

**BEFORE THE NATIONAL GREEN TRIBUNAL
WESTERN ZONE, PUNE
O.A. No. 48 of 2020 (WZ)**

IN THE MATTER OF:

Tanaji Balasaheb Gambhire ...Applicant

versus

Union of India and Ors. ...Respondents

AND

Appeal No. 42 of 2020 (WZ)

Ram Baban Borkar ...Appellant

versus

Union of India and Ors. ...Respondents

WRITTEN SUBMISSIONS ON BEHALF OF RESPONDENT NO 14 & 15

1. The Answering Respondents humbly submit that the captioned application and appeal ought to be dismissed, since:
 - a. The dispute sought to be raised is *ex-facie* barred by limitation since all construction even as per the Joint Committee Report had been completed by September 30, 2013.
 - b. Even otherwise, the actions complained of are squarely protected by the “no coercive steps” orders of the Hon’ble Supreme Court in ***Builder’s Association v. Union of India***, SLP (C) No. 10078 of 2019 as well as ***Credai Pune Metro v. Union of India***, SLP (C) No. 23143 of 2019.

2. During the final hearing on 14.07.2023, the Applicant prayed for demolition, restoration and compensation based on the following contentions:
 - A. The O.A is not barred by limitation as the cause of action only arose after the 201st SEIAA meeting.
 - B. The total built-up area (TBUA) of the project exceeded the built-up area (BUA) prescribed by the Environmental Clearance dated 10.04.2007 (1st EC).

O.A IS TIME BARRED

3. Sec.15 of the NATIONAL GREEN TRIBUNAL ACT, 2010 ('NGT Act') provides a limitation period of 5 years and employs the words "*when the cause of action first arose.*" In other words, any such application must be filed within 5 years from the date of commencement of the action being reported.
4. The Answering Respondents commenced construction of the project on 28.05.2007, and hence the OA has been filed 13 years after the cause of action first arose.¹
5. Assuming without admitting that the limitation commences on the completion of the construction, the same was completed on 30.09.2013, as also noted by the Joint Committee in their Report (paragraph 2.1.8).² Thus even assuming this to be the starting point of limitation, the OA has been filed 7 years after.
6. Thus, construction of the project being complained of in the instant case, commenced 13 years before the OA was filed, and was completed more than 7 years prior to the filing of the O.A., since the O.A. came to be filed only on 01.08.2020.
7. Paragraph 41 and 42 of the O.A. seek to reckon the limitation from the date when the 2nd EC was obtained i.e., 20.07.2020.³ It is submitted that the making of an application by the Answering Respondent, cannot revive an action against a construction which had commenced in 2007 and completed in 2013, and is hence hopelessly barred by limitation.

TOTAL BUILT UP AREA INCLUDED ONLY FSI AREA

The allegation of exceeding the total built up area permitted under the EC is premised on the ground that total built up area includes both FSI as well as non FSI area. No doubt, the 1st EC had recorded the TBUA to be 34,170.83 m² in the second paragraph.⁴ However, it is common place, and all building plans submitted in applying for the said EC would have also shown that the non-FSI

¹ Page 1525, Convenience Compilation.

² Page 1531, Convenience Compilation.

³ Page 54, Original Application No. 48 of 2020.

⁴ Page 1388, Convenience Compilation.

area was over and above the said 34,170.83 m². A perusal of the documents annexed to the EC Application would demonstrate the same.⁵

8. Furthermore, it may be noted that though the 1st EC is dated 10.04.2006, the same was considered under the 1994 Notification, in terms of a circular issued by the MOEF dated 13.10.2006, whereby applications pending on the date of coming into force of the EIA Notification 2006 were processed under the EIA Notification 1994. Thus, the distinction of FSI and non-FSI expressly stated in Forms 1 and 1A of the EIA Notification 2006, did not apply to the Answering Respondent's case.
9. In this context, it is pertinent to note that the Answering Respondents have not constructed FSI area above that which was mentioned in the 1st EC i.e., 34,170 m². This has been confirmed by the Joint Committee Report at paragraph 2.1.12 wherein it is stated that the total FSI area constructed thus far is 32,710.04 m².⁶
10. That it was common practice to only consider the FSI area while referring to the built up area has also been acknowledged by the Joint Committee in its report at para 2.1.7.⁷ The Report stated:
- “Further, PMC has informed that *Non-FSI area is not mentioned in the sanctioned plans as per then prevailing practice* followed by Building Permission Department, PMC.”
- (Emphasis Supplied)
11. That the EIA notification on this aspect was unclear was noticed and acknowledged in 2011 by the Hon'ble Supreme Court in *Noida Park/Anand Arya v. UOI and Ors.*, 2011 (1) SCC 744 ¶84.⁸ The Hon'ble Court held:
- “84. The EIA Notification dated 14-9-2006 urgently calls for a close second look by the authorities concerned. The projects/activities under Items 8(a) and 8(b) of the schedule to the notification need to be described with greater precision **and clarity and the definition of built-up area with facilities open to the sky needs to be freed from its present ambiguity and vagueness.**”
- (Emphasis added)
12. The aforesaid observation prompted Ministry of Environment and Forest (MoEF) to issue a clarification on 04.04.2011 to the effect that the total built up area would

⁵Page 506, 508, 509, 511 and 517, Original Application No. 48 of 2020.

⁶ Page 1528, Convenience Compilation.

⁷ Page 1531, Convenience Compilation.

⁸ Page 1328, Compilation of Judgments.

include both FSI and non FSI areas.⁹ The very fact that MoEF issued a clarification also testifies to the fact that there was an apparent ambiguity as to the interpretation of the EIA notification on this aspect. This clarification was understood by all, including the concerned State entities, to be prospective and would not affect construction activity already undertaken. In fact, the MoEF on 07.07.2017 issued an office memorandum that it was indeed prospective.¹⁰

13. However, the Hon'ble Supreme Court in *M/s. Goel Ganga Developers India Pvt. Ltd. v. Union of India & Ors.*, (2018) 18 SCC 257 held that BUA always included both FSI and non-FSI.
14. This led to much confusion, whereby those who had embarked on constructing on the earlier understanding, were sought to be penalised. Hence writ petitions came to be filed by associations of the construction industry. The Bombay High Court in *Builders' Association of India v. Union of India*, W.P NO 954 of 2019 though did not interfere, it laid bare the contradiction between *Noida Park/Anand Arya* (supra) and *Goel Ganga* (supra), in its narration.¹¹
15. This order of the Bombay High Court has been challenged before the Hon'ble Supreme Court by the *Builder's Association v. Union of India* (supra),¹² as well as *Credai Pune Metro v. Union of India* (supra),¹³ and the Hon'ble Supreme Court has on 03.05.2019 and 20.09.19, directed that "no coercive action" will be taken against builders who constructed during this period.
16. It is submitted that the orders of the Hon'ble Supreme Court in the aforesaid pending SLPs are an acknowledgment (even if *prima facie*) of the fact that those who commenced construction before 2011 did so on a *bona fide* belief and hence ought not to be penalised. It is humbly submitted that the said direction by the Hon'ble

⁹ Page 15, Compilation of Notifications and Judgments.

¹⁰ Page 19, Compilation of Notifications and Judgments.

¹¹ Page 1368, Compilation of Judgments.

¹² Page 1372, Compilation of Judgments.

¹³ Page 1373, Compilation of Judgments.

Supreme Court is essentially an *in rem* order since it was issued in SLPs preferred by representative bodies of the construction industry.

17. The aforesaid order of the Hon'ble Supreme Court are in consonance with the well settled principle on certainty in law and the protection to be afforded to citizens laid down in *S. G. Jaisinghani v. Union of India*, AIR 1967 SC1427:

“14. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and in general, such **decisions should be predictable and the citizen should know where he is**. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law” (Emphasis added)

18. The report of the Joint Committee, cognisant of the aforesaid position and in an implicit acknowledgment of the *bona fides* of the Answering Respondent, does not recommend demolition, penalisation or the like, but recommends that the Answering Respondent be directed to apply to the MoEFCC under the SOP dated 07.07.2021.¹⁴ The said SOP has met with the approval of the Hon'ble Supreme Court in *Electrosteel Steels Limited v. Union of India*, 2021 SCC OnLine SC 1247.¹⁵

19. In a very similar factual scenario, the Hon'ble Delhi High Court in *Maruti Suzuki India Ltd. v. Ministry of Environment and Forests*, 2014 1SCC OnLine Del 3264, where due to ambiguity in the EIA notification with respect to inclusion of certain projects, held:

“15. However, in the present case, **petitioner cannot be said to have acted with *mala fide* intent in not applying for prior EC as firstly there was no authoritative judgment** on the said issue and secondly, upon the petitioner being asked to seek prior EC, despite its *bonafide* belief that EIA Notification 2006 was not applicable to its projects, did in fact apply for EC in compliance with HSPCB direction for its projects in Haryana as far back as 14th February, 2013, i.e., **prior to filing of the present writ petition.**” (Emphasis added)

20. Similarly, in the present case, the Answering Respondent applied for another EC (four years prior to the O.A being filed) in 2016, seeking change of use, since it wanted to operate a multiplex within the same premises. This application disclosed in terms the FSI and non-FSI area constructed. The SEAC in four different meetings (58th, 68th, 99th and 109th) and the SEIAA in two meetings (175th and 201st)

¹⁴Page 1512, Convenience Compilation.

¹⁵Page 195, Compilation of Notifications and Judgments.

considered the EC application for change in use and existing constructions made and granted the EC on 20.07.2020 (2nd EC).

21. Hence in summary it is submitted that:

- a. The O.A is barred by limitation as the cause of action first arose 13 years ago and even on demur 7 years ago.
- b. The Answering Respondents have till date not constructed FSI area over and above the area mentioned in the 1st EC.
- c. All authorities were *ad idem* till 2011 that the TBUA did not include non-FSI areas, as is acknowledged in the Joint Committee Report and is obvious from the clarification issued by the MoEF in 2011.
- d. Even after the judgment in *Goel Ganga (supra)* the Hon'ble Supreme Court has protected representative bodies of the construction industry from any coercive action from construction undertaken before the said judgment.
- e. The Answering Respondent cannot be penalised today, given the admitted ambiguity in the law as was prevailing when the construction was commenced.
- f. The “*no coercive steps*” order by the Hon'ble Supreme Court must necessarily inure to the benefit of the Answering Respondents.

22. At the final hearing, the counsel for the Appellant in Appeal No.42 of 2020 (WZ) confined himself to the aforesaid issues by adopting the arguments of the Applicant. Hence, in Appeal No.42 of 2020 (WZ), the Answering Respondent reiterates its arguments in the O.A.