BEFORE THE NATIONAL GREEN TRIBUNAL

(WESTERN ZONE) BENCH, PUNE

APPEAL NO.10/2016(WZ)

CORAM:

HON'BLE DR. JUSTICE JAWAD RAHIM
(JUDICIAL MEMBER)

HON'BLE DR. AJAY A.DESHPANDE
(EXPERT MEMBER)

In the Matter of:

1. **Old Cross Fishing Canoe Owners Co-op Society Ltd.**
   Under the Co-operative Society Rules,
   Office: H.No.116,
   Non-Mon, Dempo Bhatt Vasco-Goa
   Katem Baina, Vasco-da-Gama, Goa,
   Through its President Mr. Custodio D'Souza, Major, R/o. Katem Baina, Vasco-da-Gama, Goa.

2. **Baina Ramponkar & Fishing Canoe Owners Society,**
   Office: Katem Baina, Vasco-da-Gama, Goa.
   Through its President Mr. Alcantra Gurjao, Major, R/o. Katem Baina, Vasco-da-Gama, Goa.

....**APPELLANTS**

VERSUS

1. **The Mormugao Port Trust,**
   Through its Chairman
   Vasco-da-Gama, Goa.

2. **The Union of India,**
   Through the Ministry of Environment & Forest,
   Government of India,
   Paryavaran Bhawan, CGO Complex,
   Lodhi Road, New Delhi-110 003.

3. **The Goa Coastal Zone Management Authority,**
   Through Member Secretary,
   3rd Floor, Dempo Towers,
   Patto, Panaji – Goa.

4. **The State of Goa,**
   Through its Chief Secretary,
   Government of Goa, Secretariat,
   Alto Provorim, Goa.

…….**RESPONDENTS**

Counsel for Appellant(s):

Mr. Nigel D' Costa, Advocate a/w. Mr. Asim Sarode, Adv.

Counsel for Respondent(s):

Mr. Neeraj Kaul, ASG a/w Mr. Subodh Kantak Sr. Adv.,
Mr. Y.V. Nandkarni, Adv. & Mr. Rohan Shirodkar, Adv. for Respondent No.1
Mr. Anirudha Tapkire, Adv. h/f Mr. Amit Karkhanis, Adv. for Respondent No.2
Mr. Amogh V. Prabhudesai, Adv. for Respondent Nos.3 & 4

Date: 2nd September, 2016

ORDER/JUDGMENT

1. By this Appeal, the Appellant Societies i.e. Old Cross Fishing Canoe Owners Society Ltd and Baina Ramponkar & Fishing Canoe Owners Society have challenged the Environmental Clearance (EC), dated 9th February, 2016, granted for the capital dredging activity to Mormugoa Port Trust proposed by Respondent No.1 i.e Mormugoa Port Trust (MPT), the Respondent No.1 by the Ministry of Environment and Forest (MoEF) on several facts and grounds.

2. This Appeal has been filed under Section 16(h) read with Section 18, 15 and 20 of the National

Green Tribunal Act, 2010. The Appellants seek following reliefs:

> "II. That direction be given to the Respondents to cancel the Environmental Clearance dated 09/02/2016 granted by the Respondent No.2 to the Respondent No.1 for deepening and dredging of existing navigational channel at Vasco-da-Gama, Mormugao, Goa.
>
> III. That an order be passed directing the Respondent No.1 to forthwith stop the illegal dredging work being carried out at Kharewada Bay, Vasco-da-Gama, Goa and to take necessary action to restore the sea bed to its original condition."

3. This Tribunal had issued Interim Order on 4th May, 2016 in view of the urgency expressed by the Appellants, declining stay the ongoing dredging activities but the Respondent No.1 was put to certain terms for carrying out the proposed dredging activities.

4. The Appellants submit that Respondent No.1 i.e. The Mormugoa Port Trust propose to deepen the existing navigation approach channel in Vasco bay to allow larger capsize vessels into port area and for that purpose they have proposed to deepen depth of water to 19.5-9.8meters from the existing depth of 14.1-14.4 meters over the entire length (@18km) of the approach channel. They contend that such massive dredging would

result in adversarial changes in the water quality by sediment dispersal and collapsing of the sea bed. They also submit that the removal of gravels and stones during dredging would cause irreversible impacts on the aquatic life and the sea bed. Appellants therefore, submit that such massive dredging activity will result in degradation of the eco-system, disturbing ecology and thereby affecting the environment and livelihood of local fishermen community.

5. The Appellants allege that the dredging activities are environmentally sensitive activities and even though, Goa Coastal Zone Management (GCZMA), while forwarding the application of Respondent No.1 to MoEF, had highlighted various issues to be considered and decided by the MoEF. The MoEF has not appraised the project proposal strictly as per the EIA Notification. It failed to reasonably and scientifically deal with apprehensions of the local people as well as issues raised by GCZMA.

6. Appellants also allege that the Respondent No.1 was granted the Environmental Clearance on 9th February, 2016,but the actual dredging activities has commenced from 1st January, 2016 in violation of the provisions of the Environmental (Protection) Act and EIA Notification, 2006.

7. The Appellants also point out that the Environmental Clearance has been granted without the mandatory public hearing required for category 'A' projects as per the EIA Notification. They submit that MoEF, in utter disregard to and without any legal powers, has amended the terms of reference (ToR) given for the EIA studies on 23rd September, 2015 wherein such exemption has been given as "the project/activity is covered under Para 7 III Stage (3) (i) (cc) of the EIA Notification, 2006 (as amended), hence would be exempted from public consultation."

8. The Appellants further allege that this particular provision of exemption is strictly limited to 'maintenance dredging' subject to further condition that the dredged material shall be disposed within the port limits. And, therefore, the Appellants strongly contend that the MoEF has given an illegal and unauthorized exemption of the public consultation for such a massive project, which has numerous long term environment consequences, including loss of ecology and livelihood for traditional fishermen. They submit that the public consultation and hearing are an essential part of the EIA process and the legal rights of the local people related to environment have been subverted by MoEF by declining the opportunity of public hearing to vent their

apprehensions and grievances.

9. In view of the Interim Order passed on 4th May, 2016, the final hearing was expedited. At the same time, this Tribunal had appointed the Committee to ascertain the environmental impacts as it was noticed that there is no regulatory compliance verification till passing of the Interim Order on May 4th, 2016, though the actual dredging commenced since January 1st, 2016. Some preliminary reports have been submitted by the Committee appointed by the Tribunal. Considering the contents of periodic Reports of the monitoring committee, the matter was heard on 11th July, 2016 and a detail order has been passed.

10. It can be noticed from the prayers that the main relief sought is to cancel/revoke the EC dated 9th February, 2016. In case this EC is found to be invalid, as a consequential relief, the prayer No.2 would trigger for further consideration and determination and accordingly, the Appeal was heard for the relief related to the challenge to the impugned EC at this stage.

11. The present proceedings are Appeal proceedings under Section 16(h) of the National Green Tribunal Act, 2010 challenging the impugned EC dated 9.2.2016 and, therefore, the only limited issue which is to be dealt is testing the impugned EC on the principles of

legality, reasonability and application of mind. Accordingly, we will deal on this issue in subsequent paragraphs.

12. Learned Counsel Mr. Nigel D' Costa appearing for the Appellants submits that basically he has two limbs of argument. Firstly, he contends that the exemption from the public hearing granted by the MoEF, by amendment of approved Term ToR, is illegal as the EIA Notification contemplates the exemption of the public hearing by operation of law itself and there is no specific authority granted to MoEF to exempt any project from public hearing/consultation on case to case basis. He, therefore, alleged that there is a mischief played by MoEF by issuing the amendment in the ToR without the approval of Expert Appraisal Committee (EAC) or without any substantive powers under the EIA Notification. And, therefore, such an exemption from the public hearing granted to this particular project is *ultravires* of EIA Notification.

13. He further submits that the MoEF in its affidavit has elaborated on the reasons for granting such exemption which, on mere perusal would show that the same are not factually related to exemption clause of EIA Notification and there are no legal powers conferred on the MoEF to grant such an exemption. He submits that it

is an admitted fact that the dredging involved in the project is a 'capital dredging activity' and not the 'maintenance dredging' and, therefore, the provision of Para 7 of EIA notification cannot be used or applied by the MoEF to grant such exemption. Furthermore, he argued that the exemption for maintenance dredging is also conditional that the dredged material shall be disposed of within the port limits. It is also mandatory that the maintenance dredging is exempted from EC process, provided it forms part of the original proposal for which environmental management plan was prepared and environmental clearance obtained. He, therefore, submits that both these yardsticks have not been verified by MoEF before grant of such exemption and the project has been cleared for grant of EC without mandatory public hearing. He also contends that such exemption is given without approval/recommendation of EAC of MoEF. It was even not placed in public domain and is issued as an administrative order.

14. Another limb of the argument of Learned Counsel for Appellants is that procedure contemplated under EC Regulations 2006 has not been strictly adhered to. The issues raised by GCZMA have not been addressed either in the EIA report or appraised by EAC while granting the EC. He submits that had public hearing

been conducted, the local residents would have pointed out to various possible environmental impacts relating on the environment baseline data and apprehensions of impacts of the proposed activity on environment and their traditional fishing activities. This would have facilitated the EAC to take a right decision on the EIA report.

15. He also submits that the capital dredging activity *perse* cannot be considered in isolation as it is the case of the Respondent No.1 that the proposed project would facilitate movement of larger ships into the port for increased material handling. He submits that such increase material handling would also necessary involve other infrastructure like road connectivity, parking area, increased traffic, storage houses etc. and therefore, the EAC should have considered various aspects related to the capital dredging and should have, necessarily, verified whether the existing capacity of the Mormugoa Port would in any way increase attracting the provision of Entry 7(e) of the Notification.

16. He relied on the Judgment of Hon'ble Madras High Court 2010 Supreme (Mad) 1881 in bunch of Writ Petitions 10641 to 10643 of 2009 to contend that public hearing is an essential feature of the environmental clearance process and the same cannot be given go-bye

by any administrative decision. He, therefore, pointed out that subsequent to filling of this Appeal; the Respondent No.1 has initiated some studies to assess the environmental damages. He, therefore, submits that the EC dated 9th February, 2016 may be declared as void and illegal and be set aside. Alternatively, he also pleaded that the EC may be kept in abeyance till the public hearing is conducted as per law and also report of studies commissioned by Respondent No.1 are available so that EAC can take a considered decision in this regard.

17. Learned ASG Shri Neeraj Kaul appearing for Respondent No.1 highlighted the importance of the proposed capital dredging activities. He submits that the project will increase the cargo traffic at the Mormugoa Port which will lead to overall socio-economic development of the region and will also be environmental friendly. He submits that the Respondent No.1 has carried out the necessary EIA studies through reputed government firm i.e. Water and Power Consultancy Services (India) Limited (WAPCOS) Ltd. and the same was duly considered by EAC. He submits that the issues which were flagged by the GCZMA were only apprehensions of one of its' Expert Member and Respondent No.1 has adequately explained the details to GCZMA as well as EAC, MoEF. He submits that the

MoEF in its own understanding of the project, particularly, the preparation of the EIA report and also importance of the project has taken a conscious decision to exempt the project from public consultation. He contends, at the most it could be a possible error of MoEF under the legal scheme of EIA Notification, however, there is no malafide involved in the process nor it has been alleged by the Appellants. He submits that there could be a genuine error on the part of MoEF but quashing EC cannot be an answer or solution in such case. He submits that more than 65% of the dredging work is completed and more than Rs.193 Crores worth work orders have been issued. He submits that this is a public funded project and any adverse order would result into loss of the public exchequer. He, therefore, contends that balancing computing interest weighs towards the Respondent No.1 in the form of balance of convenience as there is no proved irreparable damage reported by the Monitoring Committee appointed by the Tribunal. He further submits that the Respondent No.1 is committed to comply with all the conditions of EC and carry out the dredging activity in the environmental friendly manner for sustainable development of the area. He, therefore, submits that the Appeal may be dismissed.

18. Learned ASG also submits that Respondent

No.1 is a Government Company and conscious of its social and legal obligations. He submits that Respondent No.1 has filed three (3) affidavits dated 8th March 2016, 15th July 2016 and 21st July 2016 and placed all facts on record to rebut allegations. He submits that as per the interim order of the Tribunal, the monitoring committee appointed by Tribunal has submitted reports. He further submits that the monitoring committee has opined that in order to understand long term impact, certain specific studies need to be carried out through expert agencies. He further submits that Respondent No.1 has accordingly initiated some studies through expert agencies. The various project details like DPR, CWPRS Report, dredged material disposal plans have been submitted. Learned ASG, therefore, contends that the Tribunal can wait till such reports are available and the allegations of Appellants regarding long term impacts can be verified through such studies.

19. Learned Counsel Mr. Anirudha Tapkire appearing for MoEF submits that he will go with the affidavit filed by MoEF through Mr. Aditya Narayan Singh, Scientist-D dated 6th April, 2016. On perusal of this affidavit, it is noted that MoEF considered this project of deepening of approach channel for capsize vessels at the Mormugoa Port by the Mormugoa Port

Trust, is covered under the provisions of EIA Notification, 2006 and listed at item No. 7(e) in the Schedule of this Notification. It is submitted that EAC has formulated the Terms of Reference (ToR) for the EIA studies which was communicated to the Project Proponent on 9th December, 2014. As regards exemption from public consultation, the Ministry affidavit deals with this issue in paragraph No.10.

20. Respondent Nos.3 and 4 have not filed any affidavit. However, as the Appeal is against the impugned EC issued by the Respondent No.2, their replies are not necessary to deal with the challenge to the EC.

21. Based on the above discussion, pleadings and documents on record, the only point which requires determination for the present adjudication is whether the exemption given to the project from conducting the public hearing is valid, legal or otherwise.

22. In the beginning following points can be noted which have not been disputed by the contesting parties:

(a) The project in question is related to deepening of approach channel in capsize vessels at Mormugoa Port. This deepening of approach channel will be carried out by the capital dredging activity. The approach channel has been designed for 185000 DWT bulk

carriers.

(b) The capital dredging activities were commenced from 1st January, 2016, admittedly before the grant of EC dated 9th February, 2016.

(c) The dredged material which is estimated to be 15 million cum will be disposed of in the off-shore disposal area. As per Central Water & Power Research Station (CWPRS) recommendations, the disposal area of 2 x 2 km, located at a distance of 1 km north from the intersection of the centre line of the outer approach channel with the -20 m contour at a depth of about -27 m CD has been identified.

(d) The MoEF granted exemption from the public consultation process by communication dated 23rd September, 2015.

23. Under these circumstances, it would be necessary to refer to the provisions of EIA Notification, 2006 related to the scheme of EC appraisal in the context of the project in question. The EIA Notification, 2006 in Para-7 has stipulated four stages for appraisal of EC applications for new projects which are as under:

- Stage 1- Screening
- Stage 2 – Scoping
- Stage 3 – Public Consultation
- Stage 4 – Appraisal

It is an admitted fact that the proposed project involves capital dredging and as per the Schedule annexed to the Notification the capital dredging inside and outside port

is enlisted at Entry – 7(e) of the Schedule. For clarity the said Entry is reproduced as under:

7(e)	[38][Ports, harbours, break waters, dredging]	≥ 5 million TPA of cargo handling capacity (excluding fishing harbours)	≥ 5 million TPA of cargo handling capacity and/or/ ports/harbours ≥10,000 TPA of fish handling capacity	[39] [General Condition shall apply *Note.* – 1. Capital dredging inside and outside the ports or harbours and channels are included; 2. Maintenance dredging is exempt provided it formed part of the original proposal for which Environment Management Plan (EMP) was prepared and environmental clearance obtained]

24. The EIA notification 2006, rightly refers public consultation stage of the EC Appraisal as a process by which the concerns of the local effected persons and others who have plausible stake in the environmental impacts of the project or activity are ascertained with a view of taking into account all the material aspects in the project or activity design for safeguarding and protecting interest of all concerned. The

Notification also makes it mandatory for all Category 'A' and Category 'B1' projects or activities to undertake public consultation. The Para 7 of 2006 Notification also list out certain exemptions to certain projects from public consultation process. The relevant provision of the public consultation and the exemption are as under:

> "Para 7 III Stage (3) (i)(cc) *[maintenance dredging, provided, the dredged material shall be disposed within port limits]"*

25. Admittedly, the instant project is a Category 'A' project which is manifest from Paragraph – 6 of the impugned EC dated 9th February, 2016. The exemption clause referred to above is clearly applicable to the maintenance dredging provided that the dredged material is disposed within port limits. As the proposed project involves capital dredging, it is not clear how this particular exemption provision which is applicable only to the maintenance dredging, has been considered and relied upon by the MoEF while issuing order dated 23rd September, 2015 exempting the capital dredging activities from public consultation.

26. The MoEF in its affidavit dated 6th April, 2016 has dealt on this issue in Paragraph No.10 which is reproduced below:

> "10. It is submitted that in this instant case, as per the provisions of EIA Notification, 2006 the project in question was exempted from public consultation/ hearing as per para 7 III Stage (3) (i) (cc) of the EIA Notification, 2006. It is

further submitted that public hearing exemption was granted by considering facts:

i. Outer Channel is to be deepened from 14.40m to 19.80m, and inner basin and turning circle from 14.10 to 19.50 m.

ii. Berths 5 & 6 and approaches to be deepened to 19.80 m, and berth no.7 and approaches to be deepened to 16.50 m.

iii. Total quality to be dredged is about 15 million cum and the dredged material is to be dumped within th sea (location identified by CWPRS, Pune).

iv. No land acquisition and R & R involved in the project, no mangroves at the project site.

v. Deepening of channel shall increase efficiency of the port, and result in overall EXIM boost due to better transport economics."

27. It is manifest from the above submission of MoEF that MoEF has not dealt on the issue of whether the project is a capital dredging or maintenance dredging but based on the considerations which are not expressly specified in the exemption clause, has granted such exemption. It is also manifest from the affidavit that the public consultation was made mandatory by EAC of MoEF while approving project specific ToR to the said project as per communication dated 9th December, 2014. It is also evident that such an exemption has been given without any reference or recommendation of the EAC which is required to carry out the environmental appraisal in the above referred four stages.

28. Learned ASG fairly conceded that there may be an error apparent on the part of MoEF in giving such exemption which is only valid for the maintenance dredging. He further submits that this is a public project

and significant amount has already been spent on the dredging activity. He, therefore, strenuously argued that the balancing computing interest is in favour of the Respondent No.1. In other words, he is of the opinion that the Respondent No.1 cannot be punished for any error or incorrect decision of the MoEF in granting the exemption from the public hearing.

29. In the Interim Order dated 4th May, 2016, we have noted that the learned Counsel for the Respondent No.1 had argued that such a decision has been taken as a policy decision subsequent to the meeting of Group of Infrastructure at the Government of India level. We had posed a query whether even if it is considered as policy decision whether such policy decision or even administrative decision can bypass or subvert the statutory provisions of the Act/Rules? We have not heard anything on this aspect from the learned ASG or the MoEF. However, we would like to record that it is a well settled legal position that policy decisions or administrative decisions cannot by-pass or subvert statutory provisions or Act/Rules. There is catena of judgments on this issue and we do not wish to go further on this aspect as both MoEF and Respondent No.1 has not taken a different stand.

30. A mere perusal of the Order dated 23rd

September, 2015 issued by MoEF would show that there is no reasoning or justification for giving such exemption. The said Order is reproduced below:

> **"Order**
>
> **Sub : Deepening of approach channel for Capesize vessels at Mormugao Port, Goa by M/s. Mormugao Port Trust – Amendment in ToR – reg.**
>
> The aforesaid project was granted ToR by the Ministry vide letter of even no. dated 9.12.2014, under the provisions of EIA Notification, 2006 as amended from time to time.
>
> 2.0 The para 4 of page 3 of the aforesaid ToR letter may be read as follows:
>
> "The project/activity is covered under Para 7 III. Stage (3) (i) (cc) of the EIA Notification, 2006 (as amended), hence would be exempted from Public Consultation".
>
> 3.0 This issue with the approval of the Competent Authority in the Ministry."

The Principal Bench of National Green Tribunal has elaborately described the subordinate or delegated legislations and executive order, while holding that passing of an order of Environment Clearance is an executive action ***Wilfred J. &OrsVs. MoEF &Ors, 17th July, 2014.*** The Bench in Paragraph 93 has also referred to issues required to be considered in such challenges:

> *"93. The Supreme Court while dealing with the cases involving challenge to such Orders and Notifications, stated the precepts that should guide the courts where the question is whether the impugned action is legislative or executive and the scope of its challenge was discussed in the case of Bombay Dyeing and Mfg. Co. Ltd. vs. Bombay Environmental Action Group and Ors., (2006) 3 SCC 434:*
>
> *"197. A matter involving environmental challenges may have to be considered by a superior court depending upon the fact as to whether the impugned action is a legislative action or an executive action. In case of an executive action, the court can look into and consider several factors, namely,*
>
> *(i) Whether the discretion conferred upon the statutory authority had been properly exercised;*

(ii) Whether exercise of such discretion is in consonance with the provisions of the Act;

(iii) Whether while taking such action, the executive government had taken into consideration the purport and object of the Act;

(iv) Whether the same sub served other relevant factors which would affect the public in large;

(v) Whether the principles of sustainable development which have become part of our constitutional law have been taken into consideration; and

(vi) Whether in arriving at such a decision, both substantive due process and procedural due process had been complied with".

31. In view of the above discussions, we are of the opinion that the Order dated 23rd September, 2015 issued by MoEF giving exemption from public consultation to the capital dredging project of Respondent No.1 is issued without any valid reasons or any specific express provisions or powers conferred upon MoEF under the EIA Notification, 2006 read with the Environment (Protection) Act, 1986. And therefore, such an exemption from the public consultation given by communication dated 23rd September, 2015 is contrary to statutory provisions of EIA Notification, 2006 and needs to be set aside and quashed.

32. Another limb of arguments advanced by learned counsel for Appellants is regarding the inadequacies of the EIA report and also, the role of public consultation to make such impact assessment more realistic and practical. The learned Counsel appearing for the Appellants submit that the Appellants are the

traditional fishermen staying in the vicinity of the project and are carrying out traditional fishing activities in the adjoining area. He has alleged several short term and long term environmental consequences which will affect local ecology and their livelihood. We are inclined to accept his contention that if public hearing had been conducted, the Appellants would have had an opportunity to raise several issues like increased traffic, biodiversity of the project area and adverse effect on their livelihood in clear terms and such issues would have assisted the EAC to take considered decision. Learned Counsel for the Appellant as well as Respondent No.1 fairly admits that public consultation is a crucial and important element of the environmental appraisal process and therefore, we hold that exempting the project from public consultation/ public hearing has infringed fundamental right of the concerned persons and has deprived just and fair opportunity rendering issue of impugned EC arbitrary.

33. The learned Counsel for Appellants also brought to our notice the inconsistencies in the EIA report, particularly, the CRZ studies annexed as Annexure-III which clearly indicates that study has been conducted on behalf of the third party i.e. M/s. JSW Infrastructure Limited. He further pointed out that the

environmental impacts which have been produced in the EIA report in Chapter-IV are cryptic and do not have any quantitative information particularly related to prediction of impact of dredging or disposal of dredged material. He alleged that only general qualitative statements without any substantive data or analytical information are made in the report. He, therefore, raised serious questions on the technical contents and correctness of the EIA report as such, which according to him could have been questioned during public consultation process. Though, this is not a point to be determined by the Tribunal, we have found merit in the allegations of the Appellants particularly with regard to impact prediction assessment and also, the involvement of the third party in preparation of the report. In fact, this aspect was referred in one of the hearings and on 24th May, 2016, Tribunal has noted that this report is by a private agency and thereafter, the Respondent No.1 has not filed any document to prove otherwise.

34. We have also noted that the issue of disposal of dredging material has been studied by CWPRS quite elaborately and in its Report No.5259 of February, 2015 it is observed following:

> **"5.0 Identification of Disposal Ground**
>
> It is proposed to dredge 0.1 Million m^3 of dredged material per day for the total estimated capital

> dredging quantity of the about 14Million m^3 using two dredgers. MIKE -21 AD (Advection and Dispersion) model is used to study the sediment behavior after dumping the dredged material. Model was simulated for a period of one month considering 2500 cum of hoppered material being dumped at an interval of one hour at (-)27m depth contour (UTM 356000 E and 1705000 N) north of the approach channel. The location of dumping ground and simulation of results are shown in Fig. 19(a) & (b) respectively. It could be seen from figure that sediment plume moves towards north and it spreads in 4 km wide area. Plume crosses the north boundary of model and it could be seen from the sediment plume pattern that it may move further 5 km toward north before it attains ambient conditions. The dredging would take place during month of August-September when the offshore currents are northward. In order to optimize the disposal ground location, disposal at other shallower contour depths viz. (-) 25m and (-)26 m were also tried but the plumes were observed to disperse move towards the port areas, hence are not recommended. Thus location (UTM 356000 E and 1705000 N) is recommended to dump the dredged material at (-)27 m depth contour in a 2 km by 2 km area".

35. However, subsequently, we have noted that CWPRS has filed another Report dated 20th May, 2015 wherein they have identified two separate dredging disposal grounds, one for the capital dredging (15 million/cum) and another for the annual maintenance dredging (6 million/cum). We find that this particular conclusion is neither reflected in the EIA report nor in the EC granted to the project. The detailed impact assessment of dredged material disposal as available in earlier CWPRS report is also not available in EIA report. We have also found the various environmental impacts as enumerated in interim order dated 4th May 2016 have not been adequately addressed in EIA Report. We are sure that the MoEF/EAC will take due note of the above

discussions, without any prejudice, to ensure that the EIA report is not prepared at the instance of the project proponent or any third party and to ensure it should comprehensively deal with the issues related to environmental consequences of capital dredging activity.

36. The learned Counsel for Appellants argued that the capital dredging cannot be considered in isolation to the material handling capacity of the port activities. The increased depths in the approach channel will undoubtedly allow movement of large vessels enabling them to carry larger loads. We find merit in this argument and it is for MoEF to consider whether the capital dredging can be considered in isolation to the port cargo handling capacity which is referred in Entry 7(e) of the Schedule of EIA Notification, 2006.

37. In the last two decades, the country as a whole has seen public discourses on transparency and accountability. In our considered view, the MoEF needs to be reminded of these two important qualities in public administration. Besides, in our considered view, we should invoke 'precautionary principle' in case like this. This compels us to record and issue directions to MoEF that whenever Application for grant of EC is sought, it must keep in mind precautionary principle and examine factual, legal and all aspects of the project before

granting any such permission.

38. The said exemption is also issued without approval of EAC and not even put in public domain. Clearly, this is an error by MoEF outside its jurisdiction and authority. Hence, in such case, the logical consequences will be quashing the impugned order. Further, the role of Respondent No.1 is also not as novice as portrayed. We have recorded submissions of Respondent No.1 in Interim order regarding the decision of exemption taken in Group of Infrastructure meeting. It seems that the MoEF was unduly influenced by such decision, wherein Respondent No.1, the Mormugao Port Trust and its administrative Ministry participated. Further, Respondent No.1 has initiated certain studies to assess long term environmental impact subsequent to institution of this Appeal, which should have been conducted prior to obtaining EC.

39. Before parting we would also observe that wherever the administrative decision or action is contrary to law, improper, illegal or unsustainable, the doctrine of reasonableness and fair plea also applies and such the administrative orders cannot be exempted from applying test of sustainability even in contours of law whenever such administrative action or decision source their strength or power to any statute or notification. In the

instant case, MoEF is deemed to have exercised the power to grant EC under the mandate of EC Regulations, 2006. Therefore, decision to grant EC or for that matter decision to grant exemption from public consultation, should answer to mandatory requirements and criteria laid down under the said Notification. As in the said Notification, capital dredging is not exempted from public consult, except maintenance dredging, decision of MoEF to grant exemption of public hearing for capital dredging cannot be sustained in the eyes of Law.

40. The Apex Court in ***State of Himachal Pradesh Vs. Ganesh Food Products AIR 1996 SC 149*** have held that the Government Development Agencies charged with decision making ought to give due regard to ecological factors including (a) the environmental policy of the Central and the State Government; (b) sustainable development and utilization of natural resources; and (c) the obligation of the present generation to preserve natural resources and pass on to the future generations to preserve the environment as intact as the one we inherited from the previous generation. Similarly the Apex Court in ***Bangalore Medical Trust Vs. Muddppa AIR 1991 SC 1902*** have held that the powers conferred under the environmental statute may be exercised only to advance environmental protection and not for a purpose

that would defeat the object of the law.

41. In the instant case, the 'Precautionary Principle' is totally ignored by the MoEF. In case of ***"Vellor Citizens' Welfare Forum Vs. Union of India, "(1996) 5 SCC 647"*** (paragraphs 10 to 20) the 'Precautionary Principle' is elaborated. So also, in ***"Jagnnath Vs. Union of India, "(1997) (2) SC 87"*** at paragraph 49 and 51, as well as in ***"Karnataka Industrial Areas Development Board Vs. C.Kenchappa & Ors, "(2006) SCC 371"*** at paragraphs 66, 77, and 94, the Apex Court laid down following principles:

- *Environmental measures to be taken by the Govt. and statutory bodies must anticipate, prevent and attack which causes environmental degradation.*
- *Where there are threats of serious or irreversible damage, lack of scientific certainty cannot be used as a reason for postponing measures to prevent such degradation.*
- *The onus is on the developer to show that his actions are environmentally benign.*

42. In summary, we are of the considered opinion that the exemption given by the MoEF to the impugned project from public consultation for grant of EC is without any authority of law and is arbitrary and devoid of any powers available under EIA notification. Consequently, the EC dated 9th February, 2016 is also invalid and issued without compliance of the provisions of EIA Notification, 2006.

43. Having reached to this conclusion, we now

proceed to consider alternate plea advanced by learned Additional Solicitor General to bail out 1st Respondent from legal implications of illegality in their project. He submits to us that the Tribunal may take into consideration amongst other issues that this project is a public project and any adverse order will result in loss of public funds and delay the project which is in public interest.

44. Per contra, the Appellant has brought to our notice several incidental issues that may arise as consequence of capital dredging in the area. He has highlighted that capital dredging cannot be considered in isolation to increased material handling capacity of the port after capital dredging. The increase in depth of water in approach channel will undoubtedly allow movements of large vessels enabling them to carry greater loads which will have direct impact on surrounding environment especially aquatic life and ecology.

45. We have taken into consideration above said contentions.

46. It is admitted that 1st Respondent is the Govt. instrumentality and claims to have embarked on public project. If that be so, then public interest undoubtedly shall be of paramount considerations, more particularly, when it relates to likely adverse impacts on

environment, which has bearing on posterity.

47. The contention of learned ASG is in the nature of seeking discretionary order to allow the project on the basis of 'hardship'. We are conscious of the fact that, even if, on question of law, the impugned order is quashed or set aside, the project has to be considered keeping in mind a general legal principle which deals with prevention of undue hardship etc. In case of order of this nature, balance of convenience, irreparable injury and hardship, though can be canvassed, but cannot become harbinger for consideration as in case of grant of injunctive orders. We are dealing with a case relating to adverse, severe impacts on environment as a consequence of illegality in process of grant of Environment Clearance (EC), which has emboldened Project Proponent to indulge in capital dredging, which has undoubtedly changed very geomorphology of sea bed. Therefore, merely because the project involves public funds cannot be a defense or a shield from suffering further consequential orders.

48. In the present stage of Appeal, there is no question of deciding proportion of damage or liability of the parties. In the instant case, what we were dealing with is legality, propriety and sustainability of the impugned order passed by MoEF from which follows

several severe environmental consequences. It is manifest from the order of MoEF that it has not only failed to apply its mind to the factual aspects of the project, but as for unexplained reasons indulged in misinterpreting provisions of Clause-7 of EIA Notification, which exempts "only certain projects" as indicated therein. In this case, it was important for MoEF to have identified whether the project in question is a maintenance dredging or capital dredging. Distinction has been totally ignored and for obvious reasons the project which is a capital dredging is construed as a maintenance dredging, which is exempted under Clause-7 of the EIA Notification. Therefore, we have taken a view that it is not a neglect or omission, but may be for some other reasons.

49. Be that as it may, ultimate effect of such decision is important. As consequence of such decision the 1st Respondent has proceeded with capital dredging and now claims equity on the plea that it has completed about 60% of the project work. Therefore, doctrine of proportionality cannot be implied in the present case to hold that whatever may be illegality or un-sustainability of the order of MoEF the project must be allowed to continue.

50. Another important aspect that needs to be taken into consideration which non-suits 1st Respondent

from equitable relief is a fact that it, despite being equipped with best of legal support and administrative advisors, has commenced the project in the month of January, 2016, much before grant of EC on 9.2.2016. The very fact, it has commenced the project without even waiting for EC to be issued, shows disdainful conduct of 1st Respondent in treating mandatory provisions as mere formality and not as necessity to commence its project. The wrong doer cannot take plea of its own wrong unless it is influenced by external factors. In the instant case, act done by 1st Respondent is of his own doing and it therefore cannot take shelter of '*fait accompli*' having completed the project to the extent of 60% to seek further indulgence to complete it after being declared as project without EC. Thus, we are not inclined to believe that balance of convenience is in favour of 1st Respondent. In consequence, we are of the opinion that even if the project to be in public interest it may be very minimal extent, but larger public interest is certainly affected by this project.

51. Considering the above discussion, we are of considered view that when the precautionary safeguards incorporated in EIA Notification have not been followed, the plea of Respondent No.1 of public project, project delay etc. cannot be accepted. Respondent No.1 is

obliged to show that its project is environmentally benign and aimed at sustainable development, in a procedure, strictly in compliance with the EIA Notification, 2006. We also need to recognize that in all such cases the 'Environment' is the silent sufferer and not represented in present litigation.

52. The sum of our conclusion would be balance of convenience, though canvassed by learned ASG to be in favour of Project Proponent, is not in its favour for the simple reason that unless the project as appraised is strictly as per EIA Notification based on precautionary principle. There could be reasonable apprehensions of irreversible environmental damages which in any case cannot be compared with economic loss, particularly when Respondent No.1 is put on notice through interim order by this Tribunal and also the fact that it has commenced dredging activity much before obtaining impugned EC.

53. And therefore, in view of above discussions, we pass following orders; based on precautionary principle as enumerated in Section 20 of National Green Tribunal Act, 2010.

1. The communication dated 23rd September, 2015 of MoEF granting exemption from public consultation to the project of Respondent No.1

is quashed as illegal, arbitrary and in violation to the provisions of the EIA Notification, 2006. Consequently, the impugned EC dated 9th February, 2016 is also quashed and set aside.

2. The matter is remanded back to EAC of MoEF for further action.

3. The Interim Order dated 4th May, 2016 stands vacated. However, in view of the further proceedings regarding the restoration and restitution, the Bank Guarantee deposited by Respondent No.1 with GCZMA shall be retained by the Authority till further orders.

4. The Respondent No.1 and MoEF are directed to pay cost of Rs.2 Lakhs each to both the Appellants within four (4) weeks.

5. In view of this order, 1st Respondent shall not proceed with dredging activity, except as provided in this order.

54. The matter will be further heard regarding the restoration and restitution of the environment and is listed for hearing on 5th October, 2016.

...,JM
(Dr. Justice Jawad Rahim)

.......................................,EM
(Dr.Ajay A. Deshpande)

DATE: 2nd September, 2016
PUNE.
mk

NGT