Keystone Realtors Pvt. Ltd. vs Anil V. Tharthare on 3 December, 2019

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Bench: Ajay Rastogi, Dhananjaya Y Chandrachud

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 2435 OF 2019

Keystone Realtors Pvt. Ltd. …Appellant

Versus

Shri Anil V Tharthare & Ors. …Respondents

JUDGMENT

Dr Dhananjaya Y Chandrachud, J

1. The present Civil Appeal arises from an order dated 11 February 2019 of the Principal Bench of the National Green Tribunal1. In its order, the NGT held that the increase in the total construction area of the appellant s project was an “expansion” under a notification (bearing number S.O. 1533) dated 14 September 20062 of the Ministry of Environment and Forests. The NGT found that the appellant had undertaken an “expansion” as set out in Paragraph 2 of the EIA NGT EIA Notification Notification without complying with the regulatory procedure prescribed. The appellant was directed to deposit an amount of Rupees one crore with the Central Pollution Control Board3. Noting that the construction at the project site had been completed, the NGT appointed a

five-member expert committee to study the impact of the appellant s expanded project and to suggest remedial measures.

The facts

2. The appellant is the project proponent of a residential redevelopment, called „Oriana Residential Project situated at CTS no 646, 646 (Pt) Gandhinagar, Bandra (East), Mumbai 400050. On 8 June 2010 the appellant received a Commencement Certificate to carry out the development and erect a building situated at the project property. The appellant began construction. When the construction commenced, the total construction area was 8,720.32 square metres. The ambit of the project was expanded, and the constructed area was increased to 32,395.17 square metres. Under the EIA Notification, an Environmental Clearance4 was necessary if the total construction area exceeded 20,000 square metres. Hence, the appellant applied for an EC under the EIA Notification.

3. The fourth respondent, the State Level Expert Appraisal Committee for Maharashtra5 recommended the grant of an EC for the project. On 2 May 2013 the third respondent, the State Level Environment Impact Assessment Authority CPCB EC SEAC for Maharashtra6, based on the recommendations of the SEAC granted an EC. It is not in dispute that at the time when the EC dated 2 May 2013 was granted, the total construction area of the project was 32,395.17 square metres. The grant of the EC was conditional on the appellant obtaining a „consent for establishment from the Maharashtra Pollution Control Board under the Air (Prevention and Control of Pollution) Act 1981 and the Water (Prevention and Control of Pollution) Act 1974.

4. By a letter dated 24 September 2013, the appellant informed the Environment Department of the Government of Maharashtra, the second respondent, that the construction area was being further increased by 8,085.71 square metres, as a result of which the total construction area of the project would stand enhanced to 40,480.88 square metres. In its letter, the appellant sought an „amendment to the EC dated 2 May 2013 by the third respondent to reflect the increase in the total construction area. On 13 March 2014, the third respondent granted an „amendment to the EC dated 2 May 2013 on the ground that there was only a “marginal increase in built up and construction area”. The third respondent noted the changes in the specification of the project as follows:

Description	As per EC dated 2 May	Amendment
FSI area	16,346.32 sq mts	21,365.54 sq mts
Non FSI area	16,048.85 sq mts	19,115.34 sq mts
Total Construction area	32,395.17 sq mts	40,480.88 sq mts
Nos of tenements	Members Sale 61	Members Sale 77

SEIAA

Building Configuration	Member	2 Basement	Member	2 Basement

5. The first respondent, claiming to be a resident of MIG Colony, Gandhinagar, Bandra East, Mumbai, challenged the grant of the amended EC dated 13 March 2014 before the Pune Bench of the NGT. In response, the appellant filed two applications, challenging the standing of the first respondent and contending that the challenge was barred by limitation. By an order dated 4 May 2016, the Pune Bench of the NGT rejected the applications questioning the maintainability of the proceedings and setting up the bar of limitation. The appellant filed a writ petition before the High Court of Judicature at Bombay to challenge the decision of the Pune Bench of the NGT. The Bombay High Court, allowing the writ petition held by an order dated 12 August 2016, that the appeal was not maintainable at the behest of the first respondent, and the challenge against the grant of the amended EC dated 13 March 2014 was barred by limitation. By an administrative order dated 31 July 2018, the dispute was transferred from the Pune Bench of the NGT to the Principal Bench which heard the parties and delivered the impugned order.

Relevant clauses of the EIA Notification

6. The present dispute raises important questions regarding the interpretation the EIA Notification. The EIA Notification seeks to ensure the protection and preservation of the environment during the execution of new projects and the expansion or modernisation of existing projects. It imposes restrictions on the execution of new projects and on the expansion of existing projects, until their potential environmental impact has been assessed and approved by the grant of an EC. Paragraph 2 of the EIA Notification reads thus:

> "2. Requirement for prior Environmental Clearance (EC): -
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> The following projects or activities shall require prior environmental clearance from the concerned regulatory authority, which shall hereinafter be referred to as the Central Government in the Ministry of Environment and Forests for matters falling under Category „A in the Schedule and at State level the State Environment Impact Assessment Authority (SEIAA) for matters falling under Category „B in the said Schedule, before any construction work, or preparation of land by the project management except for securing the land, is started on the project or activity:
>
> (i) All new projects or activities listed in the Schedule to this notification;
>
> (ii) Expansion and modernisation of existing projects or activities listed in the Schedule to this notification with addition of capacity beyond the limits specified for the concerned sector, that is, projects or activities which cross the threshold limits given in the Schedule after expansion or modernisation;
>
> (iii) Any change in product – mix in an existing manufacturing unit included in Schedule beyond the specified range." (Emphasis supplied) The Schedule to the EIA

> Notification classifies potential projects into Category „A and Category „B based on their size and potential environmental impact.

Category „A projects require project proponents to secure an EC from the Ministry of Environment, Forests and Climate Change. Category „B projects require project proponents to secure an EC from the SEIAA, based on the recommendations of the SEAC. Where a project falls within the parameters stipulated in the Schedule, paragraph 2 of the EIA Notification provides that no construction work shall begin unless an EC is granted in regard to three types of activity: (i) new projects or activities provided in the Schedule, (ii) expansion or modernisation of existing projects or activities provided in the Schedule, and (iii) changes in the product mix in existing manufacturing units provided in the Schedule beyond the specified range. The present dispute raises questions as to how the second type of activity, the "expansion" of existing projects, should be construed under the EIA Notification.

7. In order to secure an EC, the project proponent must submit an application in the manner set out in Form 1 and Supplementary Form 1A (if applicable) of the EIA Notification. Under paragraph 7(i) of the EIA Notification, the project proponent must also submit a pre-feasibility report. However, in the case of projects under item 8 of the Schedule, only a conceptual plan is required to be submitted. Paragraph 7(ii) of the EIA Notification states that:

> "7(ii) Prior Environmental Clearance (EC) process for Expansion or Modernisation of Change of product mix in existing projects:
>
> All applications seeking prior environmental clearance for expansion with increase in the production capacity beyond the capacity for which prior environmental clearance has been granted under this notification or with increase in either lease area or production capacity in the case of mining projects or for the modernisation of an existing unit with increase in the total production capacity beyond the threshold limit prescribed in the Schedule to this notification through change in process and or technology or involving a change in the product mix shall be made in Form 1 and they shall be considered by the concerned Expert Appraisal Committee or State Level Expert Appraisal Committee within sixty days, who will decide on the due diligence necessary including preparation of EIA and public consultation and the application shall be appraised accordingly for grant of environmental clearance." (Emphasis supplied) Clause (ii) of paragraph 2 of the EIA Notification requires the project proponent to secure an EC from the relevant regulatory authority prior to undertaking any "expansion" of an existing project. Paragraph 7(ii) further stipulates that all applications for an EC in cases of "expansion" resulting in the increase of production capacity or lease area beyond the capacity/area stipulated in the previous EC shall be made in the manner set out in Form 1 or 1A (as applicable).

8. The appellant s application in Form 1 acknowledges that the project fell under entry 8(a) of Schedule 1 of the EIA Notification. Entry 8 deals with „Building and Construction projects having a built-up area of or greater than 20,000 square metres but less than 1,50,000 square metres. Entry

8 of the Schedule to the EIA Notification is as follows:

> 8 – Building / Construction projects / Area Development projects and Townships 8(a) Building and Construction □20,000 sq mts Built-up area for projects and <1,50,000 sq covered mts of built-up construction: in area the case of facilities open to the sky, it will be the activity area 8(b) Townships and Area Covering an area All projects under Development projects □50 ha and or item 8(b) shall be built up area appraised as □1,50,000 sq mts Category B1 Issue

> 9. In applying for the original EC, the appellant submitted an application in Form 1 as required under the provisions of the EIA Notification. The total construction area identified in the appellant s Form 1 was 32,395.17 square metres. However, in September 2013 the appellant informed the second respondent of an increase by 8,085.71 square metres as a result of which the total construction area of the project would be 40,480.88 square metres. In seeking an „amendment to the EC dated 2 May 2013 the appellant did not submit an updated Form 1. Further, the „amendment to the EC was granted by the SEIAA without the recommendations of the SEAC. The issue before this Court is whether the „amended EC dated 13 March 2014 granted by the SEIAA without following the procedure stipulated in paragraph 7(ii) of the EIA Notification is valid.

Submissions

10. Mr Mukul Rohatgi, learned Senior Counsel appearing on behalf of the appellant submitted that:

> (i) When construction began, the total construction area of the appellant s project was 8,720.32 square metres. As the EIA Notification requires projects with a total built up area of or more than 20,000 square metres to procure an EC prior to the start of construction, no EC was required before construction of the appellant s project commenced;

> (ii) Pursuant to the first increase, when the appellant s project crossed the 20,000 square metre threshold provided for in the EIA Notification, the appellant submitted a Form 1 and was granted a valid EC dated 2 May 2013 by the third respondent;

> (iii) Pursuant to the second increase, the built up area of the appellant s project only marginally increased by 8,085.71 square metres to a total construction area of 40,480.88 square metres, which is within the upper limit of 1,50,000 square metres prescribed by entry 8(a) of the Schedule to the EIA Notification. Therefore, the second increase was not an “expansion” within the meaning of clause (ii) of paragraph 2 of the EIA Notification and no fresh Form 1 or EC was required at the time of the second increase;

(iv) Clause (ii) of paragraph 2 only applies to situations where the project crosses the lower or upper threshold limits stipulated in the Schedule. Any increase in production capacity or construction area within the limits set out in the Schedule would not constitute an "expansion" within the meaning of Clause (ii) of paragraph 2 and does not require compliance with the procedure under paragraph 7(ii) of the EIA Notification;

(v) The increase in the appellant s project is only marginal and does not have an adverse impact on the environment;

(vi) The SEIAA applied its mind to the appellant s request for an „amendment ; noted that the increase in construction area was only marginal and issued an amendment to the original EC dated 2 May 2013; and

(vii) The NGT had no basis to impose the fine of Rupees one crore on the appellant.

11. Joining issue with the above submissions, Mr Aditya Pratap, learned counsel appearing on behalf of the first respondent submitted that:

(i) Under clause (ii) of paragraph 2 read with paragraph 7(ii) of the EIA Notification, any expansion beyond the "threshold limit" requires a fresh EC. The appellant s project had crossed the threshold limit of 20,000 square metres and the second increase of 8,085.71 square metres constituted an „expansion beyond the threshold limit and hence required a fresh EC;

(ii) Once a project breaches the lower threshold limit set out in the Schedule to the EIA Notification, any expansion or modernisation, even within the upper threshold set out in the Schedule, will require the submission of a fresh Form 1 and the matter to be placed before the Expert Appraisal Committee or the SEAC, as applicable in accordance with paragraph 7(ii) of the EIA Notification;

(iii) Adopting the appellant s interpretation of clause (ii) of paragraph 2 would defeat the object and purpose of the EIA Notification as a whole. It would allow project proponents to incrementally increase the construction area and over time significantly impinge on the environmental impact of the project without seeking a fresh EC;

(iv) If the law prescribes an act to be done in a particular manner, it must be done only in that manner and no other. Under paragraph 7(ii) of the EIA Notification, it was incumbent on the SEIAA to place the matter before the SEAC for appraisal and recommendations;

and

(v) The EIA Notification is an operationalisation of the precautionary principle, which forms a part of the environmental law of India. The EIA Notification must be read in a manner which gives effect to the precautionary principle.

Interpreting paragraphs 2 and 7

12. The central controversy between the parties to the present dispute is the manner in which paragraphs 2 and 7 of the EIA Notification should be interpreted. Clause (ii) of paragraph 2 of the EIA Notification stipulates that a project proponent shall require an EC prior to the start of construction in the case of an "expansion". Clause (ii) uses the phrase "expansion…beyond the limits specified for the concerned sector". The first respondent sought to lay emphasis on this construction to argue that any expansion beyond the lower limit stipulated in the Schedule would attract the requirement of a prior EC under paragraph 2. However, the above language in clause (ii) is further qualified by the phrase "that is, projects or activities which cross the threshold limits given in the Schedule after expansion or modernisation." A plain reading of the second half of clause (ii) would indicate that it applies to cases where a project was initially below the threshold limits stipulated in the Schedule but after the proposed expansion, would breach the threshold limits. Clause (ii) of paragraph 2 of the EIA Notification therefore would not appear to cover a case where a project had already crossed the lower threshold limit set out in the Schedule and the expansion does not cross the upper limit stipulated by the Schedule.

13. However, clause (ii) of paragraph 2 must be read with paragraph 7(ii) of the EIA Notification. Paragraph 7(ii) lays down the exact procedure to be followed by a project proponent in the case of an expansion. Two crucial points must be noted with respect to paragraph 7(ii). First, it uses the phrase, "expansion with increase in production capacity beyond the capacity for which prior environment clearance has been granted". Second, the qualifying language referring to breaching the threshold limits "after expansion" is absent. An "expansion" can occur even after the grant of an EC when the project first crossed the lower limit stipulated in the threshold and it is not necessary for the project to breach the upper limit after the expansion. Therefore, a close reading of paragraph 7(ii) would support the interpretation put forth by the first respondent – that even after obtaining an EC if the project is expanded beyond the limits for which the prior EC was obtained, a fresh application would need to be made even if the expansion is within upper the limit prescribed in the Schedule.

14. The dangers effectively articulated by the learned counsel for the first respondent are real. If clause (ii) of paragraph 2 does not cover a case where the expansion is within the limits stipulated by the Schedule, a project proponent may incrementally keep increasing the size of the project area over time resulting in a significant increase in the project size without an assessment of the environmental impact resulting from the expansion. Such an outcome would defeat the entire scheme of the EIA Notification which is to ensure that any new or additional environmental impact is assessed and certified by the relevant regulatory authorities. In the present case, the lower limit of Entry 8(a) of the Schedule is a built up area of 20,000 square metres and the upper limit is 1,50,000 square metres. It cannot be doubted that the environmental impact of a construction of 1,50,000 square metres is drastically more than construction of 20,000 square metres. If the appellant s

argument is accepted in totality, a project proponent could potentially secure an EC for constructing 20,000 square metres and by „amendment steadily increase the area of construction up to 1,50,000 square metres without submitting an updated Form 1 or any substantive review by the SEAC.

15. We note that subsequent to the EIA Notification being published in 2006, a draft notification was issued on 19 January 2009.7 The draft notification proposed the following amendment:

> "in para 2 [of the EIA Notification], after sub-para (iii), the following shall be inserted; namely:-
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> Notification S.O. 195 (E) dated 19 January 2009.
>
> However modernisation or expansion proposals without any increase in pollution load, and, or without any additional water and or land requirement are exempted from the provisions of this Notification:
>
> Provided that, a self certification, stating that the proposals shall not involve any additional pollution load, waste generation or water requirement, be submitted to the regulatory authority by the project proponent." Prior to adopting the draft notification, hearings were conducted and written comments were solicited from various stakeholders including: (i) Central Ministries and Departments, (ii) State Governments and their Agencies, (ii) Industries and their Associations and (iv) Civil Society including NGOs. A committee was constituted by the Ministry of Environment and Forests, Government of India which published a report in October 2009. The committee specifically recommended against the adoption of the above amendment, noting:
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> "The amendments propose to exempt modernisation and expansion of projects based on a self certification by project authorities that there is no increase in pollution load. It is totally unacceptable that the modernisation and expansion of projects be removed from the environmental clearance regime, with or without the requirement of self certification. There are several industries operating in critically polluted areas or are in violation of their environmental clearance conditions, which need to be considered before the expansion of a project is considered. What is to be considered is not just whether there is an increase in pollution load but also the current impact of the project and its compliance with environmental clearance conditions. We can provide clear examples wherein the non- compliance of the clearance conditions has not been considered while granting clearance for expansion which includes adding new components to the existing industrial operations etc. This has allowed several projects to continue their activities and expand despite blatant non compliance. Finally, it is only with industrial, thermal power and other such related operations that one can decide on parameters of pollution. Development projects like highways, airports and other infrastructure projects which seek to expand might have a

> detrimental impact due to factors such as change in land use (i.e. construction over a wetland, grassland or agricultural land etc). Despite this, the project proponent can certify that there is no change in pollution load and hence expansion is to be allowed. The current process seeks a detailed EIA report to determine whether impacts can be mitigated. If the amendment is brought into force, it will simply do away with this critical and necessary step in the environmental clearance process. Therefore, this amendment should not be allowed.
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> ... The draft notification takes a myopic view of environmental and social impact of modernisation and expansion. Any modernisation/expansion projects will necessarily entail increase in production, increase in transportation, increase in pressure on the local infrastructure and local natural resources and increase in the pollution load during the construction phase. So, even if a modernisation/expansion does not lead to an increase in the pollution load or water or land requirement within the factory premises during the operation phase, it will lead to an increase in environmental and social impact outside the premise." (Emphasis supplied) The draft amendment was not adopted in subsequent amendments to the EIA Notification. We find considerable merit in the observations of the committee that the requirement of an EC at the time of expansion forms a critical step in the environmental clearance regime. According to the committee, it assists officials not just in evaluating and mitigating any adverse impact caused by the expansion but also in assessing whether the project proponent is in compliance with their existing obligations. Crucially, any form of expansion necessarily puts a strain on the local environment and infrastructure and needs to be carefully evaluated in a holistic manner.

16. In a case where the text of the provisions requires interpretation, this Court must adopt an interpretation which is in consonance with the object and purpose of the legislation or delegated legislation as a whole. The EIA Notification was adopted with the intention of restricting new projects and the expansion of new projects until their environmental impact could be evaluated and understood. It cannot be disputed that as the size of the project increases, so does the magnitude of the project s environmental impact. This Court cannot adopt an interpretation of the EIA Notification which would permit, incrementally or otherwise, project proponents to increase the construction area of a project without any oversight from the Expert Appraisal Committee or the SEAC, as applicable. It is true that there may exist certain situations where the expansion sought by a project proponent is truly marginal or the environmental impact of such expansion is non-existent. However, it is not for this Court to lay down a bright-line test as to what constitutes a „marginal increase and what constitutes a material increase warranting a fresh Form 1 and scrutiny by the Expert Appraisal Committee. If the government in its wisdom were to prescribe that a one-time „marginal increase (e.g. 5% or 10%) in project size, within the threshold limit stipulated in the Schedule, could be subject to a lower standard of scrutiny without diluting the urgent need for environmental protection, conceivably this Court may give effect to such a provision. This would be subject to any challenge on the ground of their being a violation of the precautionary principle. However, as the EIA Notification currently stands, an expansion within the limits prescribed by the

Schedules would be subject to the procedure set out in paragraph 7(ii).

17. At the time of the second increase, the total construction area of the appellant s project was enlarged from 32,395.17 square metres to 40,480.88 square metres. As a result of the expansion, the appellant constructed sixteen additional flats which were sold at the prevailing market rate. The appellant did not comply with the procedure set out under paragraph 7(ii) of the EIA Notification but rather sought an „amendment to the EC. The third respondent did not require the appellant to submit an updated Form 1 nor was the proposal processed and evaluated by the fourth respondent. The „amendment to the EC dated 13 March 2014 does not discuss the potential environmental impact of the increase in construction area, but merely records that the construction area now stands at 40,480.88 square metres. The procedure set out under paragraph 7(ii) of the EIA Notification exists to ensure that where a project is expanded in size, the environmental impact on the surrounding area is evaluated holistically considering all the relevant factors including air and water availability and pollution, management of solid and wet waste and the urban carrying capacity of the area. This was not done in the case of the appellant s project. It was not open to the third respondent to grant an „amendment to the EC without following the procedure set out in paragraph 7(ii) of the EIA Notification.

18. We further note that as on the date of the impugned order construction at the project site had already been completed. A core tenet underlying the entire scheme of the EIA Notification is that construction should not be executed until ample scientific evidence has been compiled so as to understand the true environmental impact of a project. By completing the construction of the project, the appellant denied the third and fourth respondents the ability to evaluate the environmental impact and suggest methods to mitigate any environmental damage. At this stage, only remedial measures may be taken. The NGT has already directed the appellant to deposit Rupees one crore and has set up an expert committee to evaluate the impact of the appellant s project and suggest remedial measures. In view of these circumstances, we uphold the directions of the NGT and direct that the committee continue its evaluation of the appellant s project so as to bring its environmental impact as close as possible to that contemplated in the EC dated 2 May 2013 and also suggest the compensatory exaction to be imposed on the appellant.

19. The appeal is dismissed. There shall be no order as to costs.

20. Pending application(s), if any, shall stands disposed of.

.....J [Dr Dhananjaya Y Chandrachud]
.....J [Ajay Rastogi] New Delhi;

December 3, 2019.