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

MEMORANDUM OF APPEAL

[Under Section 18(1) read with Section 16 of the National Green Tribunal Act, 2010]

APPEAL No. 93 OF 2017

BETWEEN

AJAYAGHOSH.....**APPELLANT**

Versus

STATE ENVIRONMENT IMPACT ASSESSMENT AUTHORITY, KERALA & ORS.....**RESPONDENTS**

ARGUMENT NOTE FILED BY THE COUNSEL FOR THE APPELLANT IN APPEAL No.93 of 2017(SZ)

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I. Maintainability and Limitation:

1. Appeal is filed before the National Green Tribunal on 19.12.2017 and within 14 days from the date of Annexure A14 order. As per Annexure A14, the appeal has to be heard on merit. After considering the date of EC and the date of filing of Writ Petition and all relevant facts, the Hon'ble Court had passed Annexure A14. Annexure A14 order has not been interfered by any Court of Law, till date and no shard of document has been produced by the respondents to show that the appellant has not complied with Annexure A14 judgment. Therefore the appeal is liable to be heard on merit and disposed of as stipulated in Annexure A14.

2. The argument that Annexure A14 is bad in law and that such time could not have been granted considering the limitation period as prescribed in the NGT Act, was taken as a specific ground in Annexure A15 Appeal. All the arguments related to the limitation raised against this Appeal herein was raised by the 4th and 5th Respondents in Annexure A15 and thus resulted in Annexure A16 Judgment. The respondents herein, being parties of Annexure A16 Judgment, are barred from raising the same plea/grounds, on the Principle of Res-judicata and constructive res-judicata. So far as Annexure A14 and A16 stands, this Appeal has to-be heard on merit and disposed of.

II. Delisted Project:

1. The project was recommended to be de-listed by the SEAC in its 53rd meeting on 26.02.2016 vide Annexure A4. No contrary decision was made by SEIAA within the time stipulated by paragraph 8(i), (ii), (iii) and (iv) of the EIA Notification, 2006. Therefore, Annexure A4 decision to delist the application has become final. After the time stipulated, neither SEAC nor SEIAA has any power to re-consider the application for appraisal. Hence, Annexure A8 made thereafter is without power. Paragraph 10 of Appeal is not factually disputed by the SEIAA in pleadings or arguments.

III. Bad/ Improper Appraisal:

1. The appraisal is the detailed scrutiny of the Form-1, Form-1A, Conceptual Plan and other documents submitted. No appraisal was done by the SEAC in its meeting held on 28.07.2016 as evident from Annexure A8. The SEAC has got only 15 minutes to consider this project such large magnitude. Appraisal is in violation of the judgment in **Utkarsh Mandal Vs Union of India** in **WPC No. 9340/2009**. Paragraph No.29 in this Appeal was not factually disputed by the SEIAA.

2. Annexure A2 minutes of SEAC has taken note of several important ecological parameters and had raised specific concerns. 11 members of SEAC participated in Annexure A2 meeting. The committee had found that the project site falls within CRZ III area. Committee also observed that the area being prone to earthquake with earlier precedence, construction of only two floors is permissible, with respect to topography and ground water regime of the Project Site. The committee also opined about the tendency for high liquefaction in the project site. These aspects were not at all considered or addressed by the SEAC while making Annexure A8 minutes recommending the project for the grant of EC. No explanation is given by SEIAA in their argument. Annexure A1 issued based on Annexure A8 is arbitrary and hence liable to be set aside.

3. Paragraph No.16 of the Appeal is not factually disputed by the SEIAA. SEIAA had spent less than 5 minutes for the decision making of each project in their 62nd meeting as evident from Annexure A10.

4. The ground water table starts at 8m below ground level as observed by SEAC in Annexure A2. The digging work and construction work below the said water table has badly affected the appellant's well water and environment of the nearby areas. This aspect was not at all apprised by the SEAC while making Annexure A8 recommendation. Para 24 of the Appeal is not factually disputed by the Respondents.

IV. Deliberate suppression of materials facts in Form-1:

1. In Annexure A19 site inspection report, the KCZMA has categorically stated that the project site itself falls within 100 meter from the HTL and is CRZ III area. Annexure A19 report also states that the slope cutting and excavation of soil are carried out in the site for erecting foundation structures, within the 'No Development Zone' of CRZ III area. The project proponent has not challenged the report yet. The project ought not have been permitted since it is a prohibited activity in the CRZ Notification.

2. The Annexure R4(d)1 letter issued by the KCZMA stating that the project in survey No.159/2B (p) of Feroke village does not fall within CRZ area is issued only based on the proposal as submitted by the project proponent. This is evident from the letter itself. The material fact that the construction is within 100 meter of HTL was suppressed by the project proponent before KCZMA also. This was later found to be false as per Annexure A19 report, after site inspection. While making Form-1 application, the project proponent was fully aware about the 'No Development Zone', implication of CRZ notification and the close proximity of mangroves. These aspects were deliberately concealed in Form-1 application.

3. Even if the project site doesn't fall in CRZ III area, the project proponent ought to have revealed the close proximity of CRZ III area and mangroves to the project site in the Form-1 application. Deliberate concealment of material facts and submission of misleading / false data would make the application liable to be rejected at any stage, even after EC was granted. SEAC and SEIAA should have rejected the project as the construction within NDZ is impermissible in law.

4. Kadalundi-Vallikkadavu Community reserve is declared as per Annexure A13 notification, issued under Section.36(C) of the Wildlife (Protection) Act, 1972. As per Section.2 (24-A) of the Wildlife (Protection) Act, 1972, the community reserve declared under Section.36(C) would come under the definition "Protected Area". As per Annexure A17 and A18, the project area in question falls within

4km from this Protected Area. Annexure A13 notification is for protecting **migratory birds**. Part III of the Form-1 application specifically seek information about Environment Sensitivity within 15km aerial distance of the proposed project site. The presence of a protected area within 4km was deliberately concealed by the 4th Respondent.

5. The dictum laid down by the Hon'ble Supreme Court in the matter of **Hanuman Laxman Aroskar & Anr Vs Union of India & Ors** reported in **2019 (15) SCC 401** with regard to deliberate and material suppression of information in Form-1 is as follows:

> "67. We cannot gloss over the patent and abject failure of the State of Goa as the project proponent in failing to disclose wet lands, water sources, water bodies, biospheres, mountains and forests within an aerial distance of 15 kilometres as required by Form 1. The disclosure in Form 1 constitutes the very foundation of the process which is initiated on the basis of the information supplied by the project proponent. Following the disclosure in Form 1, ToR are formulated, and this leads to the preparation of the EIA report. A duty is cast upon the project proponent to make a full, complete and candid disclosure of all aspects bearing upon the environment in the area of study. The project proponent cannot profess an ignorance about the environment in the study area. The project proponent is bound by the highest duty of transparency and rectitude in making the disclosures in Form 1.
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> 68. There can be no manner of doubt that Form 1 is an important ingredient in the entire process envisaged under the 2006 notification. Hence, clause (vi) of para 8 of the 2006 notification provides that deliberate concealment or submission of false or misleading information or data which is material to screening or scoping or appraisal or decision on the application shall make the application liable for rejection and lead to the cancellation of a prior EC granted on that basis. The declaration which is required of the project proponent is to a similar effect.
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> 69. We are unable to accept the submission that the disclosure required was of reserved forests comprehended within a notification under sub-section (2) of Section 20 of the Indian Forest Act 1927. Form 1 requires a disclosure of areas which are important or sensitive for ecological reasons, among them, being "forests". The expression "forests" is used without reference to a statutory or artificial definition and must hence incorporate a meaning which bears upon the ordinary description of the term. The expression "forests", means a forest as commonly understood, without reference to a notification under the Indian Forest Act 1927 or any other statutory

enactment. Such an interpretation will subserve the purpose of an EIA. The purpose is to ensure that all relevant facets of the environment are noticed, that base-lines are documented, and that the potential impact of a project or activity on the environment is assessed. Forests are forests without reference to recognition in a statutory form devised for a specific purpose.

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75. Though the EIA report adverts to the presence of forests within the study area in Goa and Maharashtra, we have to consider whether this by itself warrants the grant of an EC inspite of the fact that there has been a patent failure on part of the project proponent to make a transparent and candid disclosure of material facts in Form 1. Information furnished in Form 1 is crucial to the preparation of the ToR by the EAC. The EAC comprises of experts. It is constituted, among other reasons, for the specific purpose of assessing the information furnished in Form 1 and preparing comprehensive ToR. There is an intrinsic link between the disclosures in Form 1 which constitute the basis for formulating the ToR and between the ambit of the EIA report required by the ToR and the final EIA report. The ToR guide the preparation of the EIA report. A failure to disclose information in Form 1 impairs the functioning of the EAC in the preparation of the ToR and in consequence, leads to preparation of a deficient EIA report.

76. The submission that the EIA report deals with the prevalence of forested areas and warrants the grant of an EC cannot be accepted for yet another reason. EACs and SEACs are conferred with the authority to reject applications for the grant of an EC at the stage of scoping itself, prior to the preparation of the ToR. The application may be rejected on the basis of the information furnished by the project proponent in Form 1. Claiming an EC as a matter of right merely because the EIA report has assessed parameters that were omitted in Form 1, bypasses the authority of the EAC and SEAC to reject an application at the preliminary stage and cannot be countenanced. The regulatory authority is required to assess the final documents submitted to it "strictly with reference to the ToR" and communicate to the EAC and SEAC any discrepancies between the EIA report and the ToR. A deficient ToR on the basis of the non-disclosure of material information in Form 1 impedes this process.

77. The failure on part of a project proponent to disclose material information in Form 1 as stipulated under the 2006 notification has a cascading effect on the salient objective which underlies the 2006 notification. The 2006 notification represents an independent code with the avowed objective of balancing the development agenda with the protection of the environment. An applicant cannot claim an EC, under the

2006 notification, based on substantial or proportionate compliance with the terms stipulated in the notification. The terms of the notification lay down strict standards that must be complied with by an applicant seeking an EC for a proposed project. The burden of establishing environmental compliance rests on a project proponent who intends to bring about a change in the existing state of the environment. Whereas, in the present case, there has thus been a patent failure on part of the project proponent to make mandatory disclosures stipulated in Form 1 under the 2006 notification, that must have consequences in law. There can be no gambles with the environment: a 'heads I win, tails you lose' approach is simply unacceptable; unacceptable if we are to preserve environmental governance under the rule of law.

Therefore, going by the above mentioned dictum, it is clear that the deliberate concealment and misrepresentation of material information has been done by the project proponent while preferring the Form-1 application. This impairs the functioning of the EAC in the preparation of the ToR and in consequence, leads to preparation of a deficient EIA report. Thus, the EC is liable to be cancelled.

V. Height of the building:

1. 87 meter is the height of the construction in question. Admittedly this falls within 4 kms from the Protected Area, specifically for the protection of Migratory Birds. The construction in question is in between the Kadalundi River and the Protected Area. The impact of this project on the Community Reserve and the migratory birds has not been assessed anywhere in the process of granting Annexure A1. It is an undisputed fact. Hence EC has to be cancelled and re-appraisal should be done based on the fresh Form-1 revealing all material facts.
2. As per the reply statement filed and Annexure R4(c), the construction project is of 59,528.41 sq meter whereas the impugned EC was only for 58,542.09 sq meters. Admittedly, 986.32 square meter construction has been deliberately concealed from the SEIAA. Paragraph 20 of the appeal is not disputed by the respondents.

3. SEIAA is formed under Section.3(3) of the EP Act. The power under Sub-Rule 3 of Rule 5 is a power coupled with duty. In the matter of **N.D. Jayal and Another v. Union of India and Others** reported in **(2004) 9 SCC 362**, a 3-Judge Bench of Supreme Court highlighted the necessity of strict compliance of the provisions of the Environmental Protection Act, 1986 stating as:

'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."

In the matter of **Deewan Singh and others v. Rajendra Pd. Ardevi and others** reported in **(2007)10 SCC 528**, at paragraph 32, the Hon'ble Supreme Court held as follows:

"Even if the expression "shall" is read as "may" although there does not exist any reason therefor, the statute provides for a power coupled with a duty. It is a well-settled principle of interpretation of statutes that where power is conferred upon a public authority coupled with discretion, the word "may" which denotes discretion, should be construed to mean a command."

The word "**may**" in Rule 5(3)(a) of the Environment (Protection) Rules, 1986 is to be seen as a command, and not a discretion. Thus, Rule 5(3)(a) is not only a power, but the Constitutional and Statutory duty and obligation of the Central Government and any other authority like the 1st Respondent to take measures to protect the Environment. Annexure A1 should not have been issued by the SEIAA after knowing the suppression of material facts.

4. There has been no compliance and in fact stark contravention of the procedure laid down in the Manual on Norms and Standards for Environment Clearance of Large Construction Projects prepared by the Ministry of Environment, Forest and Climate Change. Therefore, the EC is liable to be cancelled/ set aside.
5. The power given in para 8(vi) of the EIA Notification, 2008 to delist the project is a statutory duty as well. The SEIAA did not comply with the same. That omission of duty has resulted in the ecological damage in appellant's area.

VI. Irreversible damage already done:

1. In the present case, it is clearly evident that the project proponent has started the constructional activities and irreversible damage has been caused by the project proponent to the environment and ecology at large. This is mainly due to the fact that the project proponent had concealed several material information in the Form-I application and obtained the impugned EC through fraud. Therefore, the project is liable to be delisted and EC is liable to be cancelled and punitive steps have to be initiated by the authorities concerned to prosecute the project proponent for violation of the Environment (Protection) Act, 1986. Unlike, the

decision of **Hanuman Laxman Aroskar & Anr Vs Union of India & Ors** case, the project had not commenced therein and therefore the decision of the Hon'ble Supreme Court to remand the matter to the EAC for fresh reconsideration was possible as the environment was not disrupted. However, in the present case, the project proponent has caused serious irreversible damage to the environment and ecology of the area and thus remanding back the matter to the SEAC for fresh consideration would be futile process and would serve no meaning. The 4th Respondent has already damaged the site with the impugned EC. Irreversible damage has been done already. The impugned EC shall liable to be set aside on the above arguments.

Dated this the 27th day of October, 2020

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