

(2014) 08 MAD CK 0272

In the Madras High Court

Case No : Writ Appeal Nos. 1299, 1510 and 1538 of 2013

Phoenix Fly Ash Brick Manufactures' Association

APPELLANT

Vs

Tamil Nadu Fly Ash Bricks and Blocks Manufactures'
Association
Tamil Nadu Fly Ash Bricks and Block's
Manufactures Association Vs Tamilnadu Generation and
Distribution Corporation Limited

RESPONDENT

Date of Decision : 19-08-2014

Acts Referred:

Constitution of India, 1950 — Article 12, 21, 226, 32, 47

Electricity Act, 2003 — Section 174

Environment (Protection) Act, 1986 — Section 24, 3, 5

Motor Vehicles Act, 1988 — Section 211

Citation : (2014) 5 LW 492 : (2014) 6 MLJ 275

Hon'ble Judges : N. Paul Vasantha Kumar, J;K. Ravichandra Babu, J

Bench : Division Bench

Judgement

1. These Writ Appeals are arising out of an order made in W.P.No.12295 of 2011, dated 13.06.2013, wherein the writ petition filed by the Tamilnadu Generation and Distribution Corporation Limited (hereinafter referred to as "TANGEDCO") was allowed and the Office Memorandum dated 18.03.2011 issued by the fourth respondent herein was set aside.

2. The appellant in W.A.No.1299 of 2013, is the third respondent in the above writ petition. The appellants in other two Writ Appeals are third parties to the writ petition and they filed these Writ Appeals after obtaining leave of this Court.

3. Brief facts necessary for disposal of these writ appeals are as follows:

The appellants are the Brick Manufacturers and they are getting fly ash free of charge from various thermal power plants in this State, as per the notification issued by the Union of India. The Thermal Power Stations attempted to collect service charges from the Bricks Manufacturers and when such attempt was challenged before this Court on an earlier round of litigation, the first and second

respondents herein, were directed to approach the Union of India for getting a decision on their right to collect the service charge by the Thermal Power Plants while supplying fly ash to the brick manufacturers. The Union of India passed an order dated 18.03.2011 stating that the collection of service charge is not permissible and the Brick Manufacturers should be supplied with 20% of the fly ash free from all charges. It also directed to refund the money already collected. Aggrieved against the said order, the TANGEDCO representing the Thermal Power Plants, filed the Writ Petition. The learned Single Judge allowed the Writ Petition. Aggrieved against the same, these Writ Appeals are filed.

4. The above said writ petition was filed by the respondents 1&2 herein as Writ Petitioners therein, challenging the Office Memorandum in File No. 9-8/2005-HSMD, dated 18.03.2011. Through the said impugned Office Memorandum, the Ministry of Environment and Forest, Government of India has ordered that at least 20% of dry ESP fly ash shall be made available free of charge to the units manufacturing fly ash bricks or clay-fly ash bricks, blocks and tiles on a priority basis over other users. It was further ordered that it was not legally tenable to levy service charges on supply of dry ESP fly ash to brick manufactures, as the Fly Ash Utilisation Amendment Notification S.O.No.2804 (E), dated 3.11.2009, issued by the Central Government, does not provide for levying of such a charge. Thus, the said impugned office memorandum directed the TANGEDCO to discontinue the levying of service charge on supply of dry ESP fly ash forthwith and also to arrange for refund of the service charges collected from the concerned Fly Ash Bricks and Blocks Manufactures.

5. Though the TANGEDCO has challenged the said Office Memorandum in its entirety, it appears that they are aggrieved against only the clause, which prohibits the TANGEDCO from levying the service charge on supply of dry ESP fly ash to the Bricks and Block Manufactures as well as the direction for refund of the amount already collected towards such service charge. In other words, the TANGEDCO is agreeable for supply of 20% of dry ESP fly ash at free of cost to the brick manufacturing units, but, they want to collect the service charge for making such supply of ESP fly-ash at free of cost.

6. The learned Single Judge allowed the Writ Petition and quashed the impugned Office Memorandum in its entirety by holding that the part of the notification obliging the TANGEDCO to provide free of cost, 20% of the fly ash generated by them to other manufactures, runs counter to the objects of the Electricity Act, 2003 and is inconsistent with the said objects and therefore, it cannot stand in the light of the Section 174 of the Electricity Act, 2003. The learned Single Judge also found that what was sought to be charged by the TANGEDCO, was only the cost of recovery of the expenses incurred in the collection of fly ash and through the impugned Office Memorandum, the Ministry of Environment and Forests seeks to pass on the burden of providing fly ash free of cost to the Brick Manufactures, to the consumers of electricity. The learned Single Judge also observed that if the TANGEDCO seeks to include such expenditure involved in

recovering fly ash in the tariff proposed to be revised, the Regulatory Commission would not permit the same and the consumers of electricity cannot be made to bear the costs of 20% of fly ash supplied by the generating companies to the Brick Manufactures.

7. We have elaborately heard the submissions of Mr. Vijay Narayanan, the learned Senior Counsel, Mr. R. Parathasarathy and Mr. Rahul Balaji, learned counsel appearing for the Appellants, Mr. P.H. Aravind Pandian, learned Additional Advocate General appeared on behalf of Mr. S.K. Rameshwar for the respondents 1 and 2 and Mr. S. Haja Mohideen Gisthi learned counsel appearing for the respondents 3 and 4, namely Union of India.

8. The sum and substance of the submissions made by all the learned counsels appearing for the appellants are as follows:-

(i) The notification issued by the Union of India in S.O.763(E), dated 14.09.1999, periodically amended and directed the supply of fly ash at free of charges and therefore, the TANGEDCO is not entitled to collect service charge. Free of charge means free from all charges and that will not exclude the service charge. When the order made in W.P.No.37069 of 2007, etc., batch, dated 30.04.2010, having become final and conclusive, which directed the respondents to continue the supply of fly ash at free of charge, the intended collection of service charge is against the said order of the Division Bench as no liability was obtained to collect service charge.

(ii) What cannot be achieved directly, cannot be permitted to be achieved indirectly. Likewise, when the subsequent order made in W.A.No.1361 of 2010 and W.P.No.1229 of 2010 dated 16.07.2010 has become final, conclusive and binding the parties and consequently, the TANGEDCO having failed to succeed before the Union of India in their claim for collecting the service charge, is not entitled to challenge the said order.

(iii) The learned Single Judge was not right in holding that there is conflict between the impugned proceedings and the Electricity Act, 2003. No such contention was either raised by the TANGEDCO before the Writ Court. The learned Single Judge, virtually overruled the two decisions of the earlier Division Bench of this Court and quashed the impugned Office Memorandum. General things do not derogate from specific things. In other words, the Special enactment overrides the General enactment.

(iv) As far as the fly ash is concerned, which is highly polluting substance, the only enactment that deals with the said subject is the Environment (Protection) Act, 1986. The Electricity Act, 2003, only contains measure for determining tariff for electricity and does not concern with any of its bi-products/wastes that come into existence during the course of generation of electricity. Therefore, the Environment (Protection) Act, 1986, will be the Special Act as far as the subject matter is concerned and the same will have a overriding effect of the Electricity Act, 2003. Even assuming that there is any inconsistency, the Environment

(Protection) Act, 1986, is a social legislation enacted by keeping in mind of Articles 21, 47 and 48A of the Constitution of India and therefore, any Notification issued under the above Act takes precedent over the other legislation. The cement companies are meeting 100% incidental expenses for collecting the fly ash, to the stock yard whereas they take only 80% of the fly ash.

(v) In support of the above submissions, reliance is placed on the decisions of the Hon''ble Supreme Court in the cases of Cantonment Board, Mhow and Another Vs. M.P. State Road Transport Corpn., ; U.P. State Road Transport Corporation Vs. State of U.P. and Another, and Employees Provident Fund Commissioner Vs. O.L. of Esskay Pharmaceuticals Limited, .

9. Per contra, Mr. P.H. Aravind Pandian, learned Additional Advocate General appearing for the respondents 1 and 2 contended as follows:-

Free of charge does not mean free from all charges. The incidental expenses such as maintaining the infrastructure by way of providing additional man power and other facilities, are to be met out by appellants by way of service charge. TANGEDCO is not imposing any cost on the fly ash being supplied to the Brick Manufacturers and what is sought to be collected is only service charge. Rs.578 per ton is the expenditure in taking the fly ash whereas the TANGEDCO introduced collection of service charge at the subsidised rate of Rs.100 per ton without imposing any cost or price on the fly ash provided to the Brick Manufacturers. In other words, the effort to realise a part of the expenditure incurred is based on the well established principle of law "quid pro quo". TANGEDCO has provided the facilities to such users instead of the mandate of the notification to provide fly ash in "as is where is condition". While the users are enjoying the fly ash without even paying the service charges, the TANGEDCO has been suffering from huge financial loss. The consumers of the TANGEDCO being the people at large in the State of Tamil Nadu should not be put on hardship for the sake of commercial gains of few brick, block and tiles manufacturers as against the provisions of the Electricity Act. The Electricity Act, 2003, will prevail over the Notification issued by the Union of India. The Public Interest is prevail over the private interest.

10. In support of the above submission, the learned Additional Advocate General relied on the decision of the Hon''ble Supreme Court in the case of Jantia Hill Truck Owners Association Vs. Shailang Area Coal Dealer and Truck Owner Association and Others, .

11. Mr. S. Haja Mohideen Gisthi, learned counsel appearing for respondents 3 and 4 filed a counter affidavit on behalf of the respondents 3 and 4 and made his submissions in similar line with the submissions made by the learned counsel appearing for the appellants. The perusal of the counter affidavit of respondents 3 and 4 would show that the Union of India supports the case of the appellants by categorically stating that the TANGEDCO is not entitled to collect service

charges as per notification S.O.No.2804(E) dated 03.11.2009. In fact, in the said counter affidavit, the respondents 3 and 4 prayed for allowing the writ appeal by setting aside the order passed by the learned Single Judge in W.P.No.12295 of 2011.

12. The above said writ petition was originally filed by TANGEDCO against the respondents 3 & 4 herein alone as party respondents. The third respondent in the said writ petition, who is the appellant in W.A.No.1299 of 2013, was subsequently impleaded as third respondent in M.P.No.2 of 2011, dated 12.09.2011.

13. Though very many grounds were raised by the appellants in these Writ Appeals, the core contention of the appellants is that the TANGEDCO is not entitled to charge on the fly ash under the guise of service charge, when admittedly, they are bound to supply the said fly ash at free of cost to the appellants like Brick Manufactures as per the notifications issued by the Ministry of Environment and Forest, Government of India, at various point of time. In other words, their contention in short is that what cannot be achieved directly or what is prevented to be collected directly, cannot be allowed to be collected indirectly.

14. Thus the only issue involved in these Writ Appeals is as to whether the TANGEDCO is entitled to collect service charges for the supply of fly ash to the brick manufacturers.

15. The Coal or Lignite based Thermal Power Plants in this country during the course of generation of power, produce fly ash as a by-product. Admittedly, such fly-ash, if let loose without collection or preservation, would cause environmental pollution. Likewise, the Brick Manufactures also utilised the top soil for manufacturing bricks. Therefore, in order to prevent the environmental pollution through the discharge of fly-ash from coal or lignite based thermal power plant and also to restrict the excavation of top soil by the Brick Manufactures, the Ministry of Environment and Forest, Government of India, thought fit to find out a solution to achieve the above said twin object. Accordingly, as a result of such attempt and after inviting objections and suggestions from all persons likely to be affected, a notification in S.O.763(E) was issued on 14.09.1999. The object behind issuing such notification was to protect environment, conserve top soil and prevent the dumping and disposal of fly ash discharged from coal or lignite based thermal power plants on land. For deciding the issue involved in this case, it is enough to read clause 2(1) of the said Notification, which reads as follows:-

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

(emphasis supplied)

16. A bare perusal of the above said clause 2(1) of the Notification dated 14.09.1999 would show that every coal or lignite based thermal power plant shall supply fly-ash for atleast ten years without any payment or any other consideration to the Bricks Manufacturers etc. Therefore, there cannot be any other view possible to contend that the TANGEDCO is entitled to collect any amount even under the guise of service charge as per notification dated 14.09.1999. The phrase used under clause 2(1) of the said notification "without any payment or any other consideration" would undoubtedly make it clear that the supply of fly ash has to be made not only free of cost and also from all other charges as well. It is seen that this notification dated 14.09.1999, was accepted by all parties concerned including TANGEDCO and was never challenged before the Court of law.

17. The said notification in S.O.763(E), dated 14.09.1999, was amended subsequently in S.O.979 on 27.08.2003. The said amendment did not alter or change the earlier clause 2(1) of the Original Notification dated 14.09.1999 and on the other hand only paragraph 2A dealing with "Utilisation of fly ash for reclamation of sea" was inserted after paragraph 2 of the Original notification. Therefore, the said Amendment Notification dated 27.08.2003 made in S.O.979, is not relevant for the present case.

18. On 03.11.2009, the Original Notification S.O.763, was further amended by issuing S.O.2804(E). Through the said amendment, the sub-paragraph 1 to 3 of paragraph 2 of Original Notification were substituted, wherein the relevant sub-paragraph 1 reads 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 should be made available free of any charge on "as is where is basis to manufacture of bricks, blocks or tiles including clay fly ash product, manufacturing unit(s), farmers, the Central and the State road construction agencies Public Works Department, and to agencies engaged in backfilling or stowing of mines..

(ii) at least 20% of dry ESP fly ash shall be made available free of charge to unit manufacturing fly ash or clay-fly ash bricks, blocks and tiles on a priority basis over other users and 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 utilized on 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.

19. From the perusal of the above Amended Notification dated 03.11.2009, more

particularly dealing with the supply of fly ash, it would thus show that at least 20% of the dry ESP fly ash shall be supplied free of charge to the Brick Manufacturing Units and if the demand from such units falls short of 20% of quantity, the Power Generating Plants can sell or dispose of the balance quantity to the other buyers. In other words, the intention of supplying fly ash free of charge has not been changed and only the quantum of supply to be made to the Brick Manufactures was stated as minimum of 20%.

20. When attempts were made by the various Thermal Power Stations functioning within the State to demand charges for fly ash and when the supply was made to ineligible persons, several Writ Petitions were filed before this Court in W.P.Nos.37069 of 2007 etc., batch and all those Writ Petitions were heard together and a common order was passed by the Division Bench of this Court on 30.04.2010. Out of those Writ Petitions, one of the Writ Petition in W.P.No.26841 of 2009 was filed by the Tamil Nadu Fly Ash Bricks and Blocks Manufactures Association, Chennai, who is the appellant herein in W.A.No.1299 of 2013. In the said Writ Petition, it was prayed to quash the letter dated 16.10.2009 issued by the North Chennai Thermal Station and consequently for a direction to the respondents therein to supply fly ash free of charges to the Fly Ash based manufacturing Units of Bricks, Blocks and Tiles in terms of the Notification S.O.763(E), Government of India, Ministry of Environment and Forests as amended by Amendment Notification S.O.979(E), dated 27.08.2003 and Amendment Notification S.O.2804(E), dated 03.11.2009. The Division Bench after considering various aspects of the matter has disposed of the Writ Petitions by passing a detailed order with direction that the Tamil Nadu Electricity Board and Thermal Power Station must implement the Notification issued by the Government of India in its letter and spirit and their commercial interest should not come in the way of fulfilling the social objective of allotting 20% of the dry ESP fly ash free of charge to the units manufacturing fly ash or clay fly ash bricks. The relevant paragraphs of the above said order of the Division Bench are extracted hereunder:-

15. The notification issued by the Ministry of Environment and Forests clearly provides that 20% of dry ESP fly ash should be made available free of charge to units manufacturing fly ash or clay ash bricks, blocks and tiles on a priority basis over other users. It was only in case the demand from such agencies fall short of 20% of quantity, the balance quantity can be sold by the power station. However very strangely, the Tamil Nadu Electricity Board has entered into a Memorandum of Understanding with the petitioner in W.P.No.1454 of 2008 for the purpose of selling fly ash in utter violation of the notification issued by the Government of India. Though the Tamil Nadu Electricity Board was justified in entering into a Memorandum of Understanding with the exporter, at the relevant point of time, the fact remains that the subsequent notification mandates allotment of 20% of dry ESP fly ash to the manufacturers of fly ash or clay fly ash bricks, blocks and tiles on priority basis. Therefore the statutory notification issued by the Ministry of Environment and Forests would have an over-riding effect to the terms and

conditions of the Memorandum of Understanding.

18. While considering an issue like the one raised in this writ petition, the subsequent events have also to be taken note of. In view of the notification issued by the Government of India, the Thermal Stations are bound to allot 20% of fly ash, subject to availability to the manufacturers of fly ash based products free of cost. The Tamil Nadu Electricity Board is a State within the meaning of Article 12 of the Constitution of India. It is not possible for the Board to permit export of fly ash without meeting the requirements of the local manufacturers of bricks and other allied fly ash based products. It is true that at a time when fly ash was piling up at the coal-fired Thermal Power Stations, the Tamil Nadu Electricity Board had entered into a memorandum of understanding with cement companies for the establishment and maintenance of pressurised dense fly ash disposal system. Even as per the memorandum of understanding, 20% of the fly ash were earmarked for allotment locally on first come first served basis. The Board has entered into an agreement with the petitioner in W.P.No.1454 of 2008 for allotment of their 20% share in units IV and V in the Tuticorin Thermal Power Station. The said agreement has to be interpreted in the light of the notification issued by the Government of India earmarking 20% of the fly ash to the Small Scale Industries engaged in manufacture of fly ash based bricks and allied products. When the Board found that given the local demand for fly ash and the direction issued by the Government of India, it was not possible to honour the commitment, they have issued the impugned proceedings. The export details gives a clear indication that the petitioner is making huge profits at the cost of the local tiny units. Therefore the Board was perfectly correct in cancelling the allotment. The Public Interest must prevail over private interest. It was only on account of the direction issued by the Government of India, in the interest of environment, prohibiting excavation of top soil, the brick manufacturers were compelled to use fly ash. Hence, they should get the quantity of fly ash indicated in the notification.

21. The notification issued by the Ministry of Environment was not with a purpose to help the manufacturers of fly ash bricks, blocks and tiles. It was made primarily in the interest of environment. Therefore the Government as well as Tamil Nadu Electricity Board and their Thermal Power Plants are expected to follow the notification in all its seriousness.

25. We make it clear that the Tamil Nadu Electricity Board and the Thermal Power Stations must implement the notification issued by the Government of India in its letter and spirit. Their commercial interest should not come in the way of fulfilling the social objective of allotting 20% of the dry ESP fly ash free of charge to the units manufacturing fly ash or clay fly ash bricks, blocks and tiles on priority basis over other users. We direct the Plant Level Dispute Settlement Committee to finalise the initial allotment of fly ash to the fly ash based units manufacturing bricks, blocks and tiles at the earliest and in any case within four weeks from today with notice to the concerned association of bricks

manufacturing units.

21. The above said order of the Division Bench was challenged before the Hon"ble Supreme Court in S.L.P.(C).No.16004 to 16006 of 2010 and by an order dated 12.02.2013, the Hon"ble Supreme Court dismissed the S.L.Ps., by holding that the judgment of the High Court does not call for any interference.

22. Thus, it is very clear that the order dated 30.04.2010, passed by the Division Bench in the batch of cases as referred supra, has become final, conclusive and binding all the parties to the proceedings. The respondents herein are parties to the above proceedings.

23. From a perusal of the above said order of the Division Bench made in W.P.Nos.37069 of 2007 etc., batch, dated 30.04.2010, it is clear that the Division Bench was of the considered view that 20% of the supply of fly ash to the Brick Manufactures has to be made free of charge as per the Notifications issued by the Government of India as referred supra.

24. In spite of the Notification issued by the Government of India, Ministry of Environment and Forest and in spite of the order made by this Court in W.P.Nos.37069 of 2007 etc., batch, dated 30.04.2010, as discussed supra, the Power Generating Plants attempted to collect the service charge for the supply of dry ESP fly ash from the Bricks and Blocks Manufacturers, which necessitated the Tamil Nadu Fly Ash Bricks and Blocks Manufactures" Association, who is the appellant in W.A.No.1299 of 2013 herein, filed a Writ Petition in W.P.No.1299 of 2010, seeking for Mandamus, forbearing the respondents from collecting service charge or any other charge, for the supply of dry ESP Fly Ash, to the members of the Writ Petitioner Association, in terms of the Notification SO.No.763(E), Government of India, Ministry of Environment & Forest, as amended by Amendment Notification SO.No.979(E), dated 27.08.2003, and Amendment Notification SO.No.2804(E), dated 03.11.2009, Government of India, Ministry of Environment & Forest and also as per the order and directions of this Court, dated 30.04.2010, made in W.P.No.37069 of 2007, etc.,

25. Pending disposal of the Writ Petition, the petitioner therein (appellant in W.A.No.1299/2013) has sought for an interim injunction restraining the respondents from demanding service charge for the quantity of fly ash lifted by the Members of the Association. The said Interim Application filed in M.P.No.1 of 2010 in W.P.No.12092 of 2010, came to be dismissed by the learned Single Judge. Aggrieved against the same, the petitioner therein filed W.A.No.1361 of 2010.

26. The Division Bench while considering the above Writ Appeal, also has taken the Writ Petition to be heard along with Writ Appeal. It was argued before the Division Bench by the petitioner Association therein that the collection of service charge at the rate of 100 per MT with effect from 15.10.2009 for lifting dry ESP fly ash was contrary to the terms of the Notification, dated 03.11.2009, while such Notification makes it mandatory to supply fly ash at free of charges. After

hearing both sides, the Division Bench found that the levy of service charge was without getting approval from the Union of India, Ministry of Environment and Forest. Therefore, by consent of all parties, the Division Bench directed the respondents 2 to 7 therein, who are the Tamil Nadu Electricity Board and other Thermal Power Stations, to approach the Union of India, Ministry of Environment and Forest by way of application for approval of collection of service charges from the Members of the Petitioner Association therein as well as from other users of fly ash for the supply of dry ESP fly ash. The Union of India was also directed to consider the said application and dispose of the same on merits and in accordance with law after affording an opportunity to the parties. In the mean time, the respondents 2 to 7 therein were permitted to collect the service charges at the rate of 100 per ton till the decision is taken by the first respondent. Further, it was made clear that if a decision is taken against the respondents 2 to 7 therein, the amount collected should be refunded and if the Union of India permits such collection, the respondents 2 to 7 would be entitled to collect the arrears. For proper appreciation, the relevant paragraphs 2 & 6 of the order made in W.A.No.1361 of 2010, etc., are extracted hereunder:-

2. The grievance of the members of the appellant association is that the respondents 2 to 7 issued letters, directing them to pay services charges at the rate of Rs.100/- per metric tonne with effect from 15.10.2009 for lifting dry ESP fly ash to their respective bricks manufacturing units. According to the appellant association, levy of such services charges at Rs.100/- per metric tonne is contrary to the terms of the Notification, dated 3.11.2009 issued by the Government of India, Ministry of Environment and Forest, in and by which, while making it mandatory for the use of 50% of dry fly ash in the manufacture of clay bricks, tiles or blocks for all the manufacturers, it was made clear that all the categories of fly ash based manufacturing units are entitled to get the fly ash from Thermal Power Stations at free of cost. Aggrieved against such levy of charges, the appellant association moved this Court by way of filing a writ petition in WP No. 12092 of 2010 praying to forebear the respondents 2 to 7 from collecting the service charges and pending disposal of the writ petition, the petitioner association also filed MP 1 of 2010 for grant of interim relief.

6. Having heard the learned senior counsel appearing for the petitioner and the learned Advocate General appearing for the first respondent and in view of the fact that respondents 2 to 7 levied the service charges without getting approval from the first respondent, with the consent of parties, we feel it appropriate to direct the respondents 2 to 7 to approach the first respondent by way of an application for approval for collection of service charges from the members of the appellant association as well as from other users of fly ash for the supply of dry ESP fly ash within two weeks and the first respondent is directed to consider and dispose of the same on merits and in accordance with law, after affording an opportunity to the parties, within a period of eight weeks thereafter.

(emphasis supplied)

27. It is stated that the said order passed with the consent of all parties, have become final and conclusive and has not been put into challenge by any parties.

28. From the perusal of the above said order, which is binding on the parties to the present writ appeals, following things emerge:-

(a) The petitioners therein who are the Tamil Nadu Fly Ash Bricks and Blocks Manufacturers' Association categorically contended that the collection of service charge even at the rate of 100 per MT is contrary to in terms of the Notification dated 03.11.2009, issued by the Government India and on the other hand, the fly ash has to be supplied free of all charges;

(b) The collection of such service charge was found to be without approval from the Union of India. In other words in the absence of an approval from the Union of India, the respondents 2 to 7 therein are not entitled to collect the service charge;

(c) The Union of India, Ministry of Environment and Forest has to decide as to whether the service charge can be collected for the supply of fly ash and for which purpose the respondents 2 to 7 therein were directed to approach the Union of India by way of making an application;

(d) If a decision is made against the respondents therein, the amount already collected by way of service charges should be refunded;

(e) On the other hand, if Union of India found that the respondents 2 to 7 therein are entitled to collect service charges, they would be entitled to collect the arrears as well.

29. At the risk of repetition, it is better to note that the said order passed with the consent of parties has become final, conclusive and binding on the parties and therefore, they cannot act contra to the observations and directions made in the said order. Even assuming that the directions and observations made at paragraph 7 was not with consent of parties, in view of the fact that the said order has not been challenged by any of the parties, the observations and directions made at paragraph 7 undoubtedly is binding all the parties and they cannot assail the same.

30. Consequent upon the said order passed by the Division Bench on 16.07.2010 and in compliance of the same, the Tamil Nadu Electricity Board through its letter dated 18.08.2010, requested to the Secretary, Ministry of Environment and Forest, Union of India, New Delhi to grant permission to collect service charges at a subsidised rates for allotment of fly ash to Bricks Manufacturing Units. Based on the said request made by the Tamil Nadu Electricity Board, the Ministry of Environment and Forest, Government of India has passed an order dated 26.10.2010 and denied permission.

31. The said order was however challenged by the TANGEDCO before this Court in W.P.No.91 of 2011 mainly on the ground that the same came to be passed

without considering the request of the Electricity Board to provide an opportunity of being heard. A learned Single Judge of this Court by an order dated 31.01.2011 quashed the said order dated 26.10.2010 only on the ground of violation of the principles of natural justice and directed the Union of India to pass orders afresh after providing an opportunity of personal hearing to the TANGENDCO as well as to the impleaded party therein viz., Tamilnadu Fly Ash Bricks and Block Manufacturers Association. Consequent upon such order, the TANGENDCO as well as the Brick Manufacturers Association filed their written submissions before the Union of India and after hearing them in person as directed by this Court, an office memorandum was issued on 18.03.2011 wherein the relevant portion reads as follows:

After hearing both TANGENDCO and Tamilnadu Fly Ash Bricks and Block Manufacturers Association, the following conclusions were arrived at:

1.The Fly Ash Utilisation Amendment Notification S.O.2804(E), dated November 3, 2009 issued by the Govt. of India in its Para 3(1), Clause (ii), has stated that "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 quantify can be sold or disposed of by the power station as may be possible". Any collection of service charges amounts to indirectly charging cost and thus constitutes the violation of the Notification.

2.Expenditure on freight & handling of coal, electricity consumption, maintenance of Electrostatic Precipitator, roads, lighting, etc. by TANGENDCO are part of regular expenses in the operation and are factored into the cost of power supplied by them. It is not legally tenable to levy service charges on supply of dry ESP fly ash to brick manufacturers as the Fly Ash Utilisation Amendment Notification S.O.2804(E), dated November 3, 2009 issued by the Central Government does not provide for levying of such a charge. The notification is required to be implemented in letter & spirit.

3.It is therefore directed that TANGENDCO shall comply with the Fly Ash Utilisation Amendment Notification S.O.2804(E), dated November 3, 2009 in letter & spirit.

4.The service charge levied on supply of dry ESP flyash by TANGENDCO is illegal and TANGENDCO shall discontinue it forthwith. TANGENDCO should also arrange to refund the service charges collected since the issue of Amendment notification dated November 3, 2009 from the concerned flyash bricks and blocks manufacturers.

(emphasis supplied)

32. From the perusal of the above said order, it is seen that the Union of India has rejected the request or permission sought for by the Tamil Nadu Electricity Board to collect service charges towards supply of fly ash to the bricks and block

manufacturers. The said Office Memorandum further directed the Tamil Nadu Electricity Board to arrange for refund of the service charges collected from 03rd, November, 2009, and further directed the Electricity Board to continue supply of fly ash to the said manufacturers as per the Notification No. 2804 : (E) dated 3.11.2009 in letter & spirit.

33. Thus, it is evident that the Union of India has not only reiterated that the 20% of fly ash should be made available free of any charges including the service charge and even assuming that the Notification issued on 03.11.2009 has any doubt with regard to the collection of service charge, the same has been clarified without any ambiguity, that Notification dated 03.11.2009 was intended for supply of 20% of the fly ash without any charge including service charge.

34. In our considered view, the very filing of the Writ Petition itself is not maintainable and barred by the principle of estoppel in view of the fact that the TANGEDCO or the Tamil Nadu Electricity Board being a party to the proceedings in W.A.No.1361 of 2010 and W.P.No.1229 of 2010, is bound by the order passed by the Division Bench, more particularly at paragraph 7 of its order, where it was made clear that if a decision is taken against the Electricity Board by the Union of India, the amount of service charges collected, should be refunded. It is pertinent to note that the Division Bench in the said order dated 16.07.2010, has not given any liberty to the Electricity Board to challenge the order if any, made by the Union of India against the Board.

35. On the other hand, a perusal of the said order of the Division Bench, more particularly at paragraph 6, would show that it was made with the consent of all parties. Even without there being a consent and when the Division Bench has made such an observations at paragraph 7 as stated supra and when such observations and directions has not been challenged, the present Writ Petition filed in W.P.No.12295 of 2011, is undoubtedly barred by principles of estoppel by conduct.

36. It is well settled that principle of estoppel is also applicable to the Writ proceedings under Article 226 of the Constitution of India. At this juncture, it is relevant to refer to the decision of the Hon"ble Supreme Court reported in Cauvery Coffee Traders, Mangalore Vs. Hornor Resources (Intern.) Company Ltd., , more particularly, the observation made at Paragraph Nos. 34 and 35 which reads as follows:

34.A party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do enquiry, however, it must not be applied in a manner as to violate the principles of right and good conscience.

35.Thus, it is evident that the doctrine of election is based on the Rule of estoppel-the principle that one cannot approbate and reprobate inheres in it. The

Doctrine of Estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.

37. Further, it is to be noted that the earlier order passed by the Division Bench of this Court made in W.P.Nos.37069 of 2007, etc., dated 30.04.2010 holding that the Tamilnadu Electricity Board and the Thermal Power Stations must implement the notification issued by the Government of India in its letter and spirit and their commercial interest should not come in the way of fulfilling the social objective of allotting 20% of the dry ESP fly ash free of charge to the units manufacturing fly ash or clay fly ash bricks, blocks and tiles on priority basis over other users, has become final and conclusive between the parties, after the said order has been confirmed by the Hon'ble Supreme Court by dismissing the S.L.P. filed against the said order. Therefore, in our considered view the TANGEDCO is also barred under the principles of res judicata in agitating the matter once again in these proceedings.

38. At this juncture, it is relevant to refer to the decision made by the Hon'ble Supreme Court in the case of U.P. State Road Transport Corporation Vs. State of U.P. and Another, reads as follows:-

10. In Daryao and Others Vs. The State of U.P. and Others, , a Constitution Bench considered the application of rule of res judicata in writ petitions. It was held that if a writ petition filed by a party under Article 226 is considered on the merits as a contested matter and is dismissed, the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution. Similarly, in Devilal Modi vs. STO (AIR 1956 SC 1150) which is also a decision by a Constitution Bench, it was held that it would not be right to ignore the principle of res judicata altogether in dealing with writ petitions filed by citizens alleging the contravention of their fundamental rights. It was further held that considerations of public policy cannot be ignored in such cases, and the basic doctrine that judgments pronounced by the Supreme Court are binding and must be regarded as final between the parties in respect of matters covered by them must receive due consideration. In The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others, the Constitution Bench emphasised that the binding character of judgments of courts of competent jurisdiction is in essence a part of the rule of law on which the administration of justice, so much emphasised by the Constitution, is founded and a judgment of the High Court under Article 226 passed after a hearing on the merits must bind the parties till set aside in appeal as provided by the Constitution and cannot be permitted to be circumvented by a petition under Article 32.

39. The Hon'ble Supreme Court in the decision reported in Union of India (UOI) and Others Vs. Major S.P. Sharma and Others, , considered the doctrine of res

judicata and finality of judicial proceedings referring to the earlier judgment reported in *M. Nagabhushana Vs. State of Karnataka and Others*, and held that *res judicata* is not a technical doctrine but a fundamental principle to sustain the Rule of law based on a sound principle of public policy. To put in other words, it is a principle evolved to end litigation.

40. Even on merits, we do not find any substance in the contention of TANGEDCO. The learned Single Judge allowed the Writ Petition on the ground that the supply of 20% of the fly ash free of cost runs counter to the objects of the Electricity Act, 2003, more particularly, under Section 174 of the said Act. In our considered view, such approach of the learned Single Judge is not correct in view of the fact that directions issued by the Union of India under Environment (Protection) Act, 1986, has the overriding effect on The Electricity Act, in view of power conferred under Section 5 of the Environment (Protection) Act, 1986, which reads as follows:-

5. Power to give directions:- Notwithstanding anything contained in any other law but subject to the provisions of this Act, the Central Government may, in the exercise of its powers and performance of its functions under this Act, issue directions in writing to any person, officer or any authority and such person, officer or authority shall be bound to comply with such directions.

Explanation:- For the avoidance of doubts, it is hereby declared that the power to issue directions under this section includes the power to direct:-

- (a) the closure, prohibition or regulation of any industry, operation or process: or
- (b) stoppage or regulation or the supply of electricity or water or any other service.

41. Section 24 of the Environment (Protection) Act, 1986, deals with "Effect of other laws", which reads as follows:

(1) Subject to the provisions of sub-section(2), the provisions of this Act and the rules or orders made therein shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act.

1. Where any act or omission constitutes an offence punishable under this Act and also under any other Act then the offender found guilty of such offence shall be liable to be punished under the other Act and not under this Act.

42. As rightly pointed out by the learned counsels appearing for the appellants, the learned Single Judge has not pointed out as to what is the inconsistency between the Electricity Act and the impugned Office Memorandum. In fact, that was not the case of the TANGEDCO also, as the Writ Petitioner, before the learned Single Judge. Needless to say that the Electricity Act 2003 and the Environment (Protection) Act, 1986 are operating on two different fields with different objects and reasons. The statement of objects and reasons of Environment (Protection) Act, 1986, state that the said Act was to provide for

the protection and improvement of environment and for matters connected therewith. The relevant paragraphs of the preamble portion of the said Act is extracted hereunder:-

AND WHEREAS it is considered necessary further to implement the decisions aforesaid insofar as they relate to the protection and improvement of environment and the prevention of hazards to human beings, other living creatures, plants and property;

Be it enacted by Parliament in the Thirty-seventh Year of the Republic of India as follows:-

State of Objects and Reasons:- Concern over the state of environment has grown the world over since the sixties. The decline in environmental quality has been evidenced by increasing pollution, loss of vegetal cover and biological diversity, excessive concentrations of harmful chemicals in the ambient atmosphere and in food chains, growing risks of environmental accidents and threats to life support systems.

43. Whereas the Electricity Act 2003, was enacted in relating to generation, transmission, distribution and trading and uses of electricity and to supply electricity to all areas including villagers and farmers.

44. A comparative study of the objects and reasons of both the Acts thus show that they are undoubtedly operating on two different fields and with two different objects and reasons and therefore, no inconsistency can be either pleaded or found while considering the scope of impugned order in the Writ Petition. At this juncture, it is useful to refer to the decisions of the Hon'ble Supreme Court in the case of Employees Provident Fund Commissioner Vs. O.L. of Esskay Pharmaceuticals Limited, , wherein at paragraphs 43, 44 & 45 reads as follows:-

43. It is a well recognized rule of interpretation that every part of the statute must be interpreted keeping in view the context in which it appears and the purpose of legislation. In Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. and Others, Chinnappa Reddy, J. highlighted the importance of the rule of contextual interpretation in the following words :

"33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a

whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

44. Another rule of interpretation of Statutes is that if two special enactments contain provisions which give overriding effect to the provisions contained therein, then the Court is required to consider the purpose and the policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions.

45. In *Shri Ram Narain Vs. The Simla Banking and Industrial Co. Limited*, , this Court was considering the provisions contained in the Banking Companies Act, 1949 and the Displaced Persons (Debts Adjustment) Act, 1951. Both the enactments contained provisions giving overriding effect to the provisions of the enactment over any other law. After noticing the relevant provisions, the Court observed:-

"7.....Each enactment being a special Act, the ordinary principle that a special law overrides a general law does not afford any clear solution in this case.....It is, therefore, desirable to determine the overriding effect of one or the other of the relevant provisions in these two Acts, in a given case, on much broader considerations of the purpose and policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions therein."

45. In *Cantonment Board, Mhow and Another Vs. M.P. State Road Transport Corpn.*, , the Hon"ble Supreme Court has observed at paragraph 8 as follows:-

8.....It has been stated by this court in the case of *Ashoka Marketing Ltd. and another Vs. Punjab National Bank and others*, that the principal of statutory interpretation, namely, later laws abrogate earlier contrary laws is subject to exception that a general provision does not derogate from a special one. This would mean that where a literal meaning of the general enactment covers a situation for which specific provision is made by another enactment contained in the earlier Act, it is presumed that the situation was intended to be continued to be dealt with by the specific provision rather than the later general one. in other words if the Taxation Act would have contained a provision authorising imposition of Entry Tax on Motor Vehicle than certainly the later general Act, namely the municipalities Act even if by making a provision of imposition of entry tax on Vehicles entering in to the Municipal limits would not have operated. But since the special law, namely, the Taxation Act does not have any provision authorising imposition of tax on entry of Motor Vehicles. The said provision would remain valid and would be applicable and there would be no bar for the municipality to impose entry tax on all vehicles including Motor Vehicles including Motor Vehicles for entering in to the limits of the Municipalities. This Construction being the only harmonious construction by which both the provisions remain operative it is the duty of the court adopt such construction. There is no dispute with the

proposition advanced by Mr. Lekhi, learned senior counsel with regard to theory of implied repeal.

46. We have perused the decision relied on by the learned Additional Advocate General reported in *Jantia Hill Truck Owners Association Vs. Shailang Area Coal Dealer and Truck Owner Association and Others*, . In the above said decision, the Hon''ble Supreme Court has pointed out that the State or the State Controlled Agencies rendering the services for the purpose of effectuation of the provisions of the Central Act is entitled to charge a reasonable amount in respect thereof. Perusal of the facts and circumstances of the case before the Hon''ble Supreme Court and the case before us would show that they are not under similar circumstances or same footing. It appears that in the case before the Hon''ble Supreme Court, Section 211 of the Motor Vehicles Act, 1988 provide for power to levy fee and the core question that has arisen in that matter was as to whether the State Government was empowered to issue any executive order in respect of matters required to be prescribed by the Rules. Therefore, considering the scope of Section 211 and the State Governments power to issue executive orders, the Hon''ble Supreme Court has observed at paragraph Nos. 27 and 28 as follows:

27. Apart from Section 211 of the Act the State is entitled to make laws for collection of fees in respect of any matter enumerated in List II of the Seventh Schedule to the Constitution of India as would be evident from Entry 66 thereof. If it itself carries on business, it is entitled to lay down the norms therefor.

28. Where the State or the State-controlled agencies render services for the purpose of effectuation of the provisions of a Central Act, it, in our opinion, is entitled to charge a reasonable amount in respect thereof. We may, in this behalf, refer to a decision of this Court in *T. Cajee Vs. U. Jormanik Siem and Another*, . The question which arose for consideration therein was as to whether in absence of any law regulating the appointment and succession of chiefs and headmen, a notice issued to the respondent therein to show cause as to why he should not be removed from his office, was valid.

47. In our considered view, the present facts and circumstances of the case cannot be equated with the above case before the Hon''ble Supreme Court. Moreover, in this case, already the levy of charges for the supply of fly ash was tested before this court twice and on both occasions, this Court has not passed any order entitling the TANGEDCO to collect the charges. Moreover, the TANGEDCO has never challenged the earlier notifications issued by the Union of India in this aspect at any point of time. Therefore, we are of the view that the above said decision of the Hon''ble Supreme Court cannot be applied to the facts and circumstances of the present case as the same is clearly distinguishable on facts.

48. We have already pointed out that the learned Single Judge has not stated as to what is the inconsistency in the impugned Notification issued by the Union of India, while comparing with the objects of the Electricity Act, 2003. We have also

pointed out that both the Acts viz, the Electricity Act, 2003 and the Environment (Protection) Act, are enacted with different objects and reasons and are operating in a different field. The various Notifications issued by the Union of India commencing from notification S.O.763, dated 14.09.1999, till the impugned Office Memorandum, aimed to protect the environment, conserve top soil and prevent the dumping and disposal of fly ash discharged from coal or lignite based thermal power plants. There cannot be any dispute about such object behind issuance of those notifications. When such being the object and the same is sought to be achieved through the power conferred under the relevant law, namely, Environment (Protection) Act, 1986, so long as those notifications issued are not inconsistency with the object sought to be achieved under the relevant enactment, in our considered view, the question of inconsistency, as observed by the learned Single Judge, does not arise from the point of view of the objects and reasons sought to be achieved under the Electricity Act, 2003.

49. It is not in dispute that the fly ash emerges as the by-product during the course of generating power through coal or lignite by the Thermal Power Plants. It is also not in dispute that such by-product emerging out of such power generation, if let loose without protection would cause pollution to the atmosphere, resulting assaults on human beings, other living creatures, plants and property. Therefore, it is the bounden duty of such Thermal Plants to have safeguard measures, so that such polluting material namely, fly ash is not let loose in the atmosphere and on the other hand, it is collected, dumped and removed in order to prevent pollution to the environment. When that being the mandatory obligation on the part of the power generating thermal plants through coal or lignite, they cannot be permitted to say that for doing the job of such collection and accumulation of fly ash, the huge expenditure met out by the TANGEDCO, has to be paid by the Brick Manufacturers. It is not that the said Brick Manufacturers volunteered themselves and wanted to purchase fly ash from the Thermal Power Plants on their own. On the other hand by virtue of the various notifications issued by UOI commencing from 14th, September, 1999, such Brick Manufacturers are compelled to take the fly ash and utilise the same in their brick manufacturing process to preserve the top soil. At this juncture, it is useful to refer paragraph 1 of sub-clause (1) of Notification, dated 14th, September, 1999, which reads as follows:-

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

50. Thus, it is manifestly clear that by virtue of such mandatory requirement, the Brick Manufacturers are compelled to take the fly ash from the Thermal Power Plants and they are removing the fly ash by transporting at their cost from the stock yard. As already discussed supra, these Notifications were issued to

achieve the twin object, namely to prevent the Pollution as well as the exploration of the Top soil. When that being the case, the TANGEDCO cannot be justified in contending that the Brick Manufacturers have to meet out the service charges for providing the fly ash. At this juncture, it is also relevant to note that the remaining 80% of the fly ash is being sold to various other cement manufacturing companies and it is stated that such companies have also taken care of the establishment of plant and machineries for collecting the fly ash within the Thermal Power Stations.

51. A perusal of the relevant provisions under the Environment (Protection) Act 1986, would show that the first respondent/Union of India is empowered to issue the impugned proceedings and the TANGEDCO is bound by such directions. Section 3 of the said Act empowers the Central Government to take measures to protect and improve environment. Section 5 deals with Power of the Central Government to issue such directions including the power to direct closure, prohibition or regulation or any industry, operation or process.

Section 24 of the said Act deals with effect of other laws and to contemplate that the provisions of the Environment (Protection) Act, 1986, and the Rules or orders made therein shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act. Thus, the overriding effect is clearly stated without any iota of doubt.

52. Considering all the above stated provisions of law and the scope of the same, we are of the considered view that the TANGEDCO which is an industry manufacturing power through thermal stations is bound to follow the directions issued by the Union of India which has statutory force and the competent authority having prohibited the collection of any charge for the supply of fly ash to brick manufacturers, the TANGEDCO is not entitled to collect the service charge from the Brick Manufacturers.

53. We are also not in agreement with the contention of the TANGEDCO that such expenditure, if not collected by way of service charge from the Brick Manufacturers, will have to be passed on to the common man being the consumer of electricity. Definitely the TANGEDCO cannot pass on such expenditure on the consumer because it is not the expenses being met out for generating the thermal power, but on the other hand, it is the incidental expenses being met out in collecting the by-product viz., fly ash in order to prevent the atmosphere pollution. Undoubtedly such expenditure has to be met out only by the TANGEDCO as a mandatory measure in order to comply with the requirement of the various provisions under the Environment (Protection) Act, 1986 while producing electricity. We don't think that the TANGEDCO can pass on all the expenses and expenditure being met out by them to the consumer while dealing with the collection of by product viz. fly ash, which has got nothing to do with the consumer.

54. Considering all the above facts and circumstances of the case and the scope

of the two enactments discussed above and also considering the earlier orders passed by the Division Bench of this Court out of which one order was confirmed by the Hon''ble Supreme Court and another order has become final and not challenged, we are of the view that the order of the learned Single Judge in allowing the writ petition cannot be sustained as the same has the effect of giving a contra findings to those earlier decisions of the Division Bench.

55. In fine, all the Writ Appeals are allowed and the order of the learned Single Judge is hereby set aside. Consequently, the proceedings No. 9-8/2005-HSMD, dated 18.03.2011, impugned in W.P.No.12295 of 2011 issued by the Union of India, Ministry of Environment and Forest, is upheld. No costs. Consequently, connected miscellaneous petitions are closed.