

BEFORE THE NATIONAL GREEN TRIBUNAL
SOUTHERN ZONE, CHENNAI

Application No. 1 of 2012 (SZ)

W.P.No.36467 of 2011 (High Court of Karnataka)

In the matter of

1. Sri. Narayana Manjunatha Hegde
2. Sri Sudheer Krishna Hegde
3. Sri. Ramachandra Manjunatha Hegde
4. Sri. Sridhar Thimmanna Hegde
5. Sri. Shukru Shiva Gowda
6. Sri Krishna Devu Gowda
7. Sri. Shivu Beera Gowda
8. Sri. Devu Nagu Gowda
9. Sri Nagu Shivu Gowda.
10. Sri. Ganapu Shivu Gowda
11. Sri. Gopalakrishna Gajanana Hedge
12. Sri Ganapathi Subraya Bhat
13. Sri. Suresh Ganapathi Bhat
14. Sri. Dattatraya Ishwar Bhat
15. Sri. Gopalakrishna Eshwar Bhat
16. Sri. Shankar Venkataramana Hegde .. Applicants

Vs

1. Union of India
Rep. by its Secretary
Ministry of Environment and Forest
New Delhi.
2. The Chief Conservator of Forests (Central)
Ministry of Environment and Forest
Bangalore
3. The State of Karnataka
Rep. by its Secretary to Government
Forest, Ecology and Environment Department
Bangalore
4. The Principal Conservator of Forests
Government of Karnataka, Bangalore
5. The Deputy Conservator of Forest
Honnavar Division, Uttarakannada Dist
6. The Deputy Commissioner
Uttara Kannada District, Karwar
7. Karnataka State Pollution Control Board
Karwar
8. The State Level Environment Impact Assessing Authority
Bangalore, rep. by its Member Secretary
9. The Senior Geologist
Dept. of Mines and Geology

Uttara Kannada Zilla Panchyath, Karwar

10. The Town Municipal Council
Rep. by it Chief Officer, Kumta

.. Respondents

Counsel appearing for the applicants

Mr. B.S. Krishna, Sri. Mahabaleshwar Vaidya

Counsel appearing for the respondents

For respondent Nos.1 & 2 .. Smt. Sumathi

For respondent Nos.3 to 6,8,9 & 10 .. Sri Devaraj Ashok

For respondent no.7 .. Sri.T.K. Bhaskar

O R D E R

Quoram: Hon'ble Shri Justice Dr. P.Jyothimani, Judicial Member

Hon'ble Shri P.S. Rao, Expert Member

Delivered by Dr. P.Jyothimani, J M

8th February, 2017

Whether judgment is allowed to be published on the Internet .. Yes/No

Whether judgment is to be published in the All India NGT Reporter .. Yes/No

The applicants herein, have filed W.P.No.36467 of 2011 on the file of the High Court of Karnataka at Bangalore for setting aside the order of the 3rd respondent – Secretary to Government, Forest, Ecology and Environment Department, State of Karnataka, dated 6.4.2009, Environment Clearance (EC) granted by the 8th respondent - State Level Environment Impact Assessment Authority (SEIAA), Karnataka dated 17.2.2011 for establishing Municipal Solid Waste Plant (MSW Plant) in Survey No.108 A1A1A1A1A1, Manaki Village, Kumta Taluk, Uttara Kannada Dist to set aside the communication of the 7th respondent - Karnataka State Pollution Control Board (Board) dated 26.3.2011, granting 'authorization' to the 10th respondent - Town Municipal Council, Kumta to establish MSW plant in Survey No. 108 A1A1A1A1A1, Manaki Village and also for a direction against respondent Nos.6 to 10 not to proceed with the proposal of establishment of MSW plant in the above said survey number. The said writ petition

was subsequently transferred to this Tribunal and numbered as Application No.1 of 2012.

2. The Principal Chief Conservator of Forest, Karnataka in his letter dated 14.12.2005 has submitted a proposal to obtain approval from the Government of India under Section 2 of the Forest (Conservation) Act, 1980 for diversion of 2.00 ha of forest land in Survey No.108A of Manaki Village for the purpose of establishing MSW plant at Kumta Town in favour of the 10th respondent - Town Municipal Council, Kumta. The Government of India, Ministry of Environment and Forests (MoEF), Regional Office, Bangalore has received a recommendation from the State Government on 27.3.2006 in respect of the above said project. The MoEF, Regional Office (Southern Zone), Bangalore on 25.10.2006 has given 'in principle' approval (Stage – I Clearance) for the diversion of the above said forest land, subject to fulfilment of certain conditions and that was communicated to the Principal Chief Conservator of Forest Karnataka – 4th respondent for compliance. The 4th respondent in the communication dated 26.5.2007 has furnished a compliance report and that was sent to Government of India by the State Government in its letter dated 19.7.2007. Ultimately the MoEF, Regional Office, Bangalore in the letter dated 28.9.2007 has conveyed the grant of approval (Stage – II clearance) under the provisions of the Forest (Conservation) Act for the diversion of 2.00 ha of forest land in Survey No.108A, Manaki Village for the purpose of establishing MSW plant of Kumta Town. Accordingly, the State Government in its order dated 27.11.2007 has accorded approval under Section 2 of the Forest (Conservation) Act for diversion of 2.00 ha of forest land in Survey No.108A, Manaki Village for the purpose of establishing MSW plant for Kumta Town, subject to the following conditions:

“1.The legal status of the forest land shall remain unchanged

2. Demarcation of the forest area shall be got done by erecting iron posts with barbed wire at the cost of user agency

3. The funds received from the user agency towards compensatory afforestation and NPV under this project shall be transferred to ad hoc CAMPA in account number CA 1582 of Corporation Bank, Block – II, CGO complex Phase – 1. Lodhi Road, New Delhi 110 003 immediately under intimation to Government of India.’

4. The total forest area utilized for the project shall not exceed 2.00 ha. The forest area shall be utilized only for the purpose for which it is diverted. In case

the land is not used for the stipulated purpose. Then the area will be resumed by the Forest Department.

5. The land shall be utilized only for the purpose for which it is released.

6. If the land is not required for the purpose for which it is granted the same should be resumed back to the Forest Department by the Conservator of Forest under section 82 of Karnataka Forest Act, 1963.

7. The user agency has to pay the lease rent as fixed by the Government at the time of sanction and any subsequent orders in this regard.

8. The lease is granted for 20 years

9. Karnataka Forest Act 1963 and Rules 1969 will be applicable for any violation.

10. The user agency shall pay the cost of raising compensatory afforestation over an extent of 4.00 ha. of degraded forest area at the rate prevailing at the time of sanction (at present it is Rs.54,200-00).

11. The user agency has to pay the Net Present Value as per the Government Notification dated 17.1.2004 (at Rs.5.80 to Rs.9.20 lakhs per ha. depending upon the quantity and density of the land).

12. The other condition to be stipulated by Government of India/State Government/Principal Chief Conservator of Forests, Karnataka in the interest of conservation of forests will have to be abided by the lessee.”

3. According to the applicant, the land in Survey No.108/A is a forest land measuring approximately 800 Acres and it is a Protected Reserve Forest. After the above said approval granted by the Government, the 10th respondent started dumping waste in the said land in respect of which complaints were given to the Deputy Conservator of Forests who has stopped dumping by putting up a board, thereby giving impression that the project has been stopped. Under the Right to Information Act (RTI Act) the 10th respondent has informed one of the residents of the village stating for the first time that Survey No.108/A has been selected for the purpose of establishing MSW plant. On receipt of the communication from the Deputy Conservator of Forests, Honnavar Division viz., the 5th respondent to one of the villagers that the proposal for putting up of MSW plant has been under consideration, representations were made stating that there are residential houses situated near the land called Murur Gudda and during rainy season water enters into the houses and therefore if MSW plant is started the water will get polluted. However, the 10th respondent floated tender by giving newspaper publication on 1.1.2008.

4. It is the case of the applicant that the Senior Geologist attached to Uttara Kannada Zilla Panchayath, after conducting inspection has found in his report dated 27.10.2007 addressed to the 10th respondent that Survey No.108/A is not suitable for establishing MSW plant. However, the government has passed the above said order on 27.11.2007 for diversion of forest land for the establishment of MSW plant. A Public Interest Litigation was filed in W.P.No.4381 of 2008 before the High Court of Karnataka to restrain respondent Nos.6 to 10 herein, from setting up of MSW plant. The said writ petition came to be disposed of on 27.3.2008 on the ground that the Government Order dated 27.11.2007 stated above has not been challenged. There was a further inspection carried out by a committee consisting of Geologist and others to ascertain as to whether an alternate place can be found out. There was also a complaint given to the Karnataka State Human Rights Commission wherein it was reported that the government is attempting to find out an alternate place. Then it was informed that the 10th respondent has given a different site in Forest Survey No.108/A1A1A1A1A1 located within 2 Km from the municipal limits of Kumta Town which is against the identification made by the Senior Geologist. Again the applicants have sought particulars from the 10th respondent and in a letter dated 3.1.2009 the 10th respondent has given a sketch showing the location of the alternate site which is identified as Survey No.108-A1A1A1A1A1.

5. According to the applicants, the above said area which has been chosen for the project is different from one recommended by the Senior Geologist to the 10th respondent in the communication dated 2.4.2008 wherein it is stated that an area measuring 2.00 ha, 4 Km away from Kumta Town Municipal Area towards North-Eastern side, 700 M away from Kumta – Murur Road towards North and situated at North-Eastern corner stated to be in Survey No.108/A. It was in those circumstances, the applicants and others have filed W.P.No.3034 of 2009 in the High court of Karnataka challenging the notification issued by the Government of Karnataka dated 27.11.2007 and also for a declaration that the proposal submitted by the 10th respondent for the establishment of MSW plant in Survey No.108/A and subsequent 'authorisation' given by the 7th respondent - Board and also for a direction against the 10th respondent not to proceed with the proposal.

6. In the counter filed before the High Court in the said writ petition, the official respondents having admitted that Survey No.108/A is the Protected Reserve Forest, have stated that earlier selected site is not suitable as there are Acacia plants and therefore they have identified an alternate site marked as Survey No.108/A1A1A1A1A1. It was during the course of arguments in the writ petition the Government Advocate has produced the Government Order dated 6.4.2009 by which the Government of Karnataka which has earlier issued order on 27.11.2007 stated above, has ordered that as suggested by the Conservator of Forests, Kanara Circle an alternate site in the same area in Manaki Village in Survey No.108/A1A1A1A1A1 has been identified by the 10th respondent Municipal Council and therefore the Government has accorded approval for diversion of 2.00 ha in Survey No. 108/A1A1A1A1A1 in Manaki Village for the purpose of establishing MSW plant for Kumta Town instead of Survey No.108/A of Manaki Village. Therefore, the writ petition filed by the applicants and others in W.P.No.3034 of 2009 came to be dismissed as infructuous on 24.8.2009, however, observing as follows:

“In view of the decision taken by the Government by order dated 6.4.2009, it is clear that in view of the damage that could be caused to the underground water in vicinity and health of the residents in the area, the area that was chosen in the forest Sy No.108/A1 has been abandoned for establishment of MSW Plant by respondent No.10-Kumta Town Municipal Council and an alternative site has been selected for establishment of the said plant. Respondent No.10 can establish MSW plant only after obtaining necessary permission from the Pollution Control Board and other Authorities required by law and it is open to the petitioners in the public hearing that would be held by the Pollution Control Board to air out their grievances if the establishment of MSW plant in the said land also would pollute the environment.

In any view of the matter, the establishment of the plant at the alternative site now chosen by notification dated 6.4.2009 shall be in accordance with law after obtaining necessary consent from Pollution Control Board and other Authorities as required by law and since the writ petition has become infructuous as the writ petitioners were aggrieved by the selection of the place in the forest area in Sy.No.108/1A of Manaki village and in view of the alternative site being selected for establishment of MSW Plant, the petitioners are not entitled to any relief as sought for in the writ petition.

Accordingly, the writ petition is dismissed with the above said observations.’

7. Thereafter, the applicants have received the copy of the impugned order of the 3rd respondent dated 6.4.2009 which is impugned in this application and found that the notification issued by the Government of Karnataka demarcating Survey No. 108/A1A1A1A1A1 in Manaki Village for the purpose of establishing MSW plant is

virtually a modification of the earlier notification issued by the Government on 27.11.2007 and it was found that the alternate site viz., Survey No. 108/A1A1A1A1A1 which is different from the originally approved place of 2.00 ha in Survey No.108/A and in doing so the government has not obtained the mandatory prior approval from the 1st and 2nd respondents. The notification issued by the 3rd respondent dated 6.4.2009 choosing an alternate site, forms part of the forest land Survey No.108/A.

8. The applicants have raised an issue that even otherwise the 10th respondent has not complied with the provisions of the Municipal Solid Waste (Management & Handling) Rules, 2000 (MSW Rules, 2000) which contemplates buffer zone, land for development of landfill, apart from many other lapses. The applicant and other organisations have raised their objection against the 'authorization' given by the 7th respondent Board for the MSW plant and in fact the Board has directed the 10th respondent to produce the approved plan from the Town Planning Authority and also the blue print issued by the Forest department. Further, the surrounding lands are agricultural lands and therefore it was represented that public hearing should be conducted and that was followed by a subsequent representation. However, there was no response from the Board and inspite of such representation pending before the 7th respondent Board, the 10th respondent has been starting the operations in the proposed site.

9. The Assistant Commissioner, Kumta Sub Division, Kumta has also submitted a report on 3.12.2009 to the Deputy Commissioner, Uttar Kanara, Karwar that within 500 M from the proposed site there are residential areas and by virtue of the proposed plant the ground water table will be polluted. It was also represented that Survey No.108A1A1A1A1A1 is not demarcated in the revenue records maintained by the Tahsildar, Kumta. When an application was made under the RTI Act, the Tahsildar, Kumta has informed to one of the petitioners that there is no pahani in respect of Survey No.108A1A1A1A1A1 in Manaki Village and it is stated in the said letter that Survey No.108A1A1/P1 which totally measures 795.18 Acres, is mentioned as 'Minor Forest' in one of the columns. Therefore, there is no proper identification of Survey No.108A1A1A1A1A1 and that has not been stated in the impugned order of the 3rd respondent dated 6.4.2009. In spite of the same there was no public hearing and in the mean time the 8th respondent SEIAA, without conducting any public hearing, has

granted the impugned EC to the 10th respondent – project proponent on 17.2.2011. The 7th respondent – Board has also granted 'authorisation' for the alternate site on 26.3.2011 both of which are also impugned in the writ petition.

10. It is the case of the applicant that when an alternate site has been chosen from a larger extent of nearly 800 Acres of land in Survey No.108/A in which an earlier site was notified by the government, the government ought to have obtained mandatory prior permission under the Forest (Conservation) Act in respect of the alternate site. The failure of the same will make the notification issued by the State Government dated 6.4.2009 illegal and against the provisions of the Forest (Conservation) Act, 1980 and therefore the consequential EC granted by SEIAA dated 17.2.2011 and 'authorisation' granted by the Board dated 26.3.2011 are also liable to be set aside.

11. The impugned EC granted by the 8th respondent shows that no public hearing was conducted inspite of the specific direction given by the High Court in W.P.No.3034 of 2009. Under the EIA Notification, 2006 issued by the Government of India, the State Level Expert Appraisal Committee (SEAC) has to scrutinise the application for any project and while scrutinising it has to find out whether the project comes under B1 category or B2 category and the conduct of the 8th respondent in categorising the MSW plant as B2 category and therefore public hearing is not necessary, is totally illegal. Under the EIA Notification, 2006 Municipal Solid Wastes are categorised as B category and there is no reason for the 7th respondent Board to further categorise as B2 category in the absence of any guidelines. That apart, the 'authorisation' given by the 7th respondent – Board is totally invalid on the ground that the Grama Panchayat has passed a resolution on 9.10.2009 that permission shall not be granted for the establishment of MSW plant in Survey No.108A1A1A1A1A1. Raising all the above said legal grounds, the applicant has filed the writ petition before the High Court of Karnataka for the reliefs stated above which came to be subsequently transferred to this Tribunal.

12. In the reply affidavit filed by the 10th respondent – project proponent it is stated that solid waste management is an obligation of the representatives of the local body. The Hon'ble Supreme Court in the Public Interest Litigation MRS. ALMITRA H. PATEL

AND ANOTHER VS UNION OF INDIA AND OTHER (W.P.No.888 of 1996) has constituted a committee to look into all aspects of solid waste management and for systematic scientific disposal within the limits of local bodies by giving year 2000 as deadline. Since Kumta Town is situated in the forest area, no suitable lands are available other than forest lands. Earlier, a suitable site in Survey No.108/A was chosen for the establishment of MSW plant and the government has issued sanction on 27.11.2007 for diversion of 2.00 ha of forest land. There has been opposition from the public and as there is no suitable site available in and around Kumta Town, an alternate site in Survey No.108A1A1A1A1A1 in Manaki Village had to be chosen which is 4 Km away from Mumta Murroor Road which is totally a rocky area without any tree growth and unsuitable for raising any plantation and there is no human habitation within a radius between 1½ Km and 2 Km from Eastern, Southern and Northern sides. Therefore, the Department of Forest, Ecology and Environment, Government of Karnataka has issued a partial modification of its earlier order dated 27.11.2007 in the impugned order dated 6.4.2009 for diversion of 2.00 ha of forest land in Survey No.108A1A1A1A1A1 in Manaki Village. As the Geologist has already given his opinion to start MSW plant in Survey No.108/A of Manaki Village he has also offered favourable remarks for the alternate site stated above and accordingly tender was called for the execution of the work connected with establishment of MSW plant after the approval was granted by the government by order dated 27.11.2007.

13. For the establishment of MSW plant since an alternate site is chosen in Survey No.108A1A1A1A1A1 in Manaki Village, SEIAA has given EC which is also challenged by the applicants and the alternate site has been taken possession due to the sanction of the government and according to the project proponent, the alternate site is far away from the residential area and will not affect any water body and there is no violation of MSW Rules, 2000. It is also stated that it is not correct to state that public hearing was not conducted and as per the letter of the Assistant Commissioner, Kumta it transpires that a public hearing was convened on 30.11.2009 in connection with the establishment of MSW plant in forest Survey No.108A1A1A1A1A1 in Manaki Village eventhough the plant is categorised as B2 category project by the SEIAA which does not require any public consultation process. It is also stated that as per the

decision of the High Court in W.P.3034 of 2009 due permissions have been obtained from all the authorities including the Board and the alternate site itself has been chosen as per the direction issued by the High Court.

14. In the reply filed by the 7th respondent – Board, while denying the allegations made by the applicant, it is submitted that efficient solid waste management is essential for health, environment and quality of life of the people and the MSW Rules, 2000 laid down various steps to be taken by the Municipal Authorities to ensure the management of solid waste and therefore it is the responsibility of the Municipal Authorities to provide the infrastructure and service in respect of collection, storage, segregation, transport, treatment and disposal of MSW. The Municipal Authorities are expected to obtain 'authorisation' from the Board and as the 3rd respondent government has granted approval for diversion of 2.00 ha of forest land comprised in Survey No.108A1A1A1A1A1 in Manaki Village for the establishment of MSW plant with a capacity of 10 TPD and the SEIAA has also granted EC. On an application received from the 10th respondent, the Board has placed the matter before the District Level Consent Committee which has issued 'authorisation'. The 10th respondent has applied for issuing 'authorisation' for the alternate site on 7.10.2009 and when documents were called for from the 10th respondent they failed to produce the document. However, the 10th respondent on 15.3.2011 applied for 'authorisation' for the establishment of the landfill site at Survey No.108A1A1A1A1A1 in Manaki Village along with the EC obtained from the 8th respondent. The application was placed before the District Level Consent Committee held on 24.3.2011 and 'authorisation' was issued. It is also stated that MSW projects are categorised as B2 and they do not require any public consultation.

15. Mr. B.S. Krishna, learned counsel appearing for the applicants has submitted that the Government of Karnataka, after obtaining Forest Clearance as per the Forest (Conservation) Act, 1980 in respect of a portion in forest Survey No.108/A which spreads over a large extent of area out of which only 2.00 ha alone were permitted for diversion for non forest activity. When once an alternate site is chosen in Survey No.108A1A1A1A1A1, as per the Forest (Conversation) Act, 1980 the project proponent as well as the government should have obtained fresh 'clearance' from the MoEF.

Without obtaining such 'clearance' simply based on a report of the Principal Chief Conservator of Forests, the State Government has decided to issue a modification by way of notification on 6.4.2009. It is totally opposed to the Forest (Conversation) Act, 1980 as well as the rules framed thereunder and on this score itself the impugned order of the Government dated 6.4.2009 is liable to be set aside.

16. He has further submitted that In so far as it relates to the EC granted by the SEIAA, the SEIAA is bound by the direction given by the High Court in W.P.No.3034 of 2009 wherein public hearing was contemplated by the High Court. In the absence of clear guidelines in categorising MSW plant as B2 category, it is arbitrary on the part of SEIAA to presume the project as B2 category and dispense with 'public hearing' which is not only against the EIA Notification 2006 but also against the direction given by the High Court in W.P.3034 of 2009. That apart, it is the contention of the counsel for the applicants that identification of the new place apart from being hit for want of approval from the MoEF, is not suitable for MSW plant and the SEIAA has failed to make a comprehensive study about the consequences of such plant on human habitation in the area, as there is a possibility of water pollution and contamination by virtue of the proposed plant. He also relied upon the judgment of the Supreme Court in *GOA FOUNDATION* case wherein it was clearly held that diversion of forest land without prior approval of the Central Government as per Section 2 of the Forest (Conversation) Act, 1980 is totally invalid and cannot be cured even by a subsequent approval by the Government of India.

17. On the factual matrix of the case he has submitted that the impugned order passed by the Government dated 6.4.2009 is without jurisdiction and is a nullity. The SEIAA ought to have considered these aspects before granting EC. In so far as it relates to 'authorisation' granted by the Board for the proposed MSW plant, according to the learned counsel, the Board has failed to apply the provisions of MSW Rules, 2000 and the Board itself has not conducted any public hearing to consider the objections regarding the proposed MSW plant and also relied upon various judgments of the Hon'ble Apex Court to insist his point that when once the order is a nullity it becomes incurable and therefore the entire project is to be set aside. He has also submitted that the conduct of the Board in creating a buffer zone for the purpose of granting

'authorization' is unknown under the MSW Rules. It is also submitted that the EC granted by the 8th respondent – SEIAA is liable to be set aside on the ground that the SEAC has not processed the project in an appropriate manner. According to him all the processes contained in the EIA Notification, 2006 viz., 'screening', 'scoping' and 'appraisal' are to be done by the same SEAC. On the facts of the present case, 'scoping' and 'screening' were made by one SEAC while the subsequently reconstituted SEAC has done the 'appraisal' which is not permissible as per the EIA Notification, 2006.

18. Per contra, it is the contention of Mr. Devaraj Ashok, learned counsel appearing for the respondent Nos.4 to 6, 8 and 9 that the application is not maintainable and it is only the appeal under Section 16 of the NGT Act which is maintainable when EC is challenged. Likewise, even against the order of the State Government under Section 2 of the Forest (Conservation) Act, 1980 an appeal will lie to NGT as per Section 2-A of the Forest (Conservation) Act, 1980 and therefore the application as such is not maintainable and hence liable to be dismissed.

19. He has also referred to some of the judgments to show that only those appeals which are pending before the National Environmental Appellate Authority on the date when the NGT Act came into existence, can be deemed to be transferred and merely because the High Court transferred the writ petition it cannot automatically become an appeal. While exercising the appellate jurisdiction, the Tribunal has to act as per the NGT Act and therefore the delay has to be explained by the appellant in approaching the Tribunal. He has also submitted that even the High Court in the writ petition has not adverted to the NGT Act and transfer to this Tribunal by the High Court was based on the consent of the parties and that will not be deemed to confer jurisdiction on the Tribunal in contravention of the provisions of the NGT Act. That is also the contention raised on behalf of the project proponent.

DISCUSSION & CONCLUSION:

20. We have heard the learned counsel appearing for the appellants as well as the respondents extensively, referred to various documents, judgments relied upon by the learned counsel and given our anxious thought to the issue involved in this case.

1) On the overall facts and circumstances of the case, we have to principally decide as to whether the impugned order of the 3rd respondent – Government of Karnataka dated 6.4.2009 in granting approval for diversion of 2.00 ha of forest land in Survey No.108/A1A1A1A1A1 of Manaki Village for the purpose of establishing MSW plant at Kumta Town in favour of the 10th respondent which is in effect a modification of the earlier notification of the Government of Karnataka dated 27.11.2007 wherein 2 ha of forest land was identified in Survey No.108/A of Manaki Village for the same project, without obtaining specific and prior permission from the MoEF as per Section 2 of the Forest (Conservation) Act, particularly in respect of the alternate site, is valid or not.

(2) In the event of such notification of the government dated 6.4.2009 can be held valid whether the EC granted by the SEIAA dated 17.2.2011 for the above said project in favour of the 10th respondent and the 'authorisation' granted by the 7th respondent – Board in the order dated 26.3.2011 for the project is valid under the MSW Rules, 2000.

21. As the 2nd issue is principally based on the 1st issue, which is relating to the validity or otherwise of the notification of the government of Karnataka dated 6.4.2009, we propose to take up the first issue at the first instance. It is admitted that Survey No.108/A at Manaki Village is a larger extent and forms part of the Forest Land. Out of the said larger extent of forest land, for the purpose of diversion, an extent of 2.00 ha was identified in respect of which the approval both Forest Clearance Stage – I and Stage – II, have been obtained from the MoEF under Forest (Conservation) Act, 1980 followed by the notification of the Government of Karnataka dated 27.11.2007. However, since the said site was objected, the Government has decided to find the alternate place in Survey No.108/A1A1A1A1A1 of Manaki Village which no doubt forms part of the said larger extent of forest land in Survey No.108/A at Manaki Village. It has to be considered that the alternate site stated above which is also an extent of 2.00 ha is not the originally identified 2.00 ha for which Forest Clearance was given.

22. In fact, in the reply affidavit filed by the project proponent – 10th respondent viz., the Town Municipal Council, Kumta dated 20.12.2012 it is clearly admitted that 2.00 ha

of forest land originally chosen in Survey No.108/A is different from the alternate site chosen by the Government to an extent of 2.00 ha in Survey No.108/A1A1A1A1A1. In effect, the case of the State Government is that in respect of 2.00 ha in Survey No.108/A Forest Clearance Stage – I and Stage – II have already been obtained and therefore the alternate site which is in another portion of Survey No.108/A need not require fresh Forest Clearance as per the provisions of Forest (Conservation) Act, 1980.

23. Under Forest (Conservation) Act, 1980 which provides for conservation of forests, Section 2 imposes certain restrictions which includes the restrictions regarding the use of forest land or any portion thereof for non-forest purposes except with the prior approval of the Central Government. Section 2 of the Forest (Conservation) Act, 1980 is as follows:

“2. Restriction on the de-reservation of forests or use of forest land for non-forest purpose.—Notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing—

(i) that any reserved forest (within the meaning of the expression “reserved forest” in any law for the time being in force in that State) or any portion thereof, shall cease to be reserved;

(ii) that any forest and or any portion thereof may be used for any non-forest purpose;

(iii) that any forest land or any portion thereof may be assigned by way of lease or otherwise to any private person or to any authority, corporation, agency or any other organisation not owned, managed or controlled by Government;

(iv) that any forest and or any portion thereof may be cleared of trees which have grown naturally in that land or portion, for the purpose of using it for reafforestation)

(Explanation-For the purpose of this section “non-forest purpose” means the breaking up or clearing of any forest land or portion thereof for—

(a) the cultivation of tea, coffee, spices, rubber, palms, oil-bearing plants, horticulture crops or medicinal plants;

(b) any purpose other than reforestation

But does not include any work relating or ancillary to conservation, development and management of forest and wild-life namely, the establishment of check-posts, fire lines, wireless communications and construction of fencing, bridges and culverts, dams, waterholes, trench marks, boundary marks pipelines or other like purposes)

24. The Forest (Conservation) Rules, 2003 particularly, Rule 6 which deals with the submission of proposal seeking approval of the Central Government makes it clear that the “ User Agency” which is defined under Rule 2(h) “to mean any person, organisation or company or department of the Central or State Government making a request for diversion or de-notification of forest land for non-forest purpose or using forest land for non-forest purpose in accordance with the permission granted by the Central Government under the Act or the rules” obligates such User Agency to make the proposal in Form – A to the “Nodal Officer” who is defined in Rule 2(e) “ to mean any officer not below the rank of Conservator of Forests, authorised by the State Government to deal with the forest conservation matters under the Act”. Such User Agency who sends the proposal to the Nodal Officer shall forward a copy to the concerned Divisional Forest Officer or the Conservator of Forests, Regional Office as well as the Monitoring Cell of the Forest Conservation Division of the MoEF, New Delhi. Further, on receipt of such proposal, the State Government has to forward the proposal to the Central Government within the stipulated time. The Nodal Officer of the State Government who has received the proposal if satisfied that the proposal is complete in all respects, has to send it to the Divisional Forest Officer within ten days. If the Nodal Officer of the State Government finds that the proposal of the User Agency is incomplete, he may return the same to the User Agency. The Divisional Forest Officer or the Conservator of Forests has to examine the factual details and feasibility of the proposal by carrying out inspection, making enumeration of trees and forward his findings to the Nodal Officer in a proper format within a prescribed time. The Nodal Officer, through the Principal Chief Conservator of Forests, has to forward the proposal to the State Government with his recommendations. The State Government shall forward the complete proposal with all recommendations to the Regional Office or the MoEF, New Delhi, as the case may be, within the specified period after the receipt of the proposal from the Nodal Officer. If the diversion proposal is upto 5 ha, the State Government shall along with its recommendation send the proposal to the Chief Conservator of Forests or Principal Chief Conservator of Forests of the concerned Regional Office of the MoEF, Government of India who is to decide within 45 days of receipt of the diversion proposal process, scrutinise and forward the proposal for more

than 5 ha to 40 ha along with recommendations to MoEF for obtaining decision of the Central Government. The Regional Empowered Committee may decide the proposal within 45 days from the receipt of proposal from the State Government. In respect of the proposals involving diversion of forest of more than 40 ha, the proposal has to be forwarded by the State Government to the MoEF, New Delhi. The Central Government shall refer all the proposals to the Forest Advisory Committee constituted as per Rule 3 of the Forest (Conservation) Rules, 2003 for its advice.

25. Rule 6 of the Forest (Conservation) Rules, 2003 which explains the above procedures, reads as follows:

“ 6. Submission of proposals seeking approval of the Central Government under Section 2 of the Act.

Every User Agency who want to use any forest land for non-forestry purposes, shall make its proposal in the relevant form appended to these rules, i.e. Form 'A' for proposals seeking first time approval under the Act, and Form 'B' for proposals seeking renewal of leases, where approval of the Central Government under the Act had already been obtained, to the Nodal Officer of the concerned State Government or the Union Territory Administration, as the case may be, along with requisite information and documents, complete in all respects.

2. The User Agency shall endorse a copy of the proposal, along with a copy of the receipt obtained from the office of the Nodal Officer, to the concerned Divisional Forest Officer or the Conservator of Forests, Regional Office, as well as the Monitoring Cell of the Forest Conservation Division of the Ministry of Environment and Forests, Paryavaran Bhawan, CGO Complex, New Delhi 110 003

3. (a) After having received the proposal, the State Government or the Union Territory Administration, as the case may be, shall process and forward it to the Central Government within a period of two hundred and ten days of the receipt of the proposal including the transit period.

(b) The Nodal Officer of the State Government or as the case may be, the Union Territory Administration, after having received the proposal under sub-rule (1) and on being satisfied that the proposal is complete in all respects and requires prior approval under Section 2 of the Act, shall send the proposal to the concerned Divisional Forest Officer within a period of ten days of the receipt of the proposal.

Provided that on the determination regarding completeness of the proposal or the expiry of ten days, whichever is earlier the question of completeness or otherwise of the proposal shall not be raised.

c) If the Nodal Officer of the State Government or the Union Territory Administration, as the case may be, finds that the proposal is incomplete, he shall return it within the period of ten days as specified in clause (b), to the User Agency and this time period shall not be counted for any future reference.

d) The Divisional Forest Officer or the Conservator of Forests shall examine the factual details and feasibility of the proposal, certify the maps, carry out

site inspection and enumeration of the trees and forward his findings in the format specified in this regard to the Nodal Officer within a period of ninety days of the receipt of such proposal from him.

e) (i) The Nodal Officer, through the Principal Chief Conservator of Forests, shall forward the proposal to State Government or the Union Territory Administration, as the case may be, along with his recommendations, within a period of thirty days of the receipt of such proposal from the Divisional Forest Officer or the Conservator of Forests.

ii) The State Government or the Union Territory Administration, as the case may be, shall forward the complete proposal, along with its recommendations, to the Regional Office or the Ministry of Environment and Forests, Paryavaran Bhawan, CGO Complex, New Delhi -110003 as the case may be, in the specified Forms within a period of sixty days of the receipt of the proposal from the Nodal Officer;

Provided that all proposals involving clearing of naturally grown trees on the forest land or a portion thereof for the purpose of using it for reforestation shall be sent in the form of Working Plan or Management Plan:

Provided further that the concerned State Government or as the case may be, the Union Territory Administration, shall simultaneously send the intimation to the User Agency about forwarding of the proposal, along with its recommendations, to the Regional Office or the Ministry of Environment and Forests, as the case may be.

(f) If the proposal, along with the recommendations, is not received from the concerned State Government or the Union Territory Administration, as the case may be, till fifteen days of the expiry of the time limit as specified under clause (a), it shall be construed that the concerned State Government or as the case may be, the Union Territory Administration, has rejected the proposal and the concerned State Government or the Union Territory Administration shall inform the User Agency accordingly:

Provided that in case the State Government or the Union Territory Administration, as the case may be, subsequently forward the proposal, along with its recommendations, to the Regional Office or the Ministry of Environment and Forests, as the case may be, the proposal shall not be considered by the Central Government unless an explanation for the delay to the satisfaction of the Central Government is furnished, together with action taken against any individual held to be responsible for the delay.

4. The proposal referred to in clause (e) (ii) of sub-rule (3) involving forest land up to forty hectares shall be forwarded by the concerned State Government or as the case may be, the Union Territory Administration, along with its recommendations, to the Chief Conservator of Forests or the Conservator of Forests of the concerned Regional Office of the Ministry of Environment and Forests, Government of India, who shall, within a period of forty five days of the receipt of the proposal from the concerned State Government or the Union Territory Administration, as the case may be (a) decide the diversion proposal upto five hectares other than the proposal relating to mining and encroachments, and (b) process, scrutinise and forward diversion proposal of more than five hectares and upto forty hectares including all proposals relating to mining and encroachments upto forty hectares along with the recommendations, if any, to the Ministry of Environment and Forests, Paryavaran Bhawan, CGO Complex, New Delhi 110003, for obtaining the decision of the Central Government and inform the State Government or the Union Territory Administration, as the case may be, and the User Agency concerned.

5. The Regional Empowered Committee shall decide the proposal involving diversion of forest land upto forty hectares other than the proposal relating to

mining and encroachments, within forty five days of the receipt of such proposal from the State Government or the Union Territory Administration, as the case may be:

Provided that the Central Government, may, if consider it necessary, enhance or reduce the limit of the area of the forest land.

6. The proposal referred to in clause (e) (ii) of sub-rule (3), involving forest land of more than forty hectares shall be forwarded by the concerned State Government or as the case may be, the Union Territory Administration, along with its recommendations, to the Ministry of Environment and Forests, Paryavaran Bhawan, CGO Complex, New Delhi 110003.”

26. The advice of the Forest Advisory Committee constituted as per Section 3 of the Forest (Conservation) Act, 1980, to advise the Central Government along with the recommendations received from the State Government shall be placed before the Central Government for its decision. The said procedure which is explained under Rule 7 of Forest (Conservation) Rules, 2003 is as follows:

“ 7. Committee to advise on proposals received by the Central Government.-

(1) The Central Government shall refer every proposal, complete in all respects, received by it under sub-rule (6) of rule 6 including site inspection report, wherever required, to the Committee for its advice thereon.

(2) 1-A. These proposals shall be processed and put up before the Committee and the recommendations of the Committee shall be placed within a period of ninety days of the receipt of such proposals from the State Government or the Union Territory Administration, as the case may be, before the Central Government for its decision.

(2) The Committee shall have due regard to all or any of the following matters while tendering its advice on the proposals referred to it under sub-rule (1), namely:-

- a. Whether the forests land proposed to be used for non-forest purpose forms part of a nature reserve, national park wildlife sanctuary, biosphere reserve or forms part of the habitat or any endangered or threatened species of flora and fauna or of an area lying in severely eroded catchment;
- b. Whether the use of any forest land is for agricultural purposes or for the rehabilitation of persons displaced from their residences by reason of any river valley or hydro-electric project ;
- c. Whether the State Government or the Union Territory Administration, as the case may be has certified that it has considered all other alternatives and that no other alternatives in the circumstances are feasible and that the required area is the minimum needed for the purpose; and
- d. Whether the State Government or the Union Territory Administration as the case may be undertakes to provide at its cost for the acquisition of land of an equivalent area and afforestation thereof.

(3) While tendering the advice, the Committee may also suggest any conditions or restrictions on the use of any forest land for any non-forest purpose, which in its opinion, would minimise adverse environmental impact.”

27. The Supreme Court in A. CHOWGULE & CO LTD VS GOA FOUNDATION & ORS 2008 AIR SCW 5922 held that prior approval of the Central Government for diversion of forest land for non forest use is a *sine qua non* and without such clearance even if a lease is granted by the State Government such lease is not valid in law. The Supreme Court has gone to the extent of stating that ex facto approval granted by the Central Government for part of lease lands does not amount to prior approval.

28. Section 2 of the Forest (Conservation) Act, 1980 make it very clear that “prior approval” is a condition precedent for diversion of forest land for non forest activity. The same is a mandatory requirement and applying the said principles to the fact of the present case, one cannot jump to a conclusion that prior approval obtained from the Central Government under Section 2 of the Forest (Conservation) Act, 1980 in respect of 2.00 ha of forest land in Survey No.108/A which is admittedly different from the alternate site chosen viz., Survey No.108/A1A1A1A1A1, will be sufficient and to be treated as an approval of diversion for the alternate site to the same extent of 2.00 ha in Survey No. 108/A1A1A1A1A1. The alternate site chosen requires fresh prior approval from the Central Government. To hold otherwise, it means for a portion/part of any larger extent of forest land in a particular Survey Number if the Central Government grants prior approval for non forest activity, a similar extent in a totally different area in the same survey number or in a different survey number can be used for the non forest activity. That will make the Forest (Conservation) Act, 1980 redundant. The prior approval is only in respect of an identified place with fixed boundaries which is abundantly clear from the proforma prescribed under Form – A and that cannot be used as a prior approval for any alternate site of same extent simply because the alternate site is situated in the same survey number. There is one more reason for the above said decision, that is, when a portion of a forest land in a survey number which is spread over a large extent of area has been granted Forest Clearance and the project proponent wanted to change the site and use an alternate place in the same survey number which is in a different direction, as per the provisions of the Forest

(Conservation) Act, 1980 and Forest (Conservation) Rules, 2003, the Nodal Officer, State Government and other authorities including Conservator of Forests and ultimately the Central Government has to study the implications of that alternate site for the diversion of the forest land keeping the forest conservation in view which is the main purpose of the Act itself. Therefore, we have no hesitation to hold on the factual matrix of this case that the Forest Clearance obtained by the project proponent both under Stage – I and Stage – II in respect of a portion of an extent of 2 ha in Survey No.108/A, cannot be applied for another portion of the forest land situated in a different area viz., forest Survey No. 108/A1A1A1A1A1.

29. When the Act and the rules as enumerated above, clearly contemplate separate procedure, it is unfortunate that the Principal Chief Conservator of Forests and the State Government have taken a stand that the alternate site selected in Survey No. 108/A1A1A1A1A1 is situated in the same forest and the Central Government has already granted approval and therefore it is sufficient if the State Government itself grants approval for the alternate site. The portion of the letter of the Principal Chief Conservator of Forests dated 21.11.2008 addressed to the Principal Secretary, Forest, Ecology & Environment Department, Government of Karnataka, Bangalore states as follows:

“Further, he has submitted sketch of the new site selected and has requested to accord approval of change of site, as the Sy.No. of the area is the same, for which the Government of India and Government of Karnataka have already accorded approval vide their orders cited under reference (2). Though the survey No. is the same and there is only a change of site as reported by the Conservator of Forests, it is felt that a formal approval in this regard is essential from Government of India/Government of Karnataka in order to avoid any complications that may arise in future.”

30. The Principal Chief Conservator of Forests, Karnataka, having taken such a stand in the letter stated above, ought to have directed the Nodal Officer to obtain and process revised proposals and requested the State Government to obtain prior approval from the Central Government for the alternate site, as it is seen in the tenor of the said letter dated 21.11.2008. In spite of the same, the Government of Karnataka through its Under Secretary to Government, Forest, Ecology and Environment Department, in the

impugned notification dated 6.4.2009 having referred to the said letter of the Chief Principal Conservator of Forests, Karnataka viz., Letter No.A5(2) GFL-CR-7/05-06 dated 21.11.2008, has passed order according approval for diversion of 2.00 ha of forest land in Survey No. 108/A1A1A1A1A1 of Manaki Village without obtaining prior approval for change of site from the Central Government in accordance with Section 2 of the Forest (Conservation) Act, 1980. This, in our considered view is totally against the provisions of the Forest (Conservation) Act, 1980. This defect, being incurable, will ultimately have the effect nullifying the impugned notification of the Government of Karnataka dated 6.4.2009. In such circumstances, we are of the considered view that no other submissions made by the learned counsel appearing for the applicant is necessary for us to traverse. Accordingly, the impugned notification of the Government of Karnataka dated 6.4.2009 is held as illegal, void and liable to be set aside and accordingly set aside.

31. As we have stated earlier that the impugned notification of the Government of Karnataka dated 6.4.2009 is the basis for the SEIAA to grant EC and also for the Board to grant 'authorisation' dated 26.3.2011 which are actually consequential to the order of the Government of Karnataka dated 6.4.2009, it goes without saying that the EC granted by SEIAA as well as the 'authorisation' granted by the Board have also to be set aside.

32. Consequently, the impugned notification of the Government of Karnataka dated 6.4.2009 in granting approval for the establishment of MSW plant at Kumta Town in the extent of 2.00 ha in Survey No. 108/A1A1A1A1A1 of Manaki Village is held as null and void and consequently the impugned EC granted by the SEIAA, Karnataka dated 17.2.2011 for the said project and the 'authorisation' granted by the Board for the said project dated 26.3.2011 are also declared as null and void and inoperative and the 10th respondent cannot proceed with the project. However, it will be always open to the User Agency viz., the 10th respondent to make proposal afresh for the alternate site for obtaining prior approval of the Central Government in accordance with Section 2 of the Forest (Conservation) Act, 1980 and the rules framed thereunder in which event it will be always open to the authorities concerned to consider the same in accordance with law afresh.

In the result, the application stands allowed. However, in the circumstances of the case, there shall be no order as to cost.



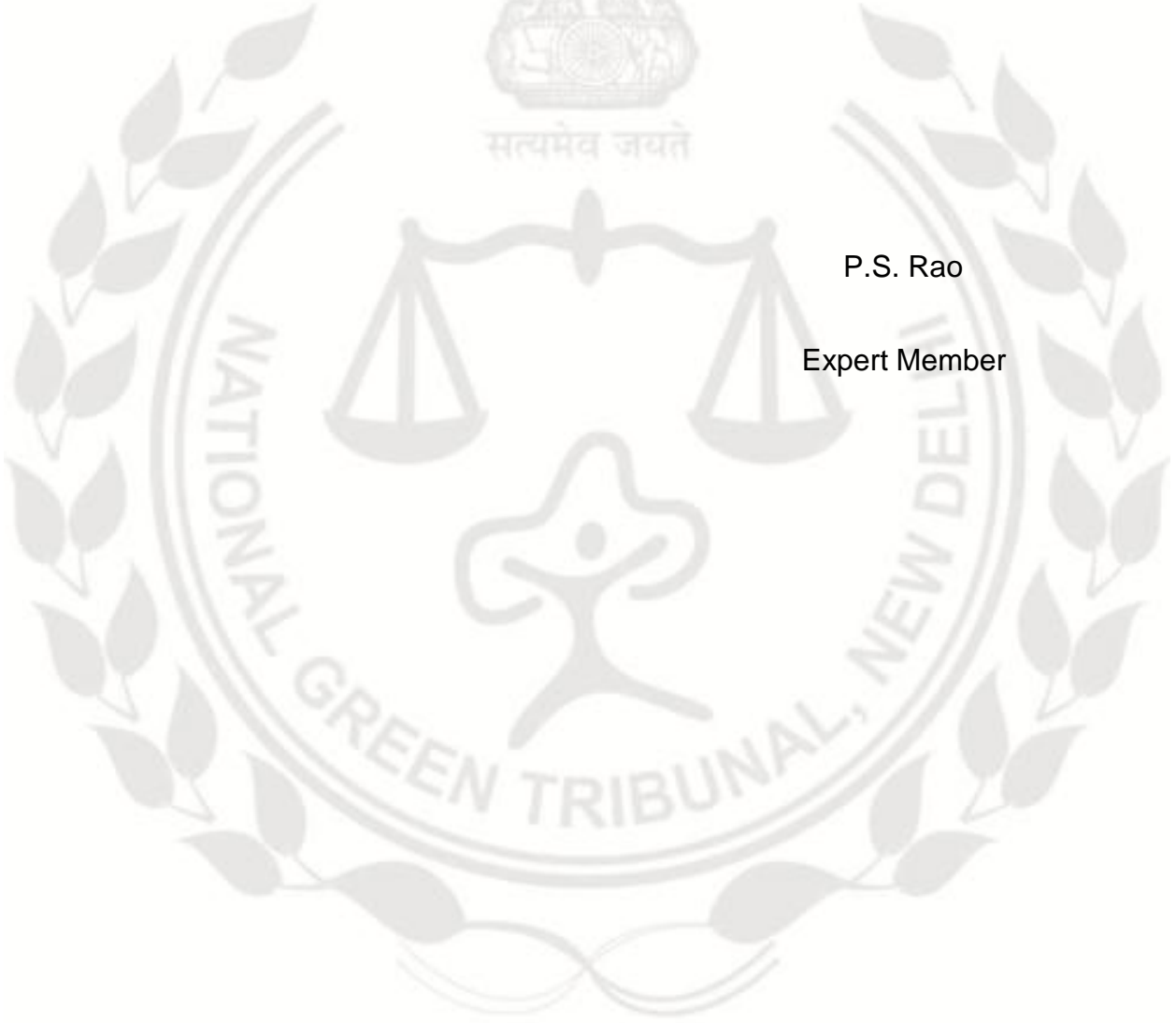
सत्यमेव जयते

Justice Dr. P. Jyothimani

Judicial Member

P.S. Rao

Expert Member



NGT