REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3116 OF 2020

GAJUBHA JADEJA JESAR .....APPELLANT(S)

VERSUS

UNION OF INDIA & ORS. .....RESPONDENT(S)

W I T H

CIVIL APPEAL NO. 3576 OF 2020

J U D G M E N T

HEMANT GUPTA, J.

1. This order shall dispose of Civil Appeal No. 3116 of 2020 arising out of an application filed by the appellant[1] before the National Green Tribunal[2] and Civil Appeal No. 3576 of 2020 filed by the Project Proponent, both arising out of the same order passed by the Tribunal on 12.2.2020.

2. The Project Proponent applied for Consent to Establish (CTE) Cold Rolled Coils of stainless steel on 20.1.2018, the permission of which was granted by Gujarat State Pollution Control Board. After the unit was erected, Project Proponent was granted permission to operate the unit on 6.2.2020. It is noted that the Project Proponent has

1 For short, the 'Applicant'
2 For short, the 'Tribunal'

invested Rs.1100 crores for the development of infrastructure and had a turnover of approximately Rs.743 crores and paid Rs.286.17 crores as Goods and Services Tax till the Financial Year 2020-21. The applicant also earned US Dollars 15.52 million foreign exchange for the country.

3. An application was filed before the Tribunal on 20.7.2019 on the ground that the Project Proponent has set up the unit in violation of Environment Impact Assessment (EIA) notification dated 14.9.2006, as such plant would fall within category 3(a) i.e., secondary metallurgical industry for which a prior environmental clearance is required. The relevant extract from the EIA notification reads thus:

3(a)	Metallurgical industries (ferrous & non ferrous)	a) Primary metallurgical industry All projects b) Sponge iron manufacturing ≥200 TPD c) Secondary metallurgical processing industry All toxic and heavy metal producing units ≥ 20,000 tonnes/annum -	Sponge iron manufacturing <200 TPD Secondary metallurgical processing industry i) All toxic and heavy metal producing units <20,000 tonnes/annum ii) All other non-toxic secondary metallurgical processing industries >5000 tonnes/annum	General Condition shall apply for Sponge iron manufacturing Note: (i) The recycling industrial units covered under HSM Rules are exempted. (ii) In case of secondary metallurgical processing industrial units only those projects involving operation of furnaces such as induction and electric are furnace, submerged are furnace, cupola and crucible furnace with capacity more than 30,000 tonnes per annum (TPA) would

				require environmental clearance (iii) Plant/units other than power plants (given against entry no. 1 (d) of the schedule), based on municipal solid waste (non hazardous) are exempted).

4. The Tribunal set up a Joint Committee on 28.7.2019. The Committee concluded that the applicability of the notification would be determined by the Ministry of Environment, Forest and Climate Change[3]. The Ministry filed an affidavit on 21.11.2019, on the basis of which the Tribunal took a prima facie view that the industry requires an environmental clearance and thus stayed all activities of the project as the Ministry sought time to file an additional response. Later, an affidavit was filed by the Ministry that a Group of Experts had been appointed on the issue. After the said report, the Project Proponent filed an application for modification of the order passed by the Tribunal on 21.11.2019 and the stay was thereafter vacated on 16.1.2020.

5. The Expert Appraisal Committee[4] in its meeting held on 23-24.12.2019 concluded that grace period of one year could be granted where the industry has been established after CTE/CTO. The Ministry filed an affidavit accepting the recommendation No. 3(iii) of the EAC recommending one year grace period for the industry. The

3 For short, the 'Ministry'
4 For short, the 'EAC'

relevant part of the recommendation is reproduced as under:

> "i. Project activity of CSPL falls under Category B of Schedule 3(a) Metallurgical Industries (ferrous and non-ferrous) of EIA Notification, 2006.
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> ii. The committee also noted that there are a few issues which may have diverse interpretations. The reports submitted by the Committee formed by the Hon'ble NGT and the joint inspection report by the Regional office of Bhopal and RO of GPCB for Kutch have also left the final interpretation to the MoEF&CC. It is also noted that the present unit has obtained CTE from GPCB which is a Statutory authority. There may be other similarly placed cases in the country. This shows that there is a scope and need for further clarification in the matter regarding certain issues so that there is no subjective interpretation in future. These issues are (1) definition of secondary metallurgy units for the purpose of EIA process, (2) clarification about the types of furnaces under applicability of MoEF&CC notification 2006 and (3) clarifying re rolling vs. cold rolling in the context of Environment Clearance. Therefore, for further smoothening the EC process for present unit and proposals in future, the MoEF&CC may consider issuing further clarifications.
>
> iii. In order to address to instant and similar cases where such re rolling/cold rolling units are established or operating with a CTE/CTO from the concerned State Pollution Control Boards, the Ministry may consider directing the State Pollution Control Boards to get a list of all such cases and take further quick actions so that they apply for EC and get covered by the EIA notification 2006. Since, these units are established or operating under the CTEs/CTOs obtained from a statutory authority i.e. the respective Stale Pollution Control Boards, a period of one year may be allowed for this recommended conversion to EC. This will also ensure that the units remain in operation for the allowed period and closures, unemployment and related social issues/unrests are avoided. During this period of one year, they will have to follow all the conditions imposed under the CTE/CTO."

6. It is on the basis of the said recommendation that the Tribunal passed the order dated 12.2.2020 that in view of the large number of such mills operating on the strength of CTE/CTO, opportunity

should be provided to such units to fall within EC regime by granting a period of at least one year to operate for the purpose.

7. The applicant challenged the time granted by the Tribunal on the ground that the Tribunal has no jurisdiction to grant period for obtaining Environmental Clearance as the EIA notification mandates a prior Environmental Clearance. Since such consent was not obtained before the setting up of the industry, the time limit of one year is against the mandate of the statute. It was further argued that under Section 21 of the National Green Tribunal Act, 2010[5], the Tribunal has the jurisdiction to set aside the Environmental Clearance but has no jurisdiction for the grant of time for Environmental Clearance.

8. The Project Proponent, aggrieved against the order passed by the Tribunal, challenged the findings recorded that Environmental Clearance is required. During the pendency of the appeal before this Court, the Project Proponent was served with a closure notice on 25.6.2021 by the Gujarat State Pollution Control Board and the unit was closed in terms of the said notice. This closure notice has been assailed by way of I.A. No. 81563 of 2021.

9. While the appeals were pending before this Court, the Government of India has published a notification on 20.7.2022 in terms of Section 3 of the Environment (Protection) Act, 1986[6] to apply Terms of Reference within one year followed by Environmental Clearance. The notification reads thus:

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5 For short, the 'NGT Act'

6 For short, the 'Environment Act'

“MINISTRY OF ENVIRONMENT, FOREST AND CLIMATE CHANGE

NOTIFICATION

New Delhi, the 20th July, 2022

S.O. 3250(E).—Whereas, the Hon’ble National Green Tribunal vide its order, dated the 12th February, 2020, in Original Application No. 55/2019 (WZ), (Gajubha Jesar Jadeja vs Union of India &Ors.), has inter alia observed that Cold Rolled Stainless Steel Manufacturing Industries require prior environment clearance but, having regard to the fact that there were a large number of such mills operating on the strength of Consent to Establish (CTE) and Consent to Operate (CTO), the Hon’ble Tribunal has held that opportunity should be provided to such units to fall within the Environment Clearance regime by granting a period of at least one year to operate for the purpose;

And whereas, the Central Government, keeping in view the impact caused due to the Covid19 pandemic has taken a considered decision in line with the above said order of the Hon’ble National Green Tribunal, so as to provide a window period for such re-rolling or cold rolling units to obtain prior Environmental Clearance;

And whereas, the Central Government is of the view that steel re-rolling operations fall under the purview of the secondary metallurgical processing industry and require Environment Clearance as per item 3(a), relating to Metallurgical Industries (Ferrous and Non-ferrous), of the Schedule to the notification of the Government of India in the erstwhile Ministry of Environment and Forest, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (ii), vide notification number S.O. 1533 (E), dated the 14th September, 2006, mandating the requirement of prior environmental clearance for the projects covered in its Schedule (hereinafter referred to as the said notification), wherein all non–toxic secondary metallurgical processing units with capacities greater than 5000 tonnes/annum (TPA) fall under category B;

Now, therefore, in exercise of the powers conferred by section 3 of the Environment (Protection) Act, 1986 (29 of 1986), the Central Government hereby directs that all the standalone re-rolling units or cold rolling units, which are in existence and in operation as on the date of this notification, with valid Consent to Establish (CTE) and Consent to Operate (CTO) from the concerned State Pollution Control Board or the

Union territory Pollution Control Committee, as the case may be, shall apply online for grant of Terms of Reference (ToR) followed by Environment Clearance and the said units shall be granted Standard Terms of Reference as per item 3(a) of the said notification and shall be exempted from the requirement of public consultation:

Provided that the application for the grant of ToR shall be made within a period of one year from the date of this notification.

2. This notification shall come in to force from the date of its publication in the Official Gazette.

[F. No. IA-J-11013/8/2019-IA.II(I)]
Dr. SUJIT KUMAR BAJPAYEE, Jt. Secy"

10. With this background, the parties have addressed arguments on the question of jurisdiction of the Tribunal to pass an order to operate a unit without Environmental Clearance and the decision of closure of the unit.

11. It may be stated that there are 1689 similar Re-Rolling/Cold Re-Rolling Steel Plants in the country out of which 403 plants are in the State of Gujarat itself. All the units have been set up without obtaining prior Environmental Clearance as there was an ambiguity whether such Rolling Steel Mills are required to obtain prior Environmental Clearance.

12. Ms. Anitha Shenoy, learned senior counsel for the applicant relies upon judgments of this Court reported as ***Common Cause*** v. ***Union of India & Ors.***[7], ***Hanuman Laxman Aroskar*** v. ***Union of India***[8] and ***Alembic Pharmaceuticals Limited*** v. ***Rohit Prajapati &***

7 (2017) 9 SCC 499
8 (2019) 15 SCC 401

Ors.[9] to contend that prior Environmental Clearance is mandatory. Since the unit has been set up in violation of the notification, the Tribunal could not permit the unit to operate.

13. On the other hand, Mr. Shyam Divan, learned senior counsel for the Project Proponent submitted that in terms of Section 21 of the NGT Act, the Tribunal is competent to pass an order towards sustainable development. It is contended that the order of the Tribunal granting time of at least one year is based upon report of the recommendation of the EAC. The EAC recommended that Re-Rolling Units are established or operating with CTE/CTO from the concerned State Pollution Control Boards, therefore, a period of one year may be allowed for this recommended conversion to Environment Clearance regime.

14. Mr. Divan also referred to an affidavit filed on behalf of the Ministry referring to the report submitted by a high-level Expert Committee under the Chairmanship of Dr. Indranil Chattoraj, Director, National Metallurgical Laboratory, Jamshedpur. The Committee noted that there is ambiguity in the EIA notification with respect to applicability of Environmental Clearance for non-toxic secondary metallurgical processing industry. Therefore, in order to bring out clarity, the Ministry may amend schedule 3(a) of the EIA notification. The relevant assertion from the affidavit reads thus:

> "7. That the committee after conducting a series of meetings submitted its report on 17/01/2022. The committee, inter-alia, has recommended that

9 (2020) 17 SCC 157

> i. “That there is an ambiguity in the EIA notification, 2006 with respect to the applicability of EC for non-toxic secondary metallurgical processing industry.
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> ii. Steel re-rolling mills [Hot rolling (or) Cold rolling] are one of the processes in the secondary metallurgical processes and attracts the provisions of the Environment Impact Assessment (EIA) Notification, 2006.
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> iii. There are around 1689 standalone steel re-rolling mills operating across the country without requisite Environment Clearance and such unit may be brought under EC regime by providing an adequate time frame.
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> iv. Revised threshold limits for primary and secondary metallurgical industry prescribed under chapter 6 may be considered by the Ministry for amending the schedule 3(a) of EIA Notification, 2006 in order to bring out clarity on the applicability of EC for difference secondary processes in metallurgical industry.
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> That a copy of the report of the HLEC has been annexed as ANNEXURE R/2.
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> 8. That it is humbly submitted that Ministry is in the process of bringing out suitable amendment in the EIA Notification 2006 in line with the recommendations made by the Committee, in order to remove the ambiguity with respect to the applicability of EC for non-toxic secondary metallurgical processing industry.”

15. It is in pursuance of such report, the amendment was published on 20.7.2022.

16. Mr. Divan further relies upon an order passed by this Court in ***Municipal Corporation of Greater Mumbai*** v. ***Ankita Sinha & Ors.***[10] wherein the question as to whether the Tribunal has *suo moto* jurisdiction to entertain proceedings under the NGT Act were examined. The scope of jurisdiction of the Tribunal was also considered.

10 2021 SCC OnLine SC 897

17. Mr. Divan also refers to an order passed by this Court reported as ***Pahwa Plastics Pvt. Ltd. & Anr.*** v. ***Dastak NGO & Ors.***[11] wherein the order passed by the Tribunal, holding that the manufacturing units which do not have prior Environmental Clearance could not be allowed to operate, was set aside.

18. We have heard learned counsel for the parties and find no error in the order passed by the Tribunal. The order of the Tribunal is based upon recommendation of the EAC which suggested that one year time should be granted to the industry to comply with the EIA notification dated 14.9.2006. The stand of the Ministry as well as the Project Proponent is that there was ambiguity in the EIA notification 2006. 1689 units have come up in the country on the basis of CTE and CTO regime. It is not a case of ambiguous interpretation in respect of one or two units but the entire country was having the same interpretation that Re-Rolling Steel Plants do not require a prior Environmental Clearance. The ambiguity has been removed only on 20.7.2022 when the notification has been amended, as reproduced above. Since there was ambiguity earlier, the Tribunal had granted time to the Project Proponent to comply with the requirement of Environmental Clearance.

19. Such direction of the Tribunal is, in fact, arising out of scope of powers conferred on the Tribunal under Section 21 of the NGT Act. This Court in ***Ankita Sinha*** considering the *suo moto* powers of the Tribunal held as under:

> "98. The NGT Act, when read as a whole, gives much leeway

11 2022 SCC OnLine SC 362

to the NGT to go beyond a mere adjudicatory role. The Parliament's intention is clearly discernible to create a multifunctional body, with the capacity to provide redressal for environmental exigencies. Accordingly, the principles of environmental justice and environmental equity must be explicitly acknowledged as pivotal threads of the NGT's fabric. The NGT must be seen as a *sui generis* institution and not *unus multorum*, and its special and exclusive role to foster public interest in the area of environmental domain delineated in the enactment of 2010 must necessarily receive legal recognition of this Court.

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102. In circumstances where adverse environmental impact may be egregious, but the community affected is unable to effectively get the machinery into action, a forum created specifically to address such concerns should surely be expected to move with expediency, and of its own accord. The potentiality of disproportionate harm imposes a higher obligation on authorities to preserve rights which may be waylaid due to such restrictive access. It is also noteworthy that the "*global impacts of climate change will fall disproportionately on minority and low-income communities*".[12] Thus, an affirmative role, beyond mere adjudication at the instance of applicant, is certainly required for *serving the ends of environmental justice*, as the statute itself requires of the NGT. We cannot validate an argument which furthers uncertainty to justify the role of a spectator, if not inaction, and would most assuredly result in injustice.

103. The NGT, with the distinct role envisaged for it, can hardly afford to remain a mute spectator when no-one knocks on its door. The forum itself has correctly identified the need for collective stratagem for addressing environmental concerns. Such a society centric approach must be allowed to work within the established safety valves of the principles of natural justice and appeal to the Supreme Court. The hands-off mode for the NGT, when faced with exigencies requiring immediate and effective response, would debilitate the forum from discharging its responsibility and this must be ruled out in the interest of justice."

20. In ***Pahwa Plastics Pvt. Ltd.***, an establishment had been set up

12 Scott La Franchi, Surveying the Precautionary Principle's Ongoing Global Development : *The Evolution of an Emergent Environmental Management Tool*, [32 B.C. Envtl. Aff. L. Rev. 679 (2005)

pursuant to CTE and CTO from the concerned statutory authority. The establishment applied for ex-post facto Environmental Clearance. In these circumstances, this Court held that ex-post Environmental Clearance should not ordinarily be granted but it cannot be declined with pedantic rigidity, regardless of the consequences of stopping the operation. Hence, the order of the Tribunal to close the units was found to be erroneous. The order of closure of establishments for the lack of Environmental Clearance was set aside by this Court, *inter alia*, for the reason that whether the unit contributing to the economy and providing livelihood to hundreds of people set up in pursuance to requisite approvals of the concerned statutory authorities should be closed down for the technical irregularity or want of prior Environmental Clearance. This Court held as under:

> "54. The manufacturing units of the Appellants appoint about 8,000 employees and have a huge annual turnover. An establishment contributing to the economy of the country and providing livelihood ought not to be closed down only on the ground of the technical irregularity of not obtaining prior Environmental Clearance irrespective of whether or not the unit actually causes pollution.
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> 56. As held by this Court in *Electrosteel Steels Limited* (supra) *ex post facto* Environmental Clearance should not ordinarily be granted, and certainly not for the asking. At the same time *ex post facto* clearances and/or approvals and/or removal of technical irregularities in terms of 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.
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> 57. The 1986 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.

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60. 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."*

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63. *Ex post facto* environmental clearance should 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. 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.

64. The question in this case is, whether a unit contributing to the economy of the country and providing livelihood to hundreds of people, which has been set up pursuant to requisite approvals from the concerned statutory authorities, and has applied for *ex post facto* EC, should be closed down for the technical irregularity of want of prior environmental clearance, pending the issuance of EC, even though it may

> not cause pollution and/or may be found to comply with the required norms. The answer to the aforesaid question has to be in the negative, more so when the HSPCB was itself under the misconception that no environment clearance was required for the units in question. HSPCB has in its counter affidavit before the NGT clearly stated that a decision was taken to regularize units such as the Apcolite Yamuna Nagar and Pahwa Yamuna Nagar Units, since requisite approvals had been granted to those units, by the concerned authorities on the misconception that no EC was required.
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> 66. *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. This Court is of the view that the NGT erred in law in directing that the units cannot be allowed to function till compliance of the statutory mandate."

21. The judgment in ***Common Cause*** referred to by Ms. Shenoy is of no help to support her arguments as the question was whether illegal mining can be said to be within the leased area for mining. It was held that illegal mining takes within its fold excess extraction of a mineral over the permissible limit even within the mining lease area under the Mines and Minerals (Development and Regulation) Act, 1957.

22. In ***Hanuman Laxman Aroskar***, this Court held that the EIA notification of the year 2006 demonstrates an increasing awareness of the complexities of the environment and the heightened scrutiny required to ensure its continued sustenance, for today and for generations to come. It embodies a commitment to sustainable development. It was held as under:

> "56. The 2006 Notification embodies the notion that the development agenda of the nation must be carried out in compliance with norms stipulated for the protection of the environment and its complexities. It serves as a balance between development and protection of the environment: there is no trade-off between the two. The protection of the environment is an essential facet of development. It cannot be reduced to a technical formula. The notification demonstrates an increasing awareness of the complexities of the environment and the heightened scrutiny required to ensure its continued sustenance, for today and for generations to come. It embodies a commitment to sustainable development. In laying down a detailed procedure for the grant of an EC, the 2006 Notification attempts to bridge the perceived gap between the environment and development."

23. In ***Alembic Pharmaceuticals Limited***, the validity of circular dated 14.5.2002 was in question. This Court found that such circular is contrary to the EIA notification of 1994. It was decided by the Ministry that the industrial units which had gone into production without obtaining an EC would have to apply for and obtain an ex-post facto EC. The said judgment has no applicability to the facts of the present case where the Ministry itself is of the opinion that there was an ambiguity in the EIA notification of 2006. Such ambiguity has been removed only when the EIA notification was subsequently amended on 20.7.2022. Therefore, the judgments referred to by Ms. Shenoy are not applicable to the facts of the present case.

24. We are constrained to point out that out of 1689 units in the country, the applicant has chosen the Project Proponent as it appears to be a motivated petition to target the Project Proponent though the Cold Steel Rolling Mills in the country were operating under the same regime. Not only the Project Proponent, but the

country also has suffered immensely on account of closure of the unit which was export oriented unit. It may be noticed that the Gujarat State Pollution Control Board has chosen the Project Proponent to serve with a closure notice on 25.6.2021. The unit is lying closed since then. In view of the amendment in the EIA notification dated 20.7.2022, the unit has time to seek Environmental Clearance in terms of the time line mentioned in the notification. Therefore, the order of closure of the unit cannot be sustained.

25. In view of the said fact, Civil Appeal No. 3116 of 2020 is dismissed. I.A. No. 81563 of 2021 in Civil Appeal No. 3576 of 2020 challenging the closure notice issued by Gujarat State Pollution Control Board dated 25.6.2021 is allowed and the closure notice is quashed. The Civil Appeal No. 3576 of 2020 stands disposed of in the above terms.

.....J.
(HEMANT GUPTA)

.....J.
(VIKRAM NATH)

NEW DELHI;
AUGUST 10, 2022.