

**BEFORE THE NATIONAL GREEN TRIBUNAL
SOUTHERN ZONE AT CHENNAI**

Appeal No. 49 of 2013 (SZ)

B E T W E E N:

1. Mr. P. Kantarao
S/O P. Rangiah
Pynampuram (Village)
Muthukur Mandal
SPSR Nellore Dist
Andhra Pradesh
2. Mr. D. Nagiah
S/O D. Cheeniah
Nelatur (Village)
Muthukur Mandal
SPSR Nellore Dist
Andhra Pradesh
3. Mr. G. Sreenivasulu Reddy
S/O G. Subramanyam Reddy
Musunuru Mandal
Muthukur Mandal
SPSR Nellore Dist
Andhra Pradesh
4. Mr. P. Bargavamma
W/O P. Vihayalaxmana Reddy
Varakavipudi (Village)
TP Gudur Mandal
SPSR Nellore Dist, AP

.... Appellants

A N D

1. The Secretary

Ministry of Environment and Forests
Government of India
Paryavaran Bhawan, CGO Complex
Lodhi Road,
New Delhi 110003

2. The Government of Andhra Pradesh

Rep. by its Chief Secretary
Secretariat,
Hyderabad 500022

3. The Member Secretary

Andhra Pradesh State Pollution Control Board
Paryavaran Bhawan,
A-3 Industrial Estate
Sanath Nagar
Hyderabad 500018.

4. The Environmental Engineer

Andhra Pradesh Pollution Control Board
Regional Office
1st Floor APSFC Building
A.K. Nagar, Nellore 524004

5. The District Collector

Nellore District
Nellore

6. Andhra Pradesh Power Development Company Ltd.,

Rep. by its Project Manager
GTS Colony, Kalyan Nagar
Erragadda, Hyderabad 500045.

.....Respondents

(Advocates appeared: M/s V. Suthakar and K.S. Viswanathan, Advocates for Appellant(s), Smt. C. Sangamithirai, Advocate for Respondent No. 1, Shri M. Govindaraj, Advocate for Respondent No. 2 and 4, Shri T. Sai Krishnan, Advocate for Respondent No. 3 and Respondent No. 4, Mr. R. Theagarajan, Sr. Counsel for Shri. D. Bharatha Charavathy, Advocate for Respondent No.6)

CORAM:

- 1. Hon'ble Shri Justice Dr. P. Jyothimani
(Judicial Member)**
- 2. Hon'ble Prof. Dr. R. Nagendran
(Expert Member)**

J U D G M E N T

Dated : 17th December, 2013

Judgement delivered by Hon'ble Justice Dr. P. Jyothimani, Judicial Member

1. This appeal is directed against the communication of Respondent No. 1, the Ministry of Environment and Forests (MoEF), Government of India dated 3rd May, 2012 and the consequential order of consent given by the Andhra Pradesh Pollution Control Board (APPCB), respondent No. 3, dated 19th December, 2012, to and in favour of the respondent No. 6 and for further direction to the respondents to conduct a fresh Environmental Impact Assessment in respect of the Thermal Power

Project proposed by the Project proponent namely respondent No. 6 strictly in accordance with the Environmental Impact Assessment Notification 2006.

2. The Appellants are the villagers of six villages in Muthukur Mandal namely Pynapuram, Nelatur, Musunuruvaripalem, Varakavipudi, Mamidipudi & Pidatapoluru situated close to Krishnapatnam port in Nellore District. The Government of Andhra Pradesh in the year 1995 by a notification dated 2nd August, 1995 acquired 299 acres of land in survey number 117-179 in Musunuruvaripalem, Pynapuram village for providing housing colonies for the employees of Krishnapattnam Power Project. The said Thermal Power Plant requires Environmental Clearance (EC) from the MoEF as per the EIA notification 2006. As per the said Notification dated 14th September, 2006, Thermal Power Plant falls under category 'A' which includes apart from new projects, expansion and modernisation of existing projects or change in product-mix and requires prior Environmental Clearance (EC) from Central Government in the Ministry of Environment and Forest. As per the notification, it requires public hearing to be conducted at the location of the project before EC is granted.

3. The Government of Andhra Pradesh is stated to have approved the proposal for establishment of 2 x 800 MW capacity Thermal Power Plant in the above said place and thereafter the respondent No. 6 has applied for EC from respondent No.1. It is said that in accordance with the notification a public hearing was held on 6th January, 2007 by the District Collector and it is stated that in the

public hearing it was informed that respondent No. 6 was proposing to set up 2 x 800 MW coal based thermal power station at Melatur and Krishnapatnam in an area measuring 1270 acres. It is stated that certain objections were raised by the public. The respondent No. 1 has granted EC for the project on 17th July, 2007. As per the said clearance, it contemplates construction of an ash pond for disposal of fly ash/bottom ash to be generated during the course of generating Thermal Power and the said pond was proposed to be set up within the Thermal Power Plant area. The APPCB in the order dated 1st October, 2007 has issued consent for establishment to respondent No. 6 in respect of the said project.

4. Thereafter, respondent No. 1 is said to have considered the request of respondent No. 6 to shift the ash pond to a different location in survey No. 190 to 300 of Pynapuram village and granted permission by the impugned order dated 3rd May, 2012. According to the Appellant, the place of relocation of ash pond was originally earmarked for construction of a housing colony to the employees of the Power Plant and is situated in the midst of six thickly populated villages and such clearance for relocation has been granted by respondent No. 1 in spite of objections. It is stated by the Appellants that after many representations made by villagers, APPCB in fact had issued a notice to the respondent No. 6 not to undertake any change in location of the ash pond without prior consent from the Board. Subsequently, the APPCB, in the impugned order dated 19th December, 2012 has issued consent for change of location of ash pond to the new site.

5. It is challenging the said impugned orders of the respondents No. 1 & 3, the present appeal has been filed by the Appellants on the grounds, that even as per the information of the respondent No. 6 dated 6th April, 2013, sought for by the villagers, the proposed new location of ash pond is a classified "Tank Poromboke", that the permission for relocation has been granted not by considering the objections raised by the public, that in spite of the notice given by the respondent No. 3 APPCB, directing the respondent No. 6 not to proceed with the shifting of the ash pond to the new site by the notice dated 6th October, 2012, within nearly two months namely on 19th December, 2012, the respondent No. 3 has passed order granting permission which is illegal and arbitrary, that the clearance given by respondent No. 1 is in violation of EIA Notification, 2006, that by the impugned orders, the lands which are categorised as water body is being illegally permitted to be used for ash pond resulting in damaging the water body, that the proposal for relocation of ash pond to a place other than the original location requires a fresh EC by MoEF which is possible only after following the EIA Notification 2006 and conducting public hearing afresh for the relocation. For a change in location of the ash pond to a different area, there ought to have been a fresh Environmental Impact Assessment and therefore, the non following of the procedure is fatal to the impugned orders. It is also the case of the Appellants that the coal based thermal project in the coastal area is creating incriminating effect resulting in ecological, human disaster and that the burning of about 4 lakhs tonnes of coal everyday and spewing of 1.45 lakh tonnes per day of

toxic fume in the environment will emit Sulphur, Zinc, Mercury and other dangerous elements to the environment. It is also their case that the agricultural activities, ecology, water bodies, sea and health of people are endangered by the impugned order and that the act of the Government in acquiring land for the respondent No. 6 which are shown as "Tank Poromboke" in the revenue registers and permitting it to be used as relocated fly ash pond for the project is against law and that the impugned order is against the Judgments and pronouncement of various orders of the Courts and the Tribunal.

6. In the reply filed by the 1st respondent, MoEF, it is stated that the EC was granted in accordance with the notification, that in the public proceeding held on 6th January, 2007 conducted by the APPCB, the public have overwhelmingly welcomed the power project, that as far as the original of EC granted to respondent No. 6, the project proponent is required to utilise 100 per cent of fly ash from the day of commencing of the plant, that for the ash pond which is for storage of bottom ash, the respondent 6 is required to develop a 3 tier green belt around the ash pond for arresting any fugitive emissions, that the earlier proposed location of ash pond was nearer to a water body and a creek which drained into the Buckingham Canal and therefore it was felt undesirable which necessitated the approval of the new location, that the Expert Appraisal Committee examined the proposal for change of ash pond location in its meeting held on 12th/13th September, 2011 and agreed for the proposal of respondent No. 6 for relocation, that it was thereafter, based on the Expert Appraisal Committee Report the respondent No. 1 has

permitted relocation under the impugned order dated 3rd May, 2012, which is well in accordance with the notification, and that the respondent No. 1 has carried out the exercise of according approval for change of location of ash pond after duly considering that the change is nowhere prejudicial to the environment at large and hence it is valid in law.

7. The respondent No. 3 APPCB in its reply while admitting that the Thermal Power Project proposed by the respondent No. 6 is covered under 'A' category of the notification, stated that the notification itself makes it clear that fresh EC is required only in the event of expansion or modernisation of the existing projects or activities listed in the Schedule to the notification with additional capacity beyond the limits specified and in the event of any change in the product mix in the existing manufacturing unit and therefore, according to respondent No. 3, the change in place of ash pond within the total area already approved does not require a fresh EC and it does not require any further public hearing.

8. It is also the case of the respondent No. 3 APPCB that the ash pond originally proposed was only an emergency ash pond and the proposed relocation is also to be established within the plant site of 1270 acres and permission was granted subject to the conditions that the ash pond water has to be recycled and should not be discharged into the sea. It is further stated that even though the representation of the villagers dated 10th September, 2012 has stated that the proposed relocation of the ash pond is situated in the midst of six villages, there was no objection raised by any one that the

proposed relocated place of ash pond was situated in a tank or water body. The notice issued by the respondent No. 4 on behalf of the APPCB dated 6th October, 2012 to respondent No. 6 directing not to undertake the relocation work was only to the effect that the same cannot be done without obtaining prior consent from the APPCB under Section 25 of the Water (Prevention and Control of Pollution) Act 1974 and Section 21 of the Air (Prevention and Control of Pollution) Act 1981 and therefore, the notice dated 6th October, 2012 is not a bar for subsequent issuance of consent to establish by the respondent No. 3 which was done after referring to the order of the respondent No.1 dated 3rd May, 2012 and taking note of the fact that the relocation of the ash pond by the respondent No. 6 will avoid contamination of fresh water tank adjacent to the site earlier envisaged. It is also stated that respondent No. 4 has made a site inspection of the proposed new place for establishment of the ash pond in Pyampuram Village on 7th November, 2012 and the report was placed for obtaining the consent to establish before Committee in the meeting held on 23rd November, 2012 and after detailed examination, the Committee recommended not only to extend the period of consent to establish up to 13th January, 2015 but also for the change of ash pond location subject to certain conditions. It is also stated that against order of the respondent No. 3, appellate authority is provided, and Appellate Authority's period has been extended by the Government of Andhra Pradesh in the order dated 1st July, 2013 and thereafter the Appellant cannot straightaway approach the Tribunal. It is also stated that since the proposed

relocated place of ash pond is situated within 1270 acres of land in respect of which EC has been given after conducting public hearing in 2007, there is no necessity for having another public hearing.

9. On behalf of respondent No. 5 the District Collector, it is stated that with regard to land for relocation by the project proponent, even though the said lands were originally classified as “Tank Poromboke”, it was reclassified later as “assessed waste” land since there was no tank in existence. In the Affidavit dated 30th July, 2013 it is stated that the Revenue Board of the erstwhile combined Madras Province has abandoned the tank as early as in the year 1924. The sanction of Revenue Board for abandoning the tank was communicated from the District Collector, Nellore in the letter dated 17th August, 1924. While paying compensation for the acquired land in the year 2006 many of the assignees were not paid compensation based on the diglot alone which was having misleading information without incorporating the above said record of 1924. It is stated that after the mistakes were identified the payment of compensation was ordered by the District Collector as per the order dated 31st August, 2010.

10. Respondent No. 6, project proponent in its reply has stated that at the outset the appeal is barred by limitation. The order of the respondent no. 1 dated 3rd May, 2012 and the consequential order dated 19th December, 2012 are challenged after the limitation period of 30 days and further condonable limit of 60 days. It is the further case of the said respondent No. 6 that when the Government of Andhra Pradesh has approved the proposal for establishing 2x800

MW capacity Thermal Power Plant in the name of Shri Damodaram Sanjeevaiah Thermal Power Station at Nelatur Village in the year 2006 and subsequent land acquisition proceedings were completed, a Special Purpose Vehicle in the name of the 6th respondent being a subsidiary company was floated and thereafter an application was made to the respondent No. 1 for the grant of EC. The respondent No. 1 after conducting a public hearing on 6th January, 2007 and circulating the Environmental Impact Assessment Report to the public as well as to the appropriate authorities, by the order dated 17th July 2007 has granted EC for the project subject to conditions. It is stated that based on the detailed project report, preliminary specifications were prepared and tenders were awarded for the project for which a total financial outlay was estimated at 10,450 crores and so far an expenditure of Rupees 7,900 crores has been incurred and the plant is nearing completion as per the Schedule and coal firing is to take place during September 2013 and energy production from December 2013. During the course of execution of the project more area was required for accommodating coal handling system and therefore, the originally allotted ash pond could not be continued and had to be shifted. As the movement of the ash pond could not be done either on the Western or Eastern side since it would be closer to the major water bodies at Nelatur Village Buckingham Canal, it was decided that there is a need for developing a 3 tier green belt area, and a decision was taken to relocate the ash pond on the northern side of the main plant which was originally earmarked for the proposed township area. On the basis that the shifting will avoid

proximity to major water bodies, respondent No.6 by a communication dated 30th May, 2011 has sought permission from the respondent No. 1 as per clause 6 of the EC already granted for relocation of the ash pond. It was after the proper detailed presentation made on 13th September, 2011, the request of the respondent No. 6 was placed before the Expert Appraisal committee of the respondent No. 1 in its meeting held on 13th September, 2011 and thereafter, by an order dated 3rd May, 2012 the respondent No. 1 has granted permission for relocation of the ash pond.

11. Based on the complaint of the appellants, respondent No.4, in the communication dated 6th October, 2012 has directed the respondent No. 6 not to proceed with the relocation before obtaining prior consent from respondent No. 3. Accordingly, the 6th respondent applied to the respondent No.3 on 6th November, 2012 and the said respondent after examining the proposal in detail, by order dated on 19th December, 2012 has granted consent. Therefore, according to the respondent No. 6, everything was done strictly in accordance with law and the work of construction of ash pond was started by levelling the land and making excavation. In the meantime, on filing the above appeal the Tribunal has granted an order of stay on 24th December, 2013. It is stated that almost the entire work has been completed. The mandatory requirement of the notification has been fully followed. The various grounds raised by the appellant have also been denied. It is also denied that there is any “Tank Poromboke” in the proposed site where the ash pond is to be relocated. The ash pond is envisaged by way of zero effluent discharge technology in 100 acres

and ash particles will be pumped into the ash pond area in a semi solid state and the entire slush will settle in the pond and water stagnate above the sediment is subsequently sent to a lagoon and reused in the plant and no water will be discharged into the sea. It is stated that the project involved in borrowing of money from a German Company and another firm in New Delhi, involving payment of huge interest and therefore, everyday of delay will cost to the exchequer. Accordingly, the respondent No. 6 has prayed for dismissal of the appeal.

12. It is the submission of Mr. K.S. Vishwanathan, learned counsel appearing for the appellants that when the original Terms of Reference by the project proponent has shown the place of ash pond in 100 acres as an emergency ash pond, whenever any change of place by way of relocation was proposed the same should have been by a reference to EAC and after conducting a public hearing. Otherwise, according to him a fresh clearance is required by following procedures including the public hearing for relocation. Therefore, according to him in the absence of such clearance, the order of the MoEF in granting permission for relocation is *prima facie* bad and it suffers from inherent illegality. He would also contend that the impugned order of the respondent No. 1 (MoEF) is liable to be struck down on the ground of non application of mind. It is his submission that based on the original EC dated 17th July, 2007, Rs.8000/- crores have been spent and thereafter, the relocation of ash pond is proposed with the purpose of drawing water from sea for which no pipelines have been made ready. He has also submitted that the

project proponent has not divulged the complete details to enable the MoEF to pass orders in a proper manner and the MoEF in its turn has failed to find out the real truth in respect of relocation of ash pond independent of divulgence of correct fact by the project proponent. He also submitted that the permission granted by the Pollution Control Board after the impugned order of the MoEF is also mechanical and not by independent exercise of its power. It is his submission that when the water body was going to be dealt with, the Government should have been properly represented. On the other hand, the collector and the RDO have only acted helping the project proponent to obtain permission for relocation.

13. *Per Contra*, Mr. R. Theagarajan, Learned Senior Counsel appearing for respondent No. 6, project proponent contended that as per the EIA notification 2006, a fresh EC is required only in cases of expansion and modernisation of the existing project. According to him even in the original EC the place of ash pond has been stated as an emergency ash pond and the relocation is only within the entire campus demarcated for the industry and therefore, it would not amount to an expansion or modernisation. It is his further submission that as stated by the RDO and the collector, the place where the relocation of ash pond is to be made, is not a water body and the same has been entered in the earlier records by mistake which was subsequently rectified. Therefore, according to him, a fresh EC is not required and consequently the impugned order of the MoEF and the consequential order of the Pollution Control Board (PCB) cannot be held to be bad in law.

14. The Learned Counsel appearing for the MoEF Mrs. Sangamithirai would also reiterate her stand that the impugned order has been passed by the MoEF in accordance with the EIA Notification and in as much as the relocation of ash pond is within the area allocated for the industry and the same has been considered to be more ecologically viable by the MoEF, one cannot jump to a conclusion that the impugned order is bad in law and passed with non application of mind. That is also the contention of the Learned Counsel appearing for the Andhra Pradesh Pollution Control Board.

15. We have heard the Learned Counsel appearing for the appellant as well as the respondents elaborately and referred to various documents and given our anxious thought to the issues involved in this case.

16. The main facts are not in dispute. The respondent No. 6 was created as a Special Purpose Vehicle being a subsidiary company of Andhra Pradesh Power Generation Corporation Ltd. which has got 51 per cent of the share with the balance 49 per cent share with the Government of Andhra Pradesh and the respondent No. 6, jointly. On a proposal made by the respondent No. 6 for establishing a 2 x 800 MW capacity Thermal Power Plant at Krishnapatnam, Nellore, Andhra Pradesh, the Government has approved the same to be found in the name of Shri Damodaram Sanjeevaiah Thermal Power Station (SDSTPS) at Nelatur Village, Muthukur Mandal, Nellore District, Andhra Pradesh. An application was made by the project proponent, the respondent No. 6 by way of a proposal to the respondent No. 1 in form 1 as per the EIA notification 2006. As per the proposal, the

requirement of lands for the project was 1250 acres which includes land for coal conveyers and the estimated requirement of coal was 13,656 TPD. The water requirement for the project was estimated at 2,96,400 ML per day which has to be drawn from sea. It has been stated in Form 1 by the project proponent that there is no ecologically sensitive area within 10 km from the project boundary and no forest land is involved.

17. On the basis of the said proposal, a public hearing was held in accordance with the EIA Notification 2006 of the MoEF, Government of India, on 6th July, 2007 in the elementary school at Nelatur conducted by the District Collector with the Environmental Engineer Nellure as the convenor. Admittedly, public representatives as well as the officers have participated in the public hearing and thereafter the proposal was referred as per Para 12 of EIA notification 2006, to the Expert Appraisal Committee. It is based on the report of the said Committee that the MoEF in the order dated 17th July, 2007 has granted EC to the project subject to various terms and conditions. One of the conditions contemplated in the EC issue by the MoEF reads as follows:

“ Para xii. Fly ash shall be collected in Silos in dry form and bottom ash in hydro bins and its 100 per cent utilisation shall be ensured from the day of the Commission of the plant. In emergency, the unutilized fly ash/bottom ash shall be disposed off at the proposed ash disposal site through HCSD system. Borrow earth shall not be taken from ash pond area for construction of ash dyke etc.”

18. The said EC also contains a clause which contemplates a fresh reference to the Ministry in cases of any deviation or alteration in the project proposed. It is relevant to extract the said clause of the EC for the better appreciation of the entire fact

“ ‘Clause 6’ In case of any deviation or alteration in the project proposed from those submitted to the Ministry for clearance, a fresh reference should be made to the Ministry to assess the adequacy of the conditions imposed and to incorporate additional environmental protection measures required, if any ”.

A close reading of the said clause makes it abundantly clear that in cases of deviation or alteration in the project from the proposal originally submitted, a duty is contemplated on the project proponent to make a fresh reference to the Ministry. The Ministry assesses the adequacy of the conditions already imposed and incorporate additional environmental protection measures. Therefore for the purpose of the Ministry to have the benefit of a fresh reference one has to satisfy that from the original project proposal, a deviation or alteration is sought for. In the absence of the meaning of the word “deviation” or “alteration”, it is to be irresistibly concluded that what is deviation or alteration of a project already proposed is subject to the satisfaction of the Ministry. If the Ministry is satisfied, for which it may always refer the proposal for deviation or alteration to the Expert Appraisal Committee if it is of category ‘A’ project or to the State Level Expert Appraisal Committee (SEAC) if it is of category ‘B’ project, and on such subjective satisfaction of the Ministry, it is

entitled to assess the adequacy of conditions already imposed or to incorporate additional environmental protection measures required. It is relevant to note that even in such event whether the Ministry has to issue a fresh Environment Clearance or not is not clear both in the original order of the Ministry given to the project proponent dated 17th July, 2007 and for that matter even in the Environment Clearance Regulations 2006 also.

19. However, in the Environment Clearance Regulations 2006, para 2 which deals with the requirements of prior EC, while making it clear that in respect of projects falling under category A in the schedule, it is the Central Government in the Ministry of Environment and Forest and in respect of matters falling under category B, it is the State Level Environmental Impact Assessment Authority (SEIAA), states that such authority shall confer prior EC in respect of all new projects and activities listed in the schedule, expansion and modernization of existing projects or activities listed in the schedule or any change in product mix in an existing manufacturing unit included in the schedule beyond the specified range. We feel it appropriate to extract the said paragraph number 2 which would throw light on the issue involved in this case.

“ 2) Requirements of prior Environmental Clearance (EC)- The following projects or activities shall require prior environmental clearance from the concerned regulatory authority, which shall hereinafter referred to as the Central Government in the Ministry of Environment and Forests for matters falling under Category ‘A’ in the

Schedule and as State level Environment Impact Assessment Authority (SEIAA) for matters falling under Category 'B' in the said Schedule, before any construction work, or preparation of land by the project management except for securing the land, is started on the project or activity:

- (i) *All new projects or activities listed in the Schedule to this notification;*
- (ii) *Expansion and modernization of existing projects or activities listed in the Schedule to this notification with addition of capacity beyond the limits specified for the concerned sector, that is, projects or activities which cross the threshold limits given in the Schedule, after expansion or modernization;*
- (iii) *Any change in product-mix in an existing manufacturing unit included in Schedule beyond the specified range.”*

(emphasis supplied)

20. Therefore it is clear that deviation or alteration of the proposal as contained in the EC given to the project proponent in this case is different from expansion and modernization of existing projects etc., contemplated in the Environment Clearance Regulations 2006.

21. On the other hand to be more clear, if a project is proposed to be deviated or altered by the project proponent which mean that without expansion and modernization but within the devices and

mechanisms contemplated in the original proposal, such deviation or alteration does not require a fresh prior Environmental Clearance and it has to be only made as a reference to the Ministry to assess the adequacy of condition already imposed and also to decide whether new environmental protection measure ought to be incorporated as additional conditions. Consequently, such proposals or deviation or alteration which does not require fresh EC need not undergo the fresh process of grant of EC including the public hearing. On the other hand, as contemplated in paragraph 2 elicited above, if in respect of an existing project, a proposal for expansion and modernization with additional capacity which crosses the threshold limits given in the schedule after the expansion or modernisation, is deemed to be a fresh proposal which requires fresh consideration and issuance of fresh prior EC in which event necessarily it has to undergo the entire process including the public hearing.

22. Now having analysed the contents of the Environmental Clearance given to the project proponent by the Ministry dated 17th July, 2007 in relation to the conditions regarding deviation and alteration and also the provisions of Environmental Clearance regulations 2006 particularly related to expansion and modernization of project, we have to consider the facts of the present case in the above background. Since we are concerned in this case about the shifting and relocation of the ash pond, it is not necessary to go into the various aspects related to the land acquisition etc, suffice to state that the entire project for which original EC was granted by the Ministry, was contained in the area of 1250 acres. The

project proponent, in the communication dated 31st May, 2011 and addressed to the Ministry of Environment and Forests Government of India has stated that as per the original EC the ash pond situated in 120 acres and was located close to an existing fresh water body and saline water creek which joins Buckingham Canal and during the detailed engineering study it was found that to relocate the ash pond area away from the main project will be environmentally advantageous and therefore, requested permission from the Ministry to shift the ash pond to a place which is admittedly within the total extent of 1250 acres originally demarcated for the project township, in order to avoid proximity to existing fresh water body and water creek which joins Buckingham Canal. The said letter of the project proponent also points out that the said request was made as per clause 6 of the original Environmental Clearance dated on 17th July, 2007 elicited above. Along with the said letter, the project proponent has also enclosed some basic information more particularly about the ash pond to be relocated apart from other particulars in the communication dated 30th August, 2011.

23. As it is seen in the impugned order of the Ministry of Environment and Forest, Government of India dated 3rd May, 2012, the said request made by the project proponent was considered by the Expert Appraisal committee (Thermal Power) in its meeting held on 12th and 13th September, 2011 and made its recommendation and accordingly the Government has permitted the change of ash pond location to the new site at co-ordinates 14° 21 ' 06" North to 14° 21' 29 " North Longitudes and 80° 06 ' 58" to 80° 07 ' 45" East Latitude.

In fact, in the said order dated 3rd May, 2012 the Ministry has imposed further conditions which are as follows :

“ xxv) The project proponent shall upload the status of compliance of the conditions stipulated in the environmental clearance issued vide this Ministry’s letter of even no. dated 17th July, 2007 in its website and updated periodically and also simultaneously send the same by e-mail to the Regional Office of the Ministry of Environment and Forests.

xxvi) Criteria pollutants levels including NO_x, RSPM (PM₁₀ & PM_{2.5}), SO_x (from stack & ambient air) shall be regularly monitored and results displayed in your website and also at the main gate of the power plant.

xxvii) A three tier thick green belts on either side of the Colony and Ash Pond shall be developed to prevent fugitive emissions and status of implementation shall be reported to the Regional Office of the Ministry regularly.”

24. Therefore, it is clear that the impugned order of respondent No. 1 is in terms of the original EC granted dated 17th July, 2007 particularly para 6 as stated above by sending a new proposal for relocation of the ash pond within the original area of the entire project, which cannot be treated as a proposal for modernisation or expansion with any additional capacity beyond the limits granted in the schedule or any change in the product mix in the existing manufacturing unit which alone requires a fresh prior EC. Therefore, we are of the view that the relocation of the ash pond on the facts

and the circumstances of the present case cannot be treated as expansion or modernisation beyond the original capacity and therefore, it does not require a fresh Environmental Clearance from the Ministry. Consequently, there is no obligation on the part of the Ministry to direct a fresh public hearing.

25. Consequent to this conclusion, the next question which follows is as to whether there was any malafide on the part of the respondent No. 6 or non consideration of the issue by the respondent No. 1 in its proper perspective and independently. The reason mentioned for the proposed relocation of ash pond is to protect a fresh water body and creek which joins the sea. As it is seen in the impugned order the recommendation of the Expert Appraisal committee (Thermal Power) in respect of the proposal for relocation of pond has been considered by the Ministry while granting such permission. Not only that, the Government as a matter of abundant caution has directed for the development of a 3 tier thick green belt on either side of the colony and ash pond to prevent fugitive emissions and also directed the status of implementation to be informed to the Ministry. We see no malafide either on the part of respondent No. 6 or the respondent No. 1 in this regard and one can never say that the impugned order of respondent No. 1 is either devoid of merit or passed with non application of mind. There is no question of assessing technical reason in a participatory manner at the stage of consideration of alteration since it is not in the form of expansion or modernisation beyond the capacity as per the Environmental Clearance Notification 2006. The contention of the

Learned Counsel appearing for the appellants that the Environmental Appraisal Committee during the time when it considered the proposal for relocation of ash pond should have set up issue based manifesto is certainly not applicable at that stage.

26. There is one other issue that is raised on behalf of the appellants namely that the APPCB having issued a show cause notice on 6th October, 2012 to the project proponent has abruptly changed its stand in the impugned order dated 19th December, 2012. The said contention in our view is totally baseless. On a reference to the notice issued by the Andhra Pradesh Pollution Control Board (APPCB) dated 6th October, 2012 which is after the permission granted by the MoEF dated 3rd May, 2012, it is seen that what is stated by the APPCB in the said notice is that the project proponent should not undertake any change in location of ash pond without obtaining prior consent from the APPCB as per the Water (Prevention and Control of Pollution) Act 1974 and Air (Prevention and Control of Pollution) Act 1981. It was after the communication dated 6th November, 2012 made by the APPCB, the project proponent has stated that the consent issued by the Board originally for 5 years has expired on 30th September, 2012 and pointing out the order of the Ministry dated 3rd May, 2012 requested the Board to extend the validity of the consent to establish till 31st March, 2015 explaining various progress of works taken up by the project proponent. Thereafter, the Executive Engineer of the Pollution Control Board has filed a detailed report. Considering the detailed report of the Executive Engineer dated 17th October, 2012 and the inspection report of the regional officer dated

12th November, 2012 which were considered by the CFE Committee in the meeting held on 23rd November, 2012 and recommended not only the extension of the consent to establish up to 31st March, 2015 but also for relocation of the ash pond, based on which the impugned order came to be passed. In fact, the impugned order of the Pollution Control Board reiterates the conditions imposed by the MoEF, Government of India for the purpose of developing a 3 tier thick green belt to prevent fugitive emissions. In such view of the matter we hold that there is certainly no change in the attitude of the APPCB and there is no reason to come to the conclusion that the impugned order of the APPCB is malafide or one passed with non - application of mind.

27. There is one other point which has been raised in the grounds of appeal by the appellants namely that the place where the ash pond is permitted to be relocated has been shown as a “reservoir” and “Tank Poromboke” in the revenue records and therefore, permission granted to shift the ash pond of the project proponent in a water body is illegal and will affect the ecological conditions. In fact, the Learned Counsel appearing for the appellants has relied upon a decision of this Tribunal dated 20th September, 2011. That was a case where in respect of Koradi Thermal Power Project in Nagpur District of Maharashtra there was an allegation of misrepresentation of the distance between the Thermal Power Plant Project from Nagpur City as 11 kilometers which is stated to be wrong and it was in those circumstances considering the impact on the public health this Bench has made certain directions to the MoEF to

take note of the issue as to whether the nuclear radiations from the Thermal Power Projects can cause any cumulative affect.

28. In the affidavit filed by the Thasildar of Muthukur Mandal, Nellore District, on behalf of the respondent No. 5 dated 8th July, 2013, it was stated that an extent of 190.62 acres of patta land and 108.78 acres of Government land were handed over to the project authorities. It was also stated in the said affidavit that earlier even in the said extents of land wherever it is classified as Tank/Tank Poromboke/Channel Poromboke, they were reclassified as Assessed Waste and assigned to the eligible persons as there was no tank in existence. However, when a document from the revenue department in the form of adangal, dated 18th July, 2013 was shown where the said survey number 213/1 was stated to be a “pond poromboke”, issued by another Thasildar of Muthukur Mandal, it was explained in the affidavit filed by the Revenue Divisional Officer, Nellore dated 30th July, 2013 that a part of the area earmarked for relocation of ash pond included in survey number 213/1 etc are shown as Pynampuram Small Tank (Pynampuram Chinna Cheruva) as shown in the survey map. It is explained that in the original diglot maintained in the year 1908 compiled by the then British Government based on which the above said map was prepared, it was mentioned as small tank. But thereafter, by a process of law, the Revenue Board of the erstwhile Combined Madras Province in the year 1924 has abandoned the tank as communicated by the District Collector of Nellore dated 17th August, 1924. It is also stated in the said affidavit that when the land was acquired in the year 2006 and

question of payment of compensation was considered, many of the assignees including those lands which were abandoned in 1924 stated above were not granted compensation by referring to the above said diglot alone. It was in those circumstances the then Revenue Divisional Officer has filed an affidavit in Andhra Pradesh High Court in a Writ Petition stating that they were Government lands but cultivated by individuals. However, after the public agitation, the matter was in detailed examined by the District Collector including the 1924 records mentioned above and thereafter by an order dated 31st August, 2010 the District Collector has ordered payment of compensation to the occupants of the said survey numbers and therefore it ceased to be a water body. In such factual circumstance explained in clear terms, we are unable to accept the contention raised on behalf of the appellants that the new place of relocation of ash pond is remaining a water body. The reference made by the Learned Counsel for the applicants to the judgment of the Andhra Pradesh High Court in K. Venket Reddy Vs. Government of Andhra Pradesh and Ors., reported in 2006 (1 ALD 29) has no application to the facts of the present case especially when due process was followed as early as in the year 1924 when the tank was abandoned.

29. The further reliance placed on the judgment of the Hon'ble Supreme Court, rendered in Hinch Lal Tiwari Vs. Kamla Devi and Ors, reported in 2001(6) SCC 496) is also not applicable to the facts of the present case. That was a case where admittedly there was a consistent finding by the authorities below that the place concerned was a pond. However, the High Court has differed and it was in those

circumstances the Hon'ble Apex Court has made some significant observations regarding the material resources of the community. It is relevant to extract the following paragraphs of the judgment for a better appreciation of the issue involved therein which is as follows :-

“12) On this finding in our view, the High Court ought to have confirmed the order of the Commissioner. However, it proceeded to hold that considering the said report the area of 10 biswas could only be allotted and the remaining five Biswas of land which have still the character of a pond, could not be allotted. In our view, it is difficult to sustain the impugned order of the High Court. There is concurrent finding that a pond exists and the area covered by it varies in the rainy season. In such a case no part of it could have been allotted to anybody for construction of house building or any allied purposes.

13) It is important to notice that the material resources of the community like forests, tanks, ponds, hillock, mountain etc. are nature's bounty. They maintain delicate ecological balance. They need to be protected for a proper and healthy environment which enables people to enjoy a quality life which is the essence of the guaranteed right under Article 21 of the Constitution. The Government, including the Revenue Authorities i.e. Respondents 11 to 13, having noticed that a pond is falling in disuse, should have bestowed their attention to develop the same which would, on one hand, have prevented ecological disaster and on the other provided better environment for the benefit of the public at large. Such vigil is

the best protection against knavish attempts to seek allotment in non- abadi sites.”

30. The said judgment was given on the admitted facts of the said case which in our respectful view is not applicable to the facts of the present case on hand.

31. Therefore, looking at any angle we are unable to come to a conclusion that the impugned orders of the respondent No. 1 and 3 suffer from any illegality. Accordingly, we confirm both the impugned orders as valid in law and the appeal stands dismissed. No order as to the cost.

Order delivered by the Hon’ble Judicial Member Justice Dr. P. Jyothimani on the 17th of December, 2013 from the Principal Bench New Delhi, by video conferencing and also signed by the Hon’ble Expert Member Prof. Dr. R. Nagendran at Southern Zone (Chennai) on the same day.

....., JM
(Dr. Justice P. Jyothimani)

....., EM
(Prof.Dr. R. Nagendran)

Chennai,

17th December, 2013