BEFORE THE NATIONAL GREEN TRIBUNAL
PRINCIPAL BENCH
NEW DELHI
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APPEAL NO. 74 OF 2014

IN THE MATTER OF:

M/s. Jai Hanuman Ent. Udyog
Through its Proprietor
Smt. Neelam Singh,
Kastooripur, Holagarh, Allahabad,
U.P.

.....Appellant

Versus

1. U.P. Pollution Control Board,
   Through its Regional Officer/Regional Office
   Allahabad, U.P.

2. Shri Akhilesh Kumar Dwivedi,
   S/o Late Chhoteylal Dwivedi,
   R/o Village – Kasturipur, Holagarh,
   Tehsil – Sauranv, Distt. Allahabad.

.....Respondents

Counsel for Appellants:
Mr. Rahul Singh, Advocate

Counsel for Respondents:
Mr. Pradeep Misra & Mr. Suraj Singh, Advocates for Respondent No.1
Mr. Yatutmas, Advocate for Respondent No. 2

JUDGMENT

PRESENT:

Hon'ble Mr. Justice Swatanter Kumar (Chairperson)
Hon'ble Dr. D.K. Agrawal (Expert Member)
Hon'ble Mr. B.S. Sajwan (Expert Member)

Reserved on: 8th April, 2015
Pronounced on: 7th May, 2015

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1. Whether the judgment is allowed to be published on the net?

2. Whether the judgment is allowed to be published in the NGT Reporter?

JUSTICE SWATANTER KUMAR, (CHAIRPERSON)

The short question that arises for consideration of the Tribunal in the present appeal is whether the U.P. Brick Kilns (Siting Criteria for Establishment) Rules, 2012 (for short 'the Rules of 2012') can be given retrospective or retroactive effect and if so, to what extent?

2. The appellant in the present appeal challenges the likelihood and correctness of the order dated 13th August, 2014, passed by the Appellate Authority constituted under Section 31(2) of the Air (Prevention and Control of Pollution) Act, 1981 (for short 'the Air Act').

3. The facts giving rise to the present appeal which fall in a narrow compass are that M/s. Jai Hanuman Ent. Udyog had been running its brick kilns at Kastooripur, Holagarh, Allahabad, U.P. It is the case of the appellant that the said brick kiln has been in existence since 2010. One Mr. Akhilesh Kumar, respondent no.2 herein, filed a complaint against the running of the appellant's brick kiln alleging that it did not possess proper licenses and had no consent from the U.P. Pollution Control Board (for short 'UPPCB') to operate. This complaint was filed on 2nd February, 2013. The Additional Officer, Zila Panchayat, Allahabad, U.P. conducted an enquiry and passed an order dated 28th February, 2013, rejecting the complaint as baseless and *malafide*. However, the respondent no.2 filed another complaint with the Regional Officer of the UPPCB, which issued a notice to the appellant on 19th January, 2013. Respondent no.2 also approached the High Court of Allahabad by filing a PIL No. 11629/2013. In that Writ Petition, it was averred by

the appellant that the brick kiln was running since 2010 without any NOC from the UPPCB or licenses from other official authorities. The Pollution Control Board had initiated action in the matter by issuing a show cause notice on 19th January, 2013. It was observed by the Hon'ble high Court that it was only thereafter, that the present appellant had become active. This Writ Petition was disposed of with a direction to respondents no. 4 and 5 that the Rules of 2012, laying down the terms and conditions for establishment of brick kiln, should be followed and no person should be permitted to establish or run a brick kiln in violation of the Rules and that necessary action should be taken expeditiously, preferably within three months.

4. In furtherance to the order of the High Court, the Zila Panchayat passed an order dated 31st May, 2013. Various authorities, including the U.P. Pollution Control Board were of the opinion that the Rules of 2012 would not apply as the unit was established since 2010. Thereafter, the UPPCB, vide its order dated 6th September, 2013 granted consent to the appellant unit. Respondent no. 2 still filed another Writ Petition in the High Court of Allahabad being PIL No. 15833/2014. The Hon'ble High Court of Allahabad, vide its order dated 13th March, 2014, after noticing the contentions that the controversy in the case would require a factual verification and an appeal is maintainable before the authority under Section 31 of the Air Act, permitted the appeal to be filed before the Appellate Authority and disposed of the Writ Petition.

After the disposal of the PIL as afore-indicated, the appellant filed an appeal before the Appellate Authority raising a challenge to the order of issuance of the consent dated 6th September, 2013 issued by the UPPCB on various grounds. The Appellate Authority after discussing the rival contentions raised before it, allowed the appeal and quashed the order dated 6th September, 2013. The Appellate Authority took the view that while issuing the consent order dated 6th September, 2014, the Board ought to have been guided by the Rules of 2012. The Appellate Authority vide its order dated 13th August, 2014, inter alia, held as under:

> "...In compliance of the order dated 13.03.2014 passed by the Hon'ble High Court in the above mentioned Writ Petition No. 15833/2014 Akhilesh Kumar Dwivedi versus State of U.P. & 5 others, with regard to the distance of M/s Jai Hanuman Ent Udyog from human a habitation and other institution which are mentioned in U.P. Brick Kilns (Siting Criteria for Establishment) Rules 2012, recent inspection report had been called for from the U.P. Pollution Control Board according to shich the location of M/s Jai Hanuman Ent Udyog, Kasturipur, Holagarh, Allahabad is not in accordance with the standards mentioned in U.P. Brick Kilns (Siting Criteria for Establishment) Rules 2012. The Regional Officer, Regional Office, U.P. Pollution Control Board, Allahabad had issued Notice to Jai Hanuman Ent. Udyog on 19.01.2013 in which it was mentioned about establishment of brick kiln without obtaining prior permission of the State Board. Thereafer, on 06.09.2013, consent has been given under Section 21 of the Air Act, 1981 to M/s Jai Hanuman Ent Udyog by the Regional Office, U.P. Pollution Control Board, Allahabad from 17.08.2013 to 31.12.2017 in which it has been mentioned that letter no. 1773/Zila Panchayat Allhd/2012-2013 dated 16.01.2013 and letter no. 1896 (3)/L/2013-13 dated 28.02.2013 regarding the industry being in accordance with the bye-laws of the Zila Panchayat were produced.
> Under section 21 of the Air (Prevention and Control of Pollution) Act, 1981, it is mandatory to obtain No Objection Certificate/consent letter from the State Board before establishment/operation but the brick kiln was established/operated by M/s Jai Hanuman

Ent Udyog contrary to the Mandatory provisions of the Air Act, 1981 without obtaining the prior consent of the State Board which is a punishable offence. For the first time in the year 2013, in its order dated 06.09.2013 granting consent to M/s Jai Hanuman Ent Udyog, the Regional Officer, Regional Office, U.P. Pollution Control Board, Allahabad has taken cognizance of the bye-laws of the Zila Panchayat Allahabad whereas the U.P. Brick Kilns (Siting Criteria for Establishment) Rules 2012 is effective since June 2012. It would have been in accordance with law to have taken cognizance of Rules, 2012 with regard to Site while disposing of the Consent application for the year 2013. The consent order dated 06.09.2013 is erroneous. The appeal filed by the appellant is fit to be allowed and the consent order dated 06.09.2013 is fit to be quashed.

ORDER

On the basis of above discussion, the Air Appeal No. 07/2014 filed by Shri. Akhilesh Kumar Dwivedi is allowed and the Air Consent Order dated 06.09.2013 issued by the Regional Officer, Regional Office, U.P. Pollution Control Board, Allahabad to M/s Jai Hanuman Ent Udyog, Kasturipur, Holagarh, Allahabad is quashed."

Aggrieved from the order of the Appellate Authority dated 13th August, 2014, the appellant has filed the present appeal.

5. The sole contention raised before us, while challenging the correctness of the impugned order, is that the unit was established in the year 2010 after taking clearance from the Zila Parishad and since then it is in operation. The Rules of 2012 had been promulgated on 27th June, 2012, therefore, the Rules of 2012 cannot be applied to the case of the appellant and the site criteria provided under these Rules of 2012 is inconsequential to the Unit. Therefore, the impugned order is liable to be set aside. It is clear from the records that when the brick kiln was established in 2010, it had taken an NOC from the Zila Parishad but it had not obtained the consent of the UPPCB under Section 21 of the Air Act. The Air Act had been promulgated on 29th March, 1981. In terms of Section 21

of the Air Act, no person shall, without the previous consent of the UPPCB, establish or operate any industrial plant in an air pollution control area. Even the units which were operative at the time of commencement of the Act were granted period of three months from the date of commencement of the Air Act, within which they were required to take the consent of the Board. Thus, there was a statutory obligation on the part of the appellant to seek consent of UPPCB for establishing and operationalizing its unit. Admittedly, the appellant did not take consent of the Board till the show cause notice dated 19th January, 2013 was issued to it. It is only after issuance of this show cause notice that the appellant had filed an application for grant of consent which admittedly has been granted on 6th September, 2013. Thus, for the first time when the unit applied for obtaining consent of the UPPCB was in August, 2013, that is, when the Air Act and all the laws framed thereunder, including the Rules of 2012, were in force. The application for grant of consent ought to have been considered by the UPPCB in accordance with the laws in force, when the application was moved and not when the unit claims to have been established or the time since when it was running. Admittedly, the unit of the appellant had come into existence without complying with the laws in force, particularly the environmental legislations. Before the appellant can claim any advantage on the strength of beneficial interpretation of the relevant provisions in order to contend that it being an existing unit and is covered only by the Rules in force in 2010 and not by the Rules of 2012 as these are prospective in nature, the unit must

show that it came into existence upon entirely complying with the laws in force at that time and after obtaining the consent of the Board under the provisions of the Air Act. If a unit is established in violation of the laws in force and in an illegal manner, then it would be estopped from claiming any benefit on the ground of the laws being prospective. Such unit cannot be permitted to exist in violation of the laws in existence, i.e. the Rules of 2012 and the prescribed standards under the Air Act. This shall be the position of law, independent of the contention that such procedural laws which are mandatory and only add additional obligation, but does not take away any existing rights, would have to be treated retroactively. Another aspect of this case is that upon field inspection and also in terms of the orders under appeal, the unit falls within the prohibited distance in terms of Rules of 2012. Compliance to these Rules being mandatory, the unit cannot be permitted to operate in any violation thereof.

6. Once it is undisputable on record that the unit of the appellant came into existence and started operating in the year 2010, without obtaining consent of the UPPCB in terms of the Air Act, then the consequences of it being an illegal unit and carrying out an unlawful activity would necessarily follow. A unit, which is established contrary to law and which pollutes the environment, cannot claim any advantage at a subsequent stage on the strength of the NOC from the Zila Parishad, which had no jurisdiction to deal with any of the matters, particularly of environment, as contemplated under the provisions of the Air Act. It is not a case of lack of jurisdiction but

that of no jurisdiction of the Zila Parishad. It was mandatory for the appellant to establish its units only upon grant of Consent to Establish and the Consent to Operate from the UPPCB. Having failed to comply with its statutory obligation, the appellant is estopped from claiming the benefit of law under the Rules in force in 2010, as opposed to the applicability of Rules of 2012.

7. Even otherwise, the environmental laws including the provisions of the Air Act and the Rules of 2012 are social beneficial legislation, intended to provide and serve greater cause of public health and environment. The purpose is to ensure that because of the emission from the brick kiln, the people residing in vicinity do not suffer on account of air pollution resulting from such activity. The purpose of providing a mandatory statutory distance of the brick kiln from the residential areas is to ensure that the people carrying on activity, particularly like schools and residential areas, are not adversely affected by carrying on of such activity. The fact that the unit of the appellant had so far been operating without obtaining consent of the UPPCB and in violation of the prescribed standards, would not vest in him a right to continue with such unlawful activity. Admittedly, the unit applied for obtaining consent of the UPPCB for the first time in the year 2013, thus, that will be the point of time to determine the application of the laws. This Tribunal had the occasion to deliberate upon and decide a somewhat similar plea in the case of *Himmat Singh Shekhawat v. State of Rajasthan and Ors., 2015 All (I) NGT Reporter (1) (Delhi) 44.* The plea raised therein was that since the Project Proponents had been carrying on the mining activity for a

considerable time, therefore, the preventive and precautionary steps directed to be taken under subsequent laws were not applicable upon them, including the judgment of the Supreme Court prohibiting mining activity in an area of less than five hectares without prior Environmental Clearances. The Tribunal took the view that such activities and restrictions, imposed in the interest of the environment, are not *stricto sensu* retrospective but are retroactive, as they do not take away the vested rights but only permit continuation thereof, subject to further restrictions. The Tribunal held as under under:

> "75. The environmental laws are laws enacted for the benefit of public at large. They are socio-beneficial legislation enacted to protect the environment for the benefit of the public at large. It is in discharge of their Constitutional obligation that such laws have been enacted by the Parliament or by other authorities in furtherance to the power of delegated legislation vested in them. These legislations and directives are incapable of being compared to the legislations in the field of 82 taxation or criminal jurisprudence. These laws have been enacted to protect the Fundamental Rights of the citizens. Thus, the contention that the existing mine holders would not be required to comply with the requirements of environmental laws, cannot be accepted. To illustratively examine this aspect, we may take a hypothetical situation, not far from reality. An industrial unit which had been established and operationalized prior to 1974, 1981 and/or 1986, was granted permission under the laws in force and the unit owner had made heavy investments in making the unit operational. The Water (Prevention and Control of Pollution) Act came into force in 1974, Air (Prevention and Control of Pollution) Act in 1981 and Environment (Protection) Act in 1986. All these Acts deal with existing units as well as the units which are to be established in future. These laws granted time to the existing units to take all anti-pollution measures and obtain the consent of the respective Pollution Control Boards to continue its operations. Failure to do so, could invite penal action including, closure of industry under these Acts. The said Unit should not be permitted to contend that since it was an existing unit,

it has earned a right to pollute the environment and cause environmental pollution, putting the life of the others at risk, on the ground that it was an existing unit and was operating in accordance with law. Such a contention, if raised, would have to be noticed only to be rejected. Similarly, these Notifications or Office Memorandums, having been issued under the environmental laws, would equally apply to the existing industries as well. The directions contained in these 83 Notifications and Office Memorandums which are otherwise valid, would equally operate to the existing mines as well as the newly undertaken mining activities. All that the law would require, is to give them some reasonable time to comply with the requirements of law, wherever a specific time is not provided under the Act or the Notification. Obviously, these laws stricto sensu are not retrospective, as they do not abolish or impair any vested rights under the existing laws. However, these laws impose a new obligation without taking away the vested right. In that sense and somewhat loosely, it can be interpreted as being retroactive in nature, as they do not take away the right of the person to carry on business or his industrial unit, but only impose a new obligation to take Environmental Clearance under the environmental laws. The activity is not prohibited, but, compliance to the environmental laws is made mandatory. Examined from that angle, in so far as we have held, the Notification dated 1st December, 2009, Office Memorandums dated 18th May, 2012, 24th June, 2013 and 24th December, 2013, except to the extent they have been quashed as above by us, are valid and would be enforceable against even the existing mining lease holders. They cannot be permitted to destroy the environment and ecology for their personal gains on the strength of the contention that they are existing units and these Notifications, Office Memorandums would not apply to them. State of Karnataka has already given a one year time to the existing mine lease holders to comply with the requirements of obtaining Environmental Clearance. Similarly, the State of Rajasthan 84 and Himachal Pradesh should also direct the existing mine lease holders to take Environmental Clearance, irrespective of their area of mining. The Hon'ble Supreme Court in the case of Deepak Kumar (supra) has clearly directed that the miners possessed of mining area of less than 5 hectares cannot operate without taking Environmental Clearance. This would unexceptionally apply to the new units, but, in our considered view, would also apply to the existing mine lease holders as well; except that they would have to be given time to comply with the requirements of law."

8. In view of the above stated principles, we are of the considered opinion that the appellant has no case for validly challenging the order dated 13th August, 2014. The appellant cannot take advantage of his own wrong conduct, which is in violation to the laws in force at the relevant time. We are in complete agreement, though, for different reasons, which we have afore-recorded, with the conclusion arrived at by the Appellate Authority in the impugned order dated 13th August, 2014.

9. Resultantly, the present Appeal No. 74 of 2014 fails and is dismissed without any order as to costs.

Justice Swatanter Kumar
Chairperson

Dr. D.K. Agrawal
Expert Member

Mr. B.S. Sajwan
Expert Member

New Delhi
7th May, 2015