

(2013) 06 MAD CK 0191

In the Madras High Court

Case No : Writ Petition No. 12295 of 2011 and M.P. No. 1 of 2011

M/s. Tamilnadu Generation and Distribution Corporation
Limited and M/s. Tamilnadu Generation and Distribution
Corporation Limited

APPELLANT

Vs

Union of India, The Deputy Director, Fly Ash Utilisation and
Tamilnadu Fly Ash Bricks and Blocks Manufacturers
Association

RESPONDENT

Date of Decision : 13-06-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11
Electricity Act, 2003 — Section 173, 174, 175, 73, 86(1)(f)
Environment (Protection) Act, 1986 — Section 3, 3(1), 3(2)(v), 5, 6

Citation : (2013) 3 CTC 817 : (2013) 3 EFLT 608 : (2013) WritLR 845

Hon'ble Judges : V. Ramasubramanian, J

Bench : Single Bench

Advocate : G. Vasudevan, M. Nirmaladevi, ACGSC for Respondents 1 and 2 and
Mr. Rathina Ashokan, for Respondent-3, for the appearing parties; Rathina
Ashokan, for Respondent-3, for the Respondent

Final Decision : Dismissed

Judgement

V. Ramasubramanian, J.—The Tamilnadu Generation and Distribution Corporation Limited, which is one of the successor entities of the

Tamilnadu Electricity Board, has come up with the above writ petition challenging an office memorandum issued by the Ministry of Environment

and Forests, Government of India, directing the petitioner to comply with the Fly Ash Utilisation Amendment Notification S.O. 2804 (E) dated

3.11.2009. Heard Mr. G. Vasudevan, learned counsel for the petitioners, Ms. M. Nirmaladevi, learned Additional Central Government Standing

Counsel for the respondents 1 and 2 and Mr. Rathina Ashokan, learned counsel for the third respondent.

2. Fly ash, which causes enormous amount of air pollution and which is considered to be hazardous to the environment, is generated in huge

quantity by thermal power plants. In order to reduce the impact of fly ash on the environment, the Government of India issued a Draft Notification

containing certain directions on 22.5.1998 under Rule 5(3) of the Environment (Protection) Rules, 1986. After receiving objections and

suggestions to the Draft Notification, a Final Notification was published by the Government of India on 14.9.1999, in exercise of the powers

conferred by Sub-Section (1) read with Clause (v) of Sub-Section (2) of Section 3 and Section 5 of the Environment (Protection) Act, 1986.

3. The Final Notification was in three parts, dealing respectively with -

(i) use of fly ash, bottom ash or pond ash in the manufacture of bricks and in other construction activities;

(ii) utilisation of ash by thermal power plants; and

(iii) specifications for use of ash based products. The first part of the Notification imposed a prohibition upon any person carrying on the activity of

manufacturing clay bricks or tiles or blocks for use in construction activities, without mixing at least 25% of fly ash, if the activity is carried on within

the radius of 50 Km from the thermal power stations. The second part of the Final Notification contained a direction to every coal or lignite based

thermal power plant to make available, ash, for at least ten years from the date of publication of the Notification without any payment or any other

consideration, for the purpose of manufacturing ash based products.

4. Subsequently, the Central Government also issued an amendment to the above Notification by another Notification dated 27.8.2003. By the

said Notification, a mandate was issued to all construction agencies engaged in the construction of buildings within a radius of 50-100 Kms from a

coal or lignite based thermal power plant, to use fly ash bricks or blocks or tiles or clay fly ash bricks, etc., subject to a minimum percentage

mentioned in the order itself. The Amendment Notification preserved intact, the obligation of coal or lignite based thermal power plants to make

available, ash, for the purpose of manufacturing ash based products for any construction activity. Additionally, the Amendment Notification stated

that the thermal power plants have to ensure availability of fair quantity of ash to each user, including brick kilns.

5. Another Draft Notification was issued on 6.11.2008 proposing several amendments to the original Notification. This Draft Notification was

issued, after taking note of the fact that though the use of fly ash in the manufacture of fly ash bricks or products rose from 1.5 million tonnes in

2002-2003 to 3.15 million tonnes in 2006-2007, the target was not achieved as on 31.8.2007. Out of the several amendments proposed in the

Draft Notification dated 6.11.2008, the portions relating to paragraph 2 of the Original Notification are relevant for our purpose. Hence, they are

extracted as follows:

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

(i) The pond ash and mound ash should be made available free of any charge on "as is where is" basis to manufacturers of bricks, blocks or tiles

including clay fly ash product manufacturing unit(s), farmers, the Central Government and the State Road Construction Agencies, Public Works

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

(ii) At least 20% of dry ESP fly ash shall be made available free of charge to units manufacturing fly ash or clay-fly ash bricks, blocks and tiles on a

priority basis over other users. If the demand from such agencies falls short of 20% of quantity, the balance quantity can be sold or disposed of by

the power station as may be possible. Provided that the fly ash obtained from the thermal power station should be utilised only for the purpose for

which it was obtained from the thermal power station or plant failing which no fly ash shall be made available to the defaulting users;

and

(6) The amount collected from sale of fly ash and fly ash based products by coal and/or lignite based thermal power stations or their subsidiary or

sister concern unit, as applicable should be kept in a separate account head and shall be utilised only for development of infrastructure or facilities

and promotion/facilitation activities for use of fly ash until 100 percent fly ash utilisation level is achieved. Thereafter as long as 100% fly ash

utilisation levels are maintained, the thermal power station would be free to utilise the amount collected for other development programmes also. In

case, there is a reduction in the fly ash utilisation levels in the subsequent year(s), the use of financial return from fly ash shall get restricted to

development of infrastructure or facilities and promotion or facilitation activities for fly ash utilisation until 100 percent fly ash utilisation level is again achieved and maintained.

6. After receiving objections and suggestions to the Draft Notification dated 6.11.2008, the Government of India issued a Final Notification dated

3.11.2009. In so far as paragraph 2 of the Original Notification is concerned, the Final Notification dated 3.11.2009 accepted the draft

amendments. Therefore, paragraphs 2(1) and (6), of the Draft Notification dated 6.11.2008 were retained in the Final Notification dated

3.11.2009.

7. Though the Tamil Nadu Electricity Board was complying with the aforesaid notifications, they found over a period of time that they were

incurring an expenditure of Rs. 578/- per ton, for the collection of fly ash. Therefore, they decided to recover at least a portion of the cost so

incurred and consequently, started demanding a sum of Rs. 100/- per ton from the units manufacturing fly ash based products. This was done with

effect from 15.10.2009.

8. Aggrieved by the collection of the charges, the Tamil Nadu Fly Ash Bricks and Blocks Manufacturers Association filed a writ petition in W.P.

No. 3444 of 2010 on the file of this Court, praying for a direction to the Electricity Board to allot 20% of the ESP fly ash free of cost. The said

writ petition was disposed of by a common order dated 30.4.2010, directing the State Government to constitute a Dispute Settlement Committee,

in each Thermal Power Plant, as per the composition indicated in the notification. The State Government was also directed to streamline the

functioning of the State Level Monitoring Committee, for the purpose of resolution of unresolved disputes. The Green Bench of this Court also

observed in paragraph 25 of its order that the Electricity Board and the Thermal Power Stations must implement the notification of the Government

of India in letter and spirit, without allowing their commercial interest to come in the way of fulfilling the social objective of allotting 20% of the fly

ash.

9. Thereafter, the third respondent herein (Association) filed another writ petition in W.P. No. 12092 of 2010 seeking to forbear the Electricity

Board from collecting service charges. Though they sought an interim order of

injunction pending disposal of the writ petition, a learned Judge of this Court refused to grant interim orders. Therefore, a writ appeal was filed in W.A. No. 1361 of 2010. The said writ appeal was disposed of by an order dated 16.7.2010, directing the Electricity Board to approach the Secretary to Government, Ministry of Environment and Forests, Government of India, seeking approval for the collection of service charges. The Secretary to Government, Ministry of Environment and Forests, was directed to give opportunity of hearing to both parties and to pass orders, within a period of eight weeks.

10. In pursuance of the said order, the Electricity Board filed an application on 18.8.2010 and the Government of India rejected the same by an order dated 26.10.2010. Aggrieved by the said order, the petitioner herein filed a writ petition in W.P. No. 91 of 2011. The said writ petition was allowed by this Court, by an order dated 31.01.2011 and the order of the Ministry of Environment and Forests dated 26.10.2010 was set aside, on the sole ground that no opportunity was granted to the parties before the impugned order was passed. The matter was remitted back to the Ministry with a direction to give an opportunity of hearing to both parties and to pass orders thereafter.

11. In pursuance of the above direction, the Ministry issued notice to both parties, allowed them to make representation and thereafter, passed the impugned order dated 18.3.2011, holding that any collection of service charges amounts to an interim collection of costs and that the same would constitute a violation of the notification. The Ministry also observed that the expenditure of freight and handling of coal etc., are all part of the regular expenses in the operation and that they are factored into the cost of power supplied to the consumers. Aggrieved by the order passed by the Ministry on 18.3.2011, rejecting the claim made by the petitioner for the collection of service charges, the petitioner has come up with the above writ petition.

12. The primary contention of the petitioner in the above writ petition is that their right to collect service charges, to recover the expenditure incurred in collecting and supplying fly ash, is based on the principle of quid pro quo and that there was no violation of the notification issued by the Ministry. The main objective of the notifications issued by the Ministry of

Environment and Forests is to ensure that the fly ash generated by Thermal Power Plants is not let into the atmosphere causing air pollution, but recycled in the form of ash based products, such as cements, bricks, etc. Such recycling would also serve another collateral purpose, namely that of preventing the erosion of top soil, on account of the manufacturers of bricks excavating top soil. These purposes, according to the petitioner, do not get diluted or hampered by the collection of charges by the petitioner.

13. However, the contention of the third respondent, which is an Association of manufacturers of fly ash, bricks and blocks, is that the petitioner is bound by the statutory notifications issued by the Ministry, in exercise of the powers conferred by the Environment (Protection) Act, 1986. Since notifications direct the supply of fly ash free of cost, subject to a ceiling of 20%, the petitioner is not entitled, according to the third respondent, to collect any amount, by whatever name it is called. According to the third respondent, the liability to supply 20% of the generated fly ash, free of cost, to the brick manufacturers is absolute and that the petitioner is also bound by the order passed by the Division Bench of this Court in W.A. No. 1361 of 2010. The third respondent also relies upon Section 73 of the Electricity Act, 2003, which empowers the Central Government to issue such directions as may be necessary, in matters of policy involving in public interest. According to the third respondent, notifications issued by the Central Government under the Environment (Protection) Act, have overriding effect upon any other law and hence, the petitioner is bound to supply 20% of fly ash, free of cost, to the manufacturers of ash based products.

14. I have carefully considered the rival contentions.

15. Before taking up the contentions one after another, it is necessary to bear in mind certain fundamental aspects, which emanate from the Environment (Protection) Act, 1986 and the Electricity Act, 2003. Environment (Protection) Act, 1986:

16. This Act was enacted purportedly with a view to implement the decisions taken at the United Nations Conference on the Human Environment held at Stockholm in June, 1972. But in reality, it came as a knee jerk reaction to the Bhopal gas tragedy. The object of the Act is to provide for the protection and improvement of environment and for matters connected

therewith. u/s 3(1) of the Act, the Central Government has the power to take all measures as it deems necessary for the purpose of protecting and improving the quality of environment and preventing, controlling and abating environmental pollution. Sub-section (2) of Section 3 lists out various matters in respect of which the Central Government may take measures. Section 5 empowers the Central Government to issue directions to any person, officer or any authority, in exercise of its powers and performance of its functions under the Act, notwithstanding anything contained in any other law. The power to issue directions includes the power to direct the closure, prohibition or regulation of any industry, operation or process or the stoppage or regulation of the supply of electricity or water or any other service. While Section 6 empowers the Central Government to issue Rules to regulate environmental pollution, Section 7 prohibits every person from carrying on any industry, operation or process which discharges or emits any environmental pollutants, in excess of the standards prescribed. The other provisions of the Act may not be relevant for our purpose and hence, I do not wish to make a reference to them.

17. There is no dispute about the fact that all the notifications right from the one dated 14.9.1999 were issued in exercise of the power conferred by Section 5 read with Section 3(2)(v) of the Environment (Protection) Act, 1986. Therefore, the fact that the notifications are actually statutory directions, cannot be in doubt at all. The Electricity Act, 2003.

18. The Electricity Act, 2003, is also an Act of Parliament, which was enacted to consolidate three different enactments, namely, The Indian Electricity Act, 1910, The Electricity (Supply) Act, 1948, and the Electricity Regulatory Commissions Act, 1998. It would be of some interest to take note of one paragraph of the Statement of Objects and Reasons of the Electricity Act, 2003. It reads as follows:

1.3. Over a period of time, however the performance of SEBs (State Electricity Boards) has deteriorated substantially on account of various factors. For instance, though power to fix tariff vests with the State Electricity Boards, they have generally been unable to take decisions on tariffs in a professional and independent manner and tariff determination in practice has been done by the State Governments. The cross-subsidies have reached unsustainable levels.

19. Paragraph 4 of the Statement of Objects and Reasons of the Electricity Act, 2003, contains the main features of the Bill, some of which are as

follows:

(i) Generation is being de-licensed and captive generation is being freely permitted; (ii) there is no provision for private transmission licensees; (iii)

distribution licensees would be free to undertake generation and generating companies would be free to take up distribution licenses; (iv) the State

Electricity Regulation Commissions may permit open access in distribution in phases with surcharge for current level of cross subsidy to be

gradually phased out and obligation to supply; and (v) trading as a distant activity is being recognised with the safeguard to the Regulatory

Commissions being authorised to fix ceilings on trading margins, if necessary.

20. The Act also provides a transfer Scheme, by which, the State Governments were empowered to create companies from out of the State

Electricity Boards. Therefore, in terms of the provisions of Part XIII of the Act, two companies by name Tamil Nadu Generation and Distribution

Corporation Limited (TANGEDCO) and the Tamil Nadu Transmission Corporation Ltd. (TANTRANSCO) were created and all the rights,

assets, liabilities, etc. of the Board were transferred to those companies. The petitioner in this writ petition is one of the two companies, so created

by the State Government.

21. After the advent of the 2003 Act, the power to determine the tariff vests with the Electricity Regulatory Commission and not even with the

distribution licensees. A procedure is prescribed by the Act, for the determination of tariffs and there are sufficient guidelines for the Commission to

arrive at the amount to be recovered.

22. Section 173 of the Act declares that nothing contained in the 2003 Act or the Rules and Regulations made thereunder shall have effect insofar

as it is inconsistent with any other provisions of the Consumer Protection Act or the Atomic Energy Act or the Railways Act. But, Section 174

makes it clear that save as otherwise provided in Section 173, the provisions of the Electricity Act, 2003, shall have effect notwithstanding anything

inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this

Act. Though Section 175 of the Act declares that the provisions of the 2003 Act

are in addition to and not in derogation of any other law for the time being in force, the Supreme Court clarified in Gujarat Urja Vikash Nigam Ltd. Vs. Essar Power Ltd., , that Section 175 is subordinate to Section 174 and hence, Section 174 would prevail over Section 175 in the matter of any conflict. In that case, even the appointment of an arbitrator u/s 11 of the Arbitration and Conciliation Act, 1986, was held to be illegal, in the light of the special provision contained in Section 86(1) (f) of the Electricity Act, 2003.

23. It is needless to point out that Electricity Act, 2003, is a subsequent legislation to the Environment (Protection) Act, 1986. There is a presumption in law that whenever parliament enacted a legislation, it was aware of the existing legislation. Since the Electricity Act, 2003, is also a parliamentary enactment, there is a presumption that Section 174 of the Act was incorporated, with full knowledge of the existence of the provisions of the Environment (Protection) Act, 1986. Keeping this fact in mind, let us now go to the rival contentions.

24. The Notification issued by the Ministry of Environment and Forests, as stated earlier, is in exercise of the powers conferred by the Environment (Protection) Act, 1986. Since they are statutory instructions, they are certainly binding on all industries, which tend to cause pollution.

The binding nature of statutory instructions has come up for consideration many a time before the Apex Court and this Court. The law on the point is too well settled to require citing of any authority. Therefore, any direction issued by the Ministry of Environment and Forests in exercise of the power conferred by the Environment (Protection) Act will have a binding effect on all industries including the petitioners herein.

25. But if there is any inconsistency between the Electricity Act, 2003 and the Notification issued under the Environment (Protection) Act, Section 174 of the Electricity Act will go to the rescue of the petitioners herein. Therefore, what is now required to be seen is as to whether there is any inconsistency.

26. As seen from the facts narrated above, the object of the Notification issued by the Ministry of Environment and Forests is two fold, namely (a) to make use of the fly ash generated by coal and thermal power plants, for the production of another product, so that fly ash is not let out into the

atmosphere; and (b) to prevent brick manufacturers from exploiting the top soil on a regular basis. These twin objectives seek to serve different

purposes. While the first objective is a deterrent for the coal or thermal power plants to ensure that fly ash generated by them is not let out into the

atmosphere, the second objective is an incentive for the brick manufacturers to persuade them not to exploit the top soil.

27. The first objective of the Notification can always be sub-served by making it mandatory for the coal or thermal power plants to use the entire

quantity of fly ash generated by them in the production of fly ash based products. The directive to the coal/thermal power plants to dispose of 80%

of the fly ash generated by them, by way of sale or otherwise, for the purpose of manufacturing ash based products, serves the first objective. The

directive to coal/thermal power plants to supply 20% of the fly ash free of costs to the brick manufacturers, seeks to serve the second objective.

28. There can be no doubt or dispute that the Ministry of Environment and Forests has necessary powers to issue directions to all polluting

industries to treat air/water pollutants discharged by them. To this extent, any directive issued by the Ministry of Environment and Forests, will not

be inconsistent or in conflict with the Electricity Act, 2003. As a matter of fact, there are Notifications issued to leather industries, chemical

industries, textile industries, etc, for the treatment of effluents. I do not think that there is any directive to those industries as to how they deal with

those effluents after they are treated. This is for the reason that such effluents also form part of the property of the manufacturer. What is curtailed

by the Ministry of Environment and Forests is only the discharge of those effluents into water resources, earth or sea bed. If, by employing any

scientific method prescribed by the Ministry, the effluent released in the manufacturing process is treated and made non-pollutable, there can be no

injunction on the right of the industries to dispose of by way of sale or otherwise, such treated effluents.

29. Similarly, fly ash, which can be equated to a by-product in the process of generation of electricity, is the property of the generating company.

While what can be curtailed by the Ministry of Environment and Forests is the discharge of that pollutant into the atmosphere, the right of the

generating company to dispose of the same without causing pollution, cannot be curtailed by the Ministry of Environment and Forests. For

instance, if a generating company sets up an ancillary unit such as a brick manufacturing unit, I do not think that the Ministry can compel the generating company to make use of only 80% of fly ash generated by them for their ancillary unit and to provide the balance 20% to their competitors, who also manufacture bricks.

30. In other words, the statutory directions issued by the Ministry compelling the generating companies to sell or otherwise dispose of fly ash to

brick manufacturing companies cannot be said to be illegal or inconsistent with the Electricity Act, 2003, as that portion of the directive seeks to

achieve the first objective of the Notification.

31. But to direct the generating companies to give free of cost, 20% of fly ash generated by coal/thermal power plants, infringes upon the property

rights of the generating companies. The very object of the Electricity Act, 2003 is to liberate the State from the heavy burden imposed upon them

by the respective State Electricity Boards, in the form of mounting losses. I have already extracted the Statement of Objects and Reasons

elsewhere in this order.

32. Paragraph 1.3 of the Statement of Objects and Reasons points out that cross-subsidies have reached unsustainable levels. Therefore, the State

Governments have been liberated even from the task of fixation of tariff, to ensure that the Government and the Electricity Boards are not crushed

under the weight of accumulated losses. In para 1.5 of its Tariff Order No. 3 of 2010, issued on 31.7.2010, the Tamil Nadu Electricity Regulatory

Commission (TNERC) presented an overview of the Tamil Nadu Electricity Board, which was created as a statutory body on 1.7.1957 under the

1948 Act. In para 1.7, the TNERC presented the "Commercial and Financial Performance" of the Board. The statistics presented therein would

send cold shivers down the spine. It is stated in para 1.7.2 therein that the accumulated deficit of TNEB upto 2008-2009 was Rs. 16,774.47

crores. In para 1.7.4, it is stated that the loans outstanding as at the end of 2008-2009 were Rs. 20,250.32 crores. The gross and net assets value

of the Board as at the end of 2008-2009 are indicated to be Rs. 25,016.17 crores and Rs. 14,841.40 crores respectively. In other words, the

accumulated deficit has gone far beyond the net assets value.

33. The exercise of revision of tariff is undertaken periodically by the Regulatory

Commission, in order to offset the losses. In other words, every consumer is now liable to share the accumulated losses, by accepting the revision of tariff.

34. While a portion of the accumulated losses, however negligible it may be, is sought to be recovered by way of revision of tariff, it may not be

proper to compel the petitioner-Corporation to sell a portion of their property free of cost in order to provide incentive to another industry, which

causes environmental degradation. Normally, an industry causing pollution or degradation of environment is imposed with an obligation. But, the

brick manufacturers are provided an incentive in the form of the impugned Notification, at the cost of the electricity generating companies, which

actually suffocate under accumulated losses running to thousands of crores. Therefore, that part of the Notification obliging the petitioner

Corporation to provide free of cost, 20% of the fly ash generated by them to other manufacturers, runs counter to the objects of the Electricity

Act, 2003. Consequently, that portion is inconsistent with the objects of the Electricity Act and hence, it cannot stand in the light of Section 174 of

the Electricity Act, 2003. What is sought to be charged by the petitioner is only the cost of recovery of the expenses incurred in the collection of fly

ash. The Ministry of Environment and Forests, in its impugned order, had gone on a thorough misconception as though the cost of recovering fly

ash is included in the tariff fixed by the Commission. In other words, the impugned order of the Ministry of Environment and Forests seeks to pass

on the burden of providing fly ash free of cost to the brick manufacturers, to the consumers of electricity. If the petitioner seeks to include this

expenditure involved in recovering fly ash, in the tariff proposed to be revised, I am sure that the Regulatory Commission would not permit the

same. In other words, the consumers of electricity cannot be made to bear the costs of 20% of fly ash supplied by the generating companies to the

brick manufacturers, on account of the impugned Notifications.

35. The respondents have not applied their mind to the above issues, as is obvious from the various Notifications. The earliest Notification on this

subject was issued in 1999. It was amended by another Notification dated 27.8.2003 and by a third Notification dated 3.11.2009. After the

advent of the first Notification of the year 1999, the Electricity Act, 2003 came to

be passed. The impact of the Electricity Act, 2003 upon these Notifications had not been considered by the respondents. Therefore, the impugned order is liable to be set aside. Accordingly, the writ petition is allowed and the impugned order is set aside. No costs. Consequently, connected miscellaneous petition is closed.