**BRIEF FOR OPINION**

*Client: J. K. Cement Limited*

**INDEX**

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| --- | --- | --- |
| **S. No.** | **Contents** | **Page No.** |
| 1. | Brief for Opinion | 2 – 17 |
| 2. | **Annexure 1**  Common Cause v. Union of India [2nd August 2017] |  |
| 3. | **Annexure 2**  EIA 1994 |  |
| 4. | **Annexure 3**  EIA 1996 |  |
| 5. | **Annexure 4**  Notification No.S.O.804(E) dated 14th March 2017 |  |
| 6. | **Annexure 5**  Notification No. S.O.1030(E) dated 8th March 2018 |  |
| 7. | **Annexure 6**  Notification No. S.O.1530(E) dated 6th April 2018 |  |

**Brief of Opinion**

The present brief for opinion (“**Brief**”) pertains to certain issues and disputes regarding M/s J.K. Cement Limited (**“the Querist**”) and its engagement in production of cement in States of Rajasthan, Karnataka, Madhya Pradesh and Haryana. The querist has several mines engaged in the mining of Limestone for the production of cement. The Querist is looking for an opinion in terms of direction passed in the Supreme Court judgment, ***“Common Cause v. Union of India” August 2, 2017 [Writ Petition (Civil) No. 114 of 2014].*** A copy of the judgment is annexed herewith as **Annexure – 1.**

1. **FACTS**
   1. M/s J.K. Cement Limited (**“the Querist**”) is engaged in production of grey & white cement in States of Rajasthan, Karnataka, Haryana and Madhya Pradesh. In the State of Rajasthan, the Querist has 5 mines of limestone, which is the main raw material for production of cement. Out of these 5 mines, 4 mines were allotted prior to the year 1984 and are operating.
   2. Insofar as the Querist is concerned, it was operating its mines in State of Rajasthan prior to 27.01.1994 after taking all the statutory permissions and clearances, including Consent to Operate from the respective State Pollution Control Board. The Querist has obtained Environmental Clearance **(“EC”)** for all its 4 mines in the year 2003. Further, except for one Mine, EC was also obtained under the EIA Notification, 2006.
   3. Details of the Mines given below: Mine wise chart is attached herewith.

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| **Nimbahera - Ahirpura – ML No.2 of 1997** | | | | | |
| Date of Grant of ML, renewal and validity | Area of ML (In Hectares) | Valid Upto | Date of EC under 1994 Notification | Date of EC under 2006 Notification | Remarks |
| 1. ML granted on 24.01.1968 for a period of 20 years upto 20.02.1968 2. ML renewed on 19.10.1989 for a period of 10 years upto 22.02.1998 3. ML renewed on 10.07.2002 for a period of 10 years from 23.02.1998 to 22.02.2018 4. ML renewed after amendment in MMDR for 50 years from the date of allotment | 403.1875 | 31.03.2030 | 04.10.2004 for 1.4 MTPA  30.05.2005 for 2.0 MTPA (on expansion) | NA | No EC taken under 2006 Notification. However, Consent to Operate was taken regularly and renewed from time to time |

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| **MALIAKHERA – ML NO.04/2003** | | | | | |
| Date of Grant of ML, renewal and validity | Area of ML (In Hactares) | Valid Upto | Date of EC under 1994 Notification | Date of EC under 2006 Notification | Remarks |
| 1. ML granted on 06.11.1984 for a period of 20 years upto 12.12.2004 2. ML renewed on 16.11.2010 for 20 years from 13.12.2004 to 11.12.2024 3. ML renewed on 27.02.2015 upto 12.12.2034 after amendment in MMDR | 315.4090 | 12.12.2034 | 04.10.2004 for 2.2 MTPA | 06.08.2010 for 3.2 MTPA | We have EC under both the Notification |

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| **TILAKHERA – ML NO.7/1997** | | | | | |
| Date of Grant of ML, renewal and validity | Area of ML (In Hectares) | Valid Upto | Date of EC under 1994 Notification | Date of EC under 2006 Notification | Remarks |
| 1. ML granted on 28.09.1977 for a period of 20 years upto 08.05.1998 2. ML renewed on 10.11.2010 for a period of 20 years from 09.05.1998 to 08.05.2018 3. ML renewed upto 01.04.2030 after MMDR Amendment on 27.02.2015 | 299.20 | 01.04.2030 | 04.10.2004 for 0.36 MTPA  30.05.2005 for 0.6 MTPA (Expansion) | 23.01.2014 for 1.6 MTPA (Expansion) | We have EC under both the Notification |

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| **KARUNDA – ML NO.3/2003** | | | | | |
| Date of Grant of ML, renewal and validity | Area of ML (In Hectares) | Valid Upto | Date of EC under 1994 Notification | Date of EC under 2006 Notification | Remarks |
| 1. ML granted on 06.11.1984 for a period of 20 years upto 12.12.2004 2. ML renewed on 18.11.2010 for a period of 10 years from 13.12.2004 to 04.07.2014 3. ML renewed upto 13.12.2034 after MMDR Amendment on 27.02.2015 | 240.86 | 13.12.2034 | 04.10.2004 for 1.09 MTPA | 06.08.2010 for 2.0 MTPA (Expansion) | We have EC under both the Notification |

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| **MANGROL – ML NO.26/2008** | | | | | |
| Date of Grant of ML, renewal and validity | Area of ML (In Hectares) | Valid Upto | Date of EC under 1994 Notification | Date of EC under 2006 Notification | Remarks |
| 1. ML granted on 15.02.2011 for a period of 30 years from 04.05.2012 to 03.05.2042 2. ML renewed upto 04.05.2063 after MMDR Amendment on 26.02.2015 | 132.0 | 04.05.2063 | Not Applicable | 06.08.2010 for 1.5 MTPA | 1994 Notification not applicable for this ML and EC obtained under 2006 Notification |

1. **ISSUES RAISED BEFORE THE SUPREME COURT**

The ***“Common Cause v. Union of India”*** judgment was passed by the Apex Court on August 2, 2017. The following issues were raised in the judgment for consideration:

1. Mining leases operated in violation of the Forest (Conservation) Act, 1980.
2. Illegal mining outside the sanctioned mining lease areas.
3. Mining leases acquired in violation of Section 6 of the MMDR Act, 1957.
4. Violation of Rule 37 of the Mineral Concession Rules, 1960 by the lessees.
5. Inordinate delays in taking decisions by the State Government regarding renewal of the mining leases.
6. **BACKGROUND**

Before discussing the ***“Common Cause v. Union of India”*** *judgment,* a brief background of mining law is given below:

*Period from 1994--2006*

* 1. That it may be noted that the Environment (Protection) Act, 1986 was enacted on 23.05.1986. Further, under Section 6 of the said Act, the Central Government has framed the Environment (Protection) Rules, 1986 published in the Official Gazette vide

Notification S.O. 844(E) dated 19.11.1986. Rule 5(3) of the said Rules are relevant:

*“(3) (a) Whenever it appears to the Central Government that it is expedient to impose*

*prohibition or restrictions on the locations of an industry or the carrying on of processes and operations in an area, it may by notification in the Official Gazette and in such other manner as the Central government may deem necessary from time to time, give notice of its intention to do so.*

*(b) Every notification under clause (a) shall give a brief description of the area, the industries, operations, processes in that area about which such notification pertains and also specify the reasons for the imposition of prohibition or restrictions on the locations of the industries and carrying on of process or operations in that area.*

*(c) Any person interested in filing an objection against the imposition of prohibition or restrictions on carrying on of processes or operations as notified under clause (a) may do so in writing to the Central Government with in sixty days from the date of publication of the notification in the Official Gazette.*

*(d) The Central Government shall with in a period of one hundred and twenty days from the date of publication of the notification in the Official Gazette consider all the objections received against such notification and may [within one hundred and eighty days from such day of publication] impose prohibition or restrictions on location of such industries and the carrying on of any process or operation in an area.”*

* 1. That the requirement of obtaining EC was introduced first vide EIA Notification dated 27.01.1994 [“EIA Notification 1994”] issued under the aforesaid Rule 5(3) of the Environment (Protection) Rules, 1986. Under the said notification, EC was required only for ‘new projects’ or for ‘expansion or modernisation’ of existing projects as given under Schedule I of EIA 1994. Cement is at Item No.27 of Schedule-I to EIA 1994. A copy of EIA 1994 is annexed herewith as **Annexure – 2.**
  2. That it is relevant to note that the Explanatory Note to the EIA Notification 1994 stated that ‘expansion or modernisation’ would mean an increase in the pollution load from existing levels. This was understood to mean that if there was no increase in the sanctioned leasehold area, or unless the lease fell for renewal, there would be no requirement of obtaining EC. It is relevant to note that Item No.8 pertains to the projects which were already initiated before EIA 1994, which reads as under:

*“8. Exemption for projects already initiated*

*For projects listed in Schedule-I to the notification in respect of which the required land has been acquired and all relevant clearances of the State Government including NOC from the respective State Pollution Control Boards have been obtained before 27th January 1994, a project proponent will not be required to seek environment clearance from the IAA. However, those units who have not yet commence d production will inform the IAA.*

* 1. That this understanding was made clear by the MoEF in July 1994 by way of a Press Note which stated inter alia as follows:

*“2. The question of applicability of the Notification to certain types of mining projects*

*which are in the process of renewal have been released from time to time. In this regard, it is further clarified that: -*

1. *Environmental Clearance will not be required at the time of renewal if there is no increase in the originally sanctioned lease area.*
2. *Environmental clearance will not be required at the time of renewal in cases where expansion is envisaged if the lease area does not exceed 5 hectares, even after expansion.”*

* 1. That further, it is relevant to point out that the MoEF on 19.06.1997 issued a letter whereby the requirements for obtaining EC at the time of renewal were clarified.
  2. That it may further be noted that in respect of the EIA Notification, 1994, the MoEF continuously issued circulars allowing new units to apply for clearance under the EIA Notification, 1994 on an ex post facto basis. The first such Circular was dated 5th November, 1998, which permitted such new units to apply for environmental clearances by 31st March, 1998. This period, vide Circular dated 27th December, 2000, was extended up to 30th June, 2001. The MoEF finally vide Circular dated 14th May, 2002, further extended the deadline up to 31st March, 2003.
  3. That the position regarding the EIA Notification 1994 was further clarified by the judgment dated 18.03.2004 of the Hon’ble Supreme Court in M.C. Mehta v. UOI, (2004) 12 SCC 118 wherein it was stated that the requirement of obtaining EC under the EIA Notification 1994 would be applicable at the time of renewal if the lease in question fell for renewal after 1994.
  4. That pursuant to the decision of the Hon’ble Supreme Court in ***M.C. Mehta*** ***v. Union of India***, the MoEF issued two clarificatory circulars viz. 28.10.2004 and 25.04.2005 wherein it was stated that the requirement of obtaining EC under the EIA Notification 1994 would be when (a) mining projects started production; or increased production; or increased their lease area, after 1994; or (b) the lease fell for renewal. Therefore, the 2005 Circular clarified that mining units which continued to operate at pre-1994 capacities would obtain EC only at the time of renewal. It further gave a window to even get an ex post facto approval in case production had been increased or lease area had been expanded after 1994.
  5. It is clear from a perusal of the above Circulars that the EIA Notification 1994 was to apply only in respect of (a) new projects; (b) if there was an increase in production higher than the year prior to year 1993-94.; (c) if there was an expansion of lease area; and (d) at the time of renewal.
  6. The expression expansion was defined to include expansion in both production and lease area. However, as far as production is concerned it was clarified that if the annual production of any year from 1994-95 onwards exceeded the annual production the years preceding 1993-94, the same would constitute expansion.

*Period from 14.09.2006 - 2010*

* 1. The existing regime under the EIA Notification 1994 continued until its supersession by the issuance of the EIA Notification dated 14.09.2006 (“EIA Notification 2006”). A copy of EIA 2006 is annexed herewith as **Annexure – 3.**
  2. The Notification of 14th September, 2006 provided for prior environmental clearance from the Central Government in the following events: -

I. If it was a new project.

II. If it was an expansion of modernisation of existing project i.e. if there was an addition of capacity beyond the limits specified.

* 1. That subsequent to the issuance of the EIA Notification 2006, the Ministry of Environment and Forests **(“MoEF”)** issued Circular dated 13.10.2006 containing Interim Operational Guidelines in respect of applications made under the EIA Notification 1994. In the same, it was stated that applications received under the EIA Notification 1994 would continue to be processed thereunder, and violations, if any, would attract the relevant provisions of the Environment (Protection) Act, 1986.
  2. That subsequent to the issuance of the EIA Notification 2006, the MoEF issued a clarificatory Circular dated 02.07.2007 on the applicability of the same, stating as follows:

*“It is clarified that all such mining projects which did not require environmental clearance under the EIA Notification 1994 would continue to operate without obtaining environ mental clearance till the mining lease falls due for renewal, if there is no increase in lease area and / or there is no enhancement of production. In the event of any increase in lease are a and or production, such projects would need to obtain prior environmental clearance. Further, all such projects which have been operating without any environmental clearance would obtain environmental clearance at the time of their lease renewal even if there is no increase either in terms of lease area of production.”*

* 1. That on 19.08.2010, the MoEF issued Office Memorandum clarifying as follows:

*“All the project proponents may note that any contravention of the provisions of the EIA Notification amounts to violation of the Environment (Protection) Act, 1986 and would attract penal action under the provisions thereof. The project proponent may also note that in case of any project where TORs have been prescribed for undertaking detailed EIA study and where construction activities relating to the project have been initiated by them, the TOR’s so prescribed may be suspended / withdrawn in addition to initiating penal action under the provisions of the EP Act, 1986.”*

* 1. That on 16.11.2010, the MoEF issued a further Office Memorandum issuing a clarification in respect of projects which had not obtained prior clearance under the EIA Notification 2006. The MoEF stated inter alia as follows:

*“As per existing practice being followed in the Ministry for considering such violation cases as and when these are submitted for environmental clearance, while environmental clearance is granted to deserving projects prospectively, based on their merit, in accordance with the recommendation of the Expert Appraisal Committees, simultaneously the concerned State Governments, under the powers delegated to them under the Environment (Protection) Act, 1986 are requested to initiate action against such units for the period these units have operated in violation of the said Act as per procedure laid down.”*

Further, the MoEF laid down a detailed procedure to deal with such violations.

*Period from 2010 - present*

* 1. A notification no.S.O.804(E) dated 14th March 2017 was issued by MOEF laying down the procedure to consider the applications for EC by the lease holders who did not take the EC for their projects or expansion or modernization of their existing projects under EIA 2006. Another notification no. S.O.1030(E) dated 8th March 2018 was issued making various amendments in the notification dated 14th March 2017. A copy of the Notification no.S.O.804(E) dated 14th March, 2017 and No. S.O.1030(E) dated 8th March 2018 is annexed herewith as **Annexure – 4 & 5.**
  2. Recently, the Hon’ble Supreme Court in its judgment dated 2nd February, 2018 in the case of Goa Foundation vs. M/s Sesa has held that the validity of the EC for mining projects granted under 1994 shall be of five years and as per para 9 of EIA 2006, the EC shall be valid for the estimated project life subject to a maximum of 30 years.
  3. Accordingly, MOEF issued a notification no.S.O.1530(E) dated 06.04.2018 directing that the mining projects who have taken EC under EIA 1994 but did not take EC under EIA 2006 for expansion/modernization/amendment, were directed to make applications for EC within 6 months from the date of notification as per EIA 2006 for grant of EC which would be considered by the concerned Committee and decided. A copy of the Notification no.S.O.1530(E) dated 06.04.2018 is annexed herewith as **Annexure – 6.**

1. **Directions issued by the Supreme Court in *“Common Cause v. Union of India”***

* 1. The Hon’ble Supreme Court in its judgment dated 02.08.2017 in the case of Common Case of Union of India, has issued the following directions:

*“Para 186.*

1. *A mining project that has commenced prior to 27th January 1994 and has obtained a No Objection Certificate from the SPCB prior to that date is permitted to continue its mining operations without obtaining an EC from the Impact Assessment Agency. However, this is subject to any expansion (including an increase in the lease area) or modernization activity after 27th January 1994 which would result in an increase in the pollution load. In that event, a prior EC is required. However, if the pollution load is not expected to increase despite the proposed expansion (including any increase in the lease area) or modernization activity, a certificate to this effect is absolutely necessary from the SPCB, which would be reviewed by the Impact Assessment Agency.*
2. *The renewal of a mining lease after 27th January 1994 will require an EC even if there is no expansion or modernization activity or any increase in the pollution load.*
3. *For considering the pollution load the base year would be 1993-94 which is to say that if the annual production after 27th January 1994 exceeds the annual production of 1993-94, it would be treated as an expansion requiring an EC.*
4. *There is no doubt that a new mining project after 27th January 1994 would require a prior EC.*
5. *Any iron ore or manganese ore extracted contrary to EIA 1994 or EIA 2006 would constitute illegal or unlawful mining (as understood and interpreted by us) and compensation at 100% of the price of the mineral should be recovered from 2000-2001 onwards in terms of Section 21(5) of the MMDR Act, if the extracted mineral has been disposed of. In addition, any rent, royalty or tax for the period for such mining activity was carried out outside the mining lease area should be recovered.*
6. *With effect from 14th September 2006 all mining projects having a lease area of 5 hactares or more are required to have an EC. The extraction of any material in such a case without an EC would amount to illegal or unlawful mining attracting the provisions of Section 21(5) of the MMDR Act.*
7. *For a mining lease of iron ore or manganese ore of less than 5 hectares area, the provisions of EIA 1994 will continue to apply subject to EIA 2006.*
8. *Any mining activity carried on after 7th January 1998 without an FC amounts to illegal or unlawful mining in terms of the provisions of Section 21(5) of MMDR Act attracting 100% recovery of the price of the extracted mineral that is disposed of.*
9. *In the event of any overlap, that is, illegal or unlawful mining without an FC or without an EC or without both would attract only 100% compensation and not 200% compensation. In other words, only one set of compensation would be payable by the mining lease holder.*
10. *No mining lease holder will be entitled to the benefit of any payments made towards NPV or additional NPV or penal compensatory afforestation.”*

In the light of the directions issued by the Hon’ble Supreme Court in the case of Common Cause, MOEF issued an Office Memorandum dated 30th May 2018, directing the State Governments to ensure that mining operations of the project proponent who have filed application for EC in terms of notifications dated 14.03.2017 and 08.03.2018, till the entire compensation as directed in the case of Common Cause is paid to the respective Department of Mining & Geology.

1. **Queries by J. K. Cement**

In light of the above discussion, we solicit your legal opinion on the following issues:

1. As per ruling base year is taken as 1993-94, therefore for calculation of penalty whether the production of base year should be taken as reference and any production over this quantity is liable for penalty in the years 2000 till the EC was obtained?
2. Whether the directions issued by the Supreme Court in Common Cause were not restricted to only iron ore or manganese ore mining companies in the State of Orissa or every lease holder in India?
3. If our project is prior to 1994 and thus not obtained an EC, then in this situation whether it is mandatory to take a NOC from SPCB even if there is no expansion?
4. Whether the Consent to Operate granted by State Pollution Control Board for the operations of mines would falls definition of “NOC” from SPCB as held by the Supreme Court in the case of Common Cause?
5. If the Consent to Operate from SPCB amounts to NOC, in that case whether the Querist would be liable for compensation?
6. Whether we are guilty of illegal mining when we have a valid Consent to Operate (CTO) from the State Pollution Control Board which was renewed from time to time?
7. Once the State Government has given a CTO then should it not be deemed that all conditions mandatory to be complied with have been checked and thereby the mining cannot be termed illegal.
8. Whether it is not the State Government to ensure before issuing a Consent to Operate to insist for a EC to any industry and once such consent is issued, the State Government cannot turn back and claim compensation for the mining done with their consent?
9. Up-to what period the compensation to be calculated i.e. whether it is the date of the validity of the EC obtained by the Querist under EIA 1994 or till new EC applied for is granted under EIA 2006?
10. The querist seeks an opinion whether the compensation will be calculated for the period 2001 to 2003 only or beyond that also?
11. The querist seeks an opinion with regard to the term *disposed of* used in the paragraph. Whether the word *disposed of* means sale ofextracted mineral or whether dues, meaning the extracted mineral in that period?