

**A.F.R.**

**HIGH COURT OF ORISSA: CUTTACK**

**W.P.(C) No.19605 of 2010**

In the matter of an application under Articles 226 and 227 of the Constitution of India.

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M/s. Vedanta Aluminium Limited,  
represented by Dr. Mukesh Kumar,  
President & Chief Operating Officer,  
aged about 52 years, S/o. Babu Lal Jaiswal,  
At/P.O. Lanjigarh,  
Dist: Kalahandi

... Petitioner

-Versus-

Union of India and another

... Opp.Parties

For Petitioner : Mr. Sundaram, Sr. Advocate  
M/s. M.K. Mishra, P.K.Das,  
S. Senapati & T. Mishra

For Opp.Parties : Mr. S.D. Das  
Asst. Solicitor General

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P R E S E N T:

**THE HONOURABLE THE CHIEF JUSTICE SHRI.V.GOPALA GOWDA  
AND**

**THE HONOURABLE SHRI JUSTICE B.N.MAHAPATRA**

Date of Judgement: 19 .07.2011

**B.N. Mahapatra, J.** This writ petition has been filed praying for the following reliefs:

- (a) issue a writ of certiorari quashing the impugned order/directions issued on 20.10.2010 pursuant to the show cause notice dated 31.08.2010;
- (b) issue a writ of mandamus directing the opp. party to reinstate the Terms of Reference issued to the petitioner;

- (c) issue a declaration that the public hearing proceedings are good and valid and have full force in respect of the proposed expansion project,
- (d) issue a writ in the nature of mandamus permitting the construction in relation to the expansion project to continue,
- (e) issue a writ of prohibition restraining the opposite parties as also their related Departments from initiating legal action under the provisions of the Environment (Protection) Act, 1986 for the alleged violation of the EIA Notification, 2006;
- (e-i) In the alternative issue a writ of mandamus directing the opposite party No.1 to consider the case of the petitioner (as highlighted in its application of 22.11.2010 and reminders dated 07.12.2010 and 21.12.2010), in accordance with and in terms of the Office Memorandum dated 16.11.2010 issued by opposite party No.1.
- (f) pass any such further or other order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

2. The petitioner's case in a nutshell is that it is a registered company under the Companies Act, 1956, having its registered office at SIPCOT Industrial Complex, Madurai Bypass Road, T.V. Puram, P.O. Tuticorin-628 002, Tamil Nadu and site office at Via-Viswanathpur, P.O. Lanjigarh,-766027, Dist: Kalahandi, Orissa. On 27.01.1994, the Ministry of Environment and Forests issued the Environment Impact Assessment (for short, "EIA") Notification, 1994 under Section 3 of the Environment (Protection) Act, 1986 read with Rule 5 of the Environment (Protection)

Rules, 1986. On 17.08.2002, Sterlite Industries (I) Ltd. (for short, "Sterlite"), the petitioner's predecessor - in - interest submitted its application for the establishment of the IMTPA Alumina Refinery and 75 MW Captive Power Plant" at Lanjigarh, Kalahandi, Orissa to the Orissa State Prevention and Control of Pollution Board under Section 25 of Water (Prevention and Control) Act, 1974 and under Section 21 of Air (Prevention and Control) Act, 1981. On 19.03.2003, Sterlite also submitted an application to opposite party No.1-Union of India, represented through its Secretary, Ministry of Environment and Forests seeking environmental clearance for the said project. On 07.06.2003, Sterlite entered into a Memorandum of Understanding (for short, "MOU") with the Government of Orissa for setting up of the IMTPA Alumina Refinery and 3MTPA of Bauxite mining facilities as well as for the installation of a 4 x 25 MW captive power plant, at an aggregate investment of Rs.4000 crores. On 22.09.2004, opposite party No.1-Union of India granted its approval for setting up of the said project subject to the conditions stipulated in the said letter. On 14.09.2006, opposite party No.1 issued the EIA Notification, 2006 which was in supercession of the earlier Notification of 1994.

3. On 03.10.2007 the petitioner submitted its application to opposite party No.1 for expansion of the project from 1 to 6 MTPA of Alumina and power generation from 75 MW to 300 MW. On 11.02.2008 the opposite party No.1 vide its letter No.F. No.11011/1103/2007-IA II (I) sought certain clarifications from the petitioner in respect of the application for expansion. On 16.02.2008, the petitioner filed the details. On

20.02.2008, the petitioner gave a representation to the Members of the Expert Appraisal Committee (Industry) at the 78<sup>th</sup> meeting at New Delhi in respect of the Terms of Reference (for short, "TOR") for clearance. The proposal pertained to the expansion of the Alumina Refinery from 1MTPA to 6 MTPA. On 12.03.2008, opposite party No.1 issued TOR for preparation of the Environment Impact Assessment Report (for short, "EIAR") as also the Environment Management Plan Report by the petitioner. On 28.03.2008, the Board of Directors passed a resolution in-principle for approval of the expansion projects. On 03.11.2008, opposite party No.2 accorded consent to the petitioner to operate, which was valid up to 31.03.2009. With an objective of taking stock of the situation, opposite party No.2 carried out an inspection of the Project and its premises between 03-05.12.2008, subsequent to which a report was submitted. The report recorded the preventive and remedial measures undertaken by the petitioner and recommended certain other steps to be taken to mitigate the issue of pollution. The report also noted that construction for the expansion of the existing project had commenced. On 13.11.2008, the petitioner addressed a letter to the Managing Director, Industrial Promotion and Investment Corporation of Orissa Limited (for short, "IPICOL") seeking approval and clearance of the expansion project under the single window policy of the Government of Orissa in respect of foreign investment required for the said expansion. On 17.12.2008, the petitioner addressed another letter to the Managing Director, IPICOL furnishing further details as sought for by IPICOL (vide its letter dated 08.12.2008) and seeking clearance of the

expansion project. On 12.01.2009, opposite party no.2 had issued a notice under Section 33A of the Water (Prevention and Control of Pollution) Act, 1974 (for short, "Act 1974") and Section 31A of the Air (Prevention and Control of Pollution) Act, 1981 (for short, "Act 1981") *inter alia*, directing stoppage of construction work with regard to the expansion project. On 29.01.2009, the petitioner filed its reply in response to notice dated 12.01.2009 issued by opposite party No.2 with a status report.

4. On 21.03.2009, opposite party No.1 issued an advertisement in two local newspapers about the public hearing to be held on 25.04.2009 in compliance with the EIA Notification, 2006 for grant of environmental clearance for the expansion of the said project. On 30/31.03.2009, opposite party no.2 conducted an inspection of the petitioner's project and recorded the petitioner's consent to operate conditions prescribed by opposite party No.2 and the petitioner's compliance in respect of the same. This pertains to the existing projects. On 12.05.2009, the Member Secretary of opposite party No.2 forwarded to the Secretary of opposite party No.1, a copy of the proceeding of the public hearing conducted on 25.04.2009 in respect of the proposed expansion. According to the petitioner, the said proceedings certified that the overall opinion of the public was favourable towards the expansion project.

5. In May, 2009, subsequent to the public hearing and the approval received at such hearing, the petitioner commenced construction activities of the proposed expansion project. On 17.08.2009, the petitioner submitted final EIA report to opposite party No.1. On 22.06.2009, the same

was placed before the EAC at its meeting. At the said meeting the Committee sought additional information and also decided that a sub-committee comprising members from the EAC shall visit the plant site in order to assess the pollution control measures being adopted in the existing Alumina Refinery to be augmented and suggest additional pollution control measures for the proposed expansion project. On 31.08.2009, the minutes of the meeting of the Expert Appraisal Committee held during 17-18.08.2009 were approved by the Chairman of the Committee.

6. On 01.09.2009, opposite party No.1 sought certain additional information from the petitioner in the report of the proposed expansion project. On 09.10.2009, opposite party No.1 sent another reminder letter to the petitioner seeking required information. On 13.10.2009, the petitioner responded to the above letters of opposite party No.1 and furnished all the information sought, *inter alia*, clarifying that the show cause notices issued by opposite party No.2 had since been complied with and opposite party No.2 issued the consent to operate which was valid up to 31.03.2011.

7. On 31.12.2009, opposite party No.2 wrote to opposite party No.1 upon certain issues raised by an NGO on the proposed expansion. On 29.01.2010, the petitioner wrote to opposite party No.1 stating its readiness to receive the Sub-Committee of the EAC at the project site. On 16.02.2010, opposite party No.2 conveyed its consent to establish under Section 25 of the Act, 1974 and Section 21 of the Act, 1981 and Rules framed thereunder.

8. On 16-17.05.2010, the Eastern Regional Officer of the opposite party No.1 inspected the plant site and reported that the petitioner had carried out substantial construction relating to the expansion for which environmental clearance was yet to be accorded by the Ministry. Out of the 14 mines from which Bauxite was to be sourced, only one mine, namely KJST Iron Manganese and Bauxite Mines of M/s. S.N. Mohanty had obtained the environmental clearance, vide the Ministry's letter dated 28.01.2008.

9. On 09.07.2010, the Sub-Committee of the EAC visited the petitioner's site of the proposed expansion project. On 16.08.2010, the Saxena Committee submitted its report and highlighted the factum of construction undertaken by the petitioner without obtaining the environment clearance as per the EIA Notification, 2006. On 19.08.2010, opposite party No.2 issued a circular bearing No.J-11013/41/2006-I.A.II(I) as a clarification with respect to the activities that could be undertaken without prior environmental clearance.

10. On 31.08.2010, opposite party No.1 issued a show cause notice to the petitioner placing reliance on paragraphs 1 and 2 of the EIA Notification, 2006 as to why the Term of Reference issued for the expansion should not be withdrawn. On 15.09.2010, the petitioner replied to the above show cause notice. On 21.09.2010, opposite party No.1 informed the petitioner about the personal hearing fixed for 30.09.2010 and also sought further information from the petitioner. On 30.09.2010, the petitioner submitted additional information on the list of queries mentioned by opp.

party No.1 in its earlier letter dated 21.09.2010. On 03.09.2010, a meeting was held between the petitioner and opposite party No.1, the details of which were recorded in the form of minutes. On 04.10.2010, pursuant to the meeting held on 30.09.2010, the petitioner submitted further information with respect to the queries raised at the meeting. On 20.10.2010, opposite party No.1 issued directions to the petitioner whereby the TOR were withdrawn and the petitioner was directed to maintain status quo and to undertake no further construction. On 28.10.2010, the petitioner replied to the above directions issued by opposite party No.1 but there has been no response to the same from the Government. Hence, the present writ petition.

11. Mr. Sundaram, learned Senior Advocate appearing for the petitioner submits that the show cause notice and impugned direction have been passed by opposite party No.1 without any application of mind and without consideration of submissions made by the petitioner and on reliance of irrelevant materials. As the expansion project involves no change in the process or technology or the product mix, but is merely in respect of enhancement of capacity, the provisions of paragraph 1 and 7(ii) of the EIA Notification, 2006 have no application. The existing process of low temperature and low pressure digestion and Bayer's process technology would continue to be utilized in the proposed expanded project and there would be no change in respect of either the process or the technology or product mix. As the petitioner's industry falls under Item 3(a) of the Schedule of the EIA Notification, 2006, which deals with "Metallurgical



Industries (ferrous and nonferrous), for which no threshold limits have been prescribed and therefore, paragraph-2 of the EIA Notification, 2006 has no application. The environmental clearance was essential at the stage of setting up and establishing the existing refinery, in respect of which, clearance have been obtained from the authorities concerned. It is only in response to an Office Memorandum issued by opposite party No.1 on 16.11.2010, stipulating a procedure for grant of Environmental clearance for the alleged violations of the EIA Notification, 2006, the petitioner without prejudice to its rights and contentions and its belief that it is not in fact in violation of any of the environmental norms, applied under the said Office Memorandum to the opposite party on 22.11.2010. Non-consideration of the said application by the opposite parties caused irreparable and irremediable hardship and loss to the petitioner.

12. Opposite party No.1 in its direction dated October, 20, 2010 did not allege any irregularity either in the EIA report submitted by the petitioner or in the public hearing conducted by the petitioner and as such the withdrawal of the TOR and the cancellation of the public hearing by opposite party No.1 was illegal and arbitrary. The petitioner in the instant case has merely commenced construction activities and it is submitted that "expansion" as contemplated in the EIA Notification, 2006, would and could only be when the petitioner commences operations from the proposed expanded unit, i.e., when the factory is operationalized. The impugned directions violates the petitioner's fundamental rights under Article 19(1)(g) of the Constitution.

13. In carrying out the activities for preparation of the expansion of the project there has been no violation of any of the pollution norms. The petitioner has obtained all the necessary clearances and permissions essential for the proposed expansion. The site preparation work has started in May, 2009, after the public hearing proceedings were concluded in respect of the proposed expansion. The estimated capital expenditure for the project is around Rs.10,000/- crores, of which a sum of Rs.5,000/- crores has already been committed till date and the ordering of the plant and machinery is nearing completion. The proposed expansion currently generates employment for around 10,000 families directly and around 15,000 families indirectly in an area like Lanjigarh. The Hon'ble Supreme Court in IA Nos.1324 & 1474 in W.P.(C) No. 202 of 1995 and IA Nos.2081-2082 in W.P.(C) No.549 of 2007 on the Bauxite Mining Project for the Alumina refinery, Lanjigarh, has specifically noted that "we have a picture of abject poverty in which the local people are living in Lanjigarh Tehsil including the tribal people. There is no proper housing, hospitals, schools and people are living in extremely poor conditions which is not in dispute. Opposite party No.1 has committed grave injustice to the petitioner in withdrawing the TOR at the proposed site. The basic objective of the Environment Protection Act, 1986 is to ensure that adequate safeguard had been placed to prevent environment pollution and degradation of the environment through a process of sustainable development.

14. The petitioner's existing Alumina Refinery has adopted state of the Art Technologies in all its areas of operation and became the first

Alumina Refinery in the country and among the few in the world to successfully implement the Zero Discharge System. The petitioner has always complied with the conditions, guidelines or instructions issued from time to time by the regulatory bodies like opposite parties herein as also other Central and State Authorities. No compromise is made in design procurement and operation in achieving the <sup>basic</sup> basis objective of the Environment Protection Act, 1986. The construction activities were not in violation of the EIA Notification, 2006 or there has been no violation of any of the pollution parameters. The petitioner has all along submitted six monthly reports of the surrounding environmental conditions to opposite party No.2 in respect of the existing project. These reports would go to substantiate the stand of the petitioner that there has been no violation of any of the pollution parameters at the existing refinery or as a result of the construction activities undertaken with respect to the proposed expansion. By issuing the impugned show cause notice and subsequent directions, opposite parties committed a grave error and injustice in depriving the petitioner of its legitimate expectation of setting up the proposed expansion plan in respect of which all the necessary approvals and sanctions have been accorded. Opposite parties are barred by the doctrine of promissory estoppel in respect of the impugned actions, inasmuch as based on the approvals granted by the authorities concerned as also the mute silence in respect of the construction activities despite being aware of the same.

15. Basing on the TOR issued to the petitioner, the petitioner has undertaken large scale actions in order to ensure compliance with the

same. The objections and submissions made by the petitioner in respect of the allegations made in the show cause notice were not taken into consideration by opposite party No.1 while passing the impugned directions dated 20.10.2010. The show cause notice issued on 31.08.2010 was defective since it was ambiguous and not clear with regard to the area of violation by the petitioner as per paragraphs 1 and 2 of the EIA Notification, 2006. The petitioner being an environmentally conscious company, uses caustic soda manufactured by Membrane Technology. The petitioner is actively working on the "Zero Waste Concept" and has already commenced manufacturing red mud, bricks by developing a process in collaboration with the Institute of Minerals and Metals Technology, Bhubaneswar. The petitioner uses state of the art technology like pipe conveyors for materials movement, dry fog system for dust suppression, bag filters for dust collection, wet scrubbing system for lime handling and has also maintained and is further developing the green belt within the plant as also around the periphery. The petitioner provides a rehabilitation colony with hospital and schools for the rehabilitated villagers as well as the local population from other villages. At the hospitals, medical treatment is provided free of cost. Kalahandi is the most backward region in Orissa and in Kalahandi itself, Lanjigarh is the latest developed. The lone project set up by the petitioner at the site has had a major impact in eradicating poverty and is providing opportunities to the poor and most deprived tribal population of the area to merge into mainstream.

16. Mr. S.D. Das, learned Asst. Solicitor General appearing on behalf of opposite party No.1 submits that on 3<sup>rd</sup> August, 2007, the petitioner submitted an application under the provisions of EIA Notification, 2006 to the Ministry of Environment and Forests (opposite party No.1) for expansion of alumina refinery capacity and captive power plant from 1 to 6 MTPA and from 75 to 300 MW respectively at Lanjigarh in the district of Kalahandi in Orissa. After following the due procedure, the TOR for preparation of EIA/Environment Management Plan (EMP) report including conducting public hearing was prescribed by the Ministry on 12<sup>th</sup> March, 2008. The petitioner submitted the final report vide letter dated 22<sup>nd</sup> June 2009 after completing the public hearing which was held on 25<sup>th</sup> April, 2009 for seeking environmental clearance. The proposal was placed before the Expert Appraisal Committee in its meeting held on 17<sup>th</sup> August, 2009 and the Committee sought additional information and also decided that a sub-committee comprising members from the Expert Appraisal Committee shall visit the plant site to assess the pollution control measures being adopted in the refinery to be augmented and suggest additional pollution control measures to be adopted for the proposed expansion and hence, the proposal was deferred.

17. The Ministry of Environment and Forest was informed by its Eastern Regional Office at Bhubaneswar about the construction which was undertaken by the petitioner before obtaining the environmental clearance in violation of provisions of EIA Notification, 2006. The report of the Sub-Committee of the Expert Appraisal Committee (Industry) who visited the

site on 9<sup>th</sup> July, 2010 brought out that the petitioner has undertaken substantial construction of 6 MTPA Alumina Refinery and 300 MW Captive Power Plant. Dr. N.C. Saxena Committee brought out in its report dated 16.08.2010 that the petitioner had already proceeded with the construction activity for its expansion from 1 MTPA to 6 MTPA without obtaining environmental clearance. From their own submission, the petitioner had confirmed that they have already completed 50-55% construction activity. According to the petitioner, they had started construction activity in May, 2009 immediately after the public hearing which was over in April, 2009. However, record of opposite party No.1 indicates that the construction for expansion project was noticed in November, 2008. Opposite party No.1 issued show cause notice dated 31<sup>st</sup> August, 2010 for expansion of Alumina Refinery and Captive Power plant.

18. Opposite party No.2 had also issued show cause notice on 12<sup>th</sup> January, 2009 under Section 33A of the Act, 1974 and Section 31 A of the Act, 1981 to the petitioner for undertaking expansion activity without obtaining consent to establish the plant from Pollution Control Board and Environment Clearance.

19. The petitioner filed its reply vide letter dated 15<sup>th</sup> September, 2010 to the show cause issued by the Ministry vide letter dated 31<sup>st</sup> August, 2010. In its show cause reply, the petitioner requested for a personal hearing before taking final decision on the project. The personal hearing took place on 30<sup>th</sup> September, 2010 in the Ministry. As decided

during the course of personal hearing, certain additional documents were submitted by the petitioner vide letter dated 4<sup>th</sup> October, 2010.

20. Basing on the response/submissions of the petitioner, directions were issued in accordance with Section 5 of the Environment (Protection) Act, 1986. The directions were issued on 20.10.2010 and TOR issued on 12<sup>th</sup> March, 2009 for expansion of Alumina Refinery from 1 MTPA to 6 MTPA and 75 MW to 300 MW CPP was withdrawn and consequently the public hearing conducted on 25<sup>th</sup> April, 2009 was also cancelled. The opposite parties were directed to maintain the status quo at the site and no further construction shall be undertaken in respect of expansion of project. The Secretary, Forest and Environment Department, Government of Orissa was directed to take legal action under the provisions of Environment (Protection) Act, 1986 for violation of the EIA Notification, 2006.

21. The petitioner vide letter No.VAL/MK/MOEF/10/010 dated 28.10.2010 requested opposite party No.1 for withdrawal of direction issued under the Environment (Protection) Act, 1986 on 20<sup>th</sup> September, 2010 and consideration of proposal for environmental clearance for expansion project. The petitioner's matter was examined with reference to the Circular No.J-11013/41/2006-IA.II (I) dated 16<sup>th</sup> November, 2010 issued by opposite party No.1. Paragraph-4(i) of the Circular dated 16<sup>th</sup> November, 2010 issued by the Ministry envisages that all such cases of violation which are submitted to the Ministry/State Environmental Impact Assessment Authorities for environmental clearance would be referred to the Expert Appraisal Committee/State Expert Appraisal Committee for their

consideration based on the merit of the proposal. It is further envisaged that after the said Committee makes its recommendations on the project, the proposal will be processed on file for obtaining the approval of the Competent Authority of the Ministry.

22. The petitioner was further intimated that any consideration of the fresh proposal for environmental clearance to be submitted by the company shall not be construed as regularization/condonation of violation of the Environment (Protection) Act, 1986 and EIA Notification, 2006 which took place due to undertaking of substantial construction activity without prior environmental clearance by the company.

23. Mr. Das submitted that opposite party No.1 does not agree that on principle, approval of the petitioner's proposal was impliedly granted. The Expert Committee in its meeting held on 31.08.2009 decided to inspect the site to assess the pollution control measures being adopted in the existing Alumina refinery and sought additional information. Since appraisal of the project was not completed, the argument of the petitioner that the environmental clearance would have been granted to the petitioner within 45 days of the receipt of the recommendation of the Expert Appraisal Committee, which in the instant case ought to have been granted by the EAC within 45 days of 31 August, 2009, is not in line with the EIA Notification, 2006.

24. The petitioner did not indicate about the starting of construction work while it applied for TOR and also in the EIA/EMP reports prepared for the expansion project. In the case of the petitioner,



appraisal process was not completed. As the petitioner violated the provisions of EIA Notification, 2016 and final directions were issued to it for withdrawal of Term of Reference issued in March, 2009 and cancellation of public hearing held on 25<sup>th</sup> April, 2009. The process for environmental clearance has to be started de novo. Therefore, the petitioner vide letter dated 11.01.2011 was requested to submit fresh proposal to the Ministry for obtaining environmental clearance for the above project under the procedure laid down in EIA Notification, 2006.

25. On the rival contentions of the parties, the following questions fall for consideration by this Court:

- (i) Whether the provisions of paragraphs 1, 2 and 7 (ii) of the EIA Notification, 2006 are applicable to the expansion project of the petitioner?
- (ii) Whether construction work undertaken by the petitioner for expansion of its existing project without obtaining environmental clearance violates the mandates of EIA Notification, 2006?
- (iii) Whether opposite parties are justified in withdrawing the Terms of Reference and in canceling the public hearing proceeding held in respect of the proposed expansion plan?
- (iv) Whether opposite party No.1 is justified in holding that the process for environmental clearance has to be started de novo and the petitioner has to submit fresh proposal to the Ministry for obtaining environmental

clearance for the expansion project under the procedure laid down in the EIA Notification, 2006?

26. To deal with question No.(1), it is felt necessary to reproduce paragraphs-1,2 and 7(ii) of the EIA Notification, 2006:

"Now, therefore, in exercise of the powers conferred by sub-section (1) and clause (v) of sub-section (2) of section (3) of the Environment (Protection) Act, 1986, read with clause (d) of sub-rule (3) of rule 5 of the Environment (Protection) Rules, 1986 and in supersession of the notification number S.O. 60 (E) dated the 27<sup>th</sup> January, 1994, except in respect of things done or omitted to be done before such supersession, the Central Government hereby directs that on and from the date of its publication the required construction of new projects or activities or the expansion or modernization of existing projects or activities listed in the Schedule to this notification entailing capacity addition with change in process and or technology shall be undertaken in any part of India only after the prior environmental clearance from the Central Government or as the case may be, by, the State Level Environment Impact Assessment Authority, duly constituted by the Central Government under sub-section (3) of section 3 of the said Act, in accordance with the procedure specified hereinafter in this notification.

2. **Requirements of prior Environmental Clearance (EC) :** - The following projects or activities shall require prior environmental clearance from the concerned regularity authority, which shall hereinafter referred to be as the Central Government in the Ministry of Environment and Forests for matters falling under Category 'A' in the Schedule and at State level the State Environment Impact Assessment Authority (SEIAA) for matters falling under Category 'B' in the said Schedule, before any construction work, or preparation of land by the project management except for securing the land, is started on the project or activity:

- (i) All new projects or activities listed in the Schedule to this notification;
- (ii) Expansion and modernization of existing projects or activities listed in the Schedule to this notification with addition of capacity beyond the

limits specified for the concerned sector, that is, projects or activities which cross the threshold limits given in the Schedule, after expansion or modernization.;

(iii) Any change in product - mix in an existing manufacturing unit included in Schedule beyond the specified range.

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7(ii). **Prior Environmental Clearance (EC) process for Expansion or Modernization or Change of product mix in existing projects:**

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

27. Admittedly, the EIA Notification, 2006 was published in the Gazette of India, Extraordinary, Part-II, Ministry of Environment and Forests on 14<sup>th</sup> September, 2006. On 03.10.2007 the petitioner submitted its application to opposite party No.1 for expansion of the project from 1 MTPA to 6 MTPA Alumina and power generation from 75 MW to 300 MW. In Paragraph (1) of the EIA Notification, 2006, it is provided that the Central Government directs that on and from the date of its publication, the required construction of new projects or activities or the expansion or modernization of existing projects or activities listed in the Schedule to that

notification entailing capacity addition with change in process and/or technology shall be undertaken in any part of India only after the prior environmental clearance from the Central Government or as the case may be, by the State Level Environment Impact Assessment Authority, duly constituted by the Central Government under sub-section (3) of section 3 of the said Act, in accordance with the procedure specified in the said notification. Paragraph 7(ii) of the said notification provides that all applications seeking environmental clearance for expansion with increase in production capacity beyond the capacity for which prior environmental clearance has been granted under this Notification or with increase in either lease area or production capacity in the case of mining projects or for modernization of an existing unit with increase in the total production capacity beyond the threshold limits prescribed in the Schedule to that notification through change in the process or technology or involving a change in the product-mix shall be made in Form-I and they shall be considered by the concerned Expert Appraisal Committee or the State Level Expert Appraisal Committee within 60 days who will decide on the due diligence necessary including preparation of EIA and public consultations and the application shall be appraised accordingly for grant of environmental clearance. As per Paragraph -2(ii), prior environmental clearance is required for expansion and modernization of the existing project.

28. In the instant case, the petitioner undertakes expansion of its existing project for which prior environmental clearance has to be obtained.

29. A conjoint reading of Paragraphs 1, 2 and 7(ii) of the EIA Notification, 2006 makes it clear that the provisions contained in those clauses of the said notification are applicable to the expansion project of the petitioner.

30. Question Nos.(ii), (iii) and (iv) being interlinked, are dealt with together.

31. Admittedly, in the instant case, while the process for issuance of environmental clearance was going on, and for that purpose various directions were being issued to the petitioner for compliance, the petitioner started its expansion work. According to the petitioner, prior environmental clearance is not the pre-requisite or the precondition for undertaking construction activities within an existing premise as the environmental clearance has already been obtained in respect of the existing project. The opposite parties were aware of sight preparation work undertaken by the petitioner since November, 2006 and yet the opposite party No.1 sought to issue the show cause notice almost two years later and in the meanwhile impliedly permitting the petitioner to continue its construction activities and investment of money. The petitioner has invested huge sums of money and has thereby altered its position irreversibly. It is the further case of the petitioner that alteration position is irremediable and irreversible and the stoppage of work at this stage would cause grave prejudice and irreparable hardship to the petitioner, incapable of being calculated in terms of money. The opposite party No.1 has ignored the three objects sought to be achieved by Environment (Protection) Act, 1986, viz., protection of the environment,

controlling of pollution as also the sustainable development of the area. The petitioner being an environmentally conscious Company, uses Caustic soda manufactured by Membrane Technology. It is actively working on the "Zero Waste Concept" and has already commenced manufacturing red mud bricks by developing a process in collaboration with the Institute of Minerals and Metals Technology, Bhubaneswar. It has taken precautions, right from the conceptual stage of the project to ensure that the fugitive emissions during construction and operations remain well within the applicable norms. The petitioner uses state of the art technology like pipe conveyors for material movement, dry fog system for dust suppression, bag filters for dust filters/ for dust collection, wet scrubbing system for lime handling and has also maintained and is further developing the green belt within the plant as also around the periphery. It also provides a rehabilitation colony with hospital and schools for the rehabilitated villagers as well as the local population from other villages, whereby, at the hospitals, medical treatment is provided free of cost. The project set up by the petitioner at the site has had a major impact in eradicating poverty and is providing opportunities to the poor and most deprived tribal population of the area to merge into the mainstream. The petitioner has not violated any of the pollution parameters at the existing refinery or as a result of the construction activity undertaken with respect to the proposed expansion.

32. Further case of the petitioner is that opposite party No.1 has singled out the petitioner only for non-grant of approvals and clearances. In case of other entities, namely, (i) Jindal Power Limited, Tammar, Raigarh,

Chattisgarh, (ii) Pohang Steel Company, (iii) Lavasa Corporation Limited, and (iv) Steel Authority of India, Chiria Iron Ore Mines Project despite violations of environmental regime being found and established, the MoEF has sought to condone / regularize the same and has proceeded to grant the requisite clearances / permissions to the said entities. It is alleged that those actions of the MoEF are arbitrary, discriminatory, without any rational nexus and are violative of the rights enshrined in Article 14 of the Constitution of India.

33. On the other hand, opposite party No.1 denying the above allegation of the petitioner submitted that the case of the above four companies and the petitioner are not similar. The petitioner has not applied for the expansion project following the due procedure as is required in the EIA Notification, 2006, as has been done by Jindal Power Limited. As and when a proposal is submitted by the petitioner a similar procedure would be followed as in the case of Jindal Power Limited. Similarly, the case of the petitioner and Lavasa Corporation Limited are also not alike as the show cause notice issued to Lavasa Corporation Limited was due to violations of EIA Notification, 2006 and the construction work has been stopped. This is a category 'B' under EIA Notification, 2006 and the due procedure is being followed for appraisal of the project of M/s Lavasa Corporation Limited as per the directions of MoEF on 07.01.2011. The project of M/s POSCO was accorded environmental clearance in 15<sup>th</sup> May, 2007 only the additional conditions have been stipulated vide letter dated 31<sup>st</sup> January, 2011. The case of POSCO is not a case of violation of EIA Notification, 2006 and the

EC issued in 2007 is not withdrawn. Similarly, project of SAIL about Chiria Mines relates to Forest Advisory Committee, which has taken up the project for clearance under Forest (Conservation) Act, 1986. Thus, this project at present is not related to the EIA Notification, 2006 and therefore no violation proceedings are being pursued by the Ministry in the case of SAIL.

34. The specific case of opposite party No.1 is that the petitioner vide letter dated 22 June, 2009 submitted the final EIA report after completion of the public hearing which was held on 25<sup>th</sup> April, 2009 seeking environmental clearance. The proposal of the petitioner was placed before the Expert Appraisal Committee in its meeting held on 17<sup>th</sup> August, 2009 and the Committee sought additional information and also decided that a sub-committee comprising members from the Expert Appraisal Committee shall visit the plant site to assess the pollution control measures being adopted in the refinery to be augmented and suggested additional pollution control measures to be adopted for the proposed expansion.

35. In the meantime, the Ministry of Environment and Forests was informed by its Eastern Regional Office at Bhubaneswar about the construction which was undertaken by the petitioner before obtaining the environmental clearance in violation of provisions of EIA Notification, 2006. The report of the Sub-committee of the Expert Appraisal Committee (Industry) who visited the site on 9<sup>th</sup> July, 2010 brought out that the Petitioner has undertaken substantial construction of 6 MTPA Alumina Refinery and 300 MW Captive Power Plant. Dr.N.C.Saxena



Committee brought out in its report dated 16.08.2010 that the petitioner had already proceeded with the construction activity for its expansion from 1 MTPA to 6 MTPA without obtaining environmental clearance. It is their own submission that the petitioner had confirmed that it has already completed 50-55% construction activity. The only difference is while according to opposite party No.1, the construction for expansion project was noticed in November, 2008, petitioner's case is that it has started construction activities in May, 2009 immediately after the public hearing was over in April, 2009. In any event, the fact remains that the petitioner has completed about 50-55% of expansion work prior to obtaining environmental clearance, which is violative of provisions of EIA Notification, 2006.

36. Law is well settled that when the statute requires to do certain thing in certain way, the thing must be done in that way or not at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim "*Expressio unius est exclusion alteris*", meaning thereby that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following other course is not permissible. (See *Taylor v. Taylor*, (1876) 1 Ch.D.426; *Nazir Ahmed v. King Emperor*, AIR 1936 PC 253; *Ram Phal Kundu v. Kamal Sharma*; and *Indian Bank's Association v. Devkala Consultancy Service*, AIR 2004 SC 2615).

37. Moreover, the petitioner did not indicate the start of construction work while it applied for Terms of Reference and also in the EIA/EMP reports prepared for the expansion project.

38. The stand of the petitioner that it has not violated any of the pollution parameters in the existing refinery will not alter the position because the petitioner is legally bound to ensure the various statutory provisions. That cannot give licence to the petitioner to undertake expansion activities without obtaining prior environmental clearance.

39. The petitioner in many words has stated that the various measures have been taken by it for protection of the environment and development of tribals in Kalahandi, a backward district, but that cannot absolve the petitioner from complying with the requirement of EIA Notification, 2006.

40. In any event, since the petitioner has undertaken construction activities for expansion of the project without adhering to the provisions of EIA Notification, 2006, the same is held to be illegal.

41. For the aforesaid reasons, opposite party No.5 has issued notice under Section 5 of the Environment (Protection) Act, 1986 for withdrawal of TOR. Opposite Party No.2- Orissa State Prevention and Pollution Control Board had also issued show cause notice on 12<sup>th</sup> January, 2009 under Section 33A of Water (Prevention & Control of Pollution) Act, 1974 and Section 31 of Air (Prevention & Control of Pollution) Act, 1981 to the petitioner for undertaking expansion activity

without obtaining consent from Pollution Control Board and environmental clearance.

42. The petitioner had filed its reply vide letter dated 15<sup>th</sup> September, 2010 to the show cause notice issued by the Ministry vide letter dated 31<sup>st</sup> August, 2010. While submitting the reply, the petitioner requested for personal hearing before finalizing the project. Accordingly, personal hearing took place at 3.30 PM on 30<sup>th</sup> September, 2010 in the Ministry. As decided in the personal hearing, certain additional documents were submitted by the petitioner vide letter dated 4<sup>th</sup> October, 2010. Considering the submissions of the petitioner to the above referred show cause notice, Opposite party No.1 issued directions to the petitioner in accordance with Section 5 of the Environment (Protection) Act, 1986 read with Rule 4 of the Environment (Protection) Rules, 1986 on 20.10.2010 which includes as follows:-

- " (a) The TOR issued on 12<sup>th</sup> March, 2009 for expansion of Alumina Refinery from 1 MTPA to 6 MTPA and 75 MW to 300 MW CPP is hereby withdrawn and consequently the public hearing conducted on 25<sup>th</sup> April, 2009 stands cancelled.
- (b) The proponent were directed to maintain the status quo at the site and no further construction shall be undertaken in respect of expansion project.
- (c) The Secretary, Forest & Environment Department, Government of Orissa shall take legal action under the provisions of Environment (Protection) Act, 1986 for violation of the EIA Notification, 2006."

43. For the reasons stated above, we are of the considered view that the construction work undertaken by the petitioner for expansion of its project without obtaining environmental clearance violates the mandates of

the EIA Notification, 2006 and therefore, the opposite parties are justified in withdrawing the Term of Reference and in canceling the public hearing proceeding held in respect of the proposed expansion. The opposite parties are also justified in holding that the process for environmental clearance has to be started de novo for which the petitioner has to submit fresh proposal to the Ministry under the procedure laid down in the EIA Notification, 2006.

44. In view of the above, the relief as prayed by the petitioner in the writ petition quoted in paragraph (1) above cannot be granted in favour of the petitioner.

45. In the result, the writ petition is dismissed.

No order as to costs.

**V. Gopala Gowda, C.J.** I agree.