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BEFORE THE HON'BLE NATIONAL GREEN TRIBUNAL (SZ), CHENNAI

APPEAL No. 88 OF 2017

BETWEEN

GEORGE ISAAC .....**APPELLANT**

Versus

MINISTRY OF ENVIRONMENT, FOREST AND CLIMATE CHANGE & ORS .....**RESPONDENTS**

ARGUMENT NOTE FILED ON BEHALF OF THE APPELLANT.

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1. SQUARLY APPLICABLE CASE

In ***English Indian Clays Ltd Vs District Collector TVm and Ors, 2018 (4) KHC 913*** the Division Bench of the Hon'ble High Court of Kerala held that if a company violates the provisions of EIA Notification in an area and start mining operations, they are not entitled to continue mining in the area, as there is no provision for post-facto clearance. The Judgment further explained why an EIA process is meaningless after once the project has started in violation. It was held that the mining done without EC was held illegal and directed to pay 100% of the cost of the mineral so extracted. **Para 32, 33, 37, 38** of the Judgement are clearly applicable in this case. **The mining was stopped for ever, by the Court even if the EC was recommended by SEAC, and it was not even under challenge.** The facts and circumstances of that case are similar to the appeal in hand. This Judgment was upheld by the Supreme Court dismissing the SLP. (HC Judgment and SLP order in Appeal (C) No.31834- 31838/2018 are attached).

In Original Application No.168 of 2015, **Mathew Thomas v.State of Kerala**, the NGT (SZ) held that the mining activity started in an area with mining lease more than 5 hectares, without obtained a prior Environmental Clearance is illegal.

Locus Standi

The scope of the filing an appeal against any EC granted is a settled legal principle. The appellant presently working at Ernakulam is aggrieved by the grant of Annex-A1 in many ways as stated in Appeal. The locus standi has not be questioned by the 1st respondent in any manner. The NGT, in **OP No. 12/2011** had held the scope 'person aggrieved' in favour of the appellant herein. In **Appeal No. 14/2014**, the NGT (West Zone) Pune had held the scope of 'person aggrieved' in favour of the appellant herein. The Delhi High Court in *Prafulla Samanthra V Ministry of Environment and Forests* ***159 (2009) DLT 604*** held that the expression *'person aggrieved'* has to be given a pan optic import and be understood to include persons who display interest in social and environment causes. The observations made in the said Judgment regarding the wider locus standi of the appellant is squarely applicable in this appeal. Hence the appellant has locus standi to maintain the appeal in view law laid down by the Tribunal.

Limitation

2. This Appeal is filed within the statutory period of limitation from the date of communication of the Annexure A1 EC. As evident from Annexure A12, the draft EC was approved by the SEIAA only on 27.06.2016. A copy of EC can be delivered to anyone only after the same. Even if public notice was taken through Annexure R6(g) on 03.07.2016, claiming that a copy of impugned EC is available in the website of the SEIAA, no such copy of Annex.A1 was available in the website of the SEIAA. 6th Respondent also did not upload a copy in their website, till date. The period of limitation starts only from the date of communication of Annexure A1 through A12, i.e.05.09.2016.

3. Annexure A1 was communicated to the applicant through **Annexure A12 dated 27.08.2016** only (page 87 of Appeal), which was received by the Appellant on 05.09.2016. The appeal was filed on **27.09.2016** and was placed before the bench on **29.09.2016**, as evident from the records of the Hon'ble Tribunal. Therefore, the appeal is filed well within the period of limitation and the rival contentions have to be rejected.

4. It is to be noted that the **SEIAA who issued Annexure A1 do not have any objection regarding the limitation of the appeal.** The claim of the Appellant that a copy of the Annexure A1 was not uploaded in the website of the 2nd Respondent till 05.09.2016 is not specifically denied by the 2nd Respondent. Therefore, the claim of the Appellant is accepted by the 2nd Respondent and thus the Limitation issue is addressed. **The 6th Respondent does not have a case that they have uploaded a copy of Annexure A1 in their website prior to 05.09.2016 or even till date**. They do not have a website at all and hence, they have violated General **Condition No.36 of Annexure A1** Hence, they are barred from raising any issue regarding the Limitation.

6th Respondent is a violator on the date of application for EC.

5. Annexure R6(a) empowers the 6th Respondent to conduct mining in **6.8637 hectares** of land in Survey No.407/2A, 407/2B, 407/1-1, 428/1A, 428/1B, 406/6A, 406/6B, 406/6C, 406/6D, 406/4A, 406/4B, 406/4C, 406/3-1, 406/1B and 406/3-2 in Aikaranadu North village of Ernakulam District, from 29.06.1985 till 28.06.1997. This activity is totally different from the mining activity permitted in Annexure R6(b). Instead, it is made clear in Annexure R6(b) that it is a fresh mining lease issued on 11.05.2009 for conducting mining in **8.6630 Hectares** of land in survey Nos.320/3 pt and 320/2 pt in Aikaranadu village of Ernakulam District for a period of 12 years. Starting of any mining activity after 14.08.2006, holding a lease more than 5 Hectares without prior EC is a case of violation of EIA Notification, 2006.

6. Annexure R6(j) only permits the 6th Respondent to continue the mining activity which was conducted based on Annexure R6(a) till the time of renewal. The 6th Respondent ought to have stopped the mining activity on the expiry of Annexure R6(a) and obtain prior EC before further renewal of the old lease, once the EIA Notification, 2006 came into force. The 6th Respondent cannot claim any benefit of Annexure R6(j) to start mining activity in a separate area for more than 8 hectares of land, without obtaining prior EC. The **"pollution load"** permitted by Annexure R6(a) was further expanded by the 6th Respondent in Annexure R6(b). The dictum laid down by the Hon'ble Apex Court in **(2017) 9 SCC 499** in no way benefits the 6th Respondent. But, as rightly held by the Apex

Court, ex-post facto clearance like that of Annexure A1 is illegal and alien to the environmental jurisprudence. The 6th Respondent cannot plead the ignorance about the environment laws prevailing this country and cause degradation by violation. It is to be noted that the 6th Respondent has not specifically denied Ground N in the Appeal, expanding their production from 25,000 MT per annum to 70,000 MT per annum without prior EC.

No Consent from PCB till 2016

7. As per the affidavit / statement filed by the Kerala State PCB, the 6th Respondent did not obtain any NOC or Consent from the SPCB till 2016. No documents were produced by the 6th Respondent to prove otherwise. Even according to the PCB, the mining activity by the 6th Respondent as on the date of application for EC is violation.

EC issued by SEIAA without authority as ex post facto

8. Appellant challenged Annexure A1 Environment Clearance mainly on the ground that the 2nd Respondent has no power for authority to issue such environment clearance that includes the violation of the provisions of the EIA Notification, 2006. Admittedly, the 6th Respondent had conducted mining operations after 11.05.2009 for more than 5 hectares of land by using Annexure A3 mining lease without obtaining prior environmental clearance. Even in Annexure A4 (page 63), the 66th Respondent admitted that the Quarry is functioning in more than 5 hectares without EC. This fact was not specifically denied by the 2nd Respondent or the 6th Respondent. Therefore, this a case involving violation and the impugned EC is granted ex post facto.

9. Para 6 of the EIA Notification, 2006 clearly mandates the application has to be submitted before starting any activity. SEIAA is statutorily empowered only to process applications, if filed before starting of activity covered in the EIA Notification, 2006. As per the provisions of EIA notification the SEIAA has no power to process applications involving violation. Post-facto clearance is alien in Environmental jurisprudence.

10. Ground No. K and X in the appeal is not specifically denied by the 2nd Respondent or by the 6th Respondent. Rule 16(2) of the NGT Rules, 2011 demands to specifically deny each contention in appeal, if to do so. If the regulatory authority SEIAA has not specifically denied an averment, as per Rule 16(2) of the NGT Rules, 2011, it shall be considered as an accepted contention. Thus, impugned EC involving case of violation is issued without authority and therefore illegal.

11. The Annexure R6 (a) was issued on 29.06.1985 for an area of **6.86 hectare** and the lease has expired on 28.06.1997. Annexure R6 (b) is an **expansion** of mining lease, issued on 11.05.2009 for an extent of **8.663 hectare, in different survey numbers,** and therefore to start any mining operation based on Annexure R6(b) the 6th Respondent ought to have obtained prior EC. This fact is undisputed between the parties herein. In the impugned EC (Page No. 29) the project proponent expressly stated that this project attracts the violation proceedings. This was totally ignored by the 2nd Respondent.

12. In **Muthuraman V Union of India**, NGT declared that the Central Government has no power to issue office memorandums to issue ex post facto clearances or **even to process application involving violations**. This declaration of law governs the field when the impugned EC was granted. No provision in EIA Notification to process application involving violation. It is binding to the MoEF&CC and SEIAA.

13. The only provision for processing application involving violation has been introduced in the year 2017 under the notification dated 14.03.2017 issued by the 1st Respondent. The power for consideration of such application is strictly restricted to the central government and not SEIAA. Annexure A1 was issued prior to this notification wherein there was no provision to deal with cases involving violation. The process of application is altogether different under that notification. **The law as on the date of issuance of Annexure A1 alone can be considered in this Appeal.**

14. The Expert Appraisal Committee in their site visit found that the quarry is a functioning one and no benches are seen while mining operations were going on. SEAC did not even look into the point that whether they have

power/authority to process an application involving violation. In the appraisal, the Committee was totally silent about the jurisdictional aspect. 2nd Respondent also did not consider the jurisdiction aspect thus, Annexure A1 is illegal on that ground also.

15. Ground N in the appeal is not seen countered/specifically denied by any of the Respondents. Annexure A2 order permits the 6th Respondent to take only **25,000 metric tonne** per year however as per Form I application and Annexure A1 it is clear that that they have quarried more than **70, 000 metric tonne** per year while Annexure A4 was preferred. It has to be presumed that the 6th Respondent was conducting mining of 70,000 metric tonne per year while Annexure A4 application was processed by the 2nd Respondent till the EC was obtained. This has to be treated as an expansion of the then existing project and constitute another violation since such expansion was also without prior EC.

16. Ground GG is not specifically denied by the 2nd Respondent in their reply statement. The non-application of mind of SEAC due to lack of time is evident from the same. Therefore, the judgment in Utkarsh Mandal Vs Union of India and Ors Wp (c) No. 9340/ 2009 laid down by Delhi High Court is squarely applicable in this case and on that ground the EC has to be set aside.

17. From Annexure A5, it is evident that the 6th Respondent was conducting mining operations as on 09.10.2015 in violation of the EIA Notification. This aspect was not considered by the 2nd Respondent. Annexure A5 is a material fact which was supressed by the 6th Respondent in Annexure A4 or any of the proceedings before the 2nd Respondent.

18. The fact that the 6th Respondent was continuing mining operation with a mining lease for more than 5 hectares without prior EC from 2009 to 2016 is an accepted fact in the counter affidavit filed by the 6th Respondent. The 6th Respondent claims ignorance about the provisions of the EIA notification. Ignorance of law is not an excuse is a well settled position of law.

19. It is not be noted that there was no appraisal done by the SEAC while recommending the issuance of the impugned EC. Annexure A8 would show

that no detailed scrutiny of the documents was done by the committee. The deliberations of the SEAC are totally absent in Annexure A8. Therefore, issuance of Annexure A1 based on an arbitrary decision making through Annexure A8 is illegal.

20. Annexure A10 would show that the nearby residential building is within 74 metres from the boundary of the quarry as on the date of imagery, 26.02.2106. Thick vegetation of plantation is there between the quarry and building, his building may not be able to be seen at the time of quarry site visit but the 6th respondent ought not to have deliberately concealed this material fact in Annexure A4.

21. The applications involving violation can be treated only by following the procedures mandated in office memorandum dated 30.05.2018. The Honourable Supreme Court has declared that cent percent of the cost of the illegally mined mineral has to be extracted from the project proponent before operationalizing environmental clearance. Cognisance of offence under the Environment Protection Act has to be initiated against the project proponent. An affidavit stating that any further violation will lead to the cancellation of EC has to be granted. In this case, the 2nd Respondent did not assess the actual quantity of illegally mined minerals taken by the 6th Respondent and its cost. The extraction of 200 metric tonne of minerals from 22.04.2009 till the date of issuance of Annexure A1 ought to have been calculated and the cost of such illegally extracted mineral should have been imposed on the 6th Respondent as penalty.

22. The 6th Respondent has withdrawn his baseless allegations regarding the alleged relationship with that of the Appellant for the lack of any proof for the same.

23. Form-1 application would reveal that the project proponent is well aware about the natural consequences of submitting false or misleading data or any part of the data before the 2nd respondent. As per EIA notification, the project will be rejected and the clearance will be revoked at the risk and cost of the proponent. This alone is sufficient for setting aside Annex-A1 EC. The project proponent is barred from raising any justification in

suppressing material facts or giving false/misleading statement in Form-1 application.

24. In Hanuman Lakshman Aroskar & Anr V. Union of India & Ors reported ***2009 (15) SCC 401*** at Para 67, 68, 77, 97 & 114, the Apex Court has held that the project proponent cannot profess and ignorance in the study area. The project proponent is bound by the highest duty of transparency and rectitude in making the disclosures in Form-I. Therefore, in view of the EIA notification and the judgment Annex-A1 is to be set aside.

Wrong Appraisal

25. Annexure A8 is issued without recording any reasons for the same. The appraisal is against the law laid by the Hon'ble Supreme Court in ***Bengaluru Development Authority V Mr Sudhakar Hegde & Ors.*** Para 72, 73, 76 are squarely applicable in this case.

72. The reasons furnished by the SEAC must be assessed with reference to the norm that it is required to submit reasons for its recommendation. The analysis by the SEAC is, to say the least, both perfunctory and fails to disclose the reasons upon which it recommended to the SEIAA the grant of EC for the PRR project. The SEAC proceeds merely on the reply furnished by the appellant to the queries raised by the SEAC at its 115th meeting dated 11-12 August, 2014. In this view, the procedure followed by the SEAC suffers from a nonapplication of mind.

73. The SEAC is under an obligation to record the specific reasons upon which it recommends the grant of an EC. The requirement that the SEAC must record reasons, besides being mandatory under the 2006 Notification, is of significance for two reasons: *(i) The SEAC makes a recommendation to the SEIAA in terms of the 2006 Notification. The regulatory authority has to consider the recommendation and convey its decision to the project proponent. The regulatory authority, as para 8(ii) of the 2006 Notification provides18, shall normally accept the recommendations of the EAC. Thus, the role of the SEAC in the grant of the EC for a proposed project is crucial.* ***and*** *(ii) The grant of an EC is subject to an appeal before the NGT under Section 16 of the NGT Act 2010.* ***The reasons furnished by the SEAC constitute the link upon which the SEIAA either grants or rejects the EC. The reasons form the material which will be considered by the NGT when it considers a challenge to the grant of an EC.***

76. The SEAC, as an expert body, must speak in the manner of an expert. Its remit is to apply itself to every relevant aspect of the project bearing upon the environment and scrutinise the document submitted to it. The SEAC is duty bound to analyse the EIA report. Apart from its failure to repudiate a process conducted beyond the prescribed time period stipulated by the MoEF-CC, the SEAC failed to apply its mind to the abject failure of the appellant in conducting the EIA process leading upto the submission of the EIA report for the grant of EC. ***The SEAC is not required to accept either the EIA report or any clarification sent to it by the project proponent. In the absence of cogent reasons by the SEAC for the recommendation of the grant of EC, the process by its very nature, together with the outcome, stands vitiated.*** *(emphasis added)*

In para 81, the Apex Court held as follows :-

> *81. The SEAC, as an expert body abdicated its role and function by relying solely on the responses submitted to it by the appellant and failing to comply with its obligations under the OMs issued by the MoEF-CC from time to time* ***In failing to provide adequate reasons for its recommendation to the SEIAA for the grant of an EC, it failed in its fundamental duty of ensuring both the application of mind to the materials presented to it as well as the furnishing of reasons which it is mandated to do under the 2006 Notification.*** *(emphasis added)*

Annexure A1 is issued based on the recommendation of the SEAC **without any specific reasons recorded to accept the documents of the proponent,** and therefore against the law laid down by the Apex Court.

26. The appraisal is against the law laid by the Hon'ble High Court of Delhi in **Utkarsh Mandal V. Union of India**. This ground was not at all countered by any of the Respondents herein.

Para 45 states as follows :-

> *45. As regards the functioning of the EAC, from the response of the MoEF to the RTI application referred to hereinbefore, it appears that the EAC granted as many as 410 mining approvals in the first six months of 2009. This is indeed a very large number of approvals in a fairly short time. We were informed that the EAC usually takes up the applications seeking environmental clearance in bulk and several projects are given clearance in one day. This comes across as an unsatisfactory state of affairs. The unseemly rush to grant environmental clearances for several mining projects in a single day should not be at the cost of environment itself. The spirit of the EAC has to be respected. We do not see how more than five applications for EIA clearance can be taken up for consideration at a single meeting of the EAC. This is another matter which deserves serious consideration at the hands of MoEF.*

This observation made against the MoEF&CC is still in force and applicable to the case in hand. Annexure A8 is to be held illegal.

27. In ***Gram Panchayat Navlakh Umbre v. Union of India and Ors***, the Court held that "the decision making process of those authorities besides being transparent must result in a reasoned conclusion which is reflective of a due application of mind to the diverse concerns arising from a project such as the present. The mere fact that a body is comprised of experts is not sufficient a safeguard to ensure that the conclusion of its deliberations is just and proper."

28. In ***Samata and Forum of Sustainable Development v. Union of India & Ors*** *(Appeal No. 9 of 2011. Judgment of NGT (Southern Zone, Chennai) on December 13, 2013)* it was held that "In order to

demonstrate the threadbare nature of discussions while considering a project for giving its recommendation, it is essential that the views, opinions, comments and suggestions made by each and every member of the committee are recorded in a structured manifest/ format."

This judgment is binding on the 2nd and 3rd Respondents, and Annexure A8 is the blatant violation of this dictum. Therefore Annex-A1 has to be set aside.

No demand from the 2nd Respondent to dismiss this Appeal.

29. Annex-A1 was issued by the 2nd respondent. The 2nd respondent in their Reply Affidavit does not make any prayer or demand for dismissal of this Appeal. Rule 16(2) of the NGT Rules, 2011 specifically demands to specifically deny the demand. There are no specific pleadings to the said effect also. Respondents are duty bound to reject demands in the appeal, through their reply affidavit, if they feel so. No such specific denial can be seen in the reply affidavit filed by the SEIAA. Therefore this is a fit case for setting aside the EC., if so. 2nd Respondent did not specifically demand for the dismissal of this Appeal, appeal has to be allowed.

Based on these facts and grounds stated above, this Hon'ble Tribunal may allow the prayers sought in the appeal.

Date this the 06th day of August, 2021

Counsel for the Appellant.