BEFORE THE NATIONAL GREEN TRIBUNAL

WESTERN ZONE BENCH AT PUNE

ORIGINAL APPLICATION NO. 41 OF 2022

IN THE MATTER OF:

Abhay Pandurang Desai ....APPLICANT

Versus

State of Maharashtra & Ors. ....RESPONDENTS

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THROUGH

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Place:

Date: 10.07.2023

BEFORE THE NATIONAL GREEN TRIBUNAL

WESTERN ZONE BENCH AT PUNE

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REJOINDER ON BEHALF OF THE APPLICANT IN RESPONSE TO JOINT COMMITTEE REPORT

Most Respectfully Showeth:

1. That the Applicant has by above titled Original Application 41 of 2022 filed under Sections 15 and Section 17(3) read with Section 20 of the National Green Tribunal Act, 2010, sought restitution of environment including agricultural lands, river Kalane, and other water resources which are damaged and polluted due to breach of mine-wall on southern side of Iron Ore mine (hereinafter referred to as 'the impugned iron ore mine') located on Sr. No. 57/1 to 57/4 of Village Kalane, Taluka Dodamarg, District Sindhudurg, Maharashtra, which is operated by Respondent No. 6 M/s Minerals and Metals.
2. The said mine-wall breach occurred on 29.07.2021 and led to outpour of massive quantities of toxic mining debris and waste water which completely destroyed agricultural and horticultural lands located on the southern side of the impugned iron ore mine in addition to polluting water streams in the area.
3. It is submitted that vide order dated 5.09.2022, this Hon'ble Tribunal was pleased to constitute a Joint Committee and direct them to conduct joint inspection and submit a factual and action taken report with regard to assessment of damage caused to environment. Accordingly, the Joint Committee has submitted a Report in compliance with Order dated 5.09.2022, which observes significant damage caused to local environment resulting in ecological pollution and degradation.

4. The Applicant submits that the Joint Committee after carrying out assessment of damage to environment has submitted *inter alia* the following recommendations:

> ***"6.0 Recommendations***
>
> *A. For damages of loss of agricultural land; loss of perennial crops (cashew & coconut) & loss of agricultural crop (rice) including plant productivity and damages to houses*
>
> *In view of the above damages:*
>
> *i. The industry i.e. M/s Minerals and Metals* ***may be directed to pay the environmental damage cost of Rs. 1,46,98,050/- (Rupees One Crore Forty-Six Lakhs Ninety-Eight Thousand Fifty Only).*** *The said environmental damage cost may be deposited with the District Collector-Sindhudurg and may be distributed to the affected persons by the District Collector-Sindhudurg in coordination with the District Agriculture Department-Govt. of Maharashtra. Whereas, it is observed that the industry i.e. M/s Minerals and Metals has already paid total amount of Rs. 60,70,300/- (12,30,300 + 48,40,000) as compensation for damages to the houses of 14 identified persons and damages to the agricultural lands of 49 identified villagers including the Applicant.* ***Hence, the amount of Rs. 60,70,300/- may be adjusted in the aforesaid environmental damage cost of Rs. 1,46,98,050/, as deemed fit by the Hon'ble NGT.***
>
> *B. Cost for land restoration in respect of damage caused to the agricultural land in view of the above:*
>
> *i. In addition to the above environmental damage cost as given at s.no. i of A, as above, the industry i.e. M/s Minerals and Metals may* ***be directed to pay the cost of land restoration of Rs. 25,75,000/- (Twenty Five Lakhs Seventy-Five Thousand Only). The said amount of Rs. 25,75,000/- may be deposited with the District Collector-Sindhudurg and may be utilized for the implementation of restoration plan*** *of the affected area(s) under reference, as submitted by KKVD in coordination with the District Agriculture Department-Govt. of Maharashtra.*
>
> *(emphasis supplied)*

5. It is submitted that the Applicant does not contest, deny, or reject the environmental compensation amount assessed by the Joint Committee which is to be paid by Respondent No. 6 for restoration of degraded environment including pollution of agricultural lands and soil, destruction of crops and trees, etc.

6. Therefore, it is submitted that Respondent No. 6 must accordingly be directed to ensure payment of the total amount of damages assessed by the Joint Committee within a time-bound manner, as may be directed by this Hon'ble Tribunal.

7. The Applicant further submits that in addition to Environmental Compensation amounts assessed by the Joint Committee, the Respondent No. 6 must be made liable to pay exemplary damages.

8. The Applicant submits that mining accident dated 29.07.2021 has been caused due to the persistent negligent, unscientific, and illegal mining carried out by Respondent No. 6 in the impugned iron ore mine. That the said submission has previously been raised by the Applicant in the present Original Application as on **Paras 14-33, Pgs. 18-26**, wherein the Applicant has detailed the various violations of mining regulations being caused by the Respondent No. 6 in operation of the impugned iron ore mine. That the said submissions previously raised are not being repeated entirely in the interests of brevity.
9. The Applicant submits that Respondents Nos. 4 and 5, viz., the Indian Bureau of Mines and the Directorate General of Mines Safety, have at various occasions observed violations of the Mineral Conservation and Development Rules, 2017 ('MCDR 2017') and the Metalliferous Mines Regulations, 1961 ('MMR 1961') respectively, and therefore, multiple violation letters were accordingly served upon the Respondent No. 6 from 2017 to 2021 by the said Respondent Authorities.
10. Herein, the said Respondent Authorities have observed *inter alia* merging of benches in irregular manner resulting in pit slope failure, width of benches being less than height which defies purpose of systematic and scientific mining, inadequate benching of sides of quarry likely to cause danger of fall of said sides, etc. that have been caused by Respondent No. 6 while carrying out mining.
11. Furthermore, Respondent No. 2 MPCB carried out 10 site inspections of the impugned iron ore mine from 1.04.2020 to 31.03.2022, wherein, 9 of the 10 site inspections reveal that the iron ore mine has been categorized by Respondent No. 2 MPCB as falling in the "High Risk" category.
12. Accordingly, the Applicant submits that unscientific and negligent mining has evidently been carried out by Respondent No.6 in the impugned iron ore mine for several years, which is indicative of a pattern of non-compliance with environmental safeguards imposed upon Respondent No. 6 by virtue of the MCDR 2017, MMR 1961, and other environmental standards.
13. That therefore, the Applicant submits that exemplary damages ought to be imposed upon Respondent No. 6 so as to act as a deterrent against such persistent

unscientific and hazardous mining amounting to non-compliance with environmental standards which has resulted in pollution to environment.

14. The Applicant relies upon the judgment dated 12.05.2000 of the Hon'ble Supreme Court in **M.C. Mehta v. Kamal Nath and Ors.**, wherein the Hon'ble Supreme Court imposed exemplary damages against environmental pollution caused due to construction of a Motel upon a river basin, and held *inter alia* as follows:

> *"Pollution is a civil wrong. By its very nature, it is a Tort committed against the community as a whole.* ***A person, therefore, who is guilty of causing pollution has to pay damages (compensation) for restoration of the environment and ecology. He has also to pay damages to those who have suffered loss on account of the act of the offender.*** *The powers of this Court under Article 32 are not restricted and it can award damages in a PIL or a Writ Petition as has been held in a series of decisions.* ***In addition to damages aforesaid, the person guilty of causing pollution can also be held liable to pay exemplary damages so that it may act as a deterrent for others not to cause pollution in any manner.*** *Unfortunately, notice for exemplary damages was not issued to M/s Span Motel although it ought to have been issued.* ***The considerations for which "fine" can be imposed upon a person guilty of committing an offence are different from those on the basis of which exemplary damages can be awarded."***
>
> *(emphasis supplied)*

A copy of the Judgment of the Hon'ble Supreme Court in **M.C. Mehta v. Kamal Nath and Ors.** is annexed and marked herewith as **ANNEXURE A-18**.

15. Furthermore, the Applicant submits that this Hon'ble Tribunal has also been pleased to direct for payment of exemplary damages in adherence to the Polluter Pays Principle, as in the case of *OA 184/2015/WZ titled Tanaji Balasaheb Gambhire v. Union of India and Ors.* That vide judgment dated 27.09.2016, this Hon'ble Tribunal has *inter alia* held as follows:

> *"47. The Tribunal is expected to apart on the principles of Sustainable Development and Polluter pays principle.* ***We are conscious of the fact that Polluter pays Principle shall not be construed as 'pay and pollute principle', and the payment has therefore to be exemplary and deterrent in order to pass a clear message that environmental compliance is supreme*** *and the party which is non-complying the environmental standards shall be at economic disadvantage."*
>
> *(emphasis supplied)*

A copy of judgment dated 27.09.2016 in *OA 184/2015/WZ titled Tanaji Balasaheb Gambhire v. Union of India and Ors.* is annexed and marked herewith as **ANNEXURE A-19**.

PRAYER

That in light of the above facts and circumstances, it is most respectfully prayed that by appropriate orders or directions, this Hon'ble Tribunal may be pleased to:

A. Direct Respondent No. 6 to pay environmental compensation in the manner recommended by the Joint Committee Report within a time-bound period;

B. Direct Respondent No. 6 to pay additional exemplary damages as deemed fit by the Hon'ble Tribunal for persistently undertaking unscientific and negligent mining which resulted in breach of mine-wall accident on 29.07.2021;

Pass any other order deemed fit in the interests of justice, equity and good conscience.

APPLICANT

THROUGH

MAITREYA PRITHWIRAJ GHORPADE

ADVOCATE

COUNSEL FOR THE APPLICANT

Mobile: 7024102546

Email: maitreya.ghorpade@gmail.com

Date: 10.07.2023

VERIFICATION

I, Abhay Pandurang Desai s/o Pandurang Desai, r/o Post Kalane, Dhawadkiwadi, Dodamarg Taluka, Sindhudurg District, Maharashtra, do hereby solemnly affirm and state as under:

1. That I am the Applicant in the above titled Original Application and am conversant with the facts and circumstances described in the present case and as such, I am competent to swear this affidavit.

2. That the contents of the accompanying Rejoinder are true and correct and nothing material has been concealed therefrom.

APPLICANT

BEFORE THE NATIONAL GREEN TRIBUNAL,

WESTERN ZONAL BENCH SITTING AT PUNE

ORIGINAL APPLICATION NO. 41 OF 2022

IN THE MATTER OF:

ABHAY PANDURANG DESAI ...APPLICANT

VERSUS

STATE OF MAHARASHTRA & ORS ...RESPONDENTS

AFFIDAVIT

I, Abhay Pandurang Desai s/o Pandurang Desai, r/o Post Kalane, Dhawadkiwadi, Dodamarg Taluka, Sindhudurg District, Maharashtra, do hereby solemnly affirm and state as under:

3. That I am the Applicant in the above titled Original Application and am conversant with the facts and circumstances described in the present case and as such, I am competent to swear this affidavit.

4. That the contents of the accompanying Rejoinder are true and correct and nothing material has been concealed therefrom.

DEPONENT

VERIFICATION

Verified on this ____ of July 2023 that the contents of the above-mentioned affidavit are true and correct and nothing material has been concealed therefrom.

SR.NO.	575
DATE	10/07/23

DEPONENT

BEFORE ME

10 JUL 2023

DAYASHANKAR B.TIWARI
ADVOCATE & NOTARY
GOVT.OF INDIA

PETITIONER:
M.C. MEHTA

Vs.

RESPONDENT:
KAMAL NATH & ORS.

DATE OF JUDGMENT: 12/05/2000

BENCH:
S.S.Ahmad, Doraiswami Raju

JUDGMENT:

S.SAGHIR AHMAD, J. This case, which was finally decided by this Court by its Judgment dated December 13, 1996, has been placed before us for determination of the quantum of pollution fine. It may be stated that the main case was disposed of with the following directions:- 1. The public trust doctrine, as discussed by us in this judgment is a part of the law of the land. 2. The prior approval granted by the Government of India, Ministry of Environment and Forest by the letter dated November 24, 1993 and the lease-deed dated April 11, 1994 in favour of the Motel are quashed. The lease granted to the Motel by the said lease-deed in respect of 27 bighas and 12 biswas of area, is cancelled and set aside. The Himachal Pradesh Government shall take over the area and restore it to its original-natural conditions. 3. The Motel shall pay compensation by way of cost for the restitution of the environment and ecology of the area. The pollution caused by various constructions made by the Motel in the river bed and the banks of the river Beas has to be removed and reversed. We direct NEERI through its Director to inspect the area, if necessary, and give an assessment of the cost which is likely to be incurred for reversing the damage caused by the Motel to the environment and ecology of the area. NEERI may take into consideration the report by the Board in this respect. 4. The Motel through its management shall show cause why pollution fine in addition be not imposed on the Motel. 5. The Motel shall construct a boundary wall at a distance of not more than 4 meters from the cluster of rooms (main building of the Motel) towards the river basin. The boundary wall shall be on the area of the Motel which is covered by the lease dated September 29, 1981. The Motel shall not encroach/cover/utilise any part of the river basin. The boundary wall shall separate the Motel building from the river basin. The river bank and the river basin shall be left open for the public use. 6. The Motel shall not discharge untreated effluents into the river. We direct the Himachal Pradesh Pollution Control Board to inspect the pollution control devices/treatment plants set up by the Motel. If the effluent/waste discharged by the Motel is not conforming to the prescribed standards, action in accordance with law be taken against the Motel. 7. The Himachal Pradesh Pollution Control Board shall not permit the discharge of untreated effluent into river Beas. The Board shall inspect all the hotels/institutions/factories in Kullu-Manali area and in

case any of them are discharging untreated effluent/waste into the river, the Board shall take action in accordance with law. 8. The Motel shall show cause on December 18, 1996 why pollution-fine and damages be not imposed as directed by us. NEERI shall send its report by December 17, 1996. To be listed on December 18, 1996." Pursuant to the above Order, notice was issued requiring the Motel to show-cause on two points; (i) why the Motel be not asked to pay compensation to reverse the degraded environment and (ii) why pollution fine, in addition, be not imposed. Mr. G.L. Sanghi, learned Senior Counsel, appearing for M/s Span Motel Private Ltd., has contended that though it is open to the Court, in proceedings under Article 32 of the Constitution, to grant compensation to the victims whose Fundamental Rights might have been violated or who are the victims of an arbitrary executive action or victims of atrocious behaviour of public authorities in violation of public duties cast upon them, it cannot impose any fine on those who are guilty of that action. He contended that the fine is a component of Criminal Jurisprudence and cannot be utilised in civil proceedings specially under Article 32 or 226 of the Constitution either by this Court or the High Court as imposition of fine would be contrary to the provisions contained in Article 20 and 21 of the Constitution. It is contended that fine can be imposed upon a person only if it is provided by a statute and gives jurisdiction to the Court to inflict or impose that fine after giving a fair trial to that person but in the absence of any statutory provision, a person cannot be penalised and no fine can be imposed upon him. Mr. M.C. Mehta, who has been pursuing this case with the usual vigour and vehemence, has contended that if a person disturbs the ecological balance and tinkers with the natural conditions of rivers, forests, air and water, which are the gifts of nature, he would be guilty of violating not only the Fundamental Rights, guaranteed under Article 21 of the Constitution, but also be violating the fundamental duties to protect environment under Article 51A(g) which provides that it shall be the duty of every citizen to protect and improve the natural environment including forests, lakes, rivers and wildlife and to show compassion for living creatures. The planet Earth which is inhabited by human beings and other living creatures, including animals and birds, has been so created as to cater to the basic needs of all the living creatures. Living creatures do not necessarily mean the human beings, the animals, the birds, the fish, the worms, the sepents, the hydras, but also the plants of different varieties, the creepers, the grass and the vast forests. They survive on fresh air, fresh water and the sacred soil. They constitute the essential elements for survival of "life" on this planet. The living creatures, including human beings, lived peacefully all along. But when the human beings started acting inhumanly, the era of distress began which in it wake brought new problems for survival. The industrial revolution brought an awakening among the men inhabiting this Earth that the Nature, with all its resources was not unlimited and forever renewable. The uncontrolled industrial development generating tonnes of industrial waste disturbed the ecological balance by polluting the air and water which in turn, had a devastating effect on the wildlife and, therefore, the early efforts to protect the environment related to the protection of wildlife. But then the two world wars, the first world war (1914-1918) and the second world war (1939 to 1945) during which atomic bombs were exploded resulting in the loss of

thousands of lives and burning down of vast expanses of forests, made the man realise that if the environmental disturbances were not controlled, his own survival on this planet would become impossible. The United Nations, therefore, held a Conference on human environment at Stockholm in 1972. In the wake of the resolutions adopted at that Conference, different countries at different stages enacted laws to protect the deteriorating conditions of environment. Here in India, the Legislature enacted three Acts, namely, The Water (Prevention & Control of Pollution) Act, 1974; the Air (Prevention & Control of Pollution) Act, 1981 and The Environment (Protection) Act, 1986. It also enacted the Water (Prevention & Control of Pollution) Cess Act, 1977. Under these Acts, Rules have been framed to give effect to the provisions thereof. They are : The Water (Prevention and Control of Pollution) Rules, 1975; The Water (Prevention & Control of Pollution) Cess Rules, 1978; The Air (Prevention and Control of Pollution) Rules, 1982; The Air (Prevention & Control of Pollution) (Union Territories) Rules, 1983; The Environment (Protection) Rules, 1986; The Hazardous Wastes (Management and Handling) Rules, 1989; The Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989, The Chemical Accidents (Emergency Planning, Preparedness and Response) Rules, 1996 and hosts of other Rules and Notifications. In addition to these Acts and Rules, there are, on the Statute Book, other Acts dealing, in a way, with the Environmental laws, for example, the Indian Forest Act, 1927; The Forest (Conservation) Act, 1980; The Wildlife (Protection) Act, 1972 and the Rules framed under these Acts. Various States in India have also made their Environmental laws and rules for the protection of environment. Apart from the above Statutes and the Rules made thereunder, Article 48A of the Constitution provides that the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country. One of the fundamental duties of every citizen as set out in Article 51A(g) is to protect and improve the natural environment, including forests, lakes, rivers and wildlife and to have compassion for living creatures. These two Articles have to be considered in the light of Article 21 of the Constitution which provides that no person shall be deprived of his life and liberty except in accordance with the procedure established by law. Any disturbance of the basic environment elements, namely air, water and soil, which are necessary for "life", would be hazardous to "life" within the meaning of Article 21 of the Constitution. In the matter of enforcement of rights under Article 21 of the Constitution, this Court, besides enforcing the provisions of the Acts referred to above, has also given effect to Fundamental Rights under Article 14 and 21 of the Constitution and has held that if those rights are violated by disturbing the environment, it can award damages not only for the restoration of the ecological balance, but also for the victims who have suffered due to that disturbance. In order to protect the "life", in order to protect "environment" and in order to protect "air, water and soil" from pollution, this Court, through its various judgments has given effect to the rights available, to the citizens and persons alike, under Article 21 of the Constitution. The judgment for removal of hazardous and obnoxious industries from the residential areas, the directions for closure of certain hazardous industries, the directions for closure of slaughter-house and its relocation, the various directions issued for the protection of the Ridge area in

Delhi, the directions for setting up effluent treatment plants to the Industries located in Delhi, the directions to Tanneries etc., are all judgments which seek to protect environment. In the matter of enforcement of Fundamental Rights under Article 21, under Public Law domain, the Court, in exercise of its powers under Article 32 of the Constitution, has awarded damages against those who have been responsible for disturbing the ecological balance either by running the industries or any other activity which has the effect of causing pollution in the environment. The Court while awarding damages also enforces the "POLLUTER PAYS PRINCIPLE" which is widely accepted as a means of paying for the cost of pollution and control. To put in other words, the wrongdoer, the polluter, is under an obligation to make good the damage caused to the environment. The recognition of the vice of pollution and its impact on future resources was realised during the early part of 1970. The United Nations Economic Commission for Europe, during a panel discussion in 1971, concluded that the total environmental expenditure required for improvement of the environment was overestimated but could be reduced by increased environmental awareness and control. In 1972, the Organisation for Economic Cooperation and Development adopted the "POLLUTER PAYS PRINCIPLE" as a recommendable method for pollution cost allocation. This principle was also discussed during the 1972 Paris Summit. In 1974, the European Community recommended the application of the principle by its member States so that the costs associated with environmental protection against pollution may be allocated according to uniform principles throughout the Community. In 1989, the Organisation for Economic Cooperation and Development reaffirmed its use and extended its application to include costs of accidental pollution. In 1987, the principle was acknowledged as a binding principle of law as it was incorporated in European Community Law through the enactment of the Single European Act, 1987. Article 130r.2 of the 1992 Maastricht Treaty provides that Community Environment Policy "shall be based on the principle that the polluter should pay." "POLLUTER PAYS PRINCIPLE" has also been applied by this Court in various decisions. In Indian Council for Enviro Legal Action vs. Union of India, AIR 1996 SC 1446 = 1996 (2) SCR 503 = (1996) 3 SCC 212 = JT 1996 (2) SC 196, it was held that once the activity carried on was hazardous or inherently dangerous, the person carrying on that activity was liable to make good the loss caused to any other person by that activity. This principle was also followed in Vellore Citizens Welfare Forum vs. Union of India & Ors., AIR 1996 SC 2715 = (1996) 5 SCC 647= JT 1996 (7) SC 375 which has also been discussed in the present case in the main judgment. It was for this reason that the Motel was directed to pay compensation by way of cost for the restitution of the environment ecology of the area. But it is the further direction why pollution fine, in addition, be not imposed which is the subject matter of the present discussion. Chapter VII of the Water (Prevention and Control of Pollution) Act, 1974 contains the provisions dealing with penalties and procedure. This Chapter consists of Sections 41 to 50. Sub-section (2) and (3) of Section 41 provide for the punishment and imposition of fine. They are quoted below:- "41.(2) Whoever fails to comply with any order issued under clause (e) of sub-section (1) of Section 32 or any direction issued by a Court under sub-section (2) of Section 33 or any direction issued under Section 33A, shall in respect of each failure and on conviction, be

punishable with imprisonment for a term which shall not be less than one year and six months but which may extend to six years and fine, and in case the failure continues, with an additional fine which may extend to five thousand rupees for every day during which such failure continues after the conviction for the first such failure. (3) If the failure referred to in sub-section (2) continues beyond a period of one year after the date of conviction, the offender shall, on conviction, be punishable with imprisonment for a term which shall not be less than two years but which may extend to seven years and with fine." Similarly, Section 42 provides that a person shall be liable to be punished with imprisonment for a term which may extend to three months or with fine which may extend to ten thousand rupees or with both. Sub-section (2) of Section 42 also contemplates imprisonment for a term which may extend to three months or with fine which may extend to ten thousand rupees or with both. Section 43 contemplates penalty for contravention of the provisions of Section 24. Section 44 contemplates penalty for contravention of Section 25 or Section 26. They also contemplate imposition of fine. Section 45 provides that if a person who has been convicted of any offence under Section 24 or Section 25 or Section 26 is again found guilty of an offence involving a contravention of the same provision, he shall, on the second and on every subsequent conviction, be punishable with imprisonment for a term which shall not be less than two years but which may extend to seven years and with fine. Section 45A provides that whoever contravenes any of the provisions of this Act or fails to comply with any order or direction given under this Act, for which no penalty has been elsewhere provided in this Act, shall be punishable with imprisonment which may extend to three months or with fine which may extend to ten thousand rupees or with both and in the case of continuing contravention or failure, he may be punished with an additional fine. Section 47 contemplates offences by Companies while Section 48 contemplates offences by Government Departments. Section 15 of the Environment (Protection) Act, 1986 provides for penalty for contravention of the provisions of the Act and the rules, orders and directions made thereunder. Sub-section (1) of Section 15 speaks of imprisonment for a term which may extend to five years or with fine which may extend to one lakh rupees, or with both, and in case the failure or contravention continues, with additional fine which may extend to five thousand rupees for every day during which such failure or contravention continues after the conviction for the first such failure or contravention. Section 16 of the Act contemplates offences by the Companies while Section 17 contemplates offences by Government Departments. Chapter VI of the Air (Prevention and Control of Pollution) Act, 1981 contains the provisions for penalties and procedure. This Chapter consists of Sections 37 to 46. Section 37 provides penalties for failure to comply with the provisions of Section 21 or Section 22 or with the directions issued under Section 31A. It provides that the person shall be punishable with imprisonment for a term which shall not be less than one year and six months but which may extend to six years and with fine, and in case the failure continues, with an additional fine which may extend to five thousand rupees for every day. Sub-section (2) of this Section provides that if the failure continues beyond the period of one year after the date of conviction, the offender shall be punishable with imprisonment for a term which shall not be less than two years but which may extend to seven years and

with fine. Section 38 also provides penalties for certain acts and it provides that for such acts as are referred to in that Section, a person shall be punishable with imprisonment for a term which may extend to three months or with fine which may extend to ten thousand rupees or with both. Section 39 contemplates penalty for contravention of certain provisions of the Act and it provides for imprisonment for a term which may extend to three months or with fine which may extend to ten thousand rupees or with both, and in the case of continuing contravention, with an additional fine which may extend to five thousand rupees for every day during which such contravention continues after conviction for the first such contravention. Section 40 speaks of offences by Companies while Section 41 speaks of offences by Government Departments. All the three Acts, referred to above, also contemplate the taking of the cognizance of the offences by the Court. Thus, a person guilty of contravention of provisions of any of the three Acts which constitutes an offence has to be prosecuted for such offence and in case the offence is found proved then alone he can be punished with imprisonment and fine or both. The sine qua non for punishment of imprisonment and fine is a fair trial in a competent court. The punishment of imprisonment or fine can be imposed only after the person is found guilty. In the instant case, a finding has been recorded that M/s Span Motel had interfered with the natural flow of river and thus disturbed the environment and ecology of the area. It has been held liable to pay damages. The quantum of damages is under the process of being determined. The Court directed a notice to be issued to show cause why pollution fine be not imposed. In view of the above, it is difficult for us to hold that the pollution fine can be imposed upon M/s Span Motel without there being any trial and without there being any finding that M/s Span Motel was guilty of the offence under the Act and are, therefore, liable to be punished with imprisonment or with FINE. This notice has been issued without reference to any provision of the Act. The contention that the notice should be treated to have been issued in exercise of power under Article 142 of the Constitution cannot be accepted as this Article cannot be pressed into aid in a situation where action under that Article would amount to contravention of the specific provisions of the Act itself. A fine is to be imposed upon the person who is found guilty of having contravened any of the provisions of the Act. He has to be tried for the specific offence and then on being found guilty, he may be punished either by sentencing him to undergo imprisonment for the period contemplated by the Act or with fine or with both. But recourse cannot be taken to Article 142 to inflict upon him this punishment. The scope of Article 142 was considered in several decisions and recently in Supreme Court Bar Association vs. Union of India, AIR 1998 SC 1895 = (1998) 4 SCC 409, by which the decision of this Court in V.C. Mishra, Re, (1995) 2 SCC 584, was partly overruled, it was held that the plenary power of this Court under Article 142 of the Constitution are inherent in the Court and are "COMPLEMENTARY" to those powers which are specifically conferred on the Court by various statutes. This power exists as a separate and independent basis of jurisdiction apart from the statutes. The Court further observed that though the powers conferred on the Court by Article 142 are curative in nature, they cannot be construed as powers which authorise the Court to ignore the substantive rights of a litigant. The Court further observed that this power cannot be used to "supplant" substantive law applicable to the case

or cause under consideration of the Court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby achieve something indirectly which cannot be achieved directly. Similarly, in M.S. Ahlawat vs. Union of India & Anr., AIR 2000 SC 168 = (2000) 1 SCC 278, it was held that under Article 142 of the Constitution, the Supreme Court cannot altogether ignore the substantive provisions of a statute and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute. Thus, in addition to the damages which have to be paid by M/s Span Motel, as directed in the main Judgment, it cannot be punished with fine unless the entire procedure prescribed under the Act is followed and M/s Span Motel are tried for any of the offences contemplated by the Act and is found guilty. The notice issued to M/s Span Motel why pollution fine be not imposed upon them is, therefore, withdrawn. But the matter does not end here. Pollution is a civil wrong. By its very nature, it is a Tort committed against the community as a whole. A person, therefore, who is guilty of causing pollution has to pay damages (compensation) for restoration of the environment and ecology. He has also to pay damages to those who have suffered loss on account of the act of the offender. The powers of this Court under Article 32 are not restricted and it can award damages in a PIL or a Writ Petition as has been held in a series of decisions. In addition to damages aforesaid, the person guilty of causing pollution can also be held liable to pay exemplary damages so that it may act as a deterrent for others not to cause pollution in any manner. Unfortunately, notice for exmeplary damages was not issued to M/s Span Motel although it ought to have been issued. The considerations for which "fine" can be imposed upon a person guilty of committing an offence are different from those on the basis of which exemplary damages can be awarded. While withdrawing the notice for payment of pollution fine, we direct a fresh notice be issued to M/s Span Motel to show cause why in addition to damages, exemplary damages be not awarded for having committed the acts set out and detailed in the main judgment. This notice shall be returnable within six weeks. This question shall be heard at the time of quantification of damages under the main judgment.

BEFORE THE NATIONAL GREEN TRIBUNAL

(WESTERN ZONE) BENCH, PUNE

APPLICATION No.184/2015 (WZ)
[M.A. No.77/2016, M.A. No.194/2016, M.A. No.186/2016]

CORAM:

HON'BLE DR. JUSTICE JAWAD RAHIM
(JUDICIAL MEMBER)
HON'BLE DR. AJAY A.DESHPANDE
(EXPERT MEMBER)

In the Matter of:

Mr. Tanaji Balasaheb Gambhire
Age : Adult, Occupation : Service
R/o. Flat No.16, CTS-296, Laxmi Apartment, Near Shivaji Maratha High School, White House Lane, Shukrawar Peth, Pune – 411 002.

....**APPLICANT**

VERSUS

1. **The Union of India,**
   Through the Ministry of Environment & Forest,
   Government of India,
   Paryavaran Bhawan, CGO Complex,
   Lodhi Road, New Delhi-110 003.

2. **The Principal Secretary,**
   Environment Department,
   Government of Maharashtra,
   15th Floor, New Administrative Building,
   Mantralaya, Mumbai – 400 032.

3. **State Level Environment Impact Assessment Authority**
   Through Member Secretary
   15th Floor, New Administrative Building
   Mantralaya, Mumbai – 400 032.

4. **Maharashtra Pollution Control Board**
   Through its Member Secretary,
   Kalptaru Point, 3rd Floor, Near Sion Circle,
   Opp. Cine Planet Cinema, Sion (E),
   Mumbai.

5. **Maharashtra Pollution Control Board**
   Through its Regional Officer, SRO-1
   Jog Centre, 3rd Floor, Mumbai-Pune Road,
   Wakadewadi, Pune – 411 003.

6. **Pune Municipal Commissioner**
   PMC Building, Shivajinagar,
   Pune – 411 005.

7. **City Engineer**
   Pune Municipal Corporation,
   PMC Building, Shivajinagar,
   Pune – 411 005.

8. **District Collector – Pune**
   President – District Environment Committee,
   Pune.

9. **M/s. Goel Ganga Developers India Pvt. Ltd.**
   3rd Floor, San Mahu Complex,
   Opp. Poona Club, 5, Bund Garden,
   Pune – 411 001.

.....**RESPONDENTS**

Counsel for Applicant(s):

Mr. Shriram P. Pingle, Advocate

Counsel for Respondent(s):

Mr. S.S. Sanyal, Advocate a/w Mrs. Supriya Dangare, Advocate for Respondent Nos.4 and 5
Mr. P.S. Suryavanshi, Adv. for Respondent Nos.6 & 7
Mr. S.V. Mishra, Senior Advocate a/w Mr. Sachin S. Bhalerao, Advocate for Respondent No.9

Date: 27th September, 2016

ORDER/JUDGMENT

1. This Application, numbered as 184/2015 invoking jurisdiction of this Tribunal, is under Section 14 and 15 of the National Green Tribunal Act, 2010

(for short 'NGT Act'). The Applicant Tanaji Balasaheb Gambhire has sought certain directions against the 9th Respondent – Project Proponent (PP) M/s Goel Ganga Developers India Private Limited who is said to have envisaged construction venture to construct a commercial and residential complex.

2. In the Application, the Applicant has sought following directions:

A. Direct the Respondents to demolish the illegal structures at the site in question and restore the area to its original position.

B. Direct the State Level Impact Assessment Authority and the Maharashtra State Pollution Control Board to initiate appropriate action against the project proponent for violation of the provisions of EIA notification, 2006 and other applicable laws.

C. Direct Respondent No.2 to take appropriate action against the State Level Impact Assessment Authority for granting environment clearance in violation of the provisions of EIA Notification, 2006.

D. Direct the State Level Impact Assessment Authority and the Maharashtra State Pollution Control Board to disclose all such projects which have been granted post facto clearance or have been constructed without taking prior environment clearance.

E. Having regard to the damage to the public health, property and environment, principles of sustainable development and polluter pays principles and direct the Respondent No.9 to

deposit a heavy amount of compensation to the environment relief fund.

3. In support of the reliefs so sought, he has averred factual and legal aspects to which we shall refer briefly now.

a. The 9th Respondent obtained Environmental Clearnace (for short 'EC') for its project at Survery Nos.35 to 40 in Village Vadgaon Budruk, Sinhagad Road, Pune. The project conceived and approved by said EC is to construct 12 buildings with stilt, basment plus 11 floors vertically for 552 flats, 50 shops and 34 offices. The total plot area is 79,100 sq.mts while the total built-up area is to 57,658.42 sq.mtrs.

b. The EC was obtained by the 9th Respondent-PP on 4th April, 2008 and thereafter, PP has commenced construction activity. The Applicant has not brought in question the EC dated 4th April, 2008 but has other serious grievances.

c. The Applicant would contend that after the project of 9th Respondent–PP has sufficiently progressed, the Member Secretray of Maharashtra Pollution Control Board (MPCB) caused inspection of the construction activity on 31st August, 2015 and thereafter, granted a personal hearing to the Respondent No.9-PP in respect of MPCB findings. The Minutes of the Meeting held on 31st August, 2015 show that the Regional Officer of the MPCB had reported non-compliance of the terms on which EC was granted to the 9th Respondent. In that, there is clear statement that though the EC was for construction of 12 buildings but the Respondent No.9-PP has built 15 buildings and increased

number of flats from 552 to 738 as also the number of shops was increased from 84 to 111.

d. The Minutes of the Meeting further show that the representative of PP had accepted the non-compliance to the conditions of EC in increasing the construction of number of buildings, number of flats, offices and shops.

e. The Minutes of the Meeting would also record that consent for additional building of Ground plus 30 Floor was not taken though the civil work of its construction was in progress.

4. The Applicant relies on such material information recorded in the Meeting to contend that there was clear finding on inspection by the competent authority i.e. MPCB that the Respondent No.9-PP had not complied with the conditions of the EC granted. Reference is also made to the fact that MPCB having noticed such non-compliance had directed the Respondent No.9-PP to voluntarily stop construction activity till modified EC is obtained. Consequently, having noticed deliberate violation of the conditions of EC and non-compliance of its voluntary closure directions, MPCB had issued direction not only for stopping further construction activity but directed disconnection of electricity to the project by its Order dated 30th September, 2015.

5. The Applicant further points out that despite such lapses on the part of the Respondent No.9-PP, it

managed to get the Occupancy Certificate for part of the project which is complete and has virtually occupied it. This, according to the Applicant, is in total violation of the legal mandate that mandatory consent of operate should be obtained before the project activity is undertaken.

6. Amongst other issues raised he points out to the fact that building plan for construction activity of the project was revised by Respondent No.9-PP nine times. This, according to him, illustrates the significant modification in the scale of construction in terms of area, plinth area and floor heights, besides change in lay-out scheme. Refering to condition No.5 of the EC. It is alleged that the scope of the project in terms of built up area has changed. Moreover, the project lay-out as well as number of buildings also has substantially changed. Thus, the Respondent No.9-PP was obliged to obtain modified EC before undertaking such activity which is in total deviation to the original EC. Citing numerous statistical data, the Applicant would further claim that the construction activity carried out by the Repsondent-9 PP has grossly exceeded the scope of the project as approved by EC in terms of built up area and configuration of project.

7. Based on these facts, he would contend that the project activity is not as per the proposal which

was considered and approved by Ministry of Environment and Forest while granting the original EC on 4th April, 2008 and therefore there is gross violation of EC condition.

8. The other contention urged by the Applicant is to indicate failure on the part of the Statutory Authorities like Pune Municipal Corporation (PMC), State Level Environment Impact Assessment Authority (SEIAA), Department of Environment, State of Maharashtra (DoE) in discharge of its statutory functions. In this regard, he contends that Pune Municipal Corporation (for short 'PMC') was well aware of such violations but granted Completion Certificate. Reference was made to page-36 of the Rejoinder where it is stated that violation of non-compliance of EC was well within the knowledge of the concerned officer of PMC. He then refers to the action taken by Deputy Engineer of Building Construction Department of PMC who having realised the blanket violation of EC then, had directed Respondent No.9-PP on 20.2.2015 not to continue construction activity without obtaining amended EC. It is alleged, despite such clear direction of the Deputy Engineer, the Respondent No.9-PP continued construction as per its revised approved lay-out by PMC which depended totally on the validity of the EC. Thus, he contends

that grant of revised lay-out plan by PMC itself is not tenable and consequently the construction activity being illegal needs to be restrained.

9. In this regard he would refer to the order passed by PMC imposing fine of Rs.1,57,00,000/- for illegal occupancy of part of the project building which Respondent No.9-PP without remorse has accepted and deposited on 23rd October, 2015.

10. The Applicant has further alleged total inaction on the part of SEAC and SEIAA and to substantiate his contention refers to the material on record which shows that SEAC sub-committee visited the project site on 29th February, 2014 with an object to verify compliance of the 2008 EC conditions. During such visit, it noticed non-compliance of the EC by Respondent No.9-PP but conveniently failed to record that Respondent No.9-PP had increased the project activity in terms of buildings, built-up area, etc. The report of SEAC Committee is described as cursory, casual, unscientific and against realities. It is only later that SEIAA on the basis of query/complaint of Applicant, on 3rd August, 2015 took action and in this regard proposed directions were issued under provisions of Section 5 of Environment (Protection) Act, 1986, by State Department of Environment (DOE) in August 2015 and thereafter, no follow up action

was taken in terms of the directions. SEIAA which is competent to take independent decision and action against the violators of EC conditions and Project Proponents has failed to initiate any action. What he tries to say is that SEIAA, being specialised body, should have used its conferred power to take action rather than referring or depending on the action taken by Department of Environment. Thus, he contends that SEAC, SEIAA and DOE have jointly and severally failed to discharge its statutory function in taking appropriate legal permissible action against Respondent No.9-PP restraining such illegal activity for non-compliance thereby enabling the Respondent No.9-PP to further violate the EC mandate. He would contend that by keeping the proceedings before it, SEIAA has virtually allowed the Project Proponent to proceed with the illegal construction thereby wandering DoE direction issued on 3rd August, 2015.

11. On above set of facts, he has sought certain reliefs as recorded by us in the para supra.

12. On admission of this Application, Notice was caused to all the Respondents who are total nine in numbers. Amongst them Union of India through Ministry of Environment and Forest -1st Respondent, The Principal Secretary, Environment Department – 2nd Respondent, State Level Environment Impact

Assessment Authority – 3rd Respondent, Maharashtra Pollution Control Board – 3rd Respondent, Regional Officer, Maharashtra Pollution Control Board – 5th Respondent, Pune Municipal Corporation – 6th Respondent, City Engineer, Pune Municipal Corporation – 7th Respondent, District Collector, Pune – 8th Respondent, M/s. Goel Ganga Developers India Pvt. Ltd. – 9th Respondent. Amongst all, initially the Respondent No.9-PP resisted the proceedings but we have noticed a very strange conduct of the Secretary of Department of Environment falling in line with the Respondent No.9-PP as could be seen from the conduct.

13. The record would show that all the Respondents have responded to the Notice in this Application as recorded by us on 23rd December, 2015. Certain observations made in the preamble of that Order at paragraph Nos.1 and 2, would itself show that this Tribunal had taken a note o6 the manner in which the Respondents reacted to initiation of the action by the Applicant. In para No 2-3 at page-2 of the Order and the last para on the same page, we have summarised what we noticed. Ultimately being convinced that the Applicant had made out prima facie case for grant of interim relief, lest, the Respondent No.9-PP emboldened by the inaction on

the part of Statutory Authorities as likely to proceed with the construction activity which was shown by the Applicant to be legally impermissible if restrained, orders were passed against Respondent-9 PP. We had also simultaneously directed PMC to ensure that no further construction of whatsoever nature is carried out and called for report from it regarding what is the status of construction at the site within 10 days. As is expected, Respondent No.9-PP entered contest and sought vacating the Interim Order but when confronted with certain factual aspects, made a statement that no construction activity is going on and it has stopped the construction. We feel it will be worth to record that we have taken into consideration contention urged on behalf of the Respondent No.9-PP to seek vacating of the order but we opined that let the pleadings be completed to allow all stakeholders who virtually prosecute and defend action through this Application. We also see from proceeding, considering the urgency, this Application was initially heard on merit in part. This is exactly what the Respondent No.9-PP also submitted on 16th March, 2016 persuading us to expedite the hearing.

14. We have thus heard substantially the learned Counsel for the Applicant, Respondent Nos.1 to 8 and

the learned Senior Counsel Mr. Mishra assisted by Mr. Sachin Bhalerao for the Respondent No.9-PP.

15. We have given our careful consideration to all the legal and factual contentions urged by learned Advocates. While the learned Counsel for the Applicant relies mainly on the original EC dated 4th April, 2008 and present factual aspect showing there is marked difference in the project itself and the project has virtually changed from what it was originally conceived in terms of increase of number of buildings, plinth area, shops and other commercial activities. We have summarized the contentions of the Applicant and would like to repeat it as the same is relied upon by the Applicant.

16. Now, we need to refer to contentions of Mr. Mishra, the learned Senior Counsel for Respondent No.9-PP who in his persuasive eloquence asserted that project as conceived itself was legally permissible and during construction activity they have ensured there is absolutely no violation of any statutory regulations. He would contend that present construction activity, in terms of the FSI i.e BUA, is within the legally permissible limit and thus, refers to the numerical numbers by which the extent is measured. The affidavit filed in this case by Mr. Atul Jaiprakash Goel representing Respondent No.9-PP contains a

statement in para-14 to the fact that EC dated 4th April, 2008 issued by MoEF was to allow construction activity comprising of the utilization of the F.S.I (Floor Space Index)/BUA, to the extent of 57,658.42 sq.mtrs., based on the conceptual plan prepared by Respondent No.9. He further states that granting of permission to utilize FSI to the extent of 57,658.42 sq.mtrs was will within the EC limits.

17. On the basis of such statement, Mr. Mishra would submit that at any stretch of imagination, the contention of the Applicant cannot be sustained because he is trying to allege violation when the constructed structure is well within sanctioned FSI/BUA of 57,658.42 sq.mtrs.

18. He would further rely on an order passed by Secretary, Department of Environment on 31st May, 2016 No.C.A.-2015/CR-6/TC-3 which is produced before this Tribunal after this case was reserved for judgment on 23rd May 2016. Relying on it, he would submit that SEIAA who had issued direction on 30th August, 2015 to stop construction activity had referred the matter to Department of Environment for considering explanation of Respondent No.9-PP and pass appropriate order. He submitted that such an exercise by DOE/SEIAA was in terms of the Order

passed by this Tribunal on 23rd February, 2016 in M.A. No.21/2016 to the following effect:

"Heard. Perused record.

Service of Notice is waived on behalf of MoEF&CC. Replies have been filed by Respondent Nos.2, 3, 4, 5,6, 7 & 9. Law Officer appearing on behalf of Respondent No.8 submits that reply filed by Respondent No.5 MPCB is adopted as the reply of Respondent No.8. Rejoinder dated 22nd February, 2016 to the reply of Respondent No.9 is tendered. Copies of the rejoinder have been furnished to the Respondents.

M.A. No.21/2016

This Application has been moved for a mandate not to issue ex-post facto environmental clearance to Project Proponent Respondent No.9. Learned Counsel appearing on behalf of Authorities Respondent Nos.2 and 3 makes a statement that they will be dealing with the application moved by Respondent No.9 for grant of environmental clearance strictly in accordance with law. In view of the statement made, we do not wish to interfere in the process of law.

Learned Counsel appearing for the Applicant submits that the Application be disposed of in terms of the statement made by the concerned Authorities Respondent Nos.2 and 3. Accordingly, this Applications stands disposed of with no order as to costs.

M.A. No.21/2016 thus stands disposed of.

E.A.No. 5/2016

As regards Execution Application No.5/2016, learned counsel appearing on behalf of Applicant seeks liberty to carry out amendment in the Application so as to bring into focus the violation of the interim order dated 23rd December 2015, in relation to specific building construction and remedy available under the National Green Tribunal Act, 2010, before this Tribunal. Liberty granted to the Applicant to make necessary amendment in E.A.. Amendment shall be made within a week. Copies of the amended Application shall be furnished to the learned counsel appearing on behalf of Respondents. Respondents may file replies to the amended Application within a week thereafter. Advance copies of the replies be furnished to the Applicant who may file re-joinder thereto, if any, within three (3) days thereafter.

List this case for further consideration on 16th March 2016."

19. Thus he contends that this Tribunal itself had directed the SEIAA to consider request of the Respondent No.9-PP for modification of the EC and

thus SEIAA being competent authority in that process thought fit to refer the case of the Respondent No.9-PP to Environment Department to take a decision about the violation before considering the request of the Respondent No.9-PP for modification of the EC to allow a larger construction activity.

20. He would submit that extent of 57,658.42 sq.mtrs structure cannot be described as being in excess of the permissible limit of the EC dated 4th April, 2008.

21. With reference to what transpired later, he would submit that Respondent No.9-PP having satisfied the PMC has received the Completion Certificate in respect of part of the building that itself is sufficient to establish its project is assessed as valid, permitting grant of Completion Certificate.

22. At this juncture, we would emphasise that the Applicant had seriously challenged the order passed by Secretary, Environment Department on 31st May, 2016 describing the order as a result of direct collusion between the officer concerned and Respondent No.9-PP to defeat any order that would be passed in this proceedings. He had through his Counsel sought opportunity to file an affidavit against the affidavit of the Respondent No.9-PP who wanted this Tribunal to take note of the order dated 31st May, 2016.

23. We have perused the proceedings with reference to the relevant date on which the arguments were heard on merit and date of posting of case reserved for judgment. The application was heard on merit on 23rd May, 2016 and reserved for judgment. During such period the order dated 31st May, 2016 has been passed by the Officer referred to above. Besides, the Learned Counsel Mr. Misra on behalf of project proponent requested us to take on record the order dated 31st May, 2016 before passing the Judgment. We took notice of the said order. In these circumstances the Learned Counsel for the applicant took opportunity to file counter to the affidavit filed by the project proponent producing the order dated 31st May, 2016. It is quite evident that the officer concerned who has passed the order in question is representing the respondent no. 2 in this case. Thus, he is deemed to have knowledge of all the stages which this case has passed and the fact that the case was reserved for judgment by the Tribunal. It is in this context the order dated 31st May, 2016 passed during the period case is pending final decision generates questionable circumstances. Further, it is seen that this order i.e. 31st May, 2016 has been passed several months after the DoE issued directions to the project proponent to stop constructions activity on the basis that the project

activity is contravening the conditions of EC dated 4th April, 2008. In these circumstances we have heard the case again on merit with reference to order passed by Principal Secretary, DoE dated 31st May, 2016 as desired by the project proponent himself.

24. We had allowed sufficient opportunity to Respondent No.9-PP and also Department of Environment and PMC represented by Mr. D.M.Gupte, learned Counsel respectively.

25. It is material to incorporate the relevant portion of the order dated 31st May, 2016 passed by Secretary DoE, Government of Maharashtra for clarity which reads thus:

> *" We also refer to the clarification issued by the MoEF, G.O.I. by amendment in EIA Notification 2006 dtd. 4-4-2011, wherein the BUA was defined. Prior to the amendment in EIA Notification 2006 dtd. 4-4-2011 there was an ambiguity in definition of BUA. The EC granted by the MoEF, GOI vide letter dtd. 4-4-2008 for construction of total BUA 57658.42 sq.m. at site was prior to clarification issued by the MoEF, GOI dtd. 4-4-2011 and on the basis of the conceptual plan. Therefore, the same will apply prospectively and not with the retro-prospective effect.*
>
> *Therefore, it reveals that even though you have constructed 18 buildings at site instead of 12 buildings by changing configuration of buildings, the total BUA (i.e.FSI) constructed at site is 48617.14 sq.m. which is within E.C. limit. It also reveals from the inspection report of the Pune Municipal Corporation dtd. 2-1-2016 that the actual construction carried out at site is 99416.72 sq.m. at plot No.1 and 2 (i.e. FSI-48617.14 sq.m. + Non-FSI – 50799.58 sq.m.) but the FSI constructed at site is 48617.14 sq.m. which is less than the total BUA admeasuring 57658.42 sq.m. permitted in the previous EC granted by the MoEF, GOI dtd. 4-4-2008. Hence, it is hereby concluded that there is no case of violation as prescribed in the EIA Notification, 2006 and accordingly the Proposed Directions issued vide above referred (1) is hereby withdrawn."*

26. From the extracted portion of the order it is clear that Secretary, DOE as virtually declared the activity of the Respondent No.9-PP has wholly legal, permissible and in support thereof has virtually granted a clean chit and certified the project as of now to be well within the permissible limits. It is material to note that the officer concerned has referred to FSI and BUA being same synonym of one aspect. How far this assertion in the order of the officer is legal and factually correct. Hence it needs to be dealt with in detail for the reason, the decision as to whether the construction activity of the Respondent No.9-PP is legal or contravenes any of the environment clearance depend upon clear definition of FSI and BUA in terms of its extent. We had thus called upon PMC to file a statement explaining the distinction between the extent of area covered under BUA (built-up area). We are dismayed at the fact that neither the PMC nor the Environment Department has seriously examined what is F.S.I and BUA. Thus, we gave one more opportunity to which PMC responded through its affidavit dated 17th August, 2016 to which we shall refer.

27. The Deputy Engineer, PMC report which has been relied by Principal Secretary, DOE contains the present level of construction, the comparison of the

F.S.I and Non F.S.I area gives startling factual information. It needs reference and as is extracted herein:

PMC report. Dy. Engineer (BP) dated. 19-12-2015.	PMC Report dt. 17-08-2016		
Total BUA (i.e. FSI) = 48617.14 sq.m.	Built-up Area		
	Plot	F.S.I.	Non F.S.I
	1	48424.66	46088.47
	2	630.55	4858.57

28. We shall now refer to what the term Built-up area and Floor Spacing Index (F.S.I.) would mean in the domain of assessment of permissibility of the project activity with reference to the environment clearance certificate granted. It would be therefore pertinent to refer to the provisions of Development Building Rules of PMC and the project activity approved by the EC of 2008.

29. The Environment Clearance dated 4th April 2008, has clear project description which unambiguously set the project limits.

> *The project proponent is proposing for construction of group housing project at S.No.35 to 40. Village Vadgaon Budruk, Singhad Road, Pune, Maharashtra at a cost of Rs.10,737.14 lakh. The project involves construction of 12 building with Stilt, basement plus 11 floors for 502 flats, 50 shops and 34 offices. The total plot area is 79,100.0 sq.m. Total built up area as indicated is 57,658.42 sq. m. Total water requirement will be 745 KLD and 400 KLD of waste water will be generated from the buildings which will be treated in Sewage Treatment Plant. The treated wastewater will be used for landscaping, DG set cooling and Horticulture purpose. The solid waste generated from the buildings will be 1500 kg./day and disposed as per the MSW Rules, 2000. The parking space is proposed for parking of 1072 cars. (Emphasis provided)*

30. It is manifest from the above referred EC that while granting the EC, the authority had appraised the project with certain configuration and more pertinently, the Total Built up area. There is no reference to the term FSI area i.e. floor space index area. There is no ambiguity in the contents of EC and therefore, what can be seen from the plain reading of the EC is that the EC granted is circumscribed by the project description including its configuration and the Total built up area.

31. The term built up area has been well established in the parlance of Civil Engineering and Town Planning. The MRTP Act, which regulate Regional and Town Planning in the state, authorise Municipal Corporation to have its own Rules, and PMC has notified the development control rules under the MRTP act in order to regulate the development activities in the corporation area. In order to clarify the existing position and the understanding of the terms, Built-up area and F.S.I., it would be pertinent to refer to the 'Development Control Rules of the PMC, Pune, 1982'. Undoubtedly, both Respondent No.9-PP and PMC are required to comply with the Environment Clearance Regulations in terms of the building permissions granted by PMC to Respondent No.9-PP under the powers conferred upon PMC by the above

said rules. The said Rules define 'built up area' and FAR/FSI and the relevant definitions from these rules are abstracted below :

2.1.3 : Built up area **–** *Area covered immediately above the plinth level by the building or external area of upper floor whichever is more accepting the areas covered by Rule 15.4.2.*

2.39 : Floor area Ratio (F.A.R.) *-- The quotient obtained by dividing the total covered area (plinth area) on all floors excluding exempted areas as given in Rule No.15.4.2 by the area of the plot.*

$$F.A.R. = \frac{\text{Total covered area on all floors.}}{\text{Plot area.}}$$

Note : The term F.A.R. is synonymous with floor Space Index (F.S.I.)

32. From these definitions it is manifestly clear that the terms "built up area" and FSI/FAR are distinct and have different interpretation altogether. This would further negate the contention of Respondent No.9-PP that the term "built up area" was not clarified until the clarification issued by MoEF on 4th April, 2011. There could be ambiguity in calculation of built up area as per earlier Environment Clearance Regulations, but this cannot be stretched under any circumstances to take a plea that the built up area and FSI are synonymous and inter-changeable terminologies. We cannot accept but reject in totality the submissions made by PMC and the Respondent No.9-PP in this regard.

33. Though, much has been claimed by Respondent No.9-PP regarding the clarificatory notification of MoEF dated 4th April 2011, wherein the term built up area has been clarified, we do not find any confusion or contradiction in definition of terms BUA and FSI. The Respondent No.9-PP is a major developer and must be well versed with these terminologies.

34. From the material referred to above, it leaves no scope for doubt that F.S.I. and BUA are two terms which apply with a distinction defining different extent of area.

35. It will shake the conscious of all concerned when we see a deliberate attempt on the part of DoE, SEAC and SEIAA to confuse the issue virtually falling in line with misleading statements of Respondent No.9-PP and Deputy Engineer, PMC. It is astonishing that both Respondent No.9-PP and Deputy Engineer, PMC refer to BUA as F.S.I. Despite such clear distinction in definitions and interpretations of BUA and FSI, they had attempted to mislead DoE, SEAC and SEIAA in believing that BUA and F.S.I are same. We expect an officer conferred with professional duty as 06 an engineer in the Department of Building Permission of PMC to be very meticulous in at least understanding the terms which make lot of difference

to the fact of construction. We least expected 06 him as to know the distinction between BUA and FSI, as administration of Corporation would depend upon his professional advice and technical expertise to take action against the erring parties who contravene the mandate of law for safeguarding the interest of citizens which the Corporation is required to protect. We are also constrained to observe that the higher authorities of Building permission department had closed their eyes even when such incorrect affidavits are filed before the Tribunal and such misleading reports are sent to state authorities like DoE, SEAC and SEIAA.

36. Therefore, un-hesitatingly we could observe that the report dated 19th December, 2015 of the Deputy Engineer is a compromised statement to paint a wrong picture of the project firstly to suppress deviation and secondly to create ambiguity in definition of the terms of F.S.I. and BUA to help Respondent No.9-PP to obtain orders from the other authorities. This is unveiled from the affidavit filed by PMC dated 17th August, 2016 in pursuance to our Order dated 2nd August, 2016. The details mentioned therein are as follows:

	Built-up Area	
Plot	F.S.I.	Non F.S.I

1	48424.66	46088.47
2	630.55	4858.57

37. We have also taken a judicial note of the fact that considering such complexity in Environment issues, MoEF had constituted Multi-disciplinary SEAC/SEIAA and had authorised it to take action against violation. SEAC and SEIAA have the necessary experience and expertise to identify violations independently by expert advice and application of mind, based on inputs from field authorities. What we observe here is that Principal Secretary of DoE just relied upon a report filed by junior most official of PMC and without any independent appraisal PS, DoE has held that construction of 18 buildings at site instead of 12 buildings, is allowed within the allowable BUA as per Environment Clearance. We do not find any environment impact appraisal or reasoning for such a finding. When openly excavation of the soil and damage to underground water is being impating the environment. No independent assessment or appraised is done.

38. We are, therefore clear in our mind that Applicant has substantiated that the original project conceived by Respondent No.9-PP had to confine to what was sanctioned under the EC dated 4th April, 2008 and any extra construction or increase in

building, plinth commercial structures, shops and flats should have support of modified EC. As of now, since no modified EC has been granted, the extent of project activity cannot increase beyond the limit circumscribed by EC dated 4th April, 2008. Any such activity or construction beyond permissible limits cannot be saved by jugglery of words, misinterpreting against the statutory definition of F.S.I. and BUA.

39. We are further satisfied that the Principal Secretary, Environment Department who has authored the order dated 31st May, 2016 has lot to explain for the reason the ultimate declaration made by him in the order declaring construction activity of Respondent No.9-PP to be in permissible limit of F.S.I. is result of his mis-interpretation of the terms F.S.I. and BUA and reflects non-application of mind.

40. The prime issue that arises for consideration in this case is as to whether the construction activity of Respondent No.9-PP, is exceeding the sanction accorded by the EC. Could the Respondent No.9-PP proceed with construction without obtaining modified EC. The answer is obviously No.

41. For the reasons aforesaid, we answer the above issue in the negative hold that the construction activity of Respondent No.9-PP to the extent it exceeds the permissible limits as per EC cannot be saved and

shall stop, subject to the grant of modified EC by competent authority.

42. From the extracted portion of the order dated 31st May, 2016 of Principal Secretary, Environment Department, it is seen that he has declared construction of 18 buildings on the site instead of 12 buildings is permissible which, according to him, only a changes on configuration of buildings. This opinion undoubtedly is based on his erroneous conclusion that total BUA which is nothing but F.S.I. consumed i.e. 48617.14 sq.mts which is within the EC limit as against the actual construction activity which has exceeded over 100000 sq.mtrs BUA. Hence we set aside that order/communication dated 31st May, 2016.

43. Besides, another issue which confronts us based on these violations is what should be the consequence of such violation. Un-hesitatingly, it can be held that the consequences of such contravention and illegal construction will be adverse on the environment and ultimately it will lead to several incidental causes of action. That will follow if the Respondent No.9-PP is allowed to continue the illegal activity as has been done by order dated 31st May, 2016. The complexity in environmental issues therefore requires a meticulous examination and dispassionately conclusion and finding.

44. Apart from the legal issues, we further notice that if not illegality in the order of PS DoE in question, it is certainly impropriety because the officer is deemed to have been informed of the fact that this Tribunal is seized of the matter and has reserved the case for judgment on 23.5.2016 after giving full opportunity to Department which the officer in question represents as Respondent No.2. Hence, he cannot plead ignorance of the fact that the case was posted for judgment in the circumstances he should have allowed adjudication by the Tribunal to take final decision on the main issue about the violation of the EC conditions based on the alleged enlarged construction activity. We also do not find merit in contention of learned Sr. counsel Shri. Mishra that such an order is line with the liberty given to SEIAA by Tribunal on 23.2.2016 to deal the application of PP for expansion of project on merit because the order in question is not related to EC but a decision of the proceedings of proposed directions under Environment (Protection) Act, 1986, which were issued by department in August 2015.

45. With these findings, it is now necessary to consider the reliefs sought by the Applicant in this Application. He has sought demolition of the illegal structures and other consequential reliefs. Learned

counsel appearing for the Applicant has strenuously argued that all these violations have been done by the repsonent-9 PP in total connivance with the authorities mainly the PMC and DoE. He has even cited a visit report of SEAC expert committee to suggest the gross inadequacy in the visit report the committee.

46. It is now a matter of record that the construction of the project in question is near completion and even the occupancy certificate is granted partially. We need to consider the fact that the project in question is primarily a residential project and many individuals have invested their money in the project for meeting need for residential accommodation by having a house in city like Pune. Any order to demolish structure would also adversely affect them. The Respondent-9 has already created 3rd party rights. Though the Respondent-9 has blatantly violated the conditions of EC, we also note the total lack of supervision and enforcement at PMC level has resulted in such illegal activity.

47. The Tribunal is expected to apart on the principles of Sustainable Development and Polluter pays principle. We are conscious of the fact that Polluter pays Principle shall not be construed as 'pay and pollute principle', and the payment has therefore

to be exemplary and deterrent in order to pass a clear message that environmental compliance is supreme and the party which is non-complying the environmental standards shall be at economic disadvantage.

48. In this regard, we would like to refer to approach taken by the Hon'ble Principal Bench of National Green Tribunal, New Delhi in Original Application No.24/2011 "Samir Mehta Vrs. Union of India & Ors." Where the Bench has noted that :

> *"The Supreme Court of India, in the case of Sterlite Industries India Ltd. V. Union of India 2013 (4) SCC 575 had held that where the industry had violated the provisions of the Water (Prevention and Control of Pollution) Act, 1974 and had operated without obtaining consent, it was liable to pay damages of Rs.100 crores for the default period. The Court applied the Rule of Strict Liability but did not strictly compute the damages with exactitude. It only enforced the liability on general principle for awarding of damages for non-compliance to the law in force. In fact, any other approach would run contra to the Principle of Strict Liability. This judgment has been followed by the Tribunal in a large number of cases. Reference can be made to the cases of S.P. Muthuraman 2015 ALL (I) NGT Reporter (2) (Delhi) 170, Krishan Kant Singh V. National Ganga River Basin Authority (2014) ALL (I) NGT Reporter 3 (Delhi) 1 and M.C. Mehta V. Kamal Nath & Ors. AIR 2002 SC 1515. Thus, we are of the considered view that the determined damages of Rs.100 crores should be paid by and recovered from Respondents No.5, 7 and 11, jointly and severally while Respondent No.6 is held liable to pay Rs.5 crores as environmental compensation for dumping of the cargo in the sea and then failing to take any precautionary or preventive measures. The consignment of 60054 MT of coal has caused marine pollution and continues to be a cause and concern for environmental pollution. The Respondents are defaulting entities which have not complied with law and have adopted a most careless and reckless attitude in relation to protecting the marine environment."*

49. We also refer to the judgment of Hon'ble Principal Bench in the matter of Krishnlal Gera Vrs.

State of Haryana (Appeal No.22 of 2015 dated 25th August 2015) wherein the Tribunal has dealt with a matter regarding construction activities without the necessary prior environmental clearance. In para 58 and 59 of the judgment after discussing the legal framework, the Tribunal has imposed environmental compensation cost of 5 % (percent) of the total cost for restoration and restitution of the environment, in addition to payment of Rs.5 crores for violating the Law and starting and completing the project without obtaining environmental clearance, on the project proponent. These directions were issued in consonance with the dictum of Hon'ble Supreme Court.

> *"Since the Project Proponent may not be directed to demolish the structure at this stage, but, shall strictly comply with the directions that we propose to pass in the present case. The scope and ambit of such directions has to be in terms of the Act of 1986 circumscribed by the statutory jurisdiction of this Tribunal. Upon detailed discussion of the laws in force, the Tribunal in the case of S.P. Muthuraman (supra) has clearly held that such directions can be issued by the Tribunal."*

50. The Principal Bench in "*Appeal No.7/2015 in the matter of Jalbiradari and Others Vrs. MoEF*" pronounced on 31st May 2016, has also considered the legal consequences in case of quashing the environmental clearance for construction project, particularly with regard to the "*fate accompli*" situation.

16. ----------

-The inevitable consequence could be the Tribunal has dealt with quashing of the Environmental Clearance and set the project at in or they be directed to maintain status quo as on the date of determination. The Tribunal has dealt with large number of cases filing under the category "fate-accompli situation". There are large numbers of projects which have started their construction activity or other activities without even complying Environmental Clearance and the projects were largely completed and then either Environmental Clearance was granted or their cases for granting Environmental Clearance were delisted. In those cases following the principle of Sustainable Development and Polluter Pays Principal, the Tribunal imposed Environmental Compensation on the project proponent for degrading/damaging the environment for starting the project without complying with the provisions of law and for violating the orders and directions. The works of those projects were stopped and a Committee was appointed to revisit for grant/consideration of the Environmental Clearance and fresh Environmental Clearance orders were issued. Even where demolition was required the same was directed. All these cases have been decided by the larger bench of the Tribunal and clearly state the binding precedent. References can be mad made to S.P. Muthuraman v. Union of India & Ors., 2015 ALL (I) NGT REPORTER (2) (DELHI) 170; Krishan Lal Gera v. State of Haryana & Ors., Appeal No. 22 of 2015 (pronounced on 25th August, 2015) & Forward Foundation & Ors. v State of Karnataka & Ors., O.A. No. 222 of 2014 (pronounced on 7th May, 2015). In these judgments, various judgments of the Hon'ble Supreme Court have been considered by the Bench. The purpose and object of the law including CRZ Notification, Environmental Clearance is to strictly regulate the development so as to prevent causing of damage of the nature and ecology. The cases are not the cases of irreparable or irreversible situations. Largely, the

90 per cent of the projects were has already been completed except some other parts of the project. There can be proper regulations on these projects, as otherwise it will only lead to colossal waste of public funds. It will result in dual disadvantage, firstly, wastage of public funds and secondly, and more importantly the demolition of the project itself would generate so much of waste and other materials that this will become a huge environmental hazard itself. The cases are not one, which are incapable of reprisal or re-appreciation. Damage to the environment and ecology to some extent has already been caused. It will be more useful to take remedial and restorative steps. They have acted in breach of the law and carried on with their activity in an unauthorized and illegal manner. ----------

51. We are also inclined to adopt the approach taken by the Bench in the interest of justice and fair play and based on the facts and circumstances of the case. The construction activity is not a prohibited activity in the subject, but a regulated activity. We also take a judicial note of the fact that the demolition of structures in question would also result in further environmental damage and generation of construction waste. Other option which could have been explored is asking the government to take over the additional construction and use it for public purpose but as noted above, already third party rights have been created, may be partially.

52. The purpose and object of the law including Environmental Clearance is to strictly regulate the

development so as to prevent causing of damage of the environment and ecology. Though in the present case substantial damage has been caused to the environment and ecology, it will be more useful to take remedial and restorative steps.

53. The Respondent-9 is a defaulting entity which has not complied with law and has adopted a most careless and reckless attitude in relation to protecting the environment. The other Respondents, particularly the PMC and DoE have been the either the mute spectator or have not performed their statutory duties. However, we would note with appreciation that it is only MPCB that has acted on the complaints of the Applicants and have diligently taken legal actions besides bringing on record the non-compliances by Respondent-9 PP.

54. For the aforesaid reasons, the Applicant succeeds in his legal pursuit to challenge the non-compliance of EC conditions by the Respondent-9 and obtain certain directions. Hence the Application is allowed and we issue following directions:

1. The Respondent No.9-PP shall pay environmental compensation cost of Rs.100 crores or 5 % (Five percent) of the total cost of project to be assessed by SEAC whichever is less for restoration and restitution of environment damages and degradation caused by the project proponent by carrying out the construction activities without the necessary prior

environmental clearance within a period of one month. In addition to this, it shall also pay a sum of Rs. 5 crores for contravening mandatory provision of several Environment Laws in carrying out the construction activities in addition to and exceeding limit of the available environment clearance and for not obtaining the consent from the Board.

2. In view of our finding that there has been manifest, deliberate or otherwise suppression of facts of illegality in the project activity of Respondent No.9-PP by the officer of PMC, we impose fine of Rs.5 Lakhs upon the PMC and direct Commissioner PMC to take appropriate action against the erring officers. The amount of Rs. 5 Lakh shall be paid within one month.

3. We direct the Chief Secretary, State of Maharashtra and the competent authority to take notice of the conduct of the officers concerned who have misled the Department of Environment in the matter relating to interpretation of F.S.I. and BUA in terms of which order dated 31st May, 2016 has been issued in particular the Principal Secretary, Department of Environment who has authored the order dated 31st May, 2016

4. PMC, DoE and SEIAA are directed to pay cost of Rs. 1 lakh each to the Applicant within 4 weeks.

55. The Application alongwith connected Misc. Applications and Execution Application is therefore disposed accordingly.

.....,JM
(Dr. Justice Jawad Rahim)

.....,EM
(Dr.Ajay A. Deshpande)

PUNE.
DATE: 27th September, 2016
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