

**BEFORE THE NATIONAL GREEN TRIBUNAL  
(WESTERN ZONE) BENCH, PUNE**

**APPLICATION No. 16 OF 2013 (WZ)**

**CORAM:**

1. **Hon'ble Shri Justice V.R. Kingaonkar  
(Judicial Member)**
2. **Hon'ble Dr. Ajay A. Deshpande  
(Expert Member)**

**B E T W E E N:**

**NASIK FLY ASH BRICKS ASSOCIATION**

Through its President Mr. Sunil Mendhekar,  
Age-47 years, Occ: Business,  
Office Address: C/o Prakash Engineering Industries,  
D-28, Street 10, MIDC, Satpur, Nasik-7.

..... **Applicant**

Versus

- 1) **MINISTRY OF ENVIRONMENT AND FOREST (MoEF)  
Govt of India**  
Paryavaran Bhavan, CGO Complex, Lodhi road,  
New Delhi-110 003, INDIA
- 2) **MAHARASHTRA STATE POWER GENERATION CO. LTD  
(MAHAGENCO)**  
Hongkong Bank Building, M.G.Road,  
Fort, Mumbai-400 001.
- 3) **CHIEF ENGINEER, NASIK THERMAL POWER  
STATION,**  
Eklahare, Tahsil: Nashik, Dist: Nashik.
- 4) **PRINCIPAL SECRETARY,**  
Urban Development Dept., Govt of Maharashtra.  
4<sup>th</sup> Floor, Mantralaya,  
Mumbai-400032.

- 5) **COMMISSIONER, NASHIK MUN. CORPORATION,**  
Nashik Municipal Corporation,  
Nashik (East).
- 6) **Collector, Nashik District**  
Maharashtra State  
PIN: 422002.
- 7) **MAHARASHTRA POLLUTION CONTROL BOARD,**  
Nashik Regional Office,  
Udyog Bhavan, First Floor,  
Trimbak Road, Near ITI,  
Satpur, Nashik-422007.

.....Respondents

**Counsel for Applicant**  
**Asim Sarode Adv**  
**Ms. Pallavi Talware**

**Counsel for Respondent(s):**

Krishna D. Ratnaparkhi, for Respondent No.1.  
Shriram S.Kulkarni, w/Chaitanya B.Nitke for Respondent Nos. 2 & 3.  
Sudhir Kotwal, for Respondent No.5.  
M.P.Barhanpurkar DMO, Nasik for Respondent No.6.  
D.M.Gupte Adv w/Supriya Dangare for Respondent No.7.

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**Date: March 21<sup>st</sup> , 2014**

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**J U D G M E N T**

1. The Applicant – Nashik Fly Ash Association claims to be an Association working on issues related to the fly ash and has filed this Application being aggrieved due to non-implementation of MoEF Notifications, related to fly ash utilization, issued from time to time. The Applicant claims that the Respondents have individually and collectively failed in effectively implementing these Notifications, resulting in inadequate utilization of fly ash which has resulted into over exploitation of natural top soil of earth, causing damages to

the environment. It is also pleaded that due to non-utilization of fly ash for brick manufacturing, the traditional red bricks are continued to be used and though there are norms for use of fly ash, even for manufacturing of the red bricks, yet same are not followed. The brick kilns manufacturing red bricks are also polluting activities as they emit air pollutants.

**2.** The Applicant submits that the Respondent 1 is Ministry of Environment and Forest, Govt. of India which has issued the Fly Ash notifications and is overall responsible for protection of environment in the country. Respondent No.2 and 3 are operating Nashik Thermal Power Station which is one of the major fly ash generator and needs to comply with the provisions of fly ash Notifications issued from time to time. Respondent 4 and 5 are responsible for urban development activities in Nashik Municipal areas including the regulating construction activities, where fly ash bricks are required to be used as per the Notification. Respondent 6 is Collector, who is responsible for regulating the fly ash use in brick manufacturing units. The Respondent No.7, i.e. Maharashtra Pollution Control Board, (MPCB), has given consent to operate to the Respondent Nos.2 and 3, under the provisions of the Water (Prevention and Control of Pollution) Act 1974 and the Air (Prevention & Control Pollution) Act 1981, and has stipulated that the Respondent No. 3 shall provide full-fledged mechanized arrangements for collection, transportation, loading and unloading of fly ash generated

from various activities in the premises and to achieve 100% fly ash utilization on or before 31<sup>st</sup> March, 2013.

**3.** The Applicant also submits that the Chief Engineer, Public Works Department (PWD), Nasik Region, vide circulation dated 20<sup>th</sup> May, 2000, has clearly instructed that from 1<sup>st</sup> July, 2000, onwards while constructing the Govt. buildings use of fly ash bricks has been made mandatory in the limits of Nasik, Bhusaval, Jalgaon Municipal areas and within radius of 50 kms from these limits. It is the case of Applicant that in spite of such clear directions issued under the fly ash notification, the construction activities in Nashik area are undertaken without mandatory use of fly ash bricks, and the Respondents are not regulating these activities for the compliance of the Notification.

**4.** The Applicant submits that the MoEF Notification dated 3<sup>rd</sup> November, 2009, in Section 11 (1) (ii) stipulates that at least 20% dry ESP fly ash should be made available free of charge to the Units manufacturing fly ash or clay-fly ash bricks, blocks and tiles etc. on priority basis over other users. If demand from such Agencies fall short of 20% of quantity, the balance quantity can be sold or disposed of by the Power Station, as may be possible. The Applicant submits that in spite of such mandatory provisions, the Respondent Nos.2 and 3, have not adhered to the stipulated norms and are not complying with the obligations stipulated in the fly ash Notifications, particularly making at least 20% of dry ESP fly

ash available to the Units manufacturing fly ash or clay-fly ash bricks, blocks and tiles on priority basis. The Applicant further submits that even the traditional brick kilns which are operational in the area, are also not using fly ash as per fly ash Notifications and the concerned Authority – the Collector has failed to take any action against these red brick manufacturing Units.

**5.** Though there are several prayers in the Application, during course of hearing and arguments, the counsel for Applicant has only pressed for prayers (A),(B) and (C) of the Application and has withdrawn remaining prayers. These prayers pressed on by the Applicant are as under:

**(A)** The Respondent No.1 to 6 may kindly be directed to implement the MoEF Notification Dated 3<sup>rd</sup> November, 2009.

**(B)** The Respondent Nos.2 and 3 may kindly be directed to immediately stay the Tender proposal dated 3/5/2013 and process issued to sale the 80% dry fly ash because it is as per the MoEF Notification.

**(C)** Directions may kindly be issued to all the Respondents that wherever Thermal Power Stations are set up use of red clay bricks shall be banned completely and only fly ash bricks shall be used.

**6.** The Respondent No.1 i.e. MoEF, has filed affidavit through Shri. Shrad, Deputy Director of MoEF, which basically deals with various Notifications issued by the MoEF from time to time on the subject of fly ash utilization. It is submitted that as per the amendment Notification

No.S.O.2804 (E), dated 3<sup>rd</sup> November, 2009, inter alia, provides for utilization of fly ash. The relevant provisions are as under:

*“(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-*

*(a) The pond 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 and the State road construction agencies, Public Works Department and to agencies engaged in backfilling or stowing of mines.*

*(b) 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 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 only for the purpose for which it was obtained from the thermal power station or plant falling which no fly ash shall be made available to the defaulting user.”*

**7.** The affidavit further mentions that the responsibility of monitoring and facilitating implementation of this Notification, is that of the State Government level monitoring committee, constituted by the State Government, as per provisions of the Notification. In addition to this, the Committee is also empowered to deal with issues which could not be resolved by Dispute Settlement Committee constituted under said Notification by each coal or lignite based thermal power station and also is empowered to suitably modify (waive/relax) the stipulation under paragraph (1) in case of non-availability of fly ash in sufficient

quantity. The State Level committee is expected to meet once in a month.

**8.** The Respondent Nos.2 and 3 filed first affidavit on 9<sup>th</sup> December, 2013 and submitted that the Application has been filed by the Applicant in abuse of process of law and has not been filed with clear hands. It is submitted that as per fly ash Notification of 2009, the thermal power stations are free to sale 80% dry ESP fly ash and at least 20% fly ash should be provided to the brick kilns manufacturers. It further mentions that the Respondent No.2 published an advertisement on 31<sup>st</sup> March 2013, for distribution of 20% of fly ash on free basis to the brick kilns and other users, as per the Notification. This advertisement was cancelled in view of policy decision of the Respondent No.2, dated 14<sup>th</sup> October 2013 and fresh advertisement was published on 27.10.2013. Respondent 3 further issued advertisement on 3<sup>rd</sup> May, 2013 for sale/disposal of balance 80% dry ESP fly ash. Applicant, through his proprietary firm, M/s. Ashking Enterprises also participated in the tender process, however, was unsuccessful in the technical bid evaluation and failed to compete in further bidding process. The affidavit further mentions various initiatives taken by the Respondent No.2 and in paragraph 18, it mentions that the MoEF Notification merely acts as guidelines to the Respondent No.2, and nowhere creates rights in favour of any specific Industry, Body

of Association, Company etc. to lift such desired amount of fly ash.

**9.** The Respondent Nos.2 and 3 further filed affidavit on 19<sup>th</sup> January 2014, and submit that the Respondent No.3, has published advertisement dated 27<sup>th</sup> October, 2013 for distribution of 20% ESP fly ash on free basis and after due scrutiny, total 29 successful applicants were issued orders dated 10<sup>th</sup> December 2013 to lift total 20% dry ESP fly ash, including M/s Trimurti Industries, in which the Applicant is a partner. The affidavit further goes on to submit that various initiatives are taken by the Respondents to increase fly ash utilization. It is further submitted that the Respondent Nos. 2 and 3 are acting as per the directions given vide MoEF vide various Notifications for utilization of fly ash and as such, any decision regarding utilization of fly ash and its management is policy decision and as such, it would not be proper for this Tribunal to interfere in the same.

**10.** Shri. Kulkarni, learned Advocate for the Respondent Nos. 2 and 3 vehemently argued the matter and highlighted that fly ash management at a coal fired thermal power station is a complex and skilled job and the Respondent Nos. 2 and 3 are efficiently performing their duties as per the fly ash notification. He admits that before last ten (10) years, the fly ash utilization was not a priority issue and most of thermal power stations were storing fly ash in the ash ponds as a final disposal method. However, since the fly ash notification of



1999, thermal power plants have started prioritizing of fly ash utilization which in fact helped the power station to reduce the fly ash storage and also, the area for such storage within the power plant complex and also, generated a new source of revenue for the power plants. He mentioned that with the increased awareness about beneficial use of fly ash in various ways like fly ash bricks, clay-fly ash bricks, fly ash construction products, use in cement manufacturing, embankments/land-filling etc., the demand of fly ash has increased significantly and therefore, the MoEF has amended the notification keeping in view increased use of fly ash and also, difficulties and constraints faced by thermal power stations, through amendments of 2003 and 2009. He further argued that Nashik Thermal Power Plant is under the Maharashtra State Power Generation Co. Ltd. (MAHAGENCO) and Mahagenco has taken a policy decision regarding 20% fly ash allocation to the units manufacturing fly ash or clay-fly ash bricks, blocks and tiles at thermal plants of Mahagenco on 14<sup>th</sup> October, 2013, which are comprehensive and self-explanatory. The Mahagenco has laid down a procedure for allotment of 20% fly ash allocation to these units on free basis, following certain due diligence, as envisaged in the notification itself. He further submits the ash generated and utilization of data of Nashik Thermal Power Station for the year 2013, which is as under:

Ash Generation and Utilization Data from April 2013 to December 2013 and Proposed Ash Generation for Month of January 2014			
Name of TPS	Month	Ash Generated in MT	Ash Utilized in MT
Nashik TPS	Apr-13	116711	99201
	May-13	126996	108786
	Jun-13	107729	64594
	Jul-13	83354	51650
	Aug-13	96842	59182
	Sep-13	113550	68854
	Oct-13	129069	64601
	Nov-13	124876	85208
	Dec-13	131211	122685
	Proposed Ash Generation for Jan 2014		130000

**11.** Learned Advocate for the Respondent Nos. 2 and 3 further submits that the Hon'ble High Court Judicature at Madras, by dated 13.6.2013, gave Judgment in Writ Petition No.12295 of 2011 and M.P.No.1 of 2011, regarding providing fly ash on free basis to various units as stipulated in the notification. He referred to paragraph 30 of said Judgment which is as follows:

*“ 30. 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. “*

He therefore argued that this judgment has not been stayed by any superior court and therefore is applicable in the instant case also. He relied on Judgment of Hon'ble Bombay High Court in Commissioner of Income Tax vs Godavari Devi Saraf on 27.9.1977 (1978 113 ITR 589 Bom)

**12.** He further submits that the Applicant has not approached this Tribunal with clean hands and he is one of

the partners in a proprietary firm, called “Ash king Enterprises”, who have also submitted the bid for fly ash generated at the Respondent No.3 unit. However, he failed in bidding in the said bid. He further argued that tender notice dated 3<sup>rd</sup> May, 2013, was related to the sale/disposal of 80% of fly ash. Subsequently, the Respondent No.3, has published advertisement on 27.10.2013 for distribution of 20% ESP dry fly ash to the eligible manufacturers as per the notification. In this tender process, the Respondent No.3, has also issued orders to 29 successful Applicants for lifting 20% ESP dry fly ash including M/s Trimurti Industries, in which the Applicant is a partner. The Applicant has already paid security deposit and has started lifting of fly ash as per the tender conditions. The Respondent Nos. 2 and 3 further submit that they had taken all the necessary pro-active steps for increasing utilization of fly ash and had contacted the potential users, as well as the Govt. Agencies for increased utilization of fly ash. The learned Counsel for Respondent Nos.2 and 3, therefore submits that they have complied with fly ash notification and, therefore, the present Application be dismissed.

**13.** The Respondent No.5, has submitted affidavit on 21.11.2013 and has submitted that the Nasik Municipal Corporation is undertaking their construction work as per the DSR published by the PWD, Govt. of Maharashtra and has also enclosed copies of the same along with a sample

copy of the sanction issued for various construction activities, wherein use of fly ash bricks and products has been made mandatory.

**14.** Respondent 6 (Collector) and 7 (MPCB) have also filed separate affidavits. Their affidavits indicate efforts taken by them for implementation of fly ash notification. However, both the affidavits fail to show the compliance level as far as utilization of fly ash by the Thermal power station (generation side) and utilization of fly ash by brick kilns, construction agencies etc. (demand side), and also, actions taken by both Respondents against the agencies non-complying with the Notification.

**15.** Considering the Application and also arguments of learned Counsel and after going through the relevant record, in our opinion, the following issues arise and need to be determined for adjudication of the present Application:

- 1.** Whether the Respondent Nos.2 and 3, are complying with fly ash notifications as amended from time to time?
- 2.** Whether there is adequate enforcement and monitoring mechanism to regulate utilization of fly ash generated by the Respondent Nos. 2 and 3?
- 3.** What steps need be taken for effective enforcement of fly ash notifications to achieve the target, set out in the notifications?

The reasons along with our findings on the issues are discussed herein below:

**16.** We may first proceed with summarization of the important aspects of fly ash notifications for better understanding of the dispute raised in the Application. 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 coal or lignite based thermal power plants. In order to reduce the impact of fly ash on the environment, the Government of India issued a Notification dated 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.

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

- a)** Use of fly ash, bottom ash or pond ash in the manufacture of bricks and in other construction activities;
- b)** Utilization of ash by thermal power plants; and
- c)** Specification for use of ash based products.

**18.** 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 contains direction to every coal or lignite based thermal power plant to make available ash for at least ten

(10) years from the date of publication of the Notification without any payment or any other consideration, for the purpose of manufacturing ash based products. The third part relates to promotion of utilization of fly ash products.

**19.** Subsequently, the Central Government issued an amendment to the above Notification by yet 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 amended Notification stated that the thermal power plants have to ensure availability of fair quantity of ash to each user, including brick kilns.

**20.** Another amended Notification was issued on 3.11.2009 with several amendments to the original Notification. Out of the several amendments, paragraph (2) is relevant in the present matter and is 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 fails 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 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”.*

**21.** We have gone through various provisions of fly ash notifications related to the enforcement and monitoring aspects. Notification dated September 14<sup>th</sup>, 1999, stipulates that *“the Authority for ensuring the use of satisfied quantity of ash, shall be the concerned Regional Officer of the State Pollution Control Board or, the Pollution Control Committee”*, as the case may be. It further stipulates that the action plans prepared by coal or lignite based thermal power plants annual implementation report, shall be submitted to the Central Pollution Control Board (CPCB), concerned State Pollution Control Board/Committee and the concerned Regional office of the MoEF. In the amended Notification dated 27<sup>th</sup> August, 2003, sub-paragraph (2), has been substituted as under:

**“(2)** The authority for ensuring the use of specified quantity of ash as per sub-paragraph (1) shall be the concerned Regional Officer of the State Pollution Control Board or the Pollution Control Board, as the case may be.

**(2A)** the concerned State Government shall be the enforcing and monitoring Authority for ensuring compliance of the provisions of sub-paragraph (1A)

A new sub-section (3c) is also added as:

**(3C)** All authorities sanctioning or renewing any land, soil or clay mining lease shall not grant such lease or extension of lease or renewal to clay brick, block or tile manufacturing unit within a radius of one hundred kilometers of the coal or lignite based thermal power plant in cases where the manufacturer does not mix a minimum of 25 per cent by weight of fly ash or pond ash in the manufacture of bricks or blocks or tiles. The cancellation of mining lease shall be decided by the district administration after giving the holder of such lease an opportunity of being heard. To enable the competent authority to verify the actual use of ash, the thermal power plant shall maintain month-wise records of ash made available to each brick kiln.”

**22.** Further through amendment dated 3<sup>rd</sup> November, 2009, paragraph 2(II), has been inserted, which stipulates that “the concerned State Government or Union Territory, shall be enforcing and monitoring Authority for ensuring compliance of the provisions of sub para (8) (i) and (a) (ii). However, it is noted that the para 8, mainly relates to use of fly ash for stowing of mines and backfilling of open-cast mines. The Notification further in paragraph 3 (7) has provision for constitution of State Level Monitoring Committee for monitoring and facilitating implementation of this Notification, which is to be constituted by concerned State government or Union Territory.



**23.** From the above amendments, we find it difficult to carve out and identify the Agency responsible for enforcement of fly ash utilization at the thermal power plant level, though the enforcement Authorities have been defined at the demand side of fly ash utilization i.e. brick kilns, mines, fly ash construction products etc. However, the enforcement Agency at the fly ash generation side for the effective fly ash utilization, is not clearly defined and, therefore, we posed this query to the learned Counsel during the hearing. No clear provision was brought to our notice which identify the enforcement agency for implementation of this Notification. In view of this, we are of the considered view that as this Notification has been issued under provisions of the Environment (Protection) Act, 1986, the Authorities responsible for enforcement of Environment (Protection) Act, 1986, are responsible for enforcement of said Notification and therefore, the MoEF, CPCB and MPCB, are responsible Authorities for enforcement of fly ash Notification, as far as the generation of fly ash and its effective utilization is concerned. However, we find hardly any efforts or actions which have been taken either by MoEF or SPCB for effective enforcement of the Notification.

**24.** We also posed a query regarding the constitution of State level committee and also, dispute settlement committees as per scheme of the Notification. MPCB could not give information regarding the said committee and also,

number of meetings and its minutes, though MPCB is an important member of this committee. The Respondent 2 and 3 also could not give much information regarding the Local level dispute settlement committee formation and its minutes. This shows the apathy of all the regulatory and monitoring agencies towards effective implementation of the Notification.

**25.** MPCB has filed its affidavit on 8.1.2014 and has submitted that the MPCB has stipulated suitable conditions for fly ash management and handling, in the consent granted to the Respondent No.3 and is also ensuring the compliance thereof. The relevant condition prescribed by the MPCB is produced as under:

Sr. No	Type of waste	Quantity	Treatment/Disposal
1	Fly ash/Bottom Ash	93240	Shall be sent to Cement Manufacturer and disposed as per Govt. of India Guidelines Notification vide no.SO 763(C) dated 14.9.1999.
2	Bottom Ash	23310 MT/Month	
3	Ash Sludge	400 MT Month	
4	Metal Scrap	20 MT year	By sale

Further MPCB has taken bank guarantee of Rs. 120 lakhs towards 100% fly ash utilization on or before 31.12.2013.

**26.** MPCB has further submitted monthly record of fly ash utilized by the Respondent No.3 from April 2012 to March 2013 and also from April, 2013 to October, 2013. The information is basically in four parts i.e. total ash generated, pulverized ash lifted by Dirk Ltd, pulverized ash lifted by the

parties. However, it does not mention about compliance or non-compliance of targets as stipulated in fly ash notification. MPCB has also further submitted that fly ash collection and handling is presently done manually and mechanical system for collection and handling of ash is not provided by the Respondent No.3. MPCB has also recorded necessity to provide mechanical handing system.

**27.** The data submitted by Mahagenco i.e. R-3 as mentioned above, reveals that record of fly ash generation is not separately available with Mahagenco under the sub-heads (a) Dry ESP Fly Ash and (b) Pond ash, which is relevant as utilization patterns have been defined and stipulated under these two categories vide the said Notification. However, data submitted by MPCB, surprisingly shows fly ash generation of two categories, namely, pulverized fly ash and pond ash. We are not sure about the source and nature of the pulverized fly ash mentioned in MPCB record. It is, therefore, necessary that thermal power stations, shall maintain record of fly ash generation and its utilization as per categories mentioned in the Notification for effective enforcement and compliance of the Notification. Apparently, it is not clearly established that the Respondent No.3, is providing 20% of dry ESP fly ash on cost free basis to the various users, as stipulated by the Notification, regularly, since 2009. Though, as per the Notification of 2009, the present fly ash utilization need to be more than 90%, which

benchmark is not achieved by the Respondent No.2. Hence, the finding of Issue No.1 is recorded in the 'Negative'.

**28.** The other areas where fly ash is required to be utilized is brick kilns, clay-fly ash brick kilns and also the construction products. There is no document placed on record by any of the enforcement Agencies i.e. MPCB, Collector and MoEF to demonstrate that any due diligence or measures are taken by these agencies for enforcing provisions of fly ash Notification, than mere mentioning fly ash utilization in the license/permits issued by them. The affidavit of District Mining Officer clearly shows that there are significant variations in the permits granted by the Revenue Department to the brick kiln owners. In some cases, fly ash utilization is stipulated while in many cases it is not even mentioned. Also in many cases, permits/licenses have not been issued, though the traditional clay brick kilns are reported to be in operation. It is also noted that there is no record available regarding number of cases recommended by SPCB for cancellation of leases on account of non-use of fly ash and also, any instance whether the Collector or Municipal Corporation has enforced the use of fly ash bricks and products in the construction activities in their area. It goes to indicate lack of seriousness, apathy and negligence on the part of all these enforcement Agencies in enforcing and regulating utilization of fly ash at demand site i.e. use in

brick kilns, construction activities, embankment etc. and therefore we record finding on Issue No.2 in the 'Negative'.

**29.** We may now switch over to examine merits of factual contentions advanced on behalf of the Respondent Nos.2 and 3, as well as submission pertaining to applicability of decision of Hon'ble Madras High Court. The contention of the Respondent Nos.2 and 3, is that distribution of fly ash is being done, in accordance with the MoEF Notification dated 3<sup>rd</sup> November 2009. It is argued that market demand and supply of bricks is variable, in accordance with the construction activities. Therefore, it is contended that the prayer Clause (C) indicated in the Application is illogical and hypothetical. Further, it is argued that since dry fly ash is commercially valuable product and can generate revenue, the directions were amended by permitting Thermal Power Plants to sell dry fly ash with rider to provide "at least" free of cost fly ash to the extent of 20%. It is argued, therefore, that it is discretion of the Respondent No.2 and 3 to decide as to how much they intend to give free of cost quantity of fly ash and to what extent revenue is required to be generated through sale of fly ash. According to the Respondent Nos.2 and 3, such sale of cost free fly ash is the policy decision and the word "at least", as used in the Notification in question, is being wrongly interpreted by the Applicant. It is vehemently argued that the Respondent Nos.2 and 3, are the owners of fly ash generated from power plant and, therefore, have

Authority to decide as to how much quantity they shall distribute free of cost, when stock of fly ash is to be sold. The Respondent Nos.2 and 3, even went to the extent of saying that the Central Government, has exceeded its powers while giving directions to provide fly ash free of cost, to the brick manufacturers under the MoEF Notification.

**30.** Learned Counsel for the Respondent Nos.2 and 3, has placed heavy reliance a Judgment of learned Single Bench of Hon'ble Madras High Court in **Writ Petition No.12295 of 2011, and MP No.1 of 2011, "M/s Tamilnadu Generation and Distribution Corporation Ltd & Anr vs Union of India and Ors"** It is submitted by the learned Advocate for the Respondent Nos.2 and 3, that the Judgment of Hon'ble Single Bench of Madras High Court, would govern the issue involved in the present Application and said Dicta will be binding on this Tribunal. He further argued that the Application does not come within ambit of Section 14 of the National Green Tribunal Act, 2010, inasmuch as the jurisdiction of NGT, relates only to deal with "substantial question of environment" which expression is only inclusive and not exhaustive, so as to cover the issues like those which are ventilated through the present Application.

**31.** We have given anxious thought to the arguments advanced on behalf of the Respondent Nos.2 and 3. At the threshold, we may dislodge contention of the Respondent Nos.2 and 3, as regards jurisdictional issue. Section 14 of the

National Green Tribunal Act, 2010, to the extent it is relevant may be reproduced as follows:

**“Section 14: Tribunal to settle disputes: –**

1. *The Tribunal shall have the jurisdiction over all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to environment), is involved and such question arises out of the implementation of the enactments specified in Schedule I.*
2. *The Tribunal shall hear the disputes arising from the Questions referred to in sub-section (1) and settle such disputes and pass order thereon.*

3. xxx      xxx      xxx      xxx      xxx

**32.** A bare perusal of Sub-section (1) of Section 14, reveals that the NGT, shall have jurisdiction over all civil cases, where substantial question relating to environment is involved. The expression “all civil cases”, is of pervasive nature and, therefore, cannot be given restrictive meaning. Additional words “including enforcement of any legal right relating to environment” as used in Sub-section (1) of Section 14, of the National Green Tribunal Act 2010, will not, in any manner give restrictive meaning to Section 14(1), but will be rather explanatory in nature. In “**Mahalaxmi Oil Mills & Anr vs Andhra Pradesh & Ors**” **SCR, SUPLL (1), 1088**, the Apex Court interpreted Section 8 of the Andhra Pradesh General Sales Tax Act, 1957. That was a case, in which expression “Tobacco or any form of Tobacco” as used in Section 8 and in 4<sup>th</sup> Schedule, entry 7 of the said Act, was considered for the

purpose of interpretation. Andhra Pradesh High Court, held that though exemption provided under Section 8, read with entry 7, of 4<sup>th</sup> Schedule of Andhra Pradesh General Sales Tax Act, 1957, was applicable to Tobacco, oil and Tobacco cake, being forms of Tobacco, yet “Tobacco seed” was not Tobacco and that only leaf, stalks and stems of Tobacco plants could be said to be “Tobacco”, within meaning of its definition. This view was confirmed by the Hon’ble Supreme Court. The entire interpretative angle in the given case, depended upon use of expression “any form of Tobacco”, which “Tobacco seed” of course did not qualify for under the Fiscal Statute. In that case, there was no question of applying interpretation by taking into account “inclusive definition” as such. As a matter of fact, Hon’ble Supreme Court, took into account intention of Legislature while using the said expression “Tobacco or any form of Tobacco” in the local Sales Tax Act. At one place, in paragraph 11, Hon’ble Supreme Court, has observed that:

*“Before us, it is urged on behalf of the assesses that the word “tobacco”, in its ordinary connotation, takes in the tobacco plant and every plant of it, including the seed. The definition also make it clear that it takes in every form of tobacco, manufactured or unmanufactured. Thus tobacco seeds, not only when they are in their raw unmanufactured state but also when, on manufacture, they manifest themselves in the form of tobacco seed oil or tobacco seed cake will*



*fall within the definition. On the other hand, on behalf of the State it is submitted that the PG NO 1094 definition, which covers both what the expression means as well as what it includes, is exhaustive. Tobacco seed does not come within the first part of the definition, for the expression “tobacco, cured or uncured, manufactured or unmanufactured” has to be read as a whole and will not take in tobacco seed. It will not come under the second part because it specifically mentions leaves, stalks and stems but leaves out seeds. Since tobacco seeds do not fall within the definition, the oil and cake produced by the crushing of the seeds will not also be covered by the definition or eligible for the consequent exemption.”*

From above observations, it is amply clear that interpretation of such expression depends on intention of Legislature. As stated earlier, in view of the fact that use of the words “shall have jurisdiction over all civil cases, where substantial question relating to environment” will encompass within its fold all types of civil matters in which environmental issues of substantial nature, are involved. Obviously, we deem it proper to reject the contention of Respondent Nos. 2 and 3 that NGT, has no jurisdiction to deal with issues raked up in the present Application.

**33.** Coming to the case of “***M/s Tamil Nadu Power Generation & Distribution Corporation Ltd vs Union of India & Ors***” (Supra), we may pinpoint that the issue involved in that case was of different nature . The MoEF by its order dated

March 18<sup>th</sup>, 2011, held that any collection of service charges by the Power Generation Plant, would amount to collection of cost and, therefore, would constitute violation of the relevant Notification. The Ministry also observed that expenditure and freight handling of coal etc., are all part of the regular expenses in the operation and that they are factored into cost of power supply to the customers. Therefore, the Power Generation and Distribution Corporation Ltd., was prohibited from recovering collection of service taxes, directly from Traders/Associations as per the MoEF Notification dated September 14<sup>th</sup>,1999. The said order of MoEF, was held bad in law, by the learned Single Judge of the Hon'ble Madras High Court. The issue involved in the present case is not akin to the issue raised before the learned Single Judge of the Hon'ble Madras High Court. Apart from that, nobody has come forward to claim any cost from the Applicant under any order of MoEF nor such order is subject matter of challenge before us. The learned Single Judge of Hon'ble Madras High Court, had not quashed relevant MoEF Notification dated November 3<sup>rd</sup>, 2009. We may make it clear that legality of said Notification, is not subject matter of challenge before us and, therefore, such issue cannot be subject matter of decision in the present Application.

**34.** Learned Advocate for the Applicant, however, vehemently argued that said Judgment of Hon'ble Madras High Court will be binding on this Tribunal, for the reason

that it is a Judgment rendered in the exercise of Writ Jurisdiction and will have binding effect. He contended that views of Madras High Court, cannot be brushed aside, only because NGT, is not administratively subordinate to the supervisory jurisdiction of that High Court. Reliance is placed on the observations in case of "**Commissioner of Income Tax vs Godavaridevi Saraf**" 1978 (2) ELT 624 Bom. We have carefully gone through the observations of the Hon'ble High Court in the given case. What is observed in the given case, is that the Tribunal constituted under the same Act, has no jurisdiction to go into the question of constitutionality of the provisions of that statute. In the said case, provision of the Income Tax Act, was held as unconstitutional, as being violative of Article 19(1) (f) of the Constitution and, therefore such decision of Madras High Court, it was held could not be overlooked, by the Income Tax Tribunal, inasmuch as that provision itself did not exist. This authority has no bearing on the issue involved in the present case. In our opinion, the decision of Hon'ble High Court, may have binding effect, if it is rendered in the same case, in its Writ Jurisdiction. Else, there is certain gray area, which needs to be legally expounded at appropriate time. In any case, the Judgment of learned Single judge of Madras High Court, has no bearing on the issue involved in the present case and, therefore, we are not bound to hold that supply of 20% free ash, as per the

MoEF Notification dated November 3<sup>rd</sup>, 2009, cannot be claimed by the Applicant.

**35.** In view of foregoing discussion and reasons recorded hereinabove, we deem it proper to hold that the Application deserves to be partly allowed with certain directions. The Application is, therefore, partly allowed with following directions:

**a)** The Respondent Nos. 2 and 3, shall hereafter maintain record of fly ash generation and utilization category-wise, as mentioned in the MoEF Notification dated November 3<sup>rd</sup>, 2009 and publish such data on their website on monthly basis, apart from furnishing the same to other Regulatory Authorities, and shall put the same in the public domain, by the end of each month.

**b)** The Ministry of Environment and Forests (MoEF) and State Pollution Control Board (MPCB), shall conduct joint inspection of Thermal Power Plants, especially of Respondent Nos. 2 and 3 per month to verify fly ash utilization, as per categories stipulated in the above referred Notification and take suitable action in case of non-compliance for six months hereafter and thereafter verification shall be done on quarterly basis in future, till necessary compliance is achieved.

**c)** The Respondents, including Respondent Nos.2 and 3, shall take measure for disposal/process or utilization of 20% fly ash to be made available to eligible units, free of cost, in accordance with the mandate of MoEF Notification dated November 3<sup>rd</sup>, 2009, prior to sale or otherwise, disposal of

remaining 80%, of stock. In case of balance stock of dry ESP ash, further disposal also shall be in terms of MoEF Notification referred to above, and not as per discretion of the Respondent Nos.2 and 3.

**d)** The Respondent Nos.2 and 3 shall publish all the information related to fly ash use, including the annual reports on their website. Respondent 1 and 7 shall also keep such annual reports submitted by the thermal power stations and also actions taken by them for enforcement of the notification on their website.

**e)** The Respondent Nos.4, 5 and 6 shall immediately take action for compliance of fly ash notification at the demand side i.e. brick kiln, construction activities etc. Necessary conditions shall be incorporated in consent/permits given for these activities which shall be enforced through necessary visits, document verification etc. They shall conduct joint awareness program for utilization of fly ash in next six (6) months for the potential users regarding the fly ash notification, with the help of Respondent Nos.3 and 4 and also, the Applicant.

**f)** The Respondent Nos.2 and 3 shall pay cost of Rs.10,000/- to the Applicant. All the Respondents to bear their own costs.

The Application is disposed of in above terms.

.....**JM**  
**(Justice V. R. Kingaonkar)**

....., **EM**  
**(Dr. Ajay.A. Deshpande)**