12(1), the other details referred to in Regulation 12(1) are set out in the detailed procedure laid down by CERC, CERC has thus prescribed the procedure for making application for grant of Long Term Open Access to inter-state transmission. The said procedure contains a format known as Format LTA-2. The said format consists of seven columns to be filled up. The sixth column calls for particulars for DD or cheque drawn for the purpose of complying Regulation 6 of the above Regulations. The other columns are very relevant for the purpose of taking an informed decision on the application made by a generating company for grant of open access. In other words, the particulars are essential for the purpose of taking a decision. In the circumstances, it need not be

over emphasized that Regulations 5 and 6 and Format LTA-2 are mandatory in nature. A simple letter seeking open access without furnishing the above particulars and without paying the application money is of no legal consequences.

(26.6) The highly competent counsel appearing for the fourth respondent further submits that a combined reading of all the above provisions would disclose that in the case of a change of region, where the power is to be supplied, has to be considered on a fresh application. The expression "application" occurring in the Fourth proviso to Regulation 12(1) has to be understood in the same manner as stated in Regulation 12(1). The application should contain the particulars referred to in Regulation 12(1) and also contain the other particulars set out in the detailed procedure namely, Form LTA-2. In the circumstances, it would be a misnomer to construe that a simple letter without containing any particulars and without complying Regulations 5 and 6 is but an apology to the application referred to in Regulation 12. It is trite law that when a statute prescribes that a matter should be done in a particular manner then it shall be done only in that manner and in no other manner. The highly competent counsel appearing for the fourth respondent submits that the above regulations are mandatory and any application without complying to the above requirements cannot be entertained by CTU. In this case, admittedly, the petitioner did not apply in the prescribed form and did not furnish the prescribed particulars and did not pay prescribed fee besides did not pay relinquishment charges. Hence, disregard of a letter is perfectly valid. The petitioner laid stress on the letter dated 20.12.2013 addressed by the first respondent and pleaded that it constitutes an estoppel. This letter is seen at pages 164 and 165 in the typed set filed by the petitioner in W.P.No.16008 of 2014. At page 165, the last two paragraphs make it absolutely clear that the whole letter is subject to CERC Regulation, Electricity Act and rules and not in derogation thereof. The highly competent counsel further submits that the petitioner cannot contend that the above letter should be read without taking into account the above said provisions. The letter makes it clear that the acceptance of LTOA shall be only in accordance with the above law. Secondly, there can be no estoppel against the statute. Hence, the argument of the petitioner fails. The highly competent counsel further submits that W.P.No.16008 of 2014 is the nature of suit for specific performance of not an agreement but compelling the party to enter into an agreement and such a suit is inconceivable. Therefore, W.P.No.16008 of 2014 is liable to be dismissed and in any event, it had become infructuous when an order was passed on 22.09.2014. A mere fact that the first respondent passed its order subject to the pendency of the writ petition here does not add to the legitimacy of the claim of the petitioner. The first respondent is a company and it cannot even make an observation on a writ petition pending here and this Court alone would be able to take into account the subsequent even that renders the writ petition infructuous and dismiss the same. The highly competent counsel further submits that there is no legal

right or statutory right vested on the petitioner to seek a mandamus as done in both writ petitions. Hence, the highly competent counsel appearing for the fourth respondent entreats the Court to dismiss the above writ petition.

27. The highly competent senior counsel Mr.S.Silambanan appearing for the seventh respondent argued the case explicitly and also submitted a written submission and narrated the facts and legal status which are as follows:-

(27.1) The highly competent senior counsel appearing for the seventh respondent submits that a perusal of the writ petition reveals that the petitioner is aggrieved by the decision of the first respondent dated 22.09.2014 in so far it relates to treating the letter dated 20.12.2013 issued in favour of the petitioner by the first respondent as null and void. In a nutshell, the petitioner has contended that on interpretation of Regulations 10 and 12 and proviso to Regulation 12 of the CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 (hereinafter "Open Access Regulations"), the petitioner's application for grant of Long Term Access should be treated to have been submitted in August 2013, when it had furnished a copy of the Power Purchase Agreement to the second respondent and requested the respondent to consider the Long Terms Open Access for the same; therefore the decision of the first and second respondent to treat the petitioner's application as having been received only in December, 2013 is illegal and arbitrary.

(27.2) The highly competent senior counsel appearing for the seventh respondent further submits that the writ petition is not maintainable in as much as the subject matter of the writ petition is squarely covered by the provisions of the Electricity Act, 2003 (hereinafter "the Act"). The Central Electricity Regulatory Commission ("hereinafter the CERC") constituted under the Act possesses the requisite jurisdiction to adjudicate on the issues raised and the reliefs prayed for in the present writ petition and therefore, the writ petition ought to be dismissed at the threshold stage itself. A bare perusal of the writ petition would show that the subject matter of the petition is squarely covered by Section 79 of the Electricity Act, 2003. Section 79 reads as under:-

"Section 79(1) The Central Commission shall discharge the following functions, namely:-

(a) to regulate the tariff of generating companies owned or by the Central Government;

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;

(c) to regulate the inter-State transmission of electricity;

(d) to determine tariff for inter-State transmission of electricity;

(e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations.

(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;

(g) to levy fees for the purposes of this Act;

(h) to specify Grid Code having regard to Grid Standards:

(i) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees.

(j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;

(k) to discharge such other functions as may be assigned under this Act."

(27.3) The highly competent senior counsel appearing for the seventh respondent further submits that Section 79(1)(c) of the Act confers jurisdiction on the CERC to regulate the "Inter-State transmission" of electricity. In this regard, the following definitions contained in the Act are relevant to note:-

"Section 2 (74) "Transmit" means conveyance of electricity by means of transmission lines and the expression "transmission" shall be construed accordingly,

"Section 2(36) "inter-State transmission system" includes-

(i) any system for the conveyance of electricity by means of main transmission line from the territory of one State to another State;

(ii) the conveyance of electricity across the territory of an intervening State as well as conveyance within the State which is incidental to such inter-State transmission of electricity;

(iii) the transmission of electricity within the territory of a State on a system built, owned, operated, maintained or controlled by Central Transmission Utility.

The highly competent counsel appearing for the seventh respondent further submits that the term "Long Term Access" is defined in Regulation 2(1) of the CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matter) Regulations, 2009 as under:-

"Regulation 2(1) "long-term access" means the right to use the inter-State transmission system for a period exceeding 12 years but not exceeding 25 years;"

The highly competent counsel appearing for the seventh respondent further submits that admittedly, the present petition pertains to non-allocation of long term access i.e., right to use the "Inter-State transmission system" to the petitioner by the first respondent. Therefore, it is evident that the subject matter of the petition is squarely covered by Section 79(1)(b) of the Act i.e., "to regulate inter-State transmission of electricity" and therefore the CERC is the designated forum to adjudicate on the issues raised by the petitioner in the present petition. The highly competent senior counsel further submits that apart from invoking the above referred provisions of the Act, the petitioner may also seek adjudication of their dispute under Section 79(1)(f) of the Act. The said provisions casts a duty upon the CERC to adjudicate upon disputes between generating companies and transmission licensees or to refer any such dispute for arbitration in regard to matters connected with clause (a) to (d) of Section 79(1). The petitioner is a generating company and the first respondent is a transmission licensee and admittedly the dispute sought to be raised by the petitioner in the present writ petition i.e., non-allocation of Long Term Open Access is in connection with "Inter-State Transmission of Electricity" and is thus squarely covered under Section 79 of the Act and can only be agitated before specifically constituted statutory body i.e, the CERC. Therefore, the present writ petition amounts to an abuse of process of law and ought not to be entertained by this Court under Article 226 of the Constitution of India and is liable to be dismissed on the this ground alone.

(27.4) The highly competent senior counsel appearing for the seventh respondent further submits that in this regard, it is also pertinent to consider the scheme of the Electricity Act, 2003. In the statement of objects and reasons, in para 3 thereof, the Electricity Act, 2003 is described as a self-contained comprehensive legislation. Any Order of the CERC is appealable both on facts and law before Appellate Tribunal for Electricity ("APTEL") under Section 111 of the Act. Under Section 125 of the Act, any order of APTEL is further appealable before the Hon'ble Supreme Court. The provision of appeal from an order made by the Commission under the Act to the Appellate Tribunal for Electricity under Section 111 and further Appeal to the Hon'ble Apex Court under Section 125 of the Act conclusively designs the hierarchy of the statutory forums for redressal of any grievance stemming from any decision of the Commission in any enquiry undertaken by its under Section 79 of the Act. Further, under Section 94 of the Act, various powers of a civil Court under the CPC are conferred upon the commission for the purposes of any enquiry or proceedings under the Act. Further, in terms of Section 95, all proceedings before the Commissions are deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the IPC and

the Commission is deemed to be a civil Court for the purposes of Section 345 and 346 of Cr.P.C. The Commission is vested with the powers of entry and seizure by Section 96 of the Act. Being a self-contained, exhaustive code, the Electricity Act thus provides a complete, efficacious, alternative remedy to the petitioner, if it has any right. Hence, the writ petition deserves to be dismissed.

(27.5) The highly competent senior counsel appearing for the seventh respondent has further submitted that without prejudice to the forgoing and in the alternative, if this Court is declined to hold that the letter of intimation dated 12.08.2013 sent by the petitioner along with copy of the PPA is sufficient and amounts to making an application, then the seventh respondent submits that it stands on the same footing as the petitioner and is entitled to be accorded the same treatment. This is clear from the following facts. The seventh respondent is a generating company within the meaning of Section 2(28) of the Electricity Act, 2003 and it setting up a 1200 MW (2 x 600) thermal power plant at Village Badadarha in District Champa, Chhattisgarh. The highly competent counsel further submits that the first respondent had initially granted LTA to the seventh respondent on 01.10.2009 for a total quantum of 705 MW from the above power plant with target beneficiaries in Western Region and Northern Region and has also executed a Bulk Power Transmission Agreement with the seventh respondent on 24.02.2010. That pursuant to competitive bidding process conducted by the Tamil Nadu Generation and Distribution Corporation Ltd., (the third respondent herein), the seventh respondent was issued an LOI on 18.07.2013 and executed a long term Power Purchase Agreement dated 19.08.2013 with the third respondent for supply of 208 MWs starting 01.02.2014 for a period of 15 years.

(27.6) The highly competent senior counsel appearing for the seventh respondent further submits that a copy of the above referred LOI to the first respondent on 18.07.2013 itself. Moreover, the seventh respondent also submitted a copy of the PPA to the first respondent under cover of its letter dated 23.08.2013 and requested for allocation of LTA of 2008 MWs to the Southern Region with effect from 01.02.2014 till 30.09.2028. The seventh respondent by its subsequent letter dated 28.08.2013 to the first respondent had stated that since the seventh respondent already has LTA for WR and NR, the same may be changed to SR. However, on insistence of the first respondent, the seventh respondent made a formal application as per the Detailed Procedure in the prescribed form on 25.11.2013 for allocation of LTA to Southern Region. The highly competent counsel further submits that the first respondent vide letter dated 20.12.2013 granted LTA for 208 MWs in favour of the seventh respondent. The LTA was granted for the full quantum of 208 MWs from 01.08.2014 to the seventh respondent on the ground that the CTU was commissioning the newly built 765 KV Solapur-Raichur D/c line, and as a result of which there was an additional Available Transmission Capacity (ATC) of 1250 MWs from the New Grid to the Southern Grid.

The grant of LTA in favour of the seventh respondent has been acknowledged and recognized by the first respondent on numerous occasions and recorded in the agenda notes and minutes of meeting conducted by the first respondent. Therefore, the writ petitions filed by the writ petitioner is not only to overcome the delay in filing its application in prescribed format only in December, but grant of the prayers by the writ petitioner would be tantamount to the writ petitioner gaining unfair advantage over this respondent. The writ petitioner has filed these writ petitions staking a claim that it having submitted the request letter in July / August, the entire grant of 500 MW should be allocated to it while the fact remains that this respondent has also submitted request letter, LOI and the Power Purchase Agreement to TANGEDCO right in July / August 2013 like the writ petitioner and entitled to pro rata allocation. The claim of the petitioner for the entire power available is therefore, ex facie, unfair, illegal and an endeavour to access the extraordinary jurisdiction of this Court to gain unfair advantage.

(27.7) The highly competent senior counsel appearing for the seventh respondent submits that in view of the above, in the event of this Court holds that no fresh application is required to be made in the case of change of region and only a request in the form of letter to the first respondent with a copy of the Power Purchase Agreement is sufficient and amounts to applications as per Open Access Regulations, as contended by the petitioner, then the seventh respondent is entitled to pro-rata allocation of LTA on the basis of letter dated 23.08.2013 sent to the first respondent along with copy of the PPA. In terms of first proviso to Regulation 10(1) of the Open Access Regulations, the applications for long term received during a month are deemed to have arrived concurrently and therefore to that extent are accorded same treatment. Regulation 10(1) reads as under:-

"Applications for long-term access or medium-term open access shall be processed on first-come-first-served basis separately for each of the aforesaid types of access. Provided that applications received during a month shall be construed to have arrived concurrently."

Hence, the highly competent counsel appearing for the seventh respondent entreats this Court that it may be pleased to take on record to consider the above written submissions on behalf of the seventh respondent and render justice.

28. From the above discussions, this Court is of the view that:-

(i) The first and second respondents' counter statement reveals that the New Grid to Southern Region in terms of Rule 24 of the Procedure for making application for grant of connectivity in ISTS. As per the said Rule, the applications shall be processed on a first-come-first-served basis. Accordingly, the respondents 4, 5 and

6 have submitted their applications during the month of November 2013. The first-come-first-served principles goes against the Principles of Natural Justice. Therefore, in the impugned order dated 22.09.2014 is not maintainable since the Rule 24.1.1. itself goes against Articles 14 and 21 of the Constitution of India.

(ii) There is no specific announcement or notification that the prescribed format applications with the necessary fees shall be reached to and by the first and second respondents. In the absence of a notification, the first and second respondents decision is an arbitrary one. Further, the petitioner has sent a letter on 31.07.2013 requesting the respondents for the evacuation of power from Ind-Barath (IBEUL) 2 x 350 MW, Jharsuguda to SR instead of WR & NR. On receipt of the above letter, it is found that the respondents neither rejected his request letter as above nor suggested to submit his application in the said format along with the necessary fees, besides, not mentioned that end of November 2013 is the cut off date for receiving applications. In view of this lapse, the impugned order is not maintainable.

(iii) The respondents have received petitioner's application in the prescribed format on 03.12.2013. The impugned order / allotment was made on pro-rata basis on 22.09.2014, after around nine months. As such, it becomes pertinent that the respondents should have rejected his application citing the lapse, but the same remains pending on his file.

(iv) The petitioner has sent a letter on 31.07.2013 requesting the respondents 1 and 2 for evacuation of power from the petitioner's generating company, viz., 2 x 350 MW, Jharsuguda to SR instead of WR & NR. The respondents have also explained about the firming up the beneficiaries for procedural allotments with requests for change of beneficiaries. Hence, there exists a nexus and a prevailing one at that, which should elucidate the problem. As such, the allotment order dated 22.09.2014 in favour of the respondents 4, 5 and 6 is not an appropriate one since the petitioner has not been treated equally and which is prejudicial.

(v) The respondents 1 and 2 had not passed the impugned order after conducting a comprehensive enquiry regarding the issue in the presence of all the aspirants. In the instant case, the issue was whether there is a violation to natural justice. The same can be dealt with under jurisdiction of the writ Court. Therefore, the above writ petition is maintainable, hence, it is being entertained.

29. On considering the facts and circumstances of the case and arguments advanced by the highly competent senior counsels on all sides and on perusing the typed-set of papers and the views mentioned above as (i) to (v), the above writ petition is allowed, by quashing the impugned proceedings dated 22.09.2014 of the second respondent. Consequently, the second respondent is directed to allocate 500 MW

capacity of evacuation to the petitioner for the supply of electrical energy to the third respondent herein pursuant to the letter dated 20.12.2013.

30. In the result, the above writ petition is allowed. There is no order as to costs. Consequently, connected miscellaneous petitions are closed.

r n s

s/d-
Assistant Registrar(CS-III)

True Copy

Sub-Assistant Registrar

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 M/s.AL.Ganthimathi, Advocate SR 10199

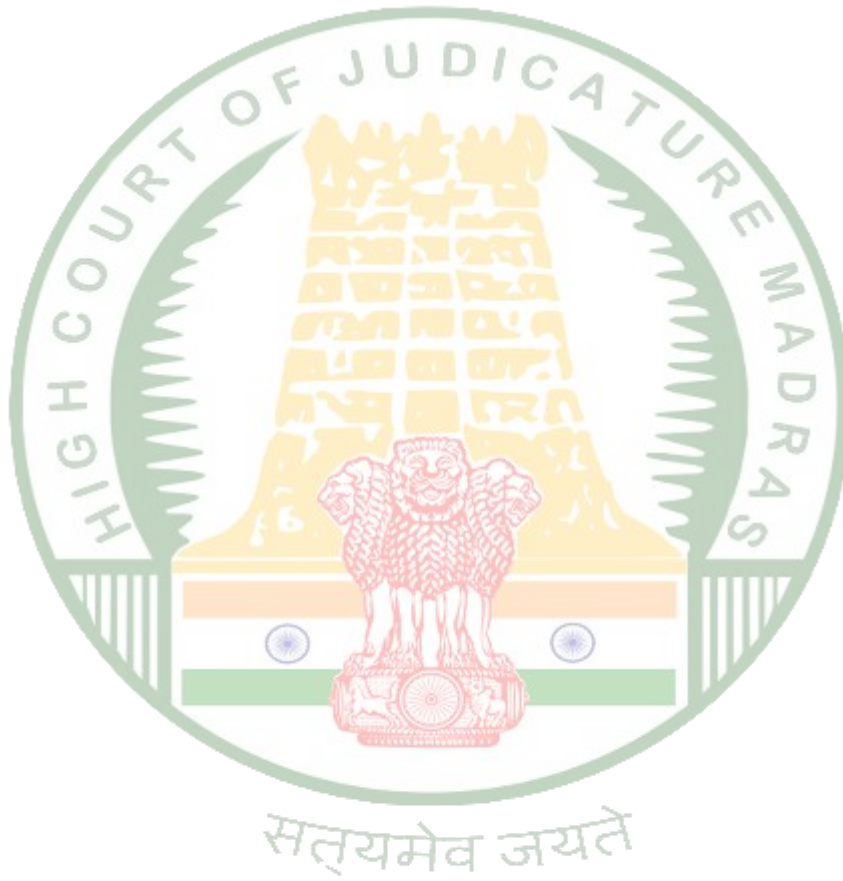
+ 1 cc to Mr.R.Sankaranarayanan, Advocate SR 10539

+ 1 cc to M/s.Aiyar and Dolia, Advocate SR 10016

+ 1 cc to Mr.K.Seshadri, Advocate SR 10147

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W.P.No.28024 of 2014 &
M.P.Nos.1 and 2 of 2014



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