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W.P.No.13712 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 07.07.2023

Pronounced on : 18. 07.2023

CORAM : JUSTICE N.SESHASAYEE

W.P.No.13712 of 2023
and WMP.No.13382 of 2023

M/s.Tamil Nadu Fly Ash Brick and
Block Manufacturers Association
Rep. by its State General Secretary Mr.V.Sivakumar
AD.61, New No.3, 3rd Street, Anna Nagar
Chennai - 600 040. ... Petitioner

Vs.

NTPC Tamil Nadu Energy Company Ltd.,
Vallur Thermal Power Project
Vekkuvoyalchavadi (P.O)
Ponneri Taluk, Thiruvallur District
Chennai - 600 103. ... Respondent

Prayer : Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari calling for the records pertaining to Tender No.NTECL/Fly ASH-SUPPLY/DOM/CS-5364 dated 12.04.2023 on the file of the respondent, insofar as relates to Condition No.4 "Inclusion of Traders and Transporter who can be individual, association of individuals /



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partnership firm, JV's, Private Ltd Firm, LLP Clauses", the same being in violative of notification in S.O.No.5841 (E) dt.31.12.2021 and MOP.No.9/7/2011-S.TH (Volume IV) dated 28.02.2023 issued by Government of India, Ministry of Power, to quash the said Clause No.4 providing eligibility to Traders and Transports.

For Petitioner : Mr.E.Om Prakash, Senior Counsel
Assisted by Mr.S.Siva Shanmugam

For Respondent : Mr.M.Vijayan
for M/s.King and Partridge

ORDER

The petitioner herein is an association of fly-ash users, which now challenges Clause 4 of the tender form dated 12.04.2023, on the ground that this clause, which provides the category of those who can participate in the tender, runs counter to the notification of Ministry of Environment, Forest and Climate Change dated 31.12.2021.

2. The entire controversy roams around a narrow space and they are bullet-pointed :

(a) Fly-ash is a by-product waste of thermal plants, and sometime in the past their non-disposal was considered as creating environmental



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concerns. Therefore, a policy decision was taken by the Government mandating that the thermal plants should dispose of 100% utilisation of the ash they produce. Accordingly, a draft notification was brought out by the Government on 22.04.2021, that culminated in a final notification dated 31.12.2021. This notification of the Government was the one stayed by NGT, but later the stay was vacated and the notification dated 31.12.2021, is still in operation. (For convenience, hence forth it would be referred to as the Notification)

(b) Clause A of the notification deals with the responsibilities of the thermal power plants to dispose the fly ash and bottom ash. Sub-clause (2) of Clause-A insists that ten specific categories of activities shall utilise the ash generated by the thermal plants. .

(c) It is in this backdrop, the respondent had come out with a tender notification dated, 12.04.2023. Clause-4 of the tender form prescribes the eligibility criterion for participating in the bid. The dispute revolves around this eligibility criteria.



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3. To make the issue more specific, the eligibility criteria provided in Clause-4 of the tender form lists that ***"all Buyers, who are Ash Users, Traders and Transporter who can be an Individual, Association of Individuals / Partnership firm, JVs, Pvt Limited firm, Limited Firm, LLP"*** are eligible to participate in the tender. The petitioner however, claim that only the end-users who are engaged in the activities in Clause A(2) of the notification dated 31.12.2021, alone can bid. According to the petitioner, allowing traders or other transporters either as individuals or association of individuals, partnership firms, joint ventures or private limited firms etc., would not fall within Clause A(2) of the notification dated 31.12.2021, some of them may well be a middle-man operating between the generators of fly-ash and the end-users.

4. Mr. Om Prakash, learned Senior Counsel appearing for the petitioner submitted that on the face of it, Clause 4 of the tender prescribing the eligibility criteria contravenes the tone and tenor of Clause A(2) of the notification, and the eligibility criteria in the tender form, to the extent it contravenes Clause A(2) of the notification requires to be struck down.



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5. Per contra, Mr.M.Vijayan of M/s.King and Partridge, the counsel for the respondent would argue that under Clause A(1), the thermal plants, the generators of fly ash and bottom ash, are mandated to dispose of the entire fly ash and the bottom ash that they generate. And if they do not dispose it off, they are exposed to the liability of paying environmental compensation under Clause C of the notification dated 31.12.2021. This apart, even Clause-A(2)(x) provides for export of fly ash. In effect, the spirit behind the notification dated 31.12.2021 is that, at any rate the generators of fly ash can keep it with them and they have to somehow dispose it off. The fallacy in the argument of the petitioner, argued the learned counsel, is that if it is restricted to mere end-users who are engaged in the activities in Clause A(2) of the notification, there is no guarantee that they would buy the entire 100% ash. Secondly, since fly ash has now have cover value, it is imperative that the respondent also optimise its revenue which is possible only when the tender is broad based. He placed reliance on the authorities in ***Directorate of Education and Others Vs Educomp Datamatics Ltd. and Others*** [(2004) 4 SCC 19] and ***Formation of Indian Network Marketing Association, Rep. by its President Vs M/s.Apple FMCG Marketing Pvt Ltd., & Others*** [2005 Writ L.R.321].



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6.1 The rival submissions are carefully weighed. What was feared is, an environmental pollutant has now turned into a valuable commercial commodity. This is well stated in the Ministry of Power's Advisory dated 22.02.2022. This provides for a tender process in disposing the fly ash or bottom ash generated by the thermal power plants. The relevant paragraphs are now extracted :

"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 help 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 TTPs 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 based TTPs are hereby advised to provide Ash to the prospective user agencies for all new commitments for supply of Ash as per the following guidelines which have been framed in accordance with MoEF&CC Notification dated 31.12.2021.

Procedure to be followed to dispose of ash:

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 remains un-utilized, then only, as one of the options, 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



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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."

6.2 The tender is accordingly invited vide tender notification dated 12.04.2023. The petitioner association is not averse to tender process, but expanding the category to individuals or entities that participate in the tender, it has a conflict between Clause A(2) of the notification dated 31.12.2021 and Clause-4 of the tender form. They are extracted below:



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Clause A(2) of the notification dated 31.12.2021	A. Responsibilities of thermal power plants to dispose fly ash and bottom ash: 1) 2) The ash generated from coal or lignite based thermal power plants shall be utilised only the following eco-friendly purposes namely: i. Fly ash based products viz bricks, blocs tiles, fibre cement sheets, pipes, boards, panels; ii. Cement manufacturing ready mix concrete; iii. Construction of road and fly over embankment, Ash and Geo-polymer based construction material; iv. Construction of dam; v. Filling up of low lying area; vi. Filling of mine voids; vii. Manufacturing of sintered or cold bonded ash aggregate; viii. Agriculture in a controller manner based on soil testing; ix. Construction of shoreline protection structures in coastal districts; x. Export of ash to other countries; xi. Any other eco-friendly purpose as notified from time to time.
Clause 4 of Tender Form dated 12.04.2023	4. Eligibility for bid participation : All Buyers who are Ash Users, Traders and Transporter who can be an Individual, Association of Individuals / Partnership firm, JVs, Pvt Limited firm, Limited Firm, LLP.

7. It is Clause A(2) which the petitioner relies on for this Court to test the legality of the eligibility criteria as provided in the tender form. Under Clause A(1) of the Notification, the thermal power plants that generate fly ash and bottom ash are under an obligation to dispose them entirely. In order to



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facilitate their disposal, the Government also has identified the industries where fly ash and bottom ash can be utilised. What the Government has notified under Clause A(2) is mere identification of the industries which can utilise the fly ash and the bottom ash generated by thermal power plants. In other words, the notification merely recognises two categories of persons, one, the generators of fly ash and bottom ash, and the other, the end-users of these products. It does not speak anything about how the thermal power plants / generators of fly ash and bottom ash make them available for their end-users.

8. If closely read, Clause A(2) only compels certain category of end-users in the industries specified in Clause A(2)(i) to (xi) to use fly ash or bottom ash. This would imply that these category of end-users do not have a choice, but to use fly ash or bottom ash in their manufacturing purposes. This Clause however, nowhere stipulates that the thermal power plants should sell fly ash or bottom ash directly to the end-users. Therefore, the perception of the petitioner that Clause A(2) requires to be considered as providing the eligibility criteria, in the context of disposal of fly ash or bottom ash appears misconceived.



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9. It might be that hitherto the end-users might have been procuring fly ash and bottom ash directly from the thermal power plants. However, as has been mentioned earlier, what was once feared as an environmental threat has now become an valuable commodity in commerce. Now, the thermal plants have found an avenue not only for disposing the fly ash and bottom ash, but also for generating revenue out of it.

10. When money is involved, then the generator is entitled to the best price that their product can obtain. Set in the context, the tender process only makes the process more transparent as it optimises the possibility for optimising the revenue. Therefore, those end-users as stated in Clause A(2) of the notification, who might have been procuring fly ash and bottom ash directly from the thermal plants, may have to now reconcile to this reality. This apart, the tender does not debar any of the end-users from participating in the tender process. In a world of commerce and competition, the end-user may not claim protection from competition in procuring their raw-material.

11. To conclude, this Court does not find merit in the claim of the petitioner



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and hence, this writ petition is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

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Index : Yes / No
Speaking order / Non-speaking order
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To:

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Vekkuvoyalchavadi (P.O)
Ponneri Taluk, Thiruvallur District
Chennai - 600 103.



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N.SESHASAYEE.J.,

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Pre-delivery order in
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