BEFORE THE HON'BLE NATIONAL GREEN TRIBUNAL

SOUTHERN ZONE BENCH AT CHENNAI

ORIGINAL APPLICATION NO. 72 OF 2022 (SZ)

IN THE MATTER OF:

MEENAVA THANTHAI K.R. SELVARAJ
KUMAR MEENAVAR NALA SANGAM …APPLICANT

VERSUS

UNION OF INDIA …RESPONDENT

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THROUGH

RITWICK DUTTA SAURABH SHARMA G.STANLY HEBZON SINGH
ADVOCATES
N-73, LOWER GROUND FLOOR,
GREATER KAILASH –I, NEW DELHI
litigation.life@gmail.com
(M) 9940178702

PLACE: CHENNAI/ NEW DELHI

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MOST RESPECTFULLY SHOWETH:-

1. That the abovementioned Original Applicationhas been filed raising "substantial questions relating to the environment" under Section 14 read with Section 2 (m) of the National Green Tribunal Act, 2010, arising out of and challenging the issuance of Office Memorandum ('impugned OM) dated 17th January 2022, by Respondent. The 'impugned OM' seeks to provide for a system of star rating for State Environment Impact Assessment Authority (SEIAA) giving greater weightage for clearing projects with lesser or no due diligence.

2. That the present Rejoinder may be treated as part and parcel of the Original Application and the contents of the Original Application are re-iterated and not been repeated herein for the sake of brevity.

3. That the Respondenthas filed it'sCounter Affidavit in the abovementionedOriginal Application which need to be Rejoined on the issues which are as mentioned in the Counter Affidavit by the Respondent:-

i. No dispute capable of adjudication under Section 14 of the NGT Act, 2010 has been raised in the instant matter before Hon'ble Tribunal as the matter is purely administrative in nature.

ii. A bare perusal of the terms of Section 14 of the NGT Act, 2010 would show that the only power conferred therein is to settle disputes arising out of substantial question relating to environment.

iii. The Hon'ble Tribunal vide order dated 13.09.2022 observed that the preliminary issue under adjudication is " *Whether an office Memorandum which is issued purely for administrative reasons can be put to challenge before this Tribunal."*

iv. EIA Notification, 2006 already provides time-lines for the completion of EC processes and the ratings criteria does not seek to change any process or time-line as already provided in the EIA Notification, 2006.

v. The OM has been issued by the Ministry to evaluate the performance of SEIAA through a star-rating system, based on efficiency and timelines in grant of EC, thereby encouraging efficiency in disposal of pending matters and at the same time promoting transparency and accountability in the functioning of SEIAA.

vi. The Impugned OM has been issued strictly, as per provisions of the EIA Notification, 2006 and that the rating system of SEIAA introduced vide impugned OM is a dynamic process based on it's performance.

vii. The time taken by the Project Proponent for furnishing reply of EDS/ADS is not counted towards delay in disposing of matters by SEIAA/SEAC. SEIAA/SEAC has complete freedom to carry out all necessary due diligence before taking decision on project.

viii. The EIA Reports are prepared as per prescribed ToRs and projects are appraised accordingly. Therefore, there is no question of EIA report quality being compromised due to ranking system, rather it would encourage the PP /consultants to improve the EIA quality fearing the EDS/ADS or return of proposals.

ix. The States have also highlighted that delay in the EC process has caused unnecessary hurdles in the upliftment and development of the underdeveloped areas.

x. The introduction of complaints redressed by SEIAA has been incorporated as a criterion to increase the accountability of the Government Agency towards the Project Proponents

xi. The EIA Notification, 2006 clearly provides that appraisal of projects which are not required to undergo public consultation shall be based on Form I/IA, any other relevant validated information available and the site visit wherever the same is considered necessary by EAC/SEAC. In view of the above, this criterion has been added to discourage unnecessary site visits.

4. **In Rejoinder to contention Nos.(i) and (ii) of the Respondent** it is denied that **"**No dispute capable of adjudication under Section 14 of the NGT Act, 2010 has been raised in the instant matter before Hon'ble Tribunal as the matter is purely administrative in nature" or that "A bare perusal of the terms of Section 14 of the NGT Act, 2010 would show that the only power conferred therein is to settle disputes arising out of substantial question relating to environment."

5. The abovementioned Original Application has been filed raising "substantial questions relating to the environment" under Section 14 read with Section 2 (m) of the National Green Tribunal Act, 2010, arising out of and challenging the issuance of impugned Office Memorandum dated 17th January 2022, by Respondent which ,inter-alia, seeks to:-

i. Provide for a system of star rating for State Environment Impact Assessment Authority (SEIAA) giving greater weightage for clearing projects with lesser or no due diligence.

ii. The 'Impugned OM' being one sided and made only with the intention of 'Ease of doing Business' and was against the principles for which EIA Notification, 2006 and Section 3 (3) of the Environment (Protection) Act, 1986 which empowered the Central Government to establish SEIAA to check all forms of environmental pollution and to tackle specific environmental issues.

6. It is stated thatthe NGT has been vested with Original, Appellate and Special jurisdiction in regard to civil issues of of Environmental matters. A mere reading of Sections 14 to 17 of the NGT Act shows that the legislature in its wisdom worded the provisions relating to the jurisdiction of the Hon'bleNGT very widely, and with a clear intent to provide the Hon'bleNGT with jurisdiction of a very wide magnitude. Upon reading the various provisions of the NGT Act cumulatively and in light of the scheme of the NGT 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 NGT Act, 2010 which curtails the jurisdiction of the Hon'bleNGT 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 the Hon'bleNGTis 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 NGT and hardly any argument can be raised that the documents like Office Memoranda would not be subject to judicial scrutiny before the NGT.

7. That the Hon'bleSupreme Court in it'sjudgment titled ***Municipal Corporation of Greater Mumbai v. Ankita Sinha, 2021 SCC OnLine SC897***wherein power of the Hon'bleNGT for taking *suo-moto*cognizance of dispute has beenrecognized, observed that environmental matters stand on a different footing and in brief, the Hon'ble Supreme Court has said as follows with respect to wide range of power and jurisdiction vested in and exercised by the Hon'bleNGT. It says:

- NGT was conceived as a complimentary specialized forum to deal with all environmental multidisciplinary issues, both asoriginal and also as an appellate authority, which complex issues were hitherto dealt with by High Courts and SupremeCourt.
- NGT was intended to be the competent forum for dealing with environmental issues instead of those being canvassed underthe writ jurisdiction of Courts. It was explicitly noted that creation of NGT would allow Supreme Court and High Courts toavoid intervening under their inherent jurisdiction when an alternative efficacious remedy would become available before thespecialized forum.
- Section 14(1) of NGT Act, 2010 deals with jurisdiction, and the jurisdictional provision conspicuously omits to specify that an application is necessary to trigger NGT into action. In situations

where the three prerequisites of Section 14(1) i.e., Civil cases; involvement of substantial question of environment; and implementation of the enactments in Schedule I are satisfied, the jurisdiction and power of NGT gets activated. On these material aspects, NGT is not required to be triggered into action by an aggrieved or interested party alone. It would therefore be logical to conclude that the exercise of power by NGT is not circumscribed by receipt of application.

- Section 14(1) exists as a standalone feature, not constricted by the operational mechanism of the subsequent subsections. The sub-Section (2) of Section 14 functions as a corollary and comes into play when a dispute arises from the questions referred to in Section 14(1). Likewise sub-Section (3) thereafter, refers to the period of limitation concerning applications, when they are addressed to the NGT. Where adjudication is involved, the adjudicatory function under Section 14(2) comes into play.
- When it is a case warranting NGT's intervention, or may be a situation calling for decisions to meet certain exigencies, the functions under Section 14(1) can be undertaken and those may not involve any formal application or an adjudicatory process. However, the later provisions may not work in similar fashion. Therefore, care must be taken to ensure unrestricteddischarge of the responsibilities under Section 14(1) and that wide arena of NGT's functioning.
- In *Bhopal Gas PeedithMahilaUdyogSangathan*v. *Union of India*, (2012) 8 SCC 326, Court mandated transfer of all casesconcerning the statutes mentioned in Schedule I of NGT Act to the specialized forum as otherwise there can be conflicts with the High Courts. Notably, some of those cases were originally registered *suo-moto*by the Courts.

- The mandate and jurisdiction of NGT is conceived to be of the widest amplitude and it is in the nature of a *sui generis* forum.
- Unlike Civil Courts which cannot travel beyond the relief sought by the parties, NGT is conferred with power of moulding anyrelief. The provisions show that NGT is vested with the widest power to appropriate relief as may be justified in the facts andcircumstances of the case, even though such relief may not be specifically prayed for by the parties.
- Myriad roles are to be discharged by NGT, as was encapsulated in the Law Commission Report, the Preamble and theStatement of Objects and Reasons.
- Parliament intended to confer wide jurisdiction on NGT so that it can deal with the multitude of issues relating to theenvironment which were being dealt with by High Courts under Article 226 of the Constitution or by Supreme Court underArticle 32 of the Constitution. viii. The activities of NGT are not only geared towards the protection of environment but also toensure that the developments do not cause serious and irreparable damage to ecology and the environment.
- Concept of *lis*, would obviously be beyond the usual understanding in civil cases where there is a party (whether private orgovernment) disturbing the environment and the other one (could be an individual, a body or the government itself), whohas concern for the protection of environment.
- NGT is not just an adjudicatory body but has to perform wider functions in the nature of prevention, remedy and
- amelioration.
- As long as the sphere of action is not breached, NGT's powers must be understood to be of the widest amplitude.

- In *MantriTechzone (P) Ltd.* v. *Forward Foundation*, (2019) 18 SCC 494, Court recognized that NGT is set up under the constitutional mandate in Entry 13 of List I in Schedule VII to enforce Article 21 with respect to the environment and in thiscontext, Tribunal has special jurisdiction for enforcement of environmental rights.
- Referring to *Andhra Pradesh Pollution Control Board* v. *Prof. M.V. Nayudu (Retd.)*, (1999) 2 SCC 718, Court said that role ofNGT was not simply adjudicatory in the nature of a *lis*but to perform equally vital roles which are preventative, ameliorativeor remedial in nature. The functional capacity of the NGT was intended to leverage wide powers to do full justice in itsenvironmental mandate.
- Statutory Tribunals were categorized to fall under four subheads; Administrative Tribunals under Article 323A; Tribunals under Article 323B; Specialized sector Tribunals and most prominently; Tribunals to safeguard rights under Article 21. As already noted, the duties of NGT brings it within the ambit of the fourth category, creating a compelling proposition for wielding much broader powers as delineated by the statute.
- Referring to ***State of Meghalaya* v. *All Dimasa Students Union*, (2019) 8 SCC 177**, Court said that reflecting on the expanded role of NGT unlike other Tribunals, this Court so appositely observed that the forum has a duty to do justice whileexercising "*wide range of jurisdiction*" and the "*wide range of powers*", given to it by the statute.
- The other pertinent provisions relating to, *inter-alia*, jurisdiction, interim orders, payment of compensation and review, donot require any application or appeal, for NGT to pass necessary orders. These crucial powers are expected to be exercised byNGT, would logically suggest that the

action/orders of NGT need not always involve any application or appeal. To holdotherwise would not only reduce its effectiveness but would also defeat the legal mandate given to the forum.

8. That in ***Vanashakti&Anr. vs. Union of India &Ors., PIL No. 28 of 2021***it has beensettled by the Hon'ble Bombay High Court that the NGT's jurisdiction to deal with environmental issues is very wide.

9. Therefore, in situations where the three prerequisites of Section 14(1) i.e., Civil cases; involvement of substantial question of environment; and implementation of the enactments in Schedule I are satisfied, the jurisdiction and power of NGT gets activated.The present case pertains to implementation of the Environmental (Protection) Act, 1986 and EIA Notification, 2006 thus coming under the purview of implementation of Schedule I enactment.

10. That **in Rejoinder to Contention Nos.(iii) to (xi) of the Respondent** it is stated that the impugned Office Memoranda is an administrative order and would be subject to merit review by the Hon'ble NGT and such a situation would not alter even if it was in exercise of Executive Power of the Union/State. It is a well settled law that an executive action cannot bypass statutory provision or override a statute. An executive action cannot run contrary to statute and attempt to achieve what was never envisaged by the statute itself.

11. That EIA Notification,2006 was enacted in exercise of the powers conferred by sub-section (1) and clause (v) of sub-section (2) of section 3 of the Environment (Protection) Act, 1986, read with clause (d) of sub-rule (3) of rule 5 of the Environment (Protection)

Rules, 1986 and in supersession of the notification number S.O. 60 (E) dated the 27th January, 1994.

12. That para 8 of the EIA Notification,2006 mentions the provisions with respect to Appraisal of the projects by EAC/SEAC.The EIA Notification, 2006 in it's appendix V prescribes procedure for appraisal. It provides for 30 days for scrutiny of final EIA report and other relevant documents submitted by the Project Proponent from the date of it's receipt by the concerned regulatory authority. This final EIA Report has to be strictly with reference to the ToR. The inadequacies noted have to be communicated to the members of EAC/SEAC with final EIA and other relevant documents. Every application placed before EAC/SEAC and it's appraisal has to be completed within 60 days of receipt of documents. So, this itself makes for a period of 90 days .The "impugned OM" on the other hand provides for 2 marks if the approval is granted in less than 80 days and 0 marks if approval is granted in more than 120 days. This itself shows that the timeline given in the "Impugned OM" even in case of projects which are complete in all respects, which have no inadequacies cannot always be appraised within 80 days. The SEIAA in order to rush through the EC granting mechanism of the "Impugned OM" would provide EC to the projects in utmost haste without proper appraisal, sidelining the shortcomings and inadequacies, with only 'Ease of Business' in mind thereby defeating the very purpose and object of EIA Notification, 2006 i.e to:-

(i) Assess the impacts of anthropogenic activities proposed by a project.

(ii) To ensure that environmental considerations are explicitly addressed, and

(iii) The EIA should aim at enhancing sustainable development

13. The 'Impugned OM' incentivizes the SEIAAs through this star rating system. According to the 'Impugned OM' on a scale of 7, a SEIAA gets 2 points for granting a clearance in less than 80 days, 1 point for clearing the project between 80 and 105 days, 0.5 points are granted if the clearance is granted between 105 and 120 days and Zero marks are given to a SEIAA if it takes more than 120 days for granting Environmental Clearance. SEIAAs can get maximum up to one point each for six of the criteria and up to two points for the remaining one. A score of seven or more is rated five star and the SEIAAs will be rated every six months.It is stated that the said criteria of star rating provides greater weightage for projects where due diligence is less. The project would be passed irrespective of various shortcomings or environmental non-compliances in it by SEIAA to get maximum marks. It is stated that a quicker decision-making might be beneficial but SEIAA's hardly have experts who are independent and are environment specialists. Such a rating system stands to reduce the SEIAA to a 'rubber stamps authority' where their performance will be judged by the speed with which they clear project and facilitate environmental degradation.

14. The impugned OM focusses only on giving marks when a timeline has to be followed by SEIAA for granted EC to the project whereas there is no marking proposed for the quality of Appraisal in terms of Environmental Impact of proposed project.

15. That it is stated that when the EIA Notification, 2006 provides for a timeline and there is no rhyme or reason for the impugned OM to come up with another Timeline just for the 'Ease of Business'. The Impugned OM is running contrary to the EIA Notification and the timeline given in it for completing various processes for carrying out impact assessment of a Project. It is not supplementing the EIA process but infact supplanting the same by giving it's own timeline over and above the timelines given in EIA Notification.

16. That it is stated that an Office Memorandum issued by MoEF&CC can neither run contrary to the provisions of the EIA Notification, 2006, nor can the Office Memorandum supplant the EIA Notification, 2006. It is a well settled law that an executive action cannot bypass statutory provision or override a statute. An executive action cannot run contrary to statute and attempt to achieve what was never envisaged by the statute itself as held by the Hon'ble Supreme Court in a ***Rajasthan State Industrial Development & Investment Corpn. v. Subhash Sindhi Coop. Housing Society***, reported in **(2013) 5 SCC 427**.

17. That it is stated that it is well settled that OM's cannot bypass the statutory procedure as provided in the EIA Notification, 2006. In the Judgement dated 07.07.2015 passed by this Hon'ble Tribunal in ***S.P.Muthuraman vs. Union of India, Original Application no. 37 of 2015 and Original application no. 213 of 2014*** it has been categorically held that an Office Memorandum cannot supplant the EIA Notification of 2006 but only be supplemental to it :-

> *"80. The impugned orders have been titled as 'Office Memorandum' and content of the orders captioned as 'guidelines' but in fact, are Office Memoranda which*

directly vary the substantive law in force. This has been adopted by the Ministry as a via-media to bypass the statutory requirements of law or for truncating the prescribed process of environmental protection, in terms of Notification of 2006. These Office Memoranda not only substantially amend or alter its application but even frustrate the requirements of the existing law.The impugned Office Memoranda vest in the authorities an unguided and unfettered discretion, both in regard to processing of application and in condonation of violation already committed by the Project Proponent. It is a very pertinent defect in terms of administrative law jurisprudence. An unguided and unreasonable discretion is bound to result in arbitrary exercise of powers. The MoEF being the controlling Ministry, all the expert bodies under it would be duty bound to carry out its directives even if it is unreasonable and unjustifiable. The expression 'serious violations', which will entitle the Ministry to outrightly reject an application, has neither been defined nor explained in the Office Memoranda. It is left in the absolute discretion of the Ministry as to which cases would be permitted as cases of serious violations and exclude others. The foundation of these Office Memoranda being that projects which are already under way and even have substantially progressed, can file an application for grant of Environmental Clearance, which has to be considered in accordance with these Office Memoranda, is an approach which is completely prohibited in terms of the Notification of 2006. The reservation of such unguided and absolute right by the Ministry in itself would necessarily have an element of discrimination and arbitrariness..

……

83. The Office Memoranda have been issued without proper application of mind, where casualty is the Notification of 2006 and the environment. The authorities have not even ventured to examine that these Office Memoranda which allegedly take recourse to the Notification of 2006 are incapable of complying with the procedure of Screening, Scoping, Public Consultation and Appraisal even substantially. For instance, site selection itself is a part of this process and if the construction has already been completed substantially or otherwise, this criteria and other relevant considerations would be rendered irrelevant. Similarly the purpose of public hearing is to hear objections of the public at large in relation to all facets of the proposed project including site selection, its impact on environment, on their way of life and what directions are required to be issued to protect the

environment and adjacent inhabitation or agricultural activities if any before any activity of the project is undertaken. All these requirements would be rendered otiose and irrelevant. Thus, even if the two most important aspects of the Notification of 2006 would not be complied with still the Office Memoranda would contemplate issuance of Environmental Clearance to these projects. This brings to the surface that the Ministry has not exercised its jurisdiction, even if vested in it, in accordance with law. The above are the few patent and serious infirmities in the Office Memoranda. An attempt is made to save them and their legality under the shelter of exercise of executive power. Certainly, the executive power of the Government is very wide. We have already dealt with the executive power by the State at some length above. Even if these instructions or orders are deemed to have been issued in exercise of executive power, even then, they have to be supplemental to and not to supplant, the law."

It was also held that the provisions of the EIA Notification, 2006 are mandatory in nature:-

"120. We are unable to find any merit in the contention raised on behalf of the Project Proponent that the provisions of the Notification of 2006 are procedural. In our considered opinion, the provisions of this enactment are substantive and mandatory. These provisions do not admit of any substantial non-compliance or vest discretion with the authorities in relation to procedure prescribed under the Notification. They are couched in a language that is purely mandatory in character and is founded on the Precautionary Principle which is one of the statutory principles to be applied by the Tribunal in terms of Section 20 of the Act of 2010. If compliance is not made to the provisions of these enactments, it will totally frustrate the Precautionary Principle and thus the precautionary principle can adversely impact the environment, protection of which is the sole object of the Act of 1986.

Thus, in view of the above discussion, it is clear that the requirements of the Notification of 2006 are mandatory in character. Their default or non-compliance is liable to be punished. The intention of the Legislature is to protect the environment for which words of specific nature like 'prior' and 'shall' have been used. The impact of non-compliance of these provisions would be of serious consequence, not

only on environment but upon the society at large. All these enactments are unambiguous and framed in no uncertain terms and this conveys that projects commenced without obtaining Environmental Clearance would invite the penalty postulated under the Act of 1986. Thus, we have no hesitation in holding that the provisions of Notification 2006 are mandatory and not procedural simplicitor."

18. That it is stated that in view of the Judgment of this Hon'ble Tribunal in ***S.P.Muthuraman vs. Union of India*** the Official Memorandum dated 17.01.2022 cannot override over Statutory provision and a process as provided in the EIA Notification, 2006 and therefore, is illegal and non-est.

19. In ***Alembic Pharmaceuticals Ltd. v. RohitPrajapati, (2020) 17 SCC 157***the Hon'ble Supreme Court has heldthatthe administrative circular is not a measure protected by Section 3. Hence there was no jurisdictional bar on NGT to enquire into its legitimacy or vires. Moreover, the administrative circular is contrary to the EIA Notification 1994 which has a statutory character. The circular is unsustainable in law. The relevant paragraph of the judgment are as follows:-

> "20. Section 3(1) is an enabling provision for the Central Government to undertake all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution. This limb of the submission of the Additional Solicitor General is crucial to the issue as to whether NGT has exceeded its jurisdiction since the decision in *Sterlite* [*T.N. Pollution Control Board* v. *Sterlite Industries (India) Ltd.*, (2019) 19 SCC 479] holds that NGT, while exercising its appellate jurisdiction, "cannot strike down rules or regulations made *under this Act*". In the present case, to demonstrate that NGT did not have the jurisdiction to strike down the Circular dated 14-5-2002, it was urged that the circular was issued by the MoEF pursuant to its powers under Section 3 of the Environment

(Protection) Act, 1986. There is an inherent difficulty in accepting the submission. Before this Court, the Union of India has not pleaded the case that the Circular dated 14-5-2002 is a measure which is traceable to the provisions of Section 3. On the contrary, in its pleadings the Union of India construed it as a "purely administrative decision". Ground (*iii*) in Para 3 of the memo of appeal states the position of the Union Government:

> "Because the Hon'ble Tribunal failed to appreciate that after the EIA Notification 1994 the opportunity to seek ex post facto environmental clearance was given to industries in background of far-reaching impact in terms of direct loss of livelihood of the employees working in the units which also supply inputs to other units and their indirect employment. *It was submitted to the Hon'ble High Court of Gujarat that issuance of Circular dated 14-5-2002, based on which environmental clearance was given, was purely an administrative decision before taking stringent action*."
>
> (emphasis supplied)

21. The omission in the appeal to make any attempt to sustain the Circular dated 14-5-2002 with reference to the provisions of Section 3 of the Environment (Protection) Act, 1986 is significant. For an action of the Central Government to be treated as a measure referable to Section 3 it must satisfy the statutory requirement of being necessary or expedient "for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environment pollution". The Circular dated 14-5-2002 in fact does quite the contrary. It purported to allow an extension of time for industrial units to comply with the requirement of an EC. The EIA Notification dated 27-1-1994 mandated that an EC has to be obtained before embarking on a new project or expanding or modernising an existing one. The EIA Notification of 1994 has been issued under the provisions of the Environment (Protection) Act, 1986 and the Environment Protection Rules, 1986, with the object of imposing restrictions and prohibitions on setting up of new projects or expansion or modernisation of existing project. The measures are based on the precautionary principle and aim to protect the interests of the environment. The Circular dated 14-5-2002 allowed defaulting industrial units which had commenced activities without an EC to cure the default by an ex post facto clearance. Being an administrative

decision, it is beyond the scope of Section 3 and cannot be said to be a measure for the purpose of protecting and improving the quality of the environment. The circular notes that there were defaulting units which had failed to comply with the requirement of obtaining an EC as mandated. The circular provided for an extension of time and inexplicably introduced the notion of an ex post facto clearance. In effect, it impacted the obligation of the industrial units to be in compliance with the law. The concept of ex post facto clearance is fundamentally at odds with the EIA Notification dated 27-1-1994. The EIA Notification of 1994 contained a stipulation that any expansion or modernisation of an activity or setting up of a new project listed in Schedule I "shall not be undertaken in any part of India unless it has been accorded environmental clearance". The language of the notification is as clear as it can be to indicate that the requirement is of a prior EC. A mandatory provision requires complete compliance. The words "shall not be undertaken" read in conjunction with the expression "unless" can only have one meaning : before undertaking a new project or expanding or modernising an existing one, an EC must be obtained. When the EIA Notification of 1994 mandates a prior EC, it proscribes a post activity approval or an ex post facto permission. What is sought to be achieved by the administrative Circular dated 14-5-2002 is contrary to the statutory Notification dated 27-1-1994. The Circular dated 14-5-2002 does not stipulate how the detrimental effects on the environment would be taken care of if the project proponent is granted an ex post facto EC. The EIA Notification of 1994 mandates a prior environmental clearance. The circular substantially amends or alters the application of the EIA Notification of 1994. The mandate of not commencing a new project or expanding or modernising an existing one unless an environmental clearance has been obtained stands diluted and is rendered ineffective by the issuance of the administrative Circular dated 14-5-2002. This discussion leads us to the conclusion that the administrative circular is not a measure protected by Section 3. Hence there was no jurisdictional bar on NGT to enquire into its legitimacy or vires. Moreover, the administrative circular is contrary to the EIA Notification 1994 which has a statutory character. The circular is unsustainable in law."

20. In ***Hussein Ghadially v. State of Gujarat, (2014) 8 SCC 425*** the Hon'ble Supreme Court hasemphasized thatif the statute

provides for a thing to be done in a particular manner, then it must be done in that manner alone or not at all. The Hon'ble Supreme Court held that:-

> "21.3….if the statute provides for a thing to be done in a particular manner, then it must be done in that manner alone. All other modes or methods of doing that thing must be deemed to have been prohibited. That proposition of law first was stated in *Taylor* v. *Taylor* [(1875) LR 1 Ch D 426] and adopted later by the Judicial Committee in *Nazir Ahmad* v. *King Emperor* [(1935-36) 63 IA 372 : (1936) 44 LW 583 : AIR 1936 PC 253] and by this Court in a series of judgments including those in *Rao Shiv Bahadur Singh* v. *State of Vindhya Pradesh* [AIR 1954 SC 322 : 1954 Cri LJ 910] , *State of U.P.* v. *Singhara Singh* [AIR 1964 SC 358 : (1964) 1 Cri LJ 263 (2)] , *Chandra Kishore Jha* v. *Mahavir Prasad* [(1999) 8 SCC 266] , *Dhanajaya Reddy* v. *State of Karnataka* [(2001) 4 SCC 9 : 2001 SCC (Cri) 652] and *Gujarat UrjaVikas Nigam Ltd.* v. *Essar Power Ltd.* [(2008) 4 SCC 755]…"

However, the said principle of law is not at all being followed in the present case.

21. Under the 2006 Notification, EC process is based on the information provided by the applicant in Form 1. That the information provided in Form 1 is crucial can be borne from the following circumstances:

i. EAC or SEAC, as the case may be, formulates comprehensive ToRs on the basis of the information furnished in Form 1 which addresses all possible environmental concerns. It is on the basis of ToR, that further studies and the EIA are carried out on the impact of the proposed project on the environment.

ii. At the appraisal stage, the regulatory authority examines the documents submitted by the applicant "strictly with

reference to ToR" and communicates any inadequacy to EAC or SEAC.

iii. Category B2 projects, which do not require scoping, are evaluated by SEAC on the basis of the information furnished by the applicant in Form 1 alone.

iv. The appraisal of all projects or activities which are not required to undergo public consultation, or submit an EIA report, shall be carried out on the basis of the prescribed application Form I and Form I-A as applicable.

v. An application for extension of the validity of EC for certain projects is to be made by submitting a revised Form I within the validity period.

22. The 'Impugned OM' incentivizes SEIAA for granting of EC in haste and without any transparency. It undermines the importance of varied data to be collected for filling up and submission of Form I. The 'Impugned OM' is based on the presumption that all information given by the Project Proponent in Form I is 'Gospel truth'. The 'Impugned OM' is also arbitrary as it does not provide any mechanism to cross check and verify the data given in Form I. In case a SEAC takes time to cross check the information it consumes time and consequently the Incentive Points too. Therefore, the focus of the SEAC/SEIAA would be more on clearing the project in haste to get incentive marks rather than focus on data credibility and cross verify the same. The very fact that in case of any data credibility issue in Fom I it is within the mandate of EAC/SEAC to do a due diligence in EAC /SEAC meeting an seek clarifications from Project Proponent. The Incentivisation system as laid down in the 'Impugned OM' would lead to an situation where any discrepancy or short coming in data given in Form I would be

avoided for the purpose of 'Ease of Business' and environmental concerns would be left out of focus for the cases which require strict implementation of EIA Notification and it's process.

23. That it is contended by the Respondent that *"The EIA Notification, 2006 clearly provides that appraisal of projects which are not required to undergo public consultation shall be based on Form I/IA, any other relevant validated information available and the site visit wherever the same is considered necessary by EAC/SEAC. In view of the above, this criterion has been added to discourage unnecessary site visits."*

24. That it is stated thatanother important aspect of scoping is conducting of field visit by a sub-group of members of EAC/SEAC or other designated authorities, if considered necessary. The 'Impugned OM'' gives 1 point if percentage of cases placed before SEIAA for which site visits were conducted were less than 10%, 0.5% marks if the cases placed before SEIAA are between 10% to 20% and no marks if the project is more than 20%. The 'Impugned OM' fails to consider that site visits are critical to understand the potential environmental impact over a local area where the project is coming up.

25. The SEIAA does not have any repository of data of a Project. The Project Proponent itself does a self assessment and files it's Form I. In order to do a ground truthing of the details given in Form I and before formulation of ToR the EAC/SEAC may conduct a field/site visit. It is only after such field visit that ToR or additional ToR's are formulated. A field visit helps in calculating the risks and the benefits of industrial projects vis-à-vis their environmental impact. A site visit also helps in deciding the alternative site during

scoping exercise and any compromise on site related issue would put the environment in serious jeopardy. A field visit also can be carried out at the stage of Appraisal of the Project. Therefore, field visits and environmental concerns addressed by them may be hampered for speedy clearances and giving incentives to the SEIAA and dissuading it to conduct field visit is arbitrary and unreasonable.

26. That as per para 12 of the Counter Affidavit " *The time taken by the Project Proponent for furnishing reply of EDS/ADS is not counted towards delay in disposing of matters by SEIAA/SEAC. SEIAA/SEAC has complete freedom to carry out all necessary due diligence before taking decision on project".* However, the above contention of the Respondent is not mentioned in the OM therefore, this contention needs to be added / incorporatedby stating that the prescribed timeline will be considered only after acceptance of complete proposal addressing the EDS/ADS by the Project Proponent.

27. That it is contended by the Respondent that the States have also highlighted that delay in the EC process has caused unnecessary hurdles in the upliftment and development of the underdeveloped areas. This contention is a very generic one. No details have been provided by the Respondent on this issue as to which are the States who have highlighted that delay in the EC process has caused unnecessary hurdles in the upliftment and development of the underdeveloped areas.

28. That it is contended by the Respondent that "*the introduction of complaints redressed by SEIAA has been incorporated as a criterion to increase the accountability of the Government Agency*

towards the Project Proponents". However, the above contention of the Respondent is not mentioned in the OM therefore, this contention needs to be added / incorporated in the OM.

29. That the 'Impugned OM' is manifested with wednesbury unreasonableness as it has ignored the basic tenets of Environmental Law. The 'Impugned OM' is one sided and made only with the intention of 'Ease of Business' and has ignored the principles for which EIA Notification, 2006 and mandate of Section 3 (3) of the Environment (Protection) Act, 1986 which empowers the Central Government to establish SEIAA to check all forms of environmental pollution and to tackle specific environmental issues.

30. That the impugned OM directly varies the substantive law in force i.e the EIA Notification. This OM has been promulgated by the MoEF&CCas a via-media to bypass the statutory requirements of law or for truncating the prescribed process of environmental protection, in terms of Notification of 2006. The OM not only substantially amends or alters its application but even frustrate the requirements of the existing law. The impugned OM vest in the authorities an unguided and unfettered discretion, both in regard to processing of application. It is a very pertinent defect in terms of administrative law jurisprudence. An unguided and unreasonable discretion is bound to result in arbitrary exercise of powers.

In view of the abovementioned facts and circumstances the prayer in the Original Application may very kindly be allowed

THROUGH

RITWICK DUTTA SAURABH SHARMA G.STANLY HEBZON SINGH
ADVOCATES

VERIFICATION

I,M.R.Thiyagarajan aged about 55 years residing at No.48, East Madha Church Street, Royapuram, Chennai – 600 013, the applicant herein, do hereby verify that the contents of the above paragraphs are true to the best of my Knowledge and legal advice and that I have not suppressed any material fact.

Date : 28.02.2023

Place : Chennai / New Delhi

APPLICANT

BEFORE THE HON'BLE NATIONAL GREEN TRIBUNAL
SOUTHERN ZONE BENCH AT CHENNAI

O.A.No.72 of 2022

MEENAVA THANTHAI
K.R.SELVARAJ KUMAR
MEENAVAR NALA SANGAM
Represented by its president,
M.R.THIYAGARAJAN ,
... Applicant

-Vs-

Union of India.

...Respondents

REJOINDER ON BEHALF OF THE APPLICANT TO THE COUNTER AFFIDAVIT FILED BY THE RESPONDENT.

M/s. RITWICK DUTTA
G.STANLY HEBZON SINGH
COUNSEL FOR APPLICANT
N-73, LOWER GROUND FLOOR,
GREATER KAILASH –I, NEW DELHI
litigation.life@gmail.com
(M) 9940178702