BEFORE THE NATIONAL GREEN TRIBUNAL

EASTERN ZONE BENCH, AT KOLKATA

ORIGINAL APPLICATION NO. 105 OF 2024

IN THE MATTER OF:

Rohit Choudhury… …. ….. ….. …. …. … …. Applicant

Versus

State of Assam & Ors… …. …. … … ….. Respondents

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New Delhi
Dated:29.07.2025

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Rejoinder Affidavit to the Counter Affidavit filed by Respondent No.2 on 20.04.2025

It is most respectfully submitted:

1. That the Applicant herein is filing Rejoinder to the Counter Affidavit filed by the Respondent No. 2 on 20.04.2025. At the outset, the Applicant deny each and every statement, allegation, averment and contention made by the Respondent in its Counter affidavit which is contrary to or inconsistent with what is stated in the original application. The Applicant prays that nothing should be deemed to be admitted by the Applicant by virtue of not having been specifically denied herein.

2. That the applicant has also filed Rejoinder dated 01.10.2024 to the reply filed by Respondent No. 2 in the matter and the applicant prays leave of the Hon'ble Tribunal to rely upon the contents of the same for the purposes of the present rejoinder.

3. That the Original Application is based on the fact that 28 hectares of Geleky Reserve Forest located in Sibsagar District of Assam has been illegally diverted by the Forest Department of Assam, Respondent No.2 herein for establishment of Commando Batallion in violation of the provisions of the Van Adhiniyam, 1980 and the Consolidated Guidelines and Clarifications on Van (Sanrakshan Evam Samvardhan) Adhiniyam, 1980 dated 29.12.2023.

4. That the applicant in addition to what has been stated in the Originial Application has also brought to the notice of the Hon'ble Tribunal the violations of the provisions of the EIA Notification, 2006 since the

construction of the Commando Batallion is more than 20,000 square meters for which “Prior Environment Clearance under Item 8 of the EIA Notification, 2006 is required (Internal page 14 to 17 of the MoEFCC reply dated 03.10.2024). The construction activity is also primarily for residential purposes which is against 11.8 and 11.9 of the Van Adhiniyam Guidelines dated 29.12.2023. The said facts have also been stated in the Rejoinder filed to the MoEFCC, Respondent No. 3 on 16.10.2024. It is thus very clear that the present construction activity is a blatant violation of both Van Adhiniyam, 1980 and the Environment (Protection)Act, 1986.

5. That the applicant has stated that the gross violations of the rules and regulations have been committed by Shri M.K Yadav who is presently serving as Special Chief Secretary (Forest), Government of Assam. The Respondent No. 2 in the Counter Affidavit filed on 20.04.2025 has denied all allegations of violation against the said officer and have tried to prove that no such violations of law have been committed by the Department and that the application filed by the applicant is malafide and needs to be dismissed. It is submitted that despite all evidence of glaring violations are on record, the Respondent No. 2 has time and again attempted to cover up the violations committed by their officer for reasons best known to them. It is further important to point out that the construction activity has been carried out in full swing and has progressed significantly during the pendency of the present matter which is evident from the Site inspection report dated 16.08.2024 and 17.08.2024 annexed as Annexure R-1 to the reply of the MoEFCC dated 03.10.2024.

6. The fact that there has been gross violations by the officer above-named is corroborated again by the directions issued by the MoEFCC, Regional Office, Shillong vide letter dated 29.05.2025 wherein the Ministry has clearly mentioned that Shri M.K Yadav has been found guilty of violating the provisions of Van Adhiniyam, 1980 and the Guidelines dated 29.12.2023 and action against him shall be initiated as per sections 3A and 3B of the Act read with Rule 15 of the Van Adhiniyam Rules, 2023. The said letter has been obtained under RTI reply dated 20.06.2025.

Copy of the RTI letters dated 20.06.2025 and 29.05.2025 received from the MoEFCC, Regional Office, Shillong are annexed herewith as **Annexure A-1**.

7. It is pertinent to mention here that the MoEFCC, Regional Office through the letter dated 29.05.2025 has directed the DFO to take action against the offender and submit a compliance report. However, as per 15(3) of the Van Adhiniyam Rules, it is an officer of the rank of Assistant Inspector General of Forest and above to be authorised by the Central Government to initiate legal proceedings and file complaints against the offences committed under the Adhiniyam. Thus, in this case the Central Government shall authorise an officer of senior and higher rank to initiate action against the concerned official. Such authority shall not be delegated to any officer of the State Government since the same could be a conflict of interest.

8. That the Respondent No.2 in its counter affidavit has claimed that it has obtained ex-post facto FC for the establishment of the commando batallion and thus the matter gets resolved with the grant of the same. It is submitted that when the Hon'ble Tribunal has already taken cognizance of the matter, no such approval by the Central or State Government or any other authority shall be given. Such approval is purely subject to the outcome of the present matter. (Condition no 3.7 at page 432 of the Counter Affidavit of the Respondent No. 2 dated 20.04.2025)

9. That it is also important to mention here that the project would also require an Ex-post facto EC, however, the procedure for the same has been struck down by the Hon'ble Supreme Court through a judgment dated 16th May 2025 in *Writ Petition (C) No. 1394 of 2023 in the matter of Vanashakti vs Union of India (2025 INSC 718)*. So now the Respondent No. 2 cannot take advantage of Ex post facto EC also.

10. That the Hon'ble Supreme Court after due consideration of the provisions of the Environment (Protection) Act, 1986 and the EIA Notification, 2006 has struck down the Notification number S.0.804(E) dated 14th March, 2017 (which refers to OMs dated 12th December 2012 and 27th June 2013) and OM dated 07.07.2021 which provided for grant of ex-post facto EC to all those projects which have started construction

works at the site or expanded the production beyond the limit of the EC, or changed the production mix without obtaining EC. The 2017 Notification and the 2021 OM were issued to regularise those projects which have started their activities without a "prior EC" and have violated the provisions of the EIA Notification, 2006. The Hon'ble Supreme Court has made the following directions in this regard.

> "*a) We hold that the 2017 notification and the 2021 OM as well as all circulars/orders/OMs/notifications issued for giving effect to these notifications are illegal and are hereby struck down;*
>
> *b) We restrain the Central Government from issuing circulars/orders/OMs/notifications providing for grant of ex post facto EC in any form or manner or for regularising the acts done in contravention of the EIA notification;*
>
> *c) We clarify that the ECs already granted till date under the 2017 notification and the 2021 OM shall, however, remain unaffected.*"

11. The Hon'ble Supreme Court in para 14.2 of the judgment has made it very clear that the provisions of the EIA notification, 2006 stipulates that without prior EC, construction of new projects or activities, expansion or modernisation of existing projects or activities listed in the Schedule entailing capacity addition with change in process or technology, cannot be undertaken.

Again, in para 27 the Hon'ble SC has made an observation that,

> "*If the project proponent goes ahead with construction which requires EC under the EIA notification, it will amount to violation of the provisions of 1986 Act and 1986 Rules. It will attract penalty under Section 15 of the 1986 Act. Perusal of the provisions of Section 15 shows that even if the penalty is paid by the project proponent, it will not regularise the project. Therefore, even after the payment of penalty, if the project is under construction, the same has to be stopped and demolished and even if operation has already commenced, the same has to be stopped and demolished. Therefore, the construction work has to be demolished.*"

12. That in terms of the judgment passed by the Hon'ble Supreme Court, it is very clear that the projects cannot undertake any construction activity in violation of the EIA Notification, 2006 and any circular, OM, notifications or orders which permits or regularises such construction would tantamount to violation of the EIA Notification, 2006 and the Environment (Protection) Act, 1986. Copy of the judgement dated 16th May 2025 in *Writ Petition (C) No. 1394 of 2023 in the matter of Vanashakti vs Union of India (2025 INSC 718)* is annexed herewith as **Annexure A-2**.

13. That the present application deals with substantial question relating to environment as defined under section 2 (m) of the NGT Act, 2010 and therefore the Hon'ble Tribunal has the jurisdiction to decide over the issues involved in the matter. Since the violations in the present case are blatantly clear, the Hon'ble Tribunal has the power to take stringent action against the officer concerned and direct for a hefty penalty and environment compensation to be recovered by the officer concerned who is responsible for carrying out illegal activity and causing damage to the forest and environment. It is also important to note that the Respondent No.2 has caused huge damage to the reserve forest area and has wasted public resources under the pretext of security and encroachment reasons. Had this been such a serious issue, the Respondent No. 2 should have adopted the right approach and followed the mandatory procedure of obtaining approvals under the relevant laws, which has been blatantly ignored in the present case.

14. That alongwith action taken under sections 3A and 3B read with Rule 15 of the Van Adhiniyam, 1980 and section 15(B) of the Environment (Protection) Act, 1986, the officer concerned is responsible to pay for the environmental damage under the Polluter Pays Principle. The Hon'ble Supreme Court *in I.A. No.20650 of 2023 in Writ Petition (Civil) No.202 of 1995 In Re: T.N Godavarman Thirumulpad versus Union of India & Ors. in Re: Gaurav Kumar Bansal in judgment dated 06.03.2024* has observed that the cost of restoring the damage should be borne by the persons responsible for the damage. The SC has held,

"155. In the case of S. Jagannath v. Union of India and others, this Court was considering the issue of pollution created by the industry which had caused harm to the villagers in the affected area, to the soil and to the underground water. This Court observed thus:

"49. (...) Consequently the polluting industries are 'absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas'. The 'Polluter Pays Principle' as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of 'Sustainable Development' and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology (...)." [emphasis supplied]

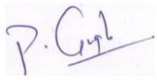
156. It could thus be seen that, worldwide as well as in our jurisprudence, the law has developed and evolved emphasizing on the restoration of the damaged ecological system. A reversal of environmental damage in conformity with the principle under Article 8(f) of the CBD is what is required. At times, the compensatory afforestation permits forestation at some other site. However, the principle of restoration of damaged ecosystem would require the States to promote the recovery of threatened species. We are of the considered view that the States would be required to take steps for the identification and effective implementation of active restoration measures that are localized to the particular ecosystem that was damaged. The focus has to be on restoration of the ecosystem as close and similar as possible to the specific one that was damaged.

158. We find that, bringing the culprits to face the proceedings is a different matter and restoration of the damage already done is a different matter. We are of the considered view that the State cannot run away from its responsibilities to restore the damage done to the forest. The

State, apart from preventing such acts in the future, should take immediate steps for restoration of the damage already done; undertake an exercise for determining the valuation of the damage done and recover it from the persons found responsible for causing such a damage."

In view of the aforesaid, it is humbly prayed that on the basis of the submissions made in the present rejoinder, directions prayed in the original application may be granted by the Hon'ble Tribunal and stringent action against the concerned official must be taken for allowing illegal construction activity inside the Geleky Reserve Forest. The Hon'ble Tribunal must direct for demolition of the illegal construction and the concerned officer shall be made personally liable to pay hefty penalty and environmental compensation for the damage done to the forest and its ecosystem.

Filed by



PARUL GUPTA
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DEFENCE COLONY,
NEW DELHI-110024
Phone:91-9891656928

New Delhi
Dated 29.07.2025

NOTARY RAVINDRA KUMAR SINGH Mumbai MAHARASHTRA Reg. No. 33920 GOVT. OF INDIA

NOTARY RAVINDRA KUMAR SINGH Mumbai, Maharashtra. Reg. No. 33920 Exp. on 20/01/2030 GOVT. OF INDIA NOTARIAL

BEFORE THE NATIONAL GREEN TRIBUNAL
EASTERN ZONE BENCH
ORIGINAL APPLICATION NO. 105 OF 2024

IN THE MATTER OF:

Rohit Choudhury.... .... Applicant

Versus

State of Assam & Ors ....Respondents

AFFIDAVIT

I, Rohit Choudhury, S/o Shri Debi Prasad Agarwal, aged about 44 years, R/o Village Gormur, P.O. Lokhujan, Bokakhat-785612, District Golaghat, Assam, presently at Mumbai, do hereby solemnly affirm and state as under:-

1. That I am the Applicant in the abovementioned Original Application and am well conversant with the facts and circumstances of the case, hence, I am competent to swear this affidavit.

2. That I have read and understood the contents of the accompanying affidavit and I say that the same are true to the best of my knowledge and belief. No part of it is false and nothing material is concealed.

NOTED IN NOTARIAL Register Sr. No. 1565 Date 23/07/2025

RohitChoudhury
DEPONENT

VERIFICATION:-

I do verify that the contents of my above said affidavit are true and correct to my knowledge and no part of it is false and nothing material is concealed therefrom.

Verified at Mumbai on this .....day of .....2025.

BEFORE ME
23 JUL 2025
23/7/25
RAVINDRA KUMAR SINGH
ADVOCATE & NOTARY
GOVT. OF INDIA
Room No. 3, Yadav Estate Vishal Dairy
Near Gaon Devi Mandir, Dhaniv Baug
Nallasopara East, Taluka Vasai
Palghar, Maharashtra

RohitChoudhury
DEPONENT

NOTARY RAVINDRA KUMAR SINGH Mumbai, Maharashtra. Reg. No. 33920 Exp. on 20/01/2030 GOVT. OF INDIA

Annexure A-1

सत्यमेव जयते

भारत सरकार
Government of India
पर्यावरण, वन एवं जलवायु परिवर्तन मंत्रालय
Ministry of Environment, Forest & Climate Change
क्षेत्रीय कार्यालय, शिलांग/Regional Office, Shillong
उप कार्यालय, गुवाहाटी/Sub - office, Guwahati
चौथी मंजिल, हौसेफेड इमारत, जी एस रोड , रुक्मणी गाँव, गुवाहाटी- ७८१०२२
4th Floor, Housefed building, GS Road, Rukmini gaon, Guwahati -781022
दूरभाष /Tel Fax: 0361-2330984, E-mail: iro.guwahati-mefcc@gov.in

File no. IRO/GHY/RTI/FC/2021/172-173 **Date:** 20.06.2025

To,

Shri. Rohit Choudhury
C/o Shri D. P. Agarwal,
Village: Gormur, P.O: Lokhujan, Bokakhat,
District: Golaghat, Assam
Pin: 785612
Email: rohitskaziranga@gmail.com

Sub: Information seeking under RTI Act of 2005 – reg.

Ref: (i) Your online RTI application dated 05.06.2025
(ii) Letter F. No. IRO-SHI/F/RTI/2023/652-53 dated 11.06.2025 of Regional Office, Shillong

Sir,

With reference to your online RTI application under reference (i), please find enclosed herewith letter F. No. 3 AS C/255/2024/Ghy/110-12 dated 29.05.2025 and F. No. 3 AS C/251/2024/Ghy/107-09 dated 29.05.2025 (coy enclosed) of Regional Office, Shillong in respect to the information as desired in your RTI application mentioned above.

Yours sincerely,

20/06/25

Shri Thoudam James Singh,
Research Officer/CPIO

Encl: as stated above.

Copy to: -

The Central Public Information Officer, Regional Office, Ministry of Environment, Forest and Climate Change, Lumbatngen, Shillong-793021 in reference to letter no. IRO-SHI/F/RTI/2023/652-53 dated 11.06.2025 for kind information please.

20/06/25

Research Officer/CPIO

भारत सरकार
Government of India
पर्यावरण, वन एवं जलवायु परिवर्तन मंत्रालय
Ministry of Environment, Forest & Climate Change
क्षेत्रीय कार्यालय, शिलांग/Regional Office, Shillong
उपकार्यालय,गुवाहाटी/Sub - Office, Guwahati
चौथी मंजिल, हौसेफेड इमारत, जी एस रोड , रुक्मणी गाँव, गुवाहाटी- ७८१०२२
4th Floor, Housefed building, GS Road, Rukmini gaon, Guwahati -781022
दूरभाष /Tel Fax: 0361-2962350, E-mail: iro.guwahati-mefcc@gov.in

F.No-3ASC/255/2024/Ghy/110-12 Dated 29/05/2025

To,

The PCCF & HoFF
Government of Assam
Aranya Bhawan, Panjabari
Guwahati -781037

Sub: Proposal for seeking prior approval of the Central Government under Section 2 (1) (ii) of the Van (Sanrakshan Evam Samvardhan) Adhiniyam, 1980 for 28 ha of forest land for the purpose of the establishment of Commando Battalion Camp in Assam -Nagaland inter State Border area of Geleky Reserved Forest under Sivasagar Forest Division - regarding.

Ref: (i)Letter No SCS/MKY/PF/NGT/2024 dated 13.03.2025 and even letter No. /10 dated 14.10.2024, No. /1 dated 16.11.2024, and No. /1 dated 13.01.2024 of Govt of Assam.
(ii) Letter No 3/255/2024/GHY/430 dated 18.09.2024, No. /500 dated 17.10.2024, No. /580 dated 22.11.2024, No. /817-18 dated 31.01.2025 and /838-40 dated 13.02.2025 of Sub Office Guwahati, RO Shillong.

Sir,

With reference to the subject and letter cited above, I am directed to inform that the information furnished by the State Govt letter No SCS/MKY/PF/NGT/2024 dated 13.03.2025 in reply to the Show Cause notice under Section 3A and 3B of the Van (Sanrakshan Evam Samvardhan) Adhiniyam, 1980 read with Rule 15(3) of the Van (Sanrakshan Evam Samvardhar) Rules, 2023 issued vide this office letter dated 18.09.2024 has been examined in this office.

It is pertinent to refer the Consolidated Guidelines and Clarifications issued under Van (Sanrakshan Evam Samvardhan) Adhiniyam, 1980 and the rules framed thereunder, which is quoted herein below:

"1.2 General Clarifications:

(viii) No work/activity can be taken up in the forest land before issue of order for its diversion for the non-forest purpose unless and to the extent permitted in the Van (Sanrakshan Evam Samvardhan) Rules, 2023 or guidelines issued there under.

11.8 Infrastructure ancillary to Forest Management:

According to the explanation in the Act, any work relating or ancillary to conservation, development and management of forests and wildlife, namely, the establishment of check- posts, fire lines, wireless communications and construction of fencing, bridges and culverts, dams, waterholes, trench marks, boundary marks, pipelines or other like purposes, is not a non-forest use and therefore, taking up such work in the forest land

does not require diversion under the Van (Sanrakshan Evam Samvardhan) Adhiniyam. As such all State Governments should ensure that the basic spirit and essence or the Van (Sanrakshan Evam Samvardhan) Adhiniyam, 1980 is not to divert forest land for construction of residential buildings, Bungalows, quarters etc. Bare minimum (operational) buildings, which are essential for management of forest by forest personnel and conservation of bio-wealth such as forest guard hut, check posts, range offices, small inspection bungalow (2-3 room), un-tarred single lane roads etc., can be taken up in selected areas without causing damage/destruction to the forests thereon. But if the structures are large and would impact on conservation, prior permission under the Van (Sanrakshan Evam Samvardhan) Adhiniyam, 1980 would be required."

The construction was going on in full swing and construction of large scale and of permanent nature with no resemblance to the activities specified in explanation (b) of Section 2 of the Van (Sanrakshan Evam Samvardhan) Adhiniyam, 1980, as seen during the site inspection conducted on 16.08.2024 & 17.08.2024 by Regional Office, Shillong. The Advisory Committee (AC) (constituted under the provisions of FCA 1980), while deliberating on the proposal of the State Government in its meeting held on 27-08-2024 has accepted the contention of the State Government on the need for placing an armed police inside the Reserve Forest to ensure its protection. However, the Advisory Committee also stated that, the prior approval of the Central Government is necessary.

Moreover, site inspection conducted by the Committee constituted as per order of Hon'ble National Green Tribunal in OA No. 105/2024/EZ also found that the area concerning is undulating and about 80% of the construction work for most of the proposed buildings has been completed. It was observed from the site inspection conducted on 16.08.2024 & 17.08.2024 by Regional Office, Shillong, MoEF&CC that the construction is in large scale

Although the plea of conservation and protection of forest has been cited by Shri. M.K. Yadava, the then PCCF & HoFF, Govt of Assam in his reply dated 13.03.2025, the stand taken or the justification given in the reply is not legally tenable.

Shri. M.K. Yadava, the then PCCF & HoFF, Govt of Assam had no authority to grant permission for clearing the forest land for non forest activity without the prior permission of Central Govt as per Rule 11.8, Van (Sanrakshan Evam Samvardhan) Adhiniyam and Rules, Guidelines and Notifications.

Therefore, the activities amounts to gross violation of the Van (Sanrakshan Evam Samvardhan) Adhiniyam and the Rules, Guidelines and Notifications framed thereunder and it is also against the legal principles framed by the Hon'ble Courts and Tribunals. The submissions provided to the Show Cause notice has been found to be not satisfactory and the Special Chief Secretary, (Forest), Forest and Environment Department, Government of Assam has failed to prove not guilty of the aforesaid offence and therefore, failed to prove, not liable to be proceeded against and to be punished as per provisions contained in Section 3-A and 3-B read with Rule 15(3) of the Van (Sanrakshan Evam Samvardhan) Adhiniyam, 1980 and Van Sanrakshan Rules 2023.

In reference to Rule 15(2) of ***Van (Sanrakshan Evam Samvardhan) Rules, 2023*** which is reproduced under:

"15. Proceedings against persons guilty of offences under the Adhiniyam.-
(2) The Central Government, after receiving the information with respect to offence committed or violations made either through State Government or Union territory Administration or authorities or any other source or suo moto, shall, after examination, communicate the same to the State Government or Union territory and the authorities

concerned under whose jurisdiction the offence under the Adhiniyam has been committed or any provision of the said Adhiniyam has been violated, for filing the complaint against the offenders before the court having jurisdiction and it shall act as a prerequisite for the authorised officer before such complaints are filed within a period of forty five days from the receipt of such communication. The State Government and authorities concerned shall submit a periodic report to Regional Office, from time to time, regarding filing of the complaints."

And in view of the above and Ministry's direction to Regional Office, Shillong, MoEF&CC, Government of India vide letter No.FC-7/14/2024-FC dated 28-08-2024, Online Proposal No. FP/AS/OTHERS/478981/2024 Stage-I dated 21-01-2025 and Online Proposal No. FP/AS/OTHERS/478981/2024 Stage-II dated 20-02-2025, the DFO concerned, Government of Assam is hereby authorized to take legal action against the offender and furnish an action taken report to this office in compliance of Rule 15(2) of *Van (Sanrakshan Evam Samvardhan) Rules,* 2023 dated 29.11.2023 within a period of 45 days.

Furthermore, considering the aforesaid facts and circumstances and the seriousness of the issues involved and also the connected litigations being taken up by the Hon'ble National Green Tribunal, the State Government is requested to periodically submit the action taken report every month to the Regional Office, Shillong, MoEF&CC, Government of India under Rule 15(2) of *Van (Sanrakshan Evam Samvardhan) Rules,* 2023 dated 29.11.2023

Yours faithfully,

(Pee Lee Ete)
Deputy Inspector General of Forests (Central)

Copy to:

1) The ADG (FC), MoEF&CC, Government of India, Indira Paryavaran Bhawan, Jor Bagh Road, Aliganj, New Delhi -110003
2) The Nodal Officer (FCA), Forest and Environment Department, Government of Assam, Panjabari, Guwahati.

29/05/2025

Deputy Inspector General of Forests (Central)

Annexure A-2

2025 INSC 718

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) NO.1394 OF 2023

VANASHAKTI **...PETITIONER**

Vs.

UNION OF INDIA **...RESPONDENT**

WITH
WRIT PETITION (C) NO.118 OF 2019
WRIT PETITION (C) NO.115 OF 2024
AND
CIVIL APPEAL NO.381-382 OF 2025

J U D G M E N T

ABHAY S. OKA, J.

1. Part IV-A of the Constitution of India containing fundamental duties as set out in Article 51A was incorporated in the Constitution by the 42nd Amendment Act with effect from 3rd January 1977. Clause (g) of Article 51A provides that it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures. This Court in several decisions has held that the right to live in a

pollution free atmosphere is a part of the fundamental right guaranteed under Article 21 of the Constitution of India.

2. The world changed rapidly after World War II. From the late 1960s and early 1970s, slowly there was a realisation about the drastic consequences of the destruction of environment and pollution of various kinds. In June 1972, at Stockholm, the United Nations Conference on Human Environment was held. In the said conference, several decisions were taken by the world community to protect the environment.

3. In our country, it took fourteen years thereafter for the legislature to come out with a law for protection and improvement of the environment. The Environment (Protection) Act, 1986 (for short, 'the 1986 Act') was brought into force with effect from 19th November 1986. As can be noticed from several orders of this Court and the High Courts, the progress of implementation of the 1986 Act has been very slow.

4. The 1970s and 1980s saw growth of industrialisation in our country. The activities such as mining, gas exploration, thermal power plants, petroleum refining industries, various other industries, building and construction projects, such as, highways started growing.

5. Again, it took twenty years after the 1986 Act came into force to exercise the power under sub-section (1) and clause (v) of sub-section (2) of Section 3 of the 1986 Act read with clause (d) of sub-rule (3) of Rule 5 of the Environment (Protection) Rules, 1986 (for short, '1986 Rules') for coming out with the Environment Impact Assessment Notification, 2006 (for short, 'the EIA notification'). The EIA notification was issued on 14th September 2006. It provided that the projects or activities mentioned in clause (2) thereof shall require prior Environmental Clearance (for short, 'the EC') from the concerned regulatory authority. The concerned regulatory authority in the Central Government is the Ministry of Environment Forests and Climate Change (for short, 'the MoEFCC') for matters falling under Category 'A' in the Schedule, and at the State level, the State Environment Impact Assessment Authority (for short, 'the SEIAA') for the matters falling in Category 'B'. In the Schedule, Categories 'A' and 'B' were incorporated setting out industries and other development work. The entire controversy in this group of petitions is about ex post facto grant of EC.

6. On 14th March 2017, a notification was issued by the MoEFCC. The said notification is hereafter referred to as 'the 2017 notification'. The said notification was made applicable to the projects or activities that have

started the work on site, expanded the production beyond the limit of the EC, or changed the production mix without obtaining EC. The 2017 notification provided that in case of such works, ex post facto EC can be granted. It provided that the projects or activities which are in violation of the EIA notification as on 14th March 2017 were eligible to apply under the 2017 notification for ex post facto EC within a period of six months from 14th March 2017.

7. The National Green Tribunal (for short, 'the NGT') vide order dated 24th May 2021 directed the MoEFCC to prepare a Standard Operating Procedure (for short, 'the SOP') for grant of EC in the cases of violation so as to address the gap in the binding law and practice being currently followed. In purported compliance with the said direction, Office Memorandum dated 7th July 2021 (for short, 'the 2021 OM') was issued.

8. In the meanwhile, the 2017 notification was challenged by way of a writ petition before the High Court of Madras in the case of Puducherry Environment Protection Association v. Union of India[1], which was decided by order dated 13th October 2017. During the course of hearing of the case before the Madras High Court, when it was pointed out that the outer limit for making applications for grant of ex post facto EC have

1 **2017 SCC OnLine Mad 7056**

been repeatedly extended, the Union of India gave a categorical undertaking that the 2017 notification was only a one-time measure. By recording the said submission made on behalf of the Union of India that the 2017 notification was certainly and clearly only a one time measure, the High Court disposed of the petition. Later on, by order dated 14th March 2018 passed by the High Court of Madras in another case, the time period under the 2017 notification for submission of proposals by project proponents was extended by a further period of thirty days.

9. In Writ Petition (C) No.1394 of 2023, the first prayer is for quashing the 2021 OM on the ground that it was arbitrary, illegal and ultra vires the provisions of the 1986 Act. The second prayer is for issuing a writ of mandamus directing the MoEFCC and SEIAA/SEACs not to process and entertain any application for ex-post facto EC after 13th May 2018. As stated earlier, the time granted under the 2017 notification to apply was lastly extended till 13th April 2018.

10. In Writ Petition (C) No.118 of 2019, the challenge is to the 2017 notification issued by the MoEFCC. A prayer was made seeking directions to the respondents to produce a list of real estate projects and project proponents who have undertaken real estate development

projects without obtaining EC under the 2006 notification.

11. In Writ Petition (C) No.115 of 2024, the challenge is to the 2017 notification and the 2021 OM. A prayer for writ of prohibition is made for restraining the MoEFCC from issuing any notification or office memorandum permitting ex-post facto EC.

12. The High Court of Madras by judgment and order dated 30th August 2024 quashed the 2021 OM and another OM dated 19th February 2021. The challenge in Civil Appeal No.381-382 of 2025 is to this decision of the High Court of Madras. In the judgment and order dated 30th August 2024, the Madras High Court declared that its order will operate only prospectively and applications under consideration will remain unaffected. The challenge in this appeal is only to the extent of giving prospective effect to the impugned judgment.

THE EIA NOTIFICATION

13. Firstly, we come to the EIA notification. It has been issued in exercise of powers under sub-Section (1) and clause (v) of sub-Section (2) of Section 3 of the 1986 Act read with clause (d) of sub-Rule (3) of Rule 5 of the 1986 Rules. Section 3 of the 1986 Act reads thus:

> "3. Power of Central Government to take measures to protect and improve environment.—(1) Subject to the provisions

of this Act, **the Central Government shall have the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution.**

(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), such measures may include measures with respect to all or any of the following matters, namely:—

(*i*) co-ordination of actions by the State Governments, officers and other authorities —

(*a*) under this Act, or the rules made thereunder; or

(*b*) under any other law for the time being in force which is relatable to the objects of this Act;

(*ii*) planning and execution of a nation-wide programme for the prevention, control and abatement of environmental pollution;

(*iii*) laying down standards for the quality of environment in its various aspects;

(*iv*) laying down standards for emission or discharge of environmental pollutants from various sources whatsoever:

Provided that different standards for emission or discharge may be laid down under this clause from different sources having regard to the quality or composition of the emission or discharge of

environmental pollutants from such sources;

(*v*) **restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards;**

(*vi*) laying down procedures and safeguards for the prevention of accidents which may cause environmental pollution and remedial measures for such accidents;

(*vii*) laying down procedures and safeguards for the handling of hazardous substances;

(*viii*) examination of such manufacturing processes, materials and substances as are likely to cause environmental pollution;

(*ix*) carrying out and sponsoring investigations and research relating to problems of environmental pollution;

(*x*) inspection of any premises, plant, equipment, machinery, manufacturing or other processes, materials or substances and giving, by order, of such directions to such authorities, officers or persons as it may consider necessary to take steps for the prevention, control and abatement of environmental pollution;

(*xi*) establishment or recognition of environmental laboratories and institutes to carry out the functions entrusted to such environmental laboratories and institutes under this Act;

(*xii*) collection and dissemination of information in respect of matters relating to environmental pollution;

(*xiii*) preparation of manuals, codes or guides relating to the prevention control and abatement of environmental pollution;

(*xiv*) such other matters as the Central Government deems necessary or expedient for the purpose of securing the effective implementation of the provisions of this Act.

(3) The Central Government may, if it considers it necessary or expedient so to do for the purposes of this Act, by order, published in the Official Gazette, constitute an authority or authorities by such name or names as may be specified in the order for the purpose of exercising and performing such of the powers and functions (including the power to issue directions under Section 5) of the Central Government under this Act and for taking measures with respect to such of the matters referred to in sub-section (2) as may be mentioned in the order and subject to the supervision and control of the Central Government and the provisions of such order, such authority or authorities may exercise the powers or perform the functions or take the measures so mentioned in the order as if such authority or authorities had been empowered by this Act to exercise those powers or perform those functions or take such measures."

(emphasis added)

13.1 Sub-section (1) of Section 3 sums up the very object of the 1986 Act. Therefore, the EIA notification has been issued not only for the purposes of protecting and improving the quality of the environment but also for preventing and abating environmental pollution. Sub-section (1) of Section 3 confers general power of taking measures on the Central Government. Sub-section (2) confers specific power for taking measures in the matters set out in clauses (i) to (ix) thereof. Clause (v) of sub-section (2) of Section 3 empowers the Central Government to take measures for putting restrictions of areas in which any industries, operations or processes shall not be carried out or shall be carried out subject to safeguards.

14. Rule 5 of the 1986 Rules reads thus:

> "**5. Prohibition and restriction on the location of industries and the carrying on of processes and operations in different areas**.—(1) The Central Government may take into consideration the following factors while prohibiting or restricting the location of industries and carrying on of processes and operations in different areas:
>
> (*i*) Standards for quality of environment in its various aspects laid down for an area.
>
> (*ii*) The maximum allowable limits of concentration of various environmental pollutants (including noise) for an area.

(*iii*) The likely emission or discharge of environmental pollutants from an industry, process or operation proposed to be prohibited or restricted.

(*iv*) The topographic and climatic features of an area.

(*v*) The biological diversity of the area which, in the opinion of the Central Government needs to be preserved.

(*vi*) Environmentally compatible land use.

(*vii*) Net adverse environmental impact likely to be caused by an industry, process or operation proposed to be prohibited or restricted.

(*viii*) Proximity to a protected area under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 or a sanctuary, National Park, game reserve or closed area notified as such under the Wild Life (Protection) Act, 1972 or places protected under any treaty, agreement or convention with any other country or countries or in pursuance of any decision made in any international conference, association or other body.

(*ix*) Proximity to human settlements.

(*x*) Any other factor as may be considered by the Central Government to be relevant to the protection of the environment in an area.

(2) While prohibiting or restricting the location of industries and carrying on of processes and operations in an area, the

Central Government shall follow the procedure hereinafter laid down.

(3) (*a*) Whenever it appears to the Central Government that it is expedient to impose prohibition or restrictions on the location of an industry or the carrying on of processes and operations in an area, it may, by notification in the Official Gazette and in such other manner as the Central Government may deem necessary from time to time, give notice of its intention to do so.

(*b*) Every notification under clause (*a*) shall give a brief description of the area, the industries, operations, processes in that area about which such notification pertains and also specify the reasons for the imposition of prohibition or restrictions on the location of the industries and carrying on of processes or operations in that area.

(*c*) Any person interested in filing an objection against the imposition of prohibition or restrictions on carrying on of processes or operations as notified under clause (*a*) may do so in writing to the Central Government within sixty days from the date of publication in the notification in the Official Gazette.

(*d*) The Central Government shall within a period of one hundred and twenty days from the date of publication of the notification in the Official Gazette consider all the objections received against such notification and may [within [seven hundred and twenty-five days [,and in respect of the States of Assam, Meghalaya, Arunachal

Pradesh, Mizoram, Manipur, Nagaland, Tripura, Sikkim and Jammu and Kashmir in exceptional circumstance and for sufficient reasons within a further period of one hundred and eighty days,]] from such date of publication] impose prohibition or restrictions on location of such industries and the carrying on of any process or operation in an area:

[Provided that on account of COVID-19 pandemic, for the purpose of this clause, the period of validity of the notification expiring in the financial year 2020-2021 and 2021-2022 shall be extended up to [30th June, 2022] or six months from the end of the month when the relevant notification would have expired without any extension, whichever is later.]

[(4) Notwithstanding anything contained in sub-rule (3), whenever it appears to the Central Government that it is in public interest to do so, it may dispense with the requirement of notice under clause (*a*) of sub-rule (3).]"

14.1 For issuing the EIA notification, power has been exercised under clause (d) of sub-rule (3) of Rule 5 which empowers the Central Government to impose prohibition or restrictions on location of such industries and the carrying on any process or operation in an area. There is a power to impose complete prohibition on carrying on any process or operation in an area. Clause (2) of the EIA notification reads thus:

> **"2. Requirements of prior Environmental Clearance (EC):-** The following projects or activities shall require prior environmental clearance from the concerned regulatory authority, which shall hereinafter referred to be as the Central Government in the Ministry of Environment and Forests for matters falling under Category 'A' in the Schedule and at State level the State Environment Impact Assessment Authority (SEIAA) for matters falling under Category 'B' in the said Schedule and at District level, the District Environment Impact Assessment Authority (DEIAA) for matters falling under Category 'B2' for mining minerals in the said Schedule, before any construction work, or preparation of land by the project management except for securing the land, is started on the project or activity:
>
> (i) All new projects or activities listed in the Schedule to this notification;
>
> (ii) Expansion, modernization or any change in the product mix or raw material mix in existing projects or activities listed in the Schedule to this notification with addition of capacity beyond the limits specified for the concerned sector in the said Schedule, subject to conditions and procedure provided in the sub-paragraph (ii) of paragraph 7."

14.2 Therefore, without prior EC, construction of new projects or activities, expansion or modernisation of existing projects or activities listed in the Schedule entailing capacity addition with change in process or

technology, cannot be undertaken. Entire procedure for grant of prior EC is laid down in the EIA notification.

LEGALITY OF THE 2017 NOTIFICATION

15. The 2017 notification refers to the OMs dated 12th December 2012 and 27th June 2013 by which a process was sought to be established for grant of EC in the cases of violation of the EIA notification. It also refers to the judgment of the High Court of Jharkhand holding these two OMs as illegal. The same OMs were also quashed by the NGT as mentioned in the said notification. There are three recitals in the said notification which are relevant. Recital Nos.9 to 11 read thus:

> "**9.** And whereas, the Ministry of Environment, Forest and Climate Change and State Environment Impact Assessment Authorities have been receiving certain proposals under the Environment Impact Assessment Notification, 2006 for grant of Terms of References and Environmental Clearance for projects which have started the work on site, expanded the production beyond the limit of environmental clearance or changed the product mix without obtaining prior environmental clearance;
>
> **10. Whereas, the Ministry of Environment, Forest and Climate Change deems it necessary for the purpose of protecting and improving**

the quality of the environment and abating environmental pollution that all entities not complying with environmental regulation under Environment Impact Assessment Notification, 2006 be brought under compliance with in the environmental laws in expedient manner;

11. And whereas, the Ministry of Environment, Forest and Climate Change deems it necessary to bring such projects and activities in compliance with the environmental laws at the earliest point of time, rather than leaving them unregulated and unchecked, which will be more damaging to the environment and in furtherance of this objective, the Government of India deems it essential to establish a process for appraisal of such cases of violation for prescribing adequate environmental safeguards to entities and the process should be such that it deters violation of provisions of Environment Impact Assessment Notification, 2006 and the pecuniary benefit of violation and damage to environment is adequately compensated for;"

15.1 Thus, what was sought to be done was to protect the project proponents who committed gross illegality by commencing construction or commencing operation or process without obtaining prior EC as provided in the

EIA notification. The 2017 notification was a one-time measure. Moreover, this Court in the case of ***Common Cause v Union of India & Ors.***[2], held in no uncertain terms that the concept of *ex post facto* or retrospective EC is completely alien to environmental jurisprudence including the EIA notification. The decision in the case of ***Common Cause***[2] was delivered on 2nd August 2017. Notwithstanding the clear declaration of law which was made on 2nd August 2017, the Central Government did not withdraw the 2017 notification.

16. We may note here that this is not the first time that the concept of prior EC was brought into force. For this purpose, useful reference can be made to a decision of this Court in the case of ***Alembic Pharmaceuticals v. Rohit Prajapati***[3]. It records that there was a notification of 27th January 1994 mandating prior EC for setting up and expansion of industrial projects falling within thirty categories. The issue before this Court was about the legality and validity of the circular dated 14th May 2002, which permitted obtaining of *ex post facto* EC. This Court specifically dealt with the challenge to the circular dated 14th May 2002. In paragraph 12, this Court noted the issue to be decided:

> "**12.** The issue to be adjudicated is whether in view of the requirement of a prior EC

2 2017 (9) SCC 499
3 2020 (17) SCC 157

> under the EIA Notification of 1994, a provision for an ex post facto EC to industrial units could be validly made by means of the Circular dated 14-5-2002."

16.1 Thereafter, this Court considered Section 3(1) of the 1986 Act. In paragraph 21 this Court held thus:

> **"21.** The omission in the appeal to make any attempt to sustain the Circular dated 14-5-2002 with reference to the provisions of Section 3 of the Environment (Protection) Act, 1986 is significant. For an action of the Central Government to be treated as a measure referable to Section 3 it must satisfy the statutory requirement of being necessary or expedient "for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environment pollution". The Circular dated 14-5-2002 in fact does quite the contrary. It purported to allow an extension of time for industrial units to comply with the requirement of an EC. The EIA Notification dated 27-1-1994 mandated that an EC has to be obtained before embarking on a new project or expanding or modernising an existing one. The EIA Notification of 1994 has been issued under the provisions of the Environment (Protection) Act, 1986 and the Environment Protection Rules, 1986, with the object of imposing restrictions and prohibitions on setting up of new projects or expansion or modernisation of existing project. The measures are based on the precautionary principle and aim to protect the interests of

the environment. The Circular dated 14-5-2002 allowed defaulting industrial units which had commenced activities without an EC to cure the default by an ex post facto clearance. Being an administrative decision, it is beyond the scope of Section 3 and cannot be said to be a measure for the purpose of protecting and improving the quality of the environment. The circular notes that there were defaulting units which had failed to comply with the requirement of obtaining an EC as mandated. The circular provided for an extension of time and inexplicably introduced the notion of an ex post facto clearance. In effect, it impacted the obligation of the industrial units to be in compliance with the law. **The concept of ex post facto clearance is fundamentally at odds with the EIA Notification dated 27-1-1994. The EIA Notification of 1994 contained a stipulation that any expansion or modernisation of an activity or setting up of a new project listed in Schedule I "shall not be undertaken in any part of India unless it has been accorded environmental clearance". The language of the notification is as clear as it can be to indicate that the requirement is of a prior EC. A mandatory provision requires complete compliance. The words "shall not be undertaken" read in conjunction with the expression "unless" can only have one meaning : before undertaking a new project or expanding or modernising an existing one, an EC must be obtained.** When the EIA Notification of 1994 mandates a prior EC, it

proscribes a post activity approval or an ex post facto permission. What is sought to be achieved by the administrative Circular dated 14-5-2002 is contrary to the statutory Notification dated 27-1-1994. The Circular dated 14-5-2002 does not stipulate how the detrimental effects on the environment would be taken care of if the project proponent is granted an ex post facto EC. The EIA Notification of 1994 mandates a prior environmental clearance. The circular substantially amends or alters the application of the EIA Notification of 1994. The mandate of not commencing a new project or expanding or modernising an existing one unless an environmental clearance has been obtained stands diluted and is rendered ineffective by the issuance of the administrative Circular dated 14-5-2002. This discussion leads us to the conclusion that the administrative circular is not a measure protected by Section 3. Hence there was no jurisdictional bar on NGT to enquire into its legitimacy or vires. Moreover, the administrative circular is contrary to the EIA Notification 1994 which has a statutory character. The circular is unsustainable in law."

(emphasis added)

16.2 Ultimately, in paragraph 23, this Court held thus:

The concept of an ex post facto EC is in derogation of the fundamental principles of environmental jurisprudence and is an anathema to the EIA Notification dated 27-1-1994. It is, as the judgment

in *Common Cause* [*Common Cause* v. *Union of India*, (2017) 9 SCC 499] holds, detrimental to the environment and could lead to irreparable degradation. The reason why a retrospective EC or an ex post facto clearance is alien to environmental jurisprudence is that before the issuance of an EC, the statutory notification warrants a careful application of mind, besides a study into the likely consequences of a proposed activity on the environment. An EC can be issued only after various stages of the decision-making process have been completed. Requirements such as conducting a public hearing, screening, scoping and appraisal are components of the decision-making process which ensure that the likely impacts of the industrial activity or the expansion of an existing industrial activity are considered in the decision-making calculus. Allowing for an ex post facto clearance would essentially condone the operation of industrial activities without the grant of an EC. In the absence of an EC, there would be no conditions that would safeguard the environment. Moreover, if the EC was to be ultimately refused, irreparable harm would have been caused to the environment. In either view of the matter, environment law cannot countenance the notion of an ex post facto clearance. This would be contrary to both the precautionary principle as well as the need for sustainable development."

(emphasis added)

16.3 In fact, as noted in paragraph 22.1, the word 'prior' was not used in the EIA notification dated 27th January 1994. However, the words 'shall not be undertaken' were used. In the 2006 EIA notification, the word 'prior' appears at multiple places.

17. The issue of *ex post facto* EC was dealt with in the case of ***Common Cause***[2], In paragraph 108, a submission was recorded that the possibility of getting *ex post facto* EC was a signal to the mining leaseholders that obtaining an EC was not mandatory or that if it was not obtained, the default was retrospectively condonable. In paragraph 125, this Court held thus:

> "**125.** We are not in agreement with the learned counsel for the mining leaseholders. **There is no doubt that the grant of an EC cannot be taken as a mechanical exercise. It can only be granted after due diligence and reasonable care since damage to the environment can have a long-term impact. EIA 1994 is therefore very clear that if expansion or modernisation of any mining activity exceeds the existing pollution load, a prior EC is necessary and as already held by this Court in *M.C. Mehta* [*M.C. Mehta* v. *Union of India*, (2004) 12 SCC 118] even for the renewal of a mining lease where there is no expansion or modernisation of any activity, a prior EC is necessary. Such importance having been given to an EC, the grant of an ex post facto**

> **environmental clearance would be detrimental to the environment and could lead to irreparable degradation of the environment. The concept of an ex post facto or a retrospective EC is completely alien to environmental jurisprudence including EIA 1994 and EIA 2006.** We make it clear that an EC will come into force not earlier than the date of its grant."
>
> (emphasis added)

18. Therefore, there is already a concluded finding of this Court that the concept of *ex post facto* or retrospective EC is completely alien to environmental jurisprudence and the EIA notification. This view was reiterated by this Court in the case of ***Electrosteel Steels Ltd. v. Union of India and Ors.***[4],. In paragraph 72, this Court held thus:

> "**72. There can be no doubt that the need to comply with the requirement to obtain environment clearance is non-negotiable.** A project can be set up or allowed to expand subject to compliance of the requisite norms. Environmental clearance is granted on condition of the suitability of the site to set up the project from the environmental angle, and existence of necessary infrastructural facilities and equipment for compliance of environmental norms. To protect future generations, it is imperative that pollution laws be strictly enforced. Under no circumstances, can industries which pollute

4 (2023) 6 SCC 615

> be allowed to operate unchecked and degrade the environment."
>
> (emphasis added)

18.1 In this case, as well as in the case of ***Alembic Pharmaceuticals***[3], this Court exercised its jurisdiction under Article 142 of the Constitution and permitted *ex post facto* EC in particular cases considering the peculiar factual situation.

19. It is in this context that the legality and validity of the 2017 notification will have to be tested. Interestingly, in paragraph 10 of the notification, it is recorded that the MoEFCC deems it necessary for the purpose of protecting and improving the quality of environment and abating environmental pollution that all the entities not complying with the environmental regulation under EIA notification be brought under compliance within the environmental laws in an expeditious manner. The object of protecting and improving the environment and preventing and abating environmental pollution was achieved by the EIA notification. The object of the 2017 notification appears to be to protect the industries and entities which violated the EIA notification. In fact, paragraph 14 of the 2017 notification is material which reads thus:

> "**14**. The projects or activities which are in violation as on date of this notification only will be eligible to apply for environmental

> clearance under this notification and the project proponents can apply for environmental clearance under this notification only within six months from the date of this notification."

20. Moreover, the 2017 notification is completely in violation of the law laid down by this court in the case of ***Common Cause***[2] and ***Alembic Pharmaceuticals***[3]**.** From the recitals of the 2017 notification, it is apparent that it was a one-time measure to protect those who were in violation as on the date of the 2017 notification. In view of the settled law, even a 'one-time measure' or 'one-time relaxation' was illegal. The 2021 OM encourages the entities who contributed to pollution by not obtaining prior EC. Whenever EC is granted, it is always conditional. Certain conditions are imposed to abate or reduce the pollution. Such one-time measures add to air and/or water pollution. Such measures infringe the right to live in a pollution free environment guaranteed by Article 21. Thus, the 2017 notification was completely illegal.

21. The Division bench of Madras High Court by judgment dated 13th October 2017, in the case of ***Puducherry Environment Protection Association***[1] dealt with the issue regarding the legality of the 2017 notification which was subject matter of challenge in a Public Interest Litigation. A very specific submission was

made before the Madras High Court on behalf of the Central Government by the learned Additional Solicitor General, which is recorded in paragraph 4(i) of the judgment. Relevant portion of paragraph 4(i) reads thus:

> "4(i) With regard to precautionary principle, faced with the situation that ex post facto clearance and regularization dates have been repeatedly extended time and again by series of notifications, **learned Additional Solicitor General at the bar, on instructions, submits that this impugned notification shall clearly and certainly be only a one time measure. We record this submission also**.
> ....."
>
> (emphasis added)

21.1 This statement was treated as an undertaking of the Central Government, which is clear from paragraph 4(n) of the said judgment:

> "4(n) We are convinced that paragraphs 3,4 and 5 of the impugned notification alluded to supra coupled with the two undertakings made on instructions by learned Additional Solicitor General that (a) public hearing can be read into paragraph 5 of the impugned notification and **(b) this shall certainly and clearly be a one time measure, this writ petition can be closed and disposed of recording the above submissions. We do so.**"
>
> (emphasis added)

21.2 It is in view of this undertaking that the High Court did not interfere. The Central Government is bound by this undertaking. It is the duty of the Central Government to comply with the undertaking in its true letter and spirit.

22. The period provided in the 2017 notification to apply for *ex-post facto* EC ended on 13th September 2017. In the case of ***Appaswamy Real Estates Limited v. Puducherry Environment Protection Association***[5], the request of the MoEFCC for extending the time provided in the 2017 notification was accepted. As a result, the OM dated 16th March 2018 was issued which permitted the project proponents to apply under the 2017 notification within thirty days from the date of the High Court order. What is pertinent to note is that notwithstanding the grant of extension of time to apply, there was no modification made to paragraph 14 of the 2017 notification which clarified that it is applicable only to those projects and activities which were in violation on the date of the said notification. Therefore, any project or activity or process which required EC under the EIA notification commenced after 14th March 2017 was not protected by the 2017 notification.

23. Apart from the fact that the very concept of grant of *ex-post facto* EC is illegal, it is not possible to understand

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why the Central Government made efforts to protect those who committed illegality by not obtaining prior EC in terms of the EIA notification. As the EIA notification was eleven years old when the 2017 notification was issued, there was no equity in favour of those who committed such gross illegality of not obtaining prior EC. The persons who acted without prior EC were not illiterate persons. They were companies, real estate developers, public sector undertakings, mining industries, etc. They were the persons who knowingly committed illegality. We, therefore, make it clear that hereafter, the Central Government shall not come out with a new version of the 2017 notification which provides for the grant of *ex-post facto* EC in any manner.

LEGALITY AND VALIDITY OF THE 2021 OM

SUBMISSIONS

24. The learned senior counsel appearing for the Petitioner submitted that post a series of judgments of this Court in ***Alembic***[3] and ***Common Cause***[2]**,** it is not permissible to grant *ex post facto* EC. He further submits that the 2021 OM is in violation of the 1986 Act and the EIA notification. He submits that EC must be prior and cannot be granted *ex post facto*. While the 2021 OM does not expressly extend the timeline under the 2017 notification or mention *ex post facto*, the 2021 OM and its

application has effectively allowed grant of *ex post facto* EC.

25. The main submission of the learned Additional Solicitor General is that the 2021 OM does not seek to grant *ex-post facto* EC. It is only an SOP. The learned ASG invited our attention to the contents of the SOP. Her submission is that it provides for the demolition of projects not allowable or permissible for want of EC. It also provides for the closure of projects allowable/permissible, if prior EC has not been taken as per the EIA notification. She submitted that even if EC is granted, it will be effective from the date of the issue, and therefore, it is not *ex post facto*. She submitted that before such EC is granted, the project proponent will have to pay certain amounts as provided therein based on Polluter Pays Principle. Moreover, the project proponents will have to undertake activities relating to remedial plan and community accommodation plan. She also pointed out that the projects which are not allowable or permissible, shall be demolished. She also pointed out provisions regarding penalty, project proponents furnishing bank guarantee, etc. Thus, in short, her submission is that the object of the 2021 OM is to protect those projects and industries which could have been granted an EC under EIA notification before the date of commencement of activities, but proceeded to commence

activities without EC. Her submission is that this measure has been taken to ensure that the huge spending on constructions is not lost and wasted.

OUR VIEW

26. The basic submission by learned ASG is based on a premise that what is provided under the 2021 OM is not grant of *ex-post facto* EC. The relevant part of the 2021 OM is in paragraph 10 and 11, which read thus:

> **"10.Standard Operating Procedure-Guiding Principles:**
>
> i. Without prejudice to any other consequences**, action has to be initiated under section 15 read with section 19** of The Environment (Protection) Act, 1986 **against all violations**.
>
> ii. Projects not allowable/permissible, for grant of EC, as per extant regulations: **To be demolished**.
>
> iii. Projects allowable/permissible, if prior EC had been taken as per extant regulations: **To be closed until EC is granted (if no prior EC has been taken) or to revert to permitted production level (in case prior EC has been granted)**.
>
> iv. **Polluter pays**: Violators to pay for violation period proportionate to the scale of project and extent of commercial transaction.
>
> v. Setting up a mechanism for reporting of violation to the regulatory authority(ies).
>
> **11. SOP for dealing with the violation cases:**

Step 1: Closure or Revision

Sl no.	Status of EC	Actions
1	If no prior EC has been taken	Order to close its operation
2	If prior EC is available for existing/old unit	Order to revert the activity /production to permissible limits.
3	If prior EC was not required for earlier production level but is now required	Restrict the activity /production to the extent to which prior EC was not required

Step 2: Action under Environment (Projection) Act, 1986

Action under section 15 read with section 19 of the Environment (Protection) Act, 1986 shall be initiated against the violators.

Step: 3: Appraisal under EIA Notification, 2006

The permissibility of the project shall be examined from the perspective of whether such activity/project was at all eligible for the grant of prior EC.

A. If not permissible:

i. The project shall be **ordered for the demolition/closure after issuing show cause notice and providing an opportunity of hearing**.

Ex. If a red industry is functioning in a CRZ-I area which means that the activity was, in the first place, not permitted at the time of

commencement of project. Therefore, the activity is not permissible and therefore it shall be ***closed & demolished****.*

ii. Respective regulatory authorities shall issue directions under section 5 of the Environment (Protection) Act, 1986 for such closure & demolition of the project/activity.

B. If permissible:

i. As per extant regulations at the time of scoping, if it is viewed that the project activity is otherwise permissible, Terms of Reference (TOR) shall be issued with directions to complete the impact assessment studies & submit Environmental Impact Assessment (EIA) report & Environmental Management Plan (EMP) in a time bound manner.

ii. Such cases of violation shall be subject to appropriate

(a) Damage Assessment

(b) Remedial Plan and

(c) Community Augmentation Plan by the Central Level Sectoral Expert Appraisal Committees or State/Union Territory Level Expert Appraisal Committees, as the case may be.

iii. The Competent Authority shall issue directions to the project proponent, under section 5 of the Environment (Protection) Act, 1986 on case to case basis mandating payment of such amount (as may be determined based on Polluter Pays principle) and undertaking activities relating to Remedial Plan and Community Augmentation Plan (to restore environmental damage caused including its social aspects).

iv. Upon submission of the EIA & EMP report, the project shall be appraised by the Central Sectoral Expert Appraisal Committees or the State/Union Territory Level Expert Appraisal Committees, as the case may be, as if it was a new proposal. If, on examination of the EIA/EMP report, the project is considered permissible for operation as per extant regulations, the requisite Environmental Clearance shall be issued **which shall be effective from the date of issue.**

v. However, during appraisal after examination if it is found that even though the project may **be permissible but not environmentally sustainable in its present form/configuration/features** then the project shall be directed to be **modified so that the project would be environmentally sustainable.**

vi. If, however, it is not considered appropriate to issue EC, the project shall be directed to be **demolished/ closed. If such proposal is a case of expansion, the project shall be directed to revert back to the extent of activity for which EC had been granted earlier or to revert back to the extent of activity for which EC was not required (as the case may be).**

vii. Central Sectoral Expert Appraisal Committees or the State/Union Territory Level Expert Appraisal Committees, as the case may be, may insist upon public hearing to be conducted for such categories of projects for which the EIA Notification 2006, as amended from time to time, requires the public hearing to be conducted.

viii. The project proponent will be required to **submit a bank guarantee equivalent to the**

> **amount of Remediation Plan and Natural & Community Resource Augmentation Plan with Central / the State Pollution Control Board (depending on whether it is appraised at Ministry or by SEIAA).** The quantification of such liability will be recommended by Expert Appraisal Committee and finalized by Regulatory Authority. The bank guarantee shall be deposited prior to the grant of environmental clearance and **will be released after successful implementation of the Remediation Plan and Natural & Community Resource Augmentation Plan."**

27. In short, it provides for grant of EC to category of 'allowable/permissible' projects. We must remember that the 2021 OM is applicable even to the completed projects. The 2021 OM says that grant of EC to such projects shall be effective from the date of issue. If the project proponent goes ahead with construction which requires EC under the EIA notification, it will amount to violation of the provisions of 1986 Act and 1986 Rules. It will attract penalty under Section 15 of the 1986 Act. Perusal of the provisions of Section 15 shows that even if the penalty is paid by the project proponent, it will not regularise the project. Therefore, even after the payment of penalty, if the project is under construction, the same has to be stopped and demolished and even if operation has already commenced, the same has to be stopped and demolished. Therefore, the construction work has to be demolished.

28. Now, we will consider what is the meaning of "*ex post facto*". Various dictionary meanings can be summarised as under:

a) Having retrospective effect or force;

b) From a thing done afterwards;

c) Retroactive or affecting something that has already happened.

29. Now, we will take a case of *ex post facto* EC provided under the 2017 notification. The effect of grant of *ex post facto* clearance is that if without obtaining EC, construction is in progress, the same is allowed to continue. If the construction is complete and operation and processes are going on, the same can go on after *ex post facto* EC is granted. Effect of grant of EC under clause (11) of 2021 OM will be grant of permission to complete the construction of the project, though construction had commenced without prior EC. Where the construction is already complete which is being used for processes etc., by grant of EC, the process/activities can continue. Thus, in effect, the EC granted under clause (11) of 2021 OM regularises something which was illegal with retrospective effect. In effect, the EC granted under clause (11) of 2021 OM will regularise the illegality done by commencing the construction or commencing the project without prior EC. Therefore, in substance, what is provided is grant of *ex post facto* EC. In other

words what is granted is EC with retrospective effect as it regularises illegality committed earlier. The grant of EC under the 2021 OM, no doubt, is subject to making payment of compensation determined based on Polluter Pays Principle and undertaking activities relating to remedial plan. Once there is a violation of the EIA notification, the project proponent has to compensate following the Polluter Pays Principle. Even if, EC is not granted to him he has to pay for remedial plan to remedy the damage done to the environment. He has to also pay the penalty under Section 15 of the 1986 Act. Therefore, what is done by the 2021 OM is something which was completely prohibited by this Court in the cases of ***Common Cause***[2] and ***Alembic Pharmaceuticals***[3]**.** It is an attempt to bring in an *ex-post facto* or retrospective regime by craftily drafting the SOP. The grant of EC under the 2021 OM in substance and in effect amounts to *ex post facto* grant of EC. The Court must come down very heavily on the attempt of the Central Government to do something which is completely prohibited under the law. Cleverly, the words *ex post facto* have not been used, but without using those words, there is a provision to effectively grant *ex post facto* EC. The 2021 OM has been issued in violation of the decisions of this Court in the cases of ***Common Cause***[2] and ***Alembic Pharmaceuticals***[3]. Therefore, we have no manner of

doubt that the 2021 OM which permits grant of EC is completely arbitrary and illegal. Moreover, the 2021 OM does not refer to exercise of any power under the 1986 Act or the 1986 Rules.

30. There is one more aspect which is required to be noted. As per paragraph 14 of the 2017 notification, provision for grant of *ex post facto* EC was made only in relation to projects or activities which were in violation as of 14th March 2017. Therefore, grant of *ex post facto* clearance was not permitted under 2017 notification for the projects and activities which were commenced or continued after 14th March 2017. The window which was initially for a period of six months was eventually extended till completion of 30 days from 14th March 2018. Therefore, the 2021 OM is brought in to do something which was not permissible under the 2017 notification, the law laid down by this Court, and the solemn undertaking given by the Central Government to the Madras High Court. We must deprecate such effort on the part of the Central Government.

31. The EIA notification is of 14th September 2006. When the 2021 OM was issued, it was nearly 15 years old. Therefore, all project proponents were fully aware of the stringent requirements under the EIA notification. The 2021 OM seeks to protect the violations of the EIA notification which have taken place or continue to take

place 15 years after the EIA notification came into force. Thus, the 2021 OM seeks to protect violators who have acted with full knowledge of consequences of violating the EIA notification. Those who violate the law regarding obtaining prior EC are not only committing gross illegality, but they are acting against the society at large. The violation of the condition of obtaining prior EC must be dealt with heavy hands. In environmental matters, the Courts must take a very strict view of the violations of the laws relating to the environment. It is the duty of the Constitutional Courts to do so.

32. Under Article 21 of the Constitution of India, the right to live in a pollution free environment is guaranteed. In fact, the 1986 Act has been enacted to give effect to this fundamental right. In 1977, fundamental duties of all citizens were incorporated in the Constitution which enjoined every citizen of India to protect and improve the environment as provided in clause (g) of Article 51A. Therefore, even the Central Government has a duty to protect and improve the natural environment.

33. Today, in the year 2025, we have been experiencing the drastic consequences of large-scale destruction of environment on human lives in the capital city of our country and in many other cities. At least for a span of two months every year, the residents of Delhi suffocate due to air pollution. The AQI level is either dangerous or

very dangerous. They suffer in their health. The other leading cities are not far behind. The air and water pollution in the cities is ever increasing. Therefore, coming out with measures such as the 2021 OM is violative of fundamental rights of all persons guaranteed under Article 21 to live in a pollution free environment. It also infringes the right to health guaranteed under Article 21 of the Constitution.

34. The 2021 OM talks about the concept of development. Can there be development at the cost of environment? Conservation of environment and its improvement is an essential part of the concept of development. Therefore, going out of the way by issuing such OMs to protect those who have caused harm to the environment has to be deprecated by the Courts which are under a constitutional and statutory mandate to uphold the fundamental right under Article 21 and to protect the environment. In fact, the Courts should come down heavily on such attempts. As stated earlier, the 2021 OM deals with project proponents who were fully aware of the EIA notification and who have taken conscious risk to flout the EIA notification and go ahead with the construction/continuation/expansion of projects. They have shown scant respect to the law and their duty to protect the environment. Apart from violation of Article 21, such action is completely arbitrary

which is violative of Article 14 of the Constitution of India besides being violative of the 1986 Act and the EIA notification.

35. We are, however, conscious of the fact that *ex post facto* EC may have been granted in certain cases both under the 2017 notification and the 2021 OM. ECs already granted under 2017 notification and the 2021 OM, at this stage, should not be disturbed.

36. Hence, we pass the following order:

a) We hold that the 2017 notification and the 2021 OM as well as all circulars/orders/OMs/notifications issued for giving effect to these notifications are illegal and are hereby struck down;

b) We restrain the Central Government from issuing circulars/orders/OMs/notifications providing for grant of *ex post* facto EC in any form or manner or for regularising the acts done in contravention of the EIA notification;

c) We clarify that the ECs already granted till date under the 2017 notification and the 2021 OM shall, however, remain unaffected.

37. The writ petitions and civil appeals are accordingly allowed on the above terms.

.....J.
(Abhay S. Oka)

.....J.
(Ujjal Bhuyan)

New Delhi;
May 16, 2025

Gmail parul gupta <parul.lawyer@gmail.com>

Service of Rejoinder Affidavit in OA No. 105 of 2024 pending before the National Green Tribunal (EZ) Bench.

1 message

parul gupta <parul.lawyer@gmail.com> Tue, Jul 29, 2025 at 4:48 PM
To: Amrita Pandey <amritalegal@gmail.com>, mrdey@rediffmail.com

To,

1. Ms Malabika Roy Dey, Advocate for R-1,2,4 and 5
2. Ms Amrita Pandey, Advocate for R-3

Dear Madam,

Please find attached the copy of the Rejoinder Affidavit to the Counter Affidavit filed by Respondent No.2 in OA No.105 of 2024 pending before the National Green Tribunal (EZ) Bench.

This email may kindly be treated as service of the Rejoinder Affidavit.

Parul Gupta
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Rejoinder to the Counter Affidavit filed by R-2 on 20.04.2025.pdf
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