

**BEFORE THE NATIONAL GREEN TRIBUNAL
(WESTERN ZONE) BENCH, PUNE
APPLICATION No. 55/2013(WZ)**

CORAM:

**Hon'ble Mr. Justice V.R. Kingaonkar
(Judicial Member)**

**Hon'ble Dr. Ajay A.Deshpande
(Expert Member)**

B E T W E E N:

Bharatkumar K. Patel
Post : Bhadeshwar, Tq. Mundra
Kutch (Gujarat)

....Applicant

V E R S U S

- 1 Ministry of Environment & Forests,
Union of India, Through : Secretary,
Paryavaran Bhavan,
C.G.O. Complex, Lodhi Road,
New Delhi – 110 003.
- 2 Department of Commerce
Through : Director, SEZ Section
Ministry of Commerce and Industry,
Udyog Bhavan,
New Delhi 110 107
- 3 Ministry of Shipping,
Union of India,
Through : Secretary,
Transport Bhavan,
1-Parliament Street
New Delhi -110 001
- 4 State of Gujarat,
Through : Chief Secretary,
Gandhi Nagar, 382 020,
Gujarat

- 5 Gujarat Pollution Control Board,
Through : Member Secretary
Paryavaran Bhavan, Section 10A,
Gandhi Nagar 382 010
- 6 Gujarat Coastal Zone Management Authority,
Block No.14/8th Floor,
New Sachivalaya, Section 10A,
Gandhi Nagar (Gujarat).
- 7 Chief Conservator of Forest, Bhuj,
Kutch Circle, Bhuj,
Opp : District Industrial Centre,
Kutch-Bhuj 370 001.
- 8 M/s. Kandla Port Trust,
Administrative Office Building,
Annex Building, 1st Floor,
Gandhi Nagar-370 201,
Kutch District (Gujarat).

.....Respondents

Counsel for Applicants:

Mr. Sandeep & Associates, Adv.

Counsel for Respondent No.2:

Mr. Krishna D. Ratnaparakh,

Mr.Arjun Garg, Adv. for Respondent No.3

Mr. Viral K. Shah for Respondent No.5.

Mr. Sumit Goel Advocate for Respondent No.8

DATE : 13th December, 2013

J U D G M E N T

1 The Applicant has filed this application under Section 14 read with Section 18 of National Green Tribunal Act 2010 claiming to be the aggrieved person, being interested in the protection of environment and ecology. Admittedly, proposed 5000 Hectare port based multi-product SEZ in Kandla and

Tuna area of Gandhidham, Bhuj, Gujrat is being developed. The Applicant submits that the CRZ Notification 2011 has declared the entire Gulf of Kutch as “Critical Vulnerable Coastal Area” due to its ecologically sensitive nature and as a result, any industrial development in the said area is prohibited. The Applicant alleges that the proposed development is in violation of CRZ Notification 2011, Environment (Protection) Act, 1986 as well as other environmental norms.

2 The Applicant further submits that the non obstante Clause as provided in Section 51 of SEZ Act, creates a separate class or area within the country itself, excluding application of all other Acts. The Applicants submit that despite the fact that due to prohibition under the CRZ Notification 2011, port based SEZ cannot be set up at the proposed location, the Ministry of Environment and Forest, Government of India, vide communication file No.11-83:2011-IA-III dated 17th February 2011, has issued Terms of Reference (ToR) of the proposed SEZ which is in clear violation of the CRZ notification 2011 read with provisions of the Environment (Protection) Act 1986. The Applicant further submits that as the industrial development in the said area, which is classified as Critically Vulnerable Coastal Area is prohibited under the CRZ Notification of 2011, the process of setting up on Kandla Port multi Product SEZ

which is carried on by all the Respondents is in violation of CRZ Notification 2011.

3 The Applicant has therefore, prayed as follows :

a) Quash the Terms of Reference granted by the Ministry of Environment and Forest vide communication bearing No.F.No.11-83/2011-IA.III dated 17-02-2012.

b) Declare that the Ministry of Environment and Forest has no authority to initiate any process of CRZ and EIA clearance for prohibited activities in CRZ areas as per the CRZ Notification, 2011.

c) Declare that the proposed project cannot be allowed in the proposed project area as the same constitutes a “prohibited activity” under the CRZ Notification, 2011.

d) Declare that the Sec.51 of the SEZ Act, 2005 is ultravires to Art.14 & 21 of the Constitution of India.

e) - - - - -

f) - - - - -

g) - - - - -

h) - - - - -

i) - - - - -

j) - - - - -

k) - - - - -

4 Opposing the application as misconceived and not maintainable in law, MoEF (Respondent No.1) has submitted an Affidavit mentioning that the Application is barred by limitation having been filed beyond prescribed period of limitation. The impugned ToR was issued by the MoEF on 17th February 2012 and the Application has been filed on 21st

February 2013 and thus, it is hopelessly time barred and sought the dismissal of the Application on this ground itself. The MoEF, Respondent No.1 further submits that the present Application is pre-mature in as much as the final clearance has not been granted to the project and ToR dated 17th February 2012 issued by the MoEF does not in any way, imply that the project has been approved. MoEF Respondent No.1 further submits that as per the information received from the project proponent, Ministry of Commerce and Industry, Government of India, on 7th May 2007 had granted formal approval for setting of port based multi product SEZ in the area about 5000 hectare at Kandla, Tuna area of Gandhidham, Bhuj (Gujrat). The project proponent has planned to develop in SEZ in 3600 Hectare at Kandla area and 1400 Hectare at Tuna area. Kandla area of SEZ will be reserved for industry seeking port facility for import and export at its near vicinity which includes non-polluting industries i.e. Health Care, automotive (Automobile and Auto components), heavy Engineering Equipment, electronics and telecom equipment, textile, electrical equipment, gems and jewelry etc. Tuna area will be reserved for ship based industries, requiring accessibility to water fronts for their operation i.e. shipyard, ship repair facility, ship bunkering facility etc. MoEF has further submitted that the Gulf of Kutch is listed under the Critically Vulnerable Coastal Area under the CRZ Notification 2011.

Further CRZ Notification 2011 prohibits new industries and expansion of existing industries, except those directly related to water front, or directly needing foreshore facility. Among the proposed activities, only the activities permissible under CRZ Notification 2011 viz. Port and harbor, shipyard, ship repair facility, ship bunkering facility etc can be permitted within the CRZ area. The MoEF has asked the project proponent to submit HTL-LTL (High Tide Line & Low Tide Line) map prepared by authorized agency on 1:4000 scale, super imposed with project lay out to know the exact details of the land falling within CRZ area. MoEF has finally submitted that it has only issued ToR at this stage and no clearance has been given to the proposed project under the CRZ notification 2011 and therefore, it has urged that the present Application/Appeal is pre-mature, misconceived, vexatious and frivolous and is devoid of any merits and out of limitation and therefore, prayed for dismissal of the appeal.

5 Respondent No.2 while opposing the application, has submitted that the Application does not disclose any cause of action and is barred by limitation, and hence sought dismissal of the Application on this ground only. Respondent No.2 has given an approval to Respondent No.8 to set up the proposed port based SEZ and has extended the approval period from time to time subject to obtaining all necessary statutory clearances from Government of India, State Government and all

concerned local bodies. Respondent No.2, therefore, submits that the proposed port based SEZ is subject to prevailing Rules, Regulations and Clearances including clearance from Ministry of Environment and Forests which has issued CRZ Notification 2011, among other regulations like EIA Notification, 2006. Respondent No.2 submits that in the proposed project, no construction or industrial activities is being carried out at present and the proposed project has not been finally notified till this date. The project proponent i.e. Respondent No.8 has been advised to seek necessary approval and clearance from the authorities. The Respondent No.2, therefore, pleads that the project proponent i.e. Respondent No.8 will have to obtain necessary CRZ and environmental clearance before commencement of project and the final notification for the project has not been issued so far and therefore, the Respondent No.2 strongly pleads for dismissal of the application on the grounds of limitation as the last document which are being mentioned in the application are dated 7th July 2011 and the application has been filed before this Tribunal in March 2013 i.e. after expiry of six months.

6 The Counsel for Respondent No.3 attended some hearings, however, no Affidavit has been filed on record though during the argument, the Learned Counsel also pleaded for dismissal of the application on the ground of limitation and also the fact that no formal Environmental Clearance has been

granted to the said project and therefore, the application is premature. The Officers of Respondent No.5 and 6 also attended some hearings and Counsel for Respondent No.5 also attended some dates of hearings. However, no Affidavit or reply had been filed by Respondent No.5, 6 and 7 though sufficient opportunity was given to them. Respondent Nos.5 and 6 are important state level environmental regulatory agencies, and they were expected to assist this Tribunal by submitting factual information.

7 Respondent No.8 i.e. M/s. Kandla Port Trust has submitted a detailed Affidavit. The Counsel for Respondent No.8 has submitted that there is no violation of CRZ Notification either of 1991 or of 2011 by Respondent No.8 and setting of the proposed port based SEZ at Kandla and Tuna is not prohibited under the CRZ Notification of either 1991 or 2011. It is submitted that both 1991 and 2011 Notifications permitted setting up of specific industries/activities in Coastal Regulation Zones with certain restrictions. He further submits that the industries proposed to be set up in SEZ of Kandla are permissible under the CRZ Notification. He further submits that there are no creeks in the part of land identified by SEZ and no creeks are affected by the proposed construction/development in SEZ. KPT had excluded the creeks from the proposed area of construction/development. He further submits that there are number of SEZ projects

approved and successfully implemented in the backyard of various ports across the country and the proposed Kandla SEZ is not an isolated one of its nature.

8 The Respondent No.8 submits that the Ministry of Commerce and industry, Government of India granted formal approval to the proposed SEZ on 7th May 2011 which will be over an area of 5000 hectare. Accordingly, Respondent No.8 have approached MoEF for getting the necessary Environmental Clearance under CRZ Notification, 2011 read with EIA Notification 2006. Respondent No.8 engaged National Institute of Oceanography to conduct of EIA study and also engaged Indian Institute of Remote Sensing Anna University for CRZ studies. Considering the above, MoEF finalized the Terms and Reference (ToR) under the impugned order for preparation of detailed EIA Report wherein it is specifically directed that recommendations of State Coastal Zone Management authority be submitted and also, public hearing shall be conducted as per provisions of EIA notification, 2006. Respondent No.8 further submitted that environmental impact assessment study have not been completed so far and after receipt of comprehensive EIA report from NIO, the Respondent No.8 will be submitting an application to Gujrat State Coastal Zone Management Authority for obtaining recommendations. After the recommendations from Gujrat State CZMA are received, the Respondent No.8 will approach MoEF for necessary

environment/CRZ clearance. The Counsel for Respondent No.8 therefore, argues that at this stage, no cause of action has arisen, for the filing of the present application. The Counsel for Respondent No.8 makes a further statement that Respondent No.8 i.e. Kandla Port Trust will not start any Project Development and Construction activity at site unless the necessary environment/CRZ clearance is received alongwith other statutory clearances.

9 We have heard Counsel for all contesting parties and also, perused the records available in the case. The prayers related to SEZ Act are outside the jurisdiction of this Tribunal as the said Act is not enlisted in Schedule 1 of NGT Act, 2010, We feel that following issues need to be addressed by this Tribunal for final adjudication in this application.

- a) Whether the ToR for environmental clearance can be challenged under the provisions of National Green Tribunal Act, 2010 ?
- b) Whether the application is barred by Limitation ?

These issues are addressed in subsequent paras :

10 MoEF vide their letter dated 17th February 2012 have approved ToR for the environmental studies to be undertaken as a part of process of grant of environment/CRZ clearance to the proposed project. The present application has been filed under provisions of section 14 read with section 18 of NGT Act, 2010. The Section 14 of NGT Act, 2010 deals with the jurisdiction of Tribunal and is reproduced below of the clarity :

14. Tribunal to settle disputes : (1) The Tribunal shall have the jurisdiction over all civil cases where a substantial question relating to environmental (including enforcement of any legal rights relating to environments), is involved and such question arises out of the implementation of the enactments specified in Schedule 1.

2) The Tribunal shall hear the disputes arising from the questions referred to in sub-section (1) and settle such disputes and pass order thereon.

3) No application for adjudication of dispute under this section shall be entertained by the Tribunal unless it is made within a period of six months from the date on which the cause of action for such dispute first arose.

Provided that the Tribunal may, if it is satisfied that the applicant was prevented by sufficient cause from filing the application within the said period, allow it to be filed within a further period not exceeding sixty days.

11 This Tribunal, in the case of *Goa Foundation & Anr. v. Union of India & Ors.*, pronounced on 18th July, 2013, on the scope of the expressions 'substantial question relating to environment' as well as 'dispute', as referred to in Section 14 of the NGT Act, held as follows:

"24. Section 2(m) of the NGT Act classifies 'substantial question relating to environment' under different heads and states it to include the cases where there is a direct violation of a specific statutory environmental obligation as a result of which the community at large, other than an individual or group of individuals, is affected or is likely to be affected by the environmental consequences; or the gravity of damage to the environment or property is substantial; or the damage to public health is broadly measurable. The other kind of cases are where the environmental consequences relate to a specific activity or a point source of pollution. In other words, where there is a direct violation of a statutory duty or obligation which is likely to affect the community, it will be a substantial question relating to environment covered under Section 14(1) providing jurisdiction to the Tribunal. When we talk about the jurisdiction being inclusive, that would mean that a question which is substantial, debatable and relates to environment,

would itself be a class of cases that would squarely fall under Section 14(1) of the NGT Act. Thus, disputes must relate to implementation of the enactments specified in Schedule I to the NGT Act. At this stage, reference to one of the scheduled Acts i.e. Environment Protection Act, 1986 may be appropriate. The object and reason for enacting that law was primarily to address the concern over the state of environment that had grown the world over. The decline in environmental quality has been evidenced by increasing pollution, loss of vegetal cover and biological diversity, excessive concentrations of harmful chemicals in the ambient atmosphere and in food chains, growing risks of environmental accidents and threats to life support systems. These were the considerations that weighed with the legislature to ensure implementation of the UN Conference on the Human Environment held at Stockholm in June, 1972 to take appropriate steps for protection and improvement of human environment. The essence of the legislation, like the NGT Act, is to attain the object of prevention and protection of environmental pollution and to provide administration of environmental justice and make it easily accessible within the framework of the statute. The objects and reasons of the scheduled Acts would have to be read as an integral part of the object, reason and purposes of enacting the NGT Act. It is imperative for the Tribunal to provide an interpretation to Sections 14 to 16 read with Section 2(m) of the NGT Act which would further the cause of the Act and not give an interpretation which would disentitle an aggrieved person from raising a substantial question of environment from the jurisdiction of the Tribunal.

35. The expression 'disputes' arising from the questions referred to in sub-section (1) of Section 14 of the NGT Act, is required to be examined by us to finally deal with and answer the contentions raised by the parties before us. The expression used in sub-section (1) supra is the expression of wide magnitude. The expression 'question' used in sub-section (1) in comparison to the expression 'dispute' used in sub-section (2) of section 14 is of much wider ambit and connotation. The disputes must arise from a question that is substantial and relates to environment. This question will obviously include the disputes referred to in Section 14(2). It is those disputes which would then be settled and decided by the Tribunal. These expressions are inter-connected and dependent upon each other. They cannot be given meaning in isolation or de hors to each other. The meaning of the word 'dispute', as stated by the Supreme Court in *Canara Bank v. National Thermal Power Corporation* (2001)1 SCC 43 is "a controversy having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other". The term dispute, again, is a generic term. It

necessarily need not always be a result of a legal injury but could cover the entire range between genuine differences of opinion to fierce controversy. Conflicts between parties arising out of any transaction entered between them is covered by the term 'dispute'.

36. The counsel appearing for the respondents, while referring to this expression, relied upon the judgment of the Supreme Court in the case of Inder Singh Rekhi v. DDA , (1988) 2 SCC 338 to support the contention that the dispute, as referred under the Arbitration Act, 1940 arises where there is a claim and there is a denial and repudiation of such claim.

12. The Applicant has raised objections to issuance of the ToR, mainly on the ground that MoEF has itself declared this project area as Critical Vulnerable Coastal Area (CVCA) under CRZ Notification, 2011 and has imposed stringent regulations on any development in this area. Applicant has pleaded that the MoEF while granting the ToR has not considered this important aspect and therefore has preferred this application while raising dispute on grant of ToR. It is accepted fact that grant of ToR is an important milestone in Environment Clearance process as defined in EIA notification 2006. The grant of ToR is result of process of screening and scoping of the project, in EC process. MoEF grants this ToR once the project proponent makes a presentation before the specifically constituted Expert Appraisal Committee on various activities proposed in the project, environmental setting of the project area, and then only EAC gives a project specific ToR which can therefore be considered as first scrutiny of the project proposal by MoEF. Therefore, it is expected that the regional environmental setting and sensitivities

are duly considered by the EAC, with the data and information available with the MoEF, before defining the ToR. We, therefore, find merit the case put forth by the Applicant on validity of challenging the ToR under section 14 of National Green Tribunal Act, 2010, and therefore, allow this argument.

13 The impugned ToR has been granted on 17th February 2012 and the present petition has been filed on 2-8-2013. It is also to be noted that these dates have not been disputed by any party. Considering the judgment of Hon'ble Principal Bench, National Green Tribunal in the Appeal No.1/2013, alongwith provisions of Section 14(3) of National Green Tribunal Act, 2010, there is a delay in filing this application, beyond the stipulated period of 6 months and therefore, the present Application is barred by Limitation of time.

14 Therefore, while holding that the ToR granted under EIA notification, 2006 could have been challenged in the instant case, the present Application is barred by limitation as stipulated in section 14 of NGT Act, 2010, and is therefore dismissed. No costs.

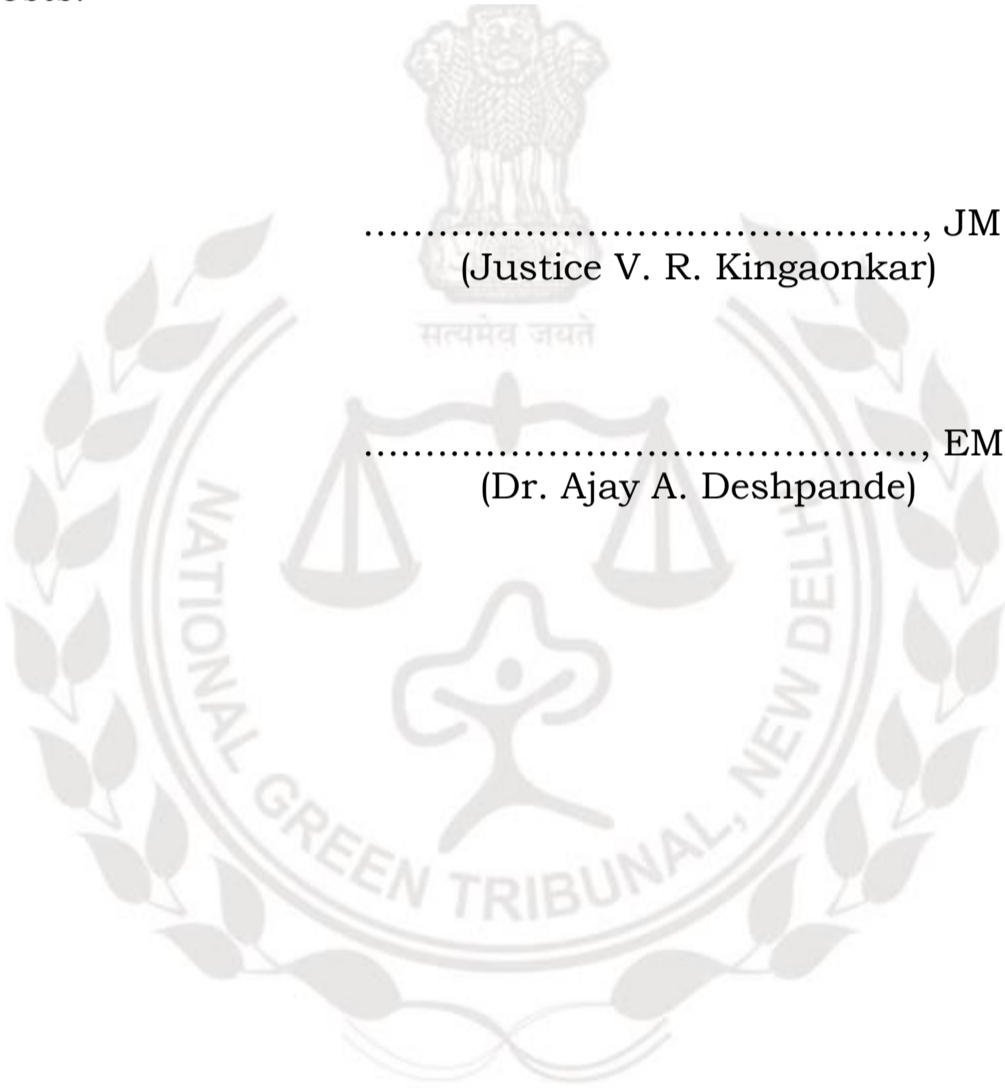
15 Notwithstanding above, we would like to mention that the points raised by Applicant are important and shall be duly addressed by the Project Proponent and also, GCZMA and MoEF in the next stages of EC appraisal process. The Applicant will also have opportunity to present his views in the public hearing which has been mandated in the ToR under reference. The

Applicant is also at liberty to represent his case by way of filing application to MoEF for due consideration in further appraisal process.

16 With these observations the Application is disposed of.
No costs.

....., JM
(Justice V. R. Kingaonkar)

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



NGT