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W.P.Nos.19888 & 16985 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.08.2022

PRONOUNCED ON : 02.09.2022

CORAM

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

W.P.Nos.19888 & 16985 of 2022 &
W.M.P.Nos.19195, 16269 & 16271 of 2022

In W.P.No.19888 of 2022

M/s. Al Khaleija Aggregates FZE,
Disponent Owner (Vessel Owner)
Business Centre – 4,
RAK Economic Zone, 304/305/306 Wing,
A.P.O. Box – 30381,
Ras Al Khaimah,
United Arab Emirates,
Rep. by its signatory authority,
Mathan Udhyakumar.

... Petitioner

VS.

1. Director General of Shipping,
9th Floor, Beta Building,
i-Think Techno Campus, Kanjurmarg (East),
Mumbai – 400 042.

2. Chief Engineer/Mech/Coal,
Tamil Nadu Generation and Distribution Corporation Ltd.
NPKRR Maligai, 144 Anna Salai
Chennai – 600 002.



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3.Apeejay Shipping Ltd.

Apeejay House,
15, Park Street, Kolkata – 700 016
Rep. by its Authorised Signatory,
Mr.Amlan Dasgupta.

... Respondents

PRAYER: Writ petition filed under section 226 of Constitution of India for Writ of Mandamus directing the first respondent to process and grant coastal trade time charter permission cum license to the petitioner pursuant to the letter of the second respondent in Ref. No.STSL/DGS/CT-SPL/MV KHALEJIA ANA3/2022-23/ dated 06.07.2022 as expeditiously as possible within the time frame to be fixed by this Court.

In W.P.No.16985 of 2022

Apeejay Shipping Ltd.
Apeejay House,
15, Park Street, Kolkata – 700 016
Rep. by its Authorised Signatory,
Mr.Amlan Dasgupta.

... Petitioner

VS.

1.Chief Engineer/Mech/Coal,
Tamil Nadu Generation and Distribution Corporation Ltd.
NPKRR Maligai, 144 Anna Salai
Chennai – 600 002.



W.P.Nos.19888 & 16985 of 2022

2.1. Director General of Shipping,
9th Floor, Beta Building,
i-Think Techno Campus, Kanjurmarg (East),
Mumbai – 400 042.

3. M/s. Al Khaleija Aggregates FZE,
Disponent Owner (Vessel Owner)
Business Centre – 4,
RAK Economic Zone, 304/305/306 Wing,
A.P.O. Box – 30381,
Ras Al Khaimah,
United Arab Emirates

... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying for Certiorarified Mandamus calling for the records of the impugned Fixture Note dated June 22, 2022 awarded to Respondent No.3 by the Respondent No.3 by the Respondent No.1 and quash the same and direct the Respondent No.1 to accept the matching offer of Rs.515.32 per Metric Tonne (INR/MT) made by the petitioner in exercise of its Right of First Refusal in terms of the Petitioner's communication dated 5th June, 2022 and consequently, award the tender in respect of item-2 of the Tender dated May 10, 2022 to the petitioner.



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For Petitioner in
W.P.No.16985 of 2022 &
for respondent 3 in
W.P.No.19888 of 2022 : Mr.ARL.Sundaresan
for Mr.Karthik Sundaram

For Respondent 1 in
W.P.No.16985 of 2022 &
for respondent 2 in
W.P.No.19888 of 2022
(TNEB) : Mr.J.Ravindran, AAG
Assisted by Mr.L.Jai Venkatesh

For Respondent 2 in
W.P.No.16985 of 2022 &
for Respondent 1 in
W.P.No.19888 of 2022 : Mr.M.Karthikeyan

For Respondent 3 in
W.P.No.16985 of 2022 &
for petitioner in
W.P.No.19888 of 2022 : Mr.Yashodh Varadhan
for Mr.S.Harshavardhan

COMMON ORDER

The tussle in these writ petitions are between a Foreign ship owner and an Indian ship owner. Both of them are competing for a time charter from TANGEDCO for their respective vessels to transport coal for TANGEDCO. M/s.Al Khaleija Aggregates FZE, the Foreign ship owner



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who is the third respondent in W.P.No.16985 of 2022 and the petitioner in W.P.No.19888 of 2022 has been declared as the successful bidder by TANGEDCO and has been awarded a time charter to operate their vessel for transporting coal for TANGEDCO.

2. M/s.Al Khaleija Aggregates FZE, the Foreign Ship owner shall hereinafter be referred to as “the Foreign ship owner”. Apeejay Shipping Limited, the Indian shipping company shall hereinafter be referred to as “The Indian ship owner”. Both the Foreign ship owner and the Indian ship owner participated in the tender called for by TANGEDCO and after becoming technically qualified, the Foreign ship owner was declared as the L1 bidder and the Indian ship owner was declared as L2, based on their respective price bids submitted by them. After the Foreign ship owner was declared as a successful bidder, they have also been awarded a contract by the execution of the Time charter party. However, the license is yet to be issued by the Directorate General of Shipping to the Foreign ship owner for operating its vessel in India to transport the coal belonging to TANGEDCO, as per time charter, due to the present dispute.



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3. In the tender called for by TANGEDCO, there is an ROFR clause (Right of First Refusal Clause). The ROFR clause became mandatory pursuant to the Make in India Policy of the Indian Government. The ROFR clause in the tender has been incorporated as a tender condition pursuant to the Directorate General of Shipping circular No.2 of 2021 dated 14.01.2021. There was a need felt to review the licensing conditions keeping in view, (a) the Government of India's policy of promoting the Make in India initiative, (b) the Ministry's existing policy to promote flagging of ships in India (c) the Public Procurement and Make in India orders dated 15.6.2017, 28.05.2018 and 04.06.2020 issued by DIPP, (d) the need to give a long term strategic boost to the domestic shipping and ship building industry, (e) the need to encourage the domestic shipping industry to support the domestic ship building industry and (f) the need to develop self- reliance and a strong synergy among these vital industries for the overall long term development and economic growth of the country.

4. With the aforesaid objectives in mind, DGS Circular No.02 of 2021 was issued making it mandatory to incorporate the right of first refusal



(ROFR) clause in tenders to benefit Indian ship owners. The relevant clauses in DGS circular No.02/2021 dated 14.01.2021 are extracted hereunder:

“21. Right of First Refusal: "Right of first refusal" is a right which accrues to a bidder in a tendering process, who offers a vessel from the category listed at paragraph 21.3.4, subject to his matching of the lowest rate offered by a bidder who offers a vessel not listed under paragraph 21.3.4. The order of preference for right of first refusal will be as indicated at paragraph 21.3.4. This right is conferred based upon the practices of the industry, and the deliberate intention of the Central Government towards encouragement and development of the Indian ship building industry and the Indian shipping industry.

“21.3.4. For further clarity the order of grant of ROFR would be as follows:

- a) Indian built, Indian flagged and Indian owned,*
- b) Foreign built, Indian flagged and Indian owned,*
- and*
- c) Indian built, foreign flagged and foreign owned.”*

“21.3.5. Further, ROFR shall be applicable to all



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inquiries for in-charter of foreign flagged vessels within a 20% margin of purchase preference (price band) i.e. the maximum extent to which the price quoted by an Indian Company may be above the L1 for the purpose of purchase preference.”

“21.4. The bidder who exercises ROFR should meet the commercial requirement by matching the lowest Composite Effective Price. It is further clarified that there shall be no price preference in favour of any vessel. The Composite Effective Price is the derived figure from the various price inputs submitted by a bidder/participant in a tender process, wherein all the costs/inputs are summarized. While working out such Composite Effective Price, inputs such as daily hire/daily rate, mobilization/demobilization charges, call out rates and conversion charges etc. are taken into account.

5. “Right of First Refusal (ROFR)” means whenever a tendering process is undertaken to charter a vessel, a bidder offering a ship built in India will be given the first priority to match the lowest bidder (L1) quote.



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The ROFR would be exercised only in case the vessel being offered for charter by the lowest bidder (L1) has been built outside India. For any bidder to exercise ROFR, his bid should be within the Margin of Purchase preference, which will be 20% of L1.

6. The applicability of circular No.02 of 2021 dated 14.01.2021 issued by the Directorate General of Shipping to the subject tender is not disputed by any of the parties. The only issue that arises for consideration in these writ petitions is whether the price evaluation will have to be done on cost per tonne basis or on charter hire per day basis for the purpose of deciding as to whether the Indian ship owner is entitled to exercise the ROFR clause by coming within the 20% price band.

7. TANGEDCO has declared the Foreign ship owner as the L1 bidder based on the quotation submitted by them on charter hire per day basis which does not include other incidental costs involved in the operation of the ship. The Indian ship owner has submitted its quotation under the subject tender on cost per tonne basis which includes other incidental costs



like bunkering costs and port charges.

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8. According to the Foreign ship owner, since the price quoted by the Indian ship owner exceeds the 20% margin of purchase preference (Price Band) over and above, the rates quoted by Foreign ship owner, they are not eligible to exercise the ROFR clause as per paragraph 21.03.05 of DGS Circular No.02 of 2021 dated 14.01.2021. However, the Indian ship owner contends that they are eligible to exercise the ROFR clause as they have matched the lowest composite effective price and their quotation falls within the 20% price band from the rates quoted by the Foreign ship owner who is the L1 bidder. According to them, if cost per tonne is taken into consideration, their quotation is within the 20% margin of the Net Cost per metric tonne provided by the Foreign ship owner and therefore, they are eligible to exercise the ROFR clause.

9. According to the Indian ship owner, the bunker charges and the port charges ought to have been included by the Foreign ship owner in its quotation and if the same was included, the Net Cost per metric tonne in



INR provided by the Indian ship owner will be within the 20% margin of the Net Cost per metric tonne in INR provided by the Foreign ship owner.

According to the Indian ship owner, the Net Cost per metric tonne in INR for the Foreign ship owner will be Rs.515.44/-. The Indian ship owner had submitted a quotation at Rs.562.46 per metric tonne in INR and the difference in price per metric tonne between Indian ship owner and the Foreign ship owner in terms of percentage is calculated as follows Rs.562.46 (quotation submitted by Indian shipowner) – Rs.515.44 (if the quotation submitted by Foreign ship owner is calculated on cost per tonne basis) = 47.02. The difference in price per metric tonne in terms of percentage is 9.1% i.e., $\text{Rs.}47.02 / \text{Rs.}515.44 * 100$.

10. According to the Indian ship owner, since the price band difference is only 9.1% and falls within the 20% margin of purchase preference (price band), the Indian ship owner must be allowed to exercise the ROFR clause. The Indian ship owner has filed W.P.No.16985 of 2022 seeking to quash the Fixture Note dated 26.06.2022 issued in favour of the Foreign ship owner and to direct TANGEDCO to accept the matching offer



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of Rs.515.32 per Metric Tonne given by them in exercise of its Right of First Refusal (ROFR) in terms of the Indian ship owner's communication dated 05.06.2022 and consequently, award the tender in their favour in respect of item-2 of the tender dated 10.05.2022.

11. However, the Foreign ship owner contends that there is a distinction between time charter and voyage charter for the purpose of exercising the ROFR clause. According to the Foreign ship owner, the ROFR clause can be exercised for a time charter only based on charter hire per day basis as the bunker charges and the port charges are paid only by TANGEDCO, the charterer.

12. According to the Indian ship owner, the Foreign ship owner is attempting to resile from and render otiose the tender conditions by contending that the Cost per tonne mentioned in the tender is only an administrative calculation and that the Cost per tonne calculation between Paradip Port and Ennore Port is only for sample purposes. According to them, on a plain reading of the tender conditions in its entirety, such



contentions of TANGEDCO are grossly erroneous and without any basis.

According to the Indian ship owner, clause 4.3 of the general instructions in the tender specifically states that though daily charter hire rate are to be quoted by the bidders, the cost per tonne alone shall be considered for the purpose of evaluation. Clause 4.3 of the tender also states that the net charter hire rate will not be considered for the purpose of evaluation.

13. According to the Foreign ship owner, there is no unjust enrichment on the part of the Foreign ship owner as alleged by the Indian ship owner. According to them, the Indian ship owner will have to match the L1 price of the Foreign ship owner. According to the Foreign ship owner, the allegation that loss has been caused to TANGEDCO is illusory and contrary to the very concept of grant of ROFR which is subject to the matching of the L1 price with the 20% price band which the Indian ship owner has not satisfied.

14. The Foreign ship owner also contends that they being the L1 tenderer, have been rightly awarded the Time charter by TANGEDCO.



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According to them, the quotation submitted by them is more beneficial to TANGEDCO than the quotation submitted by the Indian ship owner.

15. The Foreign ship owner also contends that they having already entered into a time charter party agreement with TANGEDCO, have requested the Directorate General of Shipping by their letter dated 06.07.2022 to grant of Coastal Trade Time Charter Permission cum license /SPL from 01.07.2022 to 30.03.2023, but only due to the false dispute raised by the Indian ship owner, the issuance of the license is getting delayed.

16. According to them, their vessel was hired with full crew and they have already moved the vessel from Dubai to the outer anchorage of Paradip. According to them, they have paid the necessary fees and they are incurring an expense of Rs.21,00,000/- per day. They contend that cancellation of tender would cause their vessel huge losses which cannot be recovered later.

17. Subsequent to the filing of W.P.No.16985 of 2022 by the Indian ship owner, the Directorate General of Shipping by its letter dated



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13.07.2022 has clarified that the Indian ship MV APJ Mahadeva owned by the Indian ship owner is eligible for exercising its right of first refusal in relation to item 2 of Tender. Therefore, the Directorate General of Shipping has requested TANGEDCO to review the matter within ROFR frame work of the Government of India. The Indian ship owner therefore insists for awarding of time charter by TANGEDCO in its favour as the difference is only 9.14% between the Net Cost Per Metric Tonne in INR provided by the Indian Flag Vessel versus the Foreign Flag Vessel which is within the 20% Margin of Net Cost per Metric Tonne in INR provided by the Foreign Flagged vessel.

18. TANGEDCO has reiterated that the award of contract in favour of the Foreign ship owner is only in accordance with tender conditions and they would submit that there is no arbitrariness or illegality committed by them.

Discussion:

19. The purpose and object of the Directorate General of Shipping circular No.2 of 2021 as stated in paragraph 5-8 therein are interalia (a)



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encouraging flagging of ships in India and promoting ship building in India;
and (b) providing additional market access and business support to ships
built in India.

20. The Right of First Refusal (ROFR) clause as per the Directorate General of Shipping Circular is meant to benefit Indian ship owners by giving them first priority to match the lowest bidder (L1), quote given by a Foreign ship owner.

21. According to the Indian ship owner, the Fixture note issued in favour of the Foreign ship owner is in contravention of Directorate General of Shipping Circular No.02/2021 dated 14.01.2021 and the tender conditions (more specifically 4.3, 1.3 (c) (iv) and 1.3 (c) (v) of the tender and clauses 21.3.5 and 21.4 of the DGS Circular) read with schedule E of the tender. According to them, the aforementioned clauses 4.3 and 1.3(c)(iv) of the Tender make it categorically clear that only the equivalent price of charter hire in cost per tonne in INR/MT is to be considered for the purpose of evaluation of price bids. According to them, clause 4.3 of the tender also



makes it clear that the net charter hire rate inclusive of taxes and levies will not be considered for the purpose of evaluation. It is their contention that evaluation based on Net Cost/tonne is the usual industry standard which is practised in the business for decades and therefore, TANGEDCO's sudden refusal to accept the same is arbitrary and contrary to the tender specifications and DGS Circular and is against the established industry practice.

22. However, it is the contention of the Foreign ship owner that in a time charter, daily charter hire rate determines the price and the lowest bid. According to them, the price quoted as charter hire rate is the only price within the control of the bidder as all other expenses are undertaken by the Tenderer (TANGEDCO). According to them, in a voyage charter, cost per tonne is the determining factor as the quote includes the bunkering (fuel), port charges etc., that are to be borne by the vessel owner. Since bunkering (fuel) and port charges are irrelevant in a time charter as they are borne by TANGEDCO, the daily charter hire rate determines the price and the lowest bid.



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23. According to the Foreign ship owner, the harmonious reading of the various sub paragraphs in Clause 4.3 of the DGS Circular will establish that the net daily charter hire rate in INR will govern the evaluation to determine the L1 bidder. According to them, TANGEDCO has been following the industry specific practice of which the Indian ship owner is very well aware of. According to them, in terms of clause 1.3 (c)(vi) of General Instructions to Tenderers, the charter hire rate is backworked in USD/day or INR/day using the lowest cost per tonne. According to them, this backworking was used in respect of item No.1 (not subject matter of these writ petitions) to reduce the daily charter hire rate of Indian ship owner who has been awarded the said contract from Rs.29.90 lakhs to Rs.25.76 lakhs. According to them, cost per tonne is mentioned only for administrative convenience of TANGEDCO and not for evaluation.

24. It is also contended by the Foreign ship owner that DGS circular is not an aid for irresponsible bidding. According to them, the Indian ship owner had quoted a price of Rs.29,50,000/- per day, whereas the Foreign



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ship owner quoted Rs.21,74,200/- per day. According to them, as the difference between their respective prices quoted was around 35.68% and as the price band had to be within 20% for grant of ROFR in terms of the DGS circular, TANGEDCO had rightly held that the Indian ship owner is not entitled to the benefit of DGS circular.

25. Further it is contended by the Foreign ship owner that it will be inequitable to cancel the grant of tender to their vessel Al Khaleija. According to them, after entering into the Charter party on 22.06.2022, Al Khaleija was awarded the fixture note on 28.06.2022. TANGEDCO had also requested the Directorate General of shipping by letter dated 06.07.2022 to grant Coastal Trade Time Charter Permission cum Licence / SPL from 01.07.2022 to 30.03.2023. According to them, they have already hired the full crew, moved the vessel from Dubai to the outer anchorage of Paradip, paid the necessary fees and is incurring an expenditure of over Rs.21,00,000/- per day. According to them, cancellation of the tender would cause them grave hardship, besides they will not be able to recover the losses sustained.



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26. TANGEDCO has considered the daily hire rate charges as the basis for comparison between the price quoted by the Indian ship owner and the Foreign ship owner. According to them, the daily hire rate constitutes the composite effective price referred to in the DGS circular. However, contrary to their contention, TANGEDCO considers other inputs like bunkering charges and port charges to the daily hire charge to calculate the cost per tonne in order to determine the lowest price. If the basis of evaluation of the bids is only the daily hire rate quoted by the bidders, the need for mentioning the other incidental inputs like bunker charges and port charges in addition to the daily hire charge in the tender document will not arise.

27. The Directorate General of Shipping through its letter dated 13.07.2022 has clarified that the Indian ship, MV APJ Mahadeva owned by the Indian ship owner is eligible for exercising its right of first refusal by giving the following reasons:

(a) The composite effective price referred to in paragraph 21.4 of the



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DGS circular No.2 of 2021 is to be calculated only with reference to ascertaining the cost of shipping services.

(b) Paragraph 4.3 (Charter Hire Rates) of the tender document clearly mentioned that cost/Ton in INR will be considered for the purpose of evaluation. Paragraph 4.3 (i) clearly indicates that Indian bidders are to quote the charter hire rate, for their vessel only in Indian Rupees/day and the corresponding cost per ton in INR/MT. The Schedule E to the tender document floated by TANGEDCO also makes it clear that the calculation to be provided is of the Net Cost Per Metric Tonne, in INR, which is to include the bunker charges and port charges.

(c) When bunker charges and port charges are included, the Net Cost Per Metric Tonne in INR provided by the Indian flag vessel is within the 20% margin of the Net Cost Per Metric Tonne in INR provided by the Foreign flag vessel.

(d) The difference of 9.14% between the Net Cost Per Metric Tonne in INR provided by the Indian Flag Vessel versus the Foreign flag vessel is also not disputed by TANGEDCO.



(e) The objective of the DGS Circular is to ensure competitive prices to the charterer/customer while at the same time also encouraging development of the Indian Shipping. The cost by Indian ship is less than the foreign ship, if ROFR is exercised by Indian ship.

(f) In view of the above, it appears that the Indian ship is eligible for exercising Right of First Refusal. TANGEDCO is therefore requested to review the matter within the ROFR framework of the Government of India.

28. The evaluation criteria under the tender is reproduced hereunder:

“1.3(c) Evaluation:

i) Sector for evaluation:

Cost per Ton of one round voyage in Paradip-Ennore shall be taken for evaluation.

(ii) Loading Period:

The loading period based on the loading rate 50000 MT/day at Paradip shall be taken for evaluation and for guaranteed loading norms.

(iii) The discharge period for Ennore will be arrived based on the average discharging rate of 30000 MT per day for the purpose of evaluation.



(iv) Cost per ton:

Evaluation shall be based on Cost/Ton for one round voyage in Paradip-Ennore Sector. In addition the vessel related charges for discharging the cargo at Ennore will be taken into account. The cost per ton for one round voyage in the sector mentioned in (i) above, arrived using the worksheet in Schedule-E and quoted by the bidder in the e-price schedule shall be the L1 deciding factor.

(v) After evaluating the L1 as above, Right of First Refusal (ROFR) provision as per DG/Shipping Circular No.2 of 2021 (Annexure-H), will be exercised, if applicable.

The final L1 bidder is arrived after exercising the provisions as per DG Shipping “Shipping Development Circular No.2 of 2021” or its subsequent amendments, if any.

(vi) Charter Hire Rate and Negotiation:

The charter hire rate will be back worked in USD/Day for a foreign bidders and in INR/Day for an Indian bidder, based on the lowest cost per ton quoted in e-price schedule using the same parameters as per the declarations in the technical documents and same exchange rate stipulated in e-portal (if applicable). The negotiations will be held directly with ship owners/Disponent



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owners/authorised brokers/authorised agents of the LI offer.”

29. The comparison of the prices offered by the Indian Ship owner and the Foreign ship owner on a Net Cost Per Tonne Basis is reproduced hereunder:

	Net Cost per Metric Tonne in INR/MT	Difference in price per tonne in terms of percentage
Petitioner's Vessel (MV APJ Mahadeva)	Rs.562.46	● Rs.562.46 – Rs.515.44 = Rs.47.02 ● Rs.47.02/Rs.515.44*100 = 9.1%
Foreign Flag Vessel (MV Khalejia Anna 3) offered by Respondent No.2	Rs.515.44	

The comparative figures on a Net Cost Per Tonne basis have also not been disputed by TANGEDCO, the charterer.

30. Paragraph 21.4 of the DGS Circular states as follows:

“21.4. The bidder who exercises ROFR should meet the commercial requirement by matching the lowest Composite Effective Price. It is further clarified that there shall be no



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price preference in favour of any vessel. The Composite Effective Price is the derived figure from the various price inputs submitted by a bidder/participant in a tender process, wherein all the costs/inputs are summarized. While working out such Composite Effective Price, inputs such as daily hire/daily rate, mobilization/demobilization charges, call out rates and conversion charges etc. are taken into account.”

31. The comparative figures on a Net Cost Per Tonne basis for both the offers make it clear that the difference between the two offers made by the Indian ship owner and the Foreign ship owner is approximately 9.1% which falls within the 20% price band of the Net Cost Per Tonne quoted by the Foreign ship owner. Therefore, in terms of clause 1.3(c)(v) of the tender, the Indian ship owner is entitled to exercise its right of first refusal as provided for in the Directorate General of Shipping's circular. The Directorate General of Shipping in its clarification letter dated 13.07.2022 has also clarified by giving proper reasons that the Indian ship owner is eligible to exercise its right of first refusal (ROFR). The Directorate General of Shipping is a statutory body which is empowered to issue clarification



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whenever there is a difference of opinion as to the exercise of ROFR clause by any Indian ship owner. The clarification issued by the Directorate General of Shipping on 13.07.2022 that the Indian ship owner is eligible to exercise its rights under the ROFR clause has also not been challenged by the Foreign ship owner and therefore, the findings of the Directorate General of Shipping are binding on the Foreign ship owner.

32. The Indian ship owner by its Email dated 05.06.2022 to TANGEDCO by exercising the ROFR clause as per the DGS circular has agreed to match the negotiated Net composite price offered by the Foreign ship owner on a Net Cost Per Metric Tonne basis in INR/MT i.e., the Indian ship owner has agreed to match the cost of Rs.515.32 per Metric Tonne (INR/MT) offered by the Foreign ship owner. Despite the said letter and without responding to the same, TANGEDCO has wrongfully awarded the Fixture Note to the Foreign ship owner and thereafter, has also entered into a time charter party agreement with them.



33. Clause 1.19 of the tender states that the subject tender is governed by the Tamil Nadu Transparency in Tenders Act, 1998 and the Tamil Nadu Transparency in Tenders Rules, 2000. Rule 25 of the Tender Rules 2000 states that the evaluation of tenders has to be carried out strictly in accordance with the evaluation criteria indicated in the tender documents. As discussed earlier, the evaluation criteria under the tender documents is only on Cost Per Tonne basis and not on charter hire per day basis. Since the evaluation has been done by TANGEDCO on charter hire per day basis which is erroneous, the evaluation of the subject tender by TANGEDCO has not been done in accordance with the evaluation criteria indicated in the tender documents. Further, the impugned Fixture Note and the consequential time charter party issued in favour of the Foreign ship owner are in violation of the Tender Rules and Tender Conditions.

34. Since the clarification letter dated 13.07.2022 issued by the Directorate General of Shipping makes it clear that the Indian ship owner is eligible for exercising its right of first refusal, necessarily TANGEDCO will have to act in terms of paragraph 22 of the Directorate General of Shipping



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Circular No.02/2021 dated 14.01.2021.

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35. The fuel costs represent as much as 50-60% of total ship operating costs depending upon the type of ship and service. Unless and until the bunkering costs are factored in the offer price quoted by the bidders, the beneficial deal between the two bidders in a time charter, cannot be ascertained by the charterer. Eventhough, in a time charter, the bunkering charges are usually paid by the charterer, for the effective evaluation of the total operating costs of a vessel, the quotation submitted by a bidder on cost per Tonne basis is the only method for evaluating the best quote which is beneficial to the charterer. The cost per tonne referred to in the tender is not for administrative convenience as alleged by the Foreign ship owner, but it is for evaluating the best price quoted by the bidders. The calculation of price difference by the Foreign ship owner between the rates quoted by the Indian ship owner and the Foreign ship owner at 35.68% based on daily charter hire rate quoted by the Indian ship owner at Rs.29,50,000/- per day and the Foreign ship owner at Rs.21,74,200/- per day is incorrect as the same has been calculated on charter hire per day basis



instead of cost per tonne basis.

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36. The Foreign ship owner claims that pursuant to the issuance of Fixture Note and the signing of the time charter, they had brought their vessel Al Khaleija with full crew from Dubai to the outer anchorage of Paradip, incurring an expenditure of Rs.21,00,000/- per day. However, the same is not supported by any documentary evidence and the same is also disputed by the Indian ship owner who claims that the vessel Al Khaleija is being operated even now and is not remaining idle as alleged by the Foreign ship owner. Since no documentary evidence is available to support the Foreign ship owner's contention, this Court rejects the same.

37. The Indian ship owner is also not seeking any concession from this Court as they are willing to match the cost per tonne quoted by the Foreign ship owner, if they are allowed to exercise the ROFR clause and therefore, TANGEDCO would not be put to any loss, if the time charter is awarded to the Indian Ship owner instead of Foreign ship owner. The claim of perceived loss by TANGEDCO is totally fictitious and illusory.



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38. TANGEDCO has re-written the tender conditions by awarding the contract to the Foreign ship owner. The tender conditions makes it clear that evaluation has to be done only on Cost per tonne basis and not on charter hire per day basis. Even though charter hire per day has to be disclosed by the bidder, the evaluation has to be done only on cost per tonne basis. Clause 1.3 (c) (iv) makes it clear that the evaluation has to be done only on cost per tonne basis. Having re-written the tender conditions, a bidder who has submitted the bid only in accordance with the terms and conditions of the tender should not be made to suffer. The only interpretation that can be given to the evaluation criteria mentioned in the tender is that the evaluation has to be done only on cost per tonne basis.

39. The Directorate General of Shipping which acts as an arbiter has also made it clear in its clarification letter dated 13.07.2022 that the Indian ship owner is eligible to exercise the ROFR clause. Having re-written the tender conditions which is also not beneficial to the interest of



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TANGEDCO, the charterer and is also not in the interest of the Indian shipping Industry, the award of contract to the Foreign ship owner by TANGEDCO shocks the conscience of this Court. The very object of DGS circular No.2/2021 dated 14.01.2021 will be defeated, if the Foreign ship owner is awarded the contract, despite the fact that the Indian ship owner has satisfied the price band criteria as per the DGS circular No.02/2021 dated 14.01.2021. Hence, the award of contract to the Foreign ship owner has to be necessarily quashed.

40. For the foregoing reasons, the issuance of Fixture Note and the signing of the time charter by TANGEDCO is arbitrary and illegal and is in violation of Directorate General of Shipping circular No.02/2021 dated 14.01.2021.

41. In the result, the writ petition filed by the Indian ship owner in W.P.No.16985 of 2022 has to be allowed. Accordingly, W.P.No.16985 of 2022 is **allowed** and the impugned Fixture Note dated 22.06.2022 issued in favour of the Foreign ship owner by TANGEDCO and consequential time



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charter party signed by TANGEDCO are hereby quashed. TANGEDCO is directed to accept the matching offer of Rs.515.32 per Metric Tonne (INR/MT) made by the Indian ship owner in exercise of its Right of First Refusal in terms of the Indian ship owner's communication dated 05.06.2022 and consequently, award the tender in respect of item-2 of the Tender dated 10.05.2022 to the Indian ship owner subject to the fulfilment of other terms and conditions prescribed under the tender by the Indian ship owner.

42. Since W.P.No.16985 of 2022 is allowed as prayed for, W.P.No.19888 of 2022 filed by the Foreign ship owner is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

02.09.2022

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Index : Yes/No

Internet : Yes/No

Speaking Order/Non Speaking Order



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To

WEB COPY

1. Director General of Shipping,
9th Floor, Beta Building,
i-Think Techno Campus, Kanjurmarg (East),
Mumbai – 400 042.

2. Chief Engineer/Mech/Coal,
Tamil Nadu Generation and Distribution Corporation Ltd.
NPKRR Maligai, 144 Anna Salai
Chennai – 600 002.



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W.P.Nos.19888 & 16985 of 2022

ABDUL QUDDHOSE, J.
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Pre-Delivery order in
W.P.Nos.19888 & 16985 of 2022

02.09.2022