BEFORE HONOURABLE NATIONAL GREEN TRIBUNAL
WESTERN ZONE BENCH, PUNE

Application No. 100 / 2020 (WZ)

BETWEEN

Udaysankara Samudrala ..... **Applicant**

VERSUS

Union of India & Ors ..... **Respondents**

Next date: **09.11.2021**

WRITTEN ARGUMENTS BY RESPONDENT NO. 4
'Shree Jivdani Devi Mandir Trust, Virar'
(श्री जीवदानी देवी मंदिर ट्रस्ट, विरार)

WRITTEN ARGUMENTS

1. The Advocate for Respondent No.4 (Mandir/**Temple**) is filing these Witten Arguments to summarize the submissions to be made in the court and intended to be urged and pressed before passing any ORDER in the matter.

2. Respondent No.4 have filed the Affidavit in reply dated **04.10.2021 (Continuous Page nos. as per NGT record from 1089-1177)**. Respondent further submits that the Daily Orders dated **24.12.2020, 03.08.2021 and 02.09.2021** were obtained ***on the basis of facts recorded at site*** and submitted by Ld. Counsel of Respondent No.1. These were not the statements or submissions of the Ld. Counsel of the Respondent No.4.

3. Respondent No.4 most respectfully submits that they were entitled to be heard before passing any ex-party adverse order. The Daily Order passed on 02.09.2021 is without hearing Respondent No.4 and is hurting the Respondent No.4.

LIMITATION

4. **Respondent No. 4 states and submits that the issue of limitation is of utmost importance**. This is preliminary issue being raised to decide on the maintainability of this matter and jurisdiction of the Hon'ble Tribunal to entertain this Application. Unless this is decided, all the proceedings and the orders passed in the matter would be ultra-vires and bad in law.

5. The service of Original Application was not done to the Respondents. Many important and relevant facts were suppressed by the Applicant showing ignorance.

6. There was an Original Application **No. 55/2020** on the subject matter filed on **06-03-2020** that was dismissed by the very same bench of Hon'ble Tribunal on **09-09-2020**. [Refer Affidavit in Reply by Respondent No.4 **[▟ Page 1157-1159]**.

https://greentribunal.gov.in/caseDetails/PUNE/270413800095202O?page=order

Filing Number	**270413800095/2020**	Filing Date	**06-03-2020**
Party Name	**DAMODAR ROPEWAYS & INFRA LTD VS UNION OF INDIA**		
Petitioner Advocate(s)	**RAHUL KRISHNA, RAHUL KRISHNA**	Respondent Advocate(s)	
Act	**ENVIRONMENT (PROTECTION) ACT, 1986**		
Case Number	**Original Application No. 55/2020**	Registered On	**20-08-2020**
Last Listed	**09-09-2020**		
Case Status	**DISPOSED**		

7. If the earlier Application, as per the details given above, filed on 06-03-2020 in this very same matter was

adjudicated to be barred by limitation, this present Application filed on 16-12-2020 is hopelessly barred by limitation, too.

8. Respondent No.4 states and submits that unless the issue of limitation is not decided by this Hon'ble Tribunal, there is no propriety in proceeding further in this matter on merit. Once and if it is decided after deliberations and adjudication that the Application itself is barred by limitation, Hon'ble Tribunal loses its jurisdiction and then there is no question of entertaining the application before this forum.

9. Respondent No.4 states and submits that it is important to see the chronology and diary of events in this matter, to first decide on the issue of limitation. Further, the applicant himself has specifically mentioned under LIMITATION in his own application, which needs to be examined against the provision of Act u/s.14(3) and so also the cause of action "ugly structure" and as to when it first arose. The applicant is Ld. practicing Advocate and has himself stated that the application has been filed under s.14 of the Act. **[▟ Page 37]**

MAINTAINABILITY

10. The tenability of the cause of action also must be examined in view of the definition given in **2(m)** as to whether it gives rise to 'substantial question related to environment' and whether this application is thus maintainable. **[▟ Page 1101]**

BONAFIDES & CLEAN HANDS

11. This too has been pleaded in the Affidavit in Reply dated 04.10.2021. **[▟ Page 1094]**

PLAIN & SIMPLE READING OF SCHEDULE

7	**Physical Infrastructure including Environmental Services**	
7(a)	**Air ports**	**ALSO NOTE THAT, even though category 7(e) says Ports, Air ports have been categorically stated as separate category.**
7(b)	**All ship breaking** yards including ship breaking units	This will exclude other yards for breaking cars, plant & machinery machinery, raw material yards
7(c)	**Industrial** estates/ parks/ complexes/ areas, Export Processing Zones (EPZs), Special Economic Zones (SEZs), **Biotech** Parks, **Leather** Complexes.	**Industrial** …. **Biotech** ….. **Leather** **AND NOT ESTATES OF** Tea Estates Public Parks Financial Complexes
7(d)	**Common** hazardous waste treatment, storage and disposal facilities (TSDFs)	■ The pre-qualifying word **Common xxxxxx is very important.** TSDF, ETP, MSWMF, if they are NOT COMMON, then they don't, then they don't attract the requirement of EC.
7(e)	**Ports**, Harbours, break waters, dredging	**Ports** followed by the other words make it clear that it relates to WATER and irrespective of whether its location (Sea, River, Creek). Please also note that 7(a) Air ports is added separately and not left to the imagination that it would be also covered under 7(e) which has in fact used the 'generic term' Port**s**. They have NOT said **Sea Port.**
7(f)	Highways	All are included, State & National
7(h)	**Common** Effluent Treatment Plants (CETPs)	■ Every industry OR an individual can have his own facility, without EC. e.g. Every Industry can have their ETP and even a housing society has its own MSWMF. In fact, each Society is encouraged to have its own facility.
7(i)	**Common** Municipal Solid Waste Management Facility (CMSWMF)	

12. It is important to read the "***SCHEDULE (See paragraph 2 and 7) LIST OF PROJECTS OR ACTIVITIES REQUIRING PRIOR ENVIRONMENTAL CLEARANCE***". The 'project or activity' covered under it are listed in Column 1 & 2 of the Schedule. **The list of 'project or activity' against each item is complete in all respect, exclusive and full. These are all inclusive and NOT generic in nature.** There is no use of word "**etc.**" anywhere in the Schedule, whereas it is used at many other places in the Notification.

13. In fact, the qualifying descriptive criteria are also included in the column 2, so as to leave no scope for confusion. The 'project or activity' **7(g) 'aerial ropeway'** is existing from the day one of the Notification i.e. 14.09.2006. The Notification have undergone changes, amendments from time to time. **Many activities have been added/deleted, but there is no change in 7(g) 'aerial ropeway'.** The prequalifying word '**aerial**' has not been dropped OR the ambit has been expanded by illustrations, examples, mentioning variations OR even by saying ***etc.***

14. **MoEFCC is supreme and is always free to add OR delete the words, 'project or activity' and change the qualifying criteria**. MoEFCC is free to do so anytime they feel it necessary OR any such left out 'project or activity' is noticed by them. Even if and as directed by the Hon'ble Tribunal and Supreme Court, in future, the MoEFCC may amend the Notification and widen the definitions or narrow it down. But till such change is done in the Notification formally, **no one should invent a new expanse and read it on his own.**

15. It is further important to note that the EIA Notification did undergo change even in respect of 'project or activity' 7(g) by **S.O.3067 (E) dated 01-12-2009**, as follows. But here also

formal statutory binding documented piece of legislation did not think it right to expand the nature of 'project or activity' to **anything more than 'aerial ropeway'** and nothing else. It only amended the Notification to extent of classifying its ***category with threshold limit*** as A and B, i.e. to be dealt at Central Level and State Level. The '**aerial** ropeway' projects of following nature were required to be dealt as A Category if they were:

(i) All Projects located at altitude of 1,000 mtr. and above.

(ii) All Projects located in notified ecologically sensitive areas..

16. Quite a few other 'project or activity' have the restrictive pre-qualifying criteria to define the expanse or ambit of it. If that pre-qualifying criterion is arbitrarily left out, it would include all ETP, TSDF and CMSWMF. This is not at all intended. The pre-qualifying word added "common" at the item nos. 7(d), 7(h) and 7(i) is intended to be restrictive in nature and is added deliberately.

17. There are two separate items **7(a)** and **7(e)** for **Air ports** and **Ports and Harbours**. They have not used the word "Ports" and left to the imagination that it would include all kinds of Ports, i.e. airports and sea-ports. This Notification has not left anything to imagination OR reading in between the lines.

18. It is also well settled that formal delegated legislation can't be simply changed by a Circular, Explanatory Note, Office Memorandum or Guidelines or Manual describing procedures. The purpose of the formal Gazette Notification is to make it known to the public in general and add the formal force of law behind it.

19. It is to be noted that the delegated legislation is NOT challenged by the applicant before appropriate forum or in the High Court. The EIA Notification 14.09.2006 with all its amendments is valid as it is today. Applicant has not challenged the ambit of the Notification OR has sought to amend it before the appropriate forum so as to include other forms of Ropeways.

20. It is also the well-settled Rule that even if any Act, Rule, Notification or formal piece of delegated legislation needs to be amended, then it must be done by following due process of law. Any other document, even including DRAFT NOTIFICATION remains the draft and doesn't make it binding.

21. **All above illustrations clearly show that the table is specific and can't be interpreted loosely creating confusion**. The very purpose of publishing the Gazette Notification is to make the public at large to be aware of it and to help follow it. **If discretion of interpretation or reading behind/between the lines, of what is not written, is left to the executives then it would create great harassment/ chaos/anarchy in the general public.** There is no leeway left to an individual to add/delete words that are not there, if the 'project or activity' written there makes sense and there is no confusion about the understanding of it.

22. There are several incidences of errors in understanding, clarity, confusion, duel meaning in the minds of the project proponent (PP). As such they try to seek advice and take an informed decision based on advice received by them.

23. Project Proponent under dual mind may err, make a mistake or apply for the 'Environmental Clearance' even when it would not have been required. SEAC/SEIAA also entertains the application without first examining whether the PP really

requires the EC or not. But such errors don't change the Act, Rule, Notification or mandatory nature of delegated legislation. If mistake of few would be allowed to be upheld as formal amendment of legislation, then the whole purpose of laying down and following the due process of law even for doing formal amendment, would be defeated. Even when such mistake is done by quite few, that doesn't change the formal Notification by itself.

24. If the EC is granted to several projects by SEAC/SEIAA or MoEFCC even when they were <20,000m^2 without mandatorily qualifying under 'project or activity' 8(a) in area, will it change the ***'Category with threshold limit'*** as provided in the Notification, for all projects? ***Mistakes or voluntary applications by us or anyone or grant of us EC in response to the applications made, won't 'amend' the Notification itself***.

25. Notification has been amended even in the past on several occasions. It may be amended even in future as well. During such amendments, MoEFCC in future may even broaden the Item No. 7(g) to include any other means of ropeways as well. But that doesn't make the amendment effective retrospectively. The Notification Clause No. 2 as it reads applies to ***new projects*** and the actions done or omitted to be done are saved from applicability of such future amendments. No amendment would apply retrospectively.

MOEFCC-EAC (INFRA-2) TOR

26. The Temple had applied for EC to MoEFCC EAC by submitting Form-1 and other projects details. The Temple submitted above which was noted by ***EAC at 45.4.3.2. The EAC noted the following***:-. So basically these were the submissions of the Temple which were noted and the ToR was given for ***The***

project/activity is covered under category B of item 7(g) 'Ropeways'; as against the deliberation that was required at this stage itself as to whether 'aerial ropeways' is same as 'ropeways' AND whether anyone can add/delete the words to the Notification. There are so many words that change the entire meaning/connotation if those are added/deleted.

27. It was not the question before EAC (Infra-2) per-se to decide as to whether this project requires EC or not. In fact, the Clause 7 'screening & scoping' and 'APPENDIX–V (See paragraph 7) PROCEDURE PRESCRIBED FOR APPRAISAL' only requires the EAC to issue the ToR. But nowhere it is required to determine whether it requires EC or not. **Clause 7.II. Stage (2)-Scoping (i) of the Notification** is reproduced below for ready reference.

> **"Expert Appraisal Committee in the case of Category 'A' projects activities,** ….. determine detailed and comprehensive Terms of Reference (TOR) addressing all relevant environmental concerns for the preparation of an Environment Impact Assessment (EIA) Report in respect of the project or activity for which prior environmental clearance is **sought** and the Expert Appraisal Committee …… concerned shall determine the Terms of Reference on the basis of the information furnished in the prescribed application ……"

28. **The temple was misguided or has erred in applying for the EC**. This in turn also prompted the EAC to err in issuing the ToR to the project for which EC *ab-initio* was not required. There was no representation by Temple before the EAC to this effect and as such no deliberation, discussion or adjudication on this very vital point, which would go to decide the jurisdiction of the EAC to do the appraisal. With due respect to EAC, the error was prompted by the Temple. **But this being point of law, can be raised and deliberated at any stage.** Even if the EC would have been granted by now, Temple could

have renounced the EC by writing to the MoEFCC. Merely because the EC was applied and then granted by error, the provision of the Notification doesn't stand amended, by such error, in the reverse manner. **Two wrongs can never make one right, is well settled principle of law**. Further there is no *estoppel* against the provision of law.

29. As can be seen from the Schedule, the Notification has not spared using the words necessary to clarify the expanse of the 'project or activity' e.g. in **7(c)** and **7(e)** WHEREAS it has stopped merely by using select words in 'project or activity' 7(a) and **7(f)**. When legislation has used its wisdom and categorically added the description to this category 7(g) as 'aerial ropeways' WITHOUT use of even a word like 'etc.', no formal legal authority is vested with anyone else other than MoEFCC, to amend the Notification, if required, by following due process of law. with prospective effect.

DAMAGE TO ENVIRONMENT FROM OPERATION OF FUNICULAR ROPEWAY

30. The prima-facie case, balance of convenience and irreparable loss to environment has been pleaded in the Affidavit in detail. **[▟ Page 1111]**

31. It is clear that the 'funicular ropeway' is NOT there in the original Notification anywhere.

32. The damage to environment is feasible in construction phase and operation phase, both, which is independent of each other. The construction of the 'funicular ropeway' is complete in all respect as much as it is fully operational, it has Occupancy Certificate for its Terminal Buildings from VVMC. The forest land is already diverted, alternative land is given, the payment of

Rs.67 lakhs towards plantation is made. The hill area surrounding the temple is also fully lush green with no sign of any damage to environment, flora, plant and vegetation around it.

33. There are no operational issues that can damage the environment even in the original application itself. The only 'substantial question related to environment' raised is the ugly appearance of the structure **AND nothing else**.

34. There is no issue in operational phase now, of ***land use, forest, flora, fauna, air pollution, noise, vibration, construction activity at site, use of ground water, creation of effluent, treatment of it or discharge to aquifer, storm water drainage, ground water recharge obstruction, nothing of these are the issues in operation***. When no such issues are existing where is the question of its impact on environment. In fact, probably this is the reason, this category is not included in the 7(g).

35. Therefore, even if the final outcome of this application takes time, there is no harm that is going to be caused to environment, as can be seen on the face of it. If finally, it is decided that the Temple needs to be penalized for whatever wrong has been done, all the funds collected in the meanwhile can be very well utilized for that cause of betterment/augmentation/restitution of environment. **The only objective of the applicant is to harass the Temple, obstruct the usage of the facility created for the devotees, in particular senior citizens, handicapped, ladies and children below 5 years**.

36. **But the current entry 'aerial ropeway' as it is** made in EIA Notification **is not applicable to the non-aerial**

ropeway and rather the 'funicular ropeway' which is erected on ground on rail track in this present case.

37. **The adjudication that would be under process of this Hon'ble Tribunal will be only when Bench allows and entertains the application** to be heard after passing the issue of limitation, maintainability, ambit of it and jurisdiction to try this application. **As such there is no reason to hold-back the facility created for the devotees at large.**

38. Considering all above facts and submissions, Hon'ble Tribunal should adjudicate the matter by hearing and going through in detail and passing the speaking order AND dismiss this application as time barred by limitation, without locus-standi, raising no 'substantial question related to environment' and so also on merit and law point as regarding the applicability of the EIA Notification to the present case.

Date: 08-11-2021
Place: Mumbai

Advocate for RESPONDENT NO. 4
'Shree Jivdani Devi Mandir Trust, Virar'
(श्री जीवदानी देवी मंदिर ट्रस्ट, विरार)

National Green Tribunal

Case Title	Udaysankar Samudrala Vs. Ministry of Environment Forest and Climate Change
Miscellaneous No.	2704138006312020/21
Transaction id	2700410171302021
Bank Transaction id	0811210016325
Payment Date	2021-11-08 00:00:00.0
Amount	100 Rs.
Status	SUCCESS

S. No.	File Name	Party Name	Location	Document Type
1	OA 100_2020 Udayasankara Vs UoI Written Arguments Res.4 08-11-2021.pdf	Sri Jivdani Devi Sansthan	PUNE (WESTERN ZONE BENCH)	Others