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W.P.Nos.28106 & 20924 of 2021 & 10057 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.06.2024

CORAM:

THE HONOURABLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

W.P.Nos.28106 & 20924 of 2021 & 10057 of 2022 and
WMP.Nos.22200 of 2021 & 891 of 2022

WP.No.28106 of 2021

KMCCL-JSRIDPL(JV),
Rep. By Authorised Signatory S.Karthikeyan,
4th Floor, New No.17, Old No.8,
Vijayaraghava Raod, T.Nagar, Chennai 600 017 ... Petitioner

Vs.

- 1.National Highway Authority of India,
Represented by its Project Director,
Project Implementation Unit, Kancheepuram
No.7/16, Govindarajan Street,
Tambaram West, Chennai 600 045
- 2.NTPC Tamilnadu Energy Company Limited,
Represented by its Chief Executive Officer(CEO),
NTECL Vallur Thermal Power Project,
VellivoyalChawadi, Ponneri Taluk,
Thiruvallur District, Chennai 600 103 ... Respondents

PRAYER: Writ Petition is filed under Article 226 of Constitution of India praying to issue a Writ of Mandamus forbearing the second respondent from selling/supplying/permitting the excavation of fly ash to



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any person, entity or agency other than the petitioner in any manner whatsoever in pursuance of their E-Auction proceedings dated 03.11.2021.

For Petitioner : Mr.Nithyaesh Natraj

For Respondents

For R1 : Mr.SU.Srinivasan

For R2 : Mr.Vijayan
for M/s.King & Partridge

WP.No.10057 of 2022

KMCCL-JSRIDPL(JV),
Rep. By Authorised Signatory S.Karthikeyan,
JSR castle, 4th Floor, New No.17, Old No.8,
Vijayaraghava Raod, T.Nagar, Chennai 600 017 ... Petitioner
Vs.

1.National Highway Authority of India,
Represented by its Project Director,
Project Implementation Unit, Kancheepuram
No.7/16, Govindarajan Street,
Tambaram West, Chennai 600 045

2.NTPC Tamilnadu Energy Company Limited,
Represented by its Chief Executive Officer(CEO),
NTECL Vallur Thermal Power Project,
Vellivoyal Chawadi, Ponneri Taluk,
Thiruvallur District, Chennai 600 103 ... Respondents

PRAYER: Writ Petition is filed under Article 226 of Constitution of India praying to issue a Writ of Mandamus directing the second respondent herein to comply with the notification dated 03.11.2009,



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issued by the Ministry of Environment and Forests, and consequently, direct the second respondent to supply fly ash at free of cost to the petitioner herein, in due compliance with the notification dated 03.11.2009 issued by the Ministry of Environment and Forests as well as the second respondent's own commitments to the petitioner.

For Petitioner : Mr.Nithyaesh Natraj

For Respondents

For R1 : Mr.SU.Srinivasan

For R2 : Mr.Vijayan
for M/s.King & Partridge

WP.No.20924 of 2021

KMCCL-JSRIDPL(JV),
Rep. By Authorised Signatory S.Karthikeyan,
4th Floor, New No.17, Old No.8,
Vijayaraghava Raod, T.Nagar, Chennai 600 017 ... Petitioner

Vs.

- 1.National Highway Authority of India,
Represented by its Project Director,
Project Implementation Unit, Kancheepuram
No.7/16, Govindarajan Street,
Tambaram West, Chennai 600 045
- 2.NTPC Tamilnadu Energy Company Limited,
Represented by its Chief Executive Officer(CEO),
NTECL Vallur Thermal Power Project,
Vellivoyal Chawadi, Ponneri Taluk,
Thiruvallur District, Chennai 600 103
- 3.Ministry of Environment, Forests and Climate Change,
Jor Bagh, Lodhi Colony,



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New Delhi 110 003

... Respondents

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PRAYER: Writ Petition is filed under Article 226 of Constitution of India praying to issue a Writ of Mandamus directing the second respondent to comply with the statutory government notification vide S.O.254(E) dated 25.01.2016 issued by the third respondent insofar as it relates to supply of pond ash to the petitioner is concerned and consequently direct the second respondent to supply the Pond Ash at free of cost to the petitioner and further direct the second respondent to comply with the letter of the first respondent dated 07.11.2019 bearing No.NHAI/11036/2/2019/PIU.Kanchee/2540 in letter and spirit.

For Petitioner : Mr.Nithyaesh Natraj

For Respondents

For R1 : Mr.SU.Srinivasan

For R2 : Mr.Vijayan
for M/s.King & Partridge

For R3 : Mr.R.Rajesh Vivekananthan,
Assistant Solicitor General of India

COMMON ORDER

The writ petition in WP.No.28106 of 2021 has been filed for forbearing the second respondent from selling/supplying/permitting the excavation of fly ash to any person, entity or agency other than the petitioner in any manner whatsoever in pursuance of their E-Auction



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proceedings dated 03.11.2021; the writ petition in WP.No.10057 of 2022 has been filed for direction to the second respondent to comply with the notification dated 03.11.2009 issued by the Ministry of Environment and Forests, and consequently to direct the second respondent to supply fly ash at free of cost to the petitioner in due compliance with the notification dated 03.11.2009 issued by the Ministry of Environment and Forests as well as the second respondent's own commitments to the petitioner; and the writ petition in WP.No.20924 of 2021 has been filed for direction to the second respondent to comply with the statutory government notification vide S.O.254(E) dated 25.01.2016 issued by the third respondent insofar as it relates to supply of pond ash to the petitioner is concerned and consequently to direct the second respondent to supply the Pond Ash at free of cost to the petitioner and further direct the second respondent to comply with the letter of the first respondent dated 07.11.2019 bearing No.NHAI/11036/2/2019/PIU.Kanchee/2540 in letter and spirit.

2. In all the writ petitions, petitioner is one and the same and the issue involved in these writ petitions is pertaining to supply of fly ash at free of cost to the petitioner which is a road constructing agency and



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awarded contract for the project of six laning road from Sriperumbudur to Karaipettai by the first respondent. Therefore, this Court is inclined to pass common order.

3. The petitioner is a road contractor. It was a successful bidder of the tender floated by the first respondent for the project of six laning of Sriperumbudur to Karaipettai from Km.37.000 to Km 71.015(34.015 km) of NH-4 of EPC mode. Accordingly, agreement was entered between the petitioner and the first respondent on 08.02.2019. While executing the said project, there are difficulties in getting soil for road works. The petitioner took into consideration of the notification dated 25.01.2016 issued by the Ministry of Forest, Environment and Climate Change (hereinafter called as 'Ministry') and accordingly, thermal power plants shall supply fly ash to the construction agency at the place of work at free of cost including transportation, if the construction is within the radius of 300 kilometers. The reason behind the issuance of the said notification is that since by-product of coal manufacturing is fly ash, which is also referred to as pond ash, contains toxic chemicals. Therefore, the first respondent by way of communication



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dated 07.11.2019 to the second respondent thereby recommended the supply of fly ash for the petitioner to the tune of approximately 30 lakh metric tonnes. However, it was not supplied by the second respondent. Hence, the first respondent had meeting in which they have taken a categorical stand that the pond ash will be made available to the petitioner at free of cost.

4. The learned counsel for the petitioner would submit that as per the notification dated 25.03.2015, within a radius of 100 kilometers of coal or lignite power plant, the cost of transportation of pond ash for building and road construction project, shall be borne by such coal or lignite based power plants and the cost of transportation beyond a radius of 100 kilometers and upto 500 kilometers shall be shared equally between the user construction agency engaged and the coal or lignite based thermal power plant. It was subsequently amended by another notification dated 25.01.2016, wherein the maximum distance of 100 kilometers was increased to 300 kilometers. Thus, upto a radius of 300 kilometers, cost of transportation of fly ash will have to be borne by the power plant. Though the first respondent informed the contract awarded



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in favour of the petitioner to the second respondent by its communication dated 07.11.2019 and recommended for supply of fly ash, the second respondent did not consider the request made by the first respondent and failed to supply fly ash and the second respondent insisted to bear the transportation cost by the petitioner. Therefore, the petitioner submitted detailed report dated 27.11.2020 to the second respondent for supply of pond ash on free of cost as per the existing guidelines issued by the Ministry. The second respondent by its communication dated 15.06.2021, informed the petitioner that the representation submitted by the petitioner cannot be considered since the writ petition in WP.No.33323 of 2019 is pending and awaiting orders.

4.1 He further submitted that already the first respondent and the second respondent had entered into a memorandum of understanding for supply of fly ash. However, the second respondent failed to comply with the same. He further submitted that the Ministry had issued another circular dated 22.09.2021 and notified that the power plants shall provide the fly ash to end users through a transparent bidding process only.



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Therefore, the fly ash would be provided to end users through transparent bidding process and it is applicable for future projects and not existing ones. Hence, by way of another notification dated 08.11.2021, clarified that the circular dated 22.09.2021 would have only prospective application and insofar as the existing projects were concerned, the Ministry had clarified that the fly ash may be provided as per the existing commitments. Therefore the circular dated 22.09.2021 is not applicable to the case of the petitioner since the petitioner is coming under the existing commitments as per communications and recommendations issued by the first respondent. Without considering the same, the second respondent had auctioned the fly ash and two agencies were awarded contract of sale of fly ash for a period of one year. It is hit by doctrine of fairness. The second respondent, being an instrumentality of state in terms of Article 12 of the Constitution of India, is duty bound to ensure that it acts in a fair, reasonable, non arbitrary manner. By virtue of notifications issued by the Ministry from time to time to supply fly ash at free of cost and accordingly, the second respondent is bound to supply fly ash to the petitioner. In fact, the second respondent, by its communications dated 29.07.2021 and 21.09.2021, called upon the first



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respondent to make necessary arrangements for excavation of fly ash at their side. However, it was not complied with and proceeded with auction for sale of fly ash.

4.2 He further submitted that the project was awarded to the petitioner to lay six lane road from Sriperumbudur to Karaipettai and it is a national asset creation project. It is getting delayed due to non supply of fly ash which is an indispensable component in construction of roadways. Therefore, as per the notification issued by the Ministry, the second respondent ought to have supplied fly ash on free of cost. In fact, the first respondent supported the case of the petitioner by way of two communications to the second respondent. The notifications issued by the Ministry which cast a duty on thermal power plants to supply fly ash at free of cost to road constructing agencies like the petitioner are binding upon all thermal power plants.

5. The second respondent filed counter and the learned counsel appearing for the second respondent submitted that the second respondent is a joint venture company of NTPC and TANGEDCO. The Vallur



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Thermal Power Project was implemented in two phases after obtaining environmental clearance. Thereafter, it had successfully commissioned the units. There are two types of ash produced in thermal power plants i.e. bottom ash and fly ash. As per environmental clearance conditions for Phase-I, the second respondent was sanctioned with two numbers of ash dyke lagoon-I and ash dyke lagoon-II with the area of 150 acres and 325 acres respectively. The main purpose of the two lagoons is, if one of the lagoon is filled up, the other lagoon will be used for ash dumping and the filled lagoon will be used for ash removal or it will be raised for further ash dumping. There is no privity of contract between the petitioner and the second respondent. In fact, initially the second respondent agreed to supply of fly ash on free of cost. Subsequently there is huge demand for fly ash and as such, no memorandum of understanding entered between the first respondent and the second respondent for supply of fly ash on free of cost. That apart, only one ash dyke lagoon-II was constructed and it has been in operation in the second respondent plant. The ash dumping is in slurry mode and ash is normally submerged in water and dry ash exposure is in limited area. The removal of pond ash is possible only in the locations where water is not available during excavation for ash



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loading from the dyke. The present level of ash dyke is around 5.80 meter including water level. The estimated total ash quantity is 36.47 lakh metric tonne. The ash below 5 meter level could not be removed from the ash dyke due to the presence of water and the heavy vehicle like tipper, jcb, poclain, etc cannot move inside the dyke. The quantity of ash upto 5 meter level is approximately around 30 lakh metric tonnes. Thus, the quantity of ash available for removal from the dyke is only 6.47 lakh metric tonnes and it is spread over 325 acres.

6. Under the Environment Protection Act and the Rules, Central Government issued notification in SO.No.5481(E) dated 31.12.2021 giving various directions to restrict the excavation of top soil for manufacturing of bricks and promoting the utilization of fly ash in manufacturing building materials etc. As per the said notification, the thermal power plant may charge for the ash cost and transportation as per mutually agreed terms in case power plant is able to dispose the ash through other means. It also clarified that the provision of free ash and free transportation shall be applicable only in the event of the thermal power plant is not able to dispose of the ash. Now the ash utilisation of the second respondent for the year 2019-20 is 121.02 % and for the year



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2020-21 is 122.08 %. The pond ash from the ash dyke is issued to brick industries and the cement manufacturers by their own transportation cost and also for sale price. Therefore, no cost burden on the second respondent while achieving 100% ash utilisation.

7. That apart, there is huge demand for ash and as such, the second respondent is able to sell for cost to the required buyers. In fact, the second respondent floated tender in which agencies such as brick industries and cement manufacturers had participated in the transparent e-auction in which two agencies were successful in the bidding process. They had mobilised and started lifting the pond ash from the dyke by paying the advance amount, bank guarantee, etc. as per the contract conditions. They are paying Rs.31/- per metric tonne and Rs.30/- per metric tonne respectively for pond ash and transportation cost is also borne by them. Admittedly, the petitioner has been the contractor in the project of six lane from Sriperumbudur to Karaipettai by successful bidder of the tender floated by the first respondent. The petitioner has no privity of contract with the second respondent for supply of any fly ash on free of cost. Therefore, the petitioner is a stranger to the second



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respondent and no contract between the petitioner and the second respondent whatsoever.

8. As far as the notification issued by the Ministry dated 25.03.2015, a radius of 100 kilometers from coal or lignite based thermal power plant, cost of transportation of fly ash for building and road construction projects shall be borne by such coal or lignite based thermal plant and the cost of transportation beyond a radius of 100 kilometers and upto 500 kms. shall be shared equally between user construction agency engaged and coal or lignite based thermal power plant. By the subsequent notification dated 25.01.2016 issued by the Ministry clarified that the coal or lignite based thermal power plants shall, within a radius of 300 kilometers, bear the entire cost of transportation of ash to the site of road construction projects under Pradhan Mantri Gramin Sadak Yojna and asset creation programmes of the Government involving construction of buildings, road, dams and embankments. By the notification dated 08.11.2021, the Ministry clarified that the thermal power plants have been advised to provide fly ash to the end users for all new commitments in accordance with the guidelines and that the thermal power plants may



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continue to provide fly ash for national asset creation projects under their existing commitments based on the transportation rates arrived at on the basis of transparent competitive bidding / state schedule of rates, whichever is lower as per the Central Electricity Regulatory Commission norms.

9. Though the first respondent supported the case of the petitioner, as stated supra, there is absolutely no privity of contract between the petitioner and the second respondent and there is no memorandum of understanding between the first respondent and the second respondent. Subsequently, by another notification dated 31.12.2021 issued by the Ministry clarified that the thermal power plant may charge for ash cost and transportation as per mutually agreed terms, in case thermal power plant is able to dispose of the ash through other means and those agencies make request for it and the provision of ash free of cost and free transportation shall be applicable if thermal power plant serves a notice on the construction agency for the same. As stated supra, already there is huge demand for fly ash from the agencies such as cement manufacturers and brick manufacturers. Therefore, there is absolutely no compulsion on the part of the second respondent to supply



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fly ash on free of cost. Further, there was no existing commitments from the second respondent for supply of fly ash to the petitioner and as such, any of the notifications of the Ministry are not applicable to the case of the petitioner.

10. That apart, the petitioner had entered into contract with the first respondent by calculating material cost. While being so, the fly ash being one of the raw material for laying road, it cannot be supplied on free of cost to the petitioner when there is a huge demand by other industries and the second respondent can able to remove all fly ash with the cost of manufacturers of bricks and cement. Further, there is no such clause in the contract entered between the petitioner and the first respondent for supply of fly ash by the second respondent on free of cost and the transportation charges should be borne by the second respondent. Therefore, the doctrine of fairness is not at all applicable to the case on hand since there is absolutely no compulsion or statutory bond on the part of the second respondent to supply fly ash at free of cost to the petitioner. Hence, this Court finds no merits in all the writ petitions. As such, all the writ petitions are devoid of merits and liable to be dismissed.



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11. Accordingly, all the writ petitions are dismissed.
Consequently, connected miscellaneous petitions are closed. There shall
be no order as to costs.

21.06.2024

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

1. Project Director,
National Highway Authority of India,
Project Implementation Unit, Kancheepuram
No.7/16, Govindarajan Street,
Tambaram West, Chennai 600 045
2. Chief Executive Officer(CEO),
NTPC Tamilnadu Energy Company Limited,
NTECL Vallur Thermal Power Project,
Vellivoyal Chawadi, Ponneri Taluk,
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3. Ministry of Environment, Forests and Climate Change,
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