BEFORE THE NATIONAL GREEN TRIBUNAL,
WESTERN ZONE BENCH
O.A. NO.107 / 2022 (WZ)

IN THE MATTER OF:-

MR. IRBA MASHNAJI KONAPURE & ANR **APPLICANT**

VERSUS

UNION OF INDIA & ORS …. **RESPONDENTS**

COMPILATION OF CASE LAWS ON BEHALF OF ORIGINAL APPLICANT

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Through,

Place: New Delhi
Date: 01.05.2023

Advocate for Applicant

2015 SCC OnLine NGT 169

Before the National Green Tribunal Principal Bench, New Delhi

(BEFORE SWATANTER KUMAR, CHAIRPERSON, U.D. SALVI, J.M., DR. D.K. AGRAWAL, E.M., PROF. A.R. YOUSUF, E.M. AND BIKRAM SINGH SAJWAN, E.M.)

Original Application No. 37 of 2015
(M.A. No. 291, 293 & 294 of 2015)
AND
Original Application No. 213 of 2014
(M.A. 755 of 2014 & M.A. No. 177 of 2015)

In the Matter of:

S.P. Muthuraman S/o. Ponnusamy, No. 204, Railway Feeder Road, Sankar Nagar Post-627357 Tirunelveli Distict. ... Applicant;

Versus

1. Union of India Rep. by the Secretary to Government, Ministry of Environment and Forests, Government of India, Paryavaran Bhavan, New Delhi-110003
2. The State of Tamil Nadu Rep. by the Secretary to Government, Ministry of Environment and Forests, Government of Tamil Nadu, Fort St. George, Chennai-600003 ... Respondents.

AND

In the Matter of:

Manoj Mishra Convener, Yamuna Jiye Abhiyaan, 178-F, Pocket-4, Mayur Vihar, Phase-I, Delhi-110091. ... Applicant;

Versus

Union of India Through the Secretary, Ministry of Environment, Forest & Climate Change, Indira Paryavaran Bhawan, Jor Bagh Road, New Delhi-110003. ... Respondent.

Original Application No. 37 of 2015, M.A. No. 291, 293 & 294 of 2015, Original Application No. 213 of 2014 and M.A. 755 of 2014 & M.A. No. 177 of 2015

Decided on July 7, 2015, [Hearing on: 29th April, 2015]

Original Application No. 37 of 2015

Counsel for Applicant:

Mr. T. Mohan and Mr. A. Yogeshwaran, Advocate.

Counsel for Respondents:

Mr. Vivek Chib, Mr. Asif Ahmed, Ms. Ruchira Goel, Mr. Kushal Gupta, Mr. Joby Varghese and Mr. Ankit Prakash, Advocates for Respondent No. 1

Mr. M. Yogesh Kanna and Ms. J. Janani, Advocates for Respondent No. 2.

Mr. Ashwani Kumar, Sr. Advocate, with M/s. R. Mohan and Mr. V. Balaji

Mr. K.S. Mahadevan and Mr. Krishna Kumar, Advocate

Mr. R. Chandrachud, Advocate

Mr. Ashwani Kumar, Sr. Advocate with M/s. R. Mohan Parasawarn,

Mr. Varun Sharma and Mr. Srikantha Sriniwas

Mr. Amit S. Chadha, Sr. Advocate, Mr. R. Chandrachud, Advocate

Mr. Shyamal Anand, Mr. R. Jawahar Lal and Mr. Sarvanna Kumar, Advocates for

Respondent No. 3 & 5.

Original Application No. 213 of 2015

Counsel for Applicant:

Mr. Rahul Choudhary and Ms. Neha Kurian, Advocates.

Counsel for Respondents:

Mr. Vivek Chib, Mr. Asif Ahmed, Ms. Ruchira Goel, Mr. Kushal Gupta, Mr. Joby Varghese and Mr. Ankit Prakash, Advocates for Respondent No. 1

1. Whether the judgment is allowed to be published on the net?

2. Whether the judgment is allowed to be published in the NGT Reporter?

SWATANTER KUMAR, CHAIRPERSON:— By this common judgment, we shall dispose of the Original Applications No. 213 of 2014 and 135 of 2014 (upon transfer from SZ Bench, numbered as Original Application No. 37 of 2015) as well as Miscellaneous Applications No. 291, 293, 294 of 2015 in Original Application No. 37 of 2015, Miscellaneous Applications No. 755 of 2014 & M.A. No. 177 of 2015 in Original Applications No. 213 of 2014 and the claims of all the seven interveners/Respondents, as common question of law on somewhat similar facts arise for determination of the Tribunal in all these cases. We may briefly notice the facts of each Original Application giving rise to their filing.

2. In Original Application No. 213 of 2014, the Applicant claims that he is a former member of the Indian Forest Service and is the convener of the "*Yamuna Jiye Abhiyaan*". The Organization is working for promotion of nature conservation as a strategy for establishment of a peaceful world.

3. According to the Applicant, the State is under a constitutional duty in terms of Article 51A of the Constitution of India, to protect and improve the natural environment, including forests, lakes, rivers and wildlife. Respondent No. 1 has issued a Notification dated 14th September, 2006 titled the Environment Clearance Regulations of 2006 (for short 'Notification of 2006'), under the powers conferred upon it by sub-Section (1) and clause (v) of sub-Section (2) of Section 3 of the Environmental Protection Act, 1986 (for short 'Act of 1986'). As per the provisions of the Notification of 2006, the project or activities falling under Category 'A' of the Schedule require prior permission from the Central Government while project and activities falling under Category 'B' require prior permission from the State Environment Impact Assessment Authority (for short 'SEIAA'). These permissions are to be obtained before any construction work or preparation of the land by the project management except for securing the land is started on project or activity. Respondent No. 1 issued the Office Memorandum dated 16th November, 2010 for consideration of proposals involving violation of the Act of 1986 and the Notification of 2006. On 12th December, 2012, the Ministry of Environment, Forest and Climate Change (for short 'MoEF') issued another Office Memorandum, superseding the Office Memorandum of 16th November, 2010. In terms of this Office Memorandum, it was stated that as soon as any case of violation with respect to the Notification of 2006 is brought to the notice of the MoEF, it will proceed to verify the veracity of the complaint through the regional offices and upon such verification the explanation of Project Proponent will be asked for. If the Ministry is satisfied that it is a case of violation, then before proceeding any further, the authorities would require the Project Proponent to submit its environment related policy, plan of action and a written commitment to ensure that violation will not be repeated within 60 days in terms of the Office Memorandum dated 12th December, 2012 and would delist the project in the meanwhile. Other detailed consequences were also provided in the Office Memorandum dated 12th December, 2012. The Office Memorandum dated 12th December, 2012 was further amended by the Office Memorandum dated 27th June, 2013, which *inter alia*, also provided as under:

"It is felt that in addition to these guidelines circulated vide aforesaid Office Memorandum dated 12.12.2012, in case of violation cases, the Project Proponent needs to be restrained, through appropriate directions under Section 5 of the Environment (Protection) Act, 1986 from carrying out any construction or operation activity without the required clearance or beyond the level/capacity stated in the existing clearance, as the case may be, till it procures the requisite EC/CRZ Clearance for the same."

4. According to the Applicant all the three Office Memoranda dated 16th November, 2010, 12th December, 2012 and 27th June, 2013 have been placed on record for the first time by the MoEF along with its reply filed in Appeal No. 98 of 2013. Thus, the Applicant has acquired the knowledge of these circulars only during the hearing of the said Appeal. The Applicant challenges the legality and correctness of these circulars on various grounds, including, that these Office Memoranda are contrary to and in contradiction with the provisions of the Notification of 2006; the Notification of 2006 having been issued under the provisions of Section 3 of Act of 1986, cannot be diluted, rendered ineffective or infructuous by issuance of these Office Memoranda. The Notification of 2006 requires that not only the new projects falling under category 'A' and 'B' listed in the Schedule to the Notification of 2006, but even the expansion and modernisation of such existing projects or activities would require prior Environmental Clearance from the competent authority. The Notification of 2006 further contemplates that prior Environmental Clearance would be necessary even when there is any change in the product mix in an existing manufacturing unit beyond the specified range. It is the case of the Applicant that Para 7 of the Notification of 2006 requires mandatory compliance to the process prescribed for grant of Environmental Clearance. There are four stages i.e. Screening, Scoping, Public Consultation and Appraisal prescribed under Para 7 of the Notification of 2006. This process has to be followed in terms of the Notification of 2006 before a prior Environmental Clearance can be granted to the listed projects. The Applicant alleges that impugned Office Memoranda provide for considering the project of any Applicant where construction has been done already and does not specify the compliance of these four stages prescribed under Para 7 of the Notification of 2006. Therefore, the very purpose of the provisions of Act of 1986 and the Notification of 2006 stands frustrated by these Office Memoranda. If the construction has already commenced and/or even completed, compliance to the provisions of these laws would be impossible. It is the case of the Applicant that the Notification of 2006 has been issued in furtherance to exercise of subordinate delegated legislation for satisfying and complying with the provisions of Section 3 of the Act of 1986 which mandates that Central Government shall have the power 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. The law requires the Project Proponent to take prior Environmental Clearance while these Office Memoranda state exactly to the contrary, thus, encouraging people to flout the law in force on the one hand and cause environmental damage and degradation on the other.

5. In Original Application No. 37 of 2015 (Application 135 of 2014, SZ Bench), the Applicant has impugned the Office Memoranda dated 12th December, 2012 and 27th June, 2013. While raising the challenge on similar grounds as of the Applicant in Original Application No. 213 of 2014, he has further stated that the impugned Office Memoranda are against India's international obligation such as Stockholm Conference, 1972 and Rio De Janeiro Declaration 1992 and has also violated the mandate of Article 51 of the Constitution. It is submitted that environmental management or planning is the study of unintended consequences of a project. Its purpose is to identify, examine, assess and evaluate the likely and probable impacts of a proposed project on the environment and, thereby, to work out remedial action plans to minimize these

adverse impacts on the environment. All this is required to be done at a stage before the commencement of the project. The law does not visualise such examination post-commencement and upon completion of the project, in relation to the covered projects and activities. According to the Applicant, the aim and purpose of Environmental Impact Assessment (for short 'EIA') is to inform the process of decision-making by identifying the potentially significant environmental effects and risks of development proposals and to promote sustainable development by ensuring that development proposals do not undermine critical resource and ecological functions or the well being, lifestyle and livelihood of the communities and people who depend on them. The importance of conducting an exhaustive EIA before any project is granted Environmental Clearance has been acknowledged internationally. The United Nations Environment Programme's (UNEP) Charter states that EIA should be ensured to minimize adverse effects on nature and nature assessments should be included in the fundamental elements of all planning and should be publicly disclosed and deliberated. The EIA Directive (85/337/EEC) of the European Union which is in force since 1985, requires a defined EIA to be implemented by member nations prior to official authorization for projects with potential significant environmental impacts. The very purpose of conducting an EIA before a project is granted clearance is to ensure that no development takes place without sufficient assessment of the risks and damages that would be caused to the environment due to the project's construction and development. The authorization should follow such study and imposition of conditions rather than the converse. The application for seeking Environmental Clearance has to be made in Form 1 or the Supplementary Form 1A, as the case may be. The requisites required under Form 1 have to be supplied prior to the date of commencement of the project except to the extent of arranging land. The State Level Expert Appraisal Committee (for short 'SEAC') has to assess the project as on that date and stage, then alone it has to recommend whether such project should or should not be granted such Environmental Clearance. According to the Applicant, the impugned Office Memoranda have stated that the projects which have attained substantial physical progress relating to the construction at the site shall be considered by the Expert Committee for the grant of prospective Environmental Clearance, though no Environmental Clearance was obtained prior to commencement of development, as mandated by law. Thus, the impugned Office Memoranda are contrary to law.

The impugned Office Memoranda in question provide that violations could come to the notice of the Ministry at various stages of processing of the proposals and provide for grant of Environmental Clearance even to those projects. Under these Office Memoranda, if a Project Proponent commits breach of the conditions or has already commenced or completed the construction without obtaining required Environmental Clearance for the project, then the concerned State Government is required to initiate credible action on these violations by invoking powers under Section 15 and 19 of the Act of 1986. This is an entirely unworkable system and is even contrary to the federal structure of the Constitution. If this approach and procedure is allowed to be followed then any builder/Project Proponent would complete his project causing irreversible damage to the environment and will then seek post-facto Environmental Clearance from the authorities making it a *fait accompli* situation. In that event, even the most illegal and irregular projects, which are completely violating the Environmental norms, may have to be legalised and legitimized, which would be contrary to law, would even defeat the potential penal consequences prescribed under the Act of 1986 and thus, would be unable to prevent damage to environment and ecology.

Both the Applicants have relied upon the judgment of the Supreme Court in the cases of *Lafarge Umiam Mining Pvt. Ltd.* v. *Union of India (UOI)*, (2011) 7 SCC 338 and *M.C. Mehta* v. *Union of India (UOI)*, (2004) 12 SCC 118, to contend that the

circulars issued by the MoEF cannot nullify a statutory Notification. In the case of *M.C. Mehta* (supra), the MoEF had issued a circular dated 14th May, 2002, thereby providing an opportunity to people to seek clearance in relation to projects which were already operational but in violation of the Notification of 2006. The Supreme Court observed that it showed total non-sensitivity of the MoEF towards the principle of Sustainable Development and the object behind the issuance of the Notification of 2006. The Supreme Court in the case of *M.C. Mehta* v. *Union of India*, (1987) 4 SCC 463, held that life, public health and ecology have priority over unemployment and loss of revenue. Clearly, the grant of ex post facto Environmental Clearance has not met the approval of Supreme Court legally. According to the Applicants, the circulars are violative of the spirit behind Articles 48A and 51A(g) of the Constitution of India. Under Article 21 of the Constitution, right to a decent and clean environment is a Fundamental Right and thus, its protection by all, including the State, is a Constitutional obligation.

Before we revert to the case advanced on behalf of the respective Respondents, it is essential for us to notice that a number of applications were filed for impleadment by various Project Proponents who had taken advantage of these impugned Office Memoranda or were in the process of seeking advantage thereof. MA Nos. 232, 281, 282, 166, 97 and 110, all of 2015, were filed for impleadment by different builders. These applications came to be allowed vide order dated 12th February, 2015 and 1st April, 2015 respectively. Vide these orders, the following Respondents were directed to be impleaded as contesting Respondents:

Mr. Y. Pondurai (Respondent No. 3)

M/s Ruby Manoharan Property Developers Pvt. Ltd. (Respondent No. 4)

M/s Jones Foundations Pvt. Ltd. (Respondent No. 5)

M/s SSM Builders and Promoters (Respondent No. 6)

M/s SPR and RG Construction Pvt. Ltd. (Respondent No. 7)

M/s Dugar Housing Ltd. (Respondent No. 8)

6. M/s SAS Realtors Pvt. Ltd. has also filed an application M.A. No. 291 of 2015 for impleadment and directions. The said application was heard when the Original Applications were being heard on merits. The Applicant was permitted to address the Tribunal on the merit and otherwise of his impleadment application, as well as on the Original Applications. Since we had permitted the Applicant to participate in the proceeding and address argument, this application stood allowed and consequently, M.A. No. 291 of 2015 for impleadment of M/s SAS Realtors Pvt. Ltd. as Respondent No. 9 is also allowed.

7. MAs 293 and 294 of 2015 were filed by M/s Dugar Housing Ltd. and M/s SPR and RG Construction Ltd. respectively, for producing additional documents on record which were permitted and the documents are on the file of the Tribunal. Consequently, both these Applications No. 293 and 294 of 2015 stand allowed.

Still another set of application was filed, being M.A. No. 167, 168, 169 and 172 of 2015 by different builders for impleadment and directions. During the course of hearing, none appeared on their behalf to argue and pursue these applications and resultantly vide order dated 1st April, 2015, these applications were dismissed. However, the Applicants were granted liberty to raise their grievances before the Tribunal or if they had their independent cause of action, by taking recourse to independent remedy in accordance with law.

8. M.A. 755 of 2014 has been filed in Original Application No. 213 of 2014 praying for stay of operation of these Office Memoranda. Since we are dealing with the Original Applications finally by this Judgment, M.A. No. 755 of 2014 does not survive for consideration and is accordingly disposed of. M.A. 177 of 2015 had been filed on behalf of the MoEF for waiver of cost of Rs. 20,000 which was imposed vide order of

the Registrar dated 16th February, 2015, for not filing a counter affidavit. Since the arguments have already been concluded and all parties have addressed their submissions, we do not consider it necessary to direct the payment of the cost imposed by the above order in the interest of justice. Resultantly, this application is allowed. The cost of Rs. 20,000 by order dated 16th February, 2015 is waived. The application is disposed of.

9. The Project Proponents upon their applications were directed to be impleaded as Respondents in the main application. The Applicants as well as these newly added Respondents submitted affidavits, documents and other details in regard to the projects in question. The Applicant in the main application in relation to M/s Y. Pondurai (Respondent No. 3), submitted that it is a construction project extending to 28,262.81 sq. mtrs. to which the planning permission was issued on 31st December, 2013. The construction was started even prior thereto on receipt of the recommendation from the Government. The application to SEIAA was filed on 21st February, 2014. On 28th February, 2014, SEIAA informed the Project Proponent that no activity should be carried on prior to grant of Environmental Clearance. SEIAA on 11th March, 2014 asked for photographs of the site to consider the application. On 21st March, 2014, the photographs of the project and an apology along with undertaking were submitted by the Project Proponent to the SEIAA. SEIAA on 1st April, 2014 wrote to Additional Secretary for initiation of prosecution against the said Respondent. The Applicant heavily relies upon this letter of 1st April, 2014 placed on record vide which, the Member Secretary of the SEIAA, Tamil Nadu had written to the Additional Chief Secretary to the Government, stating that there were repeated breaches on the part of the Project Proponent and that action needs to be taken. The relevant part of the said letter reads as under:

> "I inform that as per the EIA Notification 2006, all new projects or activities or expansion and modernization of those existing projects or activities listed in the schedule to the said Notification with capacity beyond the threshold limits prescribed there under, to obtain prior Environmental Clearance under the provision thereof.
>
> The Proponent vide letter dated 21.03.14 has forwarded the expressing regret over the commencing of construction without obtaining EC and also expressed assurance to not to repeat such violations in future. The Authority after careful consideration decided to address the Additional Chief Secretary, E&F Department, Government of Tamil Nadu to take action against the violation of EIA Notification, 2006 under provision of Environment (Protection) Act, 1986.
>
> In the light of the above and as per the clause 5(ii) of O.M. of MoEF, GOI, New Delhi dt: 12.12.2012 (copy is enclosed), it is requested to initiate action against Thiry Y. Pondurai, No. 129, Usman Road, T. Nagar, Chennai-600017., by invoking powers under Section 19 of the Environment (Protection) Act, 1986 for having started the construction work without obtaining requisite Prior Environmental Clearance. It is requested that the action taken in this regard may be informed to the Ministry of Environment & Forests, Government of India and to this office along with supporting documents to enable us to take further action in the matter."

10. On 22nd April, 2014, the Principal Secretary, FAC wrote to the Principal Secretary, SEIAA, bringing to his notice the Notification issued by the Ministry dated 28th February, 2014 which delegated powers vested under Section 5 of the Act of 1986, to all the State and Union Territory Environment Impact Assessment Authorities, under whose jurisdiction the project was located, to issue show cause notice for the violations committed. On 28th May, 2014, SEIAA wrote to the Principal Secretary that in case of violation of EIA Notification, 2006, prior to issuance of Environmental Clearance, a show cause notice should be issued and action has to be

taken by the State Government. On 5th June, 2014, the Principal Secretary wrote to the Tamil Nadu Pollution Control Board (for short TNPCB') requesting them to take legal action in accordance with the Notification of 2006. This resulted in the issuance of show cause notice to Respondent No. 3 on 12th July, 2014 by the TNPCB, reply to which was submitted by the Project Proponent on 23rd July, 2014.

11. On 26th November, 2014, SEIAA informed the Project Proponent that there was substantial progress in the construction of its project which was noticed even during the scrutiny of the application of Respondent No. 3. An affidavit was filed before the Tribunal by the TNPCB in April, 2015 on the basis of inspection conducted by a team on 2nd April, 2015, stating that the civil construction work in all blocks had been completed, however, outer and interior works were being carried on. On 4th April, 2015, the Project Proponent responded to the TNPCB that the structural work was completed long back and the same was started as soon as the principal approval from the Government Housing and Urban Development Department and the planning permit from the Chennai Metropolitan Development Authority (for short 'CMDA') were obtained. According to the Applicant, while referring to the report submitted by SEIAA and other documents on record, it is clear that the total project cost is Rs. 148.25 Crores. It is a project for development of commercial complex consisting of Main Block — 2 basements + ground floor + 10; Service Block - basement + ground floor + 2 floors and MLCP Block - 2 basements + ground floor + 4 floors. According to SEIAA, construction work for the project was under progress at the time of submission of the apology letter and the undertaking. In inspection of 14th April, 2015, it was noticed that civil work of all the blocks were completed.

12. Vide letter dated 26th November, 2014, the Project Proponent had been informed not to carry on any construction activity. Photographs on record taken on 21st March, 2014 had shown digging or excavation of earth and some construction activity at that level. None of the blocks had been completed at that time. While the photographs taken on 14th April, 2015 show that some of the blocks have been completed and even finished internally and exteriorly. The Applicant has also pointed out that in the application for impleadment, it is averred by the Project Proponent that he had made application to SEIAA on 21st February, 2014 for Environmental Clearance, after obtaining planning permission. In the meeting dated 11th March, 2014, SEIAA had asked him to furnish additional documents to which he replied on 21st March, 2014, but in the meanwhile the Project Proponent had commenced construction activity investing huge sums of money. However, in his letter dated 4th April, 2015, a different stand was taken and it was stated that the project was completed long back and was carried out as soon as approval was granted by the Government and after granting of permission and the planning permit being issued by the CMDA. From this, it is clear that the Project Proponent had raised construction much prior to the submission of the application for the Environmental Clearance on 21st February, 2014. In the application, he falsely declared that he was planning to start the construction activity. He continued with the construction, even after filing the letter of apology and undertaking and despite show cause notice dated 12th July, 2014 continued it till 2nd April, 2015 when the premises were inspected by the SEIAA and TNPCB. In the submission of the Applicant, the entire project of Respondent No. 3 has therefore, been constructed illegally, in an unauthorized manner and by making misrepresentations to the concerned authorities.

Stand of Respondent No. 3 (Mr. Y. Pondurai):

13. The stand of this Respondent is that after obtaining the planning permission, it had applied to SEIAA on 21st February, 2014 seeking the Environmental Clearance for the Project. The Project Proponent was required to file additional documents which he had filed on 21st March, 2014. Construction had been started by the Project Proponent on receipt of the recommendation from the Government and after the Planning

Permission had been issued. We may notice here that the Applicant however, submitted while referring to the letter of the Project Proponent dated 4th April, 2015 that even this submission of the Project Proponent is factually incorrect. In the said letter, it has been stated that the project work was structurally completed long back and the same was carried forward as soon as principal letter of approval from the Government, Housing and Urban Development Department was issued in the year 2013. The construction activity thus, had started even before filing the application before SEIAA for grant of Environmental Clearance.

According to the Project Proponent, the construction was carried out under a *bona fide* belief. The Project Proponent also claimed that it had obtained permission from the Airport Authority on 2nd November, 2012. The condition No. 2 of the letter dated 31st May, 2013 is relied by the Project Proponent to say that Environmental Clearance was to be furnished before issue of the Completion Certificate. Thus, there is no fault of the Project Proponent in raising the construction without Environmental Clearance. According to this Respondent, the main application is not maintainable either on law or on facts. Plea of limitation was also taken by this Respondent but without referring as to how the application is barred by time.

14. In relation to M/s SPR and RG Construction Pvt. Ltd. (Respondent No. 7), the Applicant has averred that planning permit from the CMDA was granted on 20th July, 2012 in which combined basement 1 & 2 + ground floor + 14 floors of block 1 to 9 residential building with 950 dwelling units was permitted. Permissions from various other authorities during the period from 25th February, 2011 to 28th April, 2011 have also been filed on record, but there is variance in the Survey Nos. given in Annexure R8 and R9 and R10, R11, R12, R13. The Project Proponent claims to have filed application to SEIAA on 28th January, 2011, which fact is not admitted by SEIAA. The Project Proponent then moved fresh application on 12th June, 2013 dated 10th June, 2013 to SEIAA for grant of Environmental Clearance. The Project Proponent had been seeking extra time from SEIAA and in regard to this, reference is made to the letters dated 20th February, 2013, 25th April, 2013 and 21st March, 2013 from SEIAA, reference of which have also been placed on record and it does not refer to the application of the Project Proponent dated 28th January, 2011. SEIAA on 12th June, 2013 acknowledged this application and passed an order that no activity should be undertaken unless Environmental Clearance was granted. On *1st* July, 2013, the Project Proponent submitted photographs with the letter of apology, pursuant to the Board meeting of Project Proponent held on 17th June, 2013, assuring non-repetition of violation. Photographs which have been placed on record show that the construction was at the very initial stages i.e. excavation work had been done and pillars were being raised. Further details were asked for by the SEIAA vide its letter dated 22nd August, 2013 clearly mentioning that if the additional particulars were not submitted by 10th September, 2013, the project would be closed without notice. The Project Proponent did not provide the requisite information within the stipulated time. On 13th September, 2013, the Project Proponent submitted some documents with the promise to provide rest of them at a subsequent date. The SEAC on 30th September, 2013 prescribed the TOR which was issued by SEIAA on 7th October, 2013. The TNPCB conducted an inspection on 10th December, 2013 and noticed that the construction activity was being carried on. Later, a compliance report of the TOR was submitted which mentions about the collection of primary data from August, 2013 to October, 2013 which is prior to even issuance of the data of the TOR. Thereafter, an EIA report was submitted on 28th April, 2014. On 22nd January, 2015, the Project Proponent wrote to the TNPCB, referring to the inspection and denying continuation of construction in violation of the undertaking provided, though a case being C.C. No. 56 of 2014 had been filed against this Respondent which was pending before the Judicial Magistrate, Ambattur. SEIAA on 19th May, 2014 wrote to the Project Proponent to furnish

additional details. According to the Applicants, the construction was going on even at that stage. Thereafter, SEAC decided to recommend proposal to SEIAA to issue Environmental Clearance but only after obtaining and considering the information stated in the recommendations. It included even that the landscape area and green area was not to be less than 15 per cent of the total area. On 20th June, 2014, SEIAA asked for further documents from the Project Proponent. The Project Proponent had written a letter to SEIAA vide its letter dated 23rd July, 2014. This letter according to the Applicant is a departure from the CMDA's planning permit since the Project Proponent was sanctioned 9 blocks, while this letter talks of 10 blocks. SEIAA again on 10th November, 2014 required the Project Proponent not to carry out any construction of the project. The 26th November, 2014 letter of the CMDA refers to a new PPA made by the Project Proponent and states that the planning permission application would be returned in the absence of a revised plan incorporating EIA Clearance for the revised proposal. On 30th January, 2015, the Project Proponent resubmitted revised PPA without EIA and asked for further three weeks time to submit the latest developments for Clearance. The Project Proponent appointed new Consultant on 11th February, 2015 and vide its letter dated 19th February, 2015, CMDA asked for a structural stability certificate.

Pursuant to Tribunal's orders, an inspection was carried out by the Tamil Nadu Pollution Control Board on 2nd April, 2015, based on which an affidavit was filed before the Tribunal, stating that the construction is almost complete in all the blocks and that outer and inner works were going on and construction was going on even on 2nd April, 2015. On 4th April, 2015, the Project Proponent submitted a reply to the show cause notice served by District Environmental Engineer, Tamil Nadu Pollution Control Board, Ambattur, where it was stated that construction had been stopped. From the current photographs placed on record, it is clear that the construction work is at its completion stage in complete contrast to the photographs submitted at the time of the filing of the documents by the Project Proponent. Stop work notice was also issued by the Tamil Nadu Pollution Control Board on 2nd April, 2015 to which the Project Proponent responded on 3rd April, 2015 by stating that they have stopped the construction activity upon the receipt of the stop work notice. According to the Applicant, this Project Proponent had all through violated its letter of apology and undertaking given to SEIAA. It carried on construction illegally and in an unauthorized manner. It even revised its plan and raised further construction in relation to additional block for which there was no construction permission and other permissions from the authorities. Even till date, the Environmental Clearance has not been granted to this project and the project has caused serious and adverse environmental and ecological impacts.

Stand of Respondent No. 7 (M/s SPR and RG Construction Pvt. Ltd.)

15. Respondent No. 7, M/s SPR and RG Construction Pvt. Ltd. has taken a stand that they are engaged in construction of residential complexes. They intend to construct residential apartments at different Survey Nos. 137/1, 138/1, 148/5A and 148/7A Karambakkam Village, Ambattur Taluk, Thiruvallur District, TN, under the name and style of “Osian Chlorophyll”. This Respondent submitted its application to SEIAA on 28th January, 2011 for grant of Environmental Clearance for the project. This project was to have the construction of floors as already indicated with a total project area of 35786.05 sq meters with a built up area of 166479.79 sq meters at a total cost of project of Rs. 251.01 crores as proposed. SEIAA had asked for additional particulars and the Project Proponent was advised to give a presentation before the SEAC which was done by the Project Proponent on 30th September, 2013. The said Expert Appraisal Committee recommended the project for grant of Environmental Clearance subject to furnishing of certain details/approvals. The Respondent claims to have complied with those requirements. According to the Project Proponent, the term of the presiding officer of SEIAA had expired around 2nd March, 2011 and remained so till 4th March,

2012 and no action was taken on the application submitted by the Project Proponent. While simultaneously pursuing the application with SEIAA, the Project Proponent also took NOCs from different authorities like Airport Authority of India, Chennai, Traffic Police, Chennai Water Supply and Sewage Board and planning permit from CMDA on 28th January, 2013. Because of the non-availability of the Members of SEIAA, the Project Proponents like other builders, started construction after seeking the planning permit. The planning permission was granted subject to the condition that the Project Proponents would obtain Environmental Clearance prior to seeking completion certificate for construction. The Applicant started construction under a *bona fide* belief. It is not disputed by this Respondent that the construction raised by it was objected to by the authorities, but taking into account the circumstances and in view of the circulars, Respondent continued with its construction. An undertaking cum apology was also furnished under the format given by the SEIAA on 26th September, 2013. Appraisal Committee on 17th June, 2014 recommended the project with some observation which the Project Proponents was willing to comply. The said Respondent upon enquiry and vide letter dated 10th November, 2014 came to know that since operation of the had been stayed by the National Green Tribunal, SEIAA had de-listed their application subject to the orders of the Tribunal.

16. It is the specific plea of the Respondent that he had applied for Environmental Clearance which had neither been accepted nor rejected within 45 days despite recommendation by the Expert Appraisal Committee, thus, there would be deemed sanction in favour of the Project Proponent under the Notification of 2006.

17. The authorities i.e. SEIAA, Tamil Nadu and Tamil Nadu Pollution Control Board have taken up the stand that the construction without prior Environmental Clearance was not permissible. The Tamil Nadu Pollution Control Board vide their letter dated 14th February, 2014 had informed the SEIAA that cases had been registered against violators i.e. Project Proponents. The inspection was conducted and stop work notice was issued on 2nd April, 2015 55 complaints have been filed against the violators including the Respondent - Project Proponents. However, in some cases, the proceedings have been stayed by the High Court of Madras. The unauthorized construction by the Project Proponent was brought to notice as back on 15th July, 2013 and despite orders, the construction was continued which was stopped only upon inspection as on 4th April, 2015. Even on 24th December, 2013, the Project Proponent was served with a notice that no construction should be carried out without grant of Environmental Clearance. The construction work in all the 10 blocks had been completed however some interior work was still to be carried out. The Board of Directors of the Project Proponent had furnished a resolution on 12th July, 2013 along with the letter of apology and assurance that no construction would be carried out. However, this was not adhered to. According to SEIAA, tenure of the State Level Environmental Assessment Authority was notified on 4th April, 2012 and after the completion of 3 years of tenure, the same has ended on 3rd April, 2015. Its reconstitution is awaited.

18. In relation to M/s Dugar Housing Ltd. (Respondent No. 8), according to the Applicant on 28th January, 2013, building permit for the construction of combined basement floor + combined stilt floor + first floor to third floor + two towers with fourth floor to 10th floor residential cum commercial building with 285 dwelling units, community hall, gymnasiums, swimming pool and office space at survey no. 779/2A, 2B, 2C, 2D, 2E & 2F of Korattur Village, Ambattur, Chennai was issued in favour of the said Respondent. This permission states that the Project Proponent had also furnished an undertaking to abide by the terms and conditions put by various authorities specified therein and the Project Proponent was to submit necessary applications to the authorities. However, in para 7, it has been stated specifically that this approval is not final and that the Project Proponent has to approach Commissioner of Corporation.

Chennai for issuance of Building Permit under the Local Body Act. On 8th May, 2013, a building license from Corporation of Chennai was applied for and was granted on the same date. However, the averment of the Project Proponent that he had applied for building license on 28th January, 2013 is factually not correct. Thereafter, application for Environmental Clearance was moved to SEIAA for construction of 56,153.22 sq mtr in a total plot area of 11,789 sq mtrs. It is also pointed out by the Applicant that there is serious variance in the documents placed on record. In the letter dated 17th June, 2011 addressed by Fire and Rescue Services Department to the Project Proponent, it has been stated that plot area in the proposal is 12,006.92 sq mtr and the proposed built up area is 41,327.80 sq mtrs. Vide this letter, the Department had given 'No Objection' to accord planning permit to the proposal, but subject to the satisfaction of the conditions specified in the report. The compliance report was to be submitted before actual Occupancy Certificate is issued and the Department was to conduct re-inspection. In response to the letter and application for Environmental Clearance dated 4th June, 2013 by the Project Proponent, SEIAA had responded vide letter dated 7th June, 2013, acknowledging the receipt of the application and clearly informing the Project Proponent that as per the Notification of 2006 along with amendments therein notified by the MoEF, no activity should be taken in any part of India unless prior Environmental Clearance is granted in accordance with the objective of the National Environmental Policy. This letter specifically requires the Project Proponent not to commence any construction activity other than clearing the site, fencing the site and putting up the temporary structure for accommodation of labour etc. On 21st June, 2013, SEIAA asked the Project Proponent to furnish additional documents including approved building site plan, photographs of the building site and a commitment letter that no activity shall be carried out before obtaining the Environmental Clearance from the competent authority.

19. According to the Applicant, no additional documents or particulars were furnished by the Project Proponent till 20th July, 2013, the last date given by the SEIAA to close their application in event of default in furnishing documents or particulars, without further notice. However, some documents were submitted by the Project Proponent on 30th July, 2013. Various letters including letter dated 21st June, 2013, 8th August, 2013 and 10th September, 2013 were written by the SEIAA to Project Proponent seeking further information. Finally, vide its letter dated 24th September, 2013, SEIAA informed the Project Proponent that SEAC meeting would be held on 30th September, 2013. In the meeting held on that day, SEAC recommended the project for grant of Environmental Clearance, subject to conditions. According to the Applicant, the documents requisitioned were not placed before SEAC as the extract of minutes of meeting of SEAC makes no reference to construction in violation of Notification of 2006 and belies the submission of alleged letter dated 26th September, 2013, which claims to have enclosed Board resolution dated 12th August, 2013. The Tamil Nadu Pollution Control Board conducted inspection of the site on 20th May, 2014 and found that the ground level work had already started which resulted in issuance of a show cause notice dated 21st May, 2014. This inspection report contradicts the resolution dated 12th August, 2013 that has been placed by the Project Proponent on record and therefore, there were clear violations of the Notification of 2006. In the show cause notice, it had been specifically noticed that the construction of the work had been carried out without obtaining Environmental Clearance. The reply to this show cause notice was submitted by Project Proponent vide their letter dated 16th June, 2014, wherein it was nowhere denied that the construction work was carried on without obtaining Environmental Clearance; in fact, the stand taken was that other clearances except Environmental Clearance have been issued in favour of the Project Proponent. According to the Project Proponent, the project construction was started because there was huge investment involving client's money and the construction has

to be taken up on time to deliver the property as committed or else it could lead to huge losses to the developer and unwarranted hassles to the end user. It was averred that after the inspection of the site, the work has been suspended.

20. Upon inspection by the Tamil Nadu Pollution Control Board, it was noticed that the unit had completed construction work of 5 blocks and interior work is under process. It is not clear that when permission was granted for building 2 blocks, how come 5 blocks were constructed. This inspection was conducted on 2nd April, 2015 and stop work notice was issued by the Board on the same day. An inspection had also been conducted on 14th April, 2015. The photographs submitted to SEIAA on 26th September, 2013 and the photographs taken on 14th April, 2015 clearly show that there are environmental violations by the Project Proponent. The entire construction has been raised without grant of Environmental Clearance and even without compliance with other laws, thus, at this stage affecting the environment and ecology of that area. Though, the Project Proponent never applied for the Environmental Clearance on the basis of the revised project but the Tamil Nadu Pollution Control Board during the course of inspection *inter alia* noticed the existence of revised plan of construction and the noncompliance to the conditions contained in the orders of various authorities.

21. In the latest affidavit of the Tamil Nadu Pollution Control Board that has been placed on record before the Tribunal on 8th April, 2015, it was observed that the unit has almost completed the civil construction work and despite issuance of show cause notice dated 21st May, 2014 and stop work notice issued by Tamil Nadu Pollution Control Board, the Project Proponent carried on with the construction work.

Stand of Respondent No. 8 (M/s Dugar Housing Ltd.)

22. The above factual position is hardly disputed by this Respondent. However, the stand taken by the Respondent is that there were vacancy in SEIAA from 2nd March, 2011 to 4th March, 2012 and therefore, they could not have sought Environmental Clearance. The construction was commenced with a view to avoid delay of the project. Though, there was objection from some of the authorities, the construction activity continued in the interest of the developer and the prospective purchasers. It is not disputed by this Project Proponent that resolution dated 12th August, 2013 was submitted to SEIAA. Finally this Respondent has raised the plea of deemed clearance. According to him, he had submitted an application for Environmental Clearance on 7th June, 2013 and it has not been given or denied till date, therefore, it would be deemed to have been granted to him as per Para 8 of Notification of 2006. Further, it is averred that in the meeting of the SEAC on 30th September, 2013, the project was not granted Environmental Clearance but recommended to SEIAA for grant of Environmental Clearance, therefore, the permission would be deemed to have been granted. It is also the plea of this Respondent that he had obtained No Objection Certificates from the Air Port Authority, Traffic Police, Fire and Rescue Services, Metro Water Supply and Sewerage Board during the year 2011–2012. He had also obtained planning permit from Chennai Metropolitan Development Authority dated 28th January, 2013 and building permission from Corporation of Chennai dated 28th January, 2013. Since the process was taking time, the construction had been started. The Project Proponent had also tendered apology to SEIAA in compliance of the letters dated 12th December, 2012 and 27th June, 2013.

In response to the above contentions raised by the Project Proponent and some of the official Respondents, it has been stated by the Applicant that the plea of vacancies in SEIAA is irrelevant as the application for Environmental Clearance was moved on 7th June, 2013 and thereafter, there was no vacancy in SEIAA, thus, no prejudice is caused to the Project Proponent on that count. The plea of *bona fide* taken by the Project Proponent is of no consequences because upon violation of the law, they

cannot take up the plea of *bona fide*, as they intentionally carried on the construction despite objections from the authorities, show cause notice, stop work notice and even their own undertaking to the authorities not to raise any construction. Now the Project Proponent has completed the construction and therefore, the misrepresentations made by it to the authorities, including the variation in the plot and construction area, would vitiate the permissions that had been granted to the Project Proponent. Since the application for obtaining the Environmental Clearance is still pending for consideration of the authorities and the Project Proponent had been asked to submit documents, the Project Proponent cannot claim any benefit under the garb of 'deeming fiction'. This principle is not applicable to the case of Respondent No. 8 either on facts and/or on law. The meeting of SEIAA held on 30th September, 2013 had clearly noticed the unauthorized construction that they began in violation of the Notification of 2006 and resolution of the Project Proponent dated 12th August, 2013, which fact is undisputable. The plea of 'deeming fiction' and *bona fide* construction can therefore, hardly be taken by this Project Proponent. SEIAA had while requiring the Project Proponent to comply with the Notification of 2006, clearly mandated on 7th June, 2013 that no construction should be carried out. This has been violated by the Respondent No. 8 frequently. The different figures of plot size and construction area having been submitted by the said Respondent to various authorities, shows that he has not approached the authorities with clean hands and *bonafidely*.

23. According to the Applicant, this project of M/s Ruby Manoharan (Respondent No. 4) relates to the construction of basement floor + stilt pt + 1st to 15th Floor residential building with 206 Dus (ground floor pt & 1st Floor pt departmental store and 12th floor swimming pool) on Survey No. 64/2, Vengaivasal Village at Tamabaram, Velachery Main Road, Vengaivasal, Chennai. It was a project of total built up area of 22,130.944 sq meters on plot of 6,173.40 sq meters. The Project Proponent had moved an application to CMDA for his planning permit, in response to which the Authority on 24th July, 2012 wrote to the Project Proponent to pay development charges and submit other documents. The CMDA on 4th January, 2013 granted planning permit to the project. It needs to be noticed that in the letter dated 24th July, 2012, detailed conditions for compliance were stated which also included a condition that the Project Proponent was to furnish an undertaking that Environmental Clearance would be taken before the said authority could issue the planning permit. After submission of its plan, it appears that the Project Proponent started construction immediately after the issuance of the letter dated 24th July, 2012.

24. On 11th January, 2013, the Project Proponent submitted an application seeking Environmental Clearance. To this application, the authorities (Member Secretary, SEIAA) responded instantaneously and informed the Project Proponent about the necessity to comply with the requirements of the Notification of 2006 and directed the Project Proponent not to raise any construction without obtaining prior Environmental Clearance. The relevant extract of the letter written by SEIAA to the Project Proponent can be usefully reproduced here:

> "It shall be noticed that construction activity towards the project implementation without obtaining prior Environmental Clearance is a cognizable offence under Section 19 of Environment (Protection) Act, 1986 and is also liable to punishment for contravention of the provision of the said Act and the Rules or orders and directions, under Section 15, 16 or 17 of the said Act. In the above circumstances, it is hereby instructed that the Proponent shall not commence any activity, other than clearing the site, fencing the site and putting up temporary structure for accommodation of labour, along with basic facilities like toilets and water supply, made as a temporary arrangement."

25. On 15th May, 2013, SEIAA wrote to the Project Proponent requiring them to file additional documents and submit the requisite technical details for grant of

Environmental Clearance. These details, required to be furnished by 3rd June, 2013, were not submitted, thereby resulting in issuance of reminder by SEIAA to Project Proponent on 8th July, 2013. This letter was responded to by the Project Proponent on 17th July, 2013, wherein they clearly stated that they shall initiate the activity on the site only after obtaining Environmental Clearance. In this letter, the built up area was stated to be 35,017 sq meters as against 22,139 sq. meters as stated in the letter of the Project Proponent itself dated 11th January, 2013.

26. The Project Proponent was again informed by SEIAA vide its letter on 22nd July, 2013 that he should not carry out any construction activity at the site other than clearing the site, fencing the site and raising temporary structure for accommodation of labour. On 27th August, 2013, the Project Proponent informed the SEIAA that they had submitted the documents and circulated the same to the members of SEAC. Conceptual Plan was submitted by the Project Proponent to SEIAA on 29th August, 2013, in which discrepancies were pointed out by the SEIAA and it asked the Project Proponent to provide reasons for change in the built up area vide its letter dated 4th September, 2013. It was also pointed out by SEIAA in this letter that the project is located at a distance of 50 mtrs. from Nanmangalam Reserve Forest and thus Project Proponent was asked to furnish No Objection Certificate (for short 'NOC') from the District Forest Officer (for short 'DFO'). The Project Proponent vide their letter dated 13th September, 2013 responded to the letter dated 4th September, 2013 furnishing the 'NOC from DFO while stating that this 'NOC from DFO was not necessary, it being a 'B' category project and in relation to the discrepancy in the built up area, it was stated that the difference in area is the consolidation of the Non-FSI and Free of FSI areas, which are otherwise not mentioned in CMDA approved plan. SEIAA again vide its letter dated 24th September, 2013, directed the Project Proponent to furnish the NOC from the DFO on account of the fact that the project was located at a distance of 50 meters from Nanmangalam Reserve Forest. In response, the Project Proponent vide its letter dated 25th September, 2013 stated that the development is categorised as General Building Construction Project and is not covered under the Notification of 2006.

27. The matter was placed in the 44th meeting of SEAC on 30th September, 2013 asking the Project Proponent to furnish additional documents including NOC from DFO and an undertaking as required and the above was communicated by the SEIAA to the Project Proponent vide its letter dated 7th October, 2013. The Project Proponent thereupon vide their letter dated 21st February, 2014 informed SEIAA that the required resolution from the Board of Directors has been passed during the meeting held on 24th January, 2014 that they would not commit violation of the Notification of 2006 and also that such violations shall not be repeated. Having noticed various violations and non-compliance by the Project Proponent, SEIAA vide its letter dated 11th March, 2014 wrote to the Additional Chief Secretary to the Government that action should be taken against this Respondent in terms of Section 19 of the Act of 1986. This letter was responded to by the Government on 22nd April, 2014, asking SEIAA to take necessary steps. The Tamil Nadu Pollution Control Board filed a complaint against this Respondent before the Court of Judicial Magistrate, Court II, Chengalpattu on 17th July, 2014. The Project Proponent filed an affidavit on 22nd July, 2014 stating that they have stopped the construction activity at site as per commitment in the Board Resolution dated 24th January, 2014 and shall carry on construction only upon securing the Environmental Clearance. On 3rd September, 2014, the Project Proponent requested SEIAA to dispose of its application notwithstanding the order passed by this Tribunal dated 21st May, 2014.

In the meanwhile, Tamil Nadu Pollution Control Board issued a show cause notice to the Project Proponent. The premises were also inspected on 2nd April, 2015 and it was noticed that the construction had been carried on in the past but was found to be

stopped at the time of inspection. From the photographs on record which were filed by the Project Proponent before SEIAA on 6th March, 2014 and the photographs taken during the course of inspection on 15th April, 2015, it is clear that the Project Proponent has violated its own undertaking, orders and directions of SEIAA, as well as other laws in force. Therefore, the Applicant has submitted that the project of Respondent No. 4 has seriously affected the environment and ecology of area and the entire construction is unauthorised and illegal.

Stand of the Respondent (M/s Ruby Manoharan)

28. The stand of the Respondent Project Proponent is that he had obtained the Planning Permit on 4th January, 2013. The Project Proponent had also obtained Airport Authority clearance with regard to height of the building from Director General of Civil Aviation on 17th October, 2011. He also claims to have obtained clearance from the Fire Department. Before the issuance of planning permit by the CMDA, the proposal was approved by the Government Housing and Urban Development Department of the State of Tamil Nadu vide their letter dated 19th June, 2012. Vide their letter dated 24th July, 2012, the CMDA asked the Project Proponent to pay the development charges for land and building, security deposits as well as infrastructure and amenity charges. As per the terms and conditions of this letter, the Project Proponent was called upon to comply with various directions and it was stated that if the directions were not complied with, the sanction was required to be revoked. Even according to the Project Proponent in an affidavit, it has been admitted that they were required to furnish an undertaking to produce 'NOC for EIA Clearance before obtaining the completion certificate. The Project Proponent started the construction after receipt of the Planning Permit which was valid till 3rd January, 2016. After obtaining the Planning Permit, it applied for grant of Environmental Clearance to SEIAA on 11th January, 2013. After submission of the said application, the Project Proponent was called upon to submit certain documents and provide more particulars. The application of the Project Proponent was pending when interim order was passed by the Tribunal staying the operation of the impugned. Before the SEIAA, the Project Proponent had filed an apology letter on 21st February, 2014. The Project Proponent filed an application before the Southern Bench of National Green Tribunal seeking for direction to SEIAA for considering its application and disposing it expeditiously. Keeping in view the fact that the interim orders of stay have been passed by the Principal Bench at New Delhi, the Project Proponent also filed an application for impleadment, praying that the interim orders passed by the Tribunal on 15th December, 2014 in M.A. 809 of 2014 in Original Application No. 135 of 2014 be vacated.

29. SEIAA and Tamil Nadu Pollution Control Board have taken clear stand that the Project Proponent had carried the construction activity without obtaining Environmental Clearance. The apology filed by the Project Proponent had clearly stated that he will not carry out any construction without obtaining Environmental Clearance and such violation will not be repeated. SEIAA had requested the Government of Tamil Nadu to take action under Section 15 and 19 of the Act of 1986 as per the guidelines of the MoEF against the Project Proponent. According to SEIAA, in view of the interim order passed by the National Green Tribunal, the application for grant of Environmental Clearance was not processed. According to SEIAA, it had acted in furtherance to the issued by MoEF dated 12th December, 2012 and 27th June, 2013 to consider the application submitted by the Project Proponent. But this application has been de-listed from the pending list of projects, as they are awaiting orders of the National Green Tribunal. The Project Proponent had been informed by various letters including that of 19th November, 2014, not to proceed with the project construction. The site was inspected on 15th April, 2014 and it was noticed that the civil structural work for all the blocks were completed. In reliance thereto, SEIAA has submitted

certain photographs.

30. According to the Tami Nadu Pollution Control Board, they had conducted the inspection on 2nd April, 2015 and they noticed that no construction work was going on at the time of inspection. They have also taken photographs in reliance thereto. They were also informed by the Project Proponent on 2nd April, 2015 that all the construction work had been stopped w.e.f 4th April, 2014.

31. According to the Applicant, the project of M/s Jones Foundation (P) Ltd (Respondent No. 5) was for construction of Group Development residential project constituting six blocks, stilt + 7 floors out of which 329 are dwelling units, a clubhouse and a ground floor plus one residential building in S. Nos. 170/1A1F2, 1B, 2B, 1C1, 1C2, 2C1, 2C2, 172, 173/1A1, 1A2, 1B1, 1B2, 1C, 1D, 1E&2; at Pallikaranai Village, Tambaram Taluk, Kancheepuram District, Tamil Nadu. The total project area is 20,895.02 sq meters with built up area of 35,848.88 sq meters with a project cost of Rs. 140 crores. The Project Proponent filed an application seeking planning permission from the CMDA on 19th May, 2010. This remained pending and various correspondences were exchanged between the parties. The planning permission according to the Project Proponent was issued on 3rd August, 2012. In terms of this letter of the CMDA, Project Proponent was required to deposit various charges like development and plot regularisation etc. The Project Proponent was to construct strictly in accordance with the sanctioned plan and no deviation was to be made. Further, it was stipulated that even the building would not be occupied without issuance of the completion certificate by the said authority. Rain water conservation measures as notified by the CMDA were expected to be adhered to strictly. Undertaking was required to be furnished for NOC from the IAF and EIA clearance before the issue of the Completion Certificate. In the event of non-compliance of the conditions, the sanction was liable to be revoked. The Project Proponent started the construction immediately thereafter and carried on with the same. The application for grant of Environmental Clearance was submitted on 3rd February, 2014 which was responded to by SEIAA vide its letter dated 5th February, 2014, directing the Project Proponent not to raise any construction, other than cleaning the site, fencing the site and putting up temporary structure for accommodation of labour. It will be useful to refer to the relevant part of the said letter:

> "Your attention is drawn to the EIA Notification dated 14th September, 2006 along with amendments thereon, notified by the Ministry of Environment and Forests, Government of India, wherein it has Imposed certain restrictions and prohibitions on new projects or activities, or on the expansion or modernization of existing projects or activities based on their potential environmental impacts as indicated in the Schedule to the notification, being undertaken in any part of India, unless prior environmental clearance has been accorded in accordance with the objectives of National Environment Policy.
>
> The Government of India, Ministry of Environment and Forests in various circulars have repeatedly emphasized that any activity started or being executed before obtaining an Environmental Clearance from the Competent Regulatory Authority i.e. State Level Environment Impact Assessment Authority shall be construed as a violation, as per the provision of the Environment (Protection) Act, 1986. The Ministry has also delegated required powers and instructed the concerned State Government to take legal action against such proponent who has started project activity without a prior Environmental Clearance for violation, by invoking powers under Section 19 of Environment (Protection) Act, 1986.
>
> It shall be noticed that activity towards the project implementation without obtaining prior Environmental Clearance is a cognizable offence under section 19 of Environment (Protection) Act, 1986 and is also liable to punishment for

contravention of the provision of the said Act and the Rules or Orders and directions, under section 15, 16 or 17 of the said Act. In the above circumstances, it is hereby instructed that the Proponent shall not commence any activity, other than cleaning the site, fencing the site and putting up temporary structure for accommodation of labour, along with basic facilities like toilets and water supply, made as a temporary arrangement.

The receipt of this communication should be acknowledged immediately."

32. Vide their letter dated 10th February, 2014, the SEIAA asked the Project Proponent to submit additional documents as well as the photographs of the construction and a resolution/undertaking of the Project Proponent. In compliance to these directions, on 27th February, 2014, the Project Proponent submitted an affidavit along with photographs showing status of the site and also other documents. SEIAA vide their letter dated 4th March, 2014, informed the Project Proponent that construction had commenced and this was in clear breach of the Notification of 2006 and they were asked to furnish a letter of commitment and expression of apology for the same and then alone the proposal would be considered any further. On 10th March, 2014, the Project Proponent submitted an apology and requested that issuance of Environmental Clearance may be considered. The letter of commitment and expression tendered by the Project Proponent read as under:

"LETTER OF COMMITMENT AND EXPRESSION OF APOLOGY

We understand the violations on the part of making substantial construction in our project at Survey No. s-170/1C2, 170/1A1F2, 170/2C2, 170/2B, 172, 170/1B, 170/2C2, 170/1C1, 173/1D, 173/1A1, 1A2, 173/1B1, 1B2, 173/1E, 2, 173/1C of Pallikarnai Village, Tambaram Taluk, Kanchipuram District, Tamil Nadu in West Anna Nagar, (Near Chettinadu Enclave), Door No: 190 Zone-14 Corporation of Chennai, which is a Multi-storeyed Residential Apartment, with (6-Blovcks-Stilt + 7 Floors and a Club House) for residential purpose with 329 dwelling units by M/s Jones Foundations Private Limited without obtaining prior Environmental Clearance under EIA notification

The subject was taken up in a meeting held by the Board of Directors of M/s. Jones Foundations Private Limited on 24/02/2014 for consideration of the environment related policy/of action and resolved to ensure that such violations will not be repeated in future.

We here by express our apology for the violations carried out by construction of the project without obtaining prior Environmental Clearance under EIA Notification 2006 and request SEIAA, Tamil Nadu to consider the issuance of the Environmental Clearance for the said project."

33. The Tamil Nadu Pollution Control Board conducted an inspection and issued a show cause notice on 16th July, 2014, clearly evidencing that the construction work was continuing even as on 15th July, 2014. In the show cause notice, the Project Proponent was required to answer as to why the prosecution should not be initiated against him by filing a complaint as per the powers conferred under Section 19(a) of the Act of 1986 and as to why recommendation should not be made to the MoEF, Government of India/Government of Tamil Nadu, for the issuance of directions under Section 5 of the Act of 1986 to suspend the construction activity till such time Environmental Clearance is obtained. Reply to this show cause notice was submitted by the Project Proponent on 26th July, 2014, in which it was said that they have already submitted the application in Form I and IA along with a conceptual plan to SEIAA, Tamil Nadu and that they were waiting for grant of Environmental Clearance to the Project. In this letter, it was stated that they have stopped all construction activities pertaining to the project after the show cause notice and that construction would be started only after grant of Environmental Clearance. The Tamil Nadu Pollution

Control Board during inspection noticed that the main civil construction work for the residential complex was almost completed and found works such as interior finishing and site cleaning work were going on. The inspection report submitted on 2nd April, 2015 resulted in a stop work notice being issued to the Project Proponent by the Tamil Nadu Pollution Control Board. The photographs submitted by the Project Proponent to SEIAA on 5th January, 2014 and the photographs taken by SEIAA on 15th April, 2015 along with the report of SEIAA, clearly show that the construction work is in violation of the law and is continued illegally during all this time and this has caused irreparable loss and damage to environment and ecology. The SEIAA vide its letter dated 18th November, 2014 had informed the Project Proponent that his project stands de-listed for grant of Environmental Clearance and would be considered only after further orders of the Tribunal.

The Project Proponent had relied upon the office order dated 21st January, 2010 issued by the Member Secretary, Chennai Metropolitan Development Authority approving the norms and procedures evolved in terms of the guidance of the Monitoring Committee to contend that they had taken permissions from the concerned authorities to raise constructions with reference to this office order dated 21st January, 2010. The office order related to issuance of completion certificate on the basis of these revised guidelines. The office order provided that the insistence for compliance report from other agencies, including CMDA, Tamil Nadu Pollution Control Board, Revenue Department and ELCOT was proposed to be dispensed with. The Project Proponent also claimed that he had obtained other statutory clearances for the purposes of construction and construction had been carried out on the basis of the approved drawings. The Project Proponent conceded in his Application M.A. No. 110 of 2015 that he had commenced and had almost completed the construction activity by investing huge sums of money and has employed large number of labourers as on 3rd February, 2014 when he applied for obtaining the Environmental Clearance. The Project Proponent submits that he was under *bona fide* impression that Environmental Clearance would be given since all particulars have been complied with. Rest of the facts afore-referred are not disputed. The Respondent stated that the main application of the Applicant was not maintainable and the same should be dismissed.

34. According to the Applicant, M/s SSM Builders and Promoters (Respondent No. 6) is a registered partnership firm engaged in the business as civil engineering contractors, lay out promoters, flat promoters, real-estate and housing/commercial project developers. In November, 2012, the Project Proponent submitted a plan for approval to the CMDA for the project 'SSM Housing Complex at Perungalthur, Chennai'. The project was envisaged in an area of 49.28 acres. The proposed housing complex contemplated 59 blocks, out of which 6 blocks were for LIG housing with GF + 3 floors and balance 53 blocks with stilt plus 4 floors comprising of a total 2952 flats. There are six commercial blocks and one club house. The total built up area of the project comes to 37.84 lakhs sq ft. The estimated project cost involved was Rs. 792.56 crores. The application for planning permission was filed with the CMDA on 2nd November, 2012 and revision of this application was sought on 11th December, 2012, 27th December, 2012 and 7th February, 2013. On 11th March, 2013, necessary fee for process was demanded by CMDA from the Project Proponent. On 5th August, 2013, the Planning Permission was granted to the Project Proponent in relation to the project in question. Project Proponent had submitted the application for grant of Environmental Clearance on 24th July, 2013. According to the Applicant, the Project Proponent claims that he had collected samples for making available for baseline data from July to September, 2013 and that it had commenced construction by 13th August, 2013. However, the Applicant has submitted that the Project Proponent had erroneously classified the project as a category 'B2' project under clause 8(b) of the Schedule to the Notification of 2006, while in Column (2) of Form 1, the Project was categorised as

8(a) under the Schedule of Notification of 2006. It is also averred by the Applicant that the samples have been collected much subsequent to the application for grant of Environmental Clearance and are even pre-dated to the TOR. Furthermore, as they were not collected by an accredited consultant they cannot be used for EIA report. On 1st August, 2013, SEIAA asked for additional documents and particulars so as to proceed with the case. These documents are stated to have been submitted on 20th August, 2013. SEIAA vide its letter dated 19th September, 2013 stated that the ToRs as well as the clarifications should also be furnished in the EIA report. On the basis of the said EIA Report, the Project Proponent was required to take further necessary actions for obtaining Environmental Clearance. The Project Proponent on 14th February, 2014 submitted a Rapid EIA report. On 24th February, 2014, the partners of the Project Proponent passed a Board Resolution expressly apologizing for violations of the Notification of 2006 by commencing construction work without grant of Environmental Clearance and undertook not to commit further violation. In fact, on 19th March, 2014, letter of commitment and expression of apology' was submitted to SEIAA. The Tamil Nadu Pollution Control Board on 11th July, 2014 conducted an inspection of the project. On the basis of this inspection, the Tamil Nadu Pollution Control Board issued a notice dated 15th July, 2014 referring to the whole background, the breaches and violation committed by this Project Proponent and the fact that during inspection on 11th July, 2014, it was found that the residential complex project was under progress without obtaining Environmental Clearance which was violative of Notification of 2006 and documents submitted by the Project Proponent. The Project Proponent thus, was required to show cause within 15 days as to why prosecution should not be launched by filing a complaint as contemplated under Section 19 of the Act of 1986 and also why recommendation should not be made to the MoEF for issuance of direction under section 5 of Act of 1986 stopping operation of the project till such Environmental Clearance is obtained. Reply to this show cause notice was submitted by Project Proponent on 22nd July, 2014. It was stated therein that in response to the issuance of the TOR, the Project Proponent had submitted rapid Environmental Impact Assessment report on 14th February, 2014 and were awaiting Environmental Clearance. It was further stated that they have stopped all construction activity pertaining to the said project and no construction would be carried out without obtaining the Environmental Clearance. On 25th November, 2014, SEIAA issued a letter to the Project Proponent stating that their application stands de-listed and would be processed only after further orders of the National Green Tribunal.

35. Under the orders of the Tribunal, the Tamil Nadu Pollution Control Board had also conducted an inspection of the premises of Respondent No. 6 on 2nd April, 2015. Photographs were also taken by SEIAA on 14th April, 2015. Photographs submitted by the Project Proponent on 26th March, 2014 and the photographs taken on 14th April, 2015 by SEIAA clearly show that there has been frequent violation of the laws in force, Notification of 2006 and even the undertaking of apology given by the Project Proponent itself.

36. On 2nd April, 2015, the inspecting team of Tamil Nadu Pollution Control Board found that the work had been stopped and the photographs taken had supported such observations made by the inspecting team.

Stand of M/s SSM Builders and Promoters (Respondent No. 6)

37. The Project Proponent has taken a stand that it was under a *bona fide* impression that he could commence construction on making an application for Environmental Clearance to SEIAA and once the Planning Permit had been granted by the CMDA. According to Respondent No. 6, he had paid the processing fee of Rs. 5 Lakhs on 27th July, 2013 and after receiving the letter from the CMDA on 5th August, 2013, it had started construction. Submission of documents including rapid Environmental Impact Assessment and issuance of TOR was a genuine basis for the

Project Proponent to start construction. Relying upon the dated 12th December, 2012, it is stated that the letter of commitment and expression of apology' was submitted on 19th March, 2014. According to the Project Proponent, green space had been left between the buildings so that there is reduced heat gain. The buildings are designed to maximize the use of solar power, rain water harvesting system have been made and STP's installed to recycle water. According to the Project Proponent, out of 2952 flats and 135 shops, 1566 flats and 82 shops have already been sold and undivided share in the land has been conveyed to the buyers. Thus, third party interests have been created. According to the Project Proponent he would be gravely prejudiced by non-processing of the Environmental Clearance application and has submitted that dated 12th December, 2012 as amended on 27th June, 2013, is in consonance with the Notification of 2006 and the Project Proponent is entitled to the benefit of the process as envisaged under the impugned Office Memoranda. According to the Project Proponent, the main application should thus be dismissed.

38. S.A.S. Pvt. Ltd. (Respondent No. 9) had filed its application through its authorised signatory which was allowed. The application for intervention/impleadment was filed in furtherance of the interim order dated 21st May, 2014 passed by the Southern Zone Bench at Chennai. Thereafter, vide order dated 15th December, 2014, the operation of the impugned is dated 12th December, 2012 and 27th June, 2013 was stayed by the Principal Bench.

39. According to the Applicant, the project of this Respondent at Village Saligramam, Chennai was for development of residential complex consisting of construction of 2 block with combined lower and upper basements and Block 1 - ground plus 17 floors, block 2 - basement plus ground floor plus 2 floors - Service, Gym and swimming Pool providing 166 residential units. The total project area is 6,985 sq meters with built up area of the project is 28,330.95 sq meters. The estimated cost of the project was 90 crores. According to the Applicant, the planning permission from the CMDA was obtained by the Project Proponent on 30th March, 2012, in furtherance to which building license was obtained by the Project Proponent from Corporation of Chennai on 23rd May, 2012. Thereafter, the Project Proponent commenced the construction without even applying for Environmental Clearance. The Project Proponent applied to SEIAA for obtaining Environmental Clearance on 4th July, 2012. No acknowledgement thereof had been placed on record by the Project Proponent. From the letter of the SEIAA dated 13th March, 2013, it is clear that the application with documents was of 13th March, 2013 itself. In terms of this letter, a bank draft towards the processing fee that was given by the Project Proponent itself, was dated 13th February, 2013. In this very letter, SEIAA had informed the Project Proponent that it shall not commence any construction other than cleaning the site or fencing the site. It was specifically re-emphasized that any construction activity started or being executed before obtaining Environmental Clearance from the competent authority would be in violation of the Act and the Notification. Vide letter dated 19th March, 2013, the Project Proponent was asked to furnish additional documents and additional fee on or before 15th April, 2013 failing which the application would be recorded as closed. The Applicant has stated that till that date, no clarifications were filed nor the fee submitted. On 25th June, 2013, the Project Proponent passed a Board Resolution expressing apology and submitting an undertaking not to repeat any violation and not to raise any constructions. In this letter of commitment and expression of apology, the Project Proponent prayed for consideration of the issue relating to Environmental Clearance. However, on 18th November, 2014, SEIAA informed the Project Proponent that the project had been de-listed. During the inspection on 14th April, 2015, photographs had been taken which if compared with the photographs submitted by the Project Proponent on 6th May, 2013 reveal that there was clear violation of the law, Notification of 2006 as well as the

undertaking given by the Project Proponent.

40. According to the authorities including Tamil Nadu Pollution Control Board and the SEIAA, they came to know of unauthorized construction by the Project Proponent on 13th May, 2013. On 21st May, 2013, Project Proponent had submitted certain photographs taken at the project site. SEIAA while following the guidelines issued by the MoEF had asked the Project Proponent to furnish certain documents. The Project Proponent submitted their Board Resolution dated 25th June, 2013 which was received by the SEIAA on 2nd August, 2013. Thereafter, Member Secretary, SEIAA vide letter dated 8th August, 2013 requested the State Government to take action for violation of the Notification of 2006. Vide letter dated 10th September, 2013, the State Government requested the Tamil Nadu Pollution Control Board to take legal action against the Project Proponent in terms of Section 19 of the Act of 1986 for having commenced the construction without obtaining prior Environmental Clearance. Thereafter, the Tamil Nadu Pollution Control Board vide its letter dated 3rd June, 2014 informed the Member Secretary, SEIAA, Tamil Nadu that District Environmental Engineer, Chennai has filed a Criminal Complaint in the Judicial Magistrate Court at Saidapet against Respondent No. 9 on 26th May, 2014. It is averred by the authorities that upon compliance with the requirements pointed out by the authorities, the application for Environmental Clearance of the Project Proponent was placed before SEIAA in its 45th Meeting held on 29th - 30th October, 2013. According to SEIAA, the project site was inspected on 14th April, 2015 in the presence of Project Proponent's representative (Site Engineer). It was noticed that civil structural works (core and shell) of all 2 blocks were completed, though at the time of inspection, no work had been carried on. Photographs were taken during the inspection and have been submitted before the Tribunal. The Project Proponent was informed vide letter dated 18th November, 2014 not to proceed with the project construction work, which had not been adhered to. The photographs furnished by the Project Proponent at time of submission of the expression of apology on 6th May, 2013, show that the construction work was structurally in progress but without any walls or without even completion of pillars of any floor. However, photographs taken on 14th April, 2015 show that the building was majorly finished from outside and inside, which was clearly in violation of the law and the undertaking furnished by the Project Proponent.

Stand of Respondent No. 9 (SAS Realtors Pvt. Ltd.)

41. The stand of the Project Proponent is that he had obtained various approvals from the local authorities since 2011 along with Planning Permission from the CMDA on 30th March, 2012 and Planning Permit from the Chennai Corporation on 23rd May, 2012. The Project Proponent commenced construction activity in compliance with these approvals to meet the timelines promised to its clients for timely delivery of the residential apartments. The authorities thereafter informed the Project Proponent that he is required to obtain Environmental Clearance. The Project Proponent had submitted the application for Environmental Clearance to the SEIAA on 4th July, 2012 but because of the change in the fees payable, the Project Proponent filed a fresh application on 18th February, 2013. In compliance to the Office Memorandum dated 12th December, 2012, it submitted a letter of commitment and an expression of apology' on 25th June, 2013, for having commenced construction activity before the receipt of the Environmental Clearance. Thereafter, it was informed to the Project Proponent by the authorities that its application was not processed in view of the stay orders of the Tribunal and that further action would be taken in accordance with further orders of the Tribunal.

42. Further, according to the Project Proponent, action of SEIAA in refusing the grant of Environmental Clearance is violative of legitimate expectation of the Project Proponent, after they have complied with all the requirements of the dated 12th

December, 2012. Since SEIAA failed to comply with the timeline of maximum 105 days provided under Para 8 of the Notification of 2006, the deemed approval would operate in favour of the Project Proponent when there is no rejection of the application from the authorities. According to the Project Proponent the action of SEIAA in delisting its project is violative of Article 14 of the Constitution of India. It is also the submission of the Project Proponent that they have taken all steps in furtherance to dated 12th December, 2012 and therefore, they are entitled to grant of Environmental Clearance and SEIAA has erroneously linked it to the orders of stay passed by the Tribunal. A feeble attempt has been made on behalf of this Respondent to point out that the Notification of 2006 does not apply to residential building projects and it extends only to location of 'industries' or on carrying on of processes and operations. Furthermore, that the Notification of 2006 goes beyond the purview of Rule 5(3) of the Environment (Protection) Rules, 1986 and hence it is *ultra vires*. According to the Project Proponent their application for EC was considered by the SEIAA in its 45th meeting held on 29th - 30th October, 2013 and whatever requirements were to be complied with by the Project Proponent had been complied with. The interim orders of stay on the impugned Office Memoranda by the Tribunal were only in relation to category 'A' projects which require Environmental Impact Assessment, public consultations and Consent to Establish. The project in question is not covered under this category and therefore, the view taken by the Official Respondents was not correct. The Project Proponent had so claimed even before the authorities.

43. The Project Proponent in its application had submitted that they would challenge the validity and correctness of the Notification of 2006 but no such steps were taken by the Applicant till the conclusion of the arguments.

44. Upon analysis of the case advanced on behalf of the respective parties and as is evident from the pleadings and records before us, we may concisely note the arguments advanced. It is contended on behalf of the Applicant that the Office Memorandum dated 12th December, 2012 and as amended by Office Memorandum dated 27th June, 2013 which provides grant of ex-post facto Environmental Clearance in terms of the Notification of 2006 and the CRZ Notification of 2011 are contrary to these Notifications, themselves. These Office Memoranda at best are administrative orders and therefore, cannot amend or modify the Notifications. It is further the contention of the Applicant that these Office Memoranda are in derogation not only to the Notification of 2006 and the CRZ Notification of 2011 but even of India's International obligations. The Office Memoranda are neither problem solving nor are they compliant with law. These Office Memoranda are not executive orders issued under the authority of Article 73 of the Constitution of India, as these Orders have neither been authenticated by the required authority nor have they complied with the procedure for exercise of executive power under that Article. In fact, they amend the statutory Notification of 2006. The Office Memoranda, in fact, destroy the very object of the Act of 1986, Notification of 2006 and they have the effect of not only going beyond scope of the Notification of 2006 but even are clearly in derogation to the procedure prescribed under it. The language of the impugned Office Memoranda suggests that they have not been issued in exercise of the powers vested in the Ministry under Section 5 of the Act of 1986 and they are not issued as per the prescribed procedure. They also do not supply the gaps, if any, in the Notification of 2006.

45. According to the Applicants, impugned Office Memoranda are arbitrary and they do not provide for any guidelines. They have an inbuilt element of discrimination and they vest unguided and unfettered discretion with the concerned authority.

Contra to these contentions, the submission on behalf of the Respondents (private Respondents) is that the Office Memoranda have been issued by the MoEF in exercise of its executive powers under Article 73 of the Constitution of India. The source of

power of the Union of India to issue such Memorandum is relatively under Article 73 of the Constitution of India, as the executive power of the Union extends to matters on which Parliament is competent to legislate under Article 246 of the Constitution. Furthermore, the impugned Office Memoranda do not have the effect of supplanting or even diluting the mandate of the Notification of 2006. On the contrary, they are in consonance with and in furtherance of the Notification of 2006 and supplement it. The requirement of prior Environmental Clearance is not diluted by these Office Memoranda since they do not permit commencement of project prior to grant of Environmental Clearance. It is further the contention of the Project Proponents that the situations which are not specifically contemplated under the Notification of 2006 are dealt with by the Office Memoranda. In other words, the Office Memoranda supply the gaps in the Notification of 2006 and further the cause of the Notification. The Office Memoranda do not pose any fetters on the powers conferred on the State or Central Government under the Act of 1986 or the Notification of 2006. They, in fact, direct enforcement of Section 15 and 19 of the Act of 1986 to prosecute the violators.

46. The Project Proponents - Respondents have also contended that they have acted in furtherance to the Office Memoranda, followed the requisite procedure and have invested huge amounts and as such the Tribunal should permit the grant of Environmental Clearance to these projects and dismiss the application of the Applicants.

47. Some of the Respondents have taken up the plea of deeming fiction as contained in Para 8(iii) of the Notification of 2006 to contend that the Environmental Clearance would be deemed to have been granted to them as their applications were not disposed off within the specified time. Some of the Respondents have also contended that the Notification of 2006 is not applicable to their projects which are for building residential complexes.

Still, some of the Respondents have further contended that the Notification of 2006 is invalid and is liable to be set aside on the ground of discrimination, vagueness etc. Respondent no. 9 having raised this plea in its application, had reserved its right to challenge the validity and correctness of Notification 2006, however, till the matter was reserved for judgment, neither any such effort was made by such Respondent nor actual application was filed challenging the Notification of 2006. Thus, we do not propose to go into the challenge to the Notification of 2006 in these petitions of the Respondents. Respondent no. 9 has even relied upon the said Notification of 2006 to contend that the Office Memoranda are valid, issued by the Competent Authority in exercise of its powers and are supplementing the Notification of 2006. In these circumstances it is neither necessary nor required by the Tribunal to examine the correctness or otherwise of Notification of 2006.

48. According to the MoEF, the Office Memoranda have been issued in exercise of the powers conferred upon the Ministry and are hence, executive instructions. According to the Ministry, they supplement the Notification of 2006.

49. The State of Tamil Nadu and Tamil Nadu Pollution Control Board have not taken any specific stand in their replies in relation to the validity of Office Memoranda but have stated that the other private Respondents being violators, they have taken action against them as per the directives of the MoEF in the impugned Office Memoranda. The private Respondents have violated the conditions of the Notification of 2006 and they have taken action against them under Section 19 and 25 of the Act of 1986. SEIAA has taken up the stand that because of violations of the Office Memoranda, they have taken action against the private Respondents (Project Proponents) and have de-listed their projects from the grant of Environmental Clearance. During the course of inspection these authorities have taken photographs and submitted inspection reports to the Tribunal. It is stated that tenure of SEIAA had ended on 3rd April, 2015 and is

under process of being re-constituted.

50. As evidenced from the facts averred and the stand taken by respective parties, the entire controversy revolves around the validity, enforcement and consequences of the impugned Office Memoranda afore-referred. To put it precisely, the stand of the MoEF and the private Respondents 3 to 9 is that the Office Memoranda dated 12th December, 2012 and 27th June, 2013 have been issued by the Ministry in exercise of its Executive Power under Article 73 of the Constitution of India. These Office Memoranda are having the force of law and are merely explanatory or supplementary to the Notification of 2006. These Office Memoranda provide and facilitate grant of Environmental Clearance through the same process as contemplated under Notification of 2006 to the projects which have already commenced construction without obtaining prior Environmental Clearance. It is contended that Office Memoranda further the cause of the Notification of 2006 and the provisions of law. The Office Memoranda are neither violative nor are in contradiction to the Act of 1986, the Rules framed thereunder, or the Notification of 2006.

51. Some of the private Respondents have also contended that the Office Memoranda have been issued in conformity with Section 3 and 5 of the Act of 1986, that issuance of such Memoranda is aided by the 'doctrine of implied or necessary powers' and that they are also entitled to the grant of Environmental Clearance as a result of 'deeming fiction' under Para 8 of the Notification of 2006.

Further, the contention of the private Respondents in particular is that they had started the projects after taking clearance as well as different permissions from various authorities and in accordance with law. At some stage of the construction, they had also filed applications for obtaining Environmental Clearance from the concerned authorities. The Terms of Reference of the building permission from CMDA even prescribed that Environmental Clearance should be taken before grant of Completion Certificate. The constructions carried out by them, though without obtaining Environmental Clearance, were for *bona fide* reasons and keeping in view the fact that not only the Project Proponents but even third parties had heavily invested in these projects. For the above reasons, they claimed to be entitled to the benefit of the Office Memoranda and consequently for protection to their construction projects.

On the contrary, the submission of the Applicants is that the impugned Office Memoranda issued by the Ministry are merely administrative orders and are in violation of the provisions of the Act of 1986, the Rules framed thereunder and in particular, the Notification of 2006. The Office Memoranda not only dilute the provisions of the Notification of 2006 but completely upset the scheme of environmental protection as contemplated under the environmental laws. On their plain reading, they are *ultra vires* the Notification of 2006 and the Ministry had no jurisdiction to issue such Office Memoranda. These Office Memoranda are not supplementing but are supplanting the Notification of 2006. Such exercise of powers is impermissible in law. Further, the contention of the Applicants is that while some of the private Respondents did not even apply for Environmental Clearance and went on to raise the construction of their respective projects being fully aware and being put to notice that they were not entitled to carry on such construction work, the other Project Proponents completely ignored and/or violated their legal obligations and applied for grant of Environmental Clearance at a stage when their respective projects were reaching structural completion. In law, none of the private Respondents could have undertaken any activity, much less construction activity, of their projects, except the preparation of the site etc, prior to grant of Environmental Clearance. All these Respondents have violated the law and raised constructions illegally and in an unauthorised manner. It is the case of the Applicant that the plea of *bona fide* belief in raising construction is a sham. Not only the private Respondents started construction but even violated their own undertaking given to the SEIAA by continuing with the

construction, in fact, with a greater vigour to complete their projects and render all environmental restrictions and laws otiose. The plea of investment by third parties is equally unfounded and *mala fide*. They have invested amounts and even mislead the public at large for making investments being fully aware of the fact that the entire construction is illegal and unauthorised. These constructions have resulted in serious adverse environmental impacts and are prejudicial to the ecology and biodiversity of the area in question.

52. Applicants have seriously contended that neither a deeming fiction nor the doctrine of necessity applies to the facts and circumstances of the case. There was no compliance to the provisions of Section 3 and 5 of the Act of 1986 and thus, these cannot be directions issued under the stated provisions. In fact, that is not even the case of MoEF, the issuing authority. Thus, the application should be allowed and the Respondents should be held liable for violation of law, raising unauthorised and illegal construction and degrading and damaging the environment and ecology, in addition to the principal prayer that the Office Memoranda be quashed.

53. In order to analytically examine the correctness and merit of the rival contentions raised, it would be appropriate for us to formulate the issues that fall for consideration of the Tribunal. Precisely, they can be stated as under:

1. Whether the Office Memoranda dated 12th December, 2012 and 27th June, 2013 have been issued by the MoEF in exercise of its statutory, executive or administrative power and the effect thereof?
2. Are the above Office Memoranda *ultra vires*, violative and in any manner in derogation of or destructive to the Notification of 2006, provisions of the Act of 1986 or Rules framed thereunder?

   Do the impugned Office Memoranda supplement or supplant the Notification of 2006? If so, the consequences thereof.
3. Whether this Tribunal has no jurisdiction to quash both the impugned Office Memoranda?
4. Are the private Respondents entitled to claim any benefit on the strength of deeming provisions as contained in Para 8(iii) of the Notification of 2006 and if so, to what effect?
5. Whether the provisions of Notification of 2006 requiring Environmental Clearance prior to commencement of construction are mandatory or directory and consequences thereof?
6. What is the status of structures raised by and the conduct of the private Respondents and its effect in law (statutory provisions relating to environment)?
7. What are the environmental impacts of the projects in question upon environment, ecology and biodiversity?
8. What relief, if any, any of the parties to the present proceedings are entitled to?
9. What directions, if any, need to be issued by the Tribunal in the peculiar facts and circumstances of the present case?

DISCUSSION ON ISSUES

Discussion on Issue Nos. 1 and 2.

1. Whether the Office Memoranda dated 12th December, 2012 and 27th June, 2013 have been issued by the MoEF in exercise of its statutory, executive or administrative power and the effect thereof?
2. Are the above Office Memoranda *ultra vires*, violative and in any manner in derogation of or destructive to the Notification of 2006, provisions of the Act of 1986 or Rules framed thereunder?

   Do the impugned Office Memoranda supplement or supplant the Notification of 2006? If so, the consequences thereof.

54. The decision on these issues would in fact be a linchpin of the entire judgment. If the Office Memoranda dated 12th December, 2012 and 27th June, 2013 are held to be valid and issued in exercise of the Executive Powers of the MoEF, then different consequences in law and on facts would follow. While a completely different set of consequences would ensue if a contrary view is taken.

55. According to the MoEF, these Office Memoranda are issued in exercise of its Executive Power. Some private Respondents supported this stand while others contend that these are the directions issued by the Ministry in terms of Section 3 and 5 of the Act of 1986. However, the MoEF and private Respondents commonly contend that these Office Memoranda are supplemental to and are intended to further the cause of the Notification of 2006.

In opposition to this, the Applicants contend that these Office Memoranda have been issued in exercise of the Administrative Power of the MoEF. They are *ultra vires* and violative of the Notification of 2006. They supplant the Notification of 2006 and defeat the very purpose of obtaining prior Environmental Clearance for commencement of the projects of a like nature, as contemplated under the Notification of 2006.

56. Now, we may notice the historical background to the issuance of these impugned Office Memoranda. The Indian Parliament enacted the Act of 1986 to provide for the protection and improvement of the environment and for matters connected therewith. This law is enacted in furtherance to the decisions taken at the United Nations Conference on Human Environment held at Stockholm in June, 1972, to which India was a party. The object of the Act was to protect and improve environment and for prevention of hazards to human beings, other living creatures, plants and property. The term 'environment' in terms of Section 2(a) was defined to include water, air and land and the inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property. In exercise of the powers conferred by Sections 6 and 25 of the Act of 1986, the Central Government made the Environment (Protection) Rules, 1986 (for short 'Rules of 1986'). Further, in exercise of the powers vested in the Central Government under Sub Section 1 and Clause (v) of Sub-section (2) of Section 3 of the Act of 1986, read with clause (d) of sub-rule (3) of Rule 5 of the Rules of 1986, the Central Government issued the Environment Impact Assessment Notification dated 27th January, 1994. This Notification requires any person who desire to undertake any new projects in any part of India or the expansion or modernisation of any existing industry or project listed in Schedule I to make an application to the MoEF in the proforma specified in Schedule II of the said Notification. Schedule I provides the list of the projects that requires Environmental Clearance from the Central Government. Under entry 18, all tourism projects between 200 metres and 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 required Environmental Clearance. Similarly, under entry No. 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 also required Environmental Clearance. Except these two entries, the construction projects of any other nature were not included in any entry of this Schedule. The Notification of 1994 in contradistinction to the Notification of 2006 had not specifically used the word 'prior Environmental Clearance'. The Notification of 1994 was issued by the Ministry after inviting objection from the public within 60 days from the date of publication of the Notification. Taking notice of lacunas, shortfalls and other practical aspects and difficulties while keeping in mind the interest of environment, the MoEF again issued a draft Notification dated 15th September, 2005 inviting objection and suggestions from

all the persons likely to be affected by this draft Notification within a period of 60 days. The significance of this Notification was that the Union Cabinet had approved the National Environmental Policy on 18th May, 2006 proposing restrictions and prohibitions to be imposed on new projects and activities and even on expansion or modernisation of existing projects or activities with reference to their potential environmental impacts which stated that the project and activity should not be undertaken unless prior Environmental Clearance has been granted in accordance with the objectives of the policy. After examining the objections and suggestions received, the Central Government on 14th September, 2006 issued a final Notification referred herein as the Notification of 2006 (supra). Clause 2 of this Notification required obtaining of prior Environmental Clearance from the concerned regulatory authority depending upon the nature of the project. Clause 2 of the said Notification reads as under:

> "Requirements of prior Environmental Clearance (EC):— The following projects or activities shall require prior environmental clearance from the concerned regulatory authority, which shall hereinafter referred to be as the Central Government in the Ministry of Environment and Forests for matters falling under Category 'A' in the Schedule and at State level the State Environment Impact Assessment Authority (SEIAA) for matters falling under Category 'B' in the said Schedule, before any construction work, or preparation of land by the project management except for securing the land, is started on the project or activity:
>
> (i) All new projects or activities listed in the Schedule to this notification;
>
> (ii) Expansion and modernization of existing projects or activities listed in the Schedule to this notification with addition of capacity beyond the limits specified for the concerned sector, that is, projects or activities which cross the threshold limits given in the Schedule, after expansion or modernization;
>
> (iii) Any change in product - mix in an existing manufacturing unit included in Schedule beyond the specified range."

57. Clause 4 of the Notification of 2006 contemplates that all projects and activities be broadly categorized into two categories - Category 'A' and Category 'B', based on the spatial extent of potential impacts on human health and natural and manmade resources. Clause 4(iii) prescribes that all the projects or activities included as Category 'B' in the Schedule, including expansion and modernization of existing projects or activities would require prior Environmental Clearance from SEIAA and prior Environmental Clearance is required even if there is a change in product mix except in the expansion carved out therein. Upon submission of the application for Environmental Clearance by the Project Proponent, the Expert Appraisal Committee is to follow four steps procedure i.e. Screening, Scoping, Public Consultation and Appraisal of the application. Environmental Clearance is to be applied for in the prescribed Form 1 under Appendix 1 and Form 1A in accordance with Appendix II to the Notification of 2006. Such application is to be filed for grant of prior Environmental Clearance before commencing any construction activity or preparation of land at the site by the Project Proponent in terms of Clause 6 of the Notification of 2006. It has to be noticed here that Form 1 and 1A require a lot of information to be supplied in relation to the project, land area and activity that is proposed to be commenced by the Project Proponent. Such information *inter alia* includes details of alternative site examination and whether the project requires Clearance under different laws including Forest (Conservation) Act, 1980, Wild Life (Protection) Act, 1972, Coastal Regulation Zone Notification, 2011, if any forest land is involved.

58. It also *inter alia* requires the information with regard to permanent or temporary change in the land use, land cover or topography, including increase in intensity of land use, pre-construction investigations like bore house, soil testing.

Underground works, including mining or tunnelling, reclamation works, impoundment, daming, culvating, realignment and other changes to the hydrology of the watercourses or the aquifers, loss of native species or genetic diversity, details of vulnerable groups of people which could be affected by the Project, municipal details of municipal waste, sewage sludge, densely populated or build up areas, environmental sensitivity, information with regard to a risk of accidents during construction or operation of the projects which could affect human health and risk of contamination of land and water from releases of pollutants into ground water or coastal areas are also required to be furnished. The Notification of 2006 further spells out how the Screening, Scoping, Public Consultation and Appraisal are to be carried out by the authorities concerned. Further, the Terms of Reference (for short ToR') that are to be prepared on the basis of the information furnished in Form 1 and 1-A would become the very basis for consideration of the project of the Project Proponent. The Notification of 2006 states that ToR are to be conveyed to the Project Proponent by the Expert Appraisal Committee or the SEAC as the case may be, upon which an EIA report is to be submitted after holding public consultation. The nominated agency has to submit its report to the regulatory authority stating whether owing to the local situation and dealing with the objections raised, in its opinion, the project should be recommended for Environmental Clearance or not. The agency has to further appraise whether the project site is proper or not. This entire process is required to be completed prior to grant of Environmental Clearance. Para 8 of the Notification of 2006 deals with the grant or rejection of 'prior Environmental Clearance'. Authorities are required to deal with the applications for grant of prior Environmental Clearance expeditiously and in any case within the time stipulated under the sub-clauses of Para 8. In terms of Para 8(iii), if the decision of the regulatory authority is not communicated to the Applicant within the period specified in subclauses (i) or (ii) of Para 8, the Applicant may proceed as if the Environment Clearance sought for has been granted or denied by the regulatory authority in terms of the final recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee, as the case may be. Therefore, the Project Proponent under the Notification of 2006 can commence its construction or activity only after the grant of Environmental Clearance. This Clearance is to be for a specific period, i.e. the validity period. The projects are supposed to be monitored by the authorities even post Environmental Clearance. This is the scheme and requirements of the Notification of 2006 that superseded the Notification of 1994. 59. On 16th November, 2010, the MoEF for the first time issued an Office Memorandum. Since the impugned Office Memoranda, including this Office Memorandum, have a significant bearing on the matters in issue before us, it will be appropriate to reproduce this Memorandum at this stage:

No. J-11013/41/2006-IA.II(I)
Government of India
Ministry of Environment & Forests

Paryavaran Bhavan,
C.G.O. Complex, Lodi Road,
New Delhi-110003
Telefax: 24362434
Dated the 16th November, 2010

Office Memorandum

Sub: 1. Consideration of proposals involving violation of the Environment (Protection) Act, 1986 or Environment Impact Assessment (EIA) Notification, 2006/the CRZ Notification, 1991, there under-Regarding.
2. Corporate Environment Policy-Regarding.

The Environment Impact Assessment (EIA) Notification, 2006 requires all new projects or activities and or expansion and modernization of those existing projects or activities listed in the schedule to the said Notification with capacity beyond the threshold limits prescribed there under, to obtain prior environmental clearance under the provisions thereof.

2. Instances have come to the notice of the Ministry of Environment & Forests where substantial physical progress relating to construction of the project has been made at site and significant investments have been made for setting up of new projects as also for the expansion components of various existing projects such as thermal power plants, integrated steel plants, mining projects etc. without obtaining a requisite prior environmental clearance as is mandated under the EIA Notification, 2006.

3. As per the existing practice being followed in the Ministry for considering such violation cases as and when these are submitted for environmental clearance, while environmental clearance is granted to deserving projects prospectively, based on their merit, in accordance with the recommendation of the Expert Appraisal Committees, simultaneously the concerned State Governments, under the powers delegate to them under the Environment (Protection) Act, 1986 are requested to initiate action against such units for the period these units have operated in violation of the said Act as per the procedure laid down.

4. The matter has been considered in the Ministry and it has been decided to follow the following procedure henceforth to deal with such cases of violations:

(i) All such cases of violation which are submitted to the Ministry of Environment & Forests/SEIAAs for environmental clearance would be referred to the respective Expert Appraisal Committee (EAC)/SEACs for their consideration based on merit of the proposal. After the EAC/SEAC have made its recommendations on the project, the proposal will be processed on file for obtaining the approval of the Competent Authority.

(ii) After the Competent Authority has approved the proposal for grant of environmental clearance, MoEF/SEIAA will send a communication to the Project Proponent informing that although the proposal has been approved by the Competent Authority, formal environmental clearance will be issued to the project only after the matter relating to the violations have been put up to the Board of Directors of the Company or to the Managing Committee/CEO of the Society, Trust, partnership/individually owned concern for consideration of its environment related policy/plan of action as also a written commitment in the form of a formal resolution to the submitted to MoEF/SEIAA to ensure that violations of the Environment (Protection) Act etc. will not be repeated. For the purpose, a time limit of 90 days will be given to the Project Proponent. In the mean time, the project will be delisted. In the eventuality of not having any response from the Project Proponent within the prescribed limit of 90 days, it will be presumed that it is no longer interested in pursuing the project further and the project fill will be closed, where after the procedure for obtaining environmental clearance will have to be initiated de-novo by such Project Proponents.

(iii) The respective State Government will be informed of the violation case for their initiating legal action against the Company as per the procedure prescribed.

(iv) The details of the Project Proponents and a copy of the commitment etc. mentioned at para 4(ii) above will be put on the website of MoEF/SEIAA for information of al/stakeholders.

This issues with the approval of the Competent Authority.

60. In para 2 of the above Office Memorandum, it was noticed that instances have come up to the MoEF where substantial physical progress relating to construction of the project has been made at site and significant investments have been made for setting up of new projects and also for the expansion of the components of various existing projects without obtaining mandated prior Environmental Clearance. Though, this Office Memorandum specifically notices that the Notification of 2006 mandates prior Environmental Clearance, however, the decision was taken that henceforth, all such cases of violation which are submitted to the Ministry would be referred to the EAC/SEAC and depending upon their recommendations, the proposals would be finally dealt with; provided other requirements of the Office Memorandum were satisfied. This Office Memorandum came to be superseded by another Office Memorandum of 12th December, 2012. Again, it was noticed in this Office Memorandum that all projects and activities beyond the threshold limits prescribed thereunder are required to obtain prior Environmental Clearance under the provisions of the Notification of 2006 or Notification of 2011 relating to Coastal Zone Regulation. Again, it noticed that the projects have been started without compliance to these requirements and in some cases, the applications have been pending before the Ministry/the authorities concerned, in terms of the Office Memorandum of 16th November, 2010. The Office Memorandum dated 12th December, 2012 reads as under:

"No. J-11013/41/2006-IAII(I)

Government of India
Ministry of Environment & Forests

Paryavaran Bhavan,
C.G.O. Complex, Lodi Road,
New Delhi-110003
E-mail: pb. rastogi@nic.in
Telefax: 011-24362434
Dated 12th December, 2012

OFFICE MEMORANDUM

Subject: Consideration of proposals for TORs/Environment Clearance/CRZ Clearance involving violation of the Environment (Protection) Act, 19861 Environment Impact Assessment (EIA) Notification, 2006/Coastal Regulation Zone (CRZ) Notification, 2011 - reg.

1. The Environment Impact Assessment Notification (EIA), 2006 and its amendments thereafter require all new projects or activities and/or expansion and modernization of existing projects or activities listed in the schedule to the said Notification with capacity beyond threshold limits prescribed thereunder, to obtain prior Environment Clearance under the provisions thereof. Similarly, CRZ Notification, 2011 imposes certain restrictions on the setting up and expansion of industries, operations or processes and the like in the CRZ.
2. Instances have come to the notice of this Ministry where without obtaining the required clearance under the aforesaid Environment Impact Assessment Notification, 2006 and/or CRZ Notification, 2011, the construction/physical operation activities relating to the projects have been started at the sites. Such activities amount to violations under the Environment (Protection) Act, 1986/EIA Notification, 2006 CRZ Notification, 2011 (henceforth referred to as violations).
3. The cases for granting Environment Clearance/CRZ Clearance for such projects are at present being dealt with in terms of OM of even number dated 16.11.2010. Now, it has been decided in that in supersession of this OM, the

procedure henceforth stated in this OM will be followed while dealing with such cases.

4. The violations could come to the notice of the Ministry at various stages of processing of the proposals, i.e.:
   i. Processing the case in the Ministry before referring the same to the Expert Appraisal Committee (EAC) for TOR/Environment Clearance/CRZ Clearance;
   ii. During the deliberations in the EAC meeting and recorded as such in the minutes of the meeting; and;
   iii. Processing the case in the Ministry after the receipt of recommendations of the EAC but before granting TOR/Environment Clearance CRZ Clearance.
5. As soon as any case of violation comes/is brought to the notice of the Ministry EAC, the Ministry EAC will proceed to verify the veracity of the complaint through the concerned Regional Office of MoEF/State Government/CZMA. Of course, such a verification will not be required in case the Project Proponent does not contest the allegation of violation. Once the Ministry EAC is satisfied that it is a violation case, before proceeding any further in the matter, the following will need to be ensured in the matter:
   i. The matter relating to the violation will need to be put up by the Project Proponent to the Board of Directors of its Company or to the Managing Committee/CEO of the Society, Trust, partnership/individually owned concern for consideration of its environment related policy/plan of action as also a written commitment in the form of a formal resolution to be submitted to MoEF to ensure that violations will not be repeated. For this purpose, a time limit of 60 days will be given to the Project Proponent. In the meantime, the project will be delisted. In the eventuality of not having any response from the Project Proponent within the prescribed limit of 60 days, it will be presumed that it is no longer interested in pursuing the project further and the project file will be closed, whereafter the procedure will have to be initiated de novo by such Project Proponents.
   ii. The State Government concerned will need to initiate credible action on the violation by invoking powers under Section 19 of the Environment (Protection) Act, 1986 for taking necessary legal action under Section 15 of the Act for the period for which the violation has taken place and evidence provided to MoEF of the credible action taken.
   iii. The details of the Project Proponent and a copy of the commitment, etc., mentioned at (i) above will be put on the website of MoEF for information of all stakeholders.
6. Once action as per para 5 above has been taken, the concerned case will be dealt with and processed as per the prescribed procedure for dealing with cases for grant of TORs/Environment Clearance CRZ Clearance and appropriate recommendation made by the EAC/decision taken by the Ministry as per the merit of the case.
7. It may be clarified that the consideration of proposals for giving TORs Environment clearance/CRZ clearance for violation cases will not be a matter of right for the Project Proponent. In cases of serious violations, the Ministry reserves the right to outrightly reject such proposals and not consider the same at all.
8. The aforesaid procedure, as stated in para 4 to 7 above will apply mutatis mutandis to the cases handled at the State level by the State Environment Impact Assessment Authorities (SEIAAs)/State Level Expert Appraisal Committees (SEACs).

9. This issues with the approval of the competent authority."

This Office Memorandum deals with situations where violations have been committed by the Project Proponent and they have come to the notice of the MoEF at various stages of construction. It requires the Ministry to verify veracity of the complaint through the concerned regional office and once the Ministry is satisfied that it is a case of violation, then before proceeding any further, the steps contemplated under para 5 to 7 of this Office Memorandum would be taken. The two significant features of this Office Memorandum are that the Project Proponent is to file an undertaking to ensure that violations are not repeated and secondly it will not be a matter of right to the Project Proponent to claim Environmental Clearance and the MoEF can outrightly reject the proposal if it found the violations to be serious. Lastly, that the procedure under para 4 to 7, would apply *mutatis mutandis* to the cases handled by SEIAAs or SEACs. This was considered to be in conformity with the Notification of 2006.

61. Still another Office Memorandum was issued on 27th June, 2013 inserting sub-para 4 in para 5 of the Office Memorandum dated 12th December, 2012 which reads as under:

"3. In view of the above, it has been decided to insert the following as sub-para (iv) below sub-para (iii) of para 5 of the aforesaid OM dated 12.12.2012:

"(iv) Directions under Section 5 of the Environment (Protection) Act, 1986 will be issued by MoEF to the Project Proponent in respect of the violations and compliance of Project Proponent obtained to such directions especially with regard to:

(a) In case the project is at construction stage and the violation is on account of carrying out construction without valid EC/CRZ Clearance or in contravention of the conditions stated in the EC/CRZ Clearance, the construction activities will need to be suspended at the existing level till EC/CRZ Clearance is obtained or the required amendment to EC/CRZ Clearance is obtained.

(b) In case the project is in operation and the violation is on account of enhanced production beyond the capacity stated in the EC/CRZ Clearance, the production will need to be restricted to the capacity stated in the EC/CRZ Clearance till EC/CRZ Clearance is obtained for enhanced capacity. In case of operation without a valid EC/CRZ Clearance, the production will need to stop till the required EC/CRZ Clearance is obtained.

(c) In case the violation is on account of carrying out modernization of existing project and/or change in product-mix in an existing manufacturing unit, the status quo as existing prior to such modernization and/or change in product-mix will be maintained till the required EC/CRZ Clearance is obtained for the modernization and/or change in product-mix.

In case of any violation to aforesaid directions, legal action as per the provisions of the Environment (Protection) Act, 1986 will be taken against the Project Proponent and the case of TOR/EC/CRZ Clearance summarily rejected.

This issues with the approval of the competent authority."

62. Under the terms of Office Memorandum dated 12th December, 2012, the Ministry took upon itself the obligation for issuing directions under Section 5 of the Act of 1986 in each case, but subject to requirements of the impugned Office Memorandum. It may be noticed that such statutory power is specifically vested in the MoEF and the Office Memorandum could confer upon it no wider powers than the statutorily provided powers.

63. In this background thus, now we have to deal with the question as to in exercise of which power, executive, administrative and/or statutory, the impugned Office Memoranda have been issued by the MoEF?

64. Since the Office Memorandum of 16th November, 2010 stood superseded by the Office Memorandum of 12th December, 2012 which was further amended by the Office Memorandum of 27th June, 2013, the challenge in the present application, is thus, confined to later two Office Memoranda only. A bare reading of the above Office Memoranda clearly shows that the provisions of law under which the said two Office Memoranda have been issued are conspicuous by its very absence in the Office Memoranda. Of course, according to the stand taken by the MoEF, they have been in the exercise of its executive powers. As already noticed, this stand is partially supported by the private Respondents (Project Proponents) who have further added that these Office Memoranda are within the ambit of directions as contemplated under Section 3 and 5 of the Act of 1986. Refuting such contentions, the Applicant has submitted that it is an exercise of administrative power *simplicitor*.

65. There are three organs of the Government: the Legislature, the Executive and the Judiciary. Legislature enacts the laws, judiciary interprets the law and declares what the law is and the executive administers the law. In the present case, we are really not concerned with the scope of legislative and judicial powers. We have to only deal with the ambit and scope of executive or administrative powers exercisable by the Executive, under which the Office Memoranda have been issued. The Executive performs validated functions viz. to investigate, to prosecute, to prepare and to adopt schemes, issues and cancel licences. The Executive can also perform some delegated, legislative functions in relation to making rules, regulations, bylaws and fixation of prices etc. It may still exercise quasi-judicial powers to resolve disputes or fix penalties etc. Such functions have become the chief weapons in its administrative armoury. Functions performed by the Executive authorities can be classified into two different heads but the distinction among these is a very fine one. To state it with precision is very difficult. This distinction gets even finer when it comes to executive and administrative functions *simplicitor*. Even in the same proceedings, it is difficult that one act may be executive while other act or series thereof may be purely administrative yet such classification is essential for varied reasons. When the executive authority exercises quasi-judicial functions, it must follow the principle of natural justice. While this requirement need not be satisfied in the case of executive functions, though, different requirements like publication, laying on the table of the house may have to be complied with. In case of a pure administrative action, even this would not be necessary. Administrative function can be delegated and administrative decision can be challenged as being unreasonable. Thus, it is proper to determine under what type of function an action is taken by the authorities and in furtherance to exercise of what power. There could be circumstances where even a single function may be partly legislative, partly executive, partly judicial and even partly administrative. This difficulty in construing what kind of function it is, can be overcome by analysing the function and determining its character in each case. For instance, the function of the Wage Board may be held to be legislative if future role of conduct is to be prescribed. It may be held to be judicial if the dispute is as to the relative rights of the parties as they rest on past or present circumstances. But, if there are neither present rights asserted, nor a future rule of conduct prescribed, but merely a fact ascertained, necessary for the practical effectuation of admitted rights, it can be said to be an administrative act (*Australian Boot Trade Employees' Federation* v. *Whybrow & Co.*, (1910) 10 CLR 266 (317), *Express Newspaper (P) Ltd.* v. *Union of India*, AIR 1958 SC 578 (610).

66. The legislature enacts the legislation and that which the administration applies is administrative. Another way to look at it is by putting emphasis on the extent and applicability of law. Whereas legislative power is power to make rule for the subjects in general and for their prospective application, administrative power is applicable to such law to specific cases and to particular situations. Administration again would

normally indicate as to how the power should be exercised. Smith in 'Judicial Review of Administrative Action', (1980), states with elaboration the legal consequences that flow from the fundamental distinction between legislative and administrative actions:

1. "If an order is legislative in character, it has to be published in a certain manner, but it is not necessary if it is of an administrative nature.
2. If an order is legislative in character, the court will not issue a writ of certiorari to quash it, but if an order is an administrative order and the authority was required to act judicially, the court can quash it by issuing writ of certiorari.
3. Generally, subordinate legislation cannot be held invalid for unreasonableness, unless its unreasonableness is evidence of malafide or otherwise shows the abuse of power. But in case of unreasonable administrative order, the aggrieved party is entitled to a legal remedy.
4. Only in most exceptional circumstances can legislative power be sub delegated but administrative powers can be sub-delegated
5. Duty to give reasons applies to administrative orders but not to legislative orders."

67. The Supreme Court in the case of *Union of India (UOI)* v. *Cynamide India Ltd. etc.*, (1987) 2 SCC 720, summed up this fine distinction between legislative and administrative functions while observing that it was 'difficult in theory and impossible in practice', still, held that a legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases and an administrative act is the making and issuance of a specific direction or the application of a general rule to a particular case in accordance with the requirements of policy'; while questioning that it was a broad distinction, not necessarily always true. Sometimes administration and administrative adjudication may also be of general application and legislation of particular application only.

68. In the case of *Rai Sahib Ram Jawaya Kapur* v. *The State of Punjab*, AIR 1955 SC 549, the Court observed that it may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily, the executive power connotes the residue of governmental functions that remains after legislative and judicial functions are taken away. Referring to various judgments, Justice C.K. Thakkar in his book '*Administrative Law*', 2nd Edition, 2012, refers to the ingredients of administrative functions as follows:

1. "An administrative order is generally based on governmental policy or expediency.
2. In administrative decisions, there is no legal obligation to adopt a judicial approach to the questions to be decided, and decisions are usually subjective rather than objective.
3. An administrative authority is not bound by the rules of evidence and procedure unless the relevant statute specifically imposes such an obligation.
4. An administrative authority can take a decision in exercise of a statutory power or even in the absence of a statutory provision, provided such a decision or act does not contravene provision of law.
5. Administrative functions may be delegated and sub-delegated unless there is a specific bar or prohibition in the statute.
6. While taking a decision, an administrative authority may not only consider the evidence adduced by the parties to the dispute, but may also use its discretion.
7. An administrative authority is not always bound by the principles of natural justice unless the statute casts such duty on the authority, either expressly or by necessary implication or if it is required to act judicially.
8. An administrative order may be held to be invalid on ground of

unreasonableness.

9. An administrative action will not become a quasi-judicial action merely because it has to be performed after forming an opinion as to the existence of an objective fact.

10. The prerogative writ of certiorari and prohibition are not always available against administrative actions."

69. In the case of *Automotive Tyre Manufacturers Association* v. *The Designated Authority*, (2011) 2 SCC 258, the Supreme Court elucidated the factors for determining whether the function was administrative, quasi-judicial or otherwise. These factors are: the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. Besides this, it is a generally accepted principle of functioning of administrative authorities that guidelines should be provided for the rust exercise thereof and to prevent abuse of power and to ensure that it does not become a "new despotism". Various judgments of the Supreme Court, after enunciating the principles that control the application of these concepts, illustratively stated the cases of administrative function. For instances an order of preventive detention, an order setting up a Commission of enquiry, an order making or refusing to make a reference under the Industrial Dispute Act, 1947, an order granting or refusing sanction to prosecute public servant, an order of externment, power to issue licence or permit or even withdrawal from prosecution. Having examined the dimensions of the administrative actions of the State, now we will revert to the executive powers of the State. Subject to the provisions of the Constitution, the executive power of the Union extends to all matters in respect to which the Parliament has power to make laws, while the executive powers of the State extends to all matters in respect to which the State Legislature has power to make laws. This executive power of the Union or of the State, broadly speaking, is co-extensive and co-terminus with its respective legislative power (*G.V. Ramanaiah* v. *The Superintendent of Central Jail, Rajahmundry*, (1974) 3 SCC 531). Ordinarily, the executive power connotes the residue of Governmental functions that remain after legislative and judicial functions are taken away. The executive functions comprises both determination of policy as well as carrying it into execution (*Wharton's Law Lexicon*, 15th Edition, 2009). Since the governmental functions have increased, it is essential and inevitable for the Government to issue administrative instructions for the determination of policy and its uniform application. It is also a settled principle that these administrative instructions or regulations which have no statutory force, do not give rise to any legal right and can hardly be enforced in a Court of law against the administration. This is also not an absolute rule and is subject to certain exceptions. Administrative instructions in some cases confer a justifiable right in favour of an aggrieved party. The Executive power of the State is again of a very wide magnitude. In performance of the executive functions, public authorities issue orders which are not far from having a legislative colour and make decisions affecting the personal and proprietary rights of individuals which are quasi-judicial in character. In addition to these quasi-judicial and quasi-legislative functions, the executive has also been empowered by statute to exercise functions which are legislative and judicial in character, and in certain instances, powers are exercised which appear to partake at the same moment legislative, executive and judicial characteristics. The Supreme Court in the case of *Jayantilal Amritlal* v. *F.N. Rana*, AIR 1964 SC 648, held that even this generic executive power of the State emanates from the provisions under our Constitution. Chapter I of Part V of the Constitution refers itself to the Executive of the Union of India. Article 53(1) of the Constitution states that executive power of the Union shall be vested in the President and shall be exercised by him either directly or

through officers subordinate to him in accordance with this Constitution. Article 73 mandates that subject to the provisions of the Constitution, the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement. In terms of Article 77, all executive action of the Government of India shall be expressed to be taken in the name of the President. Further, Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in Rules. Once an order or instrument is authenticated in the prescribed manner, then it shall not be called in question on the ground that it is not an order or instrument made or executed by the President. The executive power of the State on the one hand is co-extensive with the respective legislative power, while, it can supplement the statute on the other hand. The executive power would take within its ambit the power of subordinate or delegated legislation. For instance, under an Act, the Central Government is empowered to frame regulations for effective implementation of an Act. This power can be exercised to supplement the provisions of the Act, i.e., the principle legislation or even for filling the gaps which appear in the main statute. However, the executive instructions or powers cannot be used beyond the power conferred by the main statute. The exercise of an executive power must have a source in law and should serve the ends of the principle Act. The executive power, where it is exercised generally with reference to Article 53 of the Constitution of India, must adhere to the constitutionally prescribed procedure.

70. Having dealt with the distinction between Legislative, Executive and Administrative Functions, generally, now, we would proceed to examine the specific contentions with reference to the impugned Office Memoranda.

71. First of all, we would deal with the contention whether the impugned Office Memoranda can be said to be issued under Section 5 of the Act of 1986? This question has to be answered in the negative for varied reasons. Firstly, it is not the case of the MoEF which has issued these Office Memoranda that they have been issued in exercise of the statutory powers vested in them under the provisions of Section 5 of the Act of 1986. Normally it is possible for a Court or a Tribunal to attach certain weightage to the author of the documentation in this regard. However, that cannot be the sole consideration in answering such a question. The Tribunal has to analyse the order or document on its own merit. It is true that Section 3 empowers the Central Government to take measures to protect and improve the quality of the environment and that such measures can be in respect of all or any of the matters stated under Clause (i) to (xiv) of Sub-section (2) of Section 3 of the Act of 1986. However, none of the matters stated therein cover the impugned Office Memoranda in question. Furthermore, these Office Memoranda cannot be said to form the measures taken for protecting or improving the quality of the environment. Similarly, Section 5 of the Act of 1986 empowers the Central Government to issue directions to any person, officer or any authority. Such directions could be issued in exercise of its powers, performance of its functions of the Central Government notwithstanding anything contained in any other law but subject to the provisions of this Act of 1986. These directions include the power to direct the closure, prohibition or regulation of any industry, operation or process. It can also direct stoppage or regulation of the supply of electricity or water or any other service. Under Rule 4 of the Rules of 1986, it is required that these directions shall be in writing, shall specify the nature of action to be taken and the time within which it shall be complied with etc. In terms of Sub-rule 3(a) of Rule 4, a notice of not less than 15 days is required to be served upon the person to whom the directions is proposed to be issued, clearly notifying such direction to him and giving him an opportunity to file objections, if any. In terms of Sub-Rule 3(b) and 4, it is required of the authority which proposes to issue direction for the stoppage or

regulation of industrial operation or process or disconnect amenities like water and electricity etc. to issue notice to the occupier to file objections and upon receipt of such objections to decide the same within 45 days thereof. Thus, right of hearing and compliance to principle of natural justice is mandatory except in terms of proviso to Sub-Rule 3(b) and Rule 5 wherein compliance to the principle of natural justice and hearing can be dispensed with by the Central Government, where it is of the opinion that there is likelihood of grave injury to the environment and it is not expedient to provide an opportunity to file objections against the proposed direction. The directions passed under Section 5 have to be in strict compliance to the procedure laid down under the Rules of 1986 and by considering all relevant factors as stated therein. It is nobody's case, not even that of the private Respondents, that such compliance to the Rules has been made by the MoEF. The measures and the directions as contemplated under the Act of 1986 can only be taken after following the prescribed procedure and for the purposes as contemplated in law. From the record, it is clear that neither of these ingredients are satisfied in the cases in hand. Nobody intended to invoke these provisions and none complied with the requirements of law. A bare reading of the impugned Office Memoranda clearly shows that they are beyond the purview and scope of either Section 3 or Section 5 of the Act of 1986. Some of the Respondents have even taken the argument that if the Office Memoranda are treated to be directions or measures issued under Section 5 of the Act of 1986, then an appeal would lie before the Tribunal in terms of Section 16(g) of the NGT Act, 2010 and which would in any case be barred by time as of today. Since we are of the considered view that these Office Memoranda have not been issued by the Ministry in exercise of its powers under Section 3 or 5 of the Act of 1986, the question of limitation as contemplated under Section 16 of the NGT Act would not at all arise. These Office Memoranda apparently do not show or make reference to the power in exercise of which they have been issued. They specifically mention the statutory requirement in terms of the Notification of 2006 to obtain *prior Environmental Clearance* before the commencement of any project or activity (emphasis supplied). What seems to have provoked the authorities to issue these Office Memoranda from time to time are the instances which have been brought to the notice of the Ministry, where, without obtaining required Clearances under the Notification of 2006, construction and/or physical operation/activities of the project had been started at the sites which amount to violation of the Act of 1986 and the Notification of 2006. These violations have come to the notice of the Ministry at different stages. These Office Memoranda presumably are intended to provide solution to this problem and save the proposed projects if they comply with the procedure prescribed under the Law. Rules of 1986 have been framed by the Central Government in exercise of its powers vested under Sections 6 and 25 of the Act of 1986 with a primary intention of carrying out purpose of the Act of 1986. The Notification of 2006 has been issued under the provisions of the Act of 1986 and the Rules of 1986, again with the object of imposing certain restrictions and prohibitions on new projects or activities or expansion or modernisation of existing projects or activities for protecting the environment. Thus, it is evident that the Notification of 2006 is in the nature of a subordinate, delegated legislation and is a statutory document having the force of law and is enacted to serve the ends of the provisions of a Parliamentary enactment i.e. the Act of 1986. The Office Memoranda do not refer to the source of their power under the provisions of any Act, Rules, or Notification. They even do not satisfy the basic ingredients of an order or instrument having been issued in compliance to the prescribed procedure under Articles 53, 73 and/or 77 of the Constitution. They have neither been issued nor authenticated by a person authorized by the President of India and in any case, they have not even been issued in the name of the President of India. The contention raised on behalf of MoEF and some of the private Respondents that the issuance of impugned Office Memoranda

is in exercise of the executive power, is therefore, not tenable. No documents have been placed on record to show that the ingredients of issuance of an executive order or exercise of executive power by the Union are satisfied in the present case.

72. It needs to be noticed at this stage that reference has also been made to Article 73 of the Constitution of India to contend that these Office Memoranda squarely fall within the executive power of the Union of India. This contention merits rejection. Even on the bare reading of Article 73 of the Constitution, the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The executive powers of the Union is co-extensive and co-terminus with legislative powers of the Parliament. In other words, exercise of executive power should have a direct reference to law under which it is being exercised. Certainly, it does not imply that the executive power of the State/Union cannot be exercised where the legislature has not enacted any law or that such power would be restricted only to that field, as held by the Supreme Court in the case of *Ram Jawaya Kapur* (supra). It is a settled principle of Constitutional jurisprudence that the entries in the Lists are merely fields of legislation. They identify the fields where the Union and the State Legislature or either of them would have the power to enact laws, individually or concurrently. Thus, every power exercisable by the Union or the State under the Constitution should be identifiable to the fields specified in the respective Lists or to any other law framed by the Competent Legislature.

73. We have already noticed that within the dimensions of the executive power, compliance to the constitutionally provided procedure would be a *sine qua non*, for it to have the force of law. In the case of *Gulf Goans Hotels Company Ltd.* v. *Union of India (UOI)*, (2014) 10 SCC 673, where the Supreme Court was dealing with the cases of demolition of properties in furtherance to the orders of demolition by the State authorities, it was held that a government policy to acquire the "force of law", need to confirm to a certain form possessed by other laws in force and encapsulate a mandate and disclose a specific purpose. In terms of Article 77, all executive action of the Government of India shall be expressed to be taken in the name of the President, as this Article provides the form in which the Executive must make and authenticate its orders and decision. The burden of showing compliance with this requirement would be on the Government and it is also essential that what is claimed to be a law must be notified or made public in order to bind the citizens. It may be noticed that this compliance in a given case could be substantial compliance as opposed to strict or absolute compliance. In fact, in the case of *State of Uttaranchal* v. *Sunil Kumar Vaish*, (2011) 8 SCC 670, the Supreme Court even held that unless an order is expressed in the name of the President or the Governor and is authenticated in the manner prescribed by the Rules, the same cannot be treated as an order on behalf of the Government. Similar approach was also adopted in the case of *Shanti Sports Club* v. *Union of India*, AIR 2010 SC 433. The Supreme Court had earlier also taken the similar view in the case of *Harla* v. *The State of Rajasthan*, AIR 1951 SC 467,

> "We hold that, in the absence of some specific law or custom to the contrary, a mere resolution of a Council of Ministers in the Jaipur State without further publication or promulgation would not be sufficient to make a law operative".

On the one hand, the impugned Office Memoranda do not specify the above essential ingredients for exercise of executive power. Thus, these Office Memoranda do not have any force of law to be treated as integral part of the Notification of 2006. While on the other hand, they lack purpose, are not supplementary to or even furthering the cause of the Notification of 2006. This aspect we shall discuss in detail shortly.

74. We have deliberated at some length above what is an administrative action and its illustrations. That which the legislature enacts is legislative' and that which the

administration applies is 'administrative'. Thus, an Act of Parliament is legislative' but an order of deportation based on such Act is 'administrative'. An administrative power is applicable to specific cases and particular situations. The executive functions comprise both, determination of policy as well as carrying it into execution. The other relevant considerations being, nature of power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. If we apply these tests in context of the orders already held to be administrative orders (supra) then, it would appear that the impugned Office Memoranda in substance are administrative orders. The impugned Office Memoranda have been issued under the umbrella of framing policy or taking policy decisions by the State. It is contended that these Office Memoranda are intended to implement the Notification of 2006. In exercise of its power under the Office Memoranda, Ministry has to take decisions in regard to examining each case and refer the same to the regulatory authority keeping in mind the stage at which the applications for grant of Environmental Clearance are moved. These Office Memoranda provide benefit to the class of the project or activity owners who have started construction in violation of the law i.e., without obtaining prior Environmental Clearance. They do not deal with any subject in general but are applicable to specific case and particular situations. Decisions of the authorities in furtherance to these Office Memoranda are bound to be subjective in contradistinction to being objective decisions.

75. The impugned Office Memoranda by and large satisfy the tests and ingredients of an administrative order. They admittedly have not been issued in exercise of subordinate or delegated legislation. Indisputably, they have also not been issued under Sections 3 and 5 of the Act of the 1986. Apparently, they are not in compliance with the Constitutional requirements and other ingredients of exercise of executive power *simplicitor*. The obvious result thereto would be that these Office Memoranda have been issued by the Ministry in exercise of its administrative power and have to be construed as administrative orders alone.

76. Having held that the Office Memoranda are orders issued by the Ministry in exercise of its administrative powers *simplicitor*, we would now proceed to examine the legality and correctness of these administrative orders. We may clarify that for discussion on this issue, it would not be of much relevance whether these Office Memoranda have been issued by the authorities in exercise of their administrative or executive powers.

77. The Office Memorandum dated 12th December, 2012 and as amended by Office Memorandum dated 27th June, 2013 as already noticed have been issued as consequences of certain instances brought to the notice of the Ministry, that projects and activities have been started at site without obtaining prior Environmental Clearance. These Office Memoranda intend to provide the procedure which has to be followed while dealing with such cases. In these Memoranda it is specifically noticed that obtaining prior Environmental Clearance before commencement of a project or activities is mandatory and that the Applicants have violated the law and these violations have come to the notice of the Ministry at various stages of processing the proposals. They further contemplate that these applications have to be proceeded in accordance with the procedure prescribed under these Office Memoranda. The stages referred to in the impugned Office Memoranda are: processing the case in the Ministry before referring to the Expert Appraisal Committee for ToR/Environmental Clearance/CRZ Clearance; during deliberations in the EAC meeting and during processing the case in the Ministry after receipt of the recommendations of the EAC, but before granting ToR/Environmental Clearance/CRZ Clearance. The authorities are expected to verify the veracity of the complaint unless Project Proponent does not

contest the allegations of violations. Before proceeding any further in the matter, the Project Proponent is required to submit a written commitment in the form of a resolution to ensure that violations will not be repeated. For this purpose, 60 days time limit has been given to the Project Proponent. The project would be de-listed in the meantime and in the event of default, it will be presumed that the Project Proponent is no longer interested in pursuing the project further and the project file will be closed. The State Government will then be required to initiate credible action under Section 19 of the Act of 1986 for taking legal action under Section 15 of the Act of 1986 in relation to the violations. Upon completion of such action, the concerned case will be dealt and proceeded with as per the prescribed procedure in dealing with the cases of ToR/Environmental Clearance/CRZ Clearance and appropriate recommendations to be made by EAC and decision to be taken by the Ministry on merits of the case. A kind of proviso is added to the Office Memorandum of 12th December, 2012 that in case of serious violations, the Ministry reserves the right to outrightly reject such proposal and not consider the same at all. The procedure prescribed under the Office Memorandum of 12th December, 2012 is to apply to cases pending before the SEIAAs and SEACs as well. Office Memorandum dated 27th June, 2013 terms the procedure under the Office Memorandum of 12th December, 2012 as 'guidelines' wherein it was provided that in cases of violation, the Project Proponent needs to be restrained, through appropriate directions under Section 5 of the Act of 1986 from carrying out any construction or operation activity without obtaining required Clearance. Vide the Office Memorandum of 27th June, 2013, sub para (iv) below sub para (iii) of para 5 of Office Memorandum dated 12th December, 2012, was inserted whereby the MoEF took on to itself the responsibility of issuing directions under Section 5 of the Act of 1986 for suspending the construction work if the project is operational, till grant of Clearance and if there is violation then, to take action as per the provisions of the Act of 1986. First and foremost, what these Office Memoranda seek to do is to condone the violations of law. These Office Memoranda deal only with the violators of law who have started the construction of their projects without obtaining prior Environmental Clearance, thus, in complete violation to the provisions of Act of 1986 and the Notification of 2006. The Office Memoranda which are stated to be guidelines as per their contents thus, have the effect of rendering an offence under law otiose, which is impermissible.

78. The Notification of 2006, under Para 2 mandates that certain project or activities which are listed in the Schedule shall require *prior Environmental Clearance* (emphasis supplied) from the concerned regulatory authorities, irrespective of whether they fall under Category 'A' or category 'B', as the case may be. Furthermore, Para 6 requires that *application seeking prior Environmental Clearance shall be made by the Project Proponent*, before commencing any construction activity or preparation of the land at the site by the Applicant (emphasis supplied). The Notification of 2006, a statutory document having the force of law has used the words '*prior Environmental Clearance*' 34 times and in addition thereto the expression 'prior' has been used six times to emphasise the need for obtaining Environmental Clearance prior to the commencement of any project activity. In other words, the Notification mandates the requirement of 'prior Environmental Clearance' without exception. However the entire mandate of prior Environmental Clearance has not only been diluted but completely rendered infructuous or ineffective by issuance of these impugned Office Memoranda. Therefore, the Office Memoranda stated to be 'guidelines', are potently destructive of the Notification of 2006. The Notification of 2006 requires application for prior Environmental Clearance to be submitted in Form 1 and supplementary Form 1A, if applicable, under Appendix I and II respectively. These forms require information, details and scientific analysis in relation to the project and site, prior to commencement of any activity of the project or even preparation of land. We have in

some detail above, noticed the requirements which are impossible of compliance once the project has been completed or substantial construction activity has been undertaken at the site in question. The impugned Office Memoranda do not even take note of this aspect and suffer from the infirmity of non-application of mind. Furthermore, the impugned Office Memoranda also offend the doctrine of "*Expressio unius est exclusion alterius*". Since the law provides performance of acts in a particular manner, the impugned Office Memoranda under the garb of 'guidelines', cannot be permitted to alter the same completely; being prejudicial to the principal law.

79. The impugned Office Memoranda do not even advert themselves to how the interest of the environment would be protected in cases where the projects have substantially progressed. It does not even refer as to how detrimental effects on environment would be taken care of, if the Project Proponent is permitted to file an application and claim Environmental Clearance after the project is at a very advanced stage of completion.

80. The impugned orders have been titled as 'Office Memorandum' and content of the orders captioned as 'guidelines' but in fact, are Office Memoranda which directly vary the substantive law in force. This has been adopted by the Ministry as a via-media to bypass the statutory requirements of law or for truncating the prescribed process of environmental protection, in terms of Notification of 2006. These Office Memoranda not only substantially amend or alter its application but even frustrate the requirements of the existing law. The impugned Office Memoranda vest in the authorities an unguided and unfettered discretion, both in regard to processing of application and in condonation of violation already committed by the Project Proponent. It is a very pertinent defect in terms of administrative law jurisprudence. An unguided and unreasonable discretion is bound to result in arbitrary exercise of powers. The MoEF being the controlling Ministry, all the expert bodies under it would be duty bound to carry out its directives even if it is unreasonable and unjustifiable. The expression 'serious violations', which will entitle the Ministry to outrightly reject an application, has neither been defined nor explained in the Office Memoranda. It is left in the absolute discretion of the Ministry as to which cases would be permitted as cases of serious violations and exclude others. The foundation of these Office Memoranda being that projects which are already under way and even have substantially progressed, can file an application for grant of Environmental Clearance, which has to be considered in accordance with these Office Memoranda, is an approach which is completely prohibited in terms of the Notification of 2006. The reservation of such unguided and absolute right by the Ministry in itself would necessarily have an element of discrimination and arbitrariness. The Office Memoranda do not spell out any rational or proper differential criteria for condonation or otherwise of the violations stated to have been committed by the Project Proponent.

81. The MoEF has issued three Office Memoranda dated 16th November, 2010, 12th December, 2012 and 27th June, 2013. All these Office Memoranda have the same feature, that is, instances of project commencement and their construction without obtaining Environmental Clearance, have been brought to the notice of the Ministry. There is no reason, much less a plausible justification recorded in any of these Office Memoranda, as to why such violations have been continued year after year. If the intention was to make it a one-time settlement, to serve the economic and public interest, then MoEF ought not to have issued any further extension to the Office Memorandum of 2010. Repetitive condonation of violation of law would only aim at encouraging violators to flout the law repeatedly. At this stage, we may also deal with the submission made on behalf of the Respondents that issuance of these Office Memoranda was justifiable on the basis of the doctrine of necessity or implied power. This submission is entirely ill-founded. Firstly, we fail to understand as to why the Ministry should take a step for condoning violation of law which was not within its

jurisdiction and secondly why should it prescribe a methodology contrary to law. Doctrine of necessity does not operate on the axis of illegality and violations. Even if the doctrine of necessity could have any application on the facts of the present case then, the necessity could be at best a onetime scheme rather than providing a regulatory and parallel mechanism in violation of the law in force, which would negate the substantive provisions of the law in fact. It is a settled canon of law that Government cannot issue directions which would encourage violation of law on the one hand and frustrate the object of law on the other. Mandatory principle of proper governance and even the law is that the authorities must enforce the law and ensure that the public respects the law. This is the fundamental essence of the Rule of Law. Even on this count, the Office Memoranda would amount to improper use of power, whether administrative or executive.

82. Upon proper analysis of the language of these Office Memoranda and the law (referred herein after), these Office Memoranda whether they be issued as administrative orders or issued in exercise of executive power, are not clarificatory or supplementary to the Notification of 2006. On the contrary, under no uncertain terms, they are supplanting the Notification of 2006 and are in complete derogation to the laws in force.

83. The Office Memoranda have been issued without proper application of mind, where casualty is the Notification of 2006 and the environment. The authorities have not even ventured to examine that these Office Memoranda which allegedly take recourse to the Notification of 2006 are incapable of complying with the procedure of Screening, Scoping, Public Consultation and Appraisal even substantially. For instance, site selection itself is a part of this process and if the construction has already been completed substantially or otherwise, this criteria and other relevant considerations would be rendered irrelevant. Similarly the purpose of public hearing is to hear objections of the public at large in relation to all facets of the proposed project including site selection, its impact on environment, on their way of life and what directions are required to be issued to protect the environment and adjacent inhabitation or agricultural activities if any before any activity of the project is undertaken. All these requirements would be rendered otiose and irrelevant. Thus, even if the two most important aspects of the Notification of 2006 would not be complied with still the Office Memoranda would contemplate issuance of Environmental Clearance to these projects. This brings to the surface that the Ministry has not exercised its jurisdiction, even if vested in it, in accordance with law. The above are the few patent and serious infirmities in the Office Memoranda. An attempt is made to save them and their legality under the shelter of exercise of executive power. Certainly, the executive power of the Government is very wide. We have already dealt with the executive power by the State at some length above. Even if these instructions or orders are deemed to have been issued in exercise of executive power, even then, they have to be supplemental to and not to supplant, the law.

84. In the case of *Union of India (UOI)* v. *K.P. Joseph*, AIR 1978 SC 303, dealing with the question whether Respondent No. 1 in that case was entitled to the benefit of ex-military personnel on re-employment, in view of the administrative instructions that had been issued in absence of rules framed under Article 309 of the Constitution, the Supreme Court while confirming the judgment of the High Court of Mysore held as under:

> "9. Generally speaking, an administrative Order confers no justiciable right, but this rule, like all other general rules, is subject to exceptions. This Court has held in *Sant Ram Sharma* v. *State of Rajasthan*, (1968) II LLJ 830 SC that although Government cannot supersede statutory rules by administrative instructions, yet, if the rules framed under Article 309 of the Constitution are silent on any particular

point, the Government can fill up gaps and supplement the rules and issue instructions not inconsistent with the rules already framed and these instructions will govern the conditions of service."

85. The Supreme Court had also taken a similar view in the case of *Sant Ram Sharma* v. *State of Rajasthan*, AIR 1967 SC 1910, where the Court clearly held that Government cannot amend or supersede statutory rules by administrative instructions, but, if the rules are silent on any particular point, the Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed. Similarly, in the case of *M. Srinivasa Prasad* v. *The Comptroller and Auditor General of India*, (2007) 10 SCC 246, the Supreme Court held that if the statutory rules in force are absent or are silent on an particular aspect, then, executive orders can fill up such lacunas. The administrative instructions would normally have no force of law and would relate to matters procedural in nature, without affecting substantive rights or obligations.

86. The executive instructions too cannot go beyond the executive power, which can also not be beyond the statutory provisions under which they are exercised. Furthermore, such instructions should not be vague or uncertain and must provide proper guidelines. By executive instructions, the authority issuing them cannot open new heads. The executive instructions within these confines should be issued only when there are no statutory provisions on the subject. They would also be issued to supplement statutory provisions, to ensure their proper application. In the case of *Indra Sawhney etc.* v. *Union of India, etc.*, 1992 Supp (3) SCC 217, Supreme Court mandated that such propositions are unexceptionable and executive instructions which go contrary to statutory provisions or the rules under Article 309 or any other statutory rules, shall not be operative to the extent they are contrary to the statutory provisions or rules. In the case of *M.C. Mehta* v. *Union of India (UOI)*, (Supra), not only that the Court reiterated these principles but even questioned MoEF's intent to legalise the commencement or continuance of mining activity without compliance to the stipulations of the Notification of 2006. However, it was observed that in any case, a statutory notification cannot be notified by issuance of circular. Such actions demonstrate non-sensitivity of MoEF to the principles of sustainable development and the object behind the issuance of the notification.

These principles would be equally applicable to the exercise of administrative power either by issuance of guidelines or Office Memoranda. A Bench of this Tribunal while dealing somewhat similar situation in the case of *Himmat Singh Shekhawat* v. *State of Rajasthan*, 2015 All (I) NGT Reporter (1) (Delhi) 44 held as under:

"58. This power to issue guidelines is not a general power but is a specific power with inbuilt limitations. The limitations are that, such guidelines would alone be for the purposes of categorizing upon scrutiny of applications, projects that would fall under Category B1' and 'B2' respectively with specific exclusion of the projects specified under Item 8(b) of the Schedule. Restrictive power to issue guidelines, is further illustrated, by the fact that Clause 2 of the Notification of 2006 does not contemplate any such categorization except projects falling under Category 'A' and 'B' only. The purpose appears to be that the power of State Level Appraisal Committees to bifurcate projects into 'B1' and 'B2' categories respectively should not be unguided and unchecked. Prescription of such guidelines could be done by issuance of appropriate Office Memorandum or orders as the power to issue such guidelines has been vested in MoEF under the statutory provisions. But the greater part of such Office Order or Office Memorandum should be such that it would not vary the content or be contrary to the statutory provisions which are in place by virtue of enacting such provisions either by primarily legislative or delegated legislative power.

59. It is a settled principle that legislature can only delegate to an outside body subordinate or ancillary legislative power for carrying out a policy of the act. The body to whom such power is delegated is required to act strictly within the framework of such delegated powers. Such power is incidental to the exercise of all powers in as much as it is necessary to delegate for the proper discharge of all the public duties. It is because the body constituted should act in the manner indicated in law and should exercise its discretion by following the procedure therein itself or by such delegation as is permissible. Unlike the situation the judges are not allowed to surrender their judgments to others. The legislature and executive can delegate powers within the framework of law. It is an axiom of Constitutional law that representative legislative bodies are given the legislative powers because the representative Government vested in the persons chosen to exercise the power of voting taxes and enacting laws which is the most important and sacred trust known to civil Government. The Delegation has its own restrictions. For instance, the legislature cannot delegate its functions of laying down legislative policy in respect of a measure and its formulation as a rule of conduct. A memorandum which is nothing but administrative order or instruction cannot amend or supersede the Statutory Rules adding something therein which would specifically alter the content and character of the Notification itself. It has been consistently reiterated with approval by the Hon'ble Supreme Court that administrative practice/administrative order cannot supersede or override the statutory rule of Notification and it is stated to be a well settled proposition of law.

The delegated power is primarily for carrying out the purposes of the Act and this power could hardly be exercised to bring into existence a substantive right or obligation or disabilities not contemplated by the provisions of the Act or the primary Notification. A Constitution Bench of the Hon'ble Supreme Court in the case of *Sant Ram* v. *State of Rajasthan*, AIR 1965 SC 1910, while dealing with the scope of executive instructions held that instructions can be issued only to supplement the statutory rules and not to supplant it. Such instructions should be subservient to the statutory provisions. They would have a binding effect provided the same has been issued to fill up the gaps between the statutory provisions and are not inconsistent with the said provisions. (Reference in regard to the above can be made *In Re: The Delhi Laws Act, 1912*, AIR 1951 SC 332, *P.D. Aggarwal* v. *State of U.P.*, (1987) 3 SCC 622, *Ram Sharma* v. *State of Rajasthan*, (1968) I ILLJ 830 SC, *Mahender Lal Jaine* v. *State of Uttar Pradesh*, (1963) Supp. 1 SCR 912, *Naga People's Movement of Human Rights* v. *Union of India*, AIR 1998 SC 431).

60. In the case before the Tribunal, specific challenge has been raised to the Office Memorandum dated 24th December, 2013 on the ground that it violates the above stated principles, in as much as by an Office Memorandum, guidelines for 'B1', 'B2' categories cannot be provided and thus, it runs contra to the statutory provisions. We may also notice here that vide this memorandum, besides providing guidelines for categorization of B1', 'B2' projects under Clause (iii) of paragraph 2, MoEF has taken a decision that river sand mining project with mine lease area of less than 5 hectares may not be considered for grant of Environmental Clearance and river sand mining projects with mining lease areas of equal or more than 5 hectares but less than 25 hectares will be categorized 'B2', that too subject to the restrictions stated in that Office Memorandum. Though, the Applicants have primarily raised a challenge in regard to the former only, but bare reading of the Notification has brought before us the question in regard to the latter as well. Dealing with the former challenge afore-noticed, it is clear that Clause 7 of the Notification of 2006 provides for further categorization of projects falling under Category 'B' into 'B1' and 'B2'. Though Clause 2 of the said Notification does not contemplate any classification other than 'A' and 'B', but, there is no challenge raised before us to

the Notification of 2006 and we see no reason to go into that aspect. The Notification of 2006 *ex facie* permits classification of Category 'B' projects and that discretion has been vested in State Level Expert Appraisal Committee, which, upon scrutiny of the applications has to take the decision. This discretion vested in the Committee is ought to be controlled by the issuance of guidelines by MoEF. MoEF had issued two guidelines, one on 24th June, 2013 and the other on 24th December, 2013 in relation to further classification and criteria which is to be adopted in that regard. Since the Office Memorandum dated 24th June, 2013, only relates to brick earth and ordinary earth and as per that Office Memorandum, such projects where the excavation area was less than 5 hectares were to be categorized as 'B2' projects, subject to the guidelines stated therein they were to be screened in accordance with the Notification of 2006. Under Paragraph 4(b) of this Memorandum, restrictions were laid down prohibiting any excavation of brick earth or ordinary earth within one km of national parks and wild life sanctuaries as well as it intended to elaborate the cluster situation. If the periphery of one borrow area is less than 500 m from the periphery of another borrow area and the total borrow area equals or exceeds 5 hectares, the activity shall become Category 'B1' project in terms of the Notification of 2006 and such activity will be permitted only if the Environmental Clearance has been obtained in respect of the cluster. If we examine these two Office Memoranda in the light of the well settled legal principles that we have referred above, partially both these Office Memoranda cannot stand scrutiny of law. As far as guidelines or instructions in relation to classification of projects falling under Category 'B' into B1' and 'B2' is concerned, the exercise of such power would be saved on the strength of Clause 7(1) of the Notification of 2006 because it is an Office Memorandum which provides guidelines for exercise of discretion by the State Level Expert Committee for such categorization. Thus, it is an exercise of executive power contemplated under the Notification of 2006. Hence the contention of the Applicant on that behalf cannot be accepted and deserves to be rejected. However, in so far as the Office Memorandum dated 24th June, 2013 placing a prohibition under paragraph 4(b)(i) is concerned, it apparently is beyond the scope of such guidelines. Prohibition of carrying on of mining activity or excavation activity which is otherwise permitted by the Notification of 2006 cannot be done by an Office Order, because it would apparently run contra to the provisions of Notification of 2006. In other words, such restriction is not only beyond the scope of the power vested in MoEF but in fact imposition of absolute restriction in exercise of delegated power is not permissible. Similarly, the Office Memorandum dated 24th December, 2013 in so far as it declares that river sand mining of a lease area of less than 5 hectares would not be considered for grant of Environmental Clearance is again violative of the above settled principles. No such restriction has been placed under the Notification of 2006 or under the provisions of the Act and the Rules of 1986. The executive therefore, cannot take away the right which is impermissible under the principle or subordinate legislation. Of course, part of the same Paragraph 2(iii), in so far as it categorizes 'B2' projects, covering the mine lease area equal to or more than 5 hectares but less than 25 hectares is concerned, the same cannot be faulted in view of the fact that it only provides a criteria or a guiding factor for determining the categorization of projects. It neither vests any substantive right, nor any obligation in relation to any matter that is not squarely or effectively covered under the Notification. This only furthers the cause of fair classification of projects, which is the primary purpose of the Notification. For these reasons, we quash paragraph 4(b)(i) of the Office Memorandum dated 24th June 2013 and part of paragraph 2(iii) in so far as it prohibits grant of Environmental Clearance to the mine area of less than 5 hectares as being violative of the Notification of 2006 and the Rules of 1986. The MoEF has no jurisdiction in exercise of its executive power to

issue such prohibitions, impose restrictions and/or create substantive rights and obligations. It *ex facie* is not only in excess of powers conferred upon them, but, is also in violation of the Notification of 2006. As already noticed, this Notification has been issued by MoEF in exercise of powers conferred upon it under Clause 5 of sub section 2 of section 3 of the Act of 1986 read with sub rule 4 of rule 5 of the Rules of 1986. Vide this Notification, the Central Government substituted item no. 1(a) and entries relating thereto. A Clause stating that the projects relating to non-coal mine lease and where the mining area was less than 50 hectares equal or more than 5 hectares was to be treated as Category 'B' projects, in addition to that, the minor mineral lease projects, where the mine lease area was less than 50 hectares, were also to be treated as Category 'B' projects, also, the general conditions with provisos were also substituted. It is significant to note here that the Notification of 2006 had been amended by the Central Government by issuing a Notification dated 1st December, 2009 in exercise of its delegated legislative powers. While issuing this Notification, the Central Government had followed the procedure prescribed under Sub Rule 2 and 3 of Rule 5 of Rules of 1986. It had invited objections from the public and considered those objections as is evident from the very recital of the Notification where it recorded "and where as all objection and suggestions received in response to above mentioned draft Notification have been duly considered by the Central Government……." and then it published the final Notification. Vide the Notification dated 1st December, 2009, the Central Government had substituted item no. 1(a) and the entries relating thereto of the Schedule to the Notification of 2006 besides making other amendments as well in different entries. However, while making further amendments vide Notification dated 9th September, 2013, the Central Government did not follow the prescribed procedure under Rule 5. On the contrary it substantially altered, and in fact substituted, as well as made additions of a substantial nature in Clause 4 and Clause 5 of the Notification of 2006, where, for the first time, it added minor mineral mine leases of less than 50 hectares, and also added 'general conditions to apply except for the projects where the area was less than 5 hectares in relation to minor mineral lease' and provisos thereto. The period for applying for renewal of mine lease of one year was changed to two years under the Notification dated 9th September, 2013."

87. There could be a case of executive instructions being derogatory to the principal statute or a statutory notification, still there could be cases of executive instructions being *ultra vires* or violative of the statutory notification and still further there could be cases of conflict between the two. In either of them, the Court have not tilted in favour of sustaining such executive instructions. In the case of *D.D.A.* v. *Joginder S. Monga*, (2004) 2 SCC 297, the Supreme Court held that only in a case where a conflict arises between a statute and an executive instruction, indisputably, the former will prevail over the latter. Executive instructions can supplement a statute, but they cannot run contrary to statutory provisions or whittle down their effect. In other words, executive instruction which is in conflict of and which whittles down the effect of the main Act would be liable to be struck down. When an executive instruction is beyond the power of the authority issuing the same, it would be *ultra vires* and whenever the instruction is found to be beyond the inherent jurisdiction, it would be wholly void. The delegatee can act only within the scope of delegation. The limitations are all with regard to the substance, procedure and form.

88. Another contention raised on behalf of the Respondent while relying upon the judgment of Supreme Court in the case of *Vineet Narain* v. *Union of India (UOI)*, (1998) 1 SCC 226 and other cases, is that executive instructions are enforceable if they do not change the essentials of law. This contention cannot be accepted for reasons that are recorded in this part of the Judgment. By whatever nomenclature it is addressed, whether as executive instructions, policy decision or merely Office

Memoranda issued in exercise of administrative power, their infirmities and lacunas of law would not alter. Favour of constitutionality is to be construed for such executive instructions. It is also the contention that these instructions do not dilute the effect of law but make it more rigorous. Furthermore, it being a policy decision of the MoEF, the Tribunal should not interfere in it. We are also unable to appreciate as to how these Office Memoranda fill up the gaps in the Notification of 2006. An instrument which provides for disobedience of law and indiscriminately condones the violations of the substantive law in force, it cannot be termed as an instrument made to fill up the gaps. It would be an administrative order contrary to the statutory provisions. In fact, issuance of such kind of orders received judicial causticism and was deprecated by the Supreme Court in the case of *M.C. Mehta* (supra).

89. The impugned Office Memoranda are not only in conflict with the Notification of 2006, but in fact run contra thereto. What is not only intended but in fact is prohibited to be done, is being permitted by the impugned Office Memoranda. They have been issued without reference to any power or source of law and are neither pronounced nor authenticated in the name of the prescribed executive authority. Besides this, we have already noticed in great detail the various infirmities and defects from which these Office Memoranda suffer in fact and in law. This being the position of law in relation to issuance of executive instructions in exercise of executive power or delegated legislation, these Office Memoranda having been issued in exercise of administrative power, in any case, cannot withstand the legal scrutiny and resultantly, would be liable to be quashed.

Discussion on Issue No. 3:

3. Whether this Tribunal has no jurisdiction to quash both the impugned Office Memoranda?

90. Except the intervener Applicants namely M/s SPR and RG Constructions and M/s Dugar, none of the Respondents have raised any objection to the jurisdiction of the Tribunal and competence of the Tribunal to deal with impugned Office Memoranda in accordance with law. According to these Project Proponents, this Tribunal has no power or jurisdiction to quash the Office Memoranda; they having been issued in exercise of the Executive Power of the Union and forming a part of a policy decision. In support of their contention, they relied upon the judgment of the Supreme Court in the case of *Madras Bar Association* v. *Union of India*, (2014) 10 SCC 1 and *Union of India (UOI)* v. *R. Gandhi, President, Madras Bar Association*, (2010) 11 SCC 1. On the other hand, the Applicants have primarily contended in the main application that the impugned Office Memoranda are administrative orders and would be subject to merit review by the Tribunal and such a situation would not alter even if it was in exercise of Executive Power of the Union/State. This Tribunal has been vested with Original, Appellate and Special jurisdiction in regard to directing payment of compensation for damage to and for restitution and restoration of the environment. The legislature in its wisdom worded the provisions relating to the jurisdiction of the Tribunal (Sections 14 to 17 of the Act of 2010) very widely, and with a clear intent to provide this Tribunal with jurisdiction of a very wide magnitude. Upon reading the various provisions of the Act of 2010 cumulatively and in light of the underlying scheme of the Act of 2010, including the definition of 'environment' in terms of Section 2(c) of the Act of 2010, it is quite clear that this Tribunal is having all the trappings of a Court and is conferred with the twin powers of judicial as well as merit review. There is no provision in the Act of 2010 which curtails the jurisdiction of the Tribunal to examine the validity and correctness of a delegated legislation and/or administrative or executive order passed by the Government including any of its instrumentalities or authorities. The fundamental principle for invoking the jurisdiction of this Tribunal is that, the question raised should be a substantial question relating to environment and should arise out of the implementation of the enactments specified in Schedule I of the Act of 2010. It

could even relate to enforcement of any legal right relating to environment with regard to these enactments. Delegated or subordinate legislation, executive orders and/or administrative orders in so far as they relate to the implementation of the Scheduled Acts would be open to challenge before the Tribunal and hardly any argument can be raised that the documents like Office Memoranda would not be subject to judicial scrutiny before the Tribunal.

In fact, such an argument that this Tribunal would not have jurisdiction to examine legality and correctness of such Office Memorandum is without substance and in fact should not detain us any further, in view of the judgment of the five Member Bench of this Tribunal in the case of *Wilfred J.* v. *Ministry of Environment & Forests*, 2014 ALL (I) NGT REPORTER (2) (DELHI) 137, where this Tribunal was concerned with a question whether this Tribunal being a creation of a statute is not vested with the powers of judicial review, so as to examine the constitutional validity/vires of such instruments as it would be tantamount to enlarging the jurisdiction of this Tribunal. We may notice that the Tribunal deliberated on the issue at some length and also did a comparative study of the various Acts like Central Administrative Tribunal (CAT), TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL (TDSAT), Armed Forces Tribunal on the one hand and Act of 2010 on other hand. After referring to various judgments on the subject, Tribunal following the principles laid down by the Constitutional Bench of the Supreme Court in *L. Chandra Kumar* v. *Union of India*, (1997) 3 SCC 261 held as under:

> "85. The Courts and Tribunals that are engaged in judicial functions dispensing justice to the public at large are expected to have powers which are necessary to perform its basic functions. As already noticed, unless there is a specific exclusion, such normal powers stated to be inherent in its functioning. The Supreme Court in the case of *Grindlays Bank Ltd.* v. *Central Government Industrial Tribunal*, AIR 1981 SC 606 while dealing with the powers of the Tribunal in relation to setting aside *ex parte* award in absence of any such power and the award which has become enforceable as a result of its being published rejecting the contention that the Tribunal had become *functus officio*, Court held as under:
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> > "We are of the opinion that the Tribunal had the power to pass the impugned order if it thought fit in the interest of justice. It is true that there is no express provision in the Act or the rules framed thereunder giving the Tribunal jurisdiction to do so. But it is a well-known rule of statutory construction that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. In a case of this nature, we are of the view that the Tribunal should be considered as invested with such incidental or ancillary powers unless there is any indication in the statute to the contrary. We do not find any such statutory prohibition. On the other hand, there are indications to the contrary."
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> 86. From the above, it is clear that ancillary or incidentally powers which are necessary to discharge its functions effectively for the purpose of doing justice between the parties should be considered to be endowed. If the power of judicial review in its limited scope is not expected to be endowed upon the Tribunal then majority of the cases wherein Orders, Circulars, Notifications issued in exercise of subordinate legislation are challenged could not be fully and completely decided by the Tribunal, though they exclusively fall in the domain of the Tribunal.
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> 87. Another very important aspect that cannot be overlooked by the Tribunal is that Article 226 of the Constitution of India is a discretionary jurisdiction to be exercised by the High Courts. It does not give an absolute right to a person. For variety of reasons, the High Court may decline to entertain a petition in exercise of its powers

under Article 226 of the Constitution, while the NGT Act gives a statutory right to an Applicant, aggrieved person or any person to approach the Tribunal in all matters relating to Acts specified in Schedule I of the NGT Act. It is not a discretionary jurisdiction like under Article 226 of the Constitution of India.

88. On a comparative analysis of various provisions of the different Acts afore-stated, it is evident that power, jurisdiction, judicial independence, exclusion of jurisdiction and other determinative factors prescribed under the NGT Act are of wide connotation and are free of restrictions. Sections 14, 15 and 16 read co-jointly give three different jurisdictions to the Tribunal over all disputes and appeals relating to various fields of environment. The jurisdiction is exercisable in relation to the matters arising from any or all of the Scheduled Acts. Examined objectively, the provisions of the NGT Act are more akin to the provisions of the CAT Act, in contradistinction to the provisions of the TDSAT. The various features and aspects of the NGT Act that we have discussed above would bring the case before the Tribunal within the ambit of *L. Chandra Kumar case* (supra), as opposed to the case being covered by *BSNL case* (supra). We have already dealt above, in some elaboration, the aspect as to how the cases relied upon by the Respondents do not apply to the facts of the present case, keeping in view the provisions and the legislative scheme of the referred Acts and various judicial pronouncements. At the cost of repetition, we may record here that the language of the various provisions of the NGT Act by necessary implication gives power of judicial review to the Tribunal. There is no specific or even by necessary implication exclusion of such power indicated in any of the provisions. Furthermore, in the scheme of various environmental acts and if the object and purpose of such acts are to be achieved then the power of judicial review would have to be read into the provisions of the NGT Act. If the notifications issued under any of the Scheduled Acts, by virtue of the powers vested by subordinate or delegated legislation, are *ultra vires* the Act itself or are unconstitutional as they violate Articles 14 or 19 of the Constitution of India, then it has to be construed that the Tribunal is vested with the power of examining such notifications so as to completely and comprehensively decide the disputes, applications, appeals before it. Of course, the powers of the High Courts and the Supreme Court under Articles 226 and 32 of the Constitution of India have not been excluded under the provisions of the NGT Act, thus ensuring that the Tribunal performs supplemental functions and does not supplant the Higher Courts.

89. The Supreme Court in the case of *K.S. Venkatraman and Co.* v. *State of Madras*, (1966) 2 SCR 229, has stated the proposition that an authority or Tribunal constituted under an Act cannot, unless expressly so authorised, question the validity of the Act or any provisions thereof under which it is constituted. This is a sound principle and has been followed consistently. To put it in other words, a Tribunal or an authority constituted under an Act can even examine the validity of the provisions of the Act which created it, provided it is so expressly authorized by the Act itself. This Tribunal is not travelling into that realm of law, but is concerned with the validity of the notifications issued under the Acts other than the Act that created the National Green Tribunal. For this proposition, we have referred to various judgments above.

95. Reverting to the present case the CRZ Notification dated 19th February, 1991, which has been amended on 3rd of October, 2001, was issued in exercise of the powers conferred under Section 3(1) and Section (2)(v) of the Act of 1986 and Rule 5(3)(d) of the Rules of 1986, in declaring coastal stretches as coastal regulation zone and for regulating activities in the coastal regulation zone. The legislature has delegated legislative power to the Central Government to take all measures as it deems necessary or expedient for the purposes of protecting and improving quality of the environment and preventing controlling and abating environmental pollution.

This is a very wide power, which has been vested in the Central Government by delegated legislation under these provisions. In the exercise of its powers and with the object of satisfying the stated purpose, the Notification of 2011 has been issued under the power of delegated/subordinate legislation. Thus, there cannot be any doubt that the Notification of 2011 in the case before us, is a piece of delegated legislation and its legality, correctness or otherwise can be questioned only on the limited grounds afore-stated.

96. To bring out this distinction illustratively and more clearly, we may refer to the power of the MoEF (Central Government) to issue Environmental Clearance in terms of the provisions of the Act of 1986 read with the Regulations of 2006. The order granting or refusing Environmental Clearance to a Project Proponent, is not an act of subordinate or delegated legislation but clearly is an executive act. The Central Government in exercise of its executive powers, passes an order whether or not a given project should be granted Environmental Clearance for commencing its operation. In passing such orders, the Central Government does not act in furtherance to the powers vested in it by virtue of delegated legislation. It is merely an executive act relatable to the statutory powers vested in the Central Government. The CRZ Notification issued by the Central Government is therefore an act of delegated legislation while passing of an order of Environmental Clearance is an executive order. This view finds support from the judgment of the Delhi High Court in the case of *Utkarsh Mandal* v. *Union of India*, Writ Petition (civil) no. 9340/2009 which held that "grant of environmental clearance is an executive order which involves application of mind by the executive."

91. It is to be noticed at this stage that a Civil Appeal had been preferred before the Supreme Court of India against this Judgment in Civil Appeal No. 7884-7885 of 2014 titled as *Vizhinjam International Seaport Ltd.* v. *Wilfred J.* Hon'ble Supreme Court vide its order dated 21st January, 2015, stayed all further proceedings before the Tribunal in that case but specifically allowed Tribunal to continue its exercise of such powers. Order of the Hon'ble Supreme Court is reproduced below:

"Counter affidavit, if any, be filed by the Respondents within four weeks' time. Rejoinder affidavit, if any, in two weeks' time thereafter.

In the meantime, both the sides are permitted to file additional affidavit(s).

All further proceedings, qua the appellant(s) are stayed in Appeal Nos. 17 of 2014, 88 of 2014, 14 of 2014 and Original Application No. 74 of 2014 till further orders.

We clarify that the National Green Tribunal shall continue to exercise its powers in terms of Sections 14, 16 and 18 of the National Green Tribunal Act, 2010 in other cases."

92. We may also refer to another larger Bench Judgment of the Tribunal in the case of *Himmat Singh Shekhawat* v. *State of Rajasthan* (supra), where the Tribunal was dealing with a case challenging the validity of the Office Memoranda dated 9th September, 2013 and 24th December, 2013 issued by MoEF and other similar Office Memoranda issued the State of Rajasthan as well as other states as being violative of the provisions of the Act of 1986 and being in teeth of the Judgment of the Supreme Court in the case of *Deepak Kumar* v. *State of Haryana*, (2012) 4 SCC 629.

As stated above, the Tribunal had quashed the Notifications which were in violation to the Notification of 2006 and in teeth of the Judgment of the Supreme Court. It was held that the Notification of 2006 being a statutory law cannot be diluted, varied and frustrated in the name of supplying of gaps and/or framing the policy in interest of a group of people.

The Notification or orders whether issued by the principle or delegated authority, the principle that delegated legislation cannot be beyond the principle legislation

equally applies to both. As discussed above, the body to whom the power is delegated is required to act strictly within the framework of such delegated powers. It is incidental to the exercise of all powers in as much as it is necessary to delegate for the proper discharge of all the public duties. It is because the body constituted should act in the manner indicated in law and should exercise its discretion by following the procedure therein itself, it has to be ensured by the delegate authority that it exercises such power for carrying out the purpose and object of the Act and does not interferes with or offends the substantive provisions of the Act. The discipline and protocol prescribed in a statutory instrument ought not to be altered much less defeated.

93. In light of the above stated principles, now we would revert to the judgments of the Supreme Court relied upon by the Respondent nos. 7 and 8. Firstly, we are unable to comprehend as to how the said Respondents can derive any advantage from the two cited judgments. In the first case of *Union of India (UOI)* v. *R. Gandhi, President, Madras Bar Association* (supra) (2010 case), the Supreme Court was concerned with the constitutional validity of the provisions of the Company's Act, 1956. The Supreme Court stated that the legislature is presumed not to legislate contrary to the rule of law and therefore knows that where disputes are to be adjudicated by a judicial body other than Courts, its standard should approximately be the same as to what is expected of the main stream judiciary. Rule of law is possible only where there is an independent and impartial judiciary to render justice. Further, the Supreme Court while declining to declare the Act and constitution of the National Company Law Tribunal as unconstitutional in Para 120 directed the defects in parts 1B and 1C of the Act relating to appointment and functioning of the Tribunal to be corrected/amended and then be made operational. The Supreme Court affirmed the view of the High Court that the constitution of the two Tribunals and vesting in them the powers of judicial review was not unconstitutional. However, it was subject to the observations made by the Supreme Court in paragraph 120 of the judgment.

Coming to the second case of *Madras Bar Association* v. *Union of India (UOI)* (supra) (2014 case), where the Supreme Court was concerned with the question whether provisions of the National Tax Tribunal (NTT) Act, 2005 were *ultra vires* to provisions of Constitution including the ‘doctrine of separation of power’. The Supreme Court held that since Sections 5, 6, 7, 8 and 13 of the NTT Act have already been held as illegal and unconstitutional, therefore the remaining provisions of the Act are automatically rendered otiose to the extent indicated in paras 136 and 137 of the Judgment. The Hon'ble Apex Court made the following conclusions:

> “134. (i) Parliament has the power to enact legislation, and to vest adjudicatory functions, earlier vested in the High Court, with an alternative court/tribunal. Exercise of such power by the Parliament would not per se violate the “basic structure” of the Constitution.
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> 135. (ii) Recognized constitutional conventions pertaining to the Westminster model, do not debar the legislating authority from enacting legislation to vest adjudicatory functions, earlier vested in a superior court, with an alternative court/tribunal. Exercise of such power by the Parliament would per se not violate any constitutional convention.
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> 136. (iii) The “basic structure” of the Constitution will stand violated, if while enacting legislation pertaining to transfer of judicial power, Parliament does not ensure, that the newly created court/tribunal, conforms with the salient characteristics and standards, of the court sought to be substituted.
>
> 137. (iv) Constitutional conventions, pertaining to constitutions styled on the Westminster model, will also stand breached, if while enacting legislation, pertaining to transfer of judicial power, conventions and salient characteristics of the court sought to be replaced, are not incorporated in the court/tribunal sought to

be created.

138. (v) The prayer made in Writ Petition (C) No. 621 of 2007 is declined. Company Secretaries are held ineligible, for representing a party to an appeal before the NTT.

139. (vi) Examined on the touchstone of conclusions (iii) and (iv) above, Sections 5, 6, 7, 8 and 13 of the NTT Act (to the extent indicated hereinabove), are held to be unconstitutional. Since the aforesaid provisions, constitute the edifice of the NTT Act, and without these provisions the remaining provisions are rendered ineffective and inconsequential, the entire enactment is declared unconstitutional."

From the above dictum of the Supreme Court, it is clear that the Parliament has power to enact legislations and to vest adjudicatory functions in the Tribunals which were earlier vested in the High Court. *Per se*, this would not be violative of the basic structure of the Constitution, once the framers of law take care and ensure that the statutorily created courts/tribunals conform to the salient characteristics and standards of the courts under the mainstream justice dispensation system, i.e. judiciary. If they are breached, it would generate the results of violation of doctrine of basic structure of the Constitution.

94. Before the Tribunal, no contention of this dimension has been raised. As already stated, the Tribunal has been created by a statute with all requisite safeguards and has been vested with complete adjudicatory powers as required under the mainstream justice delivery system in our country. The impugned Office Memoranda have been issued in exercise of administrative power which is presumably exercised in furtherance to the powers vested in the Ministry under the Act of 1986 and/or Notification of 2006. These Office Memoranda have been issued for the purposes of 'implementation of Acts mentioned in the Schedule' (emphasis supplied). Thus, we see no reason for accepting the contention that this Tribunal has no jurisdiction to examine the legality or correctness of these Office Memoranda. Furthermore, except these two Respondents, none of the other parties to the *lis* has even touched upon this objection.

Discussion on Issue No. 4

4. Are the private Respondents entitled to claim any benefit on the strength of deeming provisions as contained in Para 8(iii) of the Notification of 2006 and if so, to what effect?

95. The submission on behalf of Respondent no. 7, 8 and 9 that they would be deemed to have been granted Environmental Clearance in relation to their projects on the strength of Para 8, of the Notification of 2006, can be bifurcated into two distinct classes. The first being with reference to the projects of Respondent no. 7 and 8 where the contention is that they had applied for obtaining Environmental Clearance for their project and the same had been recommended by the SEAC in its meeting dated 17th June, 2014 and 30th September, 2013 respectively. Despite such recommendation being in their favour, the SEIAA did not grant or refuse Environmental Clearance within 45 days of such recommendation as per Para 8(i) of the Notification of 2006. Therefore, as per Respondent 7 and 8 since the period of 45 days has lapsed, therefore, they would be entitled to the 'deemed sanction' of Environmental Clearance in terms of Para 8 of the Notification of 2006, the regulatory authority having failed to take any final view on the Project Proponent's application. It is their case that the 'deemed sanction' would follow in terms of Para 8(iii) and the view expressed by the SEAC would be deemed to have been accepted by the regulatory authority and therefore, the Applicant is entitled to be conveyed the said order in terms thereof.

The second class of contention would be with reference to the contention of Respondent no. 9 that it had applied for obtaining Environmental Clearance for its project in the year 2012, which application was re-filed in the year 2013. The SEIAA had failed to act within the time limit provided in Clause 8(i) of the Notification of

2006, i.e. 105 days. This failure on the part of the SEIAA would result in grant of Environmental Clearance in favour of the Project Proponent on the principle of 'deeming fiction'. It is the case of Respondent no. 9 that SEIAA had only responded after two years by communicating that the operation of the impugned Office Memoranda has been stayed by the National Green Tribunal and therefore their application for Environmental Clearance has been delisted till further order by the Tribunal.

96. Contrary to the above, the Applicant contends that there is nothing in Para 8 of the Notification of 2006, which is remotely suggestive of any deeming fiction. It is a provision that merely prescribes a period within which certain acts are required to be done without specifying any consequences thereof. Furthermore, none of the Respondents have filed applications with all the relevant documents as required under law. They have not even filed their applications for Environmental Clearance complete in all respects. They have played a fraud with law and in any case misrepresented facts before SEIAA. Even after filing the application for Environmental Clearance, they have violated their undertakings to SEIAA and carried on with the constructions of their projects. This firstly would disentitle them from claiming any relief on the premise of 'deeming fiction' contained under Para 8 of the Notification of 2006, and in any case their acts and deeds would vitiate their entire application for grant of Environmental Clearance. The effect of 'deeming fiction' would thus never accrue in their favour. Once the provisions of the Notification of 2006 are not strictly complied with, the question of invoking 'deeming fiction' in terms of Para 8 of the Notification of 2006 would not even arise as these Project Proponents have not complied with the basic ingredients of these provisions.

97. We must make a note of the fact that none of the other parties, including the MoEF or SEIAA had raised the plea of 'deeming fiction' either in their oral or written submissions. Before adverting to the discussion on merits of these contentions, it will be appropriate to refer to Para 8 of the Notification of 2006 which reads as under:

"8. Grant or Rejection of Prior Environmental Clearance (EC):

(i) The regulatory authority shall consider the recommendations of the EAC or SEAC concerned and convey its decision to the Applicant within forty five days of the receipt of the recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned or in other words within one hundred and five days of the receipt of the final Environment Impact Assessment Report, and where Environment Impact Assessment is not required, within one hundred and five days of the receipt of the complete application with requisite documents, except as provided below.

(ii) The regulatory authority shall normally accept the recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned. In cases where it disagrees with the recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned, the regulatory authority shall request reconsideration by the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned within forty five days of the receipt of the recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned while stating the reasons for the disagreement. An intimation of this decision shall be simultaneously conveyed to the Applicant. The Expert Appraisal Committee or State Level Expert Appraisal Committee concerned, in turn, shall consider the observations of the regulatory authority and furnish its views on the same within a further period of sixty days. The decision of the regulatory authority after considering the views of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned shall be final

and conveyed to the Applicant by the regulatory authority concerned within the next thirty days.

(iii) In the event that the decision of the regulatory authority is not communicated to the Applicant within the period specified in sub-paragraphs (i) or (ii) above, as applicable, the Applicant may proceed as if the environment clearance sought for has been granted or denied by the regulatory authority in terms of the final recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned."

98. First and foremost we have to examine what is a deeming fiction, when it operates and what are its ingredients? The expressions 'deemed' and 'deeming fiction' have been described in *P. Ramanatha Aiyar's Law Lexicon* 3rd edition, 2012 as follows:

"Deemed: The word 'deemed' is used to impose an artificial construction of a word or phrase in a statute that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is impossible. *St. Aubyn (L.M.)* v. *A.G.*, 1952 AC 15

Deeming fiction: A supposition of law that a thing is true without inquiring whether it be so or not, that it may have the effect of truth so far as it is consistent with justice.

The word "deemed" is used in various senses. Sometimes, it means "generally regarded". At other time, it signifies 'taken prima facie to be', while in other case, it means, 'taken conclusively'. Its various meanings are, - 'to deem' is 'to hold in belief, estimation or opinion'; to judge; adjudge; decide; considered to be; to have or to be of an opinion; to esteem; to suppose, to think, decide or believe on considerations."

99. Deeming fiction in a provision of a statute is indicative of the intention of the framers of law that they expect compliance to the requirements of the provision in a prescribed time frame. In some cases, it may prescribe proper consequences of default while in others it may be just require compliance *simplicitor*. When such words are used in a statute, they would provide the meaning for some matters or things and the way in which it is to be adopted. Furthermore, every provision of a statute is brought into by legislature with a particular object in mind; no word used by the legislature is therefore futile. Normally, such words should be interpreted with the aid of examining the whole scheme of an enactment, like the Notification of 2006 in the present case. Therefore, impact of the expression used under paragraph 8 should be examined and interpreted in light of the entire scheme of the Notification of 2006. The concept of 'deeming fiction' should be understood and interpreted by applying the principle of strict construction. Every requirement preceding the stage from which 'deeming fiction' operates must be specified in all respects and the principle of substantial compliance would have no application for determining the controversy in issue. A Bench of this Tribunal in the case of *Laxmi Suiting* v. *State of Rajasthan*, 2014 ALL (I) NGT REPORTER (2) DELHI 1, while dealing with the essentials and ingredients of 'deeming fiction' contained in Section 25(7) of the Water (Prevention and Control of Pollution) Act, 1974 (for short Water Act') held as under:

"33. A deeming provision creates a legal fiction. When a statute enacts that something shall be deemed to have been done, which in fact and in truth has not been done, the court is entitled and bound to ascertain for what purpose and between what persons the statutory fiction is to be resorted to. After ascertaining the purpose, full effect must be given to the statutory fiction and it should be carried out to its logical conclusion and to that end, it would be proper and even necessary to assume all those facts on which alone the fiction can operate. In other

words, the facts and requirements of the fiction must be satisfied. It has, in fact, also been held by some courts that the word 'deemed' when used in a statute establishes a conclusive or rebuttal presumption, depending upon the context.

34. Another legal principle of construing the legal fiction is that the law cannot be extended beyond its purpose. The Supreme Court, in the case of *Bengal Immunity Co. Ltd.* v. *State of Bihar* (AIR 1955 SC 661) stated that the legal fictions are created only for some definite purpose. A legal fiction is to be limited to that purpose for which it was created and should not be extended beyond that legitimate field. This approach was reiterated by the Supreme Court of India in the case of *Union of India* v. *Sampat Raj Dugar* (AIR 1992 SC 1417), wherein while dealing with Clause 5(3)(ii) of the Import (Control) Order, held that fiction created was for the proper implementation of the Import and Export (Control) Act, 1947 and to hold the licensee responsible for anything and everything that happens from the time of import till the goods are cleared through Customs and it was also held that the fiction cannot be employed to attribute ownership of imported goods to the importer in a case where he abandons them i.e. in a situation where the importer does not pay or receive the documents of title. Reference can also be made to the case of *Rajkumar Khurana* v. *State of NCT of Delhi* [(2009) 6 SCC 72].

35. Section 25(7) is intended to provide for the deemed fiction only where the law is complied with. The obvious reason for providing the deeming fiction under Section 25 of the Water Act is to ensure that the Board does not unduly withhold the application of an industry or a unit which has acted in accordance with the law and has moved the application for establishment/operation complete in all respects to the Board. The intention of the framers of law is to balance the relationship between the industry and the Board. It is not intended to give any undue or unlawful advantage to either of the two. The Board must not be able to frustrate the establishment of a project merely by delaying its decision on the application. It is also not intended to give any right to the industry to start its operation without obtaining consent of the Board or even making an application for that purpose. On the principle aforestated, it will not be permissible to stretch the provisions of Section 25 of the Water Act to give protection to the class of persons who are polluters and are even covered under the specified category contemplated under Section 25(5) supra.

36. In view of the above discussion, we are of the considered view that the Applicants are not entitled to the benefit or advantage of the deeming fiction of law contemplated under Section 25(7) of the Water Act inter alia but specifically for the following reasons:

(i) The Applicants did not submit applications, as contemplated under Section 25 (2) of the Water Act, complete in all respects to the Board."

In the above backdrop, let us now examine as to what is the object and essential features contained in Para 8 of the Notification of 2006. The Notification of 2006 has been issued by the Ministry in exercise of the statutory powers vested in it under Section 3 of the Act of 1986 and Rule 5 of the Rules of 1986. The Notification has been issued for the purposes of effectively ensuring environmental protection and for implementing the provisions contained in the Principal Act. The purpose is to ensure that the project and the activities as stated in the Schedule to the Notification of 2006 only and only commence construction after the Project Proponent has obtained the Environmental Clearance and that is why Para 2 of the Notification of 2006 requires prior Environmental Clearance from the regulatory authority. The whole scheme of the Notification of 2006 does not postulate any relaxation of this mandatory requirement. Thus, there is unquestionable and undisputable legal obligation upon the Project Proponent to seek prior Environmental Clearance before the commencement of any

activity in relation to the project in question. Such obligation is to be complied with as per Form 1 or supplementary Form 1A, as the case may be, to be submitted to the concerned regulatory authority. Form 1 has various columns which would be incapable of being filled and it will be impracticable, if not impossible, for an applicant to furnish the requisite data supported by appropriate analysis, as contemplated in the various columns of Form 1. Still further, the requirement on the part of the Project Proponent would be to have a complete EIA report on the basis of ToR which again is relatable to the application (Form 1) submitted by the Project Proponent. The authorities are neither required under any law nor under any memorandum of practice to conduct any inspection to verify the contents of the application or the physical situation existing on the site. The averments in the application are normally taken to be correct. It is evident from the record before us that Project Proponents have violated the law and because of their intentional violation and illegal acts of the private Respondents, compliance to the provisions of Notification of the 2006, has been rendered impracticable. The provisions of Para 8(i) to 8(iii) would come into play only when an Applicant complies with his statutory obligations and satisfies the essential requirements of this provision strictly. Indisputably these private Respondents have not done so. Until and unless a complete, comprehensive application in accordance with Form 1 and supplementary Form 1A as per Appendix I and II of the Notification of 2006 respectively, complete in all respects, is submitted, nothing contained in these provisions would come into play much less than it would enable the Project Proponents to claim any advantage or benefit on the plea of deemed fiction.

100. There is a definite process required to be followed, i.e., Screening, Scoping and Appraisal, in addition to Public Consultation, which would lead to passing of an order granting or refusing Environmental Clearance in terms of the Notification of 2006, in cases where SEAC has recommended grant or refusal of Environmental Clearance. The matter then has to be placed before the regulatory authority, i.e. SEIAA, which is empowered to alter such recommendation of SEAC, agree with the same or take completely contra view. However, where it proposes to disagree with the recommendations of SEAC, the SEAC would be required to give its views within 60 days from the date when the file was returned to it by SEIAA for reconsideration and intimation would also be given to the Project Proponent before it takes the final view. It is only when the requirements of Para 8(i) and (ii) have been complied with that any 'deeming fiction' in terms of Para 8(iii) can come into play. After the view of SEAC is considered by the regulatory authority, then it would convey its decision within next 30 days to the Project Proponent. It is only if the decision of the regulatory authority is not intimated that the Project Proponent may proceed as if the Environmental Clearance sought for has been granted or denied by the regulatory authority in terms of the final recommendations of the EAC or the SEAC as the case may be. The word 'deemed' has to be construed differently with reference to the provisions of the Act where it is so used. When a statute enacts that something shall be deemed to have been done, which in fact and in reality was not done, the court is entitled and in fact bound to ascertain for what purposes and between what persons such statutory fiction is to be resorted to and full effect must then be given to the statutory fiction and it should be carried to its logical conclusion. It has been time and again emphasized in various judgments of various courts, including that of the Supreme Court, that the Court has to ascertain the purpose of the legal fiction, as the term 'deemed' has been used for manifold purposes (Refer: *The State of Bombay* v. *Pandurang Vinayak Chaphalkar*, AIR 1953 SC 244 and *B.B. Chibber* v. *Anand Lok Cooperative GRP Housing Society Ltd.*, AIR 2001 Delhi 348). These Principles were also reiterated by the Supreme Court in the case of *Aneeta Hada* v. *Godfather Travels and Tours Pvt. Ltd.*, (2012) 5 SCC 661, where the Court held as under:

"29. In *The Bengal Immunity Company Ltd.* v. *State of Bihar*, AIR 1955 SC 661, the

majority in the Constitution Bench have opined that legal fictions are created only for some definite purpose."

101. 'Deeming fiction' as an established concept of law, has to be construed strictly and completely according to the facts and circumstances of a case. The dimension of its application would depend upon the language of the provisions where 'deeming fiction' is contained, its purpose and the object sought to be achieved under those provisions and the attendant circumstances of a particular case. It is neither possible nor permissible to prescribe a strait-jacket formula for applicability of this fiction in law. Upon a bare reading of Para 8(i) of the Notification 2006, it is evident that it does not contain any 'deeming fiction'. On the contrary, it only prescribes a time period within which the application for grant of Environmental Clearance should be decided and order is to be communicated to the Project Proponent. This clause does not provide for any consequences if the said decision was not taken within the prescribed time.

102. Para 8(i) provides that the regulatory authority has to convey its decision to the Applicant within 45 days of the receipt of the recommendation of the EAC or SEAC, as the case may be, or convey its decision within 105 days of the receipt of the final Environment Impact Assessment report. In case where Environment Impact Assessment is not required, then, within 105 days of the receipt of the *complete application with requisite document* (emphasis supplied). Para 8(ii) further provides that the regulatory authority shall normally accept the recommendation of the EAC or SEAC but wherever it decides to disagree with such recommendations, regulatory authority shall request reconsideration by the EAC or SEAC as the case may be, within 45 days of the receipt of the recommendations made to it, along with reason for its disagreement. Such intimation of decision is also to be conveyed to the Applicant.

103. EAC or SEAC as the case may be, in turn, shall consider the observations of the regulatory authority and furnish its views on the same within a further period of 60 days. Whereupon, the regulatory authority, after considering the view as furnished by the EAC or SEAC as the case may be, should take its decision, which shall be final and which would be conveyed to the Applicant within the next 30 days. In other words this entire exercise has to be completed within 135 days. Both these Paras i.e. 8(i) and 8 (ii) do not provide for any consequences of default. It is Para 8(iii) of the Notification of 2006, which provides for a kind of deeming fiction. In terms of this Para, if the decision of the regulatory authority is not communicated to the Applicant within the period specified in Para 8(i) & (ii), the Applicant may proceed as if the Environmental Clearance sought for has been granted or denied by the regulatory authority in terms of the final recommendations of the EAC or SEAC as the case may be. For the provision of Para 8(iii) to become effective the following conditions are required to be satisfied:—

(1) The application submitted by the Applicant to the SEIAA or the MoEF as the case may be, should be complete in all respects along with requisite documents.

(2) All the requisite proceedings contemplated under the Notification of 2006 must be completed, i.e. preparation of Terms of Reference (ToR) and submission of final EIA report.

(3) There should be unambiguous recommendation by the SEAC or EAC, for granting or refusing to grant the Environmental Clearance. After submission of the final EIA report (wherever required) and upon completing the procedure prescribed under Clause 8(ii), the matter should remain pending and the Applicant uninformed of the order, for the period of 105 days or 135 days, as the case may be.

104. It is only thereafter that the deeming fiction contained in Para 8(iii) can operate, but even then the clear mandate of the Legislature is that the Environmental

Clearance to a Project should not be deemed to have been granted to the Project Proponent. It will only be the recommendation of the EAC or SEAC that would enable the Applicant to proceed with his project in terms of the said recommendations. The limited operation of the deeming fiction under Para 8, is only the final recommendation of the EAC or the SEAC, as the case may be, that would operate by fiction of law as the order of the regulatory authority. It is because of the default on the part of the regulatory authority to pass the final order that results in invoking the principle of 'deeming fiction' as contemplated under Para 8(iii) of the Notification of 2006.

105. The Project Proponent has to mandatorily comply with the requirements of Para 8(i) and 8(ii) strictly. The principle of substantial compliance and/or inability on the part of the Applicant to file an application, complete in all respects, would not be a relevant consideration for invoking deeming fiction under Para 8(iii) of the 2006 Notification. Like in economics, other things must remain the same for application of any principle of economics. Similarly, filling up details of Form-A completely and accurately is as essential before consideration of an application for grant of Environmental Clearance.

106. Now, let us examine whether any of the three Project Proponents, claiming advantage of the principle of 'deeming fiction' have satisfied the above stated requirements of law or not. It must be noticed here that any Applicant who seeks benefit under the law of deeming fiction has to satisfy the twin requirements of firstly doing the acts/activities which are lawful and secondly, he must comply with requirements of the provisions *stricto sensu*. In the present case all the three Project Proponents i.e. Respondent nos. 7, 8 & 9 have commenced construction activity of their Projects without even submitting the application for grant of Environmental Clearance. The Project Proponents have obviously not submitted an application complete in all respects and with requisite documents. We have already noticed that there are large numbers of columns in Form 1 and supplementary Form 1A under the Notification of 2006, which these Project Proponents have not and in fact could not have filled appropriately in the corresponding forms to be accompanied with the application for Environmental Clearance. These columns require them to submit data and analysis reports, which it was not possible for them to provide, having already raised huge constructions. Furthermore, all the three Project Proponents were sent different letters from SEIAA, asking them for additional documents and information in respect of their projects which their respective applications lacked. In this regard reference could be made to letters dated 22nd August, 2013, 28th April, 2014, 20th June, 2014, 19th May, 2014 and 17th June, 2014 to SPR & RG, letters dated 21st June, 2013, 08th August, 2013 and 10th September, 2013 to M/s Dugar Housing and letter dated 21st May, 2013 to SAS Realtors Ltd. In the letters addressed by SEIAA to these Project Proponents acknowledging receipt of their application for Environmental Clearance, it had clearly indicated that this does not vest any right in the Project Proponent and they should not start or carry on any construction activity until and unless Environmental Clearance was granted to them. The Project Proponents were permitted only to clear the site and raise temporary structures for accommodation of labour along with basic facilities, as temporary arrangements. The Project Proponents violated the requirements of law and the undertaking given by them to SEIAA at the time of submission of application for Environmental Clearance. The Notification of 2006 contemplates prior Environmental Clearance to any structure or project activity. The Project Proponents having violated the law cannot be permitted to take advantage of their own wrong under the shelter of 'deeming fiction'. The conduct of these Project Proponents and serious violation of law committed by them *inter alia* disables them from claiming the benefit of 'deeming fiction' under Para 8 of the Notification of 2006 in the facts and circumstances of the case. Furthermore, it is not the case of anybody before us that SEAC had recommended the grant of Environmental Clearance to

Project Proponents unconditionally. The recommendation was conditional and it was not grant of Environmental Clearance in fact and in substance. The Project Proponent was to first satisfy the regulatory authority that it had fulfilled the conditions that had been imposed in the recommendation of the concerned authority. In other words, it was not a case of clear recommendation for grant of Environmental Clearance which could have become operative upon expiry of the prescribed period. In the case of *SPR & RG Construction Private Limited* (Respondent No. 7) the SEAC in its meeting on 30th September, 2013 decided to recommend proposal only for grant of standard ToR and to conduct EIA study in addition to compliance to the conditions which were to be incorporated in the ToR. One out of them related to NOC from Chief Controller of Explosives, adequacy feasibility and functionality of STP to be verified by the Tamil Nadu Pollution Control Board.

However, in its meeting on 17th June, 2014, the proposal of Respondent no. 7 was recommended for issue of Environmental Clearance, but only after considering the conditions imposed on the project. These conditions were as follows:—

1. "Project land area excluding landscape area not less than 15% shall be earmarked for green belt development.
2. The adequacy and feasibility of the STP proposed for the project shall be verified by Tamil Nadu Pollution Control Board as per the ToR condition.
3. Design of the rain water harvesting facility shall be done based on soil lithology study and the same shall be consulted with any Academic Institution.
4. Plan of solid waste management including disposal, in tie-up with local NGO shall be furnished.
5. Revised Budget Allocation (0.5% of the project outlay) & detailed work plan for the CSR Activities shall be furnished in an AFFIDAVIT Form."

107. There is nothing on record to show and is not even the case of the Project Proponent that the above conditions have been complied with and the Authorities referred herein further confirm noncompliance thereto. Thus, there was no unambiguous and unequivocal grant of Environmental Clearance recommendation to the Regulatory Authority by the SEAC.

From the above discussion it is clear that none of the Project Proponents satisfied the basic essentials or requirements of Para 8 of the Notification of 2006. Non-compliance to law, intentional violation of law and further, the illegal conduct of the Project Proponent would disentitle them from getting any relief under Para 8 of the Notification of 2006.

Discussion on Issue No. 5

5. Whether the provisions of Notification of 2006 are mandatory or directory and consequences thereof?

108. Years back, Lord Campbell in *Liverpool Borough Bank* v. *Turner*, (1861) 30 LJ Ch 379 said, "no universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be considered". These observations have stood the tests of time and even today the process of judicial interpretation has not favoured the enunciation of any universal rule or strait jacket formula. This question has to be decided with reference to the intent of the Legislature, and not the language in which the intention is clothed. In some cases, the courts have also taken the view that such intent can be derived from the nature and design of the statute and the consequences which would flow from construing it in the one way or the other. It will depend upon the findings of the court on these aspects that would finally determine whether the provision is mandatory or directory. The use of the words 'as nearly as may be' in contrast to the words 'at least' will *prima facie*

indicate a directory requirement, negative words indicate a mandatory requirement, 'may' indicate a directory requirement and 'shall' a mandatory requirement. Illustratively it could be explained by taking an example of a set of service rules which provide that adverse remarks shall be communicated to the civil servant concerned, ordinarily within seven months. The object of communicating the adverse remarks is to give an opportunity to the civil servant to improve his performance to make up the deficiency noticed in his work and to give him an opportunity to represent against the remarks, in case he disputes them, to the reviewing authority. In light of this object and having regard to the part adverse remarks play in the service career, the rules on a proper construction will require: (i) communication of the remarks to the civil servant concerned; (ii) communication within a reasonable time; and (iii) communication ordinarily within seven months. The first two requirements will be construed as mandatory and non-compliance of either of them will make the remarks as also any adverse action on their basis, invalid. The third requirement will be treated as directory and its non-compliance alone will not make the remarks invalid if the first two requirements are satisfied [Refer: Principles of Statutory Interpretation by Justice G.P. Singh, 13th Edition (2012)].

In either of these requirements, discretion or discretionary power hardly has a role to play. Even if a provision is being construed as directory, it has to be remembered that it leaves the donee of the powers, free to use or not to use it, at his discretion. A mandatory provision eliminates the element of discretion. A mandatory provision requires complete compliance. Noncompliance or disobedience thereto may render action invalid or nullity. In contradistinction thereto failure to obey directory provision or its disobedience would not render the action a nullity. Another way to examine this distinction is that even noncompliance is capable of being waived and consequences thereof. The Hon'ble Supreme Court in the case of *State of U.P.* v. *Baburam Upadhyay*, AIR 1961 SC 751, culled out the criteria for deciding *inter alia* whether a statutory provision is to be taken as mandatory or directory. They are:—

(a) "the nature and the design of the statute, and

(b) the consequences which follow from construing it the one way or the other,

(c) the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions,

(d) the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and,

(e) above all, whether the object of the legislation will be defeated or furthered."

109. However, subsequently, the Hon'ble Supreme Court in the case of *May George* v. *Special Tahsildar*, (2010) 13 SCC 98, expanded these principles and added the following:

(a) While determining whether a provision is mandatory or directory, somewhat on similar lines as afore-noticed, the Court has to examine the context in which the provision is used and the purpose it seeks to achieve;

(b) To find out the intent of the legislature, it may also be necessary to examine serious general inconveniences or injustices which may be caused to persons affected by the application of such provision;

(c) Whether the provisions are enabling the State to do some things and/or whether they prescribe the methodology or formalities for doing certain things;

(d) As a factor to determine legislative intent, the court may also consider, inter alia, the nature and design of the statute and the consequences which would flow from construing it, one way or the other;

(e) It is also permissible to examine the impact of other provisions in the same

statute and the consequences of non-compliance of such provisions;

(f) Physiology of the provisions is not by itself a determinative factor. The use of the words 'shall' or 'may', respectively would ordinarily indicate imperative or directory character, but not always.

(g) The test to be applied is whether non-compliance with the provision would render the entire proceedings invalid or not.

(h) The Court has to give due weight age to whether the interpretation intended to be given by the Court would further the purpose of law or if this purpose could be defeated by terming it mandatory or otherwise.

110. Sutherland *Statutory Construction*, Rev. Third Edn., 1943 (pg 640), mentions that "no statutory provisions are intended by the legislature to be disregarded". Therefore, each word in a statute has a referral meaning and it must be given its true interpretation and import.

111. In terms of interpretation of statutes, question whether a particular provision is mandatory or directory and the distinction between the two arises when a statute uses a language which imposes a duty and where a breach of that requirement renders an action void. In general parlance, in case of mandatory provisions, the act done in breach of the duty imposed is void, while in case of directory provision act done does not become void (although some other consequences may follow). *[Rani Drigraj Kuer* v. *Raja Amar Krishna Narain Singh*, AIR 1960 SC 444].

112. In an often quoted passage LORD CAMPBELL said, "no universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered [*Craies on Statute Law*, 5th edition, at p. 242 and quoted in *Liverpool Borough Bank* v. *Turner*, (1861) 30 LJ Ch 379]. This view came to be approved by the Supreme Court in the case of *State of UP* v. *Manbodhan Lal Shrivastava*, AIR 1957 SC 912, wherein the court quoted Crawford on 'Statutory Construction' -art. 261 at p. 516, "The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other...." Maxwell on Interpretation of Statutes quotes Lord Penzance in the case of *Howard* v. *Bodington*, (1877) 2 P.D. 203 (211) - "I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look into the subject matter; consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."

113. If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory whereas if by holding it mandatory, serious general inconvenience will be created to innocent persons without very much furthering the object of the enactment, the same will be construed as directory [*Delhi Airtech Services Pvt. Ltd.* v. *State of U.P.*, (2011) 9 SCC 354].

114. In Re: Presidential Poll case [AIR 1974 SC 1682], the Seven Judge Bench of the Hon'ble Supreme Court observed:

"13. In determining the question whether a provision is mandatory or directory, the subject matter, the importance of the provision, the relation of that provision to the general object intended to be secured by the Act will decide whether the provision is directory or mandatory. It is the duty of the courts to get at the real intention of the legislature by carefully attending the whole scope of the provision to be

construed. The key to the opening of every law is the reason and spirit of the law, it is the *animus impotentia*, the intention of the law maker expressed in the law itself, taken as a whole."

115. In the case of welfare statutes, the general rule of interpretation is that provisions should get that interpretation which would achieve the object of the enactment. Such statutes are to receive liberal construction but the same could not to be extended beyond the statutory scheme [*Ponni Sugars and Chemicals Ltd.* v. *Cauvery Sugar and Chemicals Ltd.*, 2001 (2) MLJ 832; *Maruti Udyog Ltd.* v. *Ram Lal*, (2005) 2 SCC 638; *National Insurance Company Ltd.* v. *Arumugham*, 2006 (2) MLJ 564]. It is also a settled law that interpretation of a statute depends upon the text and the context thereof and the object with which the statute was made [*Pratap Singh* v. *State of Jharkhand*, (2005) 3 SCC 551].

116. In light of the above stated principles, now, we may examine the provisions of the Act of 1986 and the Notification of 2006. The Act of 1986 has been enacted for the protection and improvement of environment and the prevention of hazard to human beings, other living creatures, plants and property. In light of the fact that the Article 21 of the Constitution of India includes the right to decent and clean environment, any of the provisions of the Act of 1986, in relation thereof, are a mandate of the Legislature. They do not provide discretion to a person to obey or not to obey the law and does not in any way permit dilution of the prescribed standards which are required to be adhered to by the person, who wishes to carry on any project or activity of any nature in the notified areas. The Notification of 2006 has been enacted to carry on the object and purpose of Act of 1986 effectively. The Notification as already noticed, applies not only to new projects but also to projects which propose to expand or even modernize the existing projects and are required to strictly comply with the environment standards prescribed under the Act of 1986 and the notification of 2006. We have also noticed above that the expression 'prior' appears as many as 40 times in the Notification of 2006. The expression 'shall' appears in all the relevant clauses where the Project Proponent is required to make the application and follow the prescribed procedure to obtain the Environmental Clearance prior to the commencement of any constructions work or preparation of land, except for securing the land.

117. The Notification of 2006 not only mandates an Applicant or Project Proponent to strictly comply with the provisions, but even requires the authorities to perform their prescribed functions and thus comply with the provisions within the time stipulated under those paragraphs of the Notification of 2006. It furthermore provides the consequences of non-compliance by the authorities within the period statutorily prescribed. In terms of Para 3, it is not only the consequences of failure to comply on the part of the authorities that are prescribed, but it even specifies the rights that accrue to the Project Proponent. These private rights are definite in character and are of serious consequences. The required compliance has been stated with exactitude in the Notification of 2006, which provides a schedule stating category-wise those projects which require an Environmental Clearance and even the Form which a Project Proponent is required to furnish with complete details at the time of applying for Environmental Clearance.

118. If the application is not in Form 1 and does not provide complete details and documentation in support thereof in terms of the Schedule to the Notification of 2006, the authorities have the right to decline to entertain such an application.

119. Sections 3 and 5 of the Act of 1986 empowers the Central Government to take measures to protect and improve the environment and to issue directions of very wide magnitude, including directions in relation to closure, prohibition or regulation of any industry, operation or process. It can in all event also direct disconnection of electricity

or water supply of such industry or operation or process. In exercise of its powers under Sections 6 and 25 of the 1986 Act, the Central Government has framed the Rules of 1986. The Notification of 2006 has been issued in terms of Rule 3(2) of the Act of 1986 as well as Rule 5(3) of the Rules of 1986. In other words, these later enactments are integral part of the Act of 1986, their character being statutory and language of these provisions makes it obligatory upon every Project Proponent to obtain Environmental Clearance and comply with other environmental laws without default. Section 15 of the Act of 1986 provides penalty for contravention of the provisions of the Act of 1986, the Rules, orders and the directions passed thereunder. Interestingly, Section 15 of the Act of 1986 makes both noncompliance and contravention of the provisions of these enactments punishable. In other words, every default or violation and even noncompliance of the provisions has been made punishable. This necessarily implies the mandatory character of these provisions and statutory obligation on the part of the Project Proponent to comply with them.

120. We are unable to find any merit in the contention raised on behalf of the Project Proponent that the provisions of the Notification of 2006 are procedural. In our considered opinion, the provisions of this enactment are substantive and mandatory. These provisions do not admit of any substantial non-compliance or vest discretion with the authorities in relation to procedure prescribed under the Notification. They are couched in a language that is purely mandatory in character and is founded on the Precautionary Principle which is one of the statutory principles to be applied by the Tribunal in terms of Section 20 of the Act of 2010. If compliance is not made to the provisions of these enactments, it will totally frustrate the Precautionary Principle and thus the precautionary principle can adversely impact the environment, protection of which is the sole object of the Act of 1986.

Thus, in view of the above discussion, it is clear that the requirements of the Notification of 2006 are mandatory in character. Their default or non-compliance is liable to be punished. The intention of the Legislature is to protect the environment for which words of specific nature like ‘prior’ and ‘shall’ have been used. The impact of non-compliance of these provisions would be of serious consequence, not only on environment but upon the society at large. All these enactments are unambiguous and framed in no uncertain terms and this conveys that projects commenced without obtaining Environmental Clearance would invite the penalty postulated under the Act of 1986.

Thus, we have no hesitation in holding that the provisions of Notification 2006 are mandatory and not procedural *simplicitor*.

Discussion on Issue No. 6

6. What is the status of structures raised by and conduct of the private Respondents and its effect upon the statutory provisions relating to environment?

121. The Applicants have contended that all the Project Proponents, (private Respondents) have violated the law and their acts before the statutory authorities and even before the Tribunal are full of falsehood i.e. *falsus in uno, falsus in omnibus*. It is their case that the private Respondents under the garb of a *bona fide* belief that Environmental Clearance is to be obtained before obtaining the Completion Certificate, have in fact, camouflaged compliance to the entire requirements of environmental laws. They, in fact, have frustrated the very object and purpose of the Act of 1986, Rules of 1986 and the Notification of 2006. These Respondents, because of their illegal and unauthorised actions and activities undoubtedly and in fact undisputedly, have commenced construction activities and even completed substantial section of their projects, even prior to submitting their application seeking Environmental Clearance to SEIAA. What was required was that all these private Respondents must have first

obtained Environmental Clearance prior to commencement of any construction activity at the site in question. As already noticed, the Notification of 2006 contemplates submission of various analysis data at a stage prior to commencement of any construction or activity of the project for which application is moved. When, these Respondents submitted applications for grant of Environmental Clearance, the competent authorities while acknowledging the receipt thereof had clearly commanded them not to continue with any construction activity unless the Environmental Clearance was granted. They had also called upon them to submit an undertaking to the respective authorities that they would not carry on any construction activity, which in fact they did. Despite, the above instructions, they continued the construction activity in an illegal and unauthorised way. The continuance of construction activity which was commenced thereto was itself illegal, constructed in totally unauthorised manner and was in complete violation of law. They failed to comply with the law at the threshold and violated the rules, the directions issued by the authorities at subsequent stages and their own undertakings. Consequently, they have not only rendered themselves liable for the penal action as contemplated under Section 15 of the Act of 1986 but even the constructions raised by them are in total violation of the laws in force. Now, we may look at the stages of construction and the apparent violation by different Project Proponents and their present status. In the case of Mr. Y. Pondurai (Respondent No. 3), the construction of the project started without even applying for grant of Environmental Clearance. The Project Proponent started the work of construction in full swing merely after getting the approval from the Government Housing and Urban Development Department of the State of Tamil Nadu in the year 2013. This Project Proponent submitted an application to SEIAA only on 21st February, 2014 and in the meanwhile continued with construction of the project despite a clear direction from the authorities as well as his own undertaking that he would not carry out any construction till the grant of Environmental Clearance. A Letter of Apology was also submitted by the Project Proponent on 21st March, 2014 and even then the Project Proponent continued with construction and raised substantial construction. A Show Cause Notice was issued to the Project Proponent by the TNPCB on 12th July, 2014 for carrying out construction work without obtaining Environmental Clearance. Again on 26th November, 2014, SEIAA informed Project Proponent not to continue the construction until Environment Clearance is obtained. Despite this, upon inspection of the site by TNPCB on 2nd April, 2015, it was noticed that construction work of 9 floors was over and interior works is under progress. For its repeated violation, TNPCB issued a Stop Work Notice to Project Proponent on 4th April, 2015 as construction activities were continuing without obtaining EC. The Project Proponent had again assured the authorities that he was not carrying on any construction activity. However, when on 14th April, 2015, SEIAA inspected the work site, it was noticed that civil works of all blocks was completed and no work was being carried out at the time of inspection. This project is a commercial complex consisting construction of a main block - 2 basement + Ground floor + 10 floors; Service Block - Basement - Ground Floor + 2 floors and MLCP Block - 2 basement + Ground Floor + 4 Floors. On careful analysis of above two inspection reports it becomes clear that one floor was constructed by Project Proponent even after 2nd April, 2015, i.e. even after furnishing the above undertaking and issuance of Stop Work Notice. The photographs that were filed by the Project Proponent at the time of submission of applications itself show that the construction work was not completed and it was only in progress, in fact, large construction work remained to be completed. However, when the site in question was inspected by officers of TNPCB and SEIAA on 2nd April, 2015, it came to notice that not only the entire construction work had been completed but even the finishing work of the building has also been completed. Furthermore, comparing the photographs taken on both these different occasions clearly demonstrate that the Project Proponent has

raised the construction by violating the law, his own undertaking, apology letter and direction of the authorities concerned and have even completed the entire construction of the project. This construction is clearly illegal and unauthorised in the eyes of law. Cases of all the other Respondents are also on the similar lines. We have discussed them in detail in paragraphs 14 to 43 of the Judgment. As such, there is no need for repeating those facts.

122. What we need to notice here is that the compliance to the laws in force, submission of applications for grant of Environmental Clearance complete in all respects with necessary documents are the conditions precedent of consideration of such application by the competent authorities. It is imperative that the activity for which the Environmental Clearance is sought must be an activity started completely in consonance with law. Even the approval of the drawings and principal approval of the construction of the project from CMDA was subject to compliance with the laws in force. We do not agree to the argument propounded by the Project Proponents that the grant of principal approval *ipso facto* had the effect of granting other permissions to start construction without complying with other laws and permissions from the other authorities, particularly in face of the fact that a clause of this principal approval required the Project Proponent to obtain Environmental Clearance. All these Project Proponents are deemed to be in knowledge of the laws relating to construction of such projects i.e. Act of 1986, Rules of 1986 and Notification of 2006. The Project Proponents are persons in the business of building projects, having huge means and perspicacity. They cannot be even expected to take up the plea that they were not aware of the provisions of environmental laws. It is in fact unfortunate that these Project Proponents have not only violated the laws and their own undertaking but in that process even made other innocent people invest their money into the project, being fully aware that the construction raised is completely illegal and unauthorised. The Constructions have been raised in complete and flagrant violation of law. This renders them liable to be prosecuted against in terms of Section 15 of the Act of 1986. The authorities have taken action against some of them, but that does not in any way by necessary implication or otherwise have the effect of regularising the construction that has been raised illegally, in an unauthorised manner and in violation of the principles of law. We must notice that these constructions are bound to have adverse effect on environment, ecology and biodiversity in the areas where they are located. Some of the environmental degradation and deterioration would be irreversible while other would be correctable to some extent either by demolition or by taking curative measures which we will hereafter discuss. Their illegal acts and unacceptable conduct has even rendered compliance to the provisions of the Notification of 2006 impracticable if not impossible.

123. Another plea advanced on behalf of the Applicants before the Tribunal is that the Office Memoranda are clearly in derogation and not in support of the substantive law, the attempt to condone violation would lead to compounding of offences and permitting what provisions of Notification of 2006 and Act of 1986 restricts. The legislature in its wisdom has statutorily introduced the Precautionary Principle in terms of section 20 of the NGT Act, effect of which would stand wiped out in substance by these Office Memoranda. The contention of the Applicants is that the Office Memoranda are neither remedial nor solution to a problem. It is not one time settlement for the category of the persons who might have under some bonafide impression or mistake commenced the activity of the project without obtaining environmental clearance. Office Memoranda in their operation and effect are continuous and do not propose to cover a given situation. The Office Memoranda were issued right from the year 2010 and were amended from time to time, lastly in 2013. The Office Memorandum of 27th June, 2013 *ex facie* is a law in itself as it operates as the procedure for all future times giving substantive rights to parties and runs contra

to the statutory provision and procedure established under substantive law. On the plain reading of the Notification of 2006, it is manifestly clear that it is the procedure prescribed therein besides being mandatory in character is also *sui-generis*. Once the law prescribes things to be done in a particular way then they must be done in that way alone or not at all. In *Barium Chemicals Ltd.* v. *Company Law Board*, AIR 1967 SC 295, the Hon'ble Supreme Court held "As a general rule, if the, statute directs that certain acts shall be done in a specified manner or by certain persons, their performance in any other manner than that specified or by any other person than one of those named is impliedly prohibited."

124. From such matters or procedure to be performed differently the law must specifically contemplate that it is impermissible to draw such inferences by implication. Nothing has been brought to our notice neither in the Act of 1986, Rules of 1986 and the Notification of 2006 which in express terms or even by necessary implications permits the mandated provisions to be waived and in any case in the manner that would not prejudicially effect the environment and ecology.

125. On behalf of some of the Project Proponents, another argument is advanced to contend that the various authorities understood or interpreted the law to suggest that obtaining of Environmental Clearance prior commencement of project activity was not a condition precedent. The planning permission granted to the Project Proponents also contemplated that Environmental Clearance should be obtained by these Respondents prior to issuance of completion certificate. These Office Memoranda are therefore by themselves and on interpretation of law with the aid of doctrine of *contemporanea expositio* would operate in favour of the Project Proponents for continuing default, if any, on their part. The Project Proponents have relied upon the judgment of the Hon'ble Supreme Court in *K.P. Vargheese* v. *Income Tax Officer, Ernakulam*, (1981) 4 SCC 173 in support of their contentions.

126. We are unable to find any merit in these submissions. The doctrine means that a construction which has been long adopted and publically acted upon will not be lightly disturbed by the courts.

127. The rationale behind the same is that judges who lived at/or about that time when the statutes were made, were best able to judge intentions of the makers at that time but where the wording of the statutes are plain, then its *contemporanea* interpretation cannot override the plain meaning of the words used in the statutes. The Courts do not apply this doctrine where the statute is comparatively modern. The Doctrine historically is founded on the principles that have been evolved by interpretation of ancient statutes or other documents that it has received from the *contemporanea* authority. The meaning publically given by the *contemporanea* or local usage is presumed to be true one even where the language has terminological or popularly a different meaning. It is obvious that the language of the statues must be understood in the sense in which it was understood when it was passed. (Ref: *Interpretation of Statutes* by P.M. Bakshi, 2013 Reprint edition and *Maxwell on Interpretation of Statues* 2013, 19th Impression)

128. *Contemporanea expositio as* a rule for interpretation, cannot aid where there is no question of interpretation or giving a meaning to the language of a provision is concerned. It cannot be called in aid where an Office Memorandum creates a new procedure or parallel law in conflict with the substantive law. This Doctrine applies only to the construction of ambiguous language in the other statutes where one thing to take recourse to the practice and meaning given to the provisions generally and/or very particularly by the temporary authorities. In the case of *K.P. Verghese* v. *Income Tax Officer, Ernakulam* (supra), the Hon'ble Supreme Court held that "it will settle that meaning prescribed by the authorities showing the notification is good guide to *Contemparian expositio* of the position of law." For application of this doctrine the

meaning of statute has to be in doubt. If the language of the provisions admit of no ambiguity or doubt, the question of resorting to this doctrine would hardly arise. In our considered view, the Notification of 2006, does not admit of any ambiguity or doubt. We have already in some elaboration dealt with the provisions of the notification of 2006 that clearly contemplates obtaining of prior Environmental Clearance before commencement of any activity of the project. The Office Memoranda have the effect of wiping out the 40-times used expression, 'prior Environmental Clearance' in the Notification of 2006 and the very purpose of this Notification to protect the environment. The contention of the Project Proponents that impugned Orders are clarificatory in providing what the Notification of 2006 lacks or does not provide for and that the intention behind the issuance of Office Memoranda, is to remove the ambiguity or to provide resolution to the difficulties faced in implementing the Notification of 2006, does not have any merit, as even the stand of all the authorities i.e. MoEF, SEIAA and Pollution Control Board is that prior grant of Environmental Clearance before commencement of the project activity is mandated by the Notification. Particularly, author of the Office Memoranda in its affidavit has averred '*it is true that neither the act nor the EIA Notification, 2006 grant any relaxation on the requirements of the obtaining of prior Environmental Clearance before any construction work is commenced or any project scheduled therein*.....'. This is also completely substantiated by the opening language of the impugned Office Memoranda where it is said that it was obligatory upon the Project Proponents to obtain prior Environmental Clearance. SEIAA had categorically proscribed the Project Proponents from carrying on any construction activity till Environmental Clearance was granted and had asked them not to repeat the violation. This being the stand of the authorities, the impugned Office Memoranda do not clarify any linguistic or interpreted doubt in the notification 2006 and Act of 1986 but establish a new procedure contrary to the substantive law. It is abundantly clear that principle of *contemporanea expositio* cannot be said to have universal application, each case must be considered on its own facts and executive instruction is entitled to respect but it is not beyond the pale of judicial review. One of the examples cited more often than not is that rules made under the statutes are legitimate aid to the construction of statutes as *contemporanea expositio*. Such Office Memoranda which create a substantive right and obligation by themselves which patently are contrary to the substantive law cannot even be otherwise legitimized with the aid of this doctrine. The fundamental principle of construction is that rules made or directions issued under the statutes must be treated as exactly as if they were in the Act and are of the same effect as it contained in the Act, they cannot be contrary to the fundamental provisions of a statutory notification. Another settled norm is that maxim and precedents are not to be applied mechanically and they are of assistance only in so far as they furnish guidance by compendiously summing up principles based on the rules of common sense and logic (Ref: *Rohit Pulp and Paper Mills Ltd.* v. *Collector of Central Excise, Baroda*, AIR 1991 SC 754).

In our considered opinion the Project Proponents cannot derive any benefit or advance its case with reference to doctrine of *contemporanea expositio*.

129. Equally, without merit is the other limb of the contention raised on behalf of the Project Proponents. The authorities issuing the planning permission to the Project Proponents had required the Project Proponents to obtain environmental clearance prior to the grant of completion certificate by the said authority. With reference to this term, the contention is that the Project Proponents were under a *bonafide* belief that they could start the construction without obtaining the Environmental Clearance which they were expected to obtain prior to grant of completion certificate only. This submission is fallacious at the face of it. Every person is expected to know the law. Ignorance of law cannot be a plea. The Project Proponents are not persons who can be presumed to be in ignorant of law, they are into this business for years and the

Notification of 2006 came into the existence in the year 2006. All the projects in question commenced in the year 2010 and subsequent thereto. The mandatory character of the notification of 2006 obliged the Project Proponents of any project or activity to obtain prior Environmental Clearance before starting construction. They not only failed to do so but even started huge construction and moved the applications for grant of Environmental Clearance at much subsequent stage. The terms and conditions of the planning permissions required the Project Proponents to comply with all the requirements of law including obtaining of Environmental Clearance for their respective projects. The terms and conditions of the planning permission clearly postulated that they would not even be granted completion certificate if they had not obtained the Environmental Clearance. Reading of the clause of the planning permission by the Project Proponents to take advantage of it is blatantly contrary to the very purpose of the said condition. The terms and conditions of the planning permissions are firstly to be read together, and secondly no document of this nature can be read to construe that it intends to cause waiver of any other requirement of law. All laws are to operate in their respective fields for obtaining the object of rule of law and not in favour of avoidance or dis-obedience to other laws in force. Therefore, we find no merit even in this submission of the Project Proponents.

Discussion on Issue No. 7:

7. The environmental impacts of the projects in question upon environment, ecology and biodiversity.

130. We have already held that comprehensive and definite compliance to the provisions of the Notification of 2006 have been made redundant by the unauthorised actions of the private Respondents as well as by the impugned Office Memoranda issued by the MoEF. Collection of certain data, scientific analysis, pre-construction environmental impacts of the project and other information which are pre-requisite for the submission of the application in Form 1 or supplementary Form I-A of the Appendix II under the Notification of 2006, can neither be collected nor be provided as the projects have already come up substantially or otherwise have completed construction work extensively. Not only the environmental impacts of the projects cannot be examined fairly but even the matters like site selection and public hearing cannot be deliberated upon, thus frustrating the very object of public hearing. The provisions of the Act of 1986, Rules of 1986 and the Notification of 2006 are statutory documents having the force of law. Providing a mechanism in exercise of administrative or executive power in complete deviation or disregard to the law in force, would be contrary to the basic rule of law. Besides it being in derogation to the environmental jurisprudence, it would also have adverse impacts upon environment and ecology of the area. There is greater need for compliance to the statutory provisions. Such compliance would be essential in the interest of the environment. Therefore, we have to examine the various aspects of such non-compliance law and if there can be any tolerance to the breach of the statutory provisions. If so, its extent and impacts on matters of technical and environmental significance that would flow from such breaches or defaults. Let us now examine the requirements of law with reference to environment.

131. In recent past, building construction activities in our country have been carried out without much attention to environmental issues and this has caused tremendous pressure on various finite natural resources. The green cover, water bodies and ground water resources have been forced to give way to the rapid construction activities. Modern buildings generally have high levels of energy consumption because of requirements of air-conditioning and lighting in addition to water consumption. In this scenario, it is necessary to critically assess the utilization of natural resources in these activities.

132. An application seeking prior Environmental Clearance for building construction project is required to be made in the prescribed Form 1 and supplementary Form 1A, after the identification of prospective site for the project to which the application relates, before commencing any construction activity or preparation of land, at the site by the Applicant. The Applicant is required to submit along with the application, in addition to Form 1 and the supplementary Form 1A, a copy of the conceptual plan of the project.

133. Apart from profile of the Project Proponent, name and contact address, implementing organization, organizational chart, project consultants etc., are to be mentioned clearly. After providing details of land (plot/survey numbers, village, tehsil, district, state and area of the land), goal and objectives of the proposed project, significance of the project both at local and regional level, relevance of the project in light of the existing developmental plans of the region are required to be mentioned. Background information and overall scenario of the proposed activity in the Indian context, procedures adopted for selection, criteria for selection of the site for the proposed activity, such as environmental, socio-economic, minimization of impacts, ecological sensitivity, impact of existing activities on the proposed activity, etc. is required to be spelt out. Resources and manpower requirements have to be detailed apart from time frame for project initiation, implementation and completion in following manner:

- Total site area
- Total built up area (provide area details) and total activity area
- Source of water and consumption
- Source of power and requirement
- Connectivity to the city centre, utilities and transportation networks community facilities
- Parking requirements
- Type of building material to be used
- Environmental liability of the site
- Existing structure/type of material - demolition debris, etc. 134. A map of the study area showing 500 meters from the boundary of the project area, delineating the major topographical features such as land use, drainage, location of habitats, major constructions including roads, railways, pipelines, and industries, if any in the area is required to be enclosed. A map covering aerial distance of 15 km from the boundary of the proposed project area delineating environmentally sensitive areas as specified in Form I of the Notification of 2006 is also to be annexed. In the same map, the details of environmentally sensitive areas present within a radial distance of 1 km from the project boundary are to be specifically shown. Land use map of the study area is also required to be furnished.

135. Based on the examination of the relevant details, project specific Terms of Reference (TOR) are provided for the EIA studies. While awarding TOR for EIA studies, the points that are of concern include:

a. Likely alterations to the existing land use of the area;
b. Impact on the geomorphology vis-à-vis land disturbance resulting in soil erosion, subsidence & instability of the area;
c. Impact on the natural drainage systems, including wetlands;
d. Impact of the land use changes occurring due to the proposed project on the runoff characteristics vis-à-vis flooding or water logging of the area
e. Impacts of the proposed project on the ground water vis-à- vis pollution of land & aquifers;

f. Likely threats to the biodiversity, especially vegetation pattern and displacement of terrestrial and aquatic fauna;

g. Impact on the atmospheric concentration of gases and generation of dust, smoke, odorous fumes or other hazardous gases;

h. Likely impact on the transport system in the area, including the parking space for vehicles;

i. Impact on the noise levels and vibrations in the area;

j. Likely impact on the social structure of local communities, and likely disturbance to sacred sites or other cultural values.

136. It may be kept in mind that, prior to the grant of EC, concept of sustainable development and precautionary principles were the leading factors governing the environmental jurisprudence. The application of these Principles assumes that the impacts of any development on the environment and human health are difficult to predict with certainty, therefore, prudence requires that before embarking on the development project, we explore the possible alternatives to the project. Needless to say that exploring alternatives also includes exploring all the harmful actions which the project may cause, including such damages which may be completely irreversible. Equally important component of these Principles is, to place the burden of proof on the Project Proponents to highlight that the impact of the activity on the environment and the health of the people would be minimal and/or all precautionary measures have been adopted. While exploring alternatives with regard to siting the project and the technology of the project, exploring alternatives also includes "not taking up of the project as one of the alternatives".

137. The very purpose of awarding project specific TOR for EIA studies is that it is expected that the report furnishes balanced and credible information for environmental safeguard apart from other essential environmental studies and most importantly contains the appropriate environmental management plan/s along with budgetary provisions that form integral part of the project cost.

138. This EIA report is subjected to appraisal by the Experts, prior to the grant of Environmental Clearance depending upon the nature and location specificity of the project. TOR assists the EIA consultant, prior to execution of project, to prepare an effective and user friendly report with relevant project specific data, which are easily implementable.

139. A typical EIA report, as per Environmental Impact Assessment Guidance Manual for Building, Construction, Townships and Area Development Project of MoEF, 2010, includes:

1. Description of the project site, geology, topography, climate, transport and connectivity, demographic aspects, socio, cultural and economic aspects, villages, settlements are also to be given. Historical data on climate conditions such as wind pattern, history of cyclones, storm surges, earth quake etc., is also looked into. Detailed layout plan of proposed project development, communication facilities, access/approach roads, landscape, sewage disposal facilities, and waste disposal etc. is also given. Layout plan for proposed development of built up areas with covered construction such as DG Set rooms, Administrative buildings, Utilities such as Main and Stand-by Power, Water supply installations etc. is furnished. Most importantly, requirement of natural resources and their sources are to be detailed out.
2. The environmental impacts of construction and operation are established during the early phases of site selection and planning. Planning, site selection and design form an important stage in the development of these projects and will determine their environmental impact(s). Environmental data to be considered in relation to such development pertaining to (a) land (b) ground water, surface

water (c) air (d) biological environment (e) noise (f) socio economic environment. The first feature which influences the development of a new project is the existing land use pattern of the neighbourhood of the project, whether the proposed development conforms to the development for that area or not. Study of land use pattern, habitation, cropping pattern, forest cover, environmentally sensitive places etc., provides the first insight to the likely impacts of the project. Geographical latitude and microclimatic factors such as solar access and wind loads also have major impact.

3. Identification of Project activities, including construction phase, which may affect surface water or groundwater have a direct relation to the estimated water intake requirements and identification of the source of water to be used. Description of water availability and sourcing plays a critical role in impact assessment. Baseline water quality from all sources such as ground water or municipal supply or surface water helps in proper assessment.
4. Climatological data, air and noise level pollution similarly plays an important role in assessing the likely environmental impacts and requires anti-pollution measures to be adopted.
5. Baseline information on the flora and fauna of the study area along with a description of the existing terrestrial, wetland and aquatic vegetation determines the environmental sensitivity and the need for environmental protection measures.
6. Details of solid wastes from construction sector can be categorized into two phases i.e. during construction & during operation. Details of the construction or demolition waste, i.e., massive and inert waste; Municipal waste, i.e., biodegradable and recyclable waste and hazardous & e-waste provide steps that are required to be adopted for its management.
7. Main anticipated impacts from building construction, which need to be addressed, are
   - Impact on the natural drainage system and soil erosion.
   - Loss of productive soil and impact on natural drainage pattern.
   - Study of the problem of landslides and assessment of soil erosion potential
   - Impact on air and noise quality during the construction and operation phase - the existing surrounding features of the study area and impact on them from various sources such as machinery, transportation, etc.
   - Impact of construction and operational phases on the surface and ground water on account of the building construction
   - Waste water generation its treatment and utilization
   - Impact of project during construction and operational phases on the biological environment
   - Predicted impact on the communities
   - Impact of the project during construction and operational phases for generation of waste
   - Energy requirements and infrastructure requirements needed for the activity
   - Steps to be taken to integrate the needs of other stakeholders into the location and design of access infrastructure, to reduce and manage overall environmental impacts
8. Another important consideration pertains to requirements of building construction material and technologies to be used. Any project with proper TOR and EIA report would provide details of:
   - Types of materials used in each component part of the building and landscape (envelope, superstructure, openings, roads and surrounding landscape)

- Plans and sections of buildings showing use of new technologies and nonconventional methods
- Plans and sections of building using new construction techniques

9. Similarly, it will also deal with energy conservation aspects in terms of:
   - Use of alternate renewable resources such as solar/wind power etc.
   - Options considered for supplying the power required for the Project and the environmental implications, including opportunities to increase the energy efficiency of the Project
   - Details of U & R values
   - Details of the renewable energy systems (sizing and design), building costs and integration

140. It is reported that approximately 50 percent of the energy use in buildings is devoted for producing an artificial indoor climate through heating, cooling, ventilation, and lighting. Water conservation and efficiency programs have begun to lead to substantial decrease in the use of water within buildings. Studies have shown that water-efficient appliances and fixtures can reduce consumption by up to 30 percent or more. As demand of water increases with urban growth, the economic impact of water conservation and efficiency will increase proportionately. Water efficiency not only can lead to substantial water savings, but it can also reduce the requirement for expansion of water treatment facilities. The building industry is slowly beginning to recycle its waste but there is a need to achieve significant waste reductions through more reuse of building material and adaptation, as opposed to demolition. Conventional buildings often fail to consider the interrelationship among building site, design elements, energy and resource constraints, building systems, and building function. Green buildings, through an integrated design approach, take into consideration the effect these factors have on one another. Climate and building orientation, design factors such as day lighting opportunities, and building envelope and system choices, as well as economic guidelines and occupant activities, are all factors that need to be considered in an integrated approach. Application of new building concepts can yield for savings during the construction process. Measures that are relatively easy to implement can result in savings to natural resources in the following areas:

- Lower energy costs, by monitoring usage, installing energy-efficient lamps and fixtures, and using occupancy sensors to control lighting fixtures;
- Lower water costs, by monitoring consumption and reusing storm water and/or construction waste-water where possible;
- Lower site-clearing costs, by minimizing site disruption and movement of earth and installation of artificial systems;
- Lower landfill dumping fees and associated hauling charges, through reuse and recycling of construction and demolition debris;
- Lower materials costs, with more careful purchase and reuse of resources and materials;
- Possible earnings from sale of reusable items removed during building demolition.

141. Therefore, any project with proper filling of Form I would be awarded TOR specific to the project and thereby would have EIA report that deals with environmental concerns specific to the project prior to its execution along with the necessary management plan/s and budgetary provisions.

142. In view of the above, if the project execution is carried out at any stage prior to grant of EC, it would be detrimental to the environment as at the very outset even primary baseline information for filling up Form 1 and Form 1A would not be available for providing project specific TOR for the EIA studies and thus the EIA study would become irrelevant thereby making the appraisal of EIA report only a formality. In the

whole process, even imposition of general and specific conditions in EC pertaining to construction phase of the project would be irrelevant. It is extremely important to note here that the major impacts of any building construction project (alteration to topography, water drawl, air pollution, etc.) are during the construction stage or are directly relatable to the construction of the project itself (provision of parking space, fire safety, rain water harvesting and recycling, storm water, construction methodology, enhancing energy efficiency, etc.). Lastly and most importantly, if the project layout plan requires certain changes in the layout plan on account of likely environmental concerns (such as fire safety, day lighting, seismic hazards, water conservation measures, number of basements, etc.), it would be practically impossible to do so.

143. The above discussion clearly demonstrates the intent of the framers of the law that the compliances under the Notification of 2006 will hardly have an application post-construction or after completion of projects or activities. The prescribed parameters, the documentation and data to be provided along with Form 1, in no uncertain terms oblige the Applicant not to commence any activity unless it has obtained the Environmental Clearance. The post-grant of Environmental Clearance will neither be in the interest of the environment nor would it serve the purpose of the Act of 1986 and/or the Notification of 2006. The primary data required to be submitted relates to pre-project situation and circumstances. Of course, it will also depend upon the nature of the project activity or development activity that the Project Proponent proposes to establish. The impact of building construction and the resultant concretization, particularly basement construction on the groundwater levels and flow directions can be a matter of serious concern. The manner in which the basements are being constructed, its impact on the groundwater table, in what manner how much groundwater is proposed to be extracted, would also be a relevant consideration. EIA Report prepared *ex-post-facto*, i.e. on completion of the project, would suffer from lack of due diligence and would foreclose the options for exploring alternatives. This will go against the fundamentals of the Precautionary Principle and Sustainable Development. Similarly, it will be very tedious and very difficult, if not impossible, to appropriately consider various components of the biodiversity at the site and alternative steps that should be taken by the Project Proponent to protect any rare, endangered and threatened species at the site in question. In absence of such assessment, the opportunity of protecting the local ecology gets defeated and hence the goals of sustainable development. The cumulative effect of the above discussion would be that the illegal and indiscriminate development activity that has been carried out by the Project Proponents is bound to have serious impacts on environment, ecology and biodiversity and a very comprehensive and stringent study would be required to dilute or mitigate adverse environmental impacts of the projects in question.

Issue Nos. 8 and 9

8. What relief, if any, are any of the parties to the present proceedings entitled to?

9. What directions, if any, need to be issued by this Tribunal in the peculiar facts and circumstances of the present case?

144. In this main application, as well as in the applications filed on behalf of the Project Proponents/Respondents, we are concerned with the rival reliefs claimed by the respective parties. On the one hand, the Applicants pray for setting aside of the impugned Office Memoranda, issuance of directions to the Respondents to initiate prosecution and even to pass such other orders and directions as would be necessary for the facts and circumstances of the case. While on the other hand, the Project Proponents/Respondents pray for saving of the impugned Office Memoranda passed and constructions raised by them, as well as that delisting of their application by

SEIAA was not called for and that SEIAA be directed to consider their application on merits. It is also the contention of the Project Proponents that the relief claimed by them that they being mostly residential complexes are category 'B' projects and hence they are not required to obtain the Environmental Clearance. In view of the above discussion, we have answered the issues in favour of the Applicant and against the Respondents and having held that the Office Memoranda dated 12th December, 2012 and 27th June, 2013 are liable to be quashed, the Project Proponents through their own conduct, raising illegal and unauthorized constructions, without obtaining prior Environmental Clearance and having specifically violated the provisions of the Notification of 2006 and the directions issued to them by the authorities, are not entitled to any relief claimed by them.

145. After discussing the above mentioned issues we feel that still there are two questions remaining to be dealt with by the Tribunal. First, whether the Notification of 2006 applies to the residential complexes in terms of Schedule-I to the Notification of 2006. Secondly, the construction of the projects having been completed, where 3rd party interest have already been created, what are the appropriate directions that should be issued by the Tribunal in the interest of environment and ecology and for restoration and restitution of the same within the ambit and scope of Section 15 of the NGT Act, 2010.

146. The contention of some of the Project Proponents is that their projects are residential projects and therefore the Notification of 2006 is not applicable to them, thus, it is not necessary for them to obtain Environmental Clearance. Some of them, particularly Respondent No. 9, has contended that these are category 'B' projects and therefore, no public consultation or EIA report is required. Therefore, their projects need to be cleared. The Applicants are developing multi-storey residential building. It is the case of this Project Proponent that the project does not fall within the ambit of Entry 8(a) and 8(b) of the Schedule of Notification of 2006. It only applies to industrial or commercial buildings. Furthermore, there is no valid basis for laying down the threshold limitation of 20,000 sq. mts in the Schedule. The reliance is placed upon the judgment of the Delhi High Court in the case of *Delhi Pollution Control Committee* v. *Splendor Landbase Ltd.*, LPA 895 of 2010 decided on 23rd January, 2012. While dealing with these contentions of private Respondents, we have already noticed that there is no specific challenge raised by these Respondents to the Notification of 2006. No such challenge was raised even during the course of the arguments. On the contrary, they have relied upon the impugned Memoranda issued in furtherance to the Notification of 2006.

147. The Notification of 2006 has a mandatory character and its requirements have to be satisfied in consonance with the provisions made therein. Prior Environmental Clearance from the regulatory authority is the condition precedent before any construction work or preparation of land by the Project Proponent is carried out except for securing the land. The project and activities as already stated above have been categorized into two categories; category 'A' and category 'B'. All the projects and activities which have been specified in the Schedule to the Notification of 2006 required Environmental Clearance. In these cases, we are concerned with Entry 8(a) and 8(b) of the Schedule to the Notification that reads as follows:

(1)	(2)	(3)	(4)	(5)
"8		Building or Construction projects or Area Development projects and Townships.		
8(a)	Building and Construction projects		>20000 sq.mtrs and < 1,50,000 sq. mtrs. o	The term "built up area" for the purpose of this notification the built up or covered area on all floors

			built up area	put together, including its basement and other service areas, which are proposed in the building or construction projects. Note 1.- The projects or activities shall not include industrial shed, school, college, hostel for educational institution, but such buildings shall ensure sustainable environmental management, solid and liquid waste management, rain water harvesting and may use recycled materials such as fly ash bricks. Note 2.- "General Conditions" shall not apply.
8(b)	Townships and Area Development Projects		Covering an area of > 50 ha and or built up area > 1,50,000 sq. mtrs.	A project of Township and Area Development Projects covered under this item shall require an Environment Assessment report and be appraised as Category 'B1' Project. Note.- "General Conditions" shall not apply.

148. The entry has been intentionally termed very widely by the framers. Any Building and Construction Project which has the built up area or covered area of more than 20,000 sq meters or less than 1,50,000 sq. meters would fall under Item 8(a) and Township and Area Development projects covering an area of more than 50 hectares and/or built up areas of more than 1,50,000 sq. meters would fall under Item 8(b). Both of these would be Category 'B' projects. These projects would be dealt with for grant or refusal of Environmental Clearance as per the procedure prescribed under the Notification of 2006. If we examine the scheme of the Notification of 2006 and its relevant provisions, particularly, Paragraphs 2, 6, 7 and 8, it is clear that the expression 'project and activity' are of very wide magnitude and would cover all kind of projects and activities. The definition of environment under Section 2(a) of the Act of 1986 read with definition of the same term under Section 2(c) of the NGT Act would clearly show that the 'projects' or 'activities' are not synonymous terms. What may not be covered specifically under the term 'project' may squarely fall within the ambit of 'activity'. These expressions, having not been specifically made exclusive, would be treated to be more generic and would apply to all kinds of projects and activities. Entry 8(a) talks of building and construction project only with reference to area and extent of construction. They do not even remotely suggest that such building or construction projects should be carried out for an industrial or any allied activity. Whether the complex is being constructed exclusively for residential purpose and/or for mixed use, it will not alter the situation, if otherwise, it meets the threshold requirement of the area of construction. There is no occasion before the Tribunal to

give undue narrow construction to these expressions which have been intentionally worded very widely by the framers of law. On the Rule of 'Plain Construction', these terms would include residential buildings or projects and the Notification of 2006 would be applicable to all the projects in question. The reliance placed by the private Respondents upon the judgment of the Delhi High Court in the case of *Delhi Pollution Control Committee* (supra), in our considered opinion, is misplaced. In that case, Delhi High Court was concerned with Section 25 of the Water Act. It is not necessary for us to discuss the judgment of High Court in any greater detail, primarily for two reasons, firstly, judgment relates to the provisions of the Water Act, in particular Section 25, the provisions of which are not *pari materia* to the provisions of the Act of 1986 and the Notification of 2006. These provisions are completely different from each other and have different parameters to satisfy. Second and most importantly, the High Court itself in paragraph 25 of the Judgment noticed that the reasoning given by the Learned Single Judge to expand the scope of Section 25(a) of the Water Act object of which was different, i.e., control of water pollution, in its wider magnitude, '*ignores*' (emphasis supplied) that the Act of 1986 deals with this larger issue in the context of 'environment' which has been defined therein to include water, air, land and interrelationship which exists among them and human beings and other living creatures, plants, micro-organism and property. The said Act of 1986 and Rules framed thereunder are wide enough to cover exploitation of water and the impact thereof on the environment. Then the Supreme Court proceeded to hold that the Water Act would not apply to building, housing and residential apartment units as they may not be discharging trade effluents covered under the provision of that Act.

149. It is also not necessary for us to deal with the applicability of the Water Act to such buildings, as that question does not arise before us, hence we leave the question open. However, we have no doubt in stating that the said judgment of the High Court is of no avail to the private Respondents in the present case.

150. A Bench of this Tribunal had the occasion to examine the scope of the Entries in the Schedule to the Notification of 2006 particularly, Entry 8(a), 8(b) and 7(f) in the case of *Vikrant Kumar Tongad* v. *Delhi Tourism and Transportation Corporation*, 2015 ALL (I) NGT Reporter (1) (Delhi) 244, the Tribunal held as under:

> "31. If an activity is allowed to go ahead, there may be irreparable damage to the environment and if it is stopped, there may be irreparable damage to economic interest. In case of doubt, however, protection of environment would have precedence over the economic interest. Precautionary principle requires anticipatory action to be taken to prevent harm. The harm can be prevented even on a reasonable suspicion. It is not always necessary that there should be direct evidence of harm to the environment [*Vellore Citizens Welfare Forum* v. *Union of India*, (1996) 5 SCC 647].
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> 32. The applicability of 'Principle of Liberal Construction' to socio-welfare legislation like the Act of 1986, thus, could be justified either with reference to the 'doctrine of reasonable construction' and/or even on 'constructive intuition'. In the case of *Haat Supreme Wastech Pvt. Ltd.* v. *State of Haryana*, 2013 ALL (I) NGT REPORTER (2) (DELHI) 140, the Tribunal, while dealing with interpretation of the Regulations of 2006 along with the Schedule and while deciding whether the bio-medical waste disposal plants required Environmental Clearance or not, answered the question in affirmative, that, such plants are covered under Entry 7(d) and while answering so, applied the doctrine of 'reasonable construction' as well as 'constructive intuition'. Doctrine of 'reasonable construction' is intended to provide a balance between development and the environment. The Tribunal held that there was no occasion for the Tribunal to take the scope of Entry 7(d) as unduly restrictive or limited and it gave the entry a wide meaning. It was also held that the Environmental Clearance would help in ensuring a critical analysis of the suitability of the location of the bio-

medical waste disposal plant and its surroundings and a more stringent observation of parameters and standards by the Project Proponent on the one hand and limiting its impact on public health on the other.

33. 'Development' with all its grammatical variations, means the carrying out of building, engineering, mining or other operations in, on, over or under land or the making of any material change in any building or land and includes re-development. It could also be an activity, action, or alteration that changes underdeveloped property into developed property (*Ref: Wharton's Law Lexicon*, 15th Edn., 2012, *Black's Law Dictionary* 9th Edn., 2009). Reading of Clause 2 of the Regulations of 2006 and the Schedule attached thereto, particularly in light of the above principles, clearly demonstrates that an expression of very wide magnitude has been deliberately used by the framers. They are intended to cover all projects and activities, in so far as they squarely fall within the ambit and scope of the Clause. There does not appear to be any interest for the Tribunal to give it a narrower or a restricted meaning or interpretation. In the case of *Kehar Singh* v. *State of Haryana*, 2013 ALL (I) NGT REPORTER (2) (DELHI) 140, the Tribunal had specifically held that there should exist a nexus between the act complained of and environment and that there could be departure from the rule of literal construction, so as to avoid the statute becoming meaningless or futile. In case of a social or beneficial legislation, the Tribunal should adopt a liberal or purposive construction as opposed to the rule of literal construction. The words used therein are required to be given a liberal and expanded meaning. The object and purpose of the Act of 1986 and the Schedule of Regulations of 2006 thereto was held to be of utmost relevance. In the case of present kind, if no checks and balances are provided and expert minds does not examine and assess the impacts of such projects or activities relating to development, consequences can be very devastating, particularly environmentally. Normally, the damage done to environment and ecology is very difficult to be redeemed or remedied. Thus, a safer approach has to be adopted to subject such projects to examination by Expert Bodies, by giving wider meaning to the expressions used, rather than to frustrate the object and purpose of the Regulations of 2006, causing irretrievable ecological and environmental damage.

34. There can hardly be any escape from the fact that Entries 8(a) and 8(b) are worded somewhat ambiguously. They lack certainty and definiteness. This was also noticed by the Hon'ble Supreme Court in the case of *In Re: Construction of Park at Noida Near Okhla Bird Sanctuary* v. *Union of India (UOI)*, (2011) 1 SCC 744, where the Court felt the need that the Entries could be described with greater precision and clarity and the definition of 'built-up area' with facilities open to the sky needs to be freed from its present ambiguity and vagueness. Despite the above judgment of the Hon'ble Supreme Court, Entry 8(a) and 8(b) were neither amended nor altered to provide clarity or certainty. However, the expression 'built up area' under the head 'conditions if any' in column (5) of the Schedule to the Regulations of 2006, was amended vide Notification dated 4th April, 2011. *Dehors* the ambiguities in these Entries, an interpretation that would frustrate the object and implementation of the relevant laws, would not be permissible. Township and Area Development project' is an expression which would take within its ambit the projects which may be specific in relation to an activity or may be, they are general Area Development projects, which would include construction and allied activities. 'Area Development' project is distinct from 'Building and Construction' project, which by its very language, is specific and distinct. Entries 8(a) and 8(b) of the Schedule to the Regulations of 2006 have been a matter of adjudication and interpretation before the Hon'ble Supreme Court in the case of *In Re: Construction of Park at Noida Near Okhla Bird Sanctuary* v. *Union of India (UOI)*, (supra). In that case, Hon'ble Supreme Court was concerned with the construction of a park in

Noida near the Okhla Bird Sanctuary. The Hon'ble Supreme Court provided a distinction between a Township project' and Building and Construction project' and held that a Township project' was different, both quantitatively and qualitatively from a mere 'Building and Construction project'. Further, that an Area Development project may be connected with the Township Development project and may be its first stage when grounds are cleared, roads and pathways are laid out and provisions are made for drainage, sewage, electricity and telephone lines and the whole range of other *civic infrastructure*, or an area development project may be completely independent of any township development project as in the case of creating an artificial lake, or an urban forest or setting up a zoological or botanical park or a recreational, amusement or a theme park. The Hon'ble Supreme Court principally held that a zoological or botanical park or a recreational park etc. would fall within the category of Entry 8(b) but, if it does not specify the threshold marker of minimum area, then it may have to be excluded from operation of the mandatory condition of seeking prior Environmental Clearance. The Court held as under:

> "66. The illustration given by Mr. Bhushan may be correct to an extent. Constructions with built up area in excess of 1, 50,000 sq mtrs. would be huge by any standard and in that case the project by virtue of sheer magnitude would qualify as township development project. *To that limited extent* there may be a quantitative correlation between items 8(a) and 8(b). But it must be realized *that the converse of the illustration given by Mr. Bhushan may not be true*. For example, a project which is by its nature and character *an "Area Development project" would not become a "Building and Construction project*" simply because it falls short of the threshold mark under item 8(b) but comes within the area specified in item 8(a). The essential difference between items 8(a) and 8(b) lies not only in the different magnitudes but in the difference in the nature and character of the projects enumerated there under.
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> 67. In light of the above discussion it is difficult to see the project in question as a "Building and Construction project". Applying the test of 'Dominant Purpose or Dominant Nature' of the project or the *"Common Parlance" test, i.e. how a common person using it and enjoying its facilities would view it, the project can only be categorized under item 8(b) of the schedule as a Township and Area Development project*". But under that category it does not come up to the threshold marker inasmuch as the total area of the project (33.43 hectares) is less than 50 hectares and its built-up area even if the hard landscaped area and the covered areas are put together comes to 1,05,544.49 square metres, i.e., much below the threshold marker of 1,50,000 square metres."

35. Besides dealing with the scope and dimensions of Entries 8(a) and 8(b) of the Schedule afore-stated, the Hon'ble Supreme Court, while referring to the findings given by the CEC in its report, that the Project was located at a distance of 50 mtrs. from the Okhla Bird Sanctuary and that in all probability, the project site would have fallen in the Eco-Sensitive Zone had a timely decision in this regard being taken by the State Government/MoEF, permitted continuation of the project, and held as under:

> "74. The report of the CEC succinctly sums up the situation. Though everyone, excepting the Project Proponents, views the construction of the project practically adjoining the bird sanctuary as a potential hazard to the sensitive and fragile ecological balance of the Sanctuary there is no law to stop it. This unhappy and anomalous situation has arisen simply because despite directions by this Court the authorities in the Central and the State Governments have so far not been able to evolve a principle to notify the buffer zones around Sanctuaries and National Parks to protect the sensitive and delicate ecological balance required

for the sanctuaries. But the absence of a statute will not preclude this Court from examining the project's effects on the environment with particular reference to the Okhla Bird Sanctuary. For, in the jurisprudence developed by this Court Environment is not merely a statutory issue. Environment is one of the facets of the right to life guaranteed under Article 21 of the Constitution"

36. The above dictum of the Supreme Court clearly laid down a fine distinction between Entries 8(a) and 8(b) of the Schedule to the Regulations of 2006 on one hand, while on the other hand held that mere absence of law cannot be a ground for degrading the environment, as environment is one of the facets of 'Right to Life' as envisaged under Article 21 of the Constitution of India.

37. Thus, this Tribunal has to examine the ambit and scope of Entry 8(b) while keeping in mind the Scheme and Object of the Act of 1986, the Rules of 1986, the Regulations of 2006 along with its Schedule and most importantly right to clean environment as an integral concept of our Constitutional Scheme. The project in question is construction of a 'Signature Bridge' over River Yamuna, connecting eastern and western ends of the city of Delhi and to ensure fast and smooth flow of traffic in that part of the city. This certainly is an Area Development project falling within Entry 8(b) of Schedule to the Regulations of 2006. There is also no dispute that the total constructed area of the 'Signature Project' is 1,55,260 sq. mtrs., which is higher than the threshold marker of 1,50,000 sq. mtrs. This project cannot fall within Entry 7(f) of the Schedule to the Regulations of 2006, as it is neither a national nor a city highway and not even any part thereof.

38. Having held that the project in question is covered under Entry 8(b) of the Schedule to the Regulations of 2006, now we have to consider what relief can be granted to the Applicant in the facts and circumstances of the case. Admittedly, particularly according to the Project Proponent, various other departments have granted them clearances and/or have already issued No Objection Certificates for construction of the said project. MoEF vide its letter dated 14th March, 2007 had informed the Project Proponent that 'bridges' are not covered under the Regulations of 2006 and as such, no prior Environment Clearance was required for commencement of the project. It is in the backdrop of these circumstances that the construction of the project commenced in the year 2007. As of today, more than 80 per cent of the bridge has already been completed. Huge public funds have been spent on this project. It is intended to serve public purpose and is in public interest, namely free and fast flow of traffic between east and west Delhi. Apparently, we cannot attribute any fault or breach of legal duty to the Project Proponent (Respondent No. 1). We do not think it is a case where we should either direct stoppage of project work or direct demolition thereof."

151. These Entries thus need to be construed liberally and given a wider meaning. As already stated above, on their plain reading the projects of whatever nature they may be, but so far as they are covering an area of more than the threshold limit specified in these Entries, they would be covered under the Schedule for which it would be mandatory to obtain prior Environmental Clearance. The contention that the Notification of 2006 and the Schedule would not apply to such projects thus, cannot be accepted. The projects whether residential or multi-purpose would squarely fall within the ambit and scope of the Entries in the Schedule particularly when neither the language of the Notification of 2006 nor the Entries anywhere suggests that the framers intended to exclude such building projects.

152. To obtain Environmental Clearance prior to commencement of any activity or project is the mandate of law. This language has to be given its proper and purposive meaning. It is undoubtedly mandatory. When the law mandates prior approval, it

ought not to be averred as post activity approval or *ex-post facto* permission. In such cases, courts have to consider whether any remedial measures can be imposed or certain harsher directions are called for. The Supreme Court in the case of *A.P. Pollution Control Board* v. *Prof. M.V. Nayudu (Retd.)*, (2001) 2 SCC 62 was concerned with the interpretation of Section 25 of the Water Act which requires that no person shall, without the previous consent of the State Board, establish or take any steps to establish any industry, operation or process, or any treatment and disposal system or an extension or addition thereto, which is likely to discharge sewage or trade effluent into a stream or well or sewer or on land etc. The Supreme Court held that it was a condition precedent not only for operating the unit but even for establishment of an industry. While considering the aspect that on the basis of material before it, it would not be a fit case for directing no objection from the Pollution Control Board and that even it was not possible to hold that the safeguards suggested by the appellant Board will be adequate, in the light of the Reports. The Supreme Court held that plea of principle of 'promissory estoppel' would not be applicable and grant of permission by other authorities would not accrue to the benefit of the industry in relation to grant of NOC. It will be useful to refer to the relevant paragraphs of the judgment of the Supreme Court:

> "54. On point a(ii), it referred to the definition of 'pollution' in Section 2(c) of the Water Act, Section 2(f) which defines 'sewage effluent' and Section 2(k) which defines 'trade effluent' and observed that the 'pollution potential' of the industry was to be assessed. After referring to the effluents-Commercial Castor oil, Bleaching earth, Activated carbon. Nickel catalyst, Hyflo supercel, Sulphuric Acid, Caustic Soda, Methanol, Calcium Oxide, Alum - in all 1463 MTs per month and noticed that the monthly requirement of Hydrogen was 76 500 NM. As the industry is coal based, large quantity coal is required. It would produce huge quantities of BSS, HCO, HSA, Methyl, Fatty acids, Epoxidise, Glyceren etc. Hydroxy Stearic Acid, methyl Hydroxy Stearic Acid and methanol are serious health hazardous. Items in part II list of Schedule I to the 'Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989' are the raw materials and RW2 (Dr. G.S. Siddhu) in his evidence agreed that these are hazardous (toxic) chemicals. The solid effluents generated every day are (i) spent bleaching earth 1250 Kgs, (ii) spent bleaching carbon 250 kgs, (iii) spent nickel catalyst '15 kgs. and (iv) sodium sulphate 3820 Kgs. (12-HSA) and 170 kgs. (from CME). Monthly turn out of effluents will be 400 MT. Every day 55 kgs. of nickel is consumed. Every day, 27,830 litres of water are to be used and normally the effluent will carry all these hazardous substances, including nickel. 'As it is, said that the water used could be reused for cultivation of lands in the premises of the industry, the toxic chemicals which get lodged in the surface layers of the soil will flow down in storm run offs or percolate into the ground water, to ultimately reach the water body of the two reservoirs. The NEAA further stated that Dr. Santappa in his evidence as RW-1 made admissions regarding gaseous effluents-fly ash, S02 CO2 Oxides of Nitrogen, Oxides of Sulphur and suspended particulate matter. The solid and liquid effluents could reach the lakes through seepage. The factory cannot be located in the catchment area because run-offs due to rain will carry hazardous material along surface and through seepage. The NEAA adverted to the 'Drainage Basic Analysis' by the Central Ground Water Board, to the effect that the Basin "has moderate run-off and moderately high permeability of the terrain. As such the amount of infiltration is considerably high". The said Report shows that rainfall in 796 mm (heaviest being 1326 mm) and there is every likelihood of the solids being "transported down along the gradient". The said Report of Central Ground Water Board, referred to "dolerite dykes" in the vicinity and the possibility of flow even more. Having regard to the location of the dyke and the speed and angle, the polluted water could reach

Himayat Sagar which is hardly 2 m bgl. since the dam height is 1763.50 feet. Satellite maps of NSRA were also examined and relied for this purpose. Among the substances stored are nickel, sulphuric acid, HCA, which are well-known 'hazardous' substances.

57. The NEAA, then took up issue (b) as to the likelihood of the industry affecting the sensitive catchment area. It referred to the Expert Committee Report of the HMWSSB and its recommendations which led to the issuance of the GO 192 dated 31.3.94 and GO 111 dated 8.3.96. The NEAA concluded that the "establishment of any chemical industry, carries with it, the imminent dangers of the chemicals or chemical effluents polluting the water of Himayat Sagar and Osman Sagar".

62. In the light of the above exhaust he scientific Reports of the National Environmental Appellate Authority, New Delhi the Department of Chemical Technology, Bombay University and the National Geophysical Research Institute, Hyderabad - it cannot be said that the two lakes will not be endangered. The package of the IICT - which did not deal with the elimination of effluent effects, the opinion of Dr. Santappa, the view of Director of Industries, and the view of the Government of Andhra Pradesh must be held to be base on insufficient data and not scientifically accurate.

63. It is no doubt stated by the 7th Respondent that it is prepared to adopt the safety measures suggested by the appellant Board on 1.7.97 and also those suggested by Dr. Bhowmick, by trying to see that during storage of raw materials and after release of the hazardous liquids, they are put in containers and removed.

64. In respect of these drinking water reservoirs which cater to the needs of about 70 or 80 lakhs population, we cannot rely upon a bare assurance that care will be taken in the storage of serious hazardous materials. Nor can we rely on an assurance that these hazardous substances would be effectively removed without spillage. It is, in our view, not humanly possible for any department to keep track whether the pollutants are not spilled over. This is exactly where the 'precautionary principle' comes into play. The chance of an accident, within such close proximity of the reservoirs cannot be ruled out, as pointed out in the Reports. Thus, we are led to the inference that there is a very great risk that these highly hazardous material could seep into the earth and reach the tanks, after passing through the dolerite dykes, as pointed by the National Geophysical Research Institute, Our inference from facts and the reports is that of a reasonable person, as pointed out in the main judgment in *A.P. Pollution Board* v. *Prof. M.V. Nayudu*.

65. On the basis of the scientific material now obtained by this Court from three highly reputed sources, this is certainly not a fit case for directing grant of NOC by the Pollution Control Board. It is not also possible to hold that the safeguards suggested by the appellant Board-pursuant to the direction of the Government dated 3.7.97, will be adequate, in the light of the Reports. We therefore hold that in the facts of this case, the Board could not be directed to suggest safeguards and there is every likelihood that safeguards could fail either due to accident, as stated in the report, or due to human error. We, therefore, hold on point 3 against the 7th Respondent-industry.

66. This point deals with the principle of promissory estoppel applied by the appellate authority, on the ground that once building permission and permission for change of land use were granted, the appellant Board could not refuse NOC, The learned Additional Solicitor General, Sri R.N. Trivedi referred to the amendment to Section 25(1) in this connection.

67. Under Section 25(1) of the Water (Prevention and Control of Pollution) Act, 1974 as it original stood, Subsection (1) thereof read as follows:

Section 25(1): Subject to the provisions of this section, no person shall, without

the previous consent of the State Board, bring into use any new or altered outlet for the discharge of sewage or trade effluent into a stream or well or begin to make any new discharge of sewage or trade effluent into a stream or well".

By Central Act 53/1988, the sub-section was amended and reads as follows:

Section 25(1): Subject to the provisions of this section, no person shall, without the previous consent of the State Board - (a) establish or take any steps to establish any industry, operation or process, or any treatment and disposal system or any extension or addition thereto, which is likely to discharge sewage or trade effluent into a stream or well or sewer or on land (such discharge being hereafter in this section referred to as discharge of sewage) or (b) bring into use any new or altered outlet for the discharge of sewage, or (c) bring to make any new discharge or sewage"

After the amendment, the prohibition now extends even to 'establishment' of the industry of taking of steps for that process and therefore before consent of the Pollution Board is obtained, neither can the industry be established nor any steps can be taken to establish it.

68. The learned Additional Solicitor General of India, Sri Trivedi is right in contending that the 7th Respondent industry ought not to have taken steps to obtain approval of plans by the Gram Panchayat, nor for conversion of land use by the Collector, nor should it have proceeded with civil work in a installation of machinery. The action of the industry being contrary to the provisions of the Act, no equities can be claimed.

69. The learned Appellate Authority erred in thinking that because of the approval of plan by the Panchayat, or conversion of land use by the Collector or grant of letter of intent by the Central Government, a case for applying principle of "promissory estoppel" applied to the facts of this case. There could be no estoppel against the statute. The industry could not therefore seek an NOC after violating the policy decision of the Government. Point 4 is decided against the 7th Respondent accordingly."

153. Wherever anyone violates the law and flouts the directions issued by the regulatory authority and other concerned authorities, commences construction without even applying for Environmental Clearance and completes the project or activity extensively, two fold consequences would follow. First, that it would render itself liable for imposition of penalties for contravention of the Act, Rules, Orders and directions in terms of Section 15 of the Act of 1986. The other, for issuance of directions in regard to the demolition or grant of consent subject to such conditions as may be considered appropriate by the authorities or the Tribunal. Tribunal exercising its appellate power and Original jurisdiction in terms of Section 14 and 16 of the Act of 2010, has the powers of merit and judicial review and is competent to issue such directions as it may deem necessary in terms of the said provisions including Section 18 of the NGT Act, 2010. The Court and Tribunals, particularly, in such cases of *fait accompli* have adopted a more practical approach which would permit the remaining work of the project to be completed while providing stringent safeguards in the interest of the environment as well as issuing orders which would vest the Project Proponent with civil consequences. In the case of *Sterlite Industries (India) Ltd.* v. *Union of India (UOI)*, (2013) 4 SCC 575, Supreme Court held that the appellant company was liable to pay compensation of Rs. 100 crores for polluting the environment and operating its industry without renewal of consent by the Board. In this case, industry had obtained consent to operate from the Board prior and subsequent to the period when it operated without consent of the Board. After passing of the judgment of the Supreme Court in this very case, the Tribunal directed the industry to take precautionary measures as well as directed the Pollution Control Board to impose more stringent

conditions while permitting the industry to operate (*Sterlite Industries (India) Ltd.* v. *Tamil Nadu Pollution Control Board*, 2013 ALL (I) NGT REPORTER (DELHI) 368).

154. Further, in the case of *Sarang Yadvadkar* v. *The Commissioner, Pune Municipal Corporation*, 2013 ALL (I) NGT REPORTER (DELHI) 299, the Tribunal had passed remedial and prohibitory directions in the project underway. The Corporation was constructing elevated road in the floodplain. Major part of the project had already been constructed. The Tribunal directed partial demolition of the raised structure and further directed the Corporation to construct the bridge on pillar so that there was no obstruction to the free flow of water and the course of the river was not adversely affected. This order of the Tribunal was challenged before the Supreme Court in Civil Appeal No. 3445 of 2015 and was dismissed by the Supreme Court vide its orders dated 12th February, 2015.

155. In somewhat similar situations like the one in hand, the Tribunal in the case of *Forward Foundation* v. *State of Karnataka*, Original Application No. 222 of 2014 decided on 7th May, 2015, where the Project Proponents had raised the construction on the wet lands and the Rajakaluves (storm water drains), affecting the same, without obtaining prior Environmental Clearance. The Tribunal while appointing a special Committee referred to it various questions relating to environment and ecology and prohibited the Project Proponents from creating any third-party interests. The Tribunal further imposed 5 per cent of the project cost as environmental compensation on Project Proponent for degrading and damaging the environment and ecology of the area in question and had required the Committee to submit a report to the Tribunal. The Project Proponent in this case, had preferred a statutory appeal before the Supreme Court and *inter alia* took up the plea that they were not heard on merits and imposition of penalties was not proper. The Supreme Court vide its order dated 20th May, 2015 passed in the case of *Core Mind Software and Services Pvt Ltd.* v. *Forward Foundation*, Civil Appeal No. 4829/2015, granted liberty to them without setting aside the judgment and various directions issued by the Tribunal and also to approach the Tribunal for recalling of Order and in the meanwhile stayed the direction pertaining to payment of compensation. The order of the Supreme Court reads as under:

"ORDER

> One of the main contentions raised by the appellants in these appeals is that though the Tribunal had heard the matter only on preliminary issues and no arguments on merit were advanced, final judgment decides the merits of the disputes as well and above all a penalty of Rs. 117.35 crores against original Respondent No. 9 (the appellant in C.A. No. 4832 of 2015) and Rs. 22.5 crores against Original Respondent No. 10 (the appellant in C.A. No. 4829/2015) is imposed.
>
> On the aforesaid averment, we feel that it would be more appropriate for the appellant to file an application before the Tribunal with the prayer to recall the order on merits and decide the matter afresh after hearing the counsel for the parties, as the Tribunal knows better as to what transpired at the time of hearing.
>
> With the aforesaid liberty granted to the petitioners, the appeals are disposed of. Certain preliminary issues are decided against the appellants which are also the subject matter of challenge. However, it is not necessary to deal with the same at this stage. We make it clear that in case the said application is decided against the appellants or if ultimately on merits, it would be open to the appellants to challenge those orders by filing the appeal and in that appeal all the issues which are decided in the impugned judgment can also be raised.
>
> The counsel for the appellants state that they would file the requisite application within one week. Till the said application is decided by the Tribunal, there shall be stay of the direction pertaining the payment of aforesaid penalty.

Mr. Raj Panjwani points out that the Tribunal has allowed the appellants to proceed with the construction only on the payment of the aforesaid fine/penalty. We leave it to the Tribunal to pass whatever orders it deems fit in this behalf, after hearing the parties."

156. The Applicants filed an application before the Tribunal upon which notice was issued, whereby the Tribunal while continuing the stay on the condition of payment of compensation, directed the Committee to file its report before the next date of hearing in terms of the judgment.

157. From the above judgments of the Supreme Court and the Tribunal, it is clear that in cases of the present kind, it would not be advisable to direct complete demolition of such properties. The Project Proponents claim to have invested huge amounts in raising these projects where it had obtained permission from other authorities and most importantly interest of 3rd party have been created in these properties. The Tribunal has to take a balanced approach while applying the principle of sustainable development and precautionary principle. Even in the case of *A.P. Pollution Control Board* (supra), the Supreme Court, laid great emphasis on the precautionary principle on the premise that it is always not possible to judge the environmental damage.

158. The Precautionary Principle may lose its material relevancy where the projects have been completed and even irreversible damage to the environment and ecology has been caused. The situation may be different when invoking this principle in cases of partially completed projects, it would become necessary to take remedial steps for protection of environment without any further delay. At this stage, it may still be possible to take steps while any further delay would render it absolutely impracticable. Precautionary Principle is a proactive method of dealing with the likely environmental damage. The purpose always should be to avert major environmental problem before the most serious consequences and side effects would become obvious. To put it simply, Precautionary Principle is a tool for making better health and environmental decisions. It aims to prevent at the outset rather than manage it after the fact. In some cases, this principle may have to be applied with greater rigor particularly when the faults or acts of omission, commission are attributable to the Project Proponent.

The ambit and scope of the directions that can be issued under the Act of 1986 can be of very wide magnitude including power to direct closure, prohibition or regulation of any industry, operation or process and stoppage or regulation of supply of electricity or water or any other services of such projects. The principle of sustainable development by necessary implication requires due compliance to the doctrine of balancing and precautionary principle.

159. In appropriate cases, the Courts and Tribunals have to issue directions in light of the facts and circumstances of the case. The powers of the higher judiciary under Article 226 and 32 of the Constitution are very wide and distinct. The Tribunal has limited powers but there is no legislative or other impediment in exercise of power for issuance of appropriate directions by the Tribunal in the interest of justice. Most of the environmental legislations couched the authorities with power to formulate program and planning as well as to issue directions for protecting the environment and preventing its degradation. These directions would be case centric and not general in nature. Reference can be made to judgment of the Supreme Court in the case of *M.C. Mehta* v. *Union of India*, JT 1987 (1) SC 1, *Vineet Narain* v. *Union of India (UOI)*, JT 1997 (10) SC 247 and *University of Kerala* v. *Council, Principals', Colleges, Kerala*, JT 2009 (14) SC 283.

160. In light of the above, even if the structures of the Project Proponents are to be protected and no harsh directions are passed in that behalf, still the Tribunal would be required to pass appropriate directions to prevent further damage to the environment

on the one hand and control the already caused degradation and destruction of the environment and ecology by these projects on the other hand. Furthermore, they cannot escape the liability of having flouted the law by raising substantial construction without obtaining prior Environmental Clearance as well as by flouting the directions issued by the authorities from time to time. The penalties can be imposed for such disobedience or noncompliance. The authorities have already initiated action against three of the Project Proponents and have taken proceedings in the Court of competent jurisdiction under Act of 1986. However, no action has been taken against other four Project Proponents as of now. Penalties can be imposed for violation in due course upon full trial. What requires immediate attention is the direction that Tribunal should pass for mitigating as well as preventing further harm. As far as further remedial measures, alterations, demolition or variation in the existing structure in the interest of environment and ecology which is required to be taken to preserve the environment are to be suggested by the Committee that we propose to constitute. However, as far as damage that has already been caused to the environment and ecology by the illegal and unauthorized action of the Project Proponents, they are required to pay compensation for its restoration and restitution in terms of Section 15 of Act of 2010. Needless to notice here that in this case, the Project Proponents were heard at great length on facts and merits of the case.

161. We may specifically notice here that all the Project Proponents had filed contentions and documents in support of their respective case. They addressed the Tribunal at length on factual matrix of the case as well as on law. Various contentions and claims raised by the Project Proponents before the Tribunal have been deliberated in detail.

162. In all cases, SEIAA has passed an order directing delisting of applications for Environmental Clearance which is sought to be questioned by the Project Proponents. We do not find any fault on the part of SEIAA and other official Respondents in delisting the applications for obtaining Environmental Clearance. Just one reason is enough to de-list and to reject these applications which is, that they started construction of their respective projects without obtaining Environmental Clearance and in some cases without even applying for grant of Environmental Clearance. All of them violated the direction of SEIAA as well as their own undertaking and apology to SEIAA that they would not raise any construction till grant of Environmental Clearance. There is more than ample evidence on record that such violations have been committed. Projects are squarely covered under the Notification of 2006 and, therefore, we find no infirmity in the order of SEIAA in delisting applications of Project Proponents for grant of Environmental Clearance.

163. In view of the above detailed discussion, we pass the following order and directions:

1) We hold and declare the Office Memoranda dated 12th December, 2012 and 27th June, 2013 as *ultra vires* the provisions of the Act of 1986 and the Notification of 2006. They suffer from the infirmity of lack of inherent jurisdiction and authority. Resultantly, we quash both these Office Memoranda.

2) Consequently, the above Office Memoranda are held to be ineffective and we prohibit the MoEF and the SEIAA in the entire country from giving effect to these Office Memoranda in any manner, whatsoever.

3) We hold and declare that the resolution/orders passed by the SEIAA, de-listing the applications of the Project Proponents, do not suffer from any legal infirmity. These orders are in conformity with the provisions of the Act of 1986 and the Notification of 2006 and do not call for interference.

4) We hereby constitute a Committee of the following Members:

a) Member Secretary of SEIAA, Tamil Nadu.
b) Member Secretary, Tamil Nadu Pollution Control Board.
c) Professor from Department of Civil Engineering, Environmental Branch, IIT Bombay.
d) Representative not below the rank of Director from the Ministry of Environment and Forest (to be nominated in three days from the date of pronouncement of this judgment).
e) Representative of the Chennai Metropolitan Development Authority.

5) Member Secretary of the Tamil Nadu Pollution Control Board shall be the Nodal Officer of the Committee for compliance of the directions contained in this judgment.

6) The above Committee shall inspect all the projects in question and submit a comprehensive report to the Tribunal. This comprehensive report shall relate to the illegal and unauthorized acts and activities carried out by the Respondents. It shall deal with the ecological and environmental damage done by these projects. It would further deal with the installation of STP's and other antipollution devices by the Project Proponents, including the proposed point of discharge of sewage and any other untreated waste. The Expert Committee would also state in regard to the source of water during operation phase and otherwise, use of energy efficient devices, ecologically and environmentally sensitive areas and details of alteration of and its effect on the natural topography, the natural drainage system etc. The Committee shall also examine the adequacy of rainwater harvesting system and parking area and if at all they have been provided. The report shall also deal with the mechanism provided for collection and disposal of municipal solid waste at the project site.

7) The Committee shall further report if the conditions stated in the planning permission and other permissions granted by various authorities have been strictly complied with or not.

8) The Committee shall also report to the Tribunal if the suggestions made by the SEIAA in its meetings adequately takes care of environment and ecology in relation to these projects.

9) What measures and steps, including demolition, if any, or raising of additional structures are required to be taken in the interest of environment and ecology?

10) All the Project Proponents shall pay environmental compensation of 5 per cent of their project value for restoration and restitution of the environment and ecology as well as towards their liability arising from impacts of the illegal and unauthorized constructions carried out by them. They shall deposit this amount at the first instance, which shall be subject to further adjustment. Liability of each of the Respondents is as follows:

Mr. Y. Pondurai.: Rs. 7.4125 crores.
M/s Ruby Manoharan Property Developers Pvt. Ltd.: Rs. 1.8495 crores.
M/s Jones Foundations Pvt. Ltd.: Rs. 7 crores.
M/s SSM Builders and Promoters: Rs. 36 crores.
M/s SPR and RG Construction Pvt. Ltd.: Rs. 12.5505 crores.
M/s Dugar Housing Ltd.: Rs. 6.8795 crores.
M/s SAS Realtors Pvt. Ltd.: Rs. 4.5 crores.

11) The compensation shall be payable to the Tamil Nadu Pollution Control Board within three weeks from the date of the pronouncement of this judgment. The amounts shall be kept in a separate account and shall be utilised by the Boards for the above stated purpose and subject to further orders of the Tribunal.

12) The above environmental compensation is being imposed on account of the

intentional defaults and the conduct attributable only to the Project Proponents. We direct that the Project Proponents shall not pass on this compensation to the purchasers/prospective purchasers, as an element of sale.

13) After submission of the report by the Expert Committee, the Tribunal would pass further directions for consideration of the matter by SEIAA in accordance with law.

14) All the project proponents are hereby prohibited from raising any further constructions, creating third party interest and/or giving possession to the purchasers/prospective purchasers without specific orders of the Tribunal, after submission of the report by the Expert Committee.

The report shall be submitted to the Registry of the Tribunal within a period of 45 days from the date of pronouncement of this judgment. Thereupon, the Registry would place the matter before this Tribunal for further appropriate orders and directions.

Liberty to the parties to move the Tribunal for any further directions and/or clarifications, if they so desire.

164. The above Appeal and Applications are accordingly disposed of. However, in the facts and circumstances of the case, we leave the parties to bear their own cost.

BEFORE THE NATIONAL GREEN TRIBUNAL
WESTERN ZONE BENCH, PUNE

(By Video Conferencing)

Original Application No. 35/2022 (WZ)
I.A. No. 37/2022(WZ) & I. A. No. 160/2022(WZ)

IN THE MATTER OF :

1. **Sayyed Mohammed Sabir Usman,**
   R/o: Flat No. 612, C- Wing, Mount Kailsh Apt.,
   Belasis Road, Mumbai Central, Mumbai-400008
   E-mail: Sayyedsabir455@gmail.com

.....Applicant

Versus

1. **The Principal Secretary, Environment Department,**
   Government of Maharashtra,
   Room No. 217, 2nd Floor, Annex Building,
   Mantralaya, Mumbai-400032, Maharashtra
   E-mail: Psec.env@maharashtra.gov.in

2. **State Level Environment Impact Assessment Authority-Maharashtra(SEIAA)**
   Through Member Secretary,
   15th Floor, New Administrative Building,
   Mantralaya, Mumbai-400032, Maharashtra
   E-mail: psec.env@maharashtra.gov.in

3. **Maharashtra Pollution Control Board,**
   Through Member Secretary,
   Kalptaru Point, 3rd Floor, Near Sion Circle,
   Opp. Cine Planet Cinema, Sion(E),
   Mumbai-400022, Maharashtra
   E-mail: ms@mpcb.gov.in

4. **Municipal Corporation of Greater Mumbai (MCGM),**
   Through Municipal Commissioner,
   Head Quarter, Near Chhatrapati Shivaji Terminus,
   Mumbai-400001.
   E-mail: mc@mcgm.gov.in

5. **Maharashtra Housing and Area Development Authority,**
   Through it CEO, MHADA Grihanirman Bhavan,
   Kalanagar, Bandra(E), Mumbai-400051
   E-mail: vpceo@mhada.gov.in

6. **Collector of Mumbai City,**
   Mumbai City Collectorates, Old Custom House,
   Fort, Mumbai, Maharashtra 400001
   E-mail: collector.mumbaicity@maharashtra.gov.in

7. **M/s Rock Corner Developers Private Limited,**
   A company incorporated and registered under the Companies Act, 1956,

Having Registered office at: 292, Bellasis Road, Dudhwala House, 3rd floors. A Wing, Near ST Depot, Ward E, Mumbai Central Village-Ramwadi, District Mumbai City, Mumbai-400008, Maharashtra. Email: support@idudhwala.com

....Respondent(s)

Counsel for Appellant(s):

Mr. Nitin Lonkar along-with Ms. Pradnya Belge, Advocate

Counsel for Respondent(s):

Mr. Aniruddha Kulkarni, Advocate for R-1, R-2
Ms. Manasi Joshi, Advocate for R-3
Mr. Sameer Khale, Advocate for R-4
Mr. Saket Mone, Advocate for R-7

PRESENT:

CORAM: HON'BLE MR. JUSTICE DINESH KUMAR SINGH, JUDICIAL MEMBER
HON'BLE DR. VIJAY KULKARNI, EXPERT MEMBER

Reserved on : 12.01.2023
Pronounced on : 30.01.2023

Judgment

1. This Original Application has been filed with the prayer to demolish the illegal structure at site in question and restore the area to its original position; further it is prayed that following the principles of sustainable development and polluter pays principle, direct the Respondent No.7-M/s Rock Corner Developers Private Limited/Project Proponent (PP) to deposit a heavy amount of Environmental Compensation.

2. In the body of the application, it is submitted that Respondent No.7/ Project Proponent is developing land situated at Survey Nos.1/3524 (part), 1/3526 (part) 1A/3524 (part) and 1A/3526 (part), and New Survey Nos. 13470, 13471, 13472, 14080 and Cadastral Survey Nos. 222 (p), 9A/222(p) and 1890 which is now amalgamated as New C. S. No. 222, of Byculla Division, Bellasis Road, Near ST Depot, Mumbai Central, Mumbai, for construction of residential and commercial buildings by the name & style as

"Dudhwala Complex & ID Origin".

3. The said construction has been made without obtaining prior Environmental Clearance, Consent to Establish and Consent to Operate. The total project land claimed by Project Proponent is admeasuring 9378.50 M^2 without providing mandatory Recreational Ground/ Open space. The permissible Built-up Area as per FSI will be 28017.78 M^2 and total covered Construction Built up Area will be 100000.00 M^2 . The Project Proponent has misled various authorities on account of area statement as the above said area statement is not as per the prevailing DC Rules of Municipal Corporation of Greater Mumbai (MCGM).

4. The Project Proponent has made illegal construction of more than 15 buildings/ wings or more than 500 flats, with one hotel with 50 rooms with total BUA more than 100000 M^2. The Project Proponent has further proposed additional construction in two remaining phases for additional Built up area of 75000 M^2 with 400 flats and more than 100 shops & 100 offices. The Project Proponent had undertaken the development in phased manner which is divided in five phases without obtaining any prior EC from SEIAA, and Consent to Establish and Consent to Operate from MPCB. Untreated sewage is directly discharged in the Municipal Corporation of Greater Mumbai (MCGM) sewer line. Inadequate tree plantation is done. The Project Proponent has not provided requisite open space for recreational ground as per the DC rules. About 150 M^2 area is shown in the sanction plan for recreation ground (RG), but in fact there is drive way. The Project Proponent has not obtained permission for ground water extraction from competent authority nor has Project Proponent made any test of ground water contamination. Project Proponent has not preserved top soil and constructed illegal basements causing ground water level depletion. The Project Proponent has not installed Rain Water

Harvesting System (RWH). The Project Proponent has not established Solar Energy Panel or Solar Water heaters nor has installed Storm Water Drainage System. The Project Proponent has not installed Solid Waste Composting System or OWC nor has done segregation of solid waste nor treatment of biodegradable waste. Project Proponent has installed 7 (Seven) D. G. sets. The illegal construction has caused traffic congestion leading to air pollution. The Project Proponent has not installed pollution control devices which has caused substantial damage to environment and ecology of more than Rs. 350 Crores, which ought to be recovered and the project needs to be directed to be stopped forthwith.

5. Further, it is submitted that Project Proponent has obtained NOC from the MHADA on 16.11.1998, 09.07.1999, 07.01.2000, 30.09.2014, 24.10.2016, etc. on the basis of misleading information. It has procured the layout sanction from Municipal Corporation of Greater Mumbai (MCGM) on 15.01.2000, 17.11.2000 and 30.08.2018. Project Proponent has procured the Sanction Plans for construction of buildings and Commencement Certificates from MCGM on 15.12.2000, 01.08.2003, 25.06.2004, 28.04.2011, 15.04.2019 & 30.12.2019. Project Proponent has submitted plan for commercial building for plinth check approval by Municipal Corporation Greater Mumbai (MCGM) vide letter dated 23.11.2017 and procured the layout sanction from MCGM on 29.03.2018. Project Proponent has procured intimation of disapproval and intimation of approval (IOD and IOA) along with building sanction from Municipal Corporation of Greater Mumbai(MCGM) on 30.03.2018. The Municipal Corporation of Greater Mumbai(MCGM) have prepared technical evaluation report for granting of commencement certificate on 29.09.2018. It has submitted its plan showing Open Space or Recreational ground

area of the project to the Municipal Corporation of Greater Mumbai(MCGM) for approval on 26.09.2020 and MCGM had prepared the technical report for granting of revised sanction on 01.06.2021. The Project Proponent procured the revised building sanction from MCGM on 01.06.2021. The Architect submitted the letter to MCGM stating the payment of capitation fees towards the total gross built-up area, which is nothing but only FSI area. The Project Proponent proposed to develop the said property in phases as one lay out, as per the plans approved and sanctioned from time to time and as per the other permissions, sanctions, No Objections etc., issued by the relevant competent authorities from time to time. The Project Proponent has constructed on a portion of the said property, a complex known as Dudhwala Complex (collectively known as Building No.3 and Phase 1 and Phase 2), consisting of five buildings/ wings, B (Part) to F, each consisting of ground + podium and 2 to 16 upper floors. These buildings have flats which have been given to the existing tenants. The third party purchasers in these buildings have` executed agreement for Sale with the promoter under the then prevailing laws and have been residing there. The MCGM has issued Occupation Certificate/s from time to time in respect of Building No.3 consisting of B (pt), C to F Wings (Phase 1). It has issued the Occupation Certificate for stilt + 2nd to 16th floors of B Wing (p) and for stilt + 2nd to 15th and 16th floors (part) of C & F wing (phase 1) on 27th October, 2004 and for stilt + 2nd to 15th +16th floors(part) of D and E Wing (phase-1)on 16.08.2005. The flat owners of these buildings have formed a society known as Dudhwala Complex Co-operative Housing Society limited.

6. The Project Proponent has constructed Building No.1 (Phase -1 and Phase-4), on the leasehold land of Hotel Sahil Private Limited. The Municipal Corporation of Greater Mumbai (MCGM) has

approved the plans in respect thereof on 03.06.2004, comprising of Basement + Ground + 7th Upper Floors together with front rehabilitation shops. In accordance with the approved plans, the building consisting of Basement + Ground+ 7th Upper Floors has been constructed thereon, except frontline rehabilitation shops, which are yet to be constructed. The Municipal Corporation of Greater Mumbai (MCGM) has issued a part Occupation Certificate on 25.11.2008 in respect of this building No.1.

7. Concerning Building No.3 Wing A and Wing B (Pt), the Municipal Corporation of Greater Mumbai (MCGM) has from time to time approved building plans, the latest being on 04.04.2019, permitting construction of multi-storied buildings as Wing A and Wing B (Pt).

8. The Project Proponent has constructed on a portion of the said property, a building known as "Wing A1"(Part of Building No.3) (Phase-1), consisting of "B+G+3". This building has been occupied by the existing tenants, and Municipal Corporation of Greater Mumbai has issued an Occupation Certificate in respect of this building. The premises owners have formed a society known as Kazerouni House Co-operative Housing Society Limited.

9. The promoter is proposing to construct Wing A comprising of Stilt+ Podium (1st) +2nd to 18 Upper Floors and Wing B (Pt) comprising of Basement + Ground (rehabilitation shops) + Podium (1st) + 2nd to 16 Upper Floors as sanctioned plans from time to time.

10. The Promoter has named the proposed Wing 'A' as 'ID Origins' and the other Wing B (Pt) has been named as 'Dudhwala Complex'. The Project Proponent has admitted that total FSI area to be approximately 20823.8 square meters and has undertaken the construction of commercial and residential buildings. The Applicant had issued notice to the government authority / Project Proponent requesting them to take appropriate legal action,

against the Project Proponent for non compliance of Environmental norms and when they failed to take action the applicant approached this Tribunal. The Project Proponent has carried out the substantial construction of the project even after the EIA Notification- 2006 thereby has committed intentional violation. In the present case despite total build-up area being 100000 M^2 in three phases with additional proposed build-up area of more than 75000 M^2 with two remaining phases, carried out construction without EC from statutory authority. The Project Proponent has not obtained any permission for extraction of ground water and drilled three bore wells. The Project Proponent in using 575000 liters of fresh water per day and has failed to make scientific treatment of waste water generated.

11. The Project Proponent has made deep excavation of an area admeasuring more than 4500 M^2 against the proposed ground coverage of 3000 M^2 to the average depth of 12 mtrs. At the project site is 2 Mtrs soil, 6 Mtrs Murum and 4 Mtrs basalt. The Project Proponent has made exaction of soil to the tune of 9000 Cu. Mtrs., excavation of Murum to the tune of 27000Cu. Mtrs., and excavation of basalt to the tune of 18000 Cu. Mtrs. The topsoil excavated during construction activity should have been stored for use in horticulture/ Land scape development within the project site, but Project Proponent has failed to do so.

12. Further, it is submitted that the total population at the Project site is 3250 persons. As per the DC rules average water requirement per person is 135 litres per day and fresh water consumption by residents is 438750 litres plus construction water requirement is 50000 liters per day. Therefore, total fresh water consumption would be 488750 liters per day. The waste water generated is the 80% of the total fresh water consumption, which would stand at 351000 liters per day. As per the Waste

Management Rules, average solid waste generated per person is 0.45 Kg per day, Therefore total solid waste generated would be 1462.5Kg per day. The Project Proponent was required to provide compost pits or organic waste composter at site to avoid the load on the local infrastructure but it failed to do so and that generated 1462.5 Kg of solid waste is being sent to Municipal Corporation(MC) without any scientific segregation and treatment. Sewage water is being directly discharged in Municipal Corporation (MC) sewage line in increasing load on local infrastructure for public.

13. Further, it is submitted that the Project Proponent has installed 7(Seven) DG sets having cumulative capacity of 3500 KVA for electric supply releasing NOx, Sox, CO etc. causing air pollution with release rate of 200 mg/Nm^3 and making noise at 60 dB (A) and without there being any proper acoustic enclosures to control noise. In this backdrop above prayers have been made.

14. On filling of this case, on 26.04.2022 first hearing was made and directions given to the Registry to send notices to the Respondents as well as a Joint committee was also constituted to visit the spot and submit a factual and action taken Report.

15. Pursuant to the above order, the Joint Committee has submitted its report. It is reproduced hereinbelow:

> 3.0 **Observations and findings**
>
> *This report is outcome containing factual and action taken report of the said joint committee based on the preliminary information received from the nodal agency, followed by site inspection, information given by PP & Municipal Corporation of Greater Mumbai (MCGM) through MPCB and subsequent discussions of the joint committee. The observations and findings of the joint are given as below:*
>
> *3.1* ***Observations w.r.t. Environment Clearance***
>
> *Details of sanctioned plans, plinth certificate completion certificate and current status of the project as verified and*

submitted by MCGM to MPCB is given at Table No.1. Copy of the MCGM letter vide dated 10/10/2022 is given at Annexure-2 for kind information.

Table-1: Details of sanctioned plans, plinth certificate, completion certificate and current status of the project.

Sl. No.	Particulars(J)	Plot Area	Building	Cononfiguration	Total Construction Area
1	Sanction Plan EB/2300/E/A (IOD) Dated 21.12.1979	9378.5	Building. No. 1	Base+GR+7 Floors	FSI- 2518.09 Sq.m Non FSI- 1250.46 Sq.m Total-3768.55 Sq.m
	Plinth Check Certificate Dated 28.10.1982	For Building No. 1 as per sanction plan EBBPC/2300/E/A-Dated 21.12.1979			
2	Sanction Plan EB/7383/E/A (IOD) Dated 29.03.2000	9378.5	Building. No. 3	Wing-A: ST+10 Floors Wing-B: ST+14 Floors Wing-C: ST+14 Floors Wing-D: ST+10 Floors Wing-E: ST+10 Floors Wing-F: ST+10 Floors	FSI- 11315.25 Sq.m Non FSI- 8729.17 Sq.m Total- 20044.42 Sq.m
3	Plinth Check Certificate Dated12.02.2002	For Building No. 3 (Wing F) as per sanction plan EB/7383/E/A-Dated 29.03.2000			
4	Plinth Check Certificate Dated 06.03.2002	For Building No. 3 (Wing C) as per sanction plan EB/7383/E/A-Dated 29.03.2000			
5	Plinth Check Certificate Dated 29.06.2002	For Building No. 3 (Wing B) as per sanction plan EB/7383/E/A-Dated 29.03.2000			
6	Sanction Plan EB/7383/E/A (1st Amended) Dated 01.08.2003	9378.5	Building. No. 3	Wing-A: ST+4 Floors Wing-A1: GR+3 Floors Wing-B: ST+16 Floors Wing-C: ST+16 Floors Wing-D: ST+12 Floors Wing-E: ST+16 Floors Wing-F: ST+16 Floors	FSI- 14122.01 Sq.m Non FSI- 9707.69 Sq.m Total- 23829.70 Sq.m
7	Plinth Check Certificate Dated 29.08.2003	For Building No. 3 (Wing E) as per sanction plan EB/7383/E/A-Dated 01.08.2003			
8	Sanction Plan EB/2300/E/A (1st Amended) Dated 03.06.2004	9378.5	Building. No. 1	Base+GR+7 Floors+ Rehab Shops on Ground	FSI- 2688.3 Sq.m Non FSI- 1250.46 Sq.m Total-3938.76 Sq.m

9	Plinth Check Certificate Dated	For Building No. 3 (Wing D) as per sanction plan EB/7383/E/A-Dated 25.04.2004

	18.06.2004				
10	EB/7383/E/A (2nd Amended) Dated 25.06.2004	9378.5	Building. No. 3	Wing-A: ST+6 Floors Wing-A1: GR+3 Floors Wing-B: ST+16 Floors Wing-C: ST+16 Floors Wing-D: ST+16 Floors Wing-E:	FSI-14414.59 Sq.m Non FSI-9851.31 Sq.m Total-24265.90 Sq.m
11	Completion Certificate Dated 27.10.2004	For Building No. 3 (Wing B, Wing C & Wing F) as per sanction plan EB/7383/E/A-Dated 25.06.2004			
12	Completion Certificate Dated 16.08.2005	For Building No. 3 (Wing D & Wing E) as per sanction plan EB/7383/E/A-Dated 25.06.2004			
13	Completion Certificate Dated 25.11.2008	For Building No. 1 as per sanction plan Sanction Plan EB/2300/E/A Dated 03.06.2004			
14	Plinth Check Certificate Dated 23.04.2010	For Building No. 3 (Wing A) as per sanction plan EB/7383/E/A-Dated 28.04.2011			
15	Sanction Plan EB/7383/E/A (3rd Amended) Dated 28.04.2011	9378.5	Building. No. 3	Wing-A: ST+9 Floors Wing-A1: Base+GR+3 Floors Wing-B: ST+16 Floors	FSI-14417.06 Sq.m Non FSI-10850.57 Sq.m Total-25239.30 Sq.m
16	Plinth Check Certificate Dated 26.03.2014	For Building No. 3 (Wing A1) as per sanction plan EB/7383/E/A-Dated 28.04.2011			
17	Completion Certificate Dated 15.10.2015	For Building No. 3 (Wing A1) as per sanction plan Sanction Plan EB/7383/E/A Dated 28.04.2011			
18	Plinth Check Certificate Dated 02.12.2017	For Building No. 3 (Wing B-Ext) as per sanction plan EB/7383/E/A-Dated 28.04.2011			
19	Sanction Plan EB/7383/E/A (4th Amended) Dated 04.04.2019	9378.5	Building. No. 3	Wing-A: ST+18 Floors Wing-A1: Base+GR+3 Floors Wing-B: ST+16 Floors	FSI-19865.92 Sq.m Non FSI-10850.57 Sq.m Total-30716.49 Sq.m

				Wing-E: ST+16 Floors Wing-F: ST+16 Floors	
20	Sanction Plan EB/7383/E/A (5th Amended) Dated 11.11.2020	9378.5	Building. No. 3	Wing-A: ST+18 Floors Wing-A1: GR+3 Floors Wing-B: ST+16 Floors Wing-B (Ext.): ST+16 Floors Wing-C: ST+16 Floors Wing-D: ST+16 Floors Wing-E: ST+16 Floors Wing-F: ST+16 Floors	FSI-19902.08 Sq.m Non FSI-10850.57 Sq.m Total-30752.65 Sq.m
21	Completion Certificate Dated 03.11.2021	For Building No. 3 (Wing A) as per sanction plan Sanction Plan EB/7383/E/A Dated 11.11.2020			

22	Construction as on date 25.08.2022	-	Building. No. 3 (MCGM FILE NO. EB/7383/E/A)	Wing-A: ST+POD+2ND TO 18TH Upper Floors, Work Completed Wing-A1: BASE+GR+ 1ST TO 3RD Upper Floors, Work Completed Wing-B: ST+POD+2ND TO 16TH Upper Floors, Work Completed Wing-B (Ext.): ST+POD+2ND TO 16TH Upper Floors, Work Completed	Total Construction Built up Area - 30752.65 Sq.m
			Building. No. 3 (MCGM FILE NO. EB/2300/E/A)	Basement+Ground+1 ST TO 07TH Upper Floors, Work Completed, Except Rehab Shops	Total Construction Built up Area- 3768.55 Sq.m
				Total	**34,521.2**

i. *PP has obtained first plinth check certificate vide dated 28/10/1982 for Building no. 1, which is as per layout sanctioned plan vide no. EBBPC/2300/E/A-Dated 21/12/1979 for TBA of 3,768.55 sq.m (FSI: 2,518.09 sq.m & Non-FSI: 1,250.46 sq.m) granted by MCGM. Subsequent to the aforesaid plinth check certificate, PP has obtained consecutive plinth check certificates vide even dated 12/02/2002; 06/03/2002 & 29/06/2002 for Building no. 3 (Wing-F, Wing-C & Wing-B), which is as per layout sanctioned plan vide no. EB/7383/E/A, dated 29/03/2000 for the TBA of 20,044.42 sq.m (FSI: 11,315.25 sq.m & Non-FSI: 8,729.17 sq.m) granted by MCGM.*

Further, PP has obtained 1st amendment of the aforesaid layout sanctioned plan vide no. EB/7383/E/A, dated 01/08/2003 for TBA of 23,829.7 sq.m (FSI: 14,122.01 sq.m & Non-FSI: 9,707.69 sq.m) granted by MCGM. Accordingly, PP has obtained plinth check certificate vide dated 29/08/2003 for Building no. 3, which is as per the aforesaid layout sanctioned plan vide dated 01/08/2003.

ii. *PP has obtained 1st amendment of the layout sanctioned plan vide no. EB/2300/E/A (1st Amended), dated 03/06/2004 for TBA of 3,938.76 sq.m (FSI: 2,688.3 sq.m & Non-FSI: 1,250.46 sq.m) granted by MCGM. Accordingly, PP has obtained plinth check certificate vide dated*

18/06/2004 for Building no. 3 (Wing-D), which is as per the aforesaid layout sanctioned plan vide dated 03/06/2004.
Further, PP has obtained 2nd amendment of the layout sanctioned plan vide no. EB/7383/E/A (2nd Amended), dated 25/06/2004 for TBA of 24,265.9 sq.m (FSI: 14,414.59 sq.m & Non-FSI: 9,851.31 sq.m) granted by MCGM. However, it is observed that PP has not obtained plinth check certificate based on the aforesaid layout sanctioned plan vide dated 25/06/2004.

iii. *PP has obtained completion certificate vide dated 27/10/2004 for Building No. 3 (Wing-B, Wing-C & Wing-F), which is as per sanction plan EB/7383/E/A, dated 25/06/2004. Similarly, PP has obtained completion certificate vide dated 16/08/2005 for Building No. 3 (Wing-D & Wing-E), which is as per sanction plan EB/7383/E/A, dated 25/06/2004. Similarly, PP has obtained completion certificate vide dated 25/11/2008 for Building No. 1, which is as per sanction plan EB/2300/E/A, dated 03/06/2004 respectively.*

iv. *Based on the aforesaid layout sanctioned plans & subsequent layout sanctioned amendments obtained during 1979 to 2004 and also corresponding plinth check certificates obtained during 1982 to 2004, it is observed that the project doesn't attract the provisions of EIA Notification, 27/01/1994 and its amendments in 07/07/2004. Further, as per the EIA Notification amended in 07/07/2004; EIA regime was made applicable to real estate construction activities. Relevant extract from the aforesaid amended Notification dated 07/07/2004 is given below.*

> *"(g) any construction project falling under entry 31 of Schedule-I including new townships, industrial townships, settlement colonies, commercial complexes, hotel complexes, hospitals and office complexes for 1,000 (one thousand) persons or below or discharging sewage of 50,000 (fifty thousand) litres per day or below or with an investment of Rs.50,00,00,000/- (Rupees fifty crores) or below."*

v. *Further, the aforesaid amended Notification dated 07/07/2004 mentions that new construction projects which were undertaken without obtaining the clearance required under this notification, and where construction work has not come up to the plinth level, shall require clearance under this notification with effect from the 07/07/2004.*

vi. *In view of the above, PP has obtained various plinth check certificates, during 1982 to 2004 and also PP has obtained completion certificates during 2004. Hence, the construction work up to plinth levels for the buildings no. 1 & 3 have*

already commenced prior to the amended Notification dated 07/07/2004.

vii. *However, it is pertinent to note that PP has developed the aforesaid project in a phased manner i.e. obtained various amendments of the layout sanctioned plan. Further, the amended Notification dated 07/07/2004 mentions that "Any project proponent intending to implement the proposed project under sub-paras (g) and (h) in a phased manner or in modules, shall be required to submit the details of the entire project covering all phases or modules for appraisal under this notification". Apparently, PP has not submitted details thereof for the appraisal under this Notification dated 07/07/2004.*

viii. *Thereafter, PP has obtained 3rd amendment of the layout sanctioned plan vide no. EB/7383/E/A (3rd amended), dated 28/04/2011 for TBA of 25,239.3 sq.m (FSI: 14,417.06 sq.m & Non-FSI: 10,850.57 sq.m) granted by MCGM. Accordingly, PP has obtained plinth check certificate vide dated 26/03/2014 for Building no. 3 (Wing-A 1), which is as per the aforesaid layout sanctioned plan vide dated 28/04/2011 and having the configuration of: Base + GR + 3 floors and obtained completion certificate dated 15/10/2015 for the Building no. 3 (Wing-A 1), which is as per the aforesaid layout sanctioned plan vide dated 28/04/2011.*

ix. *Similarly, PP has obtained plinth check certificate vide dated 02/12/2017 for Building no. 3 (Wing-B Ext.), which is as per the aforesaid layout sanctioned plan vide dated 28/04/2011 and having the configuration of: ST + 16 floors.*

x. *PP has obtained 4th amendment of the layout sanctioned plan vide no. EB/7383/E/A (4th amended), dated 04/04/2019 for TBA of 30,716.49 sq.m (FSI: 19,865.92 sq.m & Non-FSI: 10,850.57 sq.m) granted by MCGM. Also, obtained 5th amendment of the layout sanctioned plan vide no. EB/7383/E/A (5th amended), dated 11/11/2020 for TBA of 30,752.65 sq.m (FSI: 19,902.08 sq.m & Non-FSI: 10,850.57 sq.m) granted by MCGM. However, it is observed that PP has not obtained plinth check certificate based on the aforesaid amended layout sanctioned plans vide dated 04/04/2019 and 11/11/2020 and had obtained completion certificate vide dated 03/11/2021 for Building No. 3 (Wing-A), which is as per sanction Plan EB/7383/E/A, dated 11/11/2020.*

xi. *It is observed from the aforesaid 3rd amendment of the layout sanctioned plan vide no. EB/7383/E/A (3rd amended), dated 28/04/2011 for TBA of 25,239.3 sq.m (FSI: 14,417.06 sq.m & Non-FSI: 10,850.57 sq.m) granted by MCGM, PP has obtained plinth check certificate vide dated 26/03/2014 for Building no. 3 (Wing-A 1), having configuration of: Base + GR + 3 floors and subsequent plinth check certificate vide dated 02/12/2017 for Building no. 3 (Wing-B Ext.), having the configuration of: ST + 16 floors. The*

TBA of aforesaid amended layout sanctioned plan vide dated 28/04/2011 is more than the 20,000 sq.m and attracts prior EC requirements as per the provisions of EIA Notification, 2006. It is observed from the aforesaid first plinth checking certificates that PP has continued the construction of the project without obtaining prior EC which is required as per S. no. 2 of the Notification no S.O. 1533 (E) dated 14/09/2006 related to the requirements of prior environmental clearance notified under the Environment (Protection) Act, 1986. Also, PP has obtained completion certificate for aforesaid building no. 3 (Wing-A) on 03/11/2021 before obtaining prior EC from SEIAA, Maharashtra.

xii. *Further, total construction as on 25/08/2022 as per the information provided by MCGM is TBA of 30,752.65 sq.m for building no. 3 having configuration of: Wing-A: ST+POD+2nd to 18th Upper Floors, Work Completed; Wing-A1: BASE+GR+ 1st to 3rd Upper Floors, Work Completed; Wing-B: ST+POD+2nd to 16th Upper Floors, Work Completed; Wing-B (Ext.): ST+POD+2nd to 16th Upper Floors, Work Completed; Wing-C: ST+POD+2nd to 16th Upper Floors, Work Completed; Wing-D: ST+POD+2nd to 16th Upper Floors, Work Completed; Wing-E: ST+POD+2nd to 16th Upper Floors, Work Completed and Wing-F: ST+POD+2nd to 16th Upper Floors, Work Completed. Similarly, for building no. 3 (part) TBA of 3,768.55 sq.m having configuration of: Basement+Ground+1st to 07th Upper Floors, Work Completed, Except Rehab Shops. Hence, the total construction as on 25/08/2022 is 34,521.2 sq.m.*

3.2 Observations and findings w.r.t. CTE and CTO

i. *It is observed from the 3rd amendment of the layout sanctioned plan vide no. EB/7383/E/A (3rd amended), dated 28/04/2011 for TBA of 25,239.3 sq.m (FSI: 14,417.06 sq.m & Non-FSI: 10,850.57 sq.m) granted by MCGM, PP has obtained plinth check certificate vide dated 26/03/2014 for Building no. 3 (Wing-A 1), having configuration of: Base + GR + 3 floors and subsequent plinth check certificate vide dated 02/12/2017 for Building no. 3 (Wing-B Ext.), having the configuration of: ST + 16 floors. The TBA of aforesaid amended layout sanctioned plan vide dated 28/04/2011 is more than the 20,000 sq.m and attracts prior consent to establish from MPCB. Wherein it is observed that without obtaining CTE, PP has started construction activities; as it is evident from various plinth check certificates obtained by PP (please refer s. no. xi, as above).*

4.0 Approach for penalty and remedial measures for prior environmental clearance (EC) violation

Hon'ble NGT in O.A No. 34/2020 WZ in the matter of Tanaji B. Gambhire vs. Chief Secretary, Government of Maharashtra and ors., 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".

In compliance to the aforesaid directions of the Hon'ble NGT, a Standard Operating Procedure (SoP) for dealing with violation cases were issued by the MoEF&CC vide Office Memorandum (OM) F. No. 22-21/2020-IA.III dated 07/07/202. As per the aforesaid SOP, it outlines the penalties including closure of operations that are operating without prior environment clearance including demolition of projects. It also outlines a procedure for the grant of environmental clearance to projects that have come up without obtaining prior environment clearance required under the Environmental Impact Assessment (EIA) Notification, 2006. As per the aforesaid SOP, the different approaches for dealing the violation cases are summarised as follows;

i. Closure or revision

a. *If the project proponent has not taken prior EC, then the action shall be initiated to close the operation.*

b. *If the project proponent has taken prior EC for existing/old unit, then order to revert the activity/production to permissible limits.*

c. *If the project doesn't require EC for earlier production level but required at present, then restricting activity/production to extent to which prior EC was not required.*

ii. *Action under section 15 read with section 19 of the E (P) A, 1986 shall be initiated against the violators.*

iii. *Appraisal under EIA Notification 2006: The permissibility of the project shall be examined from the perspective of whether such activity/ project was at all eligible for the grant of prior EC:*

***a. If not permissible**: If a project is under prohibited area notified by Central/State Govt., then the such project shall be ordered for the demolition/closure after issuing show-cause notice and providing an opportunity of hearing.*

***b. If permissible**, then such violation projects shall be issued with directions to complete the impact assessment studies and submit EIA report & EMP in a time bound manner. Also, such cases of*

violation shall be subject to appropriate: Damage Assessment, Remediation Plan and Community Augmentation Plan (to restore environmental damage caused including its social aspects).

The competent authority shall issue directions u/s 5 of The Environment (Protection) Act, 1986 for mandating payment of such amount (based on polluter's pay principle), undertaking activities relating to aforesaid plans and its appraisal by the Central sectoral expert appraisal committee or the State/UT level expert appraisal committee, as the case may be. However, even though the project may be permissible but not environmentally sustainable in its present form/configuration/features then such projects shall be directed to be modified so that the project would be environmentally sustainable. Further, if the project is not considered appropriate to issue EC, such project shall be directed to be demolished/closed. The PP will be required to submit a bank guarantee equivalent to the amount of Remediation Plan and Natural and Community Resource Augmentation Plan with Central/State Pollution Control Board (depending on whether the project under reference is appraised at MoEF&CC or by SEIAA) prior to the grant of EC. The quantification of such liability will be recommended by EAC and finalized by the Regulatory Authority and the bank guarantee will be released after successful implementation of the Remediation Plan & Natural and Community Resource Augmentation Plan.

iv. Penalty provisions for violation cases and applications

a. For new projects;

- *Where operation has not commenced: 1% of the total project cost incurred up to date of filing of application along with EIA/EMP report.*
- *When operations have commenced without EC: 1% of the total project cost incurred up to the date of filing application along with EIA/EMP report PLUS 0.25% of the total turnover during period of violation.*

b. For expansion projects;

- *When operation/production with expanded capacity has not commenced: 1% of the project cost, attributable to the expansion, incurred up to date of filing application along with EIA/EMP report.*
- *When operation/production with expanded capacity have commenced: 1% of project cost (attributable to the expansion activity) incurred up to the date of filing application along with EIA/EMP report PLUS 0.25% of the total turnover (attributable to the expanded activity/capacity) involved during the period of violation.*

5.0 Conclusions

I. *As per the Hon'ble NGT order dated 26/04/2022, s. no. 11 the applicant was directed to supply the required documents and copy of the original application (OA) to the members of the committee. However, it was gathered from the nodal agency, despite directives from the Hon'ble Tribunal the applicant has not served the copy of OA to the nodal agency nor the joint committee members. However, the joint committee during its visit, deliberated with officials of MCGM, PP & MPCB and obtained various information w.r.t. the project. Despite of several follow-ups made by MPCB with MCGM during August to September, 2022 for submission of information; desired information about the project w.r.t. details of sanctioned plans, plinth certificate, completion certificate and current status of the project was provided by MCGM to MPCB on 10/10/2022.*

II. *PP has obtained various plinth check certificates, during 1982 to 2004, which were based on the layout sanctioned plan vide no. EBBPC/2300/E/A, dated 21/12/1979 for TBA of 3,768.55 sq.m (FSI: 2,518.09 sq.m & Non-FSI: 1,250.46 sq.m); layout sanctioned plan vide no. EB/7383/E/A, dated 29/03/2000 for the TBA of 20,044.42 sq.m (FSI: 11,315.25 sq.m & Non-FSI: 8,729.17 sq.m); 1st amendment of the layout sanctioned plan vide no. EB/2300/E/A (1st Amended), dated 03/06/2004 for TBA of 3,938.76 sq.m (FSI: 2,688.3 sq.m & Non-FSI: 1,250.46 sq.m) and 2nd amendment of the layout sanctioned plan vide no. EB/7383/E/A (2nd Amended), dated 25/06/2004 for TBA of 24,265.9 sq.m (FSI: 14,414.59 sq.m & Non-FSI: 9,851.31 sq.m).*

III. *Also, PP has obtained completion certificates during 2004 based on the aforesaid layout sanctioned plans and its amendments. In view of the aforesaid plinth check certificates, it may be inferred that the construction works up to plinth levels for the buildings no. 1 & 3 have already commenced prior to the amended EIA Notification dated 07/07/2004. The project doesn't attract the provisions of EIA Notification, 27/01/1994 and its amendments in 07/07/2004. However, it is pertinent to note that PP has developed the aforesaid project in a phased manner i.e. obtained various amendments of the layout sanctioned plan.*

IV. *Further, in view of the observations made by the joint committee w.r.t.* ***s. no. i & xii of section 3.1 of this report****, as above that the continued construction*

by the PP as per 3rd amendment of the layout sanctioned plan vide no. EB/7383/E/A (3rd amended), dated 28/04/2011 is TBA of 25,239.3 sq.m (FSI: 14,417.06 sq.m & Non-FSI: 10,850.57 sq.m). Further, total construction as on 25/08/2022 as per the information provided by MCGM is TBA of 30,752.65 sq.m for building no. 3 having configuration of: Wing-A: ST+POD+2nd to 18th Upper Floors, Work Completed; Wing-A1: BASE+GR+ 1st to 3rd Upper Floors, Work Completed; Wing-B: ST+POD+2nd to 16th Upper Floors, Work Completed; Wing-B (Ext.): ST+POD+2nd to 16th Upper Floors, Work Completed; Wing-C: ST+POD+2nd to 16th Upper Floors, Work Completed; Wing-D: ST+POD+2nd to 16th Upper Floors, Work Completed; Wing-E: ST+POD+2nd to 16th Upper Floors, Work Completed and Wing-F: ST+POD+2nd to 16th Upper Floors, Work Completed. Similarly, for building no. 3 (part) TBA of 3,768.55 sq.m having configuration of: Basement+Ground+1st to 07th Upper Floors, Work Completed, Except Rehab Shops. Hence, the total construction as on 25/08/2022 is 34,521.2 sq.m, which is more than 20,000 sq.m.

The aforesaid layout sanctioned plans attracts prior EC requirements as per the provisions of EIA Notification, 2006. PP has not obtained prior EC and has violated provisions of the EIA Notification 2006.

V Also, TBA of the 3rd amendment of the layout sanctioned plan vide no. EB/7383/E/A (3rd amended), dated 28/04/2011 is 25,239.3 sq.m (FSI: 14,417.06 sq.m & Non-FSI: 10,850.57 sq.m). Similarly, TBA of the 4th amendment of the layout sanctioned plan vide no. EB/7383/E/A (4th amended), dated 04/04/2019 is 30,716.49 sq.m (FSI: 19,865.92 sq.m & Non-FSI: 10,850.57 sq.m) and TBA of the 5th amendment of the layout sanctioned plan vide no. EB/7383/E/A (5th amended), dated 11/11/2020 is 30,752.65 sq.m (FSI: 19,902.08 sq.m & Non-FSI: 10,850.57 sq.m).

Based on the aforesaid latest amended layout sanctioned plans vide dated 28/04/2011 and 11/11/2020, the PP is utilizing FSI of whole plot area. Hence, the entire project including the present construction as per the latest layout sanctioned plans of the project may be treated in a holistic manner rather treating as a separate/individual component.

Further, the amended EIA Notification dated 07/07/2004 already & clearly mentions that "Any project proponent intending to implement the proposed project under sub-

paras (g) and (h) in a phased manner or in modules, shall be required to submit the details of the entire project covering all phases or modules for appraisal under this notification". Apparently, PP has not submitted details thereof for the appraisal to the Competent Authority under this Notification dated 07/07/2004.

Hence, the joint committee opined that such cases may be dealt as per the SOP for identification and handling of violation cases under the EIA Notification, 2006 issued by MoEF&CC's OMs dated 07/07/2021 and 28/01/2022. Accordingly, the approach methodology for such cases which started construction without taking prior EC from SEIAA, Maharashtra is outlined in the above paragraphs 4.0 of this report.

6.0 Recommendations

(a) For violation of EIA Notification dated 14/09/2006

In view of the aforesaid violations of:

i. Continued construction of the residential project since 26/03/2014 by M/s Rock Corner Developers Pvt. Ltd., Mumbai as per the 3rd amendment of the layout sanctioned plan vide no. EB/7383/E/A (3rd amended), dated 28/04/2011 for TBA of 25,239.3 sq.m (FSI: 14,417.06 sq.m & Non-FSI: 10,850.57 sq.m) without obtaining prior EC from SEIAA, Maharashtra.

ii. Action may be taken against M/s Rock Corner Developers Pvt. Ltd., Mumbai by the respective State or State Pollution Control Board under the provisions of section 19 of the Environment (Protection) Act, 1986;

iii. Appraisal of the project under EIA Notification, 2006 as outlined under s. no. iii (as above, given at paragraph 4.0) ***ALONG WITH*** *penalty for new project (when operations have commenced without EC) i.e. 1% of the total project cost incurred up to the date of filing application along with EIA/EMP report PLUS 0.25% of the total turnover during period of violation, may be levied by SEIAA, Maharashtra and be deposited by the PP with MPCB.*

(b) For contravening provisions under the Water (Prevention and Control of

Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981

In view of the aforesaid violations of:

i. Starting construction of the residential project by M/s Rock Corner Developers Pvt. Ltd., Mumbai for the total built up area for more than 20,000 sq-m., as at (a) above, and also obtaining

completion certificate from MCGM vide dated 03/11/2021 for building no. 3 (WIng:-A) bef(11 'bbtarnirig CTE & CTO from MPCB as required under the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981; MPCB may take necessary action against the PP under the provisions of Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981 along with penalty amount.

16. The stand of **Respondent No.7 / Project Proponent** is as follows:

The Original Application is not maintainable on account of being barred by limitation, non-joinder of necessary parties and plural remedies. The cause of action is shown by the applicant to have arisen on 07.12.2021, when the applicant issued notice to Respondent Authority with respect to alleged violation relating to the project in question. The same is completely contrary to the plain language of limitation prescribed under Section 14 and 15 of the NGT Act, which categorically shows that the time for calculating the period of limitation shall start from "the date on which the cause of action first arose."

In fact, the **Respondent No.7/ Project Proponent** commenced construction of the project in question in the year 1998, of which the applicant was having knowledge because he is resident of the vicinity where the project in question is located, but he is invoking the jurisdiction of this Tribunal after almost 24 years, though Section 14 provides for six months time from the date when the cause of action first arose, extendable to further period of 60 days, if the Tribunal finds the cause of delay to be convincing. Similarly, Section 15 of the NGT Act provides a period of five years only to the victim of pollution or for the restitution of property from the date cause of action first arose which too would be extendable for further period of 60 days subject to the Tribunal being satisfied regarding sufficiency of ground of delay.

The answering Respondent envisaged redeveloping the then existing structure on the land admeasuring 9378.50 sq.mtrs. on Survey No. 222 of Byculla Division, Bellasis Road, Near ST Depot, Mumbai Central, Mumbai.

17. The said project has three segments as follows:

A. *Building No.1- Current status of construction-; building is partly completed, and part Occupation Certificate for Building No.1 has been obtained in the year 2008.*

B. *Building No.2- current status of constructions-; there is an existing cessed structure of ground + six floors existing on site. IOD has been obtained for demolishing the existing structure and carrying out the construction of the proposed new building.*

C. *Building No.3- current status-*

   a. *Wing- A construction completed, and occupation certificate obtained in the year 2021.*
   b. *Wing-A-1 construction completed, and occupation certificate obtained in the year 2015.*
   c. *Wing-B construction completed, and part occupation certificate obtained in the year 2004.*
   d. *Wing-C construction completed, and occupation certificate obtained in the year 2004.*
   e. *Wing-D construction completed, and occupation certificate obtained in the year 2005.*
   f. *Wing-E construction completed, and occupation certificate obtained in the year 2005.*
   g. *Wing-F construction completed, and occupation certificate obtained in the year 2004.*
   h. *Wings B, C, D, E and F have formed into a society by the name of "Dudhwala Complex Co-operative Housing Society Ltd".*
   i. *Building A-1 has formed a society in the name of "Kazarouni House Co-operative Premises Society Ltd.*

18. The answering Respondent had obtained following permissions in furtherance of developing the said project :-

A. *On 16th November 1998, the Respondent No.7 obtained no objection certificate from MHADA for redevelopment of the then existing structure on the said land. Hereto marked and annexed as*

Exhibit `A' is a copy of the NOC from MHADA dated 16th November 1998.

B. *On 9th July 1999, 7th January 2000, 30th September 2014 and 24th October 2016, the Respondent No. 7 obtained revised no objection certificate for carrying out construction on the said land as per the extant law from MHADA.*

C. *On 15th January 2000, the Respondent no.7 obtained a layout approval with respect to the said land from MCGM. Annexed hereto and marked as `Exhibit-B' is a copy of the lay out approval dated 15th January 2000.*

D. *On 17th November 2000, the Respondent No.7 obtained revised lay out approval from MCGM. Annexed hereto and marked as `Exhibit-C' is a copy of the revised lay out approval dated 17th November 2000.*

E. *On 16th August 2004, the Respondent No.7 obtained NOC from MHADA for obtaining occupation certificate with respect to Wings B, C, E and F. Annexed hereto and marked as* ***Exhibit-D*** *is a copy of the NOC issued by MHADA for obtaining occupation certificate.*

F. *On 1st April 2005, the Respondent No.7 obtained NOC to obtain occupation certificate with respect to Wing-D. Annexed hereto and marked as Exhibit-E is a copy of the NOC issued by MHADA for obtaining occupation certificate.*

G. *On 6th June 2015, the Respondent No.7 obtained NOC to obtain occupation certificate with respect to Wing-A-1.Annexed hereto and marked as* ***Exhibit-F*** *is a copy of the NOC issued by MHADA for obtaining occupation certificate.*

H. *On 30th August 2018, the Respondent No.7 obtained revised lay out approval from MCGM. Annexed hereto and marked as* ***Exhibit-G is*** *a copy of the revised layout approval dated 30th August 2018.*

I. *On 22nd October 2021, the Respondent No.7 obtained NOC to obtain occupation certificate with respect to Wing-A. Annexed hereto and marked as* ***Exhibit-H*** *is a copy of the NOC issued by MHADA for obtaining occupation certificate.*

19. With respect to building No.1 being developed, the answering respondent had obtained the following permissions :

A. *On 21'1 December 1979, the* ***Respondent No.7 obtained intimation of disapproval for redeveloping*** *the* ***then existing structure. Annexed hereto and marked as Exhibit-I is a***

copy of *the LOD dated* ***21st December 1979 with respect to the Building*** *No.l.*

B. On 31st January 1981, the Respondent No.7 obtained commencement certificate with respect to construction of building No.1 .Annexed hereto and marked as Exhibit-J *is a copy* ***of the commencement certificate dated 31st January 1981 with respect to Building No.1.***

C. *On 3ni June 2004, the* ***Respondent No.7 obtained*** *approval from MCGM with respect to the amended plans to be constructed building No. 1 .*

D. *On 25[1]" November 2008, the Respondent No.7 obtained part occupation of* ***building No.1*** *from MCGM. Annexed* ***hereto and marked as Exhibit-K is a*** *copy of the part occupation received with respect* ***to building No.1 from MCGM.***

20. With respect to the Building No.2 following permissions were obtained:-

A. *The list of existing tenants and/or occupants in the existing structure which are proposed to be redeveloped has been certified by MHADA;*
B. *On 30th August 2018, the Respondent No.7 has obtained intimation of disapproval with respect to demolition of the existing structure and carring out construction of building No.2.Annexed hereto and marked as Exhibit - L is a copy of the IOD dated 30th August 2018 with respect to Building No.2.+*

21.With respect to Building No.3 following permissions have been obtained:-

A. On 29th March 2000, the Respondent No.7 obtained intimation of disapproval with respect to building No. hereto and marked as Exhibit - M *is a copy of* ***the IOD dated 29th March 2000*** *with respect to Building No.3.*

B. On r August 2003, 25th *June 2004,* ***28th April 2011,*** *4th April [1]019* ***and*** *11"* ***November 2020, the Respondent No.7 obtained approval with respect to amended plans of building No.3.***

C. On 15th December 2000, the Respondent No.7 obtained commencement certificate with respect to the *construction of building No.3.Annexed* ***hereto and marked*** *as* ***Exhibit - N*** *is a* ***copy of the commencement certificate dated*** *15th December 2000* ***with respect to the Building No.3.***

D. On 27th October 2004, MCGM was pleased to grant occupation certificate with respect to Wings B, C and *F of Building* ***No.3. annexed hereto and marked as Exhibit-O is a copy of the occupation certificate dated 27th October 2004 with respect to Wings B, C and F.***

E. On 16th August 2005, MCGM was pleased to grant occupation certificate with respect to Wings *D &* ***E of Building*** *No.3.* ***Annexed*** *hereto and marked* ***as Exhibit-I'*** *is a* ***copy of the*** *occupation certificate dated 16111 August 2005 with respect to Wings* ***D and*** *E.*

F. On 15th October 2015, MCGM was pleased to grant occupation certificate with respect to Wing A-1 of Building No.3. Annexed hereto and marked as Exhibit-Q *is* ***a*** *copy of the occupation certificate dated 15th October 2015 with respect to Wing-A-1.*

G. On 3rd November 2021, MCGM was pleased to grant occupation certificate with respect to Wing A of Building No.3. Annexed hereto and marked as Exhibit-R is a copy of the occupation certificate dated 3rd November 2021 with respect to Wing-A.

22. The answering Respondent has allotted 336 units for rehabilitation of existing tenants, and has spent Rs. 148 crores in carrying out the said project.

23. The answering Respondent was not required to obtain EC as per the then existing law. Till 1994 the Environmental Clearance from the Central Government was an administrative decision. On 27th January 1994, Union Ministry of Environment and Forests (MOEF) promulgated an EIA Notification under Environment (Protection) Act, 1986, making Environmental Clearance (EC) mandatory for **expansion or modernization of any activity** or for setting up new projects listed in Schedule 1 of the Notification. The real estate construction activities were not included in Schedule 1. Since the notification dated 27th January 1994, 12 amendments have been made in EIA notification and vide amendment dated 7th July 2004,

the EIA regime was made applicable to construction activities, the relevant portion of the said amendment is quoted hereinabove :

"<u>In the said notification,</u> -

In paragraph 3 (it seems this is typo error as actual section referred is Para 2 which says "2) Nothing contained in this Notification shall apply to:") in item (a), for the letters, word and figures "Nos.3,18 and 20", the letters, word and figures "Nos.3,18,20,31 and 32" shall be substituted; (ii) after sub-para (f), the following shall be inserted, namely:-

> *"(g) any construction project falling under entry 31 of Schedule-I including new townships, industrial townships, settlement colonies, commercial complexes, hotel complexes, hospitals and office complexes for 1,000 (one thousand) persons or below or discharging sewage of 50,000 (fifty thousand) litres per day or below or with an investment of Rs.50,00,00,000/- (Rupees fifty crones) or below."*
>
> *Explanation.-*
>
> • ***New construction projects** which were undertaken without obtaining the clearance required under this notification, and where **construction work** has not come up to the plinth level, shall require clearance under this notification with effect from the 7th day of July, 2004."*

24. It is apparent from above amendment dated 7th July, 2004 that the New Projects where the construction work had not come upto the plinth level were required to obtain EC. The Legislature has consciously used the word "construction work (which is indicative of the fact that the entire project is covered)" upto "plinth" so as to ensure that the amendment is not made applicable retrospectively in cases where-in a project consists of multiple buildings and the construction of one or more building is completed upto plinth level. An unambiguous conclusion may be drawn from the above explanation that any construction project, **<u>where-in work with respect to any of the building is completed upto plinth level, will not fall under the</u>**

purview of the amendment, hence would not require EC. This position of law stands confirmed by the affidavit placed on record by the Environment Department before this Tribunal in O. A. No. 3 of 2017.

25. Thereafter, the Notification dated 27th January, 1994 was superseded by the EIA Notification 2006, dated 14th September, 2006 which was not made applicable retrospectively.

26. It is further submitted that in the case in hand the construction activity commenced in the year 1998. In the year 2004, some of the buildings in the said project were not only complete upto plinth level but even had occupation certificate, which makes it clear that the EIA notification 2006 is not attracted to the said buildings of the project which were completed in the year 2004, i. e. prior to the amendment dated 14th September, 2006 requiring prior EC for real estate construction.

27. The project of the answering respondent is purely residential which does not require Consent to Establish and Consent to Operate under the Water (Prevention and Control of Pollution) Act, 1974 (Water Act) and the Air (Prevention and Control of Pollution) Act, 1981, (Air Act) as the same was not an industry. The only commercial activity in the said project is a Hotel being run by the name 'Sahil'. The project has been carried out strictly as per the development permission granted by the MCGM as well as MHADA, which did not impose a condition to obtain Consent to Establish and Consent to Operate.

28. There was no requirement of installing a Sewage Treatment Plant, Waste Management System and/or Pollution Monitoring System. The answering Respondent was required to construct a drainage system in the said project so as to ensure that the same is connected to the sewerage system of MCGM. Accordingly, Project Proponent (PP) duly developed and installed the drainage system. None of the authorities have ever imposed a condition to install Rainwater Harvesting System

and/or Solar Panels, therefore, such conditions cannot be imposed at belated stage. There is no existing bore-wells in the said project. The answering Respondent had obtained NOC from the Tree Authority, in pursuance thereof he performed the cutting, planting and transplanting of trees. The allegation non-preservation of top soil is completely false. The Sahil Hotel installed DG sets. Accordingly, this Original Application deserves to be dismissed.

29. The stand of **Respondent No.2 / SEIAA** is as follows:

In the present project certain constructions appear to have come up before EIA Notification amendment dated 7th July, 2004, certain construction after the said amendment before the issuance of EIA Notification 2006 and certain constructions after the EIA Notification of 2006. No application has been received from the Respondent No.7/Project Proponent by the answering Respondent after EIA notification 2006, nor any Environmental Clearance has been granted by it for the said project. As regards the position of law, the same position has been reiterated which has been stated above in reply affidavit by the Respondent No.7.

30. The stand of **Respondent No.3/ MPCB** is as follows:

The officials of the answering Respondent visited the site of Respondent No.7/ Project Proponent on 22.08.2022 and observed that there are three numbers of buildings at C. S. No. 222 (New) of Byculla Division, total plot area 9339.26 sq.mtrs. and total built up area 41837.29 sq. mtrs. The Project Proponent had obtained Commencement Certificate for certain project on 05.10.2005 i. e. after the EIA Notification dated 07.07.2004, therefore, it attracted EIA Notification, 07.07.2004. Similarly, certain construction came after EIA Notification, 2006. The representative of Respondent No.7 informed the answering respondent officials that they had not obtained Environment Clearance from the competent authority nor had they obtained

Consent to Establish and Consent to Operate from the answering Respondent for the aforesaid project. A copy of the Visit Report dated 22.08.2022 is annexed. The answering Respondent had issued proposed directions vide letter dated 13.10.2022 to Respondent No.7/Project Proponent for carrying out construction activities of residential project at the aforesaid site, without obtaining Environment clearance, Consent to Establish and Consent to Operate, which is annexed.

31. **Finding in respect of limitation:**

According to Respondent No.7/ Project Proponent this application is time barred because the construction was initially started in the year 1998 and since thereafter more than 25 (Twenty Five) years have elapsed while according to Section 15, the maximum period within which the proceedings can be initiated under the said Section is 5 (five) years from the date when the cause of action first arose. From the side of the Applicant, it is being vehemently opposed saying that the Original Application is filed within time as last amendment in the sanction plan was obtained by the Respondent No.7/ Project Proponent on 11.11.2020. He has placed reliance upon the judgment of this Tribunal passed in Original Application No. 222/2014 decided on 7th May, 2015 in the case of ***Forward Foundation vs State of Karnataka; 2015 SSC OnLine NGT 5*** where-in our attention is drawn to Paragraph Nos. 1 to 33 specifically. In this matter after having taken into consideration various case laws, this Tribunal has held that the Applicant relied upon various reports, notices and orders in support of its claim. Whether the applicant succeeds on merits or not, is different issue. For the purpose of limitation, dates of these reports, stop-work orders and notices would be relevant, which would provide the 'recurring cause of action' to the

Applicant and thus, the Application will be within prescribed period of limitation.

32. As against this, from the side of **Respondent No.7** reliance has been placed on ***Graminee Environment Development Foundation Vs. Balaji infrastructure Ltd. & Ors; 2017 SCC OnLine NGT 1098.*** *The relevant paragraph thereof is quoted hereinbelow:*

> *"11. Section 15 (3) of the NGT Act, 2010 in clear terms requires the Application for restitution of the property damaged to be made within the period of five (5) years from the date on which cause for such relief first arose, and provides for discretion to the Tribunal to condone delay for 'sufficient cause' If the application is filed within further period of sixty (60) days and no further. In the present case, the Applicant avers that the cause of action first arose on 24.02.2015, when the letter was addressed by the Member Secretary, Maharashtra Coastal Zone Management Authority (MCZMA) to the Collector, Raigad to take action in respect of the grievance made by the Applicant and yet no action was taken by the authorities. The Applicant has further revealed in her Application that she has been making several complaints to the Authorities about the said grievance, first such complaint being made on 15.09.2014 to the Divisional Commissioner, Konkan Division, Navi Mumbai, Reading of the letter dated 24.02.2015, Annexure 'I' to the Application (Pg.81) reveals the nature grievance made by the Applicant. In short, the Applicant was aggrieved by the alleged illegal blasting work, storage of minerals and reclamation by Dighi Port Ltd. Similarly, the grievance made with complaint dated 15.09.2014 is regarding alleged illegal work of reclamation of seashore and filling rocks at village Nanavali and intertidal land encroachment without EC by Dighi port Ltd., and Balaji infrastructure Ltd.*
>
> *12. In our considered opinion, making of grievance of the kind in the present case by wirting a letter cannot be*

constituted as 'cause of action' but the actual act or its consequence constitutes 'cause of action in any case. In the present case, cause of action has arisen as a result of blasting work as well as dumping of rocks etc. by Dighi Port Ltd. and its holding Company Balaji infrastructure Ltd. in the said land.

13. A perusal of the Application gives some clue as to when such acts of blasting of hills and dumping of material excavated started. The Applicant has pleaded in her Application that Respondent No.1 encroached upon 3 km of seashore of village Nanavali and without permission of any kind Govt. Authority dumped soil and rocks there. It is further pleaded that Respondent No.1 has been doing illegal activities of leveling, blasting, excavation of land, filling of land space with soil, dumping huge rocks and artificial land spaces without any permission; and in spite of such illegalities going on, Respondent Nos 2 to 7 – Govt, Authorities did nothing. The applicant in her pleadings referred to EC granted in the name of Dighi Port Ltd. on 30th September, 2005 for construction of Port At village Dighi, Taluka Shrivardhan, District Raigad and states that she does not challenge or dispute anything about such EC or any work at Dighi Port and her only grievance is that Respondent No.1 has encroached upon the property and extended various kinds of constructions beyond consented area. These facts as pleaded if read in conjunction with the plaint in Regular Civil Suit No.4 of 2009 filed by the Applicant in the court of Civil Judge, Junior Division, Shrivardhan, do make sense as to when alleged activity had started. At para-7 of the said plaint, the Applicant has categorically stated that on 26.12.2008 the defendant (therein) i. e. Dighi Port Ltd. came at the land adjacent to the house of the Applicant in order to make encroachment and reclaimed the land, and this highhanded activity of Dighi Port Ltd. was resisted by the Applicant with objection that they cannot reclaim land by blasting the hills and dumping rocks at the said land. A clear

fact emerges that the act of blasting the hill sides, dumping materials illegally and reclamation of land, first started in or about December, 2008. Thus, cause of action for the present Application clearly arouse in or about December, 2008."

33. The learned counsel for the Respondent No. 7 further relied upon the judgment in ***Jai Javan Jai Kisan and Ors. V. Vidarbha Cricket Association and Ors.- MANU/GT/0006/2017 (****Application No. 33/2016 (M. A. Nos. 317/2016, 322/2016 and 355/2016), the relevant paragraphs are quoted herein below:*

"11. Conjoint reading of Section 14 and 15 of the National Green Tribunal Act reveals that essentially any application moved for claiming reliefs there- under must necessarily present a Civil case wherein substantial question relating to environment or environmental damage arising under the enactments specified in the Schedule-I is involved. We are, therefore, of the considered opinion that it is the substantial question relating to the environment or environmental damage as aforesaid which give rise to the cause for an action under the provisions of National Green Tribunal Act, 2010. In the present case, the question raised is about restoration of the environmental damage on account of injury to it as a result of raising VCA Stadium without EC or consent to operate under the provisions of Schedule-I Acts Viz Environment (Protection) Act, 1986, the Air (prevention and Control of Pollution) Act 1981and Water (Prevention and Control of Pollution) Act 1974. As stated herein above, the causes of injury are insufficiency of Effluent Treatment Plant (ETP), open spaces, parking spaces and tree cover. These facts were very much manifest when the VCA stadium became functional in the year 2008. In our opinion, therefore, the cause of action for the present Application arose first when the VCA stadium became functional. There is nothing in the application to state that these injuries stood compounded further to actuate the Applicants to initiate the action in the present case as framed.

12. Section 15 of the National Green Tribunal Act which deals with the Application for restitution/ restoration of the environment reads as under:

"Section 15: Relief Compensation and Restitution

(1) The Tribunal May by an order Provide :-

(a) Relief and compensation to the victims of pollution and other environmental damage arising under the enactments specified in the Schedule 1 (Including accident occurring while handling any hazardous substance),

(b) For restitution of property damaged;

(c) For restitution of the environment for such area or areas, as the Tribunal may think fit.

2. The relief and compensation and restitution of property and environment referred to in clauses (a) (b) and (c) of sub-section (1) shall be addition to the relief paid or payable under the public Liability Insurance Act, 1991.

3. No application for grant of any compensation or relief or restitution of property or environment under this section shall be entertained by the Tribunal unless it is made within a period of five years from the date on which the cause for such compensation or relief first arose.

13. The present Application which ought to have been filed within a period 5 year from the date on which the cause of action for restoration first arose i. e. in the year 2008 has been filed on 11th April, 2016. The Application is thus found to be beyond the prescribed period under Section 15 of the National Green Tribunal Act, 2010 and therefore, cannot be entertained, it being time barred.

34. The learned counsel for **Respondent No.7** further relied upon the judgment dated 01.12.2022 in O.A. NO. 63/2019 (WZ) ***Mr. Ajay Jayvantrao Bhosale Vs. Union of India through MoEF&CC & Ors.***

In this Judgment, our attention was drawn to Para-10, where-in it is held that the date to establish first cause of action cannot be said to have arisen on the basis of information sought under the RTI Act

because that would leave choice in the hands of the person bringing the case at the point of his choice.

35. We have gone through the above quoted relevant paragraphs and are of the view that the facts of the cases relied upon by Respondent No.7 are totally different from the facts which are in the case in hand. In the case in hand the demolition of illegal construction has been prayed because the construction was made without obtaining prior Environmental Clearance under the EIA Notification 2006.

36. We find that the case law which has been relied upon by the learned counsel for the applicant is appropriate to be applicable in the present case because in that case the principle of 'recurring cause of action' has been treated to be correct principle of law as far as calculation of limitation period is concerned. In that case the written correspondence which was made relating to the matter in issue was taken into consideration and the cause of action was treated to be valid even on account of the last correspondence made and from that date the calculation for period of limitation was permitted to be reckoned holding that each and every date when the correspondence was made would provide recurring cause of action. Similarly, in the present case we find that the various permissions for amendment were obtained in the development plan by the Project Proponent from time to time with respect to the same project and its expansion, therefore, the last date on which the sanction was obtained i.e. 11.11.2020 could be treated to be a date from which the period of limitation can be reckoned when permission of construction was given to be made beyond the threshold limit of 20,000 Sq.m. If that is taken to be correct date and period of limitation is reckoned from it, it would be treated to be within time as this case is filed on 27.03.2022, i.e. well within five years. Hence, we find this application is not barred by limitation.

Analysis

37. On the basis of above pleadings and the prayers made by the applicant as well as respondent, the following additional issues arise for our consideration and decision-:

    1. Whether the construction in question has been made by the Respondent No.7/ Project Proponent without obtaining Environmental Clearance ? If yes what would be consequence thereof ?.
    2. If the construction is found to have been made in violation of the Environmental Clearance norms, whether the same deserves to be demolished as prayed for ?.
    3. Whether, any construction raised by the Respondent No.7/ Project Proponent, if is found to be in violation of EIA Notification, 2006, environmental compensation needs to be assessed and realized in respect of the said violations? .

38. As per the Applicant's case, the Respondent No.7/ Project Proponent has carried out illegal construction of project by the name 'Dudhawala Complex' on Survey No. 222 of Byculla Division, Bellasis Road, Near ST Depot, Mumbai Central, Mumbai without obtaining prior Environmental Clearance from State Level Environment Impact Assessment Authority (SEIAA) nor Consent to Establish and Consent to Operate were obtained from the Maharashtra Pollution Control Board (MPCB). Besides that various other violations have also been committed by the Respondent No.7/ Project Proponent stated above in the averments of the applicant which require action against the Project Proponent in accordance with the law.

Legal Position

39. We find that the position of law to a large extend is clear which is also admitted to Respondent No.7/ Project Proponent who acknowledges that after coming into force of amendment dated 7th July, 2004 in EIA regime, the building construction activity would require prior Environmental Clearance to be obtained from competent authority

before making any construction. Although any construction made prior to that date was exempted from obtaining any Environmental Clearance. But even with respect to the amendment dated 7th July, 2004, it was the position that if the construction work had not come upto the plinth level it would require prior Environmental Clearance. In case the construction had exceeded the plinth level, it would not require prior Environmental Clearance. Thereafter, the EIA Notification 2006 came into force which placed amended conditions that all the construction activity involving more than 20000sq.metrs. BUA in total would require prior Environmental Clearance to be obtained from Competent Authority.

Legal Position with historical background:

40. The pollution and consequential deterioration of environment has assumed alarming proportions and has become cause of universal concern because of which under the aegis of the United Nations discussions were held to protect and improve environment and prevent pollution. In the 1972, discussions and deliberations were made on the Human Environment in the United Nations (UN), where it was felt that there was need to enact law to tackle environmental pollution, in which India also participated and voiced its concerns. Thereafter, the Environment (Protection) Act, 1986,(hereinafter referred to as the 1986 Act) was enacted as a consequence of the decisions taken in said United Nations (UN) Conference, Section 3 Sub-Section (1) of which 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. Section 3 Sub-section (2) of the said Act enables the Central Government to take following measures:-

41. Section 3 of 1986 Act provides as follows:

> ***"3. Power of Central Government to take measures to protect and improve environment.****-(1) Subject to the provisions*

of this Act, the Central Government shall have the power 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.

(2) In particular, and without prejudice to the generality of the provisions of sub-Section (1), such measures may include measures with respect to all or any of the following matters, namely:-

i. *********
*(a)********
*(b)*******
ii. ********
iii. ********
iv. *******
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; Xxxxxx"

42.Section 3 Sub-Section (2) of the said Act provides as follows:

"(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."

43. Rule 5 (3) (d) of the EP Rules provides as follows :

"4. Prohibition and restriction on the location of industries and the carrying on processes and operations in different areas.
1. ****

2. ****
3. (a) ****
(b)***
(c) *****
(d) The Central Government shall, within a period of one hundred and twenty days from the date of publication of the notification in the Official Gazette, consider all the objections received against such notification and may within seven hundred and twenty five days and in respect of the States of Assam, Meghalaya, Arunachal Pradesh, Mizoram, Manipur, Nagaland, Tripura, Sikkim and Jammu and Kashmir in exceptional circumstance and for sufficient reasons within a further period of one hundred and eighty days, from such date publication, impose prohibition or restrictions on location of such industries and the carrying on of any process or operation in an area:
Provided that on account of COVID-19 pandemic, for the purpose of this clause, the period of validity of the notification expiring in the financial year 2020-2021 and 2021-2022 shall be extended up to 31st December, 2021 or six months from the end of the month when the relevant notification would have expired without any extension, whichever is later."

44. 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 Rules 5 (3)(d) of the Environment (Protection) Rules, 1986 the Central Government issued the Environmental Impact Assessment Notification dated 27th Janary,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 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.

45. 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 Environmental Impact Assessment (EIA) Report/ Environment Management Plan (EMP) prepared in accordance with the guidelines issued by MoEF. Another Environmental Impact Assessment Notification was issued in

2006, for grant of Terms and Environmental Clearance *inter alia* for projects which had started work on site.

46. 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(IAA) 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 to be granted, shall be made available to the parties concerned or environmental groups on request, subject to public interest. The Impact Assessment Agency (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. 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 the Impact Assessment Agency (IAA).

47. A minor amendment was made in the Environment Impact Assessment (EIA) Notification 1994, by a Notification dated 10th April, 1997, which prescribes a detailed procedure for public hearing.

48. By Notification 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 Section 5 of the 1986 Act, to the

Chairpersons of the respective State Pollution Control Boards/ committee, to issue directions to any industry or 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.

49. In ***Indian council for Enviro-Legal Action and Ors. V. Union of India and Ors.,(1996) 3 SCC 212*** The Hon'ble 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 environment, the relevant paragraph of which is quoted herein below:

> "*67. The question of liability of the respondents to defray the costs of remedial measures can also be looked into from another angle, which has now come to be accepted universally as a sound principle, viz., the "Polluter Pays" Principle.*
>
> > *"The polluter pays principle demands that the financial costs of preventing or remedying damage caused by pollution should lie with the undertakings which cause the pollution, or produce the goods which cause the pollution. Under the principle it is not the role of government to meet the costs involved in either prevention of such damage, or in carrying out remedial action, because the effect of this would be to shift the financial burden of the pollution incident to the taxpayer. The `polluter pays' principle was promoted by the Organization for Economic Co-operation and Development [OECD] during the 1970s when there was great public interest in environmental issues. During this time there were demands on government and other institutions to introduce policies and mechanisms for the protection of the environment and the public from the threats posed by pollution in a modern*

industrialized society. Since then there has been considerable discussion of the nature of the polluter pays principle, but the precise scope of the principle and its implications for those involved in past, or potentially polluting activities have never been satisfactory agreed.

Despite the difficulties inherent in defining the principle, the European Community accepted it as a fundamental part of its strategy on environmental matters, and it has been one of the underlying principles of the four Community Action Programmes on the Environment. The current Fourth Action Programme ([1987] O.J.C328/1) makes it clear that `the cost of preventing and eliminating nuisances must in principle be borne by the polluter', and the polluter pays principle has now been incorporated into the European Community Treaty as part of the new Articles on the environment which were introduced by the Single European Act of 1986. Article 130R(2) of the Treaty states that environmental considerations are to play a part in all the policies of the Community, and that action is to be based on three principles: the need for preventative action; the need for environmental damage to be rectified at source; and that the polluter should pay."

Thus, according to this principle, the responsibility for repairing the damage is that of the offending industry. Sections 3 and 5 empower the Central Government to give directions and take measures for giving effect to this principle. In all the circumstances of the case, we think it appropriate that the task of determining the amount required for carrying out the remedial measures, its recovery/realisation and the task of undertaking the remedial measures is placed upon the Central Government in the light of the provisions of the Environment [Protection] Act, 1986. It is, of course, open to the Central Government to take the help and assistance of State Government, R.P.C.B. or such other agency or authority, as they think fit."

50. The Central Government has issued Notification dated 14th March, 2017 under Section 3 (1) and Section 3(2) (V) of Environment (Protection) Act, 1986 read with Rule 5 (3)(d) of the Environment (Protection) Rules, 1986, which provides for grant of ex post facto EC for such Project Proponent who commenced, continued or completed a project without obtaining EC under the 1986 Act or EIA Notification issued under it. The relevant paragraph of the said Notification which is quoted hereinbelow:

"(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."

51.Three Judge Bench of Hon'ble Apex Court in ***Lafarge Umiam Mining Private Limited Vs. Union of India and ors.***,(**2011) 7 SCC 338** has held as below:

"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 decisionmaking 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."

52. In ***Alembic Pharmaceuticals Ltd. Vs. Rohit Prajapati and Ors. (2020) 17 SCC 157,*** The Hon'ble Supreme Court of India has held as follows:

"23. 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 decisionmaking 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."

53. In Alembic Pharmaceuticals (supra), the Hon'ble Supreme Court deprecated *ex post facto* clearances, but it did not pass orders for closure of the three industries concerned, on consideration of the consequences of their closure rather proceeded to observe as under:

37. 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.

38 . 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)"

39. After adverting to the decision in Lafarge, another Bench of three learned judges of this Court in Electrotherm (India) Limited v. Patel Vipulkumar Ramjibhai, 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 Umesh 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."*

40. *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)*

41. *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.*

42. *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. 33 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."

54. The Notification dated 14th March, 2017 was not an issue in Alembic Pharmaceuticals (Supra). The Hon'ble Supreme Court was examining the propriety and/ or illegality of a 2002 circular which was inconsistent with the EIA Notification dated 27th January, 1994.

55. In Civil Appeal Nos. 7576-7577 of 2021, Electrosteel Steels Limited Vs. Union of India and ors. decided on 9th December, 2021 the Hon'ble Supreme Court has held that *ex-post fact* environmental clearance should be granted only in exceptional circumstances taking into account all relevant environmental factors and not in routine manner. Where the adverse consequences of ex- post facto approval outweight the consequences of regularization of operation of an industry by grant of *ex-post facto* approval may be and the industry or establishment concerned otherwise conforms to the requisite pollution norms, *ex-post facto* approval may be given in accordance with the law, in conformity with the applicable Rules, Regulations and/ or Notifications. **The *Ex-post facto* approval should not be withheld only as a penal measure. The deviant industry may be penalized by an imposition of heavy penalty on the principle of 'polluter pays' and the cost of restoration of environment may be recovered from it.**

56. In another judgment in Civil Appeal No. 4795 of 2021, M/s Pahwa Plastics Pvt. Ltd. and anr. Vs. Dastak NGO and ors. delivered on 25th March, 2022, the Hon'ble Supreme Court held that the Notification dated 14th March, 2017 is valid statutory Notification issued by the Central Government 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 in the same manner as EIA Notification dated 27th January 1994 and the Notification dated 14th September, 2006. 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 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 to 14th September, 2006 undoubtedly had, and still has the power to rescind or modify or amend those notifications in like manner. It was also

held in ***Shree Sidhbali Steels Ltd. & others V. State of Uttar Pradesh & others, 2011 (3) SCC 1993,*** that power under Section 21 to amend, vary or rescind notifications, orders, rules or bye-laws can be exercised from time to time having regard to the exigency.

57. Puducherry Environment Protection Association filed a Writ Petition being W. P. No. 11189 of 2017 in the High Court assailing the said notification dated 14th March, 2017, where-in by the 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.

58. The Ministry of Environment, Forest and Climate Change(MoEF&CC) issued a draft Notification dated 23rd March, 2020 which was duly published in the Gazette of India Extraordinary Part II, which was proposed to be issued in exercise of powers conferred by sub- Section (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. In the said draft notification 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.

59. By an Office Memorandum dated 7th July, 2021 MoEF&CC issued Standard Operating system (SOP) for identification and handling of

violation cases under EIA Notification 2006, the relevant portion of the said Memorandum is reproduced hereinbelow:

> *"1. The Ministry had issued a notification number S.O.804(E), dated the 14 th 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. Vs Synochem Organics Pvt. Ltd. & Ors. and in applications pertaining to same subject matter in Original Application No. 298 of 2020 in Vineet Nagar vs. Central Ground Water Authority & Ors., 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 vs. Chief Secretary, Government of Maharashtra and Ors., 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."*

60 The SOP dated 7th July, 2021 refers to and gives effect to various judicial pronouncements including the judgment of Hon'ble Apex Court in ***Alembic Pharmaceuticals Ltd. V. Rohit Prajapati & others.*** The proposal for grant of EC in cases of violation are to be

considered on merits, with prospective effect in term of said SOP, applying "principles of proportionality and the principle that the polluter pays".

61 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, where-in 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 observing as follow:

> *"1. 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. vs 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 vs. Union of India & Another, 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 19 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 (cited 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."

62. The Hon'ble Supreme Court in M/s Pahwa Plastics Pvt. Ltd.and anr. vs. Dastak NGO and ors.has held that though it is true that in the case of ***Puducherry Environment Protection Association v. Union of India, 3 2017 SCC OnLine Mad 7056,*** the Division Bench of Madras High Court recorded the submission made on behalf of the Union of India that the relaxation was a one time relaxation. But the Hon'ble Supreme Court held that one time relaxation was permissible.

63. It is 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 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. It was held by the Hon'ble Supreme Court in ***M/s Pahwa Plastic Pvt. Ltd. case (Supra)*** that the Hon'ble Madras High Court fell in error in staying the said Office Memorandum, by relying on observations made by the Hon'ble Supreme 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 Hon'ble Supreme 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.

64. The Hon'ble Supreme Court in its judgment delivered in Civil Appeal No. 3132 of 2018 ***D. Swamy vs. Karnataka State Pollution Control Board and ors.*** on 22nd September, 2022 has also considered the Office Memorandum dated 7th July, 2021 laying down Standard Operating Procedure(SoP) for identification and handling of violation cases vis-a-vis 2006 EIA Notification and has held that the same was formulated for giving effect to various judicial pronouncements including the Judgment of the ***Alembic Pharmaceuticals Ltd. (Supra).*** In this judgment also the Hon'ble Supreme Court has made references of the W. P.(MD) No. 11757 of 2021 (***Fatima Vs. Union of India***), ***Puducherry Environment Protection Association v. Union of India, 3 2017 SCC OnLine Mad 7056, Electrosteel Steels Limited (Supra), Lafarge Umiam Mining Private Limited case (Supra)*** and has again reiterated the view that EP Act does not prohibit *ex-post facto* EC, if the same is granted in accordance with the law, in strict compliance with the Rules, Regulations, Notifications and/or applicable orders, in appropriate cases, where the projects are in compliance with environment norms and are not impermissible. Although it has also been reiterated that it should not be ordinarily granted, certainly not for the asking but at the same time it cannot be declined with pedantic rigidity, regardless of the consequences of stopping the operations.

65. **From the above discussed case laws, We are of the opinion that Hon'ble Supreme Court has considered the SOP dated 7th July, 2021 at length in the various judgments cited above and has upheld the same by saying that the Central Government has issued Office Memorandum laying down the SOP to be followed in violation cases, where-in the Project Proponent had not obtained prior EC in accordance with the EIA Notification 2006.** These are judgment of the Hon'ble Apex Court which are of the period as recent as the year 2022, and in none of them we find that there is any prohibition

for the consideration of *Ex- post facto* EC to be made in appropriate cases following the SOP dated 7th July, 2021.

66. According to the Office Memorandum dated 7th July, 2021 laying down the SOP for identification and handling of violation cases under EIA Notification 2006, following procedure have been laid down.

Issue No.1: Proposal for grant of Environmental Clearance in violation cases- to be considered on merits :

i. Hon'ble High Court of Jharkhand in the matter of Hindustan Copper Limited Vs. Union of India in W. P. (c) No. 2364 of 2014, vide order dated 28.11.2014

Held: "(.....) action for alleged violation would be an independent and separate proceeding and therefore, consideration of proposal for environment clearance cannot await initiation of action against the Project Proponent."

" (....) the proposal of the petitioner company for ***environmental clearance must be examined on its merits, independent of any proposed action for the alleged violation of the environment laws."***

ii. Hon'ble Madras High Court in the matter of Puducherry Environment Protection Association Vs. The Union of India in W. P. No. 11189 of 2017, vide order dated 13.10.2017.

Held "27. The question is whether an establishment contributing to the economy of the country and providing livelihood to hundreds of people should be closed down only because of failure to obtain prior environmental clearance, even though the establishment may not otherwise be violating pollution laws or the pollution, if any, can conveniently and effectively be checked. ***The answer necessarily has to be in the negative."***

"29. It is reiterated that protection of environment and prevention of environmental pollution and degradation are non-negotiable. At the same time, the court cannot altogether ignore the economy of the Nation and the need to protect the livelihood of hundreds of employees employed in projects, which as stated above, otherwise comply with or can be made to comply with norms."

Issue 2: Environmental Clearance- Prospective & not ex-post facto:

Hon'ble Supreme Court in the matter of Common Cause Vs. Union of India in W. P. (C) No. 114 of 2014, vide order dated 02.08.2017

Held: "(.....) an EC will come into force ***not earlier than the date of its grant.***

Issue 3: 'Principle of Proportionality' – to be applied:

Hon'ble Supreme Court in the matter of Alembic Pharmaceuticals Ltd. Vs. Rohit Prajapati & Ors. in C. A. NO. 1526 of 2016, vide order dated 01.04.2020.

Held: "(....) ***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."***

Issue 4: 'Polluter pays' principle &

Issue 5: Costs for remedial measures implicit in Section 3 & 5 of Environmental (Protection) Act, 1986.

Hon'ble Supreme Court in the matter of Indian Council for Enviro-legal Action Vs. Union of India (the Bichhri village industrial case) in (1996 SCC (3) 212)

Held:

a. *The Central Government is empowered to take all measures and issue all such directions as are called for the above purpose. The said powers will* ***include giving directions...*** *and also the power to* ***impose the cost of remedial measures*** *on the offending industry and utilize the amount so recovered for carrying out remedial measures...*

b. ***Levy of costs required for carrying out remedial measures is implicit in Sections 3 and 5*** *which are couched in very wide and expansive language. Sections 3 and 5 of the Environment (Protection) Act, 1986, apart from other provisions of Water and Air Acts, empower the Government to make all such directions and take all such measures are necessary for expedient for protecting and promoting the 'environment', which expression has been defined in very wide and expansive terms in Section 2(a) of the Environment (Protection) Act. This power includes 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 industry.*

c. *The question of liability of the respondents to defray the costs of remedial measures can also be looked into from accepted universally sound principle, viz, the "Polluter Pays" Principle. " The polluter pays principle demands that the financial costs of preventing or remedying damage cause by pollution should lie with the undertaking which cause the pollution, or produce the goods which cause the pollution."*

67. The Principal Bench of this Tribunal considered the MoEF Notification dated 14.03.2017 as well as Office Memorandum dated 07.07.2021 in Original Application No. 66/2019 in case of ***Kumar City Residents Co-operative Housing Society Ltd. Vs. Kumar Urban Development Pvt. Ltd. & 8 Ors.*** where-in vide order dated 13th May, 2022 the said Original Application was disposed of with direction contained in Para 247 of the said judgment. We find that in this case the matter related to grant of *ex-post facto* EC was considered from Para 167 to 220, comprehensively dealing with the grant of *ex-post facto* EC in violation cases. It has been opined in the said judgment that the Notification dated 14th March, 2017 was giving window of only six months to such Project Proponent who had made construction without obtaining prior EC where the same was required under EIA Notification, 2006. It was held that there was no Notification issued by the MoEF&CC to modify the EIA Notification, 2006 or the Notification dated 14th March, 2017 and that only the Office Memorandum has been issued by it in order to lay down Standard Operating Procedure (SOP) for dealing with such cases in which violations have been made. It has been held that this SOP was applicable only for such cases in which the Project Proponent had invoked the provision given in Notification dated 14th March, 2017 i.e. if the Project Proponent had not obtained prior EC for construction of the project, he could apply for grant of *ex-post facto* EC within a period of six months specified in the Notification and not beyond that.

68. For the sake of convenience we reproduce the relevant paragraphs hereinbelow:

ISSUE IV - Relating to validity of EC dated 13.12.2019

> *"167. The argument is that EC dated 13.12.2019 has been granted as 'violation case' in alleged compliance of MoEF notification dated 14.03.2017 and 08.03.2018, and procedure*

laid down therein, read with EIA 2006, as amended from time to time has not been followed.

168. EC has been granted on 13.12.2019 on an application submitted by PPs in reference to MoEF&CC notification dated 08.03.2018, in the year 2018 itself. Apparently, there is total mis-application, mis-appreciation and mis-construction of the above OM and also it is evident that procedure provided in EIA 2006 as amended from time to time has not been followed.

169. PPs submitted application in 2018 with reference to MoEF notification dated 08.03.2018 to SEIAA and thereupon, EC in question has been granted by SEIAA Maharashtra. It is evident that without prior EC, PPs have proceeded with constructions and violated provisions of EIA 2006. SEIAA has considered PPs application of 2018 as a 'violation case' and granted questioned EC. Correctness of this EC, we find is necessary to be examined in the light of certain earlier orders of this Tribunal and also OMs/notifications issued by MoEF.

170. MoEF issued OMs dated 12.12.2012 and 27.06.2013 opening a window for grant of EC where proponents have proceeded with the projects/activities, scheduled under EIA 2006, without prior EC, whether as new project or modification, expansion etc.

171. OM dated 12.12.2012 was challenged in High Court of Jharkhand in ***W.P.(C) No. 2364/2014, Hindustan Copper Limited Versus Union of India****. Vide judgment dated 28.11.2014, High Court held paragraphs 5 (i) and 5 (ii) of OM dated 12.12.2012 illegal and unconstitutional. Court also held that action for alleged violation would be an independent and separate proceeding and consideration of proposal for EC could not await initiation of action against PP who had violated provisions of EIA 2006.*

172. OMs dated 12.12.2012, 27.06.2013 were also challenged before Tribunal (Principal Bench) in ***OA 37/2015, S.P. Muthuraman vs. Union of India and another*** *and* ***OA 213/2015, Manoj Mishra vs. UoI****. Vide judgment dated 07.07.2015, Tribunal held that above OMs, on the subject of consideration of Terms of Reference or EC or Coastal Regulation Zone Clearance, involving violations of EP Act, 1986 or Environment Impact Assessment Notification, 2006, Coastal Regulation Zone Notification, 2011, could not alter or amend the provisions of Environment Impact Assessment notification, 2006 and consequently quashed the same.*

173. MoEF, however, claimed that it was repeatedly receiving proposals for grant of Terms of Reference and EC for projects/activities wherein work had started on the site in respect of either new project or extension etc. without obtaining prior EC. Taking a view that allowing these projects, without any check or regulation, would not be conducive for environment, MoEF&CC issued ***notification dated 14.03.2017*** *published in Gazette of India Extraordinary of the same date. The said notification says that a draft notification was published in Gazette of India Extraordinary dated 10.05.2016 as required by Rule 5 (iii) of EP Rules, 1986 for finalizing the process for appraisal of projects for grant of Terms of Reference and EC which have started work on site, expanded the production beyond the limit of EC or changed the product mix without obtaining prior EC under the EIA 2006. Objections*

and suggestions were invited from persons likely to be affected within 60 days. A copy of notification dated 10.05.2016 was made available to the public on the same date. After considering objections and suggestions received, final notification was issued on 14.03.2017, referring the power conferred by Section 3(1) and (2) clauses (i) (a) and (v) of EP Act, 1986 read with rule 5(3)(d) of EP Rules, 1986. Notification dated 14.03.2017, in reference to said powers said,
"...the Central Government hereby directs that the projects or activities or the expansion or modernisation of existing projects or activities requiring prior environmental clearance under the Environment Impact Assessment Notification, 2006 entailing capacity addition with change in process or technology or both undertaken in any part of India without obtaining prior environmental clearance from the Central Government or by the State Level Environment Impact Assessment Authority, as the case may be, duly constituted by the Central Government under sub-section (3) of Section 3 of the said Act, shall be considered a case of violation of the Environment Impact Assessment Notification, 2006 and will be dealt strictly as per the procedure specified in the following manner:-

(2) In case the projects or activities requiring prior environmental clearance under Environment Impact Assessment Notification, 2006 from the concerned Regulatory Authority are brought for environmental clearance after starting the construction work, or have undertaken expansion, modernization, and change in product- mix without prior environmental clearance, these projects shall be treated as cases of violations and in such cases, even Category B projects which are granted environmental clearance by the State Environment Impact Assessment Authority constituted under sub-section (3) Section 3 of the Environment (Protection) Act, 1986 shall be appraised for grant of environmental clearance only by the Expert Appraisal Committee and environmental clearance will be granted at the Central level.

(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 sub-section (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.

(6) The Expert Appraisal Committee shall stipulate the implementation of Environmental Management Plan, comprising remediation plan and natural and community resource augmentation plan corresponding to the ecological damage assessed and economic benefit derived due to violation as a condition of environmental clearance.

(7) The project proponent will be required to submit a bank guarantee equivalent to the amount of remediation plan and Natural and Community Resource Augmentation Plan with the State Pollution Control Board and the quantification will be recommended by Expert Appraisal Committee and finalized by Regulatory Authority and the bank guarantee shall be deposited prior to the grant of environmental clearance and will be released after successful implementation of the remediation plan and Natural and Community Resource Augmentation Plan, and after there commendation by regional office of the Ministry, Expert Appraisal Committee and approval of the Regulatory Authority.

14. ***The projects or activities which are in violation as on date of this notification only will be eligible to apply for environmental clearance under this notification and the project proponents can apply*** *for environmental clearance under this notification* ***only within six months from the date of this notification****."*

174. It is an admitted case of PPs that they had submitted application dated 31.08.2017 to MoEF&CC for grant of EC as violation case but no such EC was granted.

175. Another ***notification dated 08.03.2018*** *was published in Gazette of India, Extraordinary, on 09.03.2018 whereby amendment was made in paragraph 13 (2), (4), (5), (6) and (7). In fact, all the above sub-paragraphs i.e. (2), (4), (5), (6) and (7) in paragraph 13 of notification dated 14.03.2017 were substituted. The relevant extract of aforesaid notification dated 08.03.2018, reads as under:*

"Now, therefore, in exercise of the powers conferred by sub-section (1), sub-clause (a) of clause (i) and clause (v) of sub-section (2) of section 3 of the Environment (Protection) Act, 1986 (29 of 1986), read with sub-rule (4) of rule 5 of the Environment (Protection) Rules, 1986, the Central Government hereby makes the following amendments in the said notification by dispensing with the requirement of notice referred to in clause (a) of sub-rule (3) of rule 5 of the said rules, in public interest, namely:-

In the said notification, in paragraph 13, -

(a) for sub-paragraph (2), the following sub-paragraph shall be substituted, namely:-

"(2) In case the projects or activities requiring prior environmental clearance under the Environment Impact Assessment Notification, 2006 from the concerned regulatory authority are brought for environmental clearance after starting the construction work, or have undertaken expansion, modernisation, and change in product-mix without prior environmental clearance, these projects shall be treated as cases of

violations and the projects or activities covered under category A of the Schedule to the Environment Impact Assessment Notification, 2006, including expansion and modernisation of existing projects or activities and change in product mix, shall be appraised for grant of environmental clearance by the Expert Appraisal Committee in the Ministry and the environmental clearance shall be granted at Central level, and for category B projects, the appraisal and approval thereof shall vest with the State or Union territory level Expert Appraisal Committees and State or Union territory Environment Impact Assessment Authorities in different States and Union territories, constituted under sub-section (3) of section 3 of the Environment (Protection) Act, 1986.";

(b) for sub-paragraph (4), the following sub-paragraph shall be substituted, namely:-

"(4) The cases of violations will be appraised by the Expert Appraisal Committee at the Central level or State or Union territory level Expert Appraisal Committee constituted under sub-section (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 run sustainably under compliance of environmental norms with adequate environmental safeguards, and in case, where the findings of Expert Appraisal Committee for projects under category A or State or Union territory level Expert Appraisal Committee for projects under category B is negative, closure of the* ***project will be recommended along with other actions under the law****.";*

(c) for sub-paragraph (5), the following sub-paragraph shall be substituted, namely:-

"(5) In case, where the findings of the Expert Appraisal Committee or State or Union territory level Expert Appraisal Committee on point at sub-paragraph (4) above are affirmative, the projects will be granted the ***appropriate Terms of Reference for undertaking Environment Impact Assessment and preparation of Environment Management Plan and the Expert Appraisal Committee or State or Union territory level Expert Appraisal Committee, will prescribe 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, and 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 the Environment (Protection) Act, 1986, or a environmental laboratory accredited by the National Accreditation Board for Testing and Calibration Laboratories, or a laboratory of the Council of Scientific and Industrial Research institution working in the field of environment.";*

(d) for sub-paragraph (6), the following sub-paragraph shall be substituted, namely:-

"(6) The Expert Appraisal Committee or State or Union territory level Expert Appraisal Committee, as the case may be, ***shall stipulate the implementation of Environmental***

Management Plan, comprising remediation plan and natural and community resource augmentation plan corresponding to the ecological damage assessed and economic benefit derived due to violation *as a condition of environmental clearance.";*

(e) for sub-paragraph (7), the following sub-paragraph shall be substituted, namely:-

"(7) The project proponent will be required to submit a bank guarantee equivalent to the amount of remediation plan and Natural and Community Resource Augmentation Plan with the State Pollution Control Board and the quantification will be recommended by the Expert Appraisal Committee for category A projects or by the State or Union territory level Expert Appraisal Committee for category B projects, as the case may be, and finalised by the concerned Regulatory Authority, and ***the bank guarantee shall be deposited prior to the grant of environmental clearance and released after successful implementation of the remediation plan and Natural and Community Resource Augmentation Plan, and after recommendation by regional office*** *of the Ministry, Expert Appraisal Committee or State or Union territory level Expert Appraisal Committee and approval of the Regulatory Authority.".*

176. In reference to the notification dated 08.03.2018, PPs submitted fresh application in 2018 to SEIAA Maharashtra for grant of EC as a violation case and in furtherance thereof, questioned EC has been issued by SEIAA Maharashtra. We find that notifications dated 14.03.2017, as also dated 08.03.2018 on their own do not constitute an amendment in EIA 2006 nor it is so mentioned therein.

177. EIA 2006 was issued with reference to the power conferred by Section 3(1) and (2)(v) of EP Act, 1986 read with Rule 5(3)(d) of EP Rules, 1986. The notification dated 14.03.2017 is also in reference to the above provisions but includes Section (2)(i)(a) of EP Act, 1986. We may reproduce Section 3(1) and 2(i)(a) and (v) of EP Act, 1986 as under:

"3. POWER OF CENTRAL GOVERNMENT TO TAKE MEASURES TO PROTECT AND IMPROVE ENVIRONMENT*.- (1) Subject to the provisions of this Act, the Central Government, shall have the power 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.*

(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), such measures may include measures with respect to all or any of the following matters, namely:--

> *(i) co-ordination of actions by the State Governments, officers and other authorities—*
>
> *(a) under this Act, or the rules made thereunder, or*
>
> *.....xxx.....xxx.....xxx*

(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;"

178. Rules 5(3) prescribed procedure where Central Government finds it expedient to impose prohibition or restrictions on the locations of an industry or the carrying on of processes and operations in an area. Even if notification dated 14.03.2017 can not be said to be in contradiction to EIA 2006, since both have been issued in exercise of similar statutory powers, still what we find is that notification dated 14.03.2017 has given justification for its issuance in paragraphs 9, 10 and 11 which read as under:

"9. And whereas, the Ministry of Environment, Forest and Climate Change and State Environment Impact Assessment Authorities have been receiving certain proposals under the Environment Impact Assessment Notification, 2006 for grant of Terms of References and Environmental Clearance for projects which have started the work on site, expanded the production beyond the limit of environmental clearance or changed the product mix without obtaining prior environmental clearance;

10 Whereas, the Ministry of Environment, Forest and Climate Change deems it necessary for the purpose of protecting and improving the quality of the environment and abating environmental pollution that all entities not complying with environmental regulation under Environment Impact Assessment Notification, 2006 be brought under compliance with in the environmental laws in expedient manner;

11. And whereas, the Ministry of Environment, Forest and Climate Change deems it necessary to bring such projects and activities in compliance with the environmental laws at the earliest point of time, 202
rather than leaving them unregulated and unchecked, which will be more damaging to the environment and in furtherance of this objective, the Government of India deems it essential to establish a process for appraisal of such cases of violation for prescribing adequate environmental safeguards to entities and the process should be such that it deters violation of provisions of Environment Impact Assessment Notification, 2006 and the pecuniary benefit of violation and damage to environment is adequately compensated for;"

179. In para 12, it has also referred to Supreme Court decision in ***Indian Council for Enviro-Legal Action vs. Union of India, (1996) 3 SCC 212*** *which is as under:*

"12. And whereas, Hon'ble Supreme Court in Indian Council for Enviro-Legal Action Vs. Union of India (the Bichhri village industrial pollution case), while delivering its judgment on 13th February, 1996, analyzed all the relevant provisions of law and concluded that damages may be recovered under the provisions of the Environment (Protection) Act, 1986 (1996 [3] SCC 212). The Hon'ble Court observed that …… section 3 of the Environment (Protection) Act, 1986 expressly empowers the Central Government [or its delegate, as the case may be] to "take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of environment……". Section 5 clothes the Central Government [or its delegate] with the power to issue directions for achieving the objects of the Act. Read with the

wide definition of "environment" in Section 2 (a), Sections 3 and 5 clothe the Central Government with all such powers as are "necessary or expedient for the purpose of protecting and improving the quality of the environment". The Central Government is empowered to take all measures and issue all such directions as are called for the above purpose. In the present case, the said powers will include giving directions for the removal of sludge, for undertaking remedial measures and also the power to impose the cost of remedial measures on the offending industry and utilize the amount so recovered for carrying out remedial measures…….. Hon'ble Court has further observed that levy of costs required for carrying out remedial measures is implicit in Sections 3 and 5 which are couched in very wide and expansive language. Sections 3 and 5 of the Environment (Protection) Act, 1986, apart from other provisions of Water and Air Acts, empower the Government to make all such directions and take all such measures as are necessary or expedient for protecting and promoting the 'environment', which expression has been defined in very wide and expansive terms in Section 2 (a) of the Environment (Protection) Act. This power includes 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 can also be looked into from another angle, which has now come to be accepted universally as a sound principle, viz., the "Polluter Pays" Principle. "The polluter pays principle demands that the financial costs of preventing or remedying damage caused by pollution should lie withthe undertakings which cause the pollution, or produce the goods which cause the pollution"."

180. However, it has neither referred to judgment of Supreme Court in ***Common Cause vs. UoI, (2017) 9 SCC 499*** *nor* ***Alembic Pharmaceuticals Limited vs. Rohit Prajapati and Ors. (2020) 17 SCC 157*** *for the reason that both the judgments were pronounced later to the issue of notification dated 14.03.2017. Judgment in* ***Common Cause vs. UoI (supra)*** *was delivered on 02.08.2017 and* ***Alembic Pharmaceuticals Limited (supra)*** *was decided vide the judgment dated 01.04.2020.*

181. This aspect was considered by Supreme Court in ***Alembic Pharmaceuticals Limited vs. Rohit Prajapati and Others (supra)*** *in the context of provisions of EIA 1994. Initially,* ***OA 66/2015, Rohit Prajapati vs UoI*** *was filed in Tribunal. MoEF&CC issued a circular dated 14.05.2002 allowing ex-post facto ECs subject to a graded contribution into an earmarked fund based on the investment cost of the project. The said circular was challenged by Rohit Prajapati and others in Gujarat High Court by filing Writ Petition which was transfer to Tribunal. Vide judgment dated 08.01.2016, Tribunal held that law do not permit grant of an ex-post facto clearance and circular dated 14.05.2002 was an internal communication, would not over-right provisions of EIA 1994. Tribunal issued following directions:*

*"**4.1.** The authorities of the Union of India, including the MoEF, State of Gujarat, Gujarat Pollution Control Board ("GPCB") and District Collectors shall not grant consent for an industrial activity covered by the EIA notification of 1994 without the steps mandated by the notification such as screening, scoping, public hearing and decision being fulfilled.*

4.2. *The ECs granted to the industrial units of the sixth to ninth respondents shall be revoked.*

4.3. *All the industrial activities which were being operated without a valid EC and consent to operate shall be closed down within one month.*

4.4. *Each of the units shall deposit a compensation of Rs.10 lakhs for having caused environmental degradation.*

4.5. *The amount deposited shall be used for the restoration of the environment in and around the industrial area of Ankleshwar in the State of Gujarat."*

182. The above judgment affected some industrial units namely United Phosphorus Ltd., Unique Chemicals, Darshak (P) Ltd. and Nirayu (P) Ltd., who were all manufacturer of pharmaceuticals and bulk drugs at industrial area of Ankaleshwar in State of Gujarat. Darshak (P) Ltd. had merged in 2002 with Alembic Pharmaceuticals Ltd. pursuant to a scheme of amalgamation sanctioned by Gujarat High Court. Nirayu (P) Ltd. was acquired by Alembic Pharmaceuticals Ltd. under a slump sale on 01.01.2008. In view thereof, Tribunal's judgment was challenged by M/s. Alembic Pharmaceuticals Ltd. being an aggrieved party. The occasion to issue circular dated 14.05.2002 arose on account of the fact that EIA 1994 mandated prior ECs for setting up an expansion of industrial projects falling within 30 categories mentioned in Schedule I. Deadline for obtaining EC under EIA 1994 was extended by circulars dated 31.03.1999, 30.06.2001 and then 14.05.2002. Last circular dated 14.05.2002 extended period till 31.03.2003 for those industrial units which have gone into production without obtaining an EC under EIA 1994 permitting them to apply for and obtain ex-post facto EC. It was pointed out that Entry 8 Schedule I of EIA 1994 covered industries engaged in manufacturing bulk drugs and pharmaceuticals. It was found that several industries set up without EC were functioning and even Gujarat PCB allowed various industries to operate without valid EC. Consequently, circular dated 05.11.1998 issued by MoEF said:

> *"Since number of such proposals are large in number and many of the units have not applied for environmental clearance genuinely out of ignorance it has been decided to consider their case for environmental clearance on merits. This will apply only to those proposals which are received in the Ministry till 31-3-1999. Simultaneously State Pollution Control Boards have also been advised to issue requisite notices to the units to apply for environmental clearance. In case of those units which have already started production, we may consider the proposals on merits and if necessary suggest additional mitigative measures. A formal environmental clearance will be issued in these cases after approval by the competent authority."*

183. Vide circular dated 27.12.2000, MoEF directed all State PCBs to issue fresh notices to all defaulting units and extended deadline to obtain EC from 31.03.1999 to 30.06.2001. Despite, delinquent units either failed to apply for EC or failed to complete requirement of public hearing before extended date. By circular dated 14.05.2002, deadline was extended to 31.03.2003. Writ Petition was filed challenging above circular dated 14.05.2002. It was prayed

that ECs already granted in violation of EIA 1994 to industrial units be revoked. Writ Petition was transferred to Tribunal (Western Zonal Bench) by Gujarat High Court on 21.04.2015. Thereafter, as already said, Tribunal decided the matter vide judgment dated 08.01.2016 in ***OA 66/2015 (supra)*** *declaring circular dated 14.05.2002 illegal being contrary to EIA 1994. One of the proponents-Unique Chemicals Ltd. preferred a Review Petition also but the same was also dismissed. Consequently, Alembic Pharmaceuticals Ltd. and other affected units including MoEF preferred appeals before Supreme Court. The sole issue formulated by Supreme Court for adjudication was "****whether in view of the requirement of a prior EC under the EIA notification of 1994, a provision for an ex post facto EC to industrial units could be validly made by means of the circular dated 14-5-2002".***

184. Supreme Court considered issue and referred to its earlier judgment in ***Common Cause vs. UOI (2017) 9 SCC 499*** *where, in para 108, argument was advanced on behalf of the mining lease holders, proponents in that case that obtaining an EC was not mandatory and even if it was not obtained, default was retrospectively condonable. Rejecting this argument, in para 125 of the judgment, Court said:*

> *"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 (M.C. Mehta vs. Union of India, (2004) 12 SCC 118)* ***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.****"*

185. Agreeing with the above view, Supreme Court, in ***Alembic Pharmaceuticals Ltd. (supra)*** *in para 23 said:*

> *"****23.*** *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 27-1-1994****. It is, as the judgment in Common Cause (2017) 9 SCC 499 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.****"*

186. After considering the above question of law, Court found that since industries cannot escape the liability incurred on account of such non-compliances, penalties must be imposed for disobedience with the binding legal regime. Breach by industries cannot be left unattended by legal consequences. The amount should be used for purpose of restitution and restoration of environment. Consequently, Court imposed compensation of Rs. 10 crores, each, to be deposited with Gujarat PCB so as to utilize for restoration and remedial measures to improve quality of environment in the industrial areas in which the industries are located.

187. The principal reason given by Supreme Court that consideration of various aspects before grant of EC, is necessary for taking steps for protection of environment and any activity is allowed without consideration of such requisite aspects, loss already caused to environment can neither be preventive nor appropriate steps for remediation or mitigating the same, can be taken and subsequent grant of EC is nothing, but a mechanical exercise of covering up a blatant violation of environmental laws, defeating precautionary principle. This is against the basic premise of constitutional obligation of protection of environment. Hence, such step of permitting grant of post-facto EC is neither valid nor justified in respect to environmental matters.

188. Recently, the issue of ex-post facto EC has also been considered by a two judges' Bench in ***Civil Appeal No. 4795 of 2021****,* ***M/s. Pahwa Plastics Pvt. Ltd. and anr. vs. Dastak NGO & Ors****.,* ***2022 SCC Online SC 362****. Vide judgment dated 25.03.2022, Supreme Court has allowed a micro exception with regard to grant of Ex-post facto EC particularly, in the facts of that case. Court formulated question in para 2 of the judgment as under:*

"whether an establishment employing about 8000 workers, which has been set up pursuant to Consent to Establish (CTE) and Consent to Operate (CTO) from the concerned statutory authority and has applied for Ex-post facto EC can be closed down pending issuance of EC, even though it may not cause pollution and/or may be found to comply with the required pollution norms."

*189. The facts as evident from the judgment are that appellant, M/s. Pahwa Plastics Pvt. Ltd. was carrying on business of manufacture and sale of basic organic chemicals namely formaldehyde, had two manufacturing units, one at Village Kharabar, Rohtak and another at Village Jathalana, Jagadhari in Yamunanagar in State of Haryana. Another appellant was having manufacturing unit at Village Ghespur in Yamunanagar, State of Haryana. The units run by appellants are in the category of micro, small and medium enterprise as defined under the Micro, Small and Medium Enterprises Development Act, 2006. Appellant 1 was granted Consent to Establish by Haryana State Pollution Control Board (hereinafter referred to as '**HSPCB**') on 02.06.2016 in respect to its unit at Yamunanagar. For the said unit, Consent to Operate was granted by HSPCB on 26.03.2018. Similarly, appellant 2, M/s. Apcolite Polymer Pvt. Ltd. was granted consent to establish on 31.03.2010 and consent to operate on 16.01.2012. The consent to operate granted were extended also. Consent for emission of air was also granted to appellant 2 on 13.03.2016. HSPCB itself was not sure that EC was required by the units manufacturing formaldehyde. In the circumstances, appellant did not apply for grant of prior EC. On the basis of consent to establish issued by HSPCB, units were set up and production commenced. Later, MoEF&CC issued notification dated 14.03.2017, providing for grant of ex-post facto EC in the matters covered by the said notification. The notification dated 14.03.2017 was challenged in the Madras High Court in Writ Petition No. 11189/2017 but vide judgment dated 13.10.2017 challenge was rejected by the Court. Thereafter, MoEF&CC issued a draft notification dated 23rd March, 2020 providing procedure for consideration of violation cases. Consequently, State of Haryana, Department of Environment, issued an order on 10.11.2020, permitting units manufacturing formaldehyde to apply for EC within 60 days from the date of issue of said order. Consequently, appellants applied for grant of EC in terms of the aforesaid notifications. MoEF&CC issued Office Memorandum dated 07.07.2021 laying down Standard Operating Procedure (SOP) for identification and handling of violation cases. Haryana Government order dated 10.11.2020 was challenged in **OA 287/2020, Dastak N.G.O. Vs Synochem Organics Pvt. Ltd. & Ors.** before NGT and the said OA was disposed of vide order dated 3rd June 2021 where against an appeal was preferred by M/s. Pahwa Plastics Pvt. Ltd. before the Hon'ble Supreme Court.*

*190. While deciding this appeal, Supreme Court referred to its judgment in **Electrosteel Steels Ltd. Vs. Union of India (2021) SCC Online SC 1241** and reproduced paragraphs 82, 83, 84, 88 and 96 of the said judgment in para 55 of judgment and then in para 56 and 57 said as under:*

"56. As held by this Court in Electrosteel Steels Limited (supra) 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 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.

57. The 1986 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."

191. After referring to the judgment in ***Alembic Pharmaceuticals Ltd. vs Rohit Prajapati, (supra),*** *Court said that therein a circular of 2002 was being examined which was found inconsistent with EIA 1994 which was statutory. Having said so, Court said in para 62, 63, 64, 65 and 66 as under:*

62. 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.

63. ***Ex post facto environmental clearance should 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. 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.*

64. The question in this case is, whether a unit contributing to the economy of the country and providing

livelihood to hundreds of people, which has been set up pursuant to requisite approvals from the concerned statutory authorities, and has applied for ex post facto EC, should be closed down for the technical irregularity of want of prior environmental clearance, pending the issuance of EC, even though it may not cause pollution and/or may be found to comply with the required norms. The answer to the aforesaid question has to be in the negative, more so when the HSPCB was itself under the misconception that no environment clearance was required for the units in question. HSPCB has in its counter affidavit before the NGT clearly stated that a decision was taken to regularize units such as the Apcolite Yamuna Nagar and Pahwa Yamuna Nagar Units, since requisite approvals had been granted to those units, by the concerned authorities on the misconception that no EC was required.

65. It is reiterated that the 1986 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 in their survival.

66. 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. This Court is of the view that the NGT erred in law in directing that the units cannot be allowed to function till compliance of the statutory mandate."

192. Thus, Court observed that where projects are in compliance with environmental norms, not impermissible otherwise and there are other relevant factors, though ordinarily ex-post facto EC should not be granted and certainly not for asking but in exceptional circumstances it may be granted where adverse consequences of denial of ex-post facto approval outweigh the consequence of regularization of operations by grant of ex-post facto approval.

193. In the present case, we find that PPs while carrying on their operations completely violated environmental norms and laws from the commencement of the work. Even though application was filed in 2012 but they continued to execute the project though no EC was granted. Therefore, the aforesaid judgment would not help PPs in the case in hand particularly when we have already found that Notification of 14.03.2017 has not been complied with by SEIAA,

Maharashtra in granting EC in question in as much as the application whereupon the questioned EC has been granted was submitted after expiry of six months which was the period permitted under Notification dated 14.03.2017 and there was no extension of the said period by MoEF&CC by issuing any notification in exercise of powers under EP Act, 1986.

194. In any case, notification dated 14.03.2017, para (14) makes it very clear that it was a one-time remedial action taken by MoEF&CC as it clearly provided that PPs can apply for EC under notification dated 14.03.2017 only within six months from the date of the said notification. Therefore, notification dated 14.03.2017 ceases to operate for entertaining any application for EC as 'violation case' after 13.09.2017. Vide notification dated 08.03.2018, there is no change in para 14 of notification dated 14.03.2017. It only affects certain changes with regard to Authority who would consider application for EC as violation cases and permits considerations of such applications in respect of B category projects by respective SEIAAs and appraisal by respective State Level Expert Appraisal Committee i.e. SEAC. Notification dated 08.03.2018, therefore, did not confer a new right to any PP who has violated provisions of EIA Rules, 2006 to submit a fresh application after 13.09.2017.

195. In the present case, SEIAA Maharashtra has not looked into this aspect and by entertaining application submitted by PPs in 2018, it has illegally granted questioned EC since no such application was entertainable by SEIAA Maharashtra.

196. Further, notification dated 08.03.2018 in the substituted paragraphs 4, 5, 6 and 7 has clearly referred to consideration of particular aspects by respective Expert Appraisal Committee. Substituted para 4 says that Committee will assess, whether project constructed at the site under prevailing laws is permissible and expansion has been done which can run sustainably under compliance of environmental norms with adequate environmental safeguards. If on the above aspects, findings recorded by respective Expert Appraisal Committee is negative, closure of the project shall be recommended along with other actions under law. It is only when on the above aspects, the respective Expert Appraisal Committee records its findings in affirmative thereafter, it shall grant appropriate Terms of Reference for undertaking environment impact assessment and preparation of Environment Management Plan.

197. Paragraph (5), substituted by notification dated 08.03.2018, says that respective Committee will prescribe ***specific Terms of Reference*** *for the project on assessment on ecological damage, preparation of remediation plan and natural and community resource augmentation plan and it shall be prepared as an independent chapter in environment impact of ecological damage preparation of remediation plan and natural and community resource augmentation plan shall be done by an environmental laboratory duly notified under EP Act, 1986 or an environmental laboratory accredited by the National Accreditation Board for Testing and Calibration Laboratories, or a laboratory of the CSIR institution working in the field of environment.*

198. Sub-para (6) substituted by notification dated 08.03.2018 says that Committee shall stipulate

implementation of Environmental Management Plan, comprising remediation plan and natural and community resource augmentation plan corresponding to the ecological damage assessed and economic benefit derived due to violation as a condition of EC.

199. In the present case, EC shows that no specific Terms of Reference was issued and only on the model Terms of Reference, Environmental Impact Assessment Report was submitted by PPs and on that basis only, SEIAA Maharashtra has issued questioned EC. The specific mandatory provision particularly when it was a violation case on the part of respondent-proponent, has not been followed and observed though in the case of violation, exception carved out by prescribing the particular procedure ought to have been followed very strictly which has not been done in the case in hand.

200. We may also notice that OM dated 08.03.2018, from a bare perusal, shows that it is prospective and makes certain amendments in notification dated 14.03.2017 which cease to operate for the purpose of entertaining application for EC as violation case since this permission was granted only for a period of six months i.e., up to 13.03.2017. There is no mention in the notification dated 08.03.2018 that pending applications filed before MoEF&CC shall be transferred to State Committees or respective SEIAAs. In absence of such provision, we find difficult to read that a fresh application from PPs could have been entertained by respective States/Authorities for grant of EC under EIA 2006 and in absence of any provision transferring applications filed before MoEF, such applications had to be decided by MoEF&CC as per the provisions of notification dated 14.03.2017.

201. In this regard, we find it appropriate to notice that in notification dated 8th March, 2018, as a justification for conferring power of consideration of EC in violation cases to State Authorities, MoEF has referred to a judgment dated 27.11.2017 passed by Tribunal in ***OA 570/2016, M/s Anjli Infra Housing LLP vs. UoI & Ors.****,* ***OA 576/2016, M/s Ankur Khusal Construction LLP vs. UoI & Ors.*** *and* ***OA 579/2016, Anjli Infra Housing LLP vs. UoI & Ors.****, stating that therein order was passed for considering the project at State level for grant/refusal of EC in accordance with law. We have gone through the above judgment and find that the above judgment has been misinterpreted and misapplied by MoEF for the purpose it had referred to notification dated 08.03.2018 in as much as the context and the directions contained therein are in totally different context, have no application with respect of consideration of notification dated 14.03.2017 and 08.03.2018.*

202. From judgment dated 27.11.2017 in the above three OAs (i.e., 570/2016, OA 576/2016 and OA 579/2016 (supra)), we find that Tribunal has referred to the facts from OA 579/2016 wherein circulars/OMs of MoEF dated 16.11.2010, 12.12.2012 and 27.06.2013 were challenged. Since in another matter, OMs dated 12.12.2012 and 27.06.2013 were already declared illegal and quashed i.e. OA 37/2015 (supra) and OA 213/2014 (supra), MA 1143/2016 was filed in OA 579/2016 (supra) and MA 1444/2016 was filed in OA 576/2016 (supra) stating that matter is covered by the judgment in OA 37/2015 (supra). However, it was pointed out that the proponents had already

filed application before concernred SEIAA for grant of EC on 10.10.2013 which was pending and no order was passed. SEIAA informed Tribunal that application was delisted on account of pendency of OA 37/2015 where OMs relating to grant of EC in violations cases were challenged. Later, authorities took a view that since MoEF has issued notification dated 14.03.2017 wherein violation cases can be considered only by MoEF&CC, therefore, SEIAA could not have gone into the earlier application. The above view of MoEF&CC was found incorrect and Tribunal disposed the matter specifying that notification dated 14.03.2017 is prospective and does not apply to the cases where applications for grant of EC were already pending before respective SEIAA. Tribunal also said that existing law at the time of adjudication of rights of parties would have to take effect and the law which was not inexistence even at that time, cannot be retrospectively imposed upon the parties. The directions issued by Tribunal vide judgment dated 27.11.2017 read as under:

> *"Having heard the Learned Counsel appearing for the parties and the above facts, we dispose of all these three applications with the following directions and the reasons recorded hereinafter:-*
>
> *1) The rights of the parties have been decided by the Tribunal vide its order dated 21st April, 2016 and 12th July, 2016 and the parties not only accepted the order, but complied with the directions contained in the orders as aforestated. The said deposits/acceptance and execution of the order was without prejudice to the rights and contentions of the parties which they may like to raise in any appropriate proceedings. The notification dated 14th March, 2017 issued by Ministry of Environment, Forest and Climate Change is prospective. It may also be noticed in terms of on the implementation of Section 6 of General Clause Act, 1897. The notification has no element of retrospectively. Furthermore no provision of the notification mandates that the application actually pending and being dealt with by State Environment Impact Assessment Authority should be or deemed to be transferred to Ministry of Environment, Forest and Climate Change for consideration. Determining the rights of the parties cannot be taken away by implication of a particularly of a subordinate legislation with its explicit expression and in its perspective in its nature and content. It only refers to violation of the past and right to move Ministry of Environment, Forest and Climate Change within the specified period under the notification.*
>
> *2) We direct that the State Environment Impact Assessment Authority shall consider the application of the applicants which was delisted and pass appropriate orders in regard to grant/refusal of the Environment Clearance in accordance with law.*
>
> *3) The State Environment Impact Assessment Authority shall take into consideration and in fact impose the condition which has been stated by the joint inspection team in its report as condition of grant of Environment Clearance, if it grants. The condition imposed in*

different orders shall be part of the Environment Clearance if granted to the applicant.

4) The condition imposed by the Tribunal in S.P. Muthuraman shall form part and parcel of the Environment Clearance and if granted to the applicants.

5) The environmental compensation imposed by the Tribunal shall be maintained and the applicant would not be entitled to any refund thereof, however if the environmental compensation imposed is higher compensation the amount deposited by the applicant shall be adjusted by the competent authority.

6) The existing law at the time of adjudication of the rights of the parties would have to take effect and the law which is not in existence even at that time cannot be retrospectively imposed upon the parties to the lis.

7) We expect that the State Environment Impact Assessment Authority would deal with the applications expeditiously.
We make it clear that this order is inter-se to parties and does not state the general principle.

With the above directions Original Application No. 570 of 2016, Original Application No. 576 of 2016 and Original Application No. 579 of 2016 stand disposed of. No order as to cost."

203. Tribunal also observed that notification has no retrospective effect and there is no provision mandating applications actually pending before particular authority, deemed to be transferred to another party. Such application has to be considered by authority to whom the same were made.

204. OM dated 08.03.2018, therefore, has wrongly referred to Tribunal's order dated 27.11.2017 and taking shelter of the said order, the said notification has been issued. Therefore, the basic premise on which the said notification dated 08.3.2018 was issued, being non-est, a clear misreading of the judgment of Tribunal, the same render the notification bad in law. We also notice that unfortunately, when notification dated 08.03.2018 was issued, judgment of Supreme Court in ***Common Cause (supra)*** *had already been rendered holding that grant of EC retrospectively is unknown to environmental laws but this judgment was not referred in the above notification.*

205. Be that as it may, fact remains that in the present case, questioned EC has been granted by SEIAA, Maharashtra on the applications submitted by PPs in 2018 which is beyond the period permitted in para 14 of notification dated 14.03.2017 and no new right was conferred by notification dated 08.03.2018 for submitting fresh application, therefore, fresh application submitted to SEIAA Maharashtra was inadmissible, not maintainable in law. Hence, questioned EC granted on the said application, also cannot be sustained and held illegal.

206. Further, it is admitted from record that application for EC was granted mentioning built up area as ***259865 m2.*** *The construction included residential, commercial on undeveloped land. In* ***Re: Construction of Park at Noida near Okhla Bird Sanctuary vs. Union of India and Others (supra),*** *Supreme Court considered the terms 'buildings and construction' projects as also 'township project and area development' project. It says in para 65 that a* ***building and construction project is nothing but addition of structures over the land****. With respect of* ***township project, it is said that development of a new area for residential, commercial or industrial use. A township project is different both quantitatively and qualitatively from a mere building and construction project.*** *The term* ***area development project has been construed by Supreme Court observing that it may be connected with the township development project and may be its first stage when grounds are cleared, roads and pathways are laid out and provisions are made for drainage, sewage, electricity and telephone lines and the whole range of other civic infrastructure, or an area development project may be completely independent of any township development project as in the case of creating an artificial lake, or an urban forest or setting up a zoological or botanical park or a recreational, amusement or a theme park.***

207. In ***Rajeev Suri vs. Delhi Development Authority & Ors., (2021) SCC Online SC 7****, considering various provisions of EIA 2006, Court observed that basis as well as level of scrutiny of a proposal strictly depends upon categorization of project. In para 339, Court said,*

> *"The 2006 Notification draws a clear balance and does not prescribe equal level of scrutiny for all projects."*

208. In para 340, Court referred to item 8 of the Schedule of EIA 2006 and said,

> *"340. We may now examine the basis of categorization of projects/activities. The Schedule attached with the Notification incorporates a "List of Projects or Activities Requiring Prior Environmental Clearance". Item 8 in category B is divided into two sub-categories – item 8(a) titled "Building and Construction projects" and item 8(b) titled "townships and Area Development projects". The distinction lies in the expanse of built-up area of the proposed project. The Schedule specifies that a project with built-up area falling between 20,000 sq.m. and 1,50,000 sq.m. would be categorized as building and construction project in item 8(a). Notably, the term "built-up area" is defined 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 projects."*
>
> *"As per the Form I and Form IA submitted by the project proponent and final EC, it is a matter of record that plot no. 116 (which houses the existing Parliament building) has a built-up area of 44,940*

sq.m. and proposed built-up area on plot no. 118 is 65,000 sq.m. Therefore, total built-up area covered in the proposed project is 1,04,740 sq.m. and as per the specification provided in 2006 Notification, the project is to be categorized as category B project in item 8(a). In light of the legal position enunciated above, the appraisal of this project is mandated on the basis of Form I and Form IA. Contrary to the petitioner's argument, the requirements of scoping and public consultation are not warranted for the subject project."

209. In the present case, the project in question admittedly covered residential, commercial and other constructions, sought to develop agricultural land allowed to be used for non agricultural use (residential) and thus covered by the term 'developing area'. Since built up area being more than 2,59,000 m2, it had to treated as B1 category project under item 8(b) but questioned EC has been granted by considering the project in category B2 without following the procedure prescribed to be considered for B1 project. This also vitiates questioned EC.

210. In addition to what we have already discussed above, we answer this issue by adding some more reasons. The application was submitted in 2012, seeking EC, in respect to the projects which were already completed illegally without EC and also in respect to the project which were proposed by referring the projects all as proposed projects. The very basic claim, therefore, was incorrect and false and the application filed ought to have been rejected on this reason alone. However, in the subsequent meetings when SEAC Committee found that PPs have violated provisions of EIA 2006, by starting construction before grant of EC and they found that the case was a violation case, PPs submitted further applications, one to MoEF and thereafter, another application to SEIAA on 18.03.2018, which has culminated in grant of impugned EC. We have not been shown any provision by respondents, including MPCB and SEIAA that a composite application of construction already completed in violation EIA 2006 and proposed constructions, could be maintained, the reason being that in proposed constructions, various informations with regard to air pollution, water consumption, water pollution, etc. would be on project estimated basis while in respect to the completed construction, actual figures have to be given. But there is nothing on record to show that these two different informations were supplied by PPs. In fact, in respect of water consumption, the source of water given is PMC and requirement of fresh water is shown 485 CM/day besides recycle water necessary for flushing gardening and swimming pool. It does not include requirement of water for construction purposes and this information is completely withheld. Similar is the position in respect to effluent characteristics in as much as under chart 37 on page 136 under the heading 'Effluent Characteristic' for amount of effluent generation and capacity of ETP, PPs have mentioned 'not applicable', though for the buildings already constructed, the treatment facilities would have been provided, the quantum of sewage generated and treated by PPs would have been available but that has not been mentioned.

211. Further natural storm water drain has been changed from its original location, diverted and RCC slab has been

placed. Reference has been made to a permission granted in 2003 but neither any such permission has been placed on record nor it is shown that permission was granted by the Competent Authority at any point of time. Natural storm water drain takes run off rainwater emanating from particular place and joins to some stream etc. The part of land covered by such drain is not a private property, since the run off rainwater is a public asset. It is form of pure water and has to be persevered and maintained in a proper way. Its flow to natural stream, river etc. wherever such drain is meeting has to be maintained being a source of supply of water to such stream, river, etc. Covering or change of such drain is not permitted and it is also evident from provisions of EIA 2006 which we have already referred to in detail above. PPs, therefore, by changing its position by diverting and concretizing have committed a patent illegality.

212. Further, we find that the violation cases of grant of EC was within the jurisdiction of MoEF provided application is filed in time prescribed. Thus on this ground alone EC is liable to be declared illegal having been granted by the Authority who had no jurisdiction to grant EC after entertaining application after expiry of period mentioned in notification dated 14.-5.2-17. In the circumstances, ***we answer ISSUE IV against PPs and declare EC dated 13.12.2019 as illegal.***

213. ***Issue V:*** *Continuous violations on part of PPs are well established. Non-construction of STP and OWC, despite that number of residential and other construction have been made and third party rights have been created as a result whereof large number of people are residing in such constructed buildings but for treatment and discharge of their sewage, no appropriate arrangement has been made and, therefore, PPs are clearly guilty of consistent violation of environmental laws till date.*

214. In such matters, the question of determination of compensation has been considered in various authorities/Supreme Court and we may refer here at the Judgment of ***Goel Ganga Developers India Private Limited vs. Union of India, (2018) 18 SCC 257*** *and* ***Mantri Techzone Private Limited vs. Forward Foundation & Others, (2019)18SCC494****.*

215. The entire project cost of constructed and under construction projects, has not been disclosed by PP, though in the matter considered by SEIAA, project cost has been shown as Rs. 450 Crores.

216. The submission of respondent 1 (KUDPL) that it has already paid penalty by furnishing Bank Guarantee of Rs. 5.58 Crores is mis-conceived in as much as SEIAA Maharashtra while granting EC dated 13.12.2019 has required PPs to furnish the above Bank Guarantee to ensure compliance of various conditions of EC and it is not the penalty or environmental compensation which PPs have paid.

217. We may also observe at this stage that ordinarily Courts have taken a view that when mandatory law particularly law relating to environment or development of area are violated,

no proponent should be conferred benefit of such violation by allowing the structure created by such violation to continue and orders of demolitions have been directed. In this aspect, we may refer a recent judgment of Supreme Court in ***Supertech Limited vs. Emerald Court Owner Resident Welfare Association and others, (2021) 10 SCC 1*** *wherein Supreme Court has affirmed the judgment to Allahabad High Court and directed demolition of two towers of developer M/s. Supertech which were not constructed following parameters of development/sanctioned plan and the conditions laid down by the authority concerned. However, in the case in hand instead of taking extreme view, we are applying doctrine of proportionality recognized by Supreme Court in environmental matters except the case where natural storm water drain has been diverted, concretized and covered by a complete RCC slab which is wholly impermissible as it bound to cause persistent and permanent damage to environment and has to be remediated without carving out any exception in favour of PPs.*

218. We find it appropriate, therefore, to impose environmental compensation taking various factors like damage to the environment, remediation and deterrent factors at 7.5% of the project cost which comes to Rs. 33.75 Crores upon PPs.

219. Since illegality on the part of PPs has full cooperation and support from PMC who has issued various layout plans despite of violation of law including environmental laws by PPs and, therefore, PMC and its officers are also equally guilty. We, therefore, held PMC also responsible and liable for payment of environmental compensation by application of polluters pays principle and determine environmental compensation of Rs. 2 Crores.

220. PPs shall not be allowed to proceed with any further construction comprising Survey No. 13B/1+2+3 and 14 (part) till all requisite NOCs/clearances/consents are obtained in accordance with law. Further, construction if any made by PPs in violation of environmental laws, during pendency of this matter shall be demolished by MPCB and PMC shall co-operate with it for compliance of this order. If there is any dispute with regard to the construction as to whether the construction was made during pendency or prior, a joint team comprising MPCB, PMC and CPCB would consider the objection of PPs or any other interested person and find out the actual period of construction and, thereafter, shall proceed as per our direction."

Our Analysis:

69. In the case in hand we find that PP had obtained plinth completion certificate for Building No. 3 (Wing D) as per sanction plan EB/7383/E/A-Dated 25.04.2004. PP had obtained approval for sanction plan per EB/7383/E/A (2nd Amended) Dated 25.06.2004 for BUA 24265. 90 sqm. We note that as per EIA Notification 2004 requirements for mandatory EC were not on the basis of BUA but

on the basis of number of persons (residents). Hence, we can give benefit to PP and MCGM that EC was neither applied for by PP nor was Project Proponent asked by MCGM to obtain EC. However, thereafter PP obtained approval of Sanction Plan EB/7383/E/A (3rd Amended) Dated 28.04.2011 for BUA 25239.30. Thus there was increase in scope of project in the terms of BUA. Therefore by the year 2011, requirement of EC for BUA more than 20,000 sqm was absolutely necessary. Hence, the Project Proponent was duty bound to obtain prior EC for raising construction consequent to said amendment in sanctioned plan and MCGM was duty bound to insist on EC before approving sanction plan. Project Proponent further changed scope of project in the terms of BUA to 30716.49 and obtained Sanction Plan EB/7383/E/A(4th Amended) Dated 04.04.2019 and there after again changed BUA to 30752.65 for which he obtained Sanction Plan EB/7383/E/A(5th Amended) Dated 11.11.2020. As per the report of the Committee actual construction as on 25.08.2022 was 34,521.2 Sq.m. Thus, it is clear beyond any doubts that neither Project Proponent nor MCGM were bothered about EC nor about construction beyond sanction plan. Therefore, as far as EC requirement is considered, it is apparent that the period of violation would begin from 28.04.2011 and end on 25.08.2022. It is not clear from the submissions in the Joint Committee Report as to whether any further construction is raised by the Project Proponent or the same is still going on.

70. The Joint Committee has also submitted in its report that the Project Proponent was also required to obtain Consent to Establish from the MPCB which has not been done. It has made observation that the Project Proponent continued construction of the residential project since 26.03.2014 without obtaining prior EC from the SEIAA- Maharashtra. Therefore, it has recommended that the State of Maharashtra or MPCB may take action under Section 19 of

the EP Act and that appraisal of the project be made under Office Memorandum dated 7th July, 2021 along with the penalty for the new project (when operation has commenced without EC) i.e. 1 % of the total project cost incurred upto the date of filing of application along with EIA/ EMP report + 0.25% of total turnover during the period of violation may be levied by SEIAA- Maharashtra and directed to be deposited by the Project Proponent with MPCB.

71. Further it is recommended by the Joint Committee that the MPCB may take necessary action against the Project proponent under the Water (Prevention and Control of Pollution) Act 1974 and the Air (Prevention and Control of Pollution) Act 1981, apart from the penalty amount because no Consent to Establish and Consent to Operate were taken by the Project Proponent.

72. We are of the view that the recommendations made by the Joint Committee are not fully in consonance with law. In our view if the MoEF&CC wanted that the violation cases may be allowed to be dealt with by the concerned authority even beyond six months window permitted by the Notification dated 14th March, 2017, the said amendment could have been brought about by bringing separate notification in this regard and thereafter only Office Memorandum dated 7th July, 2021 laying down the SOP for violation cases would be applicable to such cases.

73. We are also of the opinion that the decision of the Hon'ble Apex Court ***Pahwa Plastics Pvt. Ltd. and Another case (Supra)*** has been considered by this Bench of O. A. 66/2019, ***Kumar City Residents Co-operative Housing Society Ltd (Supra)*** and it has been held that the same has been passed in the set of facts of that very case, and that it has not unsettled the legal position that the Project Proponent would be required to obtain EC in such cases where construction exceeds 20,000 sq. m built up area laid down under EIA Notification 2006. We also find that if the Office

Memorandum dated 7th July, 2021 is allowed to be operated in subsequent violation cases, that would dilute the provisions laid down in EIA Notification 2006, because looking to the human weakness, the Project Proponent would shy away from obtaining prior EC and would wait for the project to be completed and thereafter if any complaint is made or the violation comes into light, he would go for grant of ex-post facto EC.

74. We also find that in all the three judgments of the Hon'ble Supreme Court cited above, i.e. in Civil Appeal Nos. 7576-7577 of 2021 (Electrosteel Steels Limited Vs. Union of India and Ors. Etc.), Civil Appeal No. 4795 of 2021(M/s Pahwa Plastics Pvt. Ltd and anr. Vs Dastak NGO and ors.) and Civil Appeal No. 3132 of 2018(D. Swamy Vs. Karnataka State Pollution Control Board and ors.), it has been underlined that the grant of ex-post facto EC is not impermissible under EP Act, but **the same should not be granted for the asking and that the Project Proponent must establish exceptional case for the same to be allowed,** which in our opinion, means that, in every case, the circumstances have to be evaluated on case to case basis.

75. In view of the above legal position, we do not find any case made out in the set of facts of the present case to qualify it to fall in the category of exceptional case because despite there being specific provision of law as per the EIA Notification 2006 laying down that for construction to be raised of residential building with built up area beyond 20,000 sq.m, the same would require prior EC to be obtained from the Competent Authority (SEIAA/MoEF&CC), it has not been obtained. The fact that this was not in the knowledge of Project Proponent cannot be believed and therefore we find that the Project Proponent violated the law blatantly by raising construction to the extent of built of up area 34,521.2 sq.m..

76. It would be pertinent to refer here the judgment passed by the Hon'ble Supreme Court in ***Goel Ganga Developers India (P) Ltd. Vs. Union of India, (2018) 18 SCC 257,*** where-in in Para-17, following is held:

> ***"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 FIS 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 such 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 14.09.2006"***

Calculation of Environmental Compensation:

77. In Sunil Kumar Chugh Anr. Vs. Secretary, Environment Department, Govt, of Maharashtra Ors. Appeal No. 66 of 2014 in judgment delivered by Principal Bench of this Tribunal on 15th September, 2015 it was observed that-:

> *"25. It is seen from the procedure prescribed that the SEAC is mandated to appraise projects or activities of the kind in question on the basis of Form-1, Form-1A and conceptual plan and make recommendations on the project regarding grant of Environmental Clearance or otherwise and also stipulate the conditions for Environmental Clearance. Form-1 makes or should make available exhaustive information or date in respect of the project proponent and the land in question for scrutiny under the heads.*
>
> *Xxxxx*
>
> *Xxxx"*
>
> *"26. Thus, all such information helps to understand what could happen as a result of the said project and in conjunction with other existing or planned activities in the locality and this is required to be taken cognizance of by SEAC for the process of the appraisal for making suitable recommendations regarding grant of Environmental Clearance. Form-1A in Appendix II of EC Regulations, 2006 is an exhaustive questionnaire seeking answers to the specific questions in respect of Land Environment, Water Environment, Vegetation, Fauna, Air Environment, Aesthetics, Socio-Economic Aspects, Building Material, Energy Conservation and Environment*

Management Plan. Answers to these questions are of material importance for objective appraisal of the proposal for grant of Environmental Clearance. Environment Management Plan which is to be the part of Form-1A is expected to give all mitigation measures for each item wise activity to be undertaken during the construction, operation and the entire life cycle to minimize adverse environmental impacts as a result of the activities of the project and is further expected to delineate the environmental monitoring plan for compliance of various environmental Regulations and must state the steps to be taken in case of emergency such as accidents at the site including fire."

77 (A) MoEF&CC vide OM dated 4th January, 2019 issued Standard Environmental Clearance conditions have been prepared for expediting the process of Environmental Clearance without compromising environmental norms and the rigor of environment impact assessment for Building/construction Projects and Area Development Projects which include following conditions-

"III. Water quality monitoring and preservation- Installation of dual pipe plumbing for supplying fresh water for drinking, cooking and bathing etc and other for supply for recycled water for flushing, landscape irrigation, car washing, thrmal cooling, conditioning etc. shall be done. Use of water saving devices/ fixtures (viz. low flow flushing systems, use of low flow faucets tap aerators etc) for water conservation shall be incorporated in the building plan Separation of grey and black water should be done by the use of dual plumbing system. In case of single stack system separate recirculation lines for flushing by giving dual plumbing system be done. Sewage shall be treated in the STP with tertiary treatment. The treated effluent from STP shall be recycled/ re- used for flushing, AC make up water and gardening. As proposed, no treated water shall be disposed in municipal drain, etc.

V. Energy Conservation measures- Solar, or other Renewable Energy shall be installed to meet electricity generation equivalent to 1% of the demand load or as per the state level local building bye-laws requirement, whichever is higher.

VI. Waste Management- Organic waste compost/ Vermiculture pit/ Organic Waste Converter within the premises with a minimum capacity of 0.32 kg/person/ day must be installed.
VII. Green Cover- A minimum of 1 tree for every 80 sqm of land should be planted and maintained. The existing trees will be counted for this purpose. The landscape planning should include planation of native species. The species with heavy foliage, broad leaves and wide canopy cover are desirable. Water intensive and/ or invasive species should not be used for landscaping."

77(B) By escaping applying for EC, PP simply avoids planning and implementation of measures that will minimize negative environmental impact of large construction projects as he is not required to comply with any of conditions mentioned in para above.

78. We also would like to rely upon the following cases laying down the principles regarding environmental compensation :

1. ***M.C. Mehta & Anr. Vs. Union of India,(Supra)***
2. ***Sterlite Industries (India) Ltd. Vs. Union of India, (Supra)***
3. ***Goel Ganga Developers India Pvt. Ltd. Vs. Union of India,(Supra)***
4. ***Alembic Pharmaceuticals Ltd. Vs. Rohit Prajapati & Ors. (Supra)***
5. ***Mantri Techzone Pvt Ltd. Vs. Forward Foundation and Ors.(Supra)***

79. In the light of the position of law laid down in above cases, environmental compensation may be assessed to the extent of roughly 5-10 % of the project cost. Since we do not have the project cost of the existing project available with us but the project discloses total constructed area to be 34,521.2 sq.m whereas as per the sanctioned plan dated 28.04.2011 it was 25,239.30 sq.m, therefore the total construction which has been raised beyond which the necessity of EC comes into force would be (34,521.2-25,239.30) = 9281.9 sq. m.

80. Today, the market price of residential building in Metro cites is about Rs. 10,000 per sq. ft. The said cost in the year 2011 might have been close to Rs. 5000 per sq.ft. Therefore, the average cost price comes to around Rs. 7,500 sq. ft. In the case in hand, the total built up area construction of which was raised in violation, is found to be 9281.9 sq. m x 10 = 92819 sq. ft. Accordingly, the cost of the project works out at Rs. 69.6 crores approximately and 5% of the said project cost would be Rs. 3.48 crores. We deem it proper to levy this amount as environmental compensation from the Project Proponent in this case.

81. As regards the environmental compensation with respect to the violation of Consent to Establish and Consent to Operate for the aforesaid period, we leave it to the Maharashtra Pollution Control Board (MPCB) to calculate the same as per circular dated 12.07.2022 of MPCB.

82. Therefore in view of above, we dispose of this application with following directions:

1. The Respondent No.7/Project Proponent is directed to deposit the amount of Rs. 3.48 crores as assessed above, with the Maharashtra Pollution Control Board (MPCB) within a period of 2 (two) months from the date of this order.

2. The MPCB is directed to calculate the amount of Environmental Compensation with respect to the violation of Consent to Establish and Consent to Operate for the aforesaid period and realize the same from the Project Proponent within a period of 2 (two) months from the date of this order. MPCB shall also take action against Project Proponent under Water (Prevention and Control of Pollution) Act, 1974 and Air (Prevention and Control of Pollution) Act, 1981 as recommended by Joint Committee for violations and submit its report to the registrar of this Tribunal within three months.

3. The amount of compensation so realized shall be utilized for remediation of environmental damage caused by the project and improving / restitution of the environment in the area in question within a period of next six months and report of the same shall be posted on MPCB website.

4. Commissioner MCGM shall investigate and take action both administrative and criminal against the officers who have granted building plan approvals/ plinth certificates/

completion certificates/ occupancy certificates without ensuring availability of requisite EC and/or compliance of environmental clearance conditions, within 3 months and if found guilty at least adverse ACR may be recorded in their service book and submit report to Registry of this Tribunal. This report shall be posted on MCGM and MPCB website.

83.No order as to costs.

Dinesh Kumar Singh, JM

Dr. Vijay Kulkarni, EM

January 30, 2023.
Original Application No. 35/2022 (WZ)
I. A. No. 37/2022 (WZ) & I.A. 160/2022(WZ)
Sachin J.

2019 SCC OnLine NGT 876

Affirmed in *Keystone Realtors (P) Ltd.* v. *Anil V. Tharthare*, (2020) 2 SCC 66

In the National Green Tribunal†

(BEFORE ADARSH KUMAR GOEL, CHAIRPERSON AND K. RAMAKRISHNAN, MEMBER (JUDICIAL) AND NAGIN NANDA, MEMBER (EXPERT))

Anil Tharthare ... Appellant(s);

Versus

Secretary, Envt. Dept., Govt. of Maharashtra and Others ... Respondent(s).

Appeal No. 122/2018 (Earlier Appeal No. 9/2014) (WZ)

Decided on February 11, 2019, [Hearing on : 11.02.2019]

Advocates who appeared in this case:

Mr. Aditya Pratap, Advocate for the Appellant(s);

Mr. D.M. Gupte, Advocate for R-1, 2&3; Ms. Niti Jain, Proxy Counsel Ms. Niti Jain, Proxy Counsel for Respondent.

ORDER

1. This appeal has been preferred against order dated 13.03.2014 passed by the Principal Secretary, Environment-cum-Member Secretary, State Level Environment Impact Assessment Authority (SEIAA), State of Maharashtra granting 'amendment' to the Environment Clearance (EC) dated 02.05.2013 for proposed expansion of redevelopment of 'Oriana Residential Project' on plot bearing C.T.S. No. 646, 646 (Pt.) of village Bandra at Gandhinagar, Bandra East, Mumbai — 400050 by M/s Resilience Realty Pvt. Ltd. This appeal was filed on 10.04.2014 and has been pending for the last about five years.

2. Question for consideration is whether grant of EC to the expansion of the project by impugned order by treating it as 'amendment' is in violation of EIA Notification, 2006. In the process, no appraisal has been conducted by the State Level Expert Appraisal Committee (SEAC) which is mandatory for permitting 'expansion' of the project. If the EC is held to be illegal, further question is the remedial measures to be now taken.

3. The appellant claims to be an original resident of the area in question. According to the appellant, by redevelopment of the area as per sanction by the Municipal Corporation under the provisions of Development Control Regulations of Greater Mumbai, 1991 (DCR), volume of the new building will increase by 8 to 10 times. Under the scheme of development, a part of new construction has to be used by the developers to give free flats to original residents while the rest of it can be sold in the open market. Construction started in the year 2010 as shown by the Google Earth Images dated 25.01.2010 and 01.04.2011.

4. As per the provisions of EIA Notification, 2006 and under the provisions of Environment (Protection) Act, 1986, EC is required for new project as well as expansion where the extent of construction is more than 20,000 sq.m. It has been clarified by Notification dated 04.04.2011 that extent of construction covers Floor Space Index (FSI) area as well as non-FSI area.

5. Respondent No.6, the project proponent, sought EC without disclosing that more than half of the project had already been constructed. The SEAC - II in its 10th Meeting dated 14th — 16th March, 2013 appraised the project and recommended EC.

Accordingly, EC was granted on 02.05.2013.

6. Later, built up area was increased from 32,395 sq.m to 40,480 sq.m. In the process, construction reached about 15 floors. Expansion proposal was treated as 'amendment' and not considered by the SEAC as required but only by the SEIAA in its meeting on 27th - 28th January, 2014. It recommended the EC which was granted on 13.03.2014.

7. Before going into the merits, we may note that this Tribunal considered two applications of the project proponent against maintainability of the appeal and rejected the same vide the order dated 04.05.2016. The said order was a composite order in the present case and in the connected appeal. It was held that there was no merit in the objection about the *locus standi* of the appellant. Nor the appeal could be held to be barred by limitation with reference to the impugned order dated 13.03.2014.

8. According to the appellant, an independent appraisal by EAC was required which had not been done as per paragraph 7(ii) of the 2006 Notification. The present case was a case of 'expansion'. It is also submitted that the present project was Category B -I project for which procedure to be followed was screening, scoping and then evaluation. It has been taken as Category B-II project on the ground that the area was less than 1.5 lakh sq.m. In fact, the entire area should have been taken into account and not merely a particular building. It should be taken as B-I Category as the environment impact was on the whole area. The project was part of the main project of Gandhinagar lay out which involved construction in the area of 2.16 lakhs sq.m. Taking every building as a separate project defeats the requirement of environment law of which sustainable development and precautionary principles are inherent components. Even as B-II Category project, procedure of evaluation has not been followed treating the matter to be only of 'amendment' of earlier EC instead of expansion which required fresh EIA. The concerned authorities thus, acted to contrary to the Public Trust Doctrine.

9. Alternatively, it is submitted that as construction started prior to EC, it attracted Notification dated 12.12.2012, requiring d *e novo* procedure to be followed.

10. Expansion of the project required submission of fresh Form I and Form IA. Additional construction sought by amendment was also completed prior to the amended EC in violation of Office Memorandum dated 12.12.2012 and 27.06.2013 issued by Ministry of Environment, Forest and Climate Change (MoEF&CC). The FSI of 4.14 was used illegally against FSI of 2.5 as stipulated in Rule 33(5) of Development Control Regulation (DCR).

11. In their reply, the Authorities of the State of Maharashtra, respondent No. 1 to 3 have supported the impugned order by submitting that extent of project was less than 1.5 lakh sq.m. The original EC was granted on 02.05.2013. Amendment was sought on 24.09.2013, which was granted on 13.03.2014 as it was case of only 'amendment' and not 'expansion'. It was observed that the amendment was marginal and impact of environment was minimal. The amendment allowed is as follows:—

Description	As per EC dated 2nd May, 2013		Amendment	
FSI area	16,346.32 sq.m.		21,365.54 sq.m.	
Non FSI area	16,048.85 Sq.m.		19,115.34 Sq.m.	
Total construction area	32,395.17 Sq.m.		40,480.88 Sq.m.	
No. of Tenements	Members : 64 Sale : 61		Members : 64 Sale : 77	
Building	Member	2 Basements +	Member	2 Basements +

configuration		Ground + 2 Podium + stilt + 16 floors		Ground + 2 Podium + stilt + 18 floors
	Sale	2 Basements + Ground + 2 Podium + stilt (Pt) + 1st (Pt) +2nd to 15th floors + 16th (Pt) Floors	Sale	2 Basements + Ground + 2 Podium + stilt + 18 floors
Building Height	59.30 m		69.95 m	
Total water requirement	98 KLD		109 KLD	
a) Domestic water	61 KLD		63 KLD	
Recycled water	39 KLD		42 KLD	
Waste water	76 KLD		84 KLD	
STP capacity	84 KLD		92 KLD	
Solid waste generation	282 Kg/day		353/day	
Total capital cost for EMP	Rs. 250 Crores		-	
Parking details	Required : 157 Nos. Provided : 512 Nos.		Required : 295 Nos. Provided : 295 Nos.	

12. The project proponent has also filed reply stating that construction commenced in the year 2010. The plot was initially developed in 1962 as part of larger lay out referred to as Gandhinagar. Respondent No. 4, Maharashtra Housing and Area Development Authority, initiated scheme for formation and registration of cooperative societies. Each of the societies had absolute possession of respective plots. The present plot was initially combined with another adjoining plot but in 1997, payment was made for additional FSI. In 2002 a separate society was formed i.e. respondent No. 7, Model Co-operative Housing Society Ltd. Lease deed and Sale deed dated 10.08.2007 were executed in favour of respondent No. 7. Scheme for redevelopment was formulated under Rule 33(5) of the DCR for which enhanced FSI of 2.5 was allowed. Thus, redevelopment was as per Rules and NOC for redevelopment was given under DCR 33(5) on 31.05.2010. Commencement certificate was issued on 06.06.2010. Members of respondent No. 7 Cooperative Society were living in temporary alternative accommodation, awaiting construction. The project proponent halted construction and recommenced after 02.05.2013. After additional FSI was allowed on 21.10.2013, the project proponent, in anticipation, sought amendment of the EC by letter dated 23.08.2013. Since it was a minor amendment, as per consistent practice amendment was allowed. The expansion cannot be held to be a new project nor expansion.

13. We have heard the learned counsel for the parties.

14. As already noted, the question for consideration is whether the impugned order treating the expansion as 'an amendment in EC' is valid in law in view of requirements of Clause 2 of the 2006 Notification providing that prior EC is required for any project or activity in respect of 'new projects' as well as 'expansion' of the project mentioned in the schedule. Item 8(a) of the Schedule refers to building and construction projects having built up area of more than 20,000 sq.m. and less than 1.5 lakhs sq.m.

15. The plea taken by the respondents is that there is consistent practice of

treating expansion as minor amendment.

16. We are of the clear view that there is no legal sanction for such alleged consistent practice in view of express provision of the EIA Notification, 2006. No project can be set up or expanded without prior EC. Such requirement cannot be nullified by terming 'expansion' as 'amendment'. Para 2 of the EIA Notification dated 14.09.2006 is as follows:—

> "*2. Requirements of prior Environmental Clearance (EC):— The following projects or activities shall require prior environmental clearance from the concerned regulatory authority, which shall hereinafter referred to be as the Central Government in the Ministry of Environment and Forests for matters falling under Category 'A' in the Schedule and at State level the State Environment Impact Assessment Authority (SEIAA) for matters falling under Category 'B' in the said Schedule, before any construction work, or preparation of land by the project management except for securing the land, is started on the project or activity:*
>
> *(i) All new projects or activities listed in the Schedule to this notification;*
>
> *(ii) Expansion and modernization of existing projects or activities listed in the Schedule to this notification with addition of capacity beyond the limits specified for the concerned sector, that is, projects or activities which cross the threshold limits given in the Schedule, after expansion or modernization;*
>
> *(iii) Any change in product - mix in an existing manufacturing unit included in Schedule beyond the specified range."*

17. Entry 8(a) of the Schedule to the notification is as follows:

"*Building/construction projects/Area Development projects and Townships*			
8(a)	Building and Construction projects	≥ 20000 sq.mtrs and <1,50,000 *sq. mtrs of built-up area#*	*(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)*"

18. Paragraph 7(ii) of the notification is as under:

> *"7(ii). Prior Environmental Clearance (EC) process for Expansion or Modernization or Change of product mix in existing projects : All applications seeking prior environmental clearance for expansion with increase in the production capacity beyond the capacity for which prior environmental clearance has been granted under this notification or with increase in either lease area or production capacity in the case of mining projects or for the modernization of an existing unit with increase in the total production capacity beyond the threshold limit prescribed in the Schedule to this notification through change in process and or technology or involving a change in the product — mix shall be made in Form I and they shall be considered by the concerned Expert Appraisal Committee or State Level Expert Appraisal Committee within sixty days, who will decide on the due diligence necessary including preparation of EIA and public consultations and the application shall be appraised accordingly for grant of environmental clearance."*

19. Thus, the impugned order dated 13.03.2014 cannot be sustained and is liable to be quashed. Since the statutory procedure for grant of EC to the expansion of the project has not been followed, the relevant factors, including the carrying capacity of the area, having regard to the impact of expansion on the recipient environment, specifically water and air quality have not been examined by the SEAC.

20. Though vide the order dated 02.05.2013 while granting EC, a condition was

imposed under para 3 (iii) that Consent to Establish shall be obtained from the Maharashtra Pollution Control Board under the Air (Prevention and Control of Pollution Act, 1981 and Water (Prevention and Control of Pollution Act, 1974, whether or not such consent has been obtained is not clear. Since construction has already been completed even before the amended EC was granted, question is what remedial steps are to be taken for violation of law restoring the environment.

21. We note the submission that area is already highly congested and with the expansion of the project, there is adverse impact on the environment, including the air quality, and the water quality because of added municipal waste including sewage and because of further congestion including traffic.

22. Our approach is to be informed by the ground situation of environment. As per WHO list, out of the 10 most polluted cities in the world, 9 are in India.[1] Almost 7 million deaths were caused by household and outdoor pollution in the year 2016.[2] Large number of people suffer diseases such as lung and heart diseases. As per official figures, there are 102 "non attainment cities" in India where air quality exceeds the prescribed norms which issue has been subject matter of order of this Tribunal dated 08.10.2018 in Original Application No. 681/2018, "*News Item Published in 'The Times of India' Authored by Shri. Vishwa Mohan Titled "NCAP with Multiple Timelines to Clear Air in 102 Cities to be released around August 15".* As per some studies, according to Sustainable Cities Index, 2015, Mumbai is one of the least sustainable cities in the world[3].

23. Conscious of the threat posed to limited natural resources due to their overuse, this Tribunal in *Metro Transit Pvt. Ltd.* v. *South Delhi Municipal Corporation*[4] directed the Ministry of Transport to take initiative to assess the number of vehicles to be permitted proportionate to the capacity of the roads in the city in the larger interest of environment. This Tribunal has also directed in *Spoke* v. *Kasauli Glaxie Resorts* connected matters[5] to frame guidelines with respect to Carrying Capacity assessment for similarly placed hill stations as Kasauli and Eco-Sensitive Zone (ESZ) notified by MoEF&CC to check hazards of unregulated development threatening the fragile ecology. In *D.V. Girish* v. *Union of India*[6] this Tribunal has directed the Ministry of Urban Development and MOEF& CC to conduct detailed Carrying Capacity study to assess the impact of factors such as construction of resorts, new civil structures, availability of water resources, power lines, soil erosion, extraction of ground water, waste generation and handling, road traffic and pollution and evolve a management plan for preservation of Chikkmangaluru district. Further, in *Social Action for Forest and Environment (SAFE)* v. *Union of India*.[7] it was observed that the relevance of the concept of Carrying Capacity to the concept of sustainability adds to its value for organizing the management framework.

24. Bombay is highly congested city and any further constructions must be strictly legal. Any illegal construction must be visited with permissible adverse legal action.

25. Carrying capacity is integral to the principles of Sustainable Development and Polluter Pays principle. As a yardstick of sustainability, urban carrying capacity is an important conceptual underpinning that must guide a welfare state in promoting sustainable urban development. "Urban disease" frequently besetting the cities such as traffic congestion, housing shortage, lack of amenity, pose actual challenges and impediments to sustainable development. Severely straining and degrading the available natural resources of a particular area without regard to capacity assessment is causing irreversible damage to the ecology in terms of pollution of air, water and earth. In light of serious threat, this Tribunal in Original Application No. 568 of 2016, *Ajay Khera* v. *Container Corporation of India Limited* vide order dated 26.10.2018, posed the following questions:

(a) What would happen to the traffic flow if all roads become parking?

(b) What happens to the road travelers, if there is no adequate oxygen in the air on account of excessive vehicles and congestion?

(c) How would unlimited housing be provided to people if the land resources are exhausted at particular place?

(d) How will waste water and solid waste disposal needs be met, if there is unplanned population density in a particular city? These questions require serious consideration.

26. Natural resources have got to be tapped for the purposes of social development but one cannot forget at the same time that tapping of resources have to be done with realistic approach to capacity of a city or area so that environment may not be affected in any serious way. It has always to be remembered that both the air and water as resource are not without limitation.

27. It is pointed out that 16 additional flats which have being constructed by way of expansion have been sold at the cost of Rs. 6 crores per flat.

28. As regards the question whether EIA is mandatorily required, it may be noted that EIA has been recognised as the most valuable, inter-disciplinary and objective decision-making tool with respect to alternate routes for development, process technologies and project sites. It is considered an ideal anticipatory mechanism allowing measures that ensure environmental compatibility in our quest for socio-economic development. In fact, the whole concept is based on jurisprudential principle of 'Sustainable Development' and 'Precautionary Principle' though statutory basis has been provided to the same for effective enforcement.

29. The projects covered by the Notification dated 14.09.2006 cannot be undertaken without environmental clearance. This may invite prosecution and punishment under section 15 of the Environment (Protection) Act, 1986 or other provisions. Mere fact that a project is not covered by the said notification is not conclusive to negate such requirement if impact on environment justifies it. One cannot ignore that impact assessment in all cases of potential impact is by itself a part of concept of sustainable development, which in turn is part of Article 21. Thus, even where notification does not require EIA, such requirement may apply by virtue of Article 21, if there is potential of impact on environment. In such a case the Court or Tribunal concerned with enforcement of principle of sustainable development can require this to be done, as mandatory condition, for continuing a project. In our jurisprudence, the protection of environment is fully ingrained. It is not only a part of Directive Principles under Article 48A and Fundamental Duties under Article 51A(g), but also inherent in the Fundamental Right under Article 21 of the Constitution. Principles of Sustainable Development, Precautionary Principle, and Intergenerational Equity are not only part of our jurisprudence, in terms of case law but also incorporated in Section 20 of National Green Tribunal Act, 2010. Needs for development have to be fulfilled consistent with these principles. There can be no development at the cost of environment.[8]

30. Environmental laws are required to be read into every activity adversely impacting environment. Grant of any permission or sanction by any authority has always to be read as subject to inherent limitation of the environment norms being maintained. Once pollution is being created, mere permission/sanction by itself is no defense. While absence of a sanction may by itself be violation of law, even grant of sanction is never to be treated as unconditional and does not obviate the requirement to maintain environment norms. Adverse impact on environment is actionable in all situations. Accordingly, if there is an impact to the environment, there must be an Environment Impact Assessment. The fact remains that flats may have been allotted in which case it may be difficult to disturb or penalize such occupants who may not be party to violations. Still, the Tribunal cannot be mute spectator as far as the project

proponent, respondent No. 6 is concerned. In this light, to uphold the Rule of Law, it is necessary that the violators are required to compensate for their illegal acts which may also act as a deterrent against those project proponents who circumvent the law to suit their convenience. This is also in conformity with 'Polluter Pays' principle.

31. By way of an interim arrangement, let the project proponent deposit a sum of Rs. 1 crore with the CPCB within one month towards interim cost of damage to the environment. The Committee which we propose may suggest the amount which should be recovered for such violation so that the amount can be deterrent and dissuade violaters of law and also to cover the cost of restoration of the environment.

32. Our experience shows that present is not the only case of illegal construction. Such activity is rampant posing serious challenge to environment. It appears to be necessary to obtain a report from experts on factual situation and approach to be adopted in handling such issues when construction is made without valid EC.

33. We constitute a five member Expert Committee comprising of two representatives of Central Pollution Control Board (CPCB) (one engineer and one scientist), one representative of NEERI and two members of SEAC (one engineer and one scientist) to carry out Carrying Capacity study of the area for relevant environment parameters and impact of such expansion on already congested and stressed areas. The Committee may suggest remedial measures including action against violaters of law who complete projects in violation of mandatory provisions making the situation irreversible, parameters for appraisal of such projects even if such projects are within FSI when cities are already highly congested with no sufficient space for traffic and open areas and the cost of restoration of environment. The Committee may furnish its report to this Tribunal by e-mail at ngt.filing@gmail.com on or before 30.04.2019.

34. We observe that while evaluating matters of similar nature SEAC/SEIAA may take into account the impact of expansion activity in a holistic manner rather than treating such activity on standalone basis or as an isolated component as has been done in the present case.

35. The expenses of the Committee shall be initially borne by the State Pollution Control Board which may be recovered from the project proponent who has violated the law. The nodal agency will be the CPCB for coordination and compliance of this order. A copy of this order be sent to CPCB by e-mail.

36. We permit the parties to give their respective representations and relevant documents to the CPCB within two weeks.

List for further consideration on 16.05.2019.

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† Principal Bench at New Delhi (Through Video Conferencing)

[1] https : //www.cnbc.com/2018/05/03/here-are-the-worlds-10-most-polluted-cities--9-are-in-india.html

[2] https : //www.indiatoday.in/education-today/gk-current-affairs/story/14-worlds-most-polluted-15-cities-india-kanpur-tops-who-list-1224730-2018-05-02

[3] https : //s3.amazonaws.com/arcadis-whitepaper/arcadis-sustainable-cities-index-report.pdf

[4] Order dated 23.10.2018 in OA No. 773/2018

[5] Order dated 05.10.2018 in O.A. No. 218/2017

[6] Order dated 30.07.2018 in O.A. No. 462/2018

[7] Order dated 10.12.2015 in O.A. No. 87/2015

[8] *Intellectuals Forum* v. *State of A.P.*, (2006) 3 SCC 549, *Bombay Dyeing & Mfg. Co. Ltd.*, (2006) 3 SCC 434, *M.C. Mehta* v. *Union of India*, (2004) 12 SCC 118, *Tirupur Dyeing Factory Owners Assn.* v. *Noyyal River Ayacutdar Protection Assn*, (2009) 9 SCC 737, *T.N. Godavarman Thirumulpad* v. *Union of India*, (2000) 10 SCC 606, *Narmada Bachao Andolan* v. *Union of India*, (2000) 10 SCC 664, *Vellore Citizens Welfare Forum* v. *Union of*

India. (1996) 5 SCC 647, *N.D. Jayal* v. *Union of India*, (2004) 9 SCC 362, *Lafarge Umiam Mining (P) Ltd.* v. *Union of India*, (2011) 7 SCC 338, and *G. Sundarrajan* v. *Union of India*, (2013) 6 SCC 620

(2020) 2 Supreme Court Cases 66

2019
Dec. 3

(BEFORE DR D.Y. CHANDRACHUD AND AJAY RASTOGI, JJ.)

KEYSTONE REALTORS PRIVATE LIMITED .. Appellant;

Versus

2-Judge Bench

ANIL V. THARTHARE AND OTHERS .. Respondents.

Civil Appeal No. 2435 of 2019†, decided on December 3, 2019

Environment Law — Development Projects — Environment Impact Assessment Notification 2006, bearing S.O. 1533 — Paras 2 and 7 — Interpretation of — Objectives of EIA Notification, clarified

— Amendment of environmental clearance (EC) which had already been granted, for expansion of projects — Impermissibility of — Fresh clearance can be obtained from authorities for expansion, held, only by following procedure laid down under Para 7(ii) — Mandatory nature thereof, emphasised

— On facts held, amendment of EC for expansion of the project was impermissible — NGT direction of imposition of Rs One crore towards compensatory costs, affirmed — Expert committee to evaluate environmental impact and to suggest total compensatory costs to be imposed

— Held, EIA Notification seeks to ensure protection and preservation of environment during execution of new projects and expansion or modernisation of existing projects — It imposes restrictions on execution of new projects and on expansion of existing projects, until their potential environmental impact has been assessed and approved by grant of EC

— In a case where text of provisions require interpretation, court must adopt an interpretation which is in consonance with object and purpose of legislation or delegated legislation as a whole — EIA Notification was adopted with intention of restricting new projects and expansion of new projects until their environmental impact could be evaluated and understood — It cannot be disputed that as size of project increases, so does magnitude of project's environmental impact — Interpretation lending meaning that EIA Notification which would permit, incrementally or otherwise, project proponents to increase construction area of project without oversight from Expert Appraisal Committee or State Level Expert Appraisal Committee (SEAC), as applicable — It is not for courts to lay down bright-line test as to what constitutes marginal increase and what constitutes material increase — As EIA Notification currently stands, expansion within limits prescribed by Schedule is subject to procedure set out in Para 7(ii)

— Plain reading of second half of Para 2(ii) would indicate that it applies to cases where project was initially below threshold limits stipulated in Schedule but after the proposed expansion, would breach threshold limits — Therefore, it does not cover a case where project had already crossed lower threshold limit set out in Schedule and expansion does not cross upper limit stipulated by Schedule

† Arising from the Judgment and Order in *Anil Tharthare* v. *State of Maharashtra*, 2019 SCC OnLine NGT 876 [National Green Tribunal, Principal Bench at New Delhi, Appeal No. 122 of 2018 (Earlier Appeal No. 9 of 2014), dt. 11-2-2019]

— Para 2(ii) must be r/w Para 7(ii) — Para 7(ii) lays down exact procedure to be followed by project proponent in case of expansion — Two crucial aspects of Para 7(ii) are: (A) it uses phrase "expansion with increase in production capacity beyond the capacity for which prior environment clearance has been granted"; and (B) qualifying language referring to breaching threshold limits "after expansion" is absent — "Expansion" can occur even after grant of EC when project first crossed the lower limit stipulated in threshold — It is not necessary for project to breach upper limit after expansion — Therefore close reading of Para 7(ii) would mean that even after obtaining EC if project is expanded beyond limits for which the prior EC was obtained, fresh application would need to be made even if expansion is within upper limit prescribed in Schedule

— If Para 2(ii) does not cover a case where expansion is within limits stipulated by Schedule, project proponent may incrementally keep increasing size of project area over time — This would result in significant increase in project size without assessment EIA resulting from expansion — Such outcome would defeat entire scheme of EIA Notification which is to ensure that any new or additional environmental impact is assessed and certified by relevant regulatory authorities

— There is considerable merit in observations of Committee constituted by MoEF that requirement of an EC at time of expansion forms a critical step in environmental clearance regime — It assists officials not just in evaluating and mitigating any adverse impact caused by expansion but also in assessing whether project proponent is in compliance with their existing obligations — Crucially, any form of expansion necessarily puts a strain on local environment and infrastructure and needs to be carefully evaluated in holistic manner

— Lower limit of Entry 8(a) of Schedule is built-up area of 20,000 sq m and upper limit is 1,50,000 sq m — Environmental impact of construction of 1,50,000 sq m is drastically more than 20,000 sq m — At the time of second increase in present case, total construction area of appellant's project enlarged from 32,395.17 sq m to 40,480.88 sq m — As result of such expansion, appellant constructed 16 addition flats which were sold at prevailing market rate — Appellant did not comply with procedure set under Para 7(ii) — It rather sought amendment to EC — Amendment to EC dated 13-3-2014 did not discuss potential environmental impact of increase in construction area — But merely records that construction area now stands at 40,480.88 sq m

— Procedure set out under Para 7(ii) exists to ensure that where project is expanded in size, environmental impact on surrounding area is evaluated holistically considering all relevant factors including air and water availability and pollution, management of solid and wet waste and the urban carrying capacity of the area — This was not done in case of appellant's project — Held, it was not open to authorities to grant amendment of EC without following procedure set out in Para 7(ii)

— As appellant had completed construction, authorities were denied ability to evaluate environmental impact and suggest methods to mitigate any environmental damage — Therefore, only remedial measures may be taken — Hence, direction of NGT to appellant to deposit Rs One crore affirmed — Expert committee constituted by NGT directed to continue its evaluation of project so as to bring environmental impact as close as possible to that contemplated in EC dt. 2-5-2013 and also suggest compensatory exaction to be imposed on appellant — Housing and Real Estate — Building/Planning Norms — Development Permission/Occupancy Certificate/NOC/Environmental NOC — Interpretation of Statutes — Basic Rules — Purposive construction/interpretation/Mischief rule/Heydon's rule — Polluter Pays Principle and Remedial/Compensatory/Punitive Measures — Remedial action/Reclamation/Rehabilitation measures/Compensation/Disgorgement of gains of wrongdoer — Restitution — Disgorgement of Gains of Wrongdoer (Paras 6 and 13 to 21)

Anil Tharthare v. *State of Maharashtra*, 2019 SCC OnLine NGT 876, *affirmed*

Keystone Realtors (P) Ltd. v. *Environment Department*, 2016 SCC OnLine Bom 9340, *cited*

The appellant, a project proponent of residential redevelopment, received commencement certificate. When project commenced, area was 8720.32 sq m. As area of construction was increased to 32,395.17 sq m, the appellant applied for Environmental Clearance (EC) under Environment Impact Assessment (EIA). The State Level Expert Appraisal Committee for Maharashtra (SEAC) recommended the grant of an EC for the project. On 2-5-2013 the third respondent, the State Level Environment Impact Assessment Authority for Maharashtra (SEIAA), based on the recommendations of SEAC granted an EC for total construction of 32,395.17 sq m. The appellant increased total construction area by 40,480.88 sq m. Therefore, in environmental clearance given on 2-5-2013, the appellant sought amendment. Accordingly, amendment was granted to EC dated 2-5-2013.

Respondent 1 challenged grant of amended environmental clearance before the National Green Tribunal (NGT). The appellant raised several grounds questioning maintainability of petition before NGT. The contentions raised by the appellant were rejected. The appellant approached the High Court, which held that appeal on behalf of Respondent 1 not maintainable and challenge to the environmental clearance barred by limitation. However, this dispute was transferred to Principal Bench of NGT and decided against the appellant, which is challenged in this appeal. While dismissing the appeal, the Supreme Court held as above.

G-D/63343/C

Advocates who appeared in this case :

Mukul Rohatgi, Senior Advocate (Kunal Tandan, Pranaya Goyal, Aman Raj Gandhi, Nikhil Rohatgi, Abhishek Sharma, Ms Sanjana Arora, Ms Richa Saudilya and Ms Narayani Bhattacharyya, Advocates) for the Appellant;

Aditya Pratap, Munawwar Naseem, Chirag M. Shroff, Ms Mahima C. Shroff, Ms Yashika Verma and Riya Thomas, Advocates) for the Respondents.

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

1. 2019 SCC OnLine NGT 876, *Anil Tharthare* v. *State of Maharashtra* 69*a*
2. 2016 SCC OnLine Bom 9340, *Keystone Realtors (P) Ltd.* v. *Environment Department* 70*d*

The Judgment of the Court was delivered by

DR D.Y. CHANDRACHUD, J.— The present civil appeal arises from an order dated 11-2-2019[1] of the Principal Bench of the National Green Tribunal (NGT). In its order, NGT held that the increase in the total construction area of the appellant's project was an "expansion" under a Notification (bearing number S.O. 1533) dated 14-9-2006 (EIA Notification) of the Ministry of Environment and Forests. NGT found that the appellant had undertaken an "expansion" as set out in Para 2 of the EIA Notification without complying with the regulatory procedure prescribed. The appellant was directed to deposit an amount of rupees one crore with the Central Pollution Control Board (CPCB). Noting that the construction at the project site had been completed, NGT appointed a five-member expert committee to study the impact of the appellant's expanded project and to suggest remedial measures.

The facts

2. The appellant is the project proponent of a residential redevelopment, called "Oriana Residential Project" situated at CTS No. 646, 646 (Pt) Gandhinagar, Bandra (East), Mumbai 400 050. On 8-6-2010 the appellant received a commencement certificate to carry out the development and erect a building situated at the project property. The appellant began construction. When the construction commenced, the total construction area was 8720.32 sq m. The ambit of the project was expanded, and the constructed area was increased to 32,395.17 sq m. Under the EIA Notification, an Environmental Clearance (EC) was necessary if the total construction area exceeded 20,000 sq m. Hence, the appellant applied for an EC under the EIA Notification.

3. The fourth respondent, the State Level Expert Appraisal Committee for Maharashtra (SEAC) recommended the grant of an EC for the project. On 2-5-2013 the third respondent, the State Level Environment Impact Assessment Authority for Maharashtra (SEIAA), based on the recommendations of SEAC granted an EC. It is not in dispute that at the time when EC dated 2-5-2013 was granted, the total construction area of the project was 32,395.17 sq m. The grant of EC was conditional on the appellant obtaining a "consent for establishment" from the Maharashtra Pollution Control Board under the Air (Prevention and Control of Pollution) Act, 1981 and the Water (Prevention and Control of Pollution) Act, 1974.

4. By a letter dated 24-9-2013, the appellant informed the Environment Department of the Government of Maharashtra, the second respondent, that the construction area was being further increased by 8085.71 sq m, as a result of which the total construction area of the project would stand enhanced to 40,480.88 sq m. In its letter, the appellant sought an "amendment" to EC dated 2-5-2013 by the third respondent to reflect the increase in the total construction area. On 13-3-2014, the third respondent granted an "amendment" to EC dated 2-5-2013 on the ground that there was only a "marginal increase

1 *Anil Tharthare* v. *State of Maharashtra*, 2019 SCC OnLine NGT 876

in built-up and construction area". The third respondent noted the changes in the specification of the project as follows:

Description	*As per EC dated 2-5-2013*		*Amendment*	
FSI area	16,346.32 sq m		21,365.54 sq m	
Non-FSI area	16,048.85 sq m		19,115.34 sq m	
Total construction area	32,395.17 sq m		40,480.88 sq m	
Nos. of tenements	Members 64	Sale 61	Members 64	Sale 77
Building configuration	Member	2 Basement	Member	2 Basement

5. The first respondent, claiming to be a resident of MIG Colony, Gandhinagar, Bandra East, Mumbai, challenged the grant of the amended EC dated 13-3-2014 before the Pune Bench of NGT. In response, the appellant filed two applications, challenging the standing of the first respondent and contending that the challenge was barred by limitation. By an order dated 4-5-2016, the Pune Bench of NGT rejected the applications questioning the maintainability of the proceedings and setting up the bar of limitation. The appellant filed a writ petition before the High Court of Judicature at Bombay to challenge the decision of the Pune Bench of NGT. The Bombay High Court, allowing the writ petition held by an order dated 23-8-2016[2], that the appeal was not maintainable at the behest of the first respondent, and the challenge against the grant of the amended EC dated 13-3-2014 was barred by limitation. By an administrative order dated 31-7-2018, the dispute was transferred from the Pune Bench of NGT to the Principal Bench which heard the parties and delivered the impugned order.

Relevant clauses of the EIA Notification

6. The present dispute raises important questions regarding the interpretation of the EIA Notification. The EIA Notification seeks to ensure the protection and preservation of the environment during the execution of new projects and the expansion or modernisation of existing projects. It imposes restrictions on the execution of new projects and on the expansion of existing projects, until their potential environmental impact has been assessed and approved by the grant of an EC. Para 2 of the EIA Notification reads thus:

> "2. *Requirement for prior Environmental Clearance (EC)*: The following projects or activities shall require prior environmental clearance from the regulatory authority concerned, which shall hereinafter be referred to as the Central Government in the Ministry of Environment and Forests for matters falling under Category 'A' in the Schedule and at State level the State Environment Impact Assessment Authority (SEIAA) for matters falling under Category 'B' in the said Schedule, before any construction work, or preparation of land by the project management except for securing the land, is started on the project or activity:

2 *Keystone Realtors (P) Ltd.* v. *Environment Department*, 2016 SCC OnLine Bom 9340

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

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

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

7. The Schedule to the EIA Notification classifies potential projects into Category 'A' and Category 'B' based on their size and potential environmental impact. Category 'A' projects require project proponents to secure an EC from the Ministry of Environment, Forests and Climate Change. Category 'B' projects require project proponents to secure an EC from the SEIAA, based on the recommendations of SEAC. Where a project falls within the parameters stipulated in the Schedule, Para 2 of the EIA Notification provides that no construction work shall begin unless an EC is granted in regard to three types of activity: (*i*) new projects or activities provided in the Schedule, (*ii*) expansion or modernisation of existing projects or activities provided in the Schedule, and (*iii*) changes in the product mix in existing manufacturing units provided in the Schedule beyond the specified range. The present dispute raises questions as to how the second type of activity, the "expansion" of existing projects, should be construed under the EIA Notification.

8. In order to secure an EC, the project proponent must submit an application in the manner set out in Form 1 and Supplementary Form 1-A (if applicable) of the EIA Notification. Under Para 7(*i*) of the EIA Notification, the project proponent must also submit a pre-feasibility report. However, in the case of projects under Item 8 of the Schedule, only a conceptual plan is required to be submitted. Para 7(*ii*) of the EIA Notification states that:

"7(*ii*) *Prior Environmental Clearance (EC) process for expansion or modernisation of change of product mix in existing projects*:

All applications seeking prior environmental clearance for expansion with increase in the production capacity beyond the capacity for which prior environmental clearance has been granted under this notification or with increase in either lease area or production capacity in the case of mining projects or for the modernisation of an existing unit with increase in the total production capacity beyond the threshold limit prescribed in the Schedule to this notification through change in process and or technology or involving a change in the product mix *shall be made in Form 1 and they shall be considered by the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned within sixty days, who will decide on the due diligence necessary including preparation of EIA and public consultation* and the application shall be appraised accordingly for grant of environmental clearance." (emphasis supplied)

Clause (*ii*) of Para 2 of the EIA Notification requires the project proponent to secure an EC from the relevant regulatory authority prior to undertaking any "expansion" of an existing project. Para 7(*ii*) further stipulates that all applications for an EC in cases of "expansion" resulting in the increase of production capacity or lease area beyond the capacity/area stipulated in the previous EC shall be made in the manner set out in Form 1 or 1-A (as applicable).

9. The appellant's application in Form 1 acknowledges that the project fell under Entry 8(*a*) of Schedule 1 of the EIA Notification. Entry 8 deals with "Building and Construction projects having a built-up area of or greater than 20,000 sq m but less than 1,50,000 sq m". Entry 8 of the Schedule to the EIA Notification is as follows:

8 — *Building/Construction projects/Area Development projects and Townships*			
8(*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
8(*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 B1

Issue

10. In applying for the original EC, the appellant submitted an application in Form 1 as required under the provisions of the EIA Notification. The total construction area identified in the appellant's Form 1 was 32,395.17 sq m. However, in September 2013 the appellant informed the second respondent of an increase by 8085.71 sq m as a result of which the total construction area of the project would be 40,480.88 sq m. In seeking an "amendment" to EC dated 2-5-2013 the appellant did not submit an updated Form 1. Further, the "amendment" to EC was granted by the SEIAA without the recommendations of SEAC. The issue before this Court is whether the "amended" EC dated 13-3-2014 granted by the SEIAA without following the procedure stipulated in Para 7(*ii*) of the EIA Notification is valid.

Submissions

11. Mr Mukul Rohatgi, learned Senior Counsel appearing on behalf of the appellant submitted that:

11.1. When construction began, the total construction area of the appellant's project was 8720.32 sq m. As the EIA Notification requires projects with a total built-up area of or more than 20,000 sq m to procure an EC prior to the start of construction, no EC was required before construction of the appellant's project commenced;

11.2. Pursuant to the first increase, when the appellant's project crossed the 20,000 sq m threshold provided for in the EIA Notification, the appellant submitted Form 1 and was granted a valid EC dated 2-5-2013 by the third respondent;

11.3. Pursuant to the second increase, the built-up area of the appellant's project only marginally increased by 8085.71 sq m to a total construction area of 40,480.88 sq m, which is within the upper limit of 1,50,000 sq m prescribed by Entry 8(*a*) of the Schedule to the EIA Notification. Therefore, the second increase was not an "expansion" within the meaning of clause (*ii*) of Para 2 of the EIA Notification and no fresh Form 1 or EC was required at the time of the second increase;

11.4. Clause (*ii*) of Para 2 only applies to situations where the project crosses the lower or upper threshold limits stipulated in the Schedule. Any increase in production capacity or construction area *within the limits* set out in the Schedule would not constitute an "expansion" within the meaning of Clause (*ii*) of Para 2 and does not require compliance with the procedure under Para 7(*ii*) of the EIA Notification;

11.5. The increase in the appellant's project is only marginal and does not have an adverse impact on the environment;

11.6. The SEIAA applied its mind to the appellant's request for an "amendment"; noted that the increase in construction area was only marginal and issued an amendment to the original EC dated 2-5-2013; and

11.7. NGT had no basis to impose the fine of rupees one crore on the appellant.

12. Joining issue with the above submissions, Mr Aditya Pratap, learned counsel appearing on behalf of the first respondent submitted that:

12.1. Under clause (*ii*) of Para 2 read with Para 7(*ii*) of the EIA Notification, any expansion beyond the "threshold limit" requires a fresh EC. The appellant's project had crossed the threshold limit of 20,000 sq m and the second increase of 8085.71 sq m constituted an "*expansion beyond the threshold limit*" and hence required a fresh EC;

12.2. Once a project breaches the lower threshold limit set out in the Schedule to the EIA Notification, any expansion or modernisation, even within the upper threshold set out in the Schedule, will require the submission of a fresh Form 1 and the matter to be placed before the Expert Appraisal Committee or SEAC, as applicable in accordance with Para 7(*ii*) of the EIA Notification;

12.3. Adopting the appellant's interpretation of Clause (*ii*) of Para 2 would defeat the object and purpose of the EIA Notification as a whole. It would allow project proponents to incrementally increase the construction area and over time significantly impinge on the environmental impact of the project without seeking a fresh EC;

12.4. If the law prescribes an act to be done in a particular manner, it must be done only in that manner and no other. Under Para 7(*ii*) of the EIA Notification, it was incumbent on the SEIAA to place the matter before SEAC for appraisal and recommendations; and

12.5. The EIA Notification is an operationalisation of the precautionary principle, which forms a part of the environmental law of India. The EIA Notification must be read in a manner which gives effect to the precautionary principle.

Interpreting Paras 2 and 7

13. The central controversy between the parties to the present dispute is the manner in which Paras 2 and 7 of the EIA Notification should be interpreted. Clause (*ii*) of Para 2 of the EIA Notification stipulates that a project proponent shall require an EC prior to the start of construction in the case of an "expansion". Clause (*ii*) uses the phrase "expansion…beyond the limits specified for the sector concerned". The first respondent sought to lay emphasis on this construction to argue that any expansion beyond the lower limit stipulated in the Schedule would attract the requirement of a prior EC under Para 2. However, the above language in Clause (*ii*) is further qualified by the phrase "that is, projects or activities which cross the threshold limits given in the Schedule *after* expansion or modernisation". A plain reading of the second half of Clause (*ii*) would indicate that it applies to cases where a project was initially below the threshold limits stipulated in the Schedule but after the proposed expansion, would breach the threshold limits. Clause (*ii*) of Para 2 of the EIA Notification therefore would not appear to cover a case where a project had already crossed the lower threshold limit set out in the Schedule and the expansion does not cross the upper limit stipulated by the Schedule.

14. However, Clause (*ii*) of Para 2 must be read with Para 7(*ii*) of the EIA Notification. Para 7(*ii*) lays down the exact procedure to be followed by a project proponent in the case of an expansion. Two crucial points must be noted with respect to Para 7(*ii*). First, it uses the phrase, "expansion with increase in production capacity *beyond the capacity for which prior environment clearance has been granted*". Second, the qualifying language referring to breaching the threshold limits "after expansion" is absent. An "expansion" can occur even after the grant of an EC when the project first crossed the lower limit stipulated in the threshold and it is not necessary for the project to breach the upper limit after the expansion. Therefore, a close reading of Para 7(*ii*) would support the interpretation put forth by the first respondent — that even after obtaining an EC if the project is expanded beyond the limits for which the prior EC was obtained, a fresh application would need to be made even if the expansion is within the upper limit prescribed in the Schedule.

15. The dangers effectively articulated by the learned counsel for the first respondent are real. If Clause (*ii*) of Para 2 does not cover a case where the expansion is within the limits stipulated by the Schedule, a project proponent may incrementally keep increasing the size of the project area over time resulting in a significant increase in the project size without an assessment of the environmental impact resulting from the expansion. Such an outcome would defeat the entire scheme of the EIA Notification which is to ensure that any new or additional environmental impact is assessed and certified by the relevant regulatory authorities. In the present case, the lower limit of Entry 8(*a*) of the Schedule is a built-up area of 20,000 sq m and the upper limit is 1,50,000 sq m. It cannot be doubted that the environmental impact of a construction of 1,50,000 sq m is drastically more than construction of 20,000 sq m. If the appellant's argument is accepted in totality, a project proponent could potentially secure an EC for constructing 20,000 sq m and by

"amendment" steadily increase the area of construction up to 1,50,000 sq m without submitting an updated Form 1 or any substantive review by SEAC.

16. We note that subsequent to the EIA Notification being published in 2006, a draft notification was issued on 19-1-2009[3].The draft notification proposed the following amendment:

> "In Para 2 [of the EIA Notification], after sub-para (*iii*), the following shall be inserted; namely:
>
> However modernisation or expansion proposals without any increase in pollution load, and, or without any additional water and or land requirement are exempted from the provisions of this Notification:
>
> Provided that, a self-certification, stating that the proposals shall not involve any additional pollution load, waste generation or water requirement, be submitted to the regulatory authority by the project proponent."

17. Prior to adopting the draft notification, hearings were conducted and written comments were solicited from various stakeholders including: (*i*) Central Ministries and Departments, (*ii*) State Governments and their Agencies, (*iii*) Industries and their Associations, and (*iv*) Civil Society including NGOs. A committee was constituted by the Ministry of Environment and Forests, Government of India which published a report in October 2009. The committee specifically recommended against the adoption of the above amendment, noting:

> "The amendments propose to exempt modernisation and expansion of projects based on a self-certification by project authorities that there is no increase in pollution load. *It is totally unacceptable that the modernisation and expansion of projects be removed from the environmental clearance regime, with or without the requirement of self-certification*. There are several industries operating in critically polluted areas or are in violation of their environmental clearance conditions, which need to be considered before the expansion of a project is considered. What is to be considered is not just whether there is an increase in pollution load but also the current impact of the project and its compliance with environmental clearance conditions. We can provide clear examples wherein the non-compliance of the clearance conditions has not been considered while granting clearance for expansion which includes adding new components to the existing industrial operations, etc. This has allowed several projects to continue their activities and expand despite blatant non-compliance. Finally, it is only with industrial, thermal power and other such related operations that one can decide on parameters of pollution. *Development projects like highways, airports and other infrastructure projects which seek to expand might have a detrimental impact due to factors such as change in land use (i.e. construction over a wetland, grassland or agricultural land, etc.)*. Despite this, the project proponent can certify that there is no change in pollution

3 Notification S.O. 195 (E) dated 19-1-2009.

load and hence expansion is to be allowed. *The current process seeks a detailed EIA report to determine whether impacts can be mitigated. If the amendment is brought into force, it will simply do away with this critical and necessary step in the environmental clearance process*. Therefore, this amendment should not be allowed.

* * *

The draft notification takes a myopic view of environmental and social impact of modernisation and expansion. *Any modernisation/expansion projects will necessarily entail increase in production, increase in transportation, increase in pressure on the local infrastructure and local natural resources and increase in the pollution load during the construction phase*. So, even if a modernisation/expansion does not lead to an increase in the pollution load or water or land requirement within the factory premises during the operation phase, it will lead to an increase in environmental and social impact outside the premise." (emphasis supplied)

18. The draft amendment was not adopted in subsequent amendments to the EIA Notification. We find considerable merit in the observations of the committee that the requirement of an EC at the time of expansion forms a critical step in the environmental clearance regime. According to the committee, it assists officials not just in evaluating and mitigating any adverse impact caused by the expansion but also in assessing whether the project proponent is in compliance with their existing obligations. Crucially, any form of expansion necessarily puts a strain on the local environment and infrastructure and needs to be carefully evaluated in a holistic manner.

19. In a case where the text of the provisions requires interpretation, this Court must adopt an interpretation which is in consonance with the object and purpose of the legislation or delegated legislation as a whole. The EIA Notification was adopted with the intention of restricting new projects and the expansion of new projects until their environmental impact could be evaluated and understood. It cannot be disputed that as the size of the project increases, so does the magnitude of the project's environmental impact. This Court cannot adopt an interpretation of the EIA Notification which would permit, incrementally or otherwise, project proponents to increase the construction area of a project without any oversight from the Expert Appraisal Committee or SEAC, as applicable. It is true that there may exist certain situations where the expansion sought by a project proponent is truly marginal or the environmental impact of such expansion is non-existent. However, it is not for this Court to lay down a bright-line test as to what constitutes a "marginal" increase and what constitutes a material increase warranting a fresh Form 1 and scrutiny by the Expert Appraisal Committee. If the Government in its wisdom were to prescribe that a one-time "marginal" increase (e.g. 5% or 10%) in project size, within the threshold limit stipulated in the Schedule, could be subject to a lower standard of scrutiny without diluting the urgent need for environmental protection, conceivably this Court may give effect to such a provision. This would be subject to any challenge on the ground of there being a violation of

the precautionary principle. However, as the EIA Notification currently stands, an expansion within the limits prescribed by the Schedules would be subject to the procedure set out in Para 7(*ii*).

20. At the time of the second increase, the total construction area of the appellant's project was enlarged from 32,395.17 sq m to 40,480.88 sq m. As a result of the expansion, the appellant constructed sixteen additional flats which were sold at the prevailing market rate. The appellant did not comply with the procedure set out under Para 7(*ii*) of the EIA Notification but rather sought an "amendment" to EC. The third respondent did not require the appellant to submit an updated Form 1 nor was the proposal processed and evaluated by the fourth respondent. The "amendment" to EC dated 13-3-2014 does not discuss the potential environmental impact of the increase in construction area, but merely records that the construction area now stands at 40,480.88 sq m. The procedure set out under Para 7(*ii*) of the EIA Notification exists to ensure that where a project is expanded in size, the environmental impact on the surrounding area is evaluated holistically considering all the relevant factors including air and water availability and pollution, management of solid and wet waste and the urban carrying capacity of the area. This was not done in the case of the appellant's project. It was not open to the third respondent to grant an "amendment" to EC without following the procedure set out in Para 7(*ii*) of the EIA Notification.

21. We further note that as on the date of the impugned order construction at the project site had already been completed. A core tenet underlying the entire scheme of the EIA Notification is that construction should not be executed until ample scientific evidence has been compiled so as to understand the true environmental impact of a project. By completing the construction of the project, the appellant denied the third and fourth respondents the ability to evaluate the environmental impact and suggest methods to mitigate any environmental damage. At this stage, only remedial measures may be taken. NGT has already directed the appellant to deposit rupees one crore and has set up an expert committee to evaluate the impact of the appellant's project and suggest remedial measures. In view of these circumstances, we uphold the directions of NGT and direct that the committee continue its evaluation of the appellant's project so as to bring its environmental impact as close as possible to that contemplated in EC dated 2-5-2013 and also suggest the compensatory exaction to be imposed on the appellant.

22. The appeal is dismissed. There shall be no order as to costs. Pending application(s), if any, shall stand disposed of.

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2J

(BEFORE DR D.Y. CHANDRACHUD AND AJAY RASTOGI, JJ.)

ALEMBIC PHARMACEUTICALS LIMITED .. Appellant;

Versus

ROHIT PRAJAPATI AND OTHERS .. Respondents.

Civil Appeal No. 1526 of 2016† with Nos. 3175, 6604-605 of 2016 and 1555 of 2017, decided on April 1, 2020

A. **Environment Law — Environmental Clearance/NOC/Environment Impact Assessment (EIA) — Ex post facto environmental clearance (EC) to industrial units — Impermissibility of — Held, the concept of an ex post facto environmental clearance is in derogation of the fundamental principles of environmental jurisprudence and is an anathema to the EIA Notification dt. 27-1-1994 — An EC can be issued only after various stages of the decision-making process have been duly completed in accordance with law — Allowing for an ex post facto clearance would essentially condone the operation of industrial activities without the grant of an EC**

— Revocation of ex post facto EC when not warranted — Proportionality principle — Applicability of — Imposition of penalties for having caused environmental degradation and not having obtained ECs in lawful manner, instead of revocation of ECs and closure of units (*see* Shortnote *B*)

— 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 — The additional measures adopted by the industries subsequently cannot act as correctives for historical wrongs and cannot compensate for the damage already caused to the environment as a result of manufacturing activities which were carried on without ECs

B. **Environment Law — General Principles of Environmental Law — Polluter Pays Principle — Remedial action/Reclamation/Rehabilitation measures/Compensation/Disgorgement of gains of wrongdoer/Other measures — Revocation of ECs which had been granted ex post facto and closure of industrial units concerned — When warranted — Matters to be considered — Proportionality principle — Applicability of — Imposition of penalties for having caused environmental degradation and not having obtained ECs in lawful manner, instead of revocation of ECs and closure of units**

— Industries in dispute operated without an EC for several years after issuance of the EIA Notification of 1994 — Each of them had subsequently received ECs including amended ECs for expansion of existing capacities —

† Arising from the Judgment and Order in *Rohit Prajapati* v. *Union of India* (National Green Tribunal, Original Application No. 66 of 2015, dt. 8-1-2016)

These ECs had been operational for a long time — In addition, all the industrial units in dispute had made infrastructural investments and employed significant numbers of workers in their units

— In this view of the matter and taking a balanced approach, held, directions of NGT for 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 industrial units in dispute that operated without valid ECs —The industries in dispute have evaded the legally binding regime of obtaining ECs — They cannot escape the liability incurred on account of such non-compliance — Penalties must be imposed for the disobedience with a binding legal regime

— Thus, held, three industries in present case to deposit compensation quantified at Rs 10 crores each — 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

— Constitution of India — Art. 14 — Administrative Law — Judicial Review — Grounds for Judicial Review — Proportionality

C. **Environment Law — EIA Notification, 1994 — Cl. 8 of the Explanatory Note — Exemption under — Entitlement — Matters to be established and burden of establishing the same — Explained — Held, exemption must be construed in its strict sense according to its plain terms**

— Held, the burden lies on the project proponent who seeks to alter the state of the environment or to impact on the environment to demonstrate that the terms on which an exemption has been granted have been fulfilled

— None of the industries in dispute furnished an exhaustive catalogue of what were the "relevant clearances from the State Government" that had to be obtained under the provisions of the law as it then stood — A holistic analysis of the environmental impact of an industrial activity is only accounted for once all the steps listed out in EIA Notification of 1994 are followed — In that view of the matter, held, none of the industries in dispute were entitled to the benefit of the exemption contained in Cl. 8 of the Explanatory Note to the EIA Notification of 1994

D. **Environment Law — National Green Tribunal Act, 2010 — S. 16 — Jurisdiction of NGT under — Scope of — Jurisdiction of NGT to strike down Circular dt. 14-5-2002 — Said circular whether issued under EP Act, 1986**

— Held Circular dt. 14-5-2002 providing for ex post facto EC is contrary to the statutory Notification dt. 27-1-1994 and it 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 — Thus the administrative Circular dt. 14-5-2002 is not a measure protected by S. 3 of the Environment (Protection) Act — Hence there was no jurisdictional bar on NGT to enquire into legitimacy or vires of Circular dt. 14-5-2002

— Moreover, the administrative Circular dt. 14-5-2002 is contrary to the EIA Notification 1994 which has a statutory character — The circular is unsustainable in law — Environment (Protection) Act, 1986, S. 3

The Environmental Impact Assessment Notification dated 27-1-1994 issued by the MoEF in exercise of its powers under Section 3(1) and Section 3(2)(*v*) of the Environment (Protection) Act, 1986 read with Rule 5(3)(*d*) of the Environment (Protection) Rules, 1986 mandated prior environmental clearances ("ECs") for setting up and expansion of industrial projects falling within thirty categories. The deadline for obtaining an EC under the EIA Notification of 1994 was extended by various Circulars to 31-3-1999 and thereafter to 30-6-2001. By the impugned Circular dated 14-5-2002, which was quashed by NGT, the Ministry of Environment and Forest ("MoEF") extended the period till 31-3-2003 for those industrial units which had gone into production without obtaining an EC under the EIA Notification of 1994 to apply for and obtain an ex post facto EC.

The Circular dated 14-5-2002, allowed for ex post facto ECs, subject to a graded contribution into an earmarked fund based on the investment cost of the project. The Circular dated 14-5-2002 was challenged before the High Court. The proceedings were subsequently transferred to NGT. NGT by its decision dated 8-1-2016 held that the law did not permit the grant of an ex post facto clearances and that the Circular dated 14-5-2002 was an internal communication and did not override the provisions of the EIA Notification dated 27-1-1994 which had been issued in exercise of statutory powers conferred by Section 3 of the Environment (Protection) Act, 1986.

Having held that the concept of an "ex *post facto* environmental clearance" was not sustainable with reference to any provision of law, NGT issued directions that the authorities shall not grant consent for an industrial activity covered by the EIA Notification of 1994 without the steps mandated by the notification such as screening, scoping, public hearing and decision being fulfilled. All the industrial activities which were being operated without a valid EC and consent to operate directed to be closed down within one month. Each of the units directed to deposit a compensation of Rs 10 lakhs for having caused environmental degradation. The amount deposited was directed to be used for the restoration of the environment in and around the industrial area.

The order passed by NGT was challenged before the Supreme Court.

The appellants contended that the ex post facto clearance granted to them cannot be set aside by the order of NGT. Accordingly, no question of closing down the manufacturing units of the appellants can arise. The requirement of an ex post facto public hearing was introduced by an amendment in 1997 to the EIA Notification of 1994 and it is a valid procedure. In case, there is any violation of law, closure of industrial units cannot be ordered in view of significant investment and expansion undertaken by the industry. If the order of NGT prevails, the appellant would be prejudiced and suffer an irreparable loss. The appellants have employed large number of employees at its manufacturing unit.

The respondents contended that the Circular dated 14-5-2002 is illegal because environmental jurisprudence does not recognise any concept of ex post facto

clearances. Any ex post facto approval is void and the benefit of the circular cannot be given to such an industry. The Circular dated 14-5-2002 does not mention its source or authority of law. The source of the circular is not traceable to Section 3 of the Environment (Protection) Act, 1986 because the circular does not protect or improve the quality of the environment. The circular allows defaulters to get ex post facto clearances and does not encourage compliance with the law. The Comprehensive Environmental Pollution Index Report by the Central Pollution Control Board indicates that the air, water and soil parameters in and around the industrial area where the industrial units are located, are among the most critical in India. Even if the Supreme Court were to hold that the closure of the industries should not be ordered, compensation should be directed to be paid by them for restoration of the environment. These industries have brazenly operated for years without environmental clearances.

The issues to be determined by the Supreme Court were:

(*i*) Whether in view of the requirement of a prior EC under the EIA Notification of 1994, a provision for an ex post facto EC to industrial units could be validly made by means of the Circular dated 14-5-2002,

(*ii*) Jurisdiction of NGT to strike down rules or regulations made under the Environment (Protection) Act, 1986,

(*iii*) Legality of revocation of ECs by NGT.

Held :

In view of the law laid down in *Sterlite Industries*, (2019) 19 SCC 479, while exercising its jurisdiction under Section 16 of the NGT Act, NGT cannot strike down rules or regulations made under the Environment (Protection) Act, 1986. However the Circular dated 14-5-2002 cannot be regarded as to have been issued by the MoEF pursuant to its powers under Section 3 of the Environment (Protection) Act, 1986. Because the Union of India has not pleaded the case that the Circular dated 14-5-2002 is a measure which is traceable to the provisions of Section 3. On the contrary, in its pleadings the Union of India construed it as a "purely administrative decision". The omission in the appeal to make any attempt to sustain the Circular dated 14-5-2002 with reference to the provisions of Section 3 of the Environment (Protection) Act, 1986 is significant. For an action of the Central Government to be treated as a measure referable to Section 3 it must satisfy the statutory requirement of being necessary or expedient "for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environment pollution". The Circular dated 14-5-2002 in fact does quite the contrary. It allowed defaulting industrial units which had commenced activities without an EC to cure the default by an ex post facto clearance. Being an administrative decision, it is beyond the scope of Section 3 and cannot be said to be a measure for the purpose of protecting and improving the quality of the environment. The circular notes that there were defaulting units which had failed to comply with the requirement of obtaining an EC as mandated. The circular provided for an extension of time and inexplicably introduced the notion of an ex post facto clearance. In effect, it impacted the obligation of the industrial units to be in compliance with the law. (Paras 18 to 21)

The concept of ex post facto clearance is fundamentally at odds with the EIA Notification dated 27-1-1994. The EIA Notification of 1994 contained a stipulation

that any expansion or modernisation of an activity or setting up of a new project listed in Schedule I "shall not be undertaken in any part of India unless it has been accorded environmental clearance". The language of the notification is as clear as it can be to indicate that the requirement is of a prior EC. A mandatory provision requires complete compliance. The words "shall not be undertaken" read in conjunction with the expression "unless" can only have one meaning: before undertaking a new project or expanding or modernising an existing one, an EC must be obtained. When the EIA Notification of 1994 mandates a prior EC, it proscribes (command against) a post activity approval or an ex post facto permission. What is sought to be achieved by the administrative Circular dated 14-5-2002 is contrary to the statutory Notification dated 27-1-1994. The Circular dated 14-5-2002 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. Thus the administrative circular is not a measure protected by Section 3 of the 1986 Act. Hence there was no jurisdictional bar on 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. (Paras 18 to 21)

T.N. Pollution Control Board v. *Sterlite Industries (India) Ltd.*, (2019) 19 SCC 479, *distinguished*

BSNL v. *TRAI*, (2014) 3 SCC 222, *referred to*

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 27-1-1994. It is 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. (Paras 22 and 23)

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

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

The additional measures adopted by the industries subsequently, such as the installation of latest pollution capturing technologies, recent consents from GPCB and certification of "zero discharge" units, will not cure the failure to obtain ECs before the projects commenced operation. These measures are simply to ensure compliance with the pollution standards and requirements of law that exist as of date. These measures have no bearing on determining whether the industrial units were in the past operating in compliance with the requisite environmental

standards. These measures cannot act as correctives for historical wrongs and cannot compensate for the damage already caused to the environment as a result of manufacturing activities which were carried on without ECs. (Para 26)

Plea that the EIA Notification of 1994 did not apply to their manufacturing units as they were covered by the exemption in terms of Clause 8 of the Explanatory Note, cannot be accepted because before the exemption contained in Clause 8 applies, it was necessary for projects listed in Schedule I to obtain all relevant clearances from the State Government including an NOC from the State Pollution Control Board. It was in other words not sufficient to merely obtain an NOC from the State Pollution Control Board. The exemption which was carved out in the Explanatory Note was to ensure that activities which had received all required clearances at the State level, following the acquisition of land should be protected. In fact, many of them would also involve the commencement of production prior to 27-1-1994. The Explanatory Note stated that where production had not yet commenced, the IAA would have to be intimated. In order to be covered within the scope of the exemption, the burden is on the industry to demonstrate that they fulfilled conditions spelt out in Clause 8 of the Explanatory Note. The EIA notification 1994 is a significant instrument in effectuating the implementation of the precautionary principle. The burden lies on the project proponent who seeks to alter the state of the environment or to impact on the environment to demonstrate that the terms on which an exemption has been granted have been fulfilled. An exemption must be construed in its strict sense according to its plain terms. None of the three industries before the Court have furnished an exhaustive catalogue of what were the "relevant clearances from the State Government" that had to be obtained under the provisions of the law as it then stood. (Paras 27 and 28)

There has been a gross abdication of responsibility by all the three industries in terms of obtaining timely consents and authorisations from the GPCB. There exists a distinction between obtaining relevant clearances and consents from the State Pollution Control Board and obtaining an environmental clearance in accordance with the procedure laid down under the EIA Notification of 1994. A consent order issued by the State Pollution Control Board allows an industry to operate within the prescribed emission norms. However, the consent orders do not account for the social cost and impact of undertaking an industrial activity on the environment and its surroundings. A holistic analysis of the environmental impact of an industrial activity is only accounted for once all the steps listed out in EIA Notification of 1994 are followed. The purpose of setting in place specific requirements such as public hearing, screening, scoping and appraisal is to foster deliberative decisions and protect environmental concerns. The detailed process listed out in the EIA Notification of 1994 for obtaining an EC allows for minimising the adverse environmental impact of any industrial activity and improving the quality of the environment. One must adopt an ecologically rational outlook towards development. Given the social and environmental impacts of an industrial activity, environment compliance must not be seen as an obstacle to development but as a measure towards achieving sustainable development and intergenerational equity. In that view of the matter none of the three industries were entitled to the benefit of the exemption contained in Clause 8 of the Explanatory Note to the EIA Notification of 1994. (Paras 35 and 36)

The industrial units in dispute 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. 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 5-11-1998 permitting applications for ECs to be filed by 31-3-1999, which was extended subsequently to 30-6-2001. On 14-5-2002, the deadline was extended until 31-3-2003 subject to a deposit commensurate to the investment made. (Paras 37 and 38)

Goa Foundation (1) v. *Union of India*, (2005) 11 SCC 559, *referred to*

Though the industries in dispute 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 2003. In addition, all the three units have made infrastructural investments and employed significant number of workers in their industrial units. In this backdrop and taking a balanced approach the directions of 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 in dispute have evaded the legally binding regime of obtaining ECs. They cannot escape the liability incurred on account of such non-compliance. Penalties must be imposed for the disobedience with a binding legal regime. The breach by the industries cannot be left unattended by legal consequences. (Paras 41 and 42)

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 NGT, 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. (Para 42)

Electrotherm (India) Ltd. v. *Patel Vipulkumar Ramjibhai*, (2016) 9 SCC 300, *relied on*

Lafarge Umiam Mining (P) Ltd. v. *Union of India*, (2011) 7 SCC 338, *distinguished on issue of ex post facto clearance but relied on for determining appropriate measure of restitution*

Rohit Prajapati v. *Union of India*, Original Application No. 66 of 2015, order dated 8-1-2016 (NGT), *partly reversed*

Techi Tagi Tara v. *Rajendra Singh Bhandari*, (2018) 11 SCC 734, *cited*

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1. (2019) 19 SCC 479, *T.N. Pollution Control Board* v. *Sterlite Industries (India) Ltd.* 172*d-e*, 172*e-f*, 173*b-c*
2. (2018) 11 SCC 734, *Techi Tagi Tara* v. *Rajendra Singh Bhandari* 170*e*
3. (2017) 9 SCC 499, *Common Cause* v. *Union of India* 172*a-b*, 175*b*, 175*c-d*, 175*f-g*

4. (2016) 9 SCC 300, *Electrotherm (India) Ltd.* v. *Patel Vipulkumar Ramjibhai* 171*b-c*, 187*e-f*, 187*g*
5. Original Application No. 66 of 2015, order dated 8-1-2016 (NGT), *Rohit Prajapati* v. *Union of India* **(partly reversed)** 164*b-c*, 164*g*, 167*f*, 189*b-c*
6. (2014) 3 SCC 222, *BSNL* v. *TRAI* 172*e-f*
7. (2011) 7 SCC 338, *Lafarge Umiam Mining (P) Ltd.* v. *Union of India* 171*a-b*, 186*f*, 186*f-g*, 187*a*, 187*e*
8. (2005) 11 SCC 559, *Goa Foundation (1)* v. *Union of India* 170*g-h*, 186*f*
9. (2004) 12 SCC 118, *M.C. Mehta* v. *Union of India* 175*d-e*

The Judgment of the Court was delivered by

DR D.Y. CHANDRACHUD, J.— By a judgment dated 8-1-2016[1], the Bench of the National Green Tribunal ("NGT") for the Western Zone held that a circular issued by the Union Ministry of Environment and Forests ("MoEF") on 14-5-2002 is contrary to law. The circular envisaged the grant of ex post facto environmental clearances. NGT issued a slew of directions including the revocation of environmental clearances and for closing down industrial units operating without valid consents. On 17-5-2016, NGT dismissed an application for review filed by one of the affected industrial units. The industrial units and MoEF are in appeal[2].

2. The Environmental Impact Assessment ("EIA") Notification of 27-1-1994 mandated prior environmental clearances ("ECs") for setting up and expansion of industrial projects falling within thirty categories. The deadline for obtaining an EC under the EIA Notification of 1994 was extended by various circulars to 31-3-1999 and thereafter to 30-6-2001. By the Circular dated 14-5-2002, which was quashed by NGT, MoEF extended the period till 31-3-2003 for those industrial units which had gone into production without obtaining an EC under the EIA Notification of 1994 to apply for and obtain an ex post facto EC. The Circular indicated that it had been decided:

> "... to extend the deadline up to 31-3-2003 so that defaulting units could avail of this last and final opportunity to obtain ex post facto environmental clearance...."

3. The Circular dated 14-5-2002, allowed for ex post facto ECs, subject to a graded contribution into an earmarked fund based on the investment cost of the project. The first and the second respondents challenged the Circular dated 14-5-2002 before the High Court of Gujarat. The proceedings were subsequently transferred to NGT. NGT by its decision dated 8-1-2016[1] held that the law did not permit the grant of an ex post facto clearances and that the Circular dated 14-5-2002 was an internal communication and did not override

1 *Rohit Prajapati* v. *Union of India*, Original Application No. 66 of 2015, order dated 8-1-2016 (NGT)

2 Civil Appeal No. 1526 of 2016 (Alembic Pharmaceuticals Ltd.); Civil Appeal No. 3175 of 2016 (United Phosphorus Ltd.); Civil Appeals Nos. 6604-605 of 2016 (Unique Chemicals); and Civil Appeal No. 42756 of 2016 (Union of India).

the provisions of the EIA Notification dated 27-1-1994 which had been issued in exercise of statutory powers conferred by Section 3 of the Environment (Protection) Act, 1986.

4. Having held that the concept of an "ex post facto environmental clearance" was not sustainable with reference to any provision of law, NGT issued the following directions:

4.1. The authorities of the Union of India, including the MoEF, State of Gujarat, Gujarat Pollution Control Board ("GPCB") and District Collectors shall not grant consent for an industrial activity covered by the EIA notification of 1994 without the steps mandated by the notification such as screening, scoping, public hearing and decision being fulfilled.

4.2. The ECs granted to the industrial units of the sixth to ninth respondents shall be revoked.

4.3. All the industrial activities which were being operated without a valid EC and consent to operate shall be closed down within one month.

4.4. Each of the units shall deposit a compensation of Rs 10 lakhs for having caused environmental degradation.

4.5. The amount deposited shall be used for the restoration of the environment in and around the industrial area of Ankleshwar in the State of Gujarat.

5. The private respondents before NGT who were affected by the above directions are:

(*i*) United Phosphorous Ltd. — the sixth respondent;

(*ii*) Unique Chemicals — the seventh respondent;

(*iii*) Darshak (P) Ltd. — the eighth respondent; and

(*iv*) Nirayu (P) Ltd. — the ninth respondent.

The private respondents are engaged in the manufacture of pharmaceuticals and bulk drugs at the industrial area of Ankleshwar in the State of Gujarat. Alembic Pharmaceuticals Ltd. is the appellant in the lead appeal before this Court. Darshak Private Ltd. merged with the appellant in 2002 pursuant to a scheme of amalgamation sanctioned by the High Court of Gujarat. Nirayu Private Ltd. was acquired by the appellant under a slump sale on 1-1-2008. Following this exercise, the manufacturing units of erstwhile Darshak Private Ltd. and Nirayu Private Ltd. have come to be known as API-I and API-II, respectively.

EIA Notification of 1994

6. The EIA Notification was issued by the MoEF on 27-1-1994, in exercise of its powers under Section 3(1) and clause (*v*) of Section 3(2) of the

Environment (Protection) Act, 1986 read with Rule 5(3)(*d*) of the Environment (Protection) Rules, 1986. The EIA notification stipulated that:

> "... on and from the date of publication of this notification in the Official Gazette, expansion or modernisation 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."

7. The EIA notification stipulated that any person who desired to undertake a new project, or the expansion or modernisation of an existing industry, listed in Schedule I shall submit an application to the Secretary, MoEF. Entry 8 of Schedule I includes industries engaged in manufacturing bulk drugs and pharmaceuticals. The application had to be accompanied by a project report including, inter alia, an EIA report and an environmental management plan prepared in accordance with the guidelines issued by the Union Government through the MoEF from time to time. The notification spelt out the procedure to be followed upon the submission of the application including an evaluation and assessment by a stipulated agency. Clause 3(*a*) which was (substituted on 4-5-1994) provided that:

> "... no construction work primarily or otherwise relating to the setting up of the project may be undertaken till the environmental and site clearances is obtained."

8. On 10-4-1997, the EIA Notification of 1994 was amended by making a public hearing mandatory for thirty categories of activities which required an EC. On 5-11-1998, the MoEF issued a circular recording that though the EIA Notification of 1994 was in effect since 27-1-1994, units covered by the notification had been set up without obtaining prior ECs. The GPCB had despite the advice of the MoEF allowed units to operate without valid ECs. In this backdrop, the Circular dated 5-11-1998 provided that:

> "Since number of such proposals are large in number and many of the units have not applied for environmental clearance genuinely out of ignorance it has been decided to consider their case for environmental clearance on merits. This will apply only to those proposals which are received in the Ministry till 31-3-1999. Simultaneously State Pollution Control Boards have also been advised to issue requisite notices to the units to apply for environmental clearance. In case of those units which have already started production, we may consider the proposals on merits and if necessary suggest additional mitigative measures. A formal environmental clearance will be issued in these cases after approval by the competent authority."

9. By a Circular dated 27-12-2000, the MoEF directed all State Pollution Control Boards to issue fresh notices to all defaulting units and extended the deadline to obtain ECs from 31-3-1999 to 30-6-2001. In spite of this, there

were delinquent units which had either failed to apply for an EC or had failed to complete the requirement of a public hearing before the extended date. By the Circular dated 14-5-2002, the deadline was extended to 31-3-2003. The circular stated that:

> "Keeping the foregoing in view, it has been decided to extend the deadline up to 31-3-2003 so that defaulting units could avail of this last and final opportunity to obtain ex post facto environmental clearance. This would apply to all such units, which had commenced construction activities/operations without obtaining prior environmental clearance in violation of the EIA Notification of 27-1-1994."

10. In terms of the circular, those defaulting units seeking an expansion were to earmark a separate fund for "eco-development measures including community development measures in Indian projects areas" on a graded scale linked to the investment in the project. This was indicated in a tabulated form which read thus:

A	Projects with investment up to Rs 100 crores	1% of the project cost with a minimum of Rs 50,000
B	Projects with investment beyond Rs 100 crores and up to Rs 1000 crores	0.5% of the project cost subject to a minimum of Rs 1 crore and a maximum of Rs 2.5 crores
C	Projects with investment exceeding Rs 1000 crores	0.25% of the project cost subject to a maximum of Rs 5 crores

Units which failed to comply with the extended deadline were to be proceeded against.

The challenge to the ex post facto Circular dated 14-5-2002

11. A petition was instituted under Article 226 of the Constitution by the first and second respondents in the present lead appeal before the High Court of Gujarat challenging the Circular dated 14-5-2002 and seeking the revocation of the clearances which were granted to the industrial units in question. The case was transferred to the Western Zonal Bench of NGT by the High Court of Gujarat on 21-4-2015. NGT by its judgment dated 8-1-2016[1] set aside the Circular dated 14-5-2002 and issued consequential directions which have been noted in the earlier part of this judgment. Unique Chemicals Ltd., the seventh respondent before NGT, preferred a review petition against the judgment of NGT which was dismissed. The affected industrial units and the MoEF are in appeal before this Court.

12. The issue to be adjudicated is whether in view of the requirement of a prior EC under the EIA Notification of 1994, a provision for an ex post facto EC to industrial units could be validly made by means of the Circular dated 14-5-2002.

1 *Rohit Prajapati* v. *Union of India*, Original Application No. 66 of 2015, order dated 8-1-2016 (NGT)

13. During the course of the submissions, Mr Kapil Sibal, learned Senior Counsel appearing on behalf of Alembic Pharmaceuticals Ltd. has urged the following submissions:

13.1. The issue is academic as both the units of the appellant have been granted an EC for subsequent expansion to a much higher capacity after conducting a public hearing and upon consideration of all material factors. The relevant details in support of the submission are thus:

Darshak Private Ltd. (API-I)

(*a*) An EC was granted on 14-5-2003 for a capacity of 15 MT per month;

(*b*) An EC was granted on 16-4-2008 for expansion of capacity from 15 MT per month to 25 MT per month; and

(*c*) An EC was granted on 31-1-2017 for a further expansion of capacity from 25 to 75 MT per month.

Nirayu Private Ltd. (API-II)

(*a*) An EC was granted on 14-5-2003 for a capacity of 47 MT per month; and

(*b*) An EC was granted on 20-12-2016 for an expanded capacity of 300 MT per month.

13.2. The EIA Notification of 1994 omits the expression "prior". This is contrasted with the EIA Notification dated 14-9-2006 which stipulates the requirement of a "prior" EC. While a prior EC is mandatory under the Notification dated 14-9-2006, it was not under the earlier Notification dated 27-1-1994.

13.3. Once an EC has been granted for a much larger capacity after conducting a prior public hearing, the question as to whether the first EC for a lesser capacity was valid, is of no significance. Since both the units have an EC for a larger capacity, the satisfaction for granting an EC for a lesser capacity would be subsumed.

13.4. The EIA Notification of 1994 did not apply to the two units of the appellant (API-I and API-II). Clause 8 of the Explanatory Note to the EIA Notification of 1994 provides that where a no-objection certificate ("NOC") from GPCB has been obtained before 27-1-1994, an EC is not required. In this context it has been submitted that:

(*a*) On 17-7-1992, GPCB granted an NOC to establish and manufacture to the manufacturing unit of API-I;

(*b*) On 29-5-1997 and 27-7-1998, GPCB granted an authorisation to operate under the Air (Prevention and Control of Pollution) Act, 1981 ("the Air Act") to API-I;

(*c*) On 11-10-1999, GPCB granted API-I an authorisation to operate under the Water (Prevention and Control of Pollution) Act, 1974 ("the Water Act");

(*d*) On 24-5-1985, GPCB granted API-II a consent order under the Water Act;

(*e*) On 9-10-1991, GPCB granted a site clearance certificate to API-II;

(*f*) On 12-5-1993, GPCB granted an NOC to API-II to establish and for the manufacture of drugs;

(*g*) On 23-9-1993 and 13-11-1999, GPCB granted a consent under the Water Act to API-II;

(*h*) On 14-12-2001, GPCB granted an authorisation to API-II to operate under the Hazardous Waste (Management and Handling) Rules, 1989 ("the Hazardous Waste Rules"); and

(*i*) On 1-9-1999, 14-12-2001 and 7-3-2008, GPCB granted a consolidated consent and authorisation to API-II.

13.5. A public hearing was not mandatory under the EIA Notification of 1994. Clause 4 of the Explanatory Note confers a discretion to call for a hearing in case of projects that may cause large-scale displacement or with severe environmental ramifications.

13.6. If the order of NGT prevails, the appellant would be prejudiced and suffer an irreparable loss. The appellant has made an investment of over Rs 293 crores and employed a labour force of over 1000 workers.

13.7. The first respondent who was the petitioner before NGT chose to target only the appellant and two others out of over ninety different entities which were granted similar clearances. This cherry picking of certain select units demonstrates the mala fide nature of the proceedings.

14. During the course of his submissions, Mr C.U. Singh, learned Senior Counsel appearing on behalf of United Phosphorus Ltd. has urged the following submissions:

14.1. The Circular dated 5-11-1998, by which the deadline for obtaining ECs under the EIA Notification of 1994 was extended to 30-6-2001 was not challenged. The Circular dated 5-11-1998 specifically noted that the State Pollution Control Board had despite the advice of the MoEF allowed units to operate without valid ECs.

14.2. United Phosphorus Ltd. had all requisite ECs that were granted by GPCB for the existing and expanded capacity. In this context it has been submitted:

(*a*) An EC was granted on 17-7-2003 for manufacturing Phorate and Terbuphose (300 MT per month combined) and Acephate (80 MT per month);

(*b*) An EC was granted on 15-4-2008 for the expansion of capacity for manufacturing pesticides and intermediate products. Production of Phorate and Terbuphose was increased from 300 MT per month to 500 MT per month, and production of Acephate was increased to 1000 MT per month;

(*c*) An EC was granted on 10-1-2020 for an enhanced capacity of 9546 MT per month;

14.3. The complainant, the first respondent in the lead appeal, attended the public hearing held on 16-1-2002 prior to the grant of an EC on 17-7-2003 and raised no objections.

14.4. If the order of NGT prevails, the appellant would be prejudiced and suffer an irreparable loss. The appellant has employed approximately 400 permanent and contract workers at its manufacturing unit.

14.5. The challenge by the first and second respondents was to the EIA Notification 1994 which did not apply to the manufacturing unit of the appellant. At the relevant time, the appellant was exempted from obtaining an EC since it had all requisite permissions. In this context it has been submitted:

(*a*) On 3-10-1992, GPCB granted an NOC to the appellant for setting up a manufacturing unit;

(*b*) On 17-11-1995 and 2-4-1996, GPCB granted NOCs for expansion and manufacturing additional products;

(*c*) On 27-8-2009, GPCB granted a consolidated consent and authorisation to the appellant's manufacturing unit;

(*d*) On 25-7-2012, GPCB issued an NOC for the expansion of the appellant's manufacturing unit; and

(*e*) On 11-5-2015 and 27-5-2017, GPCB granted a consolidated consent and authorisation for expanded operations.

15. Appearing for Unique Chemicals Ltd., Dr Abhishek Singhvi, learned Senior Counsel urged the following submissions:

15.1. NGT did not have the jurisdiction to entertain the petition filed by the first and second respondents in view of the decision of this Court in *Techi Tagi Tara* v. *Rajendra Singh Bhandari*[3].

15.2. The EC granted in 2007 superseded the earlier EC granted in 2002. Therefore, the question of validity of the earlier EC does not arise. In this context it has been submitted:

(*a*) An EC was granted on 23-12-2002 for a capacity of 78.02 MT per month for manufacturing bulk drugs and intermediates;

(*b*) An EC was granted on 8-8-2007 for an increase in manufacturing capacity from 78.02 MT per month to 116.12 MT per month; and

(*c*) An EC was granted on 30-6-2018 for an increase in the manufacturing capacity to 290 MT per month. On 10-4-2019, the above EC was amended allowing an increase in the number of products permitted to be manufactured by the appellant.

15.3. The ex post facto clearance granted to the appellant cannot be set aside by the order of NGT in terms of the decision of this Court in *Goa Foundation (1)* v. *Union of India*[4], where 95 industrial projects were accorded ex post facto

3 (2018) 11 SCC 734
4 (2005) 11 SCC 559

clearances in terms of the Circular dated 14-5-2002. Accordingly, no question of closing down the manufacturing units of the appellants can arise.

15.4. The requirement of an ex post facto public hearing was introduced by an amendment in 1997 to the EIA Notification of 1994. The legality of an ex post facto public hearing has been upheld by this Court in *Lafarge Umiam Mining (P) Ltd.* v. *Union of India*[5].

15.5. In various cases where there has been a violation of law, this Court has not ordered the closure considering the significant investment and expansion undertaken by the industry. In *Electrotherm (India) Ltd.* v. *Patel Vipulkumar Ramjibhai*[6], this Court did not order closure of the plant since a significant expansion had already taken place and the industry was functioning.

15.6. If the order of NGT prevails, the appellant would be prejudiced and suffer an irreparable loss. The appellant has employed approximately 400 employees at its manufacturing unit.

15.7. The EIA Notification 1994 did not apply to the manufacturing unit of the appellant. The manufacturing unit of the appellant was exempt from obtaining an EC as it had all the requisite permissions. In this context it has been submitted:

(*a*) On 30-9-1995, GPCB issued an "air consent order" under the Air Act;

(*b*) On 9-1-1996, GPCB issued an authorisation under the Hazardous Waste Rules;

(*c*) On 16-4-1996, GPCB issued a "water consent order" under the Water Act;

(*d*) On 15-4-2009, GPCB granted a consolidated consent and authorisation to the manufacturing unit of the appellant;

(*e*) On 11-6-2010 and 26-6-2012, GPCB amended the consolidated consent and authorisation granted to the appellant on 13-4-2009;

(*f*) On 30-5-2011, GPCB granted consent to set up a gas-based power generation plant having a capacity of 400 kW at the manufacturing unit of the appellant;

(*g*) On 2-11-2013, GPCB granted a fresh consolidated consent and authorisation to the manufacturing unit of the appellant; and

(*h*) On 25-1-2019 and 25-10-2019, GPCB granted a fresh and revised consolidated consent and authorisation, respectively for an increase in the number of products permitted to be manufactured at the manufacturing unit of the appellant.

16. Appearing for the first and second respondents, Mr Siddharth Seem, learned counsel has urged the following submissions before this Court:

5 (2011) 7 SCC 338
6 (2016) 9 SCC 300

16.1. The Circular dated 14-5-2002 is illegal because environmental jurisprudence does not recognise any concept of ex post facto clearances. Any ex post facto approval is void and the benefit of the circular cannot be given to such an industry. In this regard, reliance was placed upon the decision of this Court in *Common Cause* v. *Union of India*[7].

16.2. The Circular dated 14-5-2002 does not mention its source or authority of law. The source of the circular is not traceable to Section 3 of the Environment (Protection) Act, 1986 because the circular does not protect or improve the quality of the environment. The circular allows defaulters to get ex post facto clearances and does not encourage compliance with the law.

16.3. The Comprehensive Environmental Pollution Index Report by the Central Pollution Control Board indicates that the air, water and soil parameters in and around the industrial area of Ankleshwar in the State of Gujarat, where the three industrial units are located, are among the most critical in India.

16.4. Even if this Court were to hold that the closure of the industries should not be ordered, compensation should be directed to be paid by them for restoration of the environment. These industries have brazenly operated for years without environmental clearances.

17. The rival submissions fall for our consideration.

18. We first address the challenge to the jurisdiction of NGT to strike down rules or regulations made under the Environment (Protection) Act, 1986. In *T.N. Pollution Control Board* v. *Sterlite Industries (India) Ltd.*[8] ("*Sterlite*") this Court analysed the adjudicatory functions which have been entrusted to NGT under the National Green Tribunal Act, 2010 ("the NGT Act"). R.F. Nariman, J. speaking for a two-Judge Bench held that while exercising its jurisdiction under Section 16, NGT cannot strike down rules or regulations made under the Environment (Protection) Act, 1986. In coming to this conclusion, the Court relied on the decision in *BSNL* v. *TRAI*[9], where the appellate power contained in Section 14 of the Telecom Regulatory Authority of India Act, 1997 ("the TRAI Act") was interpreted. After adverting to this decision, R.F. Nariman, J. concluded that: (*T.N. Pollution Control Board case*[8], SCC p. 524, para 43)

> "*43.* … NGT has no general power of judicial review akin to that vested under Article 226 of the Constitution of India possessed by the High Courts of this country."

19. While placing reliance on the above decision, Mr A.N.S. Nadkarni, learned Additional Solicitor General made an attempt to demonstrate that the power to issue the Circular dated 14-5-2002 that extended the deadline for defaulting units to avail of an ex post facto clearance until 30-3-2003 could well be traceable to Section 3 of the Environment (Protection) Act, 1986. Section 3, to the extent relevant, provides thus:

> "**3.** ***Power of Central Government to take measures to protect and improve environment.***—(1) Subject to the provisions of this Act, the Central

7 (2017) 9 SCC 499
8 (2019) 19 SCC 479
9 (2014) 3 SCC 222

> Government shall have the power 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."

20. Section 3(1) is an enabling provision for the Central Government to undertake 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. This limb of the submission of the Additional Solicitor General is crucial to the issue as to whether NGT has exceeded its jurisdiction since the decision in *Sterlite*[8] holds that NGT, while exercising its appellate jurisdiction, "cannot strike down rules or regulations made *under this Act*". In the present case, to demonstrate that NGT did not have the jurisdiction to strike down the Circular dated 14-5-2002, it was urged that the circular was issued by the MoEF pursuant to its powers under Section 3 of the Environment (Protection) Act, 1986. There is an inherent difficulty in accepting the submission. Before this Court, the Union of India has not pleaded the case that the Circular dated 14-5-2002 is a measure which is traceable to the provisions of Section 3. On the contrary, in its pleadings the Union of India construed it as a "purely administrative decision". Ground (*iii*) in Para 3 of the memo of appeal states the position of the Union Government:

> "Because the Hon'ble Tribunal failed to appreciate that after the EIA Notification 1994 the opportunity to seek ex post facto environmental clearance was given to industries in background of far-reaching impact in terms of direct loss of livelihood of the employees working in the units which also supply inputs to other units and their indirect employment. *It was submitted to the Hon'ble High Court of Gujarat that issuance of Circular dated 14-5-2002, based on which environmental clearance was given, was purely an administrative decision before taking stringent action.*" (emphasis supplied)

21. The omission in the appeal to make any attempt to sustain the Circular dated 14-5-2002 with reference to the provisions of Section 3 of the Environment (Protection) Act, 1986 is significant. For an action of the Central Government to be treated as a measure referable to Section 3 it must satisfy the statutory requirement of being necessary or expedient "for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environment pollution". The Circular dated 14-5-2002 in fact does quite the contrary. It purported to allow an extension of time for industrial units to comply with the requirement of an EC. The EIA Notification dated 27-1-1994 mandated that an EC has to be obtained before embarking on a new project or expanding or modernising an existing one. The EIA Notification of 1994 has been issued under the provisions of the Environment (Protection) Act, 1986 and the Environment Protection Rules, 1986, with the

8 *T.N. Pollution Control Board* v. *Sterlite Industries (India) Ltd.*, (2019) 19 SCC 479

object of imposing restrictions and prohibitions on setting up of new projects or expansion or modernisation of existing project. The measures are based on the precautionary principle and aim to protect the interests of the environment. The Circular dated 14-5-2002 allowed defaulting industrial units which had commenced activities without an EC to cure the default by an ex post facto clearance. Being an administrative decision, it is beyond the scope of Section 3 and cannot be said to be a measure for the purpose of protecting and improving the quality of the environment. The circular notes that there were defaulting units which had failed to comply with the requirement of obtaining an EC as mandated. The circular provided for an extension of time and inexplicably introduced the notion of an ex post facto clearance. In effect, it impacted the obligation of the industrial units to be in compliance with the law. The concept of ex post facto clearance is fundamentally at odds with the EIA Notification dated 27-1-1994. The EIA Notification of 1994 contained a stipulation that any expansion or modernisation of an activity or setting up of a new project listed in Schedule I "shall not be undertaken in any part of India unless it has been accorded environmental clearance". The language of the notification is as clear as it can be to indicate that the requirement is of a prior EC. A mandatory provision requires complete compliance. The words "shall not be undertaken" read in conjunction with the expression "unless" can only have one meaning: before undertaking a new project or expanding or modernising an existing one, an EC must be obtained. When the EIA Notification of 1994 mandates a prior EC, it proscribes a post activity approval or an ex post facto permission. What is sought to be achieved by the administrative Circular dated 14-5-2002 is contrary to the statutory Notification dated 27-1-1994. The Circular dated 14-5-2002 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 14-5-2002. 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 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.

22. Mr Kapil Sibal, learned Senior Counsel appearing on behalf of Alembic Pharmaceuticals Ltd. sought to urge that the EIA Notification dated 27-1-1994 contains an omission of the expression "prior" and contrasted this with the EIA Notification dated 14-9-2006 which stipulates the requirement of a "prior" EC. This, in his submission is an indicator that a prior EC is mandatory under the Notification dated 14-9-2006 but was not so under the earlier Notification dated 27-1-1994. This interpretation was not supported by Mr A.N.S. Nadkarni, learned Additional Solicitor General who categorically submitted that the

requirement under the Notification dated 27-1-1994 was of a prior EC. We are unable to accept the submission of Mr Kapil Sibal.

22.1. The terms of the EIA Notification dated 27-1-1994 leave no manner of doubt that a prior EC was mandated before a new project was commenced or before undertaking any expansion or modernisation of an existing project. The absence of the expression "prior" in the EIA Notification dated 27-1-1994 makes no difference since the words "shall not be undertaken … unless" postulate the requirement of a prior EC. Speaking for a two-Judge Bench of this Court in *Common Cause* v. *Union of India*[7] ("*Common Cause*"), Madan B. Lokur, J. rejected the submission which was urged on behalf of mining leaseholders that: (SCC p. 549, para 108)

> "*108*. … 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."

22.2. Disagreeing with the submission, the Court held: (*Common Cause case*[7], SCC p. 553, para 125)

> "*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*[10] *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." (emphasis supplied)

23. 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 27-1-1994. It is, as the judgment in *Common Cause*[7] 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,

7 (2017) 9 SCC 499
10 *M.C. Mehta* v. *Union of India*, (2004) 12 SCC 118

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.

24. In order to enable the Court to assess the status of compliance, the material which has been produced on the record by: (*i*) Alembic Pharmaceuticals Ltd.; (*ii*) United Phosphorous Ltd.; and (*iii*) Unique Chemicals Ltd. has been compiled in a tabulated form for each of the three industries. For Alembic Pharmaceuticals Ltd., the data for its two industrial units — Darshak Private Ltd. (API-I) and Nirayu Private Ltd. (API-II) — has been analysed separately. For each of the three industries, Table A below consists of the list of permissions, consents and authorisations obtained by the industry from various authorities. Table B contains a list of ECs which were granted from time to time to each industrial unit. The position as tabulated below is based on the material which has been disclosed on the record of these proceedings:

Table A: List of permissions, consents and authorisations granted to Alembic Pharmaceuticals Ltd.

Darshak (API-I)	
Date	*Permission/Consent/Authorisation Granted*
17-7-1992	GPCB issued a no-objection certificate to establish an industrial unit for the manufacture of the following items at API-I: (*i*) Ciprofloxacin (1.25 MT pm); and (*ii*) Norfloxacin (2.5 MT pm)
11-6-1997	GPCB granted no-objection certificate for manufacturing additional items at API-I
29-5-1997	GPCB issued air consent order authorising to operate API-I
11-7-1997, 12-7-1997 and 27-7-1998	GPCB granted no-objection certificate for manufacturing of additional items at API-I
31-3-1999	GPCB issued air consent order authorising to operate API-I
11-10-1999	GPCB issued water consent order authorising to operate API-I
Between 27-9-2002 — 23-12-2011	GPCB issued various consents under the Air Act, Water Act and Hazardous Waste Rules.
Nirayu Private Ltd. (API-II)	
Date	*Permission/Consent/Authorisation Granted*
12-7-1984	Factory licence was issued in favour of Nirayu Private Ltd.
24-5-1985	GPCB issued water consent order authorising to operate API-II
9-10-1991	GPCB issued a site clearance certificate to establish an industrial unit and manufacture the following items at API-II: (*i*) CIMC chloride (2000 kg pm); and (*ii*) Cloxacillin sodium (500 kg pm)

12-5-1993	GPCB granted a no-objection certificate to establish an industrial unit and manufacture the following items: (*i*) Acetone thiosemicarbazone (2 MT pm); (*ii*) 2 Mercapta (5 MT pm); (*iii*) Methoxy orthoxymethyl chloride (0.3 MT pm); and (*iv*) Solvent ether (7 MT pm)
1-9-1993	GPCB issued authorisation to operate API-II under the Hazardous Waste Rules
23-9-1993	GPCB issued water consent order authorising to operate API-II
4-12-1995	GPCB granted no-objection certificate for manufacturing additional items at API-II
4-10-1996 and 17-4-1998	GPCB issued air consent order to operate API-II
1-9-1999	GPCB granted consolidated consent and authorisation to operate API-II
12-11-1999	GPCB issued water consent order to operate API-II
14-12-2001	GPCB issued authorisation to operate API-II under the Hazardous Waste Rules
Between 27-9-2002 — 6-1-2015	GPCB issued various consents under the Air Act, Water Act and Hazardous Waste Rules.

Table B: List of environmental clearances granted to Alembic Pharmaceuticals Ltd.

Darshak (API-I)			
Date of Application	*Date of Public Hearing*	*EC for Expansion (Quantity)*	*Date EC Granted*
21-7-2001	30-1-2002	Manufacturing of various bulk drugs and intermediate products with a total capacity of 15 MT pm	14-5-2003 as per the 1994 EIA notification
8-12-2006	9-10-2007	Expansion of total capacity of bulk drugs from 15 to 25 MT pm	16-4-2008 as per the 2006 EIA notification
16-9-2015	12-6-2015	Expansion of total capacity of active pharmaceutical ingredients from 25 to 75 MT pm	31-1-2017 as per the 2006 EIA notification
Nirayu Private Ltd. (API-II)			
Date of Application	*Date of Public Hearing*	*EC for Expansion (Quantity)*	*Date EC Granted*
20-7-2001	30-1-2002	Manufacturing of various bulk drugs and intermediate products	14-5-2003 as per the 1994 EIA notification

		with a total capacity of 47 MT pm	
28-3-2016	12-6-2015	Expansion of total capacity of active pharmaceutical ingredients and intermediates from 47 to 300 MT pm	20-12-2016 as per the 2006 EIA notification

Table A: List of permissions, consents and authorisations granted to United Phosphorus Ltd.

Unit No. 2 — Plots Nos. 3405 and 3406

Date	*Permission/Consent/Authorisation Granted*
31-1-1992	Gujarat Industrial Development Corporation granted land to the appellant to establish and run Unit No. 2
9-3-1992	GPCB issued no-objection certificate for operation of Unit No. 2 in relation to manufacturing of various products
3-10-1992	GPCB issued no-objection certificate to set up a unit to manufacture the following items at Unit No. 2: (*i*) Carbendazim; (*ii*) Quinalphos; and (*iii*) Paraquat
1993	Unit No. 2 commenced manufacturing activities
17-11-1995	GPCB granted no-objection certificate for expansion of Unit No. 2 for manufacturing of two additional products — Phorate and Terbuphose (300 MT pm combined)
2-4-1996	GPCB granted no-objection certificate for expansion of Unit No. 2 for the manufacture of Acephate (80 MT per month)
27-8-2009	GPCB granted a consolidated consent and authorisation to Unit No. 2
25-7-2012	GPCB issued consent to establish (NOC) for expansion of Unit No. 2
11-5-2015 and 27-4-2017	GPCB granted a consolidated consent and authorisation for the expanded operations

Table B: List of environmental clearances granted to United Phosphorus Ltd.

Unit No. 2 — Plots Nos. 3405 and 3406

Date of Application	*Date of Public Hearing*	*EC for Expansion (Quantity)*	*Date EC Granted*
21-8-2002	16-1-2002	Manufacturing of Phorate and Terbuphose (300 MT pm combined) and Acephate (80 MT per month)	17-7-2003 as per EIA Notification of 1994
20-10-2007	-	Expansion of pesticides and intermediate	15-4-2008 as per EIA Notification of 2006

a			products — Production of Phorate and Terbuphose to be increased to 500 MT pm combined — Production of Acephate to be increased to 1000 MT pm	
b	-	-	Enhanced capacity of 9546 MT per month (as per written submissions)	10-1-2020 as per EIA Notification of 2006

c *Table A: List of permissions, consents and authorisations granted to Unique Chemicals Ltd.*

Unit at Plot No. 5

Date	*Permission/Consent/Authorisation Granted*
14-8-1995	GPCB issued a no-objection certificate to establish and run a unit (site clearance) at Plot No. 5
d 30-9-1995	GPCB issued air consent order authorising to operate unit at Plot No. 5
25-12-1995	GPCB issued a no-objection certificate to set up and manufacture the following items at the unit at Plot No. 5: (*i*) Dichlotofenance sodium (6 MT pm); (*ii*) Nifedipine (2 MT pm); (*iii*) Indolinone (6.9 MT pm); and (*iv*) Pefloxacin (3 MT pm)
9-1-1996	GPCB issued authorisation under the Hazardous Waste Rules
e 16-4-1996	GPCB issued water consent order authorising to operate unit at Plot No. 5
24-4-1996	Unit at Plot No. 5 commenced manufacturing activities
15-4-2009	GPCB granted a consolidated consent and authorisation to the unit at Plot No. 5
11-6-2010 and 26-6-2012	GPCB amended the consolidated consent and authorisation to the unit at Plot No. 5 granted on 15-4-2009
f 30-5-2011	GPCB granted no-objection certificate to set up a gas-based power generation plant of a capacity of 400 kW at the unit at Plot No. 5
2-11-2013	GPCB granted a fresh consolidated consent and authorisation to the unit at Plot No. 5 for manufacturing of bulk drugs and intermediates
1-7-2016	The appellant was certified as a zero liquid discharge unit
g 25-1-2019	GPCB granted a new consolidated consent and authorisation to the unit at Plot No. 5
25-10-2019	GPCB issued a revised consolidated consent and authorisation for increase in the number of products that were permitted to be manufactured at the unit at Plot No. 5

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Table B: List of environmental clearances granted to Unique Chemicals Ltd.
Unit at Plot No. 5

Date of Application	*Date of Public Hearing*	*EC for Expansion (Quantity)*	*Date EC Granted*
30-6-2001	25-1-2002	Total capacity 78.02 MT pm of bulk drugs and intermediates. Manufacturing of: (*i*) Diclofenac sodium intermediates and derivates (40 MT pm); (*ii*) Nifedipine and its intermediates (2 MT pm); (*iii*) Indelinone (7 MT pm); (*iv*) Pefloxacin and its intermediates (3 MT pm); (*v*) 2 methyl imldazole (15 MT pm); (*vi*) Phentolamine HCL (10 MT pm); (*vii*) Diltazem HCL (1 MT pm); and (*viii*) other co-products	23-12-2002 as per EIA Notification 1994
12-1-2007	Exempt — proposed project located in notified industrial area	For an increase in manufacturing of bulk drugs and intermediates from a total capacity from 78.02 MT pm to 116.12 MT pm. For an increase in manufacturing of co-products from a total capacity of 103 MT pm to 297 MT pm. For setting up a captive power plant with 1.3 MW capacity.	8-8-2007 as per EIA Notification 2006
16-3-2018	Exempt — proposed project located in notified industrial area	For an increase in manufacturing of bulk drugs and intermediates from a total capacity from 78.02 MT pm to 290 MT pm by setting up of synthetic	30-6-2018 as per EIA Notification 2006

		organic chemicals manufacturing plant	
		Amendment to the EC dated 30-6-2018 increasing the number of products permitted to be manufactured by the appellant at the unit at Plot No. 5	10-4-2019 as per the 2006 EIA notification

25. The position that emerges from the record is that in the case of all the three industries, ECs were applied for nearly a decade after the introduction of the EIA Notification 1994. In the meantime, the industries had been set up and had commenced production. GPCB issued a notice to United Phosphorus Ltd. on 30-4-2001 directing them to apply for an EC. On 9-12-2000, GPCB issued a notice to Darshak Private Ltd. (API-I) and Nirayu Private Ltd. (API-II) directing them to apply for and obtain an EC in accordance with the EIA Notification of 1994. Darshak Private Ltd. (API-I) of Alembic Pharmaceuticals Ltd., applied for an EC on 21-7-2001 which it was granted on 14-5-2003. Subsequent applications for expansion of capacity were submitted on 8-12-2006 and 16-9-2015 for which ECs were granted on 16-4-2008 and 31-1-2017, respectively. Nirayu Private Ltd. (API-II), initially applied for an EC on 20-7-2001 and the EC was granted on 14-5-2003. The application for the grant of an EC for an extended capacity was submitted on 28-3-2016 and the EC was granted on 20-12-2016. In the case of United Phosphorous Ltd., the initial EC was sought on 21-8-2002 and it was granted on 17-7-2003. An application for expansion of capacity was submitted on 20-10-2007 and it was granted on 15-4-2008. An EC for the further expansion of capacity was granted on 10-1-2020. In the case of Unique Chemicals Ltd., the initial application for an EC was submitted on 30-6-2001 and it was granted on 23-12-2002. Subsequent applications for expansion in capacity were submitted on 12-1-2007 and 16-3-2018 for which ECs were granted on 8-8-2017 and 30-6-2018, respectively. An amendment to the EC dated 30-6-2018 was granted on 10-4-2019. The documents disclosed by the three industries demonstrate that no ECs as mandated by the EIA Notification of 1994 were sought before the commencement or expansion of operations. The terms of the EIA Notification of 1994 envisage that expansion or modernisation of any activity (if the pollution load is to exceed the existing one) or a new project listed in Schedule I shall not be undertaken unless it has been granted an EC. In the present case, all the three industries continued to operate in the teeth of the EIA Notification 1994.

26. The learned counsel appearing for the three industries have relied on a range of additional measures adopted, such as the installation of latest pollution capturing technologies, recent consents from GPCB and certification of "zero

discharge" units. These measures adopted subsequently will not cure the failure to obtain ECs before the projects commenced operation. These measures are simply to ensure compliance with the pollution standards and requirements of law that exist as of date. These submissions have no bearing on determining whether the industrial units were in the past operating in compliance with the requisite environmental standards. These measures cannot act as correctives for historical wrongs and cannot compensate for the damage already caused to the environment as a result of manufacturing activities which were carried on without ECs.

27. The learned counsel for the three industries urged that the EIA Notification of 1994 did not apply to their manufacturing units as they were covered by the exemption in terms of Clause 8 of the Explanatory Note. The issue which needs to be considered is whether the industries were covered by the exemption and were not required to obtain ECs. Clause 8 of the Explanatory Note to the EIA Notification of 1994 states thus:

> "8. *Exemption for projects already initiated*
>
> For projects listed in Schedule I to the notification in respect of which the required land has been acquired and all relevant clearances of the State Government including NOC from the respective State Pollution Control Board 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."

28. Before the exemption contained in Clause 8 applies, it was necessary for projects listed in Schedule I to obtain all relevant clearances from the State Government including an NOC from the State Pollution Control Board. It was in other words not sufficient to merely obtain an NOC from the State Pollution Control Board. The exemption which was carved out in the Explanatory Note was to ensure that activities which had received all required clearances at the State level, following the acquisition of land should be protected. In fact, many of them would also involve the commencement of production prior to 27-1-1994. The Explanatory Note stated that where production had not yet commenced, the IAA would have to be intimated. In order to be covered within the scope of the exemption, the burden is on the industry to demonstrate before this Court that they fulfilled conditions spelt out in Clause 8 of the Explanatory Note. The EIA Notification 1994 is a significant instrument in effectuating the implementation of the precautionary principle. The burden lies on the project proponent who seeks to alter the state of the environment or to impact on the environment to demonstrate that the terms on which an exemption has been granted have been fulfilled. An exemption must be construed in its strict sense according to its plain terms. None of the three industries before the Court have furnished an exhaustive catalogue of what were the "relevant clearances from the State Government" that had to be obtained under the provisions of the law as it then stood.

29. With this background, we will now assess individually whether the industries in question qualified for the exemption provided by Clause 8 of the Explanatory Note.

1. ***Alembic Pharmaceuticals Ltd.***

(*i*) ***Darshak Private Ltd. (API-I)***

30. The material produced on the record indicates that on 17-7-1992, GPCB had issued an NOC to establish an industrial unit and manufacture two pharmaceuticals products. However, the NOC for manufacturing additional items was issued only on 11-6-1997 subsequent to the EIA Notification dated 27-1-1994. The NOC dated 17-7-1992 issued by GPCB clearly states:

> "We would like to inform you that the proposed location for this industrial plant is acceptable to us *provided that you will implement the following measure for the prevention and control of environmental pollution*:
>
> (A)-(C) * * *
>
> (D) Adequate arrangement for the management and handling of hazardous waste shall be made:
>
> IMPORTANT NOTE
>
> (1)-(2) * * *
>
> (3) The applicant/entrepreneur *shall be required to obtain the following from the Board prior to commencement of production*:
>
> (*a*) Consent under the Water (Prevention and Control of Pollution) Act, 1974.
>
> (*b*) Consent under the Air (Prevention and Control of Pollution) Act, 1981.
>
> (*c*) Authorisation under the Hazardous Waste (Management and Handling) Rules, 1989 under the Environment (Protection) Act, 1986." (emphasis supplied)

31. GPCB while granting the NOC to establish an industrial unit required the project proponent to undertake certain measures for the prevention and control of environmental pollution including installation of treatment plants, discharge of effluents within prescribed limits and the creation of a green belt around the industrial unit. One of the points under the "Important Note" states that the project proponent "shall be required to obtain" from the Board "prior to commencement of production" requisite consents and authorisations under the Air Act, Water Act and Hazardous Waste Rules. The language used in the NOC makes it clear that obtaining consents and authorisations under various environment related legislations was a mandatory precondition and not merely directory. In the present case, the authorisation under the Air Act was issued only on 29-5-1997 and 31-3-1999. The authorisation under the Water Act was issued on 11-10-1999. Clause 8 of the Explanatory Note states that for the exemption to apply, it was necessary for projects listed in Schedule I to have

obtained all relevant clearances from the State Government including an NOC from the State Pollution Control Board. The evidence produced on the record by Darshak Private Ltd. indicates that it did not have the requisite consents and authorisations under the Air Act, Water Act and Hazardous Waste Rules prior to the EIA Notification 1994. Many of the consents and permissions were obtained subsequently and not prior to the EIA Notification of 1994. Accordingly, the manufacturing unit of Darshak Private Ltd. (API-I) is not covered under the exemption under Clause 8 of the Explanatory Note to the EIA Notification of 1994.

(ii) Nirayu Private Ltd. (API-II)

32. A factory licence was issued on 12-7-1984 to API-II. On 24-5-1985, GPCB issued a water consent order under the Water Act. This was valid only for the manufacture of anaesthetic Ether. GPCB issued a site clearance certificate on 9-10-1991 for the manufacture of CIMC Chloride and Cloxacillin Sodium. An NOC to establish an industrial unit and to manufacture products was issued on 12-5-1993 and one for expansion on 4-12-1995. It is relevant to note that the NOC dated 12-5-1993 issued by GPCB to Nirayu Private Ltd. (API-II) is worded in exactly the same manner as the NOC dated 17-7-1992 issued to Darshak Private Ltd. (API-I). The NOC dated 12-5-1993 issued to Nirayu Private Ltd. (API-II) also mandates that the project proponent "shall be required to obtain" from the Board "prior to commencement of production" requisite consents and authorisations under the Air Act, Water Act and Hazardous Waste Rules from GPCB. In the case of Nirayu Private Ltd. (API-II), authorisation under the Hazardous Waste Rules was issued on 1-9-1993. Consent to operate API-II under the Water Act was issued on 12-11-1999. GPCB issued consolidate consent and authorisation to operate API-II on 14-12-2010. From the above narration which is based on the disclosures made by Nirayu Private Ltd., it is evident that all consents and permissions had not been obtained prior to the EIA Notification of 1994. Accordingly, the manufacturing unit of Nirayu Private Ltd. (API-II) is not covered under the exemption under Clause 8 of the Explanatory Note to the EIA Notification of 1994.

2. United Phosphorous Ltd.

33. On 31-1-1992, Gujarat Industrial Development Corporation granted land to the appellant to establish and run its unit. On 9-3-1992 and 3-10-1992, GPCB issued an NOC for the operation of the unit. The unit commenced manufacturing in 1993. It is relevant to note that the NOC dated 3-10-1993 also mandates that the project proponent "shall be required to obtain" from the GPCB "prior to commencement of production" requisite consents and authorisations under the Air Act, Water Act and Hazardous Waste Rules. United Phosphorous Ltd. has not disclosed the dates on which it received authorisations under the relevant environmental legislation. It has placed on record a consolidated consent and authorisation that was issued much later on

27-8-2009 under the Air Act, Water Act and Hazardous Waste (Management, Handling and Transboundary Movement) Rules, 2008. The disclosures which have been made are patently incomplete. No material has been produced to indicate that all relevant clearances from the State Government including the NOC from GPCB had been obtained prior to the EIA Notification 1994. Accordingly, they cannot be granted the benefit of the exemption under Clause 8 of the Explanatory Note to the EIA Notification of 1994.

3. ***Unique Chemicals Ltd.***

34. The material produced on the record indicates that GPCB issued an NOC to establish and run the manufacturing unit on 14-8-1995. It is evident from the Table enlisting the list of relevant permissions, consents and authorisations that all permissions were received after the EIA Notification 1994 was issued. Clearly, Unique Chemicals Ltd. is not entitled to the benefit of the exemption contained in Clause 8 of the Explanatory Note to the EIA Notification 1994.

35. From the material placed on the record by the industries, it becomes evident that there has been a gross abdication of responsibility by all the three industries in terms of obtaining timely consents and authorisations from the GPCB. There exists a distinction between obtaining relevant clearances and consents from the State Pollution Control Board and obtaining an environmental clearance in accordance with the procedure laid down under the EIA Notification of 1994. A consent order issued by the State Pollution Control Board allows an industry to operate within the prescribed emission norms. However, the consent orders do not account for the social cost and impact of undertaking an industrial activity on the environment and its surroundings. A holistic analysis of the environmental impact of an industrial activity is only accounted for once all the steps listed out in EIA Notification of 1994 are followed. The purpose of setting in place specific requirements such as public hearing, screening, scoping and appraisal is to foster deliberative decisions and protect environmental concerns. The detailed process listed out in the EIA Notification of 1994 for obtaining an EC allows for minimising the adverse environmental impact of any industrial activity and improving the quality of the environment. One must adopt an ecologically rational outlook towards development. Given the social and environmental impacts of an industrial activity, environment compliance must not be seen as an obstacle to development but as a measure towards achieving sustainable development and intergenerational equity.

36. We have therefore come to the conclusion that none of the three industries were entitled to the benefit of the exemption contained in Clause 8 of the Explanatory Note to the EIA Notification of 1994.

37. 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 14-5-2003 in the case of Alembic Pharmaceuticals Ltd., 17-7-2003 in the case of United Phosphorous Ltd., and 23-12-2002 in the case of Unique Chemicals Ltd. 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 ("CEPI") 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[11]. In the Interim Assessment of CEPI for 2011, the Report indicates similar critical figures[12] of pollution in the Ankleshwar area. The CEPI scores for 2013[13] and 2018[14] 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.

38. 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 5-11-1998 permitting applications for ECs to be filed by 31-3-1999, which was extended subsequently to 30-6-2001. On 14-5-2002, the deadline was extended until 31-3-2003 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 (1)* v. *Union of India*[4]. Fourth, though in the context of the facts of the case, this Court in *Lafarge Umiam Mining (P) Ltd.* v. *Union of India*[5] ("*Lafarge*") has upheld the decision to grant ex post facto clearances with respect to limestone mining projects in the State of Meghalaya. In *Lafarge*[5], 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

11 CEPI score — 88.50
12 CEPI score — 85.75
13 CEPI score — 80.93
14 CEPI score — 80.21
4 (2005) 11 SCC 559
5 (2011) 7 SCC 338

adopted a due diligence approach in reassuring itself through reports regarding the environmental impact of the project. S.H. Kapadia, C.J. speaking for the three-Judge Bench observed: [*Lafarge Umiam Mining (P) Ltd. case*[5], SCC p. 380, para 119]

> "*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 utilisation 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-recognised 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 the decision-maker has 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." (emphasis supplied)

39. After adverting to the decision in *Lafarge*[5], another Bench of three learned Judges of this Court in *Electrotherm (India) Ltd.* v. *Patel Vipulkumar Ramjibhai*[6], dealt with the issue of whether an EC granted for expansion to the appellant without holding a public hearing was valid in law. Uday Umesh Lalit, J. speaking for the Bench held thus: (*Electrotherm case*[6], SCC p. 312, para 19)

> "*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."

40. 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: (*Electrotherm case*[6], SCC p. 312, para 20)

> "*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

5 *Lafarge Umiam Mining (P) Ltd.* v. *Union of India*, (2011) 7 SCC 338
6 *Electrotherm (India) Ltd.* v. *Patel Vipulkumar Ramjibhai*, (2016) 9 SCC 300

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)

41. 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 14-5-2003 (in the case of Alembic Pharmaceuticals Ltd.), 17-7-2003 (in the case of United Phosphorous Ltd.), and 23-12-2002 (in the case of Unique Chemicals Ltd.). In addition, all the three units have made infrastructural investments and employed significant numbers of workers in their industrial units.

42. 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 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 non-compliance. 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 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.

43. 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 Ltd., United Phosphorous Ltd. and Unique Chemicals Ltd. 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 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 NGT dated 8-1-2016[1] insofar as it directed the revocation of the ECs and closure of the industries as well as the order in review dated 17-5-2016. Pending application(s), if any, shall stand disposed of.

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1 *Rohit Prajapati* v. *Union of India*, Original Application No. 66 of 2015, order dated 8-1-2016 (NGT)