BEFORE THE NATIONAL GREEN TRIBUNAL SITTING AT PUNE

MEMORANDUM OF APPLICATION

(Under Sections 15 of read with section 18 National Green Tribunal Act, 2010)

APPLICATION NO. OF 2023

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REJOINDER TO AFFIDAVIT-IN-REPLY OF RESPONDENT NO. 7

(Money Magnum Nest Pvt. Ltd.)

BEFORE THE NATIONAL GREEN TRIBUNAL SITTING AT PUNE

MEMORANDUM OF APPLICATION

(Under Sections 14 & 15 of read with section 18 National Green Tribunal Act, 2010)

APPLICATION NO. 28 OF 2023

BETWEEN:

Santosh Daundkar **... APPLICANT**

AND

Member-Secretary, State Level Environment Impact Assessment Authority and Ors. **... RESPONDENTS**

REJOINDER TO AFFIDAVIT-IN-REPLY OF RESPONDENT NO. 7 (Money Magnum Nest Pvt. Ltd.)

I, Santosh Daundkar, the Applicant above-named, residing at Mumbai, do hereby solemnly affirm and state as under:

1. The Applicant has gone through the Affidavit-in-Reply of the abovementioned Respondent, and accordingly, tenders this Rejoinder.

2. The Applicant submits that, in this Rejoinder, he shall traverse through the core points which are pertinent to the issues at stake. Accordingly, whatever has not been denied specifically, be construed as being an admission which shall be adverse to the underlying cause of this Original Application.

3. In this Affidavit-in-Reply, this Respondent has stated that he be deleted as a Respondent to this case, as he has not indulged in any violation of the law.

4. In this reference, the Applicant states that the impleading of this Respondent to this Original Application was only for an academic purpose and that the Applicant has not been seeking any specific relief against this Respondent. All that the Applicant is seeking is that there ought to be a mechanism to identity all the violations which have happened, where Recreation Ground has not been placed on the Ground and action be taken in accordance with the law.

5. Be that as it may, since this Respondent has raised certain fundamental points. The Applicant is answering to them in a specific manner. These essential points are detailed hereunder:

6. POINTS RAISED BY THIS RESPONDENT:

POINT NO. 1: Issue of Recreation Ground is sub-judice in the Supreme Court under SLP (C) Diary No. 11843/2023.

POINT NO. 2: The Original Application is barred by limitation.

POINT NO. 3: That the Applicant does not have any locus and that he is not a person aggrieved.

POINT NO. 4: DCR does not come within the purview of the NGT.

POINT NO. 5: As per the approved plan Recreation Ground has been provided on the Ground.

7. Rejoinder to the specific points raised by this Respondent:

7.1 POINT NO. 1: issue of Recreation Ground is sub-judice in the Supreme Court under SLP (C) Diary No. 11843/2023:

The Applicant submits that this Respondent is not a party to the case pending before the Hon'ble Supreme Court. Therefore, such a plea taken by this Respondent is specious in nature.

Further, in this case, no specific Orders have been issued by the Hon'ble Supreme Court directing that this Hon'ble Tribunal ought not adjudicate this case in accordance with the provisions of The National Green Tribunal Act, 2010. If this Respondent wants to get the proceedings stayed, then he will have to seek specific orders from the Hon'ble Supreme Court, which has not been done in this case.

Needless to add that if this Respondent has got any grievance, he ought to have approached the Hon'ble Supreme Court to seek a stay on these proceedings, which he has not done.

In other words, till the time the Hon'ble Supreme Court specifically prohibits the conduct of the proceedings in this case, this Respondent cannot seek any abatement of the current proceedings.

Needless to add that this Hon'ble Tribunal is governed by section 20 of The National Green Tribunal Act, 2010, which stipulates that 'Precautionary Principle' be applied. Thus, even if this Respondent has a case, till the time the Hon'ble Supreme Court gives a categorical decision, his activities which may just bear a mere probability of an environment damage, ought to stop.

7.2 POINT NO. 2: The Original Application is barred by limitation:

The contention of this Respondent is incorrect. This is because, the anchor point of this Original Application is that Recreation Ground has to be on mother earth, so that tree plantation could be done in the prescribed manner. In other words, what the Original Application seeks is leaving aside the stipulated Garden in the layout on mother earth, where indigenous variety of trees would get planted. Such tropical trees with a huge trunk, bearing an imposing height of about 100 feet, topped by a broad canopy laden leaves, cleanse the pollution at the very spot where it is generated by taking-in the toxic gases through the stomata of the leaves and sorbing them.

Thus, till the time such requisite number of tree plantation is done in the prescribed manner, there would be an absence of the mechanism of cleansing of the toxic gases, which will keep hurting and adversely affecting the health of the people.

Accordingly, this would give rise to a recurring cause of action. Each day, when toxic fumes are released and there are not adequate trees planted in the prescribed manner, then with each passing day, there would arise a fresh cause of action as with each passing day, there would be fresh injuries.

Needless to add that if legally tenable action is taken against polluting industries long after the factory is constructed and made operational, and that this action happens, irrespective of limitation, then likewise, action ought to be taken for projects which aid in pollution through the statutory omission of non-plantation of trees. No question of limitation can be invoked in such cases.

To reiterate, if the Project Proponent has not done the requisite plantation in the prescribed manner on mother earth, then till the time such a requisite plantation is done, people would keep suffering. Accordingly, till the time suffering continues the limitation would not cease to exist.

In fact, what this Respondent is seeking to convey is that once the violation has taken place, which has the effect of toxic gases not getting cleansed by the stomata of the trees, then the violation gets regularised only because the violations have been happening in the past months.

In other words, according to the Project Proponent if the pollution has been harming people for more than 6 months, then no cause of action exists thereafter, and thus people would have to suffer that pollution all their lives. Naturally, if such a scheme of regularisation exists, then the very intent and purpose of section 20 of The National Green Tribunal Act, 2010 would get defeated.

Naturally, this is a preposterous position, which would render the environmental laws completely inconsequential, and therefore, through the principles of purposive construction and the mischief rule of interpretation, this contention of this Respondent ought to be rejected.

7.3 POINT NO. 3: That the Applicant does not have any locus and that he is not a person aggrieved:

The Applicant submits that the question of locus in the realm of environmental laws is no longer *res integra*. It is needless to add that

for the lack of the requisite amount of trees to be planted in the prescribed manner, the effect of which shall impinge on the Applicant as much as it would affect others.

It is further submitted that the Hon'ble Supreme Court has enlarged the locus in the realm of environmental laws, in the case of MK Ranjitsinh in Writ Petition (Civil) No. 838 of 2019 where it was held that an environment violation at one place inland, would affect the environment of a place as far as the islands of Andamans Islands and Lakshadweep Islands. The issue of locus has also been liberally construed as has been inferred by the Hon'ble National Green Tribunal Principal Bench in Appeal No. 1 of 2013.

Accordingly, to say that the Applicant does not have any locus, would militate against the settled position in law in this respect.

7.4 POINT NO. 4: DCR does not come within the purview of the NGT:

The Applicant submits that the Project Proponent has accepted the Environment Clearance conditions, and the main condition in the Environment Clearance is that the Project Proponent shall abide by all the town planning laws, which obviously, would also mean Development Control and Promotion Regulations for Greater Mumbai, 2034.

Thus, if the Project Proponent has accepted that he would abide by the Environment Clearance conditions and the Environment Clearance stipulates that the Project Proponent ought to abide by the Development Control and Promotion Regulations for Greater Mumbai,

2034, accordingly, now it is not open for the Project Proponent to change his position and to say that this Hon'ble Tribunal does not have jurisdiction to evaluate the violations of the Development Control and Promotion Regulations for Greater Mumbai, 2034.

Needless to add that violation of Development Control and Promotion Regulations for Greater Mumbai, 2034 is also a violation of Environment Clearance conditions. The National Green Tribunal has full jurisdiction to adjudicate on the violation of Environment Clearance conditions, which have been imposed pursuant to the provisions of Environment Impact Assessment Notification of 2006.

7.5 POINT NO. 4: As per the approved plan Recreation Ground has been provided on the Ground:

The Applicant submits that the Project Proponent has stated that 25% of the area of the layout has been earmarked as a Recreation Ground and that he has provided the same on the Ground. This Respondent has also annexed a plan in relation thereof.

The Applicant submits that this Respondent is seeking to misguide the Hon'ble Tribunal in this respect by putting up incorrect facts.

The correct fact is that under the laws of the land, the land which touches the building line, that constitutes the front, rear and side open spaces, which are required to be provided under the provisions Regulation 27 of the Development Control and Promotion Regulations for Greater Mumbai, 2034. Since the height of the buildings is of more than 120 metres, therefore, under the provisions to Regulation 41 it

was mandatory for the Project Proponent to provide such front and side open spaces i.e. setbacks of 20 metres width for the purpose of light and ventilation.

However, the Project Proponent did not provide any setbacks, which has to be kept as a distinct space around a building. Instead, the Project Proponent showed the side setbacks of the respective buildings as being a Recreation Ground. Unfortunately, without caring for the imperatives of light and ventilation, and open areas, which provide a dispersal space for pollutants, the Project Proponent, could manage to get the Municipal Corporation grant an approval for a building without any setbacks. It was a blatant case, where it seems Regulation 41 was not in existence at all.

It is primarily this area of the setbacks, which at the side and rear were required to be of 20 metres width, that essentially constitutes a Garden, for tree plantation. As per the provisions of Regulation 27, this had to be a distinct from side and rear open spaces, which have to be provided under Regulation 41. In other words, garden and side and rear open spaces are 2 different and distinct provisions altogether.

The Applicant further submits that the only exception, where a Garden has been allowed to be placed within the side and rear open space is permitted in the Slum Rehabilitation Authority Schemes, and that too, with restrictions. The relevant provision in this respect is quoted hereunder:

Sub Clause 6 of Development Control Regulation 33(10):

6.10 Wherever **more than the minimum front and marginal spaces have been provided, such additional area provided may be considered as part of the amenity open space** in the project comprising both rehabilitation and free sale components, and without charging any premium for, relaxation as per clause 6.11 ,

6.11 Even if the amenity space is reduced to make the project viable a minimum of at least 8% of amenity open space shall be maintained at ground level.

NOTE: Amenity Open Space is generally referred to as a Recreation Ground under the provisions of Regulation 27.

The Applicant further submits that this Respondent has further done yet another extremely serious violation with respect to Recreation Ground.

As per the provisions Regulation 35 (b) of the Development Control and Promotion Regulations for Greater Mumbai, 2034, the land component linked to the balance Floor Space Index (FSI) has to shared with the Municipal Corporation for creation of a Recreation Ground which includes tree plantation and further to Maharashtra Housing and Area Development Authority for constructing low cost housing. The sharing ratio is 33% for Municipal Corporation, 33% for Maharashtra Housing and Area Development Authority and 34% for construction of residential and commercial buildings.

The motivating principle behind this is that more the FSI, more be the breathing space.

Unfortunately, the Project Proponent committed an infraction of the law with the help of the Municipal Corporation. In this reference, the Project Proponent, considered that the balance FSI was to get

terminated at 1.33. In other words, the Project Proponent created a wrong threshold of FSI. As per the proforma appended to the plans, the Project Proponent has used an FSI of 4. Accordingly, this threshold ought to have been 4 and not 1.33.

Unfortunately, the officers of the Municipal Corporation, did not just disregard the express provisions of the Regulation 35 mentioned above, but as much as they disregarded the Notification of the Government of Maharashtra, dated 25th June, 2021, where it was stipulated that the threshold of 4 FSI could be waived only for layouts approved before and where the share of the Municipal Corporation and Maharashtra Housing and Area Development Authority had already been handed over.

In other words, this being a fresh development, the sharing obligation ought to have been as per the contemporary regulations, and that the Project Proponent has faltered in this in a blatant manner. Had the Project Proponent followed the law, and regarded the threshold FSI as being 4, in that case, inter alia, the sharing ratio for the Municipal Corporation for the purpose of providing Recreation Ground would have increased very substantially, which in turn would have led to huge volumes of plantation of large tropical trees.

In short, the Project Proponent has usurped a huge area of Recreation Ground, which he ought to have handed over to the Municipal Corporation, where it would have done a plantation as per the norm of 1 tree for every 20 square metres of area.

Thus, while the Project Proponent has infused an overwhelming concretisation, he has completely waived his obligation to provide the Recreation Ground through the sharing mechanism mentioned above.

In view of what has been stated in the foregoing, it is clear and apparent that this Respondent has not made this Affidavit-in-Reply with clean hands. He has manipulated the law in the most outrageous manner, whereby, the ultimate sufferers would be the innocent people, who may not even be aware of such infractions crafted in a web of technicality and fervent rhetoric of being law compliant, when the reality in this double-faced scenario is otherwise.

8. Be that as it may, the purpose of this Rejoinder is only to assert that the Project Proponent has very gravely violated the law, in not setting aside the required spaces for plantation in the prescribed manner. Accordingly, it is eminently desirable, that necessary modifications in plans be carried out, to facilitate such plantation in the manner as spelt out in the mandatory guidelines issued by the Central Pollution Control Board and the directives of tree plantation given in various Orders of the Hon'ble National Green Tribunal. However, at the same time, the Applicant does not want to disorient these proceeding, due to misjoinder of issues.

11. Accordingly, the Applicant submits that he is moving the State Level Environment Impact Assessment Authority to take statutory action for the Environment Clearance conditions by the Project Proponent. The Authority has been accorded statutory powers under section 5 of the Environment Protection Act, 1986, for violation of

Environment Clearance conditions vide Notification dated 28th February, 2014. The Applicant is sanguine that the Authority would not dither from invoking its statutory obligations for protecting the "Right to Life" of the people as guaranteed under Article 21 of the Constitution of India, so that the requisite areas be provided for Garden.

12. Accordingly, it is humbly prayed that the prayers made in the Original Application be made absolute.

APPLICANT

VERIFICATION

I, Santosh Daundkar, resident of 10/37 BIT Chawl, KK Marg, Mumbai Central, Mumbai 400 008, do hereby verify that the contents of aforesaid paras 1 to 3 are true to my personal knowledge and the rest of the paragraphs are believed to be true on legal advice and that I have not suppressed any material fact.

Signature of the Applicant

DATE: 7th November, 2024

PLACE: Mumbai

BEFORE ME

M. H. CHOWDHARY
PUBLIC NOTARY
(GOVT. OF INDIA)

7 NOV 2024

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