BEFORE THE NATIONAL GREEN TRIBUNAL

SITTING AT PUNE

ORIGINAL APPLICATION NO. 41 of 2023

BETWEEN:

Arun Gaikwad ... **APPLICANT**

VERSUS

Secretary, Environment Department of the Government of Maharashtra, & others ... **RESPONDENTS**

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	Sanjay Gupta, which mandates that a Recreation Ground reservation cannot be changed.		

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COMBINED REJOINDER TO AFFIDAVIT-IN-REPLY OF RESPONDENT NO. 5 (Ministry of Environment, Forests and Climate Change) and Respondent No. 6 (State Level Environment Impact Assessment Authority)

I, Arun Nathuram Gaikwad, the Applicant above-named, residing at Mumbai, do hereby solemnly affirm and state as under:

1. The Appellant has gone through the copy of the Affidavits-in-Reply of the abovementioned Respondents i.e. Respondent No. 5, Ministry of Environment, Forests and Climate Change (MOEFCC). Since, the fundamental issues raised in both the Affidavits-in-Reply are fundamentally the same, accordingly, this Combined Rejoinder is being filed dealing with the core issues at stake, which are essential to determining the "substantial questions relating to environment" traversed through in this Original Application.

2. The Applicant submits that a perusal of the Affidavit-in-Reply, shows that there are essentially 5 core issues, which emerge with

reference to the issues at stake. Accordingly, these core issues are being dwelt upon hereunder:

3.0 THE CORE ISSUES:

3.1 ISSUE NO. 1:

Respondents do not deny this is a Township and Area Development Project:

One of the main core questions which have been traversed through in the Original Application, is that Wadala Truck Terminal is a Township and Area Development Project. Therefore, a specific Environment Clearance, was required by following the elaborate procedures, stipulated in the Environment Impact Assessment Notification of 2006 related to Township and Area Development Project. This includes determining the "Terms of Reference" and thereafter preparing an "Environment Impact Assessment Report".

It is pertinent to note that 'These Respondents' have not disputed the fact that this is a Township and Area Development Project. All they have contended is that since the project construction started in the year 1985, hence no Environment Clearance is required.

This stand taken by 'These Respondents' is untenable, for the reason that this project was made subject to substantial expansion post 14th September, 2006, when the Environment Impact Assessment Notification of 2006 was brought to force.

This is apparent from the following facts:

(a) A fresh layout of the project was prepared on 16th November, 2010 having an area of 109.24 hectares *(annexed as **ANNEXURE-'A-7'** in the Original Application)*. This layout obviously, was made after the promulgation of the Environment Impact Assessment Notification of 2006. Accordingly, it was necessary that this Township and Area Development Project ought to have taken prior Environment Clearance.

(b) Even the layout prepared as above, was further revised and this Township and Area Development Project was further expanded vide layout of 16th September, 2019, a copy of which has been annexed along the Original Application and marked as **ANNEXURE-'A-2'.** Through this fresh layout, **the size of this project was increased from 109.24 hectares to 122.10 hectares.** Therefore, this becomes an expansion case and accordingly, an Environment Clearance was required. This is more particularly apparent from Para 2 of the Notification which is quoted as under:

> **"2. REQUIREMENTS OF PRIOR ENVIRONMENTAL CLEARANCE (EC):-**
>
> The following projects or activities shall require prior environmental clearance from the concerned regulatory authority, which shall hereinafter referred to be as the Central Government in the Ministry of Environment and Forests for matters falling under Category 'A' in the Schedule and at State level the State Environment Impact Assessment Authority (SEIAA) for matters falling under Category 'B' in the said Schedule, before any construction work, or preparation of

land by the project management except for securing the land, is started on the project or activity:

(i) All new projects or activities listed in the Schedule to this notification;

(ii) Expansion and modernization of existing projects or activities listed in the Schedule to this notification with addition of capacity beyond the limits specified for the concerned sector, that is, projects or activities which cross the threshold limits given in the Schedule, after expansion or modernization;

(iii) Any change in product - mix in an existing manufacturing unit included in Schedule beyond the specified range."

(Emphasis supplied).

(c) At the time, when the project was conceived the Floor Space Index (FSI) was '1'. However, vide Notification dated 18th September, 2019 annexed as ***ANNEXURE-'A-8'*** in the Original Application, the FSI was substantially increased to '4' and this was further made intense by using a concept of 'Global FSI', which has got no statutory force. This is because while the word FSI has been defined in the Maharashtra Regional and Town Planning Act, 1966, (relevant legal provision annexed as **ANNEXURE-'A-1'**) however, a prefix ***"Global"*** was added, which is not permitted under the legal maxim – *'A verbis legis non recedendum est',* i.e. "From the words of law, there must be no departure".

Be that as it may, this was tantamount to an expansion of the project.

Considering the facts stated in (a) to (c) above, it is overwhelmingly clear that there has been a substantial expansion to this Township and Area Development Project, and therefore, a prior Environment Clearance before the expansion was necessary, which was not taken in this case.

3.2 ISSUE NO. 2:

MOEFCC has incorrectly stated that that instead of the Environment Clearance required for the entire Township and Area Development Project, it would suffice if individual plot owners take respective Environment Clearance:

In their Affidavit-in-Reply, the MOEFCC has stated that since the development of the project started in the year 1985, therefore, it was not necessary to have taken Environment Clearance for the entire Township and Area Development Project. Instead, Environment Clearance would be required only if individual plots were to cross the threshold limit of 20000 square metres.

More particularly, the MOEFCC has stated as under:

> "It is submitted that since the majority of the layout/infrastructure is developed prior to the EIA Notification, it is opined that the MMRDA shall ensure that the individual plot owners to obtain prior EC in case the Built-up Area is more than 20000 square metres."

This contention taken by the MOEFCC becomes legally untenable, because the parameters of taking Environment Clearance for the Township and Area Development Projects, are fundamental different. While the Township and Area Development Projects come under the more intense Category 8 (a) of the Schedule of the Notification, the projects of the size of 20,000 to 150000 square metres, come under the easy Category- 8 (b) of the Schedule.

Needless to add that for a Category 8(a) project an elaborate exercise of preparing the "Terms of Reference" and thereupon an "Environment Impact Assessment Report" is required, this stipulation is not applicable to the Category 8 (b) project.

Accordingly, this argument taken by the MOEFCC pales into insignificance.

3.3 ISSUE NO. 3:

'These Respondents' have taken a position which is contrary to the ruling of the Hon'ble Supreme Court in relation to the expansion of existing projects:

The Applicant submits that the Hon'ble Supreme Court in the case of *Keystone Realtors Pvt. Ltd. v. Anil V. Tharthare* ***(ANNEXURE-'A-2'),*** has clearly stated that if there is any expansion of an existing project, then a prior Environment Clearance was required.

More particularly, the Hon'ble Supreme Court held as under:

"17. At the time of the second increase, the total construction area of the appellant's project was enlarged from 32,395.17 square metres to 40,480.88 square metres. As a result of the expansion, the appellant constructed sixteen additional flats which were sold at the prevailing market rate. The appellant did not comply with the procedure set out under paragraph 7(ii) of the EIA Notification but rather sought an "amendment" to the EC. The third respondent did not require the appellant to submit an updated Form 1 nor was the proposal processed and evaluated by the fourth respondent. The "amendment" to the EC dated 13 March 2014 does not discuss the potential environmental impact of the increase in construction area, but merely records that the construction area now stands at 40,480.88 square metres. **The procedure set out under paragraph 7(ii) of the EIA Notification exists to ensure that where a project is expanded in size, the environmental impact on the surrounding area is evaluated holistically considering all the relevant factors including air and water availability and pollution, management of solid and wet waste and the urban carrying capacity of the area. This was not done in the case of the appellant's project.** It was not open to the third respondent to grant an "amendment" to the EC without following the procedure set out in paragraph 7(ii) of the EIA Notification.

18. We further note that as on the date of the impugned order construction at the project site had already been completed. A core tenet underlying the entire scheme of the EIA Notification is that construction should not be executed until ample scientific evidence has been compiled so as to understand the true environmental impact of a project. **By completing the construction of the project, the appellant denied the third and fourth respondents the ability to evaluate the environmental**

impact and suggest methods to mitigate any environmental damage. At this stage, only remedial measures may be taken. The NGT has already directed the appellant to deposit Rupees one crore and has set up an expert committee to evaluate the impact of the appellant's project and suggest remedial measures. In view of these circumstances, we uphold the directions of the NGT and direct that the committee continue its evaluation of the appellant's project so as to bring its environmental impact as close as possible to that contemplated in the EC dated 2 May 2013 and also suggest the compensatory exaction to be imposed on the appellant."

(Emphasis supplied).

The Applicant submits that the aforesaid ruling of the Hon'ble Supreme Court is crystal-clear and unambiguous. If there is any expansion in the size of an existing project, then an Environment Clearance would be mandatory, and which has not been taken in this case.

Unfortunately, despite the fact that the impugned project got substantially expanded not once, but twice, accordingly, a prior Environment Clearance was required in terms of the ruling of the Hon'ble Supreme Court mentioned above.

3.4 ISSUE NO. 4:

'These Respondents' are completely silent on the aspect that the primary requisite of having a Garden of 30.5 hectares has been sacrificed:

The Applicant submits that in the Ground No. 3 of the Original Application (at page 18) it has been brought out, specifically in detail,

that a garden area of 30.5 hectares was required, and which has been sacrificed.

This aspect has been completely set aside by in the Affidavit-in-Reply of the MOEFCC and the SEIAA. Accordingly, this point ought to be assumed to have been admitted in view of the following provisions of the Civil Procedure Code, 1908:

> **Order VIII of the Civil Procedure Code, 1908, the relevant part of which is quoted hereunder:**
>
> **3. Denial to be specific --** It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.
>
> ... ...
>
> **5. Specific denial –** (1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:

To reiterate, since 'These Respondents' have not denied the averment in the Original Application stated above. Hence this fact has been admitted and which thus entitles the Original Applicant for the environment-related relief sought in the Original Application.

3.5 ISSUE NO. 5:

'These Respondents' have obscured the conspicuous fact, that a garden of 6.76 hectares was sacrificed in violation of

the settled position in law that a Garden Reservation cannot be compromised:

Despite the fact that in the Affidavit-in-Reply of the MOEFCC it has been mentioned that the site was inspected by the Regional Office, Nagpur, yet 'These Respondents' in their Affidavit-in-Reply have clearly omitted to mention the fact that in the layout of the year 2010 **(ANNEXURE-'A-7' of the Original Application),** Recreation Ground i.e. RG of 6.76 hectares was earmarked in Block-C the project. However, in open violation of the law, this mandatory RG was deleted **(ANNEXURE-'A-2' of the Original Application).**

Needless to add that it is a settled position in the law that once a land has been earmarked as a RG, then this reservation cannot be ever deleted. While this gets support from the eminent principles of non-regression, this has been more specifically stipulated by the Hon'ble Supreme Court in the landmark case of Bangalore Medical Trust.

While considering this ruling of the Apex Court, the Hon'ble National Green Tribunal in the case of Hon'ble National Green Tribunal, Special Bench, in Original Application No. 10 of 2022, in the case of Sanjay Gupta & others v. Ghaziabad Nagar Nigam (annexed as **ANNEXURE-'A-3'**) came to the following self-explanatory inference:

> **"3.** In this regard, in Lal Bahadur v. State of UP & Others, (2018)15SCC407, change of master plan and converting green area into residential one was considered. The issue was, whether such conversion is conducive to protection of environment or not. In the master plan of 1995 of Lucknow, area in dispute was reserved as green belt. In master plan 2021, the same

area, shown earlier as green belt, was converted as residential. This part of master plan 2021 was challenged before Lucknow bench of Allahabad High Court. Writ petition was dismissed. The matter came in appeal before Supreme Court. Court held in para 12 of judgment that change of area from green belt to residential is in violation of Article 21, 48A and 51A (g) of the Constitution. **Reliance was placed on Bangalore Medical Trust v B.S. Muddappa & Others, (1991)4SCC54, wherein Court had said that protection of environment, open spaces for recreation and fresh air, playground for children, promenade for the residents and other conveniences or amenities are matters of great public concern and avital interest to be taken care of in a development scheme. Public interest in the reservation and preservation of open spaces for parks and playgrounds cannot be sacrificed by leasing or selling such sites to private persons for conversion to some other use.** Court also relied on an American Supreme Court Judgment Agins vs. City of Tiburon, [447 us 255 (1980)], wherein Court said: '... it is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as ..... pollution, ... destruction of scenic beauty, disturbance of the ecology and the environment, hazards related geology, fire and flood, and other demonstrated consequences of urban sprawl'.

4. In para 15, Court said that, "This Court had clearly laid down that such spaces could not be changed from green belt to residential or commercial one. It is not permissible to the State Government to change the parks and playgrounds contrary to legislative intent having constitutional mandate, as that would be an abuse of statutory powers vested in the authorities. Court also observed, when master plan was prepared earlier and

authorities found importance of this place to be kept as open space. Court said, "The importance of park is of universal recognition. It was against public interest, protection of the environment and such spaces reduce the ill effects of urbanisation, it was not permissible to change this area into urban area as the garden/ Greenbelt is essential for fresh air, thereby protecting against the resultant impacts of urbanization, such as pollution etc. The provision of the Act of 1973 and other enactments relating to environment could not be permitted to become statutory mockery by changing the purpose in the master plan from green belts to residential one. Authorities are enjoined with duty maintain them as such as per doctrine of public trust."

(Emphasis supplied).

Accordingly, by removing the RG area of 6.76 hectares, and doing this without taking any prior Environment Clearance, makes this entire project as being violative of the Environment Impact Assessment Notification of 2006.

5. Considering the aforesaid, it is apparent that the contentions put forward by 'These Respondents' are simply preposterous and ought to be rejected. Accordingly, the Applicant humbly reiterates that the contentions raised by these Respondents, in their Affidavits-in-Reply be rejected and the prayers made in the Original Application be made absolute.

APPLICANT

VERIFICATION

I, Arun Nathuram Gaikwad, having his address as 523/7 Fernandes Chawl, New Mill Road, Kurla West, Mumbai – 400070,

do hereby verifies that the contents of aforesaid paras in this Rejoinder to the Affidavit-in-Reply of Respondent No. 5 and Respondent No. 6, are true to my personal knowledge and belief and that I have not suppressed any material fact.

APPLICANT

18 JAN 2024

DATE: 6th January, 2024 18 JAN 2024

PLACE: Mumbai

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BEFORE ME

B.R. KASHID
ADVOCATE & NOTARY
GOVT. OF INDIA

18 JAN 2024

NOTED & REGISTERED
Sr. No. 32 Page No. 9 Reg. No. 24
Date 18 JAN 2024