Item No. 01

BEFORE THE NATIONAL GREEN TRIBUNAL
CENTRAL ZONE BENCH, BHOPAL
(Through Video Conferencing)

Appeal No.09/2022 (CZ)

ACC Limited Appellant(s)

Versus

MP SEIAA. Respondent(s)

Date of completion of hearing and reserving of order: 24.08.2022
Date of uploading of order on website: 08.09.2022

CORAM: HON'BLE MR. JUSTICE SHEO KUMAR SINGH, JUDICIAL MEMBER
HON'BLE DR. ARUN KUMAR VERMA, EXPERT MEMBER

For Applicant (s): Mr. U.N. Tiwari, Adv

For Respondent(s) : Ms. Parul Bhadoria, Adv

ORDER

1. The State Environment Impact Assessment Authority vide correspondence dated 15.12.2020 issued a show-cause notice to the appellant with the facts that the six monthly report has not been filed within time and in compliance thereof, the appellant filed the reply, which is at annexure - A/13 on 14.08.2021 with the facts that the half yearly compliance reports were submitted combinedly on regular basis and also there was no reminder to the Appellant from authorities for the period in question i.e. December, 2014 to May, 2018. Considering the reply, the MP SEIAA vide order impugned dated 19.12.2021 passed an order to revoke the Environment Clearance.

2. Aggrieved by the order, the appellant has challenged on the ground that :-

> *"That the penalty of revocation of the EC for non-submission of half-yearly reports of EC conditions is disproportionate, harsh, unfair, and arbitrary. The principle of proportionality has been applied by the Hon'ble Supreme Court in the context of environment clearances in Lafarge Umiam Mining (P) Ltd. Vs. UoI, (2011) 7 SCC 338 (para.119), Electrotherm (India) Ltd. Vs. Patel Vipulkumar Ramjibhai, (2016) 9 SCC 300 (para. 19) and more*

recently in Alembic Pharmaceuticals Ltd. Vs. Rohit Prajapati, (2020) 17 SCC 157. In Electrotherm, the High Court had directed closure of the plant on the ground that public hearing was not held before the EC was granted, which order was reversed by the Hon'ble Supreme Court applying the principle of proportionality."

3. It is further submitted that the State authorities and SEIAA are duty bound and under obligation to protect the law and implement it and not to defy it. They have to perform their duties sincerely, fairly and honestly to protect the environment not to see only the violation of it. The statement that the six monthly report was not filed from 2014 to 2018 does not have any impact on environment.

4. Secondly, the authorities who were responsible to monitor it, failed to issue any notice and failed to take cognizance of the facts and instead of taking action against their own fault, fastened the liability like closure of the unit or withdrawal of the EC, directly or indirectly damaging the economy of the industry and loss of the revenue to the State and the Centre. It is made clear that if there is any loss to the State exchequer due to fault of the authorities, they shall be held personally responsible for payment of State loss.

5. Order dated 19.12.2021 passed by SEIAA runs as follows:

Sub:Case No. 79/2008 Prior Environment Clearance for Badari Lime stonemine 5.82 ha village- Badari Vijayraghogarh, Distt. Katni (MP) by M/S ACC Limited. Kymore Cement Works, Kymore District- Katni (MP).

The case was discussed in 693rd SEIAA meeting dated 25.11.2021 and it was recorded that….

The case was discussed in 680th SEIAA meeting dated 03.08.2021 and it was recorded that….

The case was discussed in 653rd SEIAA meeting dated 08.01.2021 and it was recorded that….

The case was discussed in 645 SEIAA meeting dated 28.11.2021 and it was recorded that….

The agreement of lease transfer has been executed on 23.12.2008 to M/s ACC Limited while Prior EC was accorded by SEIAA to M/s S.N. Sunderson & Co. for above Badari Lime Stone Mine of 5.82 ha vide letter No. 372/EPCO-SEIAA/09 dated 25.03.2009 letter on M/s ACC Ltd. Has applied in SEIAA on 08.01.2018 for transfer of EC from M/s S.N. Sunderson & Co to M/S ACC Ltd., Kymore in response to this, Prior EC was transferred by SEIAA to M/s ACC Ltd., Kymore vide letter No. 1742/SEIAA/2018 dated 23.02.2018.

MOEF&CC, GOI, letter No. 18-B-30/2019(SEAC) 672 dated 14.06.2019 informed that Air & Water Consent was issued in the name of M/s S.N. Sunderson & CO. in the year 2009 and M/s ACC Ltd. Have been carrying out mining activities without valid Prior EC from 2009 to 23.02.2018 and even company has failed to submit half yearly compliance report on regular basis. M/s ACC Ltd. Has submitted compliance report for period from Dec. 2018 to May 2019 only vide letter dated 31.5.19

In response to public complaint received from Shri Ramesh Sharma vide letter dated 19.09.20, MoEF&CC, GOI vide letter No. 18-B-30/2019(SEAC)/969 dated 02.11.2020 has communicated that Central Govt. vide Gazette Notification NO. SO. 637(E) dated 28.02.2014 has delegated power vested under Section 5 of E(P) Act, 1986 to the SEIAA to issue showcause notice to PP in case of violation of the condition of the EC issued by the authority to project under the jurisdiction and to issue direction to the said PP for keeping such EC in abeyance or withdrawing them if required.

In view of above, it has been observed that ACC has not submitted six monthly compliance report on regular basis to MoEF&CC, GOI /SEIAA as per EC conditions hence why not your EC is kept in abeyance or withdrawn by authority as per provision under MoEF&CC, GOI notification dated 28.02.2014 with immediate effect as it is clear cut matter of violation of Prior EC. In light of above, you are hereby directed to clearly the above issues of justify your stand within 15 days from the date of issue of letter and present your case with clarification/justification in upcoming SEIAA meeting otherwise necessary action will be initiated accordingly. Copy to Project Proponent and MoEF&CC, GOI.

In response to above query, PP has submitted reply vide letter No.KY/ENV/MPPCB/Bhopal dated 24.12.2020. After discussion, it was decided to call PP for presentation and clarification.

- *PP vide letter no. KY/ENV/MPPCB/Bhopal/331 dated 05.03.2021 requested to present the case before SEIAA.*
- *After that, the case was presented by PP and clarified the issues related grant and transfer of EC, submission of Compliance report, execution of mining operation without EC obtaining from SEIAA, During the presentation it is observed that they have total lease area of more than 1000 ha and they have purchased the land of 5.82 ha from M/s S.N. Sunderson & Co. since it was between the land of the company.*
- *It is noted that the lease area 5.82 ha of the subject Badari mine was reduced to 5.76 has after Bandobast.*
- *It is noted that the ACC Limited approached to MPPCB for change of ownership in EC and Air & Water consents vide letter dated 29.08.2011 and 19.10.2011.*
- *In this case the Prior EC was issued to M/s S.N. Sunderson & Co. on 25.03.2009 and EC was transferred in the name of M/s ACC Limited on 23.02.2018. the half yearly compliance reports from 25.03.2019 to 23.02.2018 not submitted by PP and it is clear cut violation of EIA Notification 2006.*

After detailed discussion, it appears that this is a case of EC violation. It is decided that, the EC issued to the PP is immediately kept in abeyance and action should be takne as per the provisions provided in EIA Notification regarding violation of EC. The PP should be informed accordingly and suitable reference also be made to Regional Officer, MoEF &CC.

As per the above decision, a letter sent to Regional Office, MoEF & CC received in SEIAA dated 08.10.2021 addressed to Joint Secretary, Monitoring Cell MoEFF & CC requested to provide necessary direction in the matter with reference to MoEF &

CC OM dated 04.07.2018 fro implementation of direction of the Hon'ble Supreme Court Order dated 02.08.2017 in WP (Civil) No. 114 of 2014 wherein vide judgment dated 02.08.2017 has passed a detailed order interpreting Section 21 (5) of MMRD Act and directing payment of 100% penalty for illegal mining operations with reference to the relevant statutes as mentioned in above OM dated 04.07.2018. but it is also noted that, NOC of the Earlier PP has not been submitted by New PP during the transfer of prior EC in compliance of the mandatory provision as mentioned in Para 11 of EIA notification, 2006.

After detailed discussion, it is decided to revokes the EC issued by SEIAA vide letter NO. 1742/SEIAA/2018 dated 23.02.2018 and further action may be taken as per the recommendation of MoEFF & CC. copy to PP & all Concern.

*As per above decision you are informed that the EC issued by SEIAA vide letter No.1742/SEIAA/2018 dated 23.02.2018 is **hereby revoked**.*

Brief facts

6. The Appellant states to be a company formed in the year 1936 and is engaged in the business of manufacturing of cements, mining and allied activities. It is one of the first Indian companies to include commitment to environmental protection as one of its corporate objectives. It had installed its first pollution control equipment in the year 1966. In 2018, it became India's first cement company to publish an Environmental Product Declaration for all its blended cement products across all of its cement plants. It has been awarded, among others, the CII Climate Action Program 2.0 across all sectors in India.

7. One M/s. S.N. Sanderson and Co. was granted a mining lease for limestone over an extent of 5.82 hectares (subsequently reduced to 5.76 after *bandobast*) in village Badari, Tehsil Vijayraghogarh in Katni district of Madhya Pradesh (the "**Badari Lime Stone Mine**") for a period of 20 years from 17.02.1978 to 02.04.1998, which lease was subsequently renewed for a further period of 20 years. The Badari Lime Stone Mine is a small mining lease of 5.76 hectares that lies between the other mining lease lands of the Appellant. It is a part of the Kymore Cement Works of the Appellant comprising of Clinkering units, Cement grinding unit, Captive Power Plants, Bamangoan Mehgaon and Jamuanikala mines. This mining lease is surrounded by the 1520.22 hectares Bamangaon Mehgaon Limestone Mines of the Appellant and the other units. For better management of its overall operations in this integrated operation,

the Appellant sought transfer of the lease from M/s. Sanderson and Co. to itself.

8. On 23.12.2008, the Badari Lime Stone Mine was transferred in favour of the Appellant under the provisions of the Mines and Minerals (Development and Regulation) Act, 1957 (the "**MMDR Act**") and the rules framed thereunder. The transfer deed was executed in the statutory Form 'O' appended to the Mineral Concession Rules, 1960 and was duly signed by the State Government, the transferor M/s. Sanderson and Co., and the transferee the Appellant herein. Thereafter on 05.06.2015, the State Government executed a supplementary lease deed in favour of the Appellant extending the period of the lease up to 31.03.2030 in view of the amendments to the MMDR Act. The Appellant did not start any operations in the lease area since it was awaiting the statutory clearances including environment clearance (**EC**), Consent to Operate (**CTO**) under the Water (Prevention and Control of Pollution) Act, 1975 (the **"Water Act"**) and the Air (Prevention and Control of Pollution) Act, 1981 (the **"Air Act"**), and an approved mining plan under the MMDR Act. The Appellant took steps to follow up with the respective authorities to obtain the necessary approvals.

9. On 25.03.2009, the Respondent issued the "*Environment clearance for Badari Lime stone mine, 5.82 ha. at Khasra no.81, 86 Village Badari, Teh. Vihayraghogarh, Distt. Katni – M.P. Case No.79/2008*". Even though the **communication was issued after the transfer of the lease**, it was addressed to M/s. Sanderson and Co. The EC was granted as per the detailed procedure prescribed under the Environment Impact Assessment Notification dated 14.09.2006 (the "**EIA 2006**"), including an environment impact assessment, and upon the satisfaction of the Expert Committee constituted by the Competent Authority. The Respondent imposed various conditions in the EC.

10. The Appellant made a request to the MP State Pollution Control Board (**MPPCB**) on 29.08.2011 and 19.10.2011 to record the change of name of the project

proponent from M/s. S.N. Sanderson and Co. to the Appellant in the EC and the CTO. On 14.07.2014, the MPPCB granted the CTO under the Air and Water Acts for the period 20.05.2010 to 19.05.2015 in favour of the Appellant. As part of the EC condition, the Appellant is required to submit half yearly compliance reports to the Ministry of Environment Forests and Climate Change (**MoEF&CC**) / Respondent. For the period up to 30.12.2014, the Appellant's applications for statutory approvals were pending and operations were not commenced, and therefore, the issue of submitting compliance reports did not arise.

11. However, once the Appellant started operations from 31.12.2014 upon receiving the necessary approvals, it has been regularly submitting its half-yearly compliance reports to the MoEF&CC and the Respondent every year in the months of June and December. Neither the MoEF&CC nor the SEIAA raised any objection to the Appellant filing the consolidated half-yearly reports during this period. In the meanwhile, the Respondent issued a formal communication on 23.02.2018 reflecting the change in the name of the project proponent in the EC from M/s. S.N. Sanderson and Co. to the Appellant. On 15.12.2020, the Respondent issued a notice to the Appellant requiring it to show cause as to why the EC be not kept in abeyance or withdrawn since the Appellant allegedly had not submitted six monthly compliance report on regular basis to MoEF&CC / SEIAA under the EC conditions. This notice was issued at the instance of one Sh. Ramesh Sharma. Prior EC, once duly granted under the EIA 2006, cannot be revoked on the ground of non-submission of half-yearly reports. There is no provision in the EIA 2006 empowering the Respondent to revoke the EC on the ground that the half-yearly reports were not submitted.

12. The EIA 2006 stipulates the grounds on which an EC can be revoked. Paragraph 8(vi) provides that prior EC can be cancelled where there is "***deliberate concealment and/ or submission of false or misleading information or data which is material to screening or scoping or appraisal or decision on the application…***". It is not the case of the

Respondent that there was any such concealment, etc. Therefore, the EC could not have been revoked on the alleged ground of non-submission of half-yearly compliance report of the EC conditions.

13. The matter was taken up on 23.05.2022 and notices were issued to the respondents to submit the reply. We have heard the learned counsel for the parties and perused the record. It is argued that the penalty of revocation of the EC for non-submission of half-yearly reports of EC conditions is disproportionate, harsh, unfair, and arbitrary. The principle of proportionality has been applied by the Hon'ble Supreme Court in the context of environment clearances in *Lafarge Umiam Mining (P) Ltd. v.* UoI, (2011) 7 SCC 338 (para.119), *Electrotherm (India) Ltd. v. Patel Vipulkumar Ramjibhai,* (2016) 9 SCC 300 (para.19) and more recently in *Alembic Pharmaceuticals Ltd. v. Rohit Prajapati*, (2020) 17 SCC 157. In *Electrotherm,* the High Court had directed closure of the plant on the ground that public hearing was not held before the EC was granted, which order was reversed by the Hon'ble Supreme Court applying the principle of proportionality. The Respondent has erred in observing that the Appellant had not submitted a written no-objection from M/s. S.N. Sanderson and Co. along with the application for the change in name in the prior EC in terms of paragraph 11 of the EIA 2006. First, the Appellant was not given any opportunity to advert to this observation since it was not a ground taken in the notice to show cause, and has been taken for the first time in the Impugned Order itself. To this extent, the Appellant has suffered prejudice. Second, a transfer of mining leases is governed by the statutory regime in the MMDR Act and the rules. The transfer deed, which is executed in the statutory Form 'O' appended to the Mineral Concession Rules by the transferor, the transferee and the State Government, is evidence of the fact that the transferor has no-objection to the transfer of the lease and also for the other relevant statutory approvals in favour of the transferee. It is not in dispute that the statutory transfer deed in Form 'O' was in fact submitted to the MPPCB and the Respondent at the time of seeking the change in the name of the project proponent. The condition in paragraph 11 of EIA 2006 regarding

written no-objection from the transferor, when seen in the background of the statutory regime in the MMDR Act and the rules regarding transfer of mining leases, is clearly directory and not a mandatory condition. Therefore, it is not material in the facts of the case that a separate no-objection was not again submitted along with the application for change of name.

14. The Appellant had contended that M/s S.N. Sanderson & Co. was granted a mining lease for limestone over an area of 5.82 hectares in Badari village, district Katni, Madhya Pradesh and Since the area fell between the Balangole mining lease of the Appellant, its cement and clinker plant and captive power plant, M/s. Sanderson & Co. agreed to transfer the mining lease in favour of the Appellant and the lease was transferred by State Government on 23.12.2008.

15. On 25.03.2009, the Respondent granted the "Environment clearance for Badari Lime stone mine, 5.82 ha. at Khasra no.81, 86 Village Badari, Teh. Vijayraghogharh, Distt. Katni - M.P, Case No. 79/2008". The Appellant did not start any mining activity after the grant of the EC since the other statutory approvals were pending with the concerned authorities. On 14.07.2013, the SPCB granted the Consent to Operate (CTO) for the mining operations. The Appellant than informed the State Government on 09.12.2014 intimating them that it would be starting operations at the mine. After starting its operations on 31.12.2014, the Appellant had regularly submitted the half-yearly compliance reports of the EC conditions to the Respondent without any reminder from them. Two such reports for the period June 2015 and December 2017 have been annexed to the appeal. Similar reports were filed with the SPCB in compliance of the CTO conditions. Half-yearly reports were filed combinedly along with the adjoining mine and cement plant during 2015-2017.

16. The controversy arose on 15.12.2020 where a Respondent issued a notice of show cause with the allegation that the appellant failed to submit half yearly compliance report. The Appellant replied it vide letter dated 14.08.2021 that after the operation of mining the half yearly compliance report on EC conditions were regularly submitted to the respondents.

17. It is argued on behalf of the MPSEIAA that the MoEF & CC vide communication dated 16.04.2019 informed that M/s Sanderson & Co. has not complied the conditions of EC and half yearly report were not submitted. A notice was issued and in response to the same, M/s Sanderson & Co. has replied that the mining lease was transferred to the Appellant vide MP Government order dated 22.08.2008. it is further contended that a complaint was received in the office of the Respondent and in furtherance of the complaint a show cause notice was issued to the Appellant and after giving an opportunity of hearing, the impugned order was passed.

18. It is argued on behalf of Appellant that main allegation against the Appellant are that the Appellant has failed to submit the half yearly compliance report and thereby violated the EC condition. For want of necessary consent to operate and other statutory approval the mining was not in operation till 30.12.2014 and thus issue of submitting any compliance report for this period did not arise.

19. For the period 31.12.2014 to 23.02.2018, the Appellant had explained in its reply to the show cause notice that it had in fact filed half-yearly compliance reports combinedly for the Badari Mine along with the adjoining Bamangaon Mine, and the Cement and clinker plant without any reminder from the Respondent. However, the Respondent has completely ignored the Appellant's reply and has proceeded to pass the impugned order on 19.12.2021 revoking the EC on the ground that half yearly reports were not filed.

20. In support of the above contentions, the Appellant have filed the copy of the reply which was received in the office of SEIAA and annexed as Annexure-A/13 in reference letter dated 03.08.2021, the relevant paras as under:

> *6. The ACC limited started mining operations after obtaining consent from MP Pollution Control Board in year 2014 and as per the approved Mining Plan from IBM. The approval of IBM is attached.*
>
> *9. As far as submission of half yearly compliance reports on EC conditions are concerned, we would like to bring to your notice that*

we were regularly submitting the said reports for both applicable tenure pertaining to entire Kymore cement works comprising of Clinkering Units, Cement Grinding, Captive Power Plants, Jamuwanikala Mines, Bamangaon & Mehgaon Lime Stone Mines with Badari mines to RO MoEF&CC. The same is attached herewith for the period June-2018 to May, 2020.

10. As the Badari mines is a small mine and having same infrastructures of Bamangaon Mehgaon Lime stone mines of 1520.22 ha, hence the half yearly compliance reports were submitted combinedly on regular basis without any reminder to the applicable authorities (i.e. RO MoEF & SEIAA) for the period December, 2014 to May, 2018.

21. The submission of the periodical report for the period 31.12.2014 to 23.02.2018 which has been filed by the Appellant as Annexure-9 of this appeal has not been denied in the respondents reply. It is further contended that the impugned order suffers from the bias of perversity, is arbitrary, unreasonable and has been passed without any application of mind and is liable to be quashed and set aside.

22. It has further been argued by the learned counsel for the Appellant that even assuming for the sake of argument (without admitting) that half-yearly reports were not filed for the period 25.03.2009 to 23.02.2018, the extreme penalty of revocation of EC is highly disproportionate to the alleged non-compliance. The EC could not have been revoked for non-submission of half yearly report for a past period, especially when there is no allegation that the Appellant has violated any environment norms or caused pollution. It is now well settled by the Hon'ble Supreme Court, including in Electrosteel Steels Ltd. vs. UoI, 2021 SCC Online SC 1247. The relevant paras are quoted below:

> *"82. The question is whether an establishment contributing to the economy of the country and providing livelihood to hundreds of people should be closed down for the technical irregularity of shifting its site without prior environmental clearance, without opportunity to the establishment to regularize its operation by obtaining the requisite clearances and permissions, even though the establishment*

may not otherwise be violating pollution laws, or the pollution, if any, can conveniently and effectively be checked. The answer has to be in the negative.

83. The Central Government is well within the scope of its powers under Section 3 of the 1986 Act to issue directions to control and/or prevent pollution including directions for prior Environmental Clearance before a project is commenced. Such prior Environmental Clearance is necessarily granted upon examining the impact of the project on the environment. Ex-Post facto Environmental Clearance should not ordinarily be granted, and certainly not for the asking. At the same time ex post facto clearances and/or approvals and/or removal of technical irregularities in terms of Notifications under the 1986 Act cannot be declined with pedantic rigidity, oblivious of the consequences of stopping the operation of a running steel plant.

84. The 1986 Act does not prohibit ex post facto Environmental Clearance. Some relaxations and even grant of ex post facto EC in accordance with law, in strict compliance with Rules, Regulations Notifications and/or applicable orders, in appropriate cases, where the projects are in compliance with, or can be made to comply with environment norms, is in over view not impermissible. The Court cannot be oblivious to the economy or the need to protect the livelihood of hundreds of employees and others employed in the project and others dependent on the project, if such projects comply with environmental norms."

85. As held by a three Judge Bench of this Court in Lafarge Umiam Mining Private Limited v. Union of India 3 ("Lafarge") reported in (2011) 7 SCC 338:

> *"119. The time has come for us to apply the constitutional "doctrine of proportionality" to the matters concerning environment as a part of the process of judicial review in contradistinction to merit review. It cannot be gainsaid that utilization of the environment and its natural resources has to be in a way that is consistent with principles of sustainable development and intergenerational equity, but balancing of these equities may entail policy choices. In the circumstances, barring exceptions, decisions relating to utilization of natural resources have to be tested on the*

anvil of the well- recognized principles of judicial review. Have all the relevant factors been taken into account? Have any extraneous factors influenced the decision? Is the decision strictly in accordance with the legislative policy underlying the law (if any) that governs the field? Is the decision consistent with the principles of sustainable development in the sense that has the decision-maker taken into account the said principle and, on the basis of relevant considerations, arrived at a balanced decision? Thus, the Court should review the decisionmaking process to ensure that the decision of MoEF is fair and fully informed, based on the correct principles, and free from any bias or restraint. Once this is ensured, then the doctrine of "margin of appreciation" in favour of the decision-maker would come into play."

86. In Alembic Pharmaceuticals (supra) this Court observed:-

"27. The concept of an ex post facto EC is in derogation of the fundamental principles of environmental jurisprudence and is an anathema to the EIA notification dated 27 January 1994. It is, as the judgment in Common Cause holds, detrimental to the environment and could lead to irreparable degradation. The reason why a retrospective EC or an ex post facto clearance is alien to environmental jurisprudence is that before the issuance of an EC, the statutory notification warrants a careful application of mind, besides a study into the likely consequences of a proposed activity on the environment. An EC can be issued only after various stages of the decision-making process have been completed. Requirements such as conducting a public hearing, screening, scoping and appraisal are components of the decisionmaking process which ensure that the likely impacts of the industrial activity or the expansion of an existing industrial activity are considered in the decision-making calculus. Allowing for an ex post facto clearance would essentially condone the operation of industrial activities without the grant of an EC. In the absence of an EC, there would be no conditions that would safeguard the environment. Moreover, if the EC was to be ultimately refused, irreparable harm would have been caused to the environment. In either view of the matter, environment law cannot countenance the notion of an ex post facto clearance. This

> *would be contrary to both the precautionary principle as well as the need for sustainable development.*

87. In Alembic Pharmaceuticals (supra), this Court deprecated expost facto clearances, but this Court did not pass orders for closure of the three industries concerned, on consideration of the consequences of their closure. This court proceeded to observe and held:-

> *44. The issue which must now concern the Court is the consequence which will emanate from the failure of the three industries to obtain their ECs until 14 May 2003 in the case of Alembic Pharmaceuticals Limited, 17 July 2003 in the case of United Phosphorous Limited, and 23 December 2002 in the case of Unique Chemicals Limited. The functioning of the factories of all three industries without a valid EC would have had an adverse impact on the environment, ecology and biodiversity in the area where they are located. The Comprehensive Environmental Pollution Index 4 report issued by the Central Pollution Control Board for 2009-2010 describes the environmental quality at 88 locations across the country. Ankleshwar in the State of Gujarat, where the three industries are located showed critical levels of pollution 5 . In the Interim Assessment of CEPI for 2011, the report indicates similar critical figures 6 of pollution in the Ankleshwar area. The CEPI scores for 2013 7 and 2018 8 were also significantly high. This is an indication that industrial units have been operating in an unregulated manner and in defiance of the law. Some of the environmental damage caused by the operation of the industrial units would be irreversible. However, to the extent possible some of the damage can be corrected by undertaking measures to protect and conserve the environment.*
>
> *45. Even though it is not possible to individually determine the exact extent of the damage caused to the environment by the three industries, several circumstances must weigh with the Court in determining the appropriate measure of restitution. First, it is not in dispute that all the three industries did obtain ECs, though this was several years after the EIA notification of 1994 and the commencement of production. Second, subsequent to the grant of the ECs, the manufacturing units of all the three industries have also obtained ECs for an expansion of capacity from time to time. Third, the MoEF had*

issued a circular on 5 November 1998 permitting applications for ECs to be filed by 31 March 1999, which was extended subsequently to 30 June 2001. On 14 May 2002, the deadline was extended until 31 March 2003 subject to a deposit commensurate to the investment made. The circulars issued by the MoEF extending time for obtaining ECs came to the notice of this Court in Goa Foundation (I) v. Union of India 9 . Fourth, though in the context of the facts of the case, this Court in Lafarge Umiam Mining Private Limited v. Union of India 10 ("Lafarge") has upheld the decision to grant ex post facto clearances with respect to limestone mining projects in the State of Meghalaya. In Lafarge, the Court dealt with the question of whether ex post facto clearances stood vitiated by alleged suppression of the nature of the land by the project proponent and whether there was non-application of mind by the MoEF while granting the clearances. While upholding the ex post facto clearances, the Court held that the native tribals were involved in the decision-making process and that the MoEF had adopted a due diligence approach in reassuring itself through reports regarding the environmental impact of the project."

(Emphasis supplied)

46. After adverting to the decision in Lafarge, another Bench of three learned judges of this Court in Electrotherm (India) Limited v. Patel Vipulkumar Ramjibhai 11 , dealt with the issue of whether an EC granted for expansion to the appellant without holding a public hearing was valid in law. Justice Uday Umesh Lalit speaking for the Bench held thus:

> *"19…the decision-making process in doing away with or in granting exemption from public consultation/public hearing, was not based on correct principles and as such the decision was invalid and improper."*

47. The Court while deciding the consequence of granting an EC without public hearing did not direct closure of the appellant's unit and instead held thus:

> *"20. At the same time, we cannot lose sight of the fact that in pursuance of environmental clearance dated 27-1- 2010, the expansion of the project has been undertaken and as reported by CPCB in its affidavit*

> *filed on 7-7-2014, most of the recommendations made by CPCB are complied with. In our considered view, the interest of justice would be subserved if that part of the decision exempting public consultation/public hearing is set aside and the matter is relegated back to the authorities concerned to effectuate public consultation/public hearing. However, since the expansion has been undertaken and the industry has been functioning, we do not deem it appropriate to order closure of the entire plant as directed by the High Court. If the public consultation/public hearing results in a negative mandate against the expansion of the project, the authorities would do well to direct and ensure scaling down of the activities to the level that was permitted by environmental clearance dated 20-2-2008. If public consultation/public hearing reflects in favour of the expansion of the project, environmental clearance dated 27-1-2010 would hold good and be fully operative. In other words, at this length of time when the expansion has already been undertaken, in the peculiar facts of this case and in order to meet ends of justice, we deem it appropriate to change the nature of requirement of public consultation/public hearing from pre-decisional to post-decisional. The public consultation/public hearing shall be organised by the authorities concerned in three months from today."*
>
> (Emphasis supplied)

48. Guided by the precepts that emerge from the above decisions, this Court has taken note of the fact that though the three industries operated without an EC for several years after the EIA notification of 1994, each of them had subsequently received ECs including amended ECs for expansion of existing capacities. These ECs have been operational since 14 May 2003 (in the case of Alembic Pharmaceuticals Limited), 17 July 2003 (in the case of United Phosphorous Limited), and 23 December 2002 (in the case of Unique Chemicals Limited). In addition, all the three units have made infrastructural investments and employed significant numbers of workers in their industrial units.

49. In this backdrop, this Court must take a balanced approach which holds the industries to account for having operated without environmental clearances in the past without ordering a closure of operations. The directions of the NGT for the revocation of the ECs and for closure of the units do not accord with the principle of proportionality. At the same time, the Court cannot be oblivious to the environmental degradation caused by all three industries units that operated without valid ECs. The three industries have evaded the legally binding regime of obtaining ECs. They cannot escape the liability incurred on account of such noncompliance. Penalties must be imposed for the disobedience with a binding legal regime. The breach by the industries cannot be left unattended by legal consequences. The amount should be used for the purpose of restitution and restoration of the environment. Instead and in place of the directions issued by the NGT, we are of the view that it would be in the interests of justice to direct the three industries to deposit compensation quantified at Rs. 10 crores each. The amount shall be deposited with GPCB and it shall be duly utilised for restoration and remedial measures to improve the quality of the environment in the industrial area in which the industries operate. Though we have come to the conclusion, for the reasons indicated, that the direction for the revocation of the ECs and the closure of the industries was not warranted, we have issued the order for payment of compensation as a facet of preserving the environment in accordance with the precautionary principle. These directions are issued under Article 142 of the Constitution. Alembic Pharmaceuticals Limited, United Phosphorous Limited and Unique Chemicals Limited shall deposit the amount of compensation with GPCB within a period of four months from the date of receipt of the certified copy of this judgment. This deposit shall be in addition to the amount directed by the NGT. Subject to the deposit of the aforesaid amount and for the reasons indicated, we allow the appeals and set aside the impugned judgment of the NGT dated 8 January 2016 in so far as it directed the revocation of the ECs and closure of the industries as well as the order in review dated 17 May 2016."

88. The Notification being SO 804(E) dated 14th March, 2017 was not an issue in Alembic Pharmaceuticals (supra). This Court was examining the

propriety and/or legality of a 2002 circular which was inconsistent with the EIA Notification dated 27th January, 1994, which was statutory. Ex post facto environmental clearance should not however be granted routinely, but in exceptional circumstances taking into account all relevant environmental factors. Where the adverse consequences of ex post facto approval outweigh the consequences of regularization of operation of an industry by grant of ex post facto approval and the industry or establishment concerned otherwise conforms to the requisite pollution norms, ex post facto approval should be given in accordance with law, in strict conformity with the applicable Rules, Regulations and/or Notifications. Ex post facto approval should not be withheld only as a penal measure. The deviant industry may be penalised by an imposition of heavy penalty on the principle of 'polluter pays' and the cost of restoration of environment may be recovered from it.

89. We are of the view that the High Court erred in passing the impugned order, vacating interim orders which had been in force for two years. The impugned order is not in conformity with the principle of proportionality. This is not a case where the steel plant was started without environmental clearance or consent of JSPCB. The Appellant had applied for and obtained environmental clearance to set up an integrated steel plant (3MTPA) on 1350 acres of land at Mauza South Parbatpur, as observed above. Environmental Clearance had been granted on 21st February 2008 and Consent to Operate had been granted by JSPCB on 5th May 2008.

90. The Appellant established its steel plant in Mauza Bhagaband, 5.3 kms away from the site for which EC and CTE had been granted. It is the contention of the Appellant that the shift is minor and makes no change in the EIA/EMP on the basis of which EC has been granted. The shift did not require fresh public hearing in terms of the Circular dated 22nd January 2010 of the MoEF.

91. As aforesaid, by a letter dated 2.12.2011 addressed to the Appellant, the MoEF confirmed that the steel plant of the Appellant was within the Environment Impact Area and the affected people had the opportunity to air their views in a public hearing. The question is whether the Petitioner was required to obtain fresh prior clearance for shifting or was covered by the exemption under the said Notification dated 22nd January 2010.

92. The Appellant has all along asserted that no part of the premises of the integrated steel plant is in any forest. As such there was no violation of the Indian Forest Act, 1927 or the Forest Conservation Act, 1980. The MoEF

had also confirmed that the steel plant in question was well within the Environment Impact Area and the affected people had the opportunity in a public hearing. Be that as it may, whether the shifting of the site has really made any difference from the environmental impact angle requires consideration by the appropriate authority/forum.

93. In any case, the Appellant has duly applied for ex post facto forest clearance approval without prejudice to its rights and contentions that its steel plant is not on forest land and also applied for revised EC. On 17th December 2019, MoEF&CC accorded ex post facto in principle approval to the forest clearance proposal on the recommendations of the Forest Advisory Committee. The application for revised clearance is pending consideration. No final decision has however been taken, ostensibly in view of the interim order passed by the Madras High Court staying the operation of the Standard Operation Procedures issued vide Memorandum dated 7th July 2021.

94. The interim order passed by the Madras High Court appears to be misconceived. However, this Court is not hearing an appeal from that interim order. The interim stay passed by the Madras High Court can have no application to operation of the Standard Operating Procedure to projects in territories beyond the territorial jurisdiction of Madras High Court. Moreover, final decision may have been taken in accordance with the Orders/Rules prevailing prior to 7th July, 2021.

95. In passing the impugned order the High Court overlooked the consequences of closure of an integrated steel plant with a work force of 300 regular and 700 contractual workers. The High Court also failed to appreciate that the judgment of this Court in Alembic Pharmaceuticals (supra) was distinguishable on facts. Furthermore, continuance of the interim orders allowing operation of an industrial establishment or even the grant of revised EC to the industrial establishment cannot stand in the way of action against that establishment for contraventions, including the imposition of penalty, on the principle 'polluter pays'. The scope and effect of Section 32A of the IBC is a different issue. This Court need not examine into the question of whether penal action can be initiated against the Appellant or, whether compensation can be recovered from the Appellant, at this stage. The issue may be decided by the appropriate authority at the appropriate stage when it adjudicates an action for penalization of the Appellant or recovery of compensation from the Appellant. The application

of the Appellant for revised EC, CTO etc. shall be considered strictly in accordance with environmental norms."

23. The above philosophy was followed in *Pahwa Plastics v. Dastak NGO*, Civil Appeal no.2791/21 dated 25.03.2022 that orders passed by the Respondent would have to be tested on the doctrine of proportionality. The Hon'ble Supreme Court in the above cases where operations were conducted without even an EC has reiterated that on-going operations ought not to be stopped when either *ex post facto* approval could be given or penalty imposed for the alleged non-compliance. In view of the settled position in law, the impugned order revoking the EC and thereby stopping the Appellant's operations at the Badari Mine is liable to quashed and set aside. The relevant paragraphs of Pahawa Plastic (Supra) are quoted below:

> *It was argued that the appeal under Section 22 of the National Green Tribunal Act 2010, is against an order dated 3rd June 2021 passed by the Principal Bench of the National Green Tribunal (NGT) in O.A No.287/2020 at New Delhi, inter alia, holding that establishments such as the manufacturing units of the Appellants, which did not have prior Environmental Clearance (EC) could not be allowed to operate.*
> *The question of law involved in this appeal is, whether an establishment employing about 8000 workers, which has been set up pursuant to Consent to Establish (CTE) and Consent to Operate (CTO) from the concerned statutory authority and has applied for ex post facto EC can be closed down pending issuance of EC, even though it may not cause pollution and/or may be found to comply with the required pollution norms.*
> *The manufacturing units of the Appellants appoint about 8,000 employees and have a huge annual turnover. An establishment contributing to the economy of the country and providing livelihood ought not to be closed down only on the ground of the technical irregularity not submitting the half yearly report irrespective of whether or not the unit actually causes pollution.*

24. In **Electrosteel Steels Limited v. Union of India**, Hon'ble the Supreme Court held:

> ***"82. The question is whether an establishment contributing to the economy of the country and providing livelihood to hundreds of people should be closed down for the technical***

irregularity of shifting its site without prior environmental clearance, without opportunity to the establishment to regularize its operation by obtaining the requisite clearances and permissions, even though the establishment may not otherwise be violating pollution laws, or the pollution, if any, can conveniently and effectively be checked. The answer has to be in the negative.

***

Accordingly, the appeal is allowed. The impugned order is set aside in so far as the same is applicable to the units of the Appellants established and operated pursuant to CTE and CTO from the HSPCB in respect of which applications for ex post facto EC have been filed. The Respondent shall take a decision on the applications of the Appellants for EC in accordance with law within one month from date. Pending decision, the operation of the Pahwa Yamuna Nagar Unit and the Apcolite Yamuna Nagar Unit, in respect of which consents have been granted and even public hearing held in connection with grant of EC, shall not be interfered with.

The Appellants will be allowed to operate the units. Electricity, if disconnected, shall be restored subject to payment of charges, if any. If the application for EC is rejected on the ground of any contravention on the part of the Appellants, it will be open to the Respondents to disconnect the supply of electricity".

25. It is further argued that the only other issue raised in the impugned order dated 19.12.2021 (even though it was not made an issue in the show cause notice dated 15.12.2020) is that the Appellant had not submitted a no-objection certificate (**NOC**) from M/s. Sanderson & Co. at the time of applying for change in the name of the project proponent in the EC. The Appellant is prejudiced on account of the fact that it did not have the opportunity to advert to this issue before the Respondent since the issue is directly raised in the impugned order. The Respondent's contention is an afterthought and, in any case, without any merit. The grant and transfer of mining leases in India is statutorily governed by the MMDR Act and the rules framed thereunder. At the relevant time in the year 2008, transfer of mining leases was governed by Rule 37 of the Mineral Concession Rules, 1960. Under the rules, tri-partite transfer

deeds were executed in the statutory Form 'O' appended to the Rules by the State Government, the transferor and the transferee of the lease.

26. Even in the instant case, the State Government, the Appellant and the transferor, M/s. Sanderson & Co., had executed the transfer deed in the statutory Form 'O' on 23.12.2008 wherein the consent of M/s. Sanderson for the transfer is duly recorded. This statutory transfer deed was submitted to the Respondent for recording the Appellant's name in place of M/s. Sanderson as the project proponent. The Respondent had duly considered the said statutory transfer deed in Form 'O' as the NOC from M/s. Sanderson. In fact, the Respondent did not raise any objection in this regard either at that stage or until 19.12.2021. Clearly, the objection is an afterthought and without merit.

27. For the first time in its reply to the appeal, the Respondent has raised two additional grounds in support of the impugned order dated 19.12.2021 which do not form part of the impugned order. The Respondent alleges for the first time in its reply that there is a mismatch between the area mentioned in the EC dated 25.03.2009 (5.82 hectares) and the order of the Respondent issued on 23.02.2018 (5.76 ha). The second new ground taken in the reply is that the Appellant has carried out mining between 31.12.2014 to 23.02.2018 without the change in the name of the project proponent being recorded in the EC.

28. Mr. U.N. Tiwary, Learned counsel for the Appellant has argued that when a statutory functionary makes an order based on certain ground its validity must be adjudged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of any affidavit or otherwise (Gill v. Election Commissioner, (1978) 1 SCC 405 Para 8). With regard to the mismatch between the area it is replied that the State Government reduced the lease area from 5.82 ha to 5.76 ha after bandobast, which the Respondent was always aware of and this fact is duly recorded in their previous orders / minutes. It was specifically mentioned in the reply submitted by the Appellant and was recorded in the SEIAA's minute dated 03.08.2021. Madhya Pradesh Pollution Control Board vide letter dated 14.07.2014 communicated to the Appellant, the

mining Lime stone lease area as 5.76 hc and this has been further reply by the Appellant while submitting and depositing royalty in advance and challans for royalty.

29. It is further argued that:

(i) On the second ground of carrying on mining between 31.12.2014 to 23.02.2018 without the change in name of the project proponent being recorded in the EC dated 25.03.2009, the Appellant may point out that this issue is the subject matter of a separate proceeding initiated by the Collector, Katni, vide show cause notice on 04.02.2022 to the Appellant under S.21(5) of MMDR Act. The Appellant has submitted its reply to the notice and the matter is pending consideration with the Collector, including the grant of opportunity of oral hearing. The Respondent ought not to have parallel raised this issue in its reply before this Hon'ble Tribunal when an authority competent under the law (viz., the Collector under S.21(5) of the MMDR Act) is adjudicating upon the same. The Appellant will be gravely prejudiced in the proceedings before the Collector, Katni, in the event that this Hon'ble Tribunal makes any observation in this regard.

(ii) Without prejudice to the above and as a matter of abundant caution, the Appellant may only point that the EC was granted for the mining project on 25.03.2009. Even though the EC was issued after the lease was transferred in favor of Appellant on 23.12.2008, the name of the project proponent is mentioned as M/s. Sanderson. The Appellant thereafter applied for the change in the name of the project proponent. Therefore, the Respondent's contention that the Appellant carried out mining without an EC is not correct.

(iii) The name of the project proponent was changed in the EC for the Badari Mine on 23.02.2018 and the EC of 25.03.2009 was continued on the same terms and conditions. It is specifically recorded in the Respondent's order dated 23.02.2018 that the EC is transferred "with the same terms & conditions under which the Prior Environmental Clearance was initially granted, and for the same production capacity and validity period". Clearly, the effect of the order dated 23.02.2018 was that the EC of 25.03.2009 continued to operate, which in effect is an extension of the EC of 25.03.2009. It cannot be contended, therefore, that the mine was operated without an EC between 31.12.2014 and 23.02.2018. These submissions along with the Appellant's reply would be considered by the Ld.

Collector in the pending proceedings under S.21(5) of the MMDR Act and appropriate orders would be passed by him.

(iv) *Even assuming for the sake of argument that a case of change of name of project proponent in the EC can be characterized as a case of operating without an EC, the EC could not have been revoked on 19.12.2021 when change of name stood recorded on 23.02.2018. The revocation of the EC again would violate the doctrine of proportionality reiterated in Electrosteel and Pahwa Plastics judgments of the Hon'ble Supreme Court.*

(v) *Most importantly, the Hon'ble Supreme Court's judgment in Common Cause v. Union of India, (2017) 9 SCC 499 (paras.141, 186 & 188(5 & 9)), which has been relied by the Respondent in this regard, provides for payment of compensation under S.21(5) of the MMDR Act for allegedly operating without an EC, and not revocation of the existing EC. This is also clear from the communication of the MoEF noted in the impugned order dated 19.12.2021 which states that the Appellant would be liable to pay penalty under the said Common Cause judgment. The MoEF has not even suggested or observed that the EC is liable to be revoked on this ground. The revocation of the EC is in violation of the Common Cause judgment of the Hon'ble Supreme Court, and the Respondent cannot seek to justify it on this ground.*

There may be some overlap in the period when mining operations were conducted by the mining lease holders without an EC and/or an FC. We make it clear that mineral extracted either without an EC or without an FC or without both would attract the provisions of Section 21(5) of the MMDR Act and 100% of the price of the illegally or unlawfully mined mineral must be compensated by the mining lease holder. To the extent of the overlap or the common period, obviously only one set of compensation is payable by the mining lease holder to the State of Odisha. We order accordingly. However, we make it clear that whatever payment has already been made by the mining lease holders towards NPV, additional NPV or penal compensatory afforestation is neither adjustable nor refundable since that falls in a different category altogether".

30. To avoid any misunderstanding, confusion or ambiguity, appellant makes the following very clear:

(1) A mining project that has commenced prior to 27th January, 1994 and has obtained a No Objection Certificate from the SPCB prior to that date is permitted to continue its mining operations without obtaining an EC from the Impact Assessment Agency. However, this is subject to any expansion (including an increase in the lease area) or modernization activity after 27th January, 1994 which would result in an increase in the pollution load. In that event, a prior EC is required. However, if the pollution load is not expected to increase despite the proposed expansion (including an increase in the lease area) or modernization activity, a certificate to this effect is absolutely necessary from the SPCB, which would be reviewed by the Impact Assessment Agency.

(5) *Any iron ore or manganese ore extracted contrary to EIA 1994 or EIA 2006 would constitute illegal or unlawful mining (as understood and interpreted by us) and compensation at 100% of the price of the mineral should be recovered from 2000-2001 onwards in terms of Section 21(5) of the MMDR Act, if the extracted mineral has been disposed of. In addition, any rent, royalty or tax for the period that such mining activity was carried out outside the mining lease area should be recovered.*

(9) In the event of any overlap, that is, illegal or unlawful mining without an FC or without an EC or without both would attract only 100% compensation and not 200% compensation. In other words, only one set of compensation would be payable by the mining lease holder.

31. In reply to the above contentions raised by the learned counsel for the Appellant, the Respondent had submitted that the order impugned is well reasoned and elaborate and it finds place with regard to the complaints submitted by complainant and that the Appellant operated the mine till 23.02.2018 without obtaining any valid consent and further that the submission of consolidated half yearly compliance report has not been supported by any evidence. In reply to the above contentions, Learned counsel for the appellant had submitted that the facts has not been denied by the respondent thus facts admitted need not be proved or unless denied need not be proved. On point of non submission of NOC, the appellant has submitted that the transfer date at issue is a tripartite statutory deed in form number four of the mineral Concession Rule, 1960 and State Government was signatory in this deed thus the requirement has been fulfilled while the argument of the SEIAA is that the

NOC which is required to be submitted in pursuance to Para 11 of the EIA notification is different from form-O. The prior environmental clearance for Badri Lime Stone Mine and application in form -1 for environmental clearance and request to make an amendment in the prior EC by changing the name of PP of the mining project was duly considered by the MP SEIAA and was disposed of while decision dated 24.01.2018 which was communicated to the appellant on 23.02.2018. The ACC vide annexure- 2 on 08.06.2020 communicated to the MoEF & CC with regard to half yearly report on environmental monitoring and environmental statement reports of the year 2018-2019 for each unit. It is further argued that the action of the respondent of revoking the EC cannot be justified even if the judgment in Common Cause vs. Union of India in WP (C) No. 114 of 2014 have to apply. Hon'ble the Supreme Court has directed that the erring mining lessees have to pay penalty under Section 21 (5) of the Mines and Mineral, Development and Regulation Act, 1957 for alleged illegal mining which includes mining in violation of EC and the impugned order cannot be justified even under the common causes judgment and required to be quashed. It is further submitted that the district collector Katani has issued a notice dated 14.02.2022 to the appellant based on the judgment of the Hon'ble Supreme Court in Common Causes vs. Union of India to Show cause as to why penalty be not imposed under section 21 (5) of the Mines and Minerals Development and Regulation Act, 1957 for carrying on operations for the period January 2015 to February 2018 based on EC issued to M/s. Sanderson and Co. The Appellant has replied to the notice and proceedings are presently pending with the office of the District Collector and in light of the facts the respondent cannot raise the same issue again in the separate proceedings and where the matter of calculation of penalty is pending with the competent authority, the order in advance by rejecting the EC is hit by the principles of double jeopardy. It is nowhere mentioned by the respondent that the submission of half yearly statement had caused any damage to the environment. There is no observation or any finding by the State Pollution Control Board regarding the damage to the environment. It is further argued that operations at the mine were commenced

only on 31.12.2014 for which the competent authority has been communicated and thus the issue of filing any return for the period upto December, 2014 does not arise. On the issue of EC and its transfer it has been contended that the impugned order cannot be supported on grounds which had not been narrated in the reply. EC for the mine was issued on 25.03.2009 after the mining lease was transferred in favor of the appellant but it was in the name of M/s Sanderson. An EC is granted for the project and the project proponent undertakes to reply with all the conditions stated therein. The transfer of EC is a mere recording of change in the name with the transferee whereby the transferee undertakes to be bound by all the terms and conditions of the EC which is also clear from the EC issued to the Appellant recording he change of name. Therefore, to say that the Appellant was operating without EC is not correct, and further that the proceeding of calculation of penalty for illegal mining is pending before the committee Court and thus the order impugned is not justified.

Statutory provisions:

32. The grant of a mining lease is governed by the provisions of the Mines and Minerals (Development and Regulation) Act, 1957 (or the MMDR Act), the Mineral Concession Rules, 1960 (or the MCR) and the Mineral Conservation and Development Rules, 1988 (or the MCDR).

33. Section 4(1) of the MMDR Act provides that no person shall undertake any mining operation in any area except under and in accordance with the terms and conditions of a mining lease granted under the MMDR Act and the rules made thereunder. A mining operation is defined in Section 3(d) of the MMDR Act as meaning any operation undertaken for the purpose of winning any mineral. Section 4(2) of the MMDR Act provides that no mining lease shall be granted otherwise than in accordance with the provisions of the said Act and the rules made thereunder.

34. Section 5(2) of the MMDR Act provides for certain restrictions on the grant of a mining lease. It provides that the State Government shall not grant a mining lease unless it is satisfied that the applicant has a mining plan duly approved by the Central Government or the State Government in respect of the

concerned mine and for the development of mineral deposits in the area concerned.

35. Section 10 of the MMDR act provides for the procedure for obtaining a mining lease and sub-section (1) thereof provides that an application is required to be made for a mining lease in respect of any land in which the mineral vests in the government and the application shall be made to the State Government in the prescribed form and along with the prescribed fee.

36. Section 12 of the MMDR Act requires the State Government to maintain a set of registers. Among the registers that the State Government is required to maintain are a register of applications for mining leases and a register of mining leases. Every such register shall be open to inspection by any person on payment of such fee as the State Government may fix.

37. Section 13 of the MMDR Act provides for the rule making power of the Central Government in respect of minerals. The MCR are framed in exercise of power conferred by Section 13 of the MMDR Act.

38. Section 18 of the MMDR Act makes it the duty of the Central Government to take all such steps as may be necessary for the conservation and systematic development of minerals in India and for the protection of the environment by preventing or controlling any pollution which may be caused by mining operations. The MCDR are framed in exercise of power conferred by Section 18 of the MMDR Act.

39. The distinction between the MCR and the MCDR is that the MCR deal, *inter alia*, with the grant of a mining lease and not commencement of mining operations. However, the MCDR deal, *inter alia*, with the commencement of mining operations and protection of the environment by preventing and controlling pollution which might be caused by mining operations.

40. Section 21 of the MMDR Act deals with penalties and sub-section (1) thereof provides that whoever contravenes the provisions of sub-section (1) or sub-section (1A) of Section 4 shall be punished with imprisonment for a term which may extend to two years or with fine which may extend to Rs. 25,000 or with both. Sub-section (5) of Section 21 of the MMDR Act provides

that whenever any person raises without any lawful authority, any mineral from any land, the State Government may recover from such person the minerals so raised or where such mineral has been disposed of the price thereof. In addition thereto the State Government may also recover from such person rent, royalty or tax, as the case may be for the period during which the land was occupied by such person without any lawful authority.

Mineral Concession Rules, 1960

41. As far as the MCR are concerned, Rule 22 is of some importance and this provides for an application to be made for the grant of a mining lease in respect of land in which the mineral vests in the government. An application for the grant of a mining lease is required to be made by an applicant to the State Government in Form I to the MCR. Sub rule (5) of Rule 22 deals with a mining plan and it requires that a mining plan shall incorporate, amongst other things, a tentative scheme of mining and annual programme and plan for excavation for year to year for five years.

42. Rule 22A of the MCR makes it clear that mining operations shall be undertaken only in accordance with the duly approved mining plan. Therefore, a mining plan is of considerable importance for a mining lease holder and is in essence sacrosanct. A mining scheme and a mining plan are a *sine qua non* for the grant of a mining lease.

43. Rule 27 of the MCR deals with the conditions that every mining lease is subject to. One of the conditions is that the lessee shall comply with the MCDR.

44. The format of a mining lease is given in Form K to the MCR and this is relatable to Rule 31 of the MCR which provides that on an application for the grant of a mining lease, if an order has been made for the grant of such lease, a lease deed in Form K or in a form as near thereto as circumstances of each case may require, shall be executed within six weeks of the order, or within such extended period as the State Government may allow.

45. Part VII of Form K deals with the covenants of the lessee/lessees. Clause 10 thereof requires the lessee to keep records and accounts regarding production and employees etc. The lessee is required, inter alia, to maintain a record of the

quantity and quality of the mineral released from the leased land, the prices and all other particulars of all sales of the mineral and such other facts, particulars and circumstances, as the Central Government or the State Government may require.

46. Clause 11C is of some importance and it requires that the lessee shall take measures for the protection of the environment like planting of trees, reclamation of land, use of pollution control devices and such other measures as may be prescribed by the Central Government or the State Government from time to time at the expense of the lessee.

47. Rule 37 of the MCR deals with the transfer of a lease and provides, *inter alia*, that a mining lessee shall not without the previous consent in writing of the State Government or the Central Government, as the case may be, assign, sublet, mortgage, or in any other manner, transfer the mining lease, or any right, title or interest therein. The lessee shall not enter into or make any *bona fide* arrangement, contract or understanding whereby the lessee will or may directly or indirectly be financed to a substantial extent in respect of its operations or undertakings or be substantially controlled by any person or body of persons. Sub-rule (3) of Rule 37 of the MCR enables a State Government to determine any lease if the mining lessee has committed a breach of Rule 37 of the MCR or has transferred any lease or any right, title or interest therein otherwise than in accordance with sub-rule (2) of Rule 37 of the MCR.

48. The MCDR promulgated under Section 18 of the MMDR Act and referred to in Rule 27 of the MCR are also of some significance. Rule 9 of the MCDR prescribes that no person shall commence mining operations in any area except in accordance with a mining plan approved under Clause (b) of sub-section (2) of Section 5 of the MMDR Act.

49. The mining plan may be modified in terms of Rule 10 of the MCDR in the interest of safe and scientific mining, conservation of minerals or for protection of the environment. However, the application for modifications shall set forth

the intended modifications and explain the reasons for such modifications. The mining plan cannot be modified just for the asking.

50. Rule 13 of the MCDR provides that mining operations are required to be carried out by every holder of a mining lease in accordance with the approved mining plan. If the mining operations are not so carried out, the mining operations may be suspended by the Regional Controller of Mines in the Indian Bureau of Mines or another authorized officer.

51. From our point of view, Chapter V of the MCDR dealing with "Environment" is of significance. In this Chapter, Rule 31 of the MCDR provides that every holder of a mining lease shall take all possible precautions for the protection of the environment and control of pollution while conducting any mining operations in the area.

52. Rule 37 of the MCDR requires certain precautions to be taken against air pollution and obliges the mining lease holder to keep air pollution under control and within permissible limits specified under various environmental laws including the Air (Prevention and Control of Pollution) Act, 1981 and the Environment (Protection) Act, 1986.

53. Rule 38 of the MCDR requires the holder of a mining lease to take all possible precautions to prevent or reduce the passage of toxic and objectionable liquid effluents from the mine into surface water bodies, ground water aquifer and usable lands to a minimum. It also mandates effluents to be suitably treated, if required, to conform to the standards laid down in this regard. In other words, the provisions of the Water (Prevention and Control of Pollution) Act, 1974 are required to be adhered to by the mining lease holder.

54. Rule 41 of the MCDR requires every holder of a mining lease to carry out mining operations in such a manner as to cause least damage to the flora of the area and the nearby areas. Every holder of a mining lease is required to take immediate measures for planting not less than twice the number of trees destroyed by reason of any mining operations and to look after them during the subsistence of the lease after which these trees shall be handed over to the State Forest Department or any other appropriate authority. The holder of a

mining lease is also required to restore, to the extent possible, other flora destroyed by the mining operations.

55. Briefly therefore, the overall purpose and objective of the MMDR Act as well as the rules framed there under is to ensure that mining operationsare carried out in a scientific manner with a high degree of responsibility including responsibility in protecting and preserving the environment andthe flora of the area. Through this process, the holder of a mining lease is obliged to adhere to the standards laid down under the Environment (Protection) Act, 1986 or the EPA as well as the laws pertaining to air and water pollution and also by necessary implication, the provisions of the Forest (Conservation) Act, 1980 (for short 'the FC Act'). Exploitation of the natural resources is ruled out. If the holder of a mining lease does not adhere to the provisions of the statutes or the rules or the terms and conditions of the mining lease, that person is liable to incur penalties under Section 21 of the MMDR Act. In addition thereto, Section 4A of the MMDR Act which provides for the termination of a mining lease is applicable. This provides that where the Central Government, after consultation with the State Government is of opinion that it is expedient in the interest of regulation of mines and mineral development, preservation of natural environment, prevention of pollution, etc. then the Central Government may request the State Government to prematurely terminate a mining lease.

56. Learned counsel for the Appellant has argued that the unit is contributing to the economy of the country and providing livelihood to thousands of the people, the decision to close the unit is not appropriate order. Reliance has been placed in Civil Appeal no. 4795 of 2021 M/S PAHWA PLASTICS PVT. LTD. AND ANR Vs. DASTAK NGO AND ORS order dated 25.03.2022, where Hon'ble the Supreme Court of India has narrated the fact as follows:

> *64. The question in this case is, whether a unit contributing to the economy of the country and providing livelihood to hundreds of people, which has been set up pursuant to requisite approvals from the concerned statutory authorities, and has applied for ex post facto EC, should be closed down*

for the technical irregularity of want of prior environmental clearance, pending the issuance of EC, even though it may not cause pollution and/or may be found to comply with the required norms. The answer to the aforesaid question has to be in the negative, more so when the HSPCB was itself under the misconception that no environment clearance was required for the units in question. HSPCB has in its counter affidavit before the NGT clearly stated that a decision was taken to regularize units such as the Apcolite Yamuna Nagar and Pahwa Yamuna Nagar Units, since requisite approvals had been granted to those units, by the concerned authorities on the misconception that no EC was required.

65. ……this Court cannot be oblivious to the economy or the need to protect the livelihood of hundreds of employees and others employed in the units and dependent on the units in their survival……….

67. Accordingly, the appeal is allowed. The impugned order is set aside in so far as the same is applicable to the units of the Appellants established and operated pursuant to CTE and CTO from the HSPCB in respect of which applications for ex post facto EC have been filed. The Respondent shall take a decision on the applications of the Appellants for EC in accordance with law within one month from date. Pending decision, the operation of the Pahwa Yamuna Nagar Unit and the Apcolite Yamuna Nagar Unit, in respect of which consents have been granted and even public hearing held in connection with grant of EC, shall not be interfered with.

68. The Appellants will be allowed to operate the units. Electricity, if disconnected, shall be restored subject to payment of charges, if any. If the application for EC is rejected on the ground of any contravention on the part of the Appellants, it will be open to the Respondents to disconnect the supply of electricity.

57. The Appellant's industry/unit is contributing around Rs. 235 crores in terms of revenue to the State and Rs. 311 crores to the Central Government in the year 2021 and provides employment to around 1000 persons directly and indirectly. The real question is whether an establishment that is contributing to the economy and providing livelihood to thousands of people ought to be closed down for the technical irregularities of non submission of half yearly

reports for a certain period. The project proponent is not otherwise found to be violating any of the pollution laws or causing any pollution and in view of the above facts that non submission of the half yearly statement is not directly or indirectly affecting the rules or pollution. In view of the Electro Steel Ltd vs. UOI & Ors 2021 Online SC 1247, the revocation of EC is neither justified nor proper. The order impugned seems to be harsh, disproportionate, unfair and arbitrary. The closure of unit will directly affect the economy of the state and may disbalance the demand and supply of the material in the society and directly affect the unemployment in the state. The matter of calculation of compensation or penalty is pending before the competent forum and the respondent must have awaited the decisions of the competent authority for further proceedings.

58. In view of the above discussion, we are of the view that extreme penalty of revocation of EC for allegation of non submission of half yearly report for a past period is highly disproportionate, harsh, unfair, unjust and arbitrary and deserves to be quashed and accordingly the impugned dated 19.12.2021 is set aside. The respondents/collector/state PCB shall take a reasoned decision in accordance with law within a reasonable time on point of penalty to be paid by the appellant. Pending decisions, the operation of the unit of the appellant in respect of which consents have been granted with grant of EC, shall not be interfered with, and the appellant will be allowed to operate the unit. The appeal is allowed to that extent.

The appeal is disposed of accordingly.

Sheo Kumar Singh, JM

Arun Kumar Verma, EM

08th September, 2022
Appeal No. 09/2022 (CZ)
PU