BEFORE THE NATIONAL GREEN TRIBUNAL SITTING AT SOUTHERN BENCH

Original Application No. 53 of 2020

Between:

Olympia Grande Apartment Owner's Welfare Association,
Pallavaram Registration No. 569/2016
Represented by its Secretary Mr. S. Chandrasekar,
No. 328, GST Road,
Pallavaram, Chennai – 600 043.
Email ID: ogaowa2016@gmail.com
Phone no. 9381011008 **... APPLICANT**

And

1. M/s. KSM Nirman Pvt. Ltd.
Represented by its Managing Director,
No. 1, SIDCO Industrial Estate,
Guindy, Chennai – 600 032
Email ID: sales@olympiagroup.in
Phone No. 044 – 43563773 and two others **... RESPONDENTS**

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Dated this the 19th day of March, 2022

Signature of the Authorized Representative

X

BEFORE THE NATIONAL GREEN TRIBUNAL
PRINCIPAL BENCH
NEW DELHI

.....

ORIGINAL APPLICATION NO. 677 OF 2016
(M.A. NO. 148/2017)

IN THE MATTER OF:

Society for Protection of Environment
& Biodiversity
Through the Convener
R-7/17, Raj Nagar
Ghaziabad (UP)-201001

.....Applicant

Versus

1. Union of India
   Through Secretary, Govt. of India
   Ministry of Environment, Forest and Climate Change
   Indira Paryavaran Bhavan, Jorbagh Road,
   New Delhi-110003

2. Ministry of Urban Development
   Through Secretary, Govt. of India
   Maulana Azad Road
   Rajpath Area, Central Secretariat
   New Delhi

3. Central Pollution Control Board
   Through Member Secretary
   CBD-Cum-Office Complex
   East Arjun Nagar
   New Delhi

.....Respondents

AND

ORIGINAL APPLICATION NO. 01 OF 2017
(M.A. NO. 03/2017 & M.A. NO. 445/2017)

IN THE MATTER OF:

Pushp Jain
S/o Shri Dhanpat Rai Jain
R/o I A/2C Phase-I
Ashok Vihar
New Delhi-110052

.....Applicant

Versus

1. Union of India
   Through the Secretary
   Ministry of Environment, Forest and Climate Change
   Indira Paryavaran Bhavan
   Jorbagh Road,
   New Delhi-110003

2. Ministry of Urban Development
   Through the Secretary
   Maulana Azad Road
   Nirman Bhawan
   New Delhi 110 011

.....Respondents

AND

ORIGINAL APPLICATION NO. 7 OF 2017
(M.A. NO. 879/2017)

IN THE MATTER OF:

Ajay Kumar Singh
236, Lawyers Chambers
M.C. Sitalwad Block
Supreme Court of India
New Delhi

.....Applicant

Versus

1. Ministry of Environment, Forest and Climate Change
   Govt. of India
   Through the Secretary
   Indira Paryavaran Bhavan
   Jorbagh Road,
   New Delhi-110003

2. Ministry of Urban Development
   Govt. of India
   Through the Secretary
   Nirman Bhawan
   New Delhi 110 011

3. Delhi Development Authority
   Through its Vice Chairman
   Vikas Sadan, INA
   New Delhi

4. Central Pollution Control Board
   Through Member Secretary
   Parivesh Bhawan, East Arjun Nagar
   New Delhi

5. Central Ground Water Authority
   Through its Member Secretary
   Faridabad

6. Delhi Pollution Control Committee
   Through Member Secretary
   4th Floor, ISBT Building Kashmeri Gate
   New Delhi

7. North Delhi Municipal Corporation
   New Delhi

8. South Delhi Municipal Corporation
   New Delhi

9. East Delhi Municipal Corporation
   New Delhi

10. State Level Environment Impact Assessment
    Authority, Delhi Govt. Secretariat
    Delhi

.....Respondents

AND

ORIGINAL APPLICATION NO. 55 OF 2017

IN THE MATTER OF:

Mahendra Pandey
S/o Sh. H.C. Pandey
R/o Flat No. 18, Kanishka Apartment
C&D Block, Shalimar Bagh
Delhi

.....Applicant

Versus

1. Union of India
   Through Secretary
   Ministry of Environment, Forest and Climate Change
   Paryavaran Bhavan, Jorbagh Road,
   New Delhi-110003

2. Ministry of Urban Development
   Through its Secretary
   Maulana Azad Road
   Rajpat Area, Central Secretariat
   New Delhi

3. Central Pollution Control Board
   Through its Member Secretary
   CBD cut Office Complex
   East Arjun Nagar
   New Delhi

.....Respondents

AND

ORIGINAL APPLICATION NO. 67 OF 2017
(M.A. NO. 620/2017)

IN THE MATTER OF:

R. Sreedhar
R/o A-1/39, 2nd Floor
Freedom Fighter Colony
IGNOU Road, Gate No. 1
Neb Sarhai, New Delhi

.....Applicant

Versus

Union of India
Through the Secretary
Ministry of Environment, Forest and Climate Change
Indira Paryavaran Bhavan
Jorbagh Road,
New Delhi-110003

.....Respondent

COUNSEL FOR APPLICANTS:

Mr. Raj Panjwani, Sr. Advocate
Mr. Ritwick Dutta, Mr. Rahul Choudhary, Ms. Meera Gopal and Mr. Utkarsh Jain, Advocates
Mr. I. K. Kapila & Ms. Disha Singh, Advocates
Mr. Sanjay Upadhyay, Ms. Upama Bhattacharjee and Mr. Salik Shafique, Advocates
Mr. Gaurav Kumar Bansal, Mr. Ompal Shukin and Ms. Nandit Bansal, Advocates

COUNSEL FOR RESPONDENTS:

Mr. B.V. Niren with Mr. Vinayak Gupta, Advocates
Mr. Abhimanyu Garg and Ms. Preety Makkar, Advocates for Government of Puducherry
Mr. Tarunvir Singh Khehar, Ms. Guneet Khehar and Mr. Sandeep Mishra, Advocates and Mr. Dinesh Jindal L.O. for DPCC
Mr. Bairaja Mahapatra, Advocate and Mr. Dinesh Jindal, L.O.
Mr. Rajkumar, Advocate with Mr. Bhupender, LA for Central Pollution Control Board
Mr. D. Rajeshwar Rao, Advocate
Mr. Atma Ram N.S. Naadkarni, Ld. ASG for MoEF&CC
Mr. Divya Prakash Pandey, Advocate

Mr. Utkarsh Sharma, Advocate for State of Uttar Pradesh
Mr. Ravindra Kumar, Advocate for NOIDA Authority
Mr. Krishna Kumar Singh and Mr. Anurag Kumar, Advocates
Mr. Rahul Pratap, Advocate
Ms. Puja Kalra, Advocate

JUDGMENT

PRESENT:
HON'BLE MR. JUSTICE SWATANTER KUMAR (CHAIRPERSON)
HON'BLE DR. JUSTICE JAWAD RAHIM (JUDICIAL MEMBER)
HON'BLE MR. BIKRAM SINGH SAJWAN (EXPERT MEMBER)

Reserved on: 8th November, 2017
Pronounced on: 8th December, 2017

1. Whether the judgment is allowed to be published on the net?
2. Whether the judgment is allowed to be published in the NGT Reporter?

JUSTICE SWATANTER KUMAR (CHAIRPERSON)

By this judgement, we shall dispose of all the five cases connected with Original Application No. 677 of 2016 as a common question of law and fact arises for consideration before the Tribunal in all these cases. However, it is not necessary for us to notice the facts of each case in greater detail and it would be sufficient to refer to the factual matrix of the lead application only, i.e., Original Application No. 677 of 2016, *Society for Protection of Environment & Biodiversity vs. Union of India and ors.*

2. The Applicant-Society claims that it works in the area of environmental conservation and aims at protection of the environment, ecology, natural resources, wildlife and bio-diversity existing on earth. It has filed various cases raising several environmental issues and concerns before the Courts as well as before this Tribunal. According to the Applicant, there is pathetic condition

of urban local bodies in the area under their jurisdiction more particularly in Ghaziabad. The exemption granted from Environmental Clearance for building and construction projects would be a huge retrograde step in the area of environment conservation. It would take us back to a pre- 2004 scenario, i.e., prior to issuance of EIA framework pursuant to specific orders of the Hon'ble Supreme Court. The Applicant believes that such a step will have a disastrous effect on the environment and would cause irreversible damage to the environment. The magnitude of the environmental footprint would be immense and unregulated building and construction activity would cause immense environmental damage. The Ministry of Environment, Forest & Climate Change (for short, "MoEF&CC"), Respondent No. 1 had issued a draft notification dated 29th April, 2016 with regard to amendment of the Notification of 2006 providing exemption to various construction projects all over the country. At that stage, the Applicant had filed an application bearing Original Application No. 168 of 2016 expressing its apprehension and raising serious objections to the draft Notification. The principal contention raised at that time was that the proposed Notification intends to dilute and exempt prior Environmental Clearance for buildings and construction projects through Model Building Bye Laws, 2016, as issued by the Town & Country Planning Organizing, Ministry of Urban Development and the subsequent Notification by Delhi Development Authority of the Unified Building Bye Laws for Delhi, 2016 which were notified vide Notification dated 22nd March, 2016 in pursuance to Chapter-XIV of the Model Building Bye Laws, 2016 and in concurrence with the impugned Notification of MoEF&CC. These amendments and Bye

Laws sought to defeat and do away with the substantive provisions of EIA Notification, 2006 that require prior Environmental Clearance by building and construction projects under item no. 8(a) of the Schedule to EIA Notification, 2006. Original Application No. 168 of 2016 was disposed of by the Tribunal vide its order dated 30th September, 2016 directing MoEF&CC to consider the objections filed by the Applicant prior to issuance of the final Notification. The order dated 30th September, 2016 of the Tribunal reads as under:

> "Learned Counsel appearing for the Ministry of Environment, Forests and Climate Change submits that they are in the process of amending the EIA Notification, 2006. According to her the draft Notification has already been published and objections/suggestions have been invited and after expiry of the Statutory period they would issue the final Notification after considering the objections filed.
>
> Learned Counsel appearing for the DDA on instruction from Director of Planning submits that DDA has already notified the unified building bye laws, however, the chapter on environment conditions for sanctioning building plans would not be put into practice/implemented till Ministry of Environment, Forests and Climate Change give its approval/concurrence.
>
> The Learned Counsel appearing for the applicant has raised an issue with regard to the unified bye laws being in conflict with the Notification of EIA, 2006. According to the applicant these objections should be considered.
>
> In view of the statement made by the Learned Counsel appearing for the respective parties, we are of the considered view that nothing survives in this application. The respective authorities will abide by their statements. We also direct the Ministry of Environment, Forests and Climate Change to consider the objections of the applicant before issuing final Notification so that the unified building bye laws are not in conflict with EIA Notification, 2006.
>
> In view of the above, the Original Application No.168 of 2016 stands disposed of with no order as to cost."

3. After passing of the above order, Respondent no. 1 issued the final Notification on 9th December, 2016. Though, the objections to the draft Notification was filed by the Applicant on 23rd November, 2016 but no intimation for hearing was given to the Applicant except when the Applicant was invited through Counsel for meeting with Shri Manoj Kumar Singh, Joint Secretary, MoEF&CC, Government of India on 8th December, 2016 to discuss and make presentation on behalf of the Applicant. The discussion went on for about an hour or so and the Applicant was assured that the objections would be considered objectively by the Ministry. However, the final Notification was issued on 9th December, 2016 making substantial changes even in the draft Notification dated 29th April, 2016 which were in total derogation to the environmental laws in force.

4. The Applicant, thus, in the present case prays that the Notification dated 9th December, 2016 should be quashed and set-aside, inter-alia, but primarily on the following grounds:

I. The Impugned Notification not only dilutes but also renders otiose the substantive provisions of Environmental Impact Assessment Notification, 2006 and even that of Environment (Protection) Act, 1986 (for short, "Act of 1986"). The provisions of the impugned Notification, if implemented would potentially destroy the environment and ecology due to unregulated building and construction activities and will have disastrous effect on environment and would cause irreversible damage to the environment. The magnitude of Environmental footprint would be immense. The objections filed by the Applicant and

others have not been considered objectively and appropriately by the Ministry. The impugned Notification, thus suffers, from the element of non-application of mind as well as is violative of Principle of Natural Justice.

II. The Impugned final Notification is not only at variance with the draft Notification but even introduces new provisions which are diametrically opposite, beyond the scope and purview of the Draft Notification and even had destructive essence to the draft Notification. In this regard, the following significant variance can be noticed:

(a). Draft Notification did not contain any provision with regard to grant of exemption to the construction building projects from the provisions of Air (Prevention and Control of Pollution) Act, 1981 (for short, "Air Act, 1981) and Water (Prevention and Control of Pollution) Act, 1974 (for short, "Water Act, 1974) in relation to Consent to Establish and Consent to Operate.

(b). The composition of the Environmental Cells to monitor the conditions particularly in reference to Environmental Clearance is entirely at variance to the draft Notification.

(c). Accreditation of Environmental auditors in terms of Appendix XV to the impugned Notification is also at variance from the one proposed in the Draft Notification.

III. In exercise of subordinate legislative power, a delegatee cannot affect the application of another legislation enacted by the Parliament. In other words, while amending the Notification of 2006 in exercise of subordinate legislation, the delegated authority cannot render the provisions of Water Act, 1974 and Air Act, 1981 as inapplicable and also take away the powers of the Pollution Control Boards under the said Acts, to grant/refuse consent to establish and/or operate to a project.

IV. Neither any comprehensive study was carried out nor any data collected to support the drastic changes being made by the impugned Notification and also ignored the Precautionary Principle, the fundamental cannon of environmental jurisprudence.

V. The impugned Notification has several deficiencies which are against the basic letter and spirit of the Act of 1986 and the Notification of 2006.

VI. 'Ease of doing responsible business' cannot be in fact and in law the ground for making amendment to the environmental laws, as it primarily falls beyond the scope of the object and purposes of the environmental laws in force. It is only a ploy to circumvent the provisions of the environmental assessment. The comprehensive process for evaluating the impact on environment due to various projects has been negated by the said amendment.

VII. Under the impugned Notification, local authority is responsible for development and passing the development

plan vested through the environment cell with the power to impose conditions relating to environmental protection and ensure their compliance. The local authorities which are the sanctioning authorities would also become adjudicatory authorities under the impugned Notification. This dual functioning by the same authority make them judge in their own cause in contravention with the Principle of Natural Justice, *nemo judex in sua causa*, as well as give rise to the plea of conflicting interest.

VIII. Exemption granted under the amended Notification has no nexus to the object sought to be achieved, i.e., the environmental protection.

IX. The impugned Notification is in derogation of India's international commitment and obligation under the Rio Declaration (1992), particularly Principle 15 to 17 and the Paris Agreement, 2015.

X. The impugned Notification, if given effect to, as framed would result in wiping out the effect of environmental laws in force and hence would not be in consonance with the doctrine of non-regression.

XI. In addition to above, Applicant has also contended that the impugned Notification has an impact of disturbing the federal structure as provided in the Constitution of India. The Central Government cannot exercise power, authority and control in relation to subject matter of the Notification over the local authorities. The Environmental Cell, constituted under the amended Notification, would be under control of the local

authority or the State Government, as the case may be and, therefore, it will have apparent conflict with the Central Regulating Authority.

XII. In terms of the Notification, the violations of environmental conditions would be punishable and action would be taken under local laws, thus, divesting the CPCB or the State Regulatory Authority from taking punitive action against the defaulters and, therefore, would not be in consonance with the scheme of 1986 Act. The Notification is a manifest ploy for ousting of the application of the Environmental Acts and even the jurisdiction of the Tribunal. Furthermore, power under Section 3(1) of the Act of 1986 can be exercised in harmony and consonance with other provisions of the Act. The power under Section 3 is to be exercised for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution. The measures contemplated under Section 3 can only be taken in that behalf. Thus, power cannot be exercised for purposes beyond Section 3(1) and the provisions of the Act of 1986.

XIII. It is also contended by Applicant that MoEF has not provided any appropriate answer to the questions formulated by the Tribunal in its order dated 21st December, 2016 and 28th July, 2017.

XIV. There is no power with the Central Government to transfer its responsibility to the local authorities. The impugned

Notification does not provide power of refusal or rejection of the application seeking Environmental Clearance. The impugned Notification which introduces Paragraph no. 14 to the Notification of 2006, would be in apparent conflict with Para 1 to 13 of the Notification 2006. The Environmental Cell would not be able to function independently, fairly and in a transparent manner.

XV. The impugned Notification is unsustainable as on one hand it is not based on any study and on the other it ignores the recommendations made in the various studies conducted by the Ministry itself including Dr. Kasturirangan's reports. The positive suggestions and recommendations made in these reports have been ignored. The Notification attempts to hide behind the poor for the benefit of the builders. It also lacks in providing for requisite expertise of the members constituting the environmental cell in the interest of environment. No, criteria or qualifications have been fixed for the Member of environmental cell unlike the law in existence, which certainly would have adverse impacts as there will be massive construction activity causing serious environmental degradation.

5. From the above grounds, the applicants in all these applications pray that the impugned Notification dated 9th December, 2016 should be declared as *ultra vires* and be quashed. The challenge to the Notification is on legal grounds as well as on other reasons that it will have an adverse impact on environment, ecology and natural resources. In fact, it is contended that it will also have serious

repercussion on climate change. The Notification though claims to serve social cause of providing housing for the poor but, in fact, result of its enforcement would be contrary. It would permit construction of huge buildings and apartments without strictly complying with the environmental norms.

6. It will be appropriate to commonly state the response of various respondents together to the applications filed by the applicants. The preliminary objection has been raised as to the maintainability of the applications. It is contended that the validity of the Notification dated 9th December, 2016, has been challenged which is amending the EIA Notification, 2006 in exercise of the power conferred under Section 3 of the Environment (Protection) Act, 1986 (for short, the 'act of 1986') on the ground that it is violative of Articles 21 and 14 of the Constitution of India, which is beyond the ambit of Section 14 read with Section 18 of the NGT Act and the Tribunal has no jurisdiction to examine the validity of the subordinate legislations. The object of Notification is to delegate the power to Urban Local Bodies to grant Environmental Clearance. The scope of the Environmental Clearance has been widened as, now, Environmental Clearance is required even for building size having a built-up area 5000 sq. mtr. to 20,000 sq. mtr. While under the earlier Notification the built-up area of 20,000 sq. mtr. and above was covered. Urban Local Bodies and Urban Development Authorities are involved in the building plan approval and while granting approval, the process of granting Environmental Clearance can very well be integrated and can be given online. This will hasten the grant of clearances and there would not be any adverse impact on the construction projects. The Notification attempts to

decentralize the clearance process and has also attempted to integrate the environmental conditions along with building permissions. The local authorities would be conferred with the responsibility with support from expert bodies to discharge the important function. It is proposed to have a system of Qualified Building Environment Auditors (QBEA) providing for Third Party Auditing of environmental plans and its implementation. The QBEA will undertake certification that whether the environmental conditions have been adequately planned in the building design or not, it will thoroughly check its implementation during construction and regularly monitor its performance every five years. The setting up of an Environmental Cell at the level of Local Authority has been directed after taking into consideration lack of capacity at the level of Local Authorities. The Environmental Cell will comprise of three dedicated experts in the field of Waste Management (Solid and Liquid), Water Conservation and Management, Resource Efficiency including Building Materials, Energy Efficiency and Renewal Energy, Environmental Planning including Air Quality Management, Transport Planning and Management. The environment cell will also perform various other functions. The Local Authorities will prescribe the fee for environmental appraisal along with the fee for building permissions. Relying upon the judgement of the High Court of Delhi in the case of *Delhi Pollution Control Committee vs. Splendor Landbase Ltd.* in LPA 1/2011 and C.M. No. 6781/2011, the Notification has been issued to grant exemption to the residential complexes from the operation of Air and Water Act, respectively. The High Court expressed the view that residential complexes do not require any permission to establish or

operate under the said Acts. The QBEA is to be accredited by the MoEF&CC through qualified agency which would assess and certify building projects. The project proponent shall submit performance data and certificate of continued compliance of the project for the environmental conditions and parameters applicable after completion of construction from QBEA every five years to the environment cell focusing on different issues. If, there were violations committed by the builders who failed to take prior Environment Clearance in terms of the EIA Notification, 2006 and to deal with the violation in excess, the Ministry had issued certain Office Memorandums granting one time exemption which came to be set aside by the Tribunal *vide* its judgement dated 7th July, 2015 in the case of *S.P. Muthuraman v. Union of India and Ors.* (2015) ALL(I) NGT REPORTER (2) (DELHI) 170. 400 cases were kept on hold at different stages and in order to deal with the same, the present Notification had been issued. The purpose is to bring the entities under Environmental Compliance Regime at the earliest. The Notification provides various stages to be followed for granting prior Environmental Clearance which protects the environment in all respects. The Notification dated 9th December, 2016, provides that the States adopting the environmental conditions prescribed in appendix XIV of the Notification and incorporating it in the building bye laws and relevant state laws and incorporating the said conditions in the approvals given for building construction and making it legally enforceable, shall not require a separate Environmental Clearance from the MoEF&CC. The proposed changes by the State Government in its bylaws are to be examined by MoEF&CC and only after the concurrence of MoEF&CC to the changes

made by the State Government, that the requirement of separate environmental Clearance by the Central government for buildings to be constructed in the State or Local Authority areas, is dispensed with. Appendix XVI provides setting up of Environmental Cell in terms thereof the cell shall be responsible for assessing and appraising the environmental concerns for the area under its jurisdiction where building activities are proposed. The environmental cell can evolve and propose additional environmental conditions as per requirement. The procedure for seeking building permission incorporating environmental conditions has been made more stringent in comparison to the earlier provisions. The burden lies on the project proponent for furnishing requisite information and the Local Authorities are expected to take greater caution and care in assessing them. The comparative analysis of the Notification dated 14th September, 2006 and 9th December, 2016 shows that the later is more comprehensive in terms of prescription of environmental protection standards and conditions. The Notification dated 9th December, 2016 was issued in view of the policy decision taken by the Government of India to provide affordable housing to weaker sections in Urban areas in terms of scheme of 'Housing for All by 2022'. The general conditions that were provided under the Notification of 14th September, 2006 in substance continue but only change that has been brought about is that instead of obtaining prior Environmental Clearance from the Central Government the same shall be obtained from the State/Union Territory Environmental Impact Assessment Authority. The requirement of obtaining prior Environmental Clearance has not been dispensed with. The Draft Notification was

also challenged by the applicant which was disposed of *vide* order dated 30th September, 2016. The suggestions and objections were invited and after considering the same the final Notification was issued. The reliance placed by the applicants on the judgement of *Dr. Avinash Ramkrishna Kashiwar vs. State of Maharashtra;* (2015) 5 Mh. L.J. is of no consequence as on facts that judgement has no applicability in relation to the examination of the present Notification.

JURISDICTION OF THE TRIBUNAL:

7. According to the respondents, reliance placed by the applicant on the judgement in the case of *Dr. Avinash Ramkrishna Kashiwar vs. State of Maharashtra* (supra) is misplaced as that judgement has no application to the facts of the present case and particularly, for examining the validity of the impugned Notification. The respondents, therefore, prayed that the application requires to be dismissed on merits as well as on the preliminary objections taken by them.

8. In light of the above factual matrix of the case, we have to examine the merit or otherwise of the preliminary objections taken by the respondents in regard to the jurisdiction of this Tribunal to examine the validity of the impugned Notification. To examine this issue, we do not have to refer to the facts in any detail suffices it to notice that challenge in the present case is to the legality and validity of the Notification dated 9th December, 2016. The contentions of the respondents are that this Tribunal has been constituted under the provisions of the National Green Tribunal Act, 2010 (for short, Act of 2010') and it being a statutory Tribunal is not vested with the powers to examine the validity or constitutionality of a subordinate

legislation, i.e., Notification dated 9th December, 2016. Such aspects can only be examined by a constitutional Court, i.e., the Hon'ble Supreme Court of India or Hon'ble High Court. Reliance in this regard has been placed by them upon the judgement of the Division Bench of the Bombay High Court in the case of *Central India Ayush Drugs Manufacturers Association, Nagpur & Ors. v. State of Maharashtra,* AIR 2016 BOM 261. The respondents also relied upon the judgement of Hon'ble Supreme Court of India in the case of *Alpha Chem & Anr. v. State of Uttar Pradesh & Ors.,* 1991 Supp (1) SCC 518, wherein it was held that challenge to the constitutionality of a statute is maintainable in proceedings initiated under Articles 226 and 32 of the Constitution of India and not in appeal or revision before High Court or in proceedings initiated under a statute before an authority constituted under the said statute itself. Contrary to this, the contention of the applicant is that the Tribunal is competent and is vested with the jurisdiction and power of judicial review. In exercise of such powers it can examine the constitutionality, validity and legality of a subordinate legislation, particularly, when the Notification issued in exercise of the subordinate legislation is for the implementation of the enactments specified in Schedule I of the Act of 2010. Under the provision of the Act of 2010, such power of the Tribunal is neither expressly nor impliedly barred. On the contrary, the scheme of the Act clearly demonstrates that the Tribunal is competent to examine the correctness of a Notification issued under any of the Scheduled Acts in so far as the Notification implement or impliedly implement the provisions, object and purpose of the scheduled Act under which it is issued. In support of their contention, the applicants rely upon

the judgements of the Hon'ble Supreme Court of India in the case of *L. Chandra Kumar v. Union of India & Ors.*, 1997 (2) SCR 1186, *SP Sampath Kumar v. Union of India & Ors.*, (1987) 1 SCC 124, *State of West Bengal v. Ashish Kumar Roy & Ors.*, (2005) 10 SCC 110 and judgements of this Tribunal in the case of *Wilfred J. v. Union of India* 204 ALL (I) NGT REPORTER 2013, *SP Muthuraman v. Union of India,* 2015 ALL (I) NGT REPORTER (2) DELHI 170 and *Himmat Singh Shekhawat v. State of Rajasthan & Ors.*, ALL (I) NGT REPORTER (1) DELHI 44.

9. As far as this bench of the Tribunal is concerned the question of jurisdiction is no longer *res integra.* It has been conclusively decided by larger bench of the Tribunal in the case of *Wilfred J.* (supra), where the Tribunal held as under:

> "39. Having dealt with the constitution of the Tribunal and having established its independence, now let us proceed to examine the scope of power of the Tribunal, with particular reference to examining a subordinate or delegated legislation as being ultra vires, unconstitutional or illegal. Judicial review is the power of the court to review statutes or administrative acts or determine their constitutionality or validity according to a written constitution. In a wider sense, judicial review is not only concerned with the merits of the decision but also the decision making process. It tends to protect individuals against the misuse or abuse of power by a wide range of authorities. Judicial review is a protection to the individual and not a weapon. It is the doctrine under which legislative and/or executive actions are subject to review (and possible invalidation) by the judiciary. A specific court with the power of judicial review may annul the acts of the State, when it finds them incompatible with a higher authority (such as the terms of a written constitution). Judicial review is an example of checks and balances in a modern governmental system, where the judiciary checks the other branches of government. This principle is interpreted differently in different jurisdictions, which also have differing views on the different hierarchy of

governmental norms. As a result, the procedure and scope of judicial review may differ from country to country and State to State. Unlike in England, where the judiciary has no power to review the statutes/Acts made by the Parliament, the United States Supreme Court in terms of Article III and Article VI exercises the power of judicial review of the Acts passed by the Congress and has struck down several statutes as unconstitutional. In India, the Supreme Court and the High Courts have frequently exercised the power of judicial review keeping intact the 'doctrine of separation of power'. Challenge to legislation before the Courts in India has primarily been permitted on a very limited ground. The legislation in question should either be unconstitutional, or should lack legislative competence. Challenge to such legislation as being unreasonable has also been permitted, if it violates or unreasonably restricts the fundamental rights, particularly under Article 14 and 19 adumbrated in our Constitution.

40. The Courts are vested with the power of judicial review in relation to legislative acts and even in relation to judgments of the Courts. The power of judicial review has been exercised by the Courts in India sparingly and within the prescribed constitutional limitations. The Courts have also taken a view that functions of the Tribunal being judicial in nature, the public have a major stake in its functioning, for effective and orderly administration of justice. A Tribunal should have judicial autonomy and its administration relating to dispensation of justice should be free of opinions. (Ajay Gandhi v. B. Singh, (2004) 2 SCC 120). The National Green Tribunal has complete control over its functioning and all the administrative powers, including transfer of cases, constitution of benches and other administrative control over the functioning of the Tribunal, are vested in the Chairperson of the NGT under the provisions of the NGT Act".

10. The Tribunal in the case of *S.P. Muthuraman* (supra) also held that:

"This Tribunal has been vested with Original, Appellate and Special jurisdiction in regard to directing payment of compensation for damage to and for restitution and restoration of the environment. The legislature in its wisdom worded the provisions relating to the jurisdiction of the Tribunal (Sections 14 to 17 of the Act

> of 2010) very widely, and with a clear intent to provide this Tribunal with jurisdiction of a very wide magnitude. Upon reading the various provisions of the Act of 112 2010 cumulatively and in light of the underlying scheme of the Act of 2010, including the definition of 'environment' in terms of Section 2(c) of the Act of 2010, it is quite clear that this Tribunal is having all the trappings of a Court and is conferred with the twin powers of judicial as well as merit review. There is no provision in the Act of 2010 which curtails the jurisdiction of the Tribunal to examine the validity and correctness of a delegated legislation and/or administrative or executive order passed by the Government including any of its instrumentalities or authorities. The fundamental principle for invoking the jurisdiction of this Tribunal is that, the question raised should be a substantial question relating to environment and should arise out of the implementation of the enactments specified in Schedule I of the Act of 2010. It could even relate to enforcement of any legal right relating to environment with regard to these enactments. Delegated or subordinate legislation, executive orders and/or administrative orders in so far as they relate to the implementation of the Scheduled Acts would be open to challenge before the Tribunal and hardly any argument can be raised that the documents like Office Memoranda would not be subject to judicial scrutiny before the Tribunal".

11. The parties to the *lis* had preferred statutory appeal against the above cited judgement of the Tribunal before the Hon'ble Supreme Court of India. The Hon'ble Supreme Court of India had issued notice on the appeals and *vide* its order dated 21st January, 2015 in Civil Appeal No. 7884-7885 of 2014 had directed that further proceedings qua the appellants shall remain stay till further orders. However, in the same order the Hon'ble Supreme Court also directed that this Tribunal shall continue to exercise its powers in terms of Section 14, 16 and 18 of the NGT Act, 2010 in other cases. *Vide* order dated 3rd

February, 2016, passed by the Hon'ble Supreme Court of India in another set of appeals being Appeals No. 8550-8551 of 2014 passed an order by modifying order dated 21st January, 2015. The order dated 3rd February, 2016 reads as under:

> ".....By our Order dated 21.01.2015, we had stayed further proceedings in Appeals No. 14 of 2014, 17 of 2014 and 88 of 2014 and Original Application No. 74 of 2014 pending before the National Green Tribunal, Principal Bench at Delhi.
> Having heard learned counsel for the parties at some length, we are inclined to modify the said order so as to permit the Tribunal to proceed with the hearing of the Appeals and the Original Application for an expeditious disposal of the same. Learned counsel for the parties also agree that the appeals and the original application could be finally heard and that neither party shall pray for any interim direction in the said matters nor seek any adjournment which may unnecessarily procrastinate the entire controversy.
> In the circumstances, therefore, we modify our Order dated 21.01.2015 and permit the National Green Tribunal, Principal Bench at Delhi to proceed with the hearing of the appeals and Original Application and make an endeavour to dispose of the same as far as possible within a period of six weeks from the date a copy of this 3 order is placed before it. We make it clear that hearing of the Appeals and O.A. on merits pending before the Tribunal shall be without prejudice to the contentions open to the parties in these appeals which shall await the final hearing and disposal of the matter by the Tribunal. These appeals shall accordingly stand over for being listed after the disposal of the matters by the Tribunal. Liberty is given to the parties to mention the matter once the Tribunal passes final orders in the case before it."

In terms of the above order, the matters were finally heard by the Tribunal and disposed of *vide* order dated 2nd September, 2016. The parties had approached the Hon'ble Supreme Court after the final judgement by the Tribunal. The matter was heard by the Hon'ble Supreme Court and the Appeals were disposed of *vide* order dated 3rd

July, 2017. The order dated 3rd July, 2017 while leaving the question of law open, reads as under:

> ".....Pursuant to the order dated 3rd February, 2016, the National Green Tribunal has delivered judgment and order dated 2nd September, 2016. A review petition filed against that decision was disposed of on 30th November, 2016.
> We are told by the learned Attorney General that the project has been upheld by the National Green Tribunal. Under the circumstances, we dispose of these appeals leaving open the question decided by the National Green Tribunal on its jurisdiction to set aside subordinate legislation.
> In the event any of the aggrieved parties raises a dispute against the final order passed by the National Green Tribunal, it will be open to the appellant as well as the State of Kerala to agitate the issue of a 2 challenge to the subordinate legislation.
> Pending applications, if any, are disposed of."

In terms of the above order, it is clear that the law stated by the Tribunal in its judgement in the case of *Wilfred J. (*supra) was not disturbed by the Hon'ble Supreme Court either at the interim stage or while finally disposing of the appeals. Interim stay granted by the Hon'ble Supreme Court was limited to the appeals with a specific dictum that the Tribunal could decide other cases in terms of the provisions of the Act thereby clearly stating that the judgement in the case of *Wilfred J.* (supra) on the question of law was neither interfered nor stayed. Thus the law stated by the larger bench of the Tribunal attains finality and is binding on this bench. In any case, we have no reason not to accept the mandate of the larger bench and apply to the present case. The reliance placed by the respondents upon the judgement of the High Court of Bombay in the case of *Central India Ayush* (supra) will not be of any benefit to the respondents. Firstly,

the judgement of the High Court of Bombay does not consider the larger bench of the Tribunal in the case of *Wilfred J.* (supra). It also does not refer to the judgements of the Hon'ble Supreme Court in *L. Chandra Kumar* (supra) wherein Hon'ble Supreme Court had clearly stated that the Tribunals are competent to hear matters challenging *vires* of the statutory provisions or *vires* of the subordinate legislation. Of course such jurisdiction falls in a limited compass. In the case of *SP Sampat Kumar* (supra), the Hon'ble Supreme Court clearly stated that the Tribunal has power of the judicial review and even vested with the powers of the Civil Courts so it has wide jurisdiction including the power of judicial review. There are other judgements from other High Courts which have taken entirely a different view than the view taken by the High Court of Bombay. These High Courts have specifically referred to the Tribunal for adjudication of cases involving challenge to the Notifications issued in exercise of subordinate legislation with regard to noise pollution, plastic bags and other such matters. In this regard, we may refer to the judgement of the High Court of Delhi in the case of *All India Plastic Industries Association & Anr. v. Govt. of NCT of Delhi and Ors,* Writ Petition No. 7012 of 2012 decided on 5th December, 2016. The Division Bench of the High Court while relying upon the judgement of *L Chandra Kumar* (supra) of the Hon'ble Supreme Court of India and the provisions of the Schedule I to the Act of 2010, held that the matter before it challenging the Notification issued under Section 5 of the Environment (Protection) Act, 1986 (for short, 'act of 1986') imposing a ban on manufacture, import, store, sale or transport of any kind of plastic, carrying bags etc be transferred to this Tribunal for deciding

the same on merits including the question, validity of the Notification. It may be noticed that High Court of Delhi would be the jurisdictional High Court for the Principal Bench, National Green Tribunal.

12. The Punjab & Haryana High Court, Tripura High Court and Jharkhand High Court has also transferred the cases of *Goodwill Plastic Industries & Ors. v. Union Territory of Chandigarh & Ors., All India Plastic Industries Association v. Tripura* and *RDS Bricks v. State of Jharkhand,* respectively to the Tribunal. In all these cases, *vires* to the Notifications dated 30th July, 2008 and 3rd July, 2013 both relating to banning of plastic and Notification dated 29th March, 2012 relating to eco-sensitive zone were challenged. To put it simply all these High Courts have taken a view that the Tribunal can examine the validity of a Notification issued for implementation of a subordinate legislation.

In the another judgment of the Tribunal in the case of *SP Muthuraman v. Union of India & Anr.* (supra), wherein the office memorandums issued by the MoEF&CC dated 12th December, 2012 and 27th June, 2013 were quashed. The Tribunal took the view that it had the limited power of judicial review and it can examine the office memorandums issued in furtherance to the rules framed by MoEF&CC. A review application was filed by the different project proponents in that case, which was also dismissed *vide* order dated 1st September, 2015. The orders of the Tribunal were challenged before the Hon'ble Supreme Court of India and the Hon'ble Supreme Court *vide* its order dated 24th September, 2015, stayed the order of the Tribunal. *Vide* order dated 23rd November, 2015 and upon application

of MoEF&CC the Hon'ble Supreme Court of India clarified its order and stated that stay was applicable only to the appellant's before it. During the pendency of the appeals, some directions were passed by the Hon'ble Supreme court in relation to deposit of the environmental compensation imposed by the Tribunal. The Hon'ble Supreme Court *vide* order dated 4th July, 2016 made it clear that the Tribunal could proceed by passing of directions as contained in para 163(13) of its order dated 7th July, 2015 and parties were granted liberty to raise all submissions open to them on fact and law before the Tribunal. Even the judgement of the Tribunal on the question of jurisdiction has not been stayed by the Hon'ble Supreme Court. However, the parties have been granted liberty to raise all pleas of facts and law. The Tribunal had also passed similar judgments in the case of *Himmat Singh Shekhawat v. State of Rajasthan* (supra) and *Kalpvriksha & Ors. v. Union of India*, in OA No. 116 of 2013 (T_{HC}) decided on 17th July, 2014. All these orders have attained finality and remain undisturbed.

13. Another aspect that needs specific mentioning by us is that this Tribunal is a special and unique Tribunal constituted under the legislation enacted by the Parliament in exercise of its powers under Article 253 of the Constitution of India. It needs to be distinguished from other Tribunals enacted under Article 323(A) and 323(B) of the Constitution. This Tribunal has been constituted for the purpose of implementing the decisions at the United Nations Conference on the Human Environment held at Stockholm in June 1972, where India also participated. 186th Law Commission Report also noticed that the environmental Tribunal constituted under Article 253 could be traced

as an act of implementation of the decisions taken at the International Conference with reference to Rio-declaration of 1992. The purpose of implementing the decisions at Rio conference & Stockholm Conference and constituting the Tribunal was to provide speedy adjudicatory body in respect of the disputes arising in environmental matters. In the case of *Braj Foundation vs. State Government of UP & Ors.*, Application No. 278 of 2013 decided on 5th August, 2014, the bench of the Tribunal held that one is to remember that the Tribunal is created in furtherance to the enactment of the Parliament to give effect to the true spirit of the terms of Article 253 of the Constitution of India and, therefore, there is no iota of doubt in our mind that the Tribunal has inherent power of not only enforcing its orders but also dealing with any person who either disobeys or violates its orders. The inherent power would co-exist with the Tribunal examining the correctness of any office order or subordinate legislation whether it is in consonance or not with the provisions of the environmental laws in force particularly when it is issued under those very legislations.

In light of the above position of law and the fact that the judgments of the Tribunal in the case of *Wilfred J.* (supra) and *S.P. Muthuraman* (supra) are binding upon this bench. We have no hesitation in rejecting the objection raised by the respondents as without merit.

DISCUSISON ON MERITS OF THE CONTENTIONS RELATING TO VALIDITY OF THE NOTIFICATION

14. The draft Notification dated 29th April, 2016 was published by the Respondent inviting objections and suggestions thereto. After

considering the objections/suggestions received by the MoEF&CC, it had issued the final Notification dated 9th December, 2016. According to the Applicant, not only the Notification dated 9th December, 2016 but also the entire process of finalizing the Notification suffers from factual and legal infirmities. It is also the contention that it defeats the very object and purpose of the Act of 1986, EIA Notification of 2006 and is also opposed to the federal scheme under the Constitution of India. The detailed objections raised by the Applicant has already been noticed by us in paragraph no. 4 of the judgment (supra). According to the respondent, the notification does not suffer from any error much less legal infirmity or validity. The contentions of the respondents have also been noticed above. And within the ambit of the contentions raised before us, now, we will proceed to deliberate on these issues. First and foremost, we may refer to the comparative study of the existing and proposed regime in terms of the Notifications dated 14th September, 2006 and 9th December, 2016. The useful reference can be made to the following chart:

Sl. No.	Particulars	EIA Notification dated 14 September,2006	EIA Notification dated 09 December, 2016
1.	Consent to Establish & Operate	• Prior to the actual construction activities, the project proponent has to obtain Consent to Establish from the Board under the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981for all construction projects having BUA above 20,000 m^2 • After completion of the construction activity, the proponent has to obtain Consent to Operate from the Board under the Water	• No Consent to Establish and Operate under the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981 will be required from the State Pollution Control Boards for residential buildings up to 1,50,000 square meters

		(Prevention □ No Consent to Establish and Operate under the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981 will be required from the State Pollution Control Boards for residential buildings up to 1,50,000 square meters and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981for all construction projects having BUA above 20,000 m^2.	
2.	Construction projects having built up area below 20,000 m^2	• Projects having built up area below 20,000 m2 not require prior environmental clearance from MoEF	• BUILDINGS CATEGORY '1' (5,000 to < 20,000 Square meters) ¬ A Self declaration Form to comply with the environmental conditions (Appendix XIV– attached below) along with Form 1A and certification by the Qualified Building Environment Auditor to be submitted online by the project proponent besides application for building permission to the local authority along with the specified fee in separate accounts ¬ Thereafter, the local authority shall issue the building permission incorporating the environmental conditions in it and allow the project to start based on the self declaration and certification along with the application ¬ After completion of the construction of the building, the project proponent may update Form 1A online based on audit done by the Qualified Building Environment Auditor and shall furnish the revised compliance undertaking to the local authority. ¬ Any non-compliance issues in buildings less than

			20,000 square meters shall be dealt at the level of local body and the State through existing mechanism
3.	Construction Projects having built up area above 20,000 m^2	• An application seeking prior environmental clearance in all cases shall be made in the prescribed Form 1 annexed herewith and ¬The project proponent to submit online application in Form 1 A along with specified fee for environmental appraisal and additional fee for building permission ¬The fee for environmental appraisal will be deposited in a separate account Supplementary Form 1A, if applicable, as given in Appendix II, after the identification of prospective site(s) for the project and/or activities to which the application relates, before commencing any construction activity, or preparation of land, at the site by the applicant.	• The project proponent to submit online application in Form 1 A along with specified fee for environmental appraisal and additional fee for building permission ¬the fee for environmental appraisal will be deposited in a separate account. • The Environment Cell will process the application and present it in the meeting of the Committee headed by the authority competent to give building permission in that local authority ¬The Committee will appraise the project and stipulate the environmental conditions to be integrated in the building permission ¬After recommendations of the Committee, the building permission and environmental clearance will be issued in an integrated format by the local authority ¬The project proponent to submit Performance Data and Certificate of Continued Compliance of the project for the environmental conditions parameters applicable after completion of construction from Qualified Building Environment Auditors every five years to the Environment Cell with special focus on the following parameters; 1.Energy Use (including all energy sources) 2.Energy generated on site from onsite Renewable energy sources 3.Water use and waste water generated,

			treated and reused on site 4.Waste Segregated and Treated on site 5.Tree plantation and maintenance ¬After completion of the project, the Cell shall randomly check the projects compliance status including the five years audit report ¬The State Governments may enact the suitable law for imposing penalties for non-compliances of the environmental conditions and parameters ¬The Cell shall recommend financial penalty, as applicable under relevant State laws for noncompliance of conditions or parameters to the local authority. • On the basis of the recommendation of the Cell, the local authority may impose the penalty under relevant State laws ¬The cases of false declaration or certification shall be reported to the accreditation body and to the local body for blacklisting of Qualified Building Environment Auditors and financial penalty on the owner and Qualified Building Environment Auditors
4.	Built up Area considered for EC	• Built up area for covered construction; in the case of facilities open to the sky, it will be the activity area	• The term "built up area" for the purpose of this notification is the built up or covered area on all floors put together including its basement and other service areas, which are proposed in the buildings and construction projects
5.	Monitoring of environmental compliances	• Earlier, it was mandatory for the project proponent to submit compliance report every six months.	• Project proponent shall submit performance data & certificate of continued compliance of the project for the environmental conditions after completion of construction every five years.

6.	Process of granting permission for construction and building projects	• Under 2006 notification prior Environment clearance from SEIAA was mandatorily required even before <u>starting of the construction work or preparation of land.</u> SEIAA was to screen scope and appraise projects before granting of environment clearance. • The environmental clearance process before SEIAA comprises of four stages, all of which may not apply to particular cases as set forth. These four stages in sequential order are:- • Stage (1) Screening (Only for Category 'B' projects and activities) • Stage (2) Scoping •Stage (3) Public Consultation • Stage (4) Appraisal	• Under 2016 notification Environmental conditions are to be imposed by Environmental cell at the level of local authority. The cell will then process the application and place it before the committee headed by the authority competent to give building permissions. The committee will then appraise the project and stipulate environmental conditions without any provisions of public consultation which is an integral part of 2006 notification. • Therefore, the environmental cells work under the building permit issuing authority therefore not a independent authority to impose environmental conditions. Moreover building permit authority is not a scientifically sound body as SEIAA or SEAC.
7.	Environment Clearance Authority concerning Building and Construction projects	• Clearance was given after screening and appraising of the projects by government constituted bodies' i.e. SEIAA or SEAC who are independent bodies.	• Imposition of environmental conditions by local authority on the basis of assessment and certification by Qualified Building Environment Auditors (QBEAs) which could be a firm /Organization or an individual expert accredited by the accreditation authority.
8.	Violation of environmental conditions	• Violation of environmental conditions and parameters are dealt under section 15 and section 19 of EPA, Act 1986.	• The state Government may enact suitable laws for imposing penalties for non compliance. The local Authorities shall impose penalties based on the recommendation of environmental cell of local body.
9.	Qualification of Experts	• Multi sectoral / Multi disciplinary experts in SEAC. • Qualification as per the Schedule 6 of the	• Experts of limited sectors like Water, Air, Solid Waste, Energy and transport in environmental cell.

		current EIA notification.	

From the above comparative study of the two regimes, it is clear that the regime in terms of the Notification dated 9th December, 2016 would considerably dilute the environmental safeguards provided not only under the Regulation of 2006 but even under the Act of 1986. The Applicants have rightly placed reliance on the Principle of Non-regression. Under the International law, the doctrine of Non-regression is an accepted norm. It is founded on the idea that environmental law should not be modified to the detriment of environmental protection. This principle needs to be brought into play because today environmental law is facing a number of threats such as deregulation, a movement to simplify and at the same time diminish, environmental legislation perceived as too complex and an economic climate which favours development at the expense of protection of environment. The draft amendment of the existing environmental laws should be done with least impact on environment protection that was available under the existing law or regime. The present amendment in the Notification particularly few clauses that we will refer hereinafter can lead to severe environmental impacts.

15. The Precautionary Principle as propounded by the Hon'ble Apex Court is a cornerstone of environmental jurisprudence in the country as the environmental conditions imposed are not comprehensive enough and are only a tick-box exercise taken by the project proponent without any prior environment assessment process especially its impact on ecologically sensitive area and other environmental vulnerable area.

The impugned notification, takes away the power of the Pollution Control Boards and Committee to grant/refuse Consent to Establish and Consent to Operate for building and construction projects up to an area of 1,50,000 sq meter. It further dilutes the entire environmental assessment framework under the EIA notification 2006, which has been periodically strengthened and amended by the numerous orders of this Hon'ble Tribunal.

The impugned notification has several deficiencies that go against the basic letter and spirit of EPA Act, 1986 and the EIA notification issued there under. Power under Section 3 read with Rule 5 of Environment (Protection) Act, 1986 can only be exercised by the central government or the authorities constituted by it. Whereas the impugned notification gives power to the State Government for constitution of an authority to exercise and perform such of the powers and functions as provide under Environment Protection Act, 1986, which Includes assessment and granting of environment clearance to the projects. This would be apparently in conflict with the provisions of the Act of 1986. In this regard reference can also be made to the judgement of the constitutional bench of the Hon'ble Supreme Court in the case of *LIC v. Escorts Ltd.,* (1986) 1 SCC 264, where the Hon'ble Supreme Court held that it may be open to a subordinate legislating body to make appropriate rules and regulations to regulate the exercise of a power which the Parliament has vested in it, or as to carry out the purposes of the legislation, but it cannot divest itself of the power.

It is further stated that these conditions fall substantially below the prior environmental assessment procedure which was much detailed and brought within EIA framework after the direction of the Hon'ble Supreme Court in the *Maily Yamuna Case* (W.P.C No. 725 of 1994).

16. The impugned notification provides that the local authorities such as the development authorities and Municipal Corporation may certify compliance of Environmental Conditions prior to issuance of completion certificate based on recommendations of the Environmental Cell to be constituted in the local authority. Further, the purpose of notification regarding integration of environmental conditions, the MoEF&CC through competent agencies would accredit Qualified Building Environmental Auditor (QBEA's) to assess and certify the building projects. It is clear from the above that the entire assessment procedure has been replaced over which the MoEF&CC has no control.

17. The MoEF&CC has failed to produce any study, literature, evaluation of the reason for taking such a retrograde decision to go back to a pre-2004 situation wherein the failure of the local bodies was considered to be the primary reason for bringing building and constructions activity within the EIA framework. In pre-2004 the position was that the construction sector projects were only regulated through Bye Laws and no Environmental Clearance was required.

18. The proposal for exemption of Environmental Clearance for construction and building project with built-up area to 1,50,000 Sq mtrs. is baseless as there is no study that indicates any improvement

in environment quality with regard to all environmental facets/ availability of natural resources, following which there can be a consideration for relaxation of current norms.

The said amendment notification is only a ploy to circumvent the provisions of environmental assessment under the EIA Notification, 2006 in the name of 'ease of doing responsible business' and there is no mechanism laid down under the amendment notification for evaluation, assessment or monitoring of the environment impact of the building and construction activity. The construction industry consumes enormous resources and has a significant energy footprint; the sector emits 22 per cent of India's total annual carbon-dioxide emission. The Hon'ble Tribunal in the matter of *S.P. Muthuraman vs. Union of India & Anr.* (supra) Observed:

> *"In recent past, building construction activities in our country have been carried out without much attention to environmental issues and this has caused tremendous pressure on various finite natural resources. The green cover, water bodies and ground water resources have been forced to give way to the rapid construction activities. Modern buildings generally have high levels of energy consumption because of requirements of air-conditioning and lighting in addition to water consumption. In this scenario, it is necessary to critically assess the utilization of natural resources in these activities."*

19. The very purpose of including the construction projects in the EIA Notification was the failure of the local bodies to ensure compliance with environmental norms. The ULB's/DA's have always had specific stipulation on environmental concerns. However, such conditions were never adhered to or made a pre-requisite to such sanction. It was therefore the case of MoEF&CC that the local body have been approving new construction projects without adhering to

environmental norms. Now, the MoEF&CC itself is taking a step in backward direction without there being any changes brought about in the capacity and technical competence of the local body to assess, evaluate and monitor the environmental norms or to ensure compliance.

20. The EIA Notification, 2006, has a comprehensive process for evaluating the impact on environment which will not be the case after the said notification. For instance, the EIA Notification, 2006 provides Expert Appraisal Committee at the Centre and the State Expert Appraisal Committee at the State level. The composition of these committees comprises as per Appendix-VI to EIA Notification, 2006 of independent experts, such as, Environment Quality Expert, Sectoral Expert in Project Management etc. But as per the amendment notification the same local body which is responsible for the stipulation of the condition would be responsible for ensuring the compliance of the same with the help of Environmental cell and QBEAs. This is in contravention of the principle of *nemo judex in sua causa,* which is a principle of natural justice, meaning that a person cannot be judge of his own cause. Also, there is no technical expertise or competence within the local bodies to either evaluate impact or to ensure compliance of environmental conditions.

As per the EIA Notification 2006, clause 1.3 states "*what are the likely impacts of the proposed activity on the existing facilities adjacent to the proposed site? (Such as open spaces, community facilities).* But as per the amended notification of 2016, no such provision is laid down.

21. This Hon'ble Tribunal in O.A. No. 171 of 2013 (*NGT Bar Association vs. MoEF*) vide Order dated 13.01.2015 stated *"We direct Secretary, MoEF along with such experts and the States Afore referred will also consider the possibility of constituting the branches of SEIAA at the district or at least, division levels to ensure easy accessibility to encourage the mine holders to take EC".* Similarly, the O.M. dated 19.06.2013 states that *"In case of a large pendency case the concerned state Government feels that there is need for another SEAC, the State Government may accordingly send the proposal to MoEF&CC for setting up/notifying another SEAC and MoEF may consider the same".* However instead of adhering to their own O.M.'s and the categorical judgement of the this Tribunal, they have chosen to completely dilute EC process and violate the EIA Notification, 2006 and thereby Act of 1986.

22. A bare perusal of amendment notification would show that there is complete dilution of the norms as provided under the EIA Notification, 2006. For instance, totality of issues related to conservation of water is completely ignored for building of built-up area up to 5000 sq.mtr. There is no sewage treatment or municipal solid waste processing facilities stipulated within the premises for building up to 5000 sq. mtr. of built up area.

23. The MoEF&CC has failed to fulfil its statutory responsibilities. By transferring the powers to ULBs/ Development Authority, it has created a situation of conflict of interest as all the powers have been vested with the same authority. National documents (CAG Report, 2016) also discourage such an integration of environment condition to

the sanctioning authority under the urban local bodies instead of independent assessment by environmental experts of building and construction projects. Thus for example, the report by Comptroller and Auditor General of India (CAG Report, 2016) clearly states that urban local bodies have not been performing on environmental parameters. In most compliance audit, the environmental parameters including MSW, Waste minimisation, e-waste etc have been grossly violated.

It is submitted that on para wise comparison of the draft notification and final notification are entirely different. The main addition which were not part of draft notification but found place in the final notification are as follows:

- *Consent to establish and Consent to Operate under Water Pollution Act, 1974 and Air Pollution Act, 1981 will not be required from SPCB for residential buildings up to 1,50,000 sq.m.*
- *Stripping of building construction projects of built up area of 20,000 sq.m upto 1,50,000 sq.m. from the purview of EPA Act, 1986 and bringing under the concerned State Laws.*
- *The draft Notification specifically mentions that the exclusion/amendments mentioned in the draft notification are not intended for hospitals whereas the final notification clearly excludes hospitals also from the purview of EIA Notification and EPA Act, 1986.*
- *Addition of Appendix-XV, Accreditation of Environmental Auditors. (qualified Building Auditors).*
- *Addition of Appendix-XVI, Environmental Cell at the level of Local Authority.*

When the residential building construction projects of built up area more than 20,000 sq.m up to 1,50,000 sq.m are excluded from

the requirement of "Consent to Establish" or "Consent to Operate" then these building construction projects will be out of the purview of these statutes, what will be the relevance of CPCB norms and this will encourage indiscriminate discharge of untreated sewage into river and drains.

24. In the said notification, there is no definition of "Area". In the absence of such a definition, the "Area" can be for the whole of the State or District or Region. In this connection, attention is brought to the EIA Notification, 2006 wherein the word "built-up area" was introduced. There was no definition of "built up area" in the impugned Notification and which leads to confusion in the building construction sector.

The said notification is contrary to the recommendations of the report of the committee constituted by MoEF&CC on 11.12.2012 (The Kasturirangan report) to review the provisions of EIA Notification, 2006 relating to buildings, etc which was then accepted by MoEF&CC. The MoEF&CC vide OM dated 10.11.2015, reiterated and vetted the recommendations of Kasturirangan Committee among other things. If the MoEF&CC is now changing its stand, it is duty bound to produce back-up study or research material to prove that the local bodies have concern towards environment.

25. Besides noticing the above mentioned deficiencies in and dilutions of the existing laws by the impugned Notification, we must also notice a very strong legal infirmity in it. Admittedly, the notification has been issued by the MoEF&CC in exercise of its powers under sub-section (1) read with clause (V) of sub-section (2) of Section

(3) of the Act of 1986 and clause (d) of sub-rule (3) of Rule (5) of the Environment (Protection) Rules, 1986. By the impugned Notification, paragraph 14 is sought to be inserted after paragraph 13 of the existing Notification/Regulations of 2006. The powers under these provisions can be exercised under Section 3(2)(5) of the Act of 1986 which empowers the Central Government to take measures to protect and improvement of the quality of environment in regard to restrictions of areas in which any industry/operations or process or class of industries operations or processes shall not be carried out or shall be carried out subject to certain safeguards. In terms of section 3 (1)of the Act, this power of taking measures is to be exercised by the Central Government when it deems necessary and expedient for the purpose of protecting and improving the quality of environment and preventing, controlling and abating environmental pollution (emphasis supplied). Rule 5 deals with the prohibition and restriction on the locations of industries and the carrying on process and operations in different areas. It gives power to the Central Government to take into consideration the factors while prohibiting or restricting the locations of industries and carrying on of process/operations in different areas. Sub-rule 3 of this Rule contemplates the procedure to be followed by the Central Government while issuing the notification for imposing prohibition or restriction as stated in Sub-rule (1) of Rule 5.

Thus, both the sections and the rule gives power for issuing of any notification and placing prohibition / restriction in their terms, subject to the conditions, i.e., while issuing notification the procedure under Rule 5 (3) should be followed and more importantly it should be

exercised only for the purpose of protecting and improving the quality of the environment and preventing pollution. Once any of these essential statutory features are missing the notification issued would be liable to be interfered with. The major part of the Notification does not satisfy these ingredients.

26. The amended clause 14 while dealing with the other building category more than 20000 sq. meter also provides that no Consent to Establish and Operate under the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981 will be required from the State Pollution Control Boards for residential buildings upto 150000 sq. meter. This amendment is *ex-facie* opposed to the above objects and in fact lacks legislative competence. While exercising powers under a subordinate legislation in furtherance to Section 3 and Rule 5, the authority cannot in exercise of its subordinate legislation exclude the operation of a substantive law that is Water Act, 1974 and Air Act, 1981 enacted by the Parliament. This would suffer from the *vires* of excessive legislation. It is strange that the MoEF&CC, a delegatee under the said provision could venture upon excluding the application and enforcing of a Parliament Act without even making any amendment under that act or the rules framed under that act. This action of the MoEF&CC cannot stand the scrutiny of law.

27. The Environmental Cell is to be constituted by the local authority or the State Government, whereas the implementation of the environmental law is vested with the Central Government. The Environmental Clearance is expected to be issued by the authorities

in an integrated format. Any offence or violation thereto which is punishable under the Act of the Parliament, i.e., the Act of 1986 thus subordinate legislative amendment takes away that power and requires a local authority to take precedence in relation to providing punishment for such violation or offence. There is clear ambiguity and uncertainty in the Constitution of the Environmental Cell and its functions. There is no clarity as to the qualification which the Member of the Environmental Cell should possess. A Cell, primary duty of which is to protect the environment would have to work in subordination to a local authority whose primary object is to permit development. Thus, the possibility of conflicting interest arising in the functioning of the local authority and the Environmental Cell cannot be ruled out. It may arise even then thus defeating the very purpose of the amendment.

28. Another serious objection raised to the Notification is that the final Notification has been issued without considering the objections filed to the draft Notification. Of course, in terms of the procedure prescribed under Rule 5(3) of the Rules of 1986 the procedure must be strictly adhered to. The MoEF&CC had invited objections which were filed and even the Applicant was heard. There cannot be a doubt that requirement of considering objections effectively is not a mere formality. It should be done objectively and in accordance with law as held in the case of *Dr. Avinash Ramkrishna Kashiwar vs. the State of Maharashtra (supra):*

> 17.*"It could thus be seen that it appears to be settled position of law that the requirement of previous publication inviting objections and suggestions is not*

an empty formality. It is with an intention to enable persons likely to be affected , to be informed, so that they may take steps as may be open to them and the objections/ suggestions made would be required to be taken into consideration by the authorities before issuing a final notification".

26. *"In the result, we hold that the impugned notification dated 26.07.2013 is not sustainable in law and, therefore, quashed and set aside. Rule is, therefore, made absolute in the aforesaid terms with no orders as to costs."*

The Applicant had filed objections which were duly considered by the MoEF&CC and even the Applicant was heard. There is nothing on record before us that would show that there is no application of mind and that the objections were not considered objectively by the MoEF&CC. In light of this, we are unable to accept this contention raised on behalf of the Applicants.

29. The other argument of the Applicant which deserves to be considered with some merit is that the final impugned Notification is at substantial variance to the draft Notification. This has not only resulted in prejudice to the environment but has also defeated the purpose of Rule 5(3) of the Environment (Protection) Rules, 1986. Following are few examples of such variance and which have significant effect on the environmental laws:

(a). The exclusion of application of the Water Act and the Air Act was never proposed or stated in the draft Notification, while it has been introduced in the final Notification.

(b). Role of the State Pollution Control Boards to monitor and verify the environmental conditions is eliminated in the final notification. The construction of built up area upto area of 20,000 sq. meter upto 1,50,000 sq. meter which were

otherwise covered under the Act of 1986 now have been brought under the State Laws without specifying them in the draft notification. The draft Notification specifically mentions that the exclusion/amendment benefits mentioned in the draft Notification are not intended for hospitals whereas the final notification clearly excludes hospitals from the purview of the EIA Notification, 2006 and Environment (Protection) Act, 1986. It is at substantial variance as the hospitals fall under red category under the Central Pollution Control Board categorization dated 7th March, 2016. So, provision of dealing with the environmental conditions of hospitals falling under the environmental norms.

(C). Addition of Appendix XV, accreditation of environmental auditor (Qualified Building Environment Auditor).

(D). Addition of Appendix XVI, Environmental Cell at the level of local authority.

On the above premises, it is contended that on the one hand, there is substantial difference between the draft and the final notifications while on the other hand Applicants were deprived of the right to file objections on these aspects. Reliance is placed on the judgement of the Hon'ble Supreme Court of India in the case of *State of Punjab vs. Tehal Singh & Ors,* AIR 2002 SC 533 wherein the Supreme Court held that Principle of Natural Justice to subordinate legislation may be applied but where the legislature provides an

opportunity of hearing and filing objections then it must be adhered to *senso stricto.*

30. From the records before the Tribunal, it is clear that there are variations even of substantial nature between the draft and the final Notification dated 9th December, 2016 issued by the respondent. One of the significant failures of the same is that the applicants or public at large has lost substantive right to file objections on these aspects to the draft Notification. They have also lost the right to be heard in terms of Rule 5(3) of the Rules of 1986. Incorporation of such provisions from the draft Notification into the final Notification would not be permissible.

31. Some of the portions of the impugned Notification; particularly, relating to granting of exemption from the application of Water and Air Acts; Rendering the provisions of the central law for taking action, penalizing defaulters and offenders of the environmental law being rendered ineffective; ambiguity and deficiencies in constitution of the Environmental Cell are some of the patent features of the impugned Notification which dilutes the environmental impacts on the one hand, while on the other, they are in derogation to India's international commitments to the Rio Declaration, 1992 and Paris Agreement, 2015. If principle 15 to 17 of the Rio Declaration is read along with clauses of the Paris Agreement, 2015, particularly, in face of precautionary approach, preventing irreparable damage forming definite environmental impact assessment to examine adverse impact on the environment, reduction on the growth of is carbon emission and to adopt best practices and achieve the ambitious targets between

the stipulated time then the adopting cumulative effect of the Notification dated 9th December, 2016 would have some element of derogation. The Notification also ignores some essential features like source of water, source of raw material, urban ecology, provision of no development zone and construction face impacts. These aspects have a direct bearing on protection of environment and keeping in line with the Principle of Sustainable Development. It is important that there should be development and particularly, when the development is guided by the social cause but that development should not be permitted to cause irreparable loss to the environment and ecology. Sustainable development has to be the ultimate criteria. The Hon'ble Supreme Court in the case of *N.D. Dayal v. Union of India,* (2004) 9 SCC 362 deliberated upon the Doctrine of Sustainable Development and while comparing with the economic growth and well being held as under:

> "24.The right to development cannot be treated as a mere right to economic betterment or cannot be limited to as a misnomer to simple construction activities. The right to development encompasses much more than economic well being, and includes within its definition the guarantee of fundamental human rights. The 'development' is not related only to the growth of GNP. In the classic work - *'Development As Freedom'* the Nobel prize winner Amartya Sen pointed out that 'the issue of development cannot be separated from the conceptual framework of human right'. This idea is also part of the UN Declaration on the Right to Development. The right to development includes the whole spectrum of civil, cultural, economic, political and social process, for the improvement of peoples' well being and realization of their full potential. It is an integral part of human right. Of course, construction of a dam or a mega project is definitely an attempt to achieve the goal of wholesome development. Such works could very well be treated as integral component for development.

25. Therefore, the adherence of sustainable development principle is a sine qua non for the maintenance of the symbiotic balance between the rights to environment and development. Right to environment is a fundamental right. On the other hand right to development is also one. Here the right to 'sustainable development' cannot be singled out. Therefore, the concept of 'sustainable development' is to be treated an integral part of 'life' under Article 21. The weighty concepts like intergenerational equity (*State of Himachal Pradesh v. Ganesh Wood Products*, [1995] 6 SCC 363), public trust doctrine (*MC Mehta v. Kamal Nath*, [1997] 1 SCC 388 and precautionary principle (*Vellore Citizens*), which we declared as inseparable ingredients of our environmental jurisprudence, could only be nurtured by ensuring sustainable development.

26. To ensure sustainable development is one of the goals of Environmental Protection Act, 1986 (for short 'the Act') and this is quiet necessary to guarantee 'right to life' under Article 21. If the Act is not armed with the powers to ensure sustainable development, it will become a barren shell. In other words, *sustainable development is one of the means to achieve the object and purpose of the Act as well as the protection of 'life' under Article 21.*Acknowledgment of this principle will breath new life into our environmental jurisprudence and constitutional resolve. Sustainable development could be achieved only by strict compliance of the directions under the Act. The object and purpose of the Act-"to provide for the protection and improvement of environment" could only be achieved by ensuring the strict compliance of its directions. The concerned authorities by exercising its powers under the Act will have to ensure the acquiescence of sustainable development. Therefore, the directions or conditions put forward by the Act need to be strictly complied with. Thus the power under the Act cannot be treated as a power simpliciter, but it is a power coupled with duty. It is the duty of the State to make sure the fulfilment of conditions or direction under the Act. Without strict compliance, right to environment under Article 21 could not be guaranteed and the purpose of the Act will also be defeated. The commitment to the conditions thereof is an obligation both under Article 21 and under the Act. The conditions glued to the environmental clearance for the Tehri Dam Project given by the Ministry of Environment vide its Order dated July 19, 1990 has to be viewed from this perspective".

Despite the above shortcomings of the Notification and some clauses suffering from legal infirmity, the impugned Notification has certainly good and effective aspects as well. As already noticed by us, it brings into effect a social cause of providing affordable housing to the poor strata of the society. It also proposes to decentralize and bring authorities granting environmental clearance and those granting building permission together under a single window system so as to address environmental concerns. The concept of one window system is sought to be introduced. The Notification specifically provides for emphasis on the aspects that are required to be considered by the environmental cell with special focus on energy use, energy generated on site from on site renewable energy sources, water use and waste water generated, treated on site, waste segregated and treated on site, waste segregation and treated on site, tree plantation and maintenance. These are the few good features of the Notification which also do not suffer from element of illegality. 'Housing for all by 2022' is a purpose and object in conformity with the constitutional mandate. There would be collective and coordinated effort by the Environmental Cell, local and other authorities at the State level to expeditiously deal with environmental clearance.

ORDER/DIRECTIONS

32. The object of the Notification is laudable that is providing housing to the poor. The provisions of the existing regime under the Regulation/Notification of 2006 are sought to be liberalized and expanded for obtaining that object. Some of the provisions of the Notification are being amended to provide for decentralized regulation

in relation to building projects. Certain specified building and construction projects of specified area are proposed to be exempted from the rigours of the Notification. But these amendments would have to be in consonance with the law, where certain provisions of the amended Notification dated 9th December, 2016 are in consonance with the provisions of the Act of 1986 and do not suffer from the *vires* of illegality. Thus, some other provisions of the same Notification *ex-facie* suffer from legal infirmities and are incapable of being implemented in accordance with the scheme of federal structure under the Constitution of India. Out of them, some provisions are directly opposed to the Principle of Non-regression as they considerably dilute the existing environmental laws and standards to the prejudice of the environment. Thus, in the facts and circumstances of the present case, the Tribunal can safely take recourse to the doctrine of severability to declare some of the provisions of the Notification as *ultra-vires* or ineffective while holding the other part of the Notification as legally sound and sustainable.

33. In view of the above, we pass the following order/directions:

1. We hold and declare that this Tribunal has jurisdiction to examine the legality, validity and correctness of a Notification issued by the competent forum in exercise of its power of subordinate legislation with regard to acts stated in Schedule-I to the National Green Tribunal Act, 2010.
2. We hold and declare that (i) clause 14(8), (ii) the provisions relating to exclusion of Consent to Operate and Consent to Establish under Water (Prevention and Control of Pollution)

Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981 in clause 14 of the impugned Notification; (iii) Appendix-XVI relating to constitution and functioning of Environmental Cell, cannot be sustained and are liable to be quashed for the reasons afore-stated. Thus, we direct MoEF&CC to re-examine its Notification dated 9th December, 2016 and take appropriate steps to delete, amend and rectify the clauses of the said Notification in light of this judgement.

3. As a result of the above, the byelaws amended by the DDA vide its Notification dated 22nd March, 2016 can also not be given effect to, unless the Notification dated 9th December, 2016 is amended in terms of this judgement.

4. Till the time the Ministry comply with the above directions and notify the amended provisions of Regulations of 2006, it will not implement the impugned Notifications. However, once the amended regulations are notified, MoEF&CC/SEIAA /Local Authorities can give effect to that, without any further reference to the Tribunal.

5. MoEF&CC shall, particularly take care that the laudable social cause of 'providing Housing to the poor' does not get defeated by business, economic profitability with reference to 'ease of doing business', while particularly protecting the environment.

34. With the above order/directions, the Original Applications No. 677 of 2016, 01 of 2017, 07 of 2017, 55 of 2017 and 67 of 2017 stand disposed of, with no order as to costs.

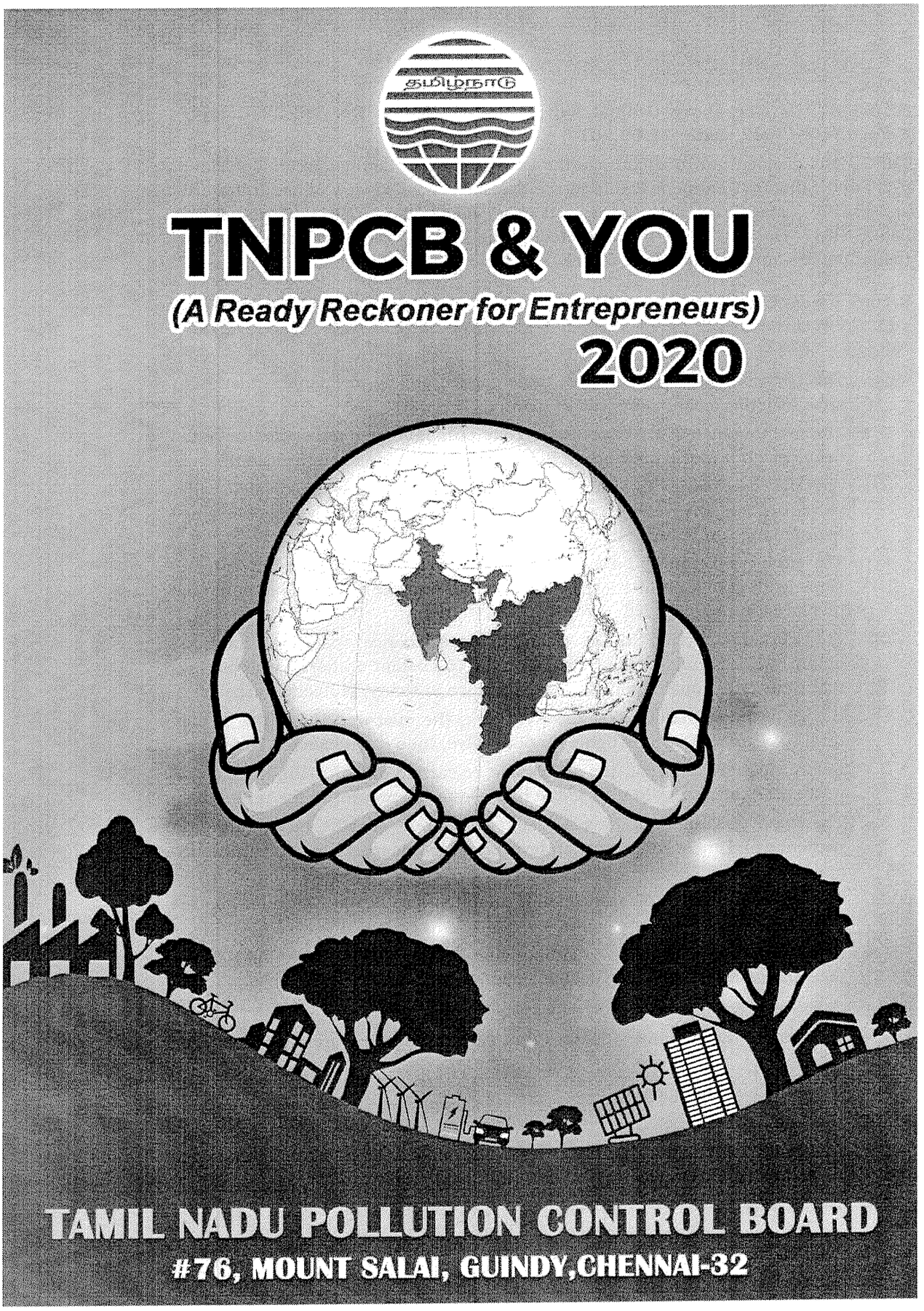
35. All the Miscellaneous Applications No. 148 of 2017, 03 of 2017, 445 of 2017, 879 of 2017 and 620 of 2017 have become infructuous and are accordingly disposed of.

SWATANTER KUMAR
CHAIRPERSON

DR. JAWAD RAHIM
JUDICIAL MEMBER

BIKRAM SINGH SAJWAN
EXPERT MEMBER

New Delhi
8th December, 2017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8.10.5 STP & ETP above Ground Lelvel (Source: Memo No. TNPCB/Compl/ F.No. 23405/2017, Date: 21.09.2017)

TNPCB has decided not to encourage the construction of Sewage Treatment Plant (STP) and Effluent Treatment Plants in the basement floor in view of health hazard and safety aspects. Hence the Board vide memo No. TNPCB/Compl/F.No. 23405/2017, Date: 21.09.2017 instructed all the DEEs/JCEE(M) not to encourage the industries for construction of STP/ETP in basement floor.

8.10.6 Precautions during cleaning / maintenance of the ETP components and their accessories. *(Source: Circular Memo No.TNPCB/ P&D/F.16032/2010/ Dated 21.3.2014)*

1. The cleaning of ETP tanks have to be carried out by mechanized methods such as jetter machine instead of manual.
2. The maintenance of ETP accessories like pumps, machineries etc., have to be carried out in the presence of Safety Officer taking all safety measures.
3. The ETP accessories like pumps, machineries etc., have to provided with valves & to ensure the valve is closed either side before carrying maintenance on pumps etc.,
4. The submersible pump have to be used in the ETP tanks seated at bottom slope leading to a pit of 1 feet by 1 feet depth and the submersible pump to be placed in the pit.
5. The workers involved in the cleaning/ maintenance operations have to obtain "work permit system" issued by the competent authority who posses required educational qualification, experience in safety/protection aspects.
6. Before cleaning/maintaining the ETP tank, the inlet and the outlet of the tank have to be closed by tightening the valve, thus isolate such ETP tank.
7. Before cleaning the tank, the air blow to be carried out by using the blower in the ETP tank so as to release the hazardous gas present in the tank.
8. Thereafter gas analyser have to be used to find out the hazardous gas presence and their concentration level so as to ensure 100% no hazardous gas is present.
9. The persons involved in the cleaning/maintenance of the ETP tank has to take the following safety measures.

- At all times, wear protective clothing and equipment that cover the hands, face and as much skin as possible, including;
- Safety goggles or glasses with side splash protection
- Dust mask that fits over the nose and mouth (to protect from aerosols like nose spray)
- Disposable rubber gloves
- Use Life jacket and oxygen cylinder with air respirators
- Dedicated work cloths, such as coveralls or raingear or old clothing that can be discarded afterwards
- Work boots.