2022 LiveLaw (SC) 791

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
INDIRA BANERJEE; J., J.K. MAHESHWARI; J.
CIVIL APPEAL NO. 3132 OF 2018; SEPTEMBER 22, 2022
D. SWAMY *versus* **KARNATAKA STATE POLLUTION CONTROL BOARD AND ORS.**

Environment (Protection) Act, 1986 - Environmental Impact Assessment Notification 2006 - Ex post facto Environmental Clearance - EP Act does not prohibit ex post facto EC. 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 environment norms, is not impermissible - Ex post facto EC should not ordinarily be granted, and certainly not for the asking. At the same time ex post facto clearances and/or approvals cannot be declined with pedantic rigidity, regardless of the consequences of stopping the operation. *(Para 46-50)*

For Appellant(s) Mr. Anand Sanjay M. Nuli, Adv. Mr. Dharm Singh, Adv. Mr. Suraj Kaushik, Adv. Mr. Agam Sharma, Adv. Mr. Nanda Kumar, K.B., Adv. Ms. Akhila Wali, Adv. Ms. Nandiniy Pandey, Adv. For M/S. Nuli & Nuli, AOR

For Respondent(s) Ms. S.J. Amith, Adv. Mr. Purushottam Sharma Tripathi, AOR Mr. B. Purshothama Reddy, Adv. Mr. Mukesh Kumar Singh, Adv. Ms. Vani Vyas, Adv.

J U D G M E N T

Indira Banerjee, J.

This appeal, under Section 22 of the National Green Tribunal Act 2010, is against a final order dated 10th May 2017 passed by the National Green Tribunal, Southern Zone, Chennai, dismissing the Application No.169 of 2016 (SZ) filed by the Appellant under Section 18(1) read with Section 14 of the National Green Tribunal Act 2010, whereby the Appellant had prayed for a direction for closure of the Common Bio-Medical Waste Treatment Facility run by the Respondent No.3, on the ground of alleged non-compliance of the provisions of the Environmental Impact Assessment Notification 2006, hereinafter referred to as "the 2006 EIA Notification" as amended on 17th April 2015.

2. In the meanwhile, by a notification being S.O. 327 (E) dated 10th April 2001, published in the Gazette of India on 12th April 2001, the Central Government has delegated the powers vested in it under the Environment (Protection) Act, 1986 (EP Act) to the Chairpersons of the respective State Pollution Control Boards/Committees to issue directions to any industry or any local or other authority to prevent violation of the Rules.

3. On or about 25th February 2012, the Respondent No.3 applied to the Respondent No.1, Karnataka State Pollution Control Board (hereinafter referred to as "KSPCB") for consent to establish a Common Bio-Medical Waste Treatment Facility over the land bearing Survey No. 82 and 38/2 at Gujjegowdanapura village, Jayapura Hobli, Mysore Taluk and District.

4. By a letter dated 24th November 2012, the Respondent No.1 KSPCB accorded consent to the Respondent No.3 to establish the Common Bio-Medical Waste Treatment

Facility under the provisions of the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981 for collection, reception, transportation, treatment and disposal of BioMedical Waste. The said consent was valid for a period of five years.

5. It appears that M/s Shree Consultant who had been operating a Common Bio-Medical Waste Treatment Facility at Survey No.25 at Mysore and had been collecting Bio-Medical Waste from four districts could not collect Bio-Medical Waste from the district of Hassan because of the Common Bio-Medical Waste Treatment Facility established by the Respondent No.3.

6. M/s Shree Consultant filed appeals bearing Nos.48 and 49 of 2012 before the Karnataka State Environment Appellate Authority, Bangalore challenging the consent granted to the Respondent No.3 to establish the Common Bio-Medical Waste Treatment Facility. The Karnataka State Environment Appellate Authority, Bangalore granted an interim stay of the order granting consent to the Respondent No.3 to establish the Common Bio-Medical Waste Treatment Facility. Ultimately however, the appeal was dismissed by a common judgment and order dated 20th April 2013.

7. M/s Shree Consultant filed Appeal Nos. 46-47 of 2013 before the National Green Tribunal, Southern Zone, Chennai against the common judgment and order dated 20th April 2013 passed by the Karnataka State Environment Appellate Authority, Bangalore in Appeal Nos.48-49 of 2012.

8. By a judgment and order dated 28th November 2013, the Principal Bench of the National Green Tribunal at New Delhi held that Bio-Medical Waste Treatment Plants were required to obtain an Environmental Clearance (EC) from the Ministry of Environment and Forests, Government of India, hereinafter referred to as "MoEF&CC", in terms of Entry 7(d) of the Notification dated 14th September 2006. The National Green Tribunal had also directed the parties who had been running Common Bio-Medical Waste Treatment Facilities to apply to the MoEF&CC for EC.

9. On 26th February 2014, the Central Pollution Control Board issued guidelines for Common Bio-Medical Waste Treatment Facilities. On 14th July 2014, the National Green Tribunal, Southern Zone, Chennai passed a judgment and order dismissing Appeal Nos. 46-47 of 2013 filed by M/s Shree Consultant and held that the Respondent No.1 had rightly given consent to the Respondent No.3 for establishing its Common Bio-Medical Waste Treatment Facility.

10. On 4th March 2015, the Respondent No.3 applied for grant of consent to operate the Common Bio-Medical Waste Facility under the provisions of the relevant Water Pollution and Air Pollution Acts.

11. On 17th April 2015, MoEF&CC amended the Notification dated 14th September 2006, in view of the Judgment dated 28th November 2013 passed by the National Green Tribunal, Principal Bench, New Delhi in Appeal No. 63 of 2012. By the amendment Entry 7(da) was inserted after Entry 7(d) in the Schedule. Entry 7(da) provided that Common Bio-Medical Waste Treatment Facilities would be required to obtain EC from the Ministry of Environment and Forest.

12. It appears that on 13th July 2015, the villagers of the Gujjegowdanapura, Manadalli, Harohalli, Chunchunarayahundi, Kallahalli, Arinakere, Mahadevpura at Jayapura Hobli, Mysore made a representation to the Respondent No.1 seeking an order banning the establishment of Common Bio-Medical Waste Treatment Facility by the Respondent No.3.

13. Thereafter, the Respondent No.1 issued notices to the Common Bio-Medical Waste Treatment Facility of the Respondent No.3, calling upon it to submit a report of compliance of pollution norms.

14. On 1st December 2015, the State Level Environment Impact Assessment Authority, Karnataka (SEIAA) issued directions to the Respondent No.1 under Section 5 of the Environment (Protection) Act, 1986 to issue consent for operation of the Common BioMedical Waste Treatment Facility and other projects attracting the 2006 EIA Notification and the amendments thereto.

15. By its letter dated 28th December 2015, the Respondent No.1 instructed all the concerned officers of the KSPCB that application for consent to establish or operate projects attracting the 2006 EIA Notification and amendments thereto were to be received by the KSPCB only if EC was attached to the application.

16. On 19th January 2016, the Respondent No.3 resubmitted its application for consent to operate the Common Bio-Medical Waste Treatment Facility, which had earlier been returned by the Respondent No.1. On 11th February 2016, the Respondent No.1 granted the Respondent No.3 consent to operate its Common BioMedical Waste Treatment Facility at Gujjegowdanapura village, Jayapura Hobli in Mysore district. The said consent was valid for the period from 1st July 2015 to 30th June 2016.

17. The Appellant filed Appeal No.3 of 2016 before the Karnataka State Environment Appellate Authority under Section 28 of the Water (Prevention and Control of Pollution) Act, 1974 challenging the consent to the Respondent No.3 to operate the Common Bio-Medical Waste Treatment Facility. Very soon thereafter the MoEF&CC revised the Bio-Medical Waste (Management and Handling) Rules 1998 under Section 6, 8 and 25 of the EP Act.

18. The Appeal No.3 of 2016 filed by the Appellant before the Karnataka State Environment Appellate Authority, against the consent order dated 11th February 2016 passed by the Respondent No.1 came to be withdrawn by the Appellant because the said appeal had become infructuous in view of the expiration of the period of consent to operate granted to the Respondent No.3 on 30th June 2016.

19. By an order dated 17th August 2016, the National Green Tribunal, Southern Zone, Chennai directed that the application for renewal of consent to operate, pending before the Respondent No.1 might be processed in accordance with law subject to the final order passed by the Tribunal.

20. Pursuant to the aforesaid order dated 17th August 2016, the Respondent No.1 renewed the consent order to operate the Common Bio-Medical Waste Treatment Facility in favour of the Respondent No.3 which was valid for the period from 17th August 2016 to 30th June 2021.

21. In exercise of power under Section 3(1) and Section 3(2)(v) of the EP Act read with Rule 5(3)(d) of the EP Rules, the Central Government issued a Notification being S.O. 804(E) dated 14th March 2017 which provides for grant of ex post facto EC for project proponents who had commenced, continued or completed a project without obtaining EC under the EP Act/EP Rules or the Environmental Impact Notification issued thereunder. Paragraphs 3, 4 and 5 of the said notification, read as hereunder:

"(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 respectivesector 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 AppraisalCommittee 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."

22. The Notification of 2017 is a valid statutory notification issued by the Central Government in exercise of power under Sections 3(1) and 3(2)(v) of the EP Act read with Rule 5(3)(d) of the EP Rules in the same manner as the EIA Notification dated 27th January 1994 and the Notification dated 14th September 2006.

23. Section 21 of the General Clauses Act, 1897 provides that where any Central Act or Regulations confer a power to issue notifications, orders, rules or bye-laws, that power includes the power, exercisable in the like manner, and subject to like sanction and conditions, if any, to add to, amend, vary or rescind any notification, order, rule or bye-law so issued. The authority, which had the power to issue Notifications dated 27th January 1994 and 14th September 2006 undoubtedly had, and still has the power to rescind or modify or amend those notifications in like manner. As held by this Court in **Shree Sidhbali Steels Ltd. & Others v. State of Uttar Pradesh & Others**[1], power under Section 21 of the General Clauses Act to amend, vary or rescind notifications, orders, rules or bye-laws can be exercised from time to time having regard to the exigency.

[1] (2011) 3 SCC 193

24. Puducherry Environment Protection Association filed a Writ Petition being W.P. No.11189 of 2017 in the High Court of Madras assailing the said notification dated 14th March 2017. By a judgment and order dated 13th October 2017, a Division Bench of the High Court refused to interfere with the said notification, holding that the impugned notification did not compromise with the need to preserve environmental purity.

25. The MoEF&CC issued a draft Notification dated 23rd March 2020 which was duly published in the Gazette of India Extraordinary Part II. The Notification was proposed to be issued in exercise of powers conferred by subsection (1) and clause (v) of sub-section (2) of Section 3 of the EP Act for dealing with cases of violation of the notification with regard to EC. It was proposed that cases of violation would be appraised by the Appraisal Committee with a view to assess whether the project had been constructed or operated at a site which was permissible under prevailing laws and could be run sustainably on compliance of environmental norms with adequate environmental safeguards. Closure was to be recommended if the findings of the Appraisal Committee were in the negative. If the Appraisal Committee found that such unit had been running sustainably upon compliance of environmental norms with adequate environment safeguards, the unit would be prescribed appropriate Terms of Reference (TOR) after which the procedure for grant of EC would follow.

26. The appeal has been opposed by the KSPCB. On behalf of the KSPCB, it is submitted that the appeal is liable to be dismissed on the ground of delay of 62 days in filing the appeal. Reasons for the delay, it is submitted, does not make out sufficient cause for the inordinate delay. It is next contented that there is no substantial question of law of general importance involved in this appeal. The appeal is liable to be dismissed on that ground. It is also contended that the appeal suffers from suppression of facts. On behalf of KSPCB, it is contended that the 2015 amendment dated 17th April 2015 to the EIA Notification is prospective in the light of the law laid down in **Narmada Bachao Andolan v. Union of India[2].** The Respondent No.3 had applied to the KSPCB for consent to operate before the EIA Notification dated 17th April 2015, for no prior ECl was required for projects which came to existence after 14th September 2006 but before 17th April 2015.

27. On 21st December 2016, the Central Pollution Control Board, MoEF&CC, Government of India issued revised guidelines for Common Bio-Medical Wastes Treatment and Disposal Facility.

28. By final judgment and order dated 10th May 2017, which is impugned in this appeal, the National Green Tribunal has dismissed the appeal filed by the Appellant, with the observation that the Respondent No.3 could not be directed to be closed down for want of EC.

29. By an Office Memorandum, being F. No. 22-21/2020-1A III,dated 7th July 2021, the MoEF&CC issued Standard Operating Procedure (SoP) for identification and handling of violation cases under 2006 EIA Notification.

30. The said Office Memorandum, inter alia, reads:

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[2] (2000) 10 SCC 664

"The Ministry had issued a notification number S.O.804(E), dated the 14th March, 2017 detailing the process for grant of Terms of Reference and Environmental Clearance in respect of projects or activities which have started the work on site and/or expanded the production beyond the limit of Prior EC or changed the product mix without obtaining Prior EC under the EIA Notification, 2006.

2. This Notification was applicable for six months from thedate of publication i.e. 14.03.2017 to 13.09.2017 and further based on court direction from 14.03.2018 to 13.04.2018.

3. Hon'ble NGT in Original Application No.287 of 2020 in thematter of Dastak N.G.O. v Synochem Organics Pvt. Ltd. & Ors. and in applications pertaining to same subject matter in Original Application No. 298 of 2020 in Vineet Nagar v Central Ground Water Authority & Ors., vide order dated 03.06.2021 held that "(...) for past violations, the concerned authorities are free to take appropriate action in accordance with polluter pays principle, following due process".

4. Further, the Hon'ble National Green Tribunal in O.A. No.34/2020 WZ in the matter of Tanaji B. Gambhire vs. Chief Secretary, Government of Maharashtra and Ors., vide order dated 24.05.2021 has directed that".... **a proper SoP be laid down for grant of EC in such cases so as to address the gaps in binding law and practice being currently followed. The MoEF may also consider circulating such SoP to all SEIAAs in the country**".

5. Therefore, in compliance to the directions of the Hon'bleNGT a Standard Operating Procedure (SoP) for dealing with violation cases is required to be drawn. The Ministry is also seized of different categories of 'violation' cases which have been pending for want of an approved structural/procedural framework based on 'Polluter Pays Principle' and 'Principle of Proportionality'. It is undoubtedly important that action under statutory provisions is taken against the defaulters/violators and a decision on the closure of the project or activity or otherwise is taken expeditiously.

6. In the light of the above directions of the Hon'ble Tribunaland the issues involved, the matter has accordingly been examined in detail in the Ministry. A detailed SoP has accordingly been framed and is outlined herein. The SoP is also guided by the observations/decisions of the Hon'ble Courts wherein principles of proportionality and polluters pay have been outlined."

31. The SoP formulated by the said Office Memorandum dated 7th July 2021 refers to and gives effect to various judicial pronouncements including the judgment of this Court in **Alembic Pharmaceuticals Ltd. v. Rohit Prajapati & Others**[3].

32. In terms of the SoP, the proposal for grant of EC in cases of violation are to be considered on merits, with prospective effect, applying principles of proportionality and the principle that the polluter pays and is liable for costs of remedial measures.

33. A Public Interest Litigation being W.P. (MD) No. 11757 of 2021 (**Fatima v. Union of India**) was filed before the Madurai Bench of the Madras High Court challenging the said Memorandum dated 7th July 2021. By an interim order dated 15th July 2021 a Division Bench of the Madras High Court admitted the Writ Petition and stayed the said memorandum.

34. The Madurai Bench of the Madras High Court observed and held:-

"This writ petition has been filed as a public interest litigation challenging the validity of the office memorandum dated 07.07.2021, issued by the respondent.

[3] 2020 SCC OnLine SC 347

2. We have heard Mr. A. Yogeshwaran, learned counselappearing for the writ petitioner and Mr.L.Victoria Gowri, learned Assistant Solicitor General of India, accepts notice for the respondent.

3. The impugned office memorandum is challenged as beingwholly without jurisdiction, contrary to the Environment Impact Assessment Notification, 2006, ultra vires the powers of the respondent under the Environment (Protection) Act, 1986 and violative of the various principles enunciated by the Hon'ble Supreme Court, while interpreting Article 21 and Article 48-A of the Constitution of India.

4. Further, it is submitted that the impugned notification is ingross violation of the undertaking given before the Hon'ble Full Bench of this Court in W.P.No.11189 of 2017, wherein, the Court took note of the submissions made on behalf of the Government of India, that the notification impugned therein is only a one-time measure. Further, it is submitted that the respondent failed to see that concept of ex-post facto approval is alien to environment jurisprudence and it is anathema to the Environment Impact Assessment Notification, 2006.

5. Further, it is submitted that the impugned notification is ingross violation of the judgment of the Hon'ble Supreme Court in the case of Alembic Pharmaceuticals Ltd. v Rohit Prajapati, 2020 SCC Online SC 347 and the orders passed by the National Green Tribunal, Principal Bench, New Delhi, in the case of S.P.Muthuraman v Union of India & Another, 2015 SCC Online NGT 169.

6. Identical grounds were considered by us in a challenge toan office memorandum dated 19.02.2021, which provided a procedure for granting post facto clearance under Coastal Regulation Zone (CRZ) Notification 2011, on the ground that despite no such provisions in the notification and being contrary to the earlier judgments and undertaking. The said writ petition in W.P(MD).No.8866 of 2021 was admitted and by order dated 30.04.2021, the said office memorandum dated 19.02.2021 has been stayed.

7. The core issue in this writ petition is whether theGovernment of India could have issued the office memorandum and brought about the Standard Operating Procedure for dealing with violators, who failed to comply with the mandatory condition of obtaining prior environment clearance under the Environment Impact Assessment Notification 2006, read with the provisions of Environment (Protection) Act, 1986. This issue was considered by the Hon'ble Supreme Court in **Alembic Pharmaceuticals Ltd (supra)**, and it was held that such office memorandum in the nature of circular is without jurisdiction. The operative portion of the judgment reads as follows:

"...What is sought to be achieved by the administrative circular dated 14 May 2002 is contrary to the statutory notification dated 27 January 1994. The circular dated 14 May 2002 does not stipulate how the detrimental effects on the environment would be taken care of if the project proponent is granted an ex post facto EC. The EIA notification of 1994 mandates a prior environmental clearance. The circular substantially amends or alters the application of the EIA notification of 1994. The mandate of not commencing a new project or expanding or modernising an existing one unless an environmental clearance has been obtained stands diluted and is rendered ineffective by the issuance of the administrative circular dated 14 May 2002. This discussion leads us to the conclusion that the administrative circular is not a measure protected by Section 3. Hence there was no jurisdictional bar on the NGT to enquire into its legitimacy or vires. Moreover, the administrative circular is contrary to the EIA Notification 1994 which has a statutory character. The circular is unsustainable in law."

8. Despite the above decision, once again the Government ofIndia, Ministry of Environment, Forest and Climate Change have chosen to adopt the route of issuing the office memorandum and virtually setting at naught the provisions of the Environment Impact Assessment Notification and the Environment (Protection) Act.

9. Before the Hon'ble First Bench, a public interest litigationwas filed by the Puducherry Environment Protection Association, challenging the notification dated 14.03.2017, on identical grounds and the Hon'ble First Bench by judgment dated 13.10.2017, recorded the submissions of

the learned Assistant Solicitor General of India that the said notification was a one-time measure and accordingly, disposed of the writ petition.

10. Once again, the Ministry of Environment, Forest andClimate Change have issued the impugned office memorandum. Thus, from what we have noted above, we are of the clear view that the petitioner has made out a prima facie case for entertaining the writ petition. Accordingly, the writ petition is **admitted** and there shall be an order of interim stay."

35. It is true that in the case of **Puducherry Environment Protection Association v. Union of India**[4], the Division Bench of Madras High Court took note of and recorded the submission made on behalf of the Union of India that the relaxation was a one-time relaxation. In view of such submission, this Court held that a one-time relaxation was permissible.

36. It is, however, well settled that words and phrases and/or sentences in a judgment cannot be read in the manner of a statute, and that too out of context. The observation of the Division Bench that a one time relaxation was permissible, is not to be construed as a finding that relaxation cannot be made more than once. If power to amend or modify or relax a notification and/or order exists, the notification and/or order may be amended and/or modified as many times, as may be necessary. A statement made by counsel in Court would not prevent the authority concerned from making amendments and/or modifications provided such amendments and/or modifications were as per the procedure prescribed by law.

37. The Division Bench of Madras High Court fell in error in staying the said office memorandum, by relying on observations made by this Court in **Alembic Pharmaceuticals Ltd**. (supra), in the context of a circular which was contrary to the statutory Environment Impact Notification of 1994. The attention of the High Court was perhaps not drawn to the fact that the notification of 7th July 2021 was in pursuance of the statutory notification of 2017 which was valid. The judgment of this Court in **Alembic Pharmaceuticals Ltd.** (supra), was clearly distinguishable and could have no application to the office memorandum dated 7th July 2021 which was issued pursuant to the notification dated 14th March 2017.

38. In Electrosteel Steels Limited v. Union of India[5], this 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.**

83. The Central Government is well within the scope of itspowers 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. ExPost facto Environmental Clearance should not ordinarily be granted, and certainly not for the asking. **At the same time ex**

[4] 2017 SCC OnLine Mad 7056
[5] 2021 SCC OnLine SC 1247

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.

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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.

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96. The appeals are allowed. The impugned order is set aside. The **Respondent No. 1 shall take a decision on the application of the Appellant for revised EC in accordance with law, within three months from date. Pending such decision, the operation of the steel plant shall not be interfered with on the ground of want of EC, FC, CTE or CTO.**"

39. The proposition of law enunciated/re-enunciated by this Court in **Electrosteel Steels Limited (supra)** was reiterated in **Pahwa Plastics Pvt. Ltd. and Anr. v. Dastak NGO and Ors.**[6]

40. As held by this Court in **Electrosteel Steels Limited** (supra) ex post facto EC 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 a Notification under the EP Act cannot be declined with pedantic rigidity, oblivious of the consequences of stopping the operation of mines, running factories and plants.

41. The EP Act does not prohibit ex post facto Environmental Clearance. 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 our 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.

[6] 2022 SCC Online SC 362

42. In **Lafarge Umiam Mining Private Limited v. Union of India**[7], a three-Judge Bench of this Court held:-

"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 utilisation 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 decisionmaker taken into account the said principle and, on the basis of relevant considerations, arrived at a balanced decision? Thus, the Court should review the decision-making 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."

43. In **Alembic Pharmaceuticals Ltd**.(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 decision-making 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."

44. Even though this Court deprecated ex post facto clearances, in **Alembic Pharmaceuticals Ltd**. (supra), this Court did not direct closure of the units concerned but explored measures to control the damage caused by the industrial units. This Court held:-

"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."

45. The Notification being SO. 804(E) dated 14th March 2017 was not in issue in **Alembic Pharmaceuticals Ltd.** (supra). In **Alembic Pharmaceuticals Ltd.** (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. The

[7] (2011) 7 SCC 338

EIA Notification dated 27th January 1994 has, as stated above, been superseded by the Notification dated 14th September 2006.

46. There can be no doubt that the need to comply with therequirement to obtain EC is non-negotiable. A unit can be set up or allowed to expand subject to compliance of the requisite environmental norms. EC is granted on condition of the suitability of the site to set up the unit, from the environmental angle, and also existence of necessary infrastructural facilities and equipment for compliance of environmental norms. To protect future generations and to ensure sustainable development, it is imperative that pollution laws be strictly enforced. Under no circumstances can industries, which pollute, be allowed to operate unchecked and degrade the environment.

47. Ex post facto environmental clearance should ordinarily not be granted routinely, but in exceptional circumstances taking into account all relevant environmental factors. Where the adverse consequences of denial of ex post facto approval outweigh the consequences of regularization of operations by grant of ex post facto approval, and the 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. In a given case, 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.

48. It is reiterated that the EP Act does not prohibit ex post facto EC. 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 environment norms, is not impermissible. As observed by this Court in **Electrosteel Steels Limited** (supra), 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 for their survival.

49. Ex post facto EC should not ordinarily be granted, and certainly not for the asking. At the same time ex post facto clearances and/or approvals cannot be declined with pedantic rigidity, regardless of the consequences of stopping the operations.

50. In our considered view, the NGT rightly found that when the Bio-Medical Waste Treatment facility of the Appellant was being operated with the requisite consent to operate, it could not be closed on the ground of want of prior Environmental Clearance. The issues raised/involved in this appeal are squarely covered by the judgment of this Court in **Electrosteel Steels Limited** (supra) and **Pahwa Plastics Pvt. Ltd.** (supra). This Court cannot lose sight of the fact that the operation of a Bio-Medical Waste Treatment Facility is in the interest of prevention of environmental pollution. The closure of the facility only on the ground of want of prior Environmental Clearance would be against public interest. There are no grounds to interfere with the judgment and order of the NGT in appeal as rightly argued by KSPCB and the Respondent No.3. The appeal is barred by delay. In any case, the appeal does not raise any substantial question of law. The appeal is therefore dismissed.