BEFORE THE NATIONAL GREEN TRIBUNAL
PRINCIPAL BENCH
NEW DELHI
.....

MISCELLANEOUS APPLICATION NO. 684 OF 2015

IN

ORIGINAL APPLICATION NO. 158 (T^{HC}) / 2013

IN THE MATTER OF:

Amit Kumar
S/o Sh. Rishipal Singh
R/o 167, Vijyant Enclave
Sector – 28, Noida – 201301
Uttar Pradesh

.....Applicant

Versus

1. Union of India
   Though
   Secretary
   Ministry of Environment & Forest
   Prayavaran Bhawan, CGO Complex,
   Lodhi Road, New Delhi-08

2. State of Uttar Pradesh
   Though
   Chief Secretary
   Uttar Pradesh Secretariat

3. Department of Forests,
   Through
   Principal Secretary,
   6th Floor, Bhapu Bhawan,
   Lucknow, Uttar Pradesh

4. Uttar Pradesh Irrigation Department
   Through
   Principal Secretary,
   Sinchai Bhawan,
   Lucknow, Uttar Pradesh

5. National Board of Wildlife
   Through
   Chairman
   Paryavaran Bhawan
   New Delhi

6. New Okhla Industrial Development Authority
Through its CEO
Administrative Complex
Sector-6, NOIDA,
Gautam Budh Nagar
Uttar Pradesh

7. District Magistrate
Surajpur Collectorate
Noida, Gautam Budh Nagar
Uttar Pradesh

8. Senior Superintendent of Police
Sector-14-A, Noida
Gautam Budh Nagar
Uttar Pradesh

.....Respondents

COUNSEL FOR APPLICANT:
Mr. Gaurav Kumar Bansal, Advocate
Mr. Dushyant Dave, Mr. Krishnan Venugopal, Sr. Advocate,
Ms. Aishwarya Bhati, Ms. Roy and Mr. Devashish Bharukha ,
Advocates in M.A. No. 684/2015

COUNSEL FOR RESPONDENTS:
Mr. Vivek Chib, Mr. Asif Ahmed and Mr. Devashish Bharukha,
Advocates for Respondent No. 1
Ms. Savitri Pandey with Ms. Azma Parveen, Advocates and
Mr. Ravindra Kumar, Advocate for Respondent No. 2 to 4

JUDGMENT

PRESENT:
Hon'ble Mr. Justice Swatanter Kumar (Chairperson)
Hon'ble Mr. Justice M.S. Nambiar (Judicial Member)
Hon'ble Dr. D.K. Agrawal (Expert Member)
Hon'ble Prof. A.R. Yousuf (Expert Member)

Reserved on: 04th August, 2015

Pronounced on: 18th August, 2015

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1. Whether the judgment is allowed to be published on the net?
2. Whether the judgment is allowed to be published in the NGT Reporter?

SWATANTER KUMAR, J.

Original Application No. 158 of 2013 came to be finally disposed of by the Tribunal vide its Order dated 3rd April, 2014. The Original Application had been filed praying that the respondents, all of them being official respondents, including the Union of India, Ministry of Environment, Forests and Climate Change (for short 'the MoEF'), State of Uttar Pradesh and its various departments, National Board for Wildlife (for short 'NBWL') and New Okhla Industrial Development Authority (for short 'NOIDA'), be directed to forthwith prevent illegal and unauthorized construction works undertaken by developers within 10 km radius of the Okhla Bird Sanctuary, to initiate criminal action against them and to demolish all the illegal and unauthorized structures built within 10 km radius of the Okhla Bird Sanctuary. The Tribunal had issued various directions requiring the State of Uttar Pradesh, NCT of Delhi and State of Haryana to furnish their response to the MoEF and had also directed the MoEF to issue a Notification for fixation of 'Eco-Sensitive Zone' as per the powers conferred under the Environment Protection Act, 1986 (for short 'Act of 1986') expeditiously. These directions required fixation of 'Eco-Sensitive Zone' around the Okhla Bird Sanctuary by the MoEF, referring to the order of the Hon'ble Supreme Court of India in *Goa Foundation v. Union of India* W.P. (C) 460 of 2004, dated 4th December, 2006, [2011 (15) SCC 791] (for short 'Goa Foundation I'). The Tribunal had observed that the States of Uttar Pradesh, NCT of Delhi and Haryana were likely to be affected, if the notified distance is within 10 km radius of the Okhla Bird Sanctuary, which was

declared a notified area under Sections 18 and 26(A) of the Wildlife Protection Act, 1972 (for short 'Act of 1972'), vide Notification dated 8th May, 1990.

The Tribunal vide its order dated 14th August, 2013 had directed NOIDA to conduct inspection of the areas where constructions were illegally carried out and upon inspection, if it is found that certain construction work, going on within 10 km radius of the Okhla Bird Sanctuary were done without obtaining proper Environmental Clearance or in contravention thereof, the same shall be immediately stopped and report be submitted by the authority to the Tribunal in this regard. This order came to be modified by a detailed order of the Tribunal dated 28th October, 2013, where the Tribunal further issued various directions. Following the directions of the Hon'ble Supreme Court in *Goa Foundation I* case (supra), one of the directions was also issued to the MoEF, that it should refer all the projects, including buildings situated within 10 km radius of the Okhla Bird Sanctuary, to the NBWL within a period of four weeks. The Tribunal also directed that all the building constructions made within 10 km radius of the Okhla Bird Sanctuary or within the 'Eco-Sensitive Zone', as may be prescribed vide the Notification to be issued by the MoEF, shall be subject to the decision of the NBWL. Structures which were illegal and located within the said area of 10 km were ordered to be removed in accordance with law. It was also directed that the interim orders would remain in force till issuance of the Notification by the MoEF. In its final order dated 3rd April, 2014, the Tribunal also observed that the Notification of the Eco- Sensitive

Zone that is to be issued by the MoEF, would be subject to the final decision of the Hon'ble Supreme Court of India in the matter pending before it.

M/s Jaypee Infratech Ltd. filed an application being MA No. 240 of 2014 seeking review/modification of the Judgment by the Tribunal dated 3rd April, 2014. It was contended *inter-alia* before the Tribunal that the interim orders were passed by the Tribunal on a wrong assumption that the Hon'ble Supreme Court of India in *Goa Foundation I* case (supra) had laid down that the 'Eco-Sensitive Zone' in respect of the Okhla Bird Sanctuary shall be within a radius of 10 km from its boundary. This Application came to be dismissed by the Tribunal vide order dated 30th May, 2014, taking a view that the interim orders passed by the Tribunal were in consonance with the orders of the Hon'ble Supreme Court of India in *Goa Foundation I* case (supra) and called for no clarification or modification.

Aggrieved by the order of the Tribunal dated 30th May 2014, the review applicant preferred a statutory appeal before the Hon'ble Supreme Court of India, being Civil Appeal No. 5822 to 5823 of 2014, which came to be dismissed vide order dated 10th June, 2014 of the Apex Court. Thus, the above orders of the Tribunal dated 30th May, 2014 and 3rd April, 2014, attained finality. It is a settled position of law that in contradistinction to dismissal of a Special Leave Petition under Article 136 of the Constitution of India, dismissal of a Statutory Appeal *in limine* would attract the Doctrine of Merger and would attain finality as held by the Hon'ble Supreme Court of India in the case of *Kunhayammed and Ors. v. State of*

Kerala and Anr., (2000) 6 SCC 359 and *Pernod Ricard India (P.) ltd v. Commissioner of Customs, ICD Tuglakabad,* (2010) 8 SCC 313.

2. Now, another application being M.A. 684 of 2015, has been filed in Original Application No. 158 of 2013 on behalf of the Supreme Court Bar Association Multi-State Co-operative Group Housing Society Ltd (for short 'the Applicant Society), through its authorized representative. The applicant has made the following prayers in this application:

> "PRAYER:
> 1) DIRECT the Ministry of Environment and Forests, Government of India to issue the final Notification in pursuance and furtherance to the draft notification dated 24.09.2014;
> 2) DECLARE that the order of this Hon'ble Tribunal in Application No. 158/2013, in the case of Amit Kumar v. Union of India & Ors dated 28.10.2013 is not applicable qua the applicant;
> 3) DECLARE that the residential complex constructed in Sector 99, Noida of the Applicant-Society being within an approved master plan duly approved by the State of U.P. and the NCR Planning Board, does not need any further clearance from the National Board for Wildlife and which may please be deemed to have granted Environmental Clearance;
> 4) DIRECT the NOIDA authority to issue Completion Certificate for the Applicant-Supreme Court Bar Association Multi-State Cooperative Group Housing Society project applied for on 6.04.2015; and,
> 5) Pass such other/further order(s) in favour of the Applicant/Applicant as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

3. In this application, it has been averred that the Applicant Society has constructed a group of housing complex on Plot no. 4 and 5 in Sector 99, NOIDA, comprising of 684 (Originally 648) flats. These flats have been allotted to the members in a draw of allotment held on 25th April, 2015 organized by the Committee appointed by

the Hon'ble Supreme Court under its order dated 9th April, 2015 in SLP (C) No. 19375/2013. It is submitted that the members of the Applicant Society, who are members of the Supreme Court Bar Association, together with their families, are unable to occupy these flats and convert them into their permanent homes. It is their case that they have constructed these flats as per the construction plans sanctioned by the NOIDA on 25 August, 2009 and Environmental Clearance for the project from the Environmental Impact Assessment Authority of the State of Uttar Pradesh which was granted vide its order dated 9th June, 2009. The Applicant Society has stated that it has also applied for issuance of Completion Certificate on 6th April, 2015 which is still pending before the competent authorities.

4. The Applicant Society has also applied for additional Environmental Clearance in respect of the additional construction which is being processed by the competent authority, as originally only 648 flats were to be constructed while later on, 684 flats were to be constructed. According to the Applicant Society, they are not able to obtain Completion Certificate from the Authorities in view of the order passed by the Tribunal on 28th October, 2013 restraining the authorities from issuing Completion Certificate to the projects which are located within 10 km radius of the Okhla Bird Sanctuary or within the 'Eco-Sensitive Zone', as may be prescribed by the Notification issued by the MoEF, till the time clearance from the NBWL is obtained. In furtherance to the directions of the Tribunal, NOIDA Authority has informed the Applicant Society vide letter dated 22nd June, 2015, that they would not issue the Completion

Certificate in the light of the orders issued by the Tribunal. According to the Applicant Society they are suffering serious prejudice as they are living in rented accommodations and have even taken loans against the flats allotted to them and they are being doubly jeopardized by payment of EMIs as well as rent for every month. It has been brought to our notice that large number of projects are likely to fall within the radius of 10 km of the said Okhla Bird Sanctuary, if it is taken to be the 'Eco-Sensitive Zone'. Further, it has been submitted that the Master Plan of NOIDA has subsequently been cleared by the National Capital Region Planning Board and as such the said Master Plan has approval from both the State of Uttar Pradesh as well as Central Government and that it has been given after due consultation even with the Wildlife and Forest Authorities as well as after inviting public objections. They also rely upon the judgment of the Hon'ble Supreme Court of India in *In Re Construction of the Park at NOIDA v. Union of India*, (2011) 1 SCC 744, where large scale constructions right next to the Okhla Bird Sanctuary were not disturbed and hence they claim that denial of Completion Certificate to the housing complex in question would be unjust. It is also stated by them that the order of the Tribunal dated 28th October, 2013 is based on the wrong assumption as was even contended in MA No. 240 of 2014 (supra). They also refer to the order of the Hon'ble Supreme Court of India dated 04th December, 2006, in *Goa Foundation I* case (supra), wherein the Hon'ble Supreme Court had taken notice of the area within the 10 km radius of the National Parks and Sanctuaries as 'Eco-Sensitive Zone'.

However, despite such directions of the Hon'ble Supreme Court of India, no Notification has been issued till date. The Hon'ble Supreme Court of India in a subsequent order dated 21st April, 2014 in *Goa Foundation v. Union Of India and Ors.*, (2014) 6 SCC 590 (for short 'Goa Foundation II') clarified and stated that in the order dated 4th December, 2006, no prohibitory directions had been issued by the Hon'ble Supreme Court on mining activities within 10 km distance from the boundaries of National Parks and the Wildlife Sanctuaries. Further, the Hon'ble Supreme Court also directed the MoEF to issue the Notification of 'Eco-Sensitive Zone' around such National Parks and Wildlife Sanctuaries after following the procedure, within a period of 6 months from the date of the Judgment. Despite the above Judgment of the Hon'ble Supreme Court, no Notification has been issued yet. The Hon'ble Supreme Court of India had also directed all authorities, Courts and Tribunal to act in aid of the order of the Hon'ble Supreme Court.

5. According to the Applicant Society, while on one hand there is no prohibitory order passed by the Hon'ble Supreme Court of India, on the other hand the Central Government is not issuing the appropriate Notification despite repeated directions from the Hon'ble Supreme Court and this Tribunal. The Applicant Society have submitted that they are suffering serious prejudice for no fault of their own. Thus they have filed the present application with the prayers afore-noticed.

6. No reply to the application has been filed on behalf of any non-applicant. However, the application is opposed by the applicant in O.A. 158 of 2013 as well by the MoEF. The MoEF has filed a note giving the background of the various orders and decisions of the Government in regard to Eco-Sensitive Zones around the National Parks and Wildlife Sanctuaries.

7. It is the contention on behalf of the MoEF, applicant in O.A. 158 of 2013 as well as by the NOIDA Authority that the present application should not be entertained by the Tribunal in view of its earlier decisions and in view of the order of the Hon'ble Supreme Court of India dated 10th June 2014. It is submitted that in view of the various Office Memoranda and guidelines issued for developmental projects situated within 10 km radius of the National Parks and Wildlife Sanctuaries by the MoEF from time to time, copies of which have been placed on record, the order of the Tribunal cannot be faulted with. In relation to issuance of Notification, it is submitted by the MoEF that 95 per cent of work has been completed as the State of Uttar Pradesh has already sent its proposal to the MoEF, objections from the public have been invited and the MoEF is in the process of finalizing and issuing the appropriate Notification in 545 days; but that being the outer limit under the Environment Protection Rules, 1986 (for short 'Rules of 1986'), the Ministry would make all possible efforts to issue the Notification at the earliest. It is also contended that the project would still require Clearance from the NBWL, being within 10 km radius of the Okhla Bird Sanctuary. It also contended that the project of the Project Proponent is covered

under the Environment Clearance Regulations, 2006 (for short 'the Notification of 2006') and it is obligatory upon the Project Proponent to take all statutory and other Clearances. According to the NOIDA Authority, there is no law in place prohibiting the construction of projects within 10 km of the Okhla Bird Sanctuary.

DISCUSSION:

8. Before we proceed to examine the merits or otherwise of the submissions made, it will be useful to refer to the events in law that resulted in passing of the above orders and directions. On 8th May, 1990, the State of Uttar Pradesh issued a Notification declaring Okhla Bird Sanctuary as a 'Protected Area' under Sections 18 and 26 (A) of the Act of 1972. Despite this Notification already being issued, this area was not protected from indiscriminate development and construction works. During the 21st meeting of the Indian Board for Wildlife held on 21st January, 2002, the National Wildlife Action Plan was adopted. This Plan envisaged declaring the identified area around the 'Protected Area' and corridors as ecologically fragile under the Act of 1986, wherever necessary. The Board thereafter adopted a Wildlife Conservation Strategy, 2002, wherein it was envisaged that the land falling within 10 kms of the boundaries of the National Parks or Wildlife Sanctuaries should be notified as 'Eco-Fragile Zones' under Section 3 (v) of the Act of 1986 and Rule 5 (5) of the Rules of 1986 framed thereunder (Point No. 09).

9. In furtherance to this decision, the Additional Director General of Forest (WL) vide letter dated 6th February, 2002, requested all the

Chief Wildlife Wardens for listing out such areas within 10 km of the boundaries of the National Parks and Sanctuaries and furnish detailed proposals for their Notification as 'Eco-Sensitive Areas' under the Act of 1986. In response to this, some of the State Governments raised concerns over the applicability of 10 km range as protected area from the boundaries of such sites and informed that it will adversely affect development of the State.

Keeping in view the constraints expressed by the States, the proposal was examined by the NBWL in its 2nd meeting held on 17th March, 2005 and it was decided that delineation of 'Eco-Sensitive Zone' would have to be site-specific and would relate to regulation, rather than prohibition of specific activities. This decision was also communicated to all the State Governments on 27th May, 2005 by the MoEF.

10. It appears from the record that during this period, a Writ Petition had already been pending before the Hon'ble Supreme Court being Civil Writ Petition No. 202 of 1995, *T.N. Godavarman Thirumulpad v. Union of India*. In this case, various orders were passed from time to time by the Apex Court and vide its order dated 4th August, 2006, Hon'ble Supreme Court while dealing with the matter of carrying on of mining activities, even on temporary work permits and while explaining the procedure for grant of such permits, *inter-alia* passed the following directions:

> On consideration thereof, the conditions precedent for the grant of TWPs as well as the procedure for their grant shall be provided hereinafter. At the outset, it is clarified that TWPs shall

be granted only where the following conditions are satisfied.
PRE-CONDITIONS:
i] TWPs can only be granted for renewal of mining leases, and not where the lease is being granted for the first time to the applicant user agency;
ii] The mine is not located inside any National Park/Sanctuary notified under Section 18, 26A or 35 of the Wildlife (Protection) Act, 1972;
iii] The grant of the TWP would not result in any mining activity within the safety zone around such areas referred to in (ii) above, (as an interim measure, one kilometer safety zone shall be maintained subject to the orders that may be made in I.A. No. 1000 regarding Jamua Ramgarh Sanctuary);
iv] The user agency who has broken up the area of the mine (in respect of which the TWP is being sought) has or had the requisite environmental clearances and at no time prior to the grant of the TWP was any mining being carried on by the user agency in relation to the mine in question, in violation of the provisions of the Forest (Conservation) Act [for short, "FC Act"]. In cases involving violation of the FC Act, a formal decision on merit should be taken under the FC Act after considering the gravity of the violation. However, the grant of a TWP may be considered where past violations have been regularized by the Ministry of Environment and Forests [for short, "MoEF"] by the grant of an approval under the FC Act with retrospective effect;
v] The conditions attached to the approval under the FC Act for the grant of the mining lease (or the renewal of the mining lease), have been fulfilled, particularly those in respect of (but not limited to) compensatory afforestation, reclamation plan and over burden dumping on the specified site;
vi] The user agency has, within the stipulated time, already filed a proposal in conformity with the Forest (Conversation) Rules, 1980, for seeking an approval under the FC Act along with the complete details as are required to be furnished. An application for the grant of the TWP in favour of the user agencies, who have either not filed a proper proposal and/or have not provided complete information, particularly in respect of (but not limited to) compensatory afforestation, phased reclamation plan, felling of trees, details of minerals extracted in the past, etc., should not be entertained;
vii] A TWP shall be granted only limited to working in the area broken up legally and during the validity of the lease. No T.W.P. can be granted in respect of, or extending to either unbroken area or the areas which have been broken after the expiry of the mining lease or have been broken in violation of the FC Act or any other law for the time being in force;
viii] In no circumstances can the duration of a TWP extend beyond the period of one year. Where an application for grant of permission under the FC Act is not disposed of during the currency of TWP, the applicant, on the strength of the same TWP, may continue to operate for a period not exceeding three months unless specific orders are obtained from this Court.
ix] A valid lease under the MMRD Act exists (including by way of a deemed extension in terms of Rule 24A (6) of the Mineral Concession Rules) in respect of the area of the TWP.

11. Thereafter, in the Public Interest Litigation filed by the Goa Foundation being Writ Petition No. 460 of 2004, regarding the issue

of declaration of 'Eco-Sensitive Zone', on 4th December, 2006, in *Goa Foundation I* case (supra), the Hon'ble Supreme Court passed a direction that MoEF would give a final opportunity to all the States and Union Territories to reply to its letter dated 27th May, 2005 by which suggestions of the States have been asked, keeping in view the decisions of the NBWL, which was communicated vide the letters dated 6th February, 2002 and 27th May, 2005. The State Governments were directed to send their proposals within four weeks upon which the Ministry was required to take a final view. The Hon'ble Supreme Court also directed that all cases where Environmental Clearance has already been granted and where activities are within 10 km zone, should be referred to the Standing Committee of the NBWL. The order dated 4th December, 2006 reads as under:

"IN THE HON'BLE SUPREME COURT OF INDIA
WRIT PETITION NO.460/2004
GOA FOUNDATION V/S UNION OF INDIA
ORDER DATED 4.12.2006

UPON hearing counsel the Court made the following
ORDER

The order dated 16th October, 2006 refers to a letter dated 27th May, 2005 which was addressed by the Ministry of Environment and Forests (MoEF) to the Chief Wildlife Wardens of all States/Union Territories requiring them to initiate measures for identification of suitable areas and submit detailed proposals at the earliest. The order passed on that date was that MoEF shall file an affidavit stating whether the proposals received pursuant to the letter of 27th May, 2005 have been referred to the Standing Committee of National Board for Wildlife under the Wild Life (Protection) Act, 1972 or not. It was further directed that such of the States/Union Territories who have not responded to the letter dated 27th May, 2005 shall do the needful within four weeks of the communication of the directions of this Court by the Ministry to them.

It seems that despite the letter dated 27th May, 2005 and despite the Ministry having issued reminders and also bringing to the notice of the States/Union Territories the orders of this Court dated 16th October, 2006, the States/Union Territories have not responded. However, we are told that the State of Goa alone has sent the proposal but that too does not appear to be

in full conformity with what was sought for in the letter dated 27th May, 2005.

The order earlier passed on 30th January, 2006 refers to the decision which was taken on 21st January, 2002 to notify the areas within 10 km. of the boundaries of national parks and sanctuaries as eco-sensitive areas. The letter dated 27th May, 2005 is a departure from the decision of 21st January, 2002. For the present, in this case, we are not considering the correctness of this departure. That is being examined in another case separately. Be that as it may, it is evident that the States/Union Territories have not given the importance that is required to be given to most of the laws to protect environment made after Rio Declaration, 1972.

The Ministry is directed to give a final opportunity to all States/Union Territories to respond to its letter dated 27th May, 2005. The State of Goa also is permitted to give appropriate proposal in addition to what is said to have already been sent to the Central Government. The communication sent to the States/Union Territories shall make it clear that if the proposals are not sent even now within a period of four weeks of receipt of the communication from the Ministry, this Court may have to consider passing orders for implementation of the decision that was taken on 21st January, 2002, namely, Notification of the areas within 10 km. of the boundaries of the sanctuaries and national parks as eco sensitive areas with a view to conserve the forest, wildlife and environment, and having regard to the precautionary principles. If the States/Union Territories now fail to respond, they would do so at their own risk and peril.

The MoEF would also refer to the Standing Committee of the National Board for Wildlife, under Sections 5 (b) and 5 (c) (ii) of the Wild Life (Protection) Act, the cases where environment clearance has already been granted where activities are within 10 km. zone."

12. In furtherance to the above order, the MoEF issued a Circular dated 27th February, 2007, wherein it referred to the order of the Hon'ble Supreme Court and noticed that a number of applications seeking Environmental Clearance have been received by the MoEF. It was notified to all concerned that while recommending and granting Environmental Clearance in new and pending cases, such clearance would be subject to the concerned Project Proponents obtaining clearance under the Act of 1972, if they were within 10 km radius of National Parks or Wildlife Sanctuaries. All the concerned authorities, including MoEF and NBWL, therefore, understood and enforced the Circular so as to impose a specific condition in the order granting

Environmental Clearance that it was subject to the Project Proponent obtaining Clearance from the NBWL.

Such intent of placing restriction on the carrying on of any activity or project within a radius of 10 km of the boundaries of the National Parks and Wildlife Sanctuaries is also clear from the fact that on 2nd December, 2009, an Office Memorandum was issued by the MoEF reiterating the contents of the Circular dated 27th February, 2007. This Office Memorandum specifically referred to the order of the Hon'ble Supreme Court dated 4th December, 2006. The Office Memorandum dated 2nd December, 2009 provides the procedure for grant of Environmental Clearance in terms of Notification of 2006. Under Clause 2(iii) it has been stated:

> "While granting Environmental Clearance to projects involving forest land, wildlife habitat (core zone of elephant/tiger reserve etc.) and or located within 10 km of the national park/wildlife sanctuary (at present the distance of 10 km has been taken in conformity with the order dated 4th December, 2006 in writ petition no. 460 in the matter of Goa Foundation v. Union of India), a specific condition shall be stipulated that the wildlife angle including clearance from the Standing Committee of the National Board for Wildlife as applicable."

We may also notice here that MoEF had even issued notices in the newspapers in the year 2009 on the similar lines as discussed above.

13. Vide letter dated 15th March, 2011, MoEF circulated guidance document for taking up non-forestry activities in the wildlife habitat. It noticed that recommendation of the State Board for Wildlife is essential for any kind of destruction/damage/removal of any wildlife

or for diverting the habitat of any wild animal, including removal of forest produce etc. It further required for recommendation of the Standing Committee of the National Board for Wildlife (Clause 1.2). Under Clause 3.1 of this document, it was stated that in case a project is located within the delineated 'Eco-Sensitive Zone' or within 10 km in absence of delineation of such a Zone, from the boundaries of National Parks or Wildlife Sanctuaries etc., then the Project Proponent should seek prior Clearance from the Standing Committee of the NBWL before seeking Environmental Clearance and the procedure as mentioned in Clause 2 of the said guidelines should be followed. Similar document was also issued by the wildlife division of the MoEF on 19th December, 2012, dealing with the guidelines for taking up non-forestry activities in wildlife habitats. Even these guidelines under Clause 3.5.1 referred to the distance from the boundaries of the National Parks or Wildlife Sanctuaries as 10 km and relied upon the order of the Hon'ble Supreme Court dated 4th December 2006 passed in Writ Petition No. 460 of 2004.

MoEF vide its Office Memorandum dated 20th August, 2014, modified the Office Memorandum dated 2nd December, 2009 and elucidated the procedure required to be followed for consideration of developmental projects located within 10 km of National Parks and Wildlife Sanctuaries for grant of Environmental Clearance.

14. The Central Empowered Committee (for short 'CEC') in the case of *T.N Godavarman* (supra), in furtherance to the orders of the Hon'ble Supreme Court in I.A. No. 1000 in Writ Petition No. 202 of

1995, submitted its recommendations on 20th September, 2012. In the said recommendations, reference had been made to the proceedings and facts afore-noticed in relation to both the Civil Writ Petition No. 460 of 2004 and 202 of 1995 as well as I.A. No. 1000, relating to Jamua Ramgarh Sanctuary. In the recommendations, the CEC noticed that after considering the fact that during the last 10 years, no significant progress has been made regarding identification and declaration of Eco-Sensitive Zones around protected areas and, therefore, after considering the matter in its totality, the CEC submitted an implementable scheme. In the report, it categorized the safety zones around National Parks and Wildlife Sanctuaries based on their areas into four different categories. Then it suggested that safety zone in respect of protected areas as 'A' and 'B' categories should be 2 kms and 1 km respectively from the boundaries of the protected area, including non-forest areas falling within that distance. In relation to categories 'C' and 'D', the distance was stated to be 500 and 100 meters respectively. Other recommendations related to mining activities.

It may be noticed at this stage that the Hon'ble Supreme Court vide its order dated 4th August, 2006, while allowing grant of temporary working permit for mining activity, protected 1 km safety zone around such areas and directed that it should be maintained as such, subject to the orders made in I.A. No. 1000 in Writ Petition No. 202 of 1995. This order of the Hon'ble Supreme Court has not been varied till date.

15. The filing of the Original Application No. 158 of 2013 by Amit Kumar, orders thereupon, filing of the Review Application by one of the Applicants before the Tribunal, its dismissal and dismissal of the Statutory Appeal by the Hon'ble Supreme Court vide its order dated 10th June, 2014, have already been noticed in details by us above.

16. On 24th September, 2014, the MoEF issued a draft Notification to conserve and protect the area around the Okhla Bird Sanctuary and to propagate improvement of and develop the different species of the birds therein and its environment. Under this Notification, the 'Eco-Sensitive Zone' ranged from 100 meters from the eastern, western and southern boundary and area up to 1.27 kms from the northern boundary of the Okhla Bird Sanctuary in the district of Gautam Budh Nagar, Uttar Pradesh and South East District of NCT of Delhi.

17. The State of Uttar Pradesh has sent its proposal, as recorded in the order of the Tribunal dated 3rd April, 2014, to the MoEF. However, the time stipulated in the directions issued by the Tribunal in the orders dated 3rd April, 2014 and 30th May, 2014, have neither been adhered to by the MoEF nor by the State of Uttar Pradesh.

The MoEF (Wildlife Division) has issued another Office Memorandum dated 26th September, 2014, laying emphasis on consideration of development projects located within 10 km of National Park and Wildlife Sanctuaries seeking Environmental Clearance. This Circular specifically stipulated that the application for grant of Environmental Clearance would not be taken up by the State level authorities, but in turn would be referred to the Standing

Committee of NBWL for its consideration and permission. It further required that the applicant and all concerned should be advised accordingly. Similar directions were also issued by the MoEF vide Office Memorandum dated 1st May, 2015.

18. As noticed above, a draft Notification dated 24th September, 2014, has already been issued by the MoEF in terms of Rule 5(3) (a) of the Rules of 1986. Upon such issuance of the draft Notification, any person interested in filing an objection against the imposition of prohibition or restriction prescribed in the said Notification may do so within 60 days from the date of its publication in the official gazette. Thereafter, the Central Government shall, within a period of 120 days from the date of publication of the Notification in the official gazette, consider all such objections received against the Notification and within a period of 545 days from the date of publication of the Notification, impose such prohibitions or restrictions as it may deem fit. From a bare reading of the provisions of Rule 5(4), it is clear that the Central Government is vested with the power and in its discretion can waive the entire process as contemplated under Rule 5(3) (a) in public interest. Even if the said process is to be adhered to, a right vests in any interested person to file objections within 60 days of the publication of the draft Notification. In other words, this period of 60 days under Rule 5(3) (c) is mandatory, as the rule vests a statutory right in any interested person to file objection within that period. Thus, this period of 60 days cannot be curtailed. However, the period of 545 days mentioned in Rule 5(3) (d), includes the period of 120 days, within which the

Government is expected to consider the objections filed by such interested persons and also the period of 60 days within which such objection are to be filed. In both these cases, the period is to be reckoned from the date of the publication of the draft Notification**.** Thus, the period of 485 days from the date of the publication of the Notification under Rule 5(3) (d), in contradistinction to the period of 60 days prescribed under Rule 5(3)(c), is to be treated as directory. These periods define the outer limits of the prescribed period and do not take away the right of the Government to issue the final Notification after considering objections in a period shorter than the one prescribed. These provisions also do not provide for any consequences in case such acts were not done or were done beyond the period specified in these Rules of 1986. These are the provisions which are intended to provide fair opportunity to the objector to file objections, for due consideration and application of mind on the part of the MoEF and then for issuance of a final Notification restricting the location of industries and carrying on of process or operations in a specified area. The purpose is to protect the environment and ecology and like in the present case, National Parks and Wildlife Sanctuaries.

19. Provisions that do not give or take away rights and are *simpliciter* procedural in a particular regulatory regime, could be treated as directory. In case of provisions which merely enable an authority to perform certain acts within a stipulated period, without any consequences for default thereof and which do not deal with any

consequential rights, in that event, it would be safe to interpret such provisions as regulatory.

For instance, the period prescribed under Rule 5(3) (d) of the Rules of 1986, which simply enables the Government to consider objections and issue Notification within the outer limit stated therein, would not and cannot prevent the Government from acting and performing these acts prior to the outer limit of the prescribed period. These provisions have to be seen in the light of the power of the State to completely dispense with the procedure in terms of Section 5(4). Thus, they can be stated to be directory in their observance. Where a statute imposes a public duty and lays down the manner in which and time within which the duty shall be performed, injustice or inconvenience resulting from the rigid adherence to the statutory prescription, may be a relevant factor in holding such prescription as only directory.

20. Now, for a very long time the principle enunciated by the Privy Council in the case of *Montreal Street Railways v. Normendry*, AIR 1917 P.C. 142, has been adhered with approval. It was held in this case that:

> "When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those who are entrusted with the duty and at the same time would not promote the main object of the legislature it has been the practice to hold such provisions to be directory only."

The Hon'ble Supreme Court in the case of *Nasirudin v. Sita Ram Aggrawal,* (2003) 2 SCC 577, dealt with the distinction between mandatory and directory principles and held as under:

> 38. Yet there is another aspect of the matter which cannot be lost sight of. It is a well-settled principle that if an act is required to be performed by a private person within a specified time, the same would ordinarily be mandatory but when a public functionary is required to perform a public function within a time-frame the same will be held to be directory unless the consequences therefor are specified. In Sutherland's Statutory Construction, 3rd Edn., Vol.3, at p. 107 it is pointed out that a statutory direction to private individuals should generally be considered as mandatory and that the rule is just the opposite to that which obtains with respect to public officers. Again, at p. 109, it is pointed out that often the question as to whether a mandatory or directory construction should be given to a statutory provision may be determined by an expression in the statute itself of the result that shall follow non-compliance with the provision.
> 39. At p. 111 it is stated as follows:
> "As a corollary of the rule outlined above, the fact that no consequence of non-compliance is stated in the statute has been considered as a factor tending towards a directory construction. But this is only an element to be considered, and is by no means conclusive."

21. Another reason for holding that these provisions are directory is that the outer limit prescribed in the provision, if strictly construed and held to be mandatory, would result in undue hardship and inconvenience to the public at large and may even come in the way of Sustainable Development. Outer limit specified in these provisions would not serve the object of the Act, if they are construed to be mandatory. For instance, the Government may be able to finalize the draft Notification upon consideration of the objections much prior to 545 days, then merely holding onto it while waiting for that period to

expire would neither serve any purpose in law nor the Principle of Sustainable Development.

22. The paramount object of the Act of 1986 and the Rules of 1986, is the protection of environment and not absolute adherence to the period prescribed. The object of the Rules of 1986 would be better served by holding the period prescribed under Rule 5(3) (d) of the Rules of 1986, as directory, which would further result in least inconvenience to the public at large. Thus, we have no hesitation in concluding that the Government is empowered to consider the objection expeditiously, earlier than 120 days but not less than 60 days and publish final Notification prior to the expiry of 545 days from the date of publication of the draft Notification.

23. The Hon'ble Supreme Court of India had passed time bound directions requiring the Government to issue the Notification contemplated under the Act and Rules of 1986. None of the Governments, including the respective State Governments, adhered to the prescribed schedule. Thereafter, the Tribunal in its judgment dated 3rd April, 2014, issued various directions laying down the whole framework in which the Centre and the State Government should act and Notification should be issued. These directions were also not adhered to by them. This resulted in issuance of further directions by the Tribunal in its order dated 30th May, 2014, while dealing with the Review Application. Even that time schedule was not adhered to. The dismissal of the Statutory Appeal by the Hon'ble Supreme Court against the order of the Tribunal, put to rest the

controversies in relation to the distance specified in the order as well as the time frame for issuance of Notification by the Central Government under the Act of 1986 and the Rules of 1986.

24. During the course of hearing, Learned Counsel appearing for the MoEF stated that the process of issuance of final Notification in terms of Rules of 5(3) (d) has practically been completed and within a very short time, the Notification would be issued. According to him nearly 95 per cent of the process has already been concluded. The process of issuing a Notification having reached its final stages, any judicial intervention by us would be least called for. Issuance of Notification under the Act or the Rules is a legislative function and Courts or Tribunals should hardly step into such exercise. It is a settled principle of law that legislative or subordinate legislative functions should be left to the body which is expected to exercise such authority. The Hon'ble Supreme Court has clearly enunciated the principle that Courts cannot issue the mandate to any legislature to enact a particular law. Similarly, no court can direct a legislature or any subordinate body to enact or not to enact a law which it may be competent to enact. It is entirely a matter for the executive branch of the Government to decide, whether or not to introduce any particular legislation.

[Reference*: M/s Narendra Chand Hem Raj v. Lt. Governor Administrator, Union Territory, Himachal Pradesh and Ors.,* 1971 (2) SCC 747 and *State of Himachal Pradesh v. A parent of a Student of Medical College, Simla and Ors.,* 1985 (3) SCC 169.]

25. Issuance of a Notification under the Act of 1986 and Rules of 1986 in accordance with the prescribed process, is in the domain of the MoEF and therefore it will not be appropriate for the Tribunal to step in that process particularly at this stage. It is also equally settled that acts should be done in the manner prescribed and in no other manner. In *Babu Verghese and Ors v. Bar Council of Kerala and Ors.*, (1999) 3 SCC 422, Hon'ble Supreme Court held that, "if the manner of doing the particular act is prescribed under any statute, the act must be done in that manner or not at all". The same view was reiterated by the Apex Court in a recent judgment of *Association of management of Private Colleges v. All India Council for Technical Education and Ors.*, (2013) 8 SCC 271. Thus, it is not in the domain of the Tribunal to issue such Notification and /or directions of that kind and it should be better left to the concerned board or authority to discharge its functions in accordance with law, including issuance of such Notification.

26. On the analysis of the principle of law and particularly the facts afore-stated, in our considered view, it will be just and proper to direct the MoEF to issue the Notification by completing the remaining 5 per cent process expeditiously in public interest and for the protection of the environment and ecology. The entire process prescribed under law has been practically completed by the Central Government of its own accord, therefore, in light of the orders of the Hon'ble Supreme Court and of the Tribunal, it will be very appropriate for the Tribunal to call upon the Government to finalize the same without any further unnecessary delay.

27. Now, we would deal with the ground of review in relation to determination of distance from the boundaries of the National Parks and the Sanctuaries. In the facts of the present case, it is evident that right from the first meeting of the NBWL in the year 2002, the recommendation of 10 km distance from the boundaries of such sites, was understood and implemented by all concerned authorities as such. It also received the same interpretation by the Hon'ble Supreme Court of India in the case of *Goa Foundation (I)* case (supra). Of course parties can raise the issue as to whether these directions were exclusively applicable to mining activities or even to the other projects and activities. But, fact of the matter is that the distance of 10 km was not only comprehended, understood and applied by all the stakeholders but was also accepted without any challenge and protest. Later on, this distance of 10 km was suggestively altered by the NBWL as site specific. The Supreme Court vide its order dated 4th August, 2006, in the case of *T. N. Godavarman* case *(supra)* held that no mining activity can be allowed within 1 km from the boundaries of the National Park and Wildlife Sanctuaries in Goa. However, in the recent judgment of the Hon'ble Supreme Court in *Goa Foundation Case II* case (supra), it was observed that the Court had not prohibited mining activity within 10 km of such boundaries.

28. When hearing the case of M/s Jaypee Infratech Ltd in M.A. No. 240 of 2014, the Tribunal as such, while issuing various directions and asking the MoEF to act in accordance with the provisions of Act

of 1986 and the Rules of 1986, reiterated that the distance contemplated by the Hon'ble Supreme Court was 10 km and has to be enforced as such. This order, as already noticed, has attained finality with the dismissal of the statutory appeal preferred by M/s Jaypee Infratech Ltd. vide order of the Hon'ble Supreme Court dated 10th June, 2014.

29. We see no reason to review the judgment of the Tribunal which has already attained finality. It was not a case *inter-se* parties as where the parties were not heard and order was passed. It was a case relating to issuance of a Notification in accordance with law for protecting the environment, ecology and the wildlife. All the concerned parties were respondents and in that sense it was an order *in rem*. The compliance of the direction of the Tribunal were not by any private party but by the official respondents, including the State Governments and the MoEF.

30. It is also a settled canon of law that what is understood, practiced and implemented over a long time is to be understood and can be used as a tool for interpretation of law to that extent. Hence, to a great extent, the doctrine of *contemporanea expositio* would be applicable in such a situation. The understanding and practice adopted for a considerable time and which is not violative of law can be treated good in law as well. To put it simply, the manner in which departments and concerned authorities have understood the law or Circulars and have implemented the same in discharge of their duties over a long period of time, can become a good practice in law.

The Hon'ble Supreme Court of India in the case of *Union of India Ors. v. Alok Kumar,* 2010 (5) SCC 349, had stated thus:

> "A practice adopted for a considerable time, which is not violative of the Constitution or otherwise bad in law or against public policy can be termed good in law as well. It is a settled principle of law that practice adopted and followed in the past and within the knowledge of the public at large, can legitimately be treated as good practice acceptable in law. What has been part of the general functioning of the authority concerned can safely be adopted as good practice, particularly when such practices are clarificatory in nature and have been consistently implemented by the concerned authority, unless it is in conflict with the statutory provisions or principal document. A practice which is uniformly applied and is in the larger public interest may introduce an element of fairness. A good practice of the past can even provide good guidance for future. This accepted principle can safely be applied to a case where the need so arises, keeping in view the facts of that case. This view has been taken by different High Courts and one also finds glimpse of the same in a judgment of this Court in the case of Deputy Commissioner of Police and Ors. v. Mohd Khaja Ali 2000 (2) SLR 49."

31. Ambiguity in the present case is not such, which can persuade the Tribunal to alter the view which has been expressed time and again by the Supreme Court as well as this Tribunal. In any case distance of 1 km from the boundaries of National Parks and Wildlife Sanctuaries would be a relevant consideration for all concerned, as recorded in the judgment of the Hon'ble Supreme Court in the case of *Goa Foundation (II)* case (supra) in para 87.3 of the judgment.

32. We may also notice that the judgment of the Hon'ble Supreme Court and of the Tribunal both, are operative only till appropriate Notification is issued by the MoEF. With the issuance of such Notification, this controversy would no longer survive. The rights of

all stakeholders would be regulated by such Notification and the uncertainty as contended by all parties would automatically come to an end.

The other contention is in relation to compliance of all the observations made in the judgment of the Tribunal dated 3rd April, 2014, that such Notification by the MoEF would be subject to orders of the Hon'ble Supreme Court. Once the Notification is issued, parties concerned or any aggrieved person would have the right to question the legality and correctness of such a Notification. As the MoEF has acted in furtherance to the Judgment of the Hon'ble Supreme Court and orders of the Tribunal, we are of the view that it would be appropriate for the MoEF to place on record compliance report of these orders before the Hon'ble Supreme Court and the Tribunal. We have no doubt in mind that the MoEF while issuing Notification would keep in mind the orders passed by the Hon'ble Supreme Court afore-referred.

33. Ergo and for the reasons afore-stated, we pass the following order and directions:

A) The prayer of the Applicant Society for review/clarification of the orders of the Tribunal dated 28th October, 2013 and 3rd April, 2014 is declined.

B) In regard to the prayer of the Applicant Society that the MoEF should be directed to issue the Notification expeditiously, and keeping in view the statement made on behalf of MoEF, we direct the Ministry to issue the final Notification which is being

finalized, within three weeks from the date of passing of this judgment.

C) All the concerned stakeholders or any aggrieved person would be at liberty to challenge the said Notification in accordance with law.

D) We direct all the concerned authorities that upon the issuance of the above Notification by the MoEF, they should deal with and act upon the application of the Applicant Society pending before them expeditiously and in accordance with law.

Miscellaneous Application No. 684 of 2015, is accordingly disposed of in the above terms, while leaving the parties to bear their own costs.

Justice Swatanter Kumar
Chairperson

Justice M.S. Nambiar
Judicial Member

Dr. D.K. Agrawal
Expert Member

Prof. A.R. Yousuf
Expert Member

New Delhi
18th August, 2015