

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 11TH DAY OF MARCH, 2024

BEFORE

THE HON'BLE MR. JUSTICE B.M.SHYAM PRASAD

WRIT PETITION NO.24239 OF 2023 (GM-KEB)

C/W

WRIT PETITION NO.26324 OF 2023 (GM-KEB)

WRIT PETITION NO.26833 OF 2023 (GM-KEB)

WRIT PETITION NO.24998 OF 2023 (GM-KEB)

IN W.P. NO.24239 OF 2023

BETWEEN

ALTILIUM ENERGIE PRIVATE LIMITED
(CIN NO.U40200DL2020PTC363593)
A PRIVATE LIMITED COMPANY INCORPORATED
AND REGISTERED UNDER
COMPANIES ACT 2013
HAVING ITS REGISTERED OFFICE
AT 1303, PKT-A
THE SLEUTHS CGHS LTD
PLOT NO.6, SECTOR 19 B
DWARKA, NEW DLEHI, DELHI – 110 075.
(REPRESENTED BY ITS
DIRECTOR AMIT KUMAR)

...PETITIONER

(BY SRI SHRIDHAR PRABHU, ADVOCATE)



AND

1. UNION OF INDIA
MINISTRY OF POWER AND
NEW AND RENEWABLE ENERGY
SHRAM SHAKTI BHAWAN
RAFI MARG, NEW DELHI-110 001
SECY POWER@NIC.IN
[REPRESENTED BY SECRETARY(POWER)]

2. CENTRAL ELECTRICITY
REGULATORY COMMISSION
A STATUTORY BODY FUNCTIONING
UNDER SECTION 76 OF THE
ELECTRICITY ACT 2003
3RD AND 4TH FLOOR
CHANDERLOK BUILDING
36, JANAPATH
NEW DELHI -110 001.
EMAIL-INFO@CERCIND.GOV.IN
[REPRESENTED BY ITS CHAIRMAN]

3. SOUTHERN REGIONAL LOAD
DISPATCH CENTRE MANAGER BY
GRID CONTROLLER OF INDIA LIMITED
A BODY ESTABLISHED UNDER
SECTION 27 OF THE
ELECTRICITY ACT 2003
29, RACE COURSE CROSS ROAD
BENGALURU – 560 009.
SRIDCCR@POSOCO.IN
[REPRESENTED BY ITS
CHIEF ENGINEER]

4. STATE OF KARNATAKA
DEPARTMENT OF ENERGY
ROOM NO.236, 2ND FLOOR

VIKASA SOUDHA
DR B R AMBEDKAR STREET
BANGALORE – 560 001.
PRS-ENERGY@KARNATAKA.GOV.IN
[REPRESENTED BY ITS
ADDITIONAL CHIEF SECRETARY]

5. STATE LOAD DISPATCH CENTER
MANAGED BY KARNATAKA POWER
TRANSMISSION CORPORATION LIMITED
A BODY ESTABLISHED UNDER
SECTION 31 OF THE ELECTRICITY ACT 2003
SLDC, RACECOURSE CROSS ROAD
ANAND RAO CIRCLE, BENGALURU – 560 009.
CEELDCKPTC@YAHOO.COM
[REPRESENTED BY ITS CHIEF ENGINEER]

6. ENERGY DEVELOPMENT COMPANY LTD
(CIN NO.L85110KA1995PLCO17003)
A PUBLIC LIMITED COMPANY
INCORPORATED AND REGISTERED UNDER THE
COMPANIES ACT, 1956
HAVING ITS REGISTERED
OFFICE AT EDCL POWER STATION
VILL-HULUGUNDA TALUKA
SOMWARAPET, KUSHALNAGAR – 571 233.
[REPRESENTED BY ITS
MANAGING DIRECTOR]

.....RESPONDENTS

(BY SRI H. SHANTI BHUSHAN, DSG A/W

Ms. PRIYANKA S BHAT, ADVOCATE FOR R1;

SRI SHASHI KIRAN SHETTY, AG A/W

SRI. BHOJEGOUDA T. KOLLAR, AGA FOR R 4;

SRI. S.S. NAGANAND, SENIOR ADVOCATE &

SRI. S.S. SRIRANGA, SENIOR ADVOCATE FOR

MS. SUMANA NAGANAND, ADVOCATE A/W
MS.NIDHI GUPTA, ADVOCATE FOR R5)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF CONSTITUTION OF INDIA, PRAYING TO A) ISSUE A WRIT OF CERTIORARI OR ANY OTHER APPROPRIATE WRIT ORDER OR DIRECTION TO QUASH THE IMPUGNED ORDER DATED 16TH OCTOBER 2023 NOTIFIED BY THE 4TH RESPONDENT STATE ON 20TH OCTOBER 2023, PRODUCED AT ANNEXURE-A BEARING NO.ENERGY P2 PPT 2023 ISSUING DIRECTION UNDER SECTION 11 OF THE ELECTRICITY ACT, 2003 TO STATE EMBEDDED GENERATING COMPANIES / GENERATORS TO SUPPLY ENERGY TO THE STATE GRID; B) ISSUE A WRIT OF CERTIORARI OR ANY OTHER APPROPRIATE WRIT ORDER OR DIRECTION QUASH THE IMPUGNED STANDING CLEARANCE BEARING NUMBER: NOC/KASLDC/SR/2023/26785 DATED 29TH SEPTEMBER 2023 ISSUED BY THE 5TH RESPONDENT SLDC, PRODUCED AT ANNEXURE-B, REFUSING TO PERMIT THE PETITIONER TO UNDERTAKE INTER-STATE TRANSACTIONS, THROUGH 6TH RESPONDENT AND C) DIRECT THE 2ND RESPONDENT CENTRAL ELECTRICITY REGULATORY COMMISSION (CERC) TO DETERMINE THE DAMAGES TO BE PAID DUE TO ILLEGALLY DENYING OPEN ACCESS FOR THE PERIOD OF 17TH OCTOBER 2023 TILL THE DATE OF RESUMPTION

OF OPEN ACCESS WITH CARRYING COST AT 1% PER MONTH AND ETC.

IN W.P.NO.26324 OF 2023

BETWEEN

SRI CHAMUNDESHWARI SUGARS LIMITED
HAVING ITS REGISTERED OFFICE AT
88/5, RICHMOND ROAD
BANGALORE – 560 025
KARNATAKA, INDIA

REPRESENTED BY ITS PRESIDENT,
SRI K.R. NACHIAPPAN

...PETITIONER

(BY SRI ADITYA NARAYAN, ADVOCATE)

AND

1. STATE OF KARNATAKA
DEPARTMENT OF ENERGY
2ND FLOOR, VIKASA SOUDHA
AMBEDKAR VEEDHI, BENGALURU – 560 001.

REPRESENTED BY THE
ADDITIONAL CHIEF SECRETARY

2. KARNATAKA POWER TRANSMISSION
CORPORATION LIMITED
(STATE LOAD DISPATCH CENTRE)
27/1, RACE COURSE ROAD
MADHAVA NAGAR, GANDHI NAGAR
BENGALURU – 560 001.

REPRESENTED BY ITS CHIEF ENGINEER

.....RESPONDENTS

(BY SRI SHASHI KIRAN SHETTY, AG A/W

SRI. BHOJEGOUDA T. KOLLAR, AGA FOR R1;

SRI. S.S. NAGANAND, SENIOR ADVOCATE &

SRI. S.S. SRIRANGA, SENIOR ADVOCATE FOR

MS. SUMANA NAGANAND, ADVOCATE A/W

MS.NIDHI GUPTA, ADVOCATE FOR R2)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF CONSTITUTION OF INDIA, PRAYING TO A) ISSUE A WRIT CERTIORARI OR ANY OTHER APPROPRIATE WRIT ORDER OR DIRECTION SETTING ASIDE THE DIRECTION ISSUED BY THE RESPONDENT NO.1 ON 16.10.2023 BEARING NO.ENERGY 82 PPT 2023 (ANNEXURE-A), AS WITHOUT JURISDICTION AND NON-EST; B) ISSUE A WRIT OF CERTIORARI OR ANY OTHER APPROPRIATE WRIT ORDER DIRECTION SETTING ASIDE THE IMPUGNED COMMUNICATION RESPONDENT NO.2 THE KARNATAKA SLDC DATED 17.10.2023 (ANNEXURE-B); C) DIRECT RESPONDENT NO.2 THE KARNATAKA SLDC NOT TO CURTAIL/WITHHOLD OPEN ACCESS TO THE PETITIONER ON THE BASIS OF THE IMPUGNED DIRECTION DATED 16.10.2023 BEARING NO.ENERGY 82 PPT 2023 (ANNEXURE-A) AND D) DIRECT RESPONDENTS TO COMPENSATE THE PETITIONER FOR LOSSES SUFFERED BY IT DUE TO THE IMPUGNED ILLEGAL ORDER

(ANNEXURE-A) ISSUED UNDER SECTION 11 OF THE
ELECTRICITY ACT, 2003 AND ETC.

IN W.P.NO.26833 OF 2023

BETWEEN

1. NSL SUGARS LIMITED
A PUBLIC LIMITED
COMPANY INCORPORATED
AND REGISTERED UNDER
COMPANIES ACT 2013
HAVING ITS REGISTERED OFFICE
AT NO.60/1, SECOND CROSS
RESIDENCY ROAD
BENGALURU - 560 025.

HAVING ITS UNIT AT ALAND
BHUSANOOR VILLAGE
ALAND TALUK, GULBARGA DISTRICT
KARNATAKA – 585 302.
(REPRESENTED BY ITS
AUTHORIZED SIGNATORY/
ASSISTANT GENERAL MANAGER).
2. NSL SUGARS (TUNGABHADRA) LIMITED
(CIN U40102KA1983PLC058128)
A PUBLIC LIMITED COMPANY
INCORPORATED AND REGISTERED
UNDER COMPANIES ACT 2013
HAVING ITS REGISTERED OFFICE AT
FACTORY PREMISES
NSL SUGARS (TUNGABHADRA) LIMITED
SIRUGUPPA TALUK
SIRUGUPPA, DESANUR,
BELLARY, KARNATAKA – 583 140.

ALSO HAVING OFFICE AT
NSL ICON, 8-2-684/2/A
ROAD NO.12
BANJARA HILLS
HYDERABAD – 560 034.

(REPRESENTED BY ITS
AUTHORISED SIGNATORY/
ASSISTANT GENERAL MANGER.

...PETITIONERS

(BY SRI SHRIDHAR PRABHU, ADVOCATE)

AND

1. UNION OF INDIA
MINISTRY OF POWER AND
NEW AND RENEWABLE ENERGY
SHRAM SHAKTI BHAWAN
RAFI MARG, NEW DELHI -110 001
SECY POWER @NIC.IN,
[REPRESENTED BY SECRETARY (POWER)]

2. CENTRAL ELECTRICITY
REGULATORY COMMISSION
A STATUTORY BODY FUNCTIONING
UNDER SECTION 76 OF THE
ELECTRICITY ACT 2003
3RD AND 4TH FLOOR
CHANDERLOK BUILDING, 36
JANPATH, NEW DELHI -110 001.
E-MAIL:INFO@CERCIND.GOV.IN
[REPRESENTED BY ITS CHAIRMAN]

3. SOUTHERN REGIONAL LOAD
DISPATCH CENTER MANAGER BY
GRID CONTROLLER OF INDIA LIMITED
A BODY ESTABLISHED UNDER
SECTION 27 OF THE ELECTRICITY ACT 2003
29, RACE COURSE ROAD
BENGALURU – 560 009.
EMAIL:SRIDCCR@POSOCO.IN
[REPRESENTED BY ITS CHIEF ENGINEER]

4. STATE OF KARNATAKA
DEPARTMENT OF ENERGY
ROOM NO.236, 2ND FLOOR,
VIKASA SOUDHA
DR.B.R. AMBEDKAR STREET
BANGALORE – 560 001.
PRS-ENERGY@KARNATAKA.GOV.IN
[REPRESENTED BY ITS
ADDITIONAL CHIEF SECRETARY].

5. STATE LOAD DISPATCH CENTER
MANAGER BY KARNATAKA POWER
TRANSMISSION CORPORATION LIMITED
A BODY ESTABLISHED UNDER
SECTION 31 OF THE ELECTRICITY ACT 2003
SLDC, RACECOURSE CROSS ROAD
ANAND RAO CIRCLE
BENGALURU – 560 009.
[REPRESENTED BY ITS CHIEF ENGINEER]

6. PTC INDIA LIMITED
[CIN NO.L40105DL999PLC099328]
A PUBLIC LIMITED COMPANY
INCORPORATED AND REGISTERED
UNDER COMPANIES ACT 1957,
2ND FLOOR, NBCC TOWER
15 BHIKAJI CAMA PLACE,
NEW DELHI – 110 066.
[REPRESENTED BY ITS

MANAGING DIRECTOR]

7. ANDHRA PRADESH CENTRAL POWER
DISTRIBUTION CORPORATION LIMITED
[CIN NO.U40108AP2019SGC113717]
A PUBLIC LIMITED COMPANY
INCORPORATED AND REGISTERED
UNDER COMPANIES ACT 2013
HAVING ITS REGISTERED OFFICE
AT CORPORATE OFFICE
BESIDE GOVERNMENT POLYTECHNIC,
ITI ROAD, KRISHNA VIJAYAWADA,
ANDHRA PRADESH, INDIA – 520 008.
EMAIL: PRAMEELA.RANICS@GMAIL.COM
[REPRESENTED BY ITS MANAGING DIRECTOR].

....RESPONDENTS

(BY SRI SHANTHI BHUSHAN, ADVOCATE FOR DSGI R1;
SRI SHASHI KIRAN SHETTY, AG A/W
SRI. BHOJEGOUA T. KOLLAR, AGA FOR R4;
SRI. S.S. NAGANAND, SENIOR ADVOCATE &
SRI. S.S. SRIRANGA, SENIOR ADVOCATE FOR
MS. SUMANA NAGANAND, ADVOCATE A/W
MS.NIDHI GUPTA, ADVOCATE FOR R5
NOTICE TO R2 AND R6 DISPENSED WITH)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226
AND 227 OF CONSTITUTION OF INDIA, PRAYING TO A)
ISSUE A WRIT OF CERTIORARI OR ANY OTHER
APPROPRIATE WRIT ORDER OR DIRECTION TO QUASH
THE IMPUGNED ORDER DATED 16TH OCTOBER 2023
NOTIFIED BY THE 4TH RESPONDENT STATE ON 20TH

OCTOBER 2023 PRODUCED AT ANNEXURE-A, BEARING: ENERGY 82 PPT 2023 ISSUING DIRECTION UNDER SECTION 11 OF THE ELECTRICITY ACT, 2003 TO GENERATING COMPANIES / GENERATORS TO SUPPLY ENERGY TO THE STATE GRID; B) ISSUE A WRIT OF CERTIORARI OR ANY OTHER APPROPRIATE WRIT ORDER OR DIRECTION TO QUASH THE IMPUGNED COMMUNICATION BEARING NO. CEE/SLDC/SEE/EE/AEE3/5973 DATED 18TH OCTOBER 2023 ISSUED BY THE 5TH RESPONDENT SLDC, PRODUCED AT ANNEXURE-B, REFUSING TO PERMIT THE PETITIONERS TO UNDERTAKE INTER -STATE TRANSACTIONS; C) ISSUE A WRIT OF MANDAMUS OR ANY OTHER APPROPRIATE WRIT, ORDER OR DIRECTION TO THE 3RD RESPONDENT SRLDC AND THE 5TH RESPONDENT SLDC TO PROVIDE TO PROVIDE OPEN ACCESS TO THE 1ST PETITIONER UNDER CENTRAL ELECTRICITY REGULATORY COMMISSION (OPEN ACCESS INTER-STATE TRANSMISSION) REGULATIONS, 2008 AS AMENDED FROM TIME TO TIME AND ETC.

IN W.P.NO.24998 OF 2023

BETWEEN

NSL SUGARS LIMITED
A PUBLIC LIMITED COMPANY INCORPORATED
AND REGISTERED UNDER COMPANIES ACT 2013

HAVING ITS REGISTERED OFFICE AT
NO.60/1, SECOND CROSS, RESIDENCY ROAD
BENGALURU - 560 025.

ALSO HAVING OFFICE AT
NSL ICON, 8-2-684/2/A
ROAD NO.12, BNAJARA HILLS
HYDERABAD - 560 034.

(REPRESENTED BY ITS AUTHORIZED SIGNATORY)

...PETITIONER

(BY SRI SHRIDHAR PRABHU, ADVOCATE)

AND

1. UNION OF INDIA
MINISTRY OF POWER AND NEW
AND RENEWABLE ENERGY
SHRAM SHAKTI BHAWAN
RAFI MARG, NEW DELHI - 110 001.
SECY POWER@NIC.IN
[REPRESENTED BY SECRETARY POWER]

2. CENTRAL ELECTRICITY REGULATORY
COMMISSION
A STATUTORY BODY FUNCTIONING
UNDER SECTION 76 OF THE
ELECTRICITY ACT 2003
3RD AND 4TH FLOOR
CHANDERLOK BUILDING
36 JANPATH, NEW DELHI - 110 001
EMAIL :INFO@CERCIND.GOV.IN
[REPRESENTED BY ITS CHAIRMAN]

3. SOUTHERN REGIONAL LOAD
DISPATCH CENTER MANAGED BY
GRID CONTROLLER OF INDIA LIMITED
A BODY ESTABLISHED UNDER
SECTION 27 OF THE ELECTRICITY ACT 2003
29, RACE COURSE CROSS, ROAD
BENGALURU - 560 009.
EMAIL: SRLDCCR@POSOCO.IN
[REPRESENTED BY ITS CHIEF ENGINEER]
4. STATE OF KARNATAKA
DEPARTMENT OF ENERGY
ROOM NO.236, 2ND FLOOR
VIKASA SOUDHA,
DR. B R AMBEDKAR STREET
BANGALORE - 560 001.
PRS-ENERGY@KARNATAKA.GOV.IN
[REPRESENTED BY ITS
ADDITIONAL CHIEF SECRETARY]
5. STATE LOAD DISPATCH CENTER
MANAGED BY KARNATAKA
POWER TRANSMISSION
CORPORATION LIMITED
A BODY ESTABLISHED UNDER SECTION 31
OF THE ELECTRICITY ACT 2003
SLDC RACE COURSE CROSS ROAD
ANAND RAO CIRCLE
BENGALURU - 560 009.
CEELDCKPTCL@YAHOO.COM
[REPRESENTED BY ITS CHIEF ENGINEER]
6. PTC INDIA LIMITED
[CIN NO.L40105DL1999PLC099328]
A PUBLIC LIMITED COMPANY
INCORPORATED AND REGISTERED
UNDER COMPANIES ACT 1957
2ND FLOOR, NBCC TOWER
15 BHIKAJI CAMA PLACE

NEW DELHI – 110 066.
[REPRESENTED BY ITS [MANAGING DIRECTOR]

7. INDIAN ENERGY EXCHANGE
LIMITED (IEX)
(CIN NO.L74999DL2007PLC277039]
A PUBLIC LIMITED COMPANY
INCORPORATED AND REGISTERED
UNDER COMPANIES ACT 1957
FIRST FLOOR, UNIT NO.1.14(A)
AVANTA BUSINESS CENTRE
SOUTHERN PARK, D-2, DISTRICT CENTRE, SAKET
NEW DELHI – 110 017.
[REPRESENTED BY ITS MANAGING DIRECTOR]
.....RESPONDENTS

(BY SRI SHANTHI BHASHAN H, DSG, A/W
SRI CHANDRASHEKAR L., ADVOCATE FOR R1
SRI SHASHI KIRAN SHETTY, AG A/W
SRI. BHOJEGUDA T. KOLLAR, AGA FOR R4;
SRI. S.S. NAGANAND, SENIOR ADVOCATE &
SRI. S.S. SRIRANGA, SENIOR ADVOCATE FOR
MS. SUMANA NAGANAND, ADVOCATE A/W
MS.NIDHI GUPTA, ADVOCATE FOR R5
NOTICE TO R2 AND R6 DISPENSED WITH)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226
OF CONSTITUTION OF INDIA, PRAYING TO A) ISSUE A
WRIT CERTIORARI OR ANY OTHER APPROPRIATE WRIT
ORDER OR DIRECTION TO QUASH THE IMPUGNED
ORDER DATED 16TH OCTOBER 2023 NOTIFIED BY THE 4TH
RESPONDENT STATE ON 20TH OCTOBER 2023,
PRODUCED AT ANNEXURE-A, ENERGY 82 PPT ISSUING
DIRECTION UNDER SECTION 11 OF THE ELECTRICITY
ACT, 2003 TO GENERATING COMPANIES / GENERATORS

TO SUPPLY ENERGY TO THE STATE GRID; B) ISSUE A WRIT OF CERTIORARI OR ANY OTHER APPROPRIATE WRIT, ORDER OR DIRECTION TO QUASH THE IMPUGNED COMMUNICATION BEARING NO.CEE/SLDC/SEE/EE/AEE3 DATED 18.09.2023 (SIC) [18TH OCTOBER 2023] ISSUED BY THE 5TH RESPONDENT SLDC, PRODUCED AT ANNEXURE-B, REFUSING TO PERMIT THE PETITIONER TO UNDER TAKE INTER-STATE TRANSACTIONS; C) DIRECT THE 2ND RESPONDENT CENTRAL ELECTRICITY REGULATORY COMMISSION (CERC) TO DETERMINE THE DAMAGES TO BE PAID DUE TO ILLEGALLY DENYING OPEN ACCESS FOR THE PERIOD OF 17TH OCTOBER 2023 TILL THE DATE OF RESUMPTION OF OPEN ACCESS WITH CARRYING COST AT 1% PER MONTH AND ETC.

THESE WRIT PETITIONS COMING ON FOR PRONOUNCEMENT OF ORDERS THIS DAY THE COURT MADE THE FOLLOWING:

ORDER

These petitions are filed by certain Generating Companies [*the Captive Generating Companies*] as also a Licensed Trader impugning the State Government Order dated 16.10.2023 issued under Section 11 of the

Electricity Act,2003 [for short, '*the Electricity Act*']. The State Government by this Order has directed all the '*Generators of electricity in the State of Karnataka*' to operate and maintain the generating stations at *Maximum Exportable Capacity* and supply all the electricity generated to the State Grid subject to certain conditions, and one of the conditions stipulated is that the ESCOMs¹ shall pay to the Generating Companies at Rs.4.86/- per unit provisionally subject to the proceedings before the KERC under Section 11[2] of the Electricity Act.

The details of the State Government order dated 16.10.2023.

2. The State Government has recorded that the directions under Section 11 of the Electricity Act are necessitated in the following circumstances. The

¹ *The Electricity Distribution Companies are called as Electricity Supply Companies, and hence, are referred to as 'ESCOMS'.*

production of electricity in the State of Karnataka is highly dependent on renewable sources of energy such as Solar energy and Wind energy, and with greater dependence on Hydro energy. The State, which is thus significantly dependent on monsoon for generation of electricity, is experiencing a major crisis of power because the monsoon has failed. The reservoir levels in the State are very low as compared to the levels of previous years and over dependency on hydel generation runs the risk of further depletion of major hydel reservoirs resulting in generation shortfall by about 3000 MU. The State has recorded a peak demand of 16,950 MW and energy consumption of 294 MU in the month of August 2023. The State is likely to reach a peak load of 18214 MW and around 357 MU/day from November 2023 up till May 2024. The SLDC is forced to take Load Management measures since August 2023.

2.1 The State Government has also emphasized the following. The ESCOMS are making all efforts to buy electricity from the Power Exchange at the maximum *cap rate*, and one of the options left to the State Government, because of the prevailing situation, is to curtail stability to an extent of 1500 to 2000 MW to maintain grid stability as mandated by CERC & KERC Regulations and orders, but that could give rise to unforeseen problems. The Generators within the state are exporting electricity outside the state through power exchange and short-term open access, and in the past, the State Government has invoked its power under Section 11 of the Electricity Act to avail power from *intra-state* [sic] generators who were availing open access.

2.2 The State Government's direction to the Generating Companies to generate electricity at *maximum exportable capacity* and supply all the

electricity generated to the State Grid is subject to the conditions as follows:

- [a] ESCOMs shall pay at Rs.4.86/unit provisionally subject to KERC orders thereon.*
- [b] The balance capacity of UPCL plant, over and above the contracted capacity with the ESCOMs under the PPA shall be supplied to State Grid at PPA rates.*
- [c] Joint meter readings shall be the basis for raising the monthly invoices.*
- [d] Rebate of 2% shall be allowed on the bill amount if payment is made within 5 days from the date of presentation of bill or otherwise 1% shall be allowed if the payments are made within 30 days.*
- [e] Due date for making payment shall be 30 days from the date of presentation of the bill.*
- [f] Late Payment Surcharge shall be payable at one-year marginal cost of lending rate (MCLR) of the State Bank of India issued as on 1st April plus 350 basis points; per month, if the payments are made beyond due date.*

[g] The Jurisdictional Distribution Licensee shall deduct the energy at 115% for the energy, if imported by the Generators covered by this Section 11 order.

[h] Energy injected by Generators under Section 11 shall be allocated amongst ESCOMs as per the quantum approved by KERC in the Tariff order dated 12.05.2023 for the FY 24 subject to certain percentage².

3. The Central Government in the month of May 2022, under Section 11 of the Electricity Act, has issued directions to the Imported Coal Based Power Plants [*ICB Plants*] in the country to operate and generate electricity at their full capacity, and in continuation of this direction, the Central Government,

² *The allocation of electricity amongst the different ESCOMs, as indicated in the State Government's Order dated 16.10.2023.*

<i>BESCOM</i>	<i>46.51%</i>
<i>MESCOM</i>	<i>8.57%</i>
<i>CESC</i>	<i>11.14%</i>
<i>HESCOM</i>	<i>20.60%</i>
<i>GESCOM</i>	<i>13.18%</i>

which anticipated a gap between the demand and supply of electricity in the country in the year 2022-23, has issued directions on 09.01.2023 *inter alia* to the Central /State Government Generating Companies to take action to import coal for blending at a particular rate to ensure that the generating stations maintain the required coal stock.

4. The Central Government, in the light of these directions and to ensure availability of electricity to meet the anticipated demand across the Country, has issued directions³ on 20.02.2023, in exercise of its jurisdiction under Section 11 of the Electricity Act, to the ICB Plants to operate and generate power at their full capacity enabling *pass through* the resultant increase in the cost of production. The Central Government by this order has also constituted a

³ *These directions are to fifteen [15] plants, and insofar as the State of Karnataka the directions are to M/s JSW and M/s Udupi Power Corporation Ltd.*

committee to examine the *passing through* of the international coal price.

5. The initial challenge to the State Government's Order dated 16.10.2023 was in the light of this Central Government's order dated 20.02.2023 by one of the ICB Plants in the state, [M/s JSW Energy Limited], in writ petition in WP No. 23642/2023. On 27.10.2023, this Court rejected the request for interim stay of the State Government's order dated 16.10.2023 but directed M/s JSW Energy Limited, subject to further orders, to continue supplying its surplus electricity to the State Grid reserving liberty to file a representation with the first respondent for payment of charges on par with the Power Exchange Rate/s as of the date of the impugned Order dated 16.10.2023. However, this Court's Order dated 27.10.2023 is challenged in an *intra – court appeal* in W.A. No. 1358/2023, and the Division Bench has disposed of

this appeal requesting this Court to decide the writ petition in WP No. 23642/2023 on merits.

6. The present set of writ petitions were filed when the writ petition in W.P. No. 23642/2023 was being heard for final disposal in the light of the Division Bench's request for expeditious disposal. However, after the arguments [common and specific to each petition] were completed in these petitions and in W.P.No. 23642/2023 and when all the petitions were listed for clarifications before pronouncement, the petitioner in writ petition in W.P. No. 23642/2023 and the State Government filed a joint memo for disposal of this writ petition placing on record the terms agreed upon. As such, this Court, on 04.03.2024, has disposed of the writ petition in WP No. 23642/2023 after hearing the learned Senior Counsels for the parties and the learned Advocate General, who unanimously submitted that all the questions canvassed originally will remain for due

consideration except insofar as the contention that the State Government's Order 16.10.2023 is in conflict with the Central Government's order dated 20.02.2023.

7. This Court must now advert to the details of the orders issued by the State Government in the past in exercise of jurisdiction under Section 11 of the Electricity Act, and these details will be necessary because the principal canvass on behalf of the State Government and the respondents is that a Division Bench in '**GMR Energy Limited v. Government of Karnataka**⁴ [this decision is hereafter is referred to as **M/s GMR**], while considering the merits of one such order, has opined that the State Government will be the *Appropriate Government* as contemplated under Section 11 of the Electricity Act even when there is *inter-state transmission of electricity* unless such transmission is to one of the establishments mentioned in Section

⁴ ILR 2010 Kar.2620

2[5][a][ii] thereof, and therefore, this Court cannot examine the competence of the State Government to issue orders Section 11 of the Electricity Act as the appropriate Government.

8. The decision of the Division Bench in M/s GMR is called in question before the Supreme Court in a writ petition and Special Leave Applications [*later registered as appeals*]. The Supreme Court has disposed of this petition and the appeals by the Order dated 16.08.2023 in the light of the common submission that the matters are rendered infructuous inasmuch as the exercise of power under Section 11 of the Electricity Act has worked itself out. The different instances when the State Government has invoked jurisdiction under Section 11 of the Electricity Act and the subsequent proceedings are as follows.

[A] State Government's Order dated 30.12.2008:

The State Government, invoking Section 11 of the Electricity Act, has directed all the Generators in the State of Karnataka to operate and maintain the Generating Stations in the State to their maximum exportable capacity and *the Plant Load Factor [PLF]* and supply the exportable electricity only to the State Grid relying upon certain asserted extraordinary circumstances. This Order dated 30.12.2008 is challenged in the writ proceedings resulting in the decision of the Division Bench in M/s GMR.

The Division Bench in M/s GMR has opined that the State Government can, as the *Appropriate Government* exercise jurisdiction under Section 11 of the Electricity Act, to issue directions even when there is inter-state transmission of electricity. There is a detailed discussion of the proposition expounded in the later part of this order because of the rival submissions.

[B] State Government's Order dated 03.04.2010:

The State Government has once again directed all the Generators in the State of Karnataka to operate and maintain the Generating Stations to their maximum exportable capacity and PLF and supply the exportable electricity to the State Grid in view of certain extraordinary circumstances. This Order also states that the rates to be paid by the Distribution Companies for the power supplied to them by the generating companies would be notified through a separate notification.

[C] State Government's Orders dated 27.01.2012 and 26.03.2014.

The State Government has issued direction to the Generators, and who did not have Power Purchase Agreement with Electricity Supply Companies, to supply electricity to the State Grid. In the order dated 27.01.2012, a price of Rs. 5.30 per unit is fixed subject

to determination of final tariff by KERC, and in the later order dated 26.03.2014, a price of Rs. 5.50 per unit is fixed subject to determination of final tariff by KERC. These Orders are not challenged by any.

[D] State Government's Order dated 16.09.2015

The State Government, by this Order dated 16.09.2015 issued under Section 11 of the Electricity Act, has directed the Generating Companies to supply power to the State Grid for the period between September 2015 and May 2016 at the provisional rate of Rs. 5.05 KWH. However, the KERC, by the Order dated 18.08.2016, while deciding on the petitions filed by ESCOMS, has revised the rate at Rs. 4.67 per KWH to be paid to the power Generating Companies. The KERC's order dated 18.08.2016 and 05.12.2017 in this regard are challenged in W.P. Nos. 60231-33/2016 and WP No. 56389/2017 respectively.

This Court, in WP Nos. 60231-33/2016 by order dated 18.09.2017, has remanded the matter to KERC for re-consideration *inter alia* on the grounds of principles of natural justice. This Court's Order is called in question in an *intra-court* appeal in WA No. 995/2018, and by the Order dated 14.09.2022 the decision in the writ petition is confirmed but modifying certain proceedings. This Court has dismissed the other petition in W.P. No. 56389/2017 by the Order dated 19.11.2018 as withdrawn but with liberty to the petitioner therein to approach the Appellate Authority.

9. This Court must now refer to the details of the present petitions and the details of the cause pleaded for this petition.

The details of the petitioner in Writ Petition in No. 26324/2023:

9.1 The petitioner, M/s Chamundeshwari Sugars Limited [M/s Chamundeshwari], has

established a sugar factory at KM Doddi, Maddur Taluk, Mandya District. M/s Chamundeshwari has a crushing capacity of 5000 TCD at KM Doddi, Mandya and along with it has also operationalized a co-generation [bagasse based] plant having an installed capacity of 26 MW with the maximum exportable capacity of 18 MW. According to M/s Chamundeshwari, it has entered into a Power Sale Agreement with M/s Tata Power Trading Company Limited [M/s TPTCL] on 29.03.2022 agreeing to sell 13.5 MWs out of the maximum exportable capacity of 18MW⁵ of power via the power exchange and as per Clause 15 of this agreement, it is bound to supply power for a period of two [2] years starting from 01.07.2022.

⁵ M/s Chamundeshwari submits that in the agreement the maximum exportable capacity is erroneously mentioned as 20 MW.

9.2 M/s Karnataka Power Transmission Corporation Limited [M/s KPTCL] has issued No Objection Certificates [NOC], which is necessary for the M/s Chamundeshwari to register itself on the National Open Access Registry. M/s KPTCL has also issued certain standing clearances to facilitate inter-state transmission of power so that the petitioner could supply power to the purchaser after the transaction through the power exchange. M/s KPTCL, after the State Government's Order dated 16.10.2023, by its Communication dated 17.10.2023 has withdrawn the NOCs and clearances granted earlier, and M/s Chamundeshwari alleges that this has compelled it to dishonour its agreement. As such, M/s Chamundeshwari has impugned the State Government's order dated 16.10.2023 and M/s KPTCL's Communication dated 17.10.2023.

The details of the petitioner in W.P. No 24239/2023

10 The petitioner, M/s Altilium Energie Private Limited [*M/s Altilium*], is engaged in the business of trading in power, and the Central Electricity Regulatory Commission has issued M/s Altilium licence in Category V [*Electricity Trading Licence bearing No. 85/2021 dated 23.05.2021*] under Section 14 of the Electricity Act. M/s Altilium and M/s Energy Development Corporation have entered into the Power Purchase Agreement [*PPA*] dated 01.02.2022 for a period of two [2] years. M/s Energy Development Corporation has agreed to sell renewable energy from its projects with green attributes, and M/s Altilium has agreed to purchase the entire quantum generated but subject to maximum of 9 MW. M/s Altilium contends that it has been trading an average of 98MWH of power daily on the Indian Energy Exchange [*M/s IEX*].

10.1 M/s KPTCL, on 29.09.2023 [*Annexure – B in this writ petition*], has refused clearance to M/s Energy Development Corporation citing imposition of Section 11 of Electricity Act and thus prohibiting it from undertaking any *inter-state transaction*. M/s Altilium contends that as a result of M/s KPTCL's refusal [dated 29.09.2023] to grant clearance and the State Government's order dated 16.10.2023, it is unable to trade in power despite the PPA dated 01.02.2022 with M/s Energy Development Corporation. This Court, on 28.11.2023, has not granted any interim relief observing that M/s Altilium has accepted that any restriction imposed by the State Government on sale of power would also be treated as a *force majeure*.

The details of the petitioner in W.P. No 24998/2023

11. The petitioner, M/s NSL Sugars Limited [M/s NSL - Koppa], has established a sugar factory at Koppa, and has operationalized a co-generation [bagasse based] plant having an installed capacity of 26 MW at 66 KV voltage level. M/s NSL - Koppa has entered into the Power Purchase Agreement dated 01.06.2022 with M/s. PTC India Limited [*formerly known as Power Trading Corporation of India Limited - for short, 'M/s PTC'*] for a period of three [3] years, and in terms of this agreement M/s NSL Koppa has agreed to *put instructions* on M/s PTC's online bidding software from time to time mentioning quantum and price for sale of electricity.

11.1 M/s NSL - Koppa contends that it is committed to sell electricity to Military Engineering Services, Delhi [for short, '*MES, Delhi*'], which is under

the aegis of Ministry of Defence, because of its Agreement dated 01.06.2022 with M/s PTC, and the electricity is sold through Indian Energy Exchange [for short, '*the IEX*'], another Power Exchange. M/s NSL - Koppa further contends that with the State Government's Order dated 16.10.2023 and the KPTCL's withdrawal of clearances by its impugned Communication dated 18.09.2023 [*Annexure - B in this writ petition*], it is unable to meet the afore commitments arising from the aforesaid agreement.

11.2 M/s NSL – Koppa has requested for interim stay of the State Government's order dated 16.10.2023, and this Court on 28.11.2023 has denied the same essentially on the ground that M/s NSL – Koppa has agreed to supply electricity subject to change in law or restriction imposed by Electricity Regulator [Central or State] and/or Government, [Central or State] and/ or Appellate Tribunal on any

aspect of the purchase of power and the jurisdiction of the State Electricity Regulatory Commission.

The details of the petitioners in W.P. No 26833/2023

12. This writ petition is filed by M/s NSL Sugars Limited and M/s NSL Sugars [Tungabhadra] Limited [M/s NSL Aland and M/s NSL Tungabhadra], and both are Public Limited Companies and primarily engaged in the manufacture of sugar generating power using bagasse. If M/s NSL Aland maintains a power plant having capacity of 34MW at 110 KV voltage level located at Bhusnoor Village, Aland Taluk, Gulbarga District, M/s NSL Tungabhadra maintains a power plant capacity of 28 MW at 110 KV voltage at Siraguppa, Desanur, Bellary. These petitioners assert that in performance of the terms of the Letter of Intent dated 08.09.2023 they are obliged to supply power to

Andhra Pradesh Central Power Distribution Corporation Limited [M/s APPDCL] through M/s PTC.

12.1 M/s NSL Aland relies upon the Communication dated 26.09.2023 issued by M/s PTC to contend that it is obligated to supply daily average of 17 MW to M/s APPDCL for the period between 01.12.2023 to 29.02.2024 and 20 MW for the period between 01.03.2024 to 31.03.2024, and M/s NSL Tungabhadra contends it is obligated to supply daily average of 6 MW to M/s APPDCL for the period between 01.12.2023 to 31.12.2023 and 9 MW for the period between 01.01.2024 to 29.02.2024. M/s KPTCL has issued Communication dated 18.10.2023, consequent to the State Government's Order dated 16.10.2023, refusing permission to M/s NSL, Aland and M/s NSL, Tungabhadra for inter-state power transmission. M/s NSL Aland and M/s NSL Tungabhadra have not

pressed for interim orders in this writ petition as the petition is taken up for final disposal.

13 The petitioners have called in question the State Government's competence to issue the impugned Order dated 16.10.2023 under Section 11 of the Electricity Act relying upon the decisions of the Hon'ble Supreme Court in ***Energy Watchdog v. Central Electricity Regulatory Commission and others***⁶ [hereinafter is referred to as ***M/s Energy Watchdog***] and the decision in Writ Petition [Civil] No. 24/2010 connected with Civil Appeal Nos.3878-3879/2011 and other connected Appeals⁷. The State Government and M/s KPTCL rely upon the decision in M/s GMR to assert competence in the State Government to issue such order. The details of the circumstances considered and the exposition in these decisions are thus

⁶ [2017] Supreme Court Cases 80

⁷ This writ petition is disposed of on 16.08.2023 by the Hon'ble Supreme Court.

discussed, and because the decision in M/s GMR is earlier in time, it is discussed first.

The details of the decision in M/s GMR:

13.1 The Division Bench in M/s GMR, while considering different questions, has considered the questions such as whether the Central Government or the State Government, in the facts and circumstances of the case, will be the *Appropriate Government* competent to exercise jurisdiction under Section 11 of the Electricity Act and whether the State Government's direction to the generating companies to supply electricity to the State Grid will defeat the object of Open-access. The Division Bench, after reference to the previous enactments holding the field and the Parliament's declared objective of providing for *trading in electricity* and *Open-access*, has opined that the Electricity Act provides and enables framework for accelerated and more efficient development of the power

sector highlighting the following as the main features of this Enactment.

- [a] De-licensing of electricity generation [including captive generation] except in cases of hydro projects, creation of transmission utility at the Centre and the State levels which would have the responsibility of ensuring that the transmission network is developed in a planned and coordinative manner, and permitting *Open Access* in distribution.
- [b] Enabling *trading in power* as a distinct activity with safeguards, and the Regulatory Commissions being authorized to fix ceiling of trading margins [if necessary].
- [c] When there is a direct relationship between a Consumer and a Generating company or a trader, the price of electricity would not be regulated and only the transmission and wheeling

charge with surcharge would be regulated.

13.2 The Division Bench has also referred to the National Electricity Policy notified on 12.02.2005 by the Central Government under Part-II of the Electricity Act. The Division Bench has observed that this policy gives effect to the mandate under Section 6 of the Electricity Act⁸ which casts an obligation on the Central and State Governments to supply electricity to rural areas [including villages and hamlets] and that the policy stipulates that there should be determined efforts to ensure that the rural electrification is complete within a period of five [5] years while also observing that the terms of this policy enumerate that it would be equally important to ensure availability of reliable and

⁸ **Section 6: *Joint responsibility of State Government and Central Government in rural electrification.***
The concerned State Government and the Central Government shall jointly endeavor to provide access to electricity to all areas including villages and hamlets through rural electricity infrastructure and electrification of households.

quality electricity at competitive rates for the industries enabling the potential for employment generation.

13.3 As regards de-licensing of power generation, the Division Bench, referring to Part-III of the Electricity Act, has opined that there is complete framework to generating companies to establish, operate and maintain generating stations without obtaining a licence under the Electricity Act but a duty is cast on the generating companies to establish, operate and maintain stations, tie-lines, sub-stations and transmission lines connected in accordance with the provisions of the Electricity Act and the Rules and Regulations made thereunder. The Division Bench has also observed that once a generating station is established, the concerned Generating Companies will have to co-ordinate with the Central transmission utility, or the State transmission utility as the case may be, for transmission of the electricity generated by it.

13.4 Significantly the Division Bench has observed that, because generation of electricity and transmission thereof have to be simultaneous, a closer reading of the provisions of the Electricity Act implies that though the establishment of a Generating Company is de-licensed but once the Generating Companies start operating the same is regulated under the Electricity Act and the Rules, and as such, the generating companies do not enjoy any monopoly status. Further, the Division Bench has observed that Section 11 of the Electricity Act is in the nature of an exception to the aforesaid rule because when *extraordinary circumstances* so justify the Generating companies will have to operate and maintain the stations in accordance with the directions of the *Appropriate Government*.

13.5 The Division Bench has underscored that the jurisdiction under Section 11 of the Electricity Act would not be available only because of an estimated

shortfall in electricity or the possibility of scarcity in the supply of electricity; that for exercise of the jurisdiction under this section there must be extraordinary circumstances, and the parliament, in explaining the expression “*extraordinary circumstances*” [*as those arising out of threat to security of State, Public Order, Natural Calamity or such other circumstances arising in public interest*] has not left any discretion in the *Appropriate Government* to decide what the *extraordinary circumstances* will be.

13.6 The Division Bench, on the question of whether the Central or the State Government is the *Appropriate Government* under Section 11 of the Electricity Act, referring to the provisions of Section 2[5][a][iii] of the Electricity Act and opining that the expression ‘*and*’ in such clause must be read conjunctively, has held thus:

"..... If so read the inter-state generation, transmission, trading or supply of electricity, would fall within the jurisdiction of the Central Government if only when the inter-state generation, transmission, trading or supply of electricity, is with respect to the installations mentioned specifically in the sub-Clause. Then the appropriate Government would be the Central Government. The reason is not far to seek. All the installations referred to in sub-Clause firstly belong to the Central Government. They are maintained by the Central Government for the public of the country, and they are key installations. Where-ever the electricity is generated, it is supplied to those installations which may be located outside the State. To ensure the proper working of those installations in extra-ordinary circumstances the Central Government can exercise the power under Section 11. Therefore, interstate supply of electricity has to be understood in the context in which it is used in the said sub-clause, namely inter-state supply of electricity to the installations specifically mentioned in that sub-clause which exclusively belongs to the Central Government. In other words, in respect of inter-state supply of electricity, installations other

than those mentioned in the said sub-clause, the Central Government has no role to play. It is not concerned."

The Division Bench as regards the constitutional framework has observed that electricity is a concurrent subject and hence a well-coordinated approach would be necessary for the development of the energy sector and if there is emphasis to ensure electricity to all the rural households for a period of five years the State Governments will have a major role.

The details of Writ Petition [Civil] No. 24/2010 connected Civil Appeal Nos.3878-3879/2011:

13.7 The decision of the Division Bench in M/s GMR is called in question before the Supreme Court in this writ petition and connected civil appeals, and the petition and appeals are disposed of by the Order dated 16.08.2023 in the light of the common submission that the matters are rendered infructuous inasmuch as the exercise of power under Section 11 of the Electricity Act

has worked itself out. Crucially, the Supreme Court has observed thus while dismissing the petition and the civil appeals:

"..... We would, however, record that the questions of law relating to interpretation of Section 11 read with Section 2(5) of the Electricity Act, 2003 are kept open."

The details of the facts discussed and the decision in M/s Energy Watchdog:

13.8 The Central Commission, when called upon under Section 79 of the Electricity Act to discharge the generators [*the petitioners therein*] from the performance of the respective PPAs on account of frustration or to evolve a mechanism to restore the generators to the economic condition prior to change in law, has held that it is vested with the jurisdiction under Section 79 of the Electricity Act to grant relief and has constituted a Committee. The Central Commissions, upon receipt of a report from such

Committee, has granted certain relief to the generators. These orders are called in question before the Appellate Tribunal for Electricity [APTEL], which has ultimately, after the orders of the Hon'ble Supreme Court on its certain earlier orders, has reversed the Commission's order holding that the Commission could not have granted any relief based on the Committee's report in exercise of its regulatory powers under Section 79[1] [b] of the Electricity Act.

13.9 The Supreme Court when this order is called in question has opined after considering the different provisions of the Electricity Act [including Section 2(5)(a)(ii) thereof], in the light of the factual matrix as aforesaid and the rival submissions, *inter alia* that the State Commissions will have jurisdiction only when the generation and supply of electricity is within a State, and when electricity generation and sale take place

outside a State, the jurisdiction will be with the Central Commission.

The questions that are considered in these writ petitions:

14 This Court has framed the following questions while hearing the learned Senior Counsels/ learned counsels and the learned Advocate General, and they are heard in the backdrop of these questions:

[A] *Whether this Court is bound by the decision of a Division Bench of this Court in M/s GMR Energy insofar as the proposition that in cases of inter-state transmission [Generation, Trading or Supply] of power the Central Government will be the Appropriate Government under Section 11 of the Electricity Act only when such transmission is for establishments/ institutions/ installations referred to in Section 2[5][a][ii] of the Electricity Act, or.*

[B] *Whether this Court can opine that the State Government can exercise*

*jurisdiction under Section 11 of the Electricity Act when there is inter state transmission of power in the light of the decision of the Supreme Court in **M/s Energy Watchdog.***

[C] *Whether the State Government's Order dated 16.10.2023 is a colourable exercise of power and in violation of the Open Access Scheme under the Electricity Act or the rights secured thereunder.*

The rival submissions on Question [A] & [B]

15 This Court, during the hearing of these petitions [including the Writ Petition in WP No. 23642/2023 which is disposed of on 04.03.2024 in the circumstances first stated above] has had the advantage of Sri K.G. Raghavan leading the learned counsels on record for the petitioners on the first question with Sri Aditya Narayan and Sri Sridhar Prabhu adopting those contentions. The canvass on the first question is as follows.

15.1 The Division Bench in M/s GMR, while answering the question which is the Appropriate Government competent to exercise power under Section 11 of the Electricity Act, has held that the expression *inter-state supply of electricity [power]* as found in Section 2(5)(a)(ii) of the Electricity Act will have to be understood in the context in which it is used. The Division Bench has observed that the expression *inter-state supply of electricity* mentioned in the said sub-clause refers to the installations/ establishments that exclusively belong to the Central Government, and therefore, in respect of *inter-state supply* of electricity to installations other than those mentioned in the said sub-clause, the Central Government has no role to play.

15.2 This proposition enunciated by the Division Bench is called in question before the Supreme Court in the petitions and appeals, and the writ petition and the connected civil appeals are dismissed on

16.08.2023 as withdrawn because it was submitted by the learned counsels that the petition/appeals have been rendered infructuous. However, the Supreme Court has observed that the questions of law relating to interpretation of Section 11 read with Section 2(5) of the Electricity Act are kept open.

15.3 In the meanwhile, the Supreme Court in M/s Energy Watchdog, though considering the jurisdiction of the Central Electricity Regulatory Commission, after a detailed reference to the different provisions [*including the provisions of Section 2(5)(a)(ii) of the Electricity Act*], has categorically held that in terms of the Scheme under the Electricity Act whenever there is *inter-state generation or supply of electricity*, it is the Central Government that is involved and only when there is *intra-state generation or supply* of electricity, the State Government or the State Commission is involved.

15.4 Sri. Shashi Kiran Shetty and Sri S S Naganand in response argued, firstly, that because the Supreme Court has disposed of the writ petition and the civil Appeal against M/s GMR observing that the interpretation of Section 2(5)(a)(ii) of the Electricity Act is left open for consideration in the appropriate proceedings, until the Supreme Court itself revisits the interpretation, this decision in M/s GMR by a Division Bench would be binding on this Court. If the Supreme Court intended the interpretation in M/s GMR should not be a precedent, it would have, as in the case of ***Department of Telecommunications v. Sardar Singh***⁹, clarified the same, and if the Supreme Court intended to reserve liberty to the concerned to re-agitate the proposition in the appropriate proceedings, it would have so clarified as in the case of ***Commissioner of Customs v. Denso Kirloskar Industries (P) Ltd.***¹⁰. The Supreme Court, on the other hand, in the subject

⁹ [2009] 16 SCC 737.

¹⁰ [2012] 4 SCC 36

writ petition and the civil appeals has neither clarified the same nor reserved liberty, and therefore, the decision in M/s GMR is binding on this Court.

15.5 Secondly, that if the decision in M/s GMR is to lose its precedential value it would be only when another Division Bench of this Court is persuaded to differ and refer the appropriate question to a larger Bench. In this regard Sri S S Naganand relies upon the decision of the High Court of Gujarat in **Collector v. Liquidator-Petrofills Cooperative Limited**¹¹ and in **Hemal Ishwarbhai Patel v. Veer Narmad South Gujarat University and Others**¹². The first of these decisions is by a Division Bench, and the second decision is by a learned single judge referring to the aforesaid Division Bench.

¹¹ *Miscellaneous Civil Application (For Review) No. 1412 of 2015 disposed of on 23.10.2015*

¹² *2016 SCC Online Guj 10037*

15.6 In rebuttal, Sri. K G Raghavan argued that this Court, only because the respondents rely upon judicial discipline [which the law of precedent commands], need not be bound by a proposition that is kept open by the Supreme Court for consideration, and it will be open to this Court to reconsider the merits of the proposition. In this regard, Sri K G Raghavan relies upon the following observations by a Full Bench of the Bombay High Court in **Gauri Plasticulture P. Ltd. v. CCE**¹³ and the decision of the Division Bench of the Delhi Court in **Fashion Linkers v. Savitri Devi**¹⁴. *The observation in Gauri Plasticulture P. Ltd. [supra] which is relied upon is as follows:*

“35. The special leave petition was dismissed, but the question of law was expressly kept open. It is in these circumstances that we are not in agreement with Mr. Patil that the issue or the controversy before us stands concluded against

¹³ 2019 SCC OnLine Bom 996

¹⁴ 1995 SCC OnLine Del 518

the Revenue. The question of law was still open to be raised and equally examined by us. There is no question of judicial discipline in such matters.....”

The observation in ***Fashion Linkers v. Savitri Devi*** [supra] which is relied upon is as follows:

“7. Now that this decision of the Bench has been ‘left open’ by the Supreme Court, the question is what is its effect? No doubt, the Supreme Court felt that, on the facts of the case before them, the Bench had done the right thing. But still the Supreme Court left the question open and hence this Court, in our view, can re-examine the matter. Deepak Kapur's case is no longer a binding precedent. On fact that case related to the validity of an election to the post of District Governor to the Rotary International held on 9-2-92 & the suit was filed to set aside the same and the Court appointed a Commissioner with power to disallow questions, as stated earlier. A Local Commissioner was appointed on 4-3-94 by the Court on the sole ground that the term of the Governor was about to expire on 30-6-94. The Supreme Court felt that, on facts, the Division Bench was right in setting aside the appointment

of the Local Commissioner. It will be noticed that in that case, the learned Single Judge had delegated judicial powers also to the Commissioner. Therefore, the Supreme Court approved the setting aside of that order. But so far as the scope of the Rule in Chapter XA was concerned the Supreme Court left it open. We shall now refer to the points that arise in the appeal.”

15.7 Sri. Shridhar Prabhu, relying on the decision of the Supreme Court in ***Kunhayammed v. State of Kerala***¹⁵, asserts that the proposition laid down by the Division Bench of this Court in M/s GMR is jeopardised with the Supreme Court assuming its appellate jurisdiction to consider the merits of this decision and with the later disposal of the appeals [and the writ petition] recording the submissions that the State Government’s Order dated 30.12.2008 has spent itself out and observing that the interpretation of the provision of Section 2[5][a][ii] of the Electricity Act being

¹⁵ (2000) 6 SCC 359

kept open for reconsideration. Sri. Shridhar Prabhu relies upon the following exposition in ***Kunhayammed's case*** to contend that this outcome would only mean that the decision of this Court in M/s GMR is merged with the Supreme Court and the proposition expounded in this decision loses its precedential value.

*"Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order **passed** in appeal would attract the **doctrine of merger**; the order may be of reversal, modification or merely affirmation."*

This Court's reasons for conclusion on Question [A] & [B]:

16 The first canvass is that this Court is bound by the decision in M/s GMR because of the proposition that a decision which is not interfered with by the Supreme Court would be a binding precedent unless otherwise declared by the Supreme Court or by an appropriate Bench of the concerned High Court. This

canvass is essentially based on the decision in **Collector v. Liquidator-Petrofills Cooperative Limited** [supra] wherein it is opined that¹⁶:

"..... when a question of law is kept open by the Supreme Court not entertaining a Special Leave Petition against the judgement of the High Court there is neither confirmation nor dilution of the ratio of the judgement under challenge and it only means that the Supreme Court has refused to bind itself or put its seal on the ratio propounded by the High Court in the judgment, and that when an identical question is presented for consideration before a bench of coordinate strength, by virtue of principles of law of precedence, the bench would be bound by the ratio of the earlier judgment unless persuaded to refer it to a larger bench."

16.1 It is next argued that what falls from this decision and the decision of the Full Bench of the Bombay High Court in **Gauri Plasticulture Ltd.**, is that if a proposition is not interfered with by the

¹⁶ This is from the paragraph as extracted by a Single Judge of the Gujarat High Court in **Hemal Ishwarbhai Patel** supra.

Supreme Court, such proposition will be binding as a precedent unless the same is reconsidered on a reference by a Larger Bench. It is further argued that the Full Bench in ***Gauri Plasticulture Ltd.***, was examining the merits of the proposition on a reference by a coordinate Bench which did not agree with the proposition enunciated by an earlier Division Bench and left open by the Supreme Court and therefore, the decision in this case would also be reiteration of the proposition in ***Collector v. Liquidator - Petrofills Cooperative Limited.***

16.2 It is further argued that when the Supreme Court leaves a question of law [*such as interpretation of a statutory provisions*] open for future consideration without any further qualification that question of law as decided by the High Court would not be a binding precedent or a similar qualification, the Supreme Court alone can revisit the question. This canvass is also

essentially because of the importance of the judicial discipline stemming from the doctrine of judicial precedents, but a Division Bench of the High Court of Delhi in ***Fashion Linkers v. Savitri Devi***, in similar circumstances, has opined that the question can be re-examined. There is an undeniable dichotomy in the views expressed by the Gujarat High Court and the Delhi High Court in the aforesaid decisions.

16.3 Unarguably, the doctrine of binding precedent is of utmost importance in the administration of a judicial system as it promotes certainty and consistency in judicial decisions promoting confidence in the system. The doctrine of binding precedents commands that *a binding precedent* must be followed unless it can be distinguished in the peculiarities of a given situation. However, the reliance upon the decision either in ***Collector v. Liquidator-Petrofills Cooperative Limited*** or ***Gauri Plasticulture Pvt. Ltd***

to contend that only the Supreme Court can re-visit the question unless declared bad by a larger bench must necessarily be examined by this Court on the strength of one distinguishing and decisive fact in the circumstances of the case.

16.4 In none of these decisions, or the other decisions relied upon, there is reference to a decision by the Supreme Court on the same proposition in the interregnum. Crucially, in the present case it is canvassed that the Supreme Court in *M/s Energy Watchdog*, while deciding on the question whether the Central Commission would be the *Appropriate Commission*, referring to the provisions of Section 2(5)(a)(ii), which is also interpreted in *M/s. GMR*, has categorically held that the scheme of the Electricity Act is that whenever there *inter-state generation* [or supply of electricity] it is the Central Government that would be involved and the State Government and the *State*

Commission would be involved only when there is *intra-State* generation or supply of electricity.

16.5 This Court must observe that if the enunciation in *M/s Energy Watchdog* must indeed prevail, such enunciation will be a binding precedent. This Court at this stage must refer to the decision of the Constitutional Bench in ***Chandra Prakash and ors Vs. State of UP and another***¹⁷ where the importance of the decision of the declaration by the Supreme Court is reiterated while emphasizing the role played by the doctrine of binding precedent in promoting certainty and consistency in judicial decision. The declaration of law in this regard in the above decision is as follows:

"A careful perusal of the above judgments shows that this Court took note of the hierarchical character of the judicial system in India. It also held that it is of paramount importance that the

¹⁷ This proposition is referred to by the Hon'ble Supreme Court in the later decision in ***Ram Kishor Arora Vs. Directorate of Enforcement*** reported in (2023) SCC Online 1682.

law declared by this Court should be certain, clear and consistent. As stated in the above judgments, it is of common knowledge that most of the decisions of this Court are of significance not merely because they constitute an adjudication on the rights of the parties and resolve the disputes between them but also because in doing so they embody a declaration of law operating as a binding principle in future cases. The doctrine of binding precedent is of utmost importance in the administration of our judicial system. It promotes certainty and consistency in judicial decisions. Judicial consistency promotes confidence in the system, therefore, there is this need for consistency in the enunciation of legal principles in the decisions of this Court."

This Court therefore cannot, without considering the import of the decision of the Supreme Court in *M/s Energy Watchdog* in the facts and circumstances of the case, apply the proposition in *M/s GMR* that the Central Government will be the *Appropriate Government* for the purposes of Section 11 of the Electricity Act only

when the *inter-state* generation and sale of electricity is for the installations referred to in Section 2[5][a][ii] of the Electricity Act, and not to examine this aspect would amount to ignoring a binding precedent.

17 It is next canvassed that the petitioners indisputably are engaged in *inter-state* generation and sale of electricity, and this is established by the SLDC and RLDC approvals for scheduling [or the terms of the respective Letters of Intent and Agreements], and that after the decision in *M/s Energy Watchdog*, the dispositive factor which determines the *Appropriate Government* [and the Appropriate Commission] is *inter-state generation* [transmission, trading or supply] of electricity and the location of the generating company cannot be a determinative factor.

18 Sri K. G. Raghavan, who has led the learned counsels for the petitioners, Sri. Aditya Narayan and

Sridhar Prabhu, has elaborated his submissions in this regard emphasizing the following:

[A] The decision in *M/s Energy Watchdog* can neither be called *observations* or *obiter dicta*. The Supreme Court in ***Secundrabad Club v. CIT***¹⁸ has elaborated that every decision will contain three ingredients: [i] findings of material facts [direct and inferential] [ii] statement of the principles of law applicable to the legal problems disclosed by the facts, and [iii] judgement based on the combined effect of the first two ingredients. If for the purposes of the parties themselves and their privies ingredient No. [iii] is the material element in the decision, for the purposes of doctrine of precedent ingredient No. [ii] would be vital and this is the *ratio decidendi*. The reliance in this

¹⁸ 2023 SCC OnLine SC 1004

regard is on the following paragraphs from the decision:

“69. Reliance could also be placed on the dissenting judgment of A.P. Sen, J. in Dalbir Singh v. State of Punjab, [1979] 3 SCC 745, wherein his Lordship observed that a decision on a question of sentence depending upon the facts and circumstances of a particular case, can never be regarded as a binding precedent, much less “law declared” within the meaning of Article 141 of the Constitution so as to bind all courts within the territory of India. According to the well-settled theory of precedents, every decision contains three basic ingredients: [i] findings of material facts, direct and inferential. An inferential finding of fact is the inference which the Judge draws from the direct or perceptible facts; [ii] statements of the principles of law applicable to the legal problems disclosed by the facts; and [iii] judgment based on the combined effect of [i] and [ii] above.

70. For the purposes of the parties themselves and their privies, ingredient [iii] is the material element in the decision, for, it determines finally their rights and liabilities in relation to the subject-matter of the action. It is the judgment that estops the parties from reopening the dispute. However, for the purpose of the doctrine of precedent, ingredient [ii] is the vital element in the decision. This is the ratio decidendi. It is not everything said by a judge when giving a judgment that constitutes a precedent. The only thing in a judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi.”

[B] The Supreme Court in *M/s Energy Watchdog*, after referring to the of the Electricity Bill 2001, the National Electricity Policy and Plan to be published under Section 3 of the Electricity Act as also the provisions

of Section 63¹⁹, 64²⁰, 79, 86 and 2[5][a]thereof, has declared that the *Central Government* and the *Central Commission* will be the *Appropriate Government* and *Appropriate Commission* respectively whenever there is *inter-state* generation and sale of electricity and that the State Government will be involved only when there is *intra-state* generation of electricity and sale. This declaration of law – *the Ratio decidendi* - will apply even for the purposes of Section 11 of the Electricity Act as both the provision of Section 11 and Sections 79²¹ and 86²² are part of the same scheme under the Electricity Act.

¹⁹ This provision prescribes mechanism for determination of tariff by transparent process of bidding which the *Appropriate Commission* must adopt.

²⁰ This provision prescribes the procedure for determination of tariff by the *Appropriate Commission*.

²¹ This provision lists the functions of the *Central Commission*.

²² This provision lists the functions of the *State Commission*.

[C] The Supreme Court in *M/s Energy Watchdog* among others, in view of the provision Sections 79 and 86 of the Electricity Act, has observed that the jurisdiction of the Central Commission, as against the jurisdiction of the State Commissions, is decided by whether there is *inter-state* transmission of electricity. The principle that emerges from this consideration is that the jurisdiction of Central and State Commissions, which discharge almost similar functions with possible overlapping of jurisdictions, is delineated by whether the transmission of electricity is *inter-state* or *intra-state*. The Supreme Court has thus declared that the dispositive factor would not be the location of the Generating Companies but the transmission between or within states.

[D] When the *Appropriate Government* exercises its jurisdiction under Section 11[1] of the Electricity Act under *extraordinary circumstances* to issue directions to the generating companies, there could be adverse financial implications and those adverse financial implications will have to be necessarily redressed by the *Appropriate Commission* under Section 11[2]. After the decision in *M/s Energy Watchdog*, if there is an adverse financial consequence for a Generating Company because of a direction issued under Section 11 of the Electricity Act, the Generating Company, when engaged in *inter-state* transmission [*generation and sale*] of electricity, will have to necessarily approach the Central Commission. In this case, there will be an anomaly, given the scheme of the Electricity Act, if the directions are issued by

the State Government under Section 11 [1] and the affected Generating Company will have to approach the concerned State Commission. If the ratio *decidendi* in *M/s Energy Watchdog* is applied, this anomaly is removed.

[E] There is another anomaly that falls out from the interpretation by the Division Bench in *M/s GMR*. This other anomaly is illustrated by referring to the case of an Airport. It is argued that the word '**and**', in Section 2[5][a][ii] of the Electricity Act between the expressions *inter-state transmission* and the different installations referred to therein, should not be read conjunctively because in the case of an Airport in a State receiving electricity from a Generating Company within such State, if the Appropriate Government is

to be the State Government, and not the Central Government, there will be an anomaly because the Central Government will be excluded as *inter-state* transmission by itself will not be sufficient. If, on the other hand, the *test of inter-state transmission* is applied, this anomaly would not arise.

[F] Whenever there is *inter-state* supply of electricity, for the purposes of scheduling supply, the necessary approvals/ no-objection from NLDC and RLDC is absolutely necessary as contemplated under the provisions of Part V of the Electricity Act, and because of the provisions of Section 2[5][a][iii] of the Electricity Act the *Central Government* will have to be the *Appropriate Government*.

18.1 Sri Shashi Kiran Shetty in rebuttal submits that the issue of '*Appropriate Government*' has not been specifically dealt with in *M/s Energy Watchdog*. The entire issue in *M/s Energy Watchdog* revolved around whether the PPA entered into by the concerned respondents in the States of Gujarat and Haryana resulted in a *Composite Scheme*²³ under Section 79[1][b] of the Electricity Act. The learned Advocate General argues that the Supreme Court has held that a *Composite Scheme* involves the supply of electricity to more than one state and hence, the Central Commission shall be '*the Appropriate Commission*' for the determination of tariff, and that the Supreme Court has not considered who should be '*the Appropriate Government*' for the purposes of Section 11 of the

²³ A composite scheme as specified under section 79[1] of the Act, which is not defined under the Electricity Act but as elaborated in the revised Tariff Policy notified under Section 3[3] of the Electricity Act on 28.01.2016, shall mean a scheme by a generating company for generation and sale of electricity in more than one State, having signed long-term or medium-term PPA prior to the date of commercial operation of the project.

Electricity Act. The learned Advocate General argues that the observations of the Supreme Court in *M/s Energy Watchdog* are merely *obiter-dicta* and not a ratio to be a binding precedent in the present circumstances.

18.2 Sri Shashi Kiran Shetty argues that if the Supreme Court had undertaken a detailed analysis of Section 2[5] of the Electricity Act in the context of Section 11 thereof to decide that in every case there is *inter-state* supply of electricity the Central Government would be the Appropriate Government, the observation in *M/s Energy Watchdog* will be a binding precedent, and an incidental observation by the Supreme Court cannot be a binding precedent. The learned Advocate General places reliance on the following paragraphs of the decision of the Hon'ble Supreme Court in ***Career Institute Educational Society v. Om Shree Thakurji Educational Society***²⁴:

²⁴2023 SCC OnLine SC 586

“6. The distinction between obiter dicta and ratio decidendi in a judgment, as a proposition of law, has been examined by several judgments of this Court, but we would like to refer to two, namely, State of Gujarat v. Utility Users' Welfare Association [(2018) 6 SCC 21] and Jayant Verma v. Union of India[(2018) 4 SCC 743].

7. The first judgment in State of Gujarat (supra) applies, what is called, “the inversion test” to identify what is ratio decidendi in a judgment. To test whether a particular proposition of law is to be treated as the ratio decidendi of the case, the proposition is to be inverted, i.e. to remove from the text of the judgment as if it did not exist. If the conclusion of the case would still have been the same even without examining the proposition, then it cannot be regarded as the ratio decidendi of the case.

8. In Jayant Verma (supra), this Court has referred to an earlier decision of this Court in Dalbir Singh v. State of Punjab[(1979)] 3 SCC 745] to state that it is not the findings of material facts, direct and inferential, but the statements of the principles of law applicable to the legal problems disclosed by the facts, which is the vital element in the decision and operates as a precedent. Even

the conclusion does not operate as a precedent, albeit operates as res judicata. Thus, it is not everything said by a Judge when giving judgment that constitutes a precedent. The only thing in a Judge's decision binding as a legal precedent is the principle upon which the case is decided and, for this reason, it is important to analyse a decision and isolate from it the obiter dicta.”

18.3 Sri S S Naganand canvasses that the decision in *M/s Energy Watchdog* is a ratio on the question whether the Central Commission would be the competent commission when there is a *Composite Scheme* to decide on the question of tariff, and the proposition that when there is a *composite scheme* because there would be *inter-state* supply of electricity, given the provisions of Section 79[1][b] of the Electricity Act, the Central Commission would be the competent commission. The learned Senior Counsel argues that the declaration that when there is *inter-state* transmission it is the Central Commission and in the

case of intra state transmission it is the State Commission must accordingly be understood.

18.4 Sri S.S. Naganand also argues that it is settled that the *judicial utterances* are made in setting of the facts of a particular case with circumstantial flexibility and one additional or a different fact may make a world of difference between the conclusion in two cases as underscored by the Hon'ble Supreme Court in ***Padma Sundara Rao v. State of Tamil Nadu***²⁵. In this regard, the learned Senior Counsel relies upon the following paragraph of the decision:

“9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that

²⁵ 2002 [3]SCC 533

judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington v. British Railways Board [(1972) 2 WLR 537 : 1972 AC 877 (HL) [Sub nom British Railways Board v. Herrington, [1972] 1 All ER 749 [HL]]] . Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.”

18.5 Sri S.S. Naganand lastly argues that the difference when the jurisdiction under Section 11 of the Electricity Act, which is in the Part III of the Electricity Act, is invoked is that it is invoked for a temporary period when there is an extra-ordinary circumstance. The learned Senior Counsel argues that these are special powers vested in the concerned *Appropriate Government* to mitigate extreme conditions which could be peculiar to a State and the reading of this Section has to be distinctive from the rest of the Electricity Act, and therefore, the decision in *M/s Energy Watchdog*,

which is decided in the context of determination of tariff [Part-VII of the Electricity Act] and functions of Regulatory Commission[Part-X of the Electricity Act], cannot be applied.

18.6 Sri S.S. Sriranga, supporting the arguments of Sri Shashi Kiran Shetty and Sri S S Naganand, submits that this Court must also consider the following:

[A] the definition of the expression '*the Appropriate Government*' in Section 2[5] of the Electricity Act does not exclude the State Government and the provisions of Section 2[5][b] is categorical that the State Government would be the *Appropriate Government* under Section 2[5][b] of the Electricity Act in cases which do not come under Section 2[5][a] thereof,

[B] the Central Government, as contemplated under Part V of the Electricity Act, may establish NLDC

and RLDC and the functions of these Load Dispatch Centres are also listed in this Part of the Electricity Act, and because the Central Government establishes these Load Dispatch Centres to over-see and supervise efficient, economical and integrated transmission and supply across states, the Central Government will be the *Appropriate Government* as contemplated under the provisions of Section 2[5][a][iii] of the Electricity Act to issue any direction to either NLDC or RLDC, and this will not be crucial to decide on the import of Section 2[5][a][ii] thereof.

19. This Court must observe that Sri K.G. Raghavan, Sri Shashi Kiran Shetty and Sri S.S. Naganand, in addition to the above, have elaborately canvassed on the interpretation of the provisions of Section 2[5][a][ii] of the Electricity Act relying upon respective decisions with Sri K.G. Raghavan trying to persuade this Court to accept his contention that the

word “*and*” should be read as “*or*” and Sri Shashi Kiran Shetty and Sri S.S. Naganand contesting such canvass relying upon the interpretation of the word “*and*” in *M/s GMR*. However, this Court must observe that this Court can only consider whether the decision in *M/s Energy Watchdog* would be a binding precedent given the peculiarities of this case.

20 This Court must also observe Sri Sridhar Prabhu has argued on the significance of Open-Access under the Electricity Act and how the decision in *M/s GMR* and the impugned order by the State Government will impact the rights of the Generating Companies and traders who avail open access. However, the relevance of open access in the scheme of the Electricity Act has been considered by the Division Bench in *M/s. GMR* and such consideration would be a binding precedent for this Court as no decision to the contrary either by the Supreme Court or a Division is brought to this

Court's notice. The Division Bench in M/s GMR, after considering the relevant provisions of the Electricity Act, has declared thus:

"111. Section 11 of the Act over-rides Section 42. The indication is clear from sub-Section [2] of Section 11 whereby the Appropriate Commission has been conferred the power to 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. In other words, though the State Commission has introduced open access and has granted open access to a generating company or a distribution licensee, in such case if the Government were to exercise power under Section 11 of the Act and the consequences is that it would have any adverse financial impact on the generating company, then the Appropriate Commission has been vested with the power to off-set such adverse financial impact. In other words, the State Commission has no power to annul the direction issued to the generating company but they have power to offset only the adverse financial impact of such direction."

20.1 This Court must observe that, in view of this exposition, when the *Appropriate Government* issues directions in exercise of jurisdiction under Section 11 of the Electricity Act the concerned Generating Company or the Trader will have to abide by such directions, and this aspect will not be germane for a decision on whether the Central or State Government would be the *Appropriate Government* to exercise jurisdiction under Section 11 of the Electricity Act in cases covered under Section 2[5][a][ii] thereof.

20.2 The learned Advocate General and the learned Senior Counsels have referred to the decisions of the Supreme Court in [a] ***Secundrabad Club v. CIT***, [b] ***Career Institute Educational Society v. Om Shree Thakurji Educational Society***²⁶, [c] ***Padma Sundara Rao v. State of Tamil Nadu***. This Court must duly

²⁶ In this decision, in addition to re-iterating the principle in the other decisions, the Supreme Court has expounded the principle of 'inversion test' i.e. whether the conclusion of the case would remain the same if proposition of law is removed from the judgement.

regard the propositions expounded in these decisions and observe that the following emerge as salient from these decisions:

- (a) *'Every utterance' in a judgment cannot be a ratio decidendi.*
- (b) *The finding on material facts, whether direct or inferential, must be taken note of.*
- (c) *The statement of the principles of law applied to the legal problems disclosed by the facts must be discerned.*
- (d) *The judgment passed on the consideration of the factual matrix as aforesaid and the application of the principles of law to the legal problem presented in the factual matrix must be observed, and the principle of law applied would be the ratio decidendi.*

20.3 This Court must necessarily first consider the circumstances in which the Supreme Court in *M/s Energy Watchdog* has declared that if there is inter-state transmission of electricity the Central Government

would be involved and not the State Governments and examine whether this declaration is a ratio *decidendi*. The Supreme Court's exposition on the inter-state transmission being the dispositive factor reads thus:

"The scheme that emerges from these sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in clauses (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression "within the State" in clauses (a), (b) and (d), and "intra-State" in clause (c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission's jurisdiction is only where generation and supply takes place within the State. On the other hand,

the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act."

20.4 It is contended on behalf of the State Government and M/s KPTCL that in *M/s Energy Watchdog* the Supreme Court was not examining the provisions of Section 11 but was examining the provisions of Sections 63 and 64 in Part-VII²⁷ and Sections 79 and 86 in Part-X²⁸ of the Electricity Act and therefore, the declaration that *inter-state* supply and sale of electricity will be the dispositive factor will not a binding precedent for this Court when examining whether the State Government could have issued the impugned order dated 16.10.2023 in exercise of the powers under Section 11 of the Electricity Act.

²⁷ *Part VII contains the provisions for adoption and determination of Tariff.*

²⁸ *Part X contains the provisions inter alia explicating the constitution, powers and functions of the Central and State Commissions.*

20.5 It is contended that insofar as this Court, this aspect is decided by a Division Bench of this Court in *M/s GMR*. It is emphasized that the fact that decision in *M/s Energy Watchdog* is in the light of the provisions of Section 79 and 86 of the Electricity Act would be a crucial difference because the Supreme Court was not examining when the Central Government and the State Government would be the Appropriate Government for the purposes of Section 11[1] of the Electricity Act. This Court is of the considered view that the decision in *M/s Energy Watchdog* that the Central Government would be involved when there is *inter-state transmission* will be a binding precedent if the cohesion of the Scheme of the Electricity Act demands that the *inter-state* transmission must be the decisive factor even for the purposes of ascertaining when the Central Government and the State Government will be the

Appropriate Government under Section 11 of the Electricity Act.

20.6 It is obvious on a plain reading of Part-III of the Electricity Act that a Generating company [including Captive Generating Companies]²⁹ can be set-up without any license, and even in the case of a hydro-electricity generating Company only a scheme will have to be submitted for concurrence by the Central Electricity Authority³⁰. However, the distribution, transmission and trading is regulated under Part-IV of the Electricity Act. The provisions of Section 12 of the Electricity Act stipulate that no person shall transmit or distribute or undertake trading of electricity unless authorised to do so by a license issued under section 14 or is exempt under Section 13. These licenses are granted by the *Appropriate Commission*, subject to the

²⁹ This is provided for in Section 9 of the Electricity Act

³⁰ This is outlined in Section 8 of the Electricity Act.

process contemplated under Section 15 and upon either general or special conditions³¹.

20.7 The Electricity Act mandates constitution of Central Regulatory Commission, State Regulatory Commissions and Joint Commission, and in this regard reference must be made to Section 76, Section 82 and Section 83 respectively. Any three of these Commissions could be the *Appropriate Commission* depending on the context because the expression *the Appropriate Commission* is defined under Section 2[4]³² with reference to Section 76, Section 82 and Section 83 and the functions of the Central Regulatory Commission

³¹ Section 16 Conditions of licence.—The Appropriate Commission may specify any general or specific conditions which shall apply either to a licensee or class of licensees and such conditions shall be deemed to be conditions of such licence

³²Section 2[4] “Appropriate Commission” means the Central Regulatory Commission referred to in sub-section [1] of section 76 or the State Regulatory Commission referred to in section 82 or the Joint Commission referred to in section 83, as the case may be;

and State Regulatory Commissions are listed correspondingly in Section 79 and Section 86.

20.8 These provisions of Section 79 and 86 clearly stipulate that license to function as a transmission licensee and an electricity trader with respect to *inter-state* operations will have to be issued by the Central Regulatory Commission³³ and the license to persons to act as transmission licensees or distribution licensees or electricity traders within a state will have to be issued by the respective State Regulatory Commission³⁴. Crucially, the provisions of these

³³ Section 79 - Functions of Central Commission:[1] The Central Commission shall discharge the following functions, namely:-

[a]. xxxxxxxx

[c] to regulate the 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;

³⁴ Section 86 - Functions of State Commission: [1] The State Commission shall discharge the following functions, namely:-

[c]facilitate intra-State transmission and wheeling of electricity;

sections stipulate that Central Regulatory Commission shall regulate *inter-state transmission* of electricity and the State Regulatory Commission must *facilitate intra-state transmission and Wheeling of electricity*. Therefore, the licensing will be based on whether there is *inter-state* or *intra-state* transmission.

20.9 This Court must next examine the provisions that contemplate regulation of transmission of electricity to discern whether the Electricity Act continues this defining role for *inter-state* and *intra-state transmissions of electricity*. It could be easily said that generation of electricity is not regulated. However, the electricity generated will have to be transmitted for further distribution/supply, and the transmission of electricity is regulated, and this itself will be the regulation of generation of electricity. This proposition

[e]to issue licenses to persons to function as transmission licensee and electricity trader with respect to their intra-State operations

is in fact underscored by the Division Bench in *M/s GMR*, and the conclusion this regard reads as follows:

“But, once a generating station is established, it starts operating and electrical energy is produced, a duty is cast on the generating company to operate and maintain generating stations in accordance with the provisions of the Act or the Rules or the Regulations made thereunder. In other words, statute regulates the operation of electricity generated by the generating station.

20.10 The regulation of transmission of electricity, apart from the terms upon which license is granted for the same, will be by the concerned Load Despatch Centres and this regulation is to ensure optimization of scheduling and despatch of electricity within a region, for monitoring grid operations keeping accounts to carry out real time operations for grid control in accordance with the prescribed grid standards and codes. The decisions in these regards

will be taken by either the RLDC or the SLDC with NLDC operating as the national level centre coordinating the scheduling and dispatch of electricity amongst RLDC for optimal use.

20.11 If there is *inter-state* transmission, it will have to be RLDC and if there is *intra-state* transmissions it will have to be by SLDC. Thus, the jurisdiction of the RLDC and SLDC is demarcated based on *inter-state* or *intra-state* transmissions. This arrangement within the Scheme under the Electricity Act is seen from Sections 25 to 33, which are in Part V of the Electricity Act, and in fact these provisions are grouped under subtitles *Inter-state transmission* and *intra-state transmission*. The regulation of transmission of electricity [and hence, regulation of generation of electricity] by a generating company [*including captive generating company and hydro-generating company*] is

based on whether such transmission is *inter-state* or *intra-state*.

20.12 In view of the provisions of Section 2[5][a][iii]³⁵ of the Act, the Central Government will be the *Appropriate Government* to issue directions to *NLDC* and *RLDC*, and the State Government will be the *Appropriate Government* to issue direction to *SLDC* because of the provisions of Section 2[5][b]. Even in this part of the Scheme under the Electricity Act, *inter-state transmission* and *intra-state transmission* is the dispositive factor to decide which will be the *Appropriate Government*. Further, the terms and conditions for the

³⁵ Section 2 [5] - "*Appropriate Government*" means, -(a) the *Central Government*,
 [a] the *central government*
 [i] xxxxxxxx
 [ii] xxxxxxxx
 [iii] *in respect of National Load Despatch Centre; and Regional Load Despatch Centre;*
 [vi] xxxxxxxxxx;
 [b] *in any other case, the State Government, having jurisdiction under this Act.*

determination of tariff³⁶ is regulated, and it is by the *Appropriate Commission* which again will be based on whether there is *inter-state or intra-state transmission*, and the trading is also regulated either by the Central or State Regulatory Commission based on whether there is *inter-state or intra-state transmission* as the *trading margin* is fixed by these Commissions respectively.

20.13 This Court must next consider whether Section 11 of the Electricity Act can be construed or understood as being outside the expanse of the Scheme under the Electricity Act despite the enunciation by the Supreme Court in *M/s Energy Watchdog*. This Court is of the considered view that if it cannot be reasonably opined that this Section is outside such expanse, the proposition that whenever there is *inter-state transmission* the Central Government would be involved

³⁶ *The meaning of the word 'tariff', which is defined in Explanation to Section 27 of the Karnataka Electricity Reform Act, 1999, is as follows: "[b] 'tariff' means a schedule of standard prices or charges for specified services which are applicable to all such specified services provided to the type of customers specified in the tariff published."*

as expounded by the Supreme Court in M/s Energy Watchdog should be applied as a precedent. This Court must now refer to the provisions of Section 11 of the Electricity Act, and Section 2[5][a][ii] as well, and these provisions read as under:

"Section 2 [5] - "Appropriate Government" means, -

- (a) *the Central Government,*
 - [i] *xxxxxxx*
 - (ii) *in relation to any inter-State generation, transmission, trading or supply of electricity and with respect to any mines, oil-fields, railways, national highways, airports, telegraphs, broadcasting stations and any works of defence, dockyard, nuclear power installations;"*

Section 11 [Directions to generating companies]:

- (1) *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."*

20.14 Indeed the *Appropriate Government*, if there are extraordinary circumstances³⁷ as contemplated under section 11[1] of the Electricity Act, can exercise jurisdiction to issue directions to the Generating Companies, and the parliament being cognizant of the fact that any direction issued under extraordinary circumstances could adversely affect the Generating Companies financially, has provided for redressal in stipulating that if there is adverse financial impact because of the directions issued under Section 11[1] the *Appropriate Commission* may offset such

³⁷ *The Division Bench in M/s GMR has elaborated on what would constitute extraordinary circumstances, and the efficacy of this elaboration has not been contested either by the petitioners or the state / State Load Dispatch Centre.*

adverse impact. The question whether the Central Regulatory Commission or the State Regulatory Commission must offset the adverse financial impact will be dependent on whether there is *inter-state or intra-state transmission* given the Scheme of the Electricity Act as discussed.

20.15 If there is a departure from this and the jurisdiction of the Commissions is made dependent on the government which exercises the jurisdiction under section 11[1] of the Electricity Act there would be an anomaly and a violation of the Scheme of the Act. In fact, it is placed on record that after the State Government's order dated 16.10.2023, M/s KPTCL has approached the KERC [the Karnataka Electricity Regulatory Commission], though in terms of the scheme under the Electricity Act and the decision in *M/s Energy Watchdog*, if the generating companies are transmitting

electricity *inter-state*, it should have approached the Central Regulatory Commission.

20.16 The reliance is on the provisions of Section 2[5][a][ii] to contend that in view of the decision in *M/s GMR* there must be a departure from the scheme of the Electricity Act as discerned and expounded in *M/s Energy Watchdog*. This Court must observe that this provision refers to subject such as *inter-state transmission, generation, distribution and trading of electricity and installations such as Railways, Highway, Airport, Telegraph and Broadcast, Defence, Dockyard - Shipping port, Nuclear power, Oil fields and mines* and each of these subjects are in the Union List of Schedule VII of the Constitution. The relevant entries in this List are as follows

Installation as mentioned in Section 2[5][a][ii]	Entry No. in Schedule VII of the Constitution
<i>Mines</i>	Entry – 54: <i>Regulation of mines and mineral development to the extent to which such regulation and development under the control of the</i>

	<i>Union is declared by Parliament by law to be expedient in the public interest</i>
<i>Oilfields</i>	Entry 53: <i>Regulation and development of oilfields and mineral oil resources; petroleum and petroleum products; other liquids and substances declared by Parliament by law to be dangerously inflammable</i>
<i>Railways</i>	Entry 22: <i>Railways</i>
<i>National Highways</i>	Entry 23: <i>Highways declared by or under law made by Parliament to be national highways.</i>
<i>Airport</i>	Entry 29: <i>Airways; aircraft and air navigation; provision of aerodromes; regulation and organisation of air traffic and of aerodromes; provision for aeronautical education and training and regulation of such education and training provided by States and other agencies</i>
<i>Telegraphs & Broadcasting stations</i>	Entry 31: <i>Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication.</i>
<i>Defence</i>	<p>Entry 1: <i>Defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilisation.</i></p> <p>Entry 7: <i>Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war.</i></p>
<i>Dockyard</i>	Entry 24: <i>Shipping and navigation on inland waterways, declared by Parliament by law to be national</i>

		<i>waterways, as regards mechanically propelled vessels; the rule of the road on such waterways.</i>
<i>Nuclear Installations</i>	<i>Power</i>	Entry 6: <i>Atomic energy and mineral resources necessary for its production.</i>

20.17 The Parliament under Section [2][5][a] has listed the circumstances when the Central Government would be the *Appropriate Government* and in Section 2[5][b] the Parliament has stipulated that in every other case the State Government shall be the *Appropriate Government*. This arrangement could be because electricity is in the Concurrent List - List III of the Seventh Schedule of the Constitution of India. This Court must observe that if two interpretations are possible of statutory provisions, that interpretation which would be in accord with the constitutional scheme must be preferred unless from the provisions of the statute itself it can be discerned that the parliament [or the legislature] intended to create an exception.

20.18 This proposition must flow from the settled law that if a provision of a statute or a rule is construed in such a way as it would be consistent with the constitution and another interpretation which would render the rule unconstitutional, the courts must lean in favour of the former construction. In this regard, this Court must refer to the decision of the Supreme Court in ***M.L. Kamra Vs. New India Assurance Company Limited***³⁸ wherein it is expounded as follows:

“If the provision of a law or the rule is construed in, such a way as would make it consistent with the constitution and another interpretation would render the provision or the rule unconstitutional, the court would lean in favour of the former construction.....”

This Court’s conclusion on Questions [A] & [B]:

21. In the light of the detailed discussion as above, this Court must, in answer to questions in [A]

³⁸ [1992] 2 SCC 36. This view is re-iterated in ***Bharat Petroleum Corpn. Ltd. v. Maddula Ratnavalli*** reported in [2007] 6 SCC 81 and also affirmed in the recent decision in ***X v. State of Delhi*** reported in [2023] 9 SCC 433.

and [B], opining that in the light of the binding precedent in *M/s Energy Watchdog*, the State Government could not have assumed jurisdiction under Section 11 of the Electricity Act in cases of *inter-state* transmission of electricity and directed even those engaged in inter-state transmission to supply electricity only to the State Grid.

On Question [c]:

22. The State Government has issued the impugned order dated 16.10.2023 in exercise of the jurisdiction under Section 11 of the Electricity Act essentially asserting, as mentioned in the first instance, the following.

[a] The production of electricity in the State of Karnataka is highly dependent on renewable sources of energy such as Solar energy and Wind energy, and with greater dependence on Hydro energy.

[b] The State, which is significantly dependent on monsoon for generation of electricity, is experiencing a major crisis of power because the monsoon has failed.

[c] The reservoir levels in the State are very low as compared to the levels of previous years and over dependency on hydel generation runs the risk of further depletion of major hydel reservoirs resulting in generation shortfall by about 3000 MU³⁹.

³⁹ *The following is referred to as the comparative levels in the major dams in the state and the expected shortfall in generation:*

Reservoir Name	% Storage as on 10.10.2022	% Storage as on 07.10.2022	Generation Loss in MU
<i>Linganamakki</i>	<i>90.60</i>	<i>45.40</i>	<i>2060</i>
<i>Supa</i>	<i>71.57</i>	<i>54.37</i>	<i>543</i>
<i>Varahi</i>	<i>73.79</i>	<i>36.26</i>	<i>365</i>
		<i>Total</i>	2968

[d] The State has recorded a peak demand of 16,950 MW and energy consumption of 294 MU in the month of August 2023. The State is likely to reach a peak load of 18214 MW and around 357 MU/day from November 2023 up till May 2024. The SLDC is forced to take Load Management measures since August 2023.

The Rival submissions on Question [C]:

23. Sri Sridhar Prabhu argues though the State Government asserts the State is experiencing a major power crisis on account of failed monsoon and increase demand from the agricultural consumers resulting in increased demand of electricity, the Hon'ble Minister for Power has stated on the Floor of the Legislature that the State is energy sufficient, and the learned counsel relies upon the following information which is

purportedly received under the provisions of the Right to Information Act, 2005:

"ಪ್ರಶ್ನೆ ಅ: ರಾಜ್ಯದಲ್ಲಿ ಗ್ಯಾರಂಟಿ ಯೋಜನೆಯ ಗೃಹಜ್ಯೋತಿ ಯೋಜನೆಯಡಿಯಲ್ಲಿ ಉಚಿತ ವಿದ್ಯುತ್ ಅನ್ನು ಗೃಹ ಬಳಕೆಗೆ ಉಪಯೋಗಿಸಿದ ಬಳಕೆದಾರರ ಸಂಖ್ಯೆ ಎಷ್ಟು; ರಿಯಾಯಿತಿಯಿಂದ ಇಲಾಖೆಗೆ ಎಷ್ಟು ನಷ್ಟ ಉಂಟಾಗಿರುತ್ತದೆ; (ಜಿಲ್ಲಾವಾರು ಸಂಪೂರ್ಣ ಮಾಹಿತಿ ಒದಗಿಸುವುದು)

ಉತ್ತರ: ವಿದ್ಯುತ್ ಸರಬರಾಜು ಕಂಪನಿಗಳು ಗೃಹ ಜ್ಯೋತಿ ಯೋಜನೆಯಡಿಯಲ್ಲಿ ಅರ್ಹ ಗೃಹ ಜ್ಯೋತಿ ಫಲಾನುಭವಿಗಳಿಗೆ ವಿದ್ಯುತ್ ಸರಬರಾಜು ಮಾಡಿ ಅದಕ್ಕನುಗುಣವಾಗಿ ಬೇಡಿಕೆಯಾಗುವ ಮೊತ್ತವನ್ನು ಸರ್ಕಾರದಿಂದ ಸಹಾಯಧನದ ರೂಪದಲ್ಲಿ ಭರಿಸಲಾಗುವುದು.

ಪ್ರಶ್ನೆ ಆ: ಬೆಲೆ ಏರಿಕೆಯಿಂದ ಇಲಾಖೆಗೆ ಎಷ್ಟು ಹೆಚ್ಚುವರಿ ಆದಾಯ ಬಂದಿದೆ ಮತ್ತು ಬೆಲೆ ಕಳೆದ ಆರು ತಿಂಗಳುಗಳಲ್ಲಿ ಎಷ್ಟು ಬಾರಿ ವಿದ್ಯುತ್ ಬಿಲ್ ಹೆಚ್ಚಿಸಲಾಗಿದೆ; ಏರಿಕೆ ವಿಚಾರ ಸರ್ಕಾರಕ್ಕೆ, ಇದೆಯೇ;

ಉತ್ತರ: ದೀರ್ಘಕಾಲದ ವಿದ್ಯುತ್ ಖರೀದಿ ಒಪ್ಪಂದಗಳಿಂದಾಗಿ ವಿದ್ಯುತ್ ಸರಬರಾಜು ಕಂಪನಿಗಳು ಉಷ್ಣ ಕೇಂದ್ರಗಳಿಗೆ ಪ್ರತಿ ತಿಂಗಳು ನಿಗದಿತ ವೆಚ್ಚವನ್ನು ಭರಿಸಬೇಕಾಗುತ್ತದೆ."

xxx

ಪ್ರಶ್ನೆ: ರಾಜ್ಯದಲ್ಲಿ ಯಾವ ಯಾವ ಮೂಲಗಳಿಂದ ಎಷ್ಟು ವಿದ್ಯುತ್ ಉತ್ಪಾದಿಸಲಾಗುತ್ತದೆ: (ವಿವರ ನೀಡುವುದು)

ಉತ್ತರ: ರಾಜ್ಯದಲ್ಲಿ 2022-23 ಮತ್ತು 2023-24 ನೇ ಸಾಲಿನ (ಏಪ್ರಿಲ್-2023 ರಿಂದ ಸೆಪ್ಟೆಂಬರ್-2023ರ ಅಂತ್ಯಕ್ಕೆ) ವಿವಿಧ ಮೂಲಗಳಿಂದ ಲಭ್ಯವಾದ ವಿದ್ಯುತ್ತಿನ ಪ್ರಮಾಣದ ವಿವರಗಳು ಕೆಳಕಂಡಂತಿವೆ:

ವಿದ್ಯುತ್ತಿನ ಮೂಲಗಳು	2022-23 ನೇ ಸಾಲಿನಲ್ಲಿ ಏಪ್ರಿಲ್ ನಿಂದ ಸೆಪ್ಟೆಂಬರ್ ಅಂತ್ಯದವರೆಗೆ ವಿದ್ಯುತ್ ಉತ್ಪಾದಿಸಿದ ಪ್ರಮಾಣ (ಮಿ.ಯು)	2023-24 ನೇ ಸಾಲಿನಲ್ಲಿ ಏಪ್ರಿಲ್ ನಿಂದ ಸೆಪ್ಟೆಂಬರ್ ಅಂತ್ಯದವರೆಗೆ ವಿದ್ಯುತ್ ಉತ್ಪಾದಿಸಿದ ಪ್ರಮಾಣ (ಮಿ.ಯು)
ಜಲವಿದ್ಯುತ್	6954.614	5496.34
ಶಾಖೋತ್ಪನ್ನ	7683.228	9846.88
ಕೇಂದ್ರ ಸರ್ಕಾರ ಸ್ವಾಮ್ಯದ ವಿದ್ಯುತ್ ಉತ್ಪಾದನಾ ಘಟಕಗಳಿಂದ ರಾಜ್ಯದಪಾಲು	8054.271	14711.85
ಅಸಂಪ್ರದಾಯಿಕ ಮೂಲಗಳಿಂದ + ಕ್ಯಾಪಿವ್	13264.852	14124.85
ಬೃಹತ್ ಐ.ಪಿ.ಪಿ.	378.052	1753.78
ಜಿಂದಾಲ್	669.485	933.72
ಒಟ್ಟು	37004.50	46867.42

24. Sri S.S. Sriranga, the learned Senior Counsel who leads for the respondents, [including the State Government] insofar as this question, denying the relevance of this information contends that the petitioners who have entered into Agreements with the concerned contingent upon the decision of the Governments, including the State Government, cannot assert locus to the challenge the State Government's order or the consequential withdrawal and refusal of approvals by M/s KPTCL as the State Load Dispatch Centre, and he relies upon the following clauses in the respective agreements signed by the petitioners.

WP No. 24239/2023

"Clause 15 (g) - any restriction imposed by any relevant State Government on sale of power from Project under this agreement."

WP No. 24998/2023

"Clause I- Force Majeure

Any restriction imposed by NLDC / RLDC of the intermediate region or the RLDC of the importing region on scheduling of power supply shall be treated as Force Majeure without any liability on either side."

In case of change in law or restriction imposed by electricity regulator (Central or State) and/or Government (Central or State) and/or Appellate Tribunal on any aspect for purchase of power, the same shall be binding on both the Parties."

WP No. 26833/2023

"Clause 12- Force Majeure

"(1) Any restriction imposed by RLDC/SLDC in scheduling of power due to breakdown of Transmission / Grid constraint shall be treated as Force majeure without any liability on either side..."

WP No. 26324/2023

"17. Force Majeure

d) Non-availability of transmission line/ corridor or grid failure. Any curtailment, suspension, non-availability of transmission capacity imposed by

any intervening SLDCs, RLDC's or any authorized entity."

This Court's reasoning and conclusion on Question [C]:

25. This Court, on perusal of the terms as aforesaid terms, cannot opine that the petitioners have waived, or otherwise jeopardized, their right to contest the State Government's order dated 16.10.2023 if it is without jurisdiction, but the allegation of colourable exercise of power must be necessarily examined in the light of the settled law on when it can be reasonably opined that there is colourable exercise of power. In this regard, this Court must refer to the decision the celebrated decision of the Supreme Court in ***State of Punjab v. Gurdial Singh***⁴⁰, while recording that this proposition is reiterated in the recent decision by the

⁴⁰ [1980] 2 SCC 471

Supreme Court in ***Pankaj Bansal v. Union of India***⁴¹.

The Supreme Court has held as follows:

"The question, then, is what is mala fides in the jurisprudence of power? Legal malice is gibberish unless juristic clarity keeps it separate from the popular concept of personal vice. Pithily put, bad faith which invalidates the exercise of power - sometimes called colourable exercise or fraud on power and oftentimes overlaps motives, passions and satisfactions - is the attainment of ends beyond the sanctioned purposes of power by simulation or pretension of gaining a legitimate goal. If the use of the power is for the fulfilment of a legitimate object the actuation or catalysation by malice is not legicidal. The action is bad where the true object is to reach an end different from the one for which the power is entrusted, goaded by extraneous considerations, good or bad, but irrelevant to the entrustment. When the custodian of power is influenced in its exercise by considerations outside those for promotion of which the power is vested the

⁴¹ 2023 SCC OnLine SC 1244

court calls it a colourable exercise and is undeceived by illusion."

26. This Court, in the light of this proposition and upon perusal of the reasons assigned by the State Government in the impugned order dated 16.10.2023 and the material that is brought on record to allege colourable exercise of power, is not persuaded to opine that the impugned order suffers from legal malice and is intended to attain a purpose not sanctioned, but the interference with the State Government's order dated 16.10.2023 is on the ground of jurisdiction in the light of the decision of the Supreme Court in *M/s Energy Watchdog* and the reading of the Scheme of the Electricity Act in the light of such decision. Therefore, the following

ORDER

The petitions are allowed quashing the impugned State Government's Order dated 16.10.2023 in

No.ENERGY 82 PPT 2023 insofar as it extends to those engaged in *inter-state* transmission of electricity and the following consequential withdrawal of approval / No – Objections issued by M/s KPTCL [the State Load Despatch Centre] to the respective petitioners.

[A] the Communication dated 18.09.2023

[*Annexure - B* in WP No.24998/2023]

[B] the Communication dated 17.10.2023

[*Annexure - B* in WP No. 26324/2023]

[C] the Communication dated 18.10.2023

[*Annexure - B* in WP No. 26833/2023]

Consequentially, M/s KPTCL, the State Load Dispatch Centre, is directed to reinstate the corresponding approvals/No-objection issued to the petitioners in W.P.No.24998/2023 and W.P.No.23624/2023, and insofar as the petitions in W.P.No.24239/2023 and

W.P.No.26833/2023, M/s KPTCL is directed to consider the respective requests in the light of this order.

**SD/-
JUDGE**

nv*