BEFORE THE NATIONAL GREEN TRIBUNAL WESTERN ZONE BENCH, PUNE
APPEAL NO. 42 OF 2020 (WZ)

IN THE MATTER OF:

RAM BABAN BORKAR (PUNE-MAHARASHTRA) ... APPELLANT

VERSUS

UNION OF INDIA THROUGH SECRETARY, MOEF&CC AND ORS..
... RESPONDENTS

AND

ORIGINAL APPLICATION NO.48 OF 2020 (WZ)

IN THE MATTER OF:

TANAJI GAMBHIRE …. APPLICANT

VERSUS

UNION OF INDIA THROUGH SECRETARY, MOEF&CC AND ORS.
….RESPONDENTS

COMPILATION OF NOTIFICATIONS AND JUDGMENTS

MINISTRY OF ENVIRONMENT AND FORESTS

ENVIRONMENT IMPACT ASSESSMENT NOTIFICATION S.O.60(E), dated 27/01/1994

(incorporating amendments vide S.O. 356(E) dated 4/5/1994, S.O. 318(E) dated 10/4/1997, S.O. 319 dated 10/4/1997, S.O. 73(E) dated 27/1/2000, S.O. 1119(E) dated 13/12/2000, S.O. 737(E) dated 1/8/2001, S.O. 1148(E) dated 21/11/2001, S.O. 632(E) dated 13/06/2002)

1) **S.O. 60 (E)-** Whereas a notification under clause (a) of sub-rule (3) of rule 5 of the Environment (Protection) Rules, 1986 inviting objections from the public within sixty days from the date of publication of the said notification, against the intention of the Central Government to impose restrictions and prohibitions on the expansion and modernization of any activity or new projects being undertaken in any part of India unless environmental clearance has been accorded by the Central Government or the State Government in accordance with the procedure specified in that notification was published as SO No. 80(E) dated 28th January, 1993;

   And whereas all objections received have been duly considered;

   Now, therefore, 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 (29 of 1986) read with clause (d) of sub-rule (3) of rule 5 of the Environment (Protection) Rules, 1986, the Central Government hereby directs that on and from the date of publication of this notification in the Official Gazette, expansion or modernization of any activity (if pollution load is to exceed the existing one, or new project listed in Schedule I to this notification, shall not be undertaken in any part of India unless it has been accorded environmental clearance by the Central Government in accordance with the procedure hereinafter specified in this notification;

2) Requirements and procedure for seeking environmental clearance of projects:

   I.(a) Any person who desires to undertake any new project in any part of India or the expansion or modernization of any existing industry or project listed in the Schedule-I shall submit an application to the Secretary, Ministry of Environment and Forests, New Delhi.

   The application shall be made in the proforma specified in Schedule-II of this notification and shall be accompanied by a project report which shall, inter

alia, include an Environmental Impact Assessment Report, Environment Management Plan and details of public hearing as specified in Schedule-IV prepared in accordance with the guidelines issued by the Central Government in the Ministry of Environment and Forests from time to time. However, Public Hearing is not required in respect of (i) small scale industrial undertakings located in (a) notified/designated industrial areas/industrial estates or (b) areas earmarked for industries under the jurisdiction of industrial development authorities; (ii) widening and strengthening of highways; (iii) mining projects (major minerals) with lease area up to twenty five hectares, (iv) units located in Export Processing Zones, Special Economic Zones and (v) modernisation of existing irrigation projects.

Provided that for pipeline projects, Environmental Impact Assessment report will not be required:

Provided further, that for pipeline and highway projects, public hearing shall be conducted in each district through which the pipeline or highway passes through.

(b) Cases rejected due to submission of insufficient or inadequate data and Plan may be reviewed as and when submitted with complete data and Plan. Submission of incomplete data or plans for the second time would itself be a sufficient reason for the Impact assessment Agency to reject the case summarily.

II. In case of the following site specific projects:

a. mining;
b. pit-head thermal power stations;
c. hydro-power, major irrigation projects and/or their combination including flood control;
d. ports and harbours (excluding minor ports);
e. prospecting and exploration of major minerals in areas above 500 hectares;

The project authorities will intimate the location of the project site to the Central Government in the Ministry of Environment and Forests while initiating any investigation and surveys. The Central Government in the Ministry of Environment and Forests will convey a decision regarding suitability or otherwise of the proposed site within a maximum period of thirty days. The said site clearance shall be granted for a sanctioned capacity and shall be valid for a period of five years for commencing the construction, operation or mining.

III. (a) The reports submitted with the application shall be evaluated and assessed by the Impact Assessment Agency, and if deemed necessary it may consult a committee of Experts, having a composition as specified in Schedule-III of this Notification. The Impact Assessment Agency (IAA) would be the Union Ministry of Environment and Forests. The Committee of Experts mentioned above shall be constituted by the Impact Assessment Agency or such other body under the Central Government authorised by the Impact Assessment Agency in this regard.

(b) The said Committee of Experts shall have full right of entry and inspection of the site or, as the case may be, factory premises at any time prior to, during or after the commencement of the operations relating to the project.

(c) The Impact Assessment Agency shall prepare a set of recommendations based on technical assessment of documents and data, furnished by the project authorities supplemented by data collected during visits to sites or factories, if undertaken and details of the public hearing.

The assessment shall be completed within a period of ninety days from receipt of the requisite documents and data from the project authorities and completion of public hearing and decision conveyed within thirty days thereafter.

The clearance granted shall be valid for a period of five years for commencement of the construction or operation of the project.

IV. In order to enable the Impact Assessment Agency to monitor effectively the implementation of the recommendations and conditions subject to which the environmental clearance has been given, the project authorities concerned shall submit a half yearly report to the Impact Assessment Agency. Subject to the public interest, the Impact Assessment Agency shall make compliance reports publicly available.

V. If no comments from the Impact Assessment Agency are received within the time limit, the project would be deemed to have been approved as proposed by project authorities.

3) Nothing contained in this Notification shall apply to:

a. any item falling under entry Nos. 3, 18 and 20 of the Schedule-I to be located or proposed to be located in the areas covered by the Notifications S.O. No.102 (E) dated 1st February, 1989, S.O. 114 (E)

dated 20th February, 1991; S.O. No. 416 (E) dated 20th June, 1991 and S.O. No.319 (E) dated 7th May, 1992.

b. any item falling under entry no.1,2,3,4,5,7,9,10,13,14,16,17,19,21,25,27 of Schedule-I if the investment is less than Rs.100 crores for new projects and less than Rs. 50 crores for expansion / modernization projects.
c. any item reserved for Small Scale Industrial Sector with investment less than Rs. 1 crore.
d. defence related road construction projects in border areas.
e. any item falling under entry no. 8 of Schedule-I, if that product is covered by the notification G.S.R. 1037(E) dated 5th December 1989.
f. Modernization projects in irrigation sector if additional command area is less than 10,000 hectares or project cost is less than Rs. 100 crores.

4) Concealing factual data or submission of false, misleading data/reports, decisions or recommendations would lead to the project being rejected. Approval, if granted earlier on the basis of false data, would also be revoked. Misleading and wrong information will cover the following:

- False information
- False data
- Engineered reports
- Concealing of factual data
- False recommendations or decisions

SCHEDULE-I

(See paras 1 and 2)

LIST OF PROJECTS REQUIRING ENVIRONMENTAL CLEARANCE FROM THE CENTRAL GOVERNMENT

1. Nuclear Power and related projects such as Heavy Water Plants, nuclear fuel complex, Rare Earths.
2. River Valley projects including hydel power, major Irrigation and their combination including flood control.
3. Ports, Harbours, Airports (except minor ports and harbours).
4. Petroleum Refineries including crude and product pipelines.
5. Chemical Fertilizers (Nitrogenous and Phosphatic other than single superphosphate).
6. Pesticides (Technical).
7. Petrochemical complexes (Both Olefinic and Aromatic) and Petro-chemical intermediates such as DMT, Caprolactam, LAB etc. and production of basic plastics such as LLDPE, HDPE, PP, PVC.
8. Bulk drugs and pharmaceuticals.
9. Exploration for oil and gas and their production, transportation and storage.
10. Synthetic Rubber.
11. Asbestos and Asbestos products.
12. Hydrocyanic acid and its derivatives.

13 (a) Primary metallurgical industries (such as production of Iron and Steel, Aluminium, Copper, Zinc, Lead and Ferro Alloys).

(b) Electric arc furnaces (Mini Steel Plants).

14. Chlor alkali industry.
15. Integrated paint complex including manufacture of resins and basic raw materials required in the manufacture of paints.

16. Viscose Staple fibre and filament yarn.
17. Storage batteries integrated with manufacture of oxides of lead and lead antimony alloys.
18. All tourism projects between 200m—500 metres of High Water Line and at locations with an elevation of more than 1000 metres with investment of more than Rs.5 crores.
19. Thermal Power Plants.
20. Mining projects (major minerals) with leases more than 5 hectares.
21. Highway Projects except projects relating to improvement work including widening and strengthening of roads with marginal land acquisition along the existing alignments provided it does not pass through ecologically sensitive areas such as National Parks, Sanctuaries, Tiger Reserves, Reserve Forests
22. Tarred Roads in the Himalayas and or Forest areas.
23. Distilleries.
24. Raw Skins and Hides
25. Pulp, paper and newsprint.
26. Dyes.
27. Cement.
28. Foundries (individual)
29. Electroplating
30. Meta amino phenol

SCHEDULE-II

[See Sub-para I (a) of para 2]

Procedure for seeking environment clearance of projects.

1. (1) Any persons who desires to establish a thermal power plant of any category mentioned n Schedule-I, shall submit an application to the Department of the State Government dealing with the subject of environment.

(2) The application shall be made in the Form 'A' specified in Schedule-II annexed to this notification and shall be accompanied by a detailed project report which shall, inter alia, include an Environmental Impact Assessment Report and an Environment Management plant prepared n accordance with the guidelines issued by the State Department of Environment from time to time.

(3) Cases rejected due to submission of insufficient or inadequate data and Action Plans may be reviewed as and when submitted with complete data and Action Plans. Submission of incomplete data for the second time would itself be a sufficient reason for the State Government to reject the case summarily.

5) In case of the pit-head thermal power plants, the applicant shall intimate the location of the project site to the State Government while initiating any investigation and surveys. The State Government will convey a decision regarding suitability or otherwise of the proposed site within a maximum period of thirty days. The said site clearance will be granted for a sanctioned capacity and it will be valid for a period of five years for commencing the construction or operation of the project.

3. (1) The applicant shall obtained No Objection Certificate from the concerned Pollution Control Board. The State Pollution Control Board shall issue No Objection Certificate to establish only after completing public hearing as specified in Schedule-IV annexed to this notification.

(2) The reports submitted with the application and No Objection Certificate from the State Pollution Control Board shall be evaluated and assessed by the State Government, in consultation with a Committee of experts which shall be constituted by the State Government as specified in Schedule-III appended to this notification.

(3) The said Committee of experts shall have full right of entry and inspection of the site or, as the case may be, factory premises at any time prior to, during or after the commencement of the preparations relating to the plant.

(4) The State Government Department dealing with the subject of Environment shall prepare a set of recommendations based on technical assessment of documents and data furnished by the applicant supplemented by data collected during visits to sites, if undertaken and interaction with affected population and environment groups, if necessary.

(5) The assessment shall be completed within a period of ninety days from receipt of the requisite documents and data from the applicant and decision conveyed within thirty days thereafter.

(6) the environmental clearance granted shall be valid for a period of five years from commencement of the construction or operation of the project.

4. Concealing factual data or submission of false, misleading data reports, decisions of recommendations would lead to the project being rejected. Approval, if granted, earlier on the basis of false data, can also be revoked.

(FORM A)

APPLICATION FORM

1. (a) Name and Address of the project proposed :

(b) Location of the project:

Name of the Place:

District, Tehsil:

Latitude/Longitude:

Nearest Airport/Railway Station :

(c) Alternate sites examined and the reasons for selecting the proposed site:

(d) Does the site conform to stipulated land use as per local land use plan:

2. Objectives of the project:

3. (a) Land Requirement:
Agriculture Land:
Forest land and Density of vegetation.
Other (specify):
(b) (i) Land use in the Catchment within 10 kms radius of the proposed site:
(ii) Topography of the area indicating gradient, aspects and altitude:
(iii) Erodibility classification of the proposed land:
(c) Pollution sources existing in 10 km radius and their impact on quality of air, water and land:
(d) Distance of the nearest National Park/Sanctuary/Biosphere Reserve/Monuments/heritage site/Reserve Forest:
(e) Rehabilitation plan for quarries/borrow areas:
(f) Green belt plan:
(g) Compensatory afforestation plan:

4. Climate and Air Quality:

(a) Windrose at site:
(b) Max/Min/Mean annual temperature:
(c) Frequency of inversion:
(d) Frequency of cyclones/tornadoes/cloud burst:
(e) Ambient air quality data:
(f) Nature & concentration of emission of SPM, Gas (CO, CO_2, NOx, CHn etc.) from the project:

5. Water balance:

(a) Water balance at site:
(b) Lean season water availability;
Water Requirement:
(c) Source to be tapped with competing users (River, Lake, Ground, Public supply):
(d) Water quality:
(e) Changes observed in quality and quantity of groundwater in the last years and present charging and extraction details:

(f) (i) Quantum of waste water to be released with treatment details:
(ii) Quantum of quality of water in the receiving body before and after disposal of solid wastes:
(iii) Quantum of waste water to be released on land and type of land:

(g) (i) Details of reservoir water quality with necessary Catchment Treatment Plan:
(ii) Command Area Development Plan:

6. Solid wastes:

(a) Nature and quantity of solid wastes generated
(b) Solid waste disposal method:

7. Noise and Vibrations:

a. Sources of Noise and Vibrations:
b. Ambient noise level:
c. Noise and Vibration control measures proposed:
d. Subsidence problem, if any, with control measures:

8. Power requirement indicating source of supply: Complete environmental details to be furnished separately, if captive power unit proposed:
9. Peak labour force to be deployed giving details of:
   - Endemic health problems in the area due to waste water/air/soil borne diseases:
   - Health care system existing and proposed:
10. (a) Number of villages and population to be displaced:
    (b) Rehabilitation Master Plan:
11. Risk Assessment Report and Disaster Management Plan:
12. (a) Environmental Impact Assessment
    (b) Environment Management Plan:
    (c) Detailed Feasibility Report:
    (d) Duly filled in questionnaire

Report prepared as per guidelines issued by the Central Government in the MOEF from time to time:

13. Details of Environmental Management Cell:

I hereby give an undertaking that the data and information given above are due to the best of my knowledge and belief and I am aware that if any part of the data/information submitted is found to be false or misleading at any stage, the

project be rejected and the clearance given, if any, to the project is likely to be revoked at our risk and cost.

Signature of the applicant
With name and full address

Given under the seal of
Organisation
on behalf of Whom the applicant is signing.

Date:

Place:

In respect to item for which data are not required or is not available as per the declaration of project proponent, the project would be considered on that basis.

SCHEDULE-III

[See Sub. Para(2), Para 3 of Schedule- II]

COMPOSITION OF THE EXPERT COMMITTEES FOR ENVIRONMENTAL IMPACT ASSESSMENT

1. The Committees will consist of experts in the following disciplines:

i. Eco-system Management
ii. Air/Water Pollution Control
iii. Water Resource Management
iv. Flora/Fauna conservation and management
v. Land Use Planning
vi. Social Sciences/Rehabilitation
vii. Project Appraisal
viii. Ecology

ix. Environmental Health
x. Subject Area Specialists
xi. Representatives of NGOs/persons concerned with environmental issues.

2. The Chairman will be an outstanding and experienced ecologist or environmentalist or technical professional with wide managerial experience in the relevant development sector.
3. The representative of Impact Assessment Agency will act as a Member-Secretary.
4. Chairman and Members will serve in their individual capacities except those specifically nominated as representatives.
5. The Membership of a Committee shall not exceed 15.

SCHEDULE IV

(See para 3, subparagraph (2) of Schedule- II)

PROCEDURE FOR PUBLIC HEARING

(1) **Process of Public Hearing**: - Whoever apply for environmental clearance of projects, shall submit to the concerned State Pollution Control Board twenty sets of the following documents namely: -

i. An executive summary containing the salient features of the project both in English as well as the local language along with Environmental Impact Assessment (EIA). However, for pipeline project, Environmental Impact Assessment report will not be required. But Environmental Management Plan including risk mitigation measures is required.
ii. Form XIII prescribed under Water (Prevention and Control of Pollution) Rules, 1975 where discharge of sewage, trade effluents, treatment of water in any form, is required.
iii. Form I prescribed under Air (Prevention and Control of Pollution) Union Territory Rules, 1983 where discharge of emissions are involved in any process, operation or industry.

iv. Any other information or document which is necessary in the opinion of the Board for their final disposal of the application.

(2) **Notice of Publics Hearing**: **-**(i) The State Pollution Control Board shall cause a notice for environmental public hearing which shall be published in at least two newspapers widely circulated in the region around the project, one of which shall be in the vernacular language of the locality concerned. State Pollution Control Board shall mention the date, time and place of public hearing. Suggestions, views, comments and objections of the public shall be invited within thirty days from the date of publication of the notification.

(ii) All persons including bona fide residents, environmental groups and others located at the project site/sites of displacement/sites likely to be affected can participate in the public hearing. They can also make oral/written suggestions to the State Pollution Control Board.

Explanation: - For the purpose of the paragraph person means: -

a. any person who is likely to be affected by the grant of environmental clearance;
b. any person who owns or has control over the project with respect to which an application has been submitted for environmental clearance;
c. any association of persons whether incorporated or not like to be affected by the project and/or functioning in the filed of environment;
d. any local authority within any part of whose local limits is within the neighbourhood wherein the project is proposed to be located.

(3) **Composition of public hearing panel: -** The composition of Public Hearing Panel may consist of the following, namely: -

(i) Representative of State Pollution Control Board;
(ii) District Collector or his nominee;
(iii) Representative of State Government dealing with the subject;
(iv) Representative of Department of the State Government dealing with Environment;
(v) Not more than three representatives of the local bodies such as Municipalities or panchayats;
(vi) Not more than three senior citizens of the area nominated by the District Collector.

(4) **Access to the Executive Summary and Environmental Impact Assessment report:-** The concerned persons shall be provided access to the

Executive Summary and Environmental Impact Assessment report of the project at the following places, namely:-

(i) District Collector Office;
(ii) District Industry Centre;
(iii) In the Office of the Chief Executive Officers of Zila Praishad or Commissioner of the Municipal Corporation/Local body as the case may be;
(iv) In the head office of the concerned State Pollution Control Board and its concerned Regional Office;
(v) In the concerned Department of the State Government dealing with the subject of environment.

5. Time period for completion of public hearing:

The public hearing shall be completed within a period of 60 days from the date of receipt of complete documents as required under paragraph 1.

MINISTRY OF ENVIRONMENT AND FORESTS

NOTIFICATION

New Delhi, the 4th April, 2011

S.O. 695(E).— Whereas by notification of the Government of India in the Ministry of Environment and Forests vide number S.O. 1533(E), dated the 14th September, 2006 issued under 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, the Central Government directed that on or from the dates of its publication, the required construction of new projects or activities or the expansion or modernization of existing projects or activities listed in the Schedule to the said notification entailing the capacity addition with change in process and or technology shall be undertaken in any part of India only after prior environmental clearance from the Central Government or as the case may be, by the State level Environment Impact Assessment Authority, duly constituted by the Central Government under sub-section (3) of section 3 of the said Act in accordance with the procedure specified therein;

And whereas, it has been decided to provide clarification with regard to the term "built up area" used in the said Notification and also to make various paras of the Notification mutually consistent and to restore the unintentional changes, which got into the Notification while making amendment vide S.O. 3067 (E) dated 1st December, 2009, in particular the entry against item no. 7(f) in the schedule to the EIA Notification, 2006 relating to highway projects and for this purpose to issue suitable amendments in the said Notification.

And whereas, clause (a) of sub-rule (3) of rule 5 of the said Environment (Protection) Rules provides that, whenever the Central Government considers that

prohibition or restrictions of any industry or carrying on any processes or operation in any area should be imposed, it shall given notice of its intention to do so;

And whereas, sub-rule (4) of rule 5 of the said Environment (Protection) Rules provides that, notwithstanding anything contained in sub-rule (3), whenever it appears to the Central Government that it is in public interest to do so, it may dispense with the requirement of notice under clause (a) of sub-rule (3);

Now therefore, in exercise of the powers conferred by sub-section (1) and clause (v) of sub-section (2) of section 3 of the said Environment (Protection) Act, read with clause (d) of sub-rule (3) of rule 5 of the said Environment (Protection) Rules, the Central Government hereby makes the following amendments in the said Notification, namely:-

In the said notification, -

(I) In para 6, for the existing words "An application seeking prior environmental clearance in all cases shall be made", the following words shall be substituted, namely:-

"An application seeking prior environmental clearance in all cases shall be made by the project proponent".

(II) In para 7, in sub-para 7 in clause (i), sub para II, stage (2) – scoping, sub para (i), in the last sentence, for the words "activities listed as Category 'B' in item 8 of the schedule (Construction / Township / Commercial Complexes / Housing)", the following words shall be substituted, namely:-

"Activities listed as Category 'B' in item 8(a) of the schedule (building and construction projects)".

(III) In the Schedule, -

(i) against item 1(a), -

in column (5), for the entries, the following entries shall be substituted, namely:-

"General conditions shall apply.

Note:

(i) Prior environmental clearance is as well required at the stage of renewal of mine lease for which application should be made up to one year prior to date of renewal.

(ii) Mineral prospecting is exempted."

(ii) against item 7(f), -

in column (4), for the entry "(i) All State Highway Projects; and" the following entry shall be substituted, namely:-

"(i) All New State Highway Projects".

(iii) against item 8(a), -

in column (5), for the entry, the following entry shall be substituted, namely:-

"The built up area for the purpose of this Notification is defined as "the built up or covered area on all the floors put together including basement(s) and other service areas, which are proposed in the building / construction projects"."

(IV) In Appendix V, for para 3, the following para shall be substituted, namely:-

"3. where a public consultation is not mandatory, the appraisal shall be made on the basis of prescribed application Form-1 and EIA report, in the case of all projects and activities other than item 8 of the schedule. In the case of item 8 of the schedule, considering its unique project cycle, the EAC or SEAC concerned shall appraise projects or activities on the basis of Form-1, Form-1A, conceptual plan and the EIA report [required only for projects listed under 8(b)] and make recommendations on the project regarding grant of environmental clearance or otherwise and also stipulate the conditions for environmental clearance".

[F. No. 3-101/2010-IA. III]

Dr. NALINI BHAT, Scientist 'G'

Note: The principal rules were published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (ii) vide notification number S.O. 1533(E), dated the 14th September, 2006 and amended vide S.O. 1737(E), dated the 11th October, 2007 and S.O. No. 3067(E) dated 1st December, 2009.

Printed by the Manager, Government of India Press, Ring Road, Mayapuri, New Delhi-110064
and Published by the Controller of Publications, Delhi-110054.

F. No. 22-35/2017-IA.III

Government of India

Ministry of Environment, Forest and Climate Change

(Impact Assessment Division)

*****

Indira Paryavaran Bhawan
Jor Bag Road, Aliganj
New Delhi - 110 003

Dated: 7th July, 2017

OFFICE MEMORANDUM

Sub: Clarification on the date of applicability of notification S.O. (E) 695 dated 04.04.2011 issued by MoEF&CC defining 'Built Up Area' of the project.

The Ministry is in receipt of a reference dated 03.04.2017 from Confederation of Real Estate Developers Association of India (CREDAI) seeking clarification on above mentioned subject. The CREDAI has requested that the definition of Built Up Area (BUA) given vide notification S.O. 695 (E) dated 04.04.2011 should have prospective effect.

2. The matter has been examined in the Ministry. The BUA defined in the notification S.O. 1533 (E) dated 14th September, 2006 mentions at item 8 (a) columns 4 and 5 "built up area for covered construction; in the case of facilities open to sky, it will be the activity area".

3. The Ministry has further defined BUA vide its notification S.O. 695 (E) dated 04.04.2011 which reads as, "the built up or covered area on all the floors put together including its basement and other service areas, which are proposed in the building or construction project."

4. The definition provided in the Ministry's notification will have its effect from the prospective date of the notification only. The projects which are not covered in the period of above notifications should be assessed as per the definition of built up area provided in the building bye-laws or Development Control Regulation (DCR) of the local authorities in the States.

5. This issues with the approval of Competent Authority.

Ashish 07.07.2017

(Dr. Ashish Kumar)
Joint Director
Ph.: 011-24695474
Email: ashish.k@nic.in

All States/UTs/SIEAAs/MoEF&CC Divisions

(2017) 9 Supreme Court Cases 499

(BEFORE MADAN B. LOKUR AND DEEPAK GUPTA, JJ.)

Writ Petition (C) No. 114 of 2014

COMMON CAUSE .. Petitioner;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

With

Writ Petition (C) No. 194 of 2014

PRAFULLA SAMANTRA AND ANOTHER .. Petitioners;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petitions (C) No. 114 of 2014 with No. 194 of 2014, decided on August 2, 2017

A. **Mines and Minerals — Illegal mining — Ambit of expression "illegal mining" — Held, illegal mining does not only mean mining outside lease area — Illegality can take place even inside lease area — Purpose of MMDR Act is to ensure scientific mining, balanced utilisation of natural resources and protection and preservation of environment by adhering to statutory provisions — Non-adherence would attract penalty and termination of lease — Adherence to statutory provisions necessarily implies adherence to provisions of Environment (Protection) Act, 1986, laws pertaining to air and water pollution and Forest Conservation Act, 1980 besides adherence to mining statutes — Submission against interpreting "illegal mining" with such wide ambit on ground that definition of "illegal mining" was inserted vide R. 2(ii-a), Mineral Concession Rules, 1960, by Noti. dt. 26-7-2012 and thus present case not covered, not tenable**

— Mineral Concession Rules, 1960 — Rr. 2(ii-a), 22, 22-A, 27 and 37 — Mines and Minerals (Development and Regulation) Act, 1957 — Ss. 21, 4-A, 2, 3, 4, 5, 6, 8, 10, 12, 13, 18 and 23-C — Mineral Conservation and Development Rules, 1988 — Rr. 9, 10, 13, 31, 37, 38 and 41 — Environment (Protection) Act, 1986 — S. 3 — Forest (Conservation) Act, 1980 — S. 2 — Words and Phrases — "Illegal mining" (Paras 84 and 128 to 130)

B. **Mines and Minerals — Illegal mining — Suspension of illegal mining leases in Odisha — Directions issued**

— IAs Nos. 45 (filed by Zenith Mining), 47 (filed by *K*) and IA No. 66 (filed by *J*) dismissed as they did not have forest clearance (FC) or environmental clearance (EC) or both

— *S* (IA No. 9) actually had a working lease and has wrongly been included as a non-operational lease — Thus said IA also dismissed but as infructuous — However, State Government directed to ensure about valid statutory clearances

— All other IAs disposed of in terms of present order — Clarified that only after compliance with statutory requirements and full payment of compensation and other dues, mining leaseholders can restart their mining operations —

And this should be deposited on or before 31-12-2017 — State Government directed to decide pending show-cause notices if not already decided by 31-12-2017 (Paras 16, 222 to 225, 227 and 232)

C. **Mines and Minerals — Illegal mining — Violation of S. 6, MMDR Act, that is, relating to entitlement of maximum area for each person — Thus this illegality also relating to benami holders — CEC not finding any such illegality in respect of 2 of 7 mining leases, accepted as nothing contrary shown — For other leases, matter directed to be listed after two weeks for fixing of dates of hearing — Mines and Minerals (Development and Regulation) Act, 1957, S. 6 (Paras 192, 193, 197 and 226)**

D. **Mines and Minerals — Illegal mining — Illegal mining in State of Odisha — Procedure for transfer of lease under R. 37, MCR — Alleged violation of — Fresh look by new Committee, required — Directions**

— Matter adjourned for setting up of new Committee to identify lapses and recommend preventive measures — Validity of constitution of earlier committee was disputed and resultant litigation pending in High Court — Mineral Concession Rules, 1960, R. 37 (Paras 198 to 200, 202, 205, 228 and 229)

E. **Mines and Minerals — Illegal mining — Illegal mining in State of Odisha — Judicial notice taken of rampant mining and huge sums of money involved**

— Judicial notice taken of illegal and rampant mining in State of Odisha causing untold misery to the tribals in area — Over-extraction of 2155 lakhs MT of iron ore and manganese ore — Rs 17,516 crores worth mineral ore produced without environmental clearance (EC) or in excess of EC — And the above figures do not include mining without forest clearance (Paras 1, 25, 26 and 48)

F. **Mines and Minerals — Illegal mining — Facts found by Justice M.B. Shah Commission under Commissions of Inquiry Act, 1952, held, reliable for present purpose — It cannot be said that mining leaseholders were not given opportunity of hearing before Commission or the Commission did not follow the procedure**

— Even otherwise First Report being a fact-finding report there is no question of giving any notice to leaseholders or their cross-examination — Public Accountability, Vigilance and Prevention of Corruption — Inquiries/Commission of Inquiry — Commissions of Inquiry Act, 1952 — Ss. 8-B and 8-C — Procedure of notice and cross-examination under (Paras 33, 34, 43 and 45)

G. **Mines and Minerals — Illegal mining — Illegal mining in Odisha — CEC report — Credibility and relevance**

— CEC reports highlighted gravity of situation — Contention that CEC exceeded its limit by reporting on issues other than environment and forest, not tenable — Directions of Court to CEC indicate that CEC was expected to report on all aspects of illegal mining — Credibility of CEC report

cannot be doubted, though its recommendations are subject to satisfaction of Court (Paras 51 to 58 and 60)

H. **Mines and Minerals — Rehabilitation and Regeneration — Projects for tribal welfare and area development — Special Purpose Vehicle (SPV) for affected districts of Odisha — Huge amounts already available — Large amounts to be made available due to present order — Utilisation of funds and accountability — Directions**

— Chief Secretary, Odisha (Chairman, SPV) directed to provide audited accounts and ensure that amounts are utilised for benefit of tribals in affected districts — While taking up said projects, a bottom up planning and participatory approach should be followed (Paras 215, 217, 219, 220 and 231)

The probe into illegal mining in State of Odisha had started due to an IA filed against illegal mining in the State in a pending writ petition, that is, *T.N. Godavarman*, WP (C) No. 202 of 1995. Reports of Central Empowered Committee (CEC) appointed by Court and inquiries made under the Commissions of Inquiry Act, 1952 revealed that all kinds of illegalities were committed by the mining leaseholders in the State of Odisha. The Court, therefore, suspended the illegal mining leases in the State of Odisha. The Court however, permitted them to approach appropriate authorities for necessary approvals and clearances and thereafter approach the Court for modification of interim order against them. Some of the IAs in present matter were thus filed by mining leaseholders for modification of said interim order. The present case also clarified about the grounds on which illegality can be said to have been committed by mining leaseholders under various statutes and rules made thereunder and the remedial measures.

Held :

Expression "illegal mining" — Ambit

The overall purpose and objective of the MMDR Act as well as the Rules framed thereunder is to ensure that mining operations are carried out in a scientific manner with a high degree of responsibility including responsibility in protecting and preserving the environment and the flora of the area. Through this process, the holder of a mining lease is obliged to adhere to the standards laid down under the Environment (Protection) Act, 1986 or the EPA as well as the laws pertaining to air and water pollution and also by necessary implication, the provisions of the Forest (Conservation) Act, 1980. Exploitation of the natural resources is ruled out. If the holder of a mining lease does not adhere to the provisions of the statutes or the rules or the terms and conditions of the mining lease, that person is liable to incur penalties under Section 21 of the MMDR Act. In addition thereto, Section 4-A of the MMDR Act which provides for the termination of a mining lease is applicable. This provides that where the Central Government, after consultation with the State Government is of the opinion that it is expedient in the interest of regulation of mines and mineral development, preservation of natural environment, prevention of pollution, etc. then the Central Government may request the State Government to prematurely terminate a mining lease. (Para 84)

It was wrongly submitted that a mining operation only outside the mining lease area would constitute "illegal mining". That is because the definition of "illegal mining" in Rule 2(*ii-a*) of the MCR was inserted by a Notification dated 26-7-2012

while the present case is concerned with an earlier period. That apart, as mentioned above, the holder of a mining lease is required to adhere to the terms of the mining scheme, the mining plan and the mining lease as well as the statutes such as the EPA, the FCA, the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981. If any mining operation is conducted in violation of any of these requirements, then that mining operation is illegal or unlawful. Any extraction of a mineral through an illegal or unlawful mining operation would become illegally or unlawfully extracted mineral. (Paras 128 and 129)

Mining operations outside a leased area are obviously illegal or unlawful mining. Illegal mining takes within its fold excess extraction of a mineral over the permissible limit even within the mining lease area which is held under lawful authority, if that excess extraction is contrary to the mining scheme, the mining plan, the mining lease or a statutory requirement. Even otherwise, it is not possible to accept such narrow interpretation since the matter is about a natural resource which is intended for the benefit of everyone and not only for the benefit of the mining leaseholders. (Para 130)

Frightening facts and figures — Judicial notice of illegal and rampant mining in State of Odisha causing untold misery to the tribals in the area

The facts revealed during the hearing of these writ petitions filed under Article 32 of the Constitution suggest a mining scandal of enormous proportions and one involving megabucks. The lessees in the districts of Keonjhar, Sundergarh and Mayurbhanj in Odisha have rapaciously mined iron ore and manganese ore, apparently destroyed the environment and forests and perhaps caused untold misery to the tribals in the area. Steps taken by the lessees to ameliorate the hardships of the tribals, is perhaps not more than a drop in the ocean—also too little, too late. (Para 1)

There are some frightening figures mentioned by CEC in its final report. According to CEC, excess mining without environmental clearance or beyond what was authorised by the environmental clearance is 2130.988 lakhs MT of iron ore and 24.129 lakhs MT of manganese ore making a total of 2155.117 lakhs MT of iron ore and manganese ore. This does not include extraction of ore without forest clearance. These figures give an indication of the extent of excess or illegal or unlawful mining carried out. In terms of rupees, according to CEC the total notional value of minerals produced without an environmental clearance or in excess of the environmental clearance, at the weighted average price of minerals as proposed by the Indian Bureau of Mines comes to about Rs 17,091.24 crores for iron ore and about Rs 484.92 crores for manganese ore making a total of Rs 17,576.16 crores. Again, this does not include mining without forest clearance. Therefore, these can be referred to as megabucks and rapacious mining. (Paras 25 and 26)

Common Cause v. *Union of India*, IA No. 35 in IA No. 17 in WP (C) No. 114 of 2014, order dated 16-1-2015 (SC); *Common Cause* v. *Union of India*, WP (C) No. 114 of 2014, order dated 7-10-2015 (SC); *Common Cause* v. *Union of India*, (2016) 11 SCC 455, *referred to*

Significant observations of Commission about miserable condition of tribals

The Commission made certain significant observations as follows:

(*a*) The tribals in the area have been displaced or stay in pathetic and miserable conditions in same area. There is rampant air pollution with the trees having the colour of minerals making it clear that tribals are forced to breathe polluted air and drink polluted water.

(*b*) Streams and ground water is polluted and there is hardly any facility of drinking water. Women have been seen fetching water from dirty nalas.

(*c*) Mining companies and beneficiation plants are drawing water from rivers and nearby water resources are getting depleted at a fast rate. River Baitrani has been seriously affected by this activity.

(*d*) Basic facilities such as medical facilities, shelter/residence, education facilities are absent. Roads have a heavy flow of traffic and on one road of the area about 7000 trucks passed during night time.

(*e*) The labour is not being paid adequate wages beyond the minimum wages even though the income of the mine owners runs into billions of rupees. (Para 48)

Facts found by Justice M.B. Shah Commission under Commissions of Inquiry Act, 1952, reliable for present purpose

The First Report of Justice M.B. Shah Commission under Commissions of Inquiry Act, 1952 is relevant for the purpose of the present judgment and order. A resume of the procedure followed will indicate that full opportunity was given to the leaseholders to have their say. [Ed.: For said resume, see paras 35 to 42.] (Paras 33 and 34)

The First Report is generally a limited fact-finding enquiry on the basis of information supplied by the mining leaseholders. Therefore, there is absolutely no question of any notice being issued to any mining leaseholder under Section 8-B or the right of cross-examination being granted to any mining leaseholder under Section 8-C, Commissions of Inquiry Act, 1952. The Commission made adequate efforts to collect the facts and this collation in the First Report was possible with the assistance of the mining leaseholders and the government authorities. Therefore, the procedure adopted by the Commission in collecting facts was neither irregular nor illegal. Any mining leaseholder who wanted to be heard was given an opportunity of being heard and was fully aware of what the Commission was attempting to achieve and if any particular mining leaseholder chose not to associate with it, it was at his or her own peril. All the mining leaseholders were fully aware of what was going on, if not personally then certainly through their list of counsel running into 18 pages or their representatives individually or their Federation. (Para 43)

There is no challenge to the reports of the Justice Shah Commission. However, the present judgment can confine itself to some limited facts adverted to by CEC in its final report. The reports of the Commission are not necessary for conclusions of the present judgment. (Para 45)

Goa Foundation v. *Union of India*, (2014) 6 SCC 590, *relied on*

CEC Report — Credibility and relevance

The gravity of the situation is apparent from the report of CEC and the Commission also seems to support it. (Para 51)

The contention that in giving the Report dated 16-10-2014 CEC has exceeded its remit is not tenable. Though in *T.N. Godavarman Thirumulpad*, IA No. 3721 in 3629 in WP (C) No. 202 of 1995, order dated 13-1-2014 (SC), the Court stated that the report of CEC should not cover cases other than forest and environmental issues, subsequent orders have been completely overlooked by the respondent leaseholders inasmuch as on 21-4-2014 CEC was specifically directed to make a list of such lessees who are operating the leases in violation of the law. The various orders of the Court make it clear that the jurisdiction of CEC was not limited and it was expected to give a detailed report on all aspects of illegal mining or mining being carried out without any lawful authority in whatever manner. The initial objection raised on behalf of the leaseholders is therefore rejected. (Paras 52 to 54)

T.N. Godavarman Thirumulpad v. *Union of India*, (2014) 14 SCC 160, *relied on*

T.N. Godavarman Thirumulpad v. *Union of India*, IA No. 3721 in 3629 in WP (C) No. 202 of 1995, order dated 13-1-2014 (SC), *clarified*

CEC constituted in *T.N. Godavarman Thirumulpad (50)*, (2013) 8 SCC 198 is now an established body which renders extremely valuable advice to the Supreme Court and provides factual material on the basis of which the Court can make some recommendations and pass appropriate orders. (Para 55)

T.N. Godavarman Thirumulpad (50) v. *Union of India*, (2013) 8 SCC 198; *T.N. Godavarman Thirumulpad* v. *Union of India*, (2013) 8 SCC 204, *relied on*

The credibility of CEC cannot be doubted though its recommendations are subject to the satisfaction of the Supreme Court. In the present cases, CEC as a fact-finding body has functioned impartially and it is only on the conclusions arrived at by CEC on the basis of the facts gathered that there can be some debate and discussion. Anyone may disagree with the views of CEC and there is no need to make heavy weather about this at all. (Para 56)

Samaj Parivartana Samudaya v. *State of Karnataka*, (2013) 8 SCC 154, *relied on*

In its Final Report dated 16-10-2014, CEC has stated that it held meetings with the Chief Secretary and other senior officials of the State of Odisha and others on six dates. It also heard the leaseholders and others on seven dates and it held meetings with three of the leaseholders, that is, Jindal Steel and Power Ltd. (JSPL), Sarda Mines Pvt. Ltd. (SMPL) and Essel Mining and Industries Ltd. (Essel) on 10-9-2014. CEC visited the site of the mining lease of SMPL from 4-3-2014 to 7-3-2014 and had site visits of a number of other lessees from 12-7-2014 to 16-7-2014. The report of CEC dealt with leasewise and yearwise details of production of iron ore and manganese ore, permissible production and production without environmental clearance/beyond environmental clearance. Separately, CEC has dealt with the facts concerning SMPL and JSPL pursuant to a meeting held with them on 11-9-2014. (Paras 57, 58 and 60)

Projects for tribal welfare and area development — special purpose vehicle (SPV) — Directions

A scheme for setting up a special purpose vehicle (SPV) for tribal welfare and area development works has been implemented by the State of Odisha. (Para 215)

T.N. Godavarman Thirumulpad v. *Union of India*, IAs Nos. 2746-48 in WP (C) No. 202 of 1995, order dated 27-1-2014 (SC); *T.N. Godavarman Thirumulpad* v. *Union of India*, IAs Nos. 2746-48 in WP (C) No. 202 of 1995, order dated 28-4-2014 (SC), *referred to*

T.N. Godavarman Thirumulpad (104) v. *Union of India*, (2008) 2 SCC 222, *cited*

Some of the salient features of the scheme are as follows: The SPV will undertake specific tribal welfare and area development works so as to ensure inclusive growth of the mineral bearing areas. These will include works/projects related to livelihood intervention, health, water supply and sanitation, education, special programmes for development of women and children, entrepreneurial development of local people, communication and infrastructure projects and agro silvi-horticultural based livelihood projects through identified agencies/ Government Departments. While taking up such projects/works a bottom up planning and participatory approach will be followed. (Para 217)

Some of the mining leaseholders offered to deposit and in fact did deposit an amount of Rs 237.05 crores for utilisation by the SPV for carrying out welfare works and activities in the districts of Keonjhar, Sundergarh and Mayurbhanj in Odisha. There are huge amounts available with the special purpose vehicle for tribal welfare and area development works but nothing is known about the utilisation of the funds. Further, as a result of present order very large amounts will again be made available to the State of Odisha. These amounts should also be kept with the special purpose vehicle. (Para 219)

To ensure that the amounts are utilised for the benefit of tribals in the affected districts and for area development works, the Chief Secretary of Odisha, ex-officio Chairman of SPV is directed to file an affidavit stating the work done as well as provided the audited accounts of the receipt and expenditure of the SPV from its inception. The Chief Secretary of Odisha should file said affidavit within a period of six weeks and in any case on or before 30-9-2017. The Registry will list these petitions along with the affidavit immediately after its receipt for consideration. (Paras 220 and 231)

Minimum area for which mining lease may be granted — Violation of and benami holders

There have been several amendments to S. 6 relating to the maximum area for which a mining lease may be granted to a person. (Paras 189 to 192)

In this background, CEC examined the case of seven mining leaseholders. (Para 193)

As far as Bonai Industrial Company Ltd. and Feegrade & Co. Pvt. Ltd. are concerned, CEC has concluded that they have not violated Section 6 of the MMDR Act. That being the position, and nothing having been shown to the contrary, the recommendation of CEC in this regard is accepted. With regard to remaining 5 companies hearing on the matter was required, thus, postponed. (Para 197)

The Court would hear Jindal Steel and Power Ltd., Sarda Mines Private Ltd., Rungta Group of Companies and Essel Mining and Industries Ltd. on the applications filed by them. For this purpose matter to be listed again after two weeks so that a convenient date of hearing can be fixed. (Para 226)

Procedure for transfer of lease — Alleged violation of — Fresh look by new committee, required — Directions

CEC has discussed the possible violation of Rule 37 of the MCR. In this context, it was noted that there were several mining leaseholders who had entered into raising contracts which were actually a transfer of the lease as postulated by Rule 37 of the MCR. (Para 198)

On this basis the State of Odisha constituted a Committee on 8-7-2011 to carry out a study of the financial transactions between the mining leaseholders and the raising contractors to determine whether there is a prima facie violation of Rule 37 of the MCR. (Para 199)

The Committee concluded that eight mining leaseholders violated Rule 37 of the MCR. (Para 200)

The Central Government in revision under Section 30, MMDR Act and Rule 55, MCR set aside the order constituting the Committee. Writ petitions thereagainst filed by the State of Odisha are pending in the High Court. (Para 202)

It will be appropriate if in fact a fresh look is given to the matter. Thus the Court would like to hear the eight mining leaseholders concerned on the question of appointing an appropriate committee in respect of the applicability of Rule 37 of the Mineral Concession Rules to them. The Court would hear all the parties with regard to setting up of an Expert Committee presided over by a retired Judge of the Supreme Court to identify the lapses that have occurred over the years that have enabled rampant illegal and unlawful mining in Odisha and to recommend preventive measures not only to the State of Odisha but generally to all other States where mining activities are proceeding on a large scale. (Paras 205, 228 and 229)

State of Rajasthan v. *Gotan Lime Stone Khanij Udyog (P) Ltd.*, (2016) 4 SCC 469, *relied on*

Common Cause v. *Union of India*, WP (C) No. 114 of 2014, order dated 28-4-2017 (SC), *referred to*

IA pursuant to liberty granted

Pursuant to the liberty granted to move for modification of the interim order dated 16-5-2014 suspending the illegal mining leases, 17 interim applications for modification were received. (Para 16)

Common Cause v. *Union of India*, (2014) 14 SCC 155; *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590, *referred to*

IAs Nos. 45 (filed by Zenith Mining) and 47 (filed by *K*) are dismissed since their lease has not been extended or has been determined and they do not have any environmental clearance or forest clearance. (Para 222)

IA No. 66 (filed by *J*) is also dismissed since there is no forest clearance available. (Para 223)

S (IA No. 9) actually had a working lease and has wrongly been included as a non-operational lease. Accordingly, IA No. 9 (filed by *S*) is also dismissed but as being infructuous. However, it is made clear that the State Government should ensure that the lessee *S* in fact has valid statutory clearances. (Para 224)

Pending show-cause notices issued by the State Government should be decided by 31-12-2017 (if not already decided) after hearing the notices concerned. (Para 225)

The amounts determined as due from all the mining leaseholders should be deposited by them on or before 31-12-2017. Subject to and only after compliance with statutory requirements and full payment of compensation and other dues, the mining leaseholders can restart their mining operations. (Para 227)

All other pending IAs are disposed of in terms of orders in present case. (Para 232)

I. **Mines and Minerals — Judicial Intervention — Illegal mining in State of Odisha — Prayer for CBI inquiry — Instead of CBI inquiry, expert committee to be set up under guidance of retired Supreme Court Judge to identify lapses and suggest measures for corrective steps that can be taken for future and for other States (Paras 47, 49, 50, 229, 213 and 214)**

Held :

Justice M.B. Shah Commission under the Commissions of Inquiry Act, 1952 suggests that Central Bureau of Investigation (CBI) may be directed to investigate into allegations of corruption made against politicians, bureaucrats and others. This however, would be considered at the appropriate stage. (Para 47)

Commission felt that the Vigilance Commission was unlikely to conduct an impartial and independent enquiry for arriving at just and proper findings because of external pressures. Accordingly, it would be more appropriate if the Central Bureau of Investigation (CBI) conducts a detailed enquiry into all cases that have been registered between 2008 and 2011. (Para 49)

It was also noted that the Railways have issued demand notices to the extent of Rs 1874 crores. The latest position with regard to these notices is not available. It was also noted that notices have been issued in 146 cases to various leaseholders for recovery of mined ore as per Section 21(5) of the MMDR Act for recovery of more than Rs 59,000 crores! (According to CEC the figure exceeds Rs 61,000 crores)!! (Paras 49 and 50)

For the present, no direction is passed with regard to any investigation by CBI. What is of immediate concern is to learn lessons from the past so that rapacious mining operations are not repeated in any other part of the country. This can be achieved through the identification of lapses and finding solutions to the problems that are faced. Undoubtedly, there have been very serious lapses that have enabled large-scale mining activities to be carried out without forest clearance or environment clearance and eventually the persons responsible for this will need to be booked but the violation of the laws and policy need to be prevented in other parts of the country. The rule of law needs to be established. Therefore, it would be appropriate if an Expert Committee is set up under the guidance of a retired Judge of the Supreme Court to identify the lapses that have occurred over the years enabling rampant illegal or unlawful mining in Odisha and measures to prevent this from happening in other parts of the country. (Paras 229 and 213)

There is no doubt that the recommendations of the Commission can form a platform for the study but it is also necessary to use technology for maintenance of registers, records and data through computers, satellite imagery, videography and other technology tools so that the natural wealth of our country is not rapaciously exploited for the benefit of a few to the detriment of a large number, many of whom are tribals inhabiting the land for several generations. (Para 114)

J. **Environment Law — Environmental Clearance/NOC/Environment Impact Assessment — EIA Notification — EIA 1994 — Applicability to mining leases — Following aspects, clarified**

— (i) statutory basis of environmental clearance (EC) for mining activities, (See para 86)

— (ii) Meaning of EC, (See para 87)

— (iii) When prior approval of EC required, (See paras 88, 89 and 96) — Requirement of environmental clearance (EC) if pollution load is to exceed due to expansion or modernisation of any activity or if new project listed in Sch. I is undertaken

— (iv) When prior EC not required, (See paras 91 and 96)

— (v) Base year for computing extent of modernisation and expansion for calculation of pollution load, that is, 1993-1994, (See paras 93, 94 and 96)

— (vi) renewal of mining leases, (See paras 100 to 108) (Paras 86 to 108)

Held :

Having regard to to object of the MMDR Act, an Environment Impact Notification dated 27-1-1994 (EIA 1994) was issued by the Central Government in exercise of powers conferred by Section 3(1) and Section 3(2)(*v*) of the EPA read with Rule 5(3)(*d*) of the Environment (Protection) Rules, 1986. It is a prohibitory Notification and directs that on and from the date of its publication in the Official Gazette:

(*i*) expansion or modernisation of any activity (if pollution load is to exceed the existing one); and

(*ii*) a new project listed in Schedule I to the notification, shall not be undertaken unless it has been accorded environmental clearance (EC) by the Central Government in accordance with the procedure specified in the Notification. (Para 86)

The Notification provides, among other things, that in case of mining operations, site clearance shall be granted for a sanctioned capacity and shall be valid for a period of five years from commencing mining operations. What this means is that on receipt of an EC a mining leaseholder can extract a mineral only from a specified site, up to the sanctioned capacity and only for a period of five years from the date of the grant of an EC. This is regardless of the quantum of extraction permissible in the mining plan or the mining lease and regardless of the duration of the mining lease. Consequently, a mining leaseholder would necessarily have to obtain a fresh EC every five years and can also apply for an increase in the sanctioned capacity. There is no concept of a retrospective EC and its validity effectively starts only from the day it is granted. Thus, the EC takes precedence over the mining lease or to put it conversely, the mining operations under a mining lease are dependent on and "subordinate" to the EC. (Para 87)

On 4-5-1994 an Explanatory Note was added to EIA 1994. As per its First Note, if any proposed expansion or modernisation activity results in an increase in the pollution load, then a prior EC is required. The project proponent should approach the State Pollution Control Board concerned (for short SPCB) for certifying whether the proposed expansion or modernisation is likely to exceed the existing pollution load or not. If the pollution load is not likely to be exceeded, the project proponent will not be required to seek an EC but a copy of such a certificate from SPCB will require to be submitted to the Impact Assessment Agency which can review the certificate. (Paras 88 and 89)

Eighth Note of Explanatory Note dated 4-5-1994 to EIA 1994, makes it clear that existing mining projects that have a no-objection certificate from SPCB before 27-1-1994 will not be required to obtain an EC from the Impact Assessment Agency. Of course, this is subject to the substantive portion of EIA 1994 and the 1st Note. However, if the existing mining project does not have a no-objection certificate from SPCB, then an EC will be required under EIA 1994. (Para 91)

A reading of EIA 1994 read with the 1st Note implies that the base year for computing extent of expansion and modernisation or increase of annual production and its impact on existing pollution load is the immediately preceding year, that is, 1993-1994. This is obvious from the opening sentence of the 1st Note, that is, a project proponent is required to seek environmental clearance for a proposed expansion/modernisation activity if the resultant pollution load is to exceed the *existing levels*. In its report, CEC also has taken 1993-1994 as the base year. (Para 93)

Circular dated 28-10-2014 cannot be interpreted to mean that production even prior to 1993-1994 could be taken as the base year. The *existing levels* mentioned in the 1st Note clearly have reference to the immediately preceding year and not to a preceding year in a comparatively remote past. Further, a very high annual production in any one year is not reflective of a consistent pattern of production — it could very well be a freak year and that freak year certainly cannot be a basic standard or the norm to measure expansion. Then if the interpretation sought to be given is accepted, there would be an absence of consistency and a lack of uniformity with different mining leaseholders having different base years. This is hardly conducive to good governance. Finally, EIA 1994 was intended to prevent the existing environmental load from increasing based on the existing data of the immediate past and not data of a few years gone by. The only exception that could be made in this regard would be if there is no production during 1993-94. In that event, the immediately preceding year would be relevant and that is the only reasonable interpretation for the use of the words "or its preceding years". (Para 94)

On a composite reading of EIA 1994, it is clear that:

(*i*) A no-objection certificate from SPCB was necessary for continuing mining operations;

(*ii*) An expansion or modernisation activity required an EC unless the pollution load was not exceeded beyond the existing levels;

(*iii*) The base year for determining the pollution load and therefore the proposed expansion would be with reference to 1993-94;

(*iv*) Whether an expansion or modernisation would lead to exceeding the existing pollution load or not would require a certificate from SPCB which could be reviewed by the IAA;

(*v*) New projects require an EC; and

(*vi*) Existing projects do not require an EC unless there is an expansion or modernisation for the duration (if any) of the validity of the certificate from SPCB. (Para 96)

Nothing more needs to be stated on this subject since CEC has proceeded to discuss the issue of mining in excess of the EC or in excess of the mining plan only

from the year 2000-01 onwards. The prior period may, therefore, be ignored and it is the period from 2000-01 onwards which is actually relevant for the present discussion. (Para 96)

Circular dated 14-5-2002 indicates that several units had come up in violation of EIA 1994. The MoEF had taken the view that such units may be permitted to apply for an EC by 31-3-1999 which was then extended to 30-6-2001 by Circulars dated 5-11-1998 and 27-12-2000, respectively. By the Circular dated 14-5-2002 the deadline for applying for an EC was extended up to 31-3-2003 as a last and final opportunity to obtain an ex post facto EC in respect of units which had commenced mining operations without obtaining a prior EC in violation of EIA 1994. (Paras 98 and 99)

M.C. Mehta v. *Union of India*, (2004) 12 SCC 118, *referred to*

As to whether EC was required particularly in respect of pre-EIA 1994 mining leases and operations it was wrongly submitted that it was not obligatory for the mining leaseholders, who did not expand their mining operations, to obtain an EC and in any event the period for obtaining an EC was extended till 31-3-2003 with ex post facto approval. (Paras 100 and 102)

With regard to EIA 1994 and Circular dated 14-5-2002, the intention of the MoEF was not to legalise the continuance of mining activity without complying with the requisite stipulations. If that were unfortunately so, then it would demonstrate a lack of sensitivity of the MoEF to the principles of sustainable development and the object behind issuing EIA 1994. EIA 1994 would apply to the renewal of a mining lease that came up for consideration post 27-1-1994. For the renewal of a mining lease, an EC was required by the mining leaseholder. EIA 1994 is mandatory. It is applicable to all mining operations—expansion of production or even increase in lease area, modernisation of the extraction process, new mining projects and renewal of mining leases. A mining leaseholder is obliged to adhere to the terms and conditions of a mining lease and the applicable laws and the mere fact that a mining plan has been approved does not entitle a mining leaseholder to commence mining operations. Although the two clarificatory Circulars issued by MoEF on 28-10-2004 and 25-4-2005 extended the date to apply for EC and although it gave the possibility of getting an ex post facto EC, that cannot be treated as a signal to the mining leaseholders that obtaining an EC was not mandatory or that if it was not obtained, the default was retrospectively condonable. Compliance with the MMDR Act and the Rules framed thereunder are important for the protection and preservation of the environment. The obligation of everyone to abide by the law cannot be overlooked. That the MoEF took a soft approach cannot be an escapist excuse for non-compliance with the law or EIA 1994. (Paras 103 to 108)

M.C. Mehta v. *Union of India*, (2004) 12 SCC 118, *relied on*

K. **Environment Law — Environmental Clearance/NOC/Environment Impact Assessment — EIA Notification — EIA 2006 and EIA 1994 — Applicability to mining leases — Concept of ex post facto environmental clearance (EC) or retrospective EC, held, completely alien to environmental jurisprudence not only under EIA 1994 but also under EIA 2006**

— No doubt EC obtained earlier would continue under certain circumstances — But a prior EC would be required (a) if there is over-extraction

beyond permissible limits or (b) if there is renewal of mining lease even if there is no over-extraction — And for this a mining plan is subordinate to EC, meaning that, mining would be illegal even if permitted by mining plan if such mining plan does not conform to conditions of EC or if a prior EC has not been obtained where required — And an EC will come into force not earlier than the date of its grant

Held :

The EIA 2006 Notification dated 14-9-2006 required prior EC for projects or activities mentioned in the Schedule to it both for major as well as minor minerals if the leased area is 5 ha or more. Several mining leaseholders, in compliance with EIA 2006, applied for and were granted an EC. (Para 109)

Circular dated 2-7-2007 clarified as follows:

(*i*) Mining leases, where no EC was required under EIA 1994 would continue to operate without an EC;

(*ii*) If there was an increase in the lease area or enhancement of production, an EC was required by the mining leaseholder;

(*iii*) All projects would require an EC at the time of renewal of the mining lease even if there was no increase in the lease area or enhancement of production. (Paras 111 and 112)

There is no confusion, vagueness or uncertainty in the application of EIA 1994 and EIA 2006 insofar as mining operations were commenced on mining leases before 27-1-1994 (or even thereafter). Post EIA 2006, every mining leaseholder having a lease area of 5 ha or more and undertaking mining operations in respect of major minerals (with which we are concerned) was obliged to get an EC in terms of EIA 2006. (Para 115)

A mining plan is subordinate to an EC. Having an approved mining plan does not imply that a mining leaseholder can commence mining operations. That being so, a modified mining plan without a revised or amended EC, is of no consequence. Allegedly, under the shield of a modified mining plan, illegal or unlawful mining in the form of mining without an EC, mining by over-reaching EIA 1994 and EIA 2006 was being carried out. (Para 117)

In a Letter dated 29-10-2010 addressed to the Controller General, Indian Bureau of Mines it was made clear that all modifications of mining plans shall be effective prospectively only and earlier instances of irregular mining shall not be regularised through a modification of the mining plan. (Para 118)

In respect of overproduction, a High Level Committee (called the Hoda Committee) on the National Mineral Policy noted in its Report dated 22-12-2006 that the permissible variation in production as per the Indian Bureau of Mines is ±10% but according to the Letter dated 12-12-2011 issued by the Ministry of Mines, the reasonable variation limit could be ±20%. The fact that in some cases the variation exceeded 20% was a cause for concern which necessitated strict and punitive action. (Paras 120 and 121)

For the purposes of renewal of the mining lease, an application is required to be made by the mining leaseholders and the deemed renewal clause under Rule 24-A of the MCR will come into operation only after an application for renewal is

made in Form J in Schedule I of the MCR. Under Rule 26 of the MCR, the State Government may refuse to renew the mining lease. In view of EIA 1994, it is quite clear that the renewal of a mining lease would require a prior EC. Circular dated 28-10-2004 issued by MoEF stated that in view of the decision in *M.C. Mehta*, (2004) 12 SCC 118 all mining projects of major minerals of more than 5 ha lease area that had not yet obtained an EC would have to do so at the time of renewal of the lease. (Paras 122 and 123)

M.C. Mehta v. *Union of India*, (2004) 12 SCC 118, *relied on*

The grant of an EC cannot be taken as a mechanical exercise. It can only be granted after due diligence and reasonable care since damage to the environment can have a long-term impact. EIA 1994 is therefore very clear that if expansion or modernisation of any mining activity exceeds the existing pollution load, a prior EC is necessary and even for the renewal of a mining lease where there is no expansion or modernisation of any activity, a prior EC is necessary. Such importance having been given to an EC, the grant of an ex post facto environmental clearance would be detrimental to the environment and could lead to irreparable degradation of the environment. The concept of an ex post facto or a retrospective EC is completely alien to environmental jurisprudence including EIA 1994 and EIA 2006. An EC will come into force not earlier than the date of its grant. (Para 125)

L. **Mines and Minerals — Encroachment — Joint survey — Directions to State of Odisha and CEC — Mining outside sanctioned mining areas, held, illegal — Directions issued for proper identification of nature and extent of encroachment of 82 leaseholders — As Joint Survey had been conducted by State of Odisha only in respect of 39 leases, authorities directed to complete survey of remaining 43 leases — CEC directed to present such report before Court on or before 31-12-2017 — Mines and Minerals (Development and Regulation) Act, 1957, S. 4**

Held :

Section 4(1) of the MMDR Act makes it clear that no person can carry out any mining operations except under and in accordance with the terms and conditions of a mining lease granted under the MMDR Act and the Rules made thereunder. Obviously therefore, any person carrying on mining operations without a mining lease, is indulging in illegal or unlawful mining. This would also necessarily imply that if a mining lease is granted to a person who carries out mining operations outside the boundaries of the mining lease, the mineral extracted would be the result of illegal or unlawful mining. (Para 131)

CEC stated that in 82 mining leases for iron ore and manganese ore there were encroachments in the form of illegal mining pits, illegal overburdened dumps, etc. (Para 132)

In respect of these 82 mining leases, the State of Odisha appointed a Committee on the suggestion of the Commission, to survey and identify the exact extent and location of the sanctioned lease area, lease area under occupation of the mining leaseholder and the area under encroachment/illegal mining. The Committee or the Joint Survey consisted of officers of the Revenue Department, Forest Department and Mining Department of the State of Odisha who carried out a field survey in respect of 39 mining leases. The findings of the field survey or the Joint

Survey were verified by a team comprising of the Director, Mines, Chief Engineer, ORSAC and the Additional Secretary, F & E Department of the Government of Odisha. (Para 133)

It is mentioned in the report of CEC that the Joint Survey for each of the 39 mining leases is technically sound and reliable. However, the fact is that a joint survey has not been conducted in respect of remaining 43 mining leases. (Para 134)

For completing the record and taking the report of CEC to its logical conclusion, it would be appropriate if a fresh Joint Survey is conducted by officers concerned of the Government of Odisha from the Revenue Department, the Forest Department, the Mining Department and any other department that may be deemed necessary. The Forest Survey of India, the MoEF, the Indian Bureau of Mines and the Geological Survey of India should also be associated in the Joint Survey. In our opinion, it would also be appropriate if CEC is also associated in the Joint Survey and the best and latest technology should be made use of including satellite imagery and thereafter a report is submitted in the Supreme Court on or before 31-12-2017 after hearing the 82 lessees identified by the Commission. (Para 135)

M. **Mines and Minerals — Illegal mining — Over extraction — Permissible limits — 20% variation in extraction over and above mining plan as per R. 22(5), MCR — Scope of, explained — Clarified that this does not permit mining leaseholder to extract entire permissible quantity for 5 years plus 20% over extraction in a single year and thereafter extract miniscule amounts over the remaining 4 years — Mining in excess of permissible limits would amount to illegal or unlawful mining or mining without lawful authority — Mineral Concession Rules, 1960, R. 22(5) (Paras 136 and 140)**

Held :

A side issue raised by the learned counsel for the mining leaseholders in this regard was the necessity (if any) of adhering to the annual plan or calendar plan of mining. It was contended that a mining leaseholder could mine in excess of the annual plan. While it is so, this submission must be tempered and appreciated in the proper context. A mining plan is valid for a period of five years but there could be a 20% variation in extraction over and above the mining plan. This is the maximum that is stated to be reasonably permissible according to the Ministry of Mines. In terms of Rule 22(5) of the MCR a mining plan shall incorporate a tentative scheme of mining and annual programme and plan for excavation from year-to-year for five years. At best, there could be a variation in extraction of 20% in each given year but this would be subject to the overall mining plan limit of a variation of 20% over five years. What this means is that a mining leaseholder cannot extract the five year quantity (with a variation of 20%) in one or two years only. The extraction has to be staggered and continued over a period of five years. If any other interpretation is given, it would lead to an absurd situation where a mining leaseholder could extract the entire permissible quantity under the mining plan plus 20% in one year and extract miniscule amounts over the remaining four years, and this could be done without any reference to the EC. The submission in this regard simply cannot be accepted. (Para 136)

While mining in excess of permissible limits under the mining plan or the EC or FC on leased area may not amount to mining on land occupied without lawful authority, it would certainly amount to illegal or unlawful mining or mining without authority of law. This is the correct interpretation of Section 21(5), MMDR Act. (Para 140)

N. **Mines and Minerals — Mines and Minerals (Development and Regulation) Act, 1957 — S. 21(5) — Compensation for illegal mining — When attracted — S. 21(5) is attracted when any person, without lawful authority extracts any mineral from any land — State Government is entitled to recover said illegally extracted mineral or price thereof — Word "any land" not confined to violations outside lease area — It includes violations within mining lease area (Para 151)**

Held :

Section 21(5) of the MMDR Act is applicable when any person raises, without any lawful authority, any mineral from *any land*. In that event, the State Government is entitled to recover from such person the mineral so raised or where the mineral has already been disposed of, the price thereof as compensation. The words "any land" are not confined to the mining lease area. As far as the mining lease area is concerned, extraction of a mineral over and above what is permissible under the mining plan or under the EC undoubtedly attracts the provisions of Section 21(5) of the MMDR Act being extraction without lawful authority. It would also attract Section 21(1) of the MMDR Act. In any event, Section 21(5) of the Act is certainly attracted and is not limited to a violation committed by a person only outside the mining lease area — it includes a violation committed even within the mining lease area. This is also because the MMDR Act is intended, among other things, to penalise illegal or unlawful mining on any land including mining lease land and also preserve and protect the environment. Action under the EPA or the MCR could be the primary action required to be taken with reference to the MCR and Rule 2(*ii-a*) thereof read with the Explanation but that cannot preclude compensation to the State under Section 21(5) of the MMDR Act. The MCR cannot be read to govern the MMDR Act. (Para 151)

Karnataka Rare Earth v. *Deptt. of Mines & Geology*, (2004) 2 SCC 783, *relied on*

Khemka & Co. (Agencies) (P) Ltd. v. *State of Maharashtra*, (1975) 2 SCC 22 : 1975 SCC (Tax) 227, *distinguished*

Director of Public Prosecutions v. *Schildkamp*, 1971 AC 1 : (1970) 2 WLR 279 : (1969) 3 All ER 1640 (HL), *referred to*

Black's Law Dictionary, 7th Edn., p. 1421; Justice Singh, G.P.: *Principles of Statutory Interpretation* (8th Edn., 2001, p. 147), *referred to*

O. **Mines and Minerals — Mines and Minerals (Development and Regulation) Act, 1957 — S. 21(5) — Compensation for illegal mining — Quantum — There can be no compromise on quantum of compensation — S. 21(5) contemplates 100% recovery — State should not forego what is its due in order to fill coffers of defaulting lessees (Paras 153 and 154)**

Held :

100% recovery should be made under the provisions of Section 21(5) of the MMDR. Submission that only 30% of the value of the illegally mined ore should be recovered cannot be accepted. (Para 153)

There can be no compromise on the quantum of compensation that should be recovered from any defaulting lessee. It simply does not stand to reason why the State should be compelled to forego what is its due from the exploitation of a natural resource and on the contrary be a party in filling the coffers of defaulting lessees in an ill-gotten manner. (Para 154)

P. **Mines and Minerals — Mines and Minerals (Development and Regulation) Act, 1957 — S. 21(5) — Compensation for illegal mining — Calculation — Base year and period of application — For said calculation, base year of 1993-1994, held, reasonable in present cases — Although some might lose and some might benefit, each leaseholder is given benefit of calculation only from year 2000-2001 and would not be penalised for period prior thereto (Paras 155 to 157)**

Held :

The issue now is with regard to the calculations made by CEC with regard to the production of iron ore and manganese ore without or in excess of the EC and/or the mining plan. The figures were not disputed (except by JSPL and SMPL). Therefore, only the application of the figures requires consideration. (Para 155)

For the said calculation, the base year of 1993-94 is most appropriate. Some lessees might lose in the process while some of them might benefit but that cannot be avoided. In any event, each mining leaseholder is being given the benefit of calculations only from 2000-2001 and is not being "penalised" for the period prior thereto. The mining leaseholders should be grateful for this since the penalty is levied from the date of EIA 1994. The cut-off from 2000-2001 (without interest) is undoubtedly reasonable and there can hardly be any grievance in this regard. The mining leaseholders cannot have their cake and eat it too, along with the icing on top. (Para 156)

Thus the compensation should be payable from 2000-2001 onwards at 100% of the price of the mineral. (Para 157)

Q. **Environment Law — Forests, Wildlife and Zoos — Mining and Industry in Forest Area — Mining in forest areas (in State of Odisha) — Permissibility of — Preconditions, stated, (a) prior approval of Central Government under S. 2, FCA, and (b) payment of net present value (NPV) as directed in *T.N. Godavarman Thirumulpad*, (2010) 15 SCC 177 considering peculiar circumstances prevailing in State of Odisha — (c) However, from 7-1-1998 any mining activity in any forest or DLC forest (forest identified by District Level Committee) is completely illegal and price of mineral extracted is recoverable under S. 21 of MMDR Act until forest clearance (FC) is obtained from Central Government, and 100% of price of iron ore or manganese ore mined without S. 2 approval should be recovered — However, clarified that a leaseholder is only liable to pay 100% price of illegally extracted ore**

for non-compliance with either FC or EC or both — For not having both FC and EC clearances, leaseholder would not be required to pay 200% — However, this has to be distinguished from NPV — Even if NPV has been paid earlier, additional NPV is neither adjustable not refundable since that falls in a different category altogether — Further, clarified that a violation of FCA is condonable on payment of penal compensatory afforestation charges, and mining leaseholders would be entitled to temporary working permit (Paras 164 to 188)

Held :

After the commencement of the FCA no fresh breaking up of forest land or no fresh clearing of the forest on any such land could be permitted by the State Government or any authority without the approval of the Central Government. However, in respect of broken up land, if the State Government permits the lessee to remove any discovered mineral, it cannot be said that there has been a violation of Section 2 of the FCA particularly since there is no breaking up of any fresh forest land. However, this does not mean that renewal of lease can be claimed as a matter of right. The primary purpose of the FCA is to prevent deforestation and ecological imbalance as a result of deforestation. Therefore, the primary duty under the FCA was to the community and the obligation to society must predominate over the obligation to the individuals. (Paras 164 and 165)

Ambica Quarry Works v. *State of Gujarat*, (1987) 1 SCC 213; *Rural Litigation and Entitlement Kendra* v. *State of U.P.*, 1989 Supp (1) SCC 504, *relied on*

State of Bihar v. *Banshi Ram Modi*, (1985) 3 SCC 643, *distinguished*

Therefore, compliance with Section 2 of the FCA is necessary as a condition precedent even for the renewal of a mining lease. (Para 166)

The definition of the word "forest" for the purposes of the FCA came up for consideration in *T.N. Godavarman Thirumulpad*, (1997) 2 SCC 267. In this context, it was held that "forest" must be understood according to its dictionary meaning and it would cover all statutorily recognised forests, whether designated, reserved, protected or otherwise. The Supreme Court further directed each State Government to constitute within one month an Expert Committee, inter alia, to identify areas which are "forest" irrespective of whether they are so notified, recognised or classified under any law and irrespective of the ownership of the land of such forest. Pursuant to the directions given by the Supreme Court, the State of Odisha constituted District Level Committees (DLC) for identification of forest lands. After the identification process, appropriate affidavits were filed by the State of Odisha in the Supreme Court in 1997-98, the last being dated 6-1-1998. (Paras 167 to 170)

The Court in *T.N. Godavarman Thirumulpad*, (2010) 15 SCC 177 accepted the recommended by CEC that given the peculiar circumstances prevailing in the State of Odisha, mining operations in the entire DLC lands included in the mining leases may be allowed to continue on payment of the net present value (NPV) subject to the fulfilment of other statutory requirements and rules being complied with. (Para 174)

Consequently, the State of Odisha appears to have implemented the recommendations regarding recovery of NPV and realised an amount of about Rs 1750 crores as additional NPV. (Para 175)

T.N. Godavarman Thirumulpad v. *Union of India*, IAs Nos. 2746-48 in WP (C) No. 202 of 1995, order dated 6-11-2009 (SC); *T.N. Godavarman Thirumulpad* v. *Union of India*, (1997) 2 SCC 267; *T.N. Godavarman Thirumulpad* v. *Union of India*, (2010) 15 SCC 177; *T.N. Godavarman Thirumulpad* v. *Union of India*, (1997) 3 SCC 312, *referred to*

In addition to the above, the mining leaseholders have subsequently deposited an amount under the heading of penal compensatory afforestation which was introduced through guidelines issued by the MoEF on 3-2-1999. (Para 176)

Given the fact that the defaulting mining leaseholders have been asked to pay and have paid additional NPV as well as an amount towards penal compensatory afforestation, it must be assumed that the violation of the FCA has been condoned to a limited extent, more particularly since in its order dated 7-5-2010 the Court permitted the State of Odisha to accept such recommendations of CEC made in the report dated 26-4-2010 as are acceptable to it. (Para 179)

This still leaves open the question of violation of the order passed by the Supreme Court on 12-12-1996 followed by the order dated 4-3-1997, namely, that mining must cease forthwith in forest areas. In regard to this violation, the only benefit (at best) that can be granted to the mining leaseholders is till 6-1-1998 when the affidavit was filed in IAs Nos. 2746-48 of 2009 in *T.N. Godavarman Thirumulpad*, (2014) 6 SCC 167. With effect from 7-1-1998 any mining activity in forest and DLC lands would clearly be completely illegal and unauthorised and the benefit that the mining leaseholders have derived from this illegal mining would be subject to Section 21(5) of the MMDR Act. Therefore, the price of the iron ore and manganese ore mined by the mining leaseholders from 7-1-1998 is payable until forest clearance under Section 2 of the FC Act is obtained by the mining leaseholders. (Para 180)

T.N. Godavarman Thirumulpad v. *Union of India*, (1997) 2 SCC 267; *T.N. Godavarman Thirumulpad* v. *Union of India*, (1997) 3 SCC 312; *T.N. Godavarman Thirumulpad* v. *Union of India*, (2014) 6 SCC 167; *T.N. Godavarman Thirumulpad* v. *Union of India*, (2014) 6 SCC 167, 172 (footnote 1), *referred to*

7-1-1998 has been fixed as the cut-off date despite the orders dated 12-12-1996 and 4-3-1997 only for the reason that it is possible that some mining leaseholders were not aware that they were inadvertently conducting mining operations on DLC lands which were identified by the State of Odisha as forest lands on the directions of the Court. For the purposes of Section 21(5) of the MMDR Act, they are entitled to the benefit of doubt along with the other mining leaseholders. (Para 183)

Therefore, the suggestion of CEC that only a part of the notional value (in this case 70%) of the iron ore and manganese ore produced by the mining leaseholders should be recovered is not acceptable. Section 21(5) of the MMDR Act should be given full effect and the recovery should be to the extent of 100%. (Para 185)

Mineral extracted either without an EC or without an FC or without both would attract the provisions of Section 21(5) of the MMDR Act and 100% of the price of the illegally or unlawfully mined mineral must be compensated by the mining leaseholder. To the extent of the overlap or the common period, obviously only one set of compensation is payable by the mining leaseholder

to the State of Odisha. However, whatever payment has already been made by the mining leaseholders towards NPV, additional NPV or penal compensatory afforestation is neither adjustable nor refundable since that falls in a different category altogether. (Para 186)

A violation of the FCA is condonable on payment of penal compensatory afforestation charges. This obviously would not apply to illegal or unlawful mining under Section 21(5) of the MMDR Act, but the mining leaseholders would be entitled to the benefit of any temporary working permission granted. (Para 187)

T.N. Godavarman Thirumulpad v. *Union of India*, (2011) 15 SCC 658; *T.N. Godavarman Thirumulpad* v. *Union of India*, (2011) 15 SCC 681, *relied on*

To avoid any misunderstanding, confusion or ambiguity, it is clarified as follows:

(*1*) A mining project that has commenced prior to 27-1-1994 and has obtained a no-objection certificate from SPCB prior to that date is permitted to continue its mining operations without obtaining an EC from the Impact Assessment Agency. However, this is subject to any expansion (including an increase in the lease area) or modernisation activity after 27-1-1994 which would result in an increase in the pollution load. In that event, a prior EC is required. However, if the pollution load is not expected to increase despite the proposed expansion (including an increase in the lease area) or modernisation activity, a certificate to this effect is absolutely necessary from SPCB, which would be reviewed by the Impact Assessment Agency.

(*2*) The renewal of a mining lease after 27-1-1994 will require an EC even if there is no expansion or modernisation activity or any increase in the pollution load.

(*3*) For considering the pollution load the base year would be 1993-94, which is to say that if the annual production after 27-1-1994 exceeds the annual production of 1993-94, it would be treated as an expansion requiring an EC.

(*4*) There is no doubt that a new mining project after 27-1-1994 would require a prior EC.

(*5*) Any iron ore or manganese ore extracted contrary to EIA 1994 or EIA 2006 would constitute illegal or unlawful mining (as understood and interpreted by us) and compensation at 100% of the price of the mineral should be recovered from 2000-2001 onwards in terms of Section 21(5) of the MMDR Act, if the extracted mineral has been disposed of. In addition, any rent, royalty or tax for the period that such mining activity was carried out outside the mining lease area should be recovered.

(*6*) With effect from 14-9-2006 all mining projects having a lease area of 5 ha or more are required to have an EC. The extraction of any mineral in such a case without an EC would amount to illegal or unlawful mining attracting the provisions of Section 21(5) of the MMDR Act.

(*7*) For a mining lease of iron ore or manganese ore of less than 5 ha area, the provisions of EIA 1994 will continue to apply subject to EIA 2006.

(*8*) Any mining activity carried on after 7-1-1998 without an FC amounts to illegal or unlawful mining in terms of the provisions of Section 21(5) of

MMDR Act attracting 100% recovery of the price of the extracted mineral that is disposed of.

(*9*) In the event of any overlap, that is, illegal or unlawful mining without an FC or without an EC or without both would attract only 100% compensation and not 200% compensation. In other words, only one set of compensation would be payable by the mining leaseholder.

(*10*) No mining leaseholder will be entitled to the benefit of any payments made towards NPV or additional NPV or penal compensatory afforestation. (Para 188)

R. **Environment Law — General Principles of Environmental Law — Precautionary Principle/Sustainable Development/Inter-Generational Equity Principle — Instances re Areas/Industries — Mining policy — Judicial interference — Scope of — Held, Court cannot interfere with mining policy or lay down limits on extent of mining activity that should be permitted by the State Government or Central Government — Therefore, prayers on basis of principles of intergenerational equity, not tenable — But considering that National Mineral Policy, 2008 is only in pen and paper and also obsolete (that is, 10 years old), Central Government directed to revisit said policy and announce a fresh, more effective, meaningful and implementable policy (Paras 207 to 211 and 230)**

Held :

The petitioner sought to impress the need to consider intergenerational equity and if possible to place a limit on the extent of mining in the State of Odisha by referring to an article titled: "Intergenerational equity: a legal framework for global environment change" by Edith Brown Weiss. He laid emphasis on three principles that form the basis of intergenerational equity, that is, the principle of "conservation of options", the principle of "conservation of quality" and the principle of "conservation of access". (Paras 207 to 210)

The Court cannot lay down limits on the extent of mining activities that should be permitted by the State of Odisha or by the Union of India. Nevertheless, it does appear that there is no effective check on mining operations nor is there any effective mining policy. The National Mineral Policy, 2008 (effective from March 2008) seems to be only on paper and is not being enforced perhaps due to the involvement of very powerful vested interests or a failure of nerve. The National Mineral Policy, 2008 is almost a decade old and a variety of changes have taken place since then, including (unfortunately) the advent of rapacious mining in several parts of the country. Therefore, it is high time that the Union of India revisits the National Mineral Policy, 2008 and announces a fresh and more effective, meaningful and implementable policy. The Union of India is directed to have a fresh look at the National Mineral Policy, 2008 which is almost a decade old, particularly with regard to conservation and mineral development. The exercise should be completed by 31-12-2017. (Paras 211 and 230)

SS-D/58937/C

Advocates who appeared in this case :

Ashok Desai, Rakesh Dwivedi and Gopal Subramanium, Senior Advocates ([Prashant Bhushan, Advocate) for the appearing parties.

Chronological list of cases cited ***on page(s)***

1. WP (C) No. 114 of 2014, order dated 28-4-2017 (SC), *Common Cause* v. *Union of India* 572*c-d*
2. (2016) 11 SCC 455, *Common Cause* v. *Union of India* 529*c-d*
3. (2016) 4 SCC 469, *State of Rajasthan* v. *Gotan Lime Stone Khanij Udyog (P) Ltd.* 573*a*
4. WP (C) No. 114 of 2014, order dated 7-10-2015 (SC), *Common Cause* v. *Union of India* 529*a*
5. IA No. 35 in IA No. 17 in WP (C) No. 114 of 2014, order dated 16-1-2015 (SC), *Common Cause* v. *Union of India* 528*d-e*
6. (2014) 14 SCC 160, *T.N. Godavarman Thirumulpad* v. *Union of India* 525*d-e*, 537*g-h*
7. (2014) 14 SCC 155, *Common Cause* v. *Union of India* 526*a-b*, 526*d*, 527*c*, 527*d-e*
8. (2014) 6 SCC 590, *Goa Foundation* v. *Union of India* 527*b*, 535*g*, 536*b*
9. (2014) 6 SCC 167, *T.N. Godavarman Thirumulpad* v. *Union of India* 523*g*, 524*d*, 567*b*
10. (2014) 6 SCC 167, 172 (footnote 1), *T.N. Godavarman Thirumulpad* v. *Union of India* 523*e-f*, 523*f-g*, 523*g-h*
11. IAs Nos. 2746-48 in WP (C) No. 202 of 1995, order dated 28-4-2014 (SC), *T.N. Godavarman Thirumulpad* v. *Union of India* 575*b*, 575*c*
12. IAs Nos. 2746-48 in WP (C) No. 202 of 1995, order dated 27-1-2014 (SC), *T.N. Godavarman Thirumulpad* v. *Union of India* 574*g*, 575*c*
13. IA No. 3721 in 3629 in WP (C) No. 202 of 1995, order dated 13-1-2014 (SC), *T.N. Godavarman Thirumulpad* v. *Union of India* 524*b-c*, 527*g*, 537*f-g*
14. (2013) 8 SCC 204, *T.N. Godavarman Thirumulpad* v. *Union of India* 538*c-d*
15. (2013) 8 SCC 198, *T.N. Godavarman Thirumulpad (50)* v. *Union of India* 538*b-c*, 538*c-d*
16. (2013) 8 SCC 154, *Samaj Parivartana Samudaya* v. *State of Karnataka* 538*d*
17. (2011) 15 SCC 681, *T.N. Godavarman Thirumulpad* v. *Union of India* 568*f-g*
18. (2011) 15 SCC 658, *T.N. Godavarman Thirumulpad* v. *Union of India* 568*f-g*
19. (2010) 15 SCC 177, *T.N. Godavarman Thirumulpad* v. *Union of India* 523*d*, 565*c*, 566*c-d*
20. IAs Nos. 2746-48 in WP (C) No. 202 of 1995, order dated 6-11-2009 (SC), *T.N. Godavarman Thirumulpad* v. *Union of India* 521*f-g*, 565*b*
21. (2008) 2 SCC 222, *T.N. Godavarman Thirumulpad (104)* v. *Union of India* 575*b*
22. (2004) 12 SCC 118, *M.C. Mehta* v. *Union of India* 547*b*, 547*f*, 547*f-g*, 547*g*, 548*c*, 548*f-g*, 549*b-c*, 549*c*, 549*c-d*, 549*e*, 550*b-c*, 551*c-d*, 552*g-h*, 553*a*, 553*e*
23. (2004) 2 SCC 783, *Karnataka Rare Earth* v. *Deptt. of Mines & Geology* 558*g*, 559*a*, 559*g-h*
24. (1997) 3 SCC 312, *T.N. Godavarman Thirumulpad* v. *Union of India* 564*d-e*, 567*a*, 567*f-g*
25. (1997) 2 SCC 267, *T.N. Godavarman Thirumulpad* v. *Union of India* 522*f*, 563*g-h*, 563*g-h*, 564*g-h*, 566*f*, 567*a*, 567*f-g*, 568*a-b*
26. WP (C) No. 202 of 1995, *T.N. Godavarman* v. *Union of India* 521*d*

27. 1989 Supp (1) SCC 504, *Rural Litigation and Entitlement Kendra* v. *State of U.P.* 563*e-f*
28. (1987) 1 SCC 213, *Ambica Quarry Works* v. *State of Gujarat* 563*b*, 563*e-f*
29. (1985) 3 SCC 643, *State of Bihar* v. *Banshi Ram Modi* 562*e*, 563*d*
30. (1975) 2 SCC 22 : 1975 SCC (Tax) 227, *Khemka & Co. (Agencies) (P) Ltd.* v. *State of Maharashtra* 558*a*, 559*g-h*
31. 1971 AC 1 : (1970) 2 WLR 279 : (1969) 3 All ER 1640 (HL), *Director of Public Prosecutions* v. *Schildkamp* 559*d-e*

The Judgment of the Court was delivered by

MADAN B. LOKUR, J.— The facts revealed during the hearing of these writ petitions filed under Article 32 of the Constitution suggest a mining scandal of enormous proportions and one involving megabucks. The lessees in the districts of Keonjhar, Sundergarh and Mayurbhanj in Odisha have rapaciously mined iron ore and manganese ore, apparently destroyed the environment and forests and perhaps caused untold misery to the tribals in the area. However, to be fair to the lessees, they did the detail steps taken to ameliorate the hardships of the tribals, but it appears to us that their contribution is perhaps not more than a drop in the ocean — also too little, too late.

Facts leading up to the report of the Central Empowered Committee

2. Rabi Das, the editor of a daily newspaper called *Ama Rajdhani* filed IAs Nos. 2746-48 of 2009 in a pending writ petition being *T.N. Godavarman* v. *Union of India*[1]. He prayed, inter alia, for the following directions from this Court:

> "(*a*) Issue a direction to the Central Empowered Committee to conduct an exhaustive fact-finding study of the illegal mining in Keonjhar, Sundargarh and other districts of Orissa;
>
> (*b*) Direct appointment of a "Commission" to investigate and study the modalities of the illegal machinations, fix responsibility on individuals (in Government and outside it) and recommend remedial measures to be immediately implemented by the Government of India and the Government of Orissa;
>
> (*c*) Direct the respondents to take effective and appropriate action to ensure closure/stoppage of all the illegal mining activities in the areas concerned and direct prosecution and punish all those found guilty of this illegal mining in violation of the Mines and Minerals (Development and Regulation) Act, 1957; the Forest (Conservation) Act, 1980 and other relevant laws."

3. The applications were taken up for consideration on 6-11-2009[2] when notice was issued to the Central Empowered Committee (for short "CEC") to file its report/response within six weeks.

---

1 WP (C) No. 202 of 1995

2 *T.N. Godavarman Thirumulpad* v. *Union of India*, IAs Nos. 2746-48 in WP (C) No. 202 of 1995, order dated 6-11-2009 (SC), wherein it was directed:

"Taken on board. Issue notice to CEC to file its report/response within six weeks."

4. On 26-4-2010 CEC submitted an interim report which was noted by this Court and taken on record. The report was of a general nature but contained quite a few recommendations. Some of the recommendations presently relevant are as follows:

> "(*b*) Even otherwise Rule 24-A(6), MCR, 1960 does not authorise the lessee to operate a mine without the statutory clearances/approvals. Therefore, in respect of a mine covered under the "deemed extension" clause, the mining operations should be permitted to be undertaken in the non-forest area of the mining lease only if (*i*) it has the requisite environmental clearance; (*ii*) it has the consent to operate from the State Pollution Control Board under the Air and Water Acts; (*iii*) Mining Plan is duly approved by the competent authority; and (*iv*) the NPV for the entire forest falling within the mining lease is deposited in the Compensatory Afforestation Fund.
>
> The mining in the forest land included in the mining lease should be permissible only if, in addition to the above, the approval under the FC Act/ TWP has been obtained;
>
> (*c*) No forest land can be leased/assigned without first obtaining the approval under the FC Act. Therefore, the forest area approved under the FC Act should not be lesser than the total forest area included in the mining leases approved under the MMDR Act, 1957. Both necessarily have to be the same. In view of the above, this Hon'ble Court while permitting grant of Temporary Working Permission to the mines in Orissa and Goa has made it one of the preconditions that the NPV will be paid for the entire forest area included in the mining leases. Similarly, all the mining leaseholders in Orissa should be directed to pay the NPV for the entire forest area, included in the mining lease;
>
> (*d*) In Orissa, substantial areas included in the mining leases as non-forest land have subsequently been identified as DLC forest (deemed forest/forest like areas) by the Expert Committee constituted by the State Government pursuant to this Hon'ble Court's order dated 12-12-1996[3]. While processing and/or approving the proposals under the FC Act in many cases such areas have been treated as non-forest land. It is recommended that (*i*) the NPV for the entire DLC area included in the mining lease, after deducting the NPV already paid, should be deposited by the leaseholder concerned, and (*ii*) the mining operations in the unbroken DLC land (virgin land) should be permissible only if the permission under the FC Act has been obtained/is obtained for such area. Keeping in view the peculiar circumstances as were existing in Orissa and subject to the above, the mining operations in the broken DLC land may be allowed to be continued provided the other statutory requirements and Rules are otherwise being complied with."

3 *T.N. Godavarman Thirumulpad* v. *Union of India*, (1997) 2 SCC 267

The report concluded by recording as follows:

> "(*a*) an attempt has been made for the first time by CEC to comply and analyse the status of all the mining leases in a State and to suggest effective and remedial measures—something made possible because of the unstinted cooperation extended by the senior functionaries of the Forest and Mines Departments of the State Government; and
>
> (*b*) the above recommendations if accepted and implemented will, besides ensuring that mining is done in compliance with the statutory provisions, result in recovery of additional amount towards the NPV, etc. running into hundreds of crores of rupees. It would be appropriate that a part of this additional amount, say 50% is used through an SPV for undertaking specific tribal welfare and area development works so as to ensure inclusive growth of the mineral bearing areas. CEC proposes to file detailed schemes in this regard for seeking permission of this Hon'ble Court provided the State of Orissa as well as the MoEF endorse the course of action proposed above."

The significance of the second conclusion will be discussed by us a little later.

5. Notice was issued on the report returnable on 7-5-2010. On the adjourned date[4], the following order was passed by this Court: (*T.N. Godavarman case*[4], SCC p. 179, paras 14-15)

> "*14*. CEC has filed its report. The State would like to file its response.
>
> *15*. Six weeks' time is granted for the same. The recommendations of CEC which are acceptable to the State Government can be complied with."

It may be mentioned that some of the recommendations made by CEC have been accepted and implemented by the State of Odisha.

6. The issue of mining in Odisha again came up for consideration on 16-9-2013[5] and this Court passed the following order:

> "We call for a report from the Central Empowered Committee within a period of six weeks. We direct that the parties of the State Government of Odisha and the Central Government will cooperate with the Central Empowered Committee to enquire into the matter and furnish a report.
>
> The matter be listed on a Monday after six weeks."

7. With reference to the order passed on 16-9-2013[5] CEC conducted an inquiry and some information was sought from M/s Sarda Mines (P) Ltd. (for short "SMPL"). This was objected to by SMPL who filed an application which was taken up for consideration on 9-12-2013. The following order[6] was passed on that day: (*T.N. Godavarman case*[6], SCC p. 172, paras 23-25)

> "*23*. By our order dated 16-9-2013[5], we had called for a report from the Central Empowered Committee within a period of six weeks. It is stated

4 *T.N. Godavarman Thirumulpad* v. *Union of India*, (2010) 15 SCC 177
5 *T.N. Godavarman Thirumulpad* v. *Union of India*, (2014) 6 SCC 167, 172 (footnote 1)
6 *T.N. Godavarman Thirumulpad* v. *Union of India*, (2014) 6 SCC 167

on behalf of the Central Empowered Committee that the report could not be ready as part of the information called for has not been furnished by the State Government.

24. Mr Venugopal, learned Senior Counsel for the applicant M/s Sarda Mines (P) Ltd. in IA No. 3721 submits that since some of the matters are pending before the High Court, a prayer has been made for not furnishing the required information to the Central Empowered Committee.

25. List this matter in the second week of January 2014. In the meantime, the Central Empowered Committee may not submit its final report."

8. The matter was again taken up on 13-1-2014[7] and this Court passed the following order:

"We have heard the learned counsel for the parties.

We have also perused the letter dated 17-10-2013 of the Member Secretary, Central Empowered Committee sent to the Chief Secretary, Government of Odisha along with its annexures and in particular, the statement of details of information and documents sought by the Central Empowered Committee for the meeting convened on 30-10-2013, which cover forest and environmental issues.

We, accordingly, modify the order dated 9-12-2013[6] and direct the Central Empowered Committee to submit its final report on the queries made by the State Government with regard to the details of the documents sought for in the letter dated 17-10-2013 within a period of six weeks.

The report will not cover cases other than forest and environmental issues.

The lessees and others from whom information is sought for will cooperate, if they do not cooperate the Central Empowered Committee will give its report.

A copy of the interim report of 26-4-2010 will be furnished to the learned counsel appearing for the State of Odisha.

This matter be listed on 20-1-2014 for consideration of the recommendations made by the Central Empowered Committee in the said report dated 26-4-2010."

Thereafter and partly based on reports given by Justice M.B. Shah, a retired Judge of this Court, holding a commission under the Commissions of Inquiry Act, 1952 a writ petition being WP (C) No. 114 of 2014 was filed by Common Cause. Several prayers were made in the writ petition, and some of the more significant prayers read as follows:

"(*a*) Issue a writ of mandamus or any other appropriate writ directing the Union of India and the Government of Odisha to immediately stop

7 *T.N. Godavarman Thirumulpad* v. *Union of India*, IA No. 3721 in 3629 in WP (C) No. 202 of 1995, order dated 13-1-2014 (SC)

6 *T.N. Godavarman Thirumulpad* v. *Union of India*, (2014) 6 SCC 167

forthwith all illegal mining in the State of Odisha and to terminate all leases that are found to be involved in illegal mining and mining in violation of the provisions of the Forest (Conservation) Act, 1980, the environment laws and other laws.

(*b*) Issue a writ of mandamus or any other appropriate writ directing the Union of India and the Government of Odisha to take action against all the violators involved either directly or indirectly in illegal mining including those named in the report of Justice Shah Commission.

(*c*) Issue a writ of mandamus or any other appropriate writ directing a thorough investigation by SIT or CBI under the supervision of this Hon'ble Court, as is recommended by the Justice Shah Commission into illegal mining in Odisha and collusion between private companies/individuals and public officials of the State/Central Governments.

* * *

(*e*) Issue a writ of mandamus or any other appropriate writ directing the respondents to recover the illegally accumulated wealth through illegal mining and related activity, as per Section 21(5) of the MMDR Act, 1957 [Mines and Minerals (Development and Regulation) Act, 1957] and launch prosecutions under Section 21(1) of the MMDR Act, 1957, and direct that the money recovered would be used for the welfare of local communities, tribals and villagers."

9. The writ petition was taken up for consideration on 21-4-2014[8] when the following order was passed: (*T.N. Godavarman case*[8], SCC p. 161, paras 1-4)

"*1*. We have heard the preliminary objections with regard to the writ petition and we are not convinced that the writ petition is not maintainable. Issue notice.

2. As the State of Odisha, Union of India and CEC have already been served with the notices, no further notices be issued to them. Notice, however, be issued to Respondents 4 and 5 returnable within four weeks.

3. It appears from the averments in para 14 of the writ petition that several lessees are operating without clearances under the Environment (Protection) Act, 1986 and the Forest (Conservation) Act, 1980, and without renewal by the Government. Hence, an interim order needs to be passed in respect of these lessees who are operating the leases in violation of the law.

4. For consideration of the interim order that should be passed, only this writ petition be listed on next Monday, 28-4-2014, as first item. It will be open for all parties and intervenors/proposed intervenors to file their respective affidavits. CEC, in the meanwhile, will make out a list of such lessees who are operating the leases in violation of the law. This list be prepared by CEC without reference to the Shah Commission's Report. Liberty is given to the parties to produce their papers before CEC. The

8 *T.N. Godavarman Thirumulpad* v. *Union of India*, (2014) 14 SCC 160

State of Odisha and the Union of India will cooperate with CEC to prepare the list."

Report of the Central Empowered Committee

10. CEC gave its final report on 25-4-2014 which was considered by this Court and a detailed interim order was passed on 16-5-2014[9]. The sum and substance of the final report dated 25-4-2014 and the interim order is that in the districts of Odisha that we are concerned with, namely, Keonjhar, Sundergarh and Mayurbhanj, the total number of leases granted for mining iron and manganese ore are 187. Of these, 102 leaseholders did not have requisite environmental clearance [under the Environment (Protection) Act, 1986] or approval under the Forest (Conservation) Act, 1980 or approved mining plan and/or consent to operate under the provisions of the Air (Prevention and Control of Pollution) Act, 1981 or the Water (Prevention and Control of Pollution) Act, 1974. This Court directed that mining operations in these 102 mining leases shall remain suspended but it will be open to such leaseholders to move the authorities concerned for necessary clearances, approvals or consents and

> "as and when the mining lessees are able to obtain all the clearances/approval/consent they may move this Court for modification of this interim order in relation to their cases". (*Common Cause case*[9], SCC p. 157, para 4)

11. This Court also found that 29 out of 187 mining leases had been determined or rejected or had lapsed. It was directed that mining operations in these 29 mining leases will also remain suspended but it would be open to all these lessees concerned to move the authorities for necessary relief and as and when they get the appropriate relief, they could move this Court for modification of the interim order.

12. This Court also found that 53 iron ore/manganese ore mining leases were operational and that they had necessary approvals under the Forest (Conservation) Act, 1980, consent to operate granted by the Odisha State Pollution Control Board and also approved mining plans. (There is no specific mention about environmental clearance.) In addition 3 mining leases were located in forest as well as non-forest land, but mining operations were being conducted in non-forest areas of the mining lease as the leaseholders did not have approvals under the Forest (Conservation) Act, 1980. Therefore a total of 56 iron ore/manganese ore mining leases were operating in the State of Odisha.

13. As far as the break-up of the 56 operational mining leases is concerned, it was found that 14 mining leases were operating on first renewal basis in accordance with the deeming provisions of Section 8(2) of the Mines and Minerals (Development and Regulation) Act, 1957 (for short "the MMDR Act") read with Rule 24-A(6) of the Mineral Concession Rules, 1960 (for short "the MCR") and 16 mining leases were operating since lease deeds for grant of renewal had been executed in their favour. The remaining 26 mining

9 *Common Cause* v. *Union of India*, (2014) 14 SCC 155

leases were operating on second and subsequent renewal basis with the renewal applications pending a final decision with the State Government.

14. In respect of the 14 first renewal mining leases, this Court permitted them to continue their operations for the time being in view of the deemed renewal provisions. This Court also permitted 16 mining leases to continue to operate since they had lease deeds executed in their favour. With regard to the remaining 26 mining leases operating on second and subsequent renewal applications, this Court drew attention to the decision rendered on 21-4-2014 in *Goa Foundation* v. *Union of India*[10] wherein it was held that the provision for a second or subsequent deemed renewal was not available in view of Section 8(3) of the MMDR Act. Consequently, these 26 leaseholders were restrained from operating until express orders were passed by the State Government under Section 8(3) of the MMDR Act. Six months' time was granted to the State Government to take a final decision on the renewal applications. This Court left it open to the mining leaseholders to apply for modification of the interim order dated 16-5-2014[9] on obtaining necessary clearances.

15. During the hearing of these petitions, we were informed that the balance 26 mining leases are now operational in view of the amendment to Section 8(3) of the MMDR Act with effect from 12-1-2015. However, we are not aware whether these 26 mining leases have the necessary statutory clearances.

16. We may also mention that pursuant to the liberty granted to move for modification of the interim order of 16-5-2014[9] we have received 17 interim applications for modification. Through a chart handed over to us in Court on 3-5-2017 we have been informed that in respect of two of the 17 applications, that is, Zenith Mining (IA No. 45) and Kavita Agrawal (IA No. 47), the lease has not been extended or has been determined and they do not have any environmental clearance or forest clearance. In respect of J.N. Pattnaik (IA No. 66), there is no forest clearance available. We were also informed that S.A. Karim (IA No. 9) actually had a working lease and had wrongly been included as a non-operational lease.

17. Be that as it may, the learned counsel for the leaseholders drew our attention to the record of proceedings of 16-5-2014 and particularly the following paragraph appearing therein:

> "We have passed interim order in a separate sheet. The Central Empowered Committee will give a final report on the writ petition by the end of July 2014 and the matter will be listed in the first week of August 2014 before the Green Bench."

We are mentioning this in the context of the order passed on 13-1-2014[7] adverted to above to the effect that "The Report will not cover cases other than forest and environmental issues."

10 (2014) 6 SCC 590
9 *Common Cause* v. *Union of India*, (2014) 14 SCC 155
7 *T.N. Godavarman Thirumulpad* v. *Union of India*, IA No. 3721 in 3629 in WP (C) No. 202 of 1995, order dated 13-1-2014 (SC)

18. In its final report, CEC has dealt with the following ten topics:

In this final report CEC dealt with the following ten topics:

"*I*. Production of iron ore and manganese ore without/in excess of the environmental clearance/Mining Plan/consent to operate.

II. Mining leases operated in violation of the Forest (Conservation) Act, 1980.

III. Illegal mining outside the sanctioned mining lease areas.

IV. Mining leases acquired in violation of Section 6 of the MMDR Act, 1957.

V. Violation of Rule 37 of the Mineral Concession Rules, 1960 by the lessees.

VI. Illegalities involved in the mining leases of Essel Mining & Industries Ltd.

VII. Illegalities involved in the mining lease of Sharda Mines (P) Ltd.

VIII. Massive illegal mining in Uliburu Forest land.

IX. Inordinate delays in taking decisions by the State Government regarding renewal of the mining leases.

X. Other issues."

19. By an order dated 16-1-2015[11] objections to the final report were permitted and we have since received quite a few objections. When the matter was taken up for consideration by this Court on 7-10-2015 and pursuant

11 *Common Cause* v. *Union of India*, IA No. 35 in IA No. 17 in WP (C) No. 114 of 2014, order dated 16-1-2015 (SC), wherein it was directed:

"*IA No. 35 in IA No. 17 of 2014 in WP (C) No. 114 of 2014*

1. Dr Rajeev Dhavan, learned Senior Counsel for the applicant Orissa Mining Corporation Ltd. (Respondent 4), on instructions, seeks permission of this Court to withdraw the application for directions (IA No. 17 of 2014) with liberty to approach the High Court. Permission sought for is granted. The application for directions (IA No. 17 of 2014) is disposed of as withdrawn with liberty to the applicant to approach the High Court. Accordingly, IA No. 35 of 2014 in IA No. 17 of 2014 is allowed. We clarify that we have not expressed any opinion on the prayers made in IA No. 17 of 2014.

IAs Nos. 31-32 of 2014 in WP (C) No. 114 of 2014

2. Issue notice. Shri Prashant Bhushan, learned counsel for the petitioner and Shri A.D.N. Rao, learned Amicus Curiae on behalf of the Central Empowered Committee, accept notice. Objections, if any, may be filed within six weeks' time from today. Whosoever wants to file objections to the report of the Central Empowered Committee filed in Writ Petition (C) No. 114 of 2014, he/they may do so within eight weeks' time from today. List the matter after eight weeks."

to the order[12] passed on that date, the learned Amicus filed a statement dated 30-10-2015 in a tabular form dealing with each IA filed in respect of the observations and recommendations made by CEC. Thereafter, when the matter was again taken up for consideration the learned Amicus filed a note dated 15-3-2016 wherein the following four issues were flagged:

> "(*i*) Leases lapsed under Section 4-A(4) of the Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as the MMDR Act, 1957) (11 leases);
>
> (*ii*) Violation of Rule 24 of the Minerals (Other than Atomic and Hydrocarbons Energy Minerals) Concession Rules, 2016 (hereinafter referred to as MCR, 2016) and Rule 37 of the Mineral Concession Rules, 1960 (hereinafter referred to as the MCR, 1960) (9 leases);
>
> (*iii*) Illegal mining in forest lands (20 leases); and
>
> (*iv*) Iron ore produced without/in excess of the environmental clearance (each of the operating leases involved)."

20. Insofar as the first issue is concerned, it is common ground that that issue has been fully, conclusively and exhaustively dealt with by this Court by a judgment and order dated 4-4-2016 (*Common Cause* v. *Union of India*[13]). Therefore, the first issue does not survive for consideration by us.

21. As far as the remaining three issues are concerned, these overlap with Topics I, II and V dealt with by CEC. Detailed submissions were made before us by the learned counsel for all the appearing parties on these issues as well as by the learned Amicus and the learned Attorney General. We propose to deal with them in this judgment and order.

22. We may mention that submissions were also made on Topics III and IV identified by CEC, that is, illegal mining outside the sanctioned mining lease areas and mining leases acquired in violation of Section 6 of the MMDR Act. We will consider these issues as well.

23. As far as Topics VI and VII identified by CEC are concerned, we would like to hear the parties in detail in respect of these issues.

---

12 *Common Cause* v. *Union of India*, WP (C) No. 114 of 2014, order dated 7-10-2015 (SC), wherein it was directed:

"*Order in all the applications except IAs Nos. 57 and 59*

For disposal of all the applications that are listed before us today, we need the assistance of Mr A.D.N. Rao, learned Amicus Curiae, in preparing a tabular form, inter alia indicating the number of application(s), the nature of relief(s) sought in the application(s) and the remarks of the Central Empowered Committee (for short "the Committee"), if any, on those reliefs. Since there are a large number of applications pending before us for urgent orders, we request the Committee to devote its time and prepare the tabular form as desired by us and submit the same before us within three weeks' time from today. After preparing the said table, Shri Rao, learned Amicus Curiae would supply a copy of the same to all the learned counsel, who have filed the applications before this Court. List the matter on 5-11-2015."

13 (2016) 11 SCC 455

24. No challenges or submissions were made on Topics VIII, IX and X and therefore we accept the report of CEC on these topics.

25. At this stage, we may mention some rather frightening figures mentioned by CEC in its final report. According to CEC, excess mining without environmental clearance or beyond what was authorised by the environmental clearance is 2130.988 lakhs MT of iron ore and 24.129 lakhs MT of manganese ore making a total of 2155.117 lakhs MT of iron and manganese ore. This does not include extraction of ore without forest clearance. These figures give an indication of the extent of excess or illegal or unlawful mining carried out.

26. In terms of rupees, according to CEC the total notional value of minerals produced without an environmental clearance or in excess of the environmental clearance, at the weighted average price of minerals as proposed by the Indian Bureau of Mines comes to about Rs 17,091.24 crores for iron ore and about Rs 484.92 crores for manganese ore making a total of Rs 17,576.16 crores. Again, this does not include mining without forest clearance. It is for this reason that we have referred to the megabucks and rapacious mining.

Justice M.B. Shah Commission of Inquiry

27. Apparently, and it appears quite independently of all these developments, the Central Government issued a Notification on 22-11-2010 under the Commissions of Inquiry Act, 1952 whereby it appointed Justice M.B. Shah, a retired judge of this Court to conduct an inquiry on the following Terms of Reference:

> "**2.** (*i*) to inquire into and determine the nature and extent of mining and trade and transportation, done illegally or without lawful authority, of iron ore and manganese ore, and the losses therefrom; and to identify, as far as possible, the persons, firms, companies and others that are engaged in such mining, trade and transportation of iron ore and manganese ore, done illegally or without lawful authority;
>
> (*ii*) to inquire into and determine the extent to which the management, regulatory and monitoring systems have failed to deter, prevent, detect and punish offences relating to mining, storage, transportation, trade and export of such ore, done illegally or without lawful authority, and the persons responsible for the same;
>
> (*iii*) to inquire into the tampering of official records, including records relating to land and boundaries, to facilitate illegal mining and identify, as far as possible, the person responsible for such tampering; and
>
> (*iv*) to inquire into the overall impact of such mining, trade, transportation and export, done illegally or without lawful authority, in terms of destruction of forest wealth, damage to the environment, prejudice to the livelihood and other rights of tribal people, forest dwellers and other persons in the mined areas, and the financial losses caused to the Central and the State Governments.
>
> **3.** The Commission shall also recommend remedial measures to prevent such mining, trade, transportation and export done illegally or without lawful authority."

28. In the Preamble to the notification appointing the Commission, it was noted that there were reports that mining, raising, transportation and export of iron ore and manganese ore illegally or without lawful authority was being carried on in various States in one or more of the following forms:

"(*a*) mining without a licence;

(*b*) mining outside the lease area;

(*c*) undertaking mining in a lease area without taking approval of the State Government concerned for transfer of concession;

(*d*) raising of minerals without lawful authority;

(*e*) raising of minerals without paying royalty in accordance with the quantities and grade;

(*f*) mining in contravention of a mining plan;

(*g*) transportation of raised mineral without lawful authority;

(*h*) mining and transportation of raised mineral in contravention of applicable Central and State Acts and Rules thereunder;

(*i*) conducting of multiple trade transactions to obfuscate the origin and source of minerals in order to facilitate their disposal;

(*j*) tampering with land records and obliteration of inter-State boundaries with a view to conceal mining outside lease areas;

(*k*) forging or misusing valid transportation permits and using forged transport permits and other documents to raise, transport, trade and export minerals;"

It is in the above context that the Terms of Reference were framed.

29. On 1-7-2013 the Commission gave the First Report on Illegal Mining of Iron and Manganese Ores in the State of Odisha. The report contains an executive summary and very briefly the Commission stated that:

(*i*) All modes of illegal mining, as stated in the Notification dated 22-11-2010 of the Central Government are being committed in the State of Odisha;

(*ii*) There is a complete disregard and contempt for law and lawful authorities on the part of many of the emerging breed of entrepreneurs;

(*iii*) It appears that the law has been made helpless because of its systematic non-implementation. The executive summary states that the following are discussed in the report:

"(A) Information regarding mining leases should be placed on website to make mining operations more transparent and to display the information for each lease on the departmental/State website with various conditions which are required to be adhered to by the lessee.

(B) Misuse of Rule 24-A(6) of the MCR, 1960 [Mineral Concession Rules, 1960] which provides for deemed extension of lease. Application for renewal of mining lease is not decided for one or other pretexts, may be, there is lack of coordination among various departments which are required to decide renewal application. There is gross misuse of deemed refusal and deemed extension of both the

provisions of renewal of leases (before 27-9-1994 and after) under Rule 24-A of the MCR, 1960. This casual and negative approach has caused dearly to the State exchequer in the form of hundred crores of stamp duty and others.

* * *

(C) Violation of the provisions of the Forest (Conservation) Act, 1980, Rules and guidelines and directions issued by the Hon'ble Supreme Court of India.

* * *

(D) Violation of the provisions of the Environment (Protection) Act, 1986.

* * *

(E) Misuse of Rules 10 and 12 of the MCDR, 1988 [Mineral Conservation and Development Rules, 1988] which provides for modification and review of mining plan only for a specific purpose, namely,

(*i*) safe and scientific mining;

(*ii*) conservation of minerals;

(*iii*) the protection of environment; and

(*iv*) in case of modification, explanation for the same.

* * *

(F) *Encroachment*:

On the basis of Google Image, the survey report prepared by the State Government by DGPS method, it was found that in 82 mining leases, there was encroachment. Out of the said leases, re-survey was ordered for 37 leases."

30. Soon thereafter, the Commission gave its Second Report on Illegal Mining of Iron and Manganese Ores in the State of Odisha, sometime in October 2013. This report dealt with specific leaseholders and violations committed by them. It is not necessary for us to delve into those specific details.

31. It was submitted before us by the learned counsel for the mining leaseholders that the reports given by the Commission were not acceptable on the ground that a notice had not been given to the leaseholders under Section 8-B or Section 8-C of the Commissions of Inquiry Act, 1952. It was submitted that under these circumstances the reports given by the Commission were vitiated and therefore the foundation of the writ petition filed by Common Cause was taken away. We are not in agreement with the learned counsel for the mining leaseholders.

32. The First Report given by the Commission was a general, overall perspective on the subject while the Second Report went into specific details of several mining leaseholders — but we are not concerned with those specifics. Therefore, whether notices were or were not issued to the leaseholders who were the subject-matter of discussion in the Second Report is of no consequence.

33. What we are really perturbed about is the facts stated by the Commission in the First Report. So far as this is concerned, we are of the view that no irregularity or illegality has been committed so as to vitiate the First Report. Notwithstanding this, we are not relying upon any of the facts determined by the Commission for the purposes of our judgment and order.

34. The procedure followed by the Commission has been mentioned in Volume I Part II of the First Report, but it is not necessary for us to recount each and every detail. Suffice it to say that a resume of the procedure followed will indicate that full opportunity was given to the leaseholders to have their say.

Resume of the procedure followed by the Commission

35. In March 2011 the Commission sent the first questionnaire to the Secretary concerned of the Government of Odisha seeking the following information regarding each leaseholder:

> "(*i*) the name of the lessee;
>
> (*ii*) area of the lease;
>
> (*iii*) date of the execution of the lease deed;
>
> (*iv*) present status (renewal, mining plan, mining scheme) approval date;
>
> (*v*) production and export particulars from the year 2008-09 up to January 2011; etc."

36. On 20-4-2011 the Commission sent the second questionnaire to the said Secretary concerned seeking further information in a form consisting of 14 questions and 4 tables.

37. Thereafter, between 24-8-2011 and 26-8-2011 the Commission issued the first notice to various mining lessees in Odisha seeking information on affidavit as per Pro formas A and B enclosed with the notice. In Pro forma A the leaseholder was asked to submit details which included the details of environmental clearance, forest clearance and renewal of lease and whether the leased mine was in operation or not. In Pro forma B the leaseholder was asked to submit details which included the details of dispatch, domestic consumption and export in million tonnes of iron ore and manganese ore from 2006-07 to 2010-11.

38. The Commission visited Odisha from 7-12-2011 to 14-12-2011, from 3-10-2012 to 11-10-2012 and from 31-10-2010 to 8-11-2012. The purpose of the visits was to collect information and seek explanations and gather facts from the Departments concerned of the Government of India and the Government of Odisha. During the visits, the Commission received as many as 140 complaints alleging illegal mining. Accordingly, a public hearing was held in Keonjhar and Bhubaneshwar on 11-12-2011 and 12-12-2011.

39. On 21-12-2012 and 12-1-2013 several Senior Counsel were given a personal hearing by the Commission including a personal hearing to the Federation of Indian Mining Industries (for short "FIMI"). Following the submissions made, a fresh notice was issued to the leaseholders from 28-1-2013

seeking information in Pro formas A to H. In terms of the fresh notice, the leaseholder was required to verify the facts stated therein (which were collected by the Commission) and if found incorrect then to state the correct facts. The fresh notice specifically mentioned that:

"(*i*) The lessee shall come fully prepared to answer, related to this matter and submit all related records.

(*ii*) Explain the production from the leased area without having approval under the FC Act, 1980.

(*iii*) Explain the production during the deemed extension period without having approval under EIA Notification dated 27-1-1994 and amendments thereon.

(*iv*) Explain the excess production in violation of EIA Notification dated 27-1-1994 and amendments thereon under the EP Act, 1986."

40. The report mentions the various dates of hearing given to the learned counsel for the leaseholders, the State of Odisha, FIMI, Federation of Indian Chambers of Commerce and Industry (FICCI) and the Ministry of Environment and Forests of the Government of India (for short "MoEF") which are as follows:

"Hearing No.	*Date*	*Place*
1.	21-12-2012	Office of the Commission, Ahmedabad.
2.	12-1-2013	–do–
3.	18-2-2013	–do–
4.	27-2-2013	Circuit House, Bhubaneshwar (Odisha).
5.	28-2-2013	–do–
6.	1-3-2013	–do–
7.	2-3-2013	–do–
8.	4-3-2013	–do–
9.	16-3-2013	Circuit House, Annexe, Ahmedabad.
10.	20-3-2013	–do–
11.	23-3-2013	Office of the Commission, Ahmedabad.
12.	2-4-2013	Circuit House, Annexe, Ahmedabad.
13.	3-4-2013	–do–
14.	4-4-2013	–do–
15.	12-4-2013	Office of the Commission, Ahmedabad.
16.	13-4-2013	–do–
17.	21-4-2013	Gujarat University Convention Centre, Nr. Helmet Cross Road, 132 ft. Ring Road, Ahmedabad.
18.	24-5-2013	Office of the Commission, Ahmedabad.
19.	25-5-2013	–do–"

41. The number of learned counsel and representatives who were heard by the Commission and with whom interactions took place are mentioned in Annexure A to Vol. I of the First Report. The list of learned counsel runs into 18 pp. — from p. 33 to p. 50 of Vol. I of the First Report. Some individual lawyers

appeared for several leaseholders but the fact of the matter is that everybody who wanted to be heard was given a hearing.

42. The function of the Commission as stated in the First Report, at the present stage, is best described in the words of the Commission itself. It is stated as follows:

> "*9*. The function of the Commission, at this stage, is only to inquire, assess the data collected and to submit the report on the said basis. On that basis, some remedial measures are suggested by the Commission for controlling illegal mining and violation of the Acts and/or Rules. For that, there is no question of issuing notices to the lessees.
>
> For collecting the data and assessing it, the principles of natural justice are fully complied with, as stated above. On the basis of the data submitted by the lessees and the submissions made by the learned counsel for them, the report is submitted."

It is further clarified on p. 198 of Vol. I of the First Report that with regard to individual mining leases in which there is a violation of the provisions of the Forest (Conservation) Act, 1980 and/or conditions of environmental clearance, etc. a report would be submitted later on.

43. It is therefore abundantly clear that the First Report is generally a limited fact-finding enquiry on the basis of information supplied by the mining leaseholders. Therefore, there is absolutely no question of any notice being issued to any mining leaseholder under Section 8-B or the right of cross-examination being granted to any mining leaseholder under Section 8-C of the Commissions of Inquiry Act, 1952. We are satisfied that the Commission made adequate efforts to collect the facts and this collation in the First Report was possible with the assistance of the mining leaseholders and their learned counsel and representatives as well as the government authorities and FIMI and FICCI. Under these circumstances, no leaseholder can seriously contend that the procedure adopted by the Commission in collecting facts was either irregular or not in accordance with law. As mentioned above, any mining leaseholder who wanted to be heard was given an opportunity of being heard and was fully aware of what the Commission was attempting to achieve and if any particular mining leaseholder chose not to associate with it, it was at his or her own peril. Lack of knowledge of the proceedings before the Commission cannot be appreciated and we are quite satisfied that all the mining leaseholders were fully aware of what was going on, if not personally then certainly through their list of learned counsel running into 18 pages or their representatives individually or their Federation.

44. In *Goa Foundation*[10] there was a challenge to the report of the Justice Shah Commission in respect of its conclusions pertaining to the State of Goa. This was dealt with by this Court in paras 11 to 14 of its decision. This Court declined to quash the report in view of the statement made by the learned

10 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590

Advocate General of Goa. But, this Court took the view that: (SCC p. 601, para 14)

> "*14.* … We will, however, examine the legal and environmental issues raised in the Report of the Justice Shah Commission and on the basis of our findings on these issues consider granting the reliefs prayed for in the writ petition filed by Goa Foundation and the reliefs prayed for in the writ petitions filed by the mining lessees, which have been transferred to this Court."

45. In the present petitions before us, there is no challenge to the reports of the Justice Shah Commission. However, we propose (as in *Goa Foundation*[10]) to confine ourselves to some limited facts adverted to by CEC in its final report. We do not propose to base any of our conclusions on the reports of the Commission.

46. The learned counsel for the petitioners insisted that the illegal or unlawful mining activity carried on in the State of Odisha as noted by the Commission deserves to be investigated by the Central Bureau of Investigation. Reference in this regard was made to the passage in Part III of Vol. I of the First Report of the Commission to the following effect:

> "Since this is one of the biggest illegal mining ever observed by the Commission, it is strongly felt that this is a fit case to handover to Central Bureau of Investigation, for further investigation and follow-up action."

47. Similarly, on p. 125 of Chapter II of Vol. I of the Report, it is stated as follows:

> "8. Terms of Reference No. 8 provides that 'The Commission may take the services of any investigating agency of the Central Government in order to effectively address its terms of reference.'
>
> The Commission, therefore, suggests that Central Bureau of Investigation (CBI) may be directed to investigate into allegations of corruption made against politicians, bureaucrats and others."

We will consider this at the appropriate stage.

48. Suffice it to say for the time being that the Commission made certain significant observations in Chapter II of the Report to the effect that:

> (*a*) That the tribals in the area have been displaced or stay in pathetic and miserable conditions in same area. There is rampant air pollution with the trees having the colour of minerals making it clear that tribals are forced to breathe polluted air and drink polluted water.
>
> (*b*) Streams and ground water is polluted and there is hardly any facility of drinking water. Women have been seen fetching water from dirty nalas.
>
> (*c*) Mining companies and beneficiation plants are drawing water from rivers and nearby water resources are getting depleted at a fast rate. River Baitrani has been seriously affected by this activity.

10 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590

(*d*) Basic facilities such as medical facilities, shelter/residence, education facilities are absent. Roads have a heavy flow of traffic and on one road of the area about 7000 trucks passed during night time.

(*e*) The labour is not being paid adequate wages beyond the minimum wages even though the income of the mine owners runs into billions of rupees.

49. Adverting to corruption in the area due to illegal mining activities, the Commission felt that the Vigilance Commission was unlikely to conduct an impartial and independent enquiry for arriving at just and proper findings because of external pressures. Accordingly, it would be more appropriate if the Central Bureau of Investigation (CBI) conducts a detailed enquiry into all cases that have been registered between 2008 and 2011. It was also noted that the Railways have issued demand notices to the extent of Rs 1874 crores. The latest position with regard to these notices is not available.

50. It was also noted that notices have been issued in 146 cases to various leaseholders for recovery of mined ore as per Section 21(5) of the MMDR Act. In the Koira circle, notices have been issued to 55 lessees for more than Rs 13,000 crores; in Joda circle, notices have been issued to 72 lessees for recovery of more than Rs 44,000 crores; in Keonjhar circle, notices have been issued to 4 lessees for recovery of about Rs 1065 crores; in Koraput circle, notices have been issued to three lessees for the recovery of about Rs 44 lakhs; and in Bolangir circle, notice has been issued to 1 lessee for the recovery of about Rs 29.5 crores. In Baripada circle, notices have been issued to 11 lessees for recovery of more than Rs 467 crores. In other words notices have been issued to the lessees for recovery of more than Rs 59,000 crores! (According to CEC the figure exceeds Rs 61,000 crores)!!

51. We have adverted to the reports of the Commission, without relying on them, only to highlight the gravity of the situation and nothing more. The gravity of the situation is also apparent from the report of CEC and the Commission seems to support it.

Initial contention

52. The initial contention urged on behalf of the respondent leaseholders was that in giving the Report dated 16-10-2014 CEC has exceeded its remit. In this context, reference was made to the order of 13-1-2014[7] in which it is stated that "The Report will not cover cases other than forest and environmental issues".

53. We are of the opinion that this objection deserves immediate rejection. The subsequent orders passed by this Court have been completely overlooked by the learned counsel inasmuch as on 21-4-2014[8] it was specifically noted by this Court that "CEC, in the meanwhile, will make out a list of such lessees who are operating the leases in violation of the law". Similarly, in the

7 *T.N. Godavarman Thirumulpad* v. *Union of India*, IA No. 3721 in 3629 in WP (C) No. 202 of 1995, order dated 13-1-2014 (SC)

8 *T.N. Godavarman Thirumulpad* v. *Union of India*, (2014) 14 SCC 160

record of proceedings of 16-5-2014 it was noted that "The Central Empowered Committee will give a final report on the writ petition by the end of July 2014. …"

54. From a reading of the orders and the proceedings that have been held in this regard from time to time, it is quite obvious to us that the jurisdiction of CEC was not limited and it was expected to give a detailed report on all aspects of illegal mining or mining being carried out without any lawful authority in whatever manner. The initial objection raised on behalf of the leaseholders is therefore rejected.

Central Empowered Committee

55. The Central Empowered Committee or CEC was first constituted by this Court by an order dated 9-5-2002 [*T.N. Godavarman Thirumulpad (50)* v. *Union of India*[14]] as an interim body. Thereafter, it was constituted by a Notification dated 17-9-2002 issued under Section 3(3) of the Environment (Protection) Act, 1986 (for short "the EPA"). It has continued functioning and assisting this Court for more than a decade and even though it has been criticised on a couple of occasions, it is now an established body which renders extremely valuable advice to this Court and provides factual material on the basis of which this Court can make some recommendations and pass appropriate orders.[14, 15]

56. The details of the functioning of CEC have been discussed by this Court in *Samaj Parivartana Samudaya* v. *State of Karnataka*[16]. In that decision, questions were raised about the credibility of CEC and while rejecting the submissions, it was made clear that the recommendations made by CEC are subject to the satisfaction of this Court. We need say nothing more except that during the course of hearing of the present petitions, some of the conclusions arrived at by CEC were disputed by the petitioners and even by the learned Amicus and some were supported by the learned counsel for the mining leaseholders, the learned Attorney General and the learned counsel for the State of Odisha. It is therefore quite clear that in the present cases, CEC as a fact-finding body has functioned impartially and it is only on the conclusions arrived at by CEC on the basis of the facts gathered that there can be some debate and discussion. Anyone may disagree with the views of CEC and there is no need to make heavy weather about this at all.

57. Insofar as the Report given by CEC on 16-10-2014 (the final report) is concerned, before going into the details thereof, we may mention that CEC has stated that it held meetings with the Chief Secretary and other senior officials of the State of Odisha and others on six dates. It also heard the leaseholders and others on seven dates and it held meetings with three of the leaseholders, that is, Jindal Steel and Power Ltd. (JSPL), Sarda Mines Pvt. Ltd. (SMPL) and Essel Mining and Industries Ltd. (Essel) on 10-9-2014. CEC visited the site of the mining lease of SMPL from 4-3-2014 to 7-3-2014 and had site visits of a number of other lessees from 12-7-2014 to 16-7-2014.

14 (2013) 8 SCC 198
15 *T.N. Godavarman Thirumulpad* v. *Union of India*, (2013) 8 SCC 204
16 (2013) 8 SCC 154

58. As far as the facts collected by CEC are concerned, there is no dispute with regard to their correctness. CEC has recorded that there are 187 iron ore and manganese ore mining leases in the State of Odisha. On the basis of the material and information collected, a statement was prepared showing leasewise and yearwise details of production of iron ore and manganese ore, permissible production and production without environmental clearance/ beyond environmental clearance. The details in this regard have been given as Annexure R-14 to the final report.

59. Regarding the correctness of the information, CEC has this to say:

> "24. A copy of the abovesaid statement prepared by CEC was made available, through the Director, Mines and Geology, Government of Odisha and also through the Federation of Indian Mining Industries (FIMI), to the lessees of each of the mining leases to enable them to verify the production and other details as given in the statement. During the hearings held before CEC between 5-8-2014 and 12-8-2014 and also in the representations filed before CEC a large number of lessees stated that the yearwise production details are not correctly reflected in the statement. Some of them also stated that the environmental clearance details are not properly reflected in the statement. Therefore, it was decided that (*a*) the State Government will reconcile the annual production and other details with the respective lessees, and (*b*) the copies of the environmental clearances may also be filed before CEC by those lessees who are disputing the environmental clearances details provided by the State. Accordingly a meeting was convened by the Director, Mines & Geology (DMG) with the lessees on 14-8-2014 and during which the annual production and other details were reconciled. The reconciled leasewise and yearwise production and other details provided to CEC by the State of Odisha may be seen in the statement enclosed at Annexure R-11 to this Report. The figures modified in the said statement, after reconciliations, are shown in bold print."

60. CEC noted that the Director, Mines and Geology of the Government of Odisha had informed CEC that each leaseholder with the exception of SMPL and JSPL agreed with the reconciled production details. On facts, therefore, there is no dispute with regard to the contents of the report of CEC, although the conclusions might be disputed. Separately, CEC has dealt with the facts concerning SMPL and JSPL pursuant to a meeting held with them on 11-9-2014.

Statutory provisions

61. The grant of a mining lease is governed by the provisions of the Mines and Minerals (Development and Regulation) Act, 1957 (or the MMDR Act), the Mineral Concession Rules, 1960 (or the MCR) and the Mineral Conservation and Development Rules, 1988 (or the MCDR).

62. Section 4(1) of the MMDR Act provides that no person shall undertake any mining operation in any area except under and in accordance with the terms and conditions of a mining lease granted under the MMDR Act and the

Rules made thereunder. A "mining operation" is defined in Section 3(*d*) of the MMDR Act as meaning any operation undertaken for the purpose of winning any mineral. Section 4(2) of the MMDR Act provides that no mining lease shall be granted otherwise than in accordance with the provisions of the said Act and the Rules made thereunder.

63. Section 5(2) of the MMDR Act provides for certain restrictions on the grant of a mining lease. It provides that the State Government shall not grant a mining lease unless it is satisfied that the applicant has a mining plan duly approved by the Central Government or the State Government in respect of the mine concerned and for the development of mineral deposits in the area concerned.

64. Section 10 of the MMDR Act provides for the procedure for obtaining a mining lease and sub-section (1) thereof provides that an application is required to be made for a mining lease in respect of any land in which the mineral vests in the Government and the application shall be made to the State Government in the prescribed form and along with the prescribed fee.

65. Section 12 of the MMDR Act requires the State Government to maintain a set of registers. Among the registers that the State Government is required to maintain are a register of applications for mining leases and a register of mining leases. Every such register shall be open to inspection by any person on payment of such fee as the State Government may fix.

66. Section 13 of the MMDR Act provides for the rule-making power of the Central Government in respect of minerals. The MCR are framed in exercise of power conferred by Section 13 of the MMDR Act.

67. Section 18 of the MMDR Act makes it the duty of the Central Government to take all such steps as may be necessary for the conservation and systematic development of minerals in India and for the protection of the environment by preventing or controlling any pollution which may be caused by mining operations. The MCDR are framed in exercise of power conferred by Section 18 of the MMDR Act.

68. The distinction between the MCR and the MCDR is that the MCR deal, inter alia, with the grant of a mining lease and not commencement of mining operations. However, the MCDR deal, inter alia, with the commencement of mining operations and protection of the environment by preventing and controlling pollution which might be caused by mining operations.

69. Section 21 of the MMDR Act deals with penalties and sub-section (1) thereof provides that whoever contravenes the provisions of sub-section (1) or sub-section (1-A) of Section 4 shall be punished with imprisonment for a term which may extend to two years or with fine which may extend to Rs 25,000 or with both. Sub-section (5) of Section 21 of the MMDR Act provides that whenever any person raises without any lawful authority, any mineral from any land, the State Government may recover from such person the minerals so raised or where such mineral has been disposed of the price thereof. In addition thereto the State Government may also recover from such person rent, royalty

or tax, as the case may be for the period during which the land was occupied by such person without any lawful authority.

Mineral Concession Rules, 1960

70. As far as the MCR are concerned, Rule 22 is of some importance and this provides for an application to be made for the grant of a mining lease in respect of land in which the mineral vests in the Government. An application for the grant of a mining lease is required to be made by an applicant to the State Government in Form I to the MCR. Sub-rule (5) of Rule 22 deals with a mining plan and it requires that a mining plan shall incorporate, amongst other things, a tentative scheme of mining and annual programme and plan for excavation for year-to-year for five years.

71. Rule 22-A of the MCR makes it clear that mining operations shall be undertaken only in accordance with the duly approved mining plan. Therefore, a mining plan is of considerable importance for a mining leaseholder and is in essence sacrosanct. A mining scheme and a mining plan are a sine qua non for the grant of a mining lease.

72. Rule 27 of the MCR deals with the conditions that every mining lease is subject to. One of the conditions is that the lessee shall comply with the MCDR.

73. The format of a mining lease is given in Form K to the MCR and this is relatable to Rule 31 of the MCR which provides that on an application for the grant of a mining lease, if an order has been made for the grant of such lease, a lease deed in Form K or in a form as near thereto as circumstances of each case may require, shall be executed within six weeks of the order, or within such extended period as the State Government may allow.

74. Part VII of Form K deals with the covenants of the lessee/lessees. Clause 10 thereof requires the lessee to keep records and accounts regarding production and employees, etc. The lessee is required, inter alia, to maintain a record of the quantity and quality of the mineral released from the leased land, the prices and all other particulars of all sales of the mineral and such other facts, particulars and circumstances, as the Central Government or the State Government may require.

75. Clause 11-C is of some importance and it requires that the lessee shall take measures for the protection of the environment like planting of trees, reclamation of land, use of pollution control devices and such other measures as may be prescribed by the Central Government or the State Government from time to time at the expense of the lessee.

76. Rule 37 of the MCR deals with the transfer of a lease and provides, inter alia, that a mining lessee shall not without the previous consent in writing of the State Government or the Central Government, as the case may be, assign, sublet, mortgage, or in any other manner, transfer the mining lease, or any right, title or interest therein. The lessee shall not enter into or make any bona fide arrangement, contract or understanding whereby the lessee will or may directly or indirectly be financed to a substantial extent in respect of its operations or undertakings or be substantially controlled by any person or body of persons.

Sub-rule (3) of Rule 37 of the MCR enables a State Government to determine any lease if the mining lessee has committed a breach of Rule 37 of the MCR or has transferred any lease or any right, title or interest therein otherwise than in accordance with sub-rule (2) of Rule 37 of the MCR.

Mineral Conservation and Development Rules, 1988

77. The MCDR promulgated under Section 18 of the MMDR Act and referred to in Rule 27 of the MCR are also of some significance. Rule 9 of the MCDR prescribes that no person shall commence mining operations in any area except in accordance with a mining plan approved under Clause (*b*) of sub-section (2) of Section 5 of the MMDR Act.

78. The mining plan may be modified in terms of Rule 10 of the MCDR in the interest of safe and scientific mining, conservation of minerals or for protection of the environment. However, the application for modifications shall set forth the intended modifications and explain the reasons for such modifications. The mining plan cannot be modified just for the asking.

79. Rule 13 of the MCDR provides that mining operations are required to be carried out by every holder of a mining lease in accordance with the approved mining plan. If the mining operations are not so carried out, the mining operations may be suspended by the Regional Controller of Mines in the Indian Bureau of Mines or another authorised officer.

80. From our point of view, Chapter V of the MCDR dealing with "Environment" is of significance. In this Chapter, Rule 31 of the MCDR provides that every holder of a mining lease shall take all possible precautions for the protection of the environment and control of pollution while conducting any mining operations in the area.

81. Rule 37 of the MCDR requires certain precautions to be taken against air pollution and obliges the mining leaseholder to keep air pollution under control and within permissible limits specified under various environmental laws including the Air (Prevention and Control of Pollution) Act, 1981 and the Environment (Protection) Act, 1986.

82. Rule 38 of the MCDR requires the holder of a mining lease to take all possible precautions to prevent or reduce the passage of toxic and objectionable liquid effluents from the mine into surface water bodies, ground water aquifer and usable lands to a minimum. It also mandates effluents to be suitably treated, if required, to conform to the standards laid down in this regard. In other words, the provisions of the Water (Prevention and Control of Pollution) Act, 1974 are required to be adhered to by the mining leaseholder.

83. Rule 41 of the MCDR requires every holder of a mining lease to carry out mining operations in such a manner as to cause least damage to the flora of the area and the nearby areas. Every holder of a mining lease is required to take immediate measures for planting not less than twice the number of trees destroyed by reason of any mining operations and to look after them during the subsistence of the lease after which these trees shall be handed over to the State Forest Department or any other appropriate authority. The holder of a mining

lease is also required to restore, to the extent possible, other flora destroyed by the mining operations.

84. Briefly therefore, the overall purpose and objective of the MMDR Act as well as the Rules framed thereunder is to ensure that mining operations are carried out in a scientific manner with a high degree of responsibility including responsibility in protecting and preserving the environment and the flora of the area. Through this process, the holder of a mining lease is obliged to adhere to the standards laid down under the Environment (Protection) Act, 1986 or the EPA as well as the laws pertaining to air and water pollution and also by necessary implication, the provisions of the Forest (Conservation) Act, 1980 (for short "the FC Act"). Exploitation of the natural resources is ruled out. If the holder of a mining lease does not adhere to the provisions of the statutes or the rules or the terms and conditions of the mining lease, that person is liable to incur penalties under Section 21 of the MMDR Act. In addition thereto, Section 4-A of the MMDR Act which provides for the termination of a mining lease is applicable. This provides that where the Central Government, after consultation with the State Government is of the opinion that it is expedient in the interest of regulation of mines and mineral development, preservation of natural environment, prevention of pollution, etc. then the Central Government may request the State Government to prematurely terminate a mining lease.

Environment Impact Assessment Notification of 27-1-1994

85. As can be seen from the statutory scheme adverted to above, protection and preservation of the environment is a significant and integral component of a mining plan, a mining lease and mining operations — and rightly so.

86. Keeping this in mind, an Environment Impact Assessment Notification dated 27-1-1994 was issued by the Central Government in exercise of powers conferred by Section 3(1) and Section 3(2)(*v*) of the EPA read with Rule 5(3)(*d*) of the Environment (Protection) Rules, 1986. The Environment Impact Assessment Notification dated 27-1-1994 (for short "EIA 1994") is a prohibitory notification and directs that on and from the date of its publication in the Official Gazette:

> (*i*) expansion or modernisation of any activity (if pollution load is to exceed the existing one); and
>
> (*ii*) a new project listed in Schedule I to the notification;

shall not be undertaken unless it has been accorded environmental clearance (for short EC) by the Central Government in accordance with the procedure specified in the Notification.

87. The Notification provides, among other things, that in case of mining operations, site clearance shall be granted for a sanctioned capacity and shall be valid for a period of five years from commencing mining operations. What this means is that on receipt of an EC a mining leaseholder can extract a mineral only from a specified site, up to the sanctioned capacity and only for a period of five years from the date of the grant of an EC. This is regardless of the quantum of extraction permissible in the mining plan or the mining lease and regardless

of the duration of the mining lease. Consequently, a mining leaseholder would necessarily have to obtain a fresh EC every five years and can also apply for an increase in the sanctioned capacity. There is no concept of a retrospective EC and its validity effectively starts only from the day it is granted. Thus, the EC takes precedence over the mining lease or to put it conversely, the mining operations under a mining lease are dependent on and "subordinate" to the EC.

88. On 4-5-1994 an Explanatory Note was added to EIA 1994. We are concerned with the 1st Note which deals with the expansion and modernisation of existing projects. This reads as follows:

> "**1.** ***Expansion and modernisation of existing projects***.—A project proponent is required to seek environmental clearance for a proposed expansion/modernisation activity if the resultant pollution load is to exceed the existing levels. The words "pollution load" will in this context cover emissions, liquid effluents and solid or semi-solid wastes generated. A project proponent may approach the State Pollution Control Board (SPCB) concerned for certifying whether the proposed modernisation/expansion activity as listed in Schedule I to the notification is likely to exceed the existing pollution load or not. If it is certified that no increase is likely to occur in the existing pollution load due to the proposed expansion or modernisation, the project proponent will not be required to seek environmental clearance, but a copy of such certificate issued by the SPCB will have to be submitted to the Impact Assessment Agency (IAA) for information. The IAA will however, reserve the right to review such cases in the public interest if material facts justifying the need for such review come to light."

89. The Note is significant and from its bare reading it is clear that if any proposed expansion or modernisation activity results in an increase in the pollution load, then a prior EC is required. The project proponent should approach the State Pollution Control Board concerned (for short "SPCB") for certifying whether the proposed expansion or modernisation is likely to exceed the existing pollution load or not. If the pollution load is not likely to be exceeded, the project proponent will not be required to seek an EC but a copy of such a certificate from SPCB will require to be submitted to the Impact Assessment Agency which can review the certificate.

90. What is the requirement, if any, under EIA 1994 with regard to an existing mining lease where there is no proposal for expansion or modernisation? Does such a mining leaseholder require an EC to continue mining operations? This is answered in the 8th Note which is also of some importance and this reads as follows:

> "**8.** ***Exemption for projects already initiated***.—For projects listed in Schedule I to the notification in respect of which required land has been acquired and all relevant clearances of the State Government including NOC from the respective State Pollution Control Boards have been obtained before 27-1-1994, a project proponent will not be required to seek environmental clearance from the IAA. However those units who have not as yet commenced production will inform the IAA."

91. The above Note makes it clear that existing mining projects that have a no-objection certificate from SPCB before 27-1-1994 will not be required to obtain an EC from the Impact Assessment Agency. Of course, this is subject to the substantive portion of EIA 1994 and the 1st Note. However, if the existing mining project does not have a no-objection certificate from SPCB, then an EC will be required under EIA 1994.

92. Two questions immediately arise from a reading of the 1st and the 8th Note. The first question is: What is the base year for considering the pollution load while proposing any expansion activity? The second question is: What is the duration for which an EC is not necessary for an ongoing project which does not propose any expansion, or to put it differently, what is the validity period for a no-objection certificate from SPCB?

93. In our opinion, as far as the first question is concerned, a reading of EIA 1994 read with the 1st Note implies that the base year would need to be the immediately preceding year, that is, 1993-94. This is obvious from the opening sentence of the 1st Note, that is,

> "A project proponent is required to seek environmental clearance for a proposed expansion/modernisation activity if the resultant pollution load is to exceed the *existing levels*." (emphasis supplied)

In its report, CEC has taken 1993-94 as the base year and we see no error in this. Even the MoEF in its Circular dated 28-10-2004 stated with regard to the expansion in production:

> "If the annual production of any year from 1994-95 onwards exceeds the annual production of 1993-94 or its preceding years (even if approved by IBM), it would constitute expansion."

If that expansion results in an increase in the pollution load over the existing levels, then an EC is mandated.

94. It was contended on behalf of the mining leaseholders that in terms of the Circular of 28-10-2004 the annual production even prior to 1993-94 could be considered for ascertaining if there was an expansion or not. We cannot accept this submission for a variety of reasons. For one, the *existing levels* mentioned in the 1st Note clearly have reference to the immediately preceding year and not to a preceding year in a comparatively remote past. Secondly, a very high annual production in any one year is not reflective of a consistent pattern of production — it could very well be a freak year and that freak year certainly cannot be a basic standard or the norm to measure expansion. Then if the interpretation sought to be given is accepted, there would be an absence of consistency and a lack of uniformity with different mining leaseholders having different base years. This is hardly conducive to good governance. Finally, EIA 1994 was intended to prevent the existing environmental load from increasing based on the existing data of the immediate past and not data of a few years gone by. We may add that the only exception that could be made in this regard would be if there is no production during 1993-94. In that event, the immediately

preceding year would be relevant and that is the only reasonable interpretation that we see for the use of the words "or its preceding years".

95. On the question of the duration or exemption period from an EC in respect of a project that has commenced prior to 27-1-1994 the substantive portion of EIA 1994 and the 8th Note grant an exemption from the requirement of obtaining an EC if there is no expansion and the existing pollution load is not exceeded. In any event, a no-objection certificate from SPCB is necessary for continuing the mining operations. Consequently, even if any mining leaseholder does not have an EC or does not require an EC for continuing mining operations (but has a no-objection certificate from SPCB), the absence of an EC would not have an adverse impact on the mining leaseholder unless of course, there was an expansion in the mining operations without any certificate from SPCB. In addition to this, the validity period (if any) of the certificate from SPCB is important — we have not been made aware whether there is such a validity period or not.

96. The contention of the learned counsel for the mining leaseholders that EIA 1994 was rather vague, uncertain and ambiguous cannot be accepted. In our opinion, on a composite reading of EIA 1994, it is clear that:

(*i*) A no-objection certificate from SPCB was necessary for continuing mining operations;

(*ii*) An expansion or modernisation activity required an EC unless the pollution load was not exceeded beyond the existing levels;

(*iii*) The base year for determining the pollution load and therefore the proposed expansion would be with reference to 1993-94;

(*iv*) Whether an expansion or modernisation would lead to exceeding the existing pollution load or not would require a certificate from SPCB which could be reviewed by the IAA;

(*v*) New projects require an EC; and

(*vi*) Existing projects do not require an EC unless there is an expansion or modernisation for the duration (if any) of the validity of the certificate from SPCB.

We need not say anything more on this subject since CEC has proceeded to discuss the issue of mining in excess of the EC or in excess of the mining plan only from the year 2000-01 onwards. The prior period may, therefore, be ignored and it is the period from 2000-01 onwards which is actually relevant for the present discussion.

97. It was submitted by the learned counsel for the mining leaseholders that the MoEF had caused some confusion with regard to the requirement of an EC at the time of renewal of a mining lease. In this connection, reference was made to a Press Note of July 1994 and a Letter dated 19-6-1997 of the MoEF to the Chief Conservator of Forests in the MoEF.

98. The learned counsel for the mining leaseholders sought to buttress their submission that EIA 1994 was vague and ambiguous by mentioning two Circulars issued by the MoEF on 5-11-1998 and 27-12-2000 extending

the period for obtaining an EC for new units. However, these circulars are apparently not on our record (which goes into 148 volumes) and therefore we cannot make any comment about them. These circulars were mentioned to also contend that even for new units the absence of an EC would not have an adverse impact on them, since the period for obtaining an EC was extended from time to time. A reference was also made to a Circular dated 14-5-2002 which later on became the subject of consideration by this Court in *M.C. Mehta* v. *Union of India*[17]. A reading of the Circular of 14-5-2002 indicates that several units had come up in violation of EIA 1994. The MoEF had taken the view that such units may be permitted to apply for an EC by 31-3-1999 which was then extended to 30-6-2001 by Circulars dated 5-11-1998 and 27-12-2000, respectively.

99. By the Circular dated 14-5-2002 the deadline for applying for an EC was extended up to 31-3-2003 as a last and final opportunity to obtain an ex post facto EC in respect of units which had commenced mining operations without obtaining a prior EC in violation of EIA 1994. The Circular also stated that:

> "... Suitable directions shall be issued by all States/UTs under the Environment (Protection) Act to units to stop construction activities/operations of all such units that fail to apply for environmental clearance by 31-3-2003. Units which fail to comply with these directions shall be proceeded against forthwith under the relevant provisions of the Environment (Protection) Act, 1986 without making reference to this Ministry."

100. It was submitted that in view of these ambiguous and unclear signals emanating from the MoEF which resulted in confusion being worse confounded, the mining leaseholders were not clear whether or not they were required to obtain an EC particularly in respect of pre-EIA 1994 mining leases and operations.

101. As mentioned above, these dates and the text of the circulars were emphasised by the learned counsel for the leaseholders to contend that it was not obligatory for the mining leaseholders, who did not expand their mining operations, to obtain an EC and in any event the period for obtaining an EC was extended till 31-3-2003 with ex post facto approval. In this context, reliance was placed on *M.C. Mehta*[17] referred to above.

102. We are not in agreement with the contention of the learned counsel for the mining leaseholders on the interpretation given to the various circulars for the reasons given above and must also correctly appreciate the decision of this Court in *M.C. Mehta*[17].

103. In *M.C. Mehta*[17] the issue that arose for consideration was whether mining activity in the Aravalli Hills causes environmental degradation and what directions are required to be issued. While considering this issue, this Court also considered EIA 1994 and the Circular dated 14-5-2002. In doing so, this Court categorically held in para 37 of the Report that the intention of the MoEF was not to legalise the continuance of mining activity without complying with the requisite stipulations. If that were unfortunately so, then it would demonstrate

17 (2004) 12 SCC 118

a lack of sensitivity of the MoEF to the principles of sustainable development and the object behind issuing EIA 1994. This Court said: (SCC p. 161)

> "*37.* … It does not appear that MoEF intended to legalise the commencement or continuance of mining activity without compliance of stipulations of the notification. In any case, a statutory notification cannot be notified [modified] by issue of circular. Further, if MoEF intended to apply this circular also to mining activity commenced and continued in violation of this notification, it would also show total non-sensitivity of MoEF to the principles of sustainable development and the object behind the issue of notification. The circular has no applicability to the mining activity."

104. Adverting to the MMDR Act, this Court expressed the view in para 52 of the Report that the approval of a mining plan does not imply that a mining leaseholder can commence mining operations. The mining leaseholder is nevertheless obliged to comply with statutory provisions including the EPA and other laws. It was said: (*M.C. Mehta case*[17], SCC p. 169)

> "*52.* The grant of permission for mining and approving mining plans and the scheme by the Ministry of Mines, Government of India by itself does not mean that mining operation can commence. It cannot be accepted that by approving mining plan and scheme by the Ministry of Mines, the Central Government is deemed to have approved mining and it can commence forthwith on such approval. … A mining leaseholder is also required to comply with other statutory provisions such as the Environment (Protection) Act, 1986; the Air (Prevention and Control of Pollution) Act, 1981; the Water (Prevention and Control of Pollution) Act, 1974 and the Forest (Conservation) Act, 1980. Mere approval of the mining plan by the Government of India, Ministry of Mines would not absolve the leaseholder from complying with the other provisions."

105. This Court also considered the question of the applicability of EIA 1994 to the renewal of an existing mining lease. It was held that the said notification would apply to the renewal of a mining lease that came up for consideration post 27-1-1994. In other words, for the renewal of a mining lease, an EC was required by the mining leaseholder. It was held in para 77 of the Report: (*M.C. Mehta case*[17], SCC p. 180)

> "*77.* We are unable to accept the contention that the notification dated 27-1-1994 would not apply to leases which come up for consideration for renewal after issue of the notification. The notification mandates that the mining operation shall not be undertaken in any part of India unless environmental clearance by the Central Government has been accorded. The clearance under the notification is valid for a period of five years. In none of the leases the requirements of the notification were complied with either at the stage of initial grant of the mining lease or at the stage

17 *M.C. Mehta* v. *Union of India*, (2004) 12 SCC 118

of renewal. Some of the leases were fresh leases granted after issue of the notification. Some were cases of renewal. No mining operation can commence without obtaining environmental impact assessment in terms of the notification."

106. It is clear from the decision rendered by this Court that EIA 1994 is mandatory in character; that it is applicable to all mining operations—expansion of production or even increase in lease area, modernisation of the extraction process, new mining projects and renewal of mining leases. A mining leaseholder is obliged to adhere to the terms and conditions of a mining lease and the applicable laws and the mere fact that a mining plan has been approved does not entitle a mining leaseholder to commence mining operations. In *M.C. Mehta*[17] this Court concluded that EIA 1994 is clearly applicable to the renewal of a mining lease.

107. Subsequent to the decision in *M.C. Mehta*[17] two clarificatory Circulars were issued by MoEF on 28-10-2004 and 25-4-2005. These were adverted to by the learned counsel for the mining leaseholders but in our opinion they are not relevant except to the extent that they make it explicit that following the decision of this Court in *M.C. Mehta*[17], an EC is required to be obtained before the renewal of a mining lease and that the term "expansion" would include an increase in production or the lease area or both.

108. It was submitted on behalf of the mining leaseholders that the possibility of getting an ex post facto EC was a signal to the mining leaseholders that obtaining an EC was not mandatory or that if it was not obtained, the default was retrospectively condonable. We do not agree. We have referred to various provisions of the MMDR Act and the Rules framed thereunder to indicate the statutory importance given to the protection and preservation of the environment. This was also emphasised in *M.C. Mehta*[17] in which it was also stated that: (SCC p. 161, para 37)

> "*37.* … It does not appear that MoEF intended to legalise the commencement or continuance of mining activity without compliance of stipulations of the notification."

It appears to us that the MoEF was, in a sense, cajoling the mining leaseholders to comply with the law and EIA 1994 rather than use the stick. That the mining leaseholders chose to misconstrue the soft implementation as a licence to not abide by the requirements of the law is unfortunate and was an act of omission or commission by them at their own peril. We cannot attribute insensitivity to the MoEF or even to the mining leaseholders to environment protection and preservation, but at the same time we cannot overlook the obligation of everyone to abide by the law. That the MoEF took a soft approach cannot be an escapist excuse for non-compliance with the law or EIA 1994.

17 *M.C. Mehta* v. *Union of India*, (2004) 12 SCC 118

Environment Impact Assessment Notification of 14-9-2006

109. On 14-9-2006 another EIA Notification was issued by the MoEF. This notification (for short EIA 2006) required prior EC for projects or activities mentioned in the Schedule to it both for major as well as minor minerals if the leased area is 5 ha or more. We were informed that several mining leaseholders, in compliance with EIA 2006, applied for and were granted an EC.

110. It was submitted by the learned counsel for the mining leaseholders that the confusion, vagueness and uncertainty caused by EIA 1994 and subsequent circulars and other communications did not end with the issuance of EIA 2006. Reference was made to a Circular dated 13-10-2006 which deals with interim operational guidelines till 13-9-2007 in respect of applications made under EIA 1994. We do not see the relevance of this circular (which really dealt with transitional issues) not only for the reason given in *M.C. Mehta*[17] that circulars cannot override statutory notifications but also because it deals with the procedure for considering applications made under EIA 1994.

111. Reference was also made to a Circular dated 2-7-2007. The passage relied upon reads as follows:

> "It is clarified that all such mining projects which did not require environmental clearance under the EIA Notification, 1994 would continue to operate without obtaining environmental clearance till the mining lease falls due for renewal, if there is no increase in lease area and/or there is no enhancement of production. In the event of any increase in lease area and or production, such projects would need to obtain prior environmental clearance. Further, all such projects which have been operating without any environmental clearance would obtain environmental clearance at the time of their lease renewal even if there is no increase either in terms of lease area or production."

112. The aforesaid Circular relates to three categories that is:

(*i*) Mining leases, where no EC was required under EIA 1994 would continue to operate without an EC;

(*ii*) If there was an increase in the lease area or enhancement of production, an EC was required by the mining leaseholder;

(*iii*) All projects would require an EC at the time of renewal of the mining lease even if there was no increase in the lease area or enhancement of production.

113. Reference was also made to an Office Memorandum dated 19-8-2010. However a reading of this document brings out that it basically relates to construction at site but makes it clear that no activity relating to any project covered under EIA 2006 including civil construction could be undertaken without obtaining a prior EC except fencing of the site to protect it from getting encroached and construction of temporary sheds for the guards.

17 *M.C. Mehta* v. *Union of India*, (2004) 12 SCC 118

114. Reference was also made to Office Memorandums dated 16-11-2010 and 12-12-2012 but having gone through them we find them of little relevance as they deal with procedural issues only.

115. All that we need to say on this subject is that there is no confusion, vagueness or uncertainty in the application of EIA 1994 and EIA 2006 insofar as mining operations were commenced on mining leases before 27-1-1994 (or even thereafter). Post EIA 2006, every mining leaseholder having a lease area of 5 ha or more and undertaking mining operations in respect of major minerals (with which we are concerned) was obliged to get an EC in terms of EIA 2006.

116. An attempt was then made by the learned counsel for the mining leaseholders to get out of the rigours of EIA 1994 and EIA 2006 by contending that some of them had modified the mining plan (with approval) and that therefore they had extracted iron ore or manganese ore, as the case may be, in terms of the mining plan but not necessarily in terms of the EC that had been obtained, if at all.

117. We have already held that a mining plan is subordinate to the EC and in *M.C. Mehta*[17] it was held by this Court that having an approved mining plan does not imply that a mining leaseholder can commence mining operations. That being so, a modified mining plan without a revised or amended EC, is of no consequence. What the contention of the learned counsel suggests to us is that under the shield of a modified mining plan, illegal or unlawful mining in the form of mining without an EC, mining by over-reaching EIA 1994 and EIA 2006 was being carried out.

118. The contention apart, the subterfuge of obtaining a modified mining plan to get over the adverse effects of excess and illegal or unlawful production of iron ore or manganese ore was deprecated by the Ministry of Mines of the Government of India. In a Letter dated 29-10-2010 addressed to the Controller General, Indian Bureau of Mines it was pointed out that the State Governments had expressed a concern that the Indian Bureau of Mines (IBM) had been modifying mining plans for allowing an increase in production of ore without adequate intimation to the State Governments. A concern was raised that such a revision was often being used to increase production of ore, which is sometimes not accounted for in mining operations in the mining lease concerned. It was made clear that all modifications of mining plans shall be effective prospectively only and earlier instances of irregular mining shall not be regularised through a modification of the mining plan.

119. In a subsequent Letter dated 12-12-2011 addressed to the Chief Secretary in the Government of Orissa the said Ministry of Mines noted that there were violations of the actual production limit laid down in the mining plan and that the State Government had finally taken steps to curb illegal mining in respect of overproduction of minerals. There was a reference to suggest (and we take it to be so) that 20% deviation from the mining plan (in terms of overproduction) would be reasonable and permissible. However, it appears from a reading of the communication that illegal mining was going on

17 *M.C. Mehta* v. *Union of India*, (2004) 12 SCC 118

beyond the 20% deviation limit and that appropriate steps were needed to curb these violations. The learned counsel for the petitioners submitted that such egregious violations must be firmly dealt with by cancellation or termination of the mining lease and a soft approach is not called for.

120. In this context, it is worth noting that a High Level Committee (called the Hoda Committee) on the National Mineral Policy noted in its Report dated 22-12-2006 in para 3.47 as follows:

> "3.47 An EMP [Environment Management Plan] has to be prepared under the MCDR and got approved by IBM. However, this EMP is not acceptable to the MoEF. The miner has to prepare two EMPs separately —one for IBM and another for MoEF. The Committee suggests that IBM and MoEF should prepare guidelines for a composite EMP so that IBM can approve the same in consultation with MoEF's field offices. This will eliminate anomalous situations where increase of even a few tonnes in production requires project authorities to get a fresh EMP approved from the MoEF although the IBM allows a grace of ±10%, keeping in view the fluctuations in the market situation and process complexities. If a single EMP is accepted in principle such anomalies can be resolved in advance. The Committee feels the MoEF should also have a cushion of ±10% in production while giving EIA clearance."

121. The above passage indicates that the permissible variation in production as per the Indian Bureau of Mines is ±10% but according to the Letter dated 12-12-2011 issued by the Ministry of Mines, the reasonable variation limit could be ±20%. It is not clear why there was a shift in the variation, but as rightly pointed out by the learned counsel for the petitioners, the fact that in some cases the variation exceeded 20% was a cause for concern which necessitated strict and punitive action.

122. A submission was made by the learned counsel for the mining leaseholders to the effect that since many of them had been granted the first deemed statutory renewal of the mining lease under Rule 24-A of the MCR, the requirements of EIA 1994 would not be applicable. We were shown various amendments made to Rule 24-A of the MCR from time to time particularly the amendments made on 10-2-1987, 7-1-1993, 27-9-1994, 17-1-2000, 18-7-2014 and 8-10-2014. In our opinion, none of these are of any consequence, the reason being that for the purposes of renewal of the mining lease, an application is required to be made by the mining leaseholders and the deemed renewal clause under Rule 24-A of the MCR will come into operation only after an application for renewal is made in Form J in Schedule I of the MCR. Under Rule 26 of the MCR, the State Government may refuse to renew the mining lease. That apart, the position in environmental jurisprudence with regard to the renewal of a mining lease has been made explicit by this Court in *M.C. Mehta*[17]. Even otherwise, in view of EIA 1994, it is quite clear that the renewal of a mining lease would require a prior EC.

17 *M.C. Mehta* v. *Union of India*, (2004) 12 SCC 118

123. We may also draw attention in this regard to a Circular dated 28-10-2004 issued by the MoEF wherein it was stated that in view of the decision in *M.C. Mehta*[17] all mining projects of major minerals of more than 5 ha lease area that had not yet obtained an EC would have to do so at the time of renewal of the lease.

124. Finally, it was submitted that whenever an EC is granted, it would have retrospective effect from the date of the application for grant of an EC. In this context, it was pointed out that there were enormous delays in granting an EC and that the Hoda Committee had noted with reference to EIA 2006 that if all goes well, the grant of an EC takes about 232 days whereas the international norm is that an EC is granted within six months or 180 days. According to the additional affidavit filed by some mining leaseholders, the period of 232 days mentioned by the Hoda Committee was actually a conservative estimate and that in fact it takes anything up to 390 days for the grant of an EC. It was submitted that the position was even worse under EIA 1994 since the MoEF rarely showed any urgency in the grant of an EC. Examples were cited before us to show that in some instances the grant of an EC took more than two years. Taking all this into consideration it was submitted that it would be more appropriate that the EC is given retrospective effect from the date of the application.

125. We are not in agreement with the learned counsel for the mining leaseholders. There is no doubt that the grant of an EC cannot be taken as a mechanical exercise. It can only be granted after due diligence and reasonable care since damage to the environment can have a long-term impact. EIA 1994 is therefore very clear that if expansion or modernisation of any mining activity exceeds the existing pollution load, a prior EC is necessary and as already held by this Court in *M.C. Mehta*[17] even for the renewal of a mining lease where there is no expansion or modernisation of any activity, a prior EC is necessary. Such importance having been given to an EC, the grant of an ex post facto environmental clearance would be detrimental to the environment and could lead to irreparable degradation of the environment. The concept of an ex post facto or a retrospective EC is completely alien to environmental jurisprudence including EIA 1994 and EIA 2006. We make it clear that an EC will come into force not earlier than the date of its grant.

Illegal mining

126. A question raised by the learned counsel for the mining leaseholders concerned is the interpretation of the expression "illegal mining". Reliance was placed on the report of CEC which refers to Rule 2(*ii-a*) of the MCR to conclude that the violation of any rule within the mining lease area would not come within the definition of "illegal mining" except where there has been a violation of the Rules framed under Section 23-C of the MMDR Act. According to CEC:

> "*17*. Illegal mining has been defined as mining operations undertaken by any person in any area without holding a mining lease. It does not

17 *M.C. Mehta* v. *Union of India*, (2004) 12 SCC 118

include violation of any rules within the mining lease area except the Rules made under Section 23-C of the MMDR Act, 1957. The mining lease area shall be considered as an area held with lawful authority by the lessee [refer Rule 2(*ii-a*), MCR, 1960]."

127. As can be seen from the above, there is a difference of opinion between CEC and the Commission on what is illegal mining or mining without lawful authority and we will give our views on the subject.

128. According to the lessees a mining operation only outside the mining lease area would constitute "illegal mining" making illegal mining lease centric. We are unable to accept this narrow interpretation given by CEC and relied upon by the learned counsel for the mining leaseholders.

129. The simple reason for not accepting this interpretation is that Rule 2(*ii-a*) of the MCR was inserted by a Notification dated 26-7-2012 while we are concerned with an earlier period. That apart, as mentioned above, the holder of a mining lease is required to adhere to the terms of the mining scheme, the mining plan and the mining lease as well as the statutes such as the EPA, the FCA, the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981. If any mining operation is conducted in violation of any of these requirements, then that mining operation is illegal or unlawful. Any extraction of a mineral through an illegal or unlawful mining operation would become illegally or unlawfully extracted mineral.

130. It is not, as suggested by the learned counsel, that illegal mining is confined only to mining operations outside a leased area. Such an activity is obviously illegal or unlawful mining. Illegal mining takes within its fold excess extraction of a mineral over the permissible limit even within the mining lease area which is held under lawful authority, if that excess extraction is contrary to the mining scheme, the mining plan, the mining lease or a statutory requirement. Even otherwise, it is not possible for us to accept the narrow interpretation sought to be canvassed by the learned counsel for the mining leaseholders particularly since we are dealing with a natural resource which is intended for the benefit of everyone and not only for the benefit of the mining leaseholders.

Encroachments

131. Section 4(1) of the MMDR Act makes it clear that no person can carry out any mining operations except under and in accordance with the terms and conditions of a mining lease granted under the MMDR Act and the Rules made thereunder. Obviously therefore, any person carrying on mining operations without a mining lease, is indulging in illegal or unlawful mining. This would also necessarily imply that if a mining lease is granted to a person who carries out mining operations outside the boundaries of the mining lease, the mineral extracted would be the result of illegal or unlawful mining.

132. In its report, CEC has dealt with illegal mining outside the sanctioned mining areas. It is stated that 82 mining leases for iron ore and manganese

ore were identified by the Commission where there were encroachments in the form of illegal mining pits, illegal overburdened dumps, etc.

133. In respect of these 82 mining leases, the State of Odisha appointed a Committee on the suggestion of the Commission, to survey and identify the exact extent and location of the sanctioned lease area, lease area under occupation of the mining leaseholder and the area under encroachment/illegal mining. The Committee or the Joint Survey consisted of officers of the Revenue Department, Forest Department and Mining Department of the State of Odisha who carried out a field survey in respect of 39 mining leases. The findings of the field survey or the Joint Survey were verified by a team comprising of the Director, Mines, Chief Engineer, ORSAC and the Additional Secretary, F & E Department of the Government of Odisha.

134. It is mentioned in the report of CEC that the Joint Survey for each of the 39 mining leases is technically sound and reliable. However, in respect of some of the leases, it would be desirable for the State Government to take another look at the results of the field survey. Unfortunately, CEC has not identified these mining leases that require another look. Be that as it may, the fact is that a joint survey has not been conducted in respect of 43 mining leases.

135. We are of the view that for completing the record and taking the report of CEC to its logical conclusion, it would be appropriate if a fresh Joint Survey is conducted by officers concerned of the Government of Odisha from the Revenue Department, the Forest Department, the Mining Department and any other department that may be deemed necessary. The Forest Survey of India, the MoEF, the Indian Bureau of Mines and the Geological Survey of India should also be associated in the Joint Survey. In our opinion, it would also be appropriate if CEC is also associated in the Joint Survey and the best and latest technology should be made use of including satellite imagery and thereafter a report is submitted in this Court on or before 31-12-2017 after hearing the 82 lessees identified by the Commission.

Adherence to the mining plan

136. A side issue raised by the learned counsel for the mining leaseholders in this regard was the necessity (if any) of adhering to the annual plan or calendar plan of mining. It was contended that a mining leaseholder could mine in excess of the annual plan. While it is so, this submission must be tempered and appreciated in the proper context. A mining plan is valid for a period of five years but there could be a 20% variation in extraction over and above the mining plan. This is the maximum that is stated to be reasonably permissible according to the Ministry of Mines. In terms of Rule 22(5) of the MCR a mining plan shall incorporate a tentative scheme of mining and annual programme and plan for excavation from year-to-year for five years. At best, there could be a variation in extraction of 20% in each given year but this would be subject to the overall mining plan limit of a variation of 20% over five years. What this means is that a mining leaseholder cannot extract the five year quantity (with a variation of 20%) in one or two years only. The extraction has to be staggered and continued over a period of five years. If any other interpretation is given,

it would lead to an absurd situation where a mining leaseholder could extract the entire permissible quantity under the mining plan plus 20% in one year and extract miniscule amounts over the remaining four years, and this could be done without any reference to the EC. The submission of the learned counsel in this regard simply cannot be accepted.

137. In the Letter dated 12-12-2011 sent by the Secretary in the Ministry of Mines of the Government of India to the Chief Secretary of the Government of Odisha (adverted to above) concerning violation of annual production limit laid down in the approved mining plan, it was stated, inter alia, that an analysis of production and violations in 104 mining leases for bulk minerals in the last ten years was undertaken by the Indian Bureau of Mines. It was noted that in 71 cases there was excess ore produced beyond the reasonable variation limit of 20%. It was noted that this was partly due to the failure of the State machinery to restrict the movement of minerals.

138. In a further Letter dated 5-9-2012 it was reiterated that any violation of the mining plan or the mining scheme noticed by the State Government should be immediately brought to the notice of the Indian Bureau of Mines to initiate suitable action. It was reiterated that transit passes to such mines should not be issued by the State Government so as to stop any additional outgo. It was added:

> "Needless to say any revision on the limits of production is subjected to statutory clearances under Environment and Forest laws. Having said that, the State Mining and Geology officials should not also lose focus on taking stringent action against any instances of illegal mining, undertaken outside the leased area, and passed off as excess production."

It is quite clear from the correspondence placed before us that as far as the Union of India is concerned, any violation of the requirements of the law has to be firmly dealt with.

139. With reference to the interpretation of Section 21(5) of the MMDR Act (which we shall soon consider) it was stated as follows:

> "Section 21(5) of the MMDR Act is clearly applicable on such land which is occupied without lawful authority. It is clarified that in the context of the MMDR Act, 1957, violations pertaining to mining operations within the mining lease area are to be dealt with only in terms of the provisions of the Mineral Conservation and Development Rules, 1988. The State Governments have clear powers to tackle any offences related to mining outside the mining lease area in terms of Section 23-C of the MMDR Act, 1957. However, the interpretation that a land granted under a mining lease by the State Government can be held to be occupied without lawful authority on the grounds of violation of provisions of any other law of the land is not appropriate and such interpretation may not stand in the court of law. Such Act or Rules, including the Environment (Protection) Act, 1986, or the Forest (Conservation) Act, 1980, etc. clearly provide penalties for violations under those laws. This aspect may be clarified to the State Accountant General also."

140. All that we need say for the present is that the interpretation given in the aforesaid Letter to Section 21(5) of the MMDR Act is not fully correct. While mining in excess of permissible limits under the mining plan or the EC or FC on leased area may not amount to mining on land occupied without lawful authority, it would certainly amount to illegal or unlawful mining or mining without authority of law.

Section 21 of the MMDR Act

141. The discussion on illegal or unlawful mining takes us to the question of the consequence of illegal or unlawful mining and the interpretation of Section 21(1) and Section 21(5) of the MMDR Act.

142. Section 21(1) of the MMDR Act is clearly relatable to a penal offence and applies if any one contravenes the provisions of Section 4(1) of the MMDR Act. Section 4(1) of the MMDR Act prohibits the undertaking of any mining operation in any area except under and in accordance with the terms and conditions of a mining lease and the Rules made thereunder. Therefore, when a person carries out a mining operation in any area other than a leased area or violates the terms of a mining lease, which incorporates the mining plan and which requires adherence to the law of the land, that person becomes liable for prosecution under Section 21(1) of the MMDR Act. In the event of a conviction, he or she shall be punishable with imprisonment for a term which may extend to five years and with fine which may extend to Rs 5 lakhs per hectare of the area.

143. As far as Section 21(5) of the MMDR Act is concerned, according to CEC the provision is applicable only if a person indulges in illegal mining outside the mining lease area. Consequently, Section 21(5) of the MMDR Act is not attracted even if the mineral raised within the mining lease area is without an EC or beyond the quantity prescribed by the EC or beyond the quantity permitted in the mining plan. In such a situation, the provisions of the EPA or the MCR come into play. This interpretation is supported by the learned counsel for the mining leaseholders who affirm that Section 21(5) of the MMDR Act is mining lease area centric. In other words, according to CEC and the learned counsel, for the purposes of Section 21(5) of the MMDR Act illegal mining is mining outside the mining lease area and Section 21(5) of the MMDR Act has to be understood in that light.

144. Reference was also made to the Explanation to Rule 2(*ii-a*) of the MCR where it is stated that for the purposes of this clause, the violation of any rules, other than the Rules made under Section 23-C of the MMDR Act, within the mining lease area by a holder of a mining lease shall not include illegal mining. In other words, it was submitted that Section 21(5) of the MMDR Act is required to be understood in the context of Rule 2(*ii-a*) of the MCR.

145. It was submitted by Shri Ashok Desai learned Senior Counsel for one of the intervenors, that the penalty postulated by Section 21(5) of the MMDR Act though an imposition of a pecuniary liability, is punishment for the commission of an offence. By referring to *Khemka & Co. (Agencies) (P)*

Ltd. v. *State of Maharashtra*[18] it was contended that the liability sought to be imposed by Section 21(5) of the MMDR Act is not a liability that is created by a clear, unambiguous and express enactment.

146. As far as the Union of India is concerned, in its affidavit filed on 20-1-2017 by Shri Sudhakar Shukla, Economic Advisor in the Government of India, Ministry of Mines, it is submitted (and this submission is supported by the learned Attorney General in his oral submissions) that Section 21(5) of the MMDR Act is in two parts. The first part refers to the raising of minerals without any lawful authority from *any land*. The second part is in addition to what is recoverable under the first part. The addition is to the effect that when a person raises a mineral from any area not in his or her lawful authority, that person is also liable to pay the rent, royalty or tax for the period during which the land was occupied without lawful authority.

147. It is further submitted that "illegal mining" as defined in Rule 2(*ii-a*) of the MCR is also required to be read in the context of Rule 26(4) and Rule 27(4-A) of the MCR which deal with the refusal to renew a mining lease if the mining leaseholder is convicted of illegal mining and the determination of a mining lease in the event the mining leaseholder is convicted of illegal mining. It is submitted that the definition of "illegal mining" in the MCR must be strictly construed and limited to the provisions of the MCR and cannot apply to the provisions of Section 21(5) of the MMDR Act.

148. In conclusion, it is reiterated by the Union of India on affidavit as follows:

> "*55*. That considering all the above, the Ministry would like to submit that the provisions of sub-section (5) of Section 21 would apply to all minerals raised without any lawful authority, be it forest clearances or environment clearances or any other such legal requirements.
>
> *56*. That penalties would arise under Section 21(5) of the MMDR Act, 1957, in respect of any form of mining activity without lawful authority. Mining outside lease area would on the face of it amount to mining without lawful authority and would attract the provisions of Section 21(5); and, in addition, *all forms of mining without lawful authority including that in breach of the limits imposed by the environmental clearance carried out within the lease area would also invite penalties under Section 21(5).*" (emphasis supplied)

149. On behalf of the State of Odisha, it was submitted by Shri Rakesh Dwivedi learned Senior Counsel by relying upon *Karnataka Rare Earth* v. *Deptt. of Mines & Geology*[19] that what is sought to be achieved by Section 21(5) of the MMDR Act is to recover the price of the mineral that has been illegally or unlawfully or unauthorisedly raised with an intention to compensate the State for the loss of the mineral owned by it, the loss having been caused by a person who is not authorised by law to raise that mineral. There is no element of penalty

18 (1975) 2 SCC 22 : 1975 SCC (Tax) 227
19 (2004) 2 SCC 783

involved in this and the recovery of the mineral or its price is not a penal action but is merely compensatory. This is what this Court had to say in *Karnataka Rare Earth*[19]: (SCC pp. 791-92, paras 12-15)

> "*12*. Is sub-section (5) of Section 21 a penal enactment? Can the demand of mineral or its price thereunder be called a penal action or levy of penalty?
>
> *13*. A penal statute or penal law is a law that defines an offence and prescribes its corresponding fine, penalty or punishment. (*Black's Law Dictionary*, 7th Edn., p. 1421.) Penalty is a liability composed (sic imposed) as a punishment on the party committing the breach. The very use of the term "penal" is suggestive of punishment and may also include any extraordinary liability to which the law subjects a wrongdoer in favour of the person wronged, not limited to the damages suffered. (*See* Aiyar, P. Ramanatha: *The Law Lexicon*, 2nd Edn., p. 1431.)
>
> *14*. In support of the submission that the demand for the price of mineral raised and exported is in the nature of penalty, the learned counsel for the appellants has relied on the marginal note of Section 21. According to Justice Singh, G.P.: *Principles of Statutory Interpretation* (8th Edn., 2001, at p. 147), though the opinion is not uniform but the weight of authority is in favour of the view that the marginal note appended to a section cannot be used for construing the section. There is no justification for restricting the section by the marginal note nor does the marginal note control the meaning of the body of the section if the language employed therein is clear and spells out its own meaning. In *Director of Public Prosecutions* v. *Schildkamp*[20] Lord Reid opined that a sidenote is a poor guide to the scope of a section for it can do no more than indicate the main subject with which the section deals and Lord Upjohn opined that a sidenote being a brief précis of the section forms a most unsure guide to the construction of the enacting section and very rarely it might throw some light on the intentions of Parliament just as a punctuation mark.
>
> *15*. We are clearly of the opinion that the marginal note "penalties" cannot be pressed into service for giving such colour to the meaning of sub-section (5) as it cannot have in law. The recovery of price of the mineral is intended to compensate the State for the loss of the mineral owned by it and caused by a person who has been held to be not entitled in law to raise the same. There is no element of penalty involved and the recovery of price is not a penal action. It is just compensatory."

150. We are in agreement with the view expressed by the learned Attorney General and Shri Dwivedi as also the view expressed in *Karnataka Rare Earth*[19]. The decision in *Khemka & Co.*[18] is not at all apposite. There is no ambiguity in Section 21(5) of the MMDR Act or in its application. We are also

19 *Karnataka Rare Earth* v. *Deptt. of Mines & Geology*, (2004) 2 SCC 783
20 1971 AC 1 : (1970) 2 WLR 279 : (1969) 3 All ER 1640 (HL)
18 *Khemka & Co. (Agencies) (P) Ltd.* v. *State of Maharashtra*, (1975) 2 SCC 22 : 1975 SCC (Tax) 227

of the opinion that though Section 21(1) of the MMDR Act might be in the realm of criminal liability, Section 21(5) of the MMDR Act is certainly not within that realm.

151. In our opinion, Section 21(5) of the MMDR Act is applicable when any person raises, without any lawful authority, any mineral from *any land*. In that event, the State Government is entitled to recover from such person the mineral so raised or where the mineral has already been disposed of, the price thereof as compensation. The words "any land" are not confined to the mining lease area. As far as the mining lease area is concerned, extraction of a mineral over and above what is permissible under the mining plan or under the EC undoubtedly attracts the provisions of Section 21(5) of the MMDR Act being extraction without lawful authority. It would also attract Section 21(1) of the MMDR Act. In any event, Section 21(5) of the Act is certainly attracted and is not limited to a violation committed by a person only outside the mining lease area — it includes a violation committed even within the mining lease area. This is also because the MMDR Act is intended, among other things, to penalise illegal or unlawful mining on any land including mining lease land and also preserve and protect the environment. Action under the EPA or the MCR could be the primary action required to be taken with reference to the MCR and Rule 2(*ii-a*) thereof read with the Explanation but that cannot preclude compensation to the State under Section 21(5) of the MMDR Act. The MCR cannot be read to govern the MMDR Act.

152. What is the significance of this discussion? It was submitted that CEC has taken the following view:

> "... it may be appropriate that 30% of the notional value of the iron and manganese produced by each of the lessees without/in excess of the environmental clearances may be directed to be recovered from the lessees concerned and with the explicit understanding the lessees as well as the officers concerned will continue to be liable for action under the provisions of the respective Acts."

153. The learned counsel for the petitioners and the learned Amicus were of the opinion that the provisions of Section 21(5) of the MMDR Act require that the entire price of the illegally mined ore should be recovered from each defaulting lessee. Similarly, in its affidavit, the Union of India differs with the recommendation of CEC. According to the affidavit of the Union of India this would be contrary to the statutory scheme and in fact 100% recovery should be made under the provisions of Section 21(5) of the MMDR. We may note that only to this extent, the learned Attorney General differed with the view expressed by the Union of India and submitted that the recommendation of CEC to recover only 30% of the value of the illegally mined ore should be accepted.

154. In our opinion, there can be no compromise on the quantum of compensation that should be recovered from any defaulting lessee — it should be 100%. If there has been illegal mining, the defaulting lessee must bear the consequences of the illegality and not be benefited by pocketing 70% of the illegally mined ore. It simply does not stand to reason why the State should be

compelled to forego what is its due from the exploitation of a natural resource and on the contrary be a party in filling the coffers of defaulting lessees in an ill-gotten manner.

Calculations on merits

155. The issue now is with regard to the calculations made by CEC with regard to the production of iron ore and manganese ore without or in excess of the EC and/or the mining plan. As already mentioned above, the figures were not disputed (except by JSPL and SMPL). Therefore, only the application of the figures requires consideration and so we do not need to examine each individual case. However, to understand and appreciate the manner in which CEC has arrived at its figures, we may state that this has been specifically mentioned by CEC in its report. The basis of the calculations is as follows:

> "(*a*) the production during the year 1993-94 has been considered as the permissible production during each year till the mining lease did not have the environmental clearance;
>
> (*b*) the permissible production for the year in which the environmental clearance was obtained for the first time has been considered on pro rata basis of (*a*) the prescribed annual production, and (*b*) the date of the grant of the environmental clearance. For this purpose the environmental clearance granted on or before 15th of a month has been considered valid for the entire month. Where the environmental clearance has been granted after 15th of a month it has been considered valid from the subsequent month. For example if the environmental clearance for a mining lease has been granted say on 10-10-2008 for an annual production of say 12 lakhs MT then in that case the permissible production for the mining lease for the year 2008-09 would be taken as 6 lakhs MT (12 × 6/12 lakh MT) and 12 lakhs MT per annum in the subsequent year; and
>
> (*c*) wherever a mining lease having environmental clearance has been granted revised environmental clearance for a higher production the permissible annual production for the year, during which the revised environmental clearance has been granted, has been considered on pro rata basis of the quantities prescribed in the earlier environmental clearance and the revised environmental clearance. For example if the mining lease was having environmental clearance for annual production of 12 lakhs MT and say on 28-9-2009 it has been granted revised environmental clearance for annual production of say 24 lakhs MT then in that case the permissible production for the year 2009-10 would be taken as 18 lakhs MT (12 × 6/12 + 24 × 6/12) and 24 lakhs MT per annum in subsequent years."

156. A submission made by the mining leaseholders was that the maximum production in any year up to 1993-94 should be considered as the base for making the calculations. Such a contention was also urged before CEC and was rejected. We have examined this contention independently and are of the view that the base year of 1993-94 is most appropriate — we have already given our reasons for this. Some lessees might lose in the process while some of them

might benefit but that cannot be avoided. In any event, each mining leaseholder is being given the benefit of calculations only from 2000-01 and is not being "penalised" for the period prior thereto. We think the mining leaseholders should be grateful for this since it was submitted by the learned counsel for the petitioners and the learned Amicus that the penalty should be levied from the date of EIA 1994. In our opinion, the cut-off from 2000-2001 (without interest) is undoubtedly reasonable and there can hardly be any grievance in this regard. The mining leaseholders cannot have their cake and eat it too, along with the icing on top.

157. Since the recommendation made by CEC in this regard is not totally unreasonable, we accept that the compensation should be payable from 2000-2001 onwards at 100% of the price of the mineral, as rationalised by CEC.

Violation of the Forest (Conservation) Act, 1980

158. Before dealing with the violations of Section 2 of the Forest (Conservation) Act, 1980 (for short "the FCA"), it is necessary to give a brief background.

159. The FCA came into operation initially through the Forest (Conservation) Ordinance, 1980 with effect from 25-10-1980. The said Ordinance was repealed and subsequently the FCA came into effect on 25-12-1980.

160. Section 2 of the FCA provides that no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing, inter alia, that any forest land or any portion thereof may be used for non-forest purposes.

161. The interpretation of Section 2 of the FCA first came up for consideration in *State of Bihar* v. *Banshi Ram Modi*[21]. In that case, Banshi Ram Modi was granted a mining lease for mining and winning mica. During the course of mining operations, feldspar and quartz were discovered. Modi then applied to the Central Government to include these minerals in the lease. The State Government agreed to do so but did not obtain the previous approval of the Central Government for the inclusion of the two minerals in the original lease.

162. The Central Government took the view that since its previous approval had not been obtained for inclusion of feldspar and quartz in the mining lease, Modi could not be permitted to mine these two minerals. This led Modi to approach the High Court with the contention that he was not breaking up or clearing any forest land other than the land on which mining operations were already being carried on. The High Court allowed the writ petition but feeling aggrieved, the State of Bihar preferred an appeal in this Court.

163. The question before this Court was a narrow one, namely, whether prior approval of the Central Government is necessary in respect of a mining lease, granted for winning a certain mineral prior to the coming into force of the FCA, if the lessee applies to the State Government after the FCA came into force for permission to win and carry any new mineral from the broken up area?

21 (1985) 3 SCC 643

164. While answering this question in the negative, it was held that after the commencement of the FCA no fresh breaking up of forest land or no fresh clearing of the forest on any such land could be permitted by the State Government or any authority without the approval of the Central Government. However, in respect of broken up land, it was held that if the State Government permits the lessee to remove any discovered mineral, it cannot be said that there has been a violation of Section 2 of the FCA particularly since there is no breaking up of any fresh forest land.

165. Subsequently in *Ambica Quarry Works* v. *State of Gujarat*[22] when the lease of the mining holder came up for renewal, the FCA had already come into force. Since the Forest Department of the State of Gujarat refused to give a no-objection certificate, the application for renewal of the lease was rejected. The question that arose for consideration was whether, after coming into force of the FCA, the mining leaseholder was entitled to renewal of the mining lease. While answering the question in the negative this Court held that the renewal of a lease cannot be claimed as a matter of right. The primary purpose of the FCA was to prevent deforestation and ecological imbalance as a result of deforestation. Therefore, the primary duty under the FCA was to the community and the obligation to society must predominate over the obligation to the individuals. While distinguishing *Banshi Ram Modi*[21] this Court held that renewal of the lease would lead to further deforestation or at least it would not help in reclaiming the area where deforestation had already taken place. The primary purpose of the FCA is to prevent further deforestation and any interpretation must subserve that purpose and implement the FCA. Under the circumstances, it was held, considering the scheme of the FCA that refusal to renew the lease without prior approval of the Central Government was not unjustified.

166. This view was reiterated in *Rural Litigation and Entitlement Kendra* v. *State of U.P.*[23] It was held that the FCA does not permit mining in a forest area. Reiterating the view expressed in *Ambica Quarry Works*[22], it was observed that compliance with Section 2 of the FCA is necessary as a condition precedent even for the renewal of a mining lease. This Court went so far as to hold that if any decree or order has already been obtained by any of the mining leaseholders, from any court relating to renewal of their lease, the same shall stand vacated and similarly, any appeal or other proceeding taken to obtain a renewal or against any order or decree granting renewal shall also become non est.

167. The definition of the word "forest" for the purposes of the FCA came up for consideration in *T.N. Godavarman Thirumulpad* v. *Union of India*[3]. In its decision of 12-12-1996[3] this Court observed that during the course of hearing

22 (1987) 1 SCC 213
21 *State of Bihar* v. *Banshi Ram Modi*, (1985) 3 SCC 643
23 1989 Supp (1) SCC 504
3 (1997) 2 SCC 267

it appeared that there is a misconception about the true scope of the FCA and the meaning of the word "forest" used therein. Consequently, there is also a misconception about the need for prior approval of the Central Government as mandated by Section 2 of the FCA in respect of certain activities in a forest area, which activities are more often of a commercial nature.

168. In this context, it was held that "forest" must be understood according to its dictionary meaning and it would cover all statutorily recognised forests, whether designated, reserved, protected or otherwise. It was further held that "forest" would also include any area recorded as a forest in the government records irrespective of the ownership. With this in mind, this Court directed that prior approval of the Central Government is required for any non-forest activity within the area of any "forest". In accordance with Section 2 of the FCA all ongoing activity within any forest in any State throughout the country, without prior approval of the Central Government must cease forthwith. This particular direction given by this Court is of immense significance.

169. This Court further directed each State Government to constitute within one month an Expert Committee, inter alia, to identify areas which are "forest" irrespective of whether they are so notified, recognised or classified under any law and irrespective of the ownership of the land of such forest.

170. Pursuant to the directions given by this Court, the State of Odisha constituted District Level Committees (for short "DLC") for identification of forest lands. After the identification process, appropriate affidavits were filed by the State of Odisha in this Court in 1997-98, the last being dated 6-1-1998.

171. In the meanwhile, in *T.N. Godavarman Thirumulpad* v. *Union of India*[24] this Court passed certain directions on 4-3-1997 with regard to what was categorised as mining matters. The directions given by this Court are as follows: (SCC p. 315, para 9)

> "*9*. We direct that—
>
> (*1*) where the lessee has not forwarded the particulars for seeking permission under the FCA, he may do so immediately;
>
> (*2*) the State Government shall forward all complete pending applications within a period of 2 weeks from today to the Central Government for requisite decisions;
>
> (*3*) applications received (or completed) hereafter would be forwarded within two weeks of their being so made.
>
> (*4*) the Central Government shall dispose of all such applications within six weeks of their being received. Where the grant of final clearance is delayed, the Central Government may consider the grant of working permissions as per existing practice."

172. It was also made clear that the order passed by this Court including the earlier order dated 12-12-1996[3] shall be obeyed and carried out by the Central

24 (1997) 3 SCC 312
3 *T.N. Godavarman Thirumulpad* v. *Union of India*, (1997) 2 SCC 267

Government and the State Governments notwithstanding any order or direction passed by a court including a High Court or Tribunal to the contrary.

173. From the above, it is explicit that in terms of the orders passed by this Court, there was a complete ban on non-forest activity on forest lands with effect from 12-12-1996. The only issue that remained was identification of all such lands by the District Level Committees and as mentioned above this exercise was completed by the State of Odisha on or about 6-1-1998. The lands identified by DLC are compendiously referred to as DLC lands.

174. In this background in IAs Nos. 2746-48 of 2009 in *T.N. Godavarman Thirumulpad*[2] CEC was directed to submit a report which it did on 26-4-2010. It was recommended by CEC that given the peculiar circumstances prevailing in the State of Odisha, mining operations in the entire DLC lands included in the mining leases, may be allowed to continue on payment of the net present value (NPV) subject to the fulfilment of other statutory requirements and rules being complied with.

175. By an order dated 7-5-2010[4] this Court directed that the recommendation of CEC acceptable to the State Government could be complied with. Consequently, the State of Odisha appears to have implemented the recommendations regarding recovery of NPV and realised an amount of about Rs 1750 crores as additional NPV.

176. We have been informed that in addition to the above, the mining leaseholders have subsequently deposited an amount under the heading of penal compensatory afforestation which was introduced through guidelines issued by the MoEF on 3-2-1999. The guidelines in this regard were communicated by the Assistant Inspector General of Forest to the Chief Secretary of all the States and Union Territories and the relevant portion thereof reads as follows:

> "4.3.1 Cases have come to the notice of the Central Government in which permission for diversion of forest land was accorded by the State Government concerned in anticipation of approval of the Central Government under the Act and/or where work has been carried out in forest area without proper authority. Such anticipatory action is neither proper nor permissible under the Act which clearly provides for prior approval of the Central Government in all cases. Proposals seeking ex post facto approval of the Central Government under the Act are normally not entertained. The Central Government will not accord approval under the Act unless exceptional circumstances justify condonation. However, penal compensatory afforestation would be insisted upon by the MoEF on all such cases of condonation.
>
> 4.3.2 The penal compensatory afforestation will be imposed over the area worked/used in violation. However, where the entire area has been

2 *T.N. Godavarman Thirumulpad* v. *Union of India*, IAs Nos. 2746-48 in WP (C) No. 202 of 1995, order dated 6-11-2009 (SC)

4 *T.N. Godavarman Thirumulpad* v. *Union of India*, (2010) 15 SCC 177

deforested due to anticipatory action of the State Government, the penal compensatory afforestation will be imposed over the total lease area."

177. It was submitted by the learned counsel for the lessees that since additional NPV as well as an amount towards penal compensatory afforestation has been paid by the defaulting mining leaseholders, the violation of Section 2 of the FCA stands condoned or in any event the illegal or unlawful mining in forest lands stands regularised.

178. CEC did not accept this submission made on behalf of the mining leaseholders on the ground that no retrospective forest clearance has been granted and even otherwise there is no provision to condone or regularise the violation of Section 2 of the FCA.

179. We are of the opinion that the view expressed by CEC in this regard is partially correct. Given the fact that the defaulting mining leaseholders have been asked to pay and have paid additional NPV as well as an amount towards penal compensatory afforestation, it must be assumed that the violation of the FCA has been condoned to a limited extent, more particularly since in its order dated 7-5-2010[4] this Court permitted the State of Odisha to accept such recommendations of CEC made in the report dated 26-4-2010 as are acceptable to it. The relevant recommendations made by CEC read as follows:

"(*c*) No forest land can be leased/assigned without first obtaining the approval under the FC Act. Therefore, the forest area approved under the FC Act should not be lesser than the total forest area included in the mining leases approved under the MMDR Act, 1957. Both necessarily have to be the same. In view of the above, this Hon'ble Court while permitting grant of temporary working permission to the mines in Orissa and Goa has made it one of the preconditions that the NPV will be paid for the entire forest area included in the mining leases. Similarly, all the mining leaseholders in Orissa should be directed to pay the NPV for the entire forest area, included in the mining leases;

(*d*) In Orissa, substantial areas included in the mining leases as non-forest land have subsequently been identified as DLC forest (deemed forest/forest-like areas) by the Expert Committee constituted by the State Government pursuant to this Hon'ble Court's order dated 12-12-1996[3]. While processing and/or approving the proposals under the FC Act in many cases such areas have been treated as non-forest land. It is recommended that (*i*) the NPV for the entire DLC area included in the mining lease, after deducting the NPV already paid, should be deposited by the leaseholder concerned, and (*ii*) the mining operations in the unbroken DLC land (virgin land) should be permissible only if the permission under the FC Act has been obtained/is obtained for such area. Keeping in view the peculiar circumstances as were existing in Orissa and subject to the above, the mining operations in the broken DLC land may be allowed to be continued

4 *T.N. Godavarman Thirumulpad* v. *Union of India*, (2010) 15 SCC 177
3 *T.N. Godavarman Thirumulpad* v. *Union of India*, (1997) 2 SCC 267

provided the other statutory requirements and rules are otherwise being complied with."

180. This still leaves open the question of violation of the order passed by this Court on 12-12-1996[3] followed by the order dated 4-3-1997[24], namely, that mining must cease forthwith in forest areas. In regard to this violation, the only benefit (at best) that can be granted to the mining leaseholders that we are concerned with, is till 6-1-1998 when the affidavit was filed in this Court in IAs Nos. 2746-48 of 2009 in *T.N. Godavarman*[6]. With effect from 7-1-1998 any mining activity in forest and DLC lands would clearly be completely illegal and unauthorised and the benefit that the mining leaseholders have derived from this illegal mining would be subject to Section 21(5) of the MMDR Act. Therefore, the price of the iron ore and manganese ore mined by the mining leaseholders from 7-1-1998 is payable until forest clearance under Section 2 of the FC Act is obtained by the mining leaseholders.

181. The report of CEC dated 16-10-2014 deals with 51 mining leases. It has been recorded by CEC that of them 15 mining leases have been found not involved in undertaking mining operations in violation of the FCA. There are 16 mining leases that have violated the provisions of the FCA between 25-10-1980 and 1999-2000 and the State Government in some of the cases has already issued a show-cause notice to the mining leaseholders. It is further stated that most of the violations pertain to the period prior to 12-12-1996. CEC has not made any particular recommendation in regard to these 16 mining leases nor do we, except to direct the State Government to promptly take a decision on the show-cause notice preferably within a period of four months and in any case before 31-12-2017.

182. CEC has also dealt with 18 other mining leaseholders (other than M/s Essel Mining and Industries Ltd. relating to the Kasia Iron Ore Mines and Jilling-Langlotta Iron & Manganese Ore Mines). With regard to these 18 mining leaseholders, the view taken by us above would hold good and clearly they are liable to compensate the State for the entire price of the iron ore and manganese ore illegally mined with effect from 7-1-1998 until the forest clearance was obtained by the mining leaseholder concerned.

183. We have fixed 7-1-1998 as the cut-off date despite the orders dated 12-12-1996[3] and 4-3-1997[24] only for the reason that it is possible that some mining leaseholders (we do not know how many) were not aware that they were inadvertently conducting mining operations on DLC lands which were identified by the State of Odisha as forest lands on the directions of this Court. For the purposes of Section 21(5) of the MMDR Act, they are entitled to the benefit of doubt and along with them, the other mining leaseholders before us.

3 *T.N. Godavarman Thirumulpad* v. *Union of India*, (1997) 2 SCC 267
24 *T.N. Godavarman Thirumulpad* v. *Union of India*, (1997) 3 SCC 312
6 *T.N. Godavarman Thirumulpad* v. *Union of India*, (2014) 6 SCC 167

184. CEC in this regard has observed as follows:

> "It will be seen that in the above cases the mining operations have been done in the forest land in violation of the Forest (Conservation) Act, 1980 and consequently also in violation of this Hon'ble Court order dated 12-12-1996[3]. CEC recommends that 70% of the notional value of the iron ore and manganese produced by the lessees by undertaking mining operations in the forest land in violation of the Forest (Conservation) Act, 1980 may be directed to be recovered from the respective lessees. Wherever the mineral production is both from the forest land as well as non-forest land then in such cases the notional value of the production from the forest land may be calculated on pro rata basis of the extent of the forest land and non-forest land involved. The notional value of the mineral, time-limit for payment of the compensation, use of the amount received as compensation and other conditions as decided by this Hon'ble Court in respect of the production without/in excess of the environmental clearance may be directed to be followed on pari-passu basis."

185. For the reasons that we have already expressed above, we are not in agreement with CEC that only a part of the notional value (in this case 70%) of the iron ore and manganese ore produced by the mining leaseholders should be recovered. We are of the view that Section 21(5) of the MMDR Act should be given full effect and so we reiterate that the recovery should be to the extent of 100%.

186. There may be some overlap in the period when mining operations were conducted by the mining leaseholders without an EC and/or an FC. We make it clear that mineral extracted either without an EC or without an FC or without both would attract the provisions of Section 21(5) of the MMDR Act and 100% of the price of the illegally or unlawfully mined mineral must be compensated by the mining leaseholder. To the extent of the overlap or the common period, obviously only one set of compensation is payable by the mining leaseholder to the State of Odisha. We order accordingly. However, we make it clear that whatever payment has already been made by the mining leaseholders towards NPV, additional NPV or penal compensatory afforestation is neither adjustable nor refundable since that falls in a different category altogether.

187. We may note that this Court has held in *T.N. Godavarman Thirumulpad* v. *Union of India*[25, 26] that a violation of the FCA is condonable on payment of penal compensatory afforestation charges. This obviously would not apply to illegal or unlawful mining under Section 21(5) of the MMDR Act, but we make it clear that the mining leaseholders would be entitled to the benefit of any temporary working permission granted.

3 *T.N. Godavarman Thirumulpad* v. *Union of India*, (1997) 2 SCC 267
25 (2011) 15 SCC 658
26 (2011) 15 SCC 681

Conclusions on the issues of mining without an EC or FC or both

188. To avoid any misunderstanding, confusion or ambiguity, we make the following very clear:

(*1*) A mining project that has commenced prior to 27-1-1994 and has obtained a no-objection certificate from SPCB prior to that date is permitted to continue its mining operations without obtaining an EC from the Impact Assessment Agency. However, this is subject to any expansion (including an increase in the lease area) or modernisation activity after 27-1-1994 which would result in an increase in the pollution load. In that event, a prior EC is required. However, if the pollution load is not expected to increase despite the proposed expansion (including an increase in the lease area) or modernisation activity, a certificate to this effect is absolutely necessary from SPCB, which would be reviewed by the Impact Assessment Agency.

(*2*) The renewal of a mining lease after 27-1-1994 will require an EC even if there is no expansion or modernisation activity or any increase in the pollution load.

(*3*) For considering the pollution load the base year would be 1993-94, which is to say that if the annual production after 27-1-1994 exceeds the annual production of 1993-94, it would be treated as an expansion requiring an EC.

(*4*) There is no doubt that a new mining project after 27-1-1994 would require a prior EC.

(*5*) Any iron ore or manganese ore extracted contrary to EIA 1994 or EIA 2006 would constitute illegal or unlawful mining (as understood and interpreted by us) and compensation at 100% of the price of the mineral should be recovered from 2000-2001 onwards in terms of Section 21(5) of the MMDR Act, if the extracted mineral has been disposed of. In addition, any rent, royalty or tax for the period that such mining activity was carried out outside the mining lease area should be recovered.

(*6*) With effect from 14-9-2006 all mining projects having a lease area of 5 ha or more are required to have an EC. The extraction of any mineral in such a case without an EC would amount to illegal or unlawful mining attracting the provisions of Section 21(5) of the MMDR Act.

(*7*) For a mining lease of iron ore or manganese ore of less than 5 ha area, the provisions of EIA 1994 will continue to apply subject to EIA 2006.

(*8*) Any mining activity carried on after 7-1-1998 without an FC amounts to illegal or unlawful mining in terms of the provisions of Section 21(5) of the MMDR Act attracting 100% recovery of the price of the extracted mineral that is disposed of.

(*9*) In the event of any overlap, that is, illegal or unlawful mining without an FC or without an EC or without both would attract only 100% compensation and not 200% compensation. In other words, only one set of compensation would be payable by the mining leaseholder.

(*10*) No mining leaseholder will be entitled to the benefit of any payments made towards NPV or additional NPV or penal compensatory afforestation.

Violation of Section 6 of the MMDR Act

189. We have examined the report of CEC with regard to the alleged violation of Section 6 of the MMDR Act and find that there have been several amendments to Section 6 relating to the maximum area for which a mining lease may be granted to a person. The following is the result of the amendments:

1. From 1-6-1958 to 11-9-1972—maximum lease area 10 sq miles.

2. From 12-9-1972 to 9-2-1987—maximum lease area 10 sq km or 1000 ha in any one State.

3. From 10-2-1987 to 17-12-1999—maximum lease area 10 sq km or 1000 ha in any part of the country.

4. From 18-12-1999 till date—maximum lease area 10 sq km or 1000 ha in one State.

190. While the word "person" has not been defined in the MMDR Act, a reading of Section 5 thereof indicates that the State Government shall not grant a mining lease to any person unless such person is an Indian national or a company as defined in the Companies Act, 1956 and subsequently in the Companies Act of 2013.

191. Sub-section (2) of Section 6 of the MMDR Act provides that a person acquiring by, or in the name of, another person a mining lease which is intended for him/her shall be deemed to be acquiring it himself/herself.

192. For the purposes of determining the total area that can be acquired for mining operations, Section 6(3) of the MMDR Act provides that the area held under a mining lease by a person as a member of a cooperative society, company or other corporation or a Hindu Undivided Family or a partner of a firm shall be deducted from the area referred to so that the sum total of the area held by such person under a mining lease only as such member or partner or individually may not in any case exceed the total area specified.

193. In this background, CEC examined the case of seven mining leaseholders. They are:

1. Essel Mining and Industries Limited
2. Rungta Mines Limited
3. Rungta Sons Pvt. Limited
4. Bonai Industrial Company Limited
5. Feegrade & Co. Pvt. Limited
6. M/s Mangilal Rungta
7. Jindal Steel & Power Limited

194. As far as Essel Mining and Industries Ltd. is concerned we propose to deal with this mining leaseholder on another occasion since even CEC has placed this mining leaseholder in a special category.

195. Similarly, so far as Rungta Mines Ltd., Rungta Sons Pvt. Ltd. and M/s Mangilal Rungta are concerned, although CEC has come to the conclusion that these persons have not acquired mining leases in violation of Section 6 of the MMDR Act, there are some critical observations made by the Commission with regard to the "Rungta Group". The learned counsel for the petitioner submitted that the view of CEC in this regard needs reconsideration. Since the "Rungta Group" was not heard by us, we propose to hear the above Rungta companies to ascertain, inter alia, whether there has been any violation of the provisions of Section 6 of the MMDR Act.

196. As far as Jindal Steel & Power Ltd. is concerned, we propose to hear this company on another occasion since the suggestion of CEC is that it is the benami holder of Sarda Mines Pvt. Ltd. If it is so held to be a benami holder of Sarda Mines Pvt. Ltd. then there is a violation of Section 6 of the MMDR Act. However, CEC has refrained from making any observations or recommendation in this regard. Accordingly, we propose to hear Jindal Steel & Power Ltd. on a later occasion on this limited issue.

197. As far as Bonai Industrial Company Ltd. and Feegrade & Co. Pvt. Ltd. are concerned, CEC has concluded that they have not violated Section 6 of the MMDR Act. That being the position, and nothing having been shown to the contrary, we accept the recommendation of CEC in this regard.

Violation of Rule 37 of the Mineral Concession Rules, 1960

198. CEC has discussed the possible violation of Rule 37 of the MCR. In this context, it was noted that there were several mining leaseholders who had entered into raising contracts which were actually a transfer of the lease as postulated by Rule 37 of the MCR.

199. On this basis the State of Odisha constituted a Committee on 8-7-2011 to carry out a study of the financial transactions between the mining leaseholders and the raising contractors to determine whether there is a prima facie violation of Rule 37 of the MCR.

200. On an examination of the material before it the Committee concluded that eight mining leaseholders violated Rule 37 of the MCR. These mining leaseholders are as under:

(*i*) R.P. Sao, Guali Iron Ore Mines, Keonjhar

(*ii*) Indrani Patnaik, Unchabali Iron Ore Mines, Keonjhar

(*iii*) M/s K.J.S. Ahluwalia, Nuagaon Iron Ore Mines, Keonjhar

(*iv*) M/s Aryan Mining & Trading Corporation Pvt. Ltd., Narayanposhi Iron Ore Mines, Sundergarh

(*v*) M/s Mideast Integrated Steel Ltd., Roida, Sidhamatha Iron Ore Mines, Keonjhar

(*vi*) Kavita Agrawal, Kusumdihi Manganese Mines, Sundergarh

(*vii*) Mala Roy & Others, Jalabari Iron Ore Mines, Keonjhar

(*viii*) M/s Sharda Mines (P) Ltd., Thakurani Iron Ores Mines, Keonjhar

201. Pursuant to the report of the Committee, a show-cause notice was issued to these mining leaseholders by the State of Odisha. Six of the mining leaseholders (other than M/s Aryan Mining & Trading Corporation Pvt. Ltd. (for short Aryan) and Kavita Agrawal (Kusumdihi Manganese Mines) challenged the show-cause notice and the decision of the Committee by filing revision petitions under Section 30 of the MMDR Act read with Rule 55 of the MCR before the Central Government. The challenge to the show-cause notice was on the ground that persons who were not government servants could not have been included in the Committee and also that the Committee was not notified in the Official Gazette as required by Section 26(2) of the MMDR Act.

202. The Central Government set aside the order constituting the Committee and the State of Odisha has challenged the orders of the Central Government before the Orissa High Court through writ petitions. We are told that the writ petitions filed by the State of Odisha are pending in the High Court.

203. As far as Aryan is concerned, we were informed that the matter was pending with the State of Odisha and a request was made to us to permit the State of Odisha to pass a final order on the submissions made by Aryan. On 28-4-2017[27] we had permitted the State of Odisha to pass final orders but we are not aware whether any orders have since been passed.

204. As far as Kavita Agrawal is concerned, her lease was terminated by the State of Odisha and the Central Government also dismissed her revision petition on 28-4-2014. The said mining leaseholder has since filed a writ petition which is pending in the Orissa High Court.

205. During the course of hearing it was proposed by the learned counsel appearing for some of the mining leaseholders that it might be appropriate if the raising contracts between these eight mining leaseholders and the raising contractors are given a fresh look. This suggestion was not acceptable to one of the mining leaseholders. However, we are of the opinion that the suggestion is reasonable and it will be appropriate if in fact a fresh look is given to the raising contracts entered into by the mining leaseholders and the raising contractors. We are also of the opinion that such an order ought to be passed with the consent of the mining leaseholders since any delay in disposal of the issue would not really subserve the interests of anybody including the mining leaseholders.

206. Accordingly, for considering the appointment of an appropriate committee in respect of the eight mining leaseholders mentioned above, we

---

27 *Common Cause* v. *Union of India*, WP (C) No. 114 of 2014, order dated 28-4-2017 (SC), wherein it was directed:

> "It has been pointed out by Mr Rakesh Dwivedi, learned Senior Counsel appearing for the State of Odisha and Mr Arvind Datar, learned Senior Counsel appearing for Aryan Mining and Trading Corporation that the proceedings pursuant to the show-cause notice under Rule 37 of the Mineral Concession Rules are complete and both of them say that a final order may be passed pursuant to the show-cause notice. We permit the authorities to pass the order. Arguments heard in part. List the matters on 2-5-2017 as part-heard matters."

would like to hear the learned counsel for the parties. We make it clear that the proposed committee will be entitled to lift the corporate veil, the importance of which in cases such as the present, has been emphasised in *State of Rajasthan* v. *Gotan Lime Stone Khanij Udyog (P) Ltd.*[28]

Intergenerational equity

207. Mr Prashant Bhushan, learned counsel for the petitioner sought to impress upon us the need to consider intergenerational equity and if possible to place a limit on the extent of mining in the State of Odisha by referring to an article titled: "Intergenerational equity: a legal framework for global environment change" by Edith Brown Weiss. He laid emphasis on three principles that form the basis of intergenerational equity.

208. The first principle relied on is called the principle of "conservation of options". This requires each generation to conserve the diversity of the natural and cultural resource base in such a manner that the options available to future generations are not restricted. It was submitted that the extent of mining activities being carried on in Odisha indicate that the entire iron ore will perhaps be fully extracted within a period of 30 years and nothing would be available for future generations. Therefore some sort of a limit would have to be placed on the mining operations.

209. The second principle relied on is the principle of "conservation of quality". This was with reference to the submission that future generations should not be subjected to a quality of the planet worse than what it is today. In other words, future generations are also entitled to quality enjoyment of the diversity in the natural and cultural resource base.

210. The third principle relied upon was the principle of "conservation of access" which is to say that future generations have an equitable right to access the diversity of the natural and cultural resource base as is available to the present generation.

211. There is no doubt considerable substance in the submission particularly if this is considered in the light of intergenerational rights and obligations which have been dealt with in the said article. However, it is really not for this Court to lay down limits on the extent of mining activities that should be permitted by the State of Odisha or by the Union of India. Nevertheless, this is an aspect that needs serious consideration by the policy and decision-makers in our country in the governance structure. At present, keeping in mind the indiscriminate mining operations in Odisha, it does appear that there is no effective check on mining operations nor is there any effective mining policy. The National Mineral Policy, 2008 (effective from March 2008) seems to be only on paper and is not being enforced perhaps due to the involvement of very powerful vested interests or a failure of nerve. We are of the opinion that the National Mineral Policy, 2008 is almost a decade old and a variety of changes have taken place since then, including (unfortunately) the advent of rapacious mining in several parts of the country. Therefore, it is

28 (2016) 4 SCC 469

high time that the Union of India revisits the National Mineral Policy, 2008 and announces a fresh and more effective, meaningful and implementable policy within the next few months and in any event before 31-12-2017. We are constrained to pass this direction in view of the facts disclosed in these petitions and in judgments delivered by this Court with regard to mining in Goa and Karnataka.

Inquiry by the Central Bureau of Investigation

212. It was emphasised by Shri Prashant Bhushan that because of the rampant illegal or unlawful mining being carried out in Odisha, there should be an enquiry by the Central Bureau of Investigation (for short "CBI") to ascertain and determine the persons involved either in turning a Nelson's eye to rampant illegal or unlawful mining or being conspirators in the activity and the extent of the illegal or unlawful mining. It was submitted that the Justice Shah Commission had very strongly recommended an inquiry conducted by CBI and criminal elements being brought to book for the despoliation of the land.

213. For the present, we do not propose to direct an investigation or inquiry by CBI for the reason that what is of immediate concern is to learn lessons from the past so that rapacious mining operations are not repeated in any other part of the country. This can be achieved through the identification of lapses and finding solutions to the problems that are faced. Undoubtedly, there have been very serious lapses that have enabled large-scale mining activities to be carried out without forest clearance or environment clearance and eventually the persons responsible for this will need to be booked but as mentioned above, the violation of the laws and policy need to be prevented in other parts of the country. The rule of law needs to be established. We are therefore of the view that it would be appropriate if an Expert Committee is set up under the guidance of a retired Judge of this Court to identify the lapses that have occurred over the years enabling rampant illegal or unlawful mining in Odisha and measures to prevent this from happening in other parts of the country.

214. There is no doubt that the recommendations of the Commission can form a platform for the study but it is also necessary to use technology for maintenance of registers, records and data through computers, satellite imagery, videography and other technology tools so that the natural wealth of our country is not rapaciously exploited for the benefit of a few to the detriment of a large number, many of whom are tribals inhabiting the land for several generations.

Utilisation of funds by the special purpose vehicle

215. In IAs Nos. 2746-48 of 2009 filed by Rabi Das, an order was passed on 27-1-2014[29] relating to the preparation of a scheme by CEC for setting up a special purpose vehicle (SPV) for tribal welfare and area development works. The relevant extract of the order reads thus:

> "50% of the additional amounts of net present value (NPV) recovered by the State of Odisha from the mining lessees will be used by the

29 *T.N. Godavarman Thirumulpad* v. *Union of India*, IAs Nos. 2746-48 in WP (C) No. 202 of 1995, order dated 27-1-2014 (SC)

State of Odisha through a special purpose vehicle (SPV) for undertaking specific tribal welfare and area development works so as to ensure inclusive growth of the mineral bearing areas. The State of Odisha will accordingly file within four weeks from today, a comprehensive plan for the development of tribals out of the aforesaid funds, taking into consideration their requirements of health, education, communication, recreation, livelihood and cultural lifestyle as indicated in this Court's judgment in *T.N. Godavarman Thirumulpad (104)* v. *Union of India*[30]."

216. Subsequently on 28-4-2014[31] this Court accepted the scheme prepared by the Government of Odisha in consultation with the Central Empowered Committee. The scheme was captioned "Setting up of special purpose vehicle (SPV) for undertaking specific tribal welfare and area development works so as to ensure inclusive growth of mineral bearing areas in the State of Odisha". This Court then passed the following order on 28-4-2014[31]:

"Pursuant to orders passed by this Court on 27-1-2014[29], the Government of Odisha in consultation with the Central Empowered Committee has prepared a scheme captioned "Setting up of special purpose vehicle (SPV) for undertaking specific tribal welfare and area development works so as to ensure inclusive growth of mineral bearing areas in the State of Odisha.

The Central Empowered Committee has submitted a report dated 9-4-2014 and has recommended that the scheme prepared by the Government of Odisha may be approved by this Court and the ad hoc CAMPA may be directed to transfer to the SPV 50% of the additional amount of the NPV recovered from the mining leaseholders by the State of Odisha for undertaking tribal welfare and development works.

We have perused the scheme prepared by the State Government of Odisha and the recommendation of the Central Empowered Committee and we approve the scheme and direct ad hoc CAMPA to transfer to the SPV 50% of the additional amount of the NPV within a month for undertaking tribal welfare development works.

The interlocutory applications be listed in the month of July 2014."

217. Some of the salient features of the scheme are as follows:

5. The SPV will undertake specific tribal welfare and area development works so as to ensure inclusive growth of the mineral bearing areas. These will include works/projects related to livelihood intervention, health, water supply and sanitation, education, special programmes for development of women and children, entrepreneurial development of local people, communication and infrastructure projects and agro

30 (2008) 2 SCC 222

31 *T.N. Godavarman Thirumulpad* v. *Union of India*, IAs Nos. 2746-48 in WP (C) No. 202 of 1995, order dated 28-4-2014 (SC)

29 *T.N. Godavarman Thirumulpad* v. *Union of India*, IAs Nos. 2746-48 in WP (C) No. 202 of 1995, order dated 27-1-2014 (SC)

silvi-horticultural based livelihood projects through identified agencies/ Government Departments. While taking up such projects/works a bottom up planning and participatory approach will be followed.

* * *

9. The general superintendence of the affairs will be vested in its Board of Directors including (*a*) to receive grants/funds and have custody of the same; (*b*) to approve Annual Budget estimates and sanction the expenditure within the limits of the budget; (*c*) to enter into any agreement for and on behalf of the SPV; (*d*) institute and defend legal proceedings; (*e*) to consider and approve the annual report, audit report, annual accounts and the financial estimates of the SPV; (*f*) to prescribe procedure to be followed for implementation of the projects/works and for maintenance of accounts; and (*g*) to undertake any other ancillary activities/works for the furtherance of the objective of the SPV.

(*a*) The funds made available to the SPV will be utilised only for the purpose for which the SPV has been set up and will not be used for any other purpose or transferred to any other authority; and

(*b*) The composition of the Board of Directors of the SPV, as provided in the present scheme, will be modified only after obtaining permission from the Hon'ble Supreme Court.

10. The accounts of the SPV will be internally audited annually by the Chartered Accountant firms empanelled with the CAG/Principal Accountant General, Odisha. The audit of the accounts of the SPV, receipts as well as expenditure, will be done annually by the office of the Principal Accountant General, Odisha.

11. The State Government has, earlier, registered a society, namely, Society for Inclusive Development of Mineral Bearing Areas of Odisha, which has been registered vide Registration No. 23354/74 of 2011-12 under the Societies Registration Act, 1860 to act as SPV for the purpose. It is now proposed to wind up the said Society and to replace it with "Odisha Mineral Bearing Areas Development Corporation" to be set up under Section 25 of the Companies Act.

218. It appears that the scheme has been implemented with the Chief Secretary of Odisha as the ex-officio Chairman of the SPV. There are several other members and directors of the SPV. There is no further information available with this Court with regard to the implementation of the scheme.

219. During the course of hearing, some of the mining leaseholders represented by Shri Gopal Subramanium, Senior Advocate offered to deposit and in fact did deposit an amount of Rs 237.05 crores for utilisation by the SPV for carrying out welfare works and activities in the districts of Keonjhar, Sundergarh and Mayurbhanj in Odisha. The deposit was made by way of a cheque on 6-4-2017 and was without prejudice to the rights and contentions of the lessees. In terms of our directions, the Registry has encashed the cheque and

kept the amount in a short-term fixed deposit. We have mentioned this only to point out that there are huge amounts available with the special purpose vehicle for tribal welfare and area development works and we have absolutely no idea about the utilisation of the funds or whether they are in fact being used for tribal welfare and area development works. We also expect that as a result of the orders that we are passing today, very large amounts will again be made available to the State of Odisha. These amounts should also be kept with the special purpose vehicle.

220. To ensure that the amounts are utilised for the benefit of tribals in the affected districts and for area development works, we would like the Chief Secretary of Odisha to file an affidavit stating the work done as well as providing the audited accounts of the receipt and expenditure of the SPV from its inception.

Conclusion

221. In view of the findings above, we dispose of the writ petitions to the extent of the directions that we have already given.

222. IAs Nos. 45 (filed by Zenith Mining) and 47 (filed by Kavita Agrawal) are dismissed since their lease has not been extended or has been determined and they do not have any environmental clearance or forest clearance.

223. IA No. 66 (filed by J.N. Pattnaik) is also dismissed since there is no forest clearance available.

224. We have been informed that S.A. Karim (IA No. 9) actually had a working lease and has wrongly been included as a non-operational lease. Accordingly, IA No. 9 (filed by S.A. Karim) is also dismissed but as being infructuous. However, it is made clear that the State Government should ensure that the lessee S.A. Karim in fact has valid statutory clearances.

225. Pending show-cause notices issued by the State Government should be decided by 31-12-2017 (if not already decided) after hearing the noticees concerned.

226. We would like to hear Jindal Steel and Power Ltd., Sarda Mines Private Ltd., Rungta Group of Companies and Essel Mining and Industries Ltd. on the applications filed by them. For this purpose list the matter again after two weeks so that a convenient date of hearing can be fixed.

227. The amounts determined as due from all the mining leaseholders should be deposited by them on or before 31-12-2017. Subject to and only after compliance with statutory requirements and full payment of compensation and other dues, the mining leaseholders can restart their mining operations.

228. We would also like to hear the eight mining leaseholders concerned on the question of appointing an appropriate committee in respect of the applicability of Rule 37 of the Mineral Concession Rules to them.

229. We would also like to hear the learned counsel for all the parties with regard to setting up of an Expert Committee presided over by a retired Judge of this Court to identify the lapses that have occurred over the years that have enabled rampant illegal and unlawful mining in Odisha and to recommend preventive measures not only to the State of Odisha but generally to all other States where mining activities are proceeding on a large scale. For the present, we pass no direction with regard to any investigation by CBI.

230. We direct the Union of India to have a fresh look at the National Mineral Policy, 2008 which is almost a decade old, particularly with regard to conservation and mineral development. The exercise should be completed by 31-12-2017.

231. The Chief Secretary of Odisha should file an affidavit as indicated by us within a period of six weeks and in any case on or before 30-9-2017. The Registry will list these petitions along with the affidavit immediately after its receipt for our consideration.

232. All other pending IAs are disposed of in terms of our orders.

(2018) 18 Supreme Court Cases 257

(BEFORE MADAN B. LOKUR AND DEEPAK GUPTA, JJ.)

GOEL GANGA DEVELOPERS INDIA PRIVATE LIMITED .. Appellant;

Versus

UNION OF INDIA THROUGH SECRETARY MINISTRY OF ENVIRONMENT AND FORESTS AND OTHERS .. Respondents.

Civil Appeals No. 10854 of 2016 with Nos. 10901 of 2016 and 5157-58 of 2018†, decided on August 10, 2018

A. **Environment Law — Environmental Clearance/NoC/Environment Impact Assessment (EIA) — Specific Clearances — Development Projects — Environment Impact Assessment (EIA) Notification, 2006 — Construction in violation of the environmental clearance (EC), as in the present case, in violation of the clearance granted under Noti. dt. 4-4-2011 — Establishment and Effect of — "Built-up area" under Notis. dt. 4-4-2011 and 14-9-2006 — Concept of floor space index (FSI)/floor area ratio (FAR) — Non-relevance of, for computation of "built-up area" for which EC is granted**

— Imposition of damages of Rs 100 crores or 10% of project cost, whichever was higher, for violation of environmental clearance in addition to Rs 5 crore damages imposed by NGT, instead of directing demolition — Detailed coercive directions issued to ensure deposit of these damages within six months

— Held, the concept of FSI or non-FSI may be relevant for the purposes of building plans under municipal laws and regulations but it has no linkage or connectivity with the grant of EC and both will have an equally deleterious effect on the environment — When EC is granted for a particular construction it includes both FSI and non-FSI areas — Held, the built-up area under the Noti. dt. 14-9-2006 means all constructed area which is not open to the sky and the built-up area under the Noti. dt. 4-4-2011 means all covered area including basement and service areas

— EC dt. 4-4-2008 was granted to the project proponent for construction of built-up area 57,658.42 sq m, whereas the total construction raised by it was 1,00,002.25 sq m — Rejecting the contention of project proponent that while calculating the built-up area the constructions mentioned in Rr. 15.4.1.1(a), (b) and (c), 17.7.3 and 15.4.2 of the Pune Municipal Corporation Development Control Rules, 1982 were to be excluded, held, the construction raised by the project proponent was in violation of the environmental clearance granted to it — However, considering that the project proponent had already taken money and a large number of flats and shops had already been

† Arising from the Judgment and Order in *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4213 [National Green Tribunal, (Western Zone) Pune Bench, Application No. 184 of 2015 (WZ), dt. 27-9-2016] and *Tanaji Balasaheb Gambhire* v. *Union of India* [National Green Tribunal, (Western Zone) Pune Bench, Review Application No. 35 of 2016, dt. 8-1-2018]

occupied and persons belonging to the middle class had invested their life's earnings, demolition not ordered/directed — However, inter alia, damages of Rs 100 crores or 10% of the project cost, whichever was higher, in addition to Rs 5 crores as levied by NGT, imposed on the project proponent — Words and Phrases — "Built-up area" — Pune Municipal Corporation Development Control Rules, 1982, Rr. 15.4.1.1(a), (b) & (c), 17.7.3 and 15.4.2 (Paras 14, 17, 53, 58.2, 66.1, 66.2 and 66.9)

B. **Environment Law — National Green Tribunal Act, 2010 — S. 19(4)(f) — Review petition — Who can hear and where — Held, the powers of review which NGT exercises are akin to those of a civil court — In terms of Or. 47 R. 5 CPC, a review petition should normally be heard by the same Bench which passed the original order**

— Further, this normal rule should not be disturbed unless it is virtually impossible for the original Bench to hear the matter or the members of the Bench themselves opt not to hear the matter — Further, under sub-rule (2) of R. 22 of 2011 Rules the matter should ordinarily be heard at the same place of sitting where it was originally decided, however, this is not a mandatory direction — National Green Tribunal (Practices and Procedure) Rules, 2011 — Rr. 22(2) and 22(3) — Civil Procedure Code, 1908 — Or. 47 R. 5 — Practice and Procedure — Review (Paras 36, 38 and 40)

C. **Environment Law — National Green Tribunal Act, 2010 — S. 19(4)(f) — Exercise of power of review — Impermissibility of, when appeal already pending**

— Statutory appeal was pending in the Supreme Court against the original order when the respondent's review application, inter alia, praying for demolition of the illegal structures and enhancement of compensation, was taken up for hearing by NGT — In the present case, held, project proponent/appellant had not only challenged original order of NGT on the ground that he had not violated EC but also on the ground that the damages awarded were highly excessive — Therefore, the Bench hearing the review application erred in holding that review application was maintainable — Civil Procedure Code, 1908 — Or. 47 R. 1(2) — Practice and Procedure — Review (Paras 7, 45 and 47)

D. **Environment Law — Polluter Pays Principle and Remedial/Compensatory/Punitive Measures — Remedial action/Reclamation/Rehabilitation measures/Compensation/Disgorgement of gains of wrongdoer — Damages for carrying out construction in violation of environmental clearance (EC) — Quantification of — Carbon footprint as basis**

— Rejecting the contention that damages should be assessed on the basis of "carbon footprint", held, the courts cannot introduce a new concept of assessing and levying damages unless expert evidence in this behalf is led or there are some well-established principles — However, in a case where expert evidence is led or on the basis of empirical data it is established that by applying the principles of carbon footprint damages can be assessed, court may rely upon

such data — Evidence Act, 1872 — S. 45 — Words and Phrases — "Carbon footprint" (Paras 59 to 63)

E. **Environment Law — Environment (Protection) Rules, 1986 — Rr. 3 to 5 — EIA Notifications issued under — Cannot be varied/abrogated by officials of MoEF — Environment (Protection) Act, 1986, S. 4**

F. **Public Accountability, Vigilance and Prevention of Corruption — Corruption/Abuse of Power — Environmental Clearance/NoC — Improper grant of — Fine imposed upon the PMC and direction given by NGT to PMC to take appropriate action against the erring officials, and directions to enquire into conduct of other officials concerned, also upheld**

The project proponent i.e. M/s Goel Ganga Developers India Pvt. Ltd., purchased 79,100 sq m or 7.91 ha of land comprised in six Survey Nos. 35, 36, 37, 38, 39 and 40 in Vadgaon, Pune. These survey numbers were amalgamated in accordance with the rules and the plot became one plot of 79,100 sq m.

The project proponent applied for environmental clearance (EC) for the project and in the proposal dated 27-6-2007, he had shown that he would be erecting/constructing 12 buildings having 552 flats, 50 shops and 34 offices. The 12 buildings were to have stilts with basement and 11 floors. The total built-up area was indicated as 57,658.42 sq m. EC was granted to the project proponent on 4-4-2008.

The original applicant filed an application before the National Green Tribunal ("NGT", for short) claiming that the project proponent i.e. M/s Goel Ganga Developers India Pvt. Ltd., had raised construction in violation of the environmental clearance ("EC", for short) granted for the project and also in violation of the various municipal laws.

The case of the project proponent was that the term "built-up area" is synonymous with "floor space index" or FSI and that the constructed area, which is exempted from FSI area, or is a non-FSI area, is not a part of the "built-up area". The project proponent contended that while calculating the built-up area, the constructions mentioned in Rules 15.4.1.1(*a*), (*b*) and (*c*) and Rule 17.7.3 of the Pune Municipal Corporation Development Control Rules, 1982 ("DCR", for short), in addition to the areas specifically exempted under Rule 15.4.2 are to be excluded. It was contended that if the built-up area is calculated in accordance with DCR then the project proponent has till date not constructed the built-up area of 57,658.42 sq m, which it was permitted to construct under the EC granted to it on 4-4-2008. The stand of the Union of India and the original applicant was that built-up area means all area which is covered regardless of the area being FSI or non-FSI in terms of the EIA Notification of 2006.

The issues involved in this appeal were:

1. Whether the project proponent i.e. M/s Goel Ganga Developers India Pvt. Ltd., had raised construction in violation of the environmental clearance.

2. Whether NGT could have entertained a review application/reviewed its order dated 27-9-2016, when an appeal against the same was already pending before the Supreme Court?

Held :

Under the notification of 2006, all constructed area, which is covered and not open to the sky has to be treated as "built-up area". There is no exception for non-FSI area. (Para 16)

Indeed, the concept of FSI or non-FSI has no concern or connection with grant of EC. The same may be relevant for the purposes of building plans under municipal laws and regulations but it has no linkage or connectivity with the grant of EC. When EC is to be granted, the authority which has to grant such clearance is only required to ensure that the project does not violate environmental norms. While projects and activities, as mentioned in the notification, may be allowed to go on, the authority while granting permission should ensure that the adverse impact on the environment is kept to the minimum. Therefore, the authority granting EC may lay down conditions which the project proponent must comply with. While doing so, such authority is not concerned whether the area to be constructed is FSI area or non-FSI area. Both will have an equally deleterious effect on the environment. (Para 17)

Notification dated 4-4-2011

It is not at all necessary to decide whether the Notification dated 4-4-2011 issued by the Ministry of Environment and Forests is clarificatory or is in substitution of the original notification of 2006. There is no ambiguity with regard to the definition of "built-up area" even under the notification of 2006 and it covers all constructed area not open to the sky. The notification of 2011 only provides that the built-up area or covered area shall be the area of all floors put together including basement(s) and other service areas. (Para 19)

Clarification dated 7-7-2017

The Notification dated 14-9-2006 was issued by the Central Government and published in the gazette after inviting objections from the public. The first clarification with regard to this notification was issued on 4-4-2011. These two decisions of the Central Government which were notified as per the provisions of law could not have been set at naught by the Joint Director even if it was issued with the approval of a higher authority. Since such decision has not been notified in the gazette, the statutory Notification dated 14-9-2006 and its subsequent clarification dated 4-4-2011 could not have been virtually set aside by the office memorandum dated 7-7-2017 issued by the Joint Director, Ministry of Environment, Forests and Climate Change. (Para 22)

Common Cause v. *Union of India*, (2017) 9 SCC 499, *relied on*

Environmental clearance (EC) for expansion of the project in question granted to it by the State Level Environment Impact Assessment Authority (SEIAA) on 20-11-2017

SEIAA has laid down general conditions for pre-construction phase and the first condition itself clearly shows that the non-FSI area constructed by the project proponent under first EC of 4-4-2008 has not been taken into consideration. (Para 27)

In case the total construction raised by the project proponent is taken as 1,00,002.25 sq m and if the area of the proposed construction is added then the project will fall in B-1 category and, therefore, SEIAA had no authority to grant EC by treating the project as falling under Category B-2. Furthermore, the EC

dated 20-11-2017 is also illegal as the same has been granted on the presumption of the order dated 31-5-2016 passed by the Principal Secretary, Environment Department, State of Maharashtra holding that the construction of 18 buildings instead of 12 buildings is permissible. (Para 28)

Allegations made by the original applicant against various officials

The law is well settled that no person can be condemned unheard. It would, therefore, not be fair to deal with allegations made against individuals who are not parties to the petition and who have had no chance to reply to the allegations levelled against them. (Para 30)

However, as far as their official capacity is concerned, NGT was fully justified in coming to the conclusion that certain officials of PMC were going out of their way to help the project proponent and therefore, directions given by NGT in its order dated 27-9-2016 in this regard, upheld. (Para 31)

Prima facie, the Principal Secretary, Environment Department, Government of Maharashtra has not acted in a fair and transparent manner. The allegations made by the original applicant cannot be lightly brushed aside. His actions need to be looked into and, therefore, direction given by NGT directing the Chief Secretary to the State of Maharashtra to take notice of the conduct of the officers concerned, upheld. (Paras 32 and 66.8)

Challenge to the order dt. 8-1-2018 passed in Tanaji Balasaheb Gambhire, 2018 SCC OnLine NGT 302

Section 19(4)(*f*) of the National Green Tribunal Act, 2010 provides that the Tribunal shall have the same powers as are vested in civil courts while trying a suit in respect of matters relating to review of its decisions. Therefore, the power of review vested with NGT is akin to the power vested with the civil court. As such, the principles which govern the exercise of review jurisdiction before a civil court will apply with equal force to NGT. (Para 34)

A review petition should normally be heard by the same Bench which originally decided the matter. A review petition should not be heard by any other Bench unless it is impossible or totally impracticable for the earlier Bench to hear the matter. In a review petition, like in the present case, where the review petitioner contends that certain arguments raised by him have not been considered then it is only the Judges who originally heard the matter who can decide whether such point was urged or not. (Para 38)

Any judicial authority including NGT which is presided over by a judicial member who may be a retired Judge of the Supreme Court or of a High Court is expected to deal with all contentions raised before it. There is a presumption that judicial authorities must have dealt with all the contentions raised before them. (Para 39)

According to sub-rule (2), the matter should ordinarily be heard at the same place of sitting where it was originally decided. However, this is not a mandatory direction because sub-rule (2) itself contemplates that the matter shall "ordinarily" be heard at the same place. In tribunals like NGT where members may be transferred from one Bench to another or may be attending a Bench on circuit then problems can sometimes arise. These issues can be easily resolved by resorting to

the latest technology and if necessary, the arguments in such cases can be heard by videoconferencing. (Para 40)

Northern India Caterers (India) Ltd. v. *Lt. Governor of Delhi*, (1980) 2 SCC 167 : 1980 SCC (Tax) 222, *referred to*

In terms of Order 47 Rule 5 CPC, a review should normally be heard by the same Bench which passed the original order. (Para 43)

Malthesh Gudda Pooja v. *State of Karnataka*, (2011) 15 SCC 330 : (2014) 2 SCC (Civ) 473, *relied on*

Malthesh Gudda Pooja v. *State of Karnataka*, 2009 SCC OnLine Kar 919; *Malthesh Gudda Pooja* v. *State of Karnataka*, 2009 SCC OnLine Kar 918, *referred to*

As far as the facts of this case are concerned, the original applicant could have raised all issues which he raised in the review application even by filing a counter-affidavit in the appeal filed by the project proponent or by challenging the original order in the Supreme Court as he has done now. In this context, once the Supreme Court was seized of the matter and all issues were being urged, NGT should not have proceeded to hear the review application. (Para 45)

The project proponent had not only challenged the original order of NGT on the ground that he had not violated the EC but also on the ground that the damages awarded were highly excessive. Therefore, the question that what should be the extent of damages was specifically before the Supreme Court. (Para 47)

Tanaji Balasaheb Gambhire v. *Union of India*, 2016 SCC OnLine NGT 4217; *Tanaji Gambhire* v. *Union of India*, 2017 SCC OnLine NGT 1954, *referred to*

On 23-5-2016, the project proponent filed reply to the affidavit dated 18-5-2016 filed by the original applicant in which they raised objections that such affidavit was not filed on 18-5-2016 and the copy of the same was handed over to them on 20-5-2016 and the original applicant had no permission to file such an affidavit. All these disputed issues as to whether such an affidavit was filed with the permission of the Court or it was referred to in the first hearing or in the second hearing could only be decided by the Bench which had heard the matter. (Para 51)

Tanaji Balasaheb Gambhire v. *Union of India*, 2016 SCC OnLine NGT 4201; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4204; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4205; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4206; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4219; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4203; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4207; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4208; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2015 SCC OnLine NGT 838; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 1330; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4209; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4215; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4210; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4211; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4202; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4212; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4214, *referred to*

Is demolition the only answer?

Now there are 807 flats and 117 shops which are either constructed or under construction. Keeping in view the interest of these third parties who were not parties before NGT, in the peculiar facts and circumstances of the case, demolition is not the answer. This would put innocent people at loss. (Para 53)

The project proponent cannot be permitted to build nothing more than 807 flats, 117 shops/offices, cultural centre and clubhouse. (Para 54)

The project proponent who has violated law with impunity cannot be allowed to go scot-free. This Court has in a number of cases awarded 5% of the project cost as damages. This is the general law. However, in the present case damages should be higher keeping in view the totally intransigent and unapologetic behaviour of the project proponent. He has manoeuvred and manipulated officials and authorities. Instead of 12 buildings, he has constructed 18; from 552 flats the number of flats has gone up to 807 and now two more buildings having 454 flats are proposed. The project proponent contends that he has made smaller flats and, therefore, the number of flats has increased. He could not have done this without getting fresh EC. With the increase in the number of flats the number of persons, residing therein is bound to increase. This will impact the amount of water requirement, the amount of parking space, the amount of open area, etc. Therefore, in the present case, we are clearly of the view that the project proponent should be and is directed to pay damages of Rs 100 crores or 10% of the project cost whichever is more. We also make it clear that while calculating the project cost the entire cost of the land based on the circle rate of the area in the year 2014 shall be added. (Para 64)

The base year has been fixed as 2014 since the original EC expired in 2014 and most of the illegal construction took place after 2014. In addition thereto, if the project proponent has taken advantage of transfer of development rights (for short "TDR") with reference to this project or is entitled to any TDR, the benefit of the same shall be forfeited and if he has already taken the benefit then the same shall either be recovered from him or be adjusted against its future projects. The project proponent shall also pay a sum of Rs 5 crores as damages, in addition to the above for contravening mandatory provisions of environmental laws. (Paras 64 and 66.9)

The project proponent is granted six months' time to deposit the amount of damages imposed above in the Registry of the Supreme Court. In case the project proponent does not deposit the amount within six months then all the assets of the project proponent as well as its Directors shall be attached and the amount of damages shall be recovered by sale of those assets. It is further directed that in case this amount is not deposited within the period of six months then the licence/registration/permission granted to the project proponent to develop any "real estate project" within the meaning of the Real Estate (Regulation and Development) Act, 2016 shall be cancelled and the project proponent and its Directors shall not be granted permission to develop any "real estate project" under the Real Estate (Regulation and Development) Act, 2016 without permission of the Court. (Para 66.13)

Whether the original applicant is entitled to special damages?

This litigation is obviously not a public interest litigation. Therefore, the claim of the original applicant to award him special damages cannot be accepted. (Para 57)

Tanaji Balasaheb Gambhire v. *Union of India*, 2016 SCC OnLine NGT 4213, *partly reversed*

Tanaji Balasaheb Gambhire v. *Union of India*, 2018 SCC OnLine NGT 302, *reversed*

Advocates who appeared in this case :

A.N.S. Nadkarni, Additional Solicitor General, Ranjit Kumar, R.P. Bhatt, Kavin Gulati and Jayant Bhushan, Senior Advocates (Venkita Subramoniam T.R., Rahat Bansal, Braj K. Mishra, Vijay Kumar, Rohit Gupta, Ms Aparna Jha, Ms Kriti Sondhi, Shriram P. Pingle, Ms Rashmi Dhongde, Nitin Lonkar, Ms Sonali Suryavanshi, Nilesh Bhandari, Ashok Jain, Gurmeet Singh Makker, Divya Prakash Pande, Salvador Santosh Rebello, Niraj Kumar, Rahul Garg, Ridhi Kackkar, Ranjesh Kr. Sinha, Gaurav Rawal, Mukesh Verma, Pawan Kr. Shukla, Ms Vasudha Zutshi, Yash Pal Dhingra, Kunal Cheema, Nishant Ramakantrao Katneshwarkar, Ninad Laud, Kush Chaturvedi, Ms Anshula Grover, Anjuman Tripathy, Somay Kapoor, Ms Priyashree Sharma, Parth Singh Chaudhary and Aman Verma, Advocates) for the appearing parties.

Chronological list of cases cited ***on page(s)***

1. 2018 SCC OnLine NGT 302, *Tanaji Balasaheb Gambhire* v. *Union of India* **(reversed)** 266*e-f*, 266*h*, 267*a*, 276*f*, 277*g-h*, 283*e-f*, 286*b-c*, 287*g-h*
2. (2017) 9 SCC 499, *Common Cause* v. *Union of India* 273*g*
3. 2017 SCC OnLine NGT 1954, *Tanaji Gambhire* v. *Union of India* 281*d*, 281*d-e*
4. 2016 SCC OnLine NGT 4219, *Tanaji Balasaheb Gambhire* v. *Union of India* 282*b-c*
5. 2016 SCC OnLine NGT 4217, *Tanaji Balasaheb Gambhire* v. *Union of India* 281*c*
6. 2016 SCC OnLine NGT 4215, *Tanaji Balasaheb Gambhire* v. *Union of India* 283*b*
7. 2016 SCC OnLine NGT 4214, *Tanaji Balasaheb Gambhire* v. *Union of India* 283*c*, 283*d-e*
8. 2016 SCC OnLine NGT 4213, *Tanaji Balasaheb Gambhire* v. *Union of India* **(partly reversed)** 265*e-f*, 266*e*, 266*e-f*, 267*a*, 275*a-b*, 275*c*, 275*f-g*, 276*a*, 283*c*, 284*d*, 287*g*, 288*a*, 288*b-c*
9. 2016 SCC OnLine NGT 4212, *Tanaji Balasaheb Gambhire* v. *Union of India* 283*c*
10. 2016 SCC OnLine NGT 4211, *Tanaji Balasaheb Gambhire* v. *Union of India* 283*b-c*
11. 2016 SCC OnLine NGT 4210, *Tanaji Balasaheb Gambhire* v. *Union of India* 283*b-c*
12. 2016 SCC OnLine NGT 4209, *Tanaji Balasaheb Gambhire* v. *Union of India* 282*f-g*, 283*d-e*
13. 2016 SCC OnLine NGT 4208, *Tanaji Balasaheb Gambhire* v. *Union of India* 282*d*, 282*f-g*
14. 2016 SCC OnLine NGT 4207, *Tanaji Balasaheb Gambhire* v. *Union of India* 282*b-c*
15. 2016 SCC OnLine NGT 4206, *Tanaji Balasaheb Gambhire* v. *Union of India* 282*b-c*
16. 2016 SCC OnLine NGT 4205, *Tanaji Balasaheb Gambhire* v. *Union of India* 282*b-c*
17. 2016 SCC OnLine NGT 4204, *Tanaji Balasaheb Gambhire* v. *Union of India* 282*b-c*
18. 2016 SCC OnLine NGT 4203, *Tanaji Balasaheb Gambhire* v. *Union of India* 282*b-c*
19. 2016 SCC OnLine NGT 4202, *Tanaji Balasaheb Gambhire* v. *Union of India* 283*c*
20. 2016 SCC OnLine NGT 4201, *Tanaji Balasaheb Gambhire* v. *Union of India* 282*b*

21. 2016 SCC OnLine NGT 1330, *Tanaji Balasaheb Gambhire* v. *Union of India* 282*e*, 282*e-f*
22. 2015 SCC OnLine NGT 838, *Tanaji Balasaheb Gambhire* v. *Union of India* 282*d-e*
23. (2011) 15 SCC 330 : (2014) 2 SCC (Civ) 473, *Malthesh Gudda Pooja* v. *State of Karnataka* 279*a*
24. 2009 SCC OnLine Kar 919, *Malthesh Gudda Pooja* v. *State of Karnataka* 279*a-b*
25. 2009 SCC OnLine Kar 918, *Malthesh Gudda Pooja* v. *State of Karnataka* 279*b-c*
26. (1980) 2 SCC 167 : 1980 SCC (Tax) 222, *Northern India Caterers (India) Ltd.* v. *Lt. Governor of Delhi* 278*g-h*

The Judgment of the Court was delivered by

DEEPAK GUPTA, J.— Applications for intervention/impleadment are allowed. Application for amendment of grounds of appeal in Civil Appeal No. 10854 of 2016 is allowed.

2. These matters are being decided by one judgment since they all arise out of one original application filed by Shri Tanaji Balasaheb Gambhire (hereinafter referred to as "the original applicant") before the National Green Tribunal ("NGT", for short) being Application No. 184 of 2015.

3. The original applicant filed an application before NGT claiming that the project proponent i.e. M/s Goel Ganga Developers India Pvt. Ltd., had raised construction in violation of the environmental clearance ("EC", for short) granted for the project and also in violation of the various municipal laws. It was prayed that the illegal structures be demolished; the State Level Environment Impact Assessment Authority (SEIAA) and the Maharashtra State Pollution Control Board be directed to initiate appropriate action against the project proponent for violation of the Environment Impact Assessment (EIA) Notification, 2006; the Union of India be directed to take action against SEIAA; and lastly, it was prayed that the project proponent be directed to pay/deposit a heavy amount of compensation in the environment relief fund. NGT vide its order dated 27-9-2016[1] allowed the application in the following terms: (*Tanaji Balasaheb case*[1], SCC OnLine NGT para 54)

> "*54.* For the aforesaid reasons, the applicant succeeds in his legal pursuit to challenge the non-compliance of EC conditions by Respondent 9 and obtain certain directions. Hence the Application is allowed and we issue following directions:
>
> 1. Respondent 9-PP shall pay environmental compensation cost of Rs 100 crores or 5% (five per cent) of the total cost of project to be assessed by SEAC whichever is less for restoration and restitution of environment damages and degradation caused by the project proponent by carrying out the construction activities without the necessary prior environmental clearance within a period of one month. In addition

1 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4213

to this, it shall also pay a sum of Rs 5 crores for contravening mandatory provision of several Environmental Laws in carrying out the construction activities in addition to and exceeding limit of the available environment clearance and for not obtaining the consent from the Board.

2. In view of our finding that there has been manifest, deliberate or otherwise suppression of facts of illegality in the project activity of Respondent 9-PP by the officer of PMC, we impose fine of Rs 5 lakhs upon the PMC and direct Commissioner PMC to take appropriate action against the erring officers. The amount of Rs 5 lakhs shall be paid within one month.

3. We direct the Chief Secretary, State of Maharashtra and the competent authority to take notice of the conduct of the officers concerned who have misled the Department of Environment in the matter relating to interpretation of FSI and BUA in terms of which order dated 31-5-2016 has been issued in particular the Principal Secretary, Department of Environment who has authored the order dated 31-5-2016.

4. PMC, DoE and SEIAA are directed to pay cost of Rs 1 lakh each to the applicant within 4 weeks."

4. Aggrieved by the aforesaid order of NGT, the project proponent filed Civil Appeal No. 10854 of 2016. Pune Municipal Corporation ("PMC", for short) also challenged the said order insofar as it adversely affects PMC by filing Civil Appeal No. 10901 of 2016.

5. Review application being Application No. 35 of 2016 was filed by the original applicant before NGT. This application was partly allowed on 8-1-2018[2] and Direction 1 in the original order dated 27-9-2016[1] was modified and substituted as under: (*Tanaji Balasaheb case*[1], SCC OnLine NGT para 54)

"*54.* …'1. Respondent 9-PP shall pay environmental compensation cost of Rs 100 crores or 5% (five per cent) of the total cost of project to be assessed by SEAC, whichever is less, for restoration and restitution of environment damage and degradation caused by the project proponent by carrying out the construction activities without the necessary prior environmental clearance within a period of one month. In addition to this, it shall also pay a sum of Rs 5 crores for contravening mandatory provision of several environment laws in carrying out the construction activities in addition to and exceeding limit of the available environment clearance and for not obtaining the consent from the Board.' "

6. Thereafter, the project proponent filed IA No. 8000 of 2018 for permission to amend its appeal permitting it to challenge the order passed in review application dated 8-1-2018[2], which we have allowed.

2 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2018 SCC OnLine NGT 302
1 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4213

7. Appeal being Diary No. 3911 of 2018 was filed by the original applicant challenging the original order dated 27-9-2016[1] as well as the order dated 8-1-2018[2] passed in review application praying that demolition of the illegal structures be ordered and the compensation be enhanced to Rs 500 crores.

The factual matrix

8. The facts briefly stated are that the project proponent purchased 79,100 sq m or 7.91 ha of land comprised in six Survey Nos. 35, 36, 37, 38, 39 and 40 in Vadgaon, Pune. These survey numbers were amalgamated in accordance with the rules and the plot became one plot of 79,100 sq m. From the documents placed on record, it is apparent that as per the Development Control Plan for the city of Pune, 3 roads of the width of 36 m, 30 m and 18 m bisected this plot into two which for the sake of convenience were referred to as Plot No. 1 and Plot No. 2. As per the Development Plan, there are certain statutory reservations in addition to the roads and some land has to be left out or reserved for schools, cultural centres, open areas, etc. The remaining area is referred to as the "balance plot area" which in this case works out to 46,993.79 sq m. Out of this "balance plot area" 15% is to be reserved for amenity space and another 10% area is to be compulsorily left out as open space leaving "net plot area" of 41,455.21 sq m. Prima facie these calculations do not appear to be correct. However, this will not impact the merits of the case. Be that as it may, the undisputed fact is that FSI has to be calculated on the "net plot area". We may, at this stage, point out that the aforesaid figures are based on the written submissions submitted on behalf of the Union of India by the learned Additional Solicitor General and these figures have not been disputed before us.

9. On 12-3-2007, the project proponent applied for sanction of layout and building proposal plan on an area of 15,141.70 sq m, originally depicted as Plot No. 3 and the sanctioned FSI was 15,313.16 sq m. Thereafter, on 5-9-2007, revised layout plan was submitted for an area measuring 28,233.23 sq m and the sanctioned FSI was 39,526.54 sq m. The project proponent applied for EC for the project and in the proposal dated 27-6-2007, he had shown that he would be erecting/constructing 12 buildings having 552 flats, 50 shops and 34 offices. The 12 buildings were to have stilts with basement and 11 floors. The total built-up area was indicated as 57,658.42 sq m. The EC was granted to the project proponent on 4-4-2008. Paras 2 and 3 of the communication granting EC read as under:

> "2. The project proponent is proposing for construction of group housing project at Sl. Nos. 35 to 40, Village Vadgaon Budruk, Singhad Road, Pune, Maharashtra at a cost of Rs 10,737.14 lakhs. The project involves construction of 12 buildings with stilt, basement plus 11 floors for 552 flats, 50 shops and 34 offices. The total plot area is 79,100.00 sq m. Total built-up area as indicated is 57,658.42 sq m. Total water requirement will be 745 KLD and 400 KLD of waste water will be generated from

1 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4213
2 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2018 SCC OnLine NGT 302

the buildings which will be treated in sewage treatment plant. The treated waste water will be used for landscaping, DG set cooling and horticulture purpose. The solid waste generated from the buildings will be 1500 kg/day and disposed as per the MSW Rules, 2000. The parking space is proposed for parking of 1072 cars.

3. EAC after due consideration of the relevant documents submitted by the project proponent and additional clarifications furnished in response to its observations have recommended the grant of environmental clearance for the project mentioned above subject to compliance with EMP and other stipulated conditions. Accordingly, the Ministry hereby accords necessary environmental clearance for the project under Category 8(*a*) of the EIA Notification, 2006 subject to the strict compliance with the specific and general conditions mentioned below:"

10. EC was granted, subject to certain conditions. We may refer to certain relevant conditions which read as under:

"*Part A—Specific conditions*

I. Construction phase

* * *

v. Permission to draw and use groundwater for construction work shall be obtained from competent authority prior to construction/operation of the project.

* * *

5. In the case of any change(s) in the scope of the project, the project would require a fresh appraisal by this Ministry."

Concept of "built-up area" under the Notification dated 14-9-2006

11. It is not disputed that EC was granted for built-up area of 57,658.42 sq m. The main dispute is with regard to the interpretation of the term "built-up area". The case of the project proponent is that the term "built-up area" is synonymous with "floor space index" or FSI and that the constructed area, which is exempted from FSI area or is a non-FSI area is not a part of the "built-up area". On the other hand, the submission made by the original applicant as well as by the learned Additional Solicitor General appearing for the Ministry of Environment, Forests and Climate Change is that the built-up area will cover all constructed area and the concept of FSI area or non-FSI area is totally alien to environmental laws.

12. The learned Senior Counsel for the project proponent has drawn our attention to the Development Control Rules for Pune Municipal Corporation, Pune, 1982 ("DCR", for short). Under DCR, no building can be constructed without grant of building permission/commencement certificate by Pune Municipal Corporation. There is a detailed procedure for obtaining the building permission/commencement certificate wherein layout plans, building plans, etc. have to be submitted. The main emphasis was on Rule 2.13 of DCR, which defines "built-up area" as follows:

"**2.13.** ***Built-up area***.—Area covered immediately above the plinth level by the building or external area of any upper floor whichever is more excepting the areas covered by Rule 15.4.2."

Rule 2.39 defines "floor area ratio" as follows:

"**2.39.** ***Floor area ratio (FAR)***.—The quotient obtained by dividing the total covered area (plinth area) on all floors excluding exempted areas as given in Rule 15.4.2 by the area of the plot.

$$\text{FAR} = \frac{\text{Total converted area on all floors}}{\text{Plot area}}$$

Note.—The term FAR is synonymous with floor space index (FSI)."

13. Strong reliance is placed on Rule 15.4.2, which reads as under:

"**15.4.2.** In addition to Rules 15.4.1.1(*a*), (*b*) and (*c*) and 17.7.3, the following shall not be included in covered area or FAR and built-up area calculations:

(*a*) A basement or cellar space under a building constructed on stilts and used as parking space, and air conditioning plant rooms used as accessory to the principal use;

(*b*) Electric cabin or substation, watchman's booth of maximum size of 1.6 sq m with minimum width or diameter of 1.2 m, pump house, garage shaft, space required for location of fire hydrants, electric fittings and water tanks;

(*c*) Projection as specifically exempted under these Rules;

(*d*) Staircase room and/or lift rooms above the topmost storey, architectural features, chimneys, elevated tanks of dimensions as permissible under these Rules;

Note.—The shaft provided for lift shall be taken for covered area calculations only on one floor up to the minimum required as per these Rules;

(*e*) One room admeasuring 2 m × 3 m on the ground floor of cooperative housing societies or apartment owners/cooperative societies buildings and other multi-storeyed buildings as office-cum-letter box room;

(*f*) Rockery, well and well structures, plant, nursery, water pool, swimming pool, (if uncovered) platform round a tree, tank fountain, bench, chabutra with open top and unenclosed sides by walls, ramps, compound wall, gate, slide, swing, overhead water tank on top buildings;

(*g*) (*Deleted*);

(*h*) Sanitary block subject to provision of Rule 15.4.1(*a*) and built-up area not more than 4 sq m."

14. The contention of the learned Senior Counsel appearing for the project proponent is that while calculating the built-up area the constructions mentioned in Rules 15.4.1.1(*a*), (*b*) and (*c*) and Rule 17.7.3 in addition to the

areas specifically exempted under Rule 15.4.2 are to be excluded. He submits that if the built-up area is calculated in accordance with DCR then the project proponent has till date not constructed the built-up area of 57,658.42 sq m, which it was permitted to construct under the EC granted to it on 4-4-2008.

15. On the other hand, the stand of the Union of India and the original applicant is that built-up area means all area which is covered regardless of the area being FSI or non-FSI in terms of the EIA Notification of 2006. The building/construction projects are covered by Item 8 of the schedule to the EIA Notification dated 14-9-2006. Construction of a project which is covered under the schedule can be commenced only after obtaining EC in terms of Para 2 of the said notification. The schedule itself categorises the various projects and activities into two categories being "Category A" and "Category B". "Category A" projects require clearance by the Central Government in the Ministry of Environment, Forests and Climate Change on the recommendation of the Expert Appraisal Committee to be constituted by the Central Government whereas those activities which form "Category B" of the schedule including modernisation and expansion of such projects require EC from the State/Union Territory Environment Impact Assessment Authority (SEIAA) and such authority is required to base its decision on the recommendation of the State/Union Territory Level Expert Appraisal Committee (SEAC). There is further division of "Category B" into B-1 and B-2. B-1 projects require Environmental Impact Assessment (EIA) Report to be prepared and scoping to be done whereas B-2 projects do not require any Environmental Impact Assessment Report. Item 8 of the schedule, with which we are concerned, reads as follows:

"(1)	(2)	(3)	(4)	(5)
8		***Building/Construction projects/Area development projects and townships***		
(*a*)	Building and construction projects		≥20,000 sq m and <1,50,000 sq m of built-up area#	#(built-up area for covered construction; in the case of facilities open to the sky, it will be the activity area)
(*b*)	Townships and area development projects		Covering an area ≥50 ha and or built-up area ≥1,50,000 sq m ++	++All projects under Item 8(*b*) shall be appraised as Category B-1."

16. From a bare perusal of the two hashtags (#) in Columns 4 and 5 of Item 8(*a*), it is apparent that what is shown under Column 5 is actually a continuation of Column 4 and basically it describes or defines "built-up area" to mean covered construction and if the facilities are open to the sky, it will be taken to be the activity area. This by itself clearly shows that under the notification of 2006, all constructed area, which is covered and not open to the sky has to be treated as "built-up area". There is no exception for non-FSI area.

17. Indeed, the concept of FSI or non-FSI has no concern or connection with grant of EC. The same may be relevant for the purposes of building plans under municipal laws and regulations but it has no linkage or connectivity with the grant of EC. When EC is to be granted, the authority which has to grant such clearance is only required to ensure that the project does not violate environmental norms. While projects and activities, as mentioned in the notification, may be allowed to go on, the authority while granting permission should ensure that the adverse impact on the environment is kept to the minimum. Therefore, the authority granting EC may lay down conditions which the project proponent must comply with. While doing so, such authority is not concerned whether the area to be constructed is FSI area or non-FSI area. Both will have an equally deleterious effect on the environment. Construction implies usage of a lot of materials like sand, gravel, steel, glass, marble, etc., all of which will impact the environment. Merely because under the municipal laws some of this construction is excluded while calculating the FSI is no ground to exclude it while granting the EC. Therefore, when EC is granted for a particular construction it includes both FSI and non-FSI areas. As far as environmental laws are concerned, all covered construction, which is not open to the sky is to be treated as built-up area in terms of the EIA Notification dated 14-9-2006.

Notification of 4-4-2011

18. Our attention has been drawn to the Notification dated 4-4-2011 issued by the Ministry of Environment and Forests. By means of this notification, the words of Column 5 against Item 8(*a*) have been replaced and substituted as under:

> "The built-up area for the purpose of this Notification is defined as 'the built-up or covered area on all the floors put together including basement(s) and other service areas, which are proposed in the building/construction projects'."

This notification clearly defines "built-up area" as all constructed area including basement and service areas without any exception.

19. The learned Senior Counsel appearing for the project proponent has submitted that this notification is only prospective in nature and, therefore, will not affect the notification of 2006. On the other hand, it has been submitted by the original applicant that this is only a clarificatory notification and as such it will come into force with effect from 2006. In our opinion, it is not at all necessary to decide whether this notification is clarificatory or is in substitution of the original notification of 2006. We say this because as held by us above, there is no ambiguity with regard to the definition of "built-up area" even under the notification of 2006 and it covers all constructed area not open to the sky. The notification of 2011 only provides that the built-up area or covered area shall be the area of all floors put together including basement(s) and other service areas. We may again re-emphasise that this definition also is in consonance with the concept of grant of EC for construction as explained

above and it is obvious that the concept of FSI or non-FSI area is alien to environmental laws.

Clarification dated 7-7-2017

20. Strong reliance has been placed by the project proponent on the office memorandum dated 7-7-2017 issued by Dr Ashish Kumar, Joint Director, Ministry of Environment, Forests and Climate Change. The said office memorandum reads as follows:

F. No. 22-35/2017-IA.III
Government of India
Ministry of Environment, Forests and Climate Change
(Impact Assessment Division)
******

Indira Paryavaran Bhawan
Jor Bag Road, Aliganj,
New Delhi - 110 003
Dated 7-7-2017

OFFICE MEMORANDUM

Sub.: Clarification on the date of applicability of Notification No. S.O.(E) 695 dated 4-4-2011 issued by MoEF & CC defining "built-up area" of the project.

The Ministry is in receipt of a reference dated 3-4-2017 from Confederation of Real Estate Developers Association of India (CREDAI) seeking clarification on the abovementioned subject. CREDAI has requested that the definition of built-up area (BUA) given vide Notification No. S.O. 695(E) dated 4-4-2011 should have prospective effect.

2. The matter has been examined in the Ministry. BUA defined in Notification No. S.O. 1533 (E) dated 14-9-2006 mentions at Item 8(*a*) Columns 4 and 5 "built-up area for covered construction, in the case of facilities open to sky, it will be the activity area".

3. The Ministry has further defined BUA vide its Notification No. S.O. 695 (E) dated 4-4-2011 which reads as, "the built-up or covered area on all the floors put together including its basement and other service areas, which are proposed in the building or construction project".

4. The definition provided in the Ministry's notification will have its effect from the prospective date of the notification only. The projects which are not covered in the period of above notifications should be assessed as per the definition of built-up area provided in the building bye-laws or Development Control Regulation (DCR) of the local authorities in the States.

5. This issues with approval of competent authority.

sd/-
(Dr Ashish Kumar)
Joint Director Ph: 011-24695474
Email: ashish.k@nic.in

All States/UTs/SIEAAs/MoEF & CC Divisions

21. It is urged on the basis of the aforesaid memorandum that prior to the Notification dated 4-4-2011, the built-up area had to be calculated and assessed as per the building bye-laws or the Development Control Regulations of the local authorities in the States. On behalf of the original applicant, it has been urged that this memorandum is meaningless and that it has been issued when the matter was pending before NGT, at the instance of one of the Directors of the project proponent, Shri Atul Goel, who was Joint Secretary of Confederation of Real Estate Developers Association of India (CREDAI), Pune.

22. Without going into this aspect of the matter, we are clearly of the view that such an office memorandum could not and should not have been issued. The Notification dated 14-9-2006 is a statutory notification issued in terms of Rule 5(3) of the Environment (Protection) Rules, 1986 which provides that before such a notification is issued, the Central Government has to give notice of its intention of issuing a notification and objections to the same are invited. No doubt the Central Government is empowered in public interest to dispense with the requirement of notice but this obviously has to be done in exceptional cases. The Notification dated 14-9-2006 was issued by the Central Government and published in the gazette after inviting objections from the public. The first clarification with regard to this notification was issued on 4-4-2011 to which we have adverted above. These two decisions of the Central Government which were notified as per the provisions of law could not have been set at naught by the Joint Director even if it was issued with the approval of a higher authority. We are of the view that since such decision has not been notified in the gazette, the statutory Notification dated 14-9-2006 and its subsequent clarification dated 4-4-2011 could not have been virtually set aside by this office memorandum.

23. We are also of the view that the so-called office memorandum is not at all clarificatory in nature. As held by us above, the notification of 2006 with regard to "built-up area" was absolutely clear and needed no clarification. We fail to understand how the concept of built-up area as understood in the building bye-laws or DCR could be introduced into the notification of 2006 by this office memorandum which virtually made the notification of 2006 totally redundant. Therefore, we quash the office memorandum dated 7-7-2017.

24. This is not the first time that we have noticed such clarificatory communications being issued by the officials of the Ministry of Environment, Forests and Climate Change, which virtually have the effect of nullifying the statutory provisions and notifications. We have adverted to some of these communications in our judgment in *Common Cause* v. *Union of India*[3]. We expect the officials of the Ministry of Environment, Forests and Climate Change to take a stand which prevents the environment and ecology from being damaged, rather than issuing clarifications which actually help the project proponents to flout the law and harm the environment.

3 (2017) 9 SCC 499

25. In view of the above, we are clearly of the view that the EC granted to the project proponent on 4-4-2008 was for constructing a total built-up area of 57,658.42 sq m and this would include all covered construction not open to the sky. No artificial division on the basis of FSI and non-FSI area can be made. Therefore, NGT was fully justified in coming to the conclusion that the construction raised by the project proponent was in total violation of the EC granted to it.

Environmental clearance dated 20-11-2017

26. The project proponent has drawn our attention to the EC for expansion of the project in question granted to it by the State Level Environment Impact Assessment Authority (SEIAA) on 20-11-2017. We may note that this clearance indicates that the existing construction comprises of 738 flats and 115 shops which have been completed, 69 flats and 2 shops which are under construction, meaning thereby that 807 flats and 117 shops are already in existence and in addition thereto 454 more flats and cultural centre are sought to be constructed. This will take the total number of flats to 1261 and number of shops to 117. We may also notice that SEIAA has laid down general conditions for pre-construction phase and the first condition is as follows:

> "(1) This environmental clearance (EC) is issued for total built-up area of 1,47,219.45 m^2 as approved by local planning authority. It is noted that the total proposed construction area is 1,47,219.45 m^2 which includes the area of previous EC (dated 4-4-2008) 57,658.42 m^2 and the proposed expansion area of 89,561.03 sq m. However, the above area of 1,47,219.45 sq m is notional as the non-FSI area component of the previous EC is not included in 1,47,219.45 m^2. After considering the non-FSI area of the previous EC, the total built-up area becomes 1,81,230.94 m^2. SEIAA has also taken note of the clarification issued by MoEF and CC vide office memorandum dated 7-7-2017, stating the definition of built-up area will be assessed as per the building bye-laws or DCR of the local authorities in the States."

27. The aforementioned condition itself clearly shows that the non-FSI area constructed by the project proponent under first EC of 4-4-2008 has not been taken into consideration. The project proponent has raised construction in Plot No. 1 of an FSI area measuring 48,424.66 sq m, and non-FSI area measuring 46,088.47 sq m. Therefore, the total construction raised in Plot No. 1 is 94,513.13 sq m. In Plot No. 2, the construction raised on an FSI area is 630.55 sq m and on the non-FSI area is 4,858.57 sq m and, therefore, the total construction already raised in Plot No. 2 is 5489.12 sq m. The total construction raised by the project proponent is 1,00,002.25 sq m against the built-up area of 57,658.42 sq m mentioned in the EC of 4-4-2008. This could not have been ignored by SEIAA.

28. In case the total construction raised by the project proponent is taken as 1,00,002.25 sq m and if the area of the proposed construction is added then the project will fall in B-1 category and, therefore, SEIAA had no authority to

grant EC by treating the project as falling under Category B-2. Furthermore, the EC dated 20-11-2017 is also illegal as the same has been granted on the presumption of the order dated 31-5-2016 passed by the Principal Secretary, Environment Department, State of Maharashtra holding that the construction of 18 buildings instead of 12 buildings is permissible. The EC completely lost sight of the fact that the order dated 31-5-2016 was quashed and set aside by NGT in its order dated 27-9-2016[1]. We may note that the official who passed the order on 31-5-2016 was the same official, who held the office of Member-Secretary of SEIAA, which granted environmental clearance on 20-11-2017. Therefore, the EC dated 20-11-2017 was beyond the authority of SEIAA and was granted under a totally false assumption and the same is therefore quashed and set aside.

Allegations made by the original applicant against various officials

29. NGT in its order dated 27-9-2016[1], has found that there was suppression of facts by the officers of PMC. NGT also directed the Chief Secretary to the State of Maharashtra to take notice of the conduct of the officers who were misleading the Department of Environment. Costs were imposed on PMC, Department of Environment and SEIAA. This has been challenged before us by PMC.

30. The original applicant, both in his original application filed before NGT and in appeal filed before us as well as in other proceedings, has made serious allegations against individual officers of PMC as well as SEIAA and specially the Principal Secretary, Environment Department, Government of Maharashtra. However, for reasons best known to the original applicant, none of these individuals has been made a party in personal capacity in these proceedings. The law is well settled that no person can be condemned unheard. It would, therefore, not be fair on our part, to deal with allegations made against individuals who are not parties to the petition and who have had no chance to reply to the allegations levelled against them. Therefore, we refrain from commenting on the conduct of the officials in their individual capacity.

31. However, as far as their official capacity is concerned, we are of the view that NGT was fully justified in coming to the conclusion that certain officials of PMC were going out of their way to help the project proponent and we, therefore, uphold the directions given by NGT in its order dated 27-9-2016[1] in this regard. In view of what we have discussed above, it is more than apparent that despite notifications of 2006 and 2011 being clear and unambiguous, the officials of PMC have given an interpretation which was tailor-made to suit the project proponent. This was being done even before the clarification of 7-7-2017 was issued. This clearly indicates that some officials of PMC were espousing the case of the project proponent at the cost of the environment.

32. We may also observe that prima facie we are of the view that the Principal Secretary, Environment Department, Government of Maharashtra

1 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4213

has not acted in a fair and transparent manner. The allegations made by the original applicant cannot be lightly brushed aside. In the original order dated 27-9-2016[1], NGT held as follows: (*Tanaji Balaseheb case*[1], SCC OnLine NGT para 42)

> "42. From the extracted portion of the order dated 31-5-2016 of Principal Secretary, Environment Department, it is seen that he has declared construction of 18 buildings on the site instead of 12 buildings is permissible which, according to him, only a changes on configuration of buildings. This opinion undoubtedly is based on his erroneous conclusion that total BUA which is nothing but FSI consumed i.e. 48,617.14 sq m which is within the EC limit as against the actual construction activity which has exceeded over 1,00,000 sq m BUA. Hence, we set aside that order/communication dated 31-5-2016."

The official holding the post of Principal Secretary must have been aware of these directions because he was a party to the proceedings before NGT. Despite that, while granting fresh EC on 20-11-2017, this official noticed that reference to the Environment Department for verification of files was withdrawn vide letter dated 31-5-2016 and the matter has been considered afresh. When the letter dated 31-5-2016 had been quashed the obvious result would be that action had to be taken in accordance with the earlier directions in the 27th meeting of SEAC III (Non-MMR) held from 10-3-2015 to 13-3-2015 and the 87th meeting of SEIAA held on 10-8-2015 to 12-8-2015. This was not done. His actions need to be looked into and, therefore, we uphold the direction given by NGT directing the Chief Secretary to the State of Maharashtra to take notice of the conduct of the officers concerned. We further direct the Chief Secretary to file detailed report in respect of the conduct of the then Principal Secretary, Department of Environment to NGT within 3 months which will thereafter pass appropriate directions in the matter.

Challenge to the order dated 8-1-2018 passed in Tanaji Balasaheb Gambhire v. Union of India[2]

33. This order has been challenged both by the project proponent by amending the appeal and by the original applicant by filing a separate appeal.

34. Section 19(4)(*f*) of the National Green Tribunal Act, 2010 provides that the Tribunal shall have the same powers as are vested in civil courts while trying a suit in respect of matters relating to review of its decisions. Therefore, the power of review vested with NGT is akin to the power vested with the civil court. As such, the principles which govern the exercise of review jurisdiction before a civil court will apply with equal force to NGT.

35. Rule 22(2) of the National Green Tribunal (Practices and Procedure) Rules, 2011 provides that a review application shall ordinarily be heard by the Tribunal at the same place of sitting which has passed the order unless the Chairperson may, for reasons to be recorded in writing, direct it to be heard by

1 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4213
2 2018 SCC OnLine NGT 302

the Tribunal sitting at any other place. Sub-rule (3) of Rule 22 provides that ordinarily review application shall be disposed of by circulation.

36. Since the powers of review which NGT exercises are akin to those of a civil court, it would be pertinent to refer to the relevant portions of Order 47 of the Civil Procedure Code, 1908, which read as follows:

> "**1.** ***Application for review of judgment.***—(1) Any person considering himself aggrieved—
>
> (*a*) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
>
> (*b*) by a decree or order from which no appeal is allowed, or
>
> (*c*) by a decision on a reference from a Court of Small Causes,
>
> and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.
>
> (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.
>
> * * *
>
> **5.** ***Application for review in court consisting of two or more Judges.***— Where the Judge or Judges, or any one of the Judges, who passed the decree or made the order, a review of which is applied for, continues or continue attached to the court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the court shall hear the same."

37. The project proponent has urged various grounds to challenge the order passed in the review application. The first ground is that whereas the original order was passed by a Bench comprising of Dr Justice Jawad Rahim and Dr Ajay A. Deshpande, the review application was heard and decided by a Bench comprising of Justice U.D. Salvi and Dr Nagin Nanda. It has been urged that Dr Justice Jawad Rahim continues to be a Judicial Member of NGT and, in fact, was sitting in the Western Bench at Pune on 8-1-2018 when the impugned judgment[2] in review was pronounced by NGT.

38. We are clearly of the view that a review petition should normally be heard by the same Bench which originally decided the matter. A review

2 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2018 SCC OnLine NGT 302

petition should not be heard by any other Bench unless it is impossible or totally impracticable for the earlier Bench to hear the matter. In a review petition, like in the present case, where the review petitioner contends that certain arguments raised by him have not been considered then it is only the Judges who originally heard the matter who can decide whether such point was urged or not. In the present case, the review application was based mainly on the contention that the affidavit dated 18-5-2016 was not taken into consideration by the Bench.

39. It is well known that parties raise various contentions in their pleadings or in their evidence. On many occasions when arguments are heard many of the pleas are not urged. Any judicial authority including NGT which is presided over by a judicial member who may be a retired Judge of this Court or of a High Court is expected to deal with all contentions raised before it. There is a presumption that judicial authorities must have dealt with all the contentions raised before them. If a party urges that some of the contentions urged by it have not been taken into consideration then it has to file a review application and it is but obvious that such review application should be heard by the same Bench which had originally heard the matter.

40. Sub-rule (3) of Rule 22 of the National Green Tribunal (Practices and Procedure) Rules, 2011 clearly lays down that a review application shall be disposed of by circulation. If the review application is to be disposed of by circulation then there is no problem in the matter being circulated before the very same Bench which had earlier heard the matter. This can be done even at a place which may be different from the original place of hearing. It is only if the Bench decides to give oral hearing in the review application and notice is issued to the opposite party that sub-rule (2) of Rule 22 will come into operation. According to sub-rule (2), the matter should ordinarily be heard at the same place of sitting where it was originally decided. However, this is not a mandatory direction because sub-rule (2) itself contemplates that the matter shall "ordinarily" be heard at the same place. In tribunals like NGT where members may be transferred from one Bench to another or may be attending a Bench on circuit then problems can sometimes arise. These issues can be easily resolved by resorting to the latest technology and if necessary, the arguments in such cases can be heard by videoconferencing. The normal rule that the same Bench should hear the review application should not be disturbed unless it is virtually impossible for the original Bench to hear the matter or the members of the Bench themselves opt not to hear the matter.

41. In this behalf, we must remind ourselves that the power of review is a power to be sparingly used. As pithily put by V.R. Krishna Iyer, J., "A plea for review, unless the first judicial view is manifestly distorted, is like asking for the moon"[4]. The power of review is not like appellate power. It is to be exercised only when there is an error apparent on the face of the record. Therefore, judicial discipline requires that a review application should be heard by the same Bench. Otherwise, it will become an intra-court appeal to another

4 *Northern India Caterers (India) Ltd.* v. *Lt. Governor of Delhi*, (1980) 2 SCC 167, p. 173, para 14 : 1980 SCC (Tax) 222

Bench before the same court or tribunal. This would totally undermine judicial discipline and judicial consistency.

42. We may refer to the judgment of this Court in *Malthesh Gudda Pooja* v. *State of Karnataka*[5]. In that case, a writ appeal was disposed[6] of by a Division Bench comprising of Hon'ble V. Gopala Gowda and L. Narayana Swamy, JJ., at the Dharwad Circuit Bench of the Karnataka High Court. Thereafter, a review petition was filed before a Bench comprising of Hon'ble K. Sreedhar Rao and Ravi Malimath, JJ. An objection was raised that the review petition should be heard by the same Judges who had originally heard the matter but this objection was overruled and the review petition was allowed[7] and the appeal was ordered to be listed afresh before the Division Bench. This appeal was listed before the Dharwad Circuit Bench consisting of Hon'ble D.V. Shailendra Kumar and N. Ananda, JJ. This Bench held that the order of review passed was a nullity since the Judges who had heard the review should not have heard the same especially when the Judges of the original Bench were available. The matter came to this Court and this Court after referring to Order 47 Rule 5 CPC and Rule 5 of the High Court of Karnataka Rules, 1959 and taking note of the fact that the Chief Justice of the Karnataka High Court had passed an order that the review petition be listed as per roster held as follows: (SCC pp. 341-42, paras 18-20)

> "*18.* Order 47 Rule 5 of the Code and Chapter 3 Rule 5 of the High Court Rules require, and in fact mandate that if the Judges who made the order in regard to which review is sought continue to be the Judges of the Court, they should hear the application for review and not any other Judges unless precluded by death, retirement or absence from the Court for a period of six months from the date of the application. An application for review is not an appeal or a revision to a superior court but a request to the same court to recall or reconsider its decision on the limited grounds prescribed for review. The reason for requiring the same Judges to hear the application for review is simple. Judges who decided the matter would have heard it at length, applied their mind and would know best, the facts and legal position in the context of which the decision was rendered. They will be able to appreciate the point in issue, when the grounds for review are raised. If the matter should go before another Bench, the Judges constituting that Bench will be looking at the matter for the first time and will have to familiarise themselves about the entire case to know whether the grounds for review exist. Further, when it goes before some other Bench, there is always a chance that the members of the new Bench may be influenced by their own perspectives, which need not necessarily be that of the Bench which decided the case.

5 (2011) 15 SCC 330 : (2014) 2 SCC (Civ) 473
6 *Malthesh Gudda Pooja* v. *State of Karnataka*, 2009 SCC OnLine Kar 919
7 *Malthesh Gudda Pooja* v. *State of Karnataka*, 2009 SCC OnLine Kar 918

19. Benjamin Cardozo's celebrated statement in *The Nature of Judicial Process* (pp. 12-13) is relevant in this context:

> 'There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognise and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions … In this mental background every problem finds its setting. We may try to see things as objectively as we please. Nonetheless, we can never see them with any eye except our own.'

20. Necessarily, therefore, when a Bench other than the Bench which rendered the judgment, is required to consider an application for review, there is every likelihood of some tendency on the part of a different Bench to look at the matter slightly differently from the manner in which the authors of the judgment looked at it. Therefore the rule of consistency and finality of decisions, makes it necessary that subject to circumstances which may make it impossible or impractical for the original Bench to hear it, the review applications should be considered by the Judge or Judges who heard and decided the matter or if one of them is not available, at least by a Bench consisting of the other Judge. It is only where both Judges are not available (due to the reasons mentioned above) the applications for review will have to be placed before some other Bench as there is no alternative. But when the Judges or at least one of them, who rendered the judgment, continues to be members or member of the court and available to perform normal duties, all efforts should be made to place it before them. The said requirement should not be routinely dispensed with."

43. A perusal of the above judgment leaves no manner of doubt that this Court has held that in terms of Order 47 Rule 5 CPC, a review should normally be heard by the same Bench which passed the original order. We may reiterate the reasons given by this Court. These are:

43.1. The Judges who heard the matter originally have applied their mind and would know best the facts and legal position;

43.2. They will be in the best position to appreciate the matter in issue when a review is filed;

43.3. If the matter goes before another Bench that Bench will have to virtually hear the matter afresh;

43.4. Most importantly, when the matter goes to a new Bench the members of the new Bench may go by their own perspective and philosophy which may be totally different to that of the Bench which originally heard the matter.

44. We may again re-emphasise that judicial discipline, judicial traditions and consistency in pronouncements require that the Bench which heard the matter originally should hear the review petition unless it is virtually impractical for the original Bench to hear the matter, or where the members of the original Bench recuse.

45. Another ground raised is that the statutory appeal was already pending in this Court against the original order when the review application was taken up for hearing. It is contended, on the basis of Order 47 Rule 1(2) CPC, that review application should not have been taken up for hearing because the original applicant could have before this Court taken up all the points which he had taken in his review application. It is also contended that this is not a case where there is an error apparent on record and as such the power of review could not have been exercised. As far as the facts of this case are concerned, we are clearly of the view that the original applicant could have raised all issues which he raised in review application even by filing a counter-affidavit in the appeal filed by the project proponent or by challenging the original order in this Court as he has done now. In this context, once this Court was seized of the matter and all issues were being urged, NGT should not have proceeded to hear the review application.

46. We may add that on 21-12-2016[8], the review application itself was listed before the Bench of Dr Justice Jawad Rahim and Dr Ajay A. Deshpande, which adjourned the matter to 25-1-2017 to hear it regarding maintainability of the review application in view of the statutory appeal provided under the National Green Tribunal Act, 2010. However, the matter got listed before the other Bench and on 25-7-2017[9], the said Bench considered this objection raised by the project proponent in terms of Order 47 Rule 1 CPC and the Bench held as follows: (*Tanaji Gambhire case*[9], SCC OnLine NGT)

> "Having perused the record, we find that the appellant is seeking quashing of the order of compensation in totality and the review applicant is seeking enhancement of the compensation granted by the Tribunal. We do not see any commonality in the grounds resorted to by the applicant and appellant in the said appeal. Exception to sub-clause (2) of Order 47 Rule 1 of the Code of Civil Procedure, therefore, does not come to the help of Respondent 9. We are, therefore, of the considered opinion that the review application is maintainable. Plea of non-maintainability of the review application is rejected."

47. We are of the view that the aforesaid finding is incorrect. The project proponent had not only challenged the original order of NGT on the ground that he had not violated the EC but also on the ground that the damages awarded were highly excessive. Therefore, the question that what should be the extent of damages was specifically before this Court. We are, therefore, clearly of the opinion that the Bench hearing the review application erred in holding that the review application was maintainable despite the appeal pending before this Court.

48. We may also note that the Bench which heard the review has rejected all other grounds of review mainly on the ground that there is no error apparent on the face of the record but has only dealt with the issue of enhancement

8 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4217
9 *Tanaji Gambhire* v. *Union of India*, 2017 SCC OnLine NGT 1954

of damages to be imposed on the basis of "carbon footprint" relying on the affidavit dated 18-5-2016. The Bench noted that this affidavit had not been taken into consideration by the earlier Bench. How could the latter Bench hearing the review application know whether any reference was made to this affidavit at the time of original hearing or not? In fact, the project proponent urges that this affidavit was never filed on 18-5-2016.

49. Here, it would be pertinent to mention that according to the original applicant he was given oral permission by the Bench to file such an affidavit on 23-2-2016. We have perused the order dated 23-2-2016[10] and find that it makes no mention of any such request being made. If there is no such request then the question of issuing an oral direction to file such an affidavit does not arise. We may also add that after 23-2-2016, the matter was listed on numerous occasions i.e. 16-3-2016[11], 5-4-2016[12], 18-4-2016[13], 22-4-2016[14], 2-5-2016[15] and 5-5-2016[16] before NGT. In none of the orders there is any reference to carbon footprint or to any affidavit to be filed by the original applicant. If an oral permission had been given, obviously the original applicant would have either filed an application or would have made a request that he wants to file such an affidavit.

50. The affidavit in question is dated 18-5-2016 and it is alleged that it was filed on 18-5-2016. The matter was listed for hearing on 19-5-2016[17] on which date also there is no reference to any such affidavit. It would be pertinent to note that in between the project proponent had filed an MA No. 389 of 2016 before the Principal Bench stating that an interim order dated 23-12-2015[18] had been passed against it and the matter was not being heard and, therefore, it may be heard by a Bench presided over by Dr Justice Jawad Rahim, who apparently was holding Court in the Pune Bench at that time and the Principal Bench allowed the same on 2-5-2016[19] directing that the matter be listed before the Bench presided over by Dr Justice Jawad Rahim. On 19-5-2016, the original applicant sought time stating that he had filed review application against the order dated 2-5-2016[19] before the Principal Bench praying that the matter should be heard by the earlier Bench presided over by Justice U.D. Salvi and, therefore, the matter could not be heard by Dr Justice Jawad Rahim on that day and was further adjourned to 23-5-2016. There is no reference to carbon footprint in the order dated 19-5-2016[17]. On 23-5-2016[20], the matter was heard by the Bench presided over by Dr Justice Jawad Rahim and the orders reserved.

10 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4201
11 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4204
12 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4205
13 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4206
14 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4219
15 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4203
16 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4207
17 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4208
18 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2015 SCC OnLine NGT 838
19 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 1330
20 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4209

In this order also there is no reference to the affidavit with regard to carbon footprint. If the filing of the affidavit would have been brought to the notice of the Bench, it would have recorded in the order that some fresh affidavit had been filed. Subsequently, the project proponent, who is the contesting respondent, filed an application on 20-7-2016 praying that in the meantime he had obtained permission of the Environment Department and SEIAA to which we have adverted hereinabove.

51. The original applicant sought time to file counter-affidavit. The matter was adjourned[21] to 28-7-2016 for rehearing deleting the same from reserved list since there were subsequent developments. On 28-7-2016[22], the matter was got adjourned to 2-8-2016 on which date[23] some execution application for implementation of the interim orders was taken up and direction was issued to PMC. The matter was again taken up on 8-8-2016[24], 19-8-2016[25] and 24-8-2016[26] when the hearing was closed and judgment was pronounced through videoconferencing on 27-9-2016[1]. In none of these orders any mention was made for carbon footprint or to the affidavit on the basis of which the review application was filed. On 23-5-2016, the project proponent filed reply to the affidavit dated 18-5-2016 filed by the original applicant in which they raised objections that such affidavit was not filed on 18-5-2016 and the copy of the same was handed over to them on 20-5-2016 and the original applicant had no permission to file such an affidavit. All these disputed issues as to whether such an affidavit was filed with the permission of the Court or it was referred to in the first hearing or in the second hearing could only be decided by the Bench which had heard the matter on 23-5-2016[20] or on 24-8-2016[26] on which dates the original application was reserved for orders.

52. We are of the considered view that the review application should have been heard by a Bench headed by Dr Justice Jawad Rahim who was admittedly available and in fact continues to be a member of NGT. Therefore, we are constrained to set aside the order passed in *Tanaji Balasaheb Gambhire* v. *Union of India*[2] dated 8-1-2018.

Is demolition the only answer?

53. The next issue which arises is that what we should do with the construction. A large number of flats are already occupied and a large number of persons have paid money for occupying these flats. The learned counsel appearing for those persons who have purchased the flats urged that the flats should not be demolished otherwise they shall be put to great monetary loss.

21 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4215
22 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4210
23 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4211
24 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4202
25 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4212
26 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4214
1 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4213
20 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4209
2 2018 SCC OnLine NGT 302

As pointed out above, now there are 807 flats and 117 shops which are either constructed or under construction. These flats are 1, 1.5 and 2 BHK flats and small shops and offices. The project proponent has already taken money from these persons and a large number of flats and shops have already been occupied and even where the remaining flats and shops are not occupied, persons belonging to the middle class have invested their life's earnings in this project. Keeping in view the interest of these third parties who were not parties before NGT, we are of the view that in the peculiar facts and circumstances of the case, demolition is not the answer. This would put innocent people at loss. Normally, this Court is loath to legalise illegal constructions but in the present case we have no option but to do so.

54. We hasten to clarify that the project proponent cannot be permitted to build any more flats. What we are permitting him to do is to only complete construction of 807 flats, 117 shops/offices and cultural centre including the clubhouse. We make it clear that he shall not be allowed to build the two buildings in which he was to construct 454 tenements, and will obviously have to return the money with interest @ 9% p.a. to the individual(s) who have invested in the same. There is no equity in favour of these persons since the plan to raise this construction was submitted only after 2014 when the validity of the earlier EC had already ended. Therefore, though we uphold the order of NGT dated 27-9-2016[1] that demolition is not the answer in the peculiar facts of the case, we also make it clear that the project proponent cannot be permitted to build nothing more than 807 flats, 117 shops/offices, cultural centre and clubhouse.

Whether the original applicant is entitled to special damages?

55. On behalf of the original applicant various issues were raised before us which had not been raised before NGT and find no mention either in the original order or even in the order under review. We are not considering those issues. It was urged that the project proponent has reduced the area of cultural centre. This averment is not correct as pointed out by the Senior Counsel appearing for the Union of India. The development plan is not only for the area under the project but covers a much larger area where more than one builder and projects may be involved. It is not the responsibility of only one builder to provide the entire community services and these have to be provided pro rata by all developers of projects in the area. It was also alleged that the builder had built 3 basements which are illegal.

56. On the other hand, it was contended by the learned Senior Counsel for the project proponent that one of the basements has already been blocked and the other two basements shall also not be put in use and would be completely blocked off. We make it clear that PMC and SEIAA will ensure that the project proponent blocks the basements in such a manner that they can never be put to any use. Another argument raised by the original applicant was that the project proponent had stated that though he would not use any groundwater, however, it has utilised the groundwater and violated the condition of the EC. Reliance

1 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4213

is placed on certain photographs showing water being pumped. On the other hand, on behalf of the project proponent it has been urged that this water was being pumped out from the excavated area when the building was built and the water level had risen. We cannot decide this disputed question of fact in these proceedings.

57. We may also point out that in this case the original applicant has tried to project the case as if he is filing the case in the public interest and has prayed for certain general directions. He has also claimed special damages for himself. The main grievance of the original applicant is with regard to the violation of the EC and according to him these violations started in the year 2009. The original applicant had applied for a flat in the project in question and had issued notice to the project proponent on 21-10-2011 about deficiency in service. This notice was replied to on 17-11-2011. Thereafter, the original applicant filed Consumer Complaint No. 95 of 2012 on 22-2-2012. This complaint was decided on 20-11-2014. Thereafter, the order of the District Consumer Disputes Redressal Forum was challenged before the State Consumer Disputes Redressal Commission both by the project proponent and original applicant in February 2015. It appears that thereafter there were complaints and counter-complaints filed by the parties against each other and the project proponent filed a civil suit for defamation against the original applicant on 2-12-2015 and it was only thereafter on 7-12-2015 an application was filed in NGT by the original applicant. We are highlighting these facts only to emphasise the fact that this litigation is obviously not a public interest litigation. Therefore, the claim of the original applicant to award him special damages cannot be accepted.

Quantification of damages

58. We need to decide and re-assess the issue of damages since the original applicant has also challenged the original order of NGT. While assessing the damages we may note certain facts:

58.1. The EC was granted on 4-4-2008 but construction commenced after issuance of consent to establish dated 20-6-2009 and the EC would be valid for a period of 5 years from the date of such consent i.e. up to 19-6-2014;

58.2. The EC dated 4-4-2008 was granted for construction of built-up area of 57,658.42 sq m, whereas admittedly, as of now the constructed built-up area is 1,00,002.25 sq m. Therefore, there is clear-cut violation of the terms of the EC;

58.3. Any construction raised after 19-6-2014 is without any EC especially since we have held that EC granted on 20-11-2017 is invalid.

Carbon footprint

59. The main case of the original applicant is that the damages should be assessed on a scientific basis by calculating the damage caused to the environment by the project proponent on the basis of "carbon footprint". In the

absence of detailed submissions, we find ourselves totally unequipped to go into this aspect of the matter.

60. In the original application filed by the original applicant before NGT, there is no reference to carbon footprint. Even when evidence was initially led, no reference was made to the same. The concept of carbon footprint was introduced by the original applicant only in his affidavit dated 18-5-2016. In fact, according to the project proponent, this affidavit was not even filed on 18-5-2016. It appears to us that there is no order of NGT specifically permitting the original applicant to file such an affidavit. The submission of the original applicant is that he was orally permitted to file the same. These disputed questions would have been only decided by the Original Bench and, therefore, we have already set aside the order passed in *Tanaji Balasaheb Gambhire* v. *Union of India*[2] dated 8-1-2018.

61. The courts cannot introduce a new concept of assessing and levying damages unless expert evidence in this behalf is led or there are some well-established principles. We find that no such principles have been accepted or established in the present case. When there are no pleadings in this regard we fail to understand how the concept of carbon footprint can be introduced after evidence has been closed, at the stage of arguments. We cannot assess the impact in actual terms and, therefore, we can only impose damages or costs on principles which have been well settled by law.

62. We may also note that the method to which the original applicant referred to is not part of any law, rule or executive instructions. This method is no doubt used to compensate and impose damages on nations but we cannot apply this method while imposing damages on a person who violates the EC. We may also add that the calculation made by the original applicant in his affidavit dated 18-5-2016 filed before NGT are based on assumptions some of which we have not found to be correct, namely — (*1*) use of groundwater; (*2*) reduction of cultural centre space; (*3*) construction of basements, etc.

63. We may make it clear that we are not laying down the law that damages cannot be assessed on the basis of carbon footprint. In a case where expert evidence in this behalf is led or on the basis of empirical data it is established that by applying the principles of carbon footprint damages can be assessed, the Court may, in the facts and circumstances of the case, rely upon such data but, in the present case, there is no such reliable material.

64. Having held so we are definitely of the view that the project proponent who has violated law with impunity cannot be allowed to go scot-free. This Court has in a number of cases awarded 5% of the project cost as damages. This is the general law. However, in the present case we feel that damages should be higher keeping in view the totally intransigent and unapologetic behaviour of the project proponent. He has manoeuvred and manipulated officials and authorities. Instead of 12 buildings, he has constructed 18; from 552 flats the number of flats has gone up to 807 and now two more buildings having 454 flats are proposed. The project proponent contends that he has made smaller flats

2 2018 SCC OnLine NGT 302

and, therefore, the number of flats has increased. He could not have done this without getting fresh EC. With the increase in the number of flats the number of persons residing therein is bound to increase. This will impact the amount of water requirement, the amount of parking space, the amount of open area, etc. Therefore, in the present case, we are clearly of the view that the project proponent should be and is directed to pay damages of Rs 100 crores or 10% of the project cost, whichever is more. We also make it clear that while calculating the project cost the entire cost of the land based on the circle rate of the area in the year 2014 shall be added. The cost of construction shall be calculated on the basis of the schedule of rates approved by the Public Works Department (PWD) of the State of Maharashtra for the year 2014. In case the PWD of Maharashtra has not approved any such rates then the Central Public Works Department rates for similar construction shall be applicable. We have fixed the base year as 2014 since the original EC expired in 2014 and most of the illegal construction took place after 2014. In addition thereto, if the project proponent has taken advantage of transfer of development rights (for short "TDR") with reference to this project or is entitled to any TDR, the benefit of the same shall be forfeited and if he has already taken the benefit then the same shall either be recovered from him or be adjusted against its future projects. The project proponent shall also pay a sum of Rs 5 crores as damages, in addition to the above for contravening mandatory provisions of environmental laws.

65. Normally, this Court is not inclined to grant ex post facto EC. However, in the peculiar facts of this case, we direct that once the project proponent deposits the amount of damages as directed by us then the project proponent may approach the appropriate authority for grant of EC. The authority may impose such conditions for grant of EC as it deems necessary.

Findings and directions

66. We summarise our findings and directions as follows:

66.1. That built-up area under the notification of 14-9-2006 means all constructed area which is not open to the sky.

66.2. Built-up area under the Notification of 4-4-2011 means all covered area including basement and service areas.

66.3. The communication dated 7-7-2017 is totally illegal and accordingly quashed.

66.4. The original application cannot be treated as a public interest litigation.

66.5. We are not taking note of the allegations levelled against the individuals who have not been arrayed as parties.

66.6. That the order dated 27-9-2016[1] of NGT is upheld except insofar as Direction 1 is concerned.

66.7. The order in review application passed by NGT on 8-1-2018[2] is held to be totally illegal and is accordingly set aside.

1 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4213
2 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2018 SCC OnLine NGT 302

66.8. We uphold the original order dated 27-9-2016[1] holding that the construction raised by the project proponent was in violation of the environmental clearance granted to it on 4-4-2008. We uphold the fine imposed upon PMC and the direction given to PMC to take appropriate action against the erring officials. We also uphold the direction given to the Chief Secretary to the State of Maharashtra and in addition, direct that the Chief Secretary to the State of Maharashtra shall look into the conduct of the official holding the post of Principal Secretary (Environment) to the Government of Maharashtra on 27-9-2016 and will submit his report to NGT within three months from today.

66.9. We impose damages of Rs 100 crores or 10% of the project cost, whichever is higher, on the project proponent and in addition thereto, project proponent will pay Rs 5 crores as levied by NGT in its order dated 27-9-2016[1].

66.10. Project proponent shall not be permitted to raise construction of two buildings having 454 tenements.

66.11. We direct that the project proponent shall only be permitted to complete construction of a total 807 flats, 117 shops/offices and cultural centre including clubhouse.

66.12. The project proponent will only be permitted to seek environmental clearance for completion of the project subject to payment of costs in the aforesaid terms and it may be granted ex post facto environmental clearance in the peculiar facts of the case, on such terms and conditions as the environmental authority deems fit and proper.

66.13. The project proponent is granted six months' time to deposit the amount of damages imposed in terms of Direction 66.9 supra in the Registry of this Court. In case the project proponent does not deposit the amount within six months then all the assets of the project proponent i.e. M/s Goel Ganga Developers India Pvt. Ltd. as well as its Directors shall be attached and the amount of damages shall be recovered by sale of those assets. It is further directed that in case this amount is not deposited within the period of six months then the licence/registration/permission granted to M/s Goel Ganga Developers India Pvt. Ltd. to develop any "real estate project" within the meaning of the Real Estate (Regulation and Development) Act, 2016 shall be cancelled and the project proponent i.e. M/s Goel Ganga Developers India Pvt. Ltd. and its Directors shall not be granted permission to develop any "real estate project" under the Real Estate (Regulation and Development) Act, 2016 without permission of this Court.

66.14. The matter be listed on 22-10-2018 for issuing appropriate directions as to how the amount of damages are to be utilised;

67. All the appeals are disposed of in the aforesaid terms. Pending application(s), if any, shall also stand disposed of.

---

1 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4213

(2018) 4 Supreme Court Cases 218

(BEFORE MADAN B. LOKUR AND DEEPAK GUPTA, JJ.)

GOA FOUNDATION .. Petitioner;

Versus

SESA STERLITE LIMITED
AND OTHERS .. Respondents.

SLP (C) No. 32138 of 2015† with Nos. 32699-727 of 2015,
WPs (C) Nos. 711 and 720 of 2015, decided on February 7, 2018

A. **Mines and Minerals — Mines and Minerals (Development and Regulation) Act, 1957 — Ss. 8(2), (3), 10-B and 11 — Mining leases declared to be illegal in *Goa Foundation*, (2014) 6 SCC 590 — Grant of second renewal — Impermissibility of — State of Goa should have granted fresh mining leases instead of granting a second renewal — Such second renewal, held, illegal in view of *Goa Foundation*, (2014) 6 SCC 590 — Second renewal of mining leases set aside — Consequential directions issued**

— Court in *Goa Foundation case* was aware and conscious of illegal and indiscriminate mining for which it did not interfere with State Government's Order dt. 10-9-2012 suspending said mining leases and MoEF's Order dt. 14-9-2012 keeping in abeyance environmental clearance — Thus Court never intended renewal of said illegal mining leases but instead intended that State should grant of fresh mining leases — When Court declared that State Government should decide in what manner mining leases are to be granted in future, it was explicit and related to grant of fresh mining leases and not a second renewal — Subsequent events like dismissal of IAs also confirm this intention — (Paras 37 to 46)

— Though renewal of lease is a fresh lease, the converse is not true — When Court directed grant of "fresh leases" in *Goa Foundation case*, it was a deliberate and conscious decision, distinct and different from granting a second renewal of expired mining leases — (Paras 57 and 59)

— Though State of Goa at first correctly understood judgment in *Goa Foundation case*, it was overtaken by erroneous interpretation of said judgment given in *Lithoferro*, 2014 SCC OnLine Bom 997 on 13-8-2014 — High Court in said judgment incorrectly understood judgment in *Goa Foundation case* — Decision in *Lithoferro case* set aside — (Paras 47 to 53, 153 and 153.5)

— Consequential directions in view of illegal grant of mining leases — Time given to mining leaseholders to stop mining by 16-3-2018 — Authorities directed to grant fresh mining leases and fresh environmental clearances

† Arising from the Judgment and Order in *Lithoferro* v. *State of Goa*, 2014 SCC OnLine Bom 997 : (2015) 3 AIR Bom R 32 (Bombay High Court, Panaji Bench, WP No. 293 of 2014, dt. 13-8-2014)

— [Ed.: *See* Shortnotes *E* and *G* for illegality on account of lack of fresh environmental clearances] — Investigation reports should be given by various investigating teams entrusted with said task and State of Goa should implement said reports unless there are very good reasons for rejecting them — Government take steps for recovery of amounts due from mining leaseholders — Property Law — Transfer of Property Act, 1882 — Ss. 105 and 111 — Though renewal of lease is a fresh lease, the converse is not true — Public Accountability, Vigilance and Prevention of Corruption — Government Grants, Largesse, Public Property and Premises — Illegal mining (Paras 37 to 60 and 154.1)

The Central Government on 2-11-2010 appointed Justice M.B Shah, a former Judge of the Supreme Court as Commission of Inquiry under Section 3, Commissions of Inquiry Act, 1952 to inquiry into large-scale illegal mining of iron ore and manganese ore. Pursuant to the reports of the said Commission, with respect to illegal mining in the State of Goa, the State Government of Goa, by order dated 10-9-2012, suspended all mining operations with effect from 11-9-2012. The Ministry of Environment and Forests (MoEF), by its order dated 14-9-2012, kept in abeyance the environmental clearances granted to 137 mining leases.

A PIL was filed in the Supreme Court for terminating the said mining leases. Several writ petitions were also filed in the High Court for quashing the two orders, that is, order dated 10-2-2012 suspending the mining leases and order dated 14-9-2012 keeping in abeyance the environmental clearances.

The Supreme Court in *Goa Foundation*, (2014) 6 SCC 590 declared the said mining leases to be illegal and further held that no second renewal of mining leases was permissible without express order in terms of Section 8(3), MMDR Act. And that only fresh mining leases as per law could be granted.

However, the High Court vide its order in *Lithoferro*, 2014 SCC OnLine Bom 997, wrongly interpreted the above order of the Supreme Court and held that renewal of a lease is also a fresh grant.

The Central Government contemplated introduction of Section 10-B, in the MMDR Act which provided that leases in respect of notified minerals could be granted only by way of e-auction by way of competitive bidding. The Ordinance relating to the above amendment was promulgated by the President of India on 12-1-2015. And the Goa Government in great haste also completed the process of second renewal of mining leases on same date, that is on 12-1-2015. To support its said illegal action, the Goa Government had also in great haste, formulated the Goa Grant of Mining Leases Policy, 2014. Thereafter the Goa Government requested the MoEF to lift the abeyance order dated 14-9-2012 in respect of 88 mining leases. MoEF by three orders dated 20-3-2015 lifted the said abeyance order with certain conditions (See paras 31 to 35 for the said conditions).

Thus the following three broad issues arise for consideration in the present case. Firstly, whether second renewal of mining leases was valid. Secondly, whether environmental clearances could have been given in present case. And thirdly, whether the impugned order in *Lithoferro case* was erroneous.

Answering the first two issues in the negative and the third issue in the affirmative, the Supreme Court held as above and below.

There is no doubt that the renewal of a lease is virtually the same as the grant of a fresh lease but a converse direction to grant a mining lease cannot be understood to mean granting a renewal of a mining lease. Obviously, the grant of a fresh lease is not the same as the renewal of a lease and when the Court in *Goa Foundation case* required the State of Goa to grant a fresh lease, it did not require the State to renew the existing (expired) lease. The Court could have explicitly declared and directed the State of Goa to grant a second renewal of the mining leases rather than to say it in a roundabout manner that it should do so by granting a fresh lease equivalent to a renewal. (Para 57)

When the Judges directed the grant of "fresh leases" in *Goa Foundation case* it was a deliberate and conscious decision, distinct and different from granting a second renewal of expired mining leases. (Para 59)

Goa Foundation v. *Union of India*, (2014) 6 SCC 590; *Goa Foundation* v. *Union of India*, (2015) 1 SCC 153, *relied on*

DDA v. *Durga Chand Kaushish*, (1973) 2 SCC 825, *explained* and *distinguished*

Provash Chandra Dalui v. *Biswanath Banerjee*, 1989 Supp (1) SCC 487; *M.C. Mehta* v. *Union of India*, (2004) 12 SCC 118; *State of W.B.* v. *Calcutta Mineral Supply Co. (P) Ltd.*, (2015) 8 SCC 655 : (2015) 4 SCC (Civ) 395; *Common Cause* v. *Union of India*, (2014) 14 SCC 155, *distinguished*

Lithoferro v. *State of Goa*, 2014 SCC OnLine Bom 997 : (2015) 3 AIR Bom R 32, *reversed*

Goa Foundation v. *Union of India*, (2014) 6 SCC 738; *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590 (footnote 17); *State of M.P.* v. *Krishnadas Tikaram*, 1995 Supp (1) SCC 587; *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590 (footnote 4); *Gajraj Singh* v. *STAT*, (1997) 1 SCC 650, *referred to*

B. **Constitution of India — Arts. 14, 39(b), 298, 299 and Preamble — Mode of alienation of natural resource — Freedom available to executive in this regard and scope of judicial review — Principles reiterated**

— Alienation through competitive bidding or auction, reiterated, as per law laid down in *Natural Resources Allocation*, (2012) 10 SCC 1, though the preferable mode of allocation, is not mandatory or a constitutional obligation, other than cases of allocation of spectrum as held in *Centre for Public Interest Litigation*, (2012) 3 SCC 1 — There is no constitutional imperative in economic policies — Art. 14 does not predefine any economic policy as a constitutional mandate — Alienation of natural resources is a policy decision, and means adopted for same executive prerogative

— Decision to not auction a natural resource is liable to challenge and subject to restricted and limited judicial review under Art. 14 of the Constitution

— In case of alienation to private party for commercial pursuit for maximising profits, auction is more preferable method — But decision to not auction a natural resource and sacrifice maximisation of revenues might be

justifiable if decision is taken for social good or public good or common good such as when alienation is to provide affordable housing to members of SCs or STs or to implement housing schemes for Below the Poverty Line (BPL) families — If not for social good, public good or common good, it cannot be dissipated in favour of a private entrepreneur virtually free of cost or for a consideration not commensurate with its worth without attracting Arts. 14 and 39(b) (Paras 61 to 80.5 and 154.2)

Natural Resources Allocation, In re, Special Reference No. 1 of 2012, (2012) 10 SCC 1; *Ajar Enterprises (P) Ltd.* v. *Satyanarayan Somani*, (2018) 12 SCC 756; *BALCO Employees' Union* v. *Union of India*, (2002) 2 SCC 333, *relied on*

Centre for Public Interest Litigation v. *Union of India*, (2012) 3 SCC 1, *held, clarified*

Manohar Lal Sharma v. *Union of India*, (2014) 9 SCC 516, *referred to*

Kasturi Lal Lakshmi Reddy v. *State of J&K*, (1980) 4 SCC 1, *cited*

C. **Constitution of India — Arts. 14, 39(b), 298, 299 and Preamble — Grant of mining leases concerned by State of Goa — Financial/economic necessity vis-à-vis sustainable development, environmental and ecological protection — Hasty decision to grant renewal of mining leases to benefit a few private persons and some royalty to State and said grants not conducive to interest of mineral development and against Goa Mineral Policy causing damage to environment and ecology and affecting health of people of Goa — Held, arbitrary and unjust — Second renewal of mining leases, set aside**

— Virtual chaos projected by State of Goa for suspension of mining leases could be an exaggeration but that is why issue of arbitrariness of policy decision is left open in present case — Nevertheless, decision of State of Goa to quickly renew mining leases while ostensibly complying with requirement of S. 8(3), MMDR Act and thereby jettisoning rule of law was unjustified — Second renewal of mining leases was unduly hasty, without considering relevant material and not in interests of mineral development — It only augmented revenues of State which is outside purview of S. 8(3), MMDR Act — Second renewal granted by State of Goa, set aside — (Paras 127, 128 and 154.3)

— Goa Grant of Mining Leases Policy, 2014 — Relevant that decision of State of Goa to not auction grant of mining leases was flawed in that it did not serve common or public or social good but primarily assisted in filling coffers of private entrepreneurs — It was extracted primarily for export to China and Japan without any value addition to domestic industry — (Paras 93 to 97)

— Decision of the Bombay High Court — It seemed as if High Court was not alive to possibility of auction of mining leases — It categorised mining leases on basis of those who had paid stamp duty and those who had not and granted relief on that basis — (Paras 89 to 92)

— Mines and Minerals — Mines and Minerals (Development and Regulation) Act, 1957, Ss. 8(2) & (3), 10-B and 11 (Paras 82 to 97, 127, 128 and 154.3)

D. **Constitution of India — Arts. 14, 39(b), 298, 299 and Preamble — Grant of mining leases concerned by State of Goa — Held, arbitrary and unjust — Sole beneficiaries of rapacious, chaotic, unregulated and illegal mining in Goa were mining leaseholders/private entities — Some others like barge owners, truck owners, etc. were also collateral beneficiaries — Surely, all this cannot be ignored or brushed aside particularly since exploitation of mineral resources for five years had no element of social or public purpose, no concern for society and no regard for the environment and laws (Paras 82 to 85)**

E. **Constitution of India — Arts. 14, 39(b), 298, 299 and Preamble — Grant of mining leases concerned by State of Goa — Complete disregard of environmental laws — Vishwanath Anand Expert Appraisal Committee report discussed — Said report highlights damage to environment and ecology by mining leaseholders and complete indifference by all concerned towards all environmental laws — Leases did not even get clearance from Central Ground Water Board for which there were serious consequences like groundwater got depleted at much faster rate than expected and its quality also deteriorated (Paras 86 to 88)**

F. **Constitution of India — Arts. 14, 39(b), 298, 299 and Preamble — Grant of iron ore mining leases by State of Goa — Non-application of mind, undue haste and against interest of mineral development of State**

— During second renewal of mining leases concerned State of Goa ignored relevant factors and showed undue haste — All mining leaseholders had committed illegality — Instead of waiting for report of teams proving said illegality, State of Goa renewed their mining leases in violation of Grant of Mining Leases Policy — Undue haste was also showed by State of Goa to renew said mining leases so as to defeat Central Government's proposed policy of granting mining leases by way of competitive bidding through e-auction — Ordinance of Central Government in this regard was made known to public on 5-1-2015 and it was promulgated on 12-1-2015 — Within said seven days, State of Goa, granted second renewal to as many as 56 mining leases

— Concept of mineral development encompasses concept of captive mining — State Government should have applied its mind to requirement of different industries and principles of equitable distribution — Admittedly, iron ore is not extracted in Goa for import substitution or value addition but only as a last option, that is, export — Matters of interests of mineral development should be considered holistically and not in an isolationist manner — Therefore, while said miners contributed virtually nothing to domestic industry, they made considerable profits through exports — Though this might contribute to foreign exchange reserves, real-time damage to environment, ecology and health of Goan people is incalculable — Export benefits cannot be weighed against said damage — No social or public purpose attached to said mining operations — Only objective was profit maximization — This certainly cannot

be described as being "in the interests of mineral development" — Mines and Minerals — Mines and Minerals (Development and Regulation) Act, 1957 — Ss. 8(2) & (3), 10-B and 11 — Mineral Concession Rules, 1960, Rr. 37 and 38 (Paras 108 to 121)

Natural Resources Allocation, In re, Special Reference No. 1 of 2012, (2012) 10 SCC 1, *relied on*

Sandur Manganese and Iron Ores Ltd. v. *State of Karnataka*, (2010) 13 SCC 1, *distinguished*

T.N. Godavarman Thirumulpad v. *Union of India*, (2010) 13 SCC 740; *Goa Foundation* v. *Union of India*, (2011) 15 SCC 791; *State of Assam* v. *Om Prakash Mehta*, (1973) 1 SCC 584; *Quarry Owners' Assn.* v. *State of Bihar*, (2000) 8 SCC 655; *CIT* v. *Anjum M.H. Ghaswala*, (2002) 1 SCC 633; *Sube Singh* v. *State (NCT of Delhi)*, (2004) 6 SCC 440; *State of U.P.* v. *Singhara Singh*, AIR 1964 SC 358 : (1964) 1 Cri LJ 263 (2) : (1964) 4 SCR 485; *Tisco Ltd.* v. *Union of India*, (1996) 9 SCC 709, *cited*

G. **Environment Law — Environmental Clearance/NOC/Environment Impact Assessment — Grant of/Quashment of/Irregularity in/Judicial review — Deemed environmental clearance (EC) — When invalid — MoEF granted deemed environmental clearance (EC) in 2014-2015 in violation of environmental law and against ruling in *Goa Foundation*, (2014) 6 SCC 590, set aside — Judicial review — Approach — Holistic approach is required for issues impacting society — Larger context of constitutionalism, rule of law, environmental jurisprudence as well as fundamental right of people of Goa to have clean air and protection of fragile ecology must be considered — One or two violations here and there may be wished away as inconsequential, but multiple violations by several persons can result in serious problems — Governance dehors interests of people not proper — Uncomfortable decisions are inevitable for balancing rights and equities**

— Some mining leaseholders had environmental clearances under EIA 1994 while others under EIA 2006 — Pursuant to requests made by State of Goa, MoEF granted EC to them notwithstanding that fresh leases could only have been permitted in view of ruling in *Goa Foundation case* and no renewals were permissible and thus fresh leases required fresh ECs

— Clarified, for renewal of mining leases in 2014-2015, lessees having valid environmental clearance (EC) under EIA 1994 also required fresh EC under 2006 EIA — Moreover EC under EIA 1994 is valid for 5 yrs and EC under EIA 2016 is valid for estimated project life or a maximum of 30 yrs — 37 mining leases which had EC under EIA 2006, thus though seemingly protected were actually not in view of ruling in *Goa Foundation case* that no second renewals were permissible, and only fresh renewals were permissible — Hence, fresh EC in terms of EIA 2006 was required (Paras 129 to 150 and 154.4)

Goa Foundation v. *Union of India*, (2014) 6 SCC 590; *Goa Foundation* v. *Union of India*, (2014) 6 SCC 738; *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590 (footnote 17); *M.C. Mehta* v. *Union of India*, (2004) 12 SCC 118; *Common Cause* v. *Union of India*, (2017) 9 SCC 499; *Ambica Quarry Works* v. *State of Gujarat*, (1987) 1 SCC 213; *Rural Litigation and Entitlement Kendra* v. *State of U.P.*, 1989 Supp (1) SCC 504; *State of M.P.* v. *Krishnadas Tikaram*, 1995 Supp (1) SCC 587, *relied on*

S.N. Mohanty v. *Union of India*, 2012 SCC OnLine Del 4000, *distinguished*

H. **Constitution of India — Art. 145(3) — Request for reference to a Bench of nine Judges, rejected (Para 152)**

Property Owners' Assn. v. *State of Maharashtra*, (2013) 7 SCC 522 : (2013) 3 SCC (Civ) 603, *referred to*

SS-D/59847/C

Advocates who appeared in this case :

Atmaram N.S. Nadkarni, Additional Solicitor General, Chander Uday Singh, Darius Khambata, Mukul Rohatgi and Huzefa Ahmadi, Senior Advocates [Prashant Bhushan, Pranav Sachdeva, O. Kuttan, Ms Neha Rathi, Sanjay Parikh, Ms Anitha Shenoy, Ms Mamta Saxena, Ms Srishti Agnihotri, Rohit Kr. Singh, Merusagar Samantaray, Salvador S. Rebello, Ms Viddushi, Ms Lhinghneviah, Ms Sneha S. Prabhu Tendulkar, Ms Nivedita Nair, Abhishek Bhardwaj, Divya Prakash Pandey, Devashish Bharuka, Ms Rukmani Bobde, G.S. Makker, Pratap Venugopal, Ms Surekha Raman, Naval Aggarwal, Anuj Sharma, Ms Niharika, Aman Shukla, Ms Kanika Kalaiyarasan (for M/s K.J. John & Co.), Sumit Goel, Tanuj Agarwal (for M/s Parekh & Co.), Yashraj Singh Deora, Ms Swati Kamat, Ms Parag Rao, Ms Asmita Singh, Ms Sanjana Saddy, Ms Ragya V. Singh, Ninad Laud, Ivo D'Costa, Jayant Mohan, Abhijit Gosavi, Rohan Sharma, Karan Mathur, Anjuman Tripathy, Nikhil Vaze, Ms Sujata Kurdukar, Rudresh Desai and P. Chaitanyashil, Advocates] for the appearing parties.

Chronological list of cases cited ***on page(s)***

1. (2018) 12 SCC 756, *Ajar Enterprises (P) Ltd.* v. *Satyanarayan Somani* 255*c-d*
2. (2017) 9 SCC 499, *Common Cause* v. *Union of India* 274*e*, 274*f-g*, 275*c*, 275*d-e*, 277*c*, 278*e*
3. (2015) 8 SCC 655 : (2015) 4 SCC (Civ) 395, *State of W.B.* v. *Calcutta Mineral Supply Co. (P) Ltd.* 247*a*
4. (2015) 1 SCC 153, *Goa Foundation* v. *Union of India* 243*g*, 244*a*
5. (2014) 14 SCC 155, *Common Cause* v. *Union of India* 247*d-e*, 247*e-f*
6. (2014) 9 SCC 516, *Manohar Lal Sharma* v. *Union of India* 249*c*, 254*a*, 254*c*, 254*e-f*
7. (2014) 6 SCC 738, *Goa Foundation* v. *Union of India* 230*c-d*, 230*d*, 242*c*, 272*g*
8. (2014) 6 SCC 590, *Goa Foundation* v. *Union of India* 227*g*, 230*c-d*, 231*f-g*, 232*a*, 232*e-f*, 233*e-f*, 233*g*, 234*f-g*, 240*e*, 241*b-c*, 241*c-d*, 241*e*, 242*c-d*, 242*e*, 242*f-g*, 243*c-d*, 243*g*, 244*a*, 244*c*, 244*d-e*, 245*d-e*, 245*e-f*, 245*g*, 245*g-h*, 246*a-b*, 246*b*, 247*b-c*, 247*d*, 247*d-e*, 247*e*, 247*e-f*, 247*g*, 248*a*, 248*a-b*, 248*c*, 253*e*, 253*f*, 262*f-g*, 265*c-d*, 266*c-d*, 266*e*, 272*f*, 272*g*, 273*b*, 274*a-b*, 276*a*, 279*d-e*, 279*e*, 279*f*, 280*a-b*, 280*b*, 280*b-c*
9. (2014) 6 SCC 590 (footnote 17), *Goa Foundation* v. *Union of India* 230*d*, 272*g*

10. (2014) 6 SCC 590 (footnote 4), *Goa Foundation* v. *Union of India* 242*b-c*
11. 2014 SCC OnLine Bom 997 : (2015) 3 AIR Bom R 32, *Lithoferro* v. *State of Goa* **(reversed)** 231*b*, 231*b-c*, 232*a-b*, 232*f*, 233*a-b*, 234*d-e*, 241*d*, 241*f-g*, 244*c*, 244*d*, 245*b*, 245*e*, 261*g*, 268*c*, 279*d*, 279*d-e*, 280*b*
12. (2013) 7 SCC 522 : (2013) 3 SCC (Civ) 603, *Property Owners' Assn.* v. *State of Maharashtra* 279*c-d*
13. (2012) 10 SCC 1, *Natural Resources Allocation, In re, Special Reference No. 1 of 2012* 249*c-d*, 249*d*, 249*g*, 250*b*, 250*e*, 251*c*, 251*f*, 252*f-g*, 253*a-b*, 253*e*, 254*a-b*, 254*g*, 255*d*, 256*b-c*, 265*d-e*, 266*a*, 266*b*, 270*a*
14. (2012) 3 SCC 1, *Centre for Public Interest Litigation* v. *Union of India* 248*d-e*, 248*f*, 249*c*, 249*f*, 249*g-h*, 254*b*, 254*b-c*, 265*d-e*, 265*e-f*
15. 2012 SCC OnLine Del 4000, *S.N. Mohanty* v. *Union of India* 278*f-g*
16. (2011) 15 SCC 791, *Goa Foundation* v. *Union of India* 258*e*, 259*d*, 259*f*
17. (2010) 13 SCC 740, *T.N. Godavarman Thirumulpad* v. *Union of India* 240*b*, 258*f-g*, 259*d*
18. (2010) 13 SCC 1, *Sandur Manganese and Iron Ores Ltd.* v. *State of Karnataka* 263*e-f*, 264*f-g*, 265*a*
19. (2004) 12 SCC 118, *M.C. Mehta* v. *Union of India* 246*g*, 274*d-e*, 274*e-f*, 275*c*, 275*d-e*, 277*a*, 278*d-e*, 279*a-b*
20. (2004) 6 SCC 440, *Sube Singh* v. *State (NCT of Delhi)* 264*c*
21. (2002) 2 SCC 333, *BALCO Employees' Union* v. *Union of India* 256*a*
22. (2002) 1 SCC 633, *CIT* v. *Anjum M.H. Ghaswala* 264*c*
23. (2000) 8 SCC 655, *Quarry Owners' Assn.* v. *State of Bihar* 264*a*
24. (1997) 1 SCC 650, *Gajraj Singh* v. *STAT* 247*a*
25. (1996) 9 SCC 709, *TISCO Ltd.* v. *Union of India* 264*d*, 268*e*
26. 1995 Supp (1) SCC 587, *State of M.P.* v. *Krishnadas Tikaram* 232*a-b*, 274*e-f*
27. 1989 Supp (1) SCC 504, *Rural Litigation and Entitlement Kendra* v. *State of U.P.* 274*e*
28. 1989 Supp (1) SCC 487, *Provash Chandra Dalui* v. *Biswanath Banerjee* 246*f-g*
29. (1987) 1 SCC 213, *Ambica Quarry Works* v. *State of Gujarat* 274*e*
30. (1980) 4 SCC 1, *Kasturi Lal Lakshmi Reddy* v. *State of J&K* 251*b*
31. (1973) 2 SCC 825, *DDA* v. *Durga Chand Kaushish* 246*e*
32. (1973) 1 SCC 584, *State of Assam* v. *Om Prakash Mehta* 263*g-h*
33. AIR 1964 SC 358 : (1964) 1 Cri LJ 263 (2) : (1964) 4 SCR 485, *State of U.P.* v. *Singhara Singh* 264*c*

The Judgment of the Court was delivered by

MADAN B. LOKUR, J.— Rapacious and rampant exploitation of our natural resources is the hallmark of our iron ore mining sector coupled with a total lack of concern for the environment and the health and well-being of the denizens in the vicinity of the mines. The sole motive of mining leaseholders seems to be to make profits (no matter how) and the attitude seems to be that if the rule of law is required to be put on the backburner, so be it. Unfortunately, the State is unable to firmly stop violations of the law and other illegalities, perhaps with a view to maximise revenue, but without appreciating the long-term impact of this indifference. Another excuse generally put forth by the State is that of development, conveniently forgetting that development must be sustainable and equitable development and not otherwise.

2. Effective implementation and in some instances circumvention of the mining and environment related laws is a tragedy in itself. Laxity and sheer apathy to the rule of law gives mining leaseholders a field day, being the primary beneficiaries, with the State being left with some crumbs in the form of royalty. For the State to generate adequate revenue through the mining sector and yet have sustainable and equitable development, the implementation machinery needs a tremendous amount of strengthening while the law enforcement machinery needs strict vigilance. Unless the two marry, we will continue to be mute witnesses to the plunder of our natural resources and left wondering how to retrieve an irretrievable situation.

3. The Government of India appears to have received information of large-scale illegal mining of iron ore and manganese ore in different States in contravention of the provisions of the Mines and Minerals (Development and Regulation) Act, 1957 (the MMDR Act); the Forest (Conservation) Act, 1980; the Environment (Protection) Act, 1986 and other rules and guidelines issued on the subject from time to time.

4. Acting on this information, the Government of India appointed Justice M.B. Shah, a former Judge of this Court as a Commission of Inquiry under Section 3 of the Commissions of Inquiry Act, 1952 by a Notification dated 22-11-2010. The terms of reference of the Commission for the State of Goa were as follows:

> "2. The terms of reference of the Commission shall be—
>
> (*i*) to inquire into and determine the nature and extent of mining and trade and transportation, done illegally or without lawful authority, of iron ore and manganese ore, and the losses therefrom; and to identify, as far as possible, the persons, firms, companies and others that are engaged in such mining, trade and transportation of iron ore and manganese ore, done illegally or without lawful authority;
>
> (*ii*) to inquire into and determine the extent to which the management, regulatory and monitoring systems have failed to deter, prevent, detect and punish offences relating to mining, storage,

transportation, trade and export of such ore, done illegally or without lawful authority, and the persons responsible for the same;

(*iii*) to inquire into the tampering of official records, including records relating to land and boundaries, to facilitate illegal mining and identify, as far as possible, the persons responsible for such tampering; and

(*iv*) to inquire into the overall impact of such mining, trade, transportation and export, done illegally or without lawful authority, in terms of destruction of forest wealth, damage to the environment, prejudice to the livelihood and other rights of tribal people, forest dwellers and other persons in the mined areas, and the financial losses caused to the Central and State Governments.

3. The Commission shall also recommend remedial measures to prevent such mining, trade, transportation and export done illegally or without lawful authority."

5. Justice Shah visited Goa and after calling for and receiving information from the authorities concerned as well as the mining leaseholders, he submitted a report on 15-3-2012 and another on 25-4-2012 to the Ministry of Mines in the Government of India. The reports were tabled in Parliament on 7-9-2012 along with an Action-Taken Report and as a result, the Government of Goa passed an order dated 10-9-2012 suspending all mining operations in the State with effect from 11-9-2012. The Ministry of Environment and Forests (MoEF) of the Government of India acted similarly and kept in abeyance the environmental clearances granted to 139 mines (actually 137 mines—there is some duplication) in the State of Goa by an order dated 14-9-2012.

6. Subsequent to the reports given by Justice Shah, a writ petition was filed by Goa Foundation in this Court being WP (C) No. 435 of 2012. The writ petition was a public interest litigation praying, inter alia, for directions to the Union of India and the State of Goa to take steps to terminate the mining leases where mining was carried out in violation of various statutes.

7. Similarly, several mining leaseholders preferred writ petitions in the Bombay High Court for a declaration that the reports given by Justice Shah are illegal and also for quashing the orders dated 10-9-2012 and 14-9-2012 whereby mining operations were suspended and environmental clearances were kept in abeyance. The writ petitions filed in the High Court were transferred to this Court for hearing along with WP (C) No. 435 of 2012.

8. This Court heard all these matters and rendered its decision in *Goa Foundation* v. *Union of India*[1] on 21-4-2014. Among other conclusions arrived at, it was held by the Court that all the iron ore and manganese ore leases had expired on 22-11-2007. Consequently, any mining operation carried out by the mining leaseholders after that date was illegal. It was also held that all the mining leaseholders had enjoyed a first deemed renewal of the mining lease and for a second renewal an express order was required to be passed in view

1 (2014) 6 SCC 590

of and in terms of Section 8(3) of the MMDR Act. For a second renewal of the mining lease, it was held that the State Government must apply its mind and record reasons for renewal being in the interest of mineral development and the necessity to renew the mining lease. Any decision taken by the State Government should also be in conformity with the constitutional provisions. The decision taken by the State of Goa to grant a mining lease in a particular manner or to a particular party could be examined by way of judicial review. It was also held that the orders dated 10-9-2012 and 14-9-2012 are not liable to be quashed and that they would continue till decisions are taken to grant fresh leases and fresh environmental clearances for mining projects.

Goa Mineral Policy, 2013

9. During the pendency of the proceedings before the Court, the State of Goa announced the draft Goa Mineral Policy on 21-8-2012. After suggestions, etc. were received, the Mineral Policy was finalised and gazetted on 28-9-2013.

10. A few salient features of the Mineral Policy may be mentioned. It is stated in the Preamble to the Mineral Policy:

> "The Goan economy is heavily dependent on the iron ore industry insofar as the major share of the regional income from the mineral industry and its allied activities like transport and trade is concerned."
>
> "However, during the period from 2006-2007 to 2011-2012, due to huge spurt in demand of low grade ore in international market followed by *illegalities and irregularities* in the previous regulatory regime, the State has witnessed the peak of *chaotic and unregulated mining* without any concern for fragile ecology and environment of the State or for the general well-being of an average Goan. It has resulted in massive export of unaccounted ore from unidentified sources like dumps and tailings. The *reckless exploitation* without any concern for sustainability that the State has witnessed in last five years has serious implications. Minerals are a finite and non-renewable natural resource and must be exploited wisely in the larger interest of the State.
>
> It is high time that the new Government that has received an unprecedented mandate from the people of Goa should take note that dependence on mining presents extreme externalities and *the State has to tread cautiously promoting a sustainable extraction regime to facilitate systematic, scientific and planned utilisation of mineral resources* and to streamline mineral based development of the State, keeping in view, protection of environment, health and safety of the people in and around the mining areas rather than race to bottom." (emphasis supplied)

11. Notwithstanding this serious indictment of the pre-existing "policy" for mining natural resources in Goa, the Mineral Policy did not address itself to the allocation or distribution of the natural resources in any of its 20 paragraphs and many sub-paragraphs. The topics dealt with in the Mineral Policy include objectives and parameters, sustainable mining and mineral conservation, mineral administration, regulation of mines and minerals, pollution and its social impact and policy highlights. Some of the other topics dealt with in the Mineral Policy include capping, based on carrying capacity of public roads and

to protect intergenerational equity, mines safety and rehabilitation of affected people, stakeholder participation (including corporate social responsibility), welfare and social responsibilities and establishment of the Goa Minerals Development Fund, etc.

12. However, what is of some significance is that Paras 1.4.4 and 1.4.5 of the Mineral Policy state that Goan iron ore is low grade, that is, having low iron (or Fe) content and that its extraction provides no or minimal domestic value addition. Almost all the iron ore extracted in Goa is exported and we were informed that only one mining leaseholder captively consumes Goan extracted iron ore. Paras 1.4.4 and 1.4.5 of the Mineral Policy read as follows:

> "1.4.4. *No domestic value addition.*—The nature of Goan iron ore is such that value addition opportunities in the domestic market are minimal. The Chinese and Japanese use Goan iron ore for blending purposes to bring down the average cost of iron ore, whereas Indian steel producers have a wide range of high grade fines to choose from. *Despite the closure of mining operations in the neighbouring State of Karnataka, Goan iron ore is not used in Indian Steel Industry due to its low Fe content.*
>
> 1.4.5. *Low grade v/s high grade.*—Goan iron ore has always been of low grade Fe content in comparison with that of Odisha, Jharkhand and Karnataka. *The low grade of ore has been competitive in global markets, because of the non-reliance on railways and close distances of mines to ports thereby reducing the overall cost.* The high silica presence in Goan ore also is a favourable factor for preference for Goan ore over Australian and Brazilian low grade ore." (emphasis supplied)

13. It appears from the above that the extraction of iron ore in Goa is geared only towards export and not for domestic purposes because of the low Fe content and high silica presence.

Vishwanath Anand Expert Appraisal Committee

14. During the pendency of the writ petition in the Court, the MoEF constituted an Expert Appraisal Committee (EAC) on 21-3-2013 with Shri Vishwanath Anand, former Secretary in the MoEF as the Chairman to specifically look into issues related to illegal mining in the State of Goa. The terms of reference of the EAC were as follows:

> (*a*) To examine the information/documents submitted by each of the 139 project proponents in response to the aforesaid direction dated 14-9-2012 under the Environment (Protection) Act, 1986 for keeping environment clearance in abeyance and making case-by-case recommendations to the MoEF;[2]
>
> (*b*) To evaluate status of compliance with respect to conditions stipulated as part of environment clearance;
>
> (*c*) * * *

2 Actually 137 project proponents — there is some duplication.

(*d*) To examine the observations relating to MoEF in Justice Shah Commission Report on illegal mining of iron and manganese ore in the State of Goa and make appropriate recommendations.

15. The EAC gave its report sometime in October 2013 with regard to 137 mining leases. Very briefly, the EAC found that many of the mining leaseholders had: (*i*) no approval from the National Board of Wildlife; or (*ii*) indulged in excess mining; or (*iii*) indulged in dump mining; or (*iv*) intersected groundwater level; or (*v*) no clearance from the Central Ground Water Board to draw groundwater; or (*vi*) no forest clearance. We may also note that the EAC also recommended the revocation of environmental clearance granted to several mining leaseholders for a variety of reasons.

16. The Mineral Policy and the report of the EAC were perhaps placed before the Court in the writ petition filed by Goa Foundation and the transferred cases, but not dealt with, except for a brief mention of the Mineral Policy.

17. All the cases before the Court were heard quite extensively in September, October and November 2013. Judgment was reserved on 11-11-2013[3] and pronounced on 21-4-2014[1]. Some of the conclusions arrived at by the Court relevant for our discussions have already been mentioned above.

18. At this stage, it may be mentioned that on 11-11-2013[3] read with an order dated 18-11-2013[4] this Court constituted an Expert Committee: (*Goa Foundation case*[3], SCC pp. 743-44, para 12)

> "*12.* … [to] conduct a macro EIA study on what should be the ceiling of annual excavation of iron ore from the State of Goa considering its iron ore resources and its carrying capacity keeping in mind the principles of sustainable development and intergenerational equity and all other relevant factors."

The members of the Expert Committee were:

1. Dr C.R. Babu (Ecologist),
2. Dr S.C. Dhiman (Geologist/Hydrogeologist),
3. Prof. B.K. Mishra (Mineralogist),
4. Prof. S. Parameswarappa (Forestry),
5. Shri Parimal Rai (nominee of the Ministry of Environment and Forests, Government of India).

19. The Expert Committee submitted an Interim Report dated 14-3-2014 to the Court after considering reports prepared by the Tata Energy Research Institute (TERI), New Delhi (1997); TERI and International Development Research Centre, Ottawa, Canada (2006); MoEF (2014); research papers prepared by the Goa University and the National Institute of Oceanography; Indian Institute of Technology (Indian School of Mines), Dhanbad (2013); Pollution Control Board, Goa (Annual Report) and other literature. It noted

3 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 738
1 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590
4 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590 (footnote 17)

large-scale degradation of the environment in Goa due to mining operations. A Final Report was also submitted by the Expert Committee to the Court on or about 12-4-2015—it was obviously not available to the Court.

Other proceedings in the High Court

20. Quite independent of the cases pending in this Court, writ petitions were filed by several mining leaseholders in the Bombay High Court praying either for consideration of their application for a second renewal of the mining lease or for the grant of a mining lease on second renewal. The High Court heard those writ petitions and delivered its judgment on 13-8-2014[5]. In the course of its judgment, the High Court referred to the Mineral Policy and observed: (*Lithoferro case*[5], SCC OnLine Bom para 3)

> "The State Government also framed Goa Mineral Policy, 2013, which was duly gazetted on 28-9-2013 and was placed on record before the Supreme Court in Writ Petition (C) No. 435 of 2012. The State Government, in terms of this policy, in principle, agreed to renew 28 leases. These leaseholders were also asked to pay stamp duty. In some cases, after payment of the stamp duty, decision under Section 8(3) of the MMDR Act was taken to renew the leases and that decision is also gazetted. Thus, the petitions are classified in three categories mentioned hereinbelow:
>
> (A) Where there is notification issued in the Official Gazette after taking a decision for renewal;
>
> (B) Where there is a decision for renewal and there is stamp duty collected; and
>
> (C) Where there are renewal applications made and are still pending.
>
> All the petitioners initially sought directions to the State Government to decide their applications for renewal filed in the year 2007. However, the petitions which fell in the first two categories were subsequently amended and directions were sought against the Government to execute second renewal lease deeds."

21. In its decision, the High Court held:

> (*i*) The decision of this Court (in *Goa Foundation*[1]) is not an impediment on the State of Goa in considering the applications filed by the petitioners before the High Court for a second renewal of the mining lease. On the contrary, the decision casts an obligation on the Government of Goa to consider all the applications for renewal under Section 8(3) of the MMDR Act;
>
> (*ii*) Consideration of the applications should be in accordance with the Mineral Policy, the provisions of the MMDR Act and the Rules made thereunder and in accordance with constitutional provisions;

5 *Lithoferro* v. *State of Goa*, 2014 SCC OnLine Bom 997 : (2015) 3 AIR Bom R 32
1 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590

(*iii*) The expression "fresh leases" occurring in para 67(82) of the decision of this Court (in *Goa Foundation*[1]) is an affirmation of the law that the renewal of a lease is also a fresh grant.

For arriving at this conclusion, the High Court placed reliance on *State of M.P.* v. *Krishnadas Tikaram*[6].

22. The High Court finally held: (*Lithoferro case*[5], SCC OnLine Bom para 16)

"*16*. In the case in hand, admittedly, all the petitioners have made applications for second renewal within the time-limit i.e. before expiry of the term of first renewal of the mining leases. The mining plans for the second renewal, thereafter, came to be approved by the IBM. The IBM also recorded its subjective satisfaction that the same is in the interest of mineral development. Thus, there is enough material on record to show that the Government agreed to grant the second renewal of mining leases under Section 8(3) of the MMDR Act and thereafter amended the Stamp Act and directed some of the petitioners to pay the stamp duty and even accepted the same. Thus, the Government gave promise that the mining leases would be executed under Section 8(3) and pursuant to the promise, the petitioners altered their position by depositing the huge stamp duty. Therefore, it is now not open for the Government to resile from the promise as it is estopped by the doctrine of promissory estoppel from doing so. The petitioners legitimately expected that after payment of the stamp duty, the Government would execute the second leases under Section 8(3) of the MMDR Act. In our considered opinion, the principle of promissory estoppel is squarely applicable to the facts of the present case. The Government is reluctant to execute the lease deeds under Section 8(3) only on the ground that it is not open for it to do so in the light of the Apex Court judgment[1] in Writ Petition (C) No. 435 of 2012. We have already held that the Supreme Court judgment[1] in Writ Petition (C) No. 435 of 2012 is not an impediment in the Government's way in executing the leases in terms of Section 8(3) of the MMDR Act."

23. In view of the above conclusions, the High Court passed the following orders: (*Lithoferro case*[5], SCC OnLine Bom para 18)

"(I) The respondent State of Goa is directed to execute the lease deeds under Section 8(3) of the MMDR Act in favour of the petitioners leaseholders who/which have already paid the stamp duty pursuant to the orders of the Government, in accordance with the Goa Mineral Policy, 2013 placed before the Supreme Court in Writ Petition (Civil) No. 435 of 2012 and subject to the conditions laid down by the Apex Court in the said writ petition.

1 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590
6 1995 Supp (1) SCC 587
5 *Lithoferro* v. *State of Goa*, 2014 SCC OnLine Bom 997 : (2015) 3 AIR Bom R 32

(II) So far as the petitioners leaseholders who/which have not paid the stamp duty are concerned, the respondent State of Goa is directed to decide their renewal applications under Section 8(3), as expeditiously as possible, and preferably within a period of three months from the date of receipt of copy of this order."

24. Two petitions for special leave have been filed directed against the judgment and order passed by the High Court on 13-8-2014[5] being SLP (C) No. 32138 of 2015 and SLPs (C) Nos. 32699-727 of 2015 and these are also before us.

Goa Grant of Mining Leases Policy, 2014

25. Keeping in mind the orders and directions passed by this Court and the High Court, the State of Goa formulated the Goa Grant of Mining Leases Policy, 2014. We were informed by the learned Additional Solicitor General that the Grant of Mining Leases Policy was approved by the Council of Ministers of the Goa State Cabinet on 1-10-2014. It was issued on 4-11-2014 and placed on the website of the Directorate of Mines and Geology of the Government of Goa on the same day. However, it was gazetted on 20-1-2015 with two paragraphs deleted from the document issued on 4-11-2014. The two deleted paragraphs are indicated below.

26. The Grant of Mining Leases Policy makes for some very important and interesting reading and includes an impassioned plea for rejecting the process of competitive bidding of mining leases *for the time being*. It also contains the statement made by the Chief Minister on the floor of the Goa State Legislative Assembly. While the Grant of Mining Leases Policy is a large document, it is necessary to read relevant extracts from it since it indicates the factors that went into taking the policy decision and also to appreciate if there was any violation of Article 14 of the Constitution. The relevant extracts read as under:

"*Background*.—In accordance with the directions contained in the judgment and order of the Hon'ble Supreme Court dated 21-4-2014[1] in Writ Petition (Civil) No. 435 of 2012, the Hon'ble Supreme Court has declared that all the mining leases in the State of Goa have expired on 22-11-2007. …

It has further been directed by the Hon'ble Supreme Court that it is for the *State Government to decide as a matter of Policy, in what manner mining leases are to be granted in the future*. …

The Hon'ble Supreme Court has in its judgment and order dated 21-4-2014[1] clearly held that the action of allowing the mines to be run on deemed extension basis from the years 2007 to 2012 was completely illegal and has further declared that the so-called deemed mining leases in the State of Goa have expired in the year 2007. …

5 *Lithoferro* v. *State of Goa*, 2014 SCC OnLine Bom 997 : (2015) 3 AIR Bom R 32

1 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590

Few things emerge out of the Hon'ble Supreme Court's order. In the first place, the mining leases have been held to have expired in the year 2007. *In the second place, the State Government has been directed, in accordance with its policy to grant fresh leases in the State.*

With these, the options available with the State Government are as follows—

> The State Government can directly auction the leases in order to secure the best returns for the grant of leases by way of a competitive bidding process,
>
> (*a*) The State Government can also form a State Corporation and undertake the mining activities through the State Mineral Development Corporation.
>
> (*b*) The State Government could also proceed to grant fresh leases, in terms of the MMRD Act by the following the process of preferential grant of leases to certain persons as specified in the MMRD Act.
>
> (*c*) Yet another option available to the State Government was to decide the renewal applications which were pending since the year 2006 and which had remained without any disposal.

Each of the aforesaid modes has its own merits and demerits. …

While the State Government was in the process of deliberating on all these issues at various levels, the judgment and order of the Hon'ble High Court in writ petition filed by certain leaseholders came to be delivered on 13-8-2014[5] whereby the Hon'ble High Court has directed the execution of the lease deeds under Section 8(3) of the MMRD Act in favour of the leaseholders who have already paid the stamp duty pursuant to Orders of the State Government in accordance with the Goa Mineral Policy, 2013, placed before the Hon'ble Supreme Court and subject to the conditions. …

This judgment and order of the Hon'ble High Court virtually leaves no choice to the State Government, thereby to completely abandon the process of competitive bedding [bidding] for earning the best revenue to the State Government. While this was the position taken by the State Government in the Goa Mineral Policy, 2013, and the Hon'ble High Court has interpreted the Order[1] of the Hon'ble Supreme Court in Writ Petition (Civil) No. 435 of 2012, *the State Government in view of Hon'ble High Court order, has for the present ruled out the process of going for competitive bidding*. The State Government is considering actively, within its constitutional powers and functions, to come out with regulatory and controlling measures and levy and collect appropriate returns having regard to the fact that the soil comprising the land belongs to the State. … The State Government has also commenced the inquiry and investigation into the violations of matters

5 *Lithoferro* v. *State of Goa*, 2014 SCC OnLine Bom 997 : (2015) 3 AIR Bom R 32

1 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590

under Rules 37 and 38 of the Mineral Concession Rules, 1960 as directed by the Hon'ble Supreme Court. …

As is seen from the aforesaid, the judgment and order of the Hon'ble High Court is an intervening circumstance inasmuch as it directs the execution of lease deeds in 28 cases and consideration of the application under Section 8(3) by the State Government in the other cases. …

In the considered opinion of the State Government, it would be futile to challenge the judgment of the Hon'ble High Court before the Hon'ble Apex Court as that would once again delay the commencement of the mining operations. As a matter of fact, a substantial portion of the State's Revenue comes from the mining sector. The State has been virtually starved of funds for undertaking many activities including Infrastructural Projects; and on account of the stopping of the mining operation, the State had to walk a tight-rope as there has been no Revenue coming from one of the major source of Revenue. …

Having regard to the aforesaid, the State Government thought it proper to act in accordance with the directions of the Hon'ble Supreme Court *by balancing the equities, needs; as also to subserve the public interest and by having sustainable development by protecting the ecological and all other factors*.

Policy Framework.—The State Government has been considering and deliberating the entire matter, and thought it proper having regard to the facts that:

(*a*) The mining leaseholders had applied for the second renewal well within time.

(*b*) The fact that the applications of the mining leaseholders for the second renewal were not disposed of by the then State Government and for which the leaseholders cannot be blamed.

(*c*) Having further regard to the fact that 27 mining leaseholders despite the closure of the mining operations, when called by the State to do so within the period, have paid the stamp duty; as also, other levies.

(*d*) Such payments helped the State Government to override the financial crisis at that point of time.

(*e*) Having regard to the fact that a large number of labour staff employed with these leaseholders.

(*f*) That mining leaseholders concerned have invested heavily into the development of mines; as also, into the machinery such as ripper dozers, cranes, wheel loader, beneficiation plants, etc.

(*g*) Other methods are not as suitable as this method for various reasons listed [in] Hon'ble Chief Minister statement to the House listed above.

The State Government after having considered the matter from every possible angle, has decided to exercise its power under Section 8(3) of the Mines and Minerals (Development and Regulations) Act, 1957, and *to*

consider each of the cases on their own merits and subject to compliance with the conditions which may be laid down by the State Government including for strict pollution control measures, and thereafter take a decision on the renewal in terms of Section 8(3) of the MMRD Act, 1957, complying fully with the procedure laid down therein.

Though the State Government has in principle decided to follow the route of the renewal of lease under Section 8(3) of the MMRD Act, it shall be subject to the following—

Unless and until the inquiry initiated pursuant to the judgment and order of the Hon'ble Supreme Court of India against those mine leaseholders found to be violating either Rule 37 or Rule 38 of the Mineral Concession Rules, 1960, or otherwise indicted in the Report of the Justice Shah Commission/PAC report or found to be engaged in, any kind of illegality of whatsoever nature such as illegal sale of ore, sale of royalty challan without ore, encroachment of adjoining areas outside the lease overproduction in excess of the limit specified in the environmental clearance; those which have undertaken unscientific mining operations; those who have violated or have not paid the royalty amount; those who have reused old royalty challans for defrauding; and those involved in illegal mining activities *shall not be considered for renewal of the mining leases.*

For this purpose, *presently the inquiries are in progress* at various levels and fora including the investigation by the SIT Team, by the Team of Chartered Accountants which have been set up by the State Government and after the inquiry is complete or during the course of the inquiry where it is found that any violations have taken place, *such persons shall not be considered for grant/renewal of the leases. …*

Those mining leaseholders who have paid stamp duty, in which there are no violations found in terms of Mr Justice Shah Inquiry/Public Accounts Committee Report, shall be considered for renewal. (Deleted from the Gazetted Policy).

The formation of the entire Policy is aimed that it is required to balance various interests having regard to the Principle of Sustainable Development; but by keeping in mind the commercial interest of the present State of economy, the interest of the labour class, the interest of the working class including other staff, the interest of the market in the mining localities, the interest of the public sector, the interest of the existing mining leaseholders and the overall welfare needs of the State; and require all urgent infrastructural development. By balancing all these interests the present Policy has been formulated by the State Government.

The above Policy is in principle decision of the State Government and will be vetted for exact legal requirements from specific necessities as also from financial viewpoints and notified thereafter."[7] (Deleted from the Gazetted Policy.) (emphasis supplied)

7 <http://www.goadmg.gov.in/Uploads/288.pdf>.

27. Around this time, and pursuant to the Budget Speech given by the Hon'ble Minister of Finance of the Government of India on 10-7-2014 it appears that steps were being taken by the Ministry concerned in the Government of India to amend the MMDR Act.[8] In fact a draft Mines and Minerals (Development and Regulation) Act, 2014 was prepared on or about 16-11-2014 and uploaded on the website of the Ministry of Mines on 17-11-2014. This information was placed before us from the response given by the Hon'ble Minister of Mines to Unstarred Question No. 2485 to be answered in the Lok Sabha on 8-12-2014. The question was:

> (*a*) whether the Government proposes to formulate a new policy on grant of mining leases for various minerals by amending the Mines and Minerals (Development and Regulation) Act, 1957;
>
> (*b*) if so, the details thereof along with the time by which the new policy is likely to be implemented;

And the answer was:

> (*a*) & (*b*): Yes Madam. The Ministry has drafted the Mines and Minerals (Development and Regulation) (MMDR) (Amendment) Bill, 2014, which has been uploaded on the website of the Ministry on 17-11-2014, calling for comments/suggestions on the draft Bill. The last date for receipt of the comments/suggestions is 10-12-2014. Based on the comments/suggestions received the draft Bill will be finalised and taken forward for introduction in Parliament.
>
> The Bill is designed to put in place mechanisms for: (*i*) improved transparency in the allocation of mineral resources; (*ii*) obtaining for the Government its fair share of the value of such resources; (*iii*) attracting private investment and the latest technology; and (*iv*) eliminating delay in administration, so as to enable expeditious and optimum development of the mineral resources of the country.

28. What was the nature of the proposed amendments? As far as we are concerned, the introduction of Section 10-B in the MMDR Act (relating to competitive bidding) is significant and this reads:

> "**10-B.** ***Mining leases for notified minerals***.—(1) Notwithstanding anything contained elsewhere in this Act, but subject to the provisions of Section 10-A and Section 17-A, the procedure for obtaining a mining lease for notified minerals in respect of land in which the minerals vest in the Government shall be as laid down in this section.
>
> (2)-(3) * * *
>
> (4) For the purpose of granting a mining lease in respect of any notified mineral in such notified area, the State Government shall select, through

---

8 "122. It is my Government's intention to encourage investment in mining sector and promote sustainable mining practices to adequately meet the requirements of industry without sacrificing environmental concerns. The current impasse in mining sector, including, iron ore mining, will be resolved expeditiously. *Changes, if necessary, in the MMDR Act, 1957 would be introduced to facilitate this*." (emphasis supplied)

auction by a method of competitive bidding, including e-auction, an applicant who satisfies the eligibility conditions.

(5) The Central Government shall prescribe the terms and conditions, and procedure, subject to which the auction will be conducted, including the bidding parameters for the selection, which could include a share in the production of the mineral, or any payment linked to the royalty payable, or any other relevant parameter, or any combination or modification of them.

(6)-(7) * * *"

[Iron ore was proposed as a notified mineral in the draft statute.]

29. Immediately after 4-11-2014 (the date on which the Grant of Mining Leases Policy was uploaded on the website of the Government of Goa) the State Government commenced granting a second renewal of the mining leases from 5-11-2014 onwards and that process was completed on 12-1-2015. The following table gives the dates of second renewal of 88 mining leases granted by the State Government on or before 12-1-2015:

Sl. No.	*Date of renewal order*	*Number of renewal orders passed*
1.	5-11-2014	5
2.	6-11-2014	5
3.	7-11-2014	3
4.	10-12-2014	3
5.	24-12-2014	10
6.	1-1-2015	3
7.	2-1-2015	3
8.	5-1-2015	2
9.	6-1-2015	22
10.	9-1-2015	1
11.	12-1-2015	31
Total = 88		

30. The date of 12-1-2015 is significant since on that date the President promulgated the Mines and Minerals (Development and Regulation) Amendment Ordinance, 2015 (which was later enacted by Parliament) whereby the grant of mining leases for notified minerals was through competitive bidding or the auction process. It is important to mention here that the approval of the Ordinance by the Cabinet of the Government of India became public knowledge on 5-1-2015[9] and it is within a week from that date that the Government of Goa granted a second renewal to 25 mining leases and to make

9 <http://www.businesstoday.in/current/economy-politics/narendra-modi-cabinet-approves-ordinance-for-mines-auction/story/214253.html>.

<https://timesofindia.indiatimes.com/business/india-business/Cabinet-approves-ordinance-for-mines-auction/articleshow/45765290.cms>.

<http://www.financialexpress.com/economy/reforms-cabinet-approves-ordinance-for-mines-auction/26342/>.

<http://www.livemint.com/Politics/VDXphnUmPYGbN4lmzEBslK/Govt-passes-executive-order-to-auction-minerals.html>.

matters worse, a second renewal was granted to 31 mining leases on 12-1-2015, the day the Ordinance came into force making a total of 56 renewals of mining leases.

Environmental clearance and orders dated 20-3-2015

31. Following the renewal of 88 mining leases, the State of Goa requested the MoEF by Letters dated 7-1-2015 and 5-2-2015 to lift the abeyance order of 14-9-2012 on the environmental clearances. Consequently, the MoEF passed three orders on 20-3-2015 (the actual sequence of the orders is not very clear).

32. The first order of 20-3-2015 was in the form of a letter addressed to the Principal Secretary, Environment, Government of Goa and it recorded that MoEF had considered all the 139 cases in which the abeyance order has been passed and had taken into account the request of the State Government, the recommendation of the EAC and the directions of this Court. It was noted that the EAC had observed that there were violations of the following nature:

(*i*) no clearance from the National Board of Wildlife and non-compliance with orders of this Court on the subject;

(*ii*) excess production;

(*iii*) dump mining;

(*iv*) intersecting groundwater table and drawal of groundwater without permission of the Central Ground Water Board;

(*v*) No forest clearance obtained where required;

(*vi*) Encroachment and false information/concealment of fact.

It was stated that the MoEF had decided to refer the cases to the appropriate authorities (including the State Government) for taking action on the violations. Accordingly, a request was made to examine the report of the EAC and take appropriate action against the lessees concerned.

33. The second order passed on 20-3-2015 was an Office Memorandum to the effect that if a project proponent has a valid and subsisting environmental clearance for a mining project under the Environment Impact Assessment Notification of 27-1-1994 (EIA 1994) or Environment Impact Assessment Notification of 14-9-2006 (EIA 2006), it will not be required to obtain a fresh environmental clearance at the time of renewal of the mining lease. This was subject to the maximum period of validity of 30 years for the environmental clearance for a mining lease.

34. The third order passed on 20-3-2015 related to lifting the abeyance order dated 14-9-2012 on the environmental clearance of the mining leases for iron ore and manganese ore. The cases of all 139 mining leases in which the abeyance order was passed were considered and the abeyance order lifted in respect of 72 cases. The details in this regard are given in the table below:

Number	*Remarks*	*Remaining*
	Total mines = 139	
2	Inadvertent repetitions	137
2	Already withdrawn	135
12	Fully located in protected area (abeyance order cannot be lifted)	123
6	Partly located in protected area (abeyance order cannot be lifted)	117
23	Within 1 km of protected area (awaiting modification of order dated 4-8-2006[10] passed by this Court)	94
22	Not having any forest clearance and will be considered only after clearance is obtained	72
35	Environmental clearance already granted under EIA Notification of 27-1-1994 and no fresh clearance is required in view of Office Memorandum dated 20-3-2015. Abeyance order lifted.	37
37	Environmental clearance already granted under EIA Notification of 14-9-2006. Abeyance order lifted.	0
	Abeyance order lifted on 20-3-2015 for 72 mines out of 139	

35. The third order of 20-3-2015 also placed certain additional specific conditions while lifting the abeyance order. These additional conditions were:

1. The State Government of Goa shall develop and implement a credible mechanism to regularly monitor and ensure that capping of 20 MTPA on the mining leases in the State of Goa is implemented as per the directions of the Hon'ble Supreme Court in its order dated 21-4-2014[1] and any further order in the matter of *Goa Foundation* v. *Union of India* in WP No. 435 of 2012.

2. No mining shall be allowed in the forest land for which FC [forest clearance] is not available.

3. The mining of dumps is not permitted unless mentioned in approved mine plan and environmental clearance letter.

4. Dumping of material outside the mine lease is not permitted unless mentioned in approved mine plan and environmental clearance letter.

5. Prior permission be obtained from Central Ground Water Board for drawal of groundwater and intersection of groundwater table as applicable.

6. Violations will be dealt as per the existing law and lifting of abeyance of EC will not in any manner affect that.

7. If any violation is observed in future the environmental clearance will be cancelled as per rules.

10 *T.N. Godavarman Thirumulpad* v. *Union of India*, (2010) 13 SCC 740

1 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590

8. The State Government will take action in cases of violation under Sections 15/19 of the Environment (Protection) Act, 1986 as noted and recommended in EAC Report.

9. Project proponent will file six monthly compliance to the Regional Officer, MoEFCC and the State Pollution Control Board.

Questions for consideration

36. Broadly speaking, on the basis of the submissions and documents placed before us, the questions raised by the Goa Foundation, the State of Goa, the Union of India and the mining leaseholders are threefold:

36.1. (*a*) *Relatable to the second renewal of the mining leases*: (*i*) In view of the decision in *Goa Foundation*[1] only fresh leases were to be granted by the State of Goa and not second renewals. (*ii*) For granting fresh leases, the State of Goa should have introduced competitive bidding or the auction process. (*iii*) Assuming the decision to grant a second renewal to the mining leaseholders was valid, the second renewals were not in accordance with law and should be set aside.

36.2. (*b*) *Relatable to the grant of environmental clearances*: In view of the decision in *Goa Foundation*[1] fresh environmental clearances were required to be obtained by the mining leaseholders.

36.3. (*c*) The impugned judgment and order passed by the High Court in *Lithoferro*[5] on 13-8-2014 was erroneous and deserves to be set aside.

Whether fresh mining leases were required to be granted?

37. The controversy in this regard has arisen in view of what is stated in para 82 of the decision in *Goa Foundation*[1]. It was stated as follows: (SCC p. 635)

> "*82*. As we have held that the deemed mining leases of the lessees in Goa expired on 22-11-1987 and the maximum period (20 years) of renewal of the deemed mining leases in Goa has also expired on 22-11-2007, mining by the lessees in Goa after 22-11-2007 was illegal. Hence, the Order dated 10-9-2012 of the Government of Goa suspending mining operations in the State of Goa and the Order dated 14-9-2012 of MoEF, Government of India, suspending the environmental clearances granted to the mines in the State of Goa, which have been impugned[5] in the writ petitions in the Bombay High Court, Goa Bench (transferred to this Court and registered as transferred cases) cannot be quashed by this Court. *The Order dated 10-9-2012 of the Government of Goa and the Order dated 14-9-2012 of MoEF will have to continue till decisions are taken by the State Government to grant fresh leases and decisions are taken by MoEF to grant fresh environmental clearances for mining projects*." (emphasis supplied)

38. The issue that arose for discussion before us was the meaning and intention of the Court in the context of grant of "fresh leases" for mining

1 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590

5 *Lithoferro* v. *State of Goa*, 2014 SCC OnLine Bom 997 : (2015) 3 AIR Bom R 32

projects. Did the Court literally mean that a fresh mining lease was required to be granted or was a second renewal sufficient compliance?

39. As the abovequoted paragraph indicates, the Court was aware and conscious of the fact that the mining leases had expired on 22-11-2007 and the mining operations thereafter carried out by the mining leaseholders was illegal. For this reason, the Court held that the suspension order passed by the State of Goa on 10-9-2012 and the abeyance order passed by the MoEF on 14-9-2012 did not require any interference.

40. Since the mining operations carried out after 22-11-2007 were illegal, the Court, in subsequent paragraphs of the judgment noted (as a follow up) that an order was passed on 5-10-2012[11] suspending transportation of iron ore and manganese ore from those leases identified by the Justice Shah Commission. Thereafter on 11-11-2013[3] it was directed that an inventory be made of the excavated mineral ores and the inventoried mineral ores be sold by e-auction under the supervision of a Monitoring Committee.

41. Further, it was held by the Court on 21-4-2014[1] that from the e-auction-sale of the mineral ores, the mining leaseholders would be entitled to the average cost (not the actual cost) of extraction, the workers would be entitled to 50% wages and allowances on the principle of laid-off compensation and the Marmagao Port Trust would be entitled to 50% of the storage charges. Out of the balance amount, 10% would be appropriated to the Goan Iron Ore Permanent Fund for the purpose of sustainable development and intergenerational equity and the remaining amount would be appropriated by the State who is the owner of the mineral ores illegally excavated by the mining leaseholders and sold by e-auction.

42. With this in mind, the Court declared in para 87.5 of the Report: (*Goa Foundation case*[1], SCC p. 637)

> "*87.5. It is for the State Government to decide as a matter of policy in what manner mining leases are to be granted in future* but the constitutionality or legality of the decision of the State Government can be examined by the Court in exercise of its power of judicial review." (emphasis supplied)

It was then directed by the Court in para 88.4 of the Report as follows: (*Goa Foundation case*[1], SCC p. 637)

> "*88.4.* The State Government *may grant mining leases* of iron ore and other ores in Goa in accordance with its policy decision and in accordance with the MMDR Act and the Rules made thereunder in consonance with the constitutional provisions." (emphasis supplied)

11 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590 (footnote 4)
3 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 738
1 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590

43. The Court was quite obviously aware that it was concerned, inter alia, with the second renewal of mining leases and yet it chose to recount the factual situation, make a declaration and pass a direction without adverting to the possibility of a second renewal of a mining lease. The Court was also conscious that the mining leaseholders had carried out indiscriminate and illegal mining for about five years (from November 2007 to September 2012) and had made profits out of the illegal mining. The Court, in our opinion, was rather charitable in not penalising the mining leaseholders for the illegal mining carried out by them. But be that as it may, quite clearly, the sequence of events from September 2012 onwards, the appointment of a Monitoring Committee to dispose of the illegally mined ore, the declaration and direction unmistakably point to the intention of the Court to end the sordid chapter of illegal mining by the leaseholders and start on a clean slate. Viewed in this perspective, we have no doubt that the Court really did intend the State of Goa to consider the grant of fresh leases in accordance with law.

44. In this context, the declaration of the Court in *Goa Foundation*[1] in para 87.5 of Report is also quite clear, namely: (SCC p. 637)

> "*87.5*. It is for the State Government to decide as a matter of policy in what manner mining leases are to be granted in future...."

The declaration was explicit and related to the grant of mining leases and not a second renewal.

45. Similarly, the direction given in para 88.4 of the Report is that: (SCC p. 637)

> "*88.4*. The State Government may grant mining leases of iron ore and other ores in Goa in accordance with its policy decision...."

was equally explicit and related to the grant of mining leases and not a second renewal.

46. Subsequent events confirm our impression and view. The decision of the Court to e-auction the mined mineral ore was sought to be recalled through IA No. 86 of 2014 filed by M/s Bandekar Brothers Private Ltd. The applicant prayed for a direction to restrain the authorities from e-auctioning the iron ore mined by it prior to 22-11-2007 and that the mined ore should be released to the applicant with the right to dispose of the same. A Bench of three learned Judges (other than those that decided *Goa Foundation*[1]) noted[12] that: (*Goa Foundation case*[12], SCC pp. 158-59, para 9)

> "*9*. The submissions advanced on behalf of the applicant were premised merely on the assertion, that the mineral ore which the applicant was claiming a right over, had been legitimately mined before 22-11-2007, and therefore, the applicant had an absolute and legitimate ownership over the

1 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590
12 *Goa Foundation* v. *Union of India*, (2015) 1 SCC 153

same. We may note, that the above position was emphasised, stressed and persistently reiterated to make the stand absolutely crystal clear."

The learned Judges considered the submissions and held by an order dated 14-10-2014[12] that the direction in *Goa Foundation*[1] was clear and categorical that the iron ore vested in the State Government and therefore the application deserved dismissal. In other words, the mining leaseholders deserved no latitude for the illegal mining and all issues needed to be dealt with strictly.

47. There is additional material to support the view that the Court had intended the State of Goa to grant fresh mining leases rather than grant a second renewal.

48. From a reading of the decision rendered by the Bombay High Court in *Lithoferro*[5] [subject-matter of SLP (C) No. 32138 of 2015 and SLPs (C) Nos. 32699-727 of 2015] it is evident that the State of Goa understood the decision of this Court in *Goa Foundation*[1] to mean that fresh mining leases were required to be granted on the basis of a policy yet to be framed by the State of Goa and the issue of second renewals did not survive consideration. The contention of the learned Advocate General of the State of Goa in this regard is recorded by the High Court in the following words: (*Lithoferro case*[5], SCC OnLine Bom para 5)

"5. … The learned Advocate General [of the State of Goa] took us through the judgment[1] of the Apex Court in Writ Petition (C) No. 435 of 2012 and relied upon the observations of the Supreme Court in paras 67, 68, 69 and 70. The learned Advocate General submitted that the Hon'ble Supreme Court has held that the deemed mining leases of the lessees in Goa expired on 22-11-1987 and the maximum of 20 years' renewal period of the deemed mining leases in Goa as provided under sub-section (2) of Section 8 of the MMDR Act, read with sub-rules 8 and 9 of Rule 24-A of the MC Rules expired on 22-11-2007. *The learned Advocate General submitted that in view of these findings of the Supreme Court, there is no question of renewal of the mining leases. The learned Advocate General submitted that in terms of the Supreme Court decision, it is for the State Government to grant fresh leases in accordance with the policy which is yet to be framed.* The learned Advocate General submitted that the Supreme Court has kept Writ Petition (C) No. 435 of 2012 pending and, therefore, it is for the petitioners to approach the Supreme Court and seek appropriate orders. *The learned Advocate General submitted that the orders on which the petitioners rely, at the most show that the Government in principle has agreed for renewal of the leases for a further period of 20 years and the same was not a final decision. He submitted that in terms of the said*

12 *Goa Foundation* v. *Union of India*, (2015) 1 SCC 153
1 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590
5 *Lithoferro* v. *State of Goa*, 2014 SCC OnLine Bom 997 : (2015) 3 AIR Bom R 32

decision of the Apex Court, it is for the State Government to frame a fresh mining policy and after framing the same, to decide granting of fresh mining leases." (emphasis supplied)

49. While considering the submissions of the learned Advocate General and the learned counsel, the High Court noted that this Court was alive to the fact that the State of Goa had granted in-principle second renewal to 28 mining leases and had collected renewal fees or stamp duty from 27 mining leases (presumably out of the 28 mining leases) as stated in the brief resume filed by the State of Goa in this Court. The High Court noted: (*Lithoferro case*[5], SCC OnLine Bom para 7)

> "7. … (II) In the brief resume presented by the State of Goa and placed on record of the Supreme Court, in Writ Petition (C) No. 435 of 2012, it is inter alia, mentioned thus:
>
> '… Presently in the State of Goa, it is found that the applications for renewal were filed well within time as contemplated by Rule 24-A of the Mineral Concession Rules, 1960. Presently, the State has ordered renewal of 28 mining leases, granted in-principle approvals and has collected renewal fees/stamp duty from 27 mining leases.' "

50. In other words, notwithstanding the in-principle grant of second renewal of 28 mining leases and collection of renewal fees or stamp duty, this Court in *Goa Foundation*[1] consciously required the State of Goa to grant fresh leases. What is equally significant is that the State of Goa also understood the decision of the Court in the same manner and intended to act on that basis.

51. Unfortunately, the State of Goa was overtaken by the events in that the High Court delivered its judgment in *Lithoferro*[5] on 13-8-2014 and while doing so, it misunderstood or incorrectly appreciated the decision of this Court in *Goa Foundation*[1] and disagreed with the view of the State of Goa. While this Court had required the State of Goa to grant fresh mining leases and the State of Goa was willing to comply with this direction, the High Court instead directed it to execute mining leases under Section 8(3) of the MMDR Act in respect of those who had paid the renewal fees or stamp duty. The High Court also directed the State of Goa to decide their pending second renewal applications within a period of three months keeping in mind the provisions of Section 8(3) of the MMDR Act (presumably after paying the renewal fees or stamp duty in terms of the Government Order of 21-2-2013). The understanding by the High Court of the decision of this Court in *Goa Foundation*[1] is totally incorrect.

52. It appears from the contents of the Grant of Mining Leases Policy that in view of the decision of this Court in *Goa Foundation*[1] the State was actively considering a policy for granting fresh mining leases by considering several

5 *Lithoferro* v. *State of Goa*, 2014 SCC OnLine Bom 997 : (2015) 3 AIR Bom R 32
1 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590

factors. However, the decision and directions of the High Court supervened leaving no choice, according to the State, but to completely abandon the process of grant of fresh mining leases through the process of competitive bidding for earning revenue and justify the abandonment.

53. As per the Grant of Mining Leases Policy, the State of Goa therefore had two realistic options before it: (*i*) To implement the judgment and order of this Court in *Goa Foundation*[1] (as understood by the State of Goa) and grant fresh mining leases in the manner felt appropriate and in accordance with law; (*ii*) To abide by the judgment of the High Court (and its understanding of the judgment of this Court in *Goa Foundation*[1] while rejecting its understanding by the State of Goa) and grant second renewal to the mining leases in terms of Section 8(3) of the MMDR Act. The State of Goa appears to have taken the view that challenging the decision of the High Court (and therefore abiding by the decision of this Court) would delay the commencement of mining operations. The State took into consideration that a substantial portion of its revenue comes from the mining sector and that the State had been virtually starved of funds on account of stoppage of mining operations. Therefore, the State decided to grant a second renewal to the mining leases and not grant fresh leases. This is quite apparent from the contents of the Grant of Mining Leases Policy wherein the above facts and conclusions have been stated in greater detail. Was this decision correct?

54. The learned counsel for the mining leaseholders submitted that the renewal of a mining lease is equivalent to or amounts to the grant of a fresh lease and therefore when the mining leases were renewed, it amounted to the grant of a fresh lease in compliance with the directions of this Court. Reliance was placed upon *DDA* v. *Durga Chand Kaushish*[13] wherein this Court held: (SCC p. 829, para 7)

> "*7.* … A renewal of a lease is really the grant of a fresh lease. It is called a "renewal" simply because it postulates the existence of a prior lease which generally provides for renewals as of right. In all other respects, it is really a fresh lease."

55. Reference was also made to *Provash Chandra Dalui* v. *Biswanath Banerjee*[14] in which it was held in para 14 of the Report that there is a distinction between extension of a lease and renewal of a lease. We do not find any relevance of this to our discussion. Reference was also made to the view expressed in *M.C. Mehta* v. *Union of India*[15] wherein this Court noted that it is settled law that grant of renewal is a fresh grant and must be consistent with law.

1 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590
13 (1973) 2 SCC 825
14 1989 Supp (1) SCC 487
15 (2004) 12 SCC 118

56. Finally reliance was placed on *State of W.B.* v. *Calcutta Mineral Supply Co. (P) Ltd.*[16] in which decision it was noted in para 31 of the Report that the renewal of a lease is a fresh grant. This decision also refers to *Gajraj Singh* v. *STAT*[17] wherein this Court observed in para 38 of the Report that the grant of renewal is a fresh grant though it breathes life into the operation of the previous lease or licence granted.

57. There is no doubt that the renewal of a lease is virtually the same as the grant of a fresh lease but a converse direction to grant a mining lease cannot be understood to mean granting a renewal of a mining lease. Obviously, the grant of a fresh lease is not the same as the renewal of a lease and when the Court in *Goa Foundation*[1] required the State of Goa to grant a fresh lease, it did not require the State to renew the existing (expired) lease. The Court could have explicitly declared and directed the State of Goa to grant a second renewal of the mining leases rather than to say it in a roundabout manner that it should do so by granting a fresh lease equivalent to a renewal. We simply cannot accept the submissions made by the learned counsel for the mining leaseholders in this regard.

58. That apart, as we have already noted above, the context and material on record disabuse the thought that the Court in *Goa Foundation*[1] did not mandate the grant of fresh mining leases in accordance with law.

59. The learned counsel for the mining leaseholders contended that the very same learned Judges that decided *Goa Foundation*[1] permitted the State Government in *Common Cause* v. *Union of India*[18] to consider granting a second renewal of mining leases under Section 8(3) of the MMDR Act. Therefore the requirement in *Goa Foundation*[1] for the grant of "fresh leases" must be understood in a manner similar to what was directed in *Common Cause*[18]. We are unable to accept this contention. The direction given in *Common Cause*[18] was an interim direction and not a final direction as in *Goa Foundation*[1]. Moreover, the facts in both cases are not at all similar so as to warrant a similar order being passed or understood. Finally, the fact that the same set of learned Judges thought it fit to direct the grant of "fresh leases" in one set of cases and thought it fit to direct consideration of a "second renewal" in another set of cases indicates that the learned Judges were aware of the difference in directions. Therefore when the learned Judges directed the grant of "fresh leases" in *Goa Foundation*[1] it was a deliberate and conscious decision distinct and different from granting a second renewal of expired mining leases.

16 (2015) 8 SCC 655 : (2015) 4 SCC (Civ) 395
17 (1997) 1 SCC 650
1 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590
18 (2014) 14 SCC 155

60. In our opinion, the direction in *Goa Foundation*[1] is quite clear and instead of considering the grant of a second renewal of the mining leases, the State of Goa was required to consider the grant of fresh mining leases. Therefore the decision of the State of Goa to grant a second renewal of the mining leases is erroneous, contrary to the decision in *Goa Foundation*[1] and must be and is quashed.

Whether the State of Goa should have auctioned the mining leases?

61. As mentioned in the Grant of Mining Leases Policy there were several options available to the State of Goa. It took the view that all its options were foreclosed post the decision of the High Court and it was obliged to grant a second renewal of the mining leases. We have already held that this was not so and that the decision to grant a second renewal of the mining leases was erroneous and fresh leases were required to be granted in accordance with the decision in *Goa Foundation*[1]. In view of our conclusion, the discussion on whether the State of Goa should have auctioned the mining leases through a process of competitive bidding is now rendered academic. However, since detailed submissions were made by the learned counsel on both sides, including by the learned Additional Solicitor General, we propose to express our views on the subject.

62. The discussion on the question of auction being the only method of allocation or disposal of natural resources arose due to the view expressed by this Court in *Centre for Public Interest Litigation* v. *Union of India*[19]. In that decision (hereafter referred to as *CPIL*—although this case is generally referred to as the *2G scam case*) the Court dealt with the question of following a non-discriminatory policy for alienation of natural resources. While doing so it was observed that an auction is "perhaps the best method for discharging this burden" and concluded by holding that "while transferring or alienating the natural resources, the State is duty-bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process". This led to the belief that the view of this Court was that natural resources should be alienated or disposed of only by auction and by no other method. The Court held in paras 95 and 96 of the Report as follows: (*Centre for Public Interest case*[19], SCC pp. 59-60)

> "*95*. This Court has repeatedly held that wherever a contract is to be awarded or a licence is to be given, the public authority must adopt a transparent and fair method for making selections so that all eligible persons get a fair opportunity of competition. To put it differently, the State and its agencies/instrumentalities must always adopt a rational method for disposal of public property and no attempt should be made to scuttle the claim of worthy applicants. When it comes to alienation of scarce natural

1 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590
19 (2012) 3 SCC 1

resources like spectrum, etc. it is the burden of the State to ensure that a non-discriminatory method is adopted for distribution and alienation, which would necessarily result in protection of national/public interest.

96. In our view, a duly publicised auction conducted fairly and impartially is perhaps the best method for discharging this burden and the methods like first-come-first-served when used for alienation of natural resources/public property are likely to be misused by unscrupulous people who are only interested in garnering maximum financial benefit and have no respect for the constitutional ethos and values. *In other words, while transferring or alienating the natural resources, the State is duty-bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process*." (emphasis supplied)

63. In *Manohar Lal Sharma* v. *Union of India*[20] a Bench of three Judges of this Court paraphrased the above passages and observed that the view expressed in *CPIL*[19] necessitated a reference by the President of India to this Court under Article 143(1) of the Constitution being *Natural Resources Allocation, In re, Special Reference No. 1 of 2012*[21].

64. What was the advisory opinion given by this Court in *Natural Resources Allocation*[21]? Among the questions referred for opinion were the following: (SCC p. 41, para 1)

Question 1. Whether the only permissible method for disposal of all natural resources across all sectors and in all circumstances is by the conduct of auctions?

Question 2. Whether a broad proposition of law that only the route of auctions can be resorted to for disposal of natural resources does not run contrary to several judgments of the Supreme Court including those of the larger Benches?

65. In the Reference, it was submitted before the Constitution Bench that paras 94 to 96 in *CPIL*[19] laid down the ratio vis-à-vis disposal of natural resources. It was argued that "these paragraphs lay down, as a proposition of law, that all natural resources across all sectors, and in all circumstances are to be disposed of by way of public auction, and on the other [hand], it was urged that the observations therein were made only qua spectrum".

66. The submissions made by the learned counsel were then discussed and thereafter this Court recorded its conclusions between paras 82 and 84 of *Natural Resources Allocation*[21]. In para 84, it was held: (SCC p. 72)

"*84*. Thus, having come to the conclusion *that 2G case*[19] *does not deal with modes of allocation for natural resources, other than spectrum*, we shall now proceed to answer the first question of the Reference pertaining to

20 (2014) 9 SCC 516
19 *Centre for Public Interest Litigation* v. *Union of India*, (2012) 3 SCC 1
21 (2012) 10 SCC 1

other natural resources, as the question subsumes the essence of the entire reference, particularly the set of first five questions." (emphasis supplied)

67. Thereafter, while answering the first question in the Reference, the Court considered the issue from various perspectives. It first dealt with the issue in the context of Article 14 and Article 39(*b*) of the Constitution and concluded in para 120 of the Report that the disposal of natural resources for revenue maximisation through auctions is not a constitutional mandate. It was held: (*Natural Resources Allocation case*[21], SCC p. 88)

> "*120*. Therefore, in conclusion, the submission that the mandate of Article 14 is that any disposal of a natural resource for commercial use must be for revenue maximisation, and thus by auction, is based neither on law nor on logic. *There is no constitutional imperative in the matter of economic policies—Article 14 does not predefine any economic policy as a constitutional mandate*. Even the mandate of Article 39(*b*) imposes no restrictions on the means adopted to subserve the public good and uses the broad term "distribution", suggesting that the methodology of distribution is not fixed. Economic logic establishes that alienation/allocation of natural resources to the highest bidder may not necessarily be the only way to subserve the common good, and at times, may run counter to public good. Hence, it needs little emphasis that disposal of all natural resources through auctions is clearly not a constitutional mandate." (emphasis supplied)

68. The issue was then considered from the standpoint of legitimate deviations from an auction. After adverting to several decisions of this Court where auctions were not the favoured method of allocation of natural resources, it was held between paras 129 and 131 of the Report as follows: (*Natural Resources Allocation case*[21], SCC p. 92)

> "*129*. Hence, it is manifest that there is no constitutional mandate in favour of auction under Article 14. The Government has repeatedly deviated from the course of auction and this Court has repeatedly upheld such actions. The judiciary tests such deviations on the limited scope of arbitrariness and fairness under Article 14 and its role is limited to that extent. *Essentially, whenever the object of policy is anything but revenue maximisation, the executive is seen to adopt methods other than auction.*
>
> *130*. A fortiori, besides legal logic, mandatory auction may be contrary to economic logic as well. Different resources may require different treatment. Very often, exploration and exploitation contracts are bundled together due to the requirement of heavy capital in the discovery of natural resources. *A concern would risk undertaking such exploration and incur heavy costs only if it was assured utilisation of the resource discovered: a prudent business venture would not like to incur the high costs involved in exploration activities and then compete for that resource in an open auction*. The logic is similar to that applied in patents. Firms are given incentives to invest in research and development with the promise of

21 *Natural Resources Allocation, In re, Special Reference No. 1 of 2012*, (2012) 10 SCC 1

exclusive access to the market for the sale of that invention. Such an approach is economically and legally sound and sometimes necessary to spur research and development. Similarly, bundling exploration and exploitation contracts may be necessary to spur growth in a specific industry.

131. Similar deviation from auction cannot be ruled out when the object of a State policy is to promote domestic development of an industry, like in *Kasturi Lal case*[22] discussed above. However, these examples are purely illustrative in order to demonstrate that *auction cannot be the sole criterion for alienation of all natural resources*." (emphasis supplied)

69. Finally, the issue was considered from the point of view of the potential of abuse in allocation of natural resources other than through auction and in this context it was held in para 135 of the Report: (*Natural Resources Allocation case*[21], SCC pp. 93-94)

"*135*. Therefore, a potential for abuse cannot be the basis for striking down a method as ultra vires the Constitution. *It is the actual abuse itself that must be brought before the court for being tested on the anvil of constitutional provisions*. In fact, it may be said that even auction has a potential of abuse, like any other method of allocation, but that cannot be the basis of declaring it as an unconstitutional methodology either. These drawbacks include cartelisation, the "winner's curse" (the phenomenon by which a bidder bids a higher, unrealistic and unexecutable price just to surpass the competition; or where a bidder, in case of multiple auctions, bids for all the resources and ends up winning licences for exploitation of more resources than he can pragmatically execute), etc. However, all the same, auction cannot be called ultra vires for the said reasons and continues to be an attractive and preferred means of disposal of natural resources especially when revenue maximisation is a priority. Therefore, *neither auction, nor any other method of disposal can be held ultra vires the Constitution, merely because of a potential abuse*." (emphasis supplied)

70. The conclusion arrived at by the Constitution Bench was then recorded between paras 148 and 150 of the Report in the following words: (*Natural Resources Allocation case*[21], SCC pp. 98-99)

"*148*. In our opinion, *auction despite being a more preferable method of alienation/allotment of natural resources*, cannot be held to be a constitutional requirement or limitation for alienation of all natural resources and therefore, every method other than auction cannot be struck down as ultra vires the constitutional mandate.

149. Regard being had to the aforesaid precepts, we have opined that auction as a mode cannot be conferred the status of a constitutional principle. *Alienation of natural resources is a policy decision, and the means adopted for the same are thus, executive prerogatives. However,*

22 *Kasturi Lal Lakshmi Reddy* v. *State of J&K*, (1980) 4 SCC 1
21 *Natural Resources Allocation, In re, Special Reference No. 1 of 2012*, (2012) 10 SCC 1

when such a policy decision is not backed by a social or welfare purpose, and precious and scarce natural resources are alienated for commercial pursuits of profit maximising private entrepreneurs, adoption of means other than those that are competitive and maximise revenue may be arbitrary and face the wrath of Article 14 of the Constitution. Hence, rather than prescribing or proscribing a method, we believe, a judicial scrutiny of methods of disposal of natural resources should depend on the facts and circumstances of each case, in consonance with the principles which we have culled out above. Failing which, the Court, in exercise of power of judicial review, shall term the executive action as arbitrary, unfair, unreasonable and capricious due to its antimony with Article 14 of the Constitution.

150. In conclusion, our answer to the first set of five questions is that auctions are not the only permissible method for disposal of all natural resources across all sectors and in all circumstances." (emphasis supplied)

71. It is therefore more than explicit that there is no constitutional requirement (let alone a mandate) for allocation of natural resources through the auction method (other than spectrum) but at the same time the auction process should not be given a go-by without any justification—the decision to give a go-by is judicially reviewable though the scope of judicial review might be rather restricted. The melting pot of allocation of a natural resource, a social or welfare purpose and adherence to the requirements of Articles 14 and 39(*b*) of the Constitution in matters of policy was a great leap forward fashioned by the Constitution Bench. Consequently, while there is no mandate, constitutional or otherwise, that natural resource allocation must be only by auction, it is certainly "a more preferable method". There are exceptions, such as when the natural resource allocation is for a "social or welfare purpose". On the other hand if the natural resource allocation is "for commercial pursuits of profit maximising private entrepreneurs" dehors any social or welfare purpose, then judicial review would be permissible and Article 14 of the Constitution would be attracted and if the executive action is found to be arbitrary, it would be struck down. Therefore, when it comes to natural resource allocation, the executive has a somewhat limited elbow room.

72. In his concurring opinion, Khehar, J. took the view (in para 186 of the Report) that: (*Natural Resources Allocation case*[21], SCC p. 137)

"*186.* … when natural resources are made available by the State to private persons for commercial exploitation exclusively for their individual gains, *the State's endeavour must be towards maximisation of revenue returns*." (emphasis supplied)

The learned Judge concluded his opinion by agreeing that an auction is one of the price recovery mechanisms, but not the only one for allocation of natural resources. "That should not be understood to mean that it can never be a

21 *Natural Resources Allocation, In re, Special Reference No. 1 of 2012*, (2012) 10 SCC 1

valid method for disposal of natural resources." (SCC p. 144, para 199) It was further held that natural resources cannot be alienated by way of largesse—there must be a reciprocal consideration either in the form of earning revenue or subserving the common good or both. The learned Judge had this to say: (*Natural Resources Allocation case*[21], SCC pp. 143-44)

> "*199*. The policy of allocation of natural resources for public good can be defined by the legislature, as has been discussed in the foregoing paragraphs. Likewise, policy for allocation of natural resources may also be determined by the executive. The parameters for determining the legality and constitutionality of the two are exactly the same. In the aforesaid view of the matter, there can be no doubt about the conclusion recorded in the main opinion that auction which is just one of the several price recovery mechanisms, cannot be held to be the only constitutionally recognised method for alienation of natural resources. That should not be understood to mean that it can never be a valid method for disposal of natural resources (refer to paras 186 to 188 of my instant opinion).
>
> *200*. I would, therefore, conclude by stating that *no part of the natural resource can be dissipated as a matter of largesse, charity, donation or endowment, for private exploitation. Each bit of natural resource expended must bring back a reciprocal consideration. The consideration may be in the nature of earning revenue or may be to "best subserve the common good". It may well be the amalgam of the two. There cannot be a dissipation of material resources free of cost or at a consideration lower than their actual worth*. One set of citizens cannot prosper at the cost of another set of citizens, for that would not be fair or reasonable." (emphasis supplied)

73. This issue was considered in *Goa Foundation*[1] as well. The Court adverted to *Natural Resources Allocation*[21] in para 81 of the Report and pithily expressed its view that the manner of granting a mining lease is a policy decision of the State Government, but the decision can be examined by way of judicial review. It was held: (*Goa Foundation case*[1], SCC p. 634)

> "*81*. We are of the considered opinion that it is for the State Government to decide as a matter of policy in what manner the leases of these mineral resources would be granted, but this decision has to be taken in accordance with the provisions of the MMDR Act and the Rules made thereunder and in consonance with the constitutional provisions and the decision taken by the State of Goa to grant a mining lease in a particular manner or to a particular party can be examined by way of judicial review by the Court." (emphasis supplied)

It was then declared in para 87.5 of the Report that: (SCC p. 637)

> "*87.5*. It is for the State Government to decide as a matter of policy in what manner mining leases are to be granted in future *but*

21 *Natural Resources Allocation, In re, Special Reference No. 1 of 2012*, (2012) 10 SCC 1
1 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590

the constitutionality or legality of the decision of the State Government can be examined by the Court in exercise of its power of judicial review." (emphasis supplied)

74. Similarly, in *Manohar Lal Sharma*[20] this Court adverted to the issue and noted the following in para 98 of the Report: (SCC p. 563)

"*98*. The Constitution Bench [*Natural Resources Allocation*[21]] clarified that the statement of law in *2G case*[19] [*CPIL*] that while transferring or alienating the natural resources, the State is duty-bound to adopt the method of auction was confined to the specific case of spectrum and not for dispensation of all natural resources. The Constitution Bench said that findings of this Court in *2G case*[19] were limited to the case of spectrum and not beyond that and that it did not deal with the modes of allocation for natural resources other than spectrum."

75. The Court in *Manohar Lal Sharma*[20] also referred to the views expressed by Khehar, J. and held, in para 104 of the Report: (SCC p. 568)

"*104*. In light of the above legal position, the argument that auction is the best way to select private parties as per Article 39(*b*) does not merit acceptance."

76. This Court then exercised its power of judicial review and considered the merits of the explanation given by the Central Government for not adopting the competitive bidding route for the allocation of coal blocks. The various submissions made, the various hurdles faced (including objections of the State Governments) as well as the impracticality of opening up the allocation of coal blocks to competitive bidding were considered and then it was held (after opening the window of Article 14 of the Constitution) in para 110 of the Report: (*Manohar Lal Sharma case*[20], SCC pp. 570-71)

"*110*. The above facts show that it took almost 8 years in putting in place allocation of captive coal blocks through competitive bidding. During this period, many coal blocks were allocated giving rise to present controversy, which was avoidable because competitive bidding would have brought in transparency, objectivity and very importantly given a level playing field to all applicants of coal and lowered the difference between the market price of coal and the cost of coal for the allottee by way of premium which would have accrued to the Government. Be that as it may, once it is laid down by the Constitution Bench of this Court in *Natural Resources Allocation*[21] that the Court cannot conduct a comparative study of various methods of distribution of natural resources and cannot mandate one method to be followed in all facts and circumstances, then if the grave situation of shortage of power prevailing at that time necessitated private

20 *Manohar Lal Sharma* v. *Union of India*, (2014) 9 SCC 516
21 *Natural Resources Allocation, In re, Special Reference No. 1 of 2012*, (2012) 10 SCC 1
19 *Centre for Public Interest Litigation* v. *Union of India*, (2012) 3 SCC 1

participation and the Government felt that it would have been impractical and unrealistic to allocate coal blocks through auction and later on in 2004 or so there was serious opposition by many State Governments to bidding system, and the Government did not pursue competitive bidding/public auction route, then in our view, the administrative decision of the Government not to pursue competitive bidding cannot be said to be so arbitrary or unreasonable warranting judicial interference. It is not the domain of the Court to evaluate the advantages of competitive bidding vis-à-vis other methods of distribution/disposal of natural resources. *However, if the allocation of subject coal blocks is inconsistent with Article 14 of the Constitution and the procedure that has been followed in such allocation is found to be unfair, unreasonable, discriminatory, non-transparent, capricious or suffers from favouritism or nepotism and violative of the mandate of Article 14 of the Constitution, the consequences of such unconstitutional or illegal allocation must follow*." (emphasis supplied)

77. More recently in *Ajar Enterprises (P) Ltd.* v. *Satyanarayan Somani*[23] this Court once again examined the issue of distribution of natural resources and held: (SCC p. 785, para 49)

"*49*. Undoubtedly, disposal of natural resources by auction is not a mandatory principle for, as the Constitution Bench held[21], individual statutes may provide for modalities of transfer by alternate modes which subserve public interest. ... The choice of methods is not left to the unbridled discretion of a public authority. Where a public authority exercises an executive prerogative, it must nonetheless act in a manner which would *subserve public interest and facilitate the distribution of scarce natural resources in a manner that would achieve public good*. Where a public authority implements a policy, which is backed by a constitutionally recognised social purpose intended to achieve the welfare of the community, the considerations which would govern would be different from those when it alienates natural resources for commercial exploitation. When a public body is actuated by a constitutional purpose embodied in the Directive Principles, the considerations which weigh with it in determining the mode of alienation should be such as would achieve the underlying object. *In certain cases, the dominant consideration is not to maximize revenues but to achieve social good such as when the alienation is to provide affordable housing to members of the Scheduled Castes or Tribes or to implement housing schemes for Below the poverty line (BPL) families. In other cases where natural resources are alienated for commercial exploitation, a public authority cannot allow them to be dissipated at its unbridled discretion at the cost of public interest.*" (emphasis supplied)

23 (2018) 12 SCC 756

21 *Natural Resources Allocation, In re, Special Reference No. 1 of 2012*, (2012) 10 SCC 1

The window is now more than ajar.

78. Till fairly recently, policy matters particularly of economic policy were hands-off as far as the courts were concerned.[24] But the recent decisions of this Court, including by the Constitution Bench in its advisory jurisdiction, have partially modified this theory and kept open the window to judicially review such a policy if it does not serve the common good as understood in Article 39(*b*) of the Constitution, if it violates Article 14 of the Constitution and alienates natural resources for maximising profits of private entrepreneurs while sidelining Article 39(*b*) of the Constitution. "The legislature and the executive are answerable to the Constitution and it is there where the judiciary, the guardian of the Constitution, must find the contours to the powers of disposal of natural resources, especially Article 14 and Article 39(*b*) [of the Constitution].[25] (SCC p. 77)"

79. Notwithstanding this, a court must exercise restraint and not set aside Government Policy only because it disagrees with it or because a better policy could be framed or simply because it has the power to set aside the policy. Policies framed by the State, after due consideration, must be respected and given enough elbow room and flexibility for implementation. Of course, there would be occasions when the implementation of a policy has teething problems or some lacuna is discovered at a slightly later stage, but that does not mean that policy itself is defective. Therefore, courts must be very cautious and circumspect in diluting or setting aside a policy and must do so only if it is constitutionally unavoidable, otherwise good governance could be a casualty.

80. The conclusions that could be drawn from all these decisions are:

80.1. It is not obligatory, constitutionally or otherwise, that a natural resource (other than spectrum) must be disposed of or alienated or allocated only through an auction or through competitive bidding;

80.2. Where the distribution, allocation, alienation or disposal of a natural resource is to a private party for a commercial pursuit of maximising profits, then an auction is a more preferable method of such allotment;

80.3. A decision to not auction a natural resource is liable to challenge and subject to restricted and limited judicial review under Article 14 of the Constitution;

80.4. A decision to not auction a natural resource and sacrifice maximisation of revenues might be justifiable if the decision is taken, inter alia, for the social good or the public good or the common good;

80.5. Unless the alienation or disposal of a natural resource is for the common good or a social or welfare purpose, it cannot be dissipated in favour of a private entrepreneur virtually free of cost or for a consideration not commensurate with its worth without attracting Article 14 and Article 39(*b*) of the Constitution.

24 *BALCO Employees' Union* v. *Union of India*, (2002) 2 SCC 333 at paras 46 and 47
25 *Natural Resource Allocation, In re, Special Reference No. 1 of 2012*, (2012) 10 SCC 1, para 95

Whether the decision of the State of Goa forsaking the auction route is arbitrary?

81. Keeping in mind the broad principles identified above, the question that arises for our consideration is whether the State of Goa was justified in not adopting the auction route for the grant of mining leases and simply granting a second renewal. For a better understanding of this issue, it would be worthwhile to again refer to the Goa Mineral Policy, the report of the EAC, the Grant of Mining Leases Policy and the decision of the Bombay High Court, which documents were relied upon by the learned Additional Solicitor General.

(i) Goa Mineral Policy

82. The Mineral Policy makes it very clear that during the period from about 2006 till about 2012 (for about 5 years) extraction of iron ore in Goa was nothing but a free-for-all situation. Illegalities and irregularities were committed in abundance by all concerned, particularly the mining leaseholders. The Mineral Policy records that the State witnessed the peak of chaotic and unregulated mining. The thought of protecting and preserving the environment, concern for the fragile ecology of Goa was far from the thoughts of the stakeholders—even the well-being of the average Goan was not taken into consideration by the stakeholders. A reading of the initial paragraphs of the Mineral Policy suggests that nothing short of rapacious mining was going on in Goa. Who were the beneficiaries of all this rapaciousness? Could all this be ignored?

83. The Mineral Policy informs us that the beneficiaries of the rapaciousness were not the domestic industry and certainly not the average Goan. The reason for this is spelt out in the Mineral Policy itself. Iron ore from Goa is not suitable for the Indian industry due to the low Fe content and the high silica presence. Therefore, there is no value addition to the Indian industry and the iron ore was mined only for export — mainly to China and also to Japan. With a port in the vicinity, Goan iron ore was an attractive buy for the global market and the spin-offs benefited those in the port, transporters and barge owners, etc. The primary beneficiary of this was, of course, the mining leaseholder, a private entity, and the price was paid by the average Goan who had to suffer a polluted environment and witness the damage to the State's ecology.

84. If the issues mentioned in the Mineral Policy are objectively considered in strict monetary terms, the only conclusion that can be drawn is that the extraction of iron ore was for commercial purposes and maximising the revenues of private entrepreneurs and not necessarily the State of Goa. The natural resource was exploited by some mining leaseholders for making profits and nothing else. There were some collateral beneficiaries as well, and they too were commercially driven entities such as barge owners, truck owners, etc. Under these circumstances, the question that arises is whether the mining leaseholders should have been given a second renewal of the mining lease virtually for a song, that is, payment only of royalty, when they were driven only by a profit motive or whether the mining leases ought to have been

auctioned? Unfortunately, the Mineral Policy did not advert to or even consider any solution that would break from the past.

85. As far as the environment, the fragile ecology of Goa and the well-being of the average Goan and the rule of law is concerned, the Mineral Policy categorically states that the State had witnessed, from 2006-2007 till 2011-2012 the peak of chaotic and unregulated mining without any concern for the fragile ecology and environment of the State or for the general well-being of an average Goan. Surely, all this cannot be ignored or brushed aside particularly since the exploitation of mineral resources for five years had no element of social or public purpose, no concern for society and no regard for the environment and the laws.

(ii) Vishwanath Anand Expert Appraisal Committee

86. A reading of the report of the EAC is disturbing and acutely highlights the damage to the environment and ecology by the mining leaseholders. The complete indifference by all concerned is evident from a careful reading of the report. We propose to refer to and quote in extenso the "summary of observations" and the "concluding remarks" from the report of the EAC since they are self-explanatory:

"Summary of Observations

I. The absence of specific conditions highlighting the mandatory requirement to obtain prior approval of the Standing Committee of the NBWL [National Board for Wild Life] in the EC [Environmental Clearance] has led to misinterpretation of the legal requirement. There has been an inordinate delay of more than 5 years before effective action against defaulting units were initiated by the Ministry for non-compliance of the Hon'ble Supreme Court order dated 4-12-2006[26].

II. Out of 137 ECs, the requirement of obtaining approval of the Standing Committee of the NBWL under the WL (P) Act, 1972 [Wild Life (Protection) Act] has not been complied with in 123 cases where the distances are less than 10 km from the nearest PA [protected area].

III. In respect of 10 cases approval of the Standing Committee of the NBWL is not mandatory as the mine leases are located beyond 10 km from nearest PA.

IV. Contrary to the directions of the Hon'ble Supreme Court dated 4-8-2006[10] in Writ Petition (Civil) No. 202 of 1995; ECs have been accorded to 41 mines located within 1 km from the nearest PA.

V. In respect of 20 cases mine leases were renewed under the MMDR Act, 1957 prior to grant of FCs [Forest Clearance].

VI. In 29 cases, project proponents have furnished wrong information about distance from the nearest PAs.

26 *Goa Foundation* v. *Union of India*, (2011) 15 SCC 791
10 *T.N. Godavarman Thirumulpad* v. *Union of India*, (2010) 13 SCC 740

VII. Non-compliance of various EC conditions such as excess production/unauthorised dump mining/drawal of groundwater without prior approval of CGWB/encroachment; have also been reported in respect of working mines.

Concluding Remarks

A reading of our observations and recommendations would show that *without exception, every proponent to whom an environment clearance was issued has either violated its conditions or has furnished information in the application which has been distant from the truth*. There are basically two types of violations; one that cannot be legally condoned and those that can be rectified with remedial measures. This is the reason why the Committee has recommended that all ECs for mines located within one km from PAs should be revoked and in cases where untruthful information was furnished in the application for EC, such mines should not be allowed to reopen. In the case of those mines which have been closed for more than five years, their reopening has not been recommended without their applying de novo for a fresh environmental clearance as micro environmental conditions on the ground would have changed during the period they remained closed. However, when one looks at the manner in which the directives dated 4-8-2006[10] and 4-12-2006[26] of the Supreme Court have been implemented one cannot help but feel that there is the absence of a bridge mechanism within the Ministry to ensure and oversee that directives of the courts are complied with due diligence and seriousness.

There are two factors which stand out; in some ECs as mentioned in this report, the condition was inserted that the project proponent should seek approval of the CWLW [Chief Wild Life Warden], in others it was stated that approval of the competent authority/Standing Committee of the NBWL should be obtained and in a third category no condition at all was imposed, even though some of these ECs pertain to the same meeting and timelines between 2005 and 2007. It is strange that officials concerned in the MoEF were not aware that other than the Standing Committee of the NBWL no other person was authorised to grant the permission envisaged by the order dated 4-12-2006[26] of the Supreme Court. This is not to state that any discrepancy in the EC letter would absolve the project proponent from complying with the law of the land. This has resulted in creating ambiguity amongst many of the project proponents and it was not until 1-1-2009, that the MoEF issued a public notice clarifying the position.

Considering that some of the project proponents may have been misguided by the ambivalence of the MoEF in not clearly delineating the legal position, it is suggested that in the case of those project proponents who did not conceal facts in their applications but did not apply for permission to the Standing Committee of the NBWL, their applications may be considered for being placed before the Standing Committee of the

10 *T.N. Godavarman Thirumulpad* v. *Union of India*, (2010) 13 SCC 740
26 *Goa Foundation* v. *Union of India*, (2011) 15 SCC 791

NBWL. However this can in no way be construed as a justification on the part of the project proponents for not complying with the requirements of the law. It must be noted for example that in those cases where mining has intersected the groundwater, approval of the CGWB [Central Ground Water Board] had not been taken by the project proponents as was required by the EC. Similarly, there are cases where mining operations have taken place without obtaining an FC.

* * *

As regards violations of the conditions of the ECs and where environmental damage has been caused, the proponents concerned should be made accountable and the MoEF should examine as to how some monetary damages can be levied through due legal process based on the polluter must pay principle, the proceeds of which could be used for environmental rehabilitation.

There are concerns about the carrying capacity of the area with regard to its ability to sustain the extent and quantum of mining that has taken place there. It is recommended that a carrying capacity study should be commissioned for the area, or if another study by a nationally recognised institution is coming to fruition the result of that should be acted upon. Such a study should also take into account the impact of mining on the hydrology of the region and the extent of pollution caused to surface and groundwater. This study should be compared to the earlier 10 years' baseline data to determine the impact of mining on the biodiversity and hydrology of the area in the last decade. Based on the finding of this, a specific policy for mining of iron ore in the region may be developed. Such a policy along with a proper control and monitoring mechanism is necessary in order to avoid a situation such as the one under question. It would hopefully also ensure that mining in this region is carried out in accordance with best sectoral practices using appropriately clean technologies." (emphasis supplied)

87. The report of the EAC reveals that there is not a single environment-related or mining-related law or legal requirement that was not violated by one or the other mining leaseholder. Quite clearly, the rule of environmental law in Goa had gone with the wind.

88. There was one extremely important requirement relating to extraction of groundwater—that is, clearance from the Central Ground Water Board—but even that was ignored. During the course of submissions, we were informed that there is plenty of groundwater available in Goa. However, what seems to have been overlooked is that with the intersection of groundwater levels with mining operations, the groundwater would get depleted much faster than expected or the quality of the groundwater would deteriorate. It is for this reason that MoEF insisted that clearance for drawal of groundwater must be taken from the Central Ground Water Board and care taken in respect of the intersection of groundwater level with mining operations (this happened in 46 cases). Unfortunately, no heed was paid to these requirements by the State of Goa or any of the mining leaseholders and not one mining leaseholder has any

clearance (where required) from the Central Ground Water Board, or at least none was brought to our notice.

(iii) Decision of the Bombay High Court

89. The High Court essentially created two classes of applicants for the grant of a mining lease — those in whose favour an in-principle decision had been taken for a second renewal of the mining lease and who had paid the necessary stamp duty in terms of the government order of 21-2-2013 and those who had not yet paid the requisite stamp duty.

90. As regards the first category, the High Court directed execution of the mining lease in their favour in accordance with the provisions of Section 8(3) of the MMDR Act. This was on the belief that the applicants had applied for the second renewal within the prescribed time period; the Indian Bureau of Mines had approved the mining plans of these applicants; the Indian Bureau of Mines was subjectively satisfied that the second renewal was in the interest of mineral development; and that in view of the principles of promissory estoppel these applicants were entitled to a second renewal of their mining lease since they had altered their position to their detriment by paying the stamp duty demanded.

91. As regards the second category (those who had not paid the stamp duty), the High Court directed the State of Goa to decide their second renewal application within a period of three months keeping in mind the provisions of Section 8(3) of the MMDR Act (and the requirement to pay the stamp duty).

92. The decision of the High Court does not at all discuss the options available to the State of Goa, namely, second renewal of the mining leases versus auction of a natural resource. In fact it appears that the High Court was not at all alive to the possibility of an auction of the mining leases, notwithstanding the view canvassed by the learned Advocate General of the State of Goa.

(iv) Goa Grant of Mining Leases Policy, 2014

93. The Grant of Mining Leases Policy announced and issued on 4-11-2014 is perhaps the most important document in the entire scheme of things and that is the reason it was read out extensively by the learned Additional Solicitor General and that is why we have chosen to quote it extensively.

94. A consideration of the contemporaneous facts beginning with the Budget Speech given by the Hon'ble Minister of Finance of the Government of India on 10-7-2014 makes it clear that an amendment to the MMDR Act was to be effected sooner than later. The Grant of Mining Leases Policy overlooks that and proceeds on the basis that the judgment of the High Court delivered on 13-8-2014[5] left the Government of Goa with no choice but to abandon the grant of mining leases through competitive bidding, even though that might be the most appropriate method of obtaining the best revenue for the public good. The Government of Goa had therefore "for the present" ruled out the process of going in for competitive bidding keeping also in mind that the

5 *Lithoferro* v. *State of Goa*, 2014 SCC OnLine Bom 997 : (2015) 3 AIR Bom R 32

State was virtually starved of funds and had to balance the equities and needs of all, including the labour class, working class and other staff, markets in mining localities, public sector, mining leaseholders, welfare needs of the State, environment and fragile ecology of the State and general well-being of the average Goan.

95. The State of Goa was also alive to the fact that many (if not all) mining leaseholders had violated the terms of the mining lease or some statutory obligation. Therefore, it was decided to categorise the offenders as follows:

Category I — Will be those mining leases which have no violations or very minimal violation of any provision/condition of applicable laws/rules, orders/permissions, etc. or those which cannot otherwise be referred to as "violations".

Category II — Are those mining leases which have been found to have violated the Provisions of the Mineral Concession Rules including Rules 37 and 38 and other matters as mentioned in the Public Accounts Committee Report/Justice Shah Commission Report. In this category, the State Government will consider each of the cases on its own merits; and wherever the violations are noticed subject to the same being remedied by paying appropriate penalty/fines including those of forfeiture, the State Government shall pass appropriate orders in accordance with law.

Category III — Mining leases will be those which are found to have violated substantially any provision/condition of applicable laws/rules/orders/permissions, etc. and in which cases the State Government shall determine the lease/reject their "Application for the Second Renewal".

96. The offences ranged, amongst others, from illegal sale of ore, sale of royalty challan without ore, encroachment of adjoining areas outside the lease, overproduction in excess of the limit specified in the environmental clearance, unscientific mining operations, violations with respect to payment of royalty amount, re-use of old royalty challans for defrauding, illegal mining activities, etc. etc. None of these are "minimal" violations. However, and this is important, the Grant of Mining Leases Policy made it clear that the following shall not be considered for renewal of mining leases:

(*i*) Those facing an inquiry initiated pursuant to the orders of this Court in para 88.2 of *Goa Foundation*[1] for the violation of Rules 37 and 38 of the Mineral Concession Rules, 1960;

(*ii*) Those indicted by the Justice M.B. Shah Commission; and

(*iii*) Those indicted by the Public Accounts Committee.

The Grant of Mining Leases Policy stated that inquiries are already in progress "at various levels and fora" including a Special Investigating Team and a team of Chartered Accountants. We dare say that violations pointed out by the EAC ought also to have been taken into consideration.

1 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590

97. Be that as it may, there is no doubt that iron ore mining in Goa was solely for commercial purposes — it was extracted primarily for export to China and Japan without any value addition to the domestic industry. True, this brought in considerable foreign exchange — nevertheless iron ore extraction gave insignificant value addition (if at all) to Indian industry. The only advantage that iron ore extraction gave to the State was in terms of royalty, but the larger benefit accrued to the private mining leaseholder who could obtain a mining lease on renewal virtually free and without any social or welfare purpose. In other words, the State sacrificed maximising revenue for no apparent positive reason, virtually surrendering itself to the commercial and profit-making motives of private entrepreneurs and ignoring the interests of Goan society in general. Therefore, in principle, the decision of the State of Goa to not auction the grant of mining leases was flawed in that it did not serve the common or public or social good but primarily assisted in filling the coffers of private entrepreneurs. We are not inclined to go so far as to describe the decision as arbitrary since it is not necessary to do so.

98. However, we make it clear that we have dealt with this issue because it was canvassed before us. We are not inclined to quash the decision of the State of Goa of not going in for competitive bidding for the grant of fresh mining leases since it is not necessary in view of our conclusion that fresh mining leases were required to be granted by the State of Goa.

99. At this stage we must refer to a submission made by Mr C.U. Singh learned counsel appearing for some of the mining leaseholders. He submitted that prior to 12-1-2015 the MMDR Act did not permit the auction of mining leases. Therefore, even if the State of Goa was desirous of introducing competitive bidding for grant of fresh mining leases it could not have done so. He drew our attention to Section 11 of the MMDR Act (as it stood prior to its amendment in 2015) which provided a preferential right for obtaining a prospecting licence or mining lease to the holder of a reconnaissance permit or prospecting licence. He submitted, placing reliance on *Sandur Manganese and Iron Ores Ltd.* v. *State of Karnataka*[27] that since the MMDR Act is a complete code in itself, the method or procedure for grant of a lease cannot travel outside the confines of the statute and the Mineral Concession Rules, 1960 framed thereunder. Reference was made to paras 40 to 43 of the judgment: (SCC pp. 25-26, paras 40-43)

> "*40.* In view of the specific parliamentary declaration as discussed and explained by this Court in various decisions, there is no question of the State having any power to frame a policy dehors the MMDR Act and the Rules.
>
> *41.* In *State of Assam* v. *Om Prakash Mehta*[28] this Court in SCC para 12 held that the MMDR Act, 1957 and the MC Rules, 1960 contain a complete code in respect of the grant and renewal of prospecting licences as well

27 (2010) 13 SCC 1
28 (1973) 1 SCC 584

as mining leases in lands belonging to the Government as well as lands belonging to private persons.

42. Again this Court in *Quarry Owners' Assn.* v. *State of Bihar*[29] held that both the Central and the State Government act as mere delegates of Parliament while exercising powers under the MMDR Act and the MC Rules.

43. It is not open to the State Government to justify grant based on criteria that are dehors the MMDR Act and the MC Rules. The exercise has to be done strictly in accordance with the statutory provisions and if there is any deviation, the same cannot be sustained. It is the normal rule of construction that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself. This principle has been reiterated in *CIT* v. *Anjum M.H. Ghaswala*[30] SCC at p. 644; *Sube Singh* v. *State (NCT of Delhi)*[31] and *State of U.P.* v. *Singhara Singh*[32]." (emphasis supplied)

Reference may also be made to para 44 of the Report that reads thus: (SCC p. 26)

"*44*. Mr Harish N. Salve and Mr Dushyant Dave, by drawing our attention to the decision of this Court in *Tisco Ltd.* v. *Union of India*[33], submitted that inasmuch as this Court had upheld the grants based on "captive consumption", there is no flaw or error in the recommendation of the State Government dated 6-12-2004. A perusal of the above decision clearly shows that it concerned with Section 8(3) of the MMDR Act which requires consideration of the extremely general criterion of the interests of mineral development before granting second renewal of a mining lease. Unlike in Section 11(3), no further criteria were specified and it was in this background, this Court upheld on the facts of that case that relevant material taken into account by the Committee set up by the Central Government rightly included "captive consumption". In view of the factual situation, the said decision can have no bearing on initial grants of mining lease where the only permissible criteria are the matters set out in Section 11(3) of the MMDR Act."

100. The controversy in *Sandur Manganese*[27] related to the grant of mining leases contrary to the provisions of Section 11 of the MMDR Act in that a non-statutory criterion was taken into consideration dehors Section 11 of the MMDR Act for evaluating the applications and seeking approval of the Central Government for granting a mining lease. This was held to be impermissible and

29 (2000) 8 SCC 655
30 (2002) 1 SCC 633
31 (2004) 6 SCC 440
32 AIR 1964 SC 358 : (1964) 1 Cri LJ 263 (2) : (1964) 4 SCR 485
33 (1996) 9 SCC 709
27 *Sandur Manganese and Iron Ores Ltd.* v. *State of Karnataka*, (2010) 13 SCC 1

it may be so. In any event, para 44 of the Report makes it clear that there is a distinction between the requirements of Section 11(3) of the MMDR Act and Section 8(3) of the MMDR Act. *Sandur Manganese*[27] is not applicable to the facts of the present case.

101. Similarly, reference was made to the Statement of Objects and Reasons for the Bill introduced in 2015 to amend the MMDR Act. It was stated therein that:

> "The present legal framework of the MMDR Act, 1957, does not permit the auctioning of mineral concessions."

102. This submission need not detain us since we are not required to adjudicate whether the State of Goa should have auctioned the mining leases or not. The State of Goa decided to renew the mining leases and we are only called upon to decide: (*i*) Whether the policy decision not to auction the grant of mining leases was arbitrary (we have already held that we are not required to express a final opinion on this). We may, however, recall *en passant* that the Goa Grant of Mining Leases Policy proceeded on the basis that the auction of mining leases was permissible and that had the sanction of the Court in *Goa Foundation*[1]. It may be added that the MMDR Act did not prohibit the auction of mining leases. (*ii*) Whether the second renewals were in accordance with law and the constitutional principles.

103. We may also note that the Constitution Bench in *Natural Resources Allocation*[21] referred to the submission that if auction were the only method of allocating natural resources (as it appears from *CPIL*[19]) then the mandate would create a conflict with some statutes including the MMDR Act. The Constitution Bench dealt with this submission in para 83 of the Report by observing: (SCC p. 72)

> "*83.* Moreover, if the judgment in *2G case*[19] is to be read as holding auction as the only permissible means of disposal of all natural resources, it would lead to the quashing of a large number of laws that prescribe methods other than auction e.g. the MMDR Act."

However, the Constitution Bench did not advert to the consequence vis-à-vis the MMDR Act of holding that auction was not mandated as the only method of allocating a natural resource. Since the question does not arise in these cases, we decline to go into this issue—we need not finally adjudicate whether the State of Goa should have auctioned the mining leases but we are called upon to decide whether the grant of second renewals was valid in law.

27 *Sandur Manganese and Iron Ores Ltd.* v. *State of Karnataka*, (2010) 13 SCC 1
1 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590
21 *Natural Resources Allocation, In re, Special Reference No. 1 of 2012*, (2012) 10 SCC 1
19 *Centre for Public Interest Litigation* v. *Union of India*, (2012) 3 SCC 1

Judicial review of renewals

104. In view of decisions of this Court, including in *Natural Resources Allocation*[21] it is permissible for this Court to judicially review, to a limited and restricted extent, the Grant of Mining Leases Policy, among other things, if it falls foul of Article 14 read with Article 39(*b*) of the Constitution and if it ignores the common or public or social good but benefits private entrepreneurs, particularly when it involves the natural resources, by sacrificing the maximisation of revenue for the State.

105. In *Natural Resources Allocation*[21] the Constitution Bench observed that: (SCC pp. 98-99, para 149)

> "*149.* … Alienation of natural resources is a policy decision, and the means adopted for the same are thus, executive prerogatives. However, when such a policy decision is not backed by a social or welfare purpose, and precious and scarce natural resources are alienated for commercial pursuits of profit maximising private entrepreneurs, adoption of means other than those that are competitive and maximise revenue may be arbitrary and face the wrath of Article 14 of the Constitution."

106. Similarly in *Goa Foundation*[1] this Court declared that: (SCC p. 637, para 87.5)

> "*87.5.* It is for the State Government to decide as a matter of policy in what manner mining leases are to be granted in future but the constitutionality or legality of the decision of the State Government can be examined by the Court in exercise of its power of judicial review."

107. Despite the dicta of the Constitution Bench and the declaration made by this Court in *Goa Foundation*[1] we do not propose to judicially review the Grant of Mining Leases Policy but to consider on merits whether the grant of second renewal to the mining leases was in accordance with the Grant of Mining Leases Policy and the law.

108. In our opinion, in renewing the mining leases, the State of Goa completely ignored several relevant and important and significant factors giving the impression that the renewals were not quite fair or reasonable.

109. For one, the State ignored the fact that every single mining leaseholder had committed some illegality or the other in varying degrees. To identify these illegalities (although they had already been identified by the Justice Shah Commission and by the EAC), a Special Investigating Team had been set up as also a team of Chartered Accountants. Instead of waiting for a report from any one of these teams, the State acted in violation of the Grant of Mining Leases Policy and renewed the mining leases. Why was the report from the Special Investigating Team not awaited or called for and examined? In the Grant of Mining Leases Policy it was clearly and explicitly stated (as mentioned above) as follows:

21 *Natural Resources Allocation, In re, Special Reference No. 1 of 2012*, (2012) 10 SCC 1
1 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590

"Unless and until the inquiry initiated pursuant to the judgment and order of the Hon'ble Supreme Court of India against those mine leaseholders found to be violating either Rule 37 or Rule 38 of the Mineral Concession Rules, 1960, or otherwise indicated in the Report of the Justice Shah Commission/PAC Report or found to be engaged in, any kind of illegality of whatsoever nature such as illegal sale of ore, sale of royalty challan without ore, encroachment of adjoining areas outside the lease overproduction in excess of the limit specified in the environmental clearance; those which have undertaken unscientific mining operations; those who have violated or have not paid the royalty amount; those who have reused old royalty challans for defrauding; and those involved in illegal mining activities *shall not be considered for renewal of the mining leases.*

For this purpose, presently the inquiries are in progress at various levels and fora including the investigation by the SIT Team, by the Team of Chartered Accountants which has been set up by the State Government and *after the inquiry is complete or during the course of the inquiry where it is found that any violations have taken place, such persons shall not be considered for grant/renewal of the leases.*" (emphasis supplied)

110. Unfortunately, the undue haste in which the State acted gives the impression that it was willing to sacrifice the rule of law for the benefit of the mining leaseholders and the explanation of satisfying the needs of some sections of society for their livelihood (after keeping them in the lurch for more than two years) was a mere fig leaf. The real intention of the second renewal was to satisfy the avariciousness of the mining leaseholders who were motivated by profits to be made through the exploitation of natural resources.

111. The undue haste also needs to be looked at in the context of the statement made in the final paragraph of the Grant of Mining Leases Policy to the effect that this Policy is an in-principle decision and would be notified after it is vetted for legal requirements "from specific necessities as also from financial viewpoints". In other words, the Grant of Mining Leases Policy as published on 4-11-2014 was not a final policy statement but only an intent that would take final shape after due vetting. The Grant of Mining Leases Policy was eventually published on 20-1-2015 but it was acted upon even before it was gazetted.

112. A partial explanation for this hurry, if we may venture to suggest, is that the State of Goa was aware (like everybody else) on 17-11-2014 if not earlier, of the policy of the Government of India to auction the grant of mining leases which policy was made available in the public domain on that date and suggestions invited. It is on 17-11-2014 that the draft Mines and Minerals (Development and Regulation) Act, 2014 was published on the website of the Ministry of Mines of the Government of India. The policy of the Government of India proposed to introduce Section 10-B by way of an amendment to the MMDR Act and the proposed amendment made it very clear that if it were to be accepted, auction of mining leases in respect of notified minerals (including iron ore) would become a reality if not an obligation. It appears that to circumvent this rather uncomfortable policy, the State pressed the accelerator on the renewal of mining leases from December 2014 onward to

benefit mining leaseholders. So much so that in respect of 5 mining leases, the State overstepped the law and granted a second renewal in early January 2015 to some entities without even waiting for any approval or deemed approval of the mining plan from the Indian Bureau of Mines or any other authority.

113. This sequence of events acquires further significance when it is recalled that an Ordinance to amend the MMDR Act was made known to the general public on 5-1-2015 and promulgated by the President on 12-1-2015 thereby mandating competitive bidding or auction for the grant of mining leases. The State of Goa perhaps anticipated this in view of the publication of the draft Mines and Minerals (Development and Regulation) Act, 2014 and therefore hurried into the second renewal of mining leases (notwithstanding the Grant of Mining Leases Policy) to defeat the introduction of the auction process. In fact in the period from 5-1-2015 to 12-1-2015 the Government of Goa granted a second renewal to as many as 56 mining leases and from 17-11-2014 the State of Goa granted a second renewal to as many as 75 mining leases. The sudden spurt of renewal of mining leases is beyond comprehension. The judgment and order of the High Court in *Lithoferro*[5] cannot be used as a shield for explaining the haste.

114. These facts must also be appreciated in the context that mining operations were suspended in Goa with effect from 10-9-2012 due to an order passed by the State of Goa. Therefore, mining operations having been suspended for more than two years, the State could have certainly waited for a few weeks more and taken an informed and reasoned decision on granting a second renewal to mining leases — but waiting for a few weeks could have led to an uncomfortable situation that would have compelled the State of Goa to auction the mining leases, hence the haste.

115. This Court held in *Tisco Ltd.* v. *Union of India*[33] that for the purposes of Section 8(3) of the MMDR Act[34] the concept of "mineral development" encompasses the concept of captive mining, an assessment of its requirement

---

5 *Lithoferro* v. *State of Goa*, 2014 SCC OnLine Bom 997 : (2015) 3 AIR Bom R 32

33 (1996) 9 SCC 709

34 "**8.** ***Periods for which mining leases may be granted or renewed***.—(1) The maximum period for which a mining lease may be granted shall not exceed thirty years:

Provided that the minimum period for which any such mining lease may be granted shall not be less than twenty years.

(2) A mining lease may be renewed for a period not exceeding twenty years.

(3) Notwithstanding anything contained in sub-section (2), if the State Government is of opinion that in the interests of mineral development it is necessary so to do, it may, for reasons to be recorded, authorise the renewal of a mining lease in respect of minerals not specified in Part A and Part B of the First Schedule for a further period or periods not exceeding twenty years in each case.

(4) Notwithstanding anything contained in sub-section (2) and sub-section (3), no mining lease granted in respect of mineral specified in Part A or Part B of the First Schedule shall be renewed except with the previous approval of the Central Government."

by different industries as well as the principle of equitable distribution [under Article 39(*b*) of the Constitution]. It is not at all clear from the records before us that the State had applied its mind to these and other factors including the report of Justice Shah, the report of the EAC, the absence of any value addition to the domestic industry and the degradation of the environment as noted by the Expert Committee appointed by this Court in concluding that a second renewal was "in the interests of mineral development". Mere reliance on the acceptance or deemed acceptance of the Indian Bureau of Mines is not enough, as imagined by the State of Goa. The matter of "interests of mineral development" has to be considered holistically and not in an isolationist manner.

116. In this context, it is also necessary to point out that the National Mineral Policy, 2008 provided that: "To maximise gains from the comparative advantage which the country enjoys intra se mineral development will be prioritised in terms of import substitution, value addition and export, in that order." Admittedly, iron ore is not extracted in Goa for import substitution, or value addition for domestic industry, but only for the last option, that is, export. Can it reasonably be said that the export of iron ore is in the interest of mineral development? We were informed that only one of the mining leaseholders captively consumes the extracted iron ore and it is evident from the Mineral Policy that despite mining operations having closed down for some period in other States, iron ore from Goa was not used in the domestic steel industry. Therefore, it is not at all clear who, other than the mining leaseholders making exports, was benefited by resumption of mining operations in Goa through a second renewal.

117. The Mineral Policy clearly suggests that for a period of five years between 2006 and 2012 the mining leaseholders committed various illegalities and irregularities in the mining process. This is an indication of their exploitative and rapacious attitude having little or no concern for the environment, the fragile ecology of Goa or even the health and well-being of the average Goan. This irreparable damage was being caused by the mining leaseholders without any benefit to the domestic industry. Therefore, while the mining leaseholders may have contributed virtually nothing to the domestic industry, they might have made considerable profits through exports and might have also benefited the foreign exchange reserves of the country, but the real-time damage to the quality of health and life of the average Goan and damage to the environment and ecology of Goa is nevertheless incalculable or at least considerable — and export benefits cannot be weighed against health or the environment.

118. What is unfortunate about the entire commercial activity of the mining leaseholders is that there was no social or public purpose attached to the mining operations. There was one and only one objective behind the mining activity and that was profit maximisation. The renewal of the mining leases would give considerable profits to the mining leaseholders well beyond the benefits that could accrue to the State or to the average resident of Goa. It was observed

by Khehar, J. in *Natural Resources Allocation*[21] that material resources of the country should not be dissipated free of cost or at a consideration lower than their actual worth. This was not kept in mind and mining leases were renewed for a small payment of stamp duty and royalty. It is therefore clear that the considerations that weighed with the State were not for the people of Goa but were for the mining leaseholders. This certainly cannot be described as being "in the interests of mineral development".

119. With the mining leaseholders violating virtually every applicable law or legal requirement, it is clear that the rule of law was not their concern. The list of violations and their variety was documented by the EAC and it makes for some very sad reading. To make matters worse, it was clearly mentioned in the Grant of Mining Leases Policy that a Special Investigating Team and a team of Chartered Accountants would look into all the violations but the State chose not to wait for any of the reports. There is no explanation for this.

120. In this background, there is little to suggest that the State considered the requirements of Section 8(3) of the MMDR Act in that the interests of mineral development were secondary while granting the second renewal of mining leases. The entire exercise undertaken by the State was a hasty charade, regardless of violations of the law by the mining leaseholders, without any benefit to the Indian industry and without any concern for the health of the average Goan.

121. The undue haste with which the State granted the second renewal of mining leases particularly after the amendments proposed to the MMDR Act were placed in the public domain by the Government of India (relating to the auction of mining leases) is a clear indication that the decision of the State was not based on relevant material and not necessarily triggered by the interests of mineral development. The very large number of renewals granted over a comparatively brief period is a clear indication that the State did not have "mineral development" in mind but had some other non-statutory interests while taking its decision to grant a second renewal to the mining leases. The haste with which the State took its decision also needs to be understood in the background of the fact that mining had been suspended by the State in September 2012 that is more than two years prior to the grant of second renewals. The urgency suddenly exhibited by the State therefore seems to be make-believe and motivated rather than genuine.

122. Facts from the record also disclose some interesting information regarding the second renewal of mining leases. The Table below indicates that except 13 mining leases, all the others were renewed after publication of the draft Mines and Minerals (Development and Regulation) Act, 2014 on 17-11-2014. The Table is given below and is self-explanatory:

21 *Natural Resources Allocation, In re, Special Reference No. 1 of 2012*, (2012) 10 SCC 1

Period	*Mining leases renewed*
Between 5-11-2014 and 17-11-2014	13
Between 10-12-2014 and 2-1-2015	19
Between 5-1-2015 and 12-1-2015	56
Total	88
On 12-1-2015	31

123. Of the 13 mining leases renewed in November 2014, it is found that according to the State of Goa all of them are Category I violators (except Geetabala M.N. Parulekar who is a Category II violator). However, it was pointed out by the learned counsel appearing on behalf of Goa Foundation that the report of the Vishwanath Anand EAC indicates that a recommendation was made to revoke the environmental clearance in respect of 6 mining leaseholders; additionally, none of the mining leaseholders had approval from the National Board for Wild Life (where required); all of them (except 2) had mined in excess of the permissible limit under the environmental clearance; all of them had indulged in dump mining; some of them were guilty of encroachments; in almost every case the mining activity intersected groundwater level and none of the mining leaseholders had permission for groundwater withdrawal. These cannot be described as minor violations but were actually multiple violations in almost all cases. How could the State of Goa and MoEF overlook these recommendations and multiple violations?

124. It may be recalled that the Mines and Minerals (Development and Regulation) Amendment Ordinance, 2015 came into force on 12-1-2015 and on that day as many as 31 mining leases were renewed. In respect of 5 mining leases renewed in January 2015 the report from the Indian Bureau of Mines was called for in January 2015 itself and the mining leases were renewed without receipt of the report from the Indian Bureau of Mines and before expiry of the mandatory period for submitting the report in terms of the second proviso to Rule 24-A(3) of the Mineral Concession Rules, 1960. In other words, without even receipt of any report from the Indian Bureau of Mines and even before the expiry of the statutory waiting period, the State of Goa renewed some mining leases. This is patently illegal.

125. We were informed by the learned Additional Solicitor General that of the 88 mining leases that were renewed, 38 of them are not working for a variety of reasons—making their renewal an empty exercise.

126. These facts are mentioned in the context of the undue haste shown by the State of Goa in granting a second renewal to the mining leases keeping the following dates in mind:

17-11-2014 — The draft Mines and Minerals (Development and Regulation) Act, 2014 was uploaded on the website of the Ministry of Mines of the Government of India.

5-1-2015 — Approval of the Mines and Minerals (Development and Regulation) Amendment Ordinance, 2015 by the Cabinet of the Government of India became public knowledge.

12-1-2015 — President of India promulgated the Mines and Minerals (Development and Regulation) Amendment Ordinance, 2015.

127. It is possible that the State did have some serious governance issues to contend with as mentioned in the Grant of Mining Leases Policy, namely, since iron ore mining had been suspended for more than two years, the State faced a lack of funds resulting in its having difficulty in undertaking infrastructure projects and other activities. The State had also to contend with the adverse effects faced by a large population that was directly or indirectly dependent on the mining sector. Additionally, the transport sector was affected as well as barges used for transport through rivers from jetties. The stoppage of mining operations therefore affected several categories of stakeholders including small business or small commercial ventures and workers/labour. The Grant of Mining Leases Policy also noted that there was a tremendous loss of foreign exchange of about $8 billion through exports and more than Rs 850 crores towards loans/advances on the mining sector for a variety of activities as well as about Rs 1000 crores towards housing, business and other loans. Overall there was a slump in economic activity which also had an impact on the education sector, etc.

128. The State has projected virtual chaos (which could be an exaggeration) but that is why we have left open the issue of arbitrariness of the policy decision. Nevertheless the State is bound by the law, however uncomfortable it might be in granting a second renewal in terms of Section 8(3) of the MMDR Act. Therefore, on an overall consideration of all aspects of the case, we are of the opinion that the decision of the State of Goa to quickly renew the mining leases while ostensibly complying with the requirements of Section 8(3) of the MMDR Act and thereby jettisoning the rule of law was unjustified.

Whether fresh environmental clearances were required to be obtained by the mining leaseholders?

129. The question whether the mining leaseholders required fresh environmental clearances arises in the context of para 82 of the decision rendered in *Goa Foundation*[1] quoted above. It must be stated that some mining leaseholders had environmental clearances under EIA 1994 while others under EIA 2006. Notwithstanding this, since we have held that fresh mining leases were required to be granted, it follows that fresh environmental clearance is required to be obtained by those who are granted a fresh mining lease.

130. That apart, the materials before the Court while deciding *Goa Foundation*[1] included the report of the Justice Shah Commission, the report of the EAC and the report of the Expert Committee constituted by the Court by orders dated 11-11-2013[3] and 18-11-2013[4]. On a combined reading of the material before it, the Court took a broad view that large-scale mining of iron ore led to several adverse impacts including those related to the environment,

1 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590
3 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 738
4 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590 (footnote 17)

ecology and health of the people of Goa and that these illegalities and irregularities were committed by almost all (if not all) mining leaseholders as reported by the EAC. The Court also accepted the view of the Expert Committee that the ecology of Goa was being degraded through indiscriminate mining and placed a cap on the annual excavation of iron ore. It was noted that mining by the lessees in Goa after 22-11-2007 was illegal and that mining operations were suspended by the State of Goa on 10-9-2012 and environmental clearances granted to the mines were kept in abeyance by the MoEF on 14-9-2012. Considering all this, as well as the law laid down in *Goa Foundation*[1] to the effect that there is no automatic second renewal of a mining lease but that a second renewal must be granted in accordance with the provisions of Section 8(3) of the MMDR Act, the Court used the expression "grant fresh environmental clearances for mining projects" in the passage referred to above.

131. We have already adverted to the report of the EAC. As far as the Expert Committee set up by the Court is concerned, it had furnished an Interim Report dated 14-3-2014 in which it noted large-scale degradation of the environment and recommended placing an annual cap between 20 and 27.5 million tonnes on the extraction of iron ore in Goa. The Expert Committee noted the following (which makes for some very depressing reading):

> "The production of iron ore has jumped from 14.6 million tons in 1941 to 41.17 million tons in 2010-2011. In 1980s the production was about 10 MT/annum. *The quantum jump in iron ore production in Goa was essentially due to steep rise in exports of fines and other low grade ore of 42% Fe content to China. This has led to massive negative impacts on all ecosystems leading to enhanced air, water, and soil pollution affecting quality of life across Goa.* This is evident by three important reports i.e. (*i*) Areawise Environmental Quality Management (AEQM) Plan for the Mining belt of Goa by Tata Energy Research Institute, New Delhi and Goa (1997) and it was submitted to the Directorate of Planning, Statistics, and Evaluation, Government of Goa, (*ii*) Environmental and Social Performance Indicators and Sustainability Markers in Minerals Development Reporting Progress towards Improved Ecosystem Health and Human Well-being, Phase III by TERI and International Development Research Centre, Ottawa, Canada (2006), and (*iii*) the Regional Environmental Impact Study of Iron Ore Mining in Goa region sponsored by MoEF, New Delhi (2014) by Indian School of Mines. Besides the above three main reports, a number of scientific research papers on the impact of iron ore mining on the environment and ecology of diverse ecosystems were published by scientists working at Goa University and NIO.
>
> *These reports and publications substantiate that the mining, particularly the enhanced level of annual production contributed to adverse impacts on the ecological systems, socioeconomics of Goa and health of people of Goa leading to loss of ecological integrity.* This is due to

1 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590

enhanced levels of pollutants, particularly RSPM and SPM, sedimentation of materials from dumps and iron ore in rivers, estuaries and shallow depth (20 m) of sea water, agricultural fields, high concentration of Fe and Mn in surface waters and their bioaccumulation." (emphasis supplied)

132. Faced with this material evidence before it, the Court took the view in *Goa Foundation*[1] that fresh environmental clearances must be obtained. Unfortunately however, the State of Goa was more concerned with earning revenue rather than the health of the people of Goa or enforcing the rule of law and therefore gave a complete go-by to the directions of this Court and to the concerns of the citizens of Goa and requested the MoEF to lift the abeyance on the environmental clearances.

133. Acting on the request made by the State of Goa by Letters dated 7-1-2015 and 5-2-2015, the MoEF passed three orders on 20-3-2015. We have already adverted to the contents of the orders passed on 20-3-2015.

134. The first order of 20-3-2015 is essentially a communication documenting the variety of illegalities and irregularities committed by the mining leaseholders and that the Government of India would be referring the cases for appropriate action and also requesting the Principal Secretary, Environment in the Government of Goa to take necessary action.

135. The second order of 20-3-2015 is an office memorandum to the effect that a project proponent will not be required to obtain a fresh environmental clearance at the time of renewal of the mining lease. This is misleading information and contrary to the decision of this Court in *M.C. Mehta* v. *Union of India*[15] as well as the decision rendered in *Common Cause* v. *Union of India*[35].

136. It was held in *Ambica Quarry Works* v. *State of Gujarat*[36], *Rural Litigation and Entitlement Kendra* v. *State of U.P.*[37] and *State of M.P.* v. *Krishnadas Tikaram*[6] (which decisions were followed in *M.C. Mehta*[15]) that the renewal of a lease, whether under the provisions of the Forest (Conservation) Act, 1980 or otherwise cannot be granted without the leaseholder complying with the necessary statutory requirements particularly since the grant of renewal is a fresh grant and must be consistent with law. The principle of compliance with statutory provisions at the stage of renewal of a lease was re-affirmed in *Common Cause*[35] in paras 105 and 106 of the Report. In para 188(2) of the Report it was categorically held as follows: (SCC p. 569)

"*188.* … (2) The renewal of a mining lease after 27-1-1994 will require an EC even if there is no expansion or modernisation activity or any increase in the pollution load."

1 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590
15 (2004) 12 SCC 118
35 (2017) 9 SCC 499
36 (1987) 1 SCC 213
37 1989 Supp (1) SCC 504
6 1995 Supp (1) SCC 587

137. The third order of 20-3-2015 is extremely cryptic in the matter of lifting the abeyance order of 14-9-2012 on environmental clearances. While dealing with 35 mining leases for which environmental clearance had been granted under EIA 1994 and 37 mining leases for which environmental clearance had been granted under EIA 2006, the following is stated:

> "It has been decided in the Ministry that the EC issued under 1994 Notification in case they are valid and subsisting *would not require fresh EC at the time of renewal* [O.M. L-11011/15/2012-IA-II (M) dated 20-3-2015]. Therefore it has been decided to lift abeyance on the 72 cases of which 35 cases had been granted EC under the provisions of EIA Notification 1994 and 37 cases had been granted EC under EIA Notification 2006." (emphasis supplied)

138. As mentioned above and as held in *M.C. Mehta*[15] and *Common Cause*[35], the renewal of a lease after 27-1-1994 would require an environmental clearance. Therefore, a mining leaseholder having a valid environmental clearance obtained under the EIA 1994 would still require a fresh environmental clearance for renewal of the mining lease in 2014-2015 as the case may be. That being so there is no doubt at all that the 35 cases referred to in the third order of 20-3-2015 who had an environmental clearance under EIA 1994 did require a fresh environmental clearance at the time of renewal of the mining lease. Since they did not have such a fresh environmental clearance the renewal of these 35 mining leases is clearly bad in law. Moreover, as held in *M.C. Mehta*[15] and *Common Cause*[35] the validity of an environmental clearance granted under EIA 1994 is only for five years. Therefore all environmental clearances granted under EIA 1994 had lost their validity before 2015, EIA 1994 having been replaced by EIA 2006.

139. As regards the 37 mining leases that had obtained environmental clearance under EIA 2006, since the validity of the environmental clearance is for the estimated project life or a maximum of 30 years in terms of Para 9 of EIA 2006 therefore no violation can be found on the ground of validity for the time period. To this limited extent, no interference is necessary at this stage in respect of these 37 mining leases. We make it clear, however, that this is subject to our conclusion that fresh mining leases were required to be granted by the State of Goa. Consequently, a mining leaseholder obtaining a fresh mining lease would require a fresh environmental clearance in terms of EIA 2006.

140. What is disturbing is that notwithstanding several and various violations, the MoEF granted environmental clearance to 72 mining leases. It seems to us that the MoEF acted without any application of mind in lifting the order placing all the environmental clearances in abeyance. Since the entire exercise carried out by the MoEF on 20-3-2015 was mechanical, at the behest of the State of Goa, without due application of mind, without considering the multiple illegalities and irregularities committed by the mining leaseholders

15 *M.C. Mehta* v. *Union of India*, (2004) 12 SCC 118
35 *Common Cause* v. *Union of India*, (2017) 9 SCC 499

or passing on the buck to the State of Goa and without considering relevant material such as the report of the EAC and the Expert Committee appointed by this Court, the exercise of lifting the abeyance order on 20-3-2015 by the MoEF must be held void and as directed by the Court in *Goa Foundation*[1] all the mining leaseholders must obtain fresh environmental clearance for their mining project.

141. We were informed by the learned Additional Solicitor General that show-cause notices have now been issued to some mining leaseholders demanding huge amounts—some running into hundreds of crores of rupees towards value of *ore extracted in excess of the environmental clearance*. We were handed over some sample show-cause notices (about 12) issued in September and October 2017 and the figures are quite staggering—the demand raised being about Rs 1500 crores! Similarly, from the Summary of Mining Audit Report submitted by the auditors (and handed over to us by the learned Additional Solicitor General—for the period July 2016 to December 2016) the amount demanded (including interest) by the State of Goa from the mining leaseholders through show-cause notices issued is about Rs 1500 crores! And without making any serious attempt to recover such huge amounts, the State of Goa has granted second renewal of mining leases and the MoEF played ball by lifting the abeyance order in respect of the environmental clearances. The inferences that can be drawn are quite obvious.

142. We must emphasise that issues impacting society are required to be looked at holistically and not in a disaggregated manner. An overall perspective is necessary on such issues including issues that impact on the environment and the people of a community or a region or the State. It is for this reason that it is necessary to look at them broadly otherwise if that broader perspective is lost, everyone will be a loser and no one will be a real beneficiary. One or two violations here and there may be wished away as inconsequential, but multiple violations by several persons can result in serious problems. As the novelist and philosopher Ayn Rand had said: We can evade reality, but we cannot evade the consequences of evading reality. Therefore, there is no doubt that the Mineral Policy, the Grant of Mining Leases Policy, the amendment to the MMDR Act, the report of the EAC and the report of the Expert Committee must be considered in the larger context of constitutionalism, the rule of law, environmental jurisprudence as well as the fundamental right of the people of Goa to have clean air and protection of the fragile ecology. Governance cannot and should not be carried out dehors the interests of the people and some uncomfortable decisions may be inevitable for balancing the equities.

143. Finally, a controversy (wholly unnecessary in our view) was raised with regard to the period of validity of the environmental clearance granted under EIA 1994. Firstly, in the view that we have taken, the validity period of an environmental clearance under EIA 1994 is academic since a fresh environmental clearance was necessary at the time of renewal of a lease. Secondly, the period of validity of an environmental clearance was considered

1 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590

in *M.C. Mehta*[15] and it was clearly held that it is valid for 5 years only. In para 77 of the Report it was observed: (SCC p. 180)

> "*77.* We are unable to accept the contention that the Notification dated 27-1-1994 would not apply to leases which come up for consideration for renewal after issue of the notification. The notification mandates that the mining operation shall not be undertaken in any part of India unless environmental clearance by the Central Government has been accorded. *The clearance under the notification is valid for a period of five years.* In none of the leases the requirements of the notification were complied with either at the stage of initial grant of the mining lease or at the stage of renewal. Some of the leases were fresh leases granted after issue of the notification. Some were cases of renewal. No mining operation can commence without obtaining environmental impact assessment in terms of the notification." (emphasis supplied)

144. A similar view was expressed in para 87 in *Common Cause*[35]. Any contrary view expressed in any notification issued by MoEF (including the Notification of 15-1-2016) cannot overrule the decisions of this Court and is void to the extent that it does so.

145. It was submitted that all relevant notifications on the subject had not been placed before the Court and hence an erroneous conclusion was arrived at with respect to EIA 1994. We propose to deal with the notifications placed before us.

146. The Notification of 27-1-1994 (EIA 1994) deals with site clearance in Para 2.II(*d*). This provides, inter alia, that site clearance will be granted for a mining operation by the Central Government and that site clearance will be valid for a period of five years for commencing the operation or mining. Paras 2.III(*a*) and 2.III(*c*) of the Notification deal with the procedure for obtaining environmental clearance, but do not provide for the validity period of the environmental clearance.

147. A Notification of 4-5-1994 refers to the Notification of 27-1-1994 and substitutes Para 2.III(*c*) therein and provides that the environmental clearance "shall be valid for a period of five years from commencement of the construction or operation". What this provides, therefore, is that if environmental clearance is granted on a particular date and the mining operation starts on a later date, then the validity of the environmental clearance commences from the later date and is valid for five years from that date. This was reiterated in the Notification of 10-4-1997.

148. The validity of an environmental clearance is specifically provided for in EIA 2006 in Para 9 thereof. As far as we are concerned, it provides that in respect of mining operations, the environmental clearance would be valid for the "project life as estimated by Expert Appraisal Committee or State Level

15 *M.C. Mehta* v. *Union of India*, (2004) 12 SCC 118
35 *Common Cause* v. *Union of India*, (2017) 9 SCC 499

Expert Appraisal Committee subject to a maximum of thirty years for mining projects…".

149. For no apparent reason and after EIA 2006, the issue of the validity of an environmental clearance granted under EIA 1994 was raked up and a notification was issued by the MoEF on 21-8-2013 in which it was noted that the Notification of 4-5-1994 provided that "the clearance granted shall be valid for a period of five years from commencement of the construction or operation". Another Notification of 21-8-2013 goes on to say that the intent of the Central Government has been and has always been that the validity of the environmental clearance is for five years "for" commencement of the construction or operation and not that the environment clearance is only for five years "from" the commencement of construction or operation. Therefore, the Central Government clarified in the Notification of 21-8-2013 that the expression "for a period of five years" shall mean "for a period of five years for commencement of the construction or operation and not five years from commencement of the construction or operation". We do not see how this controversy really arises or its relevance to the present case, but we refer to it since submissions were made to explain the distinction between "for" five years and "from" five years in respect of the validity of an environmental clearance.

150. It is perhaps sought to be contended that if environmental clearance is granted and mining operations commence within the five year period, then the environmental clearance under EIA 1994 is valid till the project or the mining lease period is over. We cannot see how such an inference can be drawn. Moreover, this submission overlooks the decisions in *M.C. Mehta*[15] and *Common Cause*[35] which accept the view that the validity of an environmental clearance granted under EIA 1994 is only five years as also the view that a valid environmental clearance is necessary for the renewal of a mining lease. No notification of the MoEF can overrule decisions of this Court. As far as EIA 2006 is concerned this submission is academic and not relevant since Para 9 of EIA 2006 provides that the environmental clearance would be valid for the estimated project life subject to a maximum of 30 years.

151. The learned counsel for the mining leaseholders also relied upon a decision of the Delhi High Court in *S.N. Mohanty* v. *Union of India*[38] to contend that notwithstanding a Notification issued by MoEF on 4-4-2011 it was not obligatory for a mining leaseholder to obtain a fresh environmental clearance at the time of renewal of a lease, if the environmental clearance was subsisting. In that case, the petitioner had an environmental clearance obtained under EIA 2006 on 15-1-2007 and the first renewal of the mining lease was due on 2-4-2012. In that context, it was submitted that it was not necessary for the

15 *M.C. Mehta* v. *Union of India*, (2004) 12 SCC 118
35 *Common Cause* v. *Union of India*, (2017) 9 SCC 499
38 2012 SCC OnLine Del 4000

petitioner to obtain environmental clearance for renewal of the mining lease. The Delhi High Court took the view that: (SCC OnLine Del para 22)

> "*22.* ... if a person has a valid and subsisting EC [environmental clearance] at the point of time he seeks a renewal of the mining lease, he would still be required to obtain another EC prior to the grant of renewal by the respondents. That, in our view, is not the intent and purport of the Supreme Court directions in *M.C. Mehta*[15]."

This question does not arise in the context of EIA 1994.

152. One final submission before us was that these cases be referred to a Bench of nine learned Judges since the constitutional validity of the Goa, Daman & Diu Mining Concessions (Abolition & Declaration of Mining Leases) Act, 1987 was under challenge in some cases and the decision in those cases would perhaps render the present proceedings infructuous. In some of these pending cases, this Court had passed an order on 29-10-2002 to await the decision of nine learned Judges in *Property Owners' Assn.* v. *State of Maharashtra*[39]. We are not at all inclined to accept this request and mention it only to reject it.

***Correctness of the decision of the High Court in Lithoferro*[5]**

153. As far as the SLPs are concerned [SLP (C) No. 32138 of 2015 and SLPs (C) Nos. 32699-727 of 2015] we set aside the judgment and order dated 13-8-2014[5] of the High Court in view of our conclusion that the State of Goa was required to grant fresh licences in terms of the decision of this Court in *Goa Foundation*[1]. The High Court proceeded on the erroneous basis that it could direct the State of Goa to grant a second renewal of the mining leases notwithstanding the direction in *Goa Foundation*[1].

Conclusions and directions

154. In view of our discussion, we arrive at the following conclusions:

154.1. As a result of the decision, declaration and directions of this Court in *Goa Foundation*[1], the State of Goa was obliged to grant fresh mining leases in accordance with law and not second renewals to the mining leaseholders.

154.2. The State of Goa was not under any constitutional obligation to grant fresh mining leases through the process of competitive bidding or auction.

154.3. The second renewal of the mining leases granted by the State of Goa was unduly hasty, without taking all relevant material into consideration and ignoring available relevant material and therefore not in the interests of mineral development. The decision was taken only to augment the revenues of the State which is outside the purview of Section 8(3) of the MMDR Act. The second

15 *M.C. Mehta* v. *Union of India*, (2004) 12 SCC 118
39 (2013) 7 SCC 522 : (2013) 3 SCC (Civ) 603
5 *Lithoferro* v. *State of Goa*, 2014 SCC OnLine Bom 997 : (2015) 3 AIR Bom R 32
1 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590

renewal of the mining leases granted by the State of Goa is liable to be set aside and is quashed.

154.4. The Ministry of Environment and Forests was obliged to grant fresh environmental clearances in respect of fresh grant of mining leases in accordance with law and the decision of this Court in *Goa Foundation*[1] and not merely lift the abeyance order of 14-9-2012.

154.5. The decision of the Bombay High Court in *Lithoferro* v. *State of Goa*[5] (and batch) giving directions different from those given by this Court in *Goa Foundation*[1] is set aside.

154.6. The mining leaseholders who have been granted the second renewal in violation of the decision and directions of this Court in *Goa Foundation*[1] are given time to manage their affairs and may continue their mining operations till *15-3-2018*. However, they are directed to stop all mining operations with effect from *16-3-2018* until fresh mining leases (not fresh renewals or other renewals) are granted and fresh environmental clearances are granted.

154.7. The State of Goa should take all necessary steps to grant fresh mining leases in accordance with the provisions of the Mines and Minerals (Development and Regulation) Act, 1957. The Ministry of Environment and Forests should also take all necessary steps to grant fresh environmental clearances to those who are successful in obtaining fresh mining leases. The exercise should be completed by the State of Goa and the Ministry of Environment and Forests as early as reasonably practicable.

154.8. The State of Goa will take all necessary steps to ensure that the Special Investigating Team and the Team of Chartered Accountants constituted pursuant to the Goa Grant of Mining Leases Policy, 2014 give their report at the earliest and the State of Goa should implement the reports at the earliest, unless there are very good reasons for rejecting them.

154.9. The State of Goa will take all necessary steps to expedite recovery of the amounts said to be due from the mining leaseholders pursuant to the show-cause notices issued to them and pursuant to other reports available with the State of Goa including the report of Special Investigating Team and the Team of Chartered Accountants.

155. The writ petitions and SLPs are disposed of in accordance with the above conclusions and directions.

---

1 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590
5 2014 SCC OnLine Bom 997 : (2015) 3 AIR Bom R 32

2021 SCC OnLine SC 1247

In the Supreme Court of India
(BEFORE INDIRA BANERJEE AND J.K. MAHESHWARI, JJ.)

Electrosteel Steels Limited ... Petitioner(s);
Versus
Union of India and Others ... Respondent(s).

Civil Appeal Nos. 7576-7577 of 2021 [Arising out of SLP (C.) Nos. 11226-11227 of 2020]

Decided on December 9, 2021

The Judgment of the Court was delivered by

INDIRA BANERJEE, J.:— Leave granted.

2. These Appeals are against an order dated 16th September 2020 passed by a Single Bench of the High Court of Jharkhand in W.P. (C) No. 1873 of 2018 and W.P. (C) No. 4850 of 2018, discontinuing the interim orders earlier passed by the High Court, allowing the Appellant to operate its unit under the supervisory regulatory control of the Respondent - Jharkhand State Pollution Control Board, hereinafter referred to as "JSPCB", which had been in force for over two years.

3. The Appellant owns and runs a 1.5 MTPA integrated steel plant in Bokaro District in Jharkhand. The said steel plant in Bokaro, which employs 3,000 regular employees and 7000 contractual employees, produced steel worth Rs. 4,200 crores in the financial year 2019-20.

4. The Appellant claims that about 30,000 persons other than those actually employed by the steel plant as regular or contractual employees depend on the steel plant for their livelihood.

5. Corporate Insolvency Resolution Process (CIRP) had commenced against the Appellant under the Insolvency and Bankruptcy Code 2016. As successful Resolution Applicant, Vedanta Ltd. took over the Appellant on or about 4th June 2018 upon payment of Rs. 5,320 crores for discharge of its debts.

6. Pollution and consequential deterioration of environment has been assuming alarming proportions, and has become a cause of universal concern. Fumes, smoke, emission of green house gases by use of motors and machines and operation of mills, factories and plants cause environmental degradation.

7. Under the aegis of the United Nations discussions and deliberations have been held to protect and improve environment and prevent pollution.

8. In 1972, the United Nations Conference on the Human Environment was convened in Stockholm to work out ways and means to protect and improve the environment. In course of deliberations, it was felt that there was need to enact law to tackle environmental pollution. India participated in the conference and strongly voiced environmental concerns.

9. The Environment (Protection) Act, 1986, hereinafter referred to as "*the 1986 Act*", has been enacted as a consequence of decisions taken at the United Nations Conference on the Human Environment held in Stockholm in June, 1972.

10. The statement of objects and reasons for enactment of the 1986 Act declares that the Act has been prompted by concern over environment, that has grown the world over, since the sixties.

11. Sub-Section (1) of Section 3 of the 1986 Act empowers the Central Government to take all such measures as it might deem necessary or expedient for the

purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution.

12. Sub-section (2) of Section 3 of the 1986 Act enables the Central Government to take, *inter alia*, the following measures:

"(i) co-ordination of actions by the State Governments, officers and other authorities—

(a) under this Act, or the rules made thereunder; or

(b) under any other law for the time being in force which is relatable to the objects of this Act;

(ii) planning and execution of a nation-wide programme for the prevention, control and abatement of environmental pollution;

(iii) laying down standards for the quality of environment in its various aspects;

(iv) laying down standards for emission or discharge of environmental pollutants from various sources whatsoever:

Provided that different standards for emission or discharge may be laid down under this clause from different sources having regard to the quality or composition of the emission or discharge of environmental pollutants from such sources;

(v) restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards;

(vi) laying down procedures and safeguards for the prevention of accidents which may cause environmental pollution and remedial measures for such accidents;

(vii) laying down procedures and safeguards for the handling of hazardous substances;

(viii) examination of such manufacturing processes, materials and substances as are likely to cause environmental pollution;

(ix) carrying out and sponsoring investigations and research relating to problems of environmental pollution;

(x) inspection of any premises, plant, equipment, machinery, manufacturing or other processes, materials or substances and giving, by order, of such directions to such authorities, officers or persons as it may consider necessary to take steps for the prevention, control and abatement of environmental pollution;

(xi) establishment or recognition of environmental laboratories and institutes to carry out the functions entrusted to such environmental laboratories and insitutes under this Act;

(xii) collection and dissemination of information in respect of matters relating to environmental pollution;

(xiii) preparation of manuals, codes or guides relating to the prevention, control and abatement of environmental pollution;

(xiv) such other matters as the Central Government deems necessary or expedient for the purpose of securing the effective implementation of the provisions of this Act."

13. Sub-section (3) of Section 3 of the 1986 Act provides as follows:

"The Central Government may, if it considers it necessary or expedient so to do for the purposes of this Act, by order, published in the Official Gazette, constitute an authority or authorities by such name or names as may be specified in the order for the purpose of exercising and performing such of the powers and functions (including the power to issue directions under Section 5) of the Central Government under this Act and for taking measures with respect to such of the matters referred

to in sub-section (2) as may be mentioned in the order and subject to the supervision and control of the Central Government and the provisions of such order, such authority or authorities may exercise the powers or perform the functions or take the measures so mentioned in the order as if such authority or authorities had been empowered by this Act to exercise those powers or perform those functions or take such measures."

14. Subject to the provisions of the 1986 Act, the Central Government has power under sub-section (1) of section 3 to take 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.

15. Section 5 of the 1986 Act provides that notwithstanding anything contained in any other law, but subject to the provisions of the 1986 Act, the Central Government may, in exercise of its powers and performance of its functions under the 1986 Act, issue directions in writing to any person, officer or any authority and such person, officer or authority shall be bound to comply with such directions.

16. In exercise of powers conferred by Sub-Section (1) and clause (v) of sub-section (2) of Section 3 of the 1986 Act read with Rule 5(3)(d) of the Environment (Protection) Rules, 1986 the Central Government issued the Environmental Impact Assessment Notification dated 27th January 1994 directing that on and from the date of publication of the said notification in the Official Gazette, expansion or modernisation of any activity or a new project listed in Schedule I of the Notification shall not be undertaken in any part of India, unless it has been accorded Environmental Clearance (EC) by the Central Government in accordance with the procedure specified in the Notification.

17. Under Clause (2)(I) of the said Notification, any person who desires to undertake any new project listed in Schedule I is required to submit an application to the Secretary, Ministry of Environment and Forests (MoEF), New Delhi in the pro forma specified in Schedule II, accompanied by a project report which is to include the EIA (Environmental Impact Assessment) Report/Environment Management Plan (EMP) prepared in accordance with the guidelines issued by MoEF. Another Environmental Impact Notification was issued in 2006, for grant of Terms and Environmental Clearance *inter alia* for projects which had started work on site.

18. The EIA Report submitted with the application of the project proponent is to be evaluated and assessed by the Impact Assessment Agency (IAA), that is MoEF, and if deemed necessary, it may consult a Committee of Experts constituted in the manner prescribed in Schedule III. The Committee of Experts shall have full right of entry and inspection of the site. The Impact Assessment Agency is to prepare a set of recommendations based on technical assessment of documents and data, furnished by the project proponent, supplemented by data collected during visits to sites, interaction with the affected population and environmental groups, if necessary. The summary of the reports, the recommendations and the conditions, subject to which EC is given shall, subject to public interest, be made available to the parties concerned or environmental groups on request. The IAA may solicit comments of the public within the specified period by arranging public hearings for that purpose. The public shall, subject to public interest, be provided access, to the summary of the EIA Report/Environment Management Plan (EMP). The clearance granted for commencement of the construction or operation of the plant, is to be valid for five years. Clause IV of the Environmental Impact Assessment Notification provides for the monitoring of the implementation of the conditions of EC and/or the recommendations and conditions laid down by IAA.

19. A minor amendment was made to the said Environmental Impact Assessment Notification dated 27th January 1994, by a Notification dated 10th April 1997, which

prescribes a detailed procedure for public hearing.

20. By a notification being S.O. 327(E), dated 10th April 2001, published in the Gazette of India, Extra., Pt.II, Sec.3(ii), dated 12th April 2001, the Central Government has delegated the powers vested in it under Section 5 of the 1986 Act, to the Chairpersons of the respective State Pollution Control Boards/Committees to issue directions to any industry or any local or other authority for the violations of the standards and rules relating to biomedical waste, hazardous chemicals, industrial solid waste and municipal solid waste including plastic waste notified under the Environment (Protection) Act, 1986 subject to the condition that the Central Government may revoke such delegation of powers or may itself invoke the provisions of Section 5 of the said Act, if in the opinion of the Central Government such a course of action is necessary in the public interest.

21. On or about 8th January 2007, the Appellant applied to the Ministry of Environment, Forest and Climate Change, Government of India, hereinafter referred to as "MoEF&CC" for grant of EC to establish 3 MTPA integrated steel plant at Mauza South Parbatpur of Chandankiyari Block of Bokaro District.

22. In its application, the Appellant stated that 1350 acres of land were required for establishing the said plant at the Mauza South Parbatpur of Chandankiyari Block of Bokaro District and that no forest land was involved in the project.

23. By a letter No. F. No. J-11011/137/2006-1A-II (i) dated 21st February 2008, the Appellant was granted EC. After obtaining EC, the Appellant applied to the JSPCB, for grant of 'Consent to Establish' (CTE) under the Air (Prevention and Control of Pollution) Act, 1981, hereinafter referred to as the Air Pollution Act, and Water (Prevention and Control of Pollution) Act 1974, hereinafter referred to as the Water Pollution Act.

24. On 5th May 2008, the JSPCB granted CTE to the Appellant to establish the 3 MTPA integrated steel plant at Mauza South Parbatpur of Chandankiyari Block of Bokaro District. The CTE was granted on the basis of the EC granted by the MoEF&CC.

25. The CTE was extended from time to time till 4th May 2011. Even though CTE was granted to the Appellant to establish a steel plant at Mauza South Parbatpur of Chandankiyari Block of Bokaro District, the Appellant established steel plant in Mauza Bhagabandh in the Chas Block in Bokaro District, 5.3 Kms away from the site for which EC and CTE had been granted.

26. A Circular No. J-11013/41/2006-1A.2(i) dated 22nd January, 2010 was issued by the Ministry of Environment and Forest (MoEF) of the Government of India which provided as follows:

> *"Instances have come to the notice of this Ministry wherein the project proponents have changed the project site after the said project has been granted environmental clearance or after the public hearing has been held. The project proponents have approached this Ministry to revalidate the environmental clearance so granted without undergoing afresh the procedure prescribed for obtaining environmental clearance. The matter has been considered in the ministry. The change in project site would lead to change in project affected people as well as the change in study area and the impact zone. As such the Environment Impact Assessment Report and Public Hearing conducted for a particular location cannot be taken valid for the changed location.*
>
> *Accordingly, it has been decided that any shift in project site location after holding of public hearing will be deemed to be a new proposal and will be appraised afresh as per the procedure prescribed under EIA Notification 2006 provided the respective Expert Appraisal Committee is satisfied that the shift is so minor as to have no change in EIA/EMP, duly recorded in the minutes and prior approval of advisor (In-charge)/SEIAA for Category 'A'/Category 'B' projects respectively is*

obtained for not holding the public hearing for the changed location afresh.

This issues with the approval of the Competent Authority."

27. By a communication being Reference No. 1142 dated 4th May 2010, the District DFO (District Forest Officer) Bokaro requested JSPCB to take action against the Appellant for setting up its integrated steel plant on forest land in Mauza Bhagabandh of Chas Block of Bokaro District, in violation of the Forest Conservation Act 1980 and Indian Forest Act 1927. The DFO, Bokaro reported encroachment of 220.88 acres of notified forest land by the Appellant to JSPCB.

28. It appears that cases had been initiated against the officials of the Appellant under the Indian Forest Act, 1927, Forest Conservation Act, 1980 and the Bihar Public Land Encroachment Act, 1955 which have been quashed by the Jharkhand High Court, by an order dated 25th January 2011.

29. On or about 23rd September 2010 the Appellant applied for Consent to Operate (CTO) under the Air Pollution Act and the Water Pollution Act for its 350 m3 blast furnace. Later on 9th September 2011, the Appellant applied for CTO in respect of its entire plant.

30. By a letter dated 2nd December 2011, addressed to the Appellant, the MoEF confirmed that the lay out of the Appellant's 3 MTPA Integrated Steel Plant was well within the Environment Impact Area and that the affected people had the opportunity to participate in a public hearing.

31. By letter dated 18th May 2012, the JSPCB reported encroachment by the Appellant upon forest land and alleged violation by the Appellant of the Forest Conservation Act, 1980 to the MoEF&CC, New Delhi. The MoEF&CC was also informed of the unauthorized shifting of the integrated steel plant from Mauza South Parbatpur of Chandankiyari Block of Bokaro District to Mauza Bhagabandh of Chas Block of Bokaro District in violation of the conditions of Environment Clearance granted by the MoEC&CC.

32. Pursuant to the report of JSPCB, MoEF&CC issued a Show Cause Notice dated 6th June 2012 to the Appellant under Section 5 of the 1986 Act. The Appellant submitted its reply to the Show Cause Notice on 20th June 2012.

33. On 10th September 2012, the Appellant once again applied to JSPCB for CTO for one year under the Water Pollution Act and Air Pollution Act. According to the Appellant, several reminders were sent to MoEF&CC requesting MoEF&CC to intimate JSPCB of the outcome of the Show Cause Notice issued to the Appellant. However, JSPCB has not been informed of the decision of MoEF&CC.

34. The Appellant filed a Writ Petition being W.P. No. 2247/2012 in the Jharkhand High Court for orders on JSPCB to grant the Appellant CTO. The said writ petition was disposed of by an order dated 5th November 2012, the operative part whereof is set out hereinbelow:—

"Respondent 1& 2 to consider the petitioner's application and as assured by them, if so required, give an opportunity of hearing to the petitioners and after taking into consideration the facts and provisions of law and the related decisions, shall dispose of the petitioner's application within five weeks from the date of receipt/production of a copy of this order."

35. On or about 27th November 2013, the application of the Appellant for CTO was rejected on the ground that the Appellant had shifted the site of its steel Plant and had encroached upon forest land in violation of the Forest Conservation Act, 1980. The operative part of the order dated 27th November 2013 reads:—

"at this stage subject to final outcome of the decision of MoEF&CC, New Delhi with respect to show cause notice dated 6.6.2012, we dispose the application for CTO in exercise of power conferred u/s 21(4) of Air (Prevention and Control of

Pollution) Act, 1981 & u/s 25(4) of Water (Prevention and Control of Pollution) Act, 1974 by "refusing" the CTO to the unit for the reason aforesaid."

36. The Appellant filed an application for contempt being Contempt Case (C) No. 939 of 2013 in W.P.(C) No. 2247 of 2012 in the Jharkhand High Court. Pursuant to an order dated 29th November 2013 in the Contempt Petition, the JSPCB disposed of the applications for grant of CTO to the Appellant.

37. By a letter dated 17th April 2013, the MoEF&CC had called for a status report from the State of Jharkhand in respect of forest land encroached by the Appellant. The Forest Department submitted a report to the MoEF&CC on 13th May, 2014.

38. Thereafter, by a letter dated 20th October 2014, the MoEF&CC, New Delhi directed the Department of Forest, Environment and Climate Change, Government of Jharkhand to take action against the Appellant for violating the provisions of Indian Forest Act, 1927 and Forest Conservation Act, 1980. In compliance with the aforesaid order, JSPCB directed the Appellant to close down its plant under Section 31(A) of the Air Pollution Act and Section 33(A) of Water Pollution Act.

39. By a Memo No. 521 dated 6th February 2015, the Department of Forest, Environment and Climate Change, Government of Jharkhand directed the DGP, Jharkhand, Ranchi and the Deputy Commissioner, Bokaro to take action against the Appellant in the light of the letter dated 20th October, 2014 of the MoEF&CC, Government of India and to submit an action taken report.

40. The aforesaid order of JSPCB was challenged by the Appellant by filing a Writ Petition being WP(C) No. 2033 of 2015 in the Jharkhand High Court. By an order dated 5th February 2016 the High Court set aside the order of the JSPCB holding that the same had been passed in violation of principles of natural justice. The High Court however, held that JSPCB would be at liberty to pass an order in accordance with law after giving the Appellant an opportunity of hearing.

41. Thereafter, a show cause notice dated 25th April 2016, was issued to the Appellant. The Appellant replied to the show cause notice on 28th September 2016, contending that the Appellant had not set up its plant on any forest land and that all pollution control measures had been taken. However, the Principal Chief Conservator of Forests (PCCF), Jharkhand had by a communication No. 2966 dated 8th August 2016 informed JSPCB that the Appellant had encroached forest land. Thereafter JSPCB once again called upon the Appellant to show cause in the light of information provided by the PCCF, Jharkhand. The Appellant by a letter dated 28th September 2016 reiterated that there was no forest land in the plant premises.

42. JSPCB passed an order No. B-319 dated 13th February 2017 disposing of the show cause notice in the light of the direction dated 5th February 2016 of the Jharkhand High Court and the applications for CTO. JSPCB granted CTO to the Appellant which was valid till 31st December, 2017.

43. The MoEF&CC and the State Environment Impact Assessment Authorities had, in the meanwhile been receiving proposals under the Environment Impact Assessment Notification, 2006 for grant of Terms of Reference and Environmental Clearance for projects which had started the work on site, expanded the production beyond the limit of environmental clearance or changed the product mix without obtaining prior environmental clearance.

44. The MoEF&CC deemed it necessary that all entities not complying with the environmental regulation under Environment Impact Assessment Notification, 2006, be brought to comply with the environmental laws in expedient manner, for the purpose of protecting and improving the quality of the environment and reducing environmental pollution.

45. The MoEF&CC deemed it necessary to bring such projects and activities in compliance with the environmental laws at the earliest point of time, rather than

leaving them unregulated and unchecked, which would be more damaging to the environment.

46. In furtherance of this objective, the Government of India deemed it essential to establish a process for appraisal of cases of violation of norms, and prescribing such adequate environmental safeguards that would deter violation of the provisions of Environment Impact Assessment Notification, 2006 and ensure that damage to environment was adequately compensated for.

47. In *Indian Council for Enviro-Legal Action* v. *Union of India*[1], the Supreme Court analyzed relevant provisions of environmental laws and concluded that damages might be recovered under the provisions of the 1986 Act, inter alia, to implement measures that were necessary or expedient for protecting and promoting the environment. This Court affirmed that the power of the Central Government under Section 3 of the 1986 Act was wide and included the power to prohibit an activity, close an industry, direct to carry out remedial measures, and wherever necessary impose the cost of remedial measures upon the offending industry. The question of liability of the respondents to defray the costs of remedial measures could also be looked into from the principle "polluter pays."

48. In exercise of power under Section 3(1) and Section 3(2)(v) of the 1986 Act read with Rule 5(3)(d) of the Environment (Protection) Rules, 1986, the Central Government has issued a Notification being S.O. 804(E) dated 14th March 2017 which provides for grant of ex post facto EC for project proponents who have commenced, continued or completed a project without obtaining EC under the 1986 Act or the EIA notification issued under it.

49. Paragraphs 3, 4 and 5 of the said notification, read as follows:

> *"(3) In cases of violation, action will be taken against the project proponent by the respective State or State Pollution Control Board under the provisions of section 19 of the Environment (Protection) Act, 1986 and further, no consent to operate or occupancy certificate will be issued till the project is granted the environmental clearance.*
>
> *(4) The cases of violation will be appraised by respective sector Expert Appraisal Committees constituted under subsection (3) of Section 3 of the Environment (Protection) Act, 1986 with a view to assess that the project has been constructed at a site which under prevailing laws is permissible and expansion has been done which can be run sustainably under compliance of environmental norms with adequate environmental safeguards; and in case, where the finding of the Expert Appraisal Committee is negative, closure of the project will be recommended along with other actions under the law.*
>
> *(5) In case, where the findings of the Expert Appraisal Committee on point at sub-para(4) above are affirmative, the projects under this category will be prescribed the appropriate Terms of Reference for undertaking Environment Impact Assessment and preparation of Environment Management Plan. Further, the Expert Appraisal Committee will prescribe a specific Terms of Reference for the project on assessment of ecological damage, remediation plan and natural and community resource augmentation plan and it shall be prepared as an independent chapter in the environment impact assessment report by the accredited consultants. The collection and analysis of data for assessment of ecological damage, preparation of remediation plan and natural and community resource augmentation plan shall be done by an environmental laboratory duly notified under Environment (Protection) Act, 1986, or a environmental laboratory accredited by National Accreditation Board for Testing and Calibration Laboratories or a laboratory of a Council of Scientific and Industrial Research institution working in the field of environment."*

50. On or about 24th August 2017, the Appellant applied for CTO for five years. On

13th November 2017, JSPCB issued a Show Cause Notice to the Appellant pointing out alleged contraventions of the conditions of Consent to Operate (CTO) earlier granted to the Appellant. The Appellant was called upon to show cause whether conditions of the CTO had been contravened while the application of the Appellant for CTO for five year was pending.

51. On 23rd November 2017, the Appellant submitted its online reply to the Show Cause Notice showing compliance of the conditions of the CTO.

52. By a communication No. 2105 dated 18th December 2017 JSPCB requested MoEF&CC to inform JSPCB of the decision on the show cause notice issued to the Appellant under Section 5 of the 1986 Act for revocation of the EC for non compliance of the conditions for grant of EC for the integrated plant at Parbatpur, Jharkhand.

53. Aggrieved by the failure of JSPCB to issue/renew the CTO to the Appellant, pursuant to its application made on 24th August 2017, the Appellant filed a writ petition being W.P.(C) No. 1873 of 2018 in the Jharkhand High Court on or about 12th April 2018 seeking directions on the JSPCB to issue CTO to the Appellant.

54. By an order dated 16th July 2018, the High Court directed the JSPCB to take a final decision on the application of renewal/grant of CTO filed by the Appellant on 24th August 2017 within the time stipulated in the said order.

55. The High Court further passed an interim order directing that the Appellant be allowed to operate its unit under the supervisory and regulatory control of the JSPCB, who might carry out periodical check as to adherence by the Appellant of pollution control laws.

56. JSPCB passed an order dated 21st August, 2018, rejecting at that stage the request of the Appellant for CTO, subject to the decision of MoEF&CC on the show cause notice issued to the appellant. The operative part of the said order is set out hereinbelow:

> *"at this stage subject to final outcome of the decision of MoEF&CC, New Delhi with respect to show cause notice dated 6.6.2012, we dispose the application for CTO in exercise of power conferred u/s 21(4) of Air (Prevention and Control of Pollution) Act, 1981 & u/s 25(40 of Water (Prevention and Control of pollution) Act, 1974 by "refusing" the CTO to the unit for the reason aforesaid."*

57. The Appellant, thereafter approached the High Court with a prayer for amendment of Writ Petition No. 1873 of 2018. By an order dated 25th August 2018, the High Court allowed the application for amendment of the Writ Petition and directed the respondent to file their response to the amended writ petition. The High Court further directed:—

> *"10. So far as interim relief is concerned, this court finds that the order passed by the respondent-Jharkhand State Pollution Control Board dated 23.08.2018 appears to be directly dependent on the final decision which is yet to be taken by the Ministry of Environment, Forest & Climate Change on the show cause issued to the petitioner as back as in the year 2012. As per the submission made by the counsel appearing on behalf of Union of India, they are shortly going to take a final decision in the matter after hearing the petitioner. Accordingly the operation, implementation and execution of the order dated 23.08.2018 passed by Jharkhand State Pollution Control Board is hereby stayed till 27.09.2018 and the interim order dated 16.07.2018 is hereby extended till 27.09.2018.*
>
> *11. So far as decision of the Ministry of Environment, Forest & Climate Change are concerned, considering the fact that the unit of the petitioner is running unit and large number of employees are working in this unit of the petitioner, this court consider it appropriate that the issue regarding the environmental clearance of the petitioner should be decided at the earliest.*
>
> *12. It is further observed that it is open to the petitioner to approach the Union*

of India with their proposal/application for regularization of the alleged violation, without prejudice to their rights (including right, title, interest, possession and nature of property of the petitioner) and advance submissions before the respondent authority of Union of India pursuant to the show cause notice issued to them dated 6.6.2012 and the appropriate authority may, if possible, simultaneously consider the aforesaid application of the petitioner for regularization along with the show cause reply of the petitioner such that entire dispute is decided and the petitioner may also have a clarity about the fate of its unit. The decision which is to be taken by the Union of India be brought on record by either of the parties by filing supplementary affidavit latest by 25.09.2018.

13. I.A. No. 7610 of 2018 and I.A No. 7613 OF 2018 are hereby disposed of.

14. It is made clear that this court has not gone into the merits of the claim of the petitioner and it will be open to the respondent no 3 to take decision as per law."

58. By the aforesaid order dated 25th August 2018, the High Court directed MoEF to take a decision on the application of the Appellant for EC as also a decision regarding violation by the Appellant of the provisions of EC by encroachment upon forest land by shifting the location of the plant.

59. On 31st August 2018, MoEF&CC issued a show cause notice No. F. No. J-11011/137/2006-1A Pt.II (i) dated 31st August 2018 to the Appellant for violating the provisions of the EC by shifting the location of its plant and encroaching upon forest land.

60. The Respondent No. 1 was also accorded personal hearing on 10th September 2018. On 12th September 2018 Mr. Gyanesh Bharti who presided over the personal hearing was transferred from MoEF&CC.

61. On 20th September 2018 the Respondent No. 1 issued an order bearing No. F. No. J-11011/137/2006-IA.II(I) revoking the EC of the Appellant on the ground that the Appellant had encroached upon 220 acres of forest land and had shifted the location of its plant from Parbatpur to Bhagabandh, violating the conditions stipulated in the EC.

62. The Appellant filed Writ petition being W.P. (C) No. 4850 of 2018 in the Jharkhand High Court challenging the revocation of the EC granted to the Appellant.

63. On 27th September 2018 the High Court passed an interim order staying the operation, implementation and execution of the impugned order dated 20th September 2018. The Court prima facie found that the impugned order, passed in violation of principles of natural justice, had serious repercussions on the unit of the Appellant which was a running unit, and had caused prejudice to the Appellant.

64. On 4th October 2018, the Appellant applied for ex post facto Forest Clearance (FC) without prejudice to its rights and contentions. On 27th November 2019 the Appellant applied for a "revised" EC without prejudice to its rights and contentions. In the meanwhile, the Interim order passed by the High Court on 27th September 2018 was extended from time to time. Such extensions were granted on 10.10.2018, 5.11.2018, 11.12.2018, 8.1.2019, 23.1.2019, 16.5.2019, 25.7.2019 and 17.10.2019.

65. On 17th December 2019, MoEF&CC passed an order according ex post facto in principle approval for the forest diversion/clearance proposal of the Appellant. The operative part of the said order reads:—

"After careful examination of the proposal of the State Government and on the basis of the recommendations of the Forest Advisory Committee and approval of the same by the competent authority of the MoEF&CC, New Delhi, the Central Government hereby accords ex-post facto 'in-principle' approval under Section-2 of the Forest (Conservation) Act, 1980 for diversion of 184.23 ha of forest land

(174.39 ha encroached (ex-post facto) and 9.84 ha virgin land) in favour of M/s Electrosteel Steels Limited in the State of Jharkhand subject to fulfilment of following conditions:—

(i) Legal status of the diverted forest land shall remain unchanged;…"

66. By an order dated 26th February 2020, the Jharkhand High Court directed that the pendency of W.P. (C) No. 4850 of 2018 and W.P. (C) No. 1873 of 2018 would not come in the way of consideration by the MoEF&CC of grant or refusal of restoration of EC and it would be open to the Ministry to take appropriate decision in accordance with law. The interim orders in force were extended.

67. Thereafter by a letter dated 2nd March 2020, the Appellant requested MoEF&CC to consider the application of the Appellant for revised EC. In the meanwhile, the interim orders passed by the High Court were further extended. The interim orders were extended by orders passed on 26.2.2020, 7.4.2020 and 29.5.2020.

68. The Writ Petition was called for hearing on 19th June 2020 whereupon it was submitted on behalf of the Respondent No. 1 that the revised EC application of the Appellant would be placed before the Expert Appraisal Committee (EAC) for consideration on merit and Violation Committee would decide on the action to be taken against the Appellant for violation of Environment (Protection) Act, 1986.

69. On 6th August 2020 and 7th August 2020, the case of the Appellant was placed before the EAC at its 35th meeting. The Appellant was invited to present its proposal online before the Committee.

70. After detailed deliberation, the EAC appraised the proposal on merits and recommended issuance of Standard Terms of Reference along with Specific Terms of Reference for undertaking Environmental Impact Assessment (EIA) and preparation of Environment Management Plan (EMP). The EAC noted that the plant was a running unit and the EC was subject to the conditions imposed in the Terms of Reference.

71. On 4th September 2020, the Jharkhand High Court extended the interim orders till 8th September 2020 while awaiting response from the Respondents. On 8th September 2020, the High Court reserved orders on the extension of interim orders dated 16th July 2018 and 27th September 2018 while listing the writ petitions for final hearing on 16th September 2020.

72. On 15th September 2020, the Respondent No. 1 filed an affidavit stating that it had no objection to extension of the interim orders considering that the steel plant employed a large workforce. At the hearing on 16th September 2020 JSPCB also consented to extension of the interim order. However, the High Court passed the impugned order dated 16th September 2021 dis-continuing the earlier interim orders on, *inter alia*, the following grounds:

(i) The Expert Appraisal Committee of the MoEF&CC had, after detailed deliberations, found that the Appellant had been in violation of the EIA Notification 2006 and general condition no. (ii) of the EC dated 21.02.2008.

(ii) The MoEF&CC had while issuing ToR for grant of EC recommended action against the Appellant under Section 19 of the 1986 Act for past violations. Extension of the interim orders would amount to staying action.

(iii) In *Alembic Pharmaceuticals Ltd.* v. *Rohit Prajapati*[2], this Court had deprecated ex post facto Ecs but passed certain directions in exercise of powers under Article 142 of the Constitution.

73. By an Office Memorandum, being F. No. 22-21/2020-1A III, dated 7th July 2021, the MoEF&CC issued Standard Operating Procedure (SOP) for Identification and Handing of violation cases under EIA Notification 2006.

74. The said Office Memorandum, *inter alia*, reads:

"The Ministry had issued a notification number S.O.804(E), dated the 14th March,

2017 detailing the process for grant of Terms of Reference and Environmental Clearance in respect of projects or activities which have started the work on site and/or expanded the production beyond the limit of Prior EC or changed the product mix without obtaining Prior EC under the EIA Notification, 2006.

2. This Notification was applicable for six months from the date of publication i.e. 14.03.2017 to 13.09.2017 and further based on court direction from 14.03.2018 to 13.04.2018.

3. Hon'ble NGT in Original Application No. 287 of 2020 in the matter of Dastak N.G.O. *v.* Synochem Organics Pvt. Ltd. *and in applications pertaining to same subject matter in Original Application No. 298 of 2020 in* Vineet Nagar *v.* Central Ground Water Authority, *vide order dated 03.06.2021 held that "(...) for past violations, the concerned authorities are free to take appropriate action in accordance with polluter pays principle, following due process".*

4. Further, the Hon'ble National Green Tribunal in O.A No. 34/2020 WZ in the matter of Tanaji B. Gambhire *v.* Chief Secretary, Government of Maharashtra, *vide order dated 24.05.2021 has directed that "... a proper SoP be laid down for grant of EC in such cases so as to address the gaps in binding law and practice being currently followed. The MoEF may also consider circulating such SoP to all SEIAAs in the country".*

5. Therefore, in compliance to the directions of the Hon'ble NGT a Standard Operating Procedure (SoP) for dealing with violation cases is required to be drawn. The Ministry is also seized of different categories of 'violation' cases which have been pending for want of an approved structural/procedural framework based on 'Polluter Pays Principle' and 'Principle of Proportionality'. It is undoubtedly important that action under statutory provisions is taken against the defaulters/violators and a decision on the closure of the project or activity or otherwise is taken expeditiously.

6. In the list of the above directions of the Hon'ble Tribunal and the issues involved, the matter has accordingly been examined in detail in the Ministry. A detailed SoP has accordingly been framed and is outlined herein. The SoP is also guided by the observations/decisions of the Hon'ble Courts wherein principles of proportionality and polluters pay have been outlined."

75. The Standard Operating Procedure formulated by the said Office Memorandum dated 7th July 2021 refers to and gives effect to various judicial pronouncements including the judgment of this Court in *Alembic Pharmaceuticals* (supra).

76. In terms of the Standard Operating Procedure, the proposal for grant of EC in cases of violation are to be considered on merits, with prospective effect, applying principles of proportionality and the principle that the polluter pays and is liable for costs of remedial measures.

77. By an interim order passed on 15th July 2021 in WP(MD) 11757 of 2021 in *Fatima* v. *Union of India*, the Madurai Bench of Madras High Court has stayed the operation of the Standard Operating Procedure.

78. By an order dated 25th August 2021, MoEF&CC rejected the application of the Appellant for the time being. The application has, in effect, been kept in abeyance.

79. The MoEF apparently did not take any decision on the application of the Appellant for EC, since the Standard Operating Procedure issued by it has been stayed by the Madurai Bench of Madras High Court, by the said order dated 15th July 2021, citing the judgment of this Court in *Alembic Pharmaceuticals* (supra).

80. The Appellant has filed an application being I.A No. 125221 of 2021 in this appeal seeking directions on the Respondent No. 1 to process the Appellant's application dated 5th August 2020 for revised EC.

81. There can be no doubt that the need to comply with the requirement to obtain

Environment Clearance is non-negotiable. A project can be set up or allowed to expand subject to compliance of the requisite norms. Environmental clearance is granted on condition of the suitability of the site to set up the project from the environmental angle, and existence of necessary infrastructural facilities and equipment for compliance of environmental norms. To protect future generations, it is imperative that pollution laws be strictly enforced. Under no circumstances, can industries which pollute be allowed to operate unchecked and degrade the environment.

82. The question is whether an establishment contributing to the economy of the country and providing livelihood to hundreds of people should be closed down for the technical irregularity of shifting its site without prior environmental clearance, without opportunity to the establishment to regularize its operation by obtaining the requisite clearances and permissions, even though the establishment may not otherwise be violating pollution laws, or the pollution, if any, can conveniently and effectively be checked. The answer has to be in the negative.

83. The Central Government is well within the scope of its powers under Section 3 of the 1986 Act to issue directions to control and/or prevent pollution including directions for prior Environmental Clearance before a project is commenced. Such prior Environmental Clearance is necessarily granted upon examining the impact of the project on the environment. Ex-Post facto Environmental Clearance should not ordinarily be granted, and certainly not for the asking. At the same time ex post facto clearances and/or approvals and/or removal of technical irregularities in terms of Notifications under the 1986 Act cannot be declined with pedantic rigidity, oblivious of the consequences of stopping the operation of a running steel plant.

84. The 1986 Act does not prohibit ex post facto Environmental Clearance. Some relaxations and even grant of ex post facto EC in accordance with law, in strict compliance with Rules, Regulations Notifications and/or applicable orders, in appropriate cases, where the projects are in compliance with, or can be made to comply with environment norms, is in over view not impermissible. The Court cannot be oblivious to the economy or the need to protect the livelihood of hundreds of employees and others employed in the project and others dependent on the project, if such projects comply with environmental norms.

85. As held by a three Judge Bench of this Court in *Lafarge Umiam Mining Private Limited* v. *Union of India*[3] ("Lafarge") reported in (2011) 7 SCC 338:

> *"119. The time has come for us to apply the constitutional "doctrine of proportionality" to the matters concerning environment as a part of the process of judicial review in contradistinction to merit review. It cannot be gainsaid that utilization of the environment and its natural resources has to be in a way that is consistent with principles of sustainable development and intergenerational equity, but balancing of these equities may entail policy choices. In the circumstances, barring exceptions, decisions relating to utilization of natural resources have to be tested on the anvil of the well-recognized principles of judicial review. Have all the relevant factors been taken into account? Have any extraneous factors influenced the decision? Is the decision strictly in accordance with the legislative policy underlying the law (if any) that governs the field? Is the decision consistent with the principles of sustainable development in the sense that has the decision-maker taken into account the said principle and, on the basis of relevant considerations, arrived at a balanced decision? Thus, the Court should review the decision-making process to ensure that the decision of MoEF is fair and fully informed, based on the correct principles, and free from any bias or restraint. Once this is ensured, then the doctrine of "margin of appreciation" in favour of the decision-maker would come into play."*

86. In *Alembic Pharmaceuticals* (supra) this Court observed:—

"27. The concept of an ex post facto EC is in derogation of the fundamental principles of environmental jurisprudence and is an anathema to the EIA notification dated 27 January 1994. It is, as the judgment in Common Cause holds, detrimental to the environment and could lead to irreparable degradation. The reason why a retrospective EC or an ex post facto clearance is alien to environmental jurisprudence is that before the issuance of an EC, the statutory notification warrants a careful application of mind, besides a study into the likely consequences of a proposed activity on the environment. An EC can be issued only after various stages of the decision-making process have been completed. Requirements such as conducting a public hearing, screening, scoping and appraisal are components of the decision-making process which ensure that the likely impacts of the industrial activity or the expansion of an existing industrial activity are considered in the decision-making calculus. Allowing for an ex post facto clearance would essentially condone the operation of industrial activities without the grant of an EC. In the absence of an EC, there would be no conditions that would safeguard the environment. Moreover, if the EC was to be ultimately refused, irreparable harm would have been caused to the environment. In either view of the matter, environment law cannot countenance the notion of an ex post facto clearance. This would be contrary to both the precautionary principle as well as the need for sustainable development.

87. In *Alembic Pharmaceuticals* (supra), this Court deprecated ex-post facto clearances, but this Court did not pass orders for closure of the three industries concerned, on consideration of the consequences of their closure. This court proceeded to observe and held:—

44. The issue which must now concern the Court is the consequence which will emanate from the failure of the three industries to obtain their ECs until 14 May 2003 in the case of Alembic Pharmaceuticals Limited, *17 July 2003 in the case of* United Phosphorous Limited, *and 23 December 2002 in the case of* Unique Chemicals Limited. *The functioning of the factories of all three industries without a valid EC would have had an adverse impact on the environment, ecology and biodiversity in the area where they are located. The Comprehensive Environmental Pollution Index[4] report issued by the Central Pollution Control Board for 2009-2010 describes the environmental quality at 88 locations across the country. Ankleshwar in the State of Gujarat, where the three industries are located showed critical levels of pollution[5]. In the Interim Assessment of CEPI for 2011, the report indicates similar critical figures[6] of pollution in the Ankleshwar area. The CEPI scores for 2013[7] and 2018[8] were also significantly high. This is an indication that industrial units have been operating in an unregulated manner and in defiance of the law. Some of the environmental damage caused by the operation of the industrial units would be irreversible. However, to the extent possible some of the damage can be corrected by undertaking measures to protect and conserve the environment.*

45. Even though it is not possible to individually determine the exact extent of the damage caused to the environment by the three industries, several circumstances must weigh with the Court in determining the appropriate measure of restitution. First, it is not in dispute that all the three industries did obtain ECs, though this was several years after the EIA notification of 1994 and the commencement of production. Second, subsequent to the grant of the ECs, the manufacturing units of all the three industries have also obtained ECs for an expansion of capacity from time to time. Third, the MoEF had issued a circular on 5 November 1998 permitting applications for ECs to be filed by 31 March 1999, which was extended subsequently to 30 June 2001. On 14 May 2002, the deadline was extended until 31 March 2003 subject to a deposit commensurate to the investment made. The circulars issued by the MoEF extending time for obtaining ECs came to

the notice of this Court in Goa Foundation (I) *v.* Union of India[9]. *Fourth, though in the context of the facts of the case, this Court in* Lafarge Umiam Mining Private Limited *v.* Union of India[10] *("Lafarge") has upheld the decision to grant ex post facto clearances with respect to limestone mining projects in the State of Meghalaya. In Lafarge, the Court dealt with the question of whether ex post facto clearances stood vitiated by alleged suppression of the nature of the land by the project proponent and whether there was non-application of mind by the MoEF while granting the clearances. While upholding the ex post facto clearances, the Court held that the native tribals were involved in the decision-making process and that the MoEF had adopted a due diligence approach in reassuring itself through reports regarding the environmental impact of the project."*

(Emphasis supplied)

46. After adverting to the decision in Lafarge, *another Bench of three learned judges of this Court in* Electrotherm (India) Limited *v.* Patel Vipulkumar Ramjibhai[11], *dealt with the issue of whether an EC granted for expansion to the appellant without holding a public hearing was valid in law. Justice Uday U. Lalit speaking for the Bench held thus:*

> *"19…the decision-making process in doing away with or in granting exemption from public consultation/public hearing, was not based on correct principles and as such the decision was invalid and improper."*

47. The Court while deciding the consequence of granting an EC without public hearing did not direct closure of the appellant's unit and instead held thus:

> *"20. At the same time, we cannot lose sight of the fact that in pursuance of environmental clearance dated 27-1-2010, the expansion of the project has been undertaken and as reported by CPCB in its affidavit filed on 7-7-2014, most of the recommendations made by CPCB are complied with. In our considered view, the interest of justice would be subserved if that part of the decision exempting public consultation/public hearing is set aside and the matter is relegated back to the authorities concerned to effectuate public consultation/public hearing. However, since the expansion has been undertaken and the industry has been functioning, we do not deem it appropriate to order closure of the entire plant as directed by the High Court. If the public consultation/public hearing results in a negative mandate against the expansion of the project, the authorities would do well to direct and ensure scaling down of the activities to the level that was permitted by environmental clearance dated 20-2-2008. If public consultation/public hearing reflects in favour of the expansion of the project, environmental clearance dated 27-1-2010 would hold good and be fully operative. In other words, at this length of time when the expansion has already been undertaken, in the peculiar facts of this case and in order to meet ends of justice, we deem it appropriate to change the nature of requirement of public consultation/public hearing from pre-decisional to post-decisional. The public consultation/public hearing shall be organised by the authorities concerned in three months from today."*

(Emphasis supplied)

48. Guided by the precepts that emerge from the above decisions, this Court has taken note of the fact that though the three industries operated without an EC for several years after the EIA notification of 1994, each of them had subsequently received ECs including amended ECs for expansion of existing capacities. These ECs have been operational since 14 May 2003 (in the case of Alembic Pharmaceuticals Limited), *17 July 2003 (in the case of* United Phosphorous Limited), *and 23 December 2002 (in the case of* Unique Chemicals Limited). *In addition, all the three units have made infrastructural investments and employed significant numbers of*

workers in their industrial units.

49. In this backdrop, this Court must take a balanced approach which holds the industries to account for having operated without environmental clearances in the past without ordering a closure of operations. The directions of the NGT for the revocation of the ECs and for closure of the units do not accord with the principle of proportionality. At the same time, the Court cannot be oblivious to the environmental degradation caused by all three industries units that operated without valid ECs. The three industries have evaded the legally binding regime of obtaining ECs. They cannot escape the liability incurred on account of such noncompliance. Penalties must be imposed for the disobedience with a binding legal regime. The breach by the industries cannot be left unattended by legal consequences. The amount should be used for the purpose of restitution and restoration of the environment. Instead and in place of the directions issued by the NGT, we are of the view that it would be in the interests of justice to direct the three industries to deposit compensation quantified at Rs. 10 crores each. The amount shall be deposited with GPCB and it shall be duly utilised for restoration and remedial measures to improve the quality of the environment in the industrial area in which the industries operate. Though we have come to the conclusion, for the reasons indicated, that the direction for the revocation of the ECs and the closure of the industries was not warranted, we have issued the order for payment of compensation as a facet of preserving the environment in accordance with the precautionary principle. These directions are issued under Article 142 of the Constitution. Alembic Pharmaceuticals Limited, United Phosphorous Limited and Unique Chemicals Limited shall deposit the amount of compensation with GPCB within a period of four months from the date of receipt of the certified copy of this judgment. This deposit shall be in addition to the amount directed by the NGT. Subject to the deposit of the aforesaid amount and for the reasons indicated, we allow the appeals and set aside the impugned judgment of the NGT dated 8 January 2016 in so far as it directed the revocation of the ECs and closure of the industries as well as the order in review dated 17 May 2016."

88. The Notification being SO 804(E) dated 14th March, 2017 was not an issue in *Alembic Pharmaceuticals* (supra). This Court was examining the propriety and/or legality of a 2002 circular which was inconsistent with the EIA Notification dated 27th January, 1994, which was statutory. Ex post facto environmental clearance should not however be granted routinely, but in exceptional circumstances taking into account all relevant environmental factors. Where the adverse consequences of ex post facto approval outweigh the consequences of regularization of operation of an industry by grant of ex post facto approval and the industry or establishment concerned otherwise conforms to the requisite pollution norms, ex post facto approval should be given in accordance with law, in strict conformity with the applicable Rules, Regulations and/or Notifications. Ex post facto approval should not be withheld only as a penal measure. The deviant industry may be penalised by an imposition of heavy penalty on the principle of 'polluter pays' and the cost of restoration of environment may be recovered from it.

89. We are of the view that the High Court erred in passing the impugned order, vacating interim orders which had been in force for two years. The impugned order is not in conformity with the principle of proportionality. This is not a case where the steel plant was started without environmental clearance or consent of JSPCB. The Appellant had applied for and obtained environmental clearance to set up an integrated steel plant (3MTPA) on 1350 acres of land at Mauza South Parbatpur, as observed above. Environmental Clearance had been granted on 21st February 2008 and Consent to Operate had been granted by JSPCB on 5th May 2008.

90. The Appellant established its steel plant in Mauza Bhagaband, 5.3 kms away

from the site for which EC and CTE had been granted. It is the contention of the Appellant that the shift is minor and makes no change in the EIA/EMP on the basis of which EC has been granted. The shift did not require fresh public hearing in terms of the Circular dated 22nd January 2010 of the MoEF.

91. As aforesaid, by a letter dated 2.12.2011 addressed to the Appellant, the MoEF confirmed that the steel plant of the Appellant was within the Environment Impact Area and the affected people had the opportunity to air their views in a public hearing. The question is whether the Petitioner was required to obtain fresh prior clearance for shifting or was covered by the exemption under the said Notification dated 22nd January 2010.

92. The Appellant has all along asserted that no part of the premises of the integrated steel plant is in any forest. As such there was no violation of the Indian Forest Act, 1927 or the Forest Conservation Act, 1980. The MoEF had also confirmed that the steel plant in question was well within the Environment Impact Area and the affected people had the opportunity in a public hearing. Be that as it may, whether the shifting of the site has really made any difference from the environmental impact angle requires consideration by the appropriate authority/forum.

93. In any case, the Appellant has duly applied for ex post facto forest clearance approval without prejudice to its rights and contentions that its steel plant is not on forest land and also applied for revised EC. On 17th December 2019, MoEF&CC accorded ex post facto in principle approval to the forest clearance proposal on the recommendations of the Forest Advisory Committee. The application for revised clearance is pending consideration. No final decision has however been taken, ostensibly in view of the interim order passed by the Madras High Court staying the operation of the Standard Operation Procedures issued vide Memorandum dated 7th July 2021.

94. The interim order passed by the Madras High Court appears to be misconceived. However, this Court is not hearing an appeal from that interim order. The interim stay passed by the Madras High Court can have no application to operation of the Standard Operating Procedure to projects in territories beyond the territorial jurisdiction of Madras High Court. Moreover, final decision may have been taken in accordance with the Orders/Rules prevailing prior to 7th July, 2021.

95. In passing the impugned order the High Court overlooked the consequences of closure of an integrated steel plant with a work force of 300 regular and 700 contractual workers. The High Court also failed to appreciate that the judgment of this Court in *Alembic Pharmaceuticals* (supra) was distinguishable on facts. Furthermore, continuance of the interim orders allowing operation of an industrial establishment or even the grant of revised EC to the industrial establishment cannot stand in the way of action against that establishment for contraventions, including the imposition of penalty, on the principle 'polluter pays'. The scope and effect of Section 32A of the IBC is a different issue. This Court need not examine into the question of whether penal action can be initiated against the Appellant or, whether compensation can be recovered from the Appellant, at this stage. The issue may be decided by the appropriate authority at the appropriate stage when it adjudicates an action for penalization of the Appellant or recovery of compensation from the Appellant. The application of the Appellant for revised EC, CTO etc. shall be considered strictly in accordance with environmental norms.

96. The appeals are allowed. The impugned order is set aside. The Respondent No. 1 shall take a decision on the application of the Appellant for revised EC in accordance with law, within three months from date. Pending such decision, the operation of the steel plant shall not be interfered with on the ground of want of EC, FC, CTE or CTO.

———

[1] (1996) 3 SCC 212

[2] 2020 SCC OnLine SC 347

[3] (2011) 7 SCC 338

[4] "CEPI"

[5] CEPI score - 88.50

[6] CEPI score - 85.75

[7] CEPI score - 80.93

[8] CEPI score - 80.21

[9] (2005) 11 SCC 559

[10] (2011) 7 SCC 338

[11] (2016) 9 SCC 300

2022 SCC OnLine SC 1278

In the Supreme Court of India
(BEFORE INDIRA BANERJEE AND J.K. MAHESHWARI, JJ.)

D. Swamy ... Appellant;

Versus

Karnataka State Pollution Control Board and Others ... Respondents.

Civil Appeal No. 3132 of 2018
Decided on September 22, 2022

The Judgment of the Court was delivered by

INDIRA BANERJEE, J.:— This appeal, under Section 22 of the National Green Tribunal Act 2010, is against a final order dated 10th May 2017 passed by the National Green Tribunal, Southern Zone, Chennai, dismissing the Application No. 169 of 2016 (SZ) filed by the Appellant under Section 18(1) read with Section 14 of the National Green Tribunal Act 2010, whereby the Appellant had prayed for a direction for closure of the Common Bio-Medical Waste Treatment Facility run by the Respondent No. 3, on the ground of alleged non-compliance of the provisions of the Environmental Impact Assessment Notification 2006, hereinafter referred to as "the 2006 EIA Notification" as amended on 17th April 2015.

2. In the meanwhile, by a notification being S.O. 327 (E) dated 10th April 2001, published in the Gazette of India on 12th April 2001, the Central Government has delegated the powers vested in it under the Environment (Protection) Act, 1986 (EP Act) to the Chairpersons of the respective State Pollution Control Boards/Committees to issue directions to any industry or any local or other authority to prevent violation of the Rules.

3. On or about 25th February 2012, the Respondent No. 3 applied to the Respondent No. 1, Karnataka State Pollution Control Board (hereinafter referred to as "KSPCB") for consent to establish a Common Bio-Medical Waste Treatment Facility over the land bearing Survey No. 82 and 38/2 at Gujjegowdanapura village, Jayapura Hobli, Mysore Taluk and District.

4. By a letter dated 24th November 2012, the Respondent No. 1 KSPCB accorded consent to the Respondent No. 3 to establish the Common Bio-Medical Waste Treatment Facility under the provisions of the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981 for collection, reception, transportation, treatment and disposal of Bio-Medical Waste. The said consent was valid for a period of five years.

5. It appears that M/s Shree Consultant who had been operating a Common Bio-Medical Waste Treatment Facility at Survey No. 25 at Mysore and had been collecting Bio-Medical Waste from four districts could not collect Bio-Medical Waste from the district of Hassan because of the Common Bio-Medical Waste Treatment Facility established by the Respondent No. 3.

6. M/s Shree Consultant filed appeals bearing Nos. 48 and 49 of 2012 before the Karnataka State Environment Appellate Authority, Bangalore challenging the consent granted to the Respondent No. 3 to establish the Common Bio-Medical Waste Treatment Facility. The Karnataka State Environment Appellate Authority, Bangalore granted an interim stay of the order granting consent to the Respondent No. 3 to establish the Common Bio-Medical Waste Treatment Facility. Ultimately however, the appeal was dismissed by a common judgment and order dated 20th April 2013.

7. M/s Shree Consultant filed Appeal Nos. 46-47 of 2013 before the National Green Tribunal, Southern Zone, Chennai against the common judgment and order dated 20th April 2013 passed by the Karnataka State Environment Appellate Authority, Bangalore in Appeal Nos. 48-49 of 2012.

8. By a judgment and order dated 28th November 2013, the Principal Bench of the National Green Tribunal at New Delhi held that Bio-Medical Waste Treatment Plants were required to obtain an Environmental Clearance (EC) from the Ministry of Environment and Forests, Government of India, hereinafter referred to as "MoEF&CC", in terms of Entry 7(d) of the Notification dated 14th September 2006. The National Green Tribunal had also directed the parties who had been running Common Bio-Medical Waste Treatment Facilities to apply to the MoEF&CC for EC.

9. On 26th February 2014, the Central Pollution Control Board issued guidelines for Common Bio-Medical Waste Treatment Facilities. On 14th July 2014, the National Green Tribunal, Southern Zone, Chennai passed a judgment and order dismissing Appeal Nos. 46-47 of 2013 filed by M/s Shree Consultant and held that the Respondent No. 1 had rightly given consent to the Respondent No. 3 for establishing its Common Bio-Medical Waste Treatment Facility.

10. On 4th March 2015, the Respondent No. 3 applied for grant of consent to operate the Common Bio-Medical Waste Facility under the provisions of the relevant Water Pollution and Air Pollution Acts.

11. On 17th April 2015, MoEF&CC amended the Notification dated 14th September 2006, in view of the Judgment dated 28th November 2013 passed by the National Green Tribunal, Principal Bench, New Delhi in Appeal No. 63 of 2012. By the amendment Entry 7(da) was inserted after Entry 7(d) in the Schedule. Entry 7(da) provided that Common Bio-Medical Waste Treatment Facilities would be required to obtain EC from the Ministry of Environment and Forest.

12. It appears that on 13th July 2015, the villagers of the Gujjegowdanapura, Manadalli, Harohalli, Chunchunarayahundi, Kallahalli, Arinakere, Mahadevpura at Jayapura Hobli, Mysore made a representation to the Respondent No. 1 seeking an order banning the establishment of Common Bio-Medical Waste Treatment Facility by the Respondent No. 3.

13. Thereafter, the Respondent No. 1 issued notices to the Common Bio-Medical Waste Treatment Facility of the Respondent No. 3, calling upon it to submit a report of compliance of pollution norms.

14. On 1st December 2015, the State Level Environment Impact Assessment Authority, Karnataka (SEIAA) issued directions to the Respondent No. 1 under Section 5 of the Environment (Protection) Act, 1986 to issue consent for operation of the Common Bio-Medical Waste Treatment Facility and other projects attracting the 2006 EIA Notification and the amendments thereto.

15. By its letter dated 28th December 2015, the Respondent No. 1 instructed all the concerned officers of the KSPCB that application for consent to establish or operate projects attracting the 2006 EIA Notification and amendments thereto were to be received by the KSPCB only if EC was attached to the application.

16. On 19th January 2016, the Respondent No. 3 resubmitted its application for consent to operate the Common Bio-Medical Waste Treatment Facility, which had earlier been returned by the Respondent No. 1. On 11th February 2016, the Respondent No. 1 granted the Respondent No. 3 consent to operate its Common Bio-Medical Waste Treatment Facility at Gujjegowdanapura village, Jayapura Hobli in Mysore district. The said consent was valid for the period from 1st July 2015 to 30th June 2016.

17. The Appellant filed Appeal No. 3 of 2016 before the Karnataka State Environment Appellate Authority under Section 28 of the Water (Prevention and

Control of Pollution) Act, 1974 challenging the consent to the Respondent No. 3 to operate the Common Bio-Medical Waste Treatment Facility. Very soon thereafter the MoEF&CC revised the Bio-Medical Waste (Management and Handling) Rules 1998 under Section 6, 8 and 25 of the EP Act.

18. The Appeal No. 3 of 2016 filed by the Appellant before the Karnataka State Environment Appellate Authority, against the consent order dated 11th February 2016 passed by the Respondent No. 1 came to be withdrawn by the Appellant because the said appeal had become infructuous in view of the expiration of the period of consent to operate granted to the Respondent No. 3 on 30th June 2016.

19. By an order dated 17th August 2016, the National Green Tribunal, Southern Zone, Chennai directed that the application for renewal of consent to operate, pending before the Respondent No. 1 might be processed in accordance with law subject to the final order passed by the Tribunal.

20. Pursuant to the aforesaid order dated 17th August 2016, the Respondent No. 1 renewed the consent order to operate the Common Bio-Medical Waste Treatment Facility in favour of the Respondent No. 3 which was valid for the period from 17th August 2016 to 30th June 2021.

21. In exercise of power under Section 3(1) and Section 3(2)(v) of the EP Act read with Rule 5(3)(d) of the EP Rules, the Central Government issued a Notification being S.O. 804(E) dated 14th March 2017 which provides for grant of ex post facto EC for project proponents who had commenced, continued or completed a project without obtaining EC under the EP Act/EP Rules or the Environmental Impact Notification issued thereunder. Paragraphs 3, 4 and 5 of the said notification, read as hereunder:

> *"(3) In cases of violation, action will be taken against the project proponent by the respective State or State Pollution Control Board under the provisions of section 19 of the Environment (Protection) Act, 1986 and further, no consent to operate or occupancy certificate will be issued till the project is granted the environmental clearance.*
>
> *(4) The cases of violation will be appraised by respective sector Expert Appraisal Committees constituted under subsection (3) of Section 3 of the Environment (Protection) Act, 1986 with a view to assess that the project has been constructed at a site which under prevailing laws is permissible and expansion has been done which can be run sustainably under compliance of environmental norms with adequate environmental safeguards; and in case, where the finding of the Expert Appraisal Committee is negative, closure of the project will be recommended along with other actions under the law.*
>
> *(5) In case, where the findings of the Expert Appraisal Committee on point at sub-para(4) above are affirmative, the projects under this category will be prescribed the appropriate Terms of Reference for undertaking Environment Impact Assessment and preparation of Environment Management Plan. Further, the Expert Appraisal Committee will prescribe a specific Terms of Reference for the project on assessment of ecological damage, remediation plan and natural and community resource augmentation plan and it shall be prepared as an independent chapter in the environment impact assessment report by the accredited consultants. The collection and analysis of data for assessment of ecological damage, preparation of remediation plan and natural and community resource augmentation plan shall be done by an environmental laboratory duly notified under Environment (Protection) Act, 1986, or a environmental laboratory accredited by National Accreditation Board for Testing and Calibration Laboratories, or a laboratory of a Council of Scientific and Industrial Research institution working in the field of environment."*

22. The Notification of 2017 is a valid statutory notification issued by the Central Government in exercise of power under Sections 3(1) and 3(2)(v) of the EP Act read

with Rule 5(3)(d) of the EP Rules in the same manner as the EIA Notification dated 27th January 1994 and the Notification dated 14th September 2006.

23. Section 21 of the General Clauses Act, 1897 provides that where any Central Act or Regulations confer a power to issue notifications, orders, rules or bye-laws, that power includes the power, exercisable in the like manner, and subject to like sanction and conditions, if any, to add to, amend, vary or rescind any notification, order, rule or bye-law so issued. The authority, which had the power to issue Notifications dated 27th January 1994 and 14th September 2006 undoubtedly had, and still has the power to rescind or modify or amend those notifications in like manner. As held by this Court in *Shree Sidhbali Steels Ltd.* v. *State of Uttar Pradesh*[1], power under Section 21 of the General Clauses Act to amend, vary or rescind notifications, orders, rules or bye-laws can be exercised from time to time having regard to the exigency.

24. Puducherry Environment Protection Association filed a Writ Petition being W.P. No. 11189 of 2017 in the High Court of Madras assailing the said notification dated 14th March 2017. By a judgment and order dated 13th October 2017, a Division Bench of the High Court refused to interfere with the said notification, holding that the impugned notification did not compromise with the need to preserve environmental purity.

25. The MoEF&CC issued a draft Notification dated 23rd March 2020 which was duly published in the Gazette of India Extraordinary Part II. The Notification was proposed to be issued in exercise of powers conferred by subsection (1) and clause (v) of sub-section (2) of Section 3 of the EP Act for dealing with cases of violation of the notification with regard to EC. It was proposed that cases of violation would be appraised by the Appraisal Committee with a view to assess whether the project had been constructed or operated at a site which was permissible under prevailing laws and could be run sustainably on compliance of environmental norms with adequate environmental safeguards. Closure was to be recommended if the findings of the Appraisal Committee were in the negative. If the Appraisal Committee found that such unit had been running sustainably upon compliance of environmental norms with adequate environment safeguards, the unit would be prescribed appropriate Terms of Reference (TOR) after which the procedure for grant of EC would follow.

26. The appeal has been opposed by the KSPCB. On behalf of the KSPCB, it is submitted that the appeal is liable to be dismissed on the ground of delay of 62 days in filing the appeal. Reasons for the delay, it is submitted, does not make out sufficient cause for the inordinate delay. It is next contented that there is no substantial question of law of general importance involved in this appeal. The appeal is liable to be dismissed on that ground. It is also contended that the appeal suffers from suppression of facts. On behalf of KSPCB, it is contended that the 2015 amendment dated 17th April 2015 to the EIA Notification is prospective in the light of the law laid down in *Narmada Bachao Andolan* v. *Union of India*[2]. The Respondent No. 3 had applied to the KSPCB for consent to operate before the EIA Notification dated 17th April 2015, for no prior ECl was required for projects which came to existence after 14th September 2006 but before 17th April 2015.

27. On 21st December 2016, the Central Pollution Control Board, MoEF&CC, Government of India issued revised guidelines for Common Bio-Medical Wastes Treatment and Disposal Facility.

28. By final judgment and order dated 10th May 2017, which is impugned in this appeal, the National Green Tribunal has dismissed the appeal filed by the Appellant, with the observation that the Respondent No. 3 could not be directed to be closed down for want of EC.

29. By an Office Memorandum, being F. No. 22-21/2020-1A III, dated 7th July 2021, the MoEF&CC issued Standard Operating Procedure (SoP) for identification and

handling of violation cases under 2006 EIA Notification.

30. The said Office Memorandum, inter alia, reads:

"The Ministry had issued a notification number S.O.804(E), dated the 14th March, 2017 detailing the process for grant of Terms of Reference and Environmental Clearance in respect of projects or activities which have started the work on site and/or expanded the production beyond the limit of Prior EC or changed the product mix without obtaining Prior EC under the EIA Notification, 2006.

2. This Notification was applicable for six months from the date of publication i.e. 14.03.2017 to 13.09.2017 and further based on court direction from 14.03.2018 to 13.04.2018.

3. Hon'ble NGT in Original Application No. 287 of 2020 in the matter of Dastak N.G.O. *v.* Synochem Organics Pvt. Ltd. *and in applications pertaining to same subject matter in Original Application No. 298 of 2020 in* Vineet Nagar *v.* Central Ground Water Authority, *vide order dated 03.06.2021 held that "(...) for past violations, the concerned authorities are free to take appropriate action in accordance with polluter pays principle, following due process".*

4. Further, the Hon'ble National Green Tribunal in O.A. No. 34/2020 WZ in the matter of Tanaji B. Gambhire *v.* Chief Secretary, Government of Maharashtra, *vide order dated 24.05.2021 has directed that"…. a proper SoP be laid down for grant of EC in such cases so as to address the gaps in binding law and practice being currently followed. The MoEF may also consider circulating such SoP to all SEIAAs in the country".*

5. Therefore, in compliance to the directions of the Hon'ble NGT a Standard Operating Procedure (SoP) for dealing with violation cases is required to be drawn. The Ministry is also seized of different categories of 'violation' cases which have been pending for want of an approved structural/procedural framework based on 'Polluter Pays Principle' and 'Principle of Proportionality'. It is undoubtedly important that action under statutory provisions is taken against the defaulters/violators and a decision on the closure of the project or activity or otherwise is taken expeditiously.

6. In the light of the above directions of the Hon'ble Tribunal and the issues involved, the matter has accordingly been examined in detail in the Ministry. A detailed SoP has accordingly been framed and is outlined herein. The SoP is also guided by the observations/decisions of the Hon'ble Courts wherein principles of proportionality and polluters pay have been outlined."

31. The SoP formulated by the said Office Memorandum dated 7th July 2021 refers to and gives effect to various judicial pronouncements including the judgment of this Court in *Alembic Pharmaceuticals Ltd.* v. *Rohit Prajapati*[3].

32. In terms of the SoP, the proposal for grant of EC in cases of violation are to be considered on merits, with prospective effect, applying principles of proportionality and the principle that the polluter pays and is liable for costs of remedial measures.

33. A Public Interest Litigation being W.P. (MD) No. 11757 of 2021 (*Fatima* v. *Union of India*) was filed before the Madurai Bench of the Madras High Court challenging the said Memorandum dated 7th July 2021. By an interim order dated 15th July 2021 a Division Bench of the Madras High Court admitted the Writ Petition and stayed the said memorandum.

34. The Madurai Bench of the Madras High Court observed and held:—

"This writ petition has been filed as a public interest litigation challenging the validity of the office memorandum dated 07.07.2021, issued by the respondent.

2. We have heard Mr. A. Yogeshwaran, learned counsel appearing for the writ petitioner and Mr. L. Victoria Gowri, learned Assistant Solicitor General of India, accepts notice for the respondent.

3. The impugned office memorandum is challenged as being wholly without jurisdiction, contrary to the Environment Impact Assessment Notification, 2006, ultra vires the powers of the respondent under the Environment (Protection) Act, 1986 and violative of the various principles enunciated by the Hon'ble Supreme Court, while interpreting Article 21 and Article 48-A of the Constitution of India.

4. Further, it is submitted that the impugned notification is in gross violation of the undertaking given before the Hon'ble Full Bench of this Court in W.P. No. 11189 of 2017, wherein, the Court took note of the submissions made on behalf of the Government of India, that the notification impugned therein is only a one-time measure. Further, it is submitted that the respondent failed to see that concept of ex-post facto approval is alien to environment jurisprudence and it is anathema to the Environment Impact Assessment Notification, 2006.

5. Further, it is submitted that the impugned notification is in gross violation of the judgment of the Hon'ble Supreme Court in the case of Alembic Pharmaceuticals Ltd. *v.* Rohit Prajapati, *2020 SCC OnLine SC 347 and the orders passed by the National Green Tribunal, Principal Bench, New Delhi, in the case of* S.P. Muthuraman *v.* Union of India, *2015 SCC OnLine NGT 169.*

6. Identical grounds were considered by us in a challenge to an office memorandum dated 19.02.2021, which provided a procedure for granting post facto clearance under Coastal Regulation Zone (CRZ) Notification 2011, on the ground that despite no such provisions in the notification and being contrary to the earlier judgments and undertaking. The said writ petition in W.P(MD). No. 8866 of 2021 was admitted and by order dated 30.04.2021, the said office memorandum dated 19.02.2021 has been stayed.

7. The core issue in this writ petition is whether the Government of India could have issued the office memorandum and brought about the Standard Operating Procedure for dealing with violators, who failed to comply with the mandatory condition of obtaining prior environment clearance under the Environment Impact Assessment Notification 2006, read with the provisions of Environment (Protection) Act, 1986. This issue was considered by the Hon'ble Supreme Court in Alembic Pharmaceuticals Ltd. *(supra), and it was held that such office memorandum in the nature of circular is without jurisdiction. The operative portion of the judgment reads as follows:*

> *"...What is sought to be achieved by the administrative circular dated 14 May 2002 is contrary to the statutory notification dated 27 January 1994. The circular dated 14 May 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 May 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 the 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."*

8. Despite the above decision, once again the Government of India, Ministry of Environment, Forest and Climate Change have chosen to adopt the route of issuing the office memorandum and virtually setting at naught the provisions of the Environment Impact Assessment Notification and the Environment (Protection) Act.

9. Before the Hon'ble First Bench, a public interest litigation was filed by the

Puducherry Environment Protection Association, challenging the notification dated 14.03.2017, on identical grounds and the Hon'ble First Bench by judgment dated 13.10.2017, recorded the submissions of the learned Assistant Solicitor General of India that the said notification was a one-time measure and accordingly, disposed of the writ petition.

10. Once again, the Ministry of Environment, Forest and Climate Change have issued the impugned office memorandum. Thus, from what we have noted above, we are of the clear view that the petitioner has made out a prima facie case for entertaining the writ petition. Accordingly, the writ petition is admitted and there shall be an order of interim stay."

35. It is true that in the case of *Puducherry Environment Protection Association* v. *Union of India*[4], the Division Bench of Madras High Court took note of and recorded the submission made on behalf of the Union of India that the relaxation was a one time relaxation. In view of such submission, this Court held that a one time relaxation was permissible.

36. It is, however, well settled that words and phrases and/or sentences in a judgment cannot be read in the manner of a statute, and that too out of context. The observation of the Division Bench that a one time relaxation was permissible, is not to be construed as a finding that relaxation cannot be made more than once. If power to amend or modify or relax a notification and/or order exists, the notification and/or order may be amended and/or modified as many times, as may be necessary. A statement made by counsel in Court would not prevent the authority concerned from making amendments and/or modifications provided such amendments and/or modifications were as per the procedure prescribed by law.

37. The Division Bench of Madras High Court fell in error in staying the said office memorandum, by relying on observations made by this Court in *Alembic Pharmaceuticals Ltd.* (supra), in the context of a circular which was contrary to the statutory Environment Impact Notification of 1994. The attention of the High Court was perhaps not drawn to the fact that the notification of 7th July 2021 was in pursuance of the statutory notification of 2017 which was valid. The judgment of this Court in *Alembic Pharmaceuticals Ltd.* (supra), was clearly distinguishable and could have no application to the office memorandum dated 7th July 2021 which was issued pursuant to the notification dated 14th March 2017.

38. In *Electrosteel Steels Limited* v. *Union of India*[5], this Court held:—

"82. The question is whether an establishment contributing to the economy of the country and providing livelihood to hundreds of people should be closed down for the technical irregularity of shifting its site without prior environmental clearance, without opportunity to the establishment to regularize its operation by obtaining the requisite clearances and permissions, even though the establishment may not otherwise be violating pollution laws, or the pollution, if any, can conveniently and effectively be checked. The answer has to be in the negative.

83. The Central Government is well within the scope of its powers under Section 3 of the 1986 Act to issue directions to control and/or prevent pollution including directions for prior Environmental Clearance before a project is commenced. Such prior Environmental Clearance is necessarily granted upon examining the impact of the project on the environment. ExPost facto Environmental Clearance should not ordinarily be granted, and certainly not for the asking. At the same time ex post facto clearances and/or approvals and/or removal of technical irregularities in terms of Notifications under the 1986 Act cannot be declined with pedantic rigidity, oblivious of the consequences of stopping the operation

of a running steel plant.

84. The 1986 Act does not prohibit ex post facto Environmental Clearance. Some relaxations and even grant of ex post facto EC in accordance with law, in strict compliance with Rules, Regulations Notifications and/or applicable orders, in appropriate cases, where the projects are in compliance with, or can be made to comply with environment norms, is in over view not impermissible. The Court cannot be oblivious to the economy or the need to protect the livelihood of hundreds of employees and others employed in the project and others dependent on the project, if such projects comply with environmental norms.

* * *

88. The Notification being SO 804(E) dated 14th March, 2017 was not an issue in Alembic Pharmaceuticals *(supra). This Court was examining the propriety and/or legality of a 2002 circular which was inconsistent with the EIA Notification dated 27th January, 1994, which was statutory. Ex post facto environmental clearance should not however be granted routinely, but in exceptional circumstances taking into account all relevant environmental factors. Where the adverse consequences of ex post facto approval outweigh the consequences of regularization of operation of an industry by grant of ex post facto approval and the industry or establishment concerned otherwise conforms to the requisite pollution norms, ex post facto approval should be given in accordance with law, in strict conformity with the applicable Rules, Regulations and/or Notifications. Ex post facto approval should not be withheld only as a penal measure. The deviant industry may be penalised by an imposition of heavy penalty on the principle of 'polluter pays' and the cost of restoration of environment may be recovered from it.*

* * *

96. The appeals are allowed. The impugned order is set aside. The Respondent No. 1 shall take a decision on the application of the Appellant for revised EC in accordance with law, within three months from date. Pending such decision, the operation of the steel plant shall not be interfered with on the ground of want of EC, FC, CTE or CTO."

39. The proposition of law enunciated/re-enunciated by this Court in *Electrosteel Steels Limited* (supra) was reiterated in *Pahwa Plastics Pvt. Ltd.* v. *Dastak NGO*[6]

40. As held by this Court in *Electrosteel Steels Limited* (supra) *ex post facto* EC should not ordinarily be granted, and certainly not for the asking. At the same time *ex post facto* clearances and/or approvals and/or removal of technical irregularities in terms of a Notification under the EP Act cannot be declined with pedantic rigidity, oblivious of the consequences of stopping the operation of mines, running factories and plants.

41. The EP Act does not prohibit *ex post facto* Environmental Clearance. Grant of *ex post facto* EC in accordance with law, in strict compliance with Rules, Regulations, Notifications and/or applicable orders, in appropriate cases, where the projects are in compliance with, or can be made to comply with environment norms, is in our view not impermissible. The Court cannot be oblivious to the economy or the need to protect the livelihood of hundreds of employees and others employed in the project and others dependent on the project, if such projects comply with environmental norms.

42. In *Lafarge Umiam Mining Private Limited* v. *Union of India*[7], a three-Judge Bench of this Court held:—

"119. The time has come for us to apply the constitutional "doctrine of proportionality" to the matters concerning environment as a part of the process of judicial review in contradistinction to merit review. It cannot be gainsaid that utilization of the environment and its natural resources has to be in a way that is

consistent with principles of sustainable development and intergenerational equity, but balancing of these equities may entail policy choices. In the circumstances, barring exceptions, decisions relating to utilisation of natural resources have to be tested on the anvil of the well-recognized principles of judicial review. Have all the relevant factors been taken into account? Have any extraneous factors influenced the decision? Is the decision strictly in accordance with the legislative policy underlying the law (if any) that governs the field? Is the decision consistent with the principles of sustainable development in the sense that has the decisionmaker taken into account the said principle and, on the basis of relevant considerations, arrived at a balanced decision? Thus, the Court should review the decision-making process to ensure that the decision of MoEF is fair and fully informed, based on the correct principles, and free from any bias or restraint. Once this is ensured, then the doctrine of "margin of appreciation" in favour of the decision-maker would come into play."

43. In *Alembic Pharmaceuticals Ltd.* (supra), this Court observed:—

"27. The concept of an ex post facto EC is in derogation of the fundamental principles of environmental jurisprudence and is an anathema to the EIA notification dated 27 January 1994. It is, as the judgment in Common Cause holds, detrimental to the environment and could lead to irreparable degradation. The reason why a retrospective EC or an ex post facto clearance is alien to environmental jurisprudence is that before the issuance of an EC, the statutory notification warrants a careful application of mind, besides a study into the likely consequences of a proposed activity on the environment. An EC can be issued only after various stages of the decision making process have been completed. Requirements such as conducting a public hearing, screening, scoping and appraisal are components of the decision-making process which ensure that the likely impacts of the industrial activity or the expansion of an existing industrial activity are considered in the decision-making calculus. Allowing for an ex post facto clearance would essentially condone the operation of industrial activities without the grant of an EC. In the absence of an EC, there would be no conditions that would safeguard the environment. Moreover, if the EC was to be ultimately refused, irreparable harm would have been caused to the environment. In either view of the matter, environment law cannot countenance the notion of an ex post facto clearance. This would be contrary to both the precautionary principle as well as the need for sustainable development."

44. Even though this Court deprecated ex post facto clearances, in *Alembic Pharmaceuticals Ltd.* (supra), this Court did not direct closure of the units concerned but explored measures to control the damage caused by the industrial units. This Court held:—

"However, since the expansion has been undertaken and the industry has been functioning, we do not deem it appropriate to order closure of the entire plant as directed by the High Court."

45. The Notification being SO. 804(E) dated 14th March 2017 was not in issue in *Alembic Pharmaceuticals Ltd.* (supra). In *Alembic Pharmaceuticals Ltd.* (supra) this Court was examining the propriety and/or legality of a 2002 circular which was inconsistent with the EIA Notification dated 27th January 1994, which was statutory. The EIA Notification dated 27th January 1994 has, as stated above, been superseded by the Notification dated 14th September 2006.

46. There can be no doubt that the need to comply with the requirement to obtain EC is non-negotiable. A unit can be set up or allowed to expand subject to compliance of the requisite environmental norms. EC is granted on condition of the suitability of the site to set up the unit, from the environmental angle, and also existence of

necessary infrastructural facilities and equipment for compliance of environmental norms. To protect future generations and to ensure sustainable development, it is imperative that pollution laws be strictly enforced. Under no circumstances can industries, which pollute, be allowed to operate unchecked and degrade the environment.

47. *Ex post facto* environmental clearance should ordinarily not be granted routinely, but in exceptional circumstances taking into account all relevant environmental factors. Where the adverse consequences of denial of *ex post facto* approval outweigh the consequences of regularization of operations by grant of *ex post facto* approval, and the establishment concerned otherwise conforms to the requisite pollution norms, *ex post facto* approval should be given in accordance with law, in strict conformity with the applicable Rules, Regulations and/or Notifications. In a given case, the deviant industry may be penalised by an imposition of heavy penalty on the principle of 'polluter pays' and the cost of restoration of environment may be recovered from it.

48. It is reiterated that the EP Act does not prohibit *ex post facto* EC. Some relaxations and even grant of *ex post facto* EC in accordance with law, in strict compliance with Rules, Regulations, Notifications and/or applicable orders, in appropriate cases, where the projects are in compliance with environment norms, is not impermissible. As observed by this Court in *Electrosteel Steels Limited* (supra), this Court cannot be oblivious to the economy or the need to protect the livelihood of hundreds of employees and others employed in the units and dependent on the units for their survival.

49. *Ex post facto* EC should not ordinarily be granted, and certainly not for the asking. At the same time *ex post facto* clearances and/or approvals cannot be declined with pedantic rigidity, regardless of the consequences of stopping the operations.

50. In our considered view, the NGT rightly found that when the Bio-Medical Waste Treatment facility of the Appellant was being operated with the requisite consent to operate, it could not be closed on the ground of want of prior Environmental Clearance. The issues raised/involved in this appeal are squarely covered by the judgment of this Court in *Electrosteel Steels Limited* (supra) and *Pahwa Plastics Pvt. Ltd.* (supra). This Court cannot lose sight of the fact that the operation of a Bio-Medical Waste Treatment Facility is in the interest of prevention of environmental pollution. The closure of the facility only on the ground of want of prior Environmental Clearance would be against public interest. There are no grounds to interfere with the judgment and order of the NGT in appeal as rightly argued by KSPCB and the Respondent No. 3. The appeal is barred by delay. In any case, the appeal does not raise any substantial question of law. The appeal is therefore dismissed.

---

[1] (2011) 3 SCC 193

[2] (2000) 10 SCC 664

[3] 2020 SCC OnLine SC 347

[4] 2017 SCC OnLine Mad 7056

[5] 2021 SCC OnLine SC 1247

[6] 2022 SCC OnLine SC 362

[7] (2011) 7 SCC 338

(2022) 8 Supreme Court Cases 156 : 2022 SCC OnLine SC 728

In the Supreme Court of India

(BEFORE B.R. GAVAI AND HIMA KOHLI, JJ.)

STATE OF ANDHRA PRADESH . . Appellant;

Versus

RAGHU RAMAKRISHNA RAJU KANUMURU (MEMBER OF PARLIAMENT) . . Respondent.

Civil Appeals Nos. 4522-24 of 2022[†], decided on June 1, 2022

A. **Constitution of India — Arts. 226 and 227 — Law declared by High Court — Binding effect of — Primacy of orders of High Court over those of statutory tribunals in case of conflicting orders**

— Held, law declared by the High Court in the State is binding on authorities and tribunals under its superintendence and they cannot ignore it — Further, tribunals are subordinate to High Court insofar as the territorial jurisdiction of High Court is concerned — Held, in case of conflicting orders passed by statutory tribunals and the High Court, it is the orders passed by the constitutional courts, which would prevail over the orders passed by the statutory tribunals — Courts, Tribunals and Judiciary — Courts, Tribunals and Special Courts — Tribunals

(Paras 11 to 15)

B. **Environment Law — National Green Tribunal Act, 2010 — S. 14 — Entertaining a lis by the NGT — Permissibility of, when High Court of competent jurisdiction found already in seisin of the matter with regard to same cause of action**

— In a writ petition, High Court vide its order dt. 16-12-2021, permitted construction activities and other allied activities in relation to the subject project, strictly in accordance with the permission accorded by the concerned Ministry and the existing Master Plan — Proceedings initiated by the NGT after taking cognizance of a letter sent to it by the respondent, a sitting MP and the NGT appointed an Experts Committee on 17-12-2021 which submitted its Report on 29-3-2022, indicating therein no violation in the construction carried out by the appellant — NGT again, vide its order dt. 6-5-2022, appointed a Second Experts Committee and without waiting for its report, by the same order, the NGT stayed further construction on part of the appellant

— Held, law declared by the High Court in the State is binding on authorities and tribunals under its superintendence and they cannot ignore it and, further, the tribunals would be subordinate to High Court insofar as the territorial jurisdiction of High Court is concerned — In case of conflicting orders passed by NGT and the High Court, it is the orders passed by the constitutional courts, which would prevail over the orders passed by the statutory tribunals

Page: 157

— Resultantly, prayer of the appellant that when High Court of competent jurisdiction was already in seisin of the matter, the NGT could not have entertained a lis with regard to the same cause of action, held acceptable and, thus, the impugned orders passed by the NGT held not sustainable and set aside — Courts, Tribunals and Judiciary — Courts, Tribunals and Special Courts — Tribunals — Constitution of India, Arts. 226 and 227

(Paras 11 to 21)

Held :

The law declared by the higher court in the State is binding on authorities and tribunals under its superintendence and they cannot ignore it. If the courts command others to act in accordance with the provisions of the Constitution and to abide by the rule of law, it is not possible to countenance violation of the constitutional principle by those who are required to lay down the law.

(Para 11)

Insofar as the tribunals are concerned, they would be subordinate to the High Court insofar as the

territorial jurisdiction of the High Court is concerned.

(Para 12)

Hence, it was not appropriate on the part of the NGT to have continued with the proceedings before it, specifically, when it was pointed that the High Court was also in seisin of the matter and had passed an interim order permitting the construction. The conflicting orders passed by the NGT and the High Court would lead to an anomalous situation, where the authorities would be faced with a difficulty as to which order they are required to follow. There can be no manner of doubt that in such a situation, it is the orders passed by the constitutional courts, which would prevail over the orders passed by the statutory tribunals.

(Para 13)

Therefore, the proceedings pending before the NGT are quashed and set aside.

(Para 15)

Raghu Ramakrishna RajuKanumuru v. *State of A.P.*, 2022 SCC OnLine NGT 151; *Raghu Ramakrishna RajuKanumuru* v. *State of A.P.*, 2022 SCC OnLine NGT 144, *reversed*

P.V.L.N. Murthy Yadav v. *A.P. Tourism Development Corpn. Ltd.*, 2021 SCC OnLine AP 4442, *referred to*

Priya Gupta v. *Ministry of Health & Family Welfare*, (2013) 11 SCC 404 : (2014) 1 SCC (Civ) 534 : 6 SCEC 194; *East India Commercial Co. Ltd.* v. *Collector of Customs*, AIR 1962 SC 1893; *Official Liquidator* v. *Dayanand*, (2008) 10 SCC 1 : (2009) 1 SCC (L&S) 943; *L. Chandra Kumar* v. *Union of India*, (1995) 1 SCC 400 : 1995 SCC (L&S) 321, *followed*

SK-D/68967/C

Advocates who appeared in this case:

Dr Abhishek Manu Singhvi and S. Niranjan Reddy, Senior Advocates [Mahfooz Ahsan Nazki (Advocate-on-Record), Polanki Gowtham, Shaik Mohamad Haneef, T. Vijaya Bhaskar Reddy, K.V. Girish Chowdary, Ms Rajeswari Mukherjee, Ms Akhila Palem, Abhishek Sharma and Sahil Raveen, Advocates], for the Appellant;

Balaji Srinivasan (Advocate-on-Record), Advocate, for the Respondent.

Chronological list of cases cited ***on page(s)***

6. (1995) 1 SCC 400 : 1995 SCC (L&S) 321, *L. Chandra Kumar* v. *Union of India* 160a

7. AIR 1962 SC 1893, *East India Commercial Co. Ltd.* v. *Collector of Customs* 160c

The Judgment of the Court was delivered by

B.R. GAVAI, J.— Permission to file appeal without certified/plain copy of impugned order is granted. Issue notice. Shri Balaji Srinivasan, learned counsel accepts notice on behalf of the sole respondent, and as such, we have heard the matter finally.

2. The appellant challenges the order dated 6-5-2022 passed by the National Green Tribunal, Principal Bench, New Delhi (hereinafter referred to as "NGT") in *Raghu Ramakrishna RajuKanumuru* v. *State of A.P.*[1], vide which it prohibited the appellant from undertaking any further construction. The appellant also challenges the order dated 20-5-2022 passed by the learned NGT in *Raghu Ramakrishna RajuKanumuru* v. *State of A.P.*[2], vide which the application seeking vacation of stay imposed vide order dated 6-5-2022[1] was rejected.

3. The appellant was already running a resort at Rushikonda Hill, near Visakhapatnam. According to the appellant, after obtaining the necessary permission, it has demolished the existing resort and is reconstructing the resort at the same place with additional facilities.

4. A writ petition being WP (PIL) No. 241 of 2021, challenging the said construction, has already been filed before the High Court of Andhra Pradesh at Amaravati. In the said writ petition, the Division Bench of the High Court has passed the following order on 16-12-2021[3] : (*P.V.L.N. Murthy Yadav case*[3], SCC OnLine AP para 4)

> "*4.* In the meanwhile, the construction activities and other allied activities in relation to the subject project, if any undertaken, shall be strictly in accordance with the permission accorded by the Ministry of Environment, Forest and Climate Change, as well as the existing Master Plan."

5. It appears that the aforesaid writ petition before the High Court was filed on 8-12-2021. However, a letter addressed by the respondent was sent on 31-10-2021 to the learned NGT. The respondent is a sitting Member of Parliament from one of the constituencies in the State of Andhra Pradesh. The learned NGT, after taking cognizance of the said letter, initiated the proceedings in *Raghu Ramakrishna RajuKanumuru* v. *State of A.P.*[1] It further appears from the record that the learned NGT had appointed an Experts Committee on 17-12-2021 which submitted its Report on 29-3-2022. A perusal of the

said report would reveal that the said Experts Committee consisting of four experts did not find any violation in the construction that was carried out by the appellant.

6. However, the learned NGT again, vide its order dated 6-5-2022[1], appointed a 2nd Experts Committee. The report of the said 2nd Experts Committee is still awaited. However, without waiting for the said report, by the same order, the learned NGT directed that no further construction to be undertaken.

7. It appears that after the order dated 6-5-2022[1] was passed by the learned NGT, the appellant filed an application for vacating stay on construction as directed in the said interim order dated 6-5-2022[1] passed by the learned NGT. However, the same was also rejected by the learned NGT vide its order dated 20-5-2022[2]. Both these orders are impugned in the present appeals.

8. Dr Abhishek Manu Singhvi, learned Senior Counsel appearing on behalf of the appellant, submitted that when the High Court of competent jurisdiction was already in seisin of the matter, the learned NGT could not have entertained a lis with regard to the same cause of action. He submitted that though this fact was brought to the notice of the learned NGT, the learned NGT refused to vacate the interim order dated 6-5-2022[1], which was in conflict with the order of the High Court dated 16-12-2021[3].

9. Dr Singhvi submitted that NGT is a Tribunal, which is subordinate to the High Court insofar as the territorial jurisdiction of the High Court is concerned. He, therefore, submitted that the very continuation of the proceedings before the learned NGT is not sustainable in law.

10. Shri Balaji Srinivasan, learned counsel appearing on behalf of the respondent, on the contrary, submitted that the appellant has acted in gross breach of the order dated 16-12-2021[3] passed by the High Court of Andhra Pradesh at Amravati. He submitted that the construction is rampantly going on in blatant violation of the order of the High Court. Contempt petition has already been filed before the High Court, wherein the High Court after taking cognizance of the blatant violation, issued notice on 4-5-2022.

11. This Court, in *Priya Gupta* v. *Ministry of Health & Family Welfare*[4], has observed thus : (SCC pp. 414-15, para 12)

> "*12*. The government departments are no exception to the consequences of wilful disobedience of the orders of the Court. Violation of the orders of the Court would be its disobedience and would invite action in accordance with law. The orders passed by this Court are the law of the land in terms of Article 141 of the Constitution of India. No court or tribunal

and for that matter any other authority can ignore the law stated by this Court. Such obedience would also be conducive to their smooth working, otherwise there would be confusion in the administration of law and the respect for law would irretrievably suffer. There can be no hesitation in holding that the law declared by the higher court in the State is binding on authorities and tribunals under its superintendence and they cannot ignore it. This Court also expressed the view that it had become necessary to reiterate that disrespect to the constitutional ethos and breach of discipline have a grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty are important hallmarks of judicial jurisprudence developed in this country, as discipline is sine qua non for effective and efficient functioning of the judicial system. If the courts command others to act in accordance with the provisions of the Constitution and to abide by the rule of law, it is not possible to countenance violation of the constitutional principle by those who are required to lay down the law. (Ref. *East India Commercial Co. Ltd.* v. *Collector of Customs*[5] and *Official Liquidator* v. *Dayanand*[6].)"

12. In any case, no law is necessary to state that insofar as the tribunals are concerned, they would be subordinate to the High Court insofar as the territorial jurisdiction of the High Court is concerned. A reference in this respect was also made to the judgment of the Constitution Bench of this Court in *L. Chandra Kumar* v. *Union of India*[7].

13. We are, therefore, of the considered view that it was not appropriate on the part of the learned NGT to have continued with the proceedings before it, specifically, when it was pointed that the High Court was also in seisin of the matter and had passed an interim order permitting the construction. The conflicting orders passed by the learned NGT and the High Court would lead to an anomalous situation, where the authorities would be faced with a difficulty as to which order they are required to follow. There can be no manner of doubt that in such a situation, it is the orders passed by the constitutional courts, which

would be prevailing over the orders passed by the statutory tribunals.

14. In that view of the matter, we are of the considered view that the continuation of the proceedings before the learned NGT for the same cause of action, which is seized with the High Court, would not be in the interest of justice.

15. We, therefore, quash and set aside the proceedings pending before the learned NGT in *Raghu Ramakrishna RajuKanumuru* v. *State of A.P.*[1]

Page: 161

16. We further find that taking into consideration the serious allegations made by the respondent, it will be appropriate that all these facts are placed before the High Court and the High Court considers passing appropriate orders in accordance with law so as to strike a balance between the development and the environmental issues.

17. Needless to state that though development is necessary for economical progress of the nation, it is equally necessary to safeguard the environment so as to preserve pollution free environment and ecology for the future generations to come.

18. We, therefore, find that it will be appropriate that the parties move the High Court for appropriate orders. The respondent would be at liberty to file an application for impleadment before the High Court in the pending proceedings, which would be considered by the High Court in accordance with law.

19. Though, the High Court has permitted construction to proceed in accordance with law, we find that till the High Court takes a fresh call on the said issue, it will be necessary to issue the following direction:

(*a*) Until the High Court considers the issue, the construction will be permitted only on the area where the construction existed earlier and which has been demolished and the flat area.

20. Dr Singhvi, learned Senior Counsel appearing on behalf of the State, on instructions from Shri Mahfooz Ahsan Nazki, stated that the appellant would not claim any equities on account of the construction, which is permitted to be proceeded further.

21. We further clarify that we have not expressed any opinion on the merits of the matter and the parties would be at liberty to raise all the issues available to them before the High Court which shall be considered in accordance with law. Since the learned NGT has already constituted an Experts Committee, the High Court would be at liberty to take into consideration the report of the said Experts Committee or if it finds appropriate may appoint other Committee as it deems fit.

22. The appeals stand disposed of in the above terms. Pending application(s), if any, shall also stand disposed of.

———

† Arising out of Diary No. 16486 of 2022. Arising from the impugned Interim Judgment and Order in *Raghu Ramakrishna RajuKanumuru* v. *State of A.P.*, 2022 SCC OnLine NGT 151 (National Green Tribunal, OA No. 361 of 2021, dt. 6-5-2022) and *Raghu Ramakrishna RajuKanumuru* v. *State of A.P.*, 2022 SCC OnLine NGT 144 (National Green Tribunal, IA No. 117 of 2022, IA No. 118 of 2022 and OA No. 361 of 2021, dt. 20-5-2022) **[Reversed]**

[1] *Raghu Ramakrishna RajuKanumuru* v. *State of A.P.*, 2022 SCC OnLine NGT 151

[2] *Raghu Ramakrishna RajuKanumuru* v. *State of A.P.*, 2022 SCC OnLine NGT 144

[3] *P.V.L.N. Murthy Yadav* v. *A.P. Tourism Development Corpn. Ltd.*, 2021 SCC OnLine AP 4442

[4] *Priya Gupta* v. *Ministry of Health & Family Welfare*, (2013) 11 SCC 404 : (2014) 1 SCC (Civ) 534 : 6 SCEC 194

[5] *East India Commercial Co. Ltd.* v. *Collector of Customs*, AIR 1962 SC 1893

[6] *Official Liquidator* v. *Dayanand*, (2008) 10 SCC 1 : (2009) 1 SCC (L&S) 943

[7] *L. Chandra Kumar* v. *Union of India*, (1995) 1 SCC 400 : 1995 SCC (L&S) 321