

SUPREME COURT OF INDIA**Bench: Justice Abhay S. Oka and Justice Sanjay Karol****Date of Decision: 10 November 2023****CIVIL APPELLATE JURISDICTION****CIVIL APPEAL NO.2212 OF 2020****M/s Sweta Estate Pvt.Ltd. Gurgaon****... Appellant*****versus*****Haryana State Pollution Control Board & Anr. ... Respondents****Legislation:**

Section 21, 31-A, 31, 37, 38 of the Air (Prevention and Control of Pollution) Act, 1981 (Air Act)

Sections 25, 26, 28, 33-A, 43, 44 of the Water (Prevention and Control of Pollution) Act, 1974 (Water Act)

Section 16 of the National Green Tribunal Act, 2010

Subject: Appeal against the order of the National Green Tribunal (NGT), concerning environmental compliance and prosecution for non-compliance with environmental norms.

Headnotes:

Civil Appeal – Environmental Compliance and Prosecution – Appellant challenged National Green Tribunal's order allowing prosecution for non-compliance with environmental norms – Issues related to ex-post facto Consent to Establish (CTE) and environmental clearance (EC) – Supreme Court set aside part of NGT's judgment, confirming the rest, allowing the appeal in part. [Para 1-12]

Environmental Clearance (EC) – Validity and expiration of EC for construction – NGT's observations on expired EC and illegal construction between specific

dates set aside by Supreme Court as beyond the scope of the appeal before NGT – Matters left open for appropriate proceedings. [Para 7, 12(a)]

Consent to Establish (CTE) – Ex-post facto CTE and its implications – Appellant's prosecution for activities conducted before grant of ex-post facto CTE discussed – Supreme Court held that appellant bound by the terms of ex-post facto CTE, confirming NGT's judgment in this regard. [Para 8-11, 12(b)]

Prosecution Approval – Challenge to approval for prosecuting appellant under environmental laws – Supreme Court found no grounds to interfere with NGT's judgment confirming prosecution as per conditions of ex-post facto CTE. [Para 11, 12(b)]

Decision – Supreme Court partly allowed the appeal, setting aside NGT's observations on EC, but confirming its decision on legality of prosecuting the appellant as per ex-post facto CTE conditions. [Para 12]

Referred Cases: None.

J U D G M E N T

ABHAY S. OKA, J.

FACTUAL ASPECTS

1. By this appeal, the appellant has taken an exception to the judgment and order dated 24th February 2020 passed by the National Green Tribunal, Principal Bench at Delhi. The appellant undertook a project of developing a housing colony at GurgaonSohna Road, Sector 48, Gurgaon, Haryana. The housing project comprised several buildings containing apartments, service apartments, etc. Initially, in August 2006, the appellant applied to the Haryana State Pollution Control Board (for short 'the Board') for a grant of Consent to Establish (CTE) under Section 21 of the Air (Prevention and Control of Pollution) Act, 1981 (the 'Air Act') and Sections 25 and 26 of the Water

(Prevention and Control of Pollution) Act, 1974 (the 'Water Act') to the Board. Based on another application made by the appellant, on 10th April 2007, the Ministry of Environment, Forest and Climate Change of the Government of India granted environmental clearance (EC) to the appellant to develop the housing complex. On 18th April 2007, the Board granted CTE under the Air and Water Act. In 2013 and 2015, the appellant applied for renewal of the CTE. The applications were rejected. On 29th December 2015, the Board issued a show cause notice of closure under Section 33-A of the Water Act and Section 31-A of the Air Act. The notice also called upon the appellant to show cause why the appellant should not be penalised under the relevant provisions of the Air Act and the Water Act. The appellant replied to the said notice.

2. On 4th March 2017, the appellant applied for EC for the expansion of the housing project to the Government of India. On 21st June 2017, the Chairman of the Board passed an order granting approval for prosecuting the appellant and its responsible Directors for the offences punishable under Sections 43 and 44 of the Water Act and Sections 37 and 38 of the Air Act. On 28th February 2012, the Board issued an office order providing that the industry which comes into operation without obtaining CTE can be granted CTE ex-post facto, provided the unit is compliant in all respects.

3. On 29th August 2017, the Government of India granted EC to the appellant for the housing complex. On 18th October 2017, the Board granted ex-post facto CTE to the appellant, which contained a condition that prosecution would be initiated against the appellant as per the approval granted under the order dated 21st June 2017. In January 2018, the appellant preferred an appeal before the Appellate Authority established under the Air and Water Acts by invoking Section 31 of the Air Act and Section 28 of the Water Act for setting aside the order dated 21st June 2017 passed by the Chairman of the Board granting approval to prosecute the appellant. The Appellate Authority, by judgment and order dated 15th March 2018, quashed the order of approval on the ground that, subsequently, ex-post facto CTE has been granted to the appellant. Being aggrieved by the said order of the Appellate Authority, the Board preferred an appeal under Section 16 of the National Green Tribunal Act, 2010, before the National Green Tribunal (NGT). By the impugned judgment, the appeal was allowed, and the order dated 15th March 2018 of the Appellate Authority was quashed and set aside. While doing so, in paragraph 12, observations were made by the NGT that EC granted on 29th August 2017 cannot condone the illegal construction raised

from 9th April 2012 to 29th August 2017. NGT held that the environment clearance granted on 10th April 2007 expired on 9th April 2012.

SUBMISSIONS

4. The learned senior counsel appearing for the appellant urged that out of a total of 28 towers, 26 towers have been constructed. He pointed out that in 2010 and 2014, occupation certificates were granted for nine and ten towers, respectively. On 24th May 2016, an occupancy certificate was granted with respect to seven towers. He submitted that even assuming without admitting that the EC expired on 9th April 2012, renewal or grant of a fresh EC was not required as the superstructure of the building was complete before 9th April 2012, and for completing the further construction, EC was not required. In any event, EC was granted on 29th August 2017. The learned senior counsel urged that in any event, NGT had no reason to deal with the controversy regarding the effect of the absence of EC as the appeal was limited to the legality and validity of the order dated 15th March 2018 passed by the Appellate Authority.

5. The learned senior counsel appearing for the appellant further submitted that once ex-post facto CTE was granted, even if the appellant conducted certain activities before the grant of ex-post facto CTE which required CTE, the appellant cannot be prosecuted as in this case, there is not a mere grant of CTE but the same will have retrospective effect. He would, therefore, submit that the impugned judgment and order is completely illegal.

6. The learned counsel appearing for the Board submitted that there was a specific condition imposed in the ex-post facto CTE that as per the prosecution the approval order dated 21st June 2017 will be filed. He submitted that the appellant never challenged the said condition, and therefore, the appellant had no right to challenge the order dated 21st June 2017 approving the prosecution. He submitted that prior to the grant of the ex-post facto CTE, on three occasions, the applications made by the appellant for the grant of CTE were rejected. He submitted that work of development cannot be carried out unless there is a valid and subsisting EC, and for a period between 9th April 2012 and 29th August 2017, admittedly, no EC was granted to the appellant. He would, therefore, submit that no interference was called for with the impugned judgment.

CONSIDERATION OF SUBMISSIONS

7. Firstly, we deal with the scope of the appeal before the NGT.

The appeal was specifically for challenging the order dated 15th March 2018 by which the Appellate Authority set aside approval granted by the Chairman of the Board on 21st June 2017 to prosecute the appellant for the offences punishable under the Air and Water Acts. Therefore, the only issue in the appeal preferred before the NGT was regarding the legality and validity of the order of the Appellate Authority and the approval granted on 21st June 2017 to prosecute the appellant. While dealing with the appeal, NGT ought not to have gone into the issue of whether the EC granted earlier expired on 9th April 2012. Considering the limited scope of appeal, NGT ought not to have gone into the question of whether the construction carried out by the appellant between 9th April 2012 to 29th August 2017 was illegal. Therefore, what is held in paragraph 12 of the impugned judgment will have to be set aside.

8. Now, we come to the main issue regarding CTE. There is no dispute that the appellant required CTE under Section 21 of the Air Act and Section 25 read with Section 26 of the Water Act. In this appeal, we need not go into the question whether there exists a power in the Board to grant ex-post facto CTE as the issue whether ex-post facto CTE could be granted did not arise before the Appellate Authority.

9. The Chairman of the Board issued the office order dated 28th February 2012 based on a resolution dated 8th February 2012 passed by the Board in its meeting. The relevant part of the said office order reads thus:

“The agenda regarding Ex-post facto Consent to Establish was placed before the Board in its 181st meeting held on 08.02.12 vide agenda item No. 161.18. **It has been decided that the industry which comes into operation without obtaining consent to establish, be granted Ex-post facto Consent to establish in case unit is presently compliant in all respects. But simultaneously prosecution action will be taken against the unit which violated the provisions of the Water/Air Acts by not obtaining prior consent to establish from the Board, as a past violation.**”

(emphasis added)

10. It cannot be disputed that ex-post facto CTE was granted to the appellant on 18th October 2017 on the basis of the said decision dated 8th

February 2012 taken by the Board. Moreover, condition no. 4 in 'other conditions' in the ex-post facto CTE reads thus: "4. Prosecution case will be filed against the unit as per approval for prosecution received from Head office vide orders No-HSPCB/2017 /926-27 dt.21.06.2017".

11. As noted earlier, even before the ex-post facto CTE was granted, the order dated 21st June 2017 was made by the Chairman granting approval to prosecute the appellant and its responsible Directors/persons for offences punishable under the Air and Water Acts. The appellant neither challenged the resolution of the Board dated 8th February 2012 nor the said condition no.4 by filing any proceedings. The appellant did not apply to modify condition no.4 by taking recourse to clause (a) of sub-section (2) of Section 27 of the Water Act. Moreover, an appeal could have been preferred by the appellant for challenging condition no.4 by taking recourse to Section 28 of the Water Act and Section 31 of the Air Act. The appellant did not challenge the Board's decision dated 8th February 2012, authorising the Board to grant ex-post facto CTE, which clearly provided that simultaneously with the grant of ex-post facto CTE, action would be taken against the unit which violated the provisions of the Air/Water Acts by not obtaining prior CTE, as a past violation. It is pertinent to note that the appellant not only failed to make any grievance about condition no.4 in the ex-post facto CTE dated 18th October 2017 but acted upon the es-post facto CTE. After the expiry of two months from the grant of the ex-post facto CTE, the appellant challenged the order dated 21st June 2017, granting the approval for prosecuting the appellant. The said challenge at the instance of the appellant ought not to have been entertained by the Appellate Authority as the appellant was bound by condition no.4 in the ex-post facto CTE granted on 18th October 2017. In fact, the judgment of the Appellate Authority shows that the attention of the Appellate Authority was invited to the aforesaid condition no.4. After having acted upon the ex-post facto CTE dated 18th October 2017, the appellant cannot be allowed to approbate and reprobate. Therefore, interference by the Appellate Authority by its judgment dated 15th March 2018 was illegal and uncalled for. To that extent, the impugned judgment of the NGT cannot be interfered with.

12. Hence, the appeal must succeed in part, and we pass the following order:

- a. The findings recorded in paragraph 12 of the impugned judgment are set aside on the ground that the issues decided thereunder were beyond the scope of appeal preferred before NGT. The issues which are dealt with in paragraph 12 are kept open. These issues can always be decided in appropriate proceedings in accordance with the law. All contentions on that behalf are left open;
- b. The impugned judgment and order, insofar as it interferes with the judgment and order dated 15th March 2018 passed by the Appellate Authority, is hereby confirmed;
- c. There will be no order as to costs and
- d. The appeal is partly allowed on the above terms.

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