
(2008) 08 MAD CK 0099

In the Madras High Court

Case No : W.A. No. 745 of 2007 and M.P. No. 1 of 2007

Associated Cement Companies Limited

APPELLANT

Vs

The Chief Engineer/Civil Designs/TNEB and Others

RESPONDENT

Date of Decision : 06-08-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2008) 08 MAD CK 0099

Hon'ble Judges : S.J. Mukhopadhaya, J;M. Venugopal, J

Bench : Division Bench

Advocate : T.R. Andhyarujina, SC for Sampath Kumar and Associates, for the Appellant; P.S. Raman, SC for N. Muthuswami, for RR-1 to 4 and R. Thiagarajan, for G.R. Lakshmanan, for R-5, for the Respondent

Final Decision : Allowed

Judgement

S.J. Mukhopadhaya, J.—The Chief Engineer, Tamil Nadu State Electricity Board (hereinafter referred to as "Electricity Board") served the impugned order dated 14th July, 2006, on the Appellant, M/s. Associated Cement Companies Ltd. (hereinafter referred to as "ACC") bringing down its allotment of fly ash from 80% to 40% in Unit-II of Mettur Thermal Power Station (hereinafter referred to as "MTPS") on the ground that ACC failed to reach its target of lifting 80% of fly ash. Learned single Judge having upheld the order, the present appeal has been preferred.

2. The Ministry of Environment and Forest, Government of India, by its notification dated 14th Sept., 1999, directed all concerns generating fly ash, such as coal and lignite based thermal power plants, to make available fly ash without any cost for at least 10 years to manufacturers of ash based products, such as cement, concrete blocks, bricks, etc. Pursuant to the said direction, Electricity Board reached a Memorandum of Understanding (hereinafter referred to as "MoU") with ACC on 5th Dec, 2001, as per which 100% fly ash generated has to be collected by ACC and out of the same 20% of the fly ash should be spared for

Electricity Board for allotting the same to other industries. ACC has to pay 80% of the charges towards water and current consumption since it is allowed only 80% collection. The Appellant, pursuant to the MoU, invested more than Rupees Four Crores and put up necessary machinery for collection of fly ash. Since then, it continued to collect fly ash, paid proportionate electricity, water and other charges and spared fly ash to others as per the direction of electricity board. After about 4 1/2 years, the Chief Engineer, Electricity Board, issued the impugned order dated 14th July, 2006, bringing down the share of ACC from 80% to 40% in Unit-II of MTPS for the reasons as mentioned above.

Stand of Appellant - ACC:

3. Learned senior counsel for the Appellant made the following submissions:

- a) The impugned order is violative of terms and conditions of MoU, as the Appellant was promised 80% of the fly ash for a period of 9 years.
- b) The impugned order is a non-speaking order passed in violation of rules of natural justice without notice to the Appellant.
- c) The reasons shown in the impugned order that the off-take of fly ash by ACC is less than the target is incorrect and not supported by materials.
- d) The impugned order is arbitrary, unilateral, passed with mala fide motive to accommodate the 5th Respondent, M/s. India Cements Ltd.
- e) The impugned order is hit by principles of promissory estoppel and against the doctrine of legitimate expectation.

Case of the Respondent before the Court:

- 4. i) The MoU between ACC and Electricity Board is not statutory and, therefore, breach of MoU is not amenable under writ jurisdiction.
- ii) ACC's collection of dry fly ash has always been far less than that contemplated under the MoU. Owing to non-collection of required fly ash, Electricity Board was constrained to make the fly ash into slurry, which resulted in considerable inconvenience and expenditure, apart from environmental hazard. The average collection of ACC for the period from October, 2003 to March, 2004, is 45%; Electricity Board was constrained to find other takers for collecting the balance 35% of the fly ash required to be collected by ACC. ACC has collected as low as 19% of fly ash in certain months. The average collection was only 53% against 80%. ACC even sold a portion of fly ash to other companies, which proves that its need is far less than the allotted 80%.
- iii) ACC would be reimbursed the expenditure of operation and maintenance cost in proportion to the quantity reduced and, thereby, it will not suffer monetarily.
- iv) The order passed in favour of the 5th Respondent, M/s. India Cements Ltd., on 14th July, 2006, is to honour the bona fide requirement of such period and mala fide cannot be alleged.

v) There being a civil dispute, it can be determined by a civil court of competent jurisdiction; disputed questions of fact cannot be determined by this Court under Article 226.

Similar stand has been taken by the learned Counsel appearing on behalf of the 5th Respondent, M/s. India Cements Ltd.

5. We have heard the learned Counsel for the parties, noticed their rival contentions and perused the records.

Certain admitted facts:

6. As per MoU, fly ash collection system was to be installed by ACC at their cost, but the machinery will become the property of the Electricity Board and the company will have no right over the electrical, mechanical and over the civil equipments so installed. 100% of the fly ash generated is collected in such system installed by ACC out of which 20% share to be released in favour of the Electricity Board, i.e., to the company, which the Electricity Board refers. The relevant portion of the MoU are as follows:

1) Collection of fly ash system of Unit-II is allotted to M/s. The Associated Cement Companies Limited.

2) Fly ash collection system to be installed by the allotted cement company at Mettur Thermal Power Station at their cost will become the property of the Board and company will have no right over all electrical, mechanical and civil equipments and structures installed.

3) The cement company has to pay the service charge of fly ash at the rate charged by the Board from time to time (present rate is Rs. 60/= per tonne). Power and water required during the installation of the system will be chargeable basis on prevalent appropriate tariff.

4) The cement company should pay security deposit of rupees FIVE lakhs. The cement company has to deposit in advance one month's proceeds of fly ash that will be issued to them.

5) Performance of the cement company in collecting 100% of fly ash will be reviewed for a period of one year and penalty deemed fit will be imposed for the short collection of fly ash due to the fault of the cement company after one year of the reviewed period.

6) 100% of the fly ash generated should be collected by the cement company from the allotted unit. Out of the above, 20% of fly ash should be spared to TNEB for allotting the same to other industries. The cement company has to pay 80% of the charges towards water and current consumption since they are allotted only 80% collection. This will come into effect from the date of commissioning of the complete system.

7) In case the company is not able to life fly ash, the company should give 21

days advance notice to enable Chief Engineer/M.T.P.S. to allot it to others. Two spells of 15 days each in a year will be permitted on this account.

7. In the impugned order dated 14th July, 2006, to bring down the share of fly ash from 80% to 40%, the Chief Engineer, Electricity Board, has shown the following grounds:

- a) The off-take of ACC is less than 80%; and
- b) There is demand for dry fly ash from others.

Before the Court, apart from the aforesaid grounds, the Electricity Board has taken additional ground that the Electricity Board was constrained to make the fly ash into slurry resulting in considerable inconvenience and expenditure and environmental hazard, which is not based on documents.

8. From different communications addressed between ACC and the Electricity Board, the following facts emerge:

- i) Electricity Board made low availability of fly ash from the Unit allotted to ACC; and
- ii) Electricity Board allotted fly ash to others more than 20% of its share, and out of 80% share of ACC.

The aforesaid fact could be traced out from the following documents filed on behalf of ACC, which is one of the grounds taken by the Appellant.

9. From the letter of ACC dated 26th Aug., 2004, written by the Senior Vice President of ACC to the Superintending Engineer (Mechanical-II), MTPS, it appears that the availability of fly ash from the unit has gone down. ACC was not able to get sufficient quantity of fly ash and, therefore, requested to stop supply to others till the situation improves. The Manager (Commercial) of ACC, vide letter dated 3rd March, 2005, informed the Chief Engineer, MTPS that ACC needs more fly ash for cement and, therefore, requested to lift the entire quantity of its share (80%). By another letter dated 15th March, 2005, the Manager (Commercial) of ACC informed to the Chief Engineer (Civil Design), Chennai that the fly ash collected in Unit-II of MTPS reduced by 30% due to imported coal having low ash. The Electricity Board was requested to exempt ACC to give fly ash to any other party from its share (80%), other than 20% share of the Electricity Board, from which it is to give others.

10. Electricity Board allotted the fly ash to other parties, including the 5th Respondent, M/s. India Cements Ltd., out of 80% share of ACC, as evident from Lr. No. SE/MII/MTPS/O & AHS/F.61 ACC/D.2894/03 dated 14th Oct., 2003, issued by the Superintending Engineer to the Vice President of ACC, Coimbatore, relevant portion of which reads as follows:

....

During September 2003 a total quantity of dry fly ash lifted from new silo

installed by M/s. ACCL in Unit II is 23,542.240 MT. The details of the companies and the split up quantity of dry fly ash issued out of 80% share of M/s. ACCL and out of 20% TNEB share are furnished herewith for information.

(Emphasis Supplied)

Sl. No. Name of Company M/S. ACCL share (in M.T) 80% TNEB share (in M.T.) 20%

- 1 M/s. ACCL 8,824.390 --
- 2 M/s. Grasim 971.120 --
- 3 M/s. ICL/ Dalavoi 3,730.210 --
- 4 M/s. Visaka 1,718.210 --
- 5 M/S. ACC (RMC) 160.520 --
- 6 M/s. ICL/ Sankari 3,429.340 301.830
- 7 M/s. Tancem -- 465.120
- 8 M/s. Tamil-nadu Asbestos -- 353.420
- 9 M/s. Everest Industries -- 1314.770
- 10 M/s. Malabar -- 94.000
- 11 M/s. Ramco/ Karnataka -- 17.000

....

This will also be evident from Lr. No. SE/MII/MTPS/O&AHS/F.61 ACCL/D.256/2005 dated 7th Feb., 2005, and Lr. No. SE/MII/MTPS/O&AHS/F.61 ACCL/D.729/2005 dated 15th April, 2005, written by the Superintending Engineer, MTPS to the Senior Vice President of ACC. This shows that out of the share of ACC, Electricity Board diverted fly ash to other companies. The letters aforesaid are extracted hereunder:

Tamil Nadu Electricity Board

From Er.M. Subramanian, B.E. Superintending Engineer, (i/c), Mechanical-II, Thermal Power Station, Mettur Dam-6. To The Senior Vice President, M/s. Associated Cement Companies Ltd., Madhukkarai Cement Works, Madhukkarai PO, Coimbatore-641 105.

Lr. No. SE/M. II/MTPS/O&AHS/F.61 ACCL/D.258/2005, dt.7.02.2005.

Sir,

Sub: MTPS - O&AHS-Installation of New PDFACS in Unit II by M/s. ACCL for 100% fly ash collection - Details of dry fly ash lifted and issued to other Companies during January 2005- Intimation - Reg.

Ref: Per. B.P.(CH) No. 39, (Tech. Branch) dt.21.02.2002.

During January 2005, total quantity of dry fly ash lifted from new silo installed by M/s. ACCL in unit II is 26,609.000 MT. The details of quantity of dry fly ash issued from the share of the M/s. ACCL to other cement companies and the details of quantity of dry fly ash issued from TNEB share are furnished herewith for information.

Encl. Statement - 1 Copy. Superintending Engineer, Mech. II/MTPS. (i/c)

TAMIL NADU ELECTRICITY BOARD, METTUR THERMAL POWER STATION
STATEMENT SHOWING THE QUANTITY OF DRY FLY ASH BETWEEN TNEB & ACCL/
Madhukkari.

For January -2005 TOTAL SILO COLLECTION = 26,609.000 MT

Sl. No. Name of the Company M/s. ACCL share (in MT) TNEB Share (in MT)

Payment Free of Cost

1 ACCL/Mad-hukkarai 16924.000

2 ICL/ Sankari 1561.000

3 TANCEM/Ariy-alur (3379.000) 2802.200 576.800

4 Tamilnadu As-bestos/Alangu-lam 445.000

5 Visaka Indus-tries/Namakkal 17.000

6 R.M.C. Ready Mix/B"lre 116.000

7 Brick Manufacturing Company's 4167.000

TOTAL 21287.200 1154.800 4167.000

EXECUTIVE ENGINEER/O&AHS MTPS/METTUR DAM

Tamil Nadu Electricity Board

From Dr. E.B. Singh Superintending Engineer (i/c) Mechanical II, Mettur Thermal Power Station Mettur Dam-6. To The Senior Vice President, M/s. Associated Cement Companies Ltd., Madhukkarai Cement Works, Madhukkarai PO, Coimbatore-641 105.

Lr. No. SE/M.II/MTPS/O&AHS/F.61 ACCL/D.729/2005, dt. 15.04.2005.

Sir,

Sub: MTPS-O&AHS-Installation of New PDFACS in Unit II by M/s. ACCL for 100% fly ash collection - Details of dry fly ash lifted and issued to other Companies during March 2005 - Intimation - Reg.

Ref: Per. B.P.(CH). No. 39, (Tech Branch) dt.21.02.2002.

During March 2005, total quantity of dry fly ash lifted from new silo installed by M/s. ACCL in Unit II is 21,842 MT. The details of quantity of dry fly ash issued from the share of the M/s. ACCL to other cement companies and the details of quantity of dry fly ash issued from TNEB share are furnished herewith for information.

Encl. Statement - 1 Copy. Superintending Engineer, Mech. II/MTPS(i/c)

STATEMENT SHOWING THE QUANTITY OF DRY FLY ASH BETWEEN TNEB & ACCL/Madhukkari.

For January -2005 TOTAL SILO COLLECTION = 21,842.000 MT

Sl. No. Name of the Company M/S. ACCL share (in MT) TNEB Share (in MT)

Payment Free of Cost

1 ACCL/ Madhukkarai 14564.000

2 R.M.C. Ready Mix/B"lre 351.000

3 Tamilnadu Asbestos/Alangulum 333.000

4 TANCEM/Ariyalur (3512.000) 2225.600 1286.400

5 Brick Manufacturing Company's 3082.000

TOTAL 17473.600 1286.400 3082.000

EXECUTIVE ENGINEER/O&AHS MTPS/METTURDAM

11. The action of the Electricity Board to divert fly ash from out of the 80% share of ACC was opposed by ACC, which will be evident from ACC's letter dated 30th April, 2005, written to Chief Engineer (Civil Design), Chennai and quoted hereunder:

THE ASSOCIATED CEMENT COMPANIES LTD., MADUKKARAI CEMENT WORKS, MADUKKARAI. II.38

FAX No.

OUR REF:MK/LPS/014

30.04.05

CHIEF ENGINEER-CIVIL DESIGN, III Floor, NPKRR Malligai, 800, Anna Salai, Chennai-2.

DEAR SIR

SUB: FLY ASH

This is further to our letter MK/LPS/264 dated 15.03.05 informing the reduced collection of fly ash at MTPS due to use of imported coal having low ash.

The average collection has reduced from more than 850 tons per day in the month of January 05 to about 650 tons per day. Our requirement of fly ash is going to increase and we shall be lifting entire collection for our use. Under the circumstances it will not be possible for us to spare fly ash for other parties. You are therefore requested to exempt us from giving fly ash under free quota of 20%.

Thanking you YOURS FAITHFULLY FOR THE ASSOCIATED CEMENT Cos. LTD.
(A.K. Saxena) VICE PRESIDENT.

12. The letters of the Vice-President, ACC and the letter of the Manager (Commercial), ACC, dated 24th May, 205 and 1st June, 205 shows that ACC always requested the Electricity Board to exempt it from giving fly ash to other parties from its own share.

During the year 2005-2006, ACC lifted 1,41,034 tons of fly ash, i.e., 71.20% of total collection. Less amount was so collected as 17,468 tons of fly ash out of the share of ACC was allotted by Electricity Board to others, which constitute 8.8% of the total collection. This was also informed by the Vice-President, ACC, vide letter dated 13th June, 2006, addressed to the Chief Engineer (Civil Design), Chennai. The said letter shows that ACC made request to allot the entire 100% collection of fly ash from Unit-II. The aforesaid facts have not been disputed by the Respondents.

13. A chart prepared by Tamil Nadu Electricity Board, MTPS also supports the stand taken by ACC that its share was diverted by Electricity Board to other companies. The chart enclosed for the period April, 2005 to June, 2006, is produced hereunder:

Sl. No. MONTH Total Quantity collected from, Silo (Tonnes) 80% (Tonnes) Lifted by Silo Company (Tonnes) Allotted by TNEB to other companies form 80% (Tonnes) Payment Categories REMARKS

Actual Quantity lifted (Tonnes) Percentage (%) Quantity (Tonnes) Percentage (%)

1 Apr-05 20315 16252 14504 71 1748 9

2 May-05 17426 13940.8 13249 76 691 4

3 Jun-05 14038 11230.4 11233 80 0 0

4 Jul-05 15652 12521.6 12225 78 296 2

5 Aug-05 15319 12255.2 12201 80 54 0

6 Sep-05 11557 9245.6 8981 78 270 2

7 Oct-05 14938 11950.4 11362 76 588 4

8 Nov-05 7846 6276.8 5102 65 1174 15

9 Dec-05 15305 12244 9156 60 3088 20

10 Jan-06 19967 15973.6 12949 65 3024 15

11 Feb-06 22728 18182.4 13823 61 4359 19

12 Mar-06 23029 18423.2 14388 62 4035 18

Average % 71 9

ACCL SILO

1 Apr-06 23116 18493 1572 68 2771 12

2 May-06 27027 21622 16187 60 5435 20

3 May-06 26082 20066 17866 68 2999 12

Average 65 15

The Respondent-Electricity Board has not disputed the data shown in the chart, as was prepared by it and produced by the Appellant. The aforesaid chart shows that ACC, out of its 80% share, always consumed more than 65%, but could not consume about 15% as fly ash of its share was diverted to other companies by the Electricity Board.

14. A bald allegation has been made by learned senior counsel for the Electricity Board that ACC sold its portion of fly ash to other companies. Such allegation is not based on any record. The documents at page Nos. 41 and 42 of the typed set, as referred to, are purchase orders dated 17th May, 2005 and 19th March, 2005, by the 5th Respondent, M/s. India Cements Ltd. It has been rightly explained that the said documents reflect not any payment for fly ash, but towards service charge as fly ash is collected by M/s. ACC and as per MoU and direction of the Electricity Board, it is to collect the service charge at the rate of Rs. 60/= per ton. As per agreement, even the 20% fly ash spared for Electricity Board, those who collect it are required to pay the service charge to ACC towards its collection charges.

15. In normal course the court do not go into the question of fact, but the manner in which the Electricity Board has proceeded, allegation and counter allegation have been made, we only noticed the documents to find out the admitted fact. From those documents, the following facts emerge, which has not been disputed by any of the party.

On 22th May, 2006, the 5th Respondent, M/s. India Cements Ltd., requested the Chief Engineer (Civil Design), to allocate fly ash from MTPS. The said letter reads as follows:

THE INDIA CEMENTS LIMITED

Registered Office: "DHUN BUILDING", 827, ANNA SALAI, CHENNAI-600002.

Phone: 28521526, Fax: 044-28520638/28520702

The Chief Engineer (Civil Designs), Tamil Nadu Electricity Board, Chennai. Kind Attn.: Shri. Gopal Dear Sir,

Sub: Allocation of fly ash from Mettur Thermal Power Station (MTPS).

As you are aware, we are the largest producer of cement in Tamil Nadu with three plants i.e. Sankarnagar Works, Dalavoi Works and Sankari Works. The total production of cement of these plants is 2005-06 was 32.54 Lakh Tonnes. Over 90-95% of our production is Portland Pozzolona Cement produced by inter grinding clinker with fly ash procured from Thermal Stations. We have no allocation of fly ash from MTPS.

We now write to request you to kindly allocate the following from MTPS

-50% of Unit-I

-50% of Unit-II

We request that 50% allocation of Unit-I and Unit-II may be made to us, as we are actual users of fly ash with MoU for 9 years.

Thanking you,

Yours faithfully,

for THE INDIA CEMENTS LTD., T.S. Raghupathy SENIOR PRESIDENT.

16. After the letter aforesaid dated 22nd May, 2005, without waiting for any decision of the Tamil Nadu Electricity Board, M/s. India Cements Ltd., purchased three stamp papers of Rs. 50/= each on 31st May, 2006, for execution of MoU. We have already noticed that the MoU between Tamil Nadu Electricity Board and ACC was existing since 5th Dec, 2001 for a period of nine years. As on May, 2006, there was no allegation made against ACC. As per the MoU, Electricity Board's share was 20% for allocation to other companies, but for reason best known to the Respondent-Electricity Board, the Chief Engineer (Civil Design), issued a proceeding "By the Order of the Chairman of Electricity Board" for allotting 25% of dry fly ash from Unit-I and 25% from Unit-II of MTPS. Therefore, prior to the impugned order by the aforesaid proceeding, the Electricity Board allocated 5% excess to its share of 20%. In the said proceeding, it was ordered to reduce allotment of fly ash of ACC and one M/s. Grasim India Ltd., by reducing its share from 80% to 40%. At that time, no allegation was made against ACC, no ground was shown for reducing its share from 80% to 40% except the ground that the Electricity Board wanted to allocate 25% fly ash from each unit in favour of the 5th Respondent, M/s. India Cements Ltd. This is evident from the proceeding of the Electricity Board dated 28th June, 2006, and quoted hereunder:

TAMIL NADU ELECTRICITY BOARD (ABSTRACT)

FLY ASH MANAGEMENT-ALLOTMENT OF 25% DRY FLY ASH FROM UNIT-I AND 25% FROM UNIT-II OF METTUR THERMAL POWER STATION TO M/s. THE INDIA

CEMENTS LTD.,-BY PARTING THE ALLOCATION ALREADY MADE TO M/s. GRASIM INDUSTRIES LTD., FROM UNIT-I AND M/s. ASSOCIATED CEMENT COMPANIES LTD., FROM UNIT-II-APPROVAL-ACCORDED.

Per. B.P.(CH) No. 261 (Technical Branch) Dated: 28.06.2006.

Aani 14, Viya, Thiruvalluvar Aandu-2037

READ:

Chief Engineer/Civil Designs/Chennai-2, note dated 12.06.2006.

PROCEEDINGS:

Approval is hereby accorded for the following:

1. For allotting 25% dry fly ash from Unit-I and 25% of dry fly ash from Unit-II of MTPS to M/s. The India Cements Ltd.
2. For revising the allotment of fly ash to M/s. Grasim Industries Ltd., by reducing from 80% share to 40% share in Unit-I of MTPS.
3. For revising the allotment of fly ash to M/s. Associated Cement Companies Ltd., by reducing from 80% share to 40% share in Unit-II of MTPS.
4. For forming a Committee under the Chairmanship of Chief Engineer/MTPS with three members from TNEB (Chief Engineer/Civil Designs, Chief Engineer/MTPS, Superintending Engineer/Mechanical/MTPS) and each one member from M/s. Grasim Industries Ltd., M/s. Associated Cement Companies Ltd., and M/s. The India Cements Ltd., to finalise the operational/maintenance cost to be borne by M/s. The India Cements Ltd., for their allotted share of fly ash and reimbursing the same to M/s. Grasim Industries Ltd., and M/s. Associated Cement Companies Ltd.,

(BY ORDER OF THE CHAIRMAN) K. Gopal CHIEF ENGINEER/CIVIL DESIGNS.

17. Only after the decision was taken by Electricity Board, next day, i.e., on 14th July, 2006, the Chief Engineer issued the impugned order making certain allegation, for the first time, as evident from the letter and quoted hereunder:

BY RPAD TAMIL NADU ELECTRICITY BOARD

From

Er. K. Gopal, M.E., M.I.E., Chief Engineer/Civil Designs, 3rd Floor, NPKRR Maaligai, 800, Anna Salai, Chennai-600 002.

To

M/s. Associated Cement Companies Ltd. Madukkarai Cement Works, P.O. Madukkarai-641 105. Coimbatore-Dt, Tamilnadu.

Lr. No. CE/CD/SE/CD/AEE/FAM/SDM II/F.PDFACS/D. 536/dt. 14.7.2006.

Sir,

Sub: MTPS-Unit II-PDFACS-M/s. Associ-ated Cement Companies Ltd., Revised allotment Orders - Issued - Regarding.

Ref: Lr. No. CE/CD/SE/D&1/E4/A2/F.PD FACS/D.440/dt.22.2.2002.

1. M/s. Associated Cement Companies Ltd, had been issued with orders vide reference cited for installation of PDFACS in Unit II of Mettur Thermal Power Station with the provision in the MoU that 80% share of fly ash is allotted to M/s. Associated Cement Companies Ltd.

2. As per MOE & F Notification, TNEB has to achieve 100% fly ash utilisation. But your off take of fly ash in Unit II of MTPS is less than the target of 80%. It is pointed out that the demand for the dry fly ash is more and TNEB is compelled to honour the requirements of all the needy entrepreneurs in a judicious manner, and as such the allotment already issued to M/s. Associated Cement Companies Ltd., has been revised from 80% to 40% share in Unit II of Mettur Thermal Power Station.

3. A committee under the Chairmanship of Chief Engineer/Mettur Thermal Power Station is formed with a representative from M/s. Associated Cement Companies Ltd., to finalise the operational/Maintenance cost to be reimbursed to M/s. Associated Cement Companies Ltd., by the other allottees. In this connection you are requested to contact the Chief Engineer/Mettur Thermal Power Station.

4. Receipt of this letter may be acknowledged.

Thanking You,

Yours faithfully,

CHIEF ENGINEER/CIVIL DESIGNS

18. Three days thereafter, a formal letter of allotment was issued by the Chief Engineer on 17th July, 2006, in favour of the 5th Respondent, M/s. India Cements Ltd., gist of which is as follows:

TAMIL NADU ELECTRICITY BOARD

From

Er. K. Gopal, M.E.,F.I.E., Chief Engineer/Civil Designs, 3rd Floor, NPKRR Maaligai, 800, Anna Salai, Chennai-600 002.

To

M/s. The India Cements Limited, Dhun Building, No. 827, Anna Salai, Chennai-600002.

Letter No. CE/CD/SE/CD/AEE-FAM/F.PDFACS/D.538 dated 17.07.2006.

Sir,

Sub: MTPS-Fly Ash Management-Allotment of 25% share of dry fly ash in Unit-I and 25% share in Unit II from the share of unit allotted companies to M/s. The India Cements Limited under service charges payment category - Orders issued.

Ref: 1. Your letter dt.22.05.2006 and subsequent correspondences.

2. Memorandum of Understanding signed by you on 13.7.2006.

1. I, acting on behalf of and by the direction of the Chairman/Tamilnadu Electricity Board, accept your request for the allotment of 25% share of dry fly ash in Unit-I and 25% share in Unit II from the share of unit allotted companies to M/s. The India Cements Limited under service charges payment category as per the terms of Memorandum of Understanding.

2. M/s. The India Cements Limited have to reimburse the operational/maintenance charges incurred by M/s. Grasim Industries Limited for Unit No. I and to M/s. Associated Cement Companies Limited for Unit No. II. The cost shall be finalized by TNEB in coordination with members from M/s. Grasim Industries Limited, M/s. Associated Cement Companies Limited and M/s. The India Cements Limited.

3. This order is issued based on the Memorandum of Understanding signed by you with TNEB. A copy of the Memorandum of Understanding is enclosed. As indicated, the validity of this allotment is limited to 9 (nine) years from the date of allotment order or the validity period of Unit allotted company at MTPS whichever is earlier.

4. Receipt of this letter shall be acknowledged.

Thanking you,

Yours faithfully,

CHIEF ENGINEER/CIVIL DESIGNS.

19. From the aforesaid records and chronological facts, it is clear that there was no allegation against ACC. It is only when the 5th Respondent requested, with a view to help the said Respondent to provide 50% of fly ash, 25%, each from Unit-I and Unit-II, decision was taken to reduce the share of ACC and another and later on when the decision was communicated, a ground for reduction was introduced by the Chief Engineer (Civil Design).

20. In the case of Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, , Supreme Court observed that non-arbitrariness is a necessary concomitant of rule of law and is in substance fair play in action. The Apex Court further held that however arbitrary, State action is open to challenge on the ground of violation of Article 14 and rule of law. In this regard, it will be desirable to refer the relevant portion, as quoted hereunder:

22. ...However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable,

the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.

23. Thus, in a case like the present, if it is shown that the impugned State action is arbitrary and, therefore, violative of Article 14 of the Constitution, there can be no impediment in striking down the impugned act irrespective of the question whether an additional right, contractual or statutory, if any, is also available to the aggrieved persons.

24. The State cannot be attributed the split personality of Dr. Jekyll and Mr. Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfil the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity.

Similar view was expressed by Supreme Court in the case of Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries, , wherein Supreme Court observed as follows:

7. In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is "fairplay in action". Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To

satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.

With regard to maintainability of a writ petition under Article 226 in respect of contractual obligation of the State or its instrumentary, the Supreme Court in *ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others*, , made the following observation:

8. As could be seen from the arguments addressed in this appeal and as also from the divergent views of the two courts below, one of the questions that falls for our consideration is whether a writ petition under Article 226 of the Constitution of India is maintainable to enforce a contractual obligation of the State or its instrumentality, by an aggrieved party.

9. In our opinion this question is no more *res integra* and is settled by a large number of judicial pronouncements of this Court. In *K.N. Guruswamy Vs. The State of Mysore and Others*, this Court held: (AIR pp.595-96, para 20)

20. The next question is whether the Appellant can complain of this by way of a writ. In our opinion, he could have done so in an ordinary case. The Appellant is interested in these contracts and has a right under the laws of the State to receive the same treatment and be given the same chance as anybody else....

We would therefore in the ordinary course have given the Appellant the writ he seeks. But, owing to the time which this matter has taken to reach us (a consequence for which the Appellant is in no way to blame, for he has done all he could to have an early hearing), there is barely a fortnight of the contract left to go.... A writ would therefore be ineffective and as it is not our practice to issue meaningless writs we must dismiss this appeal and leave the Appellant content with an enunciation of the law.

10. It is clear from the above observations of this Court in the said case, though a writ was not issued on the facts of that case, this Court has held that on a given set of facts if a State acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the court by way of writ under Article 226 of the Constitution and the court depending on facts of the said case is empowered to grant the relief. This judgment in *K.N. Guruswamy Vs. The State of Mysore and Others*, was followed subsequently by this Court in the case of *D.F.O. v. Ram Sanahi Singh* 1973 (3) SCC 864 wherein this Court held: (SCC p.865, para 4)

By that order he has deprived the Respondent of a valuable right. We are unable

to hold that merely because the source of the right which the Respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not to a petition by way of a writ. In view of the judgment of this Court in K.N. Guruswamy Vs. The State of Mysore and Others, there can be no doubt that the petition was maintainable, even if the right to relief arose out of an alleged breach of contract, where the action challenged was of a public authority invested with statutory power.

21. Learned single Judge, though noticed the submission made on behalf of the Respondent-Electricity Board, accepted the same as gospel truth, but failed to notice the rival contention and the basic materials on record, which suggests action on the part of the Electricity Board as arbitrary and mala fide in law.

For the reason aforesaid, we set aside the impugned judgment dated 19th April, 2007, passed by learned single Judge, as also the impugned order dated 14th July, 2006, with direction to the Electricity Board and its authorities to allow the Appellant, M/s. ACC to collect its 80% of share of fly ash from Unit-II at MTPS in terms with the MoU dated 5th Dec, 2001.

22. So far as the 5th Respondent, M/s. India Cements Ltd., is concerned, we are not expressing any opinion with regard to its allotment from Unit-I nor making any observation whether out of 20% quota of Electricity Board it could allot any share in favour of the said Respondent,

23. In result, the writ appeal is allowed. Rule of mandamus is issued in the nature as stated above. Consequently, connected miscellaneous petition is closed. But in the facts and circumstances, there shall be no order as to costs.