IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.1349 OF 2023

SHANTAI ENTERPRISES THROUGH ITS PROPRIETOR
MAYUR PITAMBAR PATIL AND OTHERS
VERSUS
THE STATE OF MAHARASHTRA AND OTHERS

AND
WRIT PETITION NO.2104 OF 2023

YOGESH ATMARAM PATIL AND OTHERS
VERSUS
THE STATE OF MAHARASHTRA AND OTHERS
...
Mr. B. S. Deshmukh, Advocate for the Petitioners.
Mr. S. B. Yawalkar, AGP for Respondent No.1.
Mr. Rahul A. Tambe, Advocate for Respondent Nos.2 to 4.
...
CORAM : NITIN W. SAMBRE AND
S. G. CHAPALGAONKAR, JJ.

RESERVED ON : 20.03.2023
PRONOUNCED ON : 04.05.2023

FINAL ORDER (Per Nitin W. Sambre, J):-

1. Since the issue involved in both these petitions is identical viz. seeking quashing of the E-auction notice dated 24th January, 2023 for sale of 20% dry fly ash pursuant to the Board Resolution dated 5th January, 2023 passed by respondent no.3 of respondent no.4-Thermal Unit, they are tagged and heard together by consent.

2. The petitioners are claiming to be engaged in the manufacturing activity being a small scale unit thereby manufacturing fly ash bricks and blocks.

3. It is the case of the petitioners that they were getting free of cost 20% of dry fly ash as a raw material for the aforesaid manufacturing activity by virtue of Notification issued by the

Ministry of Environmental and Power from the Thermal Stations like respondent no.4.

4. The Ministry of Power thereafter changed its policy and decided to dispose of part of the quantity of dry fly ash by adopting biding process, as same is used in construction of road, flyover etc. The Government of India, Ministry of Power has framed guidelines/procedure for disposal of dry fly ash vide Notification dated 31st December, 2021. Disposal of dry fly ash by adopting E-auction was by virtue of Advisory dated 22nd February, 2022, which was stayed by the Government on December 6, 2022.

5. The respondent no.2 issued a directions to the Thermal Units like respondent no.4 to initiate sale of dry fly ash through biding process vide communication dated January 5, 2023. As a sequel of above, it is the case of the petitioners that free supply of dry fly ash to the small industries like the petitioners was stopped by respondent no.4 and dry fly ash was released only after charging the consideration of Rs.140/- per metric ton, which is base price as reflected in the Board Resolution dated January 5, 2023.

6. The respondent no.4 in compliance with the Board Resolution referred above of respondent no.2 on January 24, 2023 published a E-auction notice in the daily newspaper in compliance with the aforesaid Board Resolution dated January 5, 2023.

7. The petitioners have questioned the same on the ground that the steps taken by respondent nos.2 and 4 are contrary to the office order dated 6th December, 2022 issued by the Government of India, Ministry of Power whereby the permission to dispose of dry fly ash by conducting E-auction was stayed.

8. Mr. Deshmukh, learned counsel for the petitioners submits that the policy floated by the respondents of making the dry fly ash available to the units like petitioners is with an intention to:

a. Deal with the issue of air pollution in an organized manner and

b. Promote the small scale units like the petitioners, who are into manufacturing of bricks and blocks by use of dry fly ash.

9. According to Mr. Deshmukh, learned counsel for the petitioners the Central Government directives are binding on the petitioners. So as to substantiate his contention he has invited our attention to the Notification dated 14th September, 1999 issued by the Ministry of Environment and Forest, which provides for utilization of dry fly ash by Thermal Power Plants, the orders issued by respondent no.4 for collection of dry fly ash, the directives issued by the Government of India on 22nd February, 2022 whereby Thermal Power Plants like respondent no.4 can charge for dry fly ash costs and transportation. Mr. Deshmukh, learned counsel would also invite our attention to the Notification dated 31st December, 2021 so as to substantiate his aforesaid contention that the respondents are not permitted to dispose of the dry fly ash by taking recourse to the E-auction mode. He would urge that the directives of the Central Government issued on 6th December, 2022 thereby directing not to enforce the Advisory issued on 22nd February, 2022 still holds the field. In view of the above, he would urge that the impugned act on the part of the respondents in going for E-auction of the dry fly ash is liable to be quashed and set aside.

10. While countering the aforesaid submissions Mr. Tambe, learned counsel appearing for respondent nos.2 to 4 would oppose the prayer of the petitioners by inviting attention of this Court to the fact that the Union of India is not added as party-respondent. According to him, earlier directives of not to implement the Advisory issued by the Ministry of Power dated February 22, 2022 was subject matter of challenge before the Apex Court in Civil Appeal Diary No(s).5195/2023. He would urge that in the Special Leave to Appeal (C) the Apex Court vide its order dated 24th February, 2023 has stayed the directives of the Green Tribunal. According to him pursuant to the order of the Apex Court the Government of India has already issued the directions on 28th February, 2023 permitting respondent nos.2 to 4 to dispose of the dry fly ash to the prospective user agencies like the petitioners as per the procedure prescribed in the Advisory dated 22nd February, 2022. As such, he would urge that there is no substance in the petitions and the petitions are liable to be dismissed.

11. Learned counsel appearing for the petitioners has placed on record the rejoinder so as to oppose the aforesaid claim, as according to him the respondents are trying to mislead this Court. He would urge that the respondents are conducting themselves in discriminatory manner as 80% of the quota of dry fly ash is allotted to four companies, who are permitted to lift huge quantify up to thousand metric ton per day at the rate ranging between Rs.58/- to Rs.80/- per metric ton, whereas for petitioners the base rate proposed is Rs.140/- per metric ton. He would urge that the decision of the respondents is not in the

interest of the environment. As such, he has sought quashing of the impugned order.

12. We have appreciated the submissions.

13. The fact remains that the disposal of dry fly ash generated in the Thermal Power Plants which are conducted and managed by respondent nos.2 and 3 like respondent no.4 are governed by the various directives issued by the Ministry of Environment and Forest. The first directive which the petitioners intend to rely upon is 14th September, 1999.

14. It appears that, the said policy has undergone change and so as to protect the interest of end consumers, who are consuming power to whom the same is to be provided at affordable rate, the respondents are permitted to dispose of dry fly ash by adopting bidding method. Accordingly, the Government of India in its communication dated 22nd February, 2022, page no.55 has noted thus:

> *"3. It is pertinent to note that the objective of the Government is to provide* ***affordable power to consumers****. Any extra costs without making efforts to monetize disposal of ash by TPPs lead to increase in electricity tariff, which is to be borne by the consumers.*
>
> *4. Ash is emerging as a valuable commodity and so giving it free, and also meeting the transportation costs will* ***lead to malpractices****. Therefore, providing such a valuable commodity through bidding process would held in providing the cheaper power to the consumers. In order to maintain transparency and to restrict malpractices, competitive bidding process is the most suitable method to determine the rate of supply of goods and services. Therefore, it is necessary to streamline the procedure to dispose off the ash by TPPs in a transparent manner and also to monetize the sale of ash so as to reduce the tariff burden on the consumers.*

*5. In view of above, all coal/lignite base TPPs are hereby **advised** to provide ash to the prospective user agencies for all new commitments for supply of Ash as per following guidelines which have been framed in accordance with MoEF&CC Notification dated 31.12.2021:-*

<u>Procedure to be folowed to dispose of Ash:</u>

5.1. The power plants shall provide ash to user agencies as stipulated in the MoEF&CC Notification dated 31.12.2021 through a transparent bidding process only.

5.2. If after bidding/auction some quantities of ash still remain un-utilized, then only, as one of the option, it could be considered to be given free of cost on first come first serve basis, if the user agency is willing to bear the transportation cost.

5.3. If ash remains un-utilized even after the steps taken in paras 5.1 and 5.2 above, TPP shall bear the cost of transportation of ash to be provided free to the eligible projects/mine owners.

5.4. Even after steps taken in paras 5.1 to 5.3 above, if the ash remains un-utilized, TPPs shall serve notice on the construction agencies/mine owners located within 300 kms from TPPs to use ash mandatorily in their projects/filling of mine voids.

5.5. The Ash shall be offered to the prospective user agencies as stipulated in the MoEF&CC Notification dated 31.12.2021 on competing demand basis, i.e. user agency who offers the highest price and meets the transportation cost will be offered the ash on priority. This will reduce the tariff of electricity and burden on the consumers. It will also be in accordance with sound vigilance practices.

5.6. The power plant may offer Ash subject to their technical restrictions such as precautions required for Dyke stability and safety etc. The power plants having lower Ash utilization shall make all efforts to increase its Ash Utilization.

5.7. In case, ash is provided free of cost and free transportation: prospective consumers shall be obliged to source the Ash from the nearest TPPs, to reduce the cost of ash transportation. If the nearest TPP refuses to do so, the *prospective consumers shall approach Ministry of Power for appropriate directions.*

<u>Procedure to be followed for transporation cost to be borne by TTPs:</u>

5.8. The transportation cost wherever required to be borne by the TPPs, shall be discovered on a competitive bidding process basis only. TPPs shall prepare a panel of transportation agencies every year based on competitive bidding for transportation in slabs of 50 kms. Which may be used for the period. The TPPs shall call for bids will in advance, so that the transportation panel is in place as soon as the previous panel expires. There should be no gap between the expiry of existing panel and the finalization of the fresh panel.

5.9. TPPs are advised to invite open bids by keeping a lower bid threshold of minimum 50 tonnes so that even small and medium commercial enterprises can also take part in the bid process.

6. The appropriate commission shall scrutinized any expenses regarding ash utilization proposed to be passed through in tariff by the Generation Company in accordance with these guidelines to ensure that the least possible burden is passed on to electricity consumers and full transparency is ensured by Generating Company as envisaged in these guidelines.

7. ***Applicability of this Advisory****: This advisory may be followed by every coal or lignite based TPP (i.e. including captive or co-generating stations or both), mentioned at para A(1) of the MoEF&CC Notification dated 31.12.2021. Further, it is clarified that above guidelines apply* ***prospectively****. TPPs are* ***advised*** *to honour their existing commitments of selling/transportation of fly ash on the basis of rates arrived through transparent competitive bidding/State Schedule of rates only, till the expiry of their existing commitment. For the remaining quantity and new commitments, both fly ash and pond ash shall invariably be disposed off through a transparent bid process.*

8. This letter supersedes the earlier letters issued in this regard vide File No.9/7/2011-S.Th (Vol. IV) dated 22.09.2021 and File No.9/7/2011-S. TH(Vol. IV) dated 08.11.2021.

9. All concerned are requested to take necessary action in this regard.

10. This issues with the approval of Hon'ble Minister for Power, New & Renewable Energy."

15. The Government of India before above has issued Notification dated 31st December, 2021 promoting utilization of dry fly ash in the manufacturing of building materials and in construction activity so as to restrict excavation of top soil. As such, it has proposed that the dry fly ash should be utilized to its entire productivity i.e. 100% use and as such, reviewed its policy. The Central Government accordingly super-session of the earlier Notification dated 14th September, 1999 has permitted the utilization of the dry fly ash at free of costs and transportation was to be borne by the parties like respondent no.4, who are generating such dry fly ash.

16. It appears that, the said policy was subject matter of challenge before National Green Tribunal, who vide order dated 25th August, 2022 has directed not to enforce the Advisory issued on 22nd February, 2022. As far as Advisory dated 22nd February, 2022 is concerned, we have already stated hereinbefore that the said Advisory was in modification to the directives referred above on 31st December, 2021.

17. The aforesaid order of the National Green Tribunal was subject matter of challenge in the Civil Appeal Diary No(s). 5195/2023 and directions issued by the Central Government permitting disposal of dry fly ash for consideration which was stayed by the National Green Tribunal was challenged. The Apex Court vide order dated 24th February, 2023 has stayed the

directions issued by the National Green Tribunal and permitted the Government to proceed ahead with the disposal of the dry fly ash for a consideration as could be noticed from the directives dated 28th February, 2023.

18. If we appreciate the entire proceedings viz. the issuance of directives by the Central Government on 22nd February, 2022 thereby modifying the directives dated 31st December, 2021, the order of stay passed by the National Green Tribunal on 25th August, 2022, the order of the Apex Court wherein the aforesaid order of Green Tribunal was challenged in SLP and stay granted by the Apex Court on February 24, 2023, the consequential Advisory issued by the Government of India on 28th February, 2023, in our opinion the petitioners have no absolute right to claim the benefit of the dry fly ash free of cost.

19. The respondent nos.2 to 4 have every right to dispose of the dry fly ash in compliance with the directives / advisory issued by the Government of India, Ministry of Power and the decision of respondent nos.2 to 4 appears to be based on the communication dated 28th February, 2023 issued by the Central Government for which the basis is the order of the Apex Court dated February 24, 2023.

20. The fact remains that the petitioners are also into profitory business. The petitioners have chosen neither to implead the Government of India as party-respondent nor questioned the Advisory issued by the Government of India from time to time.

21. Rather the conduct of the respondents appears to be in tune with the directives of the Government of India and based on the stay granted by the Apex Court.

22. In view of the above, no case for causing interference in extraordinary jurisdiction is made out. Even otherwise, the petitions are filed seeking relief from this Court in a contractual matters wherein the petitioners are seeking that the petitioners to be made available dry fly ash at free of cost.

23. The Court as such refrained itself from causing interference in aforesaid contractual matters.

24. Both these petitions accordingly lacks merit and are dismissed.

(S. G. CHAPALGAONKAR)
JUDGE

(NITIN W. SAMBRE)
JUDGE

Devendra/May-2023