

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.02.2016

Date of Reserving the Order	Date of Pronouncing the Order
11.02.2016	15.02.2016

CORAM

THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM

W.P.Nos.27936 & 36877 of 2015

W.P.No.27936 of 2015

Tamil Nadu Power Producers Association
Rep., by its Authorised Signatory Mr.Venugopal,
New No.36, Knowledge Tower, 4th Floor,
Sanjeevarayanpettai, Little Mount,
Saidapet, Chennai - 600 015. Petitioner

Vs.

1. State of Tamil Nadu
Rep., by the Secretary to Govt.,
Energy Department,
Secretariat, Fort. St., George,
Chennai - 600 009.
2. Tamil Nadu Generation and Distribution
Corporation Limited,
Rep., by its Chairman,
NPKRR Maaligai,
144, Anna Salai,
Chennai - 600 002.
3. Tamil Nadu Transmission Corpn., Ltd., (TANTRANSCO),
Rep., by its Chairman,
144, Anna Salai,
Chennai - 600 002.
4. State Load Despatch Centre (SLDC),
Rep., by its Director -Operations,
144, Anna Salai,
Chennai - 600 002. Respondents

W.P.No.36877 of 2015

M/s.Indbarath Thermal Power Ltd.,
Having its Corporate office
At No.20, Old No.129, Chamiers Road,
Nandanam,
Chennai - 600 035.

... Petitioner

Vs.

1. Government of Tamil Nadu
Rep., by the Secretary to Govt.,
Department of Energy,
Fort. St., George, Secretariat,
Chennai - 600 009.
2. The Tamil Nadu Generation and Distribution
Corporation Limited,
Rep., by its Chairman,
NPKRR Maaligai, 144, Anna Salai,
Chennai - 600 002.
3. The Tamil Nadu Generation and Distribution
Corporation (TANGEDCO) Ltd,
Rep., by its Chairman & Managing Director,
NPKRR Maaligai,
144, Anna Salai,
Chennai - 600 002.
4. Tamil Nadu Transmission Corpn., Ltd., (TANTRANSCO),
Rep., by its Chairman & Managing Director,
NPKRR Maaligai,
144, Anna Salai,
Chennai - 600 002.
5. The Chief Engineer/PPP
The Tamil Nadu Generation and
Distribution Corporation (TANGEDCO) Ltd.,
NPKRR Maaligai,
144, Anna Salai,
Chennai - 600 002.
6. The Superintending Engineer/Load
Despatch and Grid Operations
The Tamil Nadu Transmission
Corporation (TANTRANSCO) Ltd.,
NPKRR Maaligai,
144, Anna Salai,
Chennai - 600 002.

7. The Superintending Engineer,
Open Access and Coordination,
The Tamil Nadu Transmission
Corporation (TANTRANSCO) Ltd.,
NPKRR Maaligai,
144, Anna Salai,
Chennai - 600 002.

... Respondents

Prayer in W.P.No.27936 of 2015 :-Petition filed under Article 226 of the Constitution of India praying to issue Writ of Certiorarified Mandamus to call for the records comprised in the impugned G.O.(Ms.).No.77, Energy (A1), dated 10.10.2014, passed by the first respondent and quash the same as being unconstitutional and ultra vires the powers under Section 11 of the Electricity Act, 2003, in so far as it restricts interstate sale and interstate open access and consequently direct first to fourth respondents to act strictly in terms of the Electricity Act, 2003 and CERC Open Access in Interstate Transmission Regulation by permitting the petitioner to generate, transmit and sell electricity to any person outside the State of Tamilnadu in compliance with the terms thereof.

Prayer in W.P.No.36877 of 2015 :-Petition filed under Article 226 of the Constitution of India praying to issue Writ of Certiorari to call for the records relating to the impugned Government Gazettee under Part II Section viz., G.O.(Ms.).No.77, Energy (A1), dated 10.10.2014, of the first respondent and quash the same.

For petitioner : Mr.P.S.Raman Senior counsel for
Mr.Vinodkumar for petitioner in
W.P.No.27936 of 2015
Mr.AR.L.Sundaresan for
Ms.AL.Ganthimathi for petitioner in
W.P.No.36877 of 2015

For Respondents : Mr.A.L.Somayajee Advocate General
Assisted by Mr.Abdul Saleem Spl.G.P.,
and Mr.R.Rajeswaran Spl.G.P.,
for respondents

C O M M O N O R D E R

As the legal issue involved in both these Writ Petitions are identical and both the petitioners have challenged the notification issued by the Government in G.O.Ms.No.77, Energy A1, dated 10.10.2014, the matters were heard together and are disposed of by this common order.

2. The petitioner in W.P.No.27936 of 2015 is an association registered under the provision of the Tamil Nadu Societies Registration Act, 1975, consisting of members who are engaging in the business of power generation in the State of Tamil Nadu using coal, gas and other conventional fuel.

3. The petitioner in W.P.No.36877 of 2015, is a Thermal based Power Generating Plant situated at Tuticorin District. The impugned Government Order in G.O.Ms.No.77, dated 10.10.2014, has been issued in exercise of the power conferred by sub-section (1) of Section 11 of the Electricity Act, 2003, (Central Act 36/2003) (hereinafter referred to as 'Act') stating that the directions are issued in the circumstances arising in public interest. The notification states that all generating stations shall supply all exportable electricity generated to the State Grid for supply to either the Tamil Nadu Generation and Distribution Corporation Ltd., TANGEDCO, or to any other Open Access consumers within the State of Tamil Nadu as per the Regulations notified in this regard by the Tamil Nadu Electricity Regulatory Commission (TNERC).

4. Section 11 of the Act deals with "directions to generating companies" and it would be relevant to refer to the said provision:-

Directions to generating companies :- (1) The Appropriate Government may specify that a generating company shall, in extraordinary circumstances operate and maintain any generating station in accordance with the directions of that Government.

Explanation:- For the purposes of this section, the expression "extraordinary circumstances" means circumstances arising out of threat to security of the State, public order or a natural calamity or such other circumstances arising in the public interest.

(2) The Appropriate Commission may offset the adverse financial impact of the directions referred to in sub-section (1) on any generating company in such manner as it considers

appropriate.

This clause provides that the Appropriate Government may specify in extraordinary circumstances that a generating company shall operate any generating station in accordance with the directions of that Government.

5. In terms of sub-section (1) of Section 11, the appropriate Government may specify that a generating company shall, in extraordinary circumstances operate and maintain any generating station in accordance with the directions of that Government. Extraordinary circumstances has been explained to mean circumstances arising out of threat to security of the State, public order or a natural calamity or such other circumstances arising in the public interest. Sub-section (2), provides that the appropriate commission may offset the adverse financial impact of the directions referred to in sub-section (1) on any generating company in such manner as it considers appropriate.

6. The State Government exercising the power under sub-section (1) of Section 11 had issued the impugned notification. By virtue of the impugned notification, all generating stations namely the members of the petitioners association/petitioner shall supply all exportable electricity generated to the State Grid for supply to one TANGEDCO or to any other open access consumers within the State of Tamil Nadu. Thus, the embargo on the petitioner is that they are not allowed to take the exportable energy generator outside the State of Tamil Nadu and they have been directed to supply it to the State Grid for either TANGEDCO or any other open access consumer.

7. Appropriate Government has been defined under Section 2 (5) of the Act and it means, the Central Government in respect of a generating company wholly or partly owned by it; in relation to any inter-State generation, transmission, trading or supply of electricity and with respect of any mines, oil-fields, etc., and any other case, the State Government having jurisdiction under the Act. "Open access" has been defined under Section 2(47) to mean the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission. Appropriate Commission has been defined under Section 2(4) of the Act to mean the Central Regulatory Commission (CERC), referred to in Section 76(1) of the Act or the State Regulatory Commission (SERC), referred to in Section 82 of the Act or the Joint Commission referred to in Section 83 of the Act.

8. We may at this stage look into the basis for issuing the impugned notification. The Government in exercise of its power under Section 11 of the Act issued G.O.Ms.No.10, dated 27.02.2009, directing that all generating stations shall supply all exportable electricity generated to the State Grid for supply to either TANGEDCO or other High Tension Consumer within the State. After about five years during which period the said Government was in force, the Government took a decision to rescind the same by issuing G.O.Ms.No.40, dated 30.05.2014. The Chairman and Managing Director, the TANGEDCO in his letter dated 18.09.2014, which has been referred to in the impugned Government order, has stated that the wind season is likely to be come to an end during the fortnight i.e., 15.10.2014 and there is an un-bridged gap between demand and supply of power and in view of the power deficit, all the power generator by the generators within the State may be made available to the State Grid. It is further stated that with a view to ensuring adequate availability of power for consumption within the State, the Chairman and Managing Director, TANGEDCO, has requested the Government to issue direction under Section 11 of the Act to all generators in the State of Tamil Nadu to supply their power only to TANGEDCO or other open access consumers within the State of Tamil Nadu and also requested to issue orders with immediate effect. Accordingly, the Government in the impugned Government order stated that in the extraordinary circumstances stated by the Chairman and Managing Director, TANGEDCO, the Government, after carefully examination, issued notification, regarding the supply of power by generating companies to TANGEDCO or open access consumer within the State.

9. Mr. P.S. Raman, learned Senior counsel appearing for the petitioner Association submitted that the impugned order is perverse, as it has not taken into account the ground realities and the quantum of power available in the State, which has been admitted by the respondent in another Writ Petition in which they had filed a counter affidavit. Referring to the said counter affidavit in W.P.No.22648 of 2015, it is submitted that there is surplus power and there is no basis for issuance of the impugned notification. Therefore, it is submitted that there is no "extraordinary" situation for invoking Section 11 of the Act. It is further submitted that a notification invoking Section 11 of the Act was issued by the Government of Karnataka, which was challenged before the High Court of Karnataka and though the Hon'ble Division Bench upheld the notification, (in the case of GMR Energy Ltd., vs. Government of Karnataka, reported in ILR 2010 KAR 2620), the facts of the case are very relevant, as the Government of Karnataka had established a High Power Committee which conducted a detailed study submitted report to the

Government and the government agreed to purchase the entire power generator in the State and therefore, the notification was held to be valid as it was regulatory. By referring to the order passed by the Government of Karnataka, which has been quoted in the decision of the Hon'ble Division Bench, it is submitted that a detailed exercise has been done by the Government of Karnataka whereas in the State of Tamil Nadu, the impugned notification has been issued based on a letter given by the Chairman TANGEDCO, which is absolutely without any basis. Further by referring to the typed set of documents, it is submitted that periodic back down instructions have been given on a day-to-day basis by virtue of which less than 30% of the power generated by the members of the petitioner association has been drawn and on account of the backing down instructions given at short notice, the petitioners have suffered severe financial hardship, apart from damage to machinery and other civil consequences. Further, it is submitted that the TANGEDCO has not paid the generators/petitioners and bills are pending for more than 9 to 10 months and the impugned Government order is prohibitive as on one hand, the exportable energy generator is not permitted to be taken outside the State of Tamil Nadu, at the same time, the power generated is not purchased or permitted to be supplied to the State Grid/TANGEDCO and when supplied, no payment is made and therefore, the action of the respondent is absolutely perverse.

10. The learned counsel further submitted that the State Government has no jurisdiction to issue the impugned proceedings, as it is not the "Appropriate Government" as defined under Section 2(5) of the Act and for interstate access, the appropriate Government is the Central Government. In this regard, the definition of "open access" as defined under Section 2(47) was also referred to. Further, it is submitted that by virtue of the impugned notification, free movement of goods, electricity being one, on interstate transfers has been prohibited, which is violative of Article 300A of the Constitution of India. It is submitted that identical contentions were raised before the Karnataka High Court and though the High Court of Karnataka rejected those contentions, the petitioner without prejudice to their rights would contend that even assuming there is power for the State Government to issue the impugned notification, there is no record except the Chairman's letter and no worthwhile exercise was done by the State Government before issuing the impugned notification. Further, it is stated that there is no compensation paid to the generating companies as required under Section 11(2) of the Act. The learned Senior counsel while admitting that the agreement between the members of the petitioner and TANGEDCO came to an end in September 2015, it is stated that on account of an

interim order granted in another Writ Petition, the status-quo was maintained. On the above grounds, the learned Senior counsel seeks for setting aside the impugned notification.

11. Mr.AR.L.Sundaresan, learned Senior counsel for the petitioner in W.P.No.36877 of 2015, in addition submitted that regular backing down instructions have been given that too on daily basis with short notice, which has caused irreparable hardship and an amount of Rs.9.90 crores is outstanding and payable to the petitioner by TANGEDCO and the interest on the said amount itself is more than Rs.160 crores. Therefore, it is submitted that the respondents cannot have it both ways by putting an embargo on export of power outside the State and simultaneously issuing backing down instructions and crippling the generating industries. Further, it is submitted that TANGEDCO being a wholly owned Government company and the impugned notification having been issued by the Government under Section 11 of the Act, there is a duty on the part of the TANGEDCO to pay the petitioner. The learned counsel submitted that the expression "such other circumstances arising in the public interest" occurring in the explanation under Section 11 (1) shall refer to the other circumstances mentioned therein namely, circumstances arising out of threat to security of the State, public order or a natural calamity and thus by applying the ejusdem generis principle, the reason assigned in the impugned order would not fall within the expression "such other circumstances" arising in public interest. Further, it is submitted that if the petitioner is compelled to supply to other open access consumers in the State, the TANGEDCO levies a surcharge on the cross subsidy and therefore, there cannot be a compulsion on the petitioners to supply the power within the State. By referring to the object of the 2003 Act, which was also pressed into service by Mr.P.S.Raman, learned Senior counsel, it is submitted that the object is to ensure distribution of power through out the State. In this regard, reference was made to the decision of the Hon'ble Supreme Court in the case of Tata Power Company Ltd., vs. Reliance Energy Ltd., reported in (2009) 16 SCC 659. Further, it is submitted that the Government Order issued in the State of Karnataka is for a specified duration not for an indefinite period as in the instant case. Further, it is submitted that in terms of Section 43 of the Act, there is a duty cast upon the petitioners to supply power. Broadly on the above grounds, the learned Senior counsel seeks for setting aside the impugned notification.

12. Mr.A.L.Somayajee, the learned Advocate General appearing for the respondent TANGEDCO submitted that there are 9000HT consumers in the State and the agreements entered into the members of the petitioner association/petitioner came to an end

on 30.09.2015, and by virtue of the interim orders in another Writ Petition, the same arrangement was continued. Subsequently, Tender No.7, was floated for entering into fresh agreement for the period from 29.10.2015 to 31.05.2016, except one of the petitioner all others have entered into fresh agreements with TANGEDCO agreeing to all conditions and to supply at the rate of Rs.5.05ps per unit. Further, it is submitted that the earlier tender was challenged by a Generating company by filing a Writ Petition before this Court, however, no interim order was granted and the TNERC was directed to consider the deviations pointed out by the said company and TNERC has passed an order granting approval for the deviation sought for by TNGEDCO in their petitions and approved the tender floated for purchase of 100MW RTC for the period from October 2015 to May 2016 and the said order passed by the TNERC dated 28.01.2016, has become final and there is no challenge to the same. Further, by referring to the said order, it is submitted that the TNERC has directed that every effort must be made by the TANGEDCO to purchase power at the least cost as that alone would be the public interest.

13. With regard to the contentions raised by the learned Senior counsels with regard to the plea of which would be the "appropriate Government", the effect of the notification under Section 11(1), the scope of the expression, "such other circumstances arising in the public interest", it is submitted that all these issues were considered by the Hon'ble Division Bench of the Karnataka High Court and though the said decision may not bind this Court, it will definitely have a persuasive value and therefore, the learned counsel referred to the relevant paragraphs of the decision of the Division Bench of the Karnataka High Court, which has rejected similar contentions raised in these Writ Petitions. Further, it is submitted that backing down instruction is envisaged in the agreement and the petitioners are fully aware of the same. Further, it is submitted that there is no ground raised by the petitioners challenging the reasons given by the Chairman, TANGEDCO in his letter to the Government nor the contents were disputed. Further, reference was made to the provisional data for the period from February 2016 to May 2016 and it is submitted that this data will also be very relevant for the purpose of deciding the issue on hand, as the data has been prepared on the demand availability versus requirement. Further, it is submitted that principles of ejusdem generis cannot be applied as each of the circumstances mentioned in the explanation to Section 11(1) is an independent circumstances. Further, the learned Advocate General on instructions submitted that during May 2016, the Government will review the impugned decision as by then, the wind power will be achieved. The learned Advocate General

further submitted that the respondents are purchasing the power strictly as per the merit list by resorting to purchase at the cheapest rate which is available and in this regard the cost analysis for the month of December 2015 was relied on.

14. In reply, the learned Senior counsel submitted that the agreements with conditions contained therein are compelled to be signed because of the impugned order. It is submitted that if the reason for issuing backing down instruction is on account of the fact that they wanted to purchase power at cheaper rate then the reason given in the impugned notification is false. The learned counsel for the petitioner Association referred to the reply affidavit filed by the petitioner in W.P.No.27936 of 2015 and submitted that in 2009 when G.O.Ms.No.10 was issued, there was no backing down instruction to the generators. The learned Special Government Pleader appearing for the first respondent referred to the averment made in the counter affidavit and supported the stand taken by the TANGEDCO.

15. Heard the learned Senior counsels appearing for the petitioners and the learned Advocate General appearing for the respondent TANGEDCO and the learned Special Government Pleader for the Government and carefully perused the materials placed on record.

16. Firstly, I propose to consider the submission made by the learned counsel for the petitioners with regard to as to which is the "Appropriate Government" to exercise power under Section 11(1) and whether what is the purport of the expression such other circumstances arising in the "public interest" and whether the principle of ejusdem generis, could be applicable.

17. To decide this issue one need not labour much as identical submissions were raised before the Karnataka High Court in the case of GMR Energy Ltd., (supra), wherein there was a challenge to an order passed by the Government of Karnataka in exercise of power under sub-section (1) of Section 11 of the Act. After carefully going through the decision of the Hon'ble Division Bench of the Karnataka High Court, I am in respectful as recent with the judgment and I am fully convinced that the issues raised in the present Writ Petitions relating to the scope and ambit of Section 11(1) would stand squarely covered by the decision of the Karnataka High Court. I am persuaded to say so on account of the elaborate reasons assigned by the Hon'ble Division Bench. It is stated that the Special Leave Petition has been filed against the said decision, no order of stay has been granted by the Hon'ble Supreme Court. The Hon'ble Division Bench of the Karnataka High Court in the case of GMR Energy Ltd., (supra), framed six points for consideration of which,

point Nos 2, 3, 4 & 5 have been raised in these Writ Petitions. Those, points are as follows:-

40. In the light of the aforesaid facts and the rival contentions, the following points arise for consideration:-

(1).....

(2) Even if such power is conceded to the appropriate Government, can a direction to "supply power" to the State Grid is conferred under the said Section when the words used are only, 'operate and maintain' and the word supply is conspicuously missing when the same is defined under Section 2 (70) of the Act?

(3) Whether the impugned orders are violative of Article 301 of the Constitution of India and offends free trade?

(4) In the facts of the case which is the appropriate Government which is empowered to exercise power under Section 11 of the Act?

(5) Whether the power exercised defeats the object with which the Act was passed, namely the concept of 'open access'?

.....

18. On the first question, the Division Bench analysed the provisions of the Act and pointed out that "such other circumstances" occurring in the explanation under Section 11(1) is a general word or statement, it follows and enumeration of circumstances of a particular or specific meaning, held as follows:-

62. These were the only two categories which were found in the Section when the Bill was moved in the parliament. The draftsmen did not provide for any general words. It was not in his contemplation at all. When the Bill was moved in the parliament, the representatives of the people in their wisdom thought that the said provision would not adequately meet all situation. Even in the absence of the aforesaid two circumstances, if there is severe scarcity of electricity and the public at large, in particular, the farmers, people living in the villages or hamlets, or below the poverty line or working class and even people belonging to middle class, who cannot afford to pay higher tariff, cannot be denied electricity supply. The National Policy envisages an obligation on the Government to supply electricity to rural areas under Section 6 of the Act. India is still a Socialistic State. Electricity is an essential

requirement of all facets of our life. It is a basic human need, as food, clothing and shelter. Though the Act liberalizes the market economy but is not a *lazzie faire* provision, which seeks to limit the operation of the public interest and directions related thereto. Therefore, a member of the parliament proposed an amendment to cover the interest of the common man of this country by an addition of an independent category apart from the existing two categories namely "such other circumstances arising in public interest". The amendment was allowed and it became part of the Section. The subsequent amendment to Section 6 of the Act makes the intention clear. By the Electricity (Amendment) Act, 2007 the old Section 6 is substituted by new Section 6 which provides that the concerned State Government and the Central Government shall jointly endeavour of provide access to electricity to all areas including villages and hamlets through rural electricity infrastructure and electrification of households.

63. Therefore, the third category is "such other circumstances affecting public interest". Thereby meaning circumstances other than the earlier two categories. Therefore, the word OR is again used after the word calamity, making the intention clear that the third category is yet another alternative and to be read disjunctively. The only common feature running underneath these three categories is an extraordinary circumstance requiring electricity, justifying invoking the power under Section 11 of the Act. Therefore, that is not a general word used to follow the specific words constituting a genus and restricted to things *eiusdem generis* with those preceding them.

64. The cardinal rule of interpretation is to allow the general words to take their natural wide meaning. When this general word is added by way of amendment, the intention of the parliament is clear, that these words are in addition to the other two circumstances, in the Bill before amendment, as an independent category or genus. Any other interpretation would negate the parliamentary intention and would not conform to the parliaments intended meaning of the enactment. The application of the rule would produce a result contrary to the legal meaning taking to be intended by parliament. More over this principle of *eiusdem generis* is pressed into service to resolve the

ambiguity or uncertainty and reconcile incompatibility between specific and general words. In the instant case there is no ambiguity. There is no incompatibility between specific words and general words. The general words used itself constitutes an independent category or genus. "Public Interest" itself is a category. If this rule is applied to define and restrict the meaning of public interest, it would lead to absurd result. In the absence of the specific words constituting a genus, there is no room for the application of the rule.

65. This Act was passed with the fond hope to increase the production of electricity supply. By mere passing a legislation the same cannot be achieved. Reasonable time is required to achieve the object of the Act. Probably a step in the right direction is taken. Over night results cannot be expected. Therefore, it will take some more time to have enough supply of electricity produced to meet the demands of the society. Supply of electricity at reasonable rate to rural India is essential for its overall development. Equally important is availability of reliable and quality power at competitive rates to Indian industry to make it globally competitive and to enable it to exploit the tremendous potential of employment generation. Electricity is an essential requirement for all facets of our life. It has become a basic human need. It is a critical infrastructure on which the socio-economic development of the country depends. No Legislature ever intends to favour one section of the population against the other. Its ostensible and proclaimed intention is always that it is doing justice between the various sections of the population. No rule is better established than that where two meanings are possible, we must take the more reasonable one. If the choice is between the two interpretations the narrower of which would fail to achieve the manifest purpose of the legislation, Courts should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view the Parliament would legislate only for the purpose of bringing about one effective result. When the Court is called upon to give a wide or limited interpretation to a particular expression and when that expression is capable of both these

interpretations, it is open to the Court to consider what was the object of the Legislature and what was the mischief aimed at and the Court must try and give that construction to particular expression which will be more consistent with the suppression of the mischief rather than that mischief being allowed to continue uncontrolled. When material words of a statute are capable of two constructions, one of which is likely to defeat or impair the policy of the Act whilst the other construction is likely to assist the achievement of the said policy, then the Courts would prefer to adopt the latter construction. It is more probable that Legislature should have used the word in that interpretation which least offends against 'our sense of justice'. If it appears that one of the two constructions will do injustice, and the other avoid injustice, then it is the bounden duty of the Court to adopt the second, and not adopt the first, of those constructions. Where one construction leads to absurdity, and the other makes the statute logical, the latter construction is to be preferred as every effort should be made to make sense and not nonsense of legislation.

19. The next point which was considered is that even if such power is conceded to the appropriate Government, the only direction that can be given by the Government to the generating company is to operate and maintain the generating stations. The Hon'ble Division Bench after referring to the decision of the Hon'ble Supreme Court in the case of Tata Power Company Ltd., (supra), held as follows:-

86. Therefore, what Section 11 intends is a direction to the generating company to operate and maintain the generating station in accordance with the direction of the Government. The direction to operate means to generate electricity for supply to the State Grid only and not for commercial supply. Direction to maintain means to keep the generating company in good condition by checking or repairing it regularly so that the production and supply of electricity in to the State Grid is unimpaired, to enable the Government to meet the extra ordinary circumstance arising out of scarcity of electricity to meet the public demand. Here the direction is to supply the electricity which is generated in the generating company to the State Grid only and not to supply to their licensee or customer. Therefore, the argument that the Government has not

power to issue direction under Section 11 to supply electricity to the State Grid is without any substance and accordingly it is rejected.

20. The plea regarding the violation of Article 301 of the Constitution was also rejected and after referring to the decision of the Hon'ble Supreme Court in the case of Automobile Transport Rajasthan Ltd., vs. State of Rajasthan reported in AIR 1962 SC 1406, and the decision in the case of Jindal Steel Ltd., vs. State of Haryana reported in 2006 STC (145) page 544, it was held that the power in Section 11 have to be read in a balanced way to meet the public demand and public interest in a beneficial rather than a restrictive manner. On facts, the Division Bench found that the order passed by the Government of Karnataka is only regulatory and as the generators were directed to supply the same to the State Grid in public interest. An observation was made that if such supply where to have any adverse financial impact on the producer of the electricity, his interest is also protected under law. Therefore, the producer cannot have any grievance as the interest of both the producer and customer is taken care. Thus, Section 11 of the Act was held to be regulatory in nature and not a restriction.

21. The issue as to which is the "Appropriate Government" to exercise power under Section 11(1) of the Act was also elaborately considered and infact, identical submissions were made before the Karnataka High Court which were rejected and it was held that the State Government is the appropriate Government. With regard to the concept of "open access" was also considered by the Hon'ble Division Bench and it was held that the very act which provided for liberalization, privatisation or open access has conferred such power on the Government to exercise the same in extra-ordinary circumstances as mentioned in the Act. The source of all these rights, obligations and power is the same Act. Therefore, the object with which this enactment is passed, the mischief sought to be remedied and the mechanism adopted, it cannot be said exercise of power under Section 11 of the Act runs counter to this concept of open access, privatisation and liberalization of power industry in the country. Keeping in mind the interest of all stakeholders, the provisions have to be interpreted harmoniously.

22. I am in respectful agreement of the decision of the Hon'ble Division Bench of the Karnataka High Court in the case of GMR Energy Ltd., (supra), and accordingly, reject the contentions raised by the petitioners with regard to the scope of Section 11(1), and hold that the appropriate Government in the instant case is the State Government, the doctrine of

ejusdem generis would not apply. Thus, all these contentions raised by the petitioners are rejected as being devoid of merits.

23. Thus, having held that the State Government is the "Appropriate Government" and they have the power under Section 11(1) of the Act, to issue a notification as that, which is impugned herein, the argument of the learned Senior counsel for the petitioners stating that there was no record available except for the letter of the Chairman TANGEDCO and the exercise that by the Government of Karnataka by appointing a High Level Committee was not followed in the State of Tamil Nadu and the reasons assigned in the Government orders are perverse, more particularly in the light of the fact, the respondent TANGEDCO in their counter affidavit in another Writ Petition had given full details with regard to the total power available in the State, which shows that there is no deficit. It may be true that the State of Tamil Nadu has not constituted a committee as done by the Government of Karnataka, but however, this being the administrative realm, this Court will not substitute its opinion with that of the opinion rendered by the Chairman, TANGEDCO, more so, in the light of the fact that the petitioners have not disputed the correctness of the reasons assigned by the Chairman in his letter dated 18.09.2014. At this stage, this Court places on record the submission made by the learned Advocate General that the impugned Government order would be reviewed by the Government by May 2016. Therefore, the petitioners cannot maintain a challenge to the impugned notification without disputing the stand taken by the Chairman, TANGEDCO in his letter dated 18.09.2014. Therefore, the said ground raised by the petitioner is not sustainable.

24. Elaborate submissions were made by the learned Senior counsel by referring to the typed set of documents, containing bunch of backing down instructions given from time to time. It is argued that the backing down instructions have been issued by the TANGEDCO resulting in the industry getting crippled and so far as the petitioner in W.P.No.36877 of 2015, is an independent Thermal Power Plant and not an allied activity with other business activities, as done by the members of the petitioner association, and they are suffering huge financial crisis as several crores of rupees is to be paid to them by TANGEDCO. It cannot be disputed that when a person purchases a product from a manufacturer, he is bound to pay the cost. However, the transaction being contractual shall be governed by the terms and conditions of the contract between the parties. The petitioners are all generating companies and they have consciously entered into the agreements/contracts with TANGEDCO agreeing to supply power at a particular rate and binding themselves to various

conditions. The agreement also provides for certain protection to the generators in the event of defaulter or delay in payment. Thus, the arrangement between the petitioners and TANGEDCO being purely contractual and both parties having accepted to the terms and conditions of the agreement and acted based on such terms and conditions, non-adherence to certain terms and conditions such as payment for the electricity supply cannot be a ground to nullify the impugned notification. In fact, sub-section (2) of Section 11 provides for the appropriate Commission to offset the adverse financial impact of the directions referred to in Section 11(1), on any generating company in such manner as it considers appropriate. Thus, the Appropriate Commission being the TNERC would have to adjudicate as to the nature of adverse financial impact of the impugned notification on the generating company for which purpose, the affected party should approach the Commission. In fact, the Karnataka High Court in the case of GMR Energy Ltd., (supra), has pointed out this aspect and held that the producer of electricity is also protected under law. However, on the grounds raised by the petitioner, the impugned notification cannot be set at naught.

25. Above all, the agreements entered into between the petitioners and the TANGEDCO have admittedly expired on 30.09.2015 when TANGEDCO floated tenders for entering into fresh agreement for the period from 29.10.2015 to 31.05.2016, one generating company challenged the said tender by filing a Writ Petition before this Court in W.P.No.30617 of 2015, wherein prayer was made to quash the tender notification No.7 of 2015, relating to procurement of 1200MW of RTC power and for a direction to TANGEDCO to float fresh tenders with a level playing field for both inter-state generators/suppliers and intra-state generators/suppliers. Though an order of interim stay was sought for, the Writ Court was not inclined to grant interim stay, but were directed to approach the TNERC. Accordingly, the TANGEDCO filed petitions before TNERC seeking permission to float the tender for short term power purchase pending approval of the Commission in view of the urgency and to float the tender No.7 of 2015, with certain deviations. The petitioner in the said Writ Petition M/s.ARKAY Energy (Rameswaram) Ltd., filed I.A.No.2 of 2015, to intervene the said application. The Electricity Regulatory Commission after elaborately considering the submissions on either side approved the tender with deviations by its order dated 28.01.2016. The said order has become final. Consequently, the tenders were floated and surprisingly all the petitioners except one have signed fresh agreements with TANGEDCO agreeing to supply power at the rate of Rs.5.05ps per unit for the period from 29.10.2015 to 31.05.2016. Thus, when new agreements have been entered into by the petitioners, as rightly pointed out by the learned

Advocate General challenged to the impugned notification has virtually become academic. The other issue being that the petitioner would be precluded from challenging the impugned notification on the ground of acquiescence.

26. Hence, for all the above reasons, the petitioners have not made out any case of for interference with the impugned notification and accordingly, the Writ Petitions fail and they are dismissed. Consequently, the interim order passed stand vacated. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

pbn

To

1. State of Tamil Nadu
Rep., by the Secretary to Govt.,
Energy Department,
Secretariat, Fort. St., George,
Chennai - 600 009.
2. Tamil Nadu Generation and Distribution
Corporation Limited,
Rep., by its Chairman,
NPKRR Maaligai,
144, Anna Salai,
Chennai - 600 002.
3. Tamil Nadu Transmission Corpn., Ltd., (TANTRANSCO),
Rep., by its Chairman,
144, Anna Salai,
Chennai - 600 002.
4. State Load Despatch Centre (SLDC),
Rep., by its Director -Operations,
144, Anna Salai,
Chennai - 600 002.

5. The Chief Engineer/PPP
The Tamil Nadu Generation and
Distribution Corporation (TANGEDCO) Ltd.,
NPKRR Maaligai,
144, Anna Salai,
Chennai - 600 002.

6. The Superintending Engineer/Load
Despatch and Grid Operations
The Tamil Nadu Transmission
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144, Anna Salai,
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7. The Superintending Engineer,
Open Access and Coordination,
The Tamil Nadu Transmission
Corporation (TANTRANSCO) Ltd.,
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+1cc to Ms.AL.Ganthimathi, Advocate, S.R.No.9572
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+1cc to the Government Pleader, S.R.No.9615

W.P.Nos.27936 & 36877 of 2015

VS(CO)
CA(16/02/2016)

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