



W.P. Nos.19534 & 19558/2025

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
19.09.2025	15.10.2025

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

W.P. NOS.19534 & 19558 OF 2025

AND

W.M.P. NOS. 21847, 21850, 21855, 21858, 21883, 21886 & 21889 of 2025

DPJ Pollachi HAM Project Pvt. Ltd.

Rep. By Authorised Signatory, Gautam Sharma

17, Rajlaxmi B. No.6, Sujata Layout

Indraprastha Nagar, Nagpur 440 022.

.. Petitioner in WP 19534/2025

DPJain Bangalore-Chennai Express Pvt. Ltd.

Rep. By Authorised Signatory, Gautam Sharma

Shop No.L-8, Himalaya Accord Apartments

Opp. Law College, Amravati Road

Nagpur 440 010.

.. Petitioner in WP 19558/2025

- Vs -

1. Union of India

Through its Secretary

Ministry of Power

Shram Shakti Bhawan

Rafi Marg, New Delhi 110 001.

2. Ministry of Road, Transport & Highways (MoRTH)

Through its Secretary

Government of India



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Transport Bhawan
1, Parliament Street
New Delhi 110 001.

3. Ministry of environment, Forests &
Climate Change (MoEF&CC)
Through its Secretary
Indira Paryavaran Bhawan
Jor Bagh Road, New Delhi 110 003.

4. National Highways Authority of India (NHAI)
Through its Chairman
Under Ministry of Road, Transport & Highways
G 5 & 6, Sector 10, Dwarka, New Delhi 110 075. .. RR-1 to 4 in both WPs

5. Mettur Thermal Power Station – 1
Through its Chief Engineer
Mettur Dam – 6, Thoppur-Mettur Dam
Dhavani – Erode Rd, Salem 636 406. .. R-5 in WP 19534/25

6. Tamil Nadu Generation & Distribution
Corporation Ltd. (TANGEDCO)
Through its Chairman
6th Floor, TANTRANSCO Building
144, Anna Salai, Chennai 600 002. .. R-6 in WP 19534/25

7. NTPC Tamil Nadu Energy Company Ltd. (NTECL)
Vallur Thermal Power Plant
Through its Managing Director cum Chairman
Vallur Thermal Power Project
Vellaivoyal Chavadi P.O. Ponneri Taluk
Chennai 600 103. (Tamil Nadu) .. R-5 in WP 19558/25



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W.P. No.19534 of 2025 filed under Article 226 of the Constitution of India praying this Court to issue a writ of certiorarified mandamus to call for the entire records relating to the Circular No.9/7/2011-St Th.(Vol.IV) dated 22.02.2022 issued by respondent No.1 (i.e., Ministry of Power, Government of India) as being contrary to notification dated 31.12.2021 issued by respondent No.3 (i.e., Ministry of Environment, Forests & Climate Change) and consequently direct the Respondent No.5 (i.e., Mettur Thermal Power Station-1) and Respondent No.6 (i.e., Tamil Nadu Generation & Distribution Corporation Ltd.) to supply fly ash free of cost along with free transportation to the petitioner in relation to the subject road project (i.e., four lane of Madathukulam to Pollachi Section of NH-209) in terms of notification dated 14.09.1999 and/or notification dated 31.12.2021 issued by respondent No.3, as amended from time to time.

W.P. No.19558 of 2025 filed under Article 226 of the Constitution of India praying this Court to issue a writ of certiorarified mandamus to call for the entire records relating to issuance of Letter No.NHAI/11029/31/2021/PIU.Kanchee/2306 dated 12.09.2023 and Decision No.NHAI/11029/31/2021/PIU.Kanchee/0334 dated 12.02.2024 of the 4th respondent (NHAI) and the Circular No.9/7/2011-St Th.(Vol.IV) dated 22.02.2022 issued by respondent No.1 and quash the same as being contrary to the statutory notifications and circulars issued by respondent No.3 (MoEF & CC) and the circulars dated 27.08.2018, 07.01.2019 and 23.10.2020 issued by respondent No.2 (MoRTH) which mandate the use of fly ash in highway construction projects and consequently direct the respondent No.5 (i.e., Vallur Thermal Power Plant) to supply fly ash free of cost along with free transportation to the petitioner in



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relation to the subject road project (i.e., Phase III/Package-III), i.e., 4-lane Bangalore – Chennai Expressway (Km 204.500 to Km 230.000) in terms of Notification dated 14.09.1999 and/or notification dated 31.12.2021 issued by respondent No.3 as amended from time to time.

For Petitioner : Mr. J.K.Mittal, for
Mr. N.Nithianandam

For Respondents : Mr. K.K.Muralidharan, SCGSC
For RR-1 to 3 in both petitions
Mr. AR.L.Sundaresan, ASG
Assisted by Mrs. S.R.Sumathy
for R-4 in both petitions
Mr. P.Wilson, SC, for
M/s. K.Arun Prasad for RR-5 & 6
in WP No.19534/2025
Mr. M.Vijayan for
M/s.King & Partridge for R-5
in WP No.19558/2025

COMMON ORDER

The writ petitions have been filed challenging the circular of the 1st respondent dated 22.02.2022, which is contrary to the notification issued by the 3rd respondent dated 31.12.2021 and for a consequential direction to the respective respondents, viz., respondents 5 and 6 in W.P. No.19534 and the 5th respondent in W.P. No.19558/2025 to supply fly ash free of cost along with free



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transportation to the petitioner for the purpose of the respective road projects undertaken by the petitioner pursuant to the concession agreement entered into with the 4th respondent, viz., National Highways Authority of India.

2. While W.P. No.19534/2025 relates to the construction of the road project between Madathukulam and Pollachi section of NH-209, W.P. No.19558/2025 relates to the construction of the road project relating to Bangalore-Chennai Expressway between Kms.204.500 and Kms.230.000. Though the dates relating to the tender, its acceptance, finalisation, award and entering into agreement are on different dates, notwithstanding the same, since the legal issue involved in both the petitions are one and the same, they are taken up together for hearing and disposed of by this common order.

3. Suffice to cull out the facts in one of the petitions, as the issue involved in both the petitions revolve around the various notifications issued by the different wings of the Government, which mandates the use of fly ash in the construction of roads, etc., for which supplies ought to be made by the power generating corporation, within a prescribed radius, free of cost, including free



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transportation, but which have not been provided to the petitioner relegating the petitioner to come before this Court for quashment of certain notification and also for reimbursement of certain sums of money from the 4th respondent towards the expenses involved in laying of the roads by the use of earth.

4. The petitioner in both the petitions are companies, which are in the infrastructure industry and in pursuance to the notice inviting tender dated 4.5.2018, and notice inviting tender dated 28.10.2020, the D.P. Jain & Co. Infrastructure Pvt. Ltd., participated and was declared as the successful bidder. As per the conditions in the Letter of Award, the successful bidder was to form a Special Purpose Vehicle (for short 'SPV') in accordance with which the respective petitioner companies were incorporated under the provisions of the Companies Act, 2013. Thereafter, the 4th respondent entered into Concession Agreement on 5.12.2019 and 4.2.2022 respectively for the respective projects covered by the writ petitions in and by which the petitioner was the Concessioner and the 4th respondent remained the Executing Agency.



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5. It is the case of the petitioners that Ministry of Environment, Forests & Climate Change (for short 'MoE') had issued a notification dated 14.9.1999 promoting the use of fly ash inter alia in construction activities within a radius of 50 Km from the thermal power plant and making it mandatory for the Thermal Power Plants (for short 'TPP') to make available fly ash free of cost. It is the further case of the petitioners that the said notification was amended from time to time, viz., 27.8.2003, 03.11.2009 and thereafter 25.1.2016. Initially the mandate was to supply the fly ash within a radius of 50 Km of the TPP. Later on, the said radius was enhanced to 300 Kms., of the TPP. It is the further case of the petitioners that the cost of transportation of the fly ash to the site of road construction project under the Asset Creation Program of the Government was to be borne by the TPP vide notification dated 14.9.1999, which was amended on 27.8.2003, 3.11.2009 and 25.1.2016.

6. It is the further case of the petitioners that consequent upon the notification of MoE mandating the use of fly ash in road/flyover embankment construction, circular was issued by Ministry of Transport & Highways (for short 'MoRT') for the use of fly ash in construction of roads reiterating that fly ash shall



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be supplied free of cost and transportation cost shall be borne by the TPP. The circular further provided for entering into MoU for the use of fly ash between the TPP and the construction agency/contractor. It is the further averment of the petitioner that to this end, MoRT had requested the National Highways Authority of India (for short 'NHAI') to assess the quantity of fly ash that can be utilised in each of the ongoing project within the radius of 300 Kms. of the TPP.

7. It is the further averment of the petitioners vide circular dated 7.1.2019, MoRT had mandated that NHAI and all other project executing agencies shall use fly ash generated from private thermal stations/plants and MoU in this regard may be signed with them. Further circular dated 23.10.2020 was also issued by MoRT with regard to use of fly ash in road construction in line with the guidelines issued by MoE and MoRT.

8. It is the further case of the petitioners that respective letters were addressed to NHAI seeking confirmation with regard to availability of fly ash at TPPs for project requirement in line with the notifications/circulars issued by MoE and MoRT. It is further averred by the petitioners that pursuant to the letter of



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the petitioners, NHAI addressed letter seeking confirmation with regard to availability of fly ash for road construction in line with the notifications/circulars issued by MoRT and MoE and further pointed out that the petitioners were ready and willing to use fly ash in their projects.

9. It is further averred that in response to the aforesaid letter, the Tamil Nadu Generation and Distribution Corporation Ltd. (for short 'TANGEDCO'), vide its letter dated 14.7.2021, informed the 4th respondent that Mettur Thermal Power Station is already ensuring full utilisation of fly ash and, therefore, the TPP is not in a position to supply fly ash free of cost to NHAI's project, but informed that wet fly ash is available, which can be given for the project at the cost of Rs.71/- per metric ton with GST @ 5% and further informed that the transportation cost shall be borne by NHAI. The aforesaid communication from TANGEDCO was communicated to the petitioner vide its letter dated 20.07.2021. It was further informed by TANGEDCO that the requisite wet ash for the project is available.



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10. Letter dated 2.8.2021 was addressed by the petitioner to NHAI informing about the availability of wet ash, as confirmed by Mettur Thermal Power Station and pointing out that it is being made available on charge, though MoE notification prescribed that the ash as also its transportation should be provided free of cost and, therefore, requested NHAI to take up the matter with the TPP to bear the cost of the ash and transportation.

11. It is further averred by the petitioner that it had factored in the use of fly ash in its financial bid, which was informed to NHAI through the communication dated 4.9.2021 and further pointed out that the TPP has declined to provide the fly ash as also transportation of the same free of cost and, therefore, called upon NHAI to review the cost proposal of the project.

12. It is further averred by the petitioner that the Project Director, NHAI, vide its letter dated 5.10.2021 addressed to the Regional Officer, NHAI, requested to take up the matter with the Principal Secretary, Highways and Minor Ports, Government of Tamil Nadu to issue suitable direction to the TPP to supply fly ash free of cost including transportation as per the circular dated 27.8.2018.



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13. It is the further averment of the petitioner that vide letter dated 12.10.2021 to TANGEDCO pointing out the meeting held on 11.9.2021 of the Chief Secretary, Government of Tamil Nadu with reference to the circular dated 27.8.2018 on the issue of utilisation of fly ash in the construction of road and requested to issue suitable direction to the TPP for bearing the transportation cost for supply of ash for the project of the petitioner.

14. It is the further averment of the petitioner that pursuant to the letter of the petitioner dated 4.9.2021, pointing out that the petitioner has not factored in the use of fly ash in the financial bid, Independent Engineer was appointed by NHAI, who, vide his letter dated 26.10.2021 addressed to NHAI had opined that utilisation of soil will not constitute change of scope.

15. It is the further averment of the petitioner that vide letter dated 1.11.2021, the petitioner requested NHAI once again to supply fly ash free of cost by TPP and also to bear the cost of transportation in line with the notification of



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MoE and also to review the cost proposal of the project in view of the associated cost of wet ash supply from TPP.

16. MoE issued another notification dated 31.12.2021 in supersession of the earlier notification dated 14.9.1999 with regard to mandatory utilisation of fly ash and for the supply of the same by the TPP within a radius of 300 Kms. The petitioner has also averred that there have been to and fro communications between the supply of free fly ash/wet fly ash by the TPP including free transportation to be provided to the petitioner for the purpose of the project.

17. It is further averred that a circular dated 22.2.2022 was issued by Ministry of Power with regard to supply of fly ash to prospective user agencies, as per the stipulation in the notification of MoE dated 31.12.2021, but which circular ran counter to the notification wherein it had been erroneously stated that the TPP may charge for ash cost and transportation and that the provision of ash, free of cost and free transportation is applicable only if the TPP serves a notice on the construction agency. The said circular is contrary to the notification dated 31.12.2021.



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18. It is further averred that another Office Memorandum dated 26.6.2023 was issued by the Ministry of Power with reference to the Minutes of the meeting held on 14.6.2023 of the Hon'ble Minister of Power with regard to the issue relating to supply of ash for road project of MoRT/NHAI in which it was decided that TPP shall provide ash as per the notification dated 25.1.2016 with a caveat that where ash is already auctioned, the TPP may issue a No Availability Certificate to MoRT/NHAI so that an alternative arrangement may be looked into by MoRT/NHAI contractors, based on which a circular was issued by NHAI on 13.7.2023 with a reference to the above minutes.

19. Letter was thereafter addressed by the petitioner, dated 9.9.2023 to NHAI informing the efforts taken by the petitioner to obtain fly ash for use in the project, which could not be materialised and, thereafter, vide letter dated 18.7.2024, the petitioner wrote to the Project Director, NHAI seeking an amount of Rs.249,92,50,463/- as the cost of procurement, transport, etc., for the soil/borrow earth which was used in the place of fly ash. It is further averred that the said amount was an estimation cost and till 30.11.2024, the cost incurred was



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Rs.229,05,73,877/-. However, NHAI rejected the claim of the petitioner seeking the amount of Rs.249,92,50,463/-. It is the further averment that the issue with regard to the claim of the petitioner was raised in the meeting chaired by the Minister of MoRT in which it was agreed that NHAI shall reimburse the amount towards the fly ash and later seek settlement from the Ministry of Power and the Office Memorandum dated 22.11.2024 in this regard was issued, which was pursuant to the meeting held on 30.09.2024.

20. The petitioner raised the issue of reimbursement of the cost based on the above minutes with NHAI vide its letter dated 16.12.2024 and 18.12.2024, but the said claim was rejected by NHAI vide its reply dated 9.1.2025 and the petitioner was advised to refrain from raising the said issue.

21. It is the further case of the petitioner that with regard to an agreement between the petitioner and NHAI for four lane Nagpur-Umred section, as fly ash was to be made available free of cost for the construction, NHAI entered into an understanding dated 6.1.2020 with NTPC for the supply of fly ash free of cost in the said project. However, inspite of repeated requests, NHAI did not enter into



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such a MoU with TANGEDCO, which has caused immense loss to the petitioner, as the petitioner was force to use borrow earth in place of earth, which had incurred substantial cost.

22. It is further averred that though NHAI issued notice for a meeting dated 4.2.2025 for the purpose of having a discussion with regard to issue of fly ash and reimbursement of transportation cost in the project for projects, which bid due date falls between 25.1.2016 and 31.12.2021, however, the petitioner's project also being within the said time period was not included and though the said aspect was brought to the notice of NHAI, however, the petitioners' project was not included and for reasons best known to NHAI, the meeting did not take place.

23. In spite of repeated demands made by the petitioner calling upon NHAI for reimbursement of the cost towards the borrow earth used for the project, since no action was forthcoming the petitioner is constrained to seek for a direction to NHAI as also the TPP, which falls within the 300 Kms., radius, to



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supply fly ash free or in the alternative to reimburse the amount spent by the petitioner towards the cost of purchase of borrow earth for the project.

24. Learned counsel appearing for the petitioner submitted that supply of fly ash free of cost by the TPP inclusive of transportation cost to be borne by the TPP was mandated under the notification of MoE way back on 14.9.1999, continues to be in force till date, without it being superseded, which provides that the TPP shall make available ash without any payment or any other consideration for the purpose of manufacturing ash-based products, which includes utilisation in construction of roads, embankments, dams, dykes or any other construction activity within a radius of 50 Kms..

25. It is the further submission of the learned counsel that vide notification dated 27.08.2003, except for the radius within which the construction activity is carried out, the supply of fly ash free of cost was retained. It is further submitted by the learned counsel that even in the subsequent notification dated 3.11.2009, no modification has been made. Thereafter, notification dated 25.01.2016 was issued in which modification was made with regard to the radius within which the



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supply of fly ash was to be free of cost and transportation cost to be borne was also modified providing for a sharing of transportation cost between the TPP and the user. Certain other additions and modifications were also made to the manner in which assessment is to be made by the authority while disbursing payment and the manner in which certification is to be made with regard to usage of fly ash in the construction process.

26. It is the further submission of the learned counsel that MoRT had even emphasised the need for providing fly ash and transportation free of cost towards the supply of fly ash for the purpose of road construction, which would be evident from the letter dated 27.8.2018 and directions have been issued in the said letter to the TPPs and the construction agency/contractor to enter into a MoU and the quantity of fly ash available with the TPP was also directed to be provided to the Ministry. It is therefore the submission of the learned counsel that there is a clear prescription and a mandate by MoE as well as MoRT that fly ash is to be used in the construction of the road and that the said fly ash is to be supplied free of cost, which would include free transportation as well. Reference to the letter dated 7.1.2019 is also drawn by the learned counsel for the



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petitioner by submitting that it is incumbent on NHAI to enter into MoU with the TPP so as to make fly ash available for the construction of roads or flyover embankments within a radius of 300 Kms. of the TPP.

27. Learned counsel for the petitioner further submits that insofar as the two tenders are concerned, the said tenders were issued and confirmed as per the details provided below, which clearly shows that it is prior to the notifications dated 12.02.2024, 12.09.2023 and 22.02.2022 and, therefore, the said notifications cannot be made applicable to the case of the tender of the petitioner. Therefore, it is the duty of NHAI as also the TPP which is within a radius of 300 Kms., from the area where the construction of road is taken up, to provide fly ash free of cost to the contractor for putting up the road.

28. It is the further submission of the learned counsel that the financial bid submitted by the petitioner as well as the concessionaire agreement clearly reveal that utilisation of fly ash was factored in the financial bid when the bid was filed, but the Independent Engineer, who had given his opinion, has not properly appreciated the aforesaid facts and had given the opinion that the utilisation of



fly ash was not factored in the financial bid and, therefore, the claim of the petitioner for supply of free fly ash or to reimburse the cost of earth that was procured by the petitioner for the purpose of laying the road does not need to be honoured by NHAI is grossly and patently erroneous.

29. It is the further submission of the learned counsel that all along through the entire sequence of events, when the petitioner had addressed letters to NHAI for its intervention with the TPP to provide fly ash, at no point of time NHAI has made out a case that fly ash would not be free and it had addressed the TPP to provide free fly ash including free transportation to the petitioner for the purpose of construction of the road. Such being the case, NHAI cannot now come before this Court and claim that the tender conditions does not provide for utilisation of fly ash alone for the construction of the road and, therefore, the utilisation of earth by the petitioner cannot be reimbursed at the hands of NHAI.

30. It is the further submission of the learned counsel that as per the circular dated 7.1.2019, MoU is to be entered between NHAI and the TPP and failure on the part of the TPP and NHAI to enter into MoU cannot make the



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petitioner to bear the cost of procurement of fly ash and transportation of the same to site, as it does not come within the scope of work of the petitioner.

31. It is the further submission of the learned counsel that the opinion given by the Independent Engineer that the financial bid has not factored in the cost of the fly ash or for that matter earth is grossly erroneous as, as per the 1999 notification, it is mandatory for usage of fly ash in the construction of roads, which have to be provided by the TPP in line with the MoU entered into between the TPP and NHAI and there arises no necessity for the petitioner to factor in the cost of fly ash as a free commodity, which would be provided by the TPP, to be utilised in the construction of the road.

32. It is the further submission of the learned counsel that even in the meeting held by the Hon'ble Minister for MoRT, the issue of supply of free fly ash for construction of road was considered and the minutes drawn on the basis of the meeting clearly reveal that the cost, which has been expended by the contractor has been agreed to be reimbursed by NHAI in case fly ash is not



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provided free of cost and that earth has been used for the purpose of laying of the road.

33. It is therefore the submission of the learned counsel that in the present case, neither TPP nor NHAI has taken any steps to provide free fly ash to the petitioner, but the delay is attributed to the petitioner vide the letter of NHAI dated 12.2.2024 stating that the petitioner is not entitled to claim any delay/extension of time or any benefit of procurement of fly ash/borrow earth materials, which stand of NHAI is completely contrary to the statutory notifications. The said decision is against the various circulars issued in this regard.

34. It is the further submission of the learned counsel that the requirement to enter into an agreement is only between NHAI and the TPP and the petitioner, who is the contractor is in no way connected with entering into any MoU and the failure of NHAI to enter into MoU with the TPP and provide free fly ash to the petitioner cannot be put against the petitioner and the petitioner



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cannot be forced to use borrow earth in the place of fly ash, which has not been envisaged either in the financial bid or in the concessionaire agreement.

35. It is the further submission of the learned counsel that clause B (1) of the Notification dated 31.12.2021 has been wrongly interpreted in the circular issued by the Ministry of Power dated 22.2.2022, wherein it has been wrongly noted that the TPP may charge the cost of fly ash and transportation in case the TPP is able to dispose the ash through other means. In this regard, inviting the attention of this court to the notification dated 31.12.2021, it is submitted by the learned counsel that in clause B (1), there is a mandatory prescription to use fly ash in the construction of road and that the TPP shall provide the fly ash free of cost and also bear the transportation cost. Therefore, the wrong interpretation of the said clause in the circular dated 22.2.2022 cannot rob the petitioner of its right to use fly ash free of cost in the road construction activities and the TPP is bound to provide the fly ash free of cost to the petitioner, including free transportation.



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36. It is the further submission of the learned counsel that once fly ash is mandated to be used in certain activities, as prescribed in the 1999 notification, unless it is superseded, necessarily, the TPPs have to provide fly ash free of cost for the designated purposes and the TPPs cannot sell the fly ash and, thereafter, claim that if the activities prescribed in the 1999 notification requires fly ash, the same should be procured from the TPPs on payment of cost, which would be against the 1999 notification.

37. It is the further submission of the learned counsel that even, without admitting that the notification dated 31.12.2021 directing the TPP to provide fly ash, which in surplus after sales, free of cost for the activities notified in the 1999 notification, the said notification would apply only prospectively and not retrospectively and the tenders, which are undertaken by the petitioners being anterior in point of time to the said notification, NHA and TPP are bound to provide free fly ash including transportation to the petitioner by entering into MoU and not providing the same, the petitioner would be entitled to reimbursement of the amount utilised towards procurement of borrow earth.



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38. It is the further submission of the learned counsel that vide official memorandum dated 13.7.2023 which was issued after the meeting of the Minister of Power, it has been decided that the preference for fly ash free of cost shall first be given to road projects, where the fly ash is not tied up through sale to any other entity and even if process of tying it up with any other entity is underway, the same shall first be provided free of cost for the road projects and, thereafter, excess may be sold. In fact, specific directions have been issued in the said notification to take action against those TPPs/State plants, which do not follow their statutory obligations regarding supply of ash to applicable road projects.

39. It is the further submission of the learned counsel that the letter of NHA dated 12.9.2023 stating that it is not mandatory to use fly ash in the construction of the road by the petitioner goes against their very own circulars and the notifications of MoRT and MoE, which has been issued from time to time.

40. Learned counsel for the petitioner further submitted that the stand of the TPPs and NHA that no stock of fly ash is available is also erroneous for the



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reason that the reply obtained through RTI dated 3.2.2022 reveals that pond ash is available in stock and, therefore, the plea of the TPPs that no pond ash or fly ash is available is only to sell the fly ash to intending customers and thereby flout the various notifications and circulars issued by MoRT and MoE.

41. In fine, it is the submission of the learned counsel that on the date when the agreement was entered into, the mandate was for the utilisation of fly ash, which was to be supplied free of cost including free transportation to the contractor by the TPP and, therefore, NHAI, now, cannot shriek responsibility and either fly ash should be provided to the petitioner for completing the construction of road or to reimburse the amount that has been spent towards procuring and using of borrow earth in the construction of road and the notifications dated 12.9.2023, 12.2.2024 and 22.2.2022, which run counter to the 1999 notification and notification of the year 2016 are bad and the same deserves to be quashed.

42. Per contra, at the outset, it is the submission of the learned Addl. Solicitor General that the Concession Agreement contains a clause for arbitration



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and, therefore, without exhausting the said remedy, the present writ petition is not maintainable.

43. It is the further submission of the learned Addl. Solicitor General appearing for NHAI submitted that the neither the tender notification nor the award contemplate the mandatory use of fly ash for the construction of the road. It is the submission of the learned Addl. Solicitor General that the notification of 14.9.1999 specifies the providing of fly ash atleast for a period of 10 years from the notification and, thereafter, the other notifications do not extend the period of time, but only extended the benefit to the contractors that in the event the TPPs are in holding of excess of unutilised fly ash/wet ash, it would be provided free of cost for the purpose of construction of road and further the transportation cost would be decided to be borne by the party based on the distance of the TPP from the work place. Therefore, the stand of the petitioner that there is a mandatory prescription in the 1999 notification, which has not been superseded till date is wholly misconceived.



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44. It is the further submission of the learned Addl. Solicitor General that even otherwise, the tender notification does not mandate the use of fly ash for the purpose of road construction. That being the case, when there is neither a mandate in the notification nor a mandate in the tender conditions, the petitioner cannot try to prevail upon NHAI either for the purpose of providing fly ash from the TPP by entering into a MoU or for reimbursing the cost of borrow earth, which was utilised in the construction.

45. It is the further submission of the learned Addl. Solicitor General that upon the request of the petitioner for utilising fly ash, NHAI has addressed communication to the TPP calling for details with regard to availability of fly ash where it was informed that only wet ash was available for sale at a price of Rs.71 per metric ton exclusive of GST and transportation. Though the said fact was brought to the notice of the petitioner, however, the petitioner is harping on the TPP to provide fly ash/wet ash for free by relying on the 1999 Notification, which had prescribed only a period of 10 years for providing free fly ash and beyond that, even the 2016 Notification prescribed the providing of fly ash for free, only in respect of the portion, which remained unutilised after sale and not otherwise.



Therefore, NHAI cannot prevail upon the TPP to make them part with the fly ash/wet ash for free, moreso, when the TPP has even informed that there is no availability of fly ash/wet ash for being given free for the construction of the road.

46. It is the further submission of the learned Addl. Solicitor General that Clause 5.1.4 of the Concession Agreement provides that the concessioner shall, at its own cost and expense, procure the materials to be used in the project, which clearly denotes that procurement of material, which includes either fly ash/wet ash or earth, is the sole obligation of the concessionaire. It is the further submission that clauses 5.1.3 and 12.1 (d) of the concession agreement stipulates that the procurement of materials for the project is to be borne by the concessionaire and that the provisions of the concession agreement will prevail over any other notification, circular or guideline. The parties, inclusive of the concessioner, viz., the petitioner herein, having agreed to the said clauses, the claim of the petitioner for fly ash/wet ash or reimbursement of the cost of the earth at the hands of NHAI is wholly erroneous as the procurement purely falls within the ambit of the concession agreement.



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47. It is the further submission of the learned Addl. Solicitor General that the concession agreement provides that if any dispute arises under, out of, or in relation to the agreement, either party may call upon the independent engineer to mediate and settle the matter, as the opinion of the independent engineer will prevail. It is the submission of the learned Addl. Solicitor General that the petitioner never submitted any report to the independent engineer incorporating fly ash as a construction material. However, the opinion was sought for from the independent engineer based on the request of the petitioner for change of scope, in which the independent engineer has opined that fly ash was not opted to be used nor there was any inference in the financial bid that fly ash was considered as a material to be used in the construction of the road. Therefore, the present claim of the petitioner seeking reimbursement is nothing but an attempt to realise unjustifiable amount from NHAI even though the said reason for the alleged reimbursement was not within the scope of the concession agreement.

48. It is the further submission of the learned Addl. Solicitor General that guidelines for the utilisation of fly ash/wet ash and the manner and the period in which it should be disposed of and the purpose of utilisation have been clearly



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spelt out in the Notification of MoE dated 31.12.2021 and guidelines in this regard have been issued to the TPP, which does not mandate free supply of fly ash and, therefore, the petitioner cannot seek free supply inclusive of transportation, which is very much within the ambit of the TPP and NHAI has no control over the same.

49. It is further submitted that the circular dated 22.2.2022 of Ministry of Power, which is in line with the circular dated 31.12.2021 specifies the procedure to be followed in the disposal of ash. Further, the circular provides for the sale of the ash through a bidding process, which would result in financial benefit to the TPP, thereby, the cost of power generation would be minimised and would not pass on to the customers. Only the portion of the unutilised ash, if available, has been directed to be made available for road construction and other specified activities. It is the submission of the learned Addl. Solicitor General that there being no mandate to supply free ash after the period of 10 years from the 1999 notification, the circular dated 22.2.2022 and 31.12.2021 laying down the guidelines for disposal of fly ash cannot be said to running contrary to the 1999 notification.



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50. It is the further submission of the learned Addl. Solicitor General that the parties are governed by the terms of the agreement which clearly provides that it is for the concessionaire to procure all the materials and merely because NHAI has aided the concessionaire in seeking fly ash from the TPP, it cannot be said that the terms provided for the usage of fly ash in the construction of road and that it is the duty of NHAI to procure fly ash by entering into MoU with the TPP. Further, the independent engineer to whom the change in scope of work sought for by the concessionaire was referred has clearly opined that fly ash was not involved in the cost analysis while the financial bid was submitted as it was not taken as a commodity with the scope of the work. Such being the case, the petitioner cannot now come before this Court and claim that usage of fly ash is mandated vide the 1999 notification and it is for NHAI to provide fly ash by entering into MoU with the TPP. Further, it at all the petitioner is aggrieved with the report of the independent engineer, the petitioner has to resort for arbitration as provided under the agreement and the writ petition at his instance is not maintainable.



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51. Learned senior counsel and the learned counsel appearing on behalf of the respective TPP submitted that the circular dated 22.2.2022, which is challenged by the petitioner stands superceded by circular dated 15.3.2024, which prescribe exhaustive guidelines for the TPP to utilise ash by providing it to the user agencies as stipulated in the notification dated 31.12.2021 and there is no statutory provision mandating supply of fly ash by the TPP to end users free of cost.

52. It is the further submission of the learned senior counsel that there is no provision that deems mandatory supply of fly ash by the TPP free of cost, if the TPP is able to dispose of the ash through other means, which is clear from clause B(1) of the circular dated 31.12.2021. Therefore, there is a clear prescription that cost of ash and transportation may be charged by the TPP on mutually agreed terms and such being the case, the claim of the petitioner that the 1999 notification mandate free supply of ash is wholly misconceived as the same stood superseded by the circular dated 31.12.2021.



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53. It is the further submission of the learned senior counsel that no notice has been issued by the TPP to the petitioner or NHAI offering supply of fly ash free as stipulated by clause B(1) of circular dated 31.12.2021 as the TPP is able to utilise 100% of the fly ash in compliance of the notifications issued by MoE and MoRT.

54. It is the further submission of the learned senior counsel that the circular dated 22.2.2022 only details the procedure to be followed in the disposal of fly ash so as to monetize the sale of the ash, which will reduce the burden on the consumers with regard to electricity and such being the case, when the TPP is able to dispose of the fly ash for monetary returns, there being no mandate, more particularly with reference to the circular dated 26.9.2023 issued by MoRT, the TPP cannot be called upon to supply fly ash free to the petitioner.

55. It is the further submission of the learned counsel that even as per the circular dated 22.2.2022, the unutilised portion of the fly ash with the TPP could be given free of cost on first come first serve basis, provided the user is willing to bear the cost of transportation. Such being the case, the petitioner cannot call



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upon NHAI or for that matter the TPP to supply free fly ash inclusive of free transportation to the petitioner and if the petitioner is aggrieved, the petitioner has to approach the 1st respondent for suitable orders and cannot come before this Court by way of this writ petition, when no right enures on the petitioner to seek supply of free fly ash.

56. It is the further submission of the learned senior counsel that this Court in ***Tamil Nadu Fly Ash Brick & Block Manufacturers Association – Vs – NTPC Tamil Nadu Energy Company Ltd. (WP (C) No.13712/2023)*** had acknowledged the need for disposing fly ash through bidding process to prevent malpractices and to provide the TPP to optimise their revenue, which would be taken to the customers, who are the users of energy.

57. It is the further submission of the learned senior counsel that that the TPP had also, on the basis of the request made by NHAI, conducted a Board meeting on 30.6.2023 and resolved to supply fly ash free of cost on condition of 'As is where is Basis' provided that the transportation cost will not be borne by



the TPP. However, there was no response from NHAI with regard to the willingness of the concessionaire.

58. In fine, it is the submission of the learned senior counsel that the mandate for providing fly ash free of cost was not available and it had been superseded and, therefore, there was no occasion for the TPP's to provide free fly ash including free transportation and the petitioner cannot fall back on the 1999 notification to seek supply of free fly ash inclusive of free transportation and the same is misconceived and these writ petitions deserve to be dismissed.

59. This Court gave its careful consideration to the submissions advanced by the learned counsel appearing on either side and perused the materials available on record as also the various materials/notifications/circulars to which this Court's attention was drawn.

60. The petitioner premises its case on the various notifications, viz., the notifications dated 14.9.1999, 27.08.2003, 3.11.2009 and 25.1.2016, which, it is submitted, mandate that fly ash should be provided free of cost inclusive of free



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transportation to the concessionaire for the purpose of construction of road. It is the further stand of the petitioner that the said notifications having not been superseded, the same requires to be followed and, therefore, the TPP's and for that matter NHAI are bound to supply free fly ash, which has been taken into consideration by the petitioner while submitting the financial bid and non-supply of free fly ash, necessarily NHAI is bound to reimburse the petitioner the cost of borrow earth, which has been utilised in the road construction works. It is further submitted that the latter circulars dated 31.12.2021 and 22.02.2022, 12.09.2023 and 12.02.2024 run counter to the former notifications and, therefore, the said circulars cannot form the basis to negate the claim of the petitioner either for free fly ash or for reimbursement.

61. To appreciate the aforesaid contentions, this Court is bound to find out as to whether there is a mandate by MoE and MoRT for providing free fly ash by the TPP's to the concessionaire for which NHAI should act as the nodal agency in the concessionaire getting free fly ash for the road construction works.



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62. The first of the notification on which reliance is placed is dated 14.09.1999 (for short '1999 Notification') which is with regard to utilisation of fly ash for specified activities, of which road construction works also forms part. The relevant portion of the said notification is quoted hereunder :-

"1. Use of fly ash, bottom ash or pond ash in the manufacture of bricks and other construction activities.-

(1) No person shall within a radius of fifty kilometers from coal or lignite based thermal power plants, manufacture clay bricks or tiles or blocks for use in construction activities without mixing at least 25 per cent of ash (fly ash, bottom ash or pond ash) with soil on weight to weight basis.'

* * * * *

2. Utilisation of ash by Thermal Power Plants.

All coal or lignite based thermal power plants shall utilise the ash generated in the power plants as follows: -

(1) Every coal or lignite based thermal power plant shall make available ash, for at least ten years from the date of publication of this notification, without any payment or any other consideration, for the purpose of manufacturing ash-based products such as cement, concrete blocks, bricks, panels or any other material or for construction of roads, embankments, dams, dykes or for any other construction activity."

(Emphasis Supplied)



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63. Thereafter, notification dated 27.08.2003 (for short '2003 Notification') was issued in and by which in the preamble portion of the notification dated 14.9.1999, the distance of "fifty kilometres" was substituted with "one hundred kilometres" and certain other amendments were made to the said circular, with which no grievance has been espoused by the petitioner.

64. Thereafter, vide notification dated 3.11.2009 (for short '2009 Notification'), amendment was sought to be made to the 1999 notification, in certain portions, which is material for consideration of the present case, and the same is quoted hereunder :-

3. in the said notification, in paragraph 2,—

(a) for sub-paragraphs (1), (2) and (3), the following sub-paragraphs shall be substituted, namely:—

"(1) All coal or lignite based thermal power stations would be free to sell fly ash to the user agencies subject to the following conditions, namely:—

(i) the pond ash should be made available free of any charge on "as is where is basis" to manufacturers of bricks, blocks or tiles including clay fly ash product manufacturing unit(s), farmers, the Central and the State road construction.



agencies, Public Works Department, and to agencies engaged in backfilling or stowing of mines.”

(Emphasis Supplied)

65. Thereafter, notification dated 25.1.2016 (for short ‘2016 Notification’) had come to be issued, wherein, similar to notification dated 3.11.2009, there was expansion of the area within which fly ash is to be supplied for road construction works by making certain amendments with regard to transportation cost and the manner in which the utilisation of fly ash by the contractors is to be monitored. The relevant portion of the said notification is quoted hereunder :-

“1. In the said notification, in paragraph 1, -

(a) In sub-paragraph 1(A), for the words “hundred kilometres”, the words “three hundred kilometres” shall be substituted;

(b) In sub-paragraph (3), for the figures and letters “100 km”, the words “three hundred kilometres” shall be substituted;

(c) In sub-paragraph (5), for the words “hundred kilometres”, the words “three hundred kilometres” shall be substituted;

(d) In sub-paragraph (7), for the words “hundred kilometres”, the words “three hundred kilometres” shall be substituted;



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* * * * *

(10) the cost of transportation of ash for road construction projects or for manufacturing of ash based products or use as soil conditioner in agriculture activity within a radius of hundred kilometres from a coal or lignite based thermal power plant shall be borne by such coal or lignite based thermal power plant and the cost of transportation beyond the radius of hundred kilometres and up to three hundred kilometres shall be shared equally between the user and the coal or lignite based thermal power plant.”

* * * * *

(14) The coal or lignite based thermal power plants shall within a radius of three hundred kilometres 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.

4.

8) It shall be the responsibility of all State Authorities approving various construction projects to ensure that Memorandum of Understanding or any other arrangement for using fly ash or fly ash based products is made between the thermal power plants and the construction agency or contractors.”

(Emphasis Supplied)



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66. From the above notifications, the following emerges :-

- i) *That vide 1999 notification, the TPP were directed to provide ash free of cost, including transportation for at least a period of 10 years from the said date;*
- ii) *That the radius of 50 Kms., which was available under 1999 notification was expanded to 100 Kms., vide notification dated 3.11.2009;*
- iii) *That the radius of 100 Kms., which was amended in the 1999 notification was expanded to 300 Kms., vide notification dated 25.1.2016;*
- iv) *That the transportation cost within 100 Kms., was directed to be borne by TPP while supplying ash and in transport cost exceeding 100 Kms., was to be borne equally by the TPP and the user vide notification dated 25.1.2016.*



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- v) *That MoU shall be entered into between the TPP and the Construction Agency/Contractor for the use of fly ash in the construction projects, which shall be the responsibility of the State Authority while approving the projects.*

In essence, vide 2003, 2009 and 2016 Notifications, certain amendments were made to the 1999 Notification, which have been culled out above, which alone are material for the consideration of the present case.

67. From a careful consideration of the above notifications, it therefore crystallises that the 1999 notification only prescribes a period of at least ten years for the TPP to provide fly ash, including transportation free of cost to be utilised for various specified activities, including the construction of roads. The mandate of ten years has otherwise not been extended beyond the period of 10 years, though various amendments have been made vide the 2003, 2009 and 2016 Notifications. However, through various circulars, which were issued later in point of time, which are dealt with in the succeeding portion, a mandate has been casted with regard to the provision of free fly ash beyond the period of ten



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There is no quarrel that there is similarity in the Concession Agreement entered into. As per Clauses 5.1.1 and 5.1.4 of the concession agreement, it has been agreed as under :-

“5.1.1. Subject to and on the terms and conditions of this Agreement, the Concessionaire shall, at its own cost and expense, procure finance for and undertake the design, engineering, procurement, construction, operation and maintenance of the Project and observe, fulfil, comply with and perform all its obligations set out in the Agreement or arising hereunder.

* * * * *

5.1.4. The Concessionaire shall, at its own cost and expense, in addition to and not in derogation of the obligations elsewhere set out in this Agreement :

(a) make, or cause to be made, necessary applications to the relevant Government Instrumentalities with such particulars and details as may be required for obtaining Applicable Permits, other than those set forth in Clause 4.1.2, and obtain and keep force and effect such Applicable Permits in conformity with Applicable Laws;

(b) procure, as required, the appropriate proprietary rights, licenses, agreements and permissions for materials, methods, processes, know-how and systems used incorporated into the Project;



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* * * * *

71. The above clause creates an onus on the petitioner to bear the cost and expense relating to procurement of materials, licenses, permissions, etc., for the purpose of honouring the contract, as agreed in the agreement.

72. Nevertheless, vide the circular dated 27.8.2018, MoRT had instructed NHAI that it shall aid the contractor/construction agency in entering of an MoU with the TPP and a draft has been provided, the relevant portion of the said circular, for better appreciation is quoted hereunder :-

“6. The notification dated 25.1.2016 of the MOEF&CC further stipulates that an MoU or any other agreement for using fly ash is to be made between the Thermal Power Station and construction agency/contractor. A sample MoU finalized between the NTPC and officials of NHAI is enclosed as Annexure-B.”

73. From the above circular of MoRT, it is clear beyond a pale of doubt that MoU has to be entered into only between the contractor and TPP and NHAI is only a facilitator and MoU in this regard, in uniformity, will be provided by NHAI.



Therefore, as facilitator, NHAI is required to fulfil its obligation to identify the construction agency/contractor to the TPP with whom the TPP will enter into the MoU so for the supply of fly ash and that the fly ash is not given to any other party.

74. Based on the above circular, upon entering into the concessionaire agreement, the petitioner had requested NHAI and intimated its intention to use fly ash in the construction of the road and embankments and based on the said request of the petitioner, NHAI, vide its communication dated 6.7.2021 (relating to W.P. No.19534/2025) had addressed the TPP for supply of fly ash for being utilised in the road construction. However, even at the outset, it is to be stated that it is not the claim of the petitioner, by submitting its communication to NHAI aforesaid, that the financial bid submitted by the petitioner had taken into consideration fly ash as the ingredient in the construction of road and so NHAI may, in the capacity of facilitator facilitate the entering into an MoU between the petitioner and the TPP.



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75. Pursuant to the said letter, reply was addressed by the TPP (Mettur Thermal Power Station) dated 14.7.2021 stating that supply of free fly ash is not possible due to various buyers and commitments and also due to financial conditions and, in turn, informed that wet fly ash is available, which could be supplied at a cost of Rs.71/- per MT with GST @ 5% extra. Further, it was also informed that it would be duty of the construction agency/contractor to bear the cost of lifting, transporting, safety precautions, insurance, etc., and subject to acceptance of the above terms and conditions, the TPP informed that execution of MoU with TANGEDCO will be processed. The said stand of the TPP was communicated to the petitioner vide the letter of NHAI dated 20.07.2021.

76. Based on the said letter dated 14.07.2021, e-mail dated 26.7.2021 was addressed by NHAI to the TPP, which, for better clarity, is quoted hereunder :-

“Adverting to your letter dated 14.07.2021, regarding the supply of fly ash to the construction work of four laning of Madathukulam – Pollachi section of NH-209, it is informed that the Concessionaire has calculated the quantity of fly ash required for the entire project is 18,91,647 Cum (24,59,141 MT).



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As such, it is requested to intimate whether the above quantity could be supplied without any shortage and then only the concessionaire could design the high embankment portion of the project highway. Hence, the confirmation for supply of above quantity may please be given to this office at earliest."

77. Reply has been addressed by the TPP dated 26.7.2021 to the letter of NHAI informing that the requisite quantity of wet ash for the project is available. However, after all the above process and notwithstanding the fact that vide letter dated 20.07.2021 NHAI has informed the petitioner about the supply of fly ash for monetary consideration by the TPP and also for the concessionaire to bear the transportation cost and other cost based on which the fly ash will be supplied, curiously the concessionaire/petitioner after having calculated the total quantity of fly ash that is required for the entire project and communicated the same to NHAI for checking the availability with the TPP, by letter dated 2.8.2021, the petitioner, referring to the Concession Agreement had submitted that fly ash is mandated for use under clause 4.2.4 which prescribes the use of pond ash for embankment construction. Referring to the said clause and also the other clauses in the concession agreement and the various circulars and notifications



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and also the communications between the TPP and NHAI on the availability of fly ash, which have already been adverted to, the petitioner had written that fly ash need to be supplied free of cost and that transportation cost also needs to be borne by the TPP as per the notification dated 25.01.2016.

78. It is to be pointed out that the letter of the TPP dated 14.07.2021 had not been challenged by the petitioner claiming that fly ash could not be charged as per the notification dated 14.9.1999, as the said stand of the TPP had been communicated to the petitioner, but to and fro, letters were addressed by the petitioner, including spelling out the quantity of fly ash that would be required for the construction, as detailed above.

79. When the matter stood thus, vide letter dated 4.9.2021, once again referring to the various provisions of the concession agreement, the petitioner had pointed out that non-supply of free fly ash and free transportation thereof by the TPP is a grave contravention of the 1999 and 2016 notification and that the cost analysis of the petitioner while submitting the financial bid was worked out keeping in mind the utilisation of fly ash for the construction of road and



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embankment and, therefore, review of cost proposal was sought for by the petitioner.

80. In pursuance of the said communication of the petitioner, as the petitioner had spelt about the change of scope and revision of cost estimate of the project, the opinion of the independent engineer was sought for, as provided for in the Concession Agreement, vide letter dated 5.10.2021 and consequent upon the said request, the independent engineer had given its opinion dated 26.10.2021, in which it has been observed and opined as under :-

“Further, IE has made certain observations, which are as follows:

a. Construction Methodology of Embankment fill with Pond / Fly-Ash is not included in the Quality Assurance Plan (R-3) submitted by Concessionaire vide letter no. 407 dated 29.04.2021 and which was approved by IE vide letter no. 237 dated 08.05.2021.

b. Rate analysis related to the cost component of Earth work of Schedule-G, not included or bifurcated the cost component of Fly Ash/Pond Ash.

c. The revised Construction Program submitted by the Concessionaire vide letter no. 561 dated 15.07.2021, does not include the task related to identification of Fly ash source.



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d. In the Environmental Management Plan (EMP) submitted by the Concessionaire, he has not included the precautionary measures to be taken during utilization of Fly-Ash for the construction of road embankment.

e. As seen from the COS cost estimate submitted towards raising of RE wall up to shoulder level, vide letter no's. 274 dated 01.03.2021, 403 dated 28.04.2021, 610 dated 11.08.2021, 645 dated 28.08.2021, 648 dated 28.08.2021 and 698 dated 29.09.2021, the Concessionaire has considered the cost of construction of road embankment with Borrow pits only and not with the fly ash.

From the above, it is amply evident that, the statement made by the Concessionaire that, in their Financial bid which was submitted on 24.01.2019, they have considered the provisions of MOEF&CC notifications i.e. use of fly-ash in the construction of Road or Fly-over Embankment within a radius of 300 km of Thermal Power Plant, is not correct and which is only an afterthought.

* * * * *

10. As specified under Obligations of the Concessionaire, Clause 5.1.4 (b) of CA, which states as follows, the Concessionaire shall, at its own cost and expense, in addition to and not in derogation of its obligations elsewhere set out in this Agreement, "procure, as required, the appropriate proprietary rights, licenses, agreements and permissions for



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Materials, methods, processes and systems used or incorporated into the Project Highway.”

11. As per Clause 12.1 (d) of the CA, the Concessionaire shall “make its own arrangements for quarrying and procurement of materials needed for the project under and in accordance with Applicable Laws and Applicable Permits.”

81. There is no quarrel that the said opinion of the independent engineer has been communicated to the petitioner, with which the petitioner was not in acceptance as could be evident from the communication dated 1.11.2021 of the petitioner who had once again sought for either review of cost proposal or to call upon the TPP to supply fly ash to the concessionaire free of cost and also for the TPP to bear the transportation costs.

82. Though the petitioner has claimed that it has factored in the utilisation of fly ash while computing the project cost in the cost analysis and the financial bid was submitted accordingly, nevertheless, no material has been placed by the petitioner to claim that such computation was made. However, the petitioner, as pointed out by the independent engineer, has entered into the Concession Agreement in which it has agreed that it will be the responsibility of the



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concessionaire to make its own arrangements for quarrying and procurement of materials needed for the project.

83. As the matter stood thus, notification dated 31.12.2021 was issued by MoE amending and modifying certain portions of the 1999 Notification, wherein in relation to the utilisation of ash, following directions were issued :-

“B. for the purpose of utilisation of ash, the subsequent sub-paras shall apply.-

(1) All agencies (Government, Semi-Government and Private) engaged in construction activities such as road laying, road and flyover embankments, shoreline protection structures in coastal districts and dams within 300 Kms from the lignite or coal based thermal power plants shall mandatorily utilise ash in these activities :

Provided that it is delivered at the project site free of cost and transportation cost is borne by such coal or lignite based thermal power plants.

Provided further that thermal power plant may charge for ash cost and transportation as per mutually agreed terms, in case thermal power plant is able to dispose the ash through other means and those agencies makes a request for it and the provisions of ash free of cost and free transportation shall



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be applicable, if thermal power plant serves a notice on the construction agency for the same.”

84. Thereafter, circular of the Ministry of Power dated 22.02.2022 had come to be issued, which is put in issue in the present petitions, in and by which reiteration has been made with reference to clause B(1) of the circular dated 31.12.2021, providing for the procedure to be followed for disposal of ash, which is as under :-

“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



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construction agencies/mine owners located within 300 kms from TPPs to use ash mandatorily in their projects /filling of mine voids.

* * * * *

85. Though it is the contention of the petitioner that the circular dated 31.12.2021 and the circular dated 22.02.2022 are bad, as it runs counter to the 1999 Notification, even a bare perusal of the 1999 notification reveals that therein, a mandate has been provided for the supply of free ash for at least a period of ten years, which clearly reveals that after the period of ten years, it is for the TPPs to decide on the manner of disposal of fly ash based on its marketability.

86. It is to be noted at this juncture that the availability of fly ash when the 1999 Notification came to be issued shows that there were plentiful of fly ash, which required to be disposed as value of the said commodity was not to the knowledge of the holder of the ash, which resulted in the issuance of the 1999 Notification. However, after the 1999 Notification, when the 2003 and 2009 Notifications came to be issued, there was no extension given in the said



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notifications for the supply of ash for free, inclusive of free transportation to the user/contractor as the value of the commodity became clear and the usage of the commodity also increased. Once the value of the commodity became clear, necessarily, the benefit should be passed to customers of electricity as the sale of ash by the TPP resulting in monetary returns to the TPP will definitely have an impact on the fixation of electrical tariff to the consumers.

87. It is only in the aforesaid backdrop, the Government after knowing the saleability of the commodity, viz., ash, had not mandated or increased the period for supply of ash for free through the various notifications, which were issued in 2003, 2009, 2016 and thereafter, though the circulars of NHAI as well as the various departments of the Government, viz., MoE, Ministry of Power (for short 'MoP') and MoRT had erroneously used the terminology of '*mandate*' in the circulars, terming the supply of fly ash as a mandate made in the notification issued on 14.9.1999, though after the period of ten years, the mandate was not continued in the notifications issued in 2003, 2009 and 2016.



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88. Though the petitioner had sought to rely on the meeting with the Minister of Road Transport with regard to supply of fly ash for NHAI projects, the office memorandum dated 13.7.2023 with regard to the said meeting of the Minister of Power held on 14.6.2023 has captured the essence of the various circulars and notifications issued upto the year 2021 and had acted on the said circulars and decision was taken as under :-

“After regular follow up on the issue of availability of Fly-ash with Thermal Project Plants (TPPS) and applicable provisions of MoEFF&CC dated 25.01.2016 with Ministry of Power, the following decisions have been taken by FCC dated 25.01.2016 applicable projects [i.e. projects where bids received after 25.01.2016 and before 31.12.2021]:

(a) Wherever the ash is available, it shall be provided by the thermal power plants (TPPS) as per the provisions of the MoEF&CC dated 25.01.2016 Notification (copy enclosed) to applicable projects whereby TPPs will bear the cost of transportation.

(b) Where the ash available with TPPs has already been auctioned and there is no issuable ash, TPPs shall issue & 'No-Availability Certificate' to NHAI so that an alternative arrangement may be looked for, by the contractors.

(c) If the issuable ash is in the process of being tied-up as per the Ministry of Power advisory, then TPPs will first supply



the ash free of cost with free transportation to the applicable road projects, Remaining balance quantity, after meeting the requirement of the MORTH/NHAI road projects, may be disposed as per the MoP advisory dated 22.02.2022.

(d) Thermal Power Plants which are providing ash free of cost but are not bearing the transportation cost, shall be directed by Ministry of Power to bear the transportation cost as per the provisions in the MoEFF & CC's January 2016 Notification.

(e) Ministry of Power shall take action against those TPPs/State Plants which do not follow their statutory obligations regarding supply of ash to applicable road projects of NHAI/MoRTH.”

89. After the meeting with the Minister of MoRT, one other circular dated 26.09.2023 has come to be issued by MoRT in which certain Standard Operating Procedure has been prescribed to be followed in respect of the list of projects referred to in the above circular, which is as under :-

“(ii) The following SOP shall be followed in respect of the list of projects referred to in (i) above:

a. Wherever the ash is available, it shall be provided by the thermal power plants (TPPs) as per the provisions of the MoEF&CC's 2016 Notification.



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b. Where the ash available with TPPs has already been auctioned and there is no issuable ash, TPPs may issue a 'No Availability Certificate' to MORTH/NHAI so that an alternative arrangement may be looked for, by the MORTH/NHAI contractors.

c. If the issuable ash is in the process of being tied-up as per the MoPs advisory, then TPPs will first supply the ash free of cost with free transportation to the road projects for which bid due date is between January 2016 and December 2021. Remaining balance quantity, after meeting the requirement of the MORTH/NHAI road projects, may be disposed as per the MoP's advisory dated 22.02.2022.

Thermal Power Plants which are providing ash free of cost but are not bearing the transportation cost, shall be directed to bear the transportation cost as per the provisions in the MoEF&CC's January 2016 Notification in case of MORTH/NHAI projects bid out between the years 2016 to 2021.

** * * * **

The relevant provisions of Notifications of MOEF & CC regarding use of fly ash makes approaches of National Highways projects, in case of TPPs situated within 300 km radius of this amply clear that mandatory use of fly ash for construction of embankments and such projects, shall not be insisted by MORTH/NHAI in National Highways projects for



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which bid, were received after 25.01.2016 and before 31.12.2021 only in the following two conditions :

(i) If 'No Availability Certificate' of fly ash is obtained from TPPs situated within radius of 300 Km of site.

(ii) The Chief Engineer (Design) or Engineer-in-Chief, i.e. Highest Technical officer of the Authority approves deviation as per para-1 sub para (5) of MOEF&CC notification dated 25.01.2016 (read in conjunction with notification dated 03.11.2009).

** * * * **

However, the non-availability of fly ash to the projects or inadequate/slow supply majeure clause of Agreement and both Parties (Authority and the Contractor) shall of fly ash to the project site shall be treated as Non-political event under force not have any claim on each other on this account.

90. From the above circular, it is evident that clear directions have been issued to the TPPs with regard to providing fly ash for free, where there is fly ash available, which could not be sold, which shall be in consonance with 2016 Notification and where there is no fly ash available, 'No Availability Certificate' shall be issued. In the present case, in one of the writ petition, viz., W.P. No.19558/2025, no availability certificate has been issued, while in W.P.



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No.19534/2025, the TPP has made its intention to sell the fly ash at a cost, which, as aforesaid, has been communicated to the concessionaire/petitioner by NHAI, to which the concessionaire has not raised any grievance at the first instance, but only calculated the quantity of fly ash required and informed the same. Only later in point of time, the petitioner has come forward to intimate NHAI that the said fly ash should be provided free of cost. When the letter of the TPP and NHAI with regard to the fly ash is clear, that it would be given only at a cost to be borne by the concessionaire including transportation cost, the reason for which has also been specified, the concessionaire/petitioner cannot enforce the supply of free fly ash by the TPP when such a mandate is not provided in the 2016 notification.

91. At the risk of repetition, it is to be pointed out that the 2016 Notification, the relevant portion of which has already been extracted supra, only speaks about the entity that should bear the transportation cost and it does not speak about the supply of free fly ash. Further, the said notification also only casts a burden on the authorities to ensure that MoU is reached between the TPP and construction agency/contractor for the use of fly ash. When the TPP has shown its inclination to provide the fly ash at a cost, which has been



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communicated to the petitioner, at the first instance itself, the petitioner has not raised any grievance with regard to the sale of fly ash and that being the case, as an afterthought, the petitioner cannot come and claim that fly ash should be given free of cost to the petitioner as per 1999 Notification, as extension for provision of free fly ash has not been provided for either in 2003 or 2009 or 2016 Notifications.

92. Thereafter, the letter dated 6.9.2024 had come to be issued by NHAI to the petitioner rejecting its claim for provision of free fly ash or in the alternative to reimburse the cost of borrow earth, which was used for the purpose of road construction by pointing out that the present claim of the petitioner is in conflict with the terms of the Settlement Agreement dated 02.08.2023, wherein the right of the concessionaire to raise issue regarding fly ash was limited and restricted. When NHAI, relying upon the Concession Agreement, and more specifically the clauses mentioned therein, which mandate that it is the duty of the concessionaire to procure and make the materials available, the petitioner cannot seek a direction from this Court to NHAI and the TPPs to provide free fly ash, when fly ash was not a commodity, which has been taken into consideration



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while submitting the financial bid, as opined by the independent engineer, which opinion has not been challenged.

93. From the above sequence of events, two things can safely be concluded, viz., the petitioner has been a wilful subscriber to the contents of the concession agreement and had not raised any quarrel with regard to the same and further the petitioner has not challenged the opinion of the independent engineer with regard to fly ash not being part of the financial bid of the petitioner. If really the petitioner was concerned, the petitioner ought to have challenged the opinion of the independent investigator in the manner known to law and the petitioner having not raised any issue with regard to the concession agreement or the provisions thereof, which enforces quarrying and procurement of materials upon the petitioner, the petitioner cannot now turn back and claim that fly ash was not supplied for the project and, therefore, the 4th respondent/NHAI is bound to reimburse the cost of borrow earth, which was used in lieu thereof, to the petitioner.



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94. When the petitioner with open eyes had agreed to the terms of the concession agreement and the notifications nowhere mandate that fly ash should be provided free of cost beyond the period of ten years from the 1999 Notification, it is within the ambit of the TPPs to provide free ash, provided it issues a notice to the contractor/constructing agency, in which case the fly ash would be supplied for free inclusive of transportation. When no such notice has been issued by the TPP, the TPP is not bound to provide free ash to the contractor/constructing agency merely for the asking of the petitioner.

95. Further, one other aspect which also should not be lost sight of is the fact that the TPP vide their letter dated 14.07.2021 had exhibited its intention that it would supply wet fly ash at a cost of Rs.71/- per MT with GST @ 5%, which would be excluding the transporting and handling cost, which fact was duly communicated to the petitioner through the communication of the 4th respondent dated 20.07.2021. To the said communication, merely the petitioner had calculated the total quantity of fly ash required for the project and intimated the same to NHAI, which was subsequently informed to the TPP. However, what is curious to be noted here is the fact that though voluminous records pertaining



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to all the circulars, the communication of the respondents and certain communications of the petitioner have been placed on record, however, the letter in and by which the quantification of the required fly ash is made by the petitioner, which was further to the letter of NHAI dated 20.07.2021 has not been placed in the typed set of records. Had the said letter been placed, then it would have crystallised whether the petitioner had accepted the cost of the fly ash at Rs.71/- per MT exclusive of transportation, as the letter of NHAI dated 20.07.2021 had specifically informed the petitioner that the TPP is ready to provide wet fly ash at Rs.71/- per MT along with GST @ 5% exclusive of transportation cost. The reply of the petitioner is not available in record. Therefore, the only inference that could be drawn is that not only the petitioner was aware of the cost of fly ash that is required to be procured for the performance of the project, but also the fact that the cost towards such procurement is on its shoulders. If really the petitioner was really concerned with the cost, as according to the petitioner, it was not factored in the financial bid, then the petitioner, at the earliest opportunity, ought to have raised the issue, which it had not raised and, therefore, the subsequent letter dated 2.8.2021 of the petitioner seeking for review of the cost analysis is nothing but an



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afterthought only to defeat the legitimate interest of the 4th respondent. Further, once the petitioner, with its open eyes, has committed to the terms and conditions mentioned in the Concession Agreement, the petitioner is guided by the contractual clauses and it bound by the contract and it cannot fall back on the notifications and claim that ash should be supplied free of cost along with free transportation for the purpose of construction of the road.

96. Further, it should also not be lost sight of that the 1999 Notification has been amended from time to time providing for various amendments with regard to distance and certain other modifications, but not once had the term of 10 years, for the supply of free fly ash, that had been prescribed had been extended. When there is no such extension of time and that the later notifications had provided the TPP with power to sell the ash by the process of bidding, which would be in the interest of the public at large, as the monetary realisation of amounts from the sale of fly ash would have an impact in the tariff that would be charged on the end user, the petitioner cannot claim fly ash as a matter of right, moreso, when it is involved in a business activity, which is done for profit.



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97. Further, it should not be lost sight of that the agreements in both the writ petitions pertain to the concession agreement entered into on 5.12.2019 and 4.2.2022 for the two different projects. The projects are well beyond the prescribed period of 10 years from the 1999 notification. Such being the case, the petitioner cannot, as a matter of right, seek for free supply of ash from the TPP, that too more than 2 decades after the said notification, as it is not only hit by the circular dated 26.09.2023 , but the usage of ash for various commodities specified under various notifications had rendered fly ash a marketable commodity and in fact, the Government had directed off-set of certain portion of ash for specific types of usage only, which does not include road construction.

98. Though the petitioner has relied upon the MoU executed between the TPP and NHAI with respect to road construction in Nagpur region, however, it is to be pointed out that the provision of free supply of ash is within the discretion of the TPP of the State, more particularly with reference to the saleability of the commodity and when there is no mandate under the notification by extending the term beyond the period of 10 years and there is no extension on and from



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the 2009 Notification, the erroneous construction of circulars issued by the different departments, cannot add or subtract anything and it has to run in consonance with the notification. Therefore, the word “mandate” used in the various circulars could only be termed to be a misconception on the part of the department in using the particular terminology, as beyond the period of 10 years from 14.9.1999, the disposal of fly ash is at the discretion of the TPP and it cannot be said that ash should be supplied free, as the said notification of 1999 and thereafter, have been superseded by the notification of the year 2022 and 2024. Therefore, the petitioner cannot claim that supply of ash for free from the TPP for the purpose of its road construction project as a matter of right based on the 1999 Notification.

99. Further, the non-availability of fly ash in W.P. No.19558/2025 has already been informed to the petitioner vide the letter of NHAI dated 12.11.2021, wherein, while NHAI has stressed upon the concession agreement therein and pointing out to the various clauses in the concession agreement, wherein the concessionaire had been mulcted with the sole responsibility of making its own arrangements for quarrying and procurement of materials needed for the



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project, which, in fact, was based on Article 12.1 of the Concession Agreement, which was relied on by the independent engineer while giving his opinion. Therefore, as already stated above, the petitioner having accepted the subscribed his willingness to the concession agreement, is bound by the terms of the concession agreement as it is a contractual obligation and the reliance of the petitioner on certain notifications issued either by MoE, MoP or MoRT to claim that fly ash should be supplied free of cost to the petitioner, including free transportation cannot be sustained, when there is no mandate under the law for supply of free fly ash including free transportation to the petitioner beyond the period of ten years.

100. The further stand of the petitioner that fly ash cannot be sold for specified activities and that it should be provided free of cost to the petitioner is grossly misconceived as even the notifications, which have been referred to by the petitioner have made it clear that the fly ash could be sold by following certain prescribed procedures, which are provided for in the notification and circulars.



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101. If at all the petitioner is aggrieved over non-providing of free fly ash, when there is no mandate under the notification except for a period of ten years as provided under the 1999 notification, the course open to the petitioner was to approach the appropriate authority to seek for appropriate relief and relying upon the 1999 notification, which has been amended half dozen times, but the period of free supply having not been disturbed, the claim of the petitioner for free fly ash cannot be sustained.

102. For the reasons aforesaid, this Court holds as under :-

- i) There is no error or infirmity in the notifications dated 31.12.2021, 22.02.2022, 12.09.2023 and 12.02.2024, which are just and reasonable and in consonance with the 1999 notification and the same does not warrant interference at the hands of this Court.
- ii) Further, the claim of the petitioner for supply of fly ash free of cost along with free transportation based on the 1999 notification, which has since been amended, does not merit consideration as the said notifications which have been issued subsequent to the 1999 notification have not



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made any mandate for supply of free fly ash and the circulars mandating the supply of free fly ash on the basis of the notification is grossly erroneous and misconceived.

- iii) In view of the above, the claim of the petitioner for reimbursement of cost towards borrowing earth for execution of the road construction work cannot be granted and it has been rightly rejected.
- iv) Accordingly, the writ petitions fail and they are dismissed. Consequently, connected miscellaneous petitions are closed. There shall be no order as to costs.

15.10.2025

Index : Yes / No

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To

1. The Secretary to Government
Ministry of Power, Government of India
Shram Shakti Bhawan
Rafi Marg, New Delhi 110 001.
2. The Secretary
Ministry of Road, Transport & Highways (MoRTH)
Government of India, Transport Bhawan
1, Parliament Street, New Delhi 110 001.
3. The Secretary
Ministry of environment, Forests &
Climate Change (MoEF&CC)
Indira Paryavaran Bhawan
Jor Bagh Road, New Delhi 110 003.
4. The Chairman
National Highways Authority of India (NHAI)
Under Ministry of Road, Transport & Highways
G 5 & 6, Sector 10, Dwarka, New Delhi 110 075.
5. The Chief Engineer
Mettur Thermal Power Station – 1
Mettur Dam – 6, Thoppur-Mettur Dam
Dhavani – Erode Rd, Salem 636 406.
6. The Chairman
Tamil Nadu Generation & Distribution
Corporation Ltd. (TANGEDCO)
6th Floor, TANTRANSCO Building
144, Anna Salai, Chennai 600 002.



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7. The Managing Director cum Chairman
NTPC Tamil Nadu Energy Company Ltd. (NTECL)
Vallur Thermal Power Project, Vellaivoyal Chavadi P.O.
Ponneri Taluk, Chennai 600 103.



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M.DHANDAPANI, J.

GLN

**PRE-DELIVERY ORDER IN
W.P. NOS. 19534 & 19558 OF 2025**

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15.10.2025