Form No.J(2)

**IN THE HIGH COURT AT CALCUTTA**
**CONSTITUTIONAL WRIT JURISDICTION**
**APPELLATE SIDE**

Present :

**The Hon'ble Justice Raja Basu Chowdhury**

**WPA 19750 of 2022**
**With**
**CAN 1 of 2025**

**Tushar Kanti Roy**

**Versus**

**Damodar Valley Corporation & Ors.**

| | | |
|---|---|---|
| For the petitioner | : | Mr. Jishnu Saha, Sr. Advocate<br>Ms. Manju Bhuteria, Sr. Advocate<br>Mr. Suddhasatva Banerjee<br>Mr. Surojit Dasgupta<br>Ms. Arundhati Barman Roy<br>Mr. Asish Chowdhury<br>Ms. Uma Banerjee |
| For the D.V.C. | : | Mr. Dhrubo Ghosh, Sr. Advocate<br>Mr. Swarajit Dey<br>Ms. Ajeyaa Chowdhury<br>Mr. Saptarshi Kar<br>Ms. Debsarati Das<br>Mr. Ayan Ahmed |
| Heard on | : | 11.06.2025, 02.01.2026 & 16.01.2026 |
| **Judgment on** | **:** | **30th April, 2026.** |

**Raja Basu Chowdhury, J:**

1. The instant writ petition has been filed, *inter alia,* praying for a direction upon the respondents and each of them to continue the

supply of fly ash to the petitioner as per the terms and conditions contained in the agreement dated 1st January, 2019.

2. The petitioner is engaged in the lifting and selling dry fly ash from various thermal power plants in West Bengal. The petitioner carries on business under the name and style of Satyam Sales. According to the petitioner, in the year 1996, the respondent no.1 had commissioned Mejia Thermal Power Plant situated at Durlavpur, Bankura (hereinafter referred to as the "MTPS"). MTPS is one of the coal-based power plants of the respondent no.1 and apparently is the largest power plant in terms of generating capacity in the State of West Bengal. Coal is one of the raw materials used in the power plant. Since, large quantities of fly ash is generated as a by-product, which is hazardous to the environment as would corroborate from the notification issued from the Ministry of Environment and Forest dated 14th September, 1999 read with notification dated 27th August, 2003 the respondent no.1 had made provisions for free of cost disposal thereof, and in the process as aforesaid entered into an agreement dated 29th May, 2007 with the petitioner whereunder the respondent no.1 agreed to provide 0 to 300 metric tons of dry fly ash per day from the Unit of MTPS. The agreement was valid for a period of 10 years from the date of signing the agreement. As per such agreement, though the dry fly ash was to be provided from the unit no.4, free of cost, the petitioner was required to pay Rs.3 per metric ton, towards administrative-cum-service charges.

3. The agreement dated 29th May, 2007 was later amended by an agreement dated 1st April, 2009. Under such amended agreement, the respondent no.1 agreed to supply 1000 metric tons of dry fly ash per day, free of cost to the petitioner from the Unit No. 4, 5 and 6 of the MTPS subject to payment of administrative-cum-service charges of Rs.1 per metric ton. Such agreement is valid for a period of 20 years from the date of commencement thereof i.e. 1st April, 2009. According to the petitioner, notwithstanding the above agreement being valid and subsisting and creating a binding obligation to the respondent no.1 to supply at least 1000 metric tons of dry fly ash to the petitioner, by a letter dated 20th January, 2017 the respondent no.1 requested the petitioner to participate in e-auction and purchase the fly ash. The petitioner did not agree to participate in e-auction. Following the same by a further letter dated 13th September, 2017, the respondent no.1 called upon the petitioner to pay enhanced administrative-cum-service charges for fly ash lifted under the said agreement at the rate of Rs.20 per metric ton. The demand was negotiated, on the basis of the discussion that followed between the parties, the agreement dated 1st April, 2009 was amended on 1st January, 2019. The amended agreement provided for payment of administrative-cum-service charges at the rate of Rs.6 per metric ton upto 1000 metric tons per day, and beyond 1000 metric tons at the e-auction rate prevailing at that time.

2026:CHC-AS:655

4. Incidentally, in and around July, 2019, a writ petition being WP 12311(W) of 2019 was filed by one Bijay Kedia against the respondent no.1 and the petitioner, *inter alia*, praying for quashing and/or setting aside of the agreement dated 1st April, 2009 as amended on 1st January, 2019.

5. Records would reveal that on 19th October, 2020 a Division Bench of this Hon'ble Court at the interim stage was, *inter alia,* pleased to observe that it is elementary that when the Government or any public body sells something, the primary consideration should be that the same fetches the highest price. Though, at the relevant point of time fly ash was lying dumped in thermal power plants and the same was regarded as pollutant, the scenario has since changed and fly ash was now being sold in e-auction. As such public interest demands that the terms of long-term agreements that the DVC may have entered be altered.

6. The petitioner would, however, contend that the observations made by the Division Bench of this Court are stray observations, and cannot modify the binding agreement between the parties. However, according to the petitioner, in view of the above order, a meeting was held between the petitioner and respondent no.1 on 23rd November, 2020 wherein the respondent no.1 called upon the petitioner to increase and match the price of the fly ash with the e-auction rate. The petitioner, however, did not accede to such proposal. From this stage, the respondent no.1 started reducing the

supply of fly ash to the petitioner, and from 12th July, 2022, without any prior intimation to the petitioner, altogether stopped supplying dry fly ash. Although, the petitioner had lodged protest by letter dated 13th July, 2019, the respondent no.1 only in response thereto had by letter dated 19th July, 2022 called upon the petitioner to enter into a fresh agreement with the respondent no.1 in order to continue to receive the supply of dry fly ash upto 1000 metric ton per day on monthly average basis, on the condition that the petitioner would successfully participate in the e-auction bidding process for such fly ash and emerge the successful bidder in the same. The petitioner would contend that though, the respondent no.1 had stopped supply of dry fly ash citing guidelines issued by the Ministry of Power in the year 2021-22, but the agreement between the parties was not terminated and continues to subsist even as on this date. It is in the backdrop as aforesaid, the writ petition has been filed challenging the letter dated 19th July, 2022 and for a direction upon the respondent no.1 to adhere to the terms of the agreement dated 1st January, 2019 and continue supply of dry fly ash to the petitioner.

7. Mr. Jishnu Saha, learned senior advocate representing the petitioner, has argued that a concluded contract between the parties cannot be modified by the Governmental Circulars. The notification relied by the respondent no.1 did not in any manner interdict the agreement dated 1st April, 2009 entered into between

the parties as modified on 1st January, 2019. The notifications in fact do not seek to cancel or call for cancellation of the said agreements. In support of his aforesaid contention, reliance has been placed on the judgment delivered in the case of ***Jharkhand State Mineral Development Corporation Limited and Ors. v. Tirupati Niryat Private Limited & Ors.***, reported in **MANU/JH/0822/2022**. In fact, in such case, it has been held that rise in price of coal cannot justify withdrawal from a concluded contract and it would not be in public interest to promote the State or its instrumentalities to resile from its contractual obligation on such ground. While justifying the maintainability of the writ petition, Mr. Saha submits that an aggrieved party which is arbitrarily deprived of the benefits or advantages under a contract can legitimately approach the Court.

8. It is next argued that the terms of a contract cannot be unilaterally altered. By placing reliance on the judgment delivered by the Hon'ble Supreme Court in the case of ***Union of India v. Vertex Broadcasting Company Private Limited & Ors.***, reported in **(2015) 16 SCC 198**, he submits that the Union of India also cannot depart from the terms of NIT unilaterally and on the failure of the licence to accept modified terms, it cannot resort to forfeiture of licence fees. Reliance has also been placed in the case of ***Mary v. State of Kerala***, reported in **(2014) 14 SCC 272** for the proposition that a statutory contract cannot be struck down even

on the ground of unfairness and that a party cannot escape liability under such contract whatever may be the reason. It is submitted that a party cannot be discharged from a consequence of non-performance of a contractual obligation under a contract. He submits that the same view has also been reiterated in the case of ***Delhi Development Authority & Anr. v. Joint Action Committee, Allottee of SFS flats & Ors.***, reported in **(2008) 2 SCC 672**, where it has been held that purported office orders which are not backed by statute cannot seek to alter the terms of the contract nor can the same be thrust upon a party to the contract.

9. In the backdrop as aforesaid, the petitioner would contend that it is not open to the respondent no.1 to resile from its obligation under the agreement of 1st April, 2009 as modified on 1st January, 2019. This apart, by relying on the statement of ash evacuation cost incurred by the respondent no.1 as disclosed in the writ petition, it is submitted that it is evident therefrom that MTPS plant of the respondent no.1 has incurred costs of Rs.93 Crores for the Financial Year 2021-22 for evacuation of fly ash, as such there cannot be any reason for the respondent no.1 to walk away from the terms of the contract. He has also drawn the attention of this Court to the revenue generated for utilization of dry fly ash through e-auction during the 1st, April, 2022 to 31st March, 2024, and would submit that the same tantamount only to Rs. 11.10 Crores for

financial year 2022-23, and Rs.13.23 Crores for the financial year 2023-24.

10. The respondents have contested the writ petition by filing an affidavit in opposition. According to Mr. Ghosh, learned senior advocate representing the respondents, the petitioner is, in fact, seeking for specific performance of the agreement dated 1st January, 2019, which according to Mr. Ghosh ordinarily cannot be granted by this Court in exercise of its extraordinary writ jurisdiction. He submits that ordinarily, no writ of mandamus can be issued, granting writ for specific performance of a contract/work order in an application under Article 226 of the Constitution of India. According to him, the petitioner can only seek a civil remedy for its claim. In support of his contention, he has placed reliance on the judgment delivered by the Hon'ble Supreme Court in the cases of ***Sri Ram Builders v. State of Madhya Pradesh & Ors.***, reported in **(2014) 14 SCC 102**, and ***Surjeet Singh Sahni v. State of Uttar Pradesh & Anr.***, reported in **(2022) 15 SCC 536**.

11. According to him, the circumstances under which letter dated 1st January, 2019 was issued, would morefully appear from such letter. In such letter the respondent no.1 has only attempted to clarify its position to the writ petitioner regarding the changed circumstances relating to use of dry fly ash. The aforesaid letter cannot be said to be *mala fide* or arbitrary. On the contrary, the same is supported by the best principles of good governance. He

then submits that it is the obligation of the State authorities to balance public interest/equity with contractual rights. Since, dry fly ash is now a revenue earning product, the State cannot discriminate against the other buyers of fly ash who are buying the fly ash at the price determined in e-auction, by giving it away for free to the petitioner. In support of his aforesaid contention, he has placed reliance on the judgment delivered in the case of ***Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh***, reported in **(1979) 2 SCC 409**, wherein the Hon'ble Supreme Court has held that the doctrine of promissory estoppel is an equitable doctrine, the same cannot be enforced when equity demands that the Government should not be held to its promise when a public interest is likely to suffer if the Government is held to its promise. By relying on the judgment delivered in the case of ***Sharma Transport v. Government of Andhra Pradesh***, reported in **(2002) 2 SCC 188**, he submits that in such case, it has been held that promissory estoppel cannot be applied to compel the Government to carry out a representation or promise which is prohibited by law and that promissory estoppel must yield to equity for larger public interest, it demands. For the aforesaid proposition, he has also placed reliance on the judgment delivered in the case of ***Shrijee Sales Corporation & Anr. v. Union of India***, reported in **(1997) 3 SCC 398**. By relying on the judgment delivered in the case of ***Sales Tax Officer & Anr. v. Shree Durga Oil Mills & Anr.***, reported in

**(1998) 1 SCC 572**, it is submitted that the Hon'ble Supreme Court in such case has held that public interest must override any consideration of private loss or gain, and the Court will not interfere with any action taken by the Government in public interest. This apart, by placing reliance on the judgment delivered in the case of ***Natural Resources Allocation, In Re, Special Reference No. 1 of 2012***, reported in **(2012) 10 SCC 1**, and the case of ***Ram and Shyam Company v. State of Haryana & Ors.***, reported in **(1985) 3 SCC 267**, and the case of ***Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir***, reported in **(1980) 4 SCC 1** he would submit that the Hon'ble Supreme Court has held that when the natural resources are made available by the State to private persons for commercial exploitation exclusively for the individual gain, the State's endeavor must be towards maximization of revenue and must be done at the best available price. He submits that petitioner is also not entitled to claim damages in the event the respondent no.1 does not supply the petitioner the fly ash continuously. By drawing attention of this Court to Clause 4(i) of the agreement dated 1st January, 2019 appearing at page 120 of the petition, he submits that under such agreement the respondent no.1 is not financially obligated to the petitioner for break or disruption in supplying of fly ash.

12. Independent of the above, it is submitted that the writ petitioner has an alternative remedy. The disputes raised herein are

contractual disputes raising triable issue which requires adjudication upon taking oral evidence. He submits that in any event, the actions of the respondents are in accordance with law and do not warrant any interference at this stage, and as such the writ petition is liable to be dismissed, with costs. He would submit that the judgements relied on by the petitioner are distinguishable on facts, and that they do not assist the petitioner.

13. Having heard the learned advocates appearing for the respective parties and noting the materials on record, I find that initially, the petitioner had entered into an agreement with the respondent no.1 on 14th May, 2007. As pointed out by Mr. Ghosh, learned advocate representing the respondents that at the relevant point of time fly ash was considered useless and a hazardous by-product. As such the same was required to be disposed of quickly, which had no monetary value and accordingly, the above agreement dated 29th May, 2007 was entered with the petitioner who was authorised to utilize dry fly ash produced by the respondent no.1 for a period of 10 years from the respondent no.1's Mejia Thermal Power Plant. A revised agreement was entered into on 1st April, 2009 for a period of 20 years, whereby the respondent no.1 agreed to provide dry fly ash upto 1000 metric tons per day free of costs upon payment of Rs.1 per metric ton towards administrative and service charges. During the tenure of this agreement, the Central Government notified the

fly ash could be used commercially, and as such devised policy to sell the same commercially/for monetary consideration.

14. Accordingly, on 20th January, 2017, the respondent no.1 intimated the 24 entities including Satyam Sales that is the petitioner herein, M/s. UTCL and M/s. Aniket Enterprise who were in the business of lifting fly ash to participate in e-auction of dry fly ash which the respondent no.1 was in the process of commencement. According to the respondent no.1, except the petitioner the other entities participated in e-auction process.

15. On 13th September, 2017 the respondent no.1 intimated all entities including petitioner that administrative charge has increased to Rs. 20 per metric ton for collection of dry-fly ash with effect from 1st October, 2017. All other entities excepting the petitioner agreed to such enhancement. The petitioner, however, refused to accept the increase as would be evident from the letter dated 21st September, 2017 on the ground that they are committed to the end users for supply of dry fly ash at the minimum rate. By letter dated 25th January, 2018, the respondent no.1 raised a demand in respect of the supply already made up to 31st December, 2017. The petitioner did not make payment of the demand, rather by raising a dispute invoked the arbitration clause contained in the agreement dated 1st April, 2009, by letters dated 6th February, 2018 and10th May, 2018. By a further letter dated 27th June, 2018, the petitioner once again invoked the arbitration clause. However, no

steps had been taken towards proceeding with the arbitration till date.

16. In the interregnum, however, according to the respondents, the petitioner had agreed to enhance the administrative charges from Rs.1 to Rs.6 per metric ton, accordingly, on 1st January, 2019 an amended agreement was entered into between the Satyam Sales and respondent no.1, whereby the petitioner agreed to pay administrative charges to the extent of Rs.6 per metric ton whereas the other entities were participating in e-Auction and were also paying the auction price. At this stage, it was agreed between the petitioner and the respondent no.1 that if the petitioner takes more than 1000 metric tons of dry fly ash they would pay the price at par with the auction rate for such quantity over and above the quantity of 1000 metric tons. However, the tenure of the original agreement dated 1st April, 2009 was not extended thereafter.

17. Records would reveal that sometimes in July, 2019 one Bijay Kedia had filed a Public Interest Litigation before this Court wherein petitioner was also a party. It is in connection with such petition that the Division Bench of this Court in WPA 12311 of 2019 was, *inter alia,* pleased to observe as follows:

> **"***The facts are alarming and it is surprising that Damodar Valley Corporation hides behind old central notifications and even refers to Supreme Court judgments as an excuse for selling fly ash privately at an unconscionably cheap rate while the product commands a much higher price at auction. Indeed, the Union represented by Additional Solicitor-General points out that since*

*bricks to be used for construction of buildings are now required to have a fly ash content, there is great demand for such product and the old notifications may no longer be relevant.*

*On behalf of DVC it is submitted that there were notifications of 1999 and 2003 issued by the Union Government and orders of the Supreme Court which regarded fly ash to be a pollutant and it was thought fit that such pollutant had to be immediately removed, without charging any money at all, if necessary. DVC suggests that certain persons were engaged at the relevant point of time on long-term basis to undertake the work of removal of fly ash and, though subsequent agreements allow some income to be earned out of the sale or supply of fly ash by DVC to such contractors, the much higher price obtained at the auction sales are not comparable with the price paid by the long-term contractors.*

*It is elementary that when the Government or any public body sells something, the primary consideration would be that it should fetch the highest price. It is true that at one point of time fly ash would be lying dumped in thermal power plants and the like with little or no way of removing the same. Fly ash is a pollutant and has been regarded as a health hazard. It is in the initial stages, when there was no known use of fly ash, that notifications may have been issued and Supreme Court orders may have been passed to get rid of the pollutant, even without charging anything, if necessary. However, the scenario that prevailed two decades back or even ten years back cannot be used as an excuse to justify the undercharging on the ground that long-term agreements may have been entered into. If public interest demands, the terms of such long-term agreements may be altered and there is scarcely a civil court which will pass a decree for specific performance at the instance of a private contractor seeking to obtain goods from a public body at an unconscionably low price.*

*Affidavit-in-opposition to the petition be filed within two weeks after the vacation; reply thereto, if any, may be filed within a week thereafter.*

*The matter will appear before the appropriate Bench four weeks after the vacation.*"

18. In the light of the observations as aforesaid, the respondent no.1 convened a meeting on 23rd November, 2020 and called upon the representatives of the petitioner to pay the price of dry fly ash at par with the prevalent e-auction rate. The petitioner did not accept the proposal and informed the same to the respondent no.1 by letter dated 25th November, 2020. Later the Ministry of Power issued a guideline/Advisory/Circular Notification dated 22nd September, 2025, clarified on 8th February, 2025 and thereafter, on 22nd November, 2022 indicating that the ash emerging is a valuable commodity and giving it for free would lead to malpractice. Following the same, the respondent no.1 by letter dated 29th July, 2022 informed the petitioner that the agreement executed on 1st January, 2019 cannot be continued and required to be amended with immediate effect. The respondent no.1 therefore proposed to enter into a fresh agreement with the petitioner, however, the petitioner did not accept such proposal and by letter dated 28th July, 2022 called upon the respondent no.1 to withdraw the same. It is the said letter dated 19th July, 2022 which forms subject matter of challenge in the present writ petition. On the basis of arguments advanced between the parties, it would transpire that the following issues fall for consideration:

a. Whether the petitioner having invoked the arbitration clause, can be permitted to invoke the extraordinary writ remedy.

b. Whether the petitioner can compel the respondent no.1 to continue with the contract and supply fly ash to the petitioner at a discounted price, and whether can contend that the respondent no.1 is estopped from denying the same to the petitioner by citing public interest.

c. Whether the writ Court in exercise of powers under Article 226 of the Constitution of India should grant relief of specific performance of contract.

d. Whether the writ petition is maintainable since the same deals with disputed questions of fact.

19. Since, the first issue concerns maintainability of the writ petition by reasons of presence of an arbitral clause, the same is taken up first. In this context, I may note that the above issues fell for consideration before this Court at the very initial stage, when the point of maintainability was raised by the respondent no.1 on the ground of presence of an arbitral clause. It is at that stage that the Coordinate Bench of this Court by noting that the presence of an arbitration clause can no longer be considered an impediment to permit interference by a Court under Article 226 of the Constitution of India as held in the case of ***Harbanslal Sahnia & Anr. v. Indian Oil Corporation Ltd. & Ors.***, reported in **(2003) 2 SCC**

**107.**, and the case of ***Whirlpool Corporation v. Registrar of Trade Marks, Mumbai & Ors.***, reported in **(1998) 8 SCC 1**, had held that ordinarily, the exclusion of jurisdiction on the ground of alternative remedy is more of a rule of discretion rather than one of compulsion. Even otherwise, since, the petitioner's right under Article 19(1)(g) of the Constitution was being considered, as the impugned action of the respondent no.1 had a direct bearing on the petitioner's right to carry on trade and business and the case of violation of Article 14 being made out, it was held that the same was sufficient to hold that the writ petition is maintainable and accordingly, the issue was decided in favour of the petitioner. Having regard to the above, I am of the view that since at the threshold the above issue had been decided, the same cannot be reopened once again. Accordingly, it is held that the writ petition is maintainable despite presence of the arbitration clause.

20. The next issue that requires consideration is the issue of estoppel viz a viz public interest. In this context, it may be noted that at the relevant point of time, when the agreement was first entered into between the petitioner and the respondent no.1, fly ash had little commercial value. In fact, it was more onerous for the respondent no.1 to appropriately dispose of the same in accordance with the guidelines issued by the Ministry of Environment and Health as fly ash was considered hazardous. With the passage of time, however, various uses of the dry fly ash having evolved, dry fly ash in itself

has became a valuable commodity. I find as rightly pointed out by Mr. Ghosh, learned senior advocate representing the respondents that the utilization of dry fly ash has increased manifold and that presently dry fly ash is being e-auctioned. It may be noted that apart from the petitioner, there are other entities who are similarly placed with the petitioner who have been purchasing dry fly ash at e-auction. It may, however, be also noted that there is a subsisting arrangement between the petitioner on the one hand and the respondent no.1 on the other to supply fly ash at the rate of Rs.6 per metric ton on account of administrative cum service charges for the first 1000 mts., and thereafter at the rate at which dry fly ash is being sold in the e-auction. Mr. Saha, learned senior advocate representing the petitioner has by drawing attention of this Court to the disclosure made by the respondents contended that for the financial year 2021-22, DVC has generated 47,72,370 mts. of fly ash, as against the same the respondent no.1 having spent Rs. 93 Crores for evacuation, and has earned Rs.18 Crores from selling the same. In this context, a chart showing the generation, amount spent on evacuation and the amount earned through sale of fly ash for the Financial Year 2022-23 and 2023-24 is extracted hereinbelow:-

| **Year** | **Qty of Fly Ash Generated** | **Qty of Fly Ash sold via E-Auction+ EOI** | **Amt spent by DVC for evacuation of Fly Ash** | **Amt earned by DVC though selling Fly Ash** |
|---|---|---|---|---|
| FY 2021- | 47,72,370 MT (178 of Writ Petition | Month-wise data present | Rs. 93 crore (182 of Writ | Rs. 18 crore (@Pg 181 of |

| | | | | |
|---|---|---|---|---|
| 22 | | at Pg 175 of Writ Petition, in aggregate comes to approximately 16.59 LMT | Petition) | Writ Petition) |
| FY 2022-23 | 54.88 LMT (Pg 16 of Supp Affidavit) | 12.77 LMT (Pg 16 of Supp Affidavit) | Rs. 100.95 crore (Pg 16 of Supplementary Affidavit) | Rs.11.10 crore (@Pg 16 of Supplementary Affidavit) |
| FY 2023-24 | 50.38 LMT (Pg 16 of Supp Affidavit) | 13.62 LMT (Pg 16 of Supp Affidavit) | Rs. 168.07 crore (Pg 16 of Supp Affidavit) | Rs. 13.23 crore (@Pg 16 of Supplementary Affidavit) |

21. By relying on the above, Mr. Saha has contended that the respondent no.1 is not benefiting by denying fly ash to the petitioner and is in fact suffering loss. In this regard, I may note that the RTI response based on which the above disclosure has been made has to be read in the context that the same does not distinguish between the dry fly ash which is a valuable commodity and the bottom fly ash which also forms part of the production capacity. According to the claim made by the respondent no. 1 in its affidavit, I find that the theoretical ratio between the two types of fly ash i.e. the wet or bottom ash in the ash pond and the dry ash is in the ratio of 80:20. However, such ratio may vary on various factors. I also notice from the disclosure made by the respondents that ash generation takes place inside boilers and it is not physically possible to measure either the bottom ash or the dry ash inside the boilers. The bottom ash is taken to the ash pond in slurry form through pipeline directly from the boilers, the dry fly ash, however,

is captured through Electrostatic Precipitator Hoppers, and then taken to silos where the dry ash is stored and the purchasers including the petitioners bring their tankers and stand in queue to receive dry fly ash from the silos. The entire process is conducted mechanically and not manually. The figures provided in response to the RTI are of total ash generation which includes both dry ash and bottom ash. Nothing has been placed by any of the parties, based on which this Court can arrive at a concrete figure as regards the extent of generation of dry ash. As such, the submissions made by the petitioner that the respondent no.1 is incurring additional expenditure for evacuation of dry fly ash, and that it would be far more beneficial for the respondent no.1 to make the same available free of cost to the petitioner, does not stand substantiated from the materials on record.

22. This apart, I find that having regard to the judicial pronouncement in the case of ***Bijay Kedia v. Damodar Valley Corporation & Ors.,*** in WP No. 12311 (W) of 2019 dated 19th October, 2020, the respondent no.1 was under an obligation to take steps. The respondent no.1 had, accordingly, requested the petitioner to pay the price at par with the e-auction rate. It is also an admitted position that the petitioner did not accede to such proposal as would corroborate from the communication dated 25th November, 2020. It is only thereafter, the letter dated 19th July, 2022 was issued. Although, the petitioner would seek to insist that

since there is a contract between the parties, the respondent no.1 is estopped from acting to the contrary, I, however, find that the Hon'ble Supreme Court in the case of ***Ram and Shyam Company*** (supra) has clearly held that disposal of public money should be done in the best interest. Again, in the case of ***Kasturi Lal Lakshmi Reddy*** (supra), the Hon'ble Supreme Court has observed that the Government cannot act in a manner which is solely benefitting the private party and that such action would both be unreasonable and contrary to public interest. On such ground, as also by noting that there cannot be any estoppel against equity since, equity demands that Government should not be held to its promise if the public interest is likely to suffer when Government is held to its promise, provided that the Government can show that it shall be inequitable to hold the Government to its promise, though the same should not be lightly inferred. In this context, it would be relevant to reproduce paragraph 24 of the judgement delivered in the case of ***Motilal Padampat Sugar Mills Co. Ltd.*** (supra).

> ***"24.*** *This Court finally, after referring to the decision in the Ganges Manufacturing Co. v. Sourujmull, Municipal Corporation of the City of Bombay v. Secretary of State for India and Collector of Bombay v. Municipal Corporation of the City of Bombay summed up the position as follows:*
>
> > *"Under our jurisprudence the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the Judge of*

*its own obligation to the citizen on an ex parte appraisement of the circumstances in which the obligation has arisen."*

*The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution. It is elementary that in a republic governed by the rule of law, no one, howsoever high or low, is above the law. Everyone is subject to the law as fully and completely as any other and the Government is no exception. It is indeed the pride of constitutional democracy and rule of law that the Government stands on the same footing as a private individual so far as the obligation of the law is concerned : the former is equally bound as the latter. It is indeed difficult to see on what principle can a Government, committed to the rule of law, claim immunity from the doctrine of promissory estoppel. Can the Government say that it is under no obligation to act in a manner that is fair and just or that it is not bound by considerations of "honesty and good faith"? Why should the Government not be held to a high "standard of rectangular rectitude while dealing with its citizens"? There was a time when the doctrine of executive necessity was regarded as sufficient justification for the Government to repudiate even its contractual obligations; but, let it be said to the eternal glory of this Court, this doctrine was emphatically negatived in the Indo-Afghan Agencies case and the supremacy of the rule of law was established. It was laid down by this Court that the Government cannot claim to be immune from the applicability of the rule of promissory estoppel and repudiate a promise made by it on the ground that such promise may fetter its future executive action. If the Government does not want its freedom of executive action to*

*be hampered or restricted, the Government need not make a promise knowing or intending that it would be acted on by the promisee and the promisee would alter his position relying upon it. But if the Government makes such a promise and the promisee acts in reliance upon it and alters his position, there is no reason why the Government should not be compelled to make good such promise like any other private individual. The law cannot acquire legitimacy and gain social acceptance unless it accords with the moral values of the society and the constant endeavour of the Courts and the legislature, must, therefore, be to close the gap between law and morality and bring about as near an approximation between the two as possible. The doctrine of promissory estoppel is a significant judicial contribution in that direction. But it is necessary to point out that since the docrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires. If it can be shown by the Government that having regard to the facts as they have transpired, it would be inequitable to hold the Government to the promise made by it, the Court would not raise an equity in favour of the promisee and enforce the promise against the Government. The doctrine of promissory estoppel would be displaced in such a case because, on the facts, equity would not require that the Government should be held bound by the promise made by it. When the Government is able to show that in view of the facts as have transpired since the making of the promise, public interest would be prejudiced if the Government were required to carry out the promise, the Court would have to balance the public interest in the Government carrying out a promise made to a citizen which has induced the citizen to act upon it and alter his position and the public interest likely to suffer if the promise were required to be carried out by the Government and determine which way the equity lies. It would not be enough for the Government just to say that public interest requires that the Government should not be compelled to carry out the promise or that the public interest would suffer if the Government were required to honour it. The Government cannot,*

*as Shah, J., pointed out in the Indo-Afghan Agencies case, claim to be exempt from the liability to carry out the promise "on some indefinite and undisclosed ground of necessity or expediency", nor can the Government claim to be the sole Judge of its liability and repudiate it "on an ex parte appraisement of the circumstances". If the Government wants to resist the liability, it will have to disclose to the Court what are the facts and circumstances on account of which the Government claims to be exempt from the liability and it would be for the Court to decide whether those facts and circumstances are such as to render it inequitable to enforce the liability against the Government. Mere claim of change of policy would not be sufficient to exonerate the Government from the liability : the Government would have to show what precisely is the changed policy and also its reason and justification so that the Court can judge for itself which way the public interest lies and what the equity of the case demands. It is only if the Court is satisfied, on proper and adequate material placed by the Government, that overriding public interest requires that the Government should not be held bound by the promise but should be free to act unfettered by it, that the Court would refuse to enforce the promise against the Government. The Court would not act on the mere ipse dixit of the Government, for it is the Court which has to decide and not the Government whether the Government should be held exempt from liability. This is the essence of the rule of law. The burden would be upon the Government to show that the public interest in the Government acting otherwise than in accordance with the promise is so overwhelming that it would be inequitable to hold the Government bound by the promise and the Court would insist on a highly rigorous standard of proof in the discharge of this burden. But even where there is no such overriding public interest, it may still be competent to the Government to resile from the promise "on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position" provided of course it is possible for the promisee to restore status*

*quo ante. If, however, the promisee cannot resume his position, the promise would become final and irrevocable. Vide Emmanuel Avodeji Ajaye v. Briscoe [(1964) 3 All ER 556 : (1964) 1 WLR 1326]*"

23. The same view has been taken in the case of ***Sharma Transport*** (supra). It is well settled that the promissory estoppel cannot be enforced to compel the Government or a public authority to carry out a representation or promise which is prohibited by law and the doctrine of promissory estoppel must yield its place to the equity, if larger public interest so requires.

24. Admittedly, there is no gainsaying that today, the dry fly ash is a far more valuable commodity than it used to be when the parties had entered into the agreement. The same is now sold in public auction through the process of e-auction. There are participants in such public auction, substantial revenue is also generated. Although Mr. Saha in support of his cause that the State cannot choose to act unilaterally has relied on the judgement delivered in the case of ***Vertex Broadcasting Company Private Limited & Ors.*** (supra), I however find that the facts based on which the Hon'ble Supreme Court has taken a view that the union could not have departed from the terms of the NIT unilaterally, is entirely different from the case at hand. In the above case, the Union by departing from the notice inviting tender was attempting to incorporate new/additional terms and conditions in the LOI and the draft license agreements which were already finalized, it is in that context it was held that the

Union could not have departed from the terms of NIT unilaterally, and on the refusal of the licensees to accept such modified terms resort to forfeiture. In the aforesaid case, the issue of large public interest was not involved. The judgement delivered in the case of ***Mary*** (supra) also does not deal with the issue of public interest. The case at hand is not one of the state attempting to escape liability under a statutory contract rather the petitioner trying to compel the state to carry out a promise which if compelled, it is more likely that public interest would suffer especially when on one hand there is no consideration for supply of dry fly ash to the extent of 1000 mts. by the Government, and on the other, the self-same product is sold at public auction for the highest fetchable consideration. It is not a case where the Government is trying to ignore the contractual terms on indefinite or undisclosed ground of necessity or expediency. It is true that a Government is bound by the rule of law and a mere change of policy would not be sufficient to exonerate the Government from the liability, however, the Court would have to balance public interest and the Government carrying out its promise and find out where the equity lies. In this case, the materials at hand would show the circumstances which lead the respondent no.1 to review its position, the value of the dry fly ash increasing manifold, and new users for the same evolving, which were never contemplated in an era when the agreement was first executed, as such it would be rather inequitable for this Court to

compel the respondent no.1 to make available such commodity to the petitioner in exercise of extraordinary jurisdiction, when such commodity i.e. dry fly ash is otherwise sold in public auction and on the petitioner's own showing, revenue in crores, is generated therefrom. The conduct of the respondent no.1 in inviting the petitioner to re-negotiate the terms does not also appear to be unreasonable, rather the same appears to be affording opportunity to the petitioner to resume its position. Accordingly, the issue 'b' is decided against the petitioner.

25. On the issue of specific performance, I find that the Hon'ble Supreme Court in the case of ***Municipal Council Gondia*** (supra) has in no uncertain terms, in paragraph 8 thereof has been pleased to observe as follows:-

> ***"8.*** *At the outset, it is required to be noted that by the impugned judgment and order the High Court has issued a writ of mandamus virtually granting the relief of specific performance of the contract/work order. From the impugned judgment and order passed by the High Court it appears that the High Court was made to believe that the original writ petitioners had already manufactured the goods which are customized and as per the specifications and the work order. However, it is now found that there are no manufactured goods readily available which can be supplied to the appellant - Council. There are disputed questions of fact such as whether in fact the goods were manufactured as per the specifications or not. Nothing was on record before the High Court that goods were in fact and actually manufactured by the original writ petitioner No. 1, as per the specifications and the requirements of the Council and as per the work order. In absence of any evidence and material on record and there being disputed*

*questions of facts the High Court ought not to have passed the impugned judgment and order directing the Council to continue the work order and accept the goods from the original writ petitioner No. 1 and to make the payments as per the work order. Even otherwise, no writ of mandamus could have been issued virtually granting the writ for specific performance of the contract/work order in a writ petition under Article 226 of the Constitution of India. The original writ petitioners ought to have been relegated to file a civil suit for appropriate relief of losses/damages, if any, sustained."*

26. In the light of the above, and having regard to the observations made in the case of ***Surjeet Singh Sahani*** (supra), and also having regard to the arbitral clause governing the parties, and the disputed question involved, including there being no sufficient disclosure on the extent of fly ash generated viz a viz bottom ash, in my view, it shall not be prudent to conclusively decide whether specific performance of the contract between the parties and/or entitlement to damages can at all be granted, as such it shall be open to the parties to enforce their claims and/or counter claims and seek resolution of the disputes through the arbitral process in accordance with law.

27. The other two issues are thus, accordingly decided.

28. In view of the above, the connected application also stands disposed of.

29. There shall be no order as to costs.

Urgent Photostat certified copy of this order, if applied for, be made available to the parties upon compliance of requisite formalities.

**(Raja Basu Chowdhury, J.)**