IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
30.10.2024	17.12.2024

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

W.P. NOS.26250 & 26253 OF 2024
AND
W.M.P. NOS.28681, 28683, 28685, 28688 & 32181 OF 2024

W.P. NO.26250 OF 2024

1. Wind Independent Power Producers Association
Thro' its Authorised Representative
8th Floor, DLF Square, Jacaranda Marg
DLF Phase – 2, Sector 25, Gurugram
Haryana 122 002.

2. JSP Green Wind 1 Pvt. Ltd.
Thro' its Authorised Representative
Dsm-648, 6th Floor, DLF Tower
Shivaji Marg, Najafgarh Road
Moti Nagar, Delhi Industrial Area
West Delhi, New Delhi 110 015.

3. Tata Power Renewable Energy Ltd.
Thro' its Authorised Representative
Corpora A Block, 34, Sant Tukaram Road
Carnac Bunder, Mumbai
Maharashtra 400 009.

4. Sprng Akshaya Urja Pvt. Ltd.
Thro' its Authorised Representative
Unit No.FF-48 A, first Floor
Omaze Square, Plot No.14
Jasola District Centre
New Delhi 110 025.

5. JSW Renew Energy Ltd.
Thro' its Authorised Representative
JSW Centre, Bandra Kurla Complex
Bandra (East), Bandra Mumbai
Maharashtra 400 051.

6. JSW Neo Energy Ltd.
Thro' its Authorised Representative
JSW Centre, Bandra Kurla Complex
Bandra (East), Bandra Mumbai
Maharashtra 400 051.

7. JSW Renew Energy Two Ltd.
Thro' its Authorised Representative
JSW Centre, Bandra Kurla Complex
Bandra (East), Bandra Mumbai
Maharashtra 400 051.

8. Amplus Sun Beat Pvt. Ltd.
Thro' its Authorised Representative
Level 6, Emmar – The Palm Square
Gold Course Extension Road, Sector – 66
Gurgaon, Haryana 122 102.

9. Amplus Theta Energy Pvt. Ltd.
Thro' its Authorised Representative
Level 6, Emmar – The Palm Square
Gold Course Extension Road, Sector – 66

Gurgaon, Haryana 122 102. .. Petitioner in WP 26253/24

T.P.Vardhaman Surya Ltd.
Thro' its Authorised Signatory
SF No.276 & 277, Trichy-Coimbatore Highway
Vairaimadai, Pugazhoo, Thennilai South
Karur, Tamil Nadu 639 206
Nearby Landmark : Kannimar Koil
Valanayakampatti .. Petitioner in WP 26253/24

- Vs –

1. State of Tamil Nadu
Rep. By its Principal Secretary
Department of energy
Namakkal Kavignar Maligai
Fort St. George, Chennai
Tamil Nadu 600 009.

2. Tamil Nadu Green Energy Corporation Ltd.
Rep. By its Chief Engineer/NCES
7th Floor, N.P.K.R.R. Maaligai
144, Anna Salai, Chennai
Tamil Nadu 600 002.

3. Tamil Nadu Generation & Distribution
Corporation rep. By its Chairman
NPKRR Maaligai, 144, Anna Salai
Chennai, Tamil Nadu 600 002.

4. Tamil Nadu Electricity Board Ltd.
Rep. By its Chairman-cum-Managing Director
NPKRR Maaligai, 144, Anna Salai
Chennai, Tamil Nadu 600 002.

5. Ministry of New and Renewable Resources
Rep. By its Secretary
Atal Akshaya Urja Bhawan
CGO complex, Lodhi Road
New Delhi 110 003.

6. Ministry of Power
Rep. By its Secretary
Shram Shakti Bhawan, Rafi Marg
Sansad Marg Area
New Delhi 100 001. .. Respondents in both WPs

W.P. No.26250 of 2024 filed under Article 226 of the Constitution of India praying this Court to issue a writ of certiorarified mandamus to call for the records pertaining to the impugned order in (Per) FB TNGECL Proceedings No.1 dated 06.08.2024 issued by the 2nd respondent and quash the same as arbitrary, illegal and unconstitutional and consequently to forbear the respondents from making any demand arising out of the impugned order, with particular reference to additional levy of Rs.50 Lakh/MW to be paid by WPPS (where either in-principle approval or location clearance has been applied for and is yet to be granted) in Tamil Nadu having connectivity with CTU/ISTS, as 'Resource Charges'.

W.P. No.26253 of 2024 filed under Article 226 of the Constitution of India praying this Court to issue a writ of certiorarified mandamus to call for the records pertaining to the impugned order in (Per) FB TNGECL Proceedings No.1 dated 06.08.2024 issued by the 2nd respondent and quash the same as arbitrary, illegal and unconstitutional and consequently to forbear the respondents from making any demand arising out of the impugned order.

For Petitioners : Mr. P.Chidambaram, SC, for
Mr.Abinav Parthasarathy in WP 26250/24
Mr. C.S.Vaidyanathan, SC, for
Mr.Abinav Parthasarathy in WP 26253/24

For Respondents : Mr. P.S.Raman, AG,
Assisted by Mr.D.R.Arun Kumar
For RR-2 to 4 in WP 26250/24
Mr. P.Wilson, SC, for
Mr.D.R.Arun Kumar
For RR-2 to 4 in WP 26253/24
Mr. V.T.Balaji, SPC for
RR-5 & 6 in WP 26250/24 and
For RR-6 & 7 in WP 26253/24
Mr. L.S.M.Hasan Faizal, AGP for
R-1 in both petitions
Mr.Alok Shankar for R-5
Assisted by Ms.Janani Shankar
in WP 26253/24

COMMON ORDER

The levy of 'Resource Charge' at Rs.50 Lakhs/MW for the electricity generated and wheeled to the Central Transmission Unit (for short 'CTU') by the 2nd respondent, is put in issue before this Court on the ground that the 2nd respondent has no jurisdiction to levy the said charge in the absence of a statutory provision and that too against the constitutional mandate relating to levy of tax on electricity by the State, which has led to assailing the said orders by filing the present writ petitions.

2. The sum and substance of the averments as put forth in the respective writ petitions are as under :-

Tamil Nadu Electricity Board (for short 'TNEB') was formed on 1.7.1957, which was made responsible for power generation, transmission and distribution. On 8.10.2008, approval was accorded by the Government of Tamil Nadu for reorganisation of TNEB as per requirement of Section 131 of the Electricity Act, 2003, by establishing a holding company, viz., TNEB Ltd., and two subsidiary companies, viz., Tamil Nadu Transmission Corporation (for short

'TANTRANSCO') and Tamil Nadu Generation and Distribution Corporation Ltd. (for short 'TANGEDCO') with a clear stipulation that the said entities would be fully owned by the Government. The said two subsidiary companies were vested with responsibility to purchase power from generator/trader within and outside the State for subsequent sale of power to distribution companies in the State and other licensees.

3. Vide the communication dated 5.5.2018, TANGEDCO issued an order outlining the procedure for developing and commissioning of wind energy projects in the State of Tamil Nadu having connectivity with CTU/Power Grid Corporation of India Ltd. (for short 'PGCIL') for the purpose of safeguarding the interests of TANGEDCO and the existing wind developers.

4. Vide Notification dated 20.10.2023, the Ministry of Power fixed the Wind Renewable Power Obligations (for short 'RPO') of 0.67% for the FY 2024-2025 going upto 3.4% for the FY 2029-2030 in which the power generated from windmills commissioned from 1.4.2024 will be taken into account for RPO and

failure would result in levy of penal charges for non-compliance of RPO to be paid by the State Discoms.

5. Further, vide communication dated 25.10.2023, following upon its earlier circular dated 25.04.2023, Ministry of Power had addressed with regard to the imposition of additional charges by various State Governments on electricity generation and declared such charges as illegal and unconstitutional and it was further emphasised that the States do not have the authority to levy taxes or duties on electricity generation under the guise of development fees or other charges and directed all the State Governments to promptly remove any such illegal taxes or duties.

6. On 6.3.2024, the Government of Tamil Nadu, in exercise of powers conferred u/s 131 (4), (5) and (6) and Section 133 of the Electricity Act, 2023, notified the Tamil Nadu Restructuring and Transfer Scheme, 2024 transferring the renewable energy assets of TANGEDCO to Tamil Nadu Power Generation Corporation Ltd. (for short 'TNPGCL') and Tamil Nadu Green Energy Corporation Ltd. (for short 'GECL'), which clearly defined the functions and duties of GECL.

7. On 6.8.2024, the Board of GECL passed the impugned order in terms of which the earlier procedure, formulated in the year 2018 and approved by TANGEDCO for commissioning of wind power projects having connectivity with CTU/PGCIL was amended in and by which GECL accorded approval for collection of 'Resource Charges' of Rs.50 Lakhs/MW for all future projects and pending applications for wind projects which are connected to the CTU, the approval of which is as under :-

> *"a) Approved to collect Resource Charges of Rs.50 Lakhs/MW for all the pending applications for which in-principle approval is yet to be issued in respect of CTU connected projects.*
>
> *b) Approved to collect Resource Charges of Rs.50 Lakhs/MW for all the pending applications for which location clearance approval is yet to be issued in respect of CTU connected projects."*

8. Subsequent to the above approval, GECL, vide its demand letter of various dates, had called upon the respective petitioners to pay the demand charges for issuing the requisite approval. The Association submitted a

representation dated 21.08.2024 to the Department of Energy, Government of Tamil Nadu, in respect of levy of Resource Charges for CTU connected wind power projects in Tamil Nadu and sought withdrawal of the impugned order amending the procedure evolved by TANGEDCO in the year 2018 with reference to the commissioning of projects having connectivity with CTU/PGCIL. Inspite of the said representation, till date, the same has evinced no response from the Government and, therefore, left with no efficacious remedy, the present writ petitions have been filed.

SUBMISSIONS ON BEHALF OF PETITIONER IN W.P. NO.26250/2024 :

9. Learned senior counsel appearing for the petitioner, at the outset, questioned the authority of GECL to levy Resource charges. It is the submission of the learned senior counsel that GECL lacks authority and jurisdiction to levy the Resource charge and laying reference to the Transfer Scheme dated 6.3.2024, between TANGEDCO and GECL, it is submitted that the said scheme does not provide any power to levy such charges on wind energy projects with connectivity to the CTU.

10. It is the further submission of the learned senior counsel that even otherwise, the impugned order is silent on the legislative source which enables GECL to levy the Resource charges. When there is no statutory backing on the basis of which GECL could levy Resource charges, the levy made by GECL cannot be sustained as it is an act without jurisdiction and authority of law.

11. It is the further submission of the learned senior counsel that even without prejudice to the contention of the petitioner that Tamil Nadu Electricity Regulatory Commission has no jurisdiction to hear the dispute, as the present dispute does not relate to a dispute between a generating company and a distribution licensee, which alone could be tried by the Regulatory Commission, GECL has filed a petition in Petition No.45/2024 before the Regulatory Commission seeking permission to levy Resource charges, which clearly shows that even the respondents are aware that GECL has no authority to levy Resource charges. That being the admitted case of the respondents, the 2nd respondent not being vested with any statutory power the levy of Resource Charge by the 2nd respondent by passing the impugned order is wholly perverse and illegal.

12. It is the further submission of the learned senior counsel THAT THE LEVY OF Resource Charge of Rs.50 Lakh/MW amounts to a compulsory impose on the Wind Power Projects, who have got themselves to the CTU, which is akin to a tax as per Article 366 (28) of the Constitution. In this regard, it is submitted that insofar as a levy of tax, impost, charge, fee or any other charge, the levy must be supported by law. In the absence of the respondents pointing out any law, which authorises the levy of the said Resource charge, the impugned levy on the petitioners is wholly illegal.

13. It is the further submission of the learned senior counsel that any tax levied without authority of law is violative of Article 265 of the Constitution and the State Legislature, having not made any law authorising levy of Resource charge, which cannot be done by the State Legislature with regard to sale and consumption of electricity outside the State in terms of Article 286 of the Constitution, as Article 246 r/w List II Entry 53 clearly limits the levy of tax with regard to sale and consumption of electricity within the State. That being the case, it is submitted that the Constitution prohibits the imposition of any levy in

any form on the petitioners and, therefore, the present levy by the 2nd respondent under the guise of Resource charge is wholly improper and illegal.

14. Placing reliance on Article 73 r/w Articles 256 and 257 of the Constitution, it is submitted by the learned senior counsel that the executive powers of a State shall be so exercised to ensure compliance with the laws made by Parliament and the executive power of the Union shall extend to giving of such directions to a State. It is therefore the submission of the learned senior counsel that in the aforesaid scenario, the executive instructions issued by the Central Government vide circular dated 25.4.2023 is binding upon the State Government and the State cannot issue any executive instructions contrary to the executive instructions of the Central Government. It is further submitted by the learned senior counsel that even otherwise, the impugned order would not come within the ambit of executive instruction, as the same has been issued by GECL, which is a company and, therefore, has no statutory force as it is not a statutory authority.

15. It is the further submission of the learned senior counsel that levy of Resource charges vide order dated 6.8.2024 only on Wind Power Projects, which have been connected to the CTU, while leaving aside the Wind Power Projects connected to the STU is discriminatory and violative of Article 14 of the Constitution. The classification made by the 2nd respondent into CTU connected and STU-connected with regard to the various wind power projects is wholly irrational and discriminatory and the said classification bears no nexus to the object sought to be achieved, viz., facilitate establishment of wind power projects and generate renewable power. It is the further stand of the learned senior counsel that if at all, the RPO has to be satisfied by the State, as mandated by the Ministry of Power vide Gazette Notification dated 20.10.2023, either the Government or the instrumentalities of the State could very well purchase the renewable power from the CTU and there would be no levy of charge of Rs.1 Crore/MW as penalty on the State.

16. It is the further submission of the learned senior counsel that classification as CTU-connected and STU-connected should pass the test of equality under Article 14 of the Constitution, as the twin conditions of intelligible

differential and rational nexus with the object to achieve must be satisfied as otherwise the doctrine of equality will be substituted by the doctrine of classification.

17. It is the further submission of the learned senior counsel that the stand of GECL that the petitioner has accepted the original procedure dated 5.5.2018 and, therefore, GECL is vested with authority to levy 'other charges' is grossly an erroneous interpretation of the procedure. In this regard, it is submitted that the charged, which are charged under the Original Procedure dated 5.5.2018 are for in-principle approval and land approval, which are merely approval based for establishment of wind power projects and are in no way connected with the type of connective, whether it be connected to the CTU or the STU. The petitioners have merely accepted the aforesaid approval charges, as the 2nd respondent, as the nodal agency of TANGEDCO, was entrusted with the task of collating information and granting in-principle approval and locational approval and nothing further. Therefore, the charges, which are reasonable processing charges, were not objected to by the petitioners. However, the present impugned levy of Resource charge is unreasonable and discriminatory

and the same has been levied without jurisdiction by the 2nd respondent. Further, the Resource charges amounts to levy on generation of electricity, which is *per se* impermissible and against the tenets of the Constitution.

18. In the light of the aforesaid position, it is submitted by the learned senior counsel that if the deviation from the Original Procedure dated 5.5.2018 by adopting the Resource Charge levied through the impugned orders are allowed, the petitioners would be burdened with a levy of a sum of Rs.600 Crores, for the 1200 MW of electricity generated by them through the wind power projects, which was envisioned by them when the initial project was setup, as it was not intended to be levied on the petitioners at the point of time when in-principle approval and location approval was sought for.

19. It is the further submission of the learned senior counsel that changing the rules of the game after the game has began is impermissible, which has been the consistent ratio followed by the Apex Court in a catena of judgments. Pointing out this, it is submitted that subsequent to the filing of the applications by the Developers in compliance of the Original Procedure dated 5.5.2018,

Resource Charges are sought to be levied by GECL, which is impermissible and sitting over the said applications without granting approval, by insisting upon payment of Resource Charges despite the fact that the 2nd respondent has no authority to levy the Resource Charges, is nothing but an act on the part of the 2nd respondent to impose conditions subsequent to the filing of the applications by modifying the original procedure and the same amounts to unjust enrichment, which cannot be permitted by this Court.

20. It is the further submission of the learned senior counsel that renewable power being of different kinds like hydro, solar and wind, the power generated through solar power projects in the State, although are connected either to CTU or STU as per the choice of the generator, no levy of Resource Charge is made on solar power projects, whereas the levy is being imposed only on wind power projects, which are connected to the CTU, which levy is doubly discriminatory.

21. It is the further submission of the learned senior counsel that the impugned levy of Resource Charge is violative of Article 301 of the Constitution.

It is the submission of the learned senior counsel that the restraint imposed by the 2nd respondent on inter-state trade on the wind power projects, which have connected to the CTU by imposing the Resource charges, thereby disentitling the petitioners from marketing the wind power to any distribution licensee and/or open access consumer, deprives the petitioners of their right to freedom of trade.

22. It is the further submission of the learned senior counsel that the CTU-connected wind power projects could participate in the all-India tenders floated for trading its electricity generation to different States, while the STU-connected wind power projects are barred from bidding in the tender due to lack of connectivity including availability thereof in the STU network and adequacy of transmission infrastructure. Further, imposing a hefty levy on CTU-connected wind power projects by the impugned order issued by the 2nd respondent from selling their generation in the all-India market, is not only illegal and in the absence of any law passed by the State Legislature and the Bill receiving the previous sanction of the President, the restraint order with regard to inter-state

trade and commerce is directly against the provisions of Article 301 of the Constitution.

23. It is the further submission of the learned senior counsel that the imposition of Resource charges is only for encouraging the wind power projects to connect with the STU, which would enable the State to meet the RPO obligation in terms of the Ministry of Power notification dated 20.10.2023, which will absolve the State from paying the penalty for not achieving the target of 0.67% for the financial year 2024-2025 is wholly unsustainable as the State, if aggrieved by the said notification of the Ministry of Power dated 20.10.2023, ought to have challenged the said notification and failure to do so and imposing a burden by way of Resource Charge on the petitioners is wholly arbitrary and illegal.

24. It is the further submission of the learned senior counsel that even otherwise, the above contention is fallacious for the simple reason that the achievement of RPO by the State is not only through generation of wind power, but it is on the utilisation of wind power which is generated through green

energy source. If really the State wants to avoid payment of penalty, the RPO could very well be met through purchase of wind power from the CTU and is not dependent on the connectivity of the projects to the STU. The respondents can very well purchase wind power, more particularly, green energy from the CTU-connected wind power projects or through purchase of Renewable Energy Certificates and nothing prevents the respondents from purchasing green energy from CTU-connected wind power projects so as to comply with its RPO obligation. It is therefore the submission of the learned senior counsel that if the State purchases wind power from CTU, there would be question of sufferance of penalty.

25. It is the further submission of the learned senior counsel that GECL has not made any efforts to comply with the RPO mandate, which can be met both through CTU and STU connected wind power projects. TANGEDCO has neither issued any tender for procuring green power nor participated in the tenders issued by the Renewable Energy Implementing Agencies for the procurement of wind power through CTU connected wind power projects, but merely wants to absolve itself from the predicament by imposing a burden on the petitioners by

imposing Resource Charge on CTU-connected wind power projects, though the 2nd respondent has neither any authority nor jurisdiction to pass the said impugned order.

26. It is the further submission of the learned senior counsel that even according to GECL, it has applied for approval to the Regulatory Commission with regard to imposition of Resource Charges, which clearly show that GECL has no authority to impose Resource Charges and, therefore, the impugned orders, including the demand notice issued seeking payment of Resource Charges deserves to be set aside, as it is the settled law that illegal acts are non-est and they are null and void and the impugned orders being illegal acts, as is done without any statutory authority, the said orders deserve to be set aside.

27. It is the further submission of the learned senior counsel that the levy of Resource Charges only on CTU-connected wind power projects undermines the economic principles of level playing field and a competitive marked and such levy leads to disparity, which results in higher cost of generation for CTU-connected wind power projects, inspite of the fact that both CTU-connected and

STU-connected power projects use the same resource for power generation, which is in violation of Article 19 (1)(g) of the Constitution.

28. It is the further submission of the learned senior counsel that as per Sections 7 and 9 of the Electricity Act, 2003, generation of electricity is a delicensed activity and the present levy vide the impugned orders amount to backdoor licensing of generation of electricity, which is contrary to the Electricity Act and impermissible.

29. It is the further submission of the learned senior counsel that TANTRANSCO and TANGEDCO are aware of the connectivity granted/sought for by the petitioners. That being the case, the levy of Resource Charges, that too, by the 2nd respondent, not only being unconstitutional and imposed without authority as it pertains only for the wind power projects connected to CTU, but it also amounts to a retrospective levy, which cannot be permitted and it deserves to be set aside.

30. It is the further submission of the learned senior counsel that the contention of GECL that even infrastructure development charges of Rs.30 Lakhs/MW is being collected for STU connected wind power projects and, therefore, there is no violation of Article 19 (1)(g) is wholly erroneous as the said levy is made in respect of projects, which have outlived its life of 20 years and only for such of those projects, towards repowering, refurbishment or life extension projects, which provides for certain additional benefits to STU-connected projects, Tamil Nadu Repowering Policy, 2024, provides the exemption on supply of power and extention of life period of the project, however, the said benefits are not being granted to the CTU-connected projects and, therefore, drawing analogy with regard to charging Rs.30 Lakh/MW towards infrastructure development charges for STU-connected units cannot be imported to the case of the petitioners to suggest that the Resource charges is akin to infrastructure development charges and, therefore, there is no inequality between CTU-connected and STU-connected wind power projects and such a contention is nothing but an attempt to mislead the court. It is also further submitted that G.O. (Ms) No.80 dated 22.8.2024, issued by the 1st respondent along with the TN Repowering Policy has been challenged before the Madurai

Bench of this Court in W.P. (MD) No.25444/2024 in the case of Tamil Nadu Spinning Mills Association – Vs – State of Tamil Nadu & Ors. As being arbitrary, illegal, without any authority or jurisdiction and in contravention of Electricity Act, 2023 and the same is pending adjudication and, therefore, the said charges cannot be brought into play for charging the petitioners with Resource Charges, which is also arbitrary, illegal and without any authority or jurisdiction.

31. It is further pointed out by the learned senior counsel for the petitioner that as per the report of the National Institute of Wind Energy, an autonomous R&D institution under the Ministry of New & Renewable Energy, Government of India, the wind power potential of Tamil Nadu is 95,107 MW, which is available for generation through wind power projects. The report specifically states the installable capacity of wind power projects in Tamil Nadu based on the available land at 95,107 MW and, therefore the contention of the respondents that there is scarcity of land is nothing but an attempt to mislead the court by suppressing material particulars and the same deserves to be rejected.

32. Insofar as the maintainability of the writ petition is concerned, learned senior counsel submits that Section 86 (1)(f) of the Electricity Act specifically mandates that only insofar as a dispute between the parties, more specifically, with regard to the amount that could be levied as 'Resource Charge', the matter could be agitated before the Regulatory commission. However, it is the specific case of the petitioners that GECL does not have the power/jurisdiction to levy the Resource charges on the petitioner and, therefore, the arbitrariness and illegality in the action of GECL makes the petitioner amenable before the writ jurisdiction of this Court.

33. It is the further submission of the learned senior counsel that the levy of Resource Charges, which is the subject matter of the writ petition does not fall with the regulatory ambit of Section 86 of the Electricity Act. It is the pointed submission of the learned senior counsel that the imposition of Resource charges does not fall within the ambit of the sub-sections enumerated u/s 86 of the Electricity Act. It is the further submission of the learned senior counsel that GECL cannot rely on Sections 86 (1)(b) and (e) as regulation of purchase by distribution licensee does not include power to levy Resource Charges. It is

further submitted that Section 86 (1)(e) empowers the Regulatory Commission to promote generation of power from renewable energy sources and impose RPO. However, it does not envisage imposition of Resource Charges on wind power projects having CTU connectivity. Further, it is the submission of the learned senior counsel that without prejudice to the aforesaid contentions, the 2nd respondent, viz., GECL is not a 'licensee' under the Electricity Act and, therefore, a dispute between the petitioners, who are generators and the 2nd respondent, a company, which is not the licensee cannot be adjudicated by TNERC.

34. It is the further submission of the learned senior counsel that though it was the initial stand of the 2nd respondent that it is a distribution licensee, but the said plea was later withdrawn and substituted with the plea that the 2nd respondent is a trading licensee. However, it is the case of the petitioners that the 2nd respondent is not a trading licensee as well, as there is no pleading nor any material produced/exhibited to support the said contention. Further, the petitioners reserve their right to oppose the application filed by the 2nd respondent before the Regulatory Commission on the ground that the 2nd

respondent is not a licensee and, therefore, the Regulatory Commission has no jurisdiction to adjudicate upon the said petition as the dispute is not between a generator and a distribution licensee.

35. It is the further submission of the learned senior counsel that prior to the Transfer Scheme dated 6.3.2024 in and by which GECL was created, TANGEDCO was the distribution licensee in the State and the 9th proviso to Section 14 of the Electricity Act does not mandate a Distribution Licensee to have a license to undertake trading in electricity. In this regard it is submitted that a perusal of the Transfer Scheme makes it clear that the distribution function of TANGEDCO has not been transferred to GECL, which is even evident from the Transfer Scheme, more particularly, Clause (4) relating to Transfer of Undertakings by TANGEDCO, wherein, in sub-clause (6) of Clause 4, it is clearly mentioned that ***"the transferees shall continue to function as an agent of the TANGEDCO till further orders of the State Government***", which clearly shows that even as on date, GECL is merely functioning as an agent of TANGEDCO by doing the relegated activities and there is no material placed before this Court to show that the Distribution Licensee has been transferred to GECL. Further, there

is no material to also otherwise infer that GECL has been permitted to undertake trading in electrical energy, as the same would require a fresh trading license to be obtained from the Regulatory Commission, as per the Regulations and the licensee of TANGEDCO and the Scheme cannot be a deemed licensee given to GECL. In the absence of any document, which establishes that either TANGEDCO or GECL has been granted trading license by the Regulatory Commission in accordance with the TNERC (Licensing) Regulations, 2005, the claim of GECL that it can levy the Resource Charge, which is backed by a statute, even which has not been pointed out, is not only wholly flawed, but even otherwise, deserves rejection, as already submitted, GECL has filed the petition before the Regulatory Commission seeking permission to levy Resource Charges. If really GECL was in possession of the statutory power to levy the Resource Charge, there arises no necessity for GECL to file a petition before the Regulatory Commission seeking permission to levy Resource Charges.

36. In fine, it is the submission of the learned senior counsel that the 2nd respondent, viz., GECL does not have the power to levy Resource Charges and that the levy is arbitrary, illegal, perverse and contrary to the Constitutional

scheme and outside the scope of functions of the 2nd respondent, which is neither a distribution licensee nor a trading licensee, the levy of Resource Charge by the 2nd respondent is impermissible and, therefore, the impugned order dated 6.8.2024 directing demand of Resource Charge and the subsequent demand notices are liable to be set aisde.

37. In support of the aforesaid submissions, learned senior counsel placed reliance on the following decisions :-

i) *UP Power Corporation Ltd. – Vs – Ayodhya Prasad Mishra (2008 (10) SCC 139);*

ii) *Dev Patel – Vs – PEC University of Technology & Ors. (2023 SCC OnLine SC 960);*

iii) *Shrilekha Vidyarthi (Kumari) – VS – State of UP (1999 (1) SCC 212);*

iv) *Virendra Krishna Mishra – Vs – Union of India (2015 (2) SCC 712);*

v) *Special Courts Bill, 1978, In re. (1979 (1) SCC 380);*

vi) *Food Corporation of India – Vs – Kamadhenu Cattle Feed Industries (1993 (1) SCC 71);*

vii) *Reliance Energy Ltd. – Vs – Maharashtra State Road Development Corporation (2007 (8) SCC 1);*

viii) *M.K.Ranjitsinh & Ors. – Vs – Union of India & Ors. (2024 SCC OnLine SC 570);*

ix) *Atiabari Tea Co. Ltd. – Vs – State of Assam & Ors. (1960 SCC OnLine SC 117);*

x) *State of Punjab & Anr. – Vs – Gurdial Singh & Ors. (1980 (2) SCC 471);*

xi) *Commissioner of Income Tax, Udaipur Rajasthan – Vs – McDowell & Co. Ltd. (2009 (10) SCC 755);*

xii) *Indus Towers Ltd. – Vs – State of Gujarat & Ors. (2010 SCC OnLine Guj 3777);*

xiii) *Most Rev. P.M.A. Metropolitan – Vs – Moran Mar Marthoma (1995 Supp (4) SCC 286);*

xiv) *A.P. National Thermal Power Corporation Ltd. (2002 (5) SCC 203);*

xv) *NHPC Ltd. – Vs – State of HP & Ors. (2024 SCC OnLine HP 533);*

xvi) *Ritesh Tewari – Vs – State of UP (2010 (10) SCC 677);*

xvii) *Dharani Sugars & Chemicals Ltd. – Vs – Union of India (2019 (5) SCC 480); and*

xviii) *K.Manjusree – Vs – State of AP & Anr. (2008 (3) SCC 512)*

SUBMISSIONS ON BEHALF OF PETITIONER IN W.P. NO.26253/2024 :

38. Learned senior counsel appearing for the petitioner, while adopting the arguments advanced by the learned senior counsel appearing for the

petitioner in W.P. No.26250/2024, further, submitted that under the Tamil Nadu Electricity Restructuring and Transfer Scheme, 2024 (for short 'Transfer Scheme, 2024') does not indicate that it is a Distribution Licensee within the contours of the Electricity Act. It is the further submission of the learned senior counsel that though GECL claims itself to be a trading licensee in terms of Section 14 r/w 131 of the Electricity Act, reverting from its earlier stand as a Distribution Licensee, however, the said claim of the 2nd respondent is wholly incorrect and misleading for the reason that though GECL submits that pursuant to the Transfer Scheme, 2024, GECL has been vested with a Trading License and, therefore, can issue the impugned order and maintain a petition before the Regulatory Commission u/s 86 of the Electricity Act, however, TANGEDCO, which is a Distribution Licensee, has segregated and vested its property, interest, right and liability upon GECL, but GECL has not been granted with a Trading Licence. The Trading License within the State is governed by the TNERC (Licensing) Regulations, 2005, in and by which the Regulatory Commission, after considering the application made by an eligible company, grant a Trading License under Regulations 14 and 15. However, there is nothing on record to establish that TANGEDCO/GECL have been granted a Trading License by the Regulatory Commission.

39. It is the further submission of the learned senior counsel that even in the Transfer Scheme, 2024, there is no whisper about any Trading Licence either with regard to TANGEDCO which had vested with GECL or with regard to trading licence with regard to GECL. It is pointed out by the learned senior counsel that earlier GECL had taken a stand that it is a Distribution Licensee, but on being queried about the Distribution License, GECL changed its stance and has submitted that it is a Trading Licensee. However, even with regard to Trading License, there is no material to show that GECL is a Trading Licensee and that being the case, in the absence of any material to substantiate the Trading License in favour of GECL, the oral submission made across the Bar cannot be taken to come to a conclusion that GECL is a Trading Licensee.

40. It is the further submission of the learned senior counsel that Section 86 (1)(e) of the Electricity Act empowers the Regulatory Commission to promote generation of power from renewable energy sources and impose RPO, but that does not cover imposition of Resource Charges on the wind power projects, which have taken CTU connectivity. Therefore, imposition of Resource Charge

even by the Regulatory Commission is not contemplated, the executive directions passed by GECL, cannot be allowed to survive and the same can be agitated before this Court in the present writ petition.

41. It is the further submission of the learned senior counsel that even as early as on 5.9.2024, this Court has passed an order of *status quo* with regard to the impugned order and the demand notices and only thereafter, the petition before the Regulatory Commission has come to be filed on 10.9.2024, that too, seeking permission for levying the Resource Charges, which clearly indicates that even GECL is aware that it does not have power to levy Resource Charges and in the light of the above, the impugned orders have been passed in gross abdication of the powers of the 2nd respondent and, therefore, they are liable to be set aside.

42. It is the further submission of the learned senior counsel that even the impugned orders are silent about the legislative source/statutory backing enabling GECL to levy Resource Charges and that being the case, the statute

having not permitted such levy, the Resource Charges levied through the impugned order is *per se* illegal and perverse.

43. It is the further submission of the learned senior counsel that with regard to inter-state supply of electricity, it is exclusively within the domain of the Central Electricity Regulatory Commission (for short 'CERC') and the Regulations framed under the scheme of the Act, more particularly Section 178 and responsibility for transmission of electricity through Inter State Transmission Service (for short 'ISTS') is vested with the CTU in terms of Section 38 of the Act. Therefore, the imposition of charges on CTU connected wind power projects is nothing but imposing restrictions on the use of ISTS, which is within the exclusive domain of CTU/CERC and, therefore, GECL cannot impose restrictions on the access to ISTS and, therefore, the impugned order is liable to be set aside.

44. In this regard, it is submitted by the learned senior counsel that where there is inter-State generation or supply of electricity, it is the Central Government which is involved and where it relates to intra-State generation or supply of electricity, the State Government or the State Regulatory Commission

is involved. CERC has framed the Central Electricity Regulatory Commission (Connectivity and General Network Access to the inter-State Transmission System) Regulations, 2022 pursuant to conferment of powers by the Electricity Act.

45. Placing reliance on the aforesaid Regulations, Consultation Meetings for ISTS are organised in which TANTRANSCO and TANGEDCO participate in the meetings, which makes them fully aware of the connectivity status of the wind power projects. It is the submission of the learned senior counsel that the aforesaid Regulations having been framed to ensure open access to the CTU's transmission system to the generators, GECL cannot encroach upon the jurisdiction of the central authority and impose restrictions on open access to the CTU connected wind power projects.

46. It is the further submission of the learned senior counsel that no State Authority can impose a 'tax' under the garb of 'Resource Charges'without the express mandate under law, as the wind power projects are generating stations within the meaning of Section 2 (3) of the Electricity Act and what is sought to be

levied by GECL under the guise of 'Resource Charges' is a tax, which cannot be levied, as it has no statutory backing.

47. In this regard, learned senior counsel relied on Article 265 of the Constitution and contended that the Constitution mandates that no tax shall be levied or collected except by authority of law and that in order to impose tax, legislative action is essential and it cannot be collected or levied in the absence of any legislative sanction by exercising the executive power of the State under Article 162 of the Constitution. Reliance was placed on the decision of the Apex Court in ***CIT – Vs – McDowell & Co. Ltd. (2009 (10) SCC 755)***.

48. It is the further submission of the learned senior counsel that the power to tax/levy and impose charges on manufacture of goods, viz., electricity, has been exclusively granted to the Union Government under Entry 84 List-I of the Constitution and that electricity is covered under definition of goods and is covered by both entry Nos.53 and 54 of List II of Schedule VII of the Constitution.

49. It is the further submission of the learned senior counsel that Entry 53 of List II of Schedule VII empowers a State to impose taxes on the consumption or sale of electricity and Entry 54 empowers a State to impose taxes on the sale or purchase of goods other than newspapers subject to the provisions of Entry 92-A of List I. There is no entry in the Constitution which allows State to impose tax on generation of electricity. In this regard, the decision of the Apex Court in ***M.P. Cement Manufacturers' Association – Vs – State of M.P. (2004 (2) SCC 249)*** is relied upon, wherein the Apex Court has unequivocally held that the State Government is not competent to levy tax on generation of electricity.

50. It is the further submission of the learned senior counsel that electricity is listed as Entry 38 in List III of Schedule VII, wherein both the Central and State Governments are empowered to make laws and insofar as any repugnancy is concerned, Article 254, which deals with the doctrine of repugnancy provides that where the laws of the State Legislature is repugnant to the provisions of the laws enacted by the Centre, then the laws made by the Parliament shall prevail to the extent of repugnancy. In such a backdrop, it is submitted that the impugned order issued GECL is violative of Article 14 as it

creates an artificial and arbitrary distinction between STU-connected and CTU-connected projects, as the Electricity Act, 2003, does not provide for such a distinction. It is therefore the submission of the learned senior counsel that by imposing Resource Charges only on CTU-connected projects, the impugned order introduces an unreasonable classification, which lacks any rational basis or legitimate object, which is explicitly prohibited as Article 14 of the Constitution speaks of equality without any discrimination.

51. It is the further submission of the learned senior counsel that Article 14 must be based on intelligible differentia, which must have a rational relation to the object sought to be achieved, however, there is no intelligible differentia that justified treating STU-connected and CTU-connected projects differently. In this regard, the decision of the Apex Court in ***P.Royappa –Vs – State of Tamil Nadu (AIR 1974 SC 555)*** has been projected, which emphasises that arbitrariness is anathema to equality under Article 14 and the present case on hand, the differentiation between STU and CTU projects is not based on reasonable classification, the impugned order smacks with arbitrariness and lacks rational basis and thus violative of Article 14 of the Constitution.

52. It is the further submission of the learned senior counsel that the impugned order is violative of Article 19 (1)(g) of the Constitution as it undermines the principles of level playing field and a competitive marked, as the imposition of Resource Charges on CTU-connected wind power projects is arbitrary and discriminatory. Reliance is placed on the decision of the apex Court in the case of ***Reliance Energy Ltd. – Vs – Maharashtra State Road Development Corporation (2007 (8) SCC 1)***, wherein it has been held that violation of the doctrine of level playing field embodied in Article 19 (1)(g) is violation of Article 19 (1)(g). Placing reliance on the above decision, it is contended by the learned senior counsel that in the said backdrop, the Resource Charges levied on CTU-connected projects to the exemption of STU-connected projects leads to disparity, as both the entities utilize the same resource, viz., wind for power generation and, thereby, an imbalance is created, which directly attracts the violation of Article 19 (1)(g) as it fails to subserve the larger public interest.

53. It is the further submission of the learned senior counsel that the imposition of Resource Charges, undermines fair competition and, thereby, leads to a creation of a financial barrier for selling power outside the State, and putting restrictions on inter-State trade and commerce, which act is violative of Article 301 of the Constitution, which guarantees freedom of inter-State trade across the country. It is the submission of the learned senior counsel that the imposition of Resource Charges adds approximately 6 to 10% to the cost of CTU-connected projects, thereby hindering financial viability. In this regard, reliance is placed on the decision of the Apex Court in ***Atiabari Tea Co. Ltd. – Vs – State of Assam & Ors. (AIR 1961 SC 232),*** wherein the Apex Court had analyzed the scope of Article 301 of the Constitution and held that the said Article 301 guarantees freedom from restrictions directly and immediately impeding the free flow or movement of trade and in the teeth of the settled law, the impugned order is liable to be set aside.

54. Reiterating the submissions advanced by the learned senior counsel in W.P. No.26250/24, learned senior counsel for the petitioner in W.P. No.26253/24 submitted that GECL having sought approval from the Regulatory

Commission for imposition of Resource Charges, which clearly show that even GECL is aware that it is not clothed with power to impose tax and, therefore, the impugned order, which is without the approval of law requires to be set aside. Reliance is placed on the decision of the Apex Court in ***Ritesh Tewari – Vs – State of UP (2010 (10) SCC 677)*** and ***Dharani Sugars & Chemicals Ltd. – Vs – UOI (2019 (5) SCC 480)***, wherein the Apex Court has held that acts flowing from illegal acts are non-est and null and void.

55. It is the submission of the learned senior counsel that the levy of Resource Charges, as put forth on the side of the respondents is only to encourage STU-connection of the wind power projects. It is the submission of the learned senior counsel that barring the financial liability on the State with regard to utilisation of green energy, there is no rational for passing the impugned order, as the financial burden on the State cannot be the basis to impose Resource Charge. It is the further submission of the learned senior counsel that complete irrationality arises along with financial difficulties for CTU-connected wind power projects as no such fetters are imposed on STU-connected wind power projects, inspite of the fact that there is no bar for the

State Distribution licensees to procure power from CTU-connected wind power projects.

56. It is the further submission of the learned senior counsel that the stand of GECL that CTU-connected electricity is expensive is incorrect and no proof thereof has been submitted by GECL barring the statement made across the Bar.

57. It is the further submission of the learned senior counsel that STU-connected wind power projects have also to pay infrastructural development charges of Rs.30 Lakhs/MW and, therefore, there is no inequality, is wholly incorrect for the reason that infrastructural development charges are not applicable for all STU-connected projects and it is only mandatory for such of the wind energy generators, who have completed their operational life of 20 years. Further on the basis of the Tamil Nadu Repowering Police, 2024, additional benefits are conferred on STU-connected projects, which is not available to CTU-connected wind power projects.

58. Learned senior counsel, further placing reliance on the report of the National Institute of Wind Energy, further submitted that the wind potential of the State is 95,107 MW of which only 12000 MW has been harnessed and approximately 84000 MW of untapped wind energy is available and if really the State want to satisfy its RPO obligations, it can either generate the electricity and utilise the same, or on the other hand, purchase the same from the wind power projects connected with the CTU. The failure of the State to procure and utilise wind power, which alone would satisfy the RPO obligations cannot be put against the petitioners by imposing unreasonable restrictions in the form of collection of Resource Charges. It is the further submission of the learned senior counsel that there is no restriction on procuring power from CTU-connected wind power projects to comply with the RPO obligations and establishment of STU-connected wind power projects are not necessary for compliance of RPO obligations.

59. It is the further submission of the learned senior counsel that practice of restricting inter-State supply or transmission of electricity in order to comply with RPO obligations is completely irrational. If such a view is enforced, other

States, which are rich in hydro and solar power also would restrict inter-state supply resulting in deviating from the benevolent legislation in the form of Electricity Act and restriction is not the solution to comply with RPO obligations.

60. It is the further submission of the learned senior counsel that the non-compliance of RPO obligations would entail a burden of Rs.1 Crore/MW on the State has not been substantiated. Further, the passing of the burden to the consumers has also not been established. It is the further submission of the learned senior counsel that even according to the stand of GECL, it merely avers that it wants to off-set some portion of the burden from being passed on to the consumers towards which only a sum of Rs.50 Lakhs/MW is being charged on CTU-connected wind power projects. The said stand of recovering the amounts from the consumers and the wind power generators, is wholly against the Electricity Act and the inaction of the State in generating electricity through wind power cannot be put against the petitioners by collecting the penalty, which is otherwise levied on the State for non-compliance of RPO obligations, more particularly with regard to utilisation.

61. It is the further submission of the learned senior counsel that the contention of GECL that the petitioners have accepted the original procedure dated 5.5.2018, which includes payment of 'Other Charges' and, therefore, the 'Resource Charges' is nothing but 'Other Charges' as mandated in the original procedure dated 5.5.2018 passed by the distribution licensee, TANGEDCO is wholly incorrect. It is the submission of the learned senior counsel that the original procedure was issued by TANGEDCO in and by which 'Other Charges' were chargeable on the generators, but the present impugned order has been passed by GECL, which is not a distribution licenseeand it is merely a nodal agency doing the works designated by TANGEDCO, which clearly show that the distribution licence is still with TANGEDCO and, therefore, GECL cannot steps into the shoes of TANGEDCO to impose 'Resource Charges'. It is the further submission of the learned senior counsel that the amounts charged under the various other heads, which have been accepted by the petitioners, cannot be taken to mean that the Resource Charges are legitimate charges at the hands of GECL, which Resource Charges are otherwise unconstitutional and arbitrary.

62. It is the further submission of the learned senior counsel that even in the MoU signed by the State with the petitioners, the State Government has disowned all commitments, including purchase of power from the petitioners and that being the case, the respondents are not justified in imposing resource charges of Rs.50 Lakhs/MW for connecting the power source with CTU instead of STU. It is the further submission of the learned senior counsel that TANGEDCO did not purchase even a single unit of power from any of the sources for the past three years and, therefore, the case of the respondent that RPO obligation cannot be achieved unless the wind generated power is supplied to GECL is wholly fictitious and unsustainable.

63. It is the further submission of the learned senior counsel that the circulars dated 25.4.23 and 25.10.23 issued by the Ministry of Power are mere directions is wholly erroneous, as Article 73 of the Constitution mandates that the executive power of the Union extends to the matters with respect to which Parliament has power to make laws and coupled with Articles 256 and 257, the State executive has to comply with the laws made by Parliament and the executive power of the Union shall extend to the giving of such directions.

Therefore, as per the Constitutional scheme, the circulars of the Ministry of Power have to be complied with by all the State Governments including the State of Tamil Nadu, which has clearly mandates that imposition of additional charge/fee in the form of tax/duty on generation of electricity as illegal and unconstitutional. In such a scenario, the levy of Resource Charge by GECL is not only against the constitutional mandate, but is also with authority and jurisdiction and, therefore, the impugned order as also the impugned demand notices required to be set aside.

64. Per contra, the first and foremost contention, put across by the learned Advocate General appearing for the 1st respondent is that the writ petition at the behest of the petitioners is not maintainable, as the petitioners have to move the Tamil Nadu Electricity Regulatory Commission u/s 86 (1)(f) of the Electricity Act, which provides the mechanism for addressing the disputes and without availing the said remedy, filing the writ petitions before this Court is wholly erroneous and unsustainable.

65. In this regard, learned Advocate General submitted that Section 2 (39) r/w 14 of the Electricity Act, clearly prescribe that licensee means a person, who has been granted a license and that such licence shall be for transmission of electricity as a transmission licensee or distribution of electricity as a distribution licensee and trading in electricity as a trading licensee. It is therefore the submission of the learned Advocate General that GECL, being under the umbrage of TANGEDCO and permitted to trade in electricity would fall within the ambit of trading licensee and, therefore, the imposition of Resource Charges would be well within the constitutional scheme and further any dispute with regard to the same could be agitated only before the Regulatory Commission and not before this Court.

66. It is the further submission of the learned Advocate General that Resource Charge is neither a tax nor duty or impost and it is merely a charge falling with the ambit of 'Other Charges' prescribed under the original procedure dated 5.5.2018 and, therefore, GECL having been vested with all the powers with regard to grant of approval, which was hitherto fore been followed in the grant of in-principle approval for the project and also locational approval, the

collection of Resource Charges with respect to CTU-connected wind power projects is within the power of GECL and the same cannot be said to be erroneous.

67. It is the further submission of the learned Advocate General that so long as the original procedure dated 5.5.2018 with regard to imposition of 'Other Charges' has not been challenged, the impugned order demanding payment of Resource Charges would squarely be within the contours of the original procedure and the demand made by GECL based on the said original procedure cannot be found fault with.

68. It is the further submission of the learned Advocate General that the Apex Court, in ***Jaipur Vidyut Vitran Nigam Ltd. & Ors. – Vs – MB Power (Madhya Pradesh) Ltd. & Ors. (2024 (8) SCC 513)*** has held that there is a need to balance the interest of the consumers' as also the generators and only on that aspect, the present Resource Charge has been levied and further submitted that the Regulatory Commission is having wide jurisdiction and domain expertise and knowledge is competent to adjudicate the entire issue and the petitioners having

entered appearance before the Regulatory Commission the issue could be adjudicated before the Regulatory Commission and not at the first instance before this Court.

69. While agreeing with the submissions advanced by the learned Advocate General on the aforesaid points, learned senior counsel appearing for respondents 2 to 4 submitted that trifurcation of TNEB into TNEB Ltd., TANGEDCO and TANTRANSCO vide G.O. Ms. 100 energy (B2) Dept., dated 19.10.2010, the function and business of trading of electricity vested with TANGEDCO and subsequent to the formation of GECL vide G.O. No.32 dated 6.3.3024 u/s 131 of the Electricity Act, the functions, as were being performed by TANGEDCO stood transferred to GECL as it was done for the purpose of enhancing zero emission target within the State and also assessing of resource potential, procure/development, construction, operation and maintenance of non-fossil fuel energy projects.

70. It is the further submission of the learned senior counsel that Part III Clause (1) of the functions and duties of GECL, as set forth in the Transfer

Scheme, 2024 read with its miscellaneous clause of Schedule B, GECL is a trading licensee u/s 14 (c) of the Electricity Act and, therefore, as a trading licensee, the petition filed before the Regulatory Commission u/s 86 (1)(f) is maintainable. Alternatively, it is further submitted that without admitting that GECL is not a licensee as claimed by the petitioners, such disputed questions of fact cannot be gone into by this Court under its writ jurisdiction.

71. It is the further submission of the learned senior counsel that apart from the stand of the petitioners that Resource Charge is a tax/impost is a disputed question, which has to be adjudicated by the expert body after ascertaining the RPO obligation. It is further submitted that if the petitioners sweep out the limited wind resources available in the four pockets in the State, GECL would be burdened with the task of paying approximately Rs.1 Crore/MW as penalty ordered by the Ministry of Power, which would only have to be passed on to the general public. The occupation of wind rich pockets by the petitioners had disabled GECL to fulfil its obligation of establishment of 5000 MW wind power with Public-Private Partnership and, hence, the Resource Charges cannot be equated with tax/cess/impost.

72. It is the further submission of the learned senior counsel that the decisions relied on by the petitioners that the State or any entity cannot collect tax/cess/impost without the authority of law as mandated in the Constitution is in no way connected/applicable to the case on hand.

73. It is the further submission of the learned senior counsel that GECL has not imposed any tax or cess/impost on the petitioners; rather GECL has only sought to collect Resource Charges of Rs.50 Lakhs/MW from the petitioners since all the petitioners have collectively occupied 5000 acres of lands in the limited wind rich packets available in the State and the power generated from the said area, as per the agreement, is sought to be connected to CTU for a period of 25 years. The aforesaid act of the petitioners renders GECL to achieve procurement of wind power of 3.48% by the year 2030 and, therefore, for non-fulfilment of the same, GECL would have to pay Rs.1 Crore/MW to the Central Government for non-achieving of the said slab of procurement of power from wind energy.

74. It is the further submission of the learned senior counsel that the impugned order is consequential to the proceedings dated 5.5.2018, wherein TANGEDCO has clearly indicated about collection of charges, wherein there is a clear mention that the wind power developers having connectivity with CTU are to register their location with the State Nodal Agency for renewable energy after payment of applicable application/registration fees, consulting charges and other charges. What is sought to be collected as Resource Charges, squarely falls within the ambit of Other Charges as found in the Original Procedure dated 5.5.2018 and, therefore, once the petitioners have submitted themselves to the right of TANGEDCO to collect Other Charges, the imposition of Resource Charge by GECL at the behest of TANGEDCO cannot be challenged independently, as it is a consequential proceedings to the Original Procedure dated 5.5.2018. The petitioners having not been aggrieved over the original procedure dated 5.5.2018, cannot challenge the consequential proceedings imposing Resource Charges.

75. It is the further submission of the learned senior counsel that the stand of the petitioners that for avoiding payment of penalty as per RPO, it

would suffice if GECL purchases power from the CTU cannot be sustained for the reason that a duty is cast on GECL to procure power at rates, which are minimal, as the same would have to be passed on to the consumers and procuring power from CTU instead of procuring power directly from the petitioners will force GECL to pay higher rate of approximately Rs.0.65 paise per unit, which would not serve any purpose in achieving the RPO obligation as the payment of higher rate has to be passed on the consumers.

76. It is the further submission of the learned senior counsel that the stand of the petitioners that the State has disowned any commitments/liabilities towards the wind energy generators in its agreement towards purchase of power from the grnerators by TANGEDCO is liable to be rejected since the State cannot accept any liability or responsibility to procure electricity from the wind power projects connected to CTU, as already TANGEDCO has fulfilled RPO Obligation, 2018, and, therefore, there is no necessity to procure power. Further, the revised RPO Obligation, 2023 mandates procurement of wind power from scratch and the wind available within the four wind packets, in which major

area has been brought by the petitioners, would not enable GECL to achieve the wind energy slab of 3.48% by the year 2030.

77. It is the further submission of the learned senior counsel that even for the projects without substations connected to STU, GECL is collecting infrastructure charges of Rs.30 Lakhs/MW and, therefore, there is no inequality between the STU-connected and CTU-connected wind power projects.

78. It is the further submission of the learned senior counsel that the Transfer Scheme empowers GECL to assess resource potential in the State and GECL being empowered to assess the green energy resources and potential in the State has passed the impugned proceedings dated 6.8.24 to ensure that wind energy resources are properly utilized in the manner beneficial for the State and ensure that such exploitation of resources are planned in a sustainable manner.

79. It is the further submission of the learned senior counsel that the circular of the Ministry of Power dated 25.10.2023 is not binding on GECL, as it is

only advisory in nature and not mandatory and, therefore, the contention of the petitioners to the contra deserve to be rejected.

80. It is the further submission of the learned senior counsel that the petitioners having accepted the power of GECL to collect registration fees and consulting charges from wind developers having CTU-connectivity vide proceedings dated 20.04.2018, they cannot challenge the impugned order levying Resource Charges, which is directly against the dictum laid down by the Apex Court in ***Adani Gas Ltd. – Vs – Union fo India (2022 (5) SCC 210)***, wherein the Apex Court has held that the doctrine of approbate and reprobate precludes the petitioners to accept the orders from which they derive advantage, while assailing that part of the order, which causes detriment to them. Further, the petitioners having accepted the levy of charges vide proceedings dated 20.04.2018, cannot challenge the subsequent proceedings vide the impugned order claiming that they do not have competence to levy the said charges as the petitioners are estopped from taking the said stand and in this regard, reliance is placed on the decision of the Supreme Court in ***Tata Iron & Steel Co. Ltd. – Vs – Union of India (2001 (2) SCC 41)***.

81. In fine, the petitioners having agreed to pay the registration and consultation charges for grant of No Objection Certificate as prescribed under the proceedings dated 5.5.2018, they cannot challenge the present impugned proceeding levying similar charges as Resource Charges and the conduct of the petitioners preclude them from filing the present petitions and, therefore, the petitions deserve to be dismissed.

82. In support of the aforesaid submissions, learned senior counsel also relied on the following decisions :-

i) *PTC India Ltd. – Vs – Central Electricity Regulatory Commission (2010 (4) SCC 603); and*

ii) *Rai Sahib Ram Jawaya Kapur & Ors. – Vs – State of Punjab (1955 SCC OnLine SC 14)*

83. This Court gave its anxious and judicious consideration to the submissions advanced by the learned senior counsel appearing for the parties and also perused the decisions, which have been placed before this Court in support of the aforesaid submissions as also the copy of some of the MoUs,

which have been entered into between some of the petitioners and the Government of Tamil Nadu.

84. The first and foremost objection advanced on behalf of the respondents pertains to the maintainability of the present petition before this Court, which has been countered by the petitioners contending that advertence to Section 86 (1)(f) of the Electricity Act would in no way be applicable to the case, as the case would not fall within the purview of the State Commission, so as to canvass the plea of maintainability.

85. To appreciate the aforesaid contention, it is but necessary to peruse Section 86 (1)(f) of the Electricity Act, which is quoted hereunder for better appreciation :-

> *"**86. Functions of State Commission :-** (1) The State Commission shall discharge the following functions, namely –*
>
> ** * * * * * **
>
> *(f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration.*
>
> ** * * * * * *"*

86. From a careful perusal of sub-section (f) to Section 86 (1) of the Electricity Act, it is clear that the adjudication of disputes by the Regulatory Commission would only relate to disputes between the licensees and generating companies. Therefore, it becomes imperative for this Court to find out whether GECL is a licensee so that the Regulatory Commission would be able to entertain the dispute, as has been petitioned before it by GECL.

87. It is to be pointed out that there is no material placed before this Court on behalf of the respondents to establish the fact that GECL is a licensee, having a licence granted by the Regulatory Commission, either for distribution or trading. As pointed out by the learned senior counsel for the petitioners, initially, a stand was taken on behalf of the respondents that GECL was the distribution licensee, but, thereafter, it was changed and it was submitted across the Bar that GECL is a trading licensee. Nevertheless, in regard to both the submissions, there is no iota of evidence to establish that TANGEDCO had parted with its distribution licence to GECL. In fact, a perusal of the materials available

on record reveal that not even a shred of evidence is placed before this Court to establish that GECL has any licence issued by the Regulatory Commission.

88. Section 14 of the Electricity Act deals with the issuance of licence by the Regulatory Commission, which is quoted hereunder :-

> ***"14. Grant of licence:-***
>
> *The Appropriate Commission may, on an application made to it under section 15, grant a licence to any person –*
>
> *(a) to transmit electricity as a transmission licensee; or*
>
> *(b) to distribute electricity as a distribution licensee; or*
>
> *(c) to undertake trading in electricity as an electricity trader, in any area as may be specified in the licence:*
>
> *Provided that any person engaged in the business of transmission or supply of electricity under the provisions of the repealed laws or any Act specified in the Schedule on or before the appointed date shall be deemed to be a licensee under this Act for such period as may be stipulated in the licence, The Electricity Act, 2003 clearance or approval granted to him under the repealed laws or such Act specified in the Schedule, and the provisions of the repealed laws or such Act specified in the Schedule in respect of such licence shall apply for a period of one year from the date of commencement of this Act or such earlier period as may be specified, at the request of the*

licensee, by the Appropriate Commission and thereafter the provisions of this Act shall apply to such business:

Provided further that the Central Transmission Utility or the State Transmission Utility shall be deemed to be a transmission licensee under this Act:

Provided also that in case an Appropriate Government transmits electricity or distributes electricity or undertakes trading in electricity, whether before or after the commencement of this Act, such Government shall be deemed to be a licensee under this Act, but shall not be required to obtain a licence under this Act:

Provided also that the Damodar Valley Corporation, established under sub-section (1) of section 3 of the Damodar Valley Corporation Act, 1948, shall be deemed to be a licensee under this Act but shall not be required to obtain a licence under this Act and the provisions of the Damodar Valley Corporation Act, 1948, in so far as they are not inconsistent with the provisions of this Act, shall continue to apply to that Corporation:

Provided also that the Government company or the company referred to in sub-section (2) of section 131 of this Act and the company or companies created in pursuance of the Acts specified in the Schedule, shall be deemed to be a licensee under this Act:

Provided also that the Appropriate Commission may grant a licence to two or more persons for distribution of electricity through their own distribution system within the same area, subject to the conditions that the applicant for grant of licence within the same area shall, without prejudice to the other conditions or requirements under this Act, comply with the additional requirements 1[relating to the capital adequacy, credit-worthiness, or code of conduct] as may be prescribed by the Central Government, and no such applicant, who complies with all the requirements for grant of licence, shall be refused grant of licence on the ground that there already exists a licensee in the same area for the same purpose:

Provided also that in a case where a distribution licensee proposes to undertake distribution of electricity for a specified area within his area of supply through another person, that person shall not be required to obtain any separate licence from the concerned State Commission and such distribution licensee shall be responsible for distribution of electricity in his area of supply:

Provided also that where a person intends to generate and distribute electricity in a rural area to be notified by the State Government, such person shall not require any licence for such generation and distribution of electricity, but he shall comply with the measures which may be specified by the Authority under section 53:

Provided also that a distribution licensee shall not require a licence to undertake trading in electricity.”

(Emphasis Supplied)

89. Be that as it may. Though, the entire argument of the respondents is edificed on the maintainability of the writ petitions before this Court, when there is a remedy available u/s 86 (1)(f) of the Electricity Act before the Regulatory Commission, which has been countered by the petitioners contending that GECL is not a licensee and, therefore, the petitions are very well maintainable, however, notwithstanding the said scenario, it is the stand of the petitioners that the petitions could very well be taken up by this Court inspite of the availability of alternative remedy, as it is the consistent view of the Courts that availability of alternative remedy is not a bar for invoking the writ jurisdiction of this Court under Article 226 of the Constitution and that the Courts should be slow in entertaining such petitions, where an alternative remedy is available.

90. Keeping the ratio laid down on the issue of maintainability in a case where there exists an alternative remedy, it is to be pointed out that though the plea of alternative remedy is raised, this Court is not inclined to venture into the same and give its view one way or the other, but is inclined to entertain these petitions for the simple reason that the Constitutional validity of levy of 'Resource Charges' is put in issue before this Court, which could be gone into only by this Court and it would not be just and proper to relegate the petitioners and the respondents to have the dispute adjudicated before the Regulatory Commission, as that would create a constitutional embargo on the Regulatory Commission from dealing with the said issue and further such a course would be nothing but relegating the parties to a legal conundrum, where the Regulatory Commission would not be vested with power to decide the constitutional validity of a legal provision, which has been pressed into service by the petitioners before this Court. Therefore, in the interest of justice and also to give a quietus to the issue and also considering the public interest involved, as generation of electricity and its transmission and utilisation has a bearing on the lives of the common man, this Court is inclined to take up the writ petitions and decide the

same on the contentions advanced on the constitutional validity of the levy imposed by GECL.

91. Therefore, in such a backdrop of the contention raised and also the issues that have crystallised on the basis of the legal provisions pointed out, it becomes necessary for this Court to find out whether the said levy *sans* any enabling provision either under the Electricity Act or the Constitution to charge the Resource Charge, is an act without the authority of law and, therefore, the impugned order passed is without jurisdiction and authority of law and deserves to be interfered.

92. Before adverting to considering the facts of the case on the basis of the law, as has been pressed into service through the provisions under the Electricity Act and the Constitution of India, the precedents in law and the ratio laid down by the Apex Court with regard to the taxing statute requires the consideration of this Court.

POWER OF THE STATE TO LEVY TAX :

93. In the context of the power of the State to levy tax, tracing the legislative intent and power with regard to such levy, reliance is placed on the decision of the Apex Court in *McDowell's case(supra),* wherein the power flowing out of the Constitution with regard to tax being levied was considered by the Apex Court and it was held as under :-

> *"21. 'Tax', 'Duty', 'Cess' or 'fee' constituting a class denotes to various kinds of imposts by State in its sovereign power of taxation to raise revenue for the State. Within the expression of each specie each expression denotes different kind of impost depending on the purpose for which they are levied. This power can be exercised in any of its manifestation only under any law authorising levy and collection of tax as envisaged under Article 265 which uses only expression that no 'tax' shall be levied and collected except authorized by law. It in its elementary meaning coveys that to support a tax legislative action is essential, it cannot be levied and collected in the absence of any legislative sanction by exercise of executive power of State under Article 73 by the Union or Article 162 by the State.*
>
> *22. Under Article 366(28) "Taxation" has been defined to include the imposition of any tax or impost whether general or local or special and tax shall be construed accordingly. "Impost" means compulsory levy.. The well known and well*

settled characteristic of 'Tax' in its wider sense includes all imposts. Imposts in the context have following characteristics:

(i) The power to tax is an incident of sovereignty.

(ii) 'Law' in the context of Article 265 means an Act of legislature and cannot comprise an executive order or rule without express statutory authority.

(iii) The term 'Tax' under Article 265 read with Article 366(28) includes imposts of every kind viz., tax, duty, cess or fees.

(iv) As an incident of sovereignty and in the nature of compulsory exaction, a liability founded on principle of contract cannot be a "tax' in its technical sense as an impost, general, local or special."

(Emphasis Supplied)

94. A careful perusal of the above decision makes it clear that the power authorising levy and collection of tax as envisaged under Article 265 of the Constitution could be exercised only when it is clothed with a legislative sanction and in the absence of any legislative sanction, no tax could be levied by exercising the executive power under Article 73 by the Union or Article 162 by the State.

EFFECT OF ENTRIES 53 & 54 OF LIST II VIS A VIS INTER-STATE TRADE :

95. With regard to the effect of List II, Entries 53 and 54 of the Constitution and the manner in which the said provisions have to be read in respect of inter-State trade or commerce and the circumstances under which such tax can be levied, the Apex Court, in *NTPC case (supra)*, held as under :-

> *"22. We now come to the question on the interpretation of Entry 53 in List II of Seventh Schedule. It provides for taxes on the consumption or sale of electricity. The word 'sale' as occurring in Entry 52 came up for the consideration of this Court in Burmah Shell Oil Storage & Distributing Co. India Ltd. v. The Belgaum Borough Municipality MANU/SC/0314/1962: AIR 1963 SC 906 . It was held that the act of sale is merely the means for putting the goods in the way of use or consumption. It is an earlier stage, the ultimate destination of the goods being "use or consumption". We feel that the same meaning should be assigned to the word 'sale' in Entry 53. This is for a fortiorari reason in the context of electricity as there can be no sale of electricity excepting by its consumption, for it can neither be preserved nor stored. It is this property of electricity which persuaded this Court in Indian Aluminium Co. etc's caseH (supra) to hold that in the context of electricity, the word 'supply' should be interpreted to include sale or consumption of*

electricity. Entry 53 should therefore be read as 'taxes on the consumption or sale for consumption of electricity'.

23. With these two things in mind, that electricity is goods, and that sale of electricity has to be construed and read as sale for consumption within the meaning of Entry 53, the conflict, if any, between Entry 53 and Entry 54 ceases to exist and the two can be harmonized and read together. Because electricity is goods it is covered in Entry 54 also. It is not disputed that duty on electricity is tax. Tax on the sale or purchase of goods including electricity but excluding newspapers shall fall within Entry 54 and shall be subject to provisions of Entry 92A of List I. Taxes on the consumption or sale for consumption of electricity within the meaning of Entry 53 must be consumption within the State and not beyond the territory of the State. Any other sale of electricity shall continue to be subject to the limits provided by Entry 54. Even purchase of electricity would be available for taxation which it would not be if electricity was not includible in the meaning of term 'goods'. A piece of legislation need not necessarily fall within the scope of one entry alone; more than one entry may overlap to cover the subject-matter of a single piece of legislation. A bare consumption of electric energy even by one who generates the same may be liable to be taxed by reference to Entry 53 and if the State Legislature may choose to impose tax on consumption of electricity by the one who generates it, such

tax would not be deemed to be a tax necessarily on manufacture or production or a duty of exercise as held by Constitution Bench in Jiyajeerao Cotton Mills Ltd, Birlanagar, Gwalior v. State of Madhya Pradesh - MANU/SC/0266/1961 : AIR 1963 SC 414 . A mere consumption of goods (other than electricity), not accompanied by purchase or sale would not be taxable under Entry 54 because it does not provide for taxes on the consumption and Entry 53 does not speak of goods other than electricity. Thus in substance Entries 53 and 54 can be and must be read together and to the extent of sale of electricity for consumption outside the State, the electricity being goods, shall also be subject to provisions of Entry 92A of List I. This, in our opinion, is the best way of reading the two entries. In C.P. Motor Spirit Act re., AIR 1939 FC 131 it was hold that two entries in the lists may overlap and sometimes may also appear to be in direct conflict with each other. It is then the duty of this Court to reconcile the entries and bring about harmony between them. The Court should strive at searching for reasonable and practical construction to seek reconciliation and give effect to all of them. If reconciliation proves impossible the overriding power of Union Legislature operates and prevails. Gwyer, C.J. observed –

> *"A grant of the power in general terms, standing by itself, would no doubt be construed in the wider sense; but it may be qualified by other express provisions in*

the same enactment by the implication of the context, and even by considerations arising out of what appears to be the general scheme of the Act."

And again he said :

".....an endeavour must be made to solve it, as the Judicial Committee have said, by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting, and, where necessary, modifying the language of the one by that of the other. If needed such a reconciliation should prove impossible, then and only then, will the non-obstante clause operate and the federal power prevail." In Calcutta Gas Co. Ltd. v. The State of West Bengal and Ors. MANU/SC/0063/1962 : AIR1962SC1044 , the Constitution Bench has held that the same rules of construction apply for the purpose of harmonizing an apparent conflict between two entries in the same list."

* * * * * * *

Effect of Entry-53, List-II, having remained unamended:

25. Having seen the properties of electricity as goods and what is inter-State sale, let us examine the effect of Entry 53, List II, having been left unamended by Sixth Amendment from another angle. Sixth Amendment did not touch Entry 53 in List-

II and so the contents of Entry 53 were not expressly made subject to the provisions of Entry 92 A of List I and arguments were advanced with emphasis, on behalf of the States of Andhra Pradesh and Madhya Pradesh contending that such omission was deliberate and therefore the restriction which has been placed only in Entry 54 by making it subject to the provisions of Entry 92A of List I should not be read in Entry 53. It was submitted that so far as sale of electricity is concerned even if such sale takes place in the course of inter-State trade or commerce the State can legislate to tax such sale if the sale can be held to have taken place within the territory of that State or if adequate territorial nexus is established between the transaction and State legislation. For the several reasons stated hereinafter such a plea cannot be countenanced.

26. The prohibition which is imposed by Article 286(1) of the Constitution is independent of the legislative entries in Seventh Schedule. After the decision of larger Bench in Bengal Immunity Company Limited (supra) and Constitution Bench decision in Ram Narian Sons Ltd. and Ors. v. Asst. Commissioner of Sales Tax and Ors. MANU/SC/0084/1955 : [1955] 2 SCR 483 , there is no manner of doubt that the bans imposed by Articles 286 and 269 on the taxation powers of the State are independent and separate and must be got over before a State legislature can impose tax on transaction s of sale or purchase of goods. Needless to say, such ban would

operate by its own force and irrespective of the language in which in Entry in List-II of Seventh Schedule has been couched. The dimension given to field of legislation by the language of an Entry in List-II Seventh Schedule shall always remain subject to the limits of constitutional empowerment to legislate and can never afford to spill over the barriers created by the Constitution. The power of State legislature to enact law to levy tax by reference to List II of the Seventh Schedule has two limitations : one, arising out of the entry itself; and the other, flowing from the restriction embodied in the Constitution. It was held in Tata Iron and Steel Co. Ltd. Bombay v. S.R. Sarkar and Ors. MANU/SC/0270/1960 : [1961]1SCR379 that field of taxation on sale or purchase taking place in the course of inter-State trade or commerce has been excluded from the competence of the State Legislature. In 20th Century Finance Corporation Limited (supra) the Constitution Bench (majority) made it clear that the situs of the sale or purchase is wholly immaterial as regards the inter-State trade or commerce. In view of Section 3 of the Central Sales Tax, 1956 all that has to be seen is whether the sale or purchase (a) occasions the movement of goods from one State to another; or (b) is effected by a transfer of documents of title to the goods daring their movement from one State to another. If the transaction of sale satisfies any one of the two requirements it shall be deemed to be a sale or purchase of good sin the course of inter-

State trade or commerce and by virtue of Articles 269 and 286 of the Constitution the same shall be beyond the legislative competence of a State to tax without regard to the fact whether such a prohibitions spelled out by the description of a legislative entry in Seventh Schedule or not.

* * * * * * *

28. It is by reference to the ambit or limits of territory by which the legislative powers vested in Parliament and the State Legislatures are divided in Article 245. Generally speaking, a legislation having extra territorial operation can be enacted only by Parliament and not by any State Legislature; possibly the only exception being one where extra territorial operation of a State legislation is sustainable on the ground of territorial nexus. Such territorial nexus, when pleaded, must be sufficient and real and not illusory. In Burmah Shell Oil Storage & Distributing Co. India Ltd. (supra), which we have noticed, it was held that sale for use or consumption would mean the goods being brought inside the area for sale to an ultimate consumer, i.e. the one who consumes. In Entry 53, 'sale for consumption' (the meaning which we have placed on the word 'sale') would mean a sale for consumption within the State so as to bring a State Legislation within the field of Entry 53. If sale and consumption were to take place in different States, territorial nexus for the State, where the sale takes place, would be lost. We have already noticed that in case of

electricity the events of sale and consumption are inseparable. Any State legislation levying duty on sale of electricity, by artificially or fictionally assuming that the events of sale and consumption have taken place in two States, would be vitiated because of extra territorial operation of State legislation."

(Emphasis Supplied)

96. In the aforesaid decision, it has been unequivocally held by the Apex Court that "*taxes on consumption or sale for consumption of electricity within the meaning of Entry 53 must be consumption within the State and not beyond the territory of the State".* In essence, the Apex Court held that Entries 53 and 54 can be and must be read together and to the extent of sale of electricity for consumption outside the State, electricity being goods, shall also be subject to the provisions of Entry 92-A of List I.

97. Therefore, so long as the sale and consumption were to take place in different States, territorial nexus for the State where the sale takes place, would be lost. Further, any State legislation levying duty on sale of electricity by artificially or fictionally assuming that the events of sale and consumption have

taken place in two States, would be vitiated because of extraterritorial operation of State legislation. Therefore, the electricity generated by the petitioners, which have been CTU-connected, being utilised by a different State, the State of Tamil Nadu cannot tax the petitioners under the guise of 'Resource Charges', as it does not have the authority of law to make levy, be it in the form of 'Resource Charge' as the source of power for making the levy does not find place either in the Constitution or the Electricity Act, as the said electricity is not sold within the State of Tamil Nadu.

98. In this regard, the Court's attention was drawn to Article 301 of the Constitution, which relates to inter-State trade, where, there is mandate that the inter-State trade would be tax free and, therefore, the electricity, which is generated in the State of Tamil Nadu, though sold elsewhere, cannot be taxed at the hands of the State where it is generated, as it would be against the very intent of Article 301 of the Constitution.

99. In *Atiabari Tea case (supra)*, the legislative competence of the State to impose tax was dealt with, more particularly with reference to freedom of

movement of trade and the fetters placed on its movement in the form of taxes imposed on the movement of goods by referencing to Articles 301, 302 and 304 (b) of the Constitution and in the said context, the Apex Court held as under :-

> *"50. Thus the intrinsic evidence furnished by some of the Articles of Part XIII shows that taxing laws are not excluded from the operation of Art. 301; which means that tax laws can and do amount to restrictions freedom from which is guaranteed to trade under the said Part. Does that mean that all tax laws attract the provisions of Part XIII whether their impact on trade or its movement is direct and immediate or indirect and remote ? It is precisely because the words used in Art. 301 are very wide, and in a sense vague and indefinite that the problem of construing them and determining their exact width and scope becomes complex and difficult. However, in interpreting the provisions of the Constitution we must always bear in mind that the relevant provision "has to be read not in vacuo but as occurring in a single complex instrument in which one part may throw light on another". (Vide : James v. Commonwealth of Australia ((1936) A.C. 578, 613)). In construing Art. 301 we must, therefore, have regard to the general scheme of our Constitution as well as the particular provisions in regard to taxing laws. The construction of Art. 301 should not be determined on a purely academic or doctrinaire considerations; in construing the said Article we*

must adopt a realistic approach and bear in mind the essential features of the separation of powers on which our constitution rests. It is a federal constitution which we are interpreting, and so the impact of Art. 301 must be judged accordingly.

Besides, it is not irrelevant to remember in this connection that the Article we are construing imposes a constitutional limitation on the power of the Parliament and State Legislatures to levy taxes, and generally, but for such limitation, the power of taxation would be presumed to be for public good and would not be subject to judicial review or scrutiny. Thus considered we think it would be reasonable and proper to hold that restrictions freedom from which is guaranteed by Art. 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. Taxes may and do amount to restrictions; but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Art. 301. The argument that all taxes should be governed by Art. 301 whether or not their impact on trade is immediate or mediate direct or remote, adopts, in our opinion, an extreme approach which cannot be upheld. If the said argument is accepted it would mean, for instance, that even a legislative enactment prescribing the minimum wages to industrial employees may fall under Part XIII because in an economic sense an additional wage bill may indirectly affect trade or commerce. We are, therefore,

satisfied that in determining the limits of the width and amplitude of the freedom guaranteed by Art. 301 a rational and workable test to apply would be : Does the impugned restriction operate directly or immediately on trade or its movement ? It is in the light of this test that we propose to examine the validity of the Act under scrutiny in the present proceedings.

51. We do not think it necessary or expedient to consider what other laws would be affected by the interpretation we are placing on Art. 301 and what other legislative entries would fall under Part XIII. We propose to confine our decision to the Act with which we are concerned. If any other laws are similarly challenged the validity of the challenge will have to be examined in the light of the provisions of those laws. Our conclusion, therefore, is that when Art. 301 provides that trade shall be free throughout the territory of India it means that the flow of trade shall run smooth and unhampered by any restriction either at the boundaries of the States or at any other points inside the States themselves. It is the free movement or the transport of goods from one part of the country to other that is intended to be saved, and if any Act imposes any direct restrictions on the very movement of such goods it attracts the provisions of Art. 301, and its validity can be sustained only if it satisfies the requirements of Art. 302 or Art. 304 of Part XIII. At this stage we think it is necessary to repeat that when it is

said that the freedom of the movement of trade cannot be subject to any restrictions in the form of taxes imposed on the carriage of goods or their movement all that is meant is that the said restrictions can be imposed by the State Legislatures only after satisfying the requirements of Art. 304(b). It is not as if no restrictions at all can be imposed on the free movement of trade.

52. Incidentally we may observe that the difference in the provisions contained in Art. 302 and Art. 304(b) would prima facie seem to suggest that where Parliament exercises its power under Art. 302 and passes a law imposing restrictions on the freedom of trade in the public interest, whether or not the given law is in the public interest may not be justiciable, and in that sense Parliament is given the sole power to decide what restrictions can be imposed in public interest as authorised by Art. 302. On the other hand Art. 304(b) requires not only that the law should be in the public interest and should have received the previous sanction of the President but that the restrictions imposed by it should also be reasonable. Prima facie the requirement of public interest can be said to be not justiciable and may be deemed to be satisfied by the sanction of the President; but whether or not the restrictions imposed are reasonable would be justiciable and in that sense laws passed by the State Legislatures may on occasions have to face judicial scrutiny. However, this point does not fall to be

considered in the present proceedings and we wish to express no definite opinion on it.

* * * * * * *

72. Freedom guaranteed by Art. 301 is however not absolute : it is subject to the provisions contained in Part XIII of the Constitution. Article authorises Parliament to impose restriction the freedom of trade, commerce an intercourse between one State and another or within any part of the territory of India as may be required in the public interest. The Constitution has therefore circumscribed the guarantee under Art. 301 by authorising the Parliament to impose restrictions thereon. Such restrictions on trade, commerce and intercourse may be intra-State as well as inter-State : the only condition which the restrictions must fulfill is that they must be imposed in the public interest. The Learned Attorney-General urged that the courts are incompetent to adjudge whether the quantum, and the incidence of a tax imposed by a Legislature in exercise of its powers are in the public interest, and therefore it must be inferred that Arts. 301 and 302 do not deal with freedom from taxation and the limits which may be placed thereon. Counsel urged that in the modern political thought, exercise of the sovereign power of taxation is not restricted to collection of revenue for governmental purposes; it is resorted to for diverse purposes, often with view to secure a pattern of social order ensuring justice, liberty and equality amongst

citizens. That the courts may not in adjudging upon the validity of a restriction imposed by a parliamentary statue, lightly enter upon an investigation whether the amount sought to be recovered and its incidence are in the public interest, is not a ground for holding that Art.302 does not deal with restrictions which may be placed upon trade, commerce and intercourse by the imposition of taxes. The courts will normally upon the wisdom of the Parliament and presume that taxes are generally imposed in the public interest : but that does not exclude the jurisdiction of the court in a given case to enter upon an enquiry whether an impugned legislation satisfied that constitutional test. If an enquiry into the validity of a burden or impediment imposed on the freedom of trade, commerce and intercourse imposed otherwise than by levying a tax is within the competence of the court, the restraint which the courts put upon their own functions by raising a presumption of constitutionality in dealing with a burden imposed by a taxing statute cannot be forged into a fetter upon the jurisdiction. By clause (b) of Art. 304, the State Legislature are invested with similar authority to impose restrictions on the freedom of trade, commerce and intercourse with or within the state as may be required in the public interest. The territorial extent of the operation of the laws which may be made under Arts. 302 and 304(b) may not from the very nature of the jurisdiction exercised by the Legislature be co-extensive, but subject

thereto, the Parliament and the State Legislatures are entrusted in exercise of legislative authority with power to restrict freedom of trade, commerce and intercourse. Why the Constitution should have enacted that the Parliamentary law may impose restrictions as may be required in the public interest and the State law may impose reasonable restrictions as may be required in the public interest, it is difficult to appreciate. It is unnecessary for the purpose of these cases to enter upon a discussion whether there is any real distinction between the quality of restrictions which may be imposed by legislation by the parliament and State Legislatures exercising authority respectively under Arts. 302 and 304(b) of the Constitution. The two Articles enact that to cirucmscribe effectively the freedom of trade, commerce and intercourse, the restriction must satisfy the primary test that it is "required in the public interest". Clause (b) of Art. 304 is subject to a proviso that no Bill or amendment for the purpose of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President. The authority of the State Legislature to enact legislation imposing restrictions on trade, commerce and intercourse is therefore subject to the condition the before the Bill or amendment of a statute is moved, the previous sanction of the President must be obtained. Legislative power of the Parliament imposing restrictions on the freedom of trade, commerce and intercourse

may therefore be validly exercised if the restrictions are required in the public interest. On the exercise of authority in that behalf by the State Legislatures, there are placed two restrictions, (1) that the restrictions must be reasonable and required in the public interest, (2) that the Bill or amendment imposing restriction can removed or introduced in the Legislature only with the previous sanction of the President. In this context, I may refer to Art. 255 which provides, in so far as it is material, that no Act of the Legislature of a State shall be invalid by reason only that the previous sanction required by the Constitution was not given, if assent to that Act was given under clause

(c) where the previous sanction required was that of the President, by the President. Even if the previous sanction of the President has not been obtained to the moving or introduction of the Bill or amendment falling within clause

(b) of Art. 304, the Act still would not be invalid if the President has signified his assent to the Act enacted by the Legislature.

73. Article 303(1) is an exception to Art.302 as well as Art. 304(b). Notwithstanding the wide sweep of the legislative power restored by Arts.

and 304(b) to the Parliament and the State Legislatures to make laws imposing restrictions on the freedom of trade, commerce and intercourse, prohibition is imposed on the

exercise of the power in making laws giving or authorising the giving of, any preference to one State over another or making, or authorising the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the seventh schedule. Clause (1) of Art. 303 emphasises the object of the Constitution, makers to safeguard the economic unity of the nation and to prevent dissemination between the constituent States in the matter of trade and commerce. It is true that under clause (1) of Art. 302, the discrimination which is prohibited is under a law made by virtue of an entry relating to trade and commerce in the seventh schedule. But thereby, discrimination which is prohibited is not limited to discrimination under laws made under items expressly relating to the trade and commerce items of the seventh schedule. The expression "relating to trade and commerce" used in Art. 302(1) in my judgment includes all those entries in the lists of the seventh schedule which deal with the power to legislate, directly or indirectly in respect of activities in the nature of trade and commerce. By clause (2) of Art. 303, the rigour of clause (1) in the matter of laws to be enacted by Parliament is to a certain extent reduced. That clause authorises to the Parliament, but not the State Legislatures, to make laws notwithstanding clause (1) when it is declared by law that it is necessary to make discrimination which is prohibited for the purpose of dealing

with the situation arising from scarcity of goods in any part of the territory of India.

74. Article 304, in so far as it is material, provides that notwithstanding anything in Art. 301 or Art. 303, the Legislature of a State may by law, (a) impose on goods imported from other States (or the Union territories) any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported an goods so manufactured or produced. This clause implies that notwithstanding anything contained in Art. 301 or Art. 303, the State Legislature has the power to impose tax on the import of goods to which similar goods manufactured or produced in the State are subject, provide that by taxing the goods imported from another State or Union territory, no discrimination is practiced. If Art. 301 and Art. 303 did not deal with restrictions or burdens in the nature of tax, the reason for incorporating the non-obstante clause to which Art. 304, clause (1), is subject, cannot be appreciated. Undoubtedly, the provisions of Part XIII of the Constitution do not impose additional or independent powers of taxation; the powers of taxation are to be found conferred by Arts. 245, 246 and 248 read with the lists in the seventh schedule, and the provision of Part XIII are limited of the exercise of legislative power. The circumstance that the Constitution has chosen to deal with a specific field of taxation as an exception to Arts.

301 and 303 (which should really be Art. 303(1)) strongly supports the inference that taxation was one of the restrictions from the imposition of which by the guarantee of Art. 301, trade, commerce and intercourse are declared free."

EQUALITY& REASONABLE CLASSIFICATION :

100. Insofar as the rational in fixing the 'Resource Charges' in respect of CTU-connected wind power projects is concerned, it was highlighted by the respondents that by means of the TN Repowering Policy, 2024, similar charges to the tune of Rs.30 Lakhs/MW are imposed on STU-connected projects and, therefore, the classification is reasonable and it has nexus with the object sought to be achieved and that there is no discrimination and the concept of equality enshrined in Article 14 of the Constitution is fairly met.

101. In this context, in *Dev Gupta's case (supra),* the Supreme Court had occasion to consider the concept of equality and application of reasonable classification and on the said aspect, the Apex Court held thus :-

"16. This court, in Ashutosh Gupta v. State of Rajasthan4 explained how the reasonable classification is to be applied:

"6. The concept of equality before law does not involve the idea of absolute equality amongst all, which may be a physical impossibility. All that Article 14 guarantees is the similarity of treatment and not identical treatment. The protection of equal laws does not mean that all laws must be uniform. Equality before the law means that among equals the law should be equal and should be equally administered and that the likes should be treated alike. Equality before the law does not mean that things which are different shall be treated as though they were the same. It is true that Article 14 enjoins that the people similarly situated should be treated similarly but what amount of dissimilarity would make the people disentitled to be treated equally, is rather a vexed question. A legislature, which has to deal with diverse problems arising out of an infinite variety of human relations must of necessity, have the power of making special laws, to attain particular objects; and for that purpose it must have large powers of selection or classification of persons and things upon which such laws are to operate. Mere differentiation or inequality of treatment does not "per se" amount to discrimination within the inhibition of the equal protection clause. The State has always the power to make classification on a basis of rational distinctions relevant to the particular subject to be dealt with. In order to pass the test of

permissible classification, two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others who are left out of the group, and (ii) that that differentia must have a rational relation to the object sought to be achieved by the Act. What is necessary is that there must be a nexus between the basis of classification and the object of the Act. When a law is challenged as violative of Article 14, it is necessary in the first place to ascertain the policy underlying the statute and the object intended to be achieved by it. Having ascertained the policy and the object of the Act, the court has to apply a dual test in examining the validity, the test being, whether the classification is rational and based upon an intelligible differentia which distinguished persons or things that are grouped together from others that are left out of the group, and whether the basis of differentiation has any rational nexus or relation with its avowed policy and objects. In order that a law may be struck down under this article, the inequality must arise under the same piece of legislation or under the same set of laws which have to be treated together as one enactment. Inequality resulting from two different enactments made by two different authorities in relation to the same subject will not be liable to attack under Article 14".

17. It has also been held, in State of J&K v. Triloki Nath Khosa that "the object to be achieved" should not be "a mere pretence for an indiscriminate imposition of inequalities and the classification" should not be "characterized as arbitrary or absurd". The judgment in Venkateshwara Theatre v. State of A.P., is a decision where this court pointed out, to how discrimination arises, if persons who are unequals are treated as equals, thus:

> *"Just as a difference in the treatment of persons similarly situate leads to discrimination, so also discrimination can arise if persons who are unequals, i.e., differently placed, are treated similarly. … A law providing for equal treatment of unequal objects, transactions or persons would be condemned as discriminatory if there is absence of rational relation to the object intended to be achieved by the law."*

18. The observations in Roop Chand Adlakha v Delhi Development Authority are very perceptive, and relevant in the present context; the court had said that the "process of classification is in itself productive of inequality and in that sense antithetical of equality. The process would be constitutionally valid if it recognises a pre-existing inequality and acts in aid of amelioration of the effects of such pre-existent inequality. But the process cannot in itself generate or aggravate the inequality" and warned that overemphasis on

the doctrine of classification "or any anxious and sustained attempts to discover some basis for classification may gradually and imperceptibly deprive the article of its precious content and end in replacing doctrine of equality by the doctrine of classification" thus pushing classification rendering "the precious guarantee of equality "a mere rope of sand"." The application of the reasonable classification test, in Deepak Sibal v Punjab University , led to invalidation of a rule which disqualified and rendered ineligible employees of private establishments, and confining admission of candidates to government departments and institutions, in evening law college. Condemning the classification, this court said that the university had "deviated from the objective for the starting of evening classes. The objective was to accommodate in the evening classes employees in general including private employees who were unable to attend morning classes because of their employment." The justification given by the university that government employees held permanent jobs or position was held to be irrelevant for the object of opening the evening law course."

102. Similarly, in *Reliance Energy case (supra)*, the Apex Court had occasion to consider the test of reasonableness and the necessity of level playing

field to all the entities and enlarging on ratio on the said aspect, the Apex Court held thus :-

> *"36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of "non-discrimination". However, it is not a freestanding provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to "right to life". In includes "opportunity". In our view, as held in the latest judgment of the Constitution Bench of nine-Judges in the case of I.R. Coelho v. State of Tamil Nadu MANU/SC/0595/2007 : AIR2007SC861 , Article 21/14 is the heart of the chapter on fundamental rights. It covers various aspects of life. "Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalization, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said*

doctrine provides space within which equally-placed competitors are allowed to bid so as to subserve the larger public interest. "Globalization", in essence, is liberalization of trade. Today India has dismantled licence-raj. The economic reforms introduced after 1992 have brought in the concept of "globalization". Decisions or acts which results in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g) . Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforestated doctrine of "level playing field". According to Lord Goldsmith - commitment to "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act of the government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional."

103. In the light of the ratio laid down in the various decisions referred supra, the materials placed before this Court has to be dissected to find out whether GECL, or for that matter, even TANGEDCO and the State have power/authority to impose the 'Resource Charge' by means of the impugned order, which levy, according to the petitioners, is in the form of a tax and, therefore, there is no power to impose the said levy on the petitioners.

104. Prior to the carving out of GECL through G.O. Ms. No.32, Energy (B2) Dept., dated 6.3.2024, TANGEDCO was the entity, which held the Distribution Licence and also was the authority with regard to granting approval, be it in-principle and/or locational approval in respect of the entities, which sought permission for generation of green power. Resultantly, after CTU-connectivity was brought into force to tap the green-rich potential of the respective States, the entities, which entered the generational sector by resorting to Section 7 of the Electricity Act, had been filing necessary applications by registering the same with TANGEDCO after obtaining permission for connectivity with the CTU. The result was the issuance of the Original Procedure by TANGEDCO dated 5.5.2018, where the entire process of connecting to the CTU by the generators is codified.

105. The whole case of the respondents is premised on the Original Procedure dated 5.5.2018, issued by TANGEDCO, in and by which the power developers having connectivity with CTU are insisted to register their location with the State nodal agency for RE, the Chief Engineer/NCES after payment of applicable application registration fees, consulting charges and other charges. The respondents take umbrage under the head "Other Charges" as found in the original procedure dated 5.5.2018 to claim that the Resource Charges claimed through the impugned order is, in fact, the "Other Charges", which had already been spelt out in the original procedure dated 5.5.2018.

106. Though the aforesaid argument, in vehemence is submitted before this Court, however, it is to be seen whether the State had foreseen any issue, necessitating levy of 'Other Charges' under the guise of "Resource Charges" so that it could be excluded from the purview of tax. In this regard, a careful perusal of the Original Procedure dated 5.5.2018 clearly establishes that upon the generator obtaining permission for CTU-connectivity, application has to be registered with TANGEDCO, by paying the necessary registration charges,

whereinafter, inspection is carried out by field survey to approve the location to find out whether the specifications are meted out and, thereafter, report is filed and upon the WEG's carrying out the erection, locational approval clearance is granted for which as well, necessary approval charges are paid. The Original Procedure dated 5.5.2018, which crystallises the procedure to be followed, which is material for appreciation, is quoted hereunder :-

i) It is seen from the proceedings dated 5.5.2018 that the all the wind power projects, which were erected and owned in the State of Tamil Nadu are by private retail developers on private lands owned/leased by them.

ii) Around 11000 Nos. Of WEGs are erected since 1986 and only off late, the scenario has taken a turn where the wind power projects are seeking connectivity with the CTU in view of tenders floated by SECI, etc., and most of these projects are also to be erected within/nearby the existing WEG's with existing Energy Purchase Agreement/Energy Wheeling

Agreement with TANGEDCO. Meaning thereby, that TANGEDCO is already procuring wind power from Wind Energy Generators to offset its requirements.

iii) Since the WEG's are seeking connectivity with CTU, registration of their location with the State Nodal Agency is sought for by paying the necessary fees with regard to registration fees, consulting charges and other charges.

iv) Further, TANGEDCO itself have claimed that all the wind developers having CTU connectivity are registering their locations after payment of necessary fees.

v) Further, approval is first sought for by the WEG's with CTU/PGCIL, whereinafter, in-principle approval is sought for from TANGEDCO.

vi) Upon grant of in-principle approval, registration is carried out and field study is made to ascertain the feasibility of the project and upon submission of field

study report and after completion of erection of WEG, the generators apply for "Location Clearance Approval".

107. The above sequence of events clearly spell out that approval for CTU-connectivity is sought for and after obtainment, registration and approval process is taken up with TANGEDCO and only to the limited extent of such approval, charges are collected. The above procedure has been in vogue since 5.5.2018 and the private players have connected itself to the CTU and have been generating electricity and no charges are being paid to TANGEDCO with respect to the electricity generated by the said entities.

108. Part III of the Electricity Act pertains to generation of electricity, wherein Section 7 deals with generating company and requirement for setting up of generating station. For appreciation, the said provision is quoted hereunder :-

"7. Generating company and requirement for setting up of generating station :-

Any generating company may establish, operate and maintain a generating station without obtaining a licence under this Act if it complies with the technical standards relating to connectivity with the grid referred to in clause (b) of section 73."

109. From the above it is clear that there is no requirement for a generating company to obtain any licence, be it from the State or the Centre, but it is required to comply with the technical standards relating to connectivity with the grid referred to in clause (b) of Section 73, which provides that the technical standards for construction of electrical plants, electrical lines and connectivity to the grid should be as per the specification provided by the Authority.

110. Initially, Tamil Nadu Electricity Board (for short 'TNEB') was created with effect from 1.7.1957, which was later reorganised by the Government of Tamil Nadu according in-principle approval for the establishment of a holding company in TNEB Ltd., and two subsidiary companies, viz., TANTRANSCO and TANGEDCO with clear stipulation that the aforementioned companies shall be

fully owned by the Government. The aforesaid reorganisation was made by issuance of G.O. Ms. No.114, Energy (B2) Dept., dated 8.10.2008.

111. Thereafter, vide proceedings of the TANGEDCO in proceedings (Per.) TANGEDCO Proceedings (FB) No.48 dated 5.5.2018, guidelines were issued with regard to the erection, commissioning and maintenance of wind energy generators by the Board of TANGEDCO, wherein the procedure to be followed by the Wind Energy Generators were provided, which is as under :-

> *"Hence the following procedure is approved :*
>
> 1) *The Developer who wishes to develop their project under CTU connectivity in Tamil Nadu needs to get in principle approval from TANGEDCO after getting connectivity approval from CTU/PGCIL.*
> 2) *After getting in principle approval the developer needs to register their applications for each location with the Nodal Officer, The Chief Engineer/NCES/TANGEDCO/Chennai on payment of necessary charges and production of registered sale/lease deed of the location.*
> 3) *After registration the application is to be sent to concerned field Superintending Engineer/NCES/Tirunelveli or Udumalpet for field study.*

4) *After field study, if the location satisfies the land requirement, boundary distance, spacing criteria and other statutory requirements adopted by TANGEDCO from time to time, the concerned Superintending Engineer/NCES shall send the proposal to Chief Engineer/NCES a study report with details of land availability, boundary distance and spacing distance criteria of each application.*

5) *After completion of the erection of WEG, the developer shall apply for "Location Clearance Approval" to CE/NCES/Chennai.*

6) *Based on the request of the developer and the field feasibility report, the "Location Clearance Approval" (LCA) will be approved and issued by the Director/Generation/TANGEDCO.*

7) *After commissioning of the WEG, the same should be communicated to Chief Engineer/NCES and the concerned SE's/NCES for statistical record and for future location study purpose."*

112. In fact, the above sequence proves that since 1986, the above procedure is being followed and based on the energy purchase agreement and Energy Wheeling Agreement with TANGEDCO approval is granted. Therefore, there was no imposition of any charge on the WEG's with regard to any form of

tax, even under the head 'Other Charges' since 1986, except for the registration charges and locational approval charges and, in fact, approval was granted for connectivity with CTU without calling upon for payment of any other charges till the issuance of the impugned order.

113. Nowhere in the Original Procedure dated 5.5.2018, was there any whisper that CTU-connectivity would attract a levy under the head "Other Charges". In fact, all through, TANGEDCO, till the creation of GECL, was not imposing any restrictions in the form of tax/cess/impost, but everything had come head on for GECL to pass the impugned order in and by which Resource Charge to the tune of Rs.50 Lakhs/MW was imposed on the wind power projects which are in the state of approval/commissioning, on and from 6.8.2024, only on the imposition of a penalty of Rs.1 Crore/MW on the State for not achieving the RPO Obligations for the various years.

114. It has nowhere been spelt out by the 1st respondent or even for that matter by respondents 2 to 5 as to what is the clear classification of "Resource Charges". It is to be pointed out that levy of tax/cess/impost cannot be done

without the authority of law, as provided for in Article 265 of the Constitution. Without spelling out as to what is the nomenclature of 'Resource Charge' and under what authority of law the said charge is collected, the respondents cannot, at their whims and fancies, levy Resource Charge, more particularly to the wind power projects which are CTU-connected to the exclusion of STU-connected. As already pointed out above, tax could be levied by the State only on sale or consumption of electricity, as provided for in Entry 53 of List II of the VII Schedule. However, in the case on hand, the petitioners are generating companies and they are involved in inter-State trading of electricity as envisaged under Article 301 of the Constitution, which provides for free trade and commerce throughout the territory of India. Such being the case, it becomes necessary and imperative for the respondents to spell out as to what is the charge collected under the head 'Resource Charges' and under what authority the said charge is collected and whether GECL has the authority to impose the said charge.

115. In the aftermath of the above collection, which was brought to the notice of the Central Government that certain States were imposing water

tax/cess on renewable energy generated, observing and pointing out the various constitutional provisions, circular dated 25.4.2023 was issued to the States to refrain from any form of tax/cess/duties on generation of electricity. The said circular, being crucial and having been pressed into service with great vehemence, is quoted hereunder :-

> ***"To The Chief Secretaries - All the State Governments & UTs***
>
> ***Subject: Imposition of Water Tax / Cess by various State Government on HEps - reg.***
>
> *Sir,*
>
> *It has come to the notice of the Government of India (GoI) that some State Governments have imposed taxes / duties on generation of electricity. This is illegal and unconstitutional. Any tax / duty on generation of electricity, which encompasses all types of generation viz. Thermal, Hydro, Wind, Solar, Nuclear, etc. is illegal and unconstitutional. The Constitutional provisions are as follows;*
>
> *(i) The powers to levy taxes / duties are specifically stated in the VII Schedule. List -II of the VII Schedule lists the powers of levying of taxes / duties by the States in entries-4s to 63. No taxes / duties which have not been specifically mentioned in this list can be levied by the State*

Governments under any guise whatsoever - as Residuary powers are with the Central Government.

(ii) *Entry-53 of List-ll (State List) authorizes the States to put taxes on consumption or sale of electricity in its jurisdiction. This does not include the power to impose any tax or duty on the generation of electricity. This is because electricity generated within the territory of one State may be consumed in other States and no State has the power to levy taxes / duties on residents of other States.*

(iii) *Some States have imposed taxes / duties on generation of electricity under the guise of levying a cess on the use of water for generating electricity. However, though the State may call it a water cess, it is actually a tax on the generation of electricity - the tax is to be collected from the consumers of electricity who may happen to be residents in other State.*

(iv) *Article-286 of the Constitution explicitly prohibits States from imposing any taxes / duties on supply of goods or services or on both where the supply takes place outside the State.*

(v) *Articles-287 and 288 prohibit the imposition of taxes on consumption or sale of electricity consumed by the Central Government or sold to the Central Government for consumption by the Government or its agencies.*

(vi) *As per Entry-56 of the Union List of the Constitution of lndia, regulations of issues related to lnter-State Rivers come under the purview of the Centre. Most of the Hydro-Electric Plants in the States are located / proposed to be developed on lnter-State Rivers. Any imposition of tax on the non-consumptive use of water of these rivers for electricity generation is in violation of provisions of the Constitution of lndia.*

(vii) *Hydro Power Projects do not consume water to produce electricity. Electricity is generated by directing the flow of water through a turbine which generates electricity - on the same principle as electricity from wind projects where wind is utilized t; turn the turbine to produce electricity. Therefore, there is no rationale for levy of 'water cess' or "air cess".*

(viii) *The levy of water cess is against the provisions of the Constitution Entry-l7 of List-ll, does not*

authorize the State to levy any tax or duty on water'

2. In light of the above constitutional provisions' no taxes / duties may be levied by any State -under any guise on generation of electricity and if any taxes / duties have been so levied, it may be promptly withdrawn."

(Emphasis Supplied)

116. Pursuant to the aforesaid circular of the Ministry of Power, the Central Government, recognising the need for transformation to green energy to protect the environment and save natural resources and at the same time utilise the renewable natural resources to effective use, vide notification in the official gazette dated 20.10.2023, the Government of India, through the Ministry of Power, in exercise of powers conferred vide the provisions of the Energy Conservation Act had mandated the minimum share of consumption of non-fossil sources (renewable energy) by designated consumers for different types of non-fossil sources for different designated consumers in respect of electricity distribution licensee and other designated consumers who are open access consumers or captive users to the extent of electricity from sources other than distribution licensee as a percentage of their total share of energy consumption

and insofar as wind energy is concerned, the following percentage has been mandated to be complied with between the years 2024-2025 to 2029-2030 :-

S. No.	Year	Wind Renewable Energy
1	2024 – 25	0.67%
2	2025 – 26	1.45 %
3	2026 – 27	1.97 %
4	2027 – 28	2.45 %
5	2028 – 29	2.95 %
6	2029 - 30	3.48 %

117. In the said notification, it has been further mandated that the wind energy component has to be met by the energy produced from wind power projects commissioned after 31.03.2024 and that any shortfall in the specified renewable energy consumption targets would be treated as non-compliance and penalty shall be imposed, which, as submitted by the respondents is to the tune of Rs.1 Crore/MW, which is as specified under sub-section (3) of Section 26 of the Energy Conservation Act. Only in the aftermath of the aforesaid notification, the present impugned order had come to be passed on 6.8.2024 transferring a portion of the penalty to the head of the generators under the nomenclature 'Resource Charges'.

118. However, even before the impugned order had come to be passed, there was a circular dated 25.10.2023, reiterating the communication dated 25.4.2023 to the States with regard to imposition of charges on various forms of generation of electricity, which is quoted hereunder for reference :-

"CIRCULAR

Subject: Imposition of Charges by various State Governments on various forms of generation of electricity - from Hydropower/ Renewables/ Thermal etc.

It has come to the notice of the Government of lndia that some State Governments have imposed additional charges on generation of electricity from various sources under the guise of development fee/charges/fund. Such additional charges/fees in the form of any tax/duty on generation oi electricity, which encompasses all types of generation viz. Thermal, Hydro, Wind, Solar, Nuclear, etc. is illegal and unconstitutional.

2. The Ministry, vide letter No. 1512712023-Hydelll (MoP) dated 25ih April2023, (copy enclosed) had clarified the above legal position with respect to the instances of imposition of water tax/cess by some of the States. The Constitutional provisions in this regard are again reiterated below:

i) The powers to levy taxes/ duties are specifically stated in the Vll Schedule. Lislll of the Vll Schedule lists the powers of levying of taxes/ duties by the States in entries-45 to 63. No

taxes/ duties which have not been specifically mentioned in this list can be levied by the State Governments under any guise whalsoever - as Residuary powers are with the Central Government.

ii) Entry-53 of List-ll (State List) authorizes the States to levy taxes on consumption or sale of electricity in its jurisdiction. This does not include the power to impose any tax or duty on the generation of electricity. This is because electricity generated within the territory of one State may be consumed in other States and no State has the power to levy taxes/ duties on residents of other States.

iii) Article-286 of the Constitution explicitly prohibits States from imposing any taxes/ duties on supply of goods or services or on both, where the supply takes place outside the State.

(iv) Articles-287 and 288 prohibit the imposition of taxes on consumption or sale of electricity consumed by the Central Government or sold to the Central Government for consumption by the Government or its agencies.

3. ln light of the above-mentioned constitutional provisions, no taxes/ duties can be levied by any State on generation or inter-State supply of electricity under the guise of additional charges/ fee on generation of electricity from any source - Thermal/Hydro/Renewables etc.

4. ln view of the above, States are advised to promptly remove any kind of tax/ duty/ cess levied in the guise of

development fee/ charges/ fund on generation of electricity from any sources - including Thermal/Hydro/Renewables."

119. The contention of the petitioners is prefaced on the basis of the circular dated 25.10.2023 and the earlier communication to all the State Governments by the Ministry of Power, Government of India, dated 25.4.2023, in and by which there was a specific mandate imposed by the Government of India not to charge any fees/cess/tax on the generation of electricity by pointing out that the same is against the constitutional mandate and that the States are barred from imposing any tax. The specific provisions of the Constitution, which form the basis for the said circular are also spelt out in the said circular.

120. It is only on the basis of the said circular, it is submitted on behalf of the petitioners that the State is denueded of powers to impose any tax/cess/impost or any form of charge on generation of electricity and the collection of the amount conceivably coined as 'Resource Charge'is without the authority of law and is directly hit by Article 265 of the Constitution.

121. Further, it has been pointed out in the aforesaid circulars that "*Hydro Power Projects do not consume water to produce electricity and that electricity is generated by directing the flow of water through a turbine which generates electricity and on the same principle, electricity from wind projects where wind is utilized to turn the turbine to produce electricity. Therefore, there is no rationale for levy of 'water cess' or "air cess".* It is therefore precise from the said circular, as put forth on behalf of the petitioners, that the source does not get depleted due to the utilisation of the same by the generators, but it is only passing through resulting in a by-product, viz., 'electricity', while the resource is left as it is in quality as well as quantity.

122. In the present case, it is not disputed that the petitioners are generating companies, who have set up wind power projects for generation of electricity, which is being connected to the CTU. There is also no quarrel with the fact that it is purely within the discretion of the generating company to connect the supply either to the STU or CTU.

123. Further, it is the specific case of the petitioners that Entry 53 of List-II of VII Schedule of the Constitution, relating to the power of the State to impose tax on electricity only relates to imposition of ***"Taxes on the consumption or sale of electricity".*** Beyond imposing tax on consumption or sale of electricity, no other taxes could be imposed by the State Government and anything levied otherwise would be relatable only to Article 92-A of the Constitution and the petitioners being generating companies, the State is not empowered to impose any taxes on the generation of electricity.

124. Further, the petitioners have relied upon Entry 92-A of List-II of VII Schedule, which provides that ***"taxes on sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce".*** Therefore, in the wake of the decision of the Apex Court in *NTPC case (supra)* the stand of the petitioners that no tax could be levied by State Government, as it is not empowered under the constitutional scheme, on the generation of electricity and any taxes imposed by the State is subject to Article 92-A of the Constitution is justified and sustainable.

125. It is further relevant from the materials available on record, as has been adverted to by the learned senior counsel for the petitioners that the Original Procedure dated 5.5.2018, the relevant portion of which has been extracted supra, has clearly prescribed the amounts that could be levied on the generators, which is for the fees towards in-principle approval, which is notified as *"registration fees"* and the other one is the *"Location Clearance Approval",* which is granted after completion of erection of WEG, which would be based on the feasibility report submitted and approved by TANGEDCO. It is specifically pointed out before this Court that in-principle approval from TANGEDCO could be sought for only after the generators obtain connectivity approval from CTU/PGCIL.

126. From the above, it is clear that once the connectivity approval is granted by CTU/PGCIL to the generators, the duty of the State is only to ensure that the other statutory requirements regarding boundary distance, land requirement, spacing criteria, locational clearance approval, etc., are assessed by TANGEDCO for the purpose of granting approval so that there is no clash between two generators with regard to the aforesaid aspects, meaning thereby

that the State/Distribution Licensee acts as intermediary to foresee the compliance of the statutory requirements and is not clothed with any power to levy any form of tax/cess/impost and the levy is only to the extent of its duty in seeing to the compliance of the statutory requirements. Therefore, beyond such assessment and clearance of the location, the State is not empowered to impose any other restriction, in the form of collection of any other levies in the form of taxes/cess/impost.

127. In the present case, the scenario is much worse, in that, it is not TANGEDCO, which has issued the impugned order, which, as submitted by the petitioner is the Distribution Licensee, but it has been issued by GECL, viz., the 2nd respondent herein, which, even according to the Restructuring and Transfer Scheme, 2024, is only a nodal agency and is acting as agent on behalf of TANGEDCO. That being the case, the impugned order, would not even partake the character of executive instruction issued by an authority, which has executive authority, but is an agent, which has issued the said impugned order, which not only is devoid of any authority, much less, it is not clothed with any statutory power to issue the said order.

128. The other contention of the petitioners borders on the levy, which, according to the petitioners, has come to be imposed on CTU-connected wind power projects and not on STU-connected wind power projects, though it is countered otherwise by the respondents by relying upon the Restructuring and Transfer Scheme, 2024**,** in and by which Rs.30 Lakhs/MW is also charged on STU-connected units.

129. Though such a stand is taken by the respondents, it is to be noted that while the levy in the present case is in respect of fresh units, which are entering into erection/commissioning new wind power projects, however, the aforesaid levy found in the Restructuring and Transfer Scheme, 2024, is on wind power projects, which have outlived their life of 20 years. In this regard, at the risk of repetition, the decision of the Apex Court in *Dev Gupta case (supra)* would throw more light on the issue of equality, wherein it has been held as under :-

> *"**"**16. This court, in Ashutosh Gupta v. State of Rajasthan4 explained how the reasonable classification is to be applied:*
>
> *"6. The concept of equality before law does not involve the idea of absolute equality amongst all, which may be a physical*

impossibility. All that Article 14 guarantees is the similarity of treatment and not identical treatment. The protection of equal laws does not mean that all laws must be uniform. Equality before the law means that among equals the law should be equal and should be equally administered and that the likes should be treated alike. Equality before the law does not mean that things which are different shall be treated as though they were the same. It is true that Article 14 enjoins that the people similarly situated should be treated similarly but what amount of dissimilarity would make the people disentitled to be treated equally, is rather a vexed question. A legislature, which has to deal with diverse problems arising out of an infinite variety of human relations must of necessity, have the power of making special laws, to attain particular objects; and for that purpose it must have large powers of selection or classification of persons and things upon which such laws are to operate. Mere differentiation or inequality of treatment does not "per se" amount to discrimination within the inhibition of the equal protection clause. The State has always the power to make classification on a basis of rational distinctions relevant to the particular subject to be dealt with. In order to pass the test of permissible classification, two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others who are left out of the

group, and (ii) that that differentia must have a rational relation to the object sought to be achieved by the Act. What is necessary is that there must be a nexus between the basis of classification and the object of the Act. ....."

(Emphasis Supplied)

130. As stated above, it is not necessary that between two equals, there should be similar treatment and not identical treatment, however, the said similar treatment should be equally administered and that the two entities should be treated alike. Article 14 enjoins that persons similarly placed should be treated alike and any rational distinctions between the two entities should fulfil the test of permissible classification, which is founded on an intelligible differentia which distinguishes persons that are grouped together and that the differentia must have a rational relation to the object sought to be achieved. However, in the present case, though the STU-connected and CTU-connected entities are similar, yet, there is different treatment meted out to the two entities, which does not have any rational nexus and, thereby, there is a stark discrimination in the treatment meted out.

131. Further, as held by the Apex Court in *Reliance Energy case (supra)*, Article 19 (1)(g) of the Constitution confers fundamental right to carry on business to a company and, therefore, the company is entitled to invoke the doctrine of level playing field, though the same is subject to public interest. In the present case, the petitioners, who have connected their electricity generation to the CTU are identically placed to that of the generators, who have connected their generation to the STU and, therefore, are similarly placed and, therefore, they are also entitled to the same treatment, as meted out to the generators, who have connected to the STU.

132. There can be no quarrel with the fact that Government Order in G.O. Ms. No.32, Energy (B2) Dept., dated 6.3.2024 had been issued by creating three undertakings under TANGEDCO of which one is GECL, however, from a careful perusal of the said Government Order, it transpires beyond doubt that the Distribution License is still vested with TANGEDCO and only certain assets and liabilities have been transferred to GECL. The Distribution License at the hands of TANGEDCO has not been transferred to GECL, as there is no material evidencing the fact that for such transfer, necessary permission was sought for

and accorded by the Regulatory Commission. Such being the case, GECL cannot claim itself to be a distribution licensee and even without admitting that such a claim is permissible, even then, the Distribution Licensee has no power to impose any levy in the form of tax/cess/impost on the generators, which is barred by the provisions of the Electricity Act as also the Constitution of India as the State is vested only to tax on the sale or consumption of electricity and generation is specifically excluded from both Entries 53 and 54 of List II. Therefore, Resource Charge, imposed by GECL on the petitioners does not have legal legs to stand on and, therefore, seen in any manner, the said charge has not been imposed on the basis of statutory backing and is not approved by law and, therefore, necessarily, the imposition of Resource Charge cannot be countenanced.

133. Though an argument was placed on behalf of the respondents that the petitioners cannot approbate as well as reprobate, as they had already accepted the power of GECL to levy charges for in-principle approval and location clearance approval and the 'Resource Charges', only being charges, falling under the head 'Other Charges', they cannot question the same and

reliance is placed on the decision in *Adani Gas case (supra),* however, the said contention of the respondents does not deserve acceptance for the simple reason that the levy of charges towards in-principle approval and location clearance charges are administrative charges, which are imposed on the petitioners for the purpose of giving certain clearance, however, in respect of 'Resource Charges' the same is in the form of tax, which the State is not authorised to levy, as it does not have the authority of law, as no charges other than administrative charges could be levied. The charges to which the petitioners have not raised any quarrel, not being charges in the form of tax/cess/impost, the contention of the respondents that the petitioners cannot approbate and reprobate on the very same issue, is wholly misconceived and, therefore, the decision in *Adani Gas case (supra)* would not have any application to the facts in issue.

134. Further, one important aspect, which has a bearing on the entire issue, though unconnected with the constitutional mandate not to collect tax by the State, is the fact that the whole scheme is promoted to replace conventional energy with green energy, so as to safeguard the environment. Only with such

an object in mind, RPO obligations have been formulated and imposed upon the State, as reflected in the notification issued by the Ministry of Power dated 25.10.2023. There is a clear mandate therein for the usage of renewable power, viz., wind, hydro, solar, etc., with a clear increase in its utilisation every year. This clearly reveals the mind of the Central Government in not only promoting green energy, but the need to promote green energy and also to put to end to environmental degradation.

135. The above view of the Government would be writ large through the communication of the Ministry of Power dated, 25.04.2023, which has already been extracted supra, in which, there is a clear message that by the generation of hydro power or wind power in which the turbine is utilised to produce electricity, where there is no consumption of air or water and, therefore, there is no necessity to impose tax/cess. The above view of the Ministry of Power emanates from the fact that the generation of electricity from hydro/air is not utilising any material, that gets eroded, but is re-sourced and it is back in the environment without any damage to it, which could be utilised further and that the utilisation also does not hamper the environment.

136. The message through the said communication reveals that what is used is left as it is without there being any degradation and the mere usage, without there being any degradation or depletion would not amount to eradicating the source and, therefore, no tax could be imposed on such utilisation of the resource, which is provided by nature. The above view of the Central Government, has gone into the Constitution even as back as the independence of our country, as with foresight, the drafters of the constitution have visualised the need to maintain electricity under the concurrent list and also taking out imposition of tax on the generation of electricity. Therefore, the foresight of our constitution makers in not imposing tax on the generation of electricity, which has been taken through all these years by maintaining the same without any amendment, shows the realisation of the Parliament in maintaining the same, as electricity is a commodity, which has become a basic commodity, without which the life of the human community would greatly be hindered. Only to that end, the States have been precluded from imposing any tax on generation, as neither hydro nor wind energy depletes the resource, thereby causing environmental damage and also the State in which the said

generation is made does not suffer in any manner due to the utilisation of hydro/air resource. The source, being resourced and not being depleted, therefore, imposition of tax on utilisation of same is wholly against the tenor of the Constitution.

137. In the light of the discussion made above and also the underlying constitutional mandate, the impugned order dated 6.8.2024 levying 'Resource Charge' at Rs.50 Lakhs/MW for the wind power projects connected to CTU by the 2nd respondent/GECL is without jurisdiction and authority of law and, therefore, the said impugned order is set aside.

138. However, this Court though has set aside the impugned order of GECL levying Resource Charge, holding that it does not have any legal sanctity, but the reason for such imposition requires to be looked into to holistically consider the case.

139. Prior to 6.3.2024, since the issuance of the Original Procedure on 5.5.2018, there was no charge, either on CTU-connected or STU-connected wind

power projects either in the form of tax/cess/impost. However, subsequent to the issuance of Gazette Notification dated 20.10.2023 by the Ministry of Power in and by which a penalty of Rs.1 Crore/MW was levied on the States, which did not meet the RPO Obligations as stipulated in the said notification, from wind power projects commissioned after 31.03.2024, to offset the loss caused on account of the projects being CTU-connected, thereby, depriving the State from achieving the RPO obligation, the said scenario had led to the imposition of the aforesaid Resource Charge by GECL.

140. The main bone of contention advanced on behalf of the respondents is that the imposition of penalty by the Central Government vide Notification dated 20.10.2023 for non-compliance of the RPO obligation fixed in the said notification would result in a penalty of Rs.1 Crore/MW, which, if not realised from the wind energy generators, whose projects are commissioner after 31.03.2024, who are using the resources of the State, the burden of the above levy would have to be passed on to the consumers, who would be burdened with carrying the load of higher tariff and only to circumvent the same, the amount has been charged as Resource Charge from the petitioners.

141. This Court has already held that levy in any form of tax/cess/impost by the State is impermissible and Resource Charge not being a classified charge, which does not partake the character of tax/cess/impost, necessarily, the State has no authority to impose the said levy, but at the same time, it should not be lost sight of that the resources of the State is being utilised for generation of electricity, which is connected to the CTU and such being the case, though air, a natural resource, is being used for generation of electricity, necessarily, while profit is realised by the petitioners, the same should not lead to burden on the consumers through the State.

142. However, what is material to be noted here is the fact that electricity is a commodity, which cannot be stored and it is to be utilised as and when it is produced. Like the end user, who is much reliant on the supply of electricity, the generator is also much reliant on the end user so that the generation does not go waste. Therefore, the interest of the generator and the end-user should reign supreme when any act is done by the State within the scheme of the Constitution.

143. The Apex Court in *Jaipur Vidyut case (supra)* relying on the decision in *n* ***GMR Warora Energy Limited – Vs - Central Electricity Regulatory Commission (CERC) & Ors. (2023 (10) SCC 401)*** had recognised *the requirement of balancing the consumers' interest with that of the interests of the generators and had held that it will not be permissible to take a lopsided view only to protect the interest of the generators ignoring the consumers' interest and public interest*.

144. The State is duty bound to protect the interests of the public, while at the same time see to it that the private players are provided with level playing field, which would have an impact on the interests of the public. The notification of the Ministry of Power, dated, 20.10.2023 had considered the necessity for safeguarding the environment from the environmental hazards due to usage of energy from non-renewable sources. The high index of environment pollution caused due to generation of energy by utilising non-renewable sources, has been the reason for the pragmatic approach for slowly moving away to energy from

renewable sources and only to that end, amendment was made to the Electricity Act so as to enable it to cater to renewable sources of energy.

145. In fact, it would be evident from the Electricity Act that the Central and State Regulatory Commissions were established to see to it that there is shift from non-renewable energy to renewable energy over the course of time, so that environment is protected and the living conditions of the living beings are not hampered. In fact, that was the reason private players were allowed entry into tapping the potential in the renewable energy sector, where solar, hydro and wind power could be tapped beneficially so as to provide sustainable energy and at the same time with miniscule environmental degradation.

146. In fact, it would be evident from the Notification dated 20.10.2023 of the Ministry of Power that the energy consumption was sought to be slowly moved from non-renewable energy to renewable energy, as could be evident from the table extracted supra, which spans over a period from 2024-2025 to 2029-2030. The Central Government has given a scale of usage of renewable energy, more particularly, wind energy, hydro energy, distributed renewable

energy and other renewable energy over the said period by periodically increasing its utilisation so that the consumption of green energy is increased in a phased manner.

147. Notwithstanding the same, even as could be evidenced from the Original Procedure dated 5.5.2018 of TANGEDCO, there is a clear enumeration that since 1986, wind power projects are being developed in Tamil Nadu and it is mainly owned and erected by private retail developers. In a nutshell, the proceedings of TANGEDCO with regard to the same, is quoted hereunder :-

> *"The wind power projects are being developed in Tamil Nadu from 1986 and about all the Wind Power Projects are erected and owned by the private retail developers on private lands owned/leased by them."*

148. From the above, it is evident that since 1986, wind power projects have seen the entry of private players, who have either owned or leased lands for tapping the wind energy rich potential of the State for generating electricity. Sadly, the Government of Tamil Nadu, more particularly, TANGEDCO, being the distribution licensee, even since its inception in the year 2010, prior to which the

activity was carried on by TNEB, had seldom taken any steps to tap the wind potential of the State so as to create more source of renewable energy, which could be better utilised for the welfare of the living beings.

149. Even as late as in the year 2018, when the Original Procedure had been issued by TANGEDCO, it transpires that almost all of the wind energy projects in the State were developed by private retail developers and the State had merely been a mute spectator and had not taken any steps to start generation of wind power, inspite of the fact that TANGEDCO is the distribution licensee, which was also entrusted with the task of generation of electricity.

150. When a claim is made by the State that the levy of penalty by the Central Government at Rs.1 Crore/MW if RPO obligations are not met, had resulted in the imposition of Resource Charges at Rs.50 Lakh/MW on the petitioners, there is no whisper from the State as to what precluded it from generating electricity through wind power projects established by the State. In fact, the report of the National Institute of Wind Power, which has been placed before this Court on behalf of the petitioners reveal that the total wind power

potential of the State of Tamil Nadu is 95,107 MW of which the private players, like the petitioners have tapped only wind energy to the tune of about 12,000 MW. Therefore, there is more than 83,000 MW of wind energy that could be utilised for generation of electricity by erection of wind power projects which could be utilised for the betterment of the environment and also for the benefit of the public at large.

151. To put it in a more broader spectrum, the functions and duties of the Tamil Green Energy Corporation Ltd., has been spelt out in the Tamil Nadu Electricity Restructuring and Transfer Scheme, 2024, the relevant portion of which, as shown in Part III, are as under :-

> *"The functions and duties of the Tamil Nadu Green Energy Corporation Limited will be detailed as per the provisions of the Memorandum of Association and Articles of Association of the company framed thereunder as originally framed or as altered from time to time.*
>
> *1) To primarily engage in the business of generation of non-conventional/renewable energy including but not limited to wind, solar, biomass, biofuel, co-reneration, municipal solid waste, geothermal, tidal, ocean waves, all Hydro and*

pumped-storage Hydro based generation assets and any other new sources of energy (hereinafter, collectively call as "non-fossil fuel electricity generation") and trading of electrical energy.

2) To be vested with generation assets, interest in property, rights and liabilities of Tamil Nadu Generation and Distribution Corporation Ltd., necessary for the business of non-fossil fuel energy, as per decision of the Government of Tamil Nadu to reorganise the Tamil Nadu Generation and Distribution Corporation Ltd., under Part XIII Section 311 of the Electricity Act, 2003 (hereinafter referred to as 'Act') and this transfer scheme and the company shall act as a Generating Company under Section 7 of the Act.

* * * * * * * *

7) Responsible for enhancing clean energy footprint of the state/decarbonisation of electricity grids, achieving the net-zero emission target of the State of Tamil Nadu and Conceptualising pilots and commercial scale projects across sun rise technologies like Green Hydrogen, Offshore wind, Waste to Energy, geothermal, wave to energy, pumped-storage hydro, battery storage, etc.

* * * * * * * *"

(Emphasis Supplied)

152. Though GECL was formed with the aforesaid object of generation and trading in electricity, by creating it to be an agent of TANGEDCO, however, it is evident from the impugned order dated 6.8.2024 that there is promotion of wind energy generation in the State as early as in the year 1986, it is claimed that due to fast urbanisation of villages in wind prone areas, the lands have got exhausted and, therefore, identification of land parcels to establish wind power projects by the State is quite challenging. However, the fact remains that the National Institute for Wind Power has identified 95,107 MW as the wind potential in the State of which only 12,000 MW is realised till date and 83,000 MW is left for being tapped, which clearly means that there are packets from which the wind potential could be realised resulting in wind energy generation, which could be tapped by the Government. However, there seems to be no steps taken by the State towards tapping the wind potential, which would make the State a self-sufficient State insofar as renewable energy is concerned. However, the State has been silent on the said aspect, but only imposing charges on the generators, which is not permitted under the Constitution so as to satisfy its RPO oibligations. This Court, would like to impress upon the State that without tapping the potential, which is at the beck and call of the State, imposing

charges on the private players so meet out the RPO obligations, either through penalty or through wind energy utilisation, is nothing but an act, which only shows that the State is not inclined to step in and take the initiative; rather, it is making itself dependent on the private players for generation of electricity from wind power. The State, as the stakeholder, should enter into the arena of generation of green energy and cannot transfer its burden on the private power projects by imposing charges, as it is not the duty of the State to only impose charges, but also indulge itself in acts beneficial to the public. This Court hopes and trusts that the State would take all necessary endeavour to tap the wind potential that is still available to the extent of 83,000 MW, so that it need not fall on the private wind power projects for fulfilling its RPO obligations.

153. Be that as it may. Sub-section (4) of Section 131 of the Electricity Act pertains to the scheme of transfer and vesting of property and for better appreciation, the same is quoted hereunder :-

"131. Vesting or property of Board in State Government :-

* * * * * * *

4) The State Government may, after consulting the Government company or company or companies being State

Transmission Utility or generating company or transmission licensee or distribution licensee, referred to in sub-section (2) (hereinafter referred to as the transferor), require such generating company or transmission licensee or distribution licensee the property, interest in property, rights and liabilities which have been vested in the transferor under this section, and publish such scheme as statutory transfer scheme under this Act."

154. By virtue of the aforesaid provision, the Restructuring Transfer Scheme, 2024, had come into being in and by which, TANGEDCO, which is the Government Company, which was entrusted with the task of generation and distribution, has hitherto fore been trifurcated, as could be evidenced from the Tamil Nadu Electricity Restructuring and Transfer Scheme, 2024, which has been notified in the official gazette by the Government of Tamil Nadu on 6.3.2024 vide G.O. Ms. No.32, Energy (B2), more particularly clause (3), is as under :-

"3. Classification of Undertakings of TANGEDCO :

(1) The Undertakings of TANGEDCO are classified into :

(a) Thermal Generation Undertakings as set out in Schedule-A;

(b) Green Energy Undertakings as set out in Schedule-B;

(c) Distribution Undertakings as set out in Schedule-C;

(2) If the assets of the Undertakings under sub-clause (1) are subject to any security documents or arrangements in favour of third parties for any financial assistance or obligation taken by TANGEDCO and the liabilities in respect thereof have been classified in different Undertakings, the State Government, may by order, to be issued for the purpose, provide for the apportionment of the liabilities secured by such properties, assets and rights between the different Undertakings and upon such apportionment, the security shall stand apportioned to the Undertakings to the extent of the apportioned liabilities only."

155. Reading clause (3) above along with Part III of the functions and duties of GECL, being the transferee company, which is annexed to the scheme, it is evident that GECL has been entrusted not only with carrying on the activities of TANGEDCO with regard to generation and trading in electricity, but also to continue as an agent of TANGEDCO till further orders of the State Government. In essence, GECL, being the transferee company, which was created by the aforesaid scheme, has been directed to act as the agent of TANGEDCO with respect to green energy and in that regard, for the benefit of generation and

trading of green energy, which has, hithertofore, been carried out by TANGEDCO, stood vested with GECL. Further, GECL has been entrusted with foreseeing the meeting out of the RPO obligations imposed by the Ministry of Power vide notification dated 20.10.2023. Such being the case, in respect of grant of in-principle approval and locational approval, while GECL is clothed with power to give necessary approval, by stepping into the shoes of TANGEDCO, which has even been accepted by the petitioners, though GECL could not impose any tax, even in the form of Resource Charges on the wind power projects, but GECL could very well impose conditions on the wind power projects for satisfying the RPO obligations imposed upon it so that the burden by way of penalty is not passed on to the consumers.

156. From the above, it is manifestly clear that as agent of TANGEDCO, GECL is entrusted with responsibility even with regard to fulfilment of RPO obligation and in such a backdrop, it is always open to GECL, with the approval of TANGEDCO, to mandate the private players to see to it that the wind energy resource utilisation from within the State do serve the State and its citizens, as utilisation of the wind energy by the private players would necessitate them to

offset the RPO obligations of the State through reciprocal compromise by satisfying the RPO obligations cast on the State. Only such an action would ensure that the interests of both the private players, including the petitioners as also the consumers' interest are balanced as an obligation is cast on the private players to see that when it gets enriched through the resources of the State, which is for the welfare of one and all in the State, necessarily the consumers in the State also are not overburdened in view of non-fulfilment of RPO obligation by the State.

157. While the resources utilised by the private players are renewable resources, nevertheless when the wind power projects utilise the renewable resource of the State, an obligation is also cast on them to satisfy the basic requirements of the State, which will devolve upon its consumers as they would not be penalised further by means of higher tariff, when the RPO obligations are not met by the State. Therefore, as held by the Apex Court in *GMR Warora Energy case (supra)*, it is necessary for this Court to balance the interest of the consumers with the interest of the generators, as one cannot have a march over to the detriment of the other.

158. Therefore, in the interest of justice and to balance either side, viz., the generators and the consumers, as the State being a mere intermediary in the process, it becomes imperative that the RPO obligation imposed on the State by the Central Government from time to time by issuance of Government Orders is satisfied by the generators by providing the requisite energy commensurate with their generating capacity, which alone would ensure that the interests of the consumers are also satisfied.

159. In such a view of the matter, this Court holds that GECL, acting as agent of TANGEDCO, could very well, with the approval of TANGEDCO, impose conditions upon the private wind energy developers, including the petitioners, to satisfy the RPO obligations cast on the State commensurate with the generation of the individual wind energy developers so that the burden does not get transposed on the shoulders of the innocent consumers.

160. In the aforesaid facts and circumstances of the case and for the reasons stated above, the writ petitions are disposed of in the following terms with the observations and directions :-

i) *The impugned order dated 6.8.2024 issued by the 2nd respondent/GECL and the consequential demand notices issued against the petitioners calling upon payment of Resource Charges are set aside;*

ii) *The 2nd respondent/GECL with the approval of the distribution licensee, viz., TANGEDCO, is entitled to impose condition for providing of electricity to the STU by the wind energy generators like the petitioners commensurate with their generating capacity to fulfil the RPO obligation, which has hitherto fore been fixed in the Gazette Notification dated 20.10.2023 by the Ministry of Power, Government of India, and also the modification of RPO obligations, if any, through issuance of further Government Orders;*

iii) *Upon the electrical energy supplied by the wind energy generators, including the petitioners, commensurate with their generating capacity by providing the said energy by connecting to the STU, in compliance of the share of the State's RPO obligations, the State is directed to pay the cost of such electrical energy supplied by the wind energy generators, satisfying the RPO obligations, within the time as prescribed by the Tamil Nadu Electricity Regulatory Commission with regard to payments to be made to the wind energy generators for the electrical energy supplied at the rates fixed for STU-connected wind energy generators and failure to pay the amount due, the wind energy generators are at liberty to proceed against the State for realising the said amount in accordance with law.*

iv) *Consequently, connected miscellaneous petitions are closed. There shall be no order as to costs.*

17.12.2024

Index : Yes / No

GLN

To

1. The Principal Secretary to Govt.
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2. The Chief Engineer/NCES
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3. The Chairman
Tamil Nadu Generation & Distribution
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4. The Chairman-cum-Managing Director
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5. The Secretary
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6. The Secretary
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M.DHANDAPANI, J.

GLN

PRE-DELIVERY ORDER IN
W.P. NOS.26250 & 26253/2024

Pronounced on
17.12.2024