IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.08.2017

DELIVERED ON : 13.10.2017

CORAM :

The Hon'ble Ms.INDIRA BANERJEE, CHIEF JUSTICE

AND

The Hon'ble Mr.JUSTICE M.SUNDAR

W.P. No.11189 of 2017

Puducherry Environment Protection Association,
rep by its Honarary President
R.Kothandaraman,
No.18, S.V.Kovil Street,
Koodapakkam and Post,
Puducherry-605 602. .. Petitioner

Vs.

The Union of India,
rep by its Secretary to the Government,
Ministry of Environment, Forest and Climate Change,
Paryavaran Bhawan,
Jor Bagh,
New Delhi-110 003. .. Respondent

Petition filed under Article 226 of the Constitution of India praying for issue of Writ of Declaration declaring the impugned notification dated 14.3.2017 issued by the respondent in S.O.804(E) as arbitrary, illegal and violative of Articles 14 and 21 of the Constitution of India and the Environment (Protection) Act, 1986.

For Petitioner : Mr.A.Yogeswaran

For Respondent : Mr.G.Rajagopalan,
Additional Solicitor General
assisted by Mr.S.Rathnasabapathy

ORDER

M.SUNDAR, J.

This writ petition has been filed as a Public Interest Litigation. In the instant writ petition, a notification dated 14.03.2017 bearing reference S.O.804(E) made by the Union of India (hereinafter referred to as 'UOI' for brevity) has been assailed.

2 Bare minimum facts essential for understanding and appreciating this order are set out infra under the caption 'Facts in a nutshell'.

Facts in a nutshell :

3(a) Notification dated 14.03.2017 bearing reference S.O.804(E) made by the UOI which has been assailed in the instant writ petition, is hereinafter referred to as the 'impugned notification'.

3(b) The impugned notification has been made by the UOI under Section 3(1) and 3(2)(v) of the Environment (Protection) Act, 1986 (29 of 1986) (hereinafter referred to as 'E.P. Act' for brevity) read with Rule 5(3) of the Environment (Protection) Rules, 1986 (hereinafter referred to as 'E.P. Rules' for the sake of brevity). To simplify and encapsulate the core issue, it can be stated that vide the impugned notification, UOI has made a provision for grant of ex post facto environmental clearance for project proponents, who have commenced, continued or completed a project without obtaining clearance under the E.P. Act and the Environment Impact Assessment (hereinafter referred to as 'EIA' for brevity) notification issued under it.

3(c) The petitioner contends that when originally the notification was issued on 27.1.1994, the cut-off date to permit the violators to set their house in order was extended three times. Firstly upto 31.3.1999, secondly upto 30.6.2001 and thirdly upto 31.3.2003 by successive notifications dated 5.11.1998, 27.12.2000 and 14.5.2002 respectively.

3(d) The petitioner would contend that the second notification was issued on 14.9.2006. Under this notification, again the dates for project proponents who have violated various provisions of the E.P. Act and EIA notification thereunder, was successively extended on 16.11.2010, 12.12.2012, 27.6.2013, 10.5.2016 and now vide the impugned notification dated 14.3.2017. In other words, the impugned notification is the fifth opportunity for project proponents to set their house in order.

3(e) The petitioner has predicated the instant writ petition on the pivotal point that 'prior' clearance is imperative and non negotiable, whereas the impugned notification provides for ex post facto clearance, which according to the writ petitioner is impermissible.

3(f) We now proceed to discuss the submissions and contentions under the head 'discussion'.

Discussion :

4(a) As the impugned notification provides for ex post facto clearance, the same is being assailed by the writ petitioner primarily on three grounds and the same are as follows :

(i)Public hearing which is non negotiable has been given a go-by;

(ii)Scoping leading to EIA has been given a go-by; and

(iii)Environmental clearance is based on precautionary principle and the impugned notification militates against this basic principle.

4(b) In support of the above said challenge to the impugned notification on the aforesaid three points, learned counsel for the writ petitioner Mr.Yogeswaran relied on several judgments and judgments pressed into service are as follows :

(i)*Sreeranganathan K.P. Vs. Union of India [Appeal Nos.172,173,174 of 2013 (SZ) and Appeal Nos.1 and 19 of 2014 (SZ), dated 28.5.2014] (Before the National Green Tribunal, Southern Zone, Chennai)*; public hearing

(ii)*Indian Council for Enviro-Legal Action and others Vs. Union of India [(1996) 3 SCC 212*];

(iii)*S.Nandakumar Vs. Secretary to Government of Tamil Nadu and others [W.P.Nos.10641 to 10643 of 2009, etc., dated 22.4.2010] (Madras High Court*); public hearing

(iv)*Utkarsh Mandal Vs. Union of India [W.P.(Civil) No.9340 of 2009, dated 26.11.2009] (Delhi High Court*);

(v)*S.P.Muthuraman Vs. Union of India [Original Application No.37 of 2015 and another, dated 7.7.2015] (National Green Tribunal, Principal Bench, New Delhi*);

(vi)*Research Foundation for Science Technology National Resource Policy Vs. Union of India [(2005) 10 SCC 510*];

(vii)*Consumer Action Group and another Vs. State of Tamil Nadu and others,[(2000) 7 SCC 425*]; and

(viii)*Lafarge Umiam Mining Private Limited Vs. Union of India and others [(2011) 7 SCC 338*]

4(c) Judgments that were pressed into service are to buttress the aforesaid three points of attack. While *Sreeranganathan K.P., S.Nandakumar, Utkarsh Mandal, Research Foundation for Science Technology National Resource Policy* and *Consumer Action Group and another* judgments were pressed into service to buttress the submission that public hearing is extremely sanctus and non negotiable, *S.P.Muthuraman* judgment was pressed into service to buttress the submission that ex post facto clearance takes away scoping and the resultant EIA. *Lafarge Umiam Mining Private Limited* judgment was pressed into service for both the above points, namely, public hearing is sanctus / non negotiable and ex post facto clearance takes away scoping and the resultant EIA. All judgments proceed on the premise that such environmental clearances are based on precautionary principle. *Indian Council for Enviro-Legal Action* judgment was pressed into service for polluter pays principle.

4(d) We heard the learned Additional Solicitor General Mr.G.Rajagopalan.

4(e) Learned Solicitor submits that the writ petitioner has misread the impugned notification qua public hearing and scoping leading to EIA point. In support of his submission, learned Solicitor took us through the impugned notification and submitted that the EIA authority, being the Expert Appraisal Committee would assess the project and the work done by the project proponent. In case of the finding / opinion of the Expert Appraisal Committee being in the negative, all actions as per law, including penal action under Section 19 of the E.P. Act would be initiated and no consent to operate or occupy will be issued and closure of the project will be ensured.

4(f) Only in cases where findings of the Expert Appraisal Committee are in the affirmative, projects will be referred under appropriate terms of reference for undertaking assessment of environment impact, ecological damage, etc., In support of this submission, learned Solicitor laid emphasis on paragraph 5 of the impugned notification.

4(g) For the sake of convenience, we deem it appropriate to extract paragraphs 3, 4 and 5 of the impugned notification, which read as follows :

> "(3)In cases of violation, action will be taken against the project proponent by the respective State or State Pollution control Board under the provisions of section 19 of the Environment (Protection) Act, 1986 and further, no consent to operate or occupancy certificate will be issued till the project is granted the environmental clearance.
>
> (4)The cases of violation will be appraised by respective sector Expert Appraisal Committees constituted under sub-section (3) of Section 3 of the Environment (Protection) Act, 1986 with a view to assess that the project

has been constructed at a site which under prevailing laws is permissible and expansion has been done which can be run sustainably under compliance of environmental norms with adequate environmental safeguards; and in case, where the finding of the Expert Appraisal Committee is negative, closure of the project will be recommended along with other actions under the law.

(5)In case, where the findings of the Expert Appraisal Committee on point at sub-para (4) above are affirmative, the projects under this category will be prescribed the appropriate Terms of Reference for undertaking Environment Impact Assessment and preparation of Environment Management Plan. Further, the Expert Appraisal Committee will prescribe a specific Terms of Reference for the project on assessment of ecological damage, remediation plan and natural and community resource augmentation plan and it shall be prepared as an independent chapter in the environment impact assessment report by the accredited consultants. The collection and analysis of data for assessment of ecological damage, preparation of remediation plan and natural and community resource augmentation plan shall be done by an environmental laboratory duly notified under Environment (Protection) Act, 1986, or a environmental laboratory accredited by National Accreditation Board for Testing and Calibration Laboratories, or a laboratary of a Council of Scientific and Industrial Research institution working n the field of environment."

4(h) We put it to learned Solicitor that paragraph 5 does not specifically provide for public hearing. To this, it was represented by learned Solicitor that when EIA is done, it will include public hearing and that it can be read into paragraph 5. We record this submission. Therefore, this puts to rest the point of public hearing and scoping leading to EIA.

4(i) With regard to precautionary principle, faced with the situation that ex post facto clearance and regularization dates have been repeatedly extended time and again by series of notifications, learned Additional Solicitor General at the bar, on instructions, submits that this impugned notification shall clearly and certainly be only a one time measure. We record this submission also. Notwithstanding the above submissions, learned Additional Solicitor General pressed into service a judgment of a learned Single Judge of this court in *M/s.Hyundai Motors India Ltd. Vs. Union of India [2015-2-L.W. 641*] to drive home the principle that ex post facto approvals are permissible in law.

4(j) The aforesaid case law does not help the respondent as it was rendered on an entirely different realm qua facts. That would be evident from the fact that the aforesaid *Hyundai* judgment refers to the celebrated Escorts Ltd. judgment in *Life Insurance Corporation of India Vs. Escorts Ltd. [(1986) 1 SCC 264*] in paragraph 32 of *Hyundai Motors India Ltd.*'s case. To be noted, *Escorts* judgment is a judgment of a Constitution Bench. To put it in nutshell, the ratio laid down in *Escorts* judgment is when the law provides for some form of consent, it can either be 'prior consent' or 'ex post facto consent', but when the law specifically uses the expression 'prior consent', the consent cannot be ex post facto. It is clearly articulated in paragraph 63 of the *Escorts* judgment, which reads as follows :

> "63.We have already extracted Section 29(1) and we notice that the expression used is "general or special permission of the Reserve Bank of India" and that the expression is not

qualified by the word "previous" or "prior". While we are conscious that the word "prior" or "previous" may be implied if the contextual situation or the object and design of the legislation demands it, we find no such compelling circumstances justifying reading any such implication into Section 29(1). On the other hand, the indications are all to the contrary. We find, on a perusal of the several, different sections of the very Act, that the Parliament has not been unmindful of the need to clearly express its intention by using the expression "previous permission" whenever it was thought that "previous permission" was necessary. In Sections 27(1) and 30, we find that the expression "permission" is qualified by the word "previous" and in Sections 8(1), 8(2) and 31, the expression "general or special permission" is qualified by the word "previous", whereas in Sections 13(2), 19(1), 19(4), 20, 21(3), 24, 25, 28(1) and 29, the expressions "permission" and "general or special permission" remain unqualified. The distinction made by Parliament between permission simpliciter and previous permission in the several provisions of the same Act cannot be ignored or strained to be explained away by us. That is not the way to interpret statutes. The proper way is to give due weight to the use as well as the omission to use the qualifying words in different provisions of the Act. The significance of the use of the qualifying word in one provision and its non-use in another provision may not be disregarded. In our view, the Parliament deliberately avoided the qualifying word previous in Section 29(1) so as to invest the Reserve Bank of India with a certain degree of elasticity in the matter of granting permission to non-resident companies to purchase shares in Indian companies. The object of the Foreign Exchange Regulation Act, as already explained by us, undoubtedly, is to earn, conserve, regulate and store foreign exchange. The entire scheme and design of the Act is directed towards that end. Originally the Foreign Exchange Regulation Act, 1947 was enacted as a temporary measure, but it was placed permanently on the Statute Book by the Amendment Act

of 1957. The Statement of Objects and Reasons of the 1957 Amendment Act expressly stated, "India still continues to be short of foreign exchange and it is necessary to ensure that our foreign exchange resources are conserved in the national interest". In 1973, the old Act was repealed and replaced by the Foreign Exchange Regulation Act, 1973, the long title of which reads: "An Act to consolidate and amend the law regulating certain payments, dealings in foreign exchange and securities, transactions indirectly affecting foreign exchange and the import and export of currency and bullion, *for the conservation of foreign exchange resources of the country and the proper utilisation thereof in the interest of the economic development of the country.*" We have already referred to Section 76 which emphasises that every permission or licence granted by the Central Government or the Reserve Bank of India should be animated by a desire to conserve the foreign exchange resources of the country. The Foreign Exchange Regulation Act is, therefore, clearly a statute enacted in the national economic interest. When construing statutes enacted in the national interest, we have necessarily to take the broad factual situations contemplated by the Act and interpret its provisions so as to advance and not to thwart the particular national interest whose advancement is proposed by the legislation. Traditional norms of statutory interpretation must yield to broader notions of the national interest. If the legislation is viewed and construed from that perspective, as indeed it is imperative that we do, we find no difficulty in interpreting "permission" to mean "permission", previous or subsequent, and we find no justification whatsoever for limiting the expression "permission" to "previous previous'" only. In our view, what is necessary is that the permission of the Reserve Bank of India should be obtained at some stage for the purchase of shares by non-resident companies."

4(k) The above proposition laid down by the Constitution Bench of

Hon'ble Supreme Court in the celebrated *Escorts* judgment governs the field and is therefore clearly indisputable.

4(l) This takes us back to the impugned notification. It is the fervent submission of the learned Solicitor that this is only an attempt to balance development on one hand and environment protection on the other. Learned Solicitor, as set out supra would assert that this will clearly and certainly be a one time measure.

4(m) After meeting the matter on merits qua challenge to the impugned notification on the above said three points, learned Solicitor did assail the locus of the writ petitioner. Considering the nature of the matter and the wider ramifications it has, coupled with the fact that this is a public interest litigation and in the light of the trajectory the hearing has taken, we are not going into the aspect of the locus of the petitioner entity.

4(n) We are convinced that paragraphs 3,4 and 5 of the impugned notification alluded to supra coupled with the two undertakings made on instructions by learned Additional Solicitor General that (a) public hearing can be read into paragraph 5 of the impugned notification and (b) this shall certainly and clearly be a one time measure, this writ petition can be closed and disposed of recording the above submissions. We do so.

CONCLUSION :

5 We record the submissions of the learned Additional Solicitor General that (a) public hearing can be read into paragraph 5 of the impugned notification and (b) this shall certainly and clearly be a one time measure.

DECISION :

6 This writ petition is disposed of on the above terms. No costs.

(I.B., CJ.) (M.S., J.)
13.10.2017

Index : Yes/No

vvk

To

The Secretary to the Government,
The Union of India,
Ministry of Environment, Forest and Climate Change,
Paryavaran Bhawan,
Jor Bagh,
New Delhi-110 003

The Hon'ble Chief Justice
and
M.Sundar, J.

vvk

judgment in
W.P.No.11189 of 2017

13.10.2017

THE CHIEF JUSTICE

I have gone through the draft judgment prepared by my esteemed brother, Sundar, J. and I am in full agreement with him.

2. This writ petition has been filed by way of public interest, *inter alia*, challenging a notification, being S.O.804(E), dated 14.3.2017, to the extent the said notification provides:

> *"13. (1) to (3) ...*
> *(4) The cases of violation will be appraised by respective sector Expert Appraisal Committees constituted under subsection (3) of Section 3 of the Environment (Protection) Act, 1986 with a view to assess that the project has been constructed at a site which under prevailing laws is permissible and expansion has been done which can be run sustainably under compliance of environmental norms with adequate environmental safeguards; and in case, where the finding of the Expert Appraisal Committee is negative, closure of the project will be recommended along with other actions under the law."*

3. The grounds on which the notification has been challenged have elaborately been enumerated by Sundar, J. and the same are not reiterated, to avoid prolixity. The thrust of the objection to the

impugned notification is to the decision to recommend closure of the projects only in case the Expert Appraisal Committee is of the view that the project has not been constructed at a site, which, under prevailing laws, is permissible or expansion that has been done cannot be run sustainably in compliance with the environmental norms and with adequate environmental safeguards.

4. There is increasing concern over environmental degradation the world over. Pollution and consequential concentration of harmful chemicals in the atmosphere by reason of emission of green house gases by reason of use of motors and machines are assuming alarming proportions. Pulmonary disorders as a result of pollution have become a life threatening health hazard.

5. The anxiety to protect the environment has led to deliberations and discussions at the National as also International levels. Under the aegis of the United Nations, a Conference on the Human Environment was held in Stockholm way back in June, 1972.

6. The Environment (Protection) Act, 1986, hereinafter referred to as "*the 1986 Act*", has been enacted as a consequence of decisions taken at the United Nations Conference on Human Environment held in Stockholm in June, 1972, in which India

participated, with a view to take appropriate steps for protection and improvement of environment.

7. The statement of objects and reasons for enactment of the 1986 Act declares that the Act has been prompted by concern over the state of environment that has grown the world over since the sixties. The decline in environmental quality has been evidenced by increasing pollution, loss of vegetal cover and biological diversity, excessive concentration of harmful chemicals in the ambient atmosphere, growing risks of environmental accidents and threats to life support systems.

8. The resolve to protect and enhance the environmental quality found expression in the decisions taken at the United Nations Conference on the Human Environment held in Stockholm in June, 1972. Government of India participated in the conference and strongly voiced the environmental concerns. While measures had been taken before and after the conference, the need for a general legislation to implement the decisions of the conference was felt.

9. Section 3(1) of the 1986 Act empowers the Central Government to take all such measures as it might deem necessary

or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution.

10. Sub-section (2) of Section 3 of the 1986 Act enables the Central Government to take, *inter alia*, the following measures:

> *"(i) co-ordination of actions by the State Governments, officers and other authorities—*
> *(a) under this Act, or the rules made thereunder; or*
> *(b) under any other law for the time being in force which is relatable to the objects of this Act;*
>
> *(ii) planning and execution of a nation-wide programme for the prevention, control and abatement of environmental pollution;*
>
> *(iii) laying down standards for the quality of environment in its various aspects;*
>
> *(iv) laying down standards for emission or discharge of environmental pollutants from various sources whatsoever: Provided that different standards for emission or discharge may be laid down under this clause from different sources having regard to the quality or composition of the emission or discharge of environmental pollutants from such sources;*
>
> *(v) restriction of areas in which any industries, operations or processes or class of industries,*

operations or processes shall not be carried out or shall be carried out subject to certain safeguards;

(vi) laying down procedures and safeguards for the prevention of accidents which may cause environmental pollution and remedial measures for such accidents;

(vii) laying down procedures and safeguards for the handling of hazardous substances;

(viii) examination of such manufacturing processes, materials and substances as are likely to cause environmental pollution;

(ix) carrying out and sponsoring investigations and research relating to problems of environmental pollution;

(x) inspection of any premises, plant, equipment, machinery, manufacturing or other processes, materials or substances and giving, by order, of such directions to such authorities, officers or persons as it may consider necessary to take steps for the prevention, control and abatement of environmental pollution;

(xi) establishment or recognition of environmental laboratories and institutes to carry out the functions entrusted to such environmental laboratories and institutes under this Act;

(xii) collection and dissemination of information in respect of matters relating to environmental pollution;

(xiii) preparation of manuals, codes or guides relating to the prevention, control and abatement of environmental pollution;

(xiv) such other matters as the Central Government deems necessary or expedient for the purpose of securing the effective implementation of the provisions of this Act."

11. Sub-section (3) of Section 3 of the 1986 Act provides as follows:

"Section 3(3). The Central Government may, if it considers it necessary or expedient so to do for the purposes of this Act, by order, published in the Official Gazette, constitute an authority or authorities by such name or names as may be specified in the order for the purpose of exercising and performing such of the powers and functions (including the power to issue directions under section 5) of the Central Government under this Act and for taking measures with respect to such of the matters referred to in sub-section (2) as may be mentioned in the order and subject to the supervision and control of the Central Government and the provisions of such order, such authority or

authorities may exercise the powers or perform the functions or take the measures so mentioned in the order as if such authority or authorities had been empowered by this Act to exercise those powers or perform those functions or take such measures."

12. Subject to the provisions of the 1986 Act, the Central Government has power under sub-section (1) of section 3 to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environment pollution.

13. Section 5 of the 1986 Act provides that notwithstanding anything contained in any other law, but subject to the provisions of the 1986 Act, the Central Government may in exercise of its powers and performance of its functions under the 1986 Act issue directions in writing to any person, officer or any authority and such person, officer or authority shall be bound to comply with such directions.

14. In exercise of such power conferred on the Central Government, the Ministry of Environment, Forest and Climate Change issued Office Memoranda dated 12th December 2012 and 27th June 2013 requiring environmental clearance in respect of projects.

15. By an order dated 28th November 2014 in the case of ***Hindustan Copper Limited v. Union of India,*** being W.P.(C) No.2364 of 2014, the High Court of Jharkhand held that the conditions laid down under Office Memorandum dated 12th December 2012 in paragraph 5(i) and 5(ii) were illegal and unconstitutional.

16. The High Court held that action for the alleged violation would have to be an independent and separate proceeding. Consideration of a proposal for environment clearance could not await initiation of action against the project proponent. The High Court also held that the proposal for environment clearance must be examined on its merits, independent of any proposed action for the alleged violation of the environmental laws.

17. It appears that National Green Tribunal (Principal Bench) also passed an order dated 7th July 2015 in Original Application No.37 of 2015 and Original Application No.213 of 2015 holding that the Office Memoranda dated 12th December 2012 and 24th June 2013 with regard to consideration of proposals for Terms of Reference or Environment Clearance or Coastal Regulation Zone Clearance involving violations of the 1986 Act or Environment Impact Assessment Notification, 2006, Coastal Regulation Zone

Notification, 2011 could not alter or amend the provisions of the Environment Impact Assessment Notification, 2006 and quashed the same.

18. The Ministry of Environment, Forest and Climate Change and the State Environment Impact Assessment Authorities had been receiving proposals under the Environment Impact Assessment Notification, 2006 for grant of Terms of Reference and Environmental Clearance for projects which had started the work on site, expanded production beyond the limit of environmental clearance or changed the product mix without obtaining prior environmental clearance.

19. The Ministry of Environment, Forest and Climate Change deemed it necessary that all entities not complying with the environmental regulation under Environment Impact Assessment Notification, 2006, be brought to comply with the environmental laws in expedient manner, for the purpose of protecting and improving the quality of the environment and reducing environmental pollution.

20. The Ministry of Environment, Forest and Climate Change deemed it necessary to bring such projects and activities in

compliance with the environmental laws at the earliest point of time, rather than leaving them unregulated and unchecked, which would be more damaging to the environment.

21. In furtherance of this objective, the Government of India deemed it essential to establish a process for appraisal of cases of violation of norms, and prescribing such adequate environmental safeguards that would deter violation of the provisions of Environment Impact Assessment Notification, 2006 and ensure that damage to environment was adequately compensated for.

22. In ***Indian Council for Enviro-Legal Action v. Union of India, reported in (1996) 3 SCC 212,*** the Supreme Court analyzed relevant provisions of environmental laws and concluded that damages might be recovered under the provisions of the 1986 Act, inter alia, to implement measures that were necessary or expedient for protecting and promoting the environment. The Supreme Court affirmed that the power of the Central Government under Section 3 of the 1986 Act was wide and included the power to prohibit an activity, close an industry, direct to carry out remedial measures, and wherever necessary impose the cost of remedial measures upon the offending industry. The question of liability of the respondents to defray the costs of remedial measures could also

be looked into from the principle "polluter pays".

23. This principle demands that the financial costs of preventing or remedying damage caused by pollution should lie with the undertakings which cause the pollution.

24. In exercise of power under Section 3(1)(a)(i) and Section 3(2)(v) of the 1986 Act read with Rule 5(3)(d) of the Environment (Protection) Rules, 1986, the Central Government has issued the impugned notification directing that the projects or activities or the expansion of modernization of existing projects or activities requiring prior environmental clearance under the Environment Impact Assessment Notification, 2006 entailing capacity addition with change in process or technology or both, undertaken in any part of India without obtaining prior environmental clearance from the Central Government or by the State Level Environment Impact Assessment Authority, as the case might be, duly constituted by the Central Government under sub-section (3) of section 3 of the 1986 Act shall be considered a case of violation of the Environment Impact Assessment Notification, 2006 and would be dealt with strictly as per the procedure specified in the said notification.

25. Paragraphs 13(2) to 13(7) read as follows:

"(2) In case the projects or activities requiring prior environmental clearance under Environment Impact Assessment Notification, 2006 from the concerned Regulatory Authority are brought for environmental clearance after starting the construction work, or have undertaken expansion, modernization, and change in product- mix without prior environmental clearance, these projects shall be treated as cases of violations and in such cases, even Category B projects which are granted environmental clearance by the State Environment Impact Assessment Authority constituted under sub-section (3) Section 3 of the Environment (Protection) Act, 1986 shall be appraised for grant of environmental clearance only by the Expert Appraisal Committee and environmental clearance will be granted at the Central level.

(3) In cases of violation, action will be taken against the project proponent by the respective State or State Pollution Control Board under the provisions of section 19 of the Environment (Protection) Act, 1986 and further, no consent to operate or occupancy certificate will be issued till the project is granted the environmental clearance.

(4)The cases of violation will be appraised by respective sector Expert Appraisal Committees constituted under subsection (3) of Section 3 of the Environment (Protection) Act, 1986 with a view to assess that the project has been constructed at a site which under

prevailing laws is permissible and expansion has been done which can be run sustainably under compliance of environmental norms with adequate environmental safeguards; and in case, where the finding of the Expert Appraisal Committee is negative, closure of the project will be recommended along with other actions under the law.

(5) In case, where the findings of the Expert Appraisal Committee on point at sub-para (4) above are affirmative, the projects under this category will be prescribed the appropriate Terms of Reference for undertaking Environment Impact Assessment and preparation of Environment Management Plan. Further, the Expert Appraisal Committee will prescribe a specific Terms of Reference for the project on assessment of ecological damage, remediation plan and natural and community resource augmentation plan and it shall be prepared as an independent chapter in the environment impact assessment report by the accredited consultants. The collection and analysis of data for assessment of ecological damage, preparation of remediation plan and natural and community resource augmentation plan shall be done by an environmental laboratory duly notified under Environment (Protection) Act, 1986, or a environmental laboratory accredited by National Accreditation Board for Testing and Calibration Laboratories, or a laboratory of a Council of Scientific and Industrial Research institution working in the field of environment.

(6) The Expert Appraisal Committee shall stipulate the implementation of Environmental Management Plan, comprising remediation plan and natural and community resource augmentation plan corresponding to the ecological damage assessed and economic benefit derived due to violation as a condition of environmental clearance.

(7) The project proponent will be required to submit a bank guarantee equivalent to the amount of remediation plan and Natural and Community Resource Augmentation Plan with the State Pollution Control Board and the quantification will be recommended by Expert Appraisal Committee and finalized by Regulatory Authority and the bank guarantee shall be deposited prior to the grant of environmental clearance and will be released after successful implementation of the remediation plan and Natural and Community Resource Augmentation Plan, and after the recommendation by regional office of the Ministry, Expert Appraisal Committee and approval of the Regulatory Authority."

26. There can be no doubt that the need to comply with the requirement to obtain environmental clearance is non-negotiable. Environmental clearance ensures compliance of environmental laws. A project can be set up or allowed to expand subject to compliance of the requisite norms. The environmental clearance is subject to the satisfaction of the existence of necessary infrastructural facilities

and equipment for compliance of environmental norms. To protect the future generations, it is imperative that pollution laws be strictly enforced. Under no circumstances, can industries which pollute be allowed to operate and degrade the environment?

27. The question is whether an establishment contributing to the economy of the country and providing livelihood to hundreds of people should be closed down only because of failure to obtain prior environmental clearance, even though the establishment may not otherwise be violating pollution laws or the pollution, if any, can conveniently and effectively be checked. The answer necessarily has to be in the negative.

28. 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 project from the angle of environmental pollution. However, one time relaxation and that too only in cases where the projects are otherwise in compliance with or can be made to comply with the pollution norms is, in my view, not impermissible. The notification ought not to be interfered with.

29. It is reiterated that protection of environment and prevention of environmental pollution and degradation are non-negotiable. At the same time, the Court cannot altogether ignore the economy of the Nation and the need to protect the livelihood of hundreds of employees employed in projects, which as stated above, otherwise comply with or can be made to comply with norms.

30. The impugned notification does not compromise with the need to preserve environmental purity, but only allows those industries and/or projects which might otherwise have been given prior environmental clearance, but omitted to obtain environmental clearance to operate, on the conditions imposed by the authorities concerned, including their liability under the principle "polluter pays".

(I.B., CJ.)
13.10.2017

sasi/bbr

THE HON'BLE CHIEF JUSTICE

(sasi/bbr)

W.P.No.11189 of 2017

13.10.2017