

BEFORE THE NATIONAL GREEN TRIBUNAL,
SOUTHERN ZONE, CHENNAI

APPEAL NO. 05 OF 2022 [SZ]

A.K. Shaji

Appellant

M.O.E.F & CC. and others Respondents

Counter Affidavit filed by the Fifth Respondent

I, Anvar Sadath, Director of M/s Landmark Builders & Developers [India] Pvt. Ltd, having my office at Landmark World, NH 17 Bypass, Kozhikode, in Kerala State do hereby solemnly affirm and state as follows:

1. I am conversant with the facts of this case and I am filing this counter affidavit on behalf of the fifth respondent.
2. Wading through the voluminous and repetitive complaint, the primary point projected by the complainant appears to be that the Environmental Clearance No 44 of 2020 [A1] granted to us by the second respondent is liable to be cancelled because we had started construction of the building **before** getting the clearance.
3. Precisely two questions of fact and four questions of law arise for determination by this Tribunal in this matter: They are:

2 Questions of Fact

[a] Whether R5 had in fact commenced construction of any part of the building for which it applied for permission on 27.11.2018 by A2 before filing the application ?

[b] As a corollary of this query, it has to be considered whether the construction noticed by R3 during the site inspection in 2018 was part of the building for which the application was made or whether it was part of a building for which it had obtained building permit dated 26.10.2017 from the Olavanna Panchayat, that did not require any clearance from R2 ?

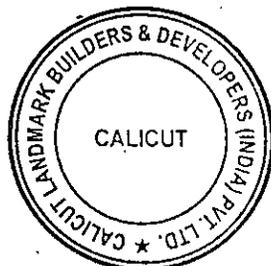
4 Questions of Law

[c] Whether any clearance under the 2016 EIA notification is required for proposed project of the fifth respondent ?

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ANVAR SADATH For Calicut Landmark Builders and Developers (India) Pvt. Ltd.

Director



[d] If environmental clearance is necessary, whether the grant of clearance by R2 will be vitiated by the violation of the rule that no construction shall be started before getting sanction from R2

[e] Assuming that there is a violation of the above rule, does proof of premature construction [before grant of clearance] compel cancellation of the clearance as an inevitable consequence, even if there is no possibility of environmental degradation and the application satisfies all the prescribed parameters?

[f] When the statute prescribes the specific penalty for the violation of any of its provisions, naming the authority to take cognisance of the violation, prescribing the procedure to be followed and the penalty, can any other adverse order not permitted by the Statute be passed against a party for the violation

Environmental clearance not required

4. The Supreme Court had occasion to consider the 2006 EIA notification. Elucidating and explaining that Notification, with specific reference to Items 8 [a] and [b], the Apex court has held that in the case of a Township, coming within the ambit of 8[b], which is qualitatively different from mere construction of buildings dealt with by 8[a], sanction from R2 is needed only if the proposed built up area is more than 1,50,000 SQ. M and the total area involved is more than 50 Hectares. Since the two cumulative conditions are not applicable in our case, the total built up area being only 81,589 sq.m with a total plot area of 33,084.50 sq.m. [less than 50 Hectares], our project under the heading Mixed Use Township Project [Vide A2], comes within the ambit of 8[b] and not 8[a] of the notification.
5. We raised this plea before R2. But R2, without assigning any cogent reasons, negated the contention, holding that the project comes under 8[a] and not 8[b]. Vide Para 9 & 10 of A1. We respectfully reiterate our argument before this Tribunal that our project comes under 8[b] and not 8[a] when it is viewed in the light of the Supreme Court ruling. This Tribunal is free to decide the question, irrespective of the view of R2. That we applied for sanction will not and cannot stand in the way of raising this defence which depends purely on the lawful interpretation of the notification.

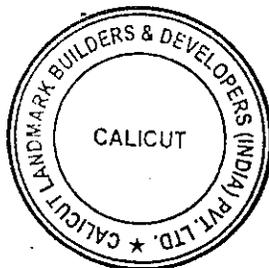
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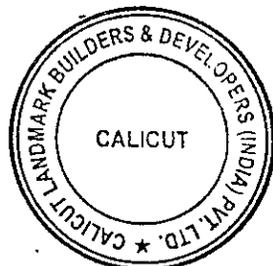
Legal consequence of violation

6. Accepting per argumentum that our project comes within the category of 8[a], and assuming that there is violation of the rule against starting of construction before sanction, the next question that arises is what are the legal consequences of such violation
7. The Jharkhand High Court has considered a case of such a "violation" and held that the proposal for environmental clearance cannot await action for violation. In the light of the principle espoused above, violation of the rule that no construction shall be commenced before clearance, can only invite appropriate action for the breach, as provided in the relevant law, and should not cast any shadow on the consideration of the application for the grant of clearance.
8. This is especially so when the 2006 notification itself does not specify the consequences of the violation. In other words, when there is no provision in the notification limiting the consideration of an application for sanction, till action for violation is completed, it is manifest that construction preceding clearance is not a ground for rejection of the application for clearance on merits. The inevitable inference is that the grant of clearance by R2 in this case cannot be invalidated even if the alleged violation is true, and this annihilates the very foundations of the present complaint.
9. In this context this respondent wishes to draw the attention of the Tribunal to the proposed new notification, which prescribes the procedure for the violation, [of the ban on pre-construction]. Even this new notification does not prohibit the sanctioning authority, from processing the application for sanction nor mandate rejection of the application on account of the aforementioned violation. It is crystal clear that the environmental clearance granted on the merits of the application is not vitiated by any violation of the pre construction rule.
10. In this context, the ruling of the Bombay High Court, where a construction lawful when commenced was "deemed" to be a violation of the 2006 EIA notification, and a stop memo was issued against the construction, pending consideration of the application for clearance the stop memo was quashed, indicating that the violation angle, is an independent wrong, which does not and should not impinge or impact on the sanction application.

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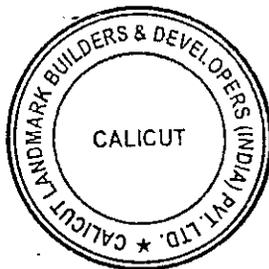
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Cancellation not warranted

11. It is trite law that when the statute creating a liability prescribes the forum for the adjudication of the liability, it is only that forum that can deal with it, and the jurisdiction of all other forums is ousted. The EIA notification being one issued under the special statute, that statute governs the mode of enforcement of the rights and liabilities there under.
12. Sections 15 to 19 of The Environment [Protection] Act, 1986 has detailed provisions to deal with violation of any order under that Act. Any complaint in that regard is to be filed only by the Central Government or its authorised nominee, as a criminal proceeding before a Magistrate, with fine and imprisonment as possible consequences. Neither SECA nor a busybody like the appellant have any locus standi to be the complainant. The jurisdictional entity that can entertain the complaint is the Court of the Magistrate, and the law applicable is the Criminal Procedure Code.
13. When this is the legal position, the complaint by SECA [R3] to R2 is misconceived and is in violation of the law. The action of R2 initially proposed to address the District Collector to take action against R5 is improper and illegal. The statutory authorities entrusted with powers affecting rights of citizens, [especially the constitutionally protected right to property] have to confine themselves to the prescribed perimeters.
14. The brash conduct of the appellant in approaching the National Green Tribunal, which is not the designated forum, to initiate action against this respondent, [directly or by routing it through R2], resulting in adverse action for alleged violation, by the issue of an order in this appeal for cancellation of A1 approval and for an enquiry by an extraneous committee are all beyond the perimeters of the law. This aspect also had been noticed, approved and applied by the Jharkhand High Court in the case, referred to supra.
15. It is significant that this ruling has inspired the MoEF & CC to make suitable amendments to the envisioned new 2020 EIA notification. The procedure now suggested is in tune with the statutory mandate, excluding all other forums except the criminal court from taking cognisance of the crime.
16. It is also illogical to infer that the clearance granted by R2 after consideration and compliance of all the parameters prescribed by the Statute, has to be cancelled merely

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ANVAR SAPATH

Director

because of the purely technical violation of the rule against preconstruction, when such violation has not resulted in any environmental damage.

Violation found to be untrue by R2

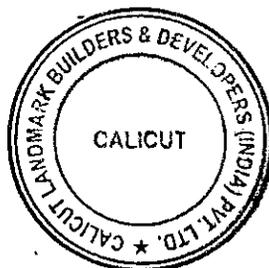
17. Long before the appellant poked his nose into this matter, R2 had information about the alleged violation of the rule by the proponent, [from the report of R3] as is evident from A5. It is therefore obvious that A1 clearance was granted by R2, taking into consideration the allegation regarding violation.
18. Conscious of the importance of the allegation, R2 conducted a detailed enquiry into the matter, on the factual and legal planes.
19. We had also produced evidence before R2 showing the grant of the permit by the Panchayat dated 26.10.2017 for the erection of a small building of 508.84 Sq M. That building being less than 12000 Sq M in area did not require any Environmental clearance. At the time of asking for this permit from the Panchayat there was no idea for us to build a township.
20. Unfortunately, when the two member team deputed by R3 SECA visited the site, they saw a part of the building covered by the Panchayat permit, with just one floor and unfinished roof, and misconstrued it as part of the building for which A2 application was filed.
21. The idea of expanding the intended building construction into a Township arose later. The 2006 EIA notification expressly encompasses "Expansion" of a building project and is not restricted to a new project alone. Expansion necessarily implies the existence of a structure before the filing of the application. If that structure was lawfully built and did not require environmental clearance, the fact that the proposed future expansion requires clearance, will not make the prior construction illegal. Nor can that lawful construction have any impact in any manner on the viability and validity of the proposed expansion.
22. A2 application for clearance from R2 was sought for a Township project captioned Trade Centre. We had submitted Form 1, Form 1A and the conceptual plan which contain the details of all the relevant parameters for assessing the environmental impact of the project.
23. The Trade Centre project for which sanction was sought by A2 application was intended as a Township, with a

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built up area of 81589 Sq M, comprising different types of buildings as shown below:

Residential Tower 1	B + G + 14 Floors
Residential Tower 2	B + G + 14 Floors
Studio Apartments	B + G + 14 Floors
Business Park	B + G + 10 Floors
Club House	G + 01 Floor
Hotel & Convention Centre	B + G + 08 Floors

24. In this application the 508.84 Sq M building was intended to be interlinked and integrated to the Hotel & Convention Centre part of the Township. The above facts were explained by me personally to the members of R2. The certificate from the engineer attached to the Panchayat was produced by me in support of my submission. R2 directly verified these facts from the Secretary of the Panchayat, who is a Government employee.
25. It was only after R2 was convinced on facts that we had not violated the rule against pre-construction before sanction of the proposed project, and after deep deliberations that the members of R2 negated the allegation of violation and issued the clearance. This will be clear from the minutes of R2.
26. I am also producing unimpeachable evidence before this Tribunal that no building had been constructed in the concerned land till March 2018. I am also producing irrefutable proof of the erection of the unfinished building being part of the permit issued by the Panchayat in March 2019. I say that the construction of the Trade Centre was started only after A1 clearance; that the work is continuing and is even now incomplete. By January 2022, only 44½% of the construction of the Township had been completed.

No data to differ from decision of R2

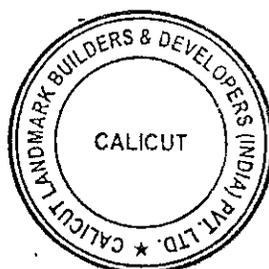
27. The appeal shows that the appellant is relying only on the objection raised by R3 about the alleged violation by us, which is a classic case of *ignoratio elenchi*. He has not placed any material before this Tribunal to support that allegation. When that very objection was raised by a responsible body like R3, and dealt with all seriousness by another expert body like R2 in detail, and that higher authority was convinced that there was no violation, [without production of any pertinent materials before this forum, that the conclusion arrived at by R2 is wrong, at least prima facie], the appellant cannot be allowed to

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Director



challenge the order of R2, by a mere diarrhea of vituperative words fuelled by his heated imagination.

28. The allegation before this Tribunal by the appellant that we had constructed a part of the new building proposed to be built as part of the Township, that the new building had been completed before the issue of A1, and that we have advertised in the media about the completion and "ready for occupation" of the building are all arrant nonsense.
29. The advertisements referred to in the appeal, which have not been exhibited, cannot and do not relate to the building for which A1 clearance was given. The appellant is attempting to mislead this tribunal by oblique references to some advertisements, without exhibiting them in this proceedings. I say that It is impossible for him to see the project site of the Trade Centre while travelling in a bus along the bypass road as claimed by him. What he might have seen is another completed project of ours called Landmark World consisting of eight towers

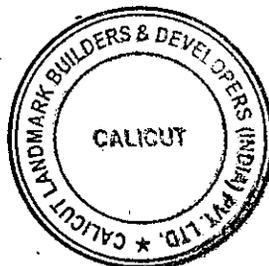
No defects in A2 on merits

30. No specific ground is raised in the appeal memorandum, as to how our application A2 is defective on merits. No explicit ground is raised pointing out how A1 order is violative of the law. Empirical assertions of vague violations are no substitute for concrete reasons, which alone can be countered. The allegations in Para DD at page 33 that "the property is a marshy and low lying land at one side and a hillock on the other end, that the hillock is removed, red earth removed from the plot has been transported outside and filled low lying areas, water channels and the water table have been seriously affected" are all baseless and false allegations, without any modicum of proof.
31. The appellant is guilty of suppression of material facts, because he has chosen to produce A2 alone as if it is the form submitted by us as our application. We had filed Form 1 and conceptual statement also as part of our application, which would show all the data required for objective evaluation of the project from the environmental perspective. That both R2 and R3 have scrupulously performed their duty is apparent from the nature of the conditions imposed in A1 clearance, which could have been determined only after detailed scrutiny of the application and the site.

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Certificate from MoEF & CC

32. The compliance report, filed by us pursuant to A1 has been checked directly by the MOEF & CC, in January 2022, and we are proud to say that there are no complaints whatever against our work.

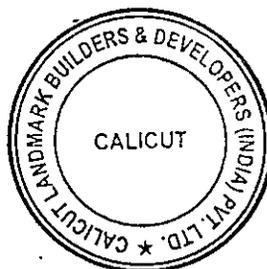
Mala Fides of the Appellant

33. The uncalled for reference in the appeal to the alleged "illegal influence" and "political pressure" and "misuse of money power" by this respondent is emphatically denied. The mala fides of the appeal is manifest from the implication that an unnamed religious leader is helping this respondent to violate the law.
34. The allegation in Ground H that we had submitted false/misleading information to R2 is emphatically denied. The appellant is guilty of deliberate vagueness in not specifying what is the illegality in the information given by us.
35. The irresponsible reference in Ground K of the appeal memo, that R5 "had obtained similar ECs in violation of the EIA Notification from R2 as ex post facto In one of the ESA villages of Western Ghats by manipulating the procedure" is actually an affront to this Tribunal. Because the veiled reference by the appellant is to the approval of two buildings constructed by us for two companies called Corpvale Projects [P] Ltd and Cliffvale Projects [P] Ltd in Kodanchery Panchayat as part of the development of Markaz Knowledge City, which was expressly approved by this Tribunal itself in its order on a similar fraudulent complaint by another wayfarer.
36. That was a case of a frivolous petition filed before this Tribunal by a devious professional to thwart our building activity in Kodanchery, by a similar bogey of environmental degradation, linking the same religious leader and accusing us of political clout and corrupting officials. The applicant managed to extract an ex parte injunction against us from continuing our constructions from this Tribunal. But after hearing us and studying the documents, this Tribunal vacated the injunction order issued against us, and finally dismissed the application.
37. Undaunted by the dismissal, a second attempt was made to obstruct our building activity by another application which was also dismissed by this Tribunal. In spite of vociferous arguments on behalf of a self styled activist akin to the appellant, this Tribunal analysed the facts and applied the correct law, resulting in the dismissal of both

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complaints on the ground that the buildings did not require any environmental clearance.

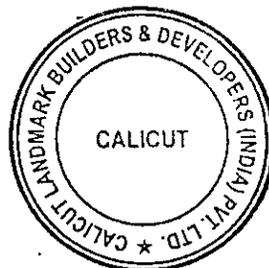
38. The reference in Ground M to a ruling of the Supreme Court is also a classic case of *ignoratio elenchi*, because that was a totally different case relating to mining leases, in respect of which there is a special provision for a "Cluster" which is conspicuously absent in the case of buildings. Similarly the ruling referred to in Ground N is the view of the Bombay court which is not in conformity with the correct law. The decision of the National Green Tribunal [Principal Bench] in Muthuraman, is limited to a case of proven and admitted violation of the prohibition against pre-construction, and that too arising under 8 [a], which has no application to the facts of this case.
39. It is unpardonable and uncharitable on the part of the appellant to attribute either inefficiency or incompetency [and even lack of integrity] on the part of the expert members of the second respondent in granting the clearance.
40. We suspect that the present appellant is the pawn in the hands of some vested interests who are inimical to us, and that this appeal is orchestrated by those busybodies, with the appellant as a willing puppet. This Tribunal has to take into consideration that no individual from the vicinity of the impugned construction and no one from the entire Kozhikode Corporation, have chosen to file any complaint to this forum against us.
41. It belies comprehension why a resident of Kannur from North Malabar which was a different geographical entity of the erstwhile Madras Presidency, [Kozhikode being part of South Malabar], with the perfunctory acquaintance of our area of operation, as a mere traveller on the road, developed an intense interest in the ecology of this area. The appellant is perhaps emulating Don Quixote or is mesmerised by Mammon in initiating this appeal, without any vestige of any genuine concern for the environment. This counter attack is justified by the appellant's unfounded accusation that we are marauders of environmental morality.
42. It is prayed that this frivolous appeal may be dismissed with exemplary costs awarded against the appellant for wasting invaluable tribunal time.

List of Documents

- R1. 26.10.2017 Notarised True copy of permit by Panchayat
R2 do Notarised true copy of plan attached to B1

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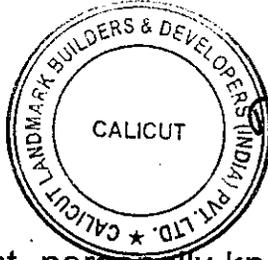


Director

- R3. 27.11.2018 Notarised copy of the plan of the proposed Expansion into a Township
- R4. Photograph of the construction existing at the time of site inspection by SEAC members
- R5. Report of Engineer attached to Panchayat
- R6. 23.02.2021 Report of R3
- R7. 20.01.2022 Certified compliance report by Addl Director Of MoEF & Commercial Courts Act, Bangalore
- R8. March 2017 Printout of Google Earth plan
- R9. Dec. 2018 do do
- R10. March 2019 do do
- R11. March 2019 do do with inset enlarged
- R12. 21.04.2015 Notarised copy of the order of the N G T in O A 01 of 2015
- R13. Notarised copy of the order of the N G T in O A of

I, Anvar Sadath, the deponent do hereby declare that the facts stated above are true to the best of my knowledge, information and belief.

Anvar Sadath



Dated 14th February 2022

ANVAR SADATH For Calicut Landmark Builders and Developers (India) Pvt. Ltd.

Deponent

Director

Literate deponent, personally known to me, solemnly affirmed and signed the above affidavit in my presence at Calicut, the contents of the affidavit having been read over and explained to him/her in the vernacular language.

Dated 14th February 2022

B G Bhaskar

B G Bhaskar. Advocate. Calicut 2