Item No. 01

BEFORE THE NATIONAL GREEN TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
(Through Video Conferencing)

Appeal No. 122/2018
(Earlier Appeal No. 9/2014) (WZ)

Anil Tharthare — Appellant(s)

Versus

The Secretary, Envt. Dept. Govt. of Maharashtra & Ors. — Respondent(s)

Date of hearing: 11.02.2019

CORAM: **HON'BLE MR. JUSTICE ADARSH KUMAR GOEL, CHAIRPERSON**
HON'BLE MR. JUSTICE K. RAMAKRISHNAN, JUDICIAL MEMBER
HON'BLE DR. NAGIN NANDA, EXPERT MEMBER

For Appellant(s): Mr. Aditya Pratap, Advocate

For Respondent (s): Mr. D.M. Gupte, Advocate for R-1, 2&3
Ms. Niti Jain, Proxy Counsel Ms. Niti Jain, Proxy Counsel for Respondent no.6

ORDER

1. This appeal has been preferred against order dated 13.03.2014 passed by the Principal Secretary, Environment-cum-Member Secretary, State Level Environment Impact Assessment Authority (SEIAA), State of Maharashtra granting 'amendment' to the Environment Clearance (EC) dated 02.05.2013 for proposed expansion of redevelopment of 'Oriana Residential Project' on plot bearing C.T.S. No. 646, 646 (Pt.) of village Bandra at Gandhinagar, Bandra East, Mumbai – 400050 by M/s Resilience Realty Pvt. Ltd. This appeal was filed on 10.04.2014 and has been pending for the last about five years.

2. Question for consideration is whether grant of EC to the expansion of the project by impugned order by treating it as 'amendment' is in violation of EIA Notification, 2006. In the process, no appraisal has been conducted by the State Level

Expert Appraisal Committee (SEAC) which is mandatory for permitting 'expansion' of the project. If the EC is held to be illegal, further question is the remedial measures to be now taken.

3. The appellant claims to be an original resident of the area in question. According to the appellant, by redevelopment of the area as per sanction by the Municipal Corporation under the provisions of Development Control Regulations of Greater Mumbai, 1991 (DCR), volume of the new building will increase by 8 to 10 times. Under the scheme of development, a part of new construction has to be used by the developers to give free flats to original residents while the rest of it can be sold in the open market. Construction started in the year 2010 as shown by the Google Earth Images dated 25.01.2010 and 01.04.2011.

4. As per the provisions of EIA Notification, 2006 and under the provisions of Environment (Protection) Act, 1986, EC is required for new project as well as expansion where the extent of construction is more than 20,000 sq.m. It has been clarified by Notification dated 04.04.2011 that extent of construction covers Floor Space Index (FSI) area as well as non-FSI area.

5. Respondent No.6, the project proponent, sought EC without disclosing that more than half of the project had already been constructed. The SEAC - II in its 10th Meeting dated 14th – 16th March, 2013 appraised the project and recommended EC. Accordingly, EC was granted on 02.05.2013.

6. Later, built up area was increased from 32,395 sq.m to 40,480 sq.m. In the process, construction reached about 15 floors. Expansion proposal was treated as 'amendment' and not

considered by the SEAC as required but only by the SEIAA in its meeting on 27th – 28th January, 2014. It recommended the EC which was granted on 13.03.2014.

7. Before going into the merits, we may note that this Tribunal considered two applications of the project proponent against maintainability of the appeal and rejected the same vide the order dated 04.05.2016. The said order was a composite order in the present case and in the connected appeal. It was held that there was no merit in the objection about the *locus standi* of the appellant. Nor the appeal could be held to be barred by limitation with reference to the impugned order dated 13.03.2014.

8. According to the appellant, an independent appraisal by EAC was required which had not been done as per paragraph 7(ii) of the 2006 Notification. The present case was a case of 'expansion'. It is also submitted that the present project was Category B-I project for which procedure to be followed was screening, scoping and then evaluation. It has been taken as Category B-II project on the ground that the area was less than 1.5 lakh sq.m. Infact, the entire area should have been taken into account and not merely a particular building. It should be taken as B-I Category as the environment impact was on the whole area. The project was part of the main project of Gandhinagar lay out which involved construction in the area of 2.16 lakhs sq.m. Taking every building as a separate project defeats the requirement of environment law of which sustainable development and precautionary principles are inherent components. Even as B-II Category project, procedure of evaluation has not been followed treating the matter to be

only of 'amendment' of earlier EC instead of expansion which required fresh EIA. The concerned authorities thus, acted to contrary to the Public Trust Doctrine.

9. Alternatively, it is submitted that as construction started prior to EC, it attracted Notification dated 12.12.2012, requiring d*e novo* procedure to be followed.

10. Expansion of the project required submission of fresh Form I and Form IA. Additional construction sought by amendment was also completed prior to the amended EC in violation of Office Memorandum dated 12.12.2012 and 27.06.2013 issued by Ministry of Environment, Forest and Climate Change (MoEF&CC). The FSI of 4.14 was used illegally against FSI of 2.5 as stipulated in Rule 33(5) of Development Control Regulation (DCR).

11. In their reply, the Authorities of the State of Maharashtra, respondent No. 1 to 3 have supported the impugned order by submitting that extent of project was less than 1.5 lakh sq.m. The original EC was granted on 02.05.2013. Amendment was sought on 24.09.2013, which was granted on 13.03.2014 as it was case of only 'amendment' and not 'expansion'. It was observed that the amendment was marginal and impact of environment was minimal. The amendment allowed is as follows:-

"

Description	As per EC dated 2nd May, 2013	Amendment
FSI area	16,346.32 sq.m.	21,365.54 sq.m.
Non FSI area	16,048.85 Sq.m.	19,115.34 Sq.m.
Total construction	32,395.17 Sq.m.	40,480.88 Sq.m.

area				
No. of Tenements	Members: 64 Sale: 61		Members: 64 Sale: 77	
Building configuration	Member	2 Basements + Ground + 2 Podium + stilt + 16 floors	Member	2 Basements + Ground + 2 Podium + stilt + 18 floors
	Sale	2 Basements + Ground + 2 Podium + stilt (Pt) + 1st (Pt) +2nd to 15th floors + 16th (Pt) Floors	Sale	2 Basements + Ground + 2 Podium + stilt + 18 floors
Building Height	59.30 m		69.95 m	
Total water requirement	98 KLD		109 KLD	
a) Domestic water	61 KLD		63 KLD	
Recycled water	39 KLD		42 KLD	
Waste water	76 KLD		84 KLD	
STP capacity	84 KLD		92 KLD	
Solid waste generation	282 Kg/day		353/day	
Total capital cost for EMP	Rs. 250 Crores		-	
Parking details	Required : 157 Nos. Provided : 512 Nos.		Required : 295 Nos. Provided : 295 Nos.	

"

12. The project proponent has also filed reply stating that construction commenced in the year 2010. The plot was initially developed in 1962 as part of larger lay out referred to as Gandhinagar. Respondent No. 4, Maharashtra Housing and Area Development Authority, initiated scheme for formation

and registration of cooperative societies. Each of the societies had absolute possession of respective plots. The present plot was initially combined with another adjoining plot but in 1997, payment was made for additional FSI. In 2002 a separate society was formed i.e. respondent No. 7, Model Co-operative Housing Society Ltd. Lease deed and Sale deed dated 10.08.2007 were executed in favour of respondent No. 7. Scheme for redevelopment was formulated under Rule 33(5) of the DCR for which enhanced FSI of 2.5 was allowed. Thus, redevelopment was as per Rules and NOC for redevelopment was given under DCR 33(5) on 31.05.2010. Commencement certificate was issued on 06.06.2010. Members of respondent No. 7 Cooperative Society were living in temporary alternative accommodation, awaiting construction. The project proponent halted construction and recommenced after 02.05.2013. After additional FSI was allowed on 21.10.2013, the project proponent, in anticipation, sought amendment of the EC by letter dated 23.08.2013. Since it was a minor amendment, as per consistent practice amendment was allowed. The expansion cannot be held to be a new project nor expansion.

13. We have heard the learned counsel for the parties.

14. As already noted, the question for consideration is whether the impugned order treating the expansion as 'an amendment in EC' is valid in law in view of requirements of Clause 2 of the 2006 Notification providing that prior EC is required for any project or activity in respect of 'new projects' as well as 'expansion' of the project mentioned in the schedule. Item 8(a) of the Schedule refers to building and construction projects having built up area of more than 20,000 sq.m. and less than 1.5 lakhs sq.m.

15. The plea taken by the respondents is that there is consistent practice of treating expansion as minor amendment.

16. We are of the clear view that there is no legal sanction for such alleged consistent practice in view of express provision of the EIA Notification, 2006. No project can be set up or expanded without prior EC. Such requirement cannot be nullified by terming 'expansion' as 'amendment'. Para 2 of the EIA Notification dated 14.09.2006 is as follows:-

> **"***2. Requirements of prior Environmental Clearance (EC):- The following projects or activities shall require prior environmental clearance from the concerned regulatory authority, which shall hereinafter referred to be as the Central Government in the Ministry of Environment and Forests for matters falling under Category 'A' in the Schedule and at State level the State Environment Impact Assessment Authority (SEIAA) for matters falling under Category 'B' in the said Schedule, before any construction work, or preparation of land by the project management except for securing the land, is started on the project or activity:*
> *(i) All new projects or activities listed in the Schedule to this notification;*
> *(ii) Expansion and modernization of existing projects or activities listed in the Schedule to this notification with addition of capacity beyond the limits specified for the concerned sector, that is, projects or activities which cross the threshold limits given in the Schedule, after expansion or modernization;*
> *(iii) Any change in product - mix in an existing manufacturing unit included in Schedule beyond the specified range***."**

17. Entry 8(a) of the Schedule to the notification is as follows:

"

Building/construction projects/ Area Development projects and Townships			
8(a)	Building and Construction projects	≥20000 sq.mtrs and *<1,50,000 sq. mtrs of built-up area#*	*(The built-up area for the purpose of this notification is defined as "the built-up or covered area on all the floors*

			put together including basement(s) and other service areas, which are proposed in the building /construction projects)

"

18. Paragraph 7(ii) of the notification is as under:

> ***"**7(ii). Prior Environmental Clearance (EC) process for Expansion or Modernization or Change of product mix in existing projects: All applications seeking prior environmental clearance for expansion with increase in the production capacity beyond the capacity for which prior environmental clearance has been granted under this notification or with increase in either lease area or production capacity in the case of mining projects or for the modernization of an existing unit with increase in the total production capacity beyond the threshold limit prescribed in the Schedule to this notification through change in process and or technology or involving a change in the product –mix shall be made in Form I and they shall be considered by the concerned Expert Appraisal Committee or State Level Expert Appraisal Committee within sixty days, who will decide on the due diligence necessary including preparation of EIA and public consultations and the application shall be appraised accordingly for grant of environmental clearance.**"***

19. Thus, the impugned order dated 13.03.2014 cannot be sustained and is liable to be quashed. Since the statutory procedure for grant of EC to the expansion of the project has not been followed, the relevant factors, including the carrying capacity of the area, having regard to the impact of expansion on the recipient environment, specifically water and air quality have not been examined by the SEAC.

20. Though vide the order dated 02.05.2013 while granting EC, a condition was imposed under para 3 (iii) that Consent to Establish shall be obtained from the Maharashtra Pollution Control Board under the Air (Prevention and Control of

Pollution Act, 1981 and Water (Prevention and Control of Pollution Act, 1974, whether or not such consent has been obtained is not clear. Since construction has already been completed even before the amended EC was granted, question is what remedial steps are to be taken for violation of law restoring the environment.

21. We note the submission that area is already highly congested and with the expansion of the project, there is adverse impact on the environment, including the air quality, and the water quality because of added municipal waste including sewage and because of further congestion including traffic.

22. Our approach is to be informed by the ground situation of environment. As per WHO list, out of the 10 most polluted cities in the world, 9 are in India.[1] Almost 7 million deaths were caused by household and outdoor pollution in the year 2016.[2] Large number of people suffer diseases such as lung and heart diseases. As per official figures, there are 102 "non attainment cities" in India where air quality exceeds the prescribed norms which issue has been subject matter of order of this Tribunal dated 08.10.2018 in Original Application No. 681/2018, *"News Item Published In 'The Times of India' Authored by Shri. Vishwa Mohan Titled "NCAP with Multiple Timelines to Clear Air in 102 Cities to be released around August 15".* As per some studies, according to Sustainable Cities Index, 2015, Mumbai is one of the least sustainable cities in the world[3].

[1] https://www.cnbc.com/2018/05/03/here-are-the-worlds-10-most-polluted-cities--9-are-in-india.html
[2] https://www.indiatoday.in/education-today/gk-current-affairs/story/14-worlds-most- polluted-15-cities -india-kanpur- tops-who-list-1224730-2018-05-02
[3] Https://s3.amazonaws.com/arcadis-whitepaper/arcadis-sustainable-cities-index-report.pdf

23. Conscious of the threat posed to limited natural resources due to their overuse, this Tribunal in *Metro Transit Pvt. Ltd Vs. South Delhi Municipal Corporation & Ors.*[4] directed the Ministry of Transport to take initiative to assess the number of vehicles to be permitted proportionate to the capacity of the roads in the city in the larger interest of environment. This Tribunal has also directed in *SPOKE Vs. M/s. Kasauli Glaxie Resorts and other connected matters*[5] to frame guidelines with respect to Carrying Capacity assessment for similarly placed hill stations as Kasauli and Eco-Sensitive Zone (ESZ) notified by MoEF&CC to check hazards of unregulated development threatening the fragile ecology. In *D.V. Girish v. Union of India & Ors.*[6] this Tribunal has directed the Ministry of Urban Development and MOEF& CC to conduct detailed Carrying Capacity study to assess the impact of factors such as construction of resorts, new civil structures, availability of water resources, power lines, soil erosion, extraction of ground water, waste generation and handling, road traffic and pollution and evolve a management plan for preservation of Chikkmangaluru district. Further, in *Social Action for Forest and Environment (SAFE) & Ors. v. Union of India and Ors.*[7] it was observed that the relevance of the concept of Carrying Capacity to the concept of sustainability adds to its value for organizing the management framework.

[4] Order dated 23.10.2018 in OA No. 773/2018
[5] Order dated 05.10.2018 in O.A. No. 218/2017
[6] Order dated 30.07.2018 in O.A. No. 462/2018
[7] Order dated 10.12.2015 in O.A. No. 87/2015

24. Bombay is highly congested city and any further constructions must be strictly legal. Any illegal construction must be visited with permissible adverse legal action.

25. Carrying capacity is integral to the principles of Sustainable Development and Polluter Pays principle. As a yardstick of sustainability, urban carrying capacity is an important conceptual underpinning that must guide a welfare state in promoting sustainable urban development. "Urban disease" frequently besetting the cities such as traffic congestion, housing shortage, lack of amenity, pose actual challenges and impediments to sustainable development. Severely straining and degrading the available natural resources of a particular area without regard to capacity assessment is causing irreversible damage to the ecology in terms of pollution of air, water and earth. In light of serious threat, this Tribunal in Original Application No. 568 of 2016, *Ajay Khera Vs. Container Corporation of India Limited & Ors.* vide order dated 26.10.2018, posed the following questions:

(a) What would happen to the traffic flow if all roads become parking?

(b) What happens to the road travelers, if there is no adequate oxygen in the air on account of excessive vehicles and congestion?

(c) How would unlimited housing be provided to people if the land resources are exhausted at particular place?

(d) How will waste water and solid waste disposal needs be met, if there is unplanned population

density in a particular city? These questions require serious consideration.

26. Natural resources have got to be tapped for the purposes of social development but one cannot forget at the same time that tapping of resources have to be done with realistic approach to capacity of a city or area so that environment may not be affected in any serious way. It has always to be remembered that both the air and water as resource are not without limitation.

27. It is pointed out that 16 additional flats which have being constructed by way of expansion have been sold at the cost of Rs. 6 crores per flat.

28. As regards the question whether EIA is mandatorily required, it may be noted that EIA has been recognised as the most valuable, inter-disciplinary and objective decision-making tool with respect to alternate routes for development, process technologies and project sites. It is considered an ideal anticipatory mechanism allowing measures that ensure environmental compatibility in our quest for socio-economic development. In fact, the whole concept is based on jurisprudential principle of 'Sustainable Development' and 'Precautionary Principle' though statutory basis has been provided to the same for effective enforcement.

29. The projects covered by the Notification dated 14.09.2006 cannot be undertaken without environmental clearance. This may invite prosecution and punishment under section 15 of the Environment (Protection) Act, 1986 or other provisions. Mere fact that a project is not covered by the said notification is not

conclusive to negate such requirement if impact on environment justifies it. One cannot ignore that impact assessment in all cases of potential impact is by itself a part of concept of sustainable development, which in turn is part of Article 21. Thus, even where notification does not require EIA, such requirement may apply by virtue of Article 21, if there is potential of impact on environment. In such a case the Court or Tribunal concerned with enforcement of principle of sustainable development can require this to be done, as mandatory condition, for continuing a project. In our jurisprudence, the protection of environment is fully ingrained. It is not only a part of Directive Principles under Article 48A and Fundamental Duties under Article 51A(g), but also inherent in the Fundamental Right under Article 21 of the Constitution. Principles of Sustainable Development, Precautionary Principle, and Intergenerational Equity are not only part of our jurisprudence, in terms of case law but also incorporated in Section 20 of National Green Tribunal Act, 2010. Needs for development have to be fulfilled consistent with these principles. There can be no development at the cost of environment.[8]

30. Environmental laws are required to be read into every activity adversely impacting environment. Grant of any permission or sanction by any authority has always to be read as subject to inherent limitation of the environment norms being maintained. Once pollution is being created, mere permission/

[8] Intellectuals Forum Vs. State of A.P - (2006) 3 SCC 549, Bombay Dyeing & Mfg. Co. Ltd. - (2006) 3 SCC 434, M.C. Mehta v. Union of India - (2004) 12 SCC 118, Tirupur Dyeing Factory Owners Assn. v. Noyyal River Ayacutdar Protection Assn - (2009) 9 SCC 737, T.N. Godavarman Thirumulpad v. Union of India - (2000) 10 SCC 606, Narmada Bachao Andolan v. Union of India - (2000) 10 SCC 664, Vellore Citizens Welfare Forum Vs. Union of India and Ors. (1996) 56 SCC 647, N.D. Jayal and Ors. Vs. Union of India and Ors. (2004) 9 SCC 362, Lafarge Umiam Mining (P) Ltd., Vs. Union of India and Ors. (2011) 7 SCC 338, and G. Sundarrajan Vs. Union of India and Ors. (2013) 6 SCC 620

sanction by itself is no defense. While absence of a sanction may by itself be violation of law, even grant of sanction is never to be treated as unconditional and does not obviate the requirement to maintain environment norms. Adverse impact on environment is actionable in all situations. Accordingly, if there is an impact to the environment, there must be an Environment Impact Assessment. The fact remains that flats may have been allotted in which case it may be difficult to disturb or penalize such occupants who may not be party to violations. Still, the Tribunal cannot be mute spectator as far as the project proponent, respondent No. 6 is concerned. In this light, to uphold the Rule of Law, it is necessary that the violators are required to compensate for their illegal acts which may also act as a deterrent against those project proponents who circumvent the law to suit their convenience. This is also in conformity with 'Polluter Pays' principle.

31. By way of an interim arrangement, let the project proponent deposit a sum of Rs. 1 crore with the CPCB within one month towards interim cost of damage to the environment. The Committee which we propose may suggest the amount which should be recovered for such violation so that the amount can be deterrent and dissuade violaters of law and also to cover the cost of restoration of the environment.

32. Our experience shows that present is not the only case of illegal construction. Such activity is rampant posing serious challenge to environment. It appears to be necessary to obtain a report from experts on factual situation and approach to be adopted in handling such issues when construction is made without valid EC.

33. We constitute a five member Expert Committee comprising of two representatives of Central Pollution Control Board (CPCB) (one engineer and one scientist), one representative of NEERI and two members of SEAC (one engineer and one scientist) to carry out Carrying Capacity study of the area for relevant environment parameters and impact of such expansion on already congested and stressed areas. The Committee may suggest remedial measures including action against violaters of law who complete projects in violation of mandatory provisions making the situation irreversible, parameters for appraisal of such projects even if such projects are within FSI when cities are already highly congested with no sufficient space for traffic and open areas and the cost of restoration of environment. The Committee may furnish its report to this Tribunal by e-mail at ngt.filing@gmail.com on or before 30.04.2019.

34. We observe that while evaluating matters of similar nature SEAC/SEIAA may take into account the impact of expansion activity in a holistic manner rather than treating such activity on standalone basis or as an isolated component as has been done in the present case.

35. The expenses of the Committee shall be initially borne by the State Pollution Control Board which may be recovered from the project proponent who has violated the law. The nodal agency will be the CPCB for coordination and compliance of this order. A copy of this order be sent to CPCB by e-mail.

36. We permit the parties to give their respective representations and relevant documents to the CPCB within two weeks.

List for further consideration on 16.05.2019.

Adarsh Kumar Goel, CP

K. Ramakrishnan, JM

Dr. Nagin Nanda, EM

February 11, 2019
Appeal No. 122/2018
(Earlier Appeal No. 9/2014) (WZ)
A