

Ex-post-facto environment clearance – an analysis in light of judgment of the Hon'ble Supreme Court in the matter of Alembic Pharmaceuticals Limited and Ors.

The Hon'ble Supreme Court has recently, on 1st April 2020, decided three Civil Appeals filed by Alembic Pharmaceuticals, Unique Chemicals Limited and UPL, arising out of orders passed by the Hon'ble National Green Tribunal, wherein the Hon'ble Supreme Court has considered the twin issues of the validity of ex-post facto environment clearance in Environmental law and the validity of the circular dated 14th May 2002 issued by the Ministry of Environment and Forest, whereby the concept of post facto environmental clearance was brought in. The Hon'ble Supreme Court has held that the notion of post facto Environment clearance is alien to Environmental law as the same is contrary to the well-established principles of sustainable development and precautionary principle and has thereby upheld to a limited extent the 2016 orders of the Hon'ble National Green Tribunal, which set aside the aforementioned circular dated 14th May 2002 holding that the same was unsustainable in law and contrary to the provisions of the EIA Notification 1994. The orders of the Hon'ble National Green Tribunal, inasmuch that they ordered revocation of the Environment Clearances granted to the Appellant units and closure of the same, have been set aside to that extent.

I) BACKGROUND OF THE CASE:

- 1) The Circular of 14th May 2002, was initially challenged before the Hon'ble Gujarat High Court, which proceedings were subsequently transferred to the Hon'ble National Green Tribunal. By a judgment dated 8th January 2016, the Hon'ble National Green Tribunal, Western Zone Bench, Pune decided the challenge to the circular dated 14th May 2002 filed by one Mr. Rohit Prajapati, holding that the same was contrary to law. The circular had envisaged the grant of post facto environment clearance. The Hon'ble National Green Tribunal *inter alia*, directed the revocation of environment clearances which had been granted, *post facto*, under the circular dated 14th May 2002 and further ordered the closing down of the Industrial Units (including the three Appellants before the Hon'ble Supreme Court) which had been operating without prior environment clearance.
- 2) On 17th May 2016, the Hon'ble National Green Tribunal dismissed the Review Petition filed by one of the Industrial Units and pursuant thereto, the Civil Appeals were filed challenging the orders dated 8th January 2016 and 17th May 2016.
- 3) By its decision dated 8th January 2016, the Hon'ble National Green Tribunal has, as stated above, held that the law did not permit grant of post facto environment clearance and the circular dated 14th May 2002, which was in the nature of an office memorandum could not override the provisions of the EIA Notification 1994, which was a notification issued in exercise of the statutory powers conferred by Section 3 of the Environment (Protection) Act, 1986.

II) POSITION/CHANGES IN LAW:

- 1) On 27th January 1994, the Ministry of Environment and Forest notified the EIA Notification 1994, under Section 3 of the Environment (Protection) Act, 1986 read with Rule 5 of the Environment (Protection) Rules, 1986. The EIA Notification 1994, stipulated as under:-

“... on and from the date of publication of this notification in the Official Gazette, expansion or modernization of any activity (if pollution load is to exceed the existing one) or new project issued in Schedule I to this notification, shall not be undertaken in any part of India unless it has been accorded environmental clearance by the Central Government in accordance with the procedure hereinafter specified in this notification.”

- 2) The EIA Notification stipulated at clause 3(a) that Environment clearance would have to be obtained and no construction work could be carried out till such time. Clause 3(a) is reproduced herein below for ease of reference.

“.. no construction work primarily or otherwise relating to the setting up of the project may be undertaken till the environmental and site clearances is obtained.”

- 3) On 10th April 1997, an amendment was carried out making public hearing mandatory for certain activities which required an environment clearance.
- 4) On 5th November 1998, a circular was issued by the Ministry of Environment and Forest which provided for provision of granting environment clearances to units which had not applied for environment clearance prior to commencing activities. The relevant portion of the circular dated 5th November 1998 is extracted below for ease of reference.

“Since number of such proposals are large in number and many of the units have not applied for environmental clearance genuinely out of ignorance it has been decided to consider their case for environmental clearance on merits. This will apply only to those proposals which are received in the Ministry till 31st March 1999. Simultaneously State Pollution Control Boards have also been advised to issue requisite notices to the units to apply for environmental clearance. In case of those units which have already started production, we may consider the proposals on merits and if necessary suggest additional mitigative measures. A formal environmental clearance will be

issued in these cases after approved by the competent authority."

- 5) By a circular dated 27th December 2000, the Ministry of Environment and Forest directed all State Pollution Control Boards, to issue notices for obtaining post facto environment clearance upto 30th June 2001. By the circular dated 14th May 2002, this dead line was extended to 31st March 2003. The relevant excerpt of the circular dated 14th May 2002 is reproduced below for ease of reference.

"Keeping the foregoing in view, it has been decided to extend the deadline upto 31st March 2003 so that defaulting units could avail of this last and final opportunity to obtain ex-post-facto environmental clearance. This would apply to all such units, which had commenced construction activities/operations without obtaining prior environmental clearance in violation of the EIA Notification of 27th January 1994."

III) FINDINGS IN THE JUDGMENT OF THE HON'BLE SUPREME COURT:

A) ISSUE OF JURISDICTION OF THE HON'BLE NATIONAL GREEN TRIBUNAL TO CONSIDER CHALLENGE TO THE CIRCULAR DATED 14TH MAY 2002:

- 1) One of the primary issues which the Hon'ble Supreme Court has gone into in the present judgment is the issue of whether the Hon'ble National Green Tribunal had requisite jurisdiction to decide a challenge to the 14th May 2002 circular. While answering the said issue, the Hon'ble Supreme Court has analysed the law laid down in ***Tamil Nadu Pollution Control Board Vs Sterlite Industries Limited reported in 2019 SCC Online SC 221***, wherein the Hon'ble Supreme Court had analysed the adjudicatory functions which had been entrusted to the Tribunal under the National Green Tribunal Act, 2010 and where it had been held that the Hon'ble National Green Tribunal cannot strike down Rules/Notifications made under the Environment (Protection) Act, 1986. The Hon'ble Supreme Court has also analysed the Judgment of ***BSNL Vs TRAI Telecom Regulatory Authority of India reported in (2014) 3 SCC 222*** where the Appellate power of TRAI had been examined.
- 2) The Hon'ble Supreme Court in the present case has agreed with the finding given in paragraph 53 of ***Sterlite*** (Supra) inasmuch that the Hon'ble National Green Tribunal has no general power of judicial review akin to Constitutional Courts and hence cannot adjudicate on the question of legality of Rules/Notifications issued under the Environment (Protection) Act 1986.
- 3) In this backdrop, the Hon'ble Supreme Court has gone on to examine whether the circular dated 14th May 2002, would qualify as a Rule/Notification issued by exercising power under Section 3 of the Environment (Protection) Act, 1986. The Hon'ble Supreme Court has

concluded that to qualify as a notification under Section 3, it must satisfy the statutory requirement of being necessary or expedient for the purpose of protecting and improving the quality of the environment.

- 4) The judgment goes on to say that the circular dated 14th May 2002, does the contrary inasmuch that it purported to allow an extension of time for deviant industry who had not obtained prior environment clearance. It is stated that the EIA Notification 1994, mandated that an environment clearance has to be obtained before embarking on a new project of expanding or modernising an existing one. The Supreme Court has further observed that the EIA Notification 1994 had been issued under the provisions of the Environment (Protection) Act, 1986, and the rules framed thereunder, based on the precautionary principle, to protect the environment.
- 5) The Supreme Court goes on to observe that no notification had been issued and the circular was an administrative decision which was at odds with the requirement of obtaining environment clearance prior to commencement mandated under the statutorily EIA Notification 1994. Being thus, the Hon'ble Supreme Court has gone on to hold that there was no jurisdictional embargo on the Hon'ble National Green Tribunal in examining the legality of the circular dated 14th May 2002.

B) ISSUE OF REQUIREMENT OF PRIOR ENVIRONMENT CLEARANCE UNDER THE EIA NOTIFICATION 1994:

- 1) It had been urged by the Appellants before the Hon'ble Supreme Court that there was a difference of phraseology between the EIA Notification 1994 and the EIA Notification 2006 as the EIA Notification 2006 for the first time used the word "prior", hereby urging that the EIA Notification 1994, did not strictly mandate for such prior environment clearance.
- 2) The Hon'ble Supreme Court, has dismissed such contention and has gone on to state that the EIA Notification 1994 mandated a prior environment clearance before a new project was commenced or any expansion/modernisation of an existing project.
- 3) The Hon'ble Supreme Court has held that the absence of the expression "prior" in the EIA Notification 1994, would make no difference since the words "shall not be undertaken ... unless" in the EIA Notification 1994 stipulate the requirement of a prior environment clearance. The Hon'ble Supreme Court has also relied on the Judgment in ***Common Cause Vs Union of India reported in (2017) 9 SCC 499*** wherein it had been held that a prior Environment Clearance was necessary under the EIA Notification 1994.

C) ISSUE OF POST FACTO ENVIRONMENT CLEARANCE BEING ALIEN TO ENVIRONMENTAL LAW:

- 1) The Hon'ble Supreme Court has held that the concept of an ex-post-facto environment clearance is alien to environmental jurisprudence and runs contrary to the EIA Notification 1994. The Supreme Court has said that the EIA Notification mandates a careful application of mind besides an in depth study into the likely consequences of a proposed activity before permitting the same with requisite measures/conditions that would safe guard the environment. In some cases, an environment clearance may be refused on valid grounds.
- 2) Providing for a retrospective environment clearance for a deviant industry which had commenced without such exercise being done would nullify the reasoning behind having the requirement of as prior environment clearance in the first place and would run contrary to both the precautionary principle and need for sustainable development and would in fact condone the operation of activity without complying with the requirement of obtaining an environment clearance.
- 3) The Hon'ble Supreme Court has in this regard, also relied on the judgment in **Common Cause** (Supra) where it had been held that a retrospective environment clearance was completely alien to environmental jurisprudence and allowing carrying out of activities without testing its permissibility under the EIA Notification may have adverse effect on the environment. It had also been held in that judgment that an environment clearance will come into force not earlier than the date of its grant, which has been relied upon in the present judgment by the Hon'ble Supreme Court.

D) DIRECTIONS BY THE HON'BLE SUPREME COURT:

- 1) The Hon'ble Supreme Court has taken judicial notice of the fact that though the three Appellant Industries had operated without an environment clearance for several years, after the EIA Notification 1994, each of them had subsequently received environmental clearances which had been operational since 2002-2003 and further, that the three units had made infrastructural investments and employed significant numbers of workers. In this view of the matter, the Hon'ble supreme Court has taken a balanced approach and held that the direction of the Hon'ble National Green Tribunal for the revocation of the environment clearance and for the closure of the units do not accord with the principle of proportionality. At the same time the Hon'ble Supreme Court has opined that there has been a serious breach of the EIA Notification 1994 by the Appellant Industries which cannot be left unattended by legal consequences. In this view of the matter, the Hon'ble Supreme Court has invoked the power under Article 142 of the Constitution of India to direct the three Industries to deposit Rs.10 crores each with the State Pollution Control Board to be utilized for environmental improvement in the region where the industries operate. This direction has been issued in place and stead of the directions issued by the National Green Tribunal for revocation and closure and are in addition to the amount directed by the

Hon'ble NGT to be deposited as environmental compensation, which direction has been upheld.

- 2) The Hon'ble Supreme Court has, subject to such deposit being made, set aside the impugned judgment of the Hon'ble National Green Tribunal in so far as it directed the revocation of the environment clearances and the closure of the industries.

E) **CRITICAL ANALYSIS OF THE JUDGEMENT:**

1. **Issue of Jurisdiction of the Hon'ble National Green Tribunal-**

The Hon'ble Supreme Court has, as stated above, held that the Hon'ble National Green Tribunal possessed the requisite jurisdiction to test the legality of the Circular dated 14th May 2002. In doing so, the Hon'ble Supreme Court has stated that:

- i. The Circular was an administrative/executive decision and not a Notification and thus could not have altered/amended the EIA Notification 1994 and is thus not hit by the rigors of the judgment in ***Sterlite (supra)***; and
- ii. That to qualify as a notification under Section 3, it must satisfy the statutory requirement of being necessary or expedient for the purpose of protecting and improving the quality of the environment, which in the present case was absent in the opinion of the Hon'ble Supreme Court.

Based on these two primary considerations, the Hon'ble Supreme Court has concluded that the Hon'ble National Green Tribunal possessed requisite jurisdiction to entertain a challenge to the validity of the 14th May 2002 circular. What is absent however, is an analysis of the provisions of the National Green Tribunal Act, 2010 to state as to which provision would enable the Hon'ble National Green Tribunal to embark on such an exercise. The Hon'ble National Green Tribunal exercises jurisdiction under Sections 14, 15 and 16 of the Act. Section 16 is the Appellate jurisdiction of the Tribunal over certain specified species of Orders; Section 15 deals with restitution of victims of environmental damage. Section 14 confers jurisdiction on the Tribunal to settle disputes where a substantial question relating to environment is involved. The Judgment in question is silent as to under which provision, the Hon'ble National Green Tribunal could entertain a challenge to the legality of the 14th May 2002 circular.

2. **Non consideration of judicial precedent while deciding the issue of Jurisdiction of the Hon'ble National Green Tribunal-**

The Hon'ble Supreme Court, while considering the jurisdiction the Hon'ble National Green Tribunal to entertain a challenge to the legality of a Circular has failed to take into consideration the Judgment of the Hon'ble Supreme Court in ***National Securities Depository Ltd. V SEBI & Ors reported in***

(2017) 5 SCC 517 wherein the Hon'ble Supreme Court was considering a similar question of whether the Hon'ble Securities Appellate Tribunal would have jurisdiction to entertain a challenge to an administrative circular issued by SEBI. The Hon'ble Supreme Court in that judgment held that the Hon'ble SAT would not have such jurisdiction.

3. Concept of *ex post facto* Environment Clearance is not alien to Environmental Law-

The Union of India had made provision for grant of *ex-post facto* Environment Clearance for Project Proponents who had commenced, continued or completed their projects without obtaining EC under the provisions of the EIA Notification, 2006. Such provision for *ex-post facto* EC was made vide Notification dated 14th March 2017, under the provisions of the Environment (Protection) Act, 1986 whereby projects or activities which were in violation of the requirement to obtain Environment Clearance, were eligible to apply for the same within 6 months from the date of the Notification i.e. upto 13th September 2017.

Subsequent to the publication of the Notification, a Public Interest Litigation challenging the same was filed in the Hon'ble Madras High Court, whereby vide order dated 7th June 2017, further action in furtherance of the Notification dated 14th March 2017 came to be stayed. By an order in ***Puducherry Environment Protection Association v. Union of India, (2017) 8 Mad LJ 513*** dated 13th October 2017, the Hon'ble Madras High Court upheld the validity of the Notification dated 14th March 2017, and vacated the order dated 7th June 2017.

As per the Notification dated 14th March 2017, all violation proposals relating to all sectors, irrespective of category, were required to be appraised by the Expert Appraisal Committee ("EAC") at the central level. By a Notification dated 8th March 2018, this aspect of the Notification dated 14th March 2017, came to be amended with the power to appraise category-B proposals being delegated to the State Government.

The Union of India had thereafter filed ***Writ Petition No. 3721 of 2018*** before the Hon'ble Madras High Court, seeking permission to extend the time for submission of proposals under the Notification dated 14th March 2017 by a period of 129 days. By an order dated 14th March 2018, extension came to be allowed for a period of 30(thirty) days from the date of delivery of the order in open court. Further, pursuant to the order dated 14th March 2018, passed by the Hon'ble Madras High Court, the MoEFCC issued an Office Memorandum dated 16th March 2018, providing for additional timeline of 30 days for submission of violation proposals.

This aspect and chain of events do not find consideration in the Judgment being analysed. The concept was introduced by a legislative action by issuing a Notification under Section 3 of the Environment (Protection) Act, 1986 and the validity of the same has been upheld. Thus, it cannot be said

that the concept of an *ex post facto* Environment Clearance is completely alien to environmental jurisprudence and as such, the Union of India does have the power under Section 3 to issue such Notification in accordance with law, as done in the case of the Notification dated 14th March 2017.

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