IN THE NATIONAL GREEN TRIBUNAL

(WZ at Pune)

OA No. 107/2019

The Goa Foundation v/s Dept of Mines & Geology & Ors

BRIEF ARGUMENTS ON BEHALF OF THE RESPONDENT NO. 4

I. PRELIMINARY OBJECTIONS.

A. Relief Sought is not Maintainable.

1. The captioned OA by the Applicant purports to challenge the Consent to Operate ("**CTO**"), dated 19.09.2019 **(annexed at pg. 30,** as amended by corrigendum dated 20.09.2019 **at pg. 119**, and 12.03.2020 **at pg. 222)**, granted by the Goa State Pollution Control Board permitting the Respondent no. 4 to operate two plants in Sy. no. 24/1, bearing Plant Nos. 2A and 4A, which have been in existence and operation since 1979.
2. In substance, the Applicant is praying for quashing the CTO. However, the Applicant has craftily worded its prayer **(at pg. 12)** to suggest that it is seeking something different, namely, a direction to the GSPCB to "*withdraw*" the CTO.
3. The prayer to "withdraw" the CTO is not maintainable because:

   First, in the absence of any plea of violation of the conditions of the CTO, the GSPCB has no power to "*withdraw*" the CTO.

   Secondly, the Applicant has made this peculiar prayer to "*withdraw*" the CTO because, to challenge it, the only statutory remedy available to the Applicant was to file an appeal under Sections 28 and 31 of the WATER (PREVENTION AND CONTROL OF POLLUTION) ACT, 1974 ('**Water Act**') and the AIR (PREVENTION AND CONTROL OF POLLUTION) ACT, 1974, ('**Air Act'**) before the appropriate authority i.e. the Administrative Tribunal in Goa. The Applicant cannot be permitted to side-step the correct statutory remedy by dressing up its appeal against grant of the CTO as a plea to "*withdraw*" the CTO.

   Thirdly, any such appeal under the Water Act and the Air Act has to be filed within the limitation period of 30 days. The Applicant has filed the instant OA before this Hon'ble Tribunal only to circumvent the said bar of limitation.

   Fourthly, such leapfrogging to the NGT, i.e., without first appealing to the Appellate Authority, has been held to be impermissible in law by the Hon'ble Supreme Court, in ***State of Tamil Nadu v. Sesa Sterlite***, 2019 SCC Online 221 **(at para 44).**

B. Forum Hunting.

4. Prior to filing the present OA, this very Applicant had first preferred a Writ Petition challenging the same CTO which was dismissed by the Bombay High Court on

16.12.2019, with an express mention of the alternate remedy available, i.e., the appellate authority under the Air Act and the Water Act **(pg.107)**. Yet the Applicant as a device to overcome the bar of limitation, preferred the instant OA, knowing fully well that the captioned OA is not maintainable.

5. In fact, the present OA is nothing but a case of 'forum hunting' and an abuse of process, as held by this Hon'ble Tribunal in a *catena* of decisions including ***M/s Shrem Resorts Pvt. Ltd v. GZMA*** Appeal No. 2/2020 (WZ) dated 17.08.20. The Applicant (i) initially approached the High Court in PIL-WP no. 69/2020 unsuccessfully, (ii) then approached this Hon'ble Tribunal in the present OA and, having failed to obtain interim relief, (iii) once again approached the High Court in PIL-WP No. 08/2020 to challenge the permissions of the DMG and the Collector. This, coupled with the fact that the Applicant has deliberately not approached the Administrative Tribunal, it is submitted is 'forum hunting' and an abuse of process.

C. <u>Limitation</u>.

6. Even assuming for the sake of argument that the present OA is maintainable, it has also been filed well beyond limitation. In case of Sections 14 of the NGT Act, an OA must be preferred either (a) within a period of 6 months, or (b) in case of Section 15, within 5 years, from the date on which the cause of action "*first arose*".
7. In the instant case, however, the allegation in the OA, more specifically in para 6 of the Addl. Rejoinder dated 03.09.20, is that *"**In 2012**, both plants II and IV were replaced with two new plants (called IIA and IVA)."* Even assuming for the sake of argument that it is true, this allegation in and of itself demonstrates that the cause of action had "*first arisen*" in 2012, and not in 2019, as falsely claimed by the Applicant. Hence, the OA is hopelessly barred by limitation.
8. Pertinently, in ***Yeshwant Bhosle v. State of Mahrashtra***, OA No. 109/2016 (WZ), this Hon'ble Tribunal has elaborated upon the law of limitation for an OA under the NGT Act. The observation of this Hon'ble Tribunal in para 8 that *"the Respondent No.1 has been <u>obsessively pursuing the activities of the applicant</u> … [and] has been aware of the activities of the Applicant*" is particularly apposite in the context of the instant case.
9. It is clear on the facts of the present case that the present OA has been filed only to circumvent the bar of limitation on challenging the CTO under Sections 31 and 28 of the Air and Water Acts, respectively, which prescribe a period of 30 days. Since an OA cannot be preferred to challenge a CTO, assuming that the OA is relatable to any other violation, yet the OA would nonetheless be barred by limitation u/s 14 and 15 of the NGT Act.

D. <u>Changing stands without an amendment</u>.

10. The Respondent No. 4 submits that, while in the OA it is argued that the grant of the CTO violated *Goa Foundation v. Sesa Sterlite*, (2018) 4 SCC 218 ("***Goa Foundation II***") **(pg. 9-10 for Grounds B & G)**, the Addnl. Rejoinder dated 03.09.20 raises a fresh and distinct ground and argues that the plants were newly constructed in 2012.

11. The allegation that the plants are newly constructed in 2012 is a totally new cause of action, which is entirely different and distinct from the original stand of the Applicant in the present OA i.e. that beneficiation constitutes "mining operations", and that the Supreme Court had invalidated the EC for "mining operations" in its judgment in ***Goa Foundation II***, which was pronounced on 07.02.2018. However, the stand in the Addnl. Rejoinder pertains to facts which, according to the Applicant itself, arose in 2012.

12. Such a fresh plea cannot be raised without an amendment (which itself is *ex facie* barred by limitation), especially since Rule 16(7) of the NGT PRACTICE & PROCEDURE RULES, 2011 expressly makes Order VI, Rule 17 of the CPC applicable to the pleadings before this Hon'ble Tribunal.

II. <u>Merits</u>.

13. The original plea raised by the Applicant that the Respondent No. 4 has violated the judgment in ***Goa Foundation II*** is without any basis, as the said judgment only prohibited "*mining operations*" **(para 154.6)**, and invalidated the ECs relatable to these leases **(para 154.4)**. However, the judgment in ***Goa Foundation II*** is inapplicable and of no consequence to the Plants in question, as set out below.

    13.1. *Firstly,* mineral beneficiation is not synonymous with mining operations, and such activity is beyond the scope of the definition of "*mining operations*" under Sec. 3(d) of the MMDR Act, which defines "*mining operations*" as "*the operations undertaken for the purpose of <u>winning of minerals</u>*". Beneficiation on the other hand is an activity of "*upgrading the ores*" after the mineral has already been won; which is done by <u>further processing</u> the extracted ore through physical, chemical and/or electrical methods (as held in ***National Mineral Development Corpn. Ltd. v. State of M.P.*** (2004) 6 SCC 281). Thus, the two cannot be equated, and in fact, the Hon'ble Delhi High Court in ***Hyderabad Asbestos Cement Products Ltd v. UoI*** 1980 SCC OnLine Del 503 (para 16), has held that <u>processing of ore</u> is not synonymous with mining operations. Consequently, the operation of the Beneficiation Plants cannot be said to be "*mining operations*", and hence would not come within the sweep of the directions in ***Goa Foundation II***.

    13.2. *Secondly*, the Plants IIA and IVA did not require an EC either under the EIA Notification, 1994 or the EIA Notification, 2006 because:

13.2.1. The 1994 Notification did not contemplate an EC for a beneficiation plant or process at all.

13.2.2. Though the 2006 Notification does contemplate an EC for a beneficiation plant, it is qualified inasmuch as, under para 2 of the said Notification, an EC is required for a project only if it is or involves (i) a *"new project"*, (ii) *"expansion and modernization of an existing project"*, or (iii) *"any change in product-mix in an existing manufacturing unit"*.

13.2.2.1. It is also pertinent to note that the MoEF had, in an "*Explanatory Note*" dated 04.05.1994, expressly clarified that projects in operation prior to 27.01.1994, are exempted from the requirement of an EC, conditional upon such project having obtained a NOC from the State Pollution Control Board, i.e. a CTO, prior to the said date. The Ministry also clarified that "*a project proponent is* ***required*** *to seek environmental clearance for a* ***proposed expansion/modernisation if the resultant pollution load is to exceed the existing levels****."*

13.2.2.2. Similarly, the MoEF by a Circular dated 15.01.2008 titled *"Applicability of EIA Notification, 2006 for cases where land has been acquired before EIA Notification, 1994"* has clarified that:

> "*Only such projects listed under EIA Notification, 2006 shall not require environment clearance under the said notification which were not listed in EIA Notification, 1994 and for which NOC was issued on or before* ***14th September, 2006***." [Emphasis added]

13.2.3. The plants in question are pre-existing (since 1979 **(pg 220)**) and do not fall within the scope of any of the three categories requiring an EC under para 2 of the EIA Notification 2006, and also do not qualify under the "*explanatory note*" dated 04.05.1994, or the Circular dated 15.01.2008.

14. Accordingly, the invalidation of the EC for mining operations in the mining leases in Goa cannot have any impact on beneficiation operations in Plants IIA and IVA.

15. The new plea sought to be taken in the Additional Rejoinder is that the two beneficiation plants are new plants established in 2012. In fact, Plants IIA and IVA have merely been shifted by 500 metres in 2012 **(see Google image at pg. 221)** within the Codli mines in terms of the mining plan requiring the excavation of the area on which the plants stood. This does not make them new plants.

16. The shifting of surface structures such as beneficiation plants is, in fact, expressly contemplated by the statutory scheme of the MINES AND MINERALS (DEVELOPMENT AND

REGULATION ACT, 1957, as amended (the "**MMDR Act**") and the Rules made thereunder, as set out below:

16.1. One of the important objectives of the MMDR Act is to balance the "*conservation and systematic development of minerals in India*" against the need for "*the protection of the environment*", which is made clear in Section 18. Accordingly, "zero waste mining" is an important component of the National Mineral Policy, 2008.

16.2. Further, the concept of a "progressive mine closure plan" (which is an important part of the statutory mining plan) is contained in Rule 2(t) read with Rules 22 and 23 of the MINERAL CONSERVATION AND DEVELOPMENT RULES, 2017 ("**MCDR 2017**"), and in Rule 2(oo) read with Rules 23A and 23B of the MINERAL CONSERVATION AND DEVELOPMENT RULES, 1988 ("**MCDR 1988**"). A progressive mine closure plan expressly contemplates the closing down of a mining pit and its restoration and afforestation as mining moves to a new area within the mining lease. Obviously, such shifting of mining operations would also necessitate the shifting of structures on the surface, which is evident from Rules 11(1), 11(3), 22(1) and 32 of the MCDR 2017, and also Rule 28 of the MCDR 1988.

16.3 Further, Form H-1 of the MCDR 1988 contemplates filing of an *"upto [sic] date"* 'surface plan' with the annual returns, which pre-supposes that structures/processing plants on the surface are likely to be moved, so as to meet the aforesaid requirement.

16.4 Thus, shifting the Plants was necessary in order to comply with the requirement of scientific mining to exhaust the mineral in a mining lease area, which is also an important facet of protection of the environment under the MMDR Act and the MCDR 1988 and the MCDR 2017.

17. To sum up, the Plants having been in operation much prior to 27.01.1994, their being shifted by 500 metres within Codli Mines does not attract any of the 3 triggers for obtaining an EC (i.e. new projects, expansion and modernisation, or change of product mix) in para 2 of the EIA Notification, 2006, and there is also no increase in the pollution load. Thus, they would not be required to obtain an EC as held by the Hon'ble Supreme Court in ***Common Cause v. Union of India*** (2017) 9 SCC 499 **(at para 91)** and ***G. Sundarajan v. Union of India*** (2013) 6 SCC 620.

18. It may also be noted that the Respondent No. 4 had in fact obtained an EC, on 29.12.2006, for Plant IIIB, as it was being expanded **(pg. 15)**. Hence, there was no reason not to seek an EC in 2012 if new plants were, in fact, commissioned.
