MANU/GT/0153/2015

BEFORE THE NATIONAL GREEN TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Appeal No. 66 of 2014

Decided On: 03.09.2015

Appellants: **Sunil Kumar Chugh and Ors.**
Vs.
Respondent: **Secretary, Environment Department, Government of Maharashtra and Ors.**

Judges/Coram:
Swatanter Kumar, J. (Chairperson), U.D. Salvi, J. (Member (J)), Dr. D.K. Agrawal, Member (E) and A.R. Yousuf, Member (E)

Counsels:
For Appellant/Petitioner/Plaintiff: Aditya Pratap, Advocate

For Respondents/Defendant: Vikas Malhotra and M.P. Sahay, Advs.

Subject: Environment

Acts/Rules/Orders:

- Constitution Of India - Article 14,
- Constitution Of India - Article 141,
- Constitution Of India - Article 21;
- Environment Protection Act, 1986 - Section 15,
- Environment Protection Act, 1986 - Section 17,
- Environment Protection Act, 1986 - Section 19(1)(b),
- Environment Protection Act, 1986 - Section 3,
- Environment Protection Act, 1986 - Section 3(2)(v);
- National Green Tribunal Act, 2010 - Section 15,
- National Green Tribunal Act, 2010 - Section 16,
- National Green Tribunal Act, 2010 - Section 18;
- Public Liability Insurance Act, 1991 - Section 7(A)

Cases Referred:

- Municipal Corporation of Greater Mumbai and Ors. vs. Kohinoor CTNL Infrastructure Company Private Limited and Anr. MANU/SC/1315/2013;
- Sterlite Industries (India) Ltd. Etc. Etc. vs. Union of India (UOI) and Ors. Etc. Etc. MANU/SC/0284/2013;
- Goa Foundation vs. Union of India (UOI) and Ors. MANU/SC/0388/2014

Disposition:
Disposed off

JUDGMENT

U.D. Salvi, J. (Member (J))

1. This is an appeal assailing the grant of Environmental Clearance on 25th March, 2014 to a building project of the respondent No. 5-M/s. Piyali Builders at CS No. 2 (part) and 89 (part), Salt Pan Division, admeasuring 6535 sq. meters (total plot area), Punjabi Colony, J.K. Bhasin Marg, Sion Koliwada, Mumbai, broadly on two grounds: firstly, having

started construction without obtaining Environmental Clearance and in violation of imperatives prescribed by the Ministry of Environment and Forests (MoEF) vide Office Memoranda dated 12th December, 2012 and 27th June, 2013 and secondly, the project had been constructed in violation of Town Planning laws and Development Control Regulations.

2. Both the appellants claimed to be residents of Mumbai having deep concern about the environment degradation occasioned by the said project coming up in the locality where they reside. Undisputedly, the total built up area of the project admeasures 29150.07 sq. meters (FSI area; 16871.82 sq. meters and Non-FSI area; 12278.25 sq. meters). It is also not disputed that the land developed was encroached by slums and was reserved for Municipal Office as well as a DP road set back; and the respondent No. 5 submitted a proposal to Slum Rehabilitation Authority under Slum rehabilitation scheme to develop the said land to accommodate 324 tenements in 1997; for which respondent No. 5 was required to hand over an area admeasuring 760 sq. meters to the Municipal Corporation for Greater Mumbai (MCGM) towards road setback for the benefit of public at large; and the first Letter Of Intent (LoI) for the built up area of 14608 sq. meters was received by the respondent No. 5 on 18th February, 2002 and this was followed by revised LoI for built up area of 15887 sq. meters on 06th January, 2006 on account of the change in the plan and a commencement certificate was issued to the respondent No. 5 on 7th September, 2006 in accordance with DC Regulations in force at the relevant time.

3. Pertinently, the Notification No. S.O. 1553 (E) dated 14th September, 2006 requiring prior Environmental Clearance to the building and construction projects having built up area of more than 20,000 sq. meters was issued by the MOEF, Government of India in exercise of its powers under Section 3 of the Environment (Protection) Act, 1986 and the Rules framed there under. Thereafter the Government of Maharashtra vide notification No. TPB/308/897/CR145/08/UD-11 increased the area for eligible rehabilitation tenements from 225 sq. feet to 269 sq. feet due to which an amended LoI dated 13th August, 2006 for an area of 17804 sq. meters was issued and MCGM gave concurrence for a consolidated rehabilitation building along with the Municipal Office on 30th March, 2013.

4. According to the appellant, the Slum Rehabilitation Authority had recorded in clear terms that the proposed built up area of the project exceeded 20,000 sq. meters and thus required Environmental Clearance from MoEF, Government of India and the same will be insisted upon before approval of further CC (Commencement Certificate) to 1st rehabilitation building. Notwithstanding the fact that the Notification of 2006 clearly stated that no construction of any nature shall commence without obtaining prior Environmental Clearance, yet the construction of the project started in full swing and the authorities including the Environment Department of Government of Maharashtra, failed to take any effective action against such construction despite various complaints lodged by the appellants, both with the Environment Department and the law enforcing agencies. The project proponent applied for the Environmental Clearance to the State Level Environment Impact Assessment Authority after the commencement of the said project i.e. on 21st February, 2011.

5. The Appellant quoted the progress of the proposals for the grant of Environmental Clearance as under:

(a) "Initial discussion about the project vide Minutes of 3rd meeting of State Level Environment Impact Appraisal Committee-2 dated 4-6 October, 2012 ("ANNEXURE A-8"). In this meeting the following decision was taken:

"1. PP could not produce documents indicating width of the existing road which is proposed as right of way for the proposed project as per the requirement of the OM dated 7th Feb. 2012 issued by MoEF.

2. PP was directed to produce appropriate documents from competent authority indicating the right of way to their property along with its width.

In view of the foregoing observations are addressed and submitted for reconsideration."

(b) Discussion about the project vide Minutes of 10th meeting of State Level Environment Impact Appraisal Committee-2 dated 14-16 March, 2013. (ANNEXURE "A-9"). In this meeting the following decision was taken:

"The project proposal was discussed on the basis of presentation made on compliance points and documents submitted by the proponent. It was noted that the proposal was earlier discussed in the 3rd SEAC II meeting.

During discussion, following point emerged:

1. PP to recast the proposal as per the road width of 27.3m in consonance of Office Memorandum dated 7th Feb, 2012.

In view of above, the proposal is deferred and shall be considered further after the above observation is addressed and submitted for reconsideration."

(c) Final discussion about the project vide Minutes of 18th Meeting of State Level Environment Impact Appraisal Committee-2 dated 19-21 September, 2013 ("ANNEXURE A-10"). In this meeting the following decision was taken:

"PP informed that they have already constructed about 13,734.03 m2 of rehabilitation component.

Considering the orders of the Hon'ble High Court regarding Construction to be undertaken up to 20,000 m2 and the letter dated 29th June 2013 from Environment department, Committee decided to appraise the project though there is violation subject to the final decision on the same by SEIAA on the same. The project proposal was discussed on the basis of presentation made on compliance points and documents submitted by the proponent. It was noted that the proposal was earlier discussed in the 3rd and 10th SEAC II meeting. All issues related to environment, including air, water, land, soil, ecology and biodiversity and social aspects were discussed.

During discussion following points emerged:

1. Parking for rehab portion is hapzardly proposed in the rehab portion, which is to be revised. PP to submit revised layout showing details for parking along with parking statement as per NBC Norms.

2. Rain water storage capacity should be based on 2 days utilisation.

3. STP for rehab portion shall be constructed first and excess treated water shall be used for construction purposes of sale building.

4. PP to submit construction and demolition waste management plan with quantification.

5. PP to provide solar PV panels for energy generation and revise energy saving calculations accordingly.

After deliberation, Committee decided to recommend the proposal for Environmental Clearance to SEIAA, in view of the court orders allowing construction up to 20,000 m2 and the letter dated 29th June 2013 from Environment department subject to compliance of above points."

(d) Final Decision about the project vide Minutes of the 66th Meeting of State Level Environment Impact Assessment Authority dated 27-28 January, 2014 ("ANNEXURE A11"). In this meeting the following decision was taken:

"Authority noted that the proposal was considered by SEAC-11 in its 3rd & 10th meeting and recommended it in 18th meeting under screening category 8(a) B2 as per EIA points. (i) parking for rehab portion is haphazardly proposed in the rehab por6tion, which is to be revised, PP to submit revised layout showing details for parking along with parking statement as per NBC Norms. (ii) Rain water storage capacity should be based on 2 days utilisation. (iii) STP for rehab portion shall be constructed first and excess treated water shall be used for construction purposes of sale building, (iv) PP to submit construction and demolition waste management plan with quantification, (v) PP to provide solar PV panels for energy generation and revise energy saving calculations accordingly.

The project proponent has complied with or agreed to comply with the above points. The Authority elaborately discussed the proposals and noted that the refuge area has been provided in the layout design. It was also observed that one podium acts as a refuge area also. The concession given by SRA in their IOA on account of the Rehab nature of the project were also considered. It was also noted that the commencement certificate had been issued prior to the judgment given by Hon'ble Supreme Court in Civil Appeal No. 11150 of 2013 (out of Special Leave petition (Civil) No. 33402/2012) dated 17th December, 2013. After detailed discussion, the SEIAA decided to grant EC to the project."

Based on such a decision taken by the State Level Environment Impact Assessment Authority, the Impugned Environment Clearance was granted vide letter dated 25th March, 2014, without informing or hearing the appellants."

6. The appellants are seeking quashing of the Environmental Clearance dated 25th March, 2014 granted to the project in question with consequent reliefs of stoppage of project work, demolition of the construction carried out till this date, invocation of Polluter Pay Principle for the violation of Environmental Clearance Regulations and such other action against the public officials who abdicated their statutory powers for according their favours by granting EC in question on following amongst other grounds:

I. Despite a clear perception that the project built up area exceeded 20,000 sq. meters and as such required prior Environmental Clearance, the respondent No. 2 SEIAA and respondent No. 3 SEAC turned a blind eye to the construction carried out by the project proponent to the extent of 13,734 sq. meters.

II. The Slum Rehabilitation Authority had conceived development of three separate buildings on the plot in question under DP Reservation of Municipal Office;

(i) Independent Municipal Office having 5 floors with 10 parking spaces on a separate carved out plot.

(ii) Rehabilitation Building.

(iii) Building for sale.

III. However, the project proponent merged the Municipal Office building with the Rehabilitation Building thereby putting strain on the environment which fact was ignored by the respondent No. 2 and 3.

IV. The appellants despite making complaints and sending notice under Section 19(1)(b) of the Environment (Protection) Act, 1986 was not given a proper opportunity of hearing and the Environment Clearance was granted upon one sided representation made by the project proponent.

V. The project proponent suppressed the fact of commencement of construction of sale building from the respondent No. 3 SEAC and continued with the same.

VI. The construction of the project was raised to such an extent as to render the collection of base line data and making provision for parking spaces as per the National Building Code of India in compliance with SEIAA condition a virtual impossibility. Grant of Environment Clearance to the project after its work had been substantially accomplished is violative of Article 14 of Constitution of India for having discriminated with the one who is required to obtain prior EC before proceeding with the construction work.

VII. Un-wholesome compromising of Town Planning stipulations relating to fire safety and marginal open spaces, recreation ground and parking spaces.

VIII. Responsibility of public servant who permitted construction to be carried out without EC under Section 17 of the EP Act, 1986, particularly, when there is no provision under the Environment (Protection) Act, 1986 to regularise the construction which has come up in violation of environment laws.

IX. 'Precautionary Principle' and 'Polluter Pays Principle', need to be invoked for quashing of EC and imposing compensatory cost on the project proponent for having carried out construction without obtaining prior EC so as to account for loss to environment.

7. A brief reply dated 17th May, 2014 giving resume of how the proposal for grant of EC to the project in question

waded its course through several meetings of SEAC between 4th October, 2012 and 28th January, 2014 leading to the grant of EC in question was filed along with relevant extracts of the minutes of the said meetings by the respondent Nos. 1 to 3. The respondent Nos. 1 to 3 affirmed that the part construction work of the project not exceeding 20,000 sq meters without obtaining EC is not violative of the provision of EIA Notification, 2006. However, the respondent Nos. 1 to 3 submitted that it had issued circular dated 17th January, 2014 in pursuant to the orders passed by the Hon'ble High Court of Bombay in WP (L) 2305/13 dated 18th December, 2013, M/s. Vardman Developers vs. U.O.I and Ors. involving issues of construction of rehabilitation component below 20,000 sq meters that the construction of rehabilitation component below 20,000 sq. meters may not be considered as violation of EIA notification, 2006 and be read with OM of 12th December, 2012. However, it was added that it is desirable that all such cases of environmental concerns should be addressed at the planning stage. According to respondent Nos. 1 to 3, in the given fact situation, the decision of issuing EC to the project after addressing of environmental issues in accordance with law particularly, orders of the Hon'ble High Court of Bombay and OM dated 12th December, 2012 issued by MoEF has to be clarified by the MoEF.

8. The respondent No. 4- CEO, Slum Rehabilitation Authority vide brief affidavit dated 23rd May, 2014 urged for the dismissal of the present appeal with cost. According to him the land in question owned by the Municipal Corporation of greater Mumbai was fully encroached upon by slum dwellers who were not even having sanitation or basic necessities of life and as such it was first declared as a slum and as per the policy of the Government of Maharashtra Slum Rehabilitation scheme was sanctioned under the DC Regulations 33(10) by the authority; and the appellant being one of the slum dwellers is a beneficiary of the said scheme as a allottee of free permanent accommodation (tenement 409) in rehabilitation building No. 1, and as such has no right to challenge the scheme in the present appeal. The respondent No. 4 further revealed that initial LOI dated 18th February, 2002 issued by the respondent authority was revised/amended from time to time i.e. on 6th January, 2006, 7th February, 2009 and 13th August, 2009 and a part occupation certificate dated 01-10-2013 has been issued to the rehabilitation building and the allottees of the permanent rehabilitation tenements are presently residing there. According to the respondent No. 4, when the LoI was first issued on 18th February, 2002 the permissible Built Up Area (BUA) was less than 20,000 sq meters and the change in Government policies brought about increase in the area of residential rehabilitation tenements from 20.90 sq. meters to 25 sq meters and in situ FSI was increased from 2.5 to 3 with consequent change in the entire planning and therefore revised LoI were issued last being 13th August, 2009 and yet the permissible BUA was still below 20,000 sq meters and did not warrant prior EC from MoEF. It further added that in order to make Slum Rehabilitation scheme viable, no parking for the slum dweller in the rehabilitation building is mandatory as the commencement Certificate was issued on 7th September, 2006. It is only upon the notification dated 4th April 2011 regarding BUA it was made clear that BUA both under FSI and free of FSI areas shall be considered and accordingly, the project proponent was asked to submit NOC from MoEF and accordingly the EC dated 25th March, 2014 for the scheme was obtained. The respondent No. 4 asserted that the respondent No. 5, the project proponent had obtained a requisite sanction/Commencement Certificate from Municipal Council for Greater Mumbai. As regards the Municipal Office, it added, the requisite concurrence from the Municipality was obtained on 30th March, 2013 and there is no violation of the Slum Rehabilitation Scheme as regard to the said issue and the requisite RG as per the parameters set out in Appendix (iv) clause 6.20 has been proposed and there is no violation as regards the RG or provided in the scheme.

9. Refuting the contentions raised by the appellants, respondent No. 5, the project proponent filed a detailed affidavit dated 21st May, 2014 along with the documents in support. Reiterating the facts asserted by the respondent No. 4-

Slum Rehabilitation Authority and the revision of LOI's, the respondent No. 5 submitted that the EC Regulations of 2006 came into force on 14th September, 2006 and as such there was no violation of law in commencement of the construction work upon the issuance of commencement certificate to the respondent No. 5 on 7th September, 2006. Inviting our attention to the process stipulated for grant of EC under the EC Regulations, 2006, the respondent No. 5 submitted that the EC in question was duly granted and the appellant was not entitled to extend the scope of the appeal preferred by them under Section 16 read with Section 18 of the NGT Act, 2010 and raise the issues relating to substantial questions relating to environment and seek reliefs consequent thereto. According to respondent No. 5 there is no document placed by the appellants either to show the bonafides and locus standii or the damage caused to the environment due to construction done prior to the grant of Environment Clearance. According to respondent No. 5 the environment Management Plan was in place during construction and all such care was taken by the project proponent to protect the environment to the extent it would be protected.

10. Quoting diary of events leading to the Environment Clearance, the project proponent stated that the authorities had taken an objective decision to grant the Environment Clearance on the basis of the material required to be furnished in form 1(A), conceptual plan power point presentation as required under law. The project proponent further stated that there was increase in total built up area from time to time and LOI were issued accordingly, last one being LOI dated 13th August, 2009 by virtue of which the total built up area of the rehabilitation component was increased from 20.90 sq meters to 25 sq. meters per each Rehab tenement. However, total built up area never exceeded 20,000 sq. meters. According to the respondent No. 5, the Commencement Certificate (CC) was granted on 7th September, 2006 i.e. prior to the Environment Clearance Regulation coming into force and as such they are saved from the rigour of the Environment Clearance Regulations. The respondent No. 5, further contended that there existed a confusion regarding the interpretation of the Category 8(a) under Environment Clearance Regulations, dated 14th September, 2006, particularly, as to whether the built up area referred to therein included non-FSI areas such as balconies, canopies, sills, pump house, common utility, etc. and such confusion prevailed not only amongst the builders but also amongst the authorities including SRA and MCGM; and such confusion vanished only when the notification dated 4th April, 2011 was issued by the MoEF, thereby making the position clear. The project proponent contended that the delay in obtaining the Environment Clearance before the commencement of the construction cannot be said to be deliberate or ill intended. Quoting Judgments of the Hon'ble High Court of Bombay, particularly with reference to the Judgment of Western Zone Bench, of this Tribunal in cases of M/s. Aadi properties (P) Ltd. vs. State Level Environmental Impact & Ors. Appeal No. 73/2013, the respondent No. 5 submitted that construction not exceeding 20,000 sq. meters under SRA/restoration projects without obtaining Environment Clearance were not considered illegal. On this background the respondent No. 5 further contended that there was no violation of the Environment Clearance Regulations and as such no action was required to be initiated against anyone including the project proponent and the authorities for such alleged violations.

11. The respondent No. 5, the project proponent submitted that the plans for construction were duly approved in accordance with the DC Regulations, then prevailing which did not provide parking to rehabilitation buildings in SRA schemes. According to respondent No. 5, project proponent the National Building Code can be treated as guidelines but not as law having a binding force.

12. The appellant filed rejoinder to the reply of the project proponent dated 22nd May, 2014 on 25th June, 2014. The appellant in its rejoinder summarised the main contentions of the project proponent as under;

a. That the Developers were not bound to take Environment Clearance and have done so in a voluntary manner without any obligation under the law:

b. That construction of up to 20,000 square meters without Environment Clearance is legal and permitted as per the ruling of the Bombay High Court in the cases of Saumya Buidcon and Vardhaman Developers.

c. That the Developers did not have mens rea or an intention to commit the offence under section 15 of the Environment Protection Act, 1986.

d. That the National Building Code of India is only advisory and does not have the force of law.

e. That since the Environment Clearance, Commencement Certificate and Letter of Intent have been received for the project, it is legal in all respects:

f That SEIAA and SEAC were not bound to hear the complaint filed by the Appellants as public hearing is not mandatory for building and construction projects under Item 8(b).

g. SEAC cannot look into parking and Open spaces as they are the exclusive domain of the Municipal Corporation of Greater Mumbai and the Slum Rehabilitation Authority.

h. The Parking requirements in Development Control Regulations are not applicable to slum rehabilitation projects.

13. The appellants made attempts to rebut them with some facts and their exposition of law. Referring to the google earth satellite photographs dated 22nd February, 2007 the appellants submitted that no construction activity had started by that date and the construction work commenced only after 28th February, 2007; on this backdrop the appellants asserted that the project proponent was mandated to obtain prior Environment Clearance for the construction project undertaken by them as per para 2 of EIA Notification, 2006 dated 14th September, 2006. Referring to the amendment in the Category 8(a) of the Environment Clearance Regulations effected EIA Notification dated 4th April, 2011, the appellant contended that it being a clarifying amendment has/had retrospective effect and therefore, the construction which exceeded 20,000 sq. meters being carried out without Environment Clearance was illegal and the Environment Clearance granted to it deserves to be quashed. Referring to the cases of M/s. Saumya Buildcon Pvt. Ltd. vs. Union of India & Ors. W.P. No. 470/2013 and M/s. Vardhman Developers limited vs. Union of India W.P.(L) No. 2305/2013 cited by the project proponent, the appellants submitted that the decisions in the said cases were given in peculiar circumstances and in no way interpret the provisions of Environment Clearance Regulations, EIA Notification, 2006 requiring prior Environment Clearance for the construction projects and therefore, the Judgments in the cases cannot be treated as judicial precedents having binding effect on other courts. According to the appellants, commencement of construction without obtaining prior Environment Clearance leaves no scope for base line studies and robs the SEAC of the opportunity of objective appraisal of the proposal for Environment Clearance.

14. Admittedly, the project in question is a project of building and construction enumerated entry 8(a) of the schedule to the Environment Clearance Regulations, 2006 and falls in category B as stipulated therein. Going by their own version of events, the construction of the project commenced on 7th September 2006 and in any event prior to the making of the application for Environment Clearance on 21st February, 2011. Therefore, the question arises as to whether post construction Environment Clearance could have been granted in violation of EC Regulations, 2006. We are therefore, obliged to examine the entire concept and scheme of granting Environmental Clearance to the projects of such kind.

15. Environment Clearance Regulations, 2006 is the product of the exercise of powers conferred by sub-section (1) and clause (V) of sub-section (2) of section 3 of the Environment (Protection) Act, 1986, read with clause (d) of Sub-Rule 3 of Rule 5 of the Environment (Protection) Rules, 1986. Section 3 of the said Act confer powers on the Central Government in order to take all such measures as deemed necessary or expedient for the purposes of protecting and improving the quality of Environment and preventing, controlling and abating Environment pollution; and in particular, to take such measures for

restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards under sub-section (2) clause (V) of the said section. Thus the purpose of employing such measures for which the powers are conferred under section 3 of the Act is to protect the environment and prevent, control and abate environmental pollution that may arise as a result of any industrial operation or the process. Keeping this purpose in mind the Central Government in clear terms directed vide Environment Clearance Regulations, 2006 that on or from date of its publication i.e. 14th September, 2006 the required construction of new projects or activities or the expansion or modernisation of existing projects or activities listed in the Schedule to the Notification (Regulations) entailing capacity in addition with change in process and/or technology shall be undertaken in any part of India only after prior Environmental Clearance in accordance with the procedure specified in the Regulation. Such direction had been issued for the purposes of protecting the environment at the place of activity in question from the likely adverse impacts of such activity. A reading of Environment Clearance Regulations 2006 copiously reveals that the required construction of new projects or activities or the expansion and modernisation of existing projects or activities listed in the Schedule has to be undertaken in any part of India only after the prior Environment Clearance. Idea is to regulate such construction in order to avoid its adverse impacts on the environment and its genesis is in precautionary principle governing the approach in handling the delicate and often complex as little understood aspects of environment which includes not only the elemental component like water, air and land but its environment relationship with all living organisms drawing the sustenance there from. We have therefore, no hesitation in holding that commencement, or continuation of construction activity without obtaining environment clearance is violative of Environment Clearance Regulations 2006 and can attract penal consequences u/s. 15 of the Environment (Protection) Act, 1986.

16. Defending its acts the respondent No. 5 submitted that the commencement of the construction took place prior to the Environment Clearance Regulations 2006coming into force and the term 'built up area' referred to in the column 4 of the entry 8(a) of the Regulation was mis-understood till the amendment to the conditions vide Notification dated 4th April, 2011 came into force.

17. Reliance has been placed by the project proponent on the Commencement Certificate issued on 7th September, 2006 to say that the construction activity commenced some seven days prior to EC Regulations, 2006 coming into force. For a construction of the dimensions as revealed by the respondent No. 5 hardly any material change had occurred within those seven days at the ground level. We have before us two things- firstly, the assertions made by the appellants with reference to Google earth satellite photographs dated 22nd February, 2007 that no construction activity had started at the project area by that date and construction activity commenced only after 22nd February, 2007 and secondly, the increase in area of the rehab tenements from 225 sq. feet to 269 sq. feet pursuant to notification dated 14th May, 2008. This notification stipulated that the new area would only be applicable to those slum rehabilitation projects which had received commencement certificate but where construction had not started. On this backdrop the respondent No. 5, without giving details of the revised Commencement Certificate merely claims that he started construction on the basis of revised Letter of Intent issued to him in 2009.Moreover, one can be alive to the fact that increase in the area of the rehab tenement component would mean change in structural features such as foundation, plinth and walls. Obviously, this called for revision and amendment to the plans and its consequent approval by the planning authority. Silence is kept by the respondent No. 5 as to when this approval to the amended plans was granted and fresh Commencement Certificate was issued. However, letter dated 06-11-2009 at annexure A-21 to the written submission addressed to the Municipal Corporation Greater Mumbai, Fire Brigade brings forth a fact that the amended plans for U-shaped

rehabilitation building/compound; high rise residential accommodation, rehab shops, welfare centre, society office, sale offices and Municipal offices were submitted for approval. Evidently, no approval was granted by them to the plans for construction of rehabilitation component, and obviously, therefore, the construction can said have been commenced well after the Environmental Clearance Regulations 2006 came into force.

18. It is true that the term "built up area" was not defined in the EIA notification 2006. The import of the term "build up area" could be understood from its plain meaning and could have been very well understood, as pointed out by the appellants, from DC Regulations for Greater Mumbai, 1991. What is built or constructed is that which can be called as built up. In common parlance therefore, that term "built up area" would mean total constructed area. If one refers to Development Control Regulations for Greater Mumbai, 1991, we find clear distinction between "built up area" and Floor Space Index (FSI) in following terms:

DCR 2(13): "Built-up area" means the area covered by a building on all floors including cantilevered portion, if any, but excepting the areas excluded specifically under these Regulations.

DCR 2(42): "Floor space index (FSI)": means the quotient of the ratio of the combined gross area of all floors, excepting areas specifically exempted under these Regulations, to the total area of the plot, viz.:-

Floor Space Index (FSI) = Total covered area on all floors/plot area

19. DC Regulations 1991 do not afford any specific exception as regard any area for computation of "built-up area" unlike specific exemption of area for computation of FSI specified as in DCR-35. Certain areas or structures permitted in recreational open spaces and areas covered by features permitted in open spaces as well as stair-case rooms, lift rooms above the topmost storey, lift-wells, stair cases and passage thereto, chimneys, elevated tanks are not to be counted towards FSI with certain exceptions as given under DCR-35. From definitions of "built-up area" and "FSI area" one can clearly see that these terms have independent and distinct meanings and they cannot be substituted or used inter-changeably with one another. No justification or excuse therefore, is available to the respondent No. 5 to contend that there was any room for misunderstanding the meaning of "built-up area" and only "FSI" area could have been the basis of coming to the conclusion whether the Environment Clearance for the project in question was necessary or not. The contention of the appellants that there was clear perception regarding the built-up area of the project exceeding 20,000 sq. meters amongst all stakeholders- project proponent and authorities concerned is meritorious.

20. Assuming that the Amendment of 2011 to the EIA notification, 2006 vide Gazette of India (Extraordinary) Notification S.O. 695(E) was enacted with the object of explaining and clarifying the meaning of the term built up area in the EIA Notification 2006, the applicants argued with reference to Zile Singh case (Zile Singh V. State of Haryana & Ors. Appeal (Civil) 6638 of 2004) that the rule against retrospective application of the statute is inapplicable to such legislations which are explanatory and declaratory in nature. The hon'ble Apex Court in Zile Singh case held as under:

"It is cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the Legislature to affect existing rights, it is deemed to be prospective only' nova constitution futuris formamim poneredebet non praeteritis' a new law ought to regulate what is to follow, not the past. (See; Principles of Statutory Interpretation by Justice G.P. Singh, Ninth Edition, 2004 at p.438). It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case

where the new law is made to cure an acknowledged evil of the benefit of the community as a whole. (ibid, p.440) The presumption against retrospective operation is not applicable to declaratory statutes. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless constructed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statue is curative or merely declaratory of the previous law retrospective operation is generally intended. An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect. (ibid, pp. 468-469).

.....

Where a statute is passed for the purpose of supplying an obvious omission in a former statute or to 'explain' a former statute, the subsequent statute has relation back to the time when the prior Act was passed. The rule against retrospectivity is inapplicable to such legislations as are explanatory and declaratory in nature. The classic illustration is the case of Att. Gen. Vs. Pougett ([1816] 2 price 381, 392). By a Customs Act of 1873 (53 Geo. 3, c. 33) a duty was imposed upon hides of 9s. 4d., but the Act omitted to state that it was to be 9s. 4d. per cwt, and to remedy this omission another Customs Act (53 Geo. 3, c. 105) was passed later in the same year. Between the passing of these two Acts some hides were exported, and it was contended that they were not liable to pay the duty of 9s. 4d. per cwt, but Thomson C.B., in giving judgment for the Attorney-General, Said: "The Duty in this instance was in fact imposed by the first Act, but the gross mistake of the omission of the weight for which the sum expressed was to have been payable occasioned the amendment made by the subsequent Act, but that had reference to the former statute as soon as it passed, and they must be taken together as if they were one and the same Act." (p.395)

21. Preamble of the said amending notification which is reproduced hereunder makes it abundantly clear that the amending Notification was to provide clarification with regard to the term "built-up area":

"And whereas, it has been decided to provide clarification with regard to the term "built-up area" used in the said Notification and also to make various paras of the Notification mutually consistent and to restore the unintentional changes, which got into the Notification while making amendment vide S.O. 3067 (E) dated 1st December, 2009, in particular the entry against item No. 7(f) in the schedule to the EIA Notification, 2006 relating to highway projects and for this purpose to issue suitable amendments in the said Notification."

obviously therefore, the clarification given necessarily applies to EIA Notification, 2006 with retrospective effect from 14th September, 2006 the date on which EIA came into force.

22. Several judgments of the Hon'ble High Court of Judicature at Bombay namely, copy of order dated 29-03-2012 in Naresh Janardhan Mali vs. The State of Maharashtra and Ors., Copy of order dated 24-09-2012 in Vardhaman Developers Ltd. vs. Union of India, Copy of order dated 16-01-2013 in Nahur Vivekanand CHS vs. Union of India, copy order dated 06-03-2013 in Saumiya Buildcon Pvt. Ltd. Vs. Union of India, copy of order dated 09-05-2013 in Tridhatu Ventures LLP Vs. State of Maharashtra, copy of order dated 21-06-2013 in Vision Developers v. Union of India, Copy of order dated 18-12-2013 in Vardhaman Developers Ltd. Vs. Union of India, copy of order dated 24-03-2014 in Glomore Construction Vs. Union of India were cited to buttress the claim that the construction without prior Environment Clearance was legally permissible. In answer, Learned Counsel appearing on behalf of the appellants submitted that these judgments cannot be regarded as a law declared and will not be binding upon this Tribunal, more particularly so because the Hon'ble High Court gave permission to construct up to 20,000 sq. meters without Environment Clearance only on a case to case basis and did not expound law with reference to EIA

Notification, 2006. It is true that the said Judgments cannot be regarded as a law declared and binding all courts within the territory of India as is the law declared by the Supreme Court under Article 141 of the Constitution. However, if the expounding of the law has been made by the Hon'ble High Court, such exposition of law will certainly have persuasive effect on us. On perusal of these judgments one finds merit in the submission made by the appellants that the Hon'ble High Court dealt with the exigencies of the fact situation on case to case basis and granted permissions to construct up to 20,000 sq. meters without Environmental Clearance. Nowhere we find that the Hon'ble High Court considered the scope and scheme of the EIA notification, 2006 and expounded the law concerning need to have prior EC for the construction as specified in Entry 8(a) of EC Regulation, 2006. Significantly, in Vardhman Developers case the Hon'ble High Court directed the petitioners not to claim any equity on the basis of the order made and further clarified that no equity shall be created in favour of the petitioner when its application for Environment Clearance is considered by the authority and the authority was to consider such proposals for Environment Clearance on its merits without being influenced by the order. The judgments, therefore, need not persuade us to hold that the respondent No. 5 is without any blame of violating EIA notification, 2006 by undertaking construction and continuing with it before the Environmental Clearance was granted.

23. For answering the present controversy which arises as a result of the commencement of the construction in question prior to the grant of environmental clearance, it is further necessary to know what happens upon the violation of the EC Regulations, 2006 by undertaking construction as aforesaid. This can be better understood by knowing what is achieved as a result of going through the process of appraisal for the grant of Environmental Clearance to the projects of construction like the one in question.

24. Needless to reiterate that the proposal for grant of EC to the project in question listed as Category B in item 8(a) of the Schedule of the EC Regulations, 2006 does not require scoping and can be appraised on the basis of I. Form-1, Form-1A and the conceptual plan-vide7(i) II. Stage (2) EC Regulations, 2006. "Public Consultation" as conceived under para 7(i) III. Stage (3) of EC Regulation, 2006 is also not needed in respect of such project of building or construction or area development projects (which do not contain any Category 'A' project and activities) and Townships. It is only the appraisal i.e. the detailed scrutiny by the SEAC that needs to be done and the recommendations of SEAC are required to be placed thereafter before the Competent Authority i.e. SEIAA for final decision for grant of Environmental Clearance. EC Regulations, 2006 prescribes procedure for appraisal at Appendix V thereto. Para-3 therein is relevant for the purpose of this case and is therefore, reproduced therein below:

"3. Where a public consultation is not mandatory, the appraisal shall be made on the basis of prescribed application in Form-1 and environment impact assessment report, in the case of all projects and activities (other than item 8 of the Schedule), except in case where the said project and activity falls under category 'B2', and in the case of items 8(a) and 8(b) of the Schedule, considering their unique project cycle, the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned shall appraise projects or activities on the basis of Form-1, Form-1A, conceptual plan and the environment impact assessment report [required only for projects listed 8(b)] and make recommendations on the project regarding grant of environment clearance or otherwise and also stipulate the conditions for environmental clearance."

25. It is seen from the procedure prescribed that the SEAC is mandated to appraise projects or activities of the kind in question on the basis of Form-1, Form-1A and conceptual plan and make recommendations on the project regarding grant of Environmental Clearance or otherwise and also stipulate the conditions for Environmental Clearance. Form-1 makes or should make available exhaustive information or data in respect of the project proponent and the land in question for scrutiny under the following heads:

I. Basic information (description of the land proposed and the project proponent, need of clearance under: the Forest (Conservation) Act, 1980, the Wildlife (Protection) Act, 1972, CRZ Notification, 1991, Government policy in respect of the site in question, involvement of forest land, tendency of litigations against the project and/or land proposed).

II. Activity:

1. Construction, operation or decommissioning of the project involving actions, which will cause physical changes in the locality (topography, land use, change in water bodies, etc.)

2. Use of natural resources for construction or operation of the project (such as land, water, material or energy, especially any resources which are non-renewable or in short supply.)

3. Use, storage, transport, handling or production of substances or materials, which could be harmful to human health or the environment or raise concerns about actual or perceived risks to human health.

4. Production of solid wastes during construction or operation or decommissioning.

5. Release of pollutants or any hazardous, toxic or noxious substances to air.

6. Generation of noise and vibration, and emissions of light and heat.

7. Risk of contamination of land or water from releases of pollutants into the ground or into sewers, surface water, ground water, coastal waters or the sea.

8. Risk of accidents during construction or operation of the project, which could affect human health or the environment.

9. Factors which should be considered such as consequential development which could lead to environmental effects or the potential for cumulative impacts with other existing or the planned activities in the locality.

III. Environmental sensitivity.

IV. Proposed Terms of Reference/or EIA Studies.

26. Thus all such information helps to understand what could happen as a result of the said project and in conjunction with other existing or planned activities in the locality and this is required to be taken cognizance of by SEAC for the process of the appraisal for making suitable recommendations regarding grant of Environmental Clearance. Form-1A in Appendix II of EC Regulations, 2006 is an exhaustive questionnaire seeking answers to the specific questions in respect of Land Environment, Water Environment, Vegetation, Fauna, Air Environment, Aesthetics, Socio-Economic Aspects, Building Material, Energy Conservation and Environment Management Plan. Answers to these questions are of material importance for objective appraisal of the proposal for grant of Environmental Clearance. Environment Management Plan which is to be the part of Form-1A is expected to give all mitigation measures for each item wise activity to be undertaken during the construction, operation and the entire life cycle to minimise adverse environmental impacts as a result of the activities of the project and is further expected to delineate the environmental monitoring plan for compliance of various environmental Regulations and must state the steps to be taken in case of emergency such as accidents at the site including fire. Nowhere the EC Regulations, 2006 has made any provision for providing hearing to the beneficiaries of the project of building or construction or area development project (which do not contain any category 'A' project and activities) and Townships. A question as to whether proper opportunity of hearing was given to the appellants or not in the process of granting EC in question, therefore, does not survive.

27. Gap between the commencement of construction (as pleaded by the project proponent as having commenced upon the issuance of Commencement Certificate dated 07-09-2006) and making of the application for grant of EC on 21-02-2011, gives scope for concealment or misrepresentation of certain facts pertinent to grant of EC, and, therefore, possibility of any mischief

in furnishing information/Data as required to be furnished vide Form-1 and Form-1A cannot be ruled out. In other words, collection and availability of wholesome baseline data necessary for objective appraisal of environmental impacts and for prescribing safeguards or corrective measures becomes farcical nay virtual impossibility as contented by the appellants.

28. In the given fact situation we can easily conclude that such Environment Management Plan must have been submitted long after the commencement of actual construction. Environment Management plan, therefore, can be suitably tailored to match the conditions for obtaining EC at the time of making the application, when things get altered due to previous construction and there remains no source of assessing its efficacy or validity with reference to the things obtaining at the time of commencing the construction.

29. On this backdrop, the appellants have chosen to make a specific grievance regarding inadequacy of open/recreational spaces and available parking spaces with reference to DC Regulations and National Building Code of India.

30. Whatever little window that is offered to what happened after submission of an application for grant of Environmental Clearance in the present case is through the minutes of the meeting of SEAC placed before us. From the reading of Minutes of 18th Meeting of the SEAC dated 19th - 21st September, 2013, we can very well gather that Environmental Management Plan was inadequate or in-appropriate as regards parking for rehab portion, rain water storage capacity, STP for rehab portion, construction and demolition, Waste Management, solar PV Panels, and yet the construction of 13,734.03 sq. meters of rehabilitation component had already come up. Nothing more needs to be stated as regard the environmental damage incurred due to the transgressions of EC Regulations, 2006 by undertaking construction prior to grant of Environmental Clearance.

31. Minutes of 66th Meeting of SEAC dated 27th -28th June, 2014 reveals how the final decision for recommendations of the grant of Environmental Clearance to the project was taken. SEAC noted the shortcomings in the project vis-a-vis parking in rehab portion, rain water storage capacity, STP for Rehab portion, solar PV panels and construction and demolition waste management plan as noticed previously and merely recorded that the project proponent has complied with or agreed to comply with the requisition made in respect of the said shortcomings and thereafter proceeded to decide the grant of Environmental Clearance in favour of the project.

32. The record before us-the lay out plan and the Environmental Clearance dated 25th March, 2014 tells us a different story. It is revealed that the green area (RG) provided on the ground is less than 8 per cent of the net plot area i.e. 5775.00 sq meters and as such is not as prescribed by the Slum Rehabilitation Authority vide clause 6.20, Appendix iv, DCR 33(10). RG area on the ground is only 380.41 square meters i.e. 6.58 per cent of the net plot area. Thus it falls short by 81.59 sq. meters which ought to have been provided in the project.

33. The record reveals that only 91 off street parking spaces are made available in the said project. According to the respondent No. 5 the project proponent, the appellant No. 1 was the slum dweller with no basic amenities, and is now beneficiary of slum rehabilitation scheme who could now enjoy permanent alternative accommodation in a new building with modern amenities and improved environmental conditions as a result of the project in question. It therefore, does not lie in the mouth of appellant No. 1, according to the respondent No. 4 the project proponent, untenable allegations against the project. It is true that the appellant No. 1 is the beneficiary of SRA scheme and was a slum dweller at one point of time. However, this cannot put him to discount to say that he enjoys little lesser rights than any non-slum dweller, particularly, right to healthy living and clean environment. The appellant No. 1 being consensual party to the development of the slum under slum rehabilitation scheme does not give any license to the developers to subvert the law and develop the area as he likes particularly, to the detriment of the rights which law confers upon every citizen alike. We

therefore, do not wish to countenance the submission made in that regard on behalf of the project proponent.

34. As regards recreational/open space area it is the case of the respondent No. 5 that reduction in amenity space to 8 per cent was permitted by the respondent No. 4 SRA as per clause 6.20 under Appendix iv of DCR 33(10) and a revised plan however was subsequently submitted wherein additional amenity space above podium level is much in excess to what was required has been provided. In this context our attention is invited to the Judgment of the Hon'ble Apex Court delivered in the case - Municipal Corporation of Greater Mumbai vs. Kohinoor CTNL Infrastructure Co. Pvt. Ltd. and Anr; MANU/SC/1315/2013 : (2014) 4 SCC 538 by the Learned Counsel appearing on behalf of the appellants. He submitted that availability of open/recreational space at the ground level is necessary to avoid adverse impact on the environment and human health as held by the Hon'ble Apex Court. The Hon'ble Apex Court held that the right to clean and healthy environment is within the ambit of Article 21 and the provisions of DCR 23 requiring recreational open space permanently open to the sky for growing trees are mandatory in the interest of basic requirements for good life and this position cannot be altered by the fact that the development schemes under DCR 33(7), 33(9), and 33(10) provide lesser recreational area/amenities spaces. The Hon'ble Apex Court however, held that the recreational area/amenities spaces has to be on the land i.e. on the ground level the relevant extract from the Judgment are quoted herein below;

The right to a clean and healthy environment is within the ambit of Article 21. Furthermore, the right to a clean and pollution free environment, is also a right under our common law jurisprudence. (para 30)

The provisions of DCR 23 are mandatory. Besides, under sub-clause (f) of DCR 23 there is a requirement of keeping the recreational open space permanently open to the sky and trees are to be grown in that space as laid down i.e. five trees per hundred square metres of the recreational space within the plot. DCR 2(64) defines "Open Space" to mean an area forming an integral part of a site left open to the sky. A "site" is defined under DCR 2(83) to mean a parcel or piece of land enclosed by definite boundaries. These DCRs when read together very much make it clear that the recreational/amenity space has to e on the land i.e. on ground level and it has got to be 15%, 20% or 25% of the area depending upon its size, as prescribed in DCR 23. The requirement of recreational space on the podium under DCR 38(34)(iv) is discretionary. Besides, as DCR 38(34)(iii) lays down, the podium shall be basically used for parking. Besides, DCR 38(34)(iv) does not contain a non-obstante clause to override the requirement under DCR 23 making it mandatory to provide recreational space on the ground floor. That being so, the provision under DCR 38(34) cannot be read in derogation of the requirement under DCR 23 or else it will result into serious erosion in the basic requirements for a good life affecting the guarantee of right to life under Article 21 of the Constitution of India. Therefore, DCR 38(34)(iv) has to be read down as inapplicable and not excluding the mandatory provision under DCR 23. (Paras 19, 27 and 28)

This position is not altered by the fact that the development schemes under DCRs 33(7), 33(9) and 33(10) provide for lesser recreational area/amenity spaces. For development projects under DCR33(7) for reconstruction of cessed buildings, and for the urban renewal schemes under DCR 33(9), and for the slum rehabilitation projects under DCR 33(10), it is permissible to reduce the recreational/amenity open spaces to the limit prescribed in the respective Regulations to facilitate these schemes. Thus, under DCRs 33(7) and 33(10) reduction in the amenity open space is permitted to make the project viable, but still minimum 8% of the project area is required to be maintained as amenity open space. Similarly, for the schemes under DCR 33(9) minimum 10% of the plot area is required to be retained as recreational space. However DCRs 33(7), (9) and (10) are not generally applicable, since in other properties, where there are no such constraints to make the development schemes of rehabilitation or reconstruction of old buildings or slums viable, there is no reason why amenity open space at the ground level should be

read as permissible, to be reduced. The only ground for reducing this mandatory open space at the ground level being given is that more parking and more accommodation may be provided, meaning thereby more construction, concretisation and financial expediency. Such a purpose cannot be read into the provisions as they presently exist, nor is it desirable to do so from the point of view of the requirement of minimum open spaces at the ground level. Besides, the requirement of having trees and open land around them is necessary from an environmental point of view, since there is already excessive concretisation, and a very serious reduction in open spaces at the ground level. (Paras 20 and 29)

Thus, having 15%, 20% or 25% of the area (depending upon the size of the lay out) as the recreational/amenity area at the ground level is a mandatory minimum requirement, and it will have to be read as such. Hence, it is not permissible to reduce the minimum recreational area provided under DCR 23 by relying upon DCR 38(34). However, if the developers wish to provide recreation area on the podium, over and above the minimum area mandated by DCR 23 at the ground level, they can certainly provide such additional recreational area. (Para 32)

We have therefore no hesitation in holding that respondent No. 5, the project proponent failed to provide minimum space at the ground level as required under law.

35. At this stage it would be worthwhile to consider the importance of Town Planning. Town Planning is the art and science of orderly use of land, setting up of buildings and communication routes in order to:

1. Make right use of the land for the right purpose.

2. Create and promote healthy conditions and environment for all the people, both rich and poor, to work, play or relax.

3. Provide social, economic, cultural and recreational amenities etc. and lastly to preserve the individuality of the town and aesthetics in the design of all elements of town or city plan.

36. Every development though conceived independently has to be in consonance with total and composite planning of the city of which it forms the part. If this is not adhered to, it tends to destroy or frustrate the planning for which it is conceived i.e. creation and promotion of healthy conditions and environment for all the people. If such planning is thrown to winds, there would be uneven and inadequate development, congested transport network, and obviously, its victim would be generally environment and particularly the people or humans who live in it.

37. In the instant case, initially three buildings - rehabilitation building having permissible FSI of 8,850 sq. meters, sale building having permissible FSI of 8,290 sq. meters and Municipal building having permissible FSI of 866.25 sq. meters were planned on the net plot area admeasuring 5,775 sq. meters were planned. Later on with the concurrence of the Municipal Corporation Rehabilitation building and Municipal building were merged together. Thus rehabilitation building/component and sale building/component are planned to house the following tenements:

Rehabilitation Building	**Sale Building**
Shops :61(25 sq.m each)	Shops: 08
Residential Flats : 263	Residential Flats: 53
Balwadi : 04	
Welfare Center : 04	
Society Office : 04	
Municipal Office :01 (866.25 sq.m)	

38. To sub-serve the aims and objectives of Town Planning the advisory like National Building Code and the DC Regulations come into play. As per NBC, 2005 annex B (clause10.1) one off street car parking space is recommended per: one residential tenement of 100 sq. meters of (built up) FSI area, every 50 sq.m of area or fraction thereof of the administrative office area for educational institute and public service or for mercantile office, and 100sq.m of area or fraction thereof of Municipal building. Applying these standards to the

tenements in rehabilitation and sale building the following picture emerges:

Rehabilitation Building

Shops: 61; If we consider 25 sqm FSI for each shop then total FSI = 1525 sqm

Balwadi: 04; If we consider 25 sqm FSI for each shop then total FSI = 100sqm

Welfare centre: 04; If we consider 25 sqm FSI for each shop then total FSI = 100 sqm

Society Office: 04; If we consider 25 sqm FSI for each shop then total FSI = 100 sqm

Residential facility: Total FSI -FSI of shops + FSI of Balwadi + FSI of welfare center i.e. 8850sqm - 1525 sqm - 100sqm - 100sqm - 100sqm = 7025 sqm

Municipal Office: 01 (admeasuring 866.25 sqm)

Considering the Built up (FSI) area of each component of rehabilitation building the parking spaces which are warranted as per NBC, 2005 are as under:

Parking required for residential facility = 7025/100=70.25 or 71 spaces

Parking required for Commercial Facility = 1525/50=30.5 or 31 spaces

Parking required for Balwadi = 100/50=2 spaces

Parking required for Welfare centre = 100/50=2 spaces

Parking required for Society Office = 100/50=2 spaces

Parking required for Municipal Office = 866.25/100=8.66 or 9 spaces

Thus total parking spaces required as per NBC, 2005 for the rehabilitation component comprising of residential tenements shops, Balwadi, Welfare centre, Society Office and Municipal Office are 117 ECS

Sale Building:

Shops: 08; If we consider 25sqm FSI for each shop then total FSI = 200sqm

Residential Facility: Total FSI-FSI of Shops = 8290sqm - 200sqm = 8090sqm

Parking required for residential facility = 8090/100=80.9 or 81

Parking required for commercial Facility = 200/50 = 2

Thus parking required in sale building = 81+2 = 83 ECS

Interestingly, the project proponent-the respondent No. 5 herein, Minutes of 66th Meeting of SEIAA dated 27th -28th January, 2014 reveal, agreed to comply with and revise layout and the parking statement as per NBC norms and now after the grant of EC in question contends that there is no obligation on his part to provide parking spaces to the rehabilitation component and comes forth with the provision of 91 parking spaces in sale building/component.

39. As regards the parking spaces, the respondent No. 5, contended that the unamended Regulation 36 of DCR prior to the amendment dated 12-08-2009 did not provide for any parking space for the rehabilitation component and what is claimed by the applicants as regards the parking is on the basis of amendment to the DCR-36 dated 12-08-2009. According to the respondent No. 5, the building plans in respect of rehabilitation component were sanctioned prior to 12-08-2009 and even the Commencement Certificate was issued on 07-09-2006 and; as such as per the DCR then in force one parking space was to be provided for every 04 tenements having carpet area about 35sq.m each and not for any tenement having lesser area. Significantly, it is the case of the respondent No. 5 that the area of rehabilitation tenements was increased from 225 sq. feet to 269 sq. feet vide Government order No. TPR/4308/497/CR/145/08/UD-11 and amended LOI was issued by the respondent No. 5 on 07-02-2009. Obviously, this called for revision and amendment to the plans and its consequent approval by the planning authority. Silence is kept by the respondent No. 5 as to when this approval to the amenities was granted. As discussed above no approval was granted by the corporation to the amended plans for construction. It

therefore, does not lie in the mouth of the respondent No. 5 to say that Commencement Certificate for such amended rehabilitation component was issued and therefore, rigour of amendment to DCR 36 dated 12-08-2009 requiring parking spaces for rehabilitation component could be avoided.

40. Development Control Regulation of Greater Mumbai Table 15 - as amended lay down the following norms:

For Rehab Building:

For Residential Facility: One parking space required for redevelopment (residential facility) = 8 tenements having carpet area upto 35 sqm each.

(In addition to this parking spaces for visitors shall be provided to the extent of at least 25% of the number stipulated above subject to a minimum of one.)

For Commercial facility: one parking for every 80 sqm of areas exceeding 800sqm.

For Educational facility: One parks for 35 sqm carpet area of the administrative office area or public service area.

Welfare centre will use as community centre; assembly and assembly halls or auditorium without fixed seats, one parks space for every 15 sqm of floor area.

For Office facility: one parking space for every 37.5 sqm of office space upto 1500sqm

For Sale Building:

For Residential Facility: (IECS required for 1 tenement with carpet area exceeding 70 sqm)

For Commercial facility: one parking space for every 40 sqm of floor area upto 800m

For Municipal Buildings

One parking space for every 37.5 sqm of office space upto 1500sqm.

Applying these norms the following picture regarding the requirement of parking spaces would emerge:

Parking required for Rehab Building:

For residential facility = 263 no of flats = 263/8=32.8 or 33 spaces

Visitor parking = 33x25/100 = 8.25 or 8 Spaces or 1 space (if considered for minimum 1)

Parking required in residential facility of Rehab. Building = 41 spaces or 34 spaces

Parking required for shops in Rehab Centre:

Considering floor area per shop as 25 sqm total floor area for 61 shops = 61x25 = 1525 sqm

Parking required 1 space for 80m^2 area.

/80 = 19.06 or 19 spaces

Parking required for welfare centre, Balwadi & Society Offices Balwadi: 4; If we consider 25 sq. m FSI for each Balwadi then total FSI = 100sqm

Welfare Centre: 4; If we consider 25 sq. m FSI for each Balwadi then total FSI = 100sqm

Society office: 4; If we consider 25 sqm FSI for each Balwadi then total FSI = 100sqm

Parking required for Balwadi = 100/35 = 2.85 or 3 spaces

Parking required for welfare Centre = 100/15=6.66 or 7 spaces

Parking required for Society Office = 100/37.5 = 2.66 or 3 spaces

Total parking space required in Rehab. Building = 41+19+3+7+3 = 73 spaces or 34+19+3+7+3 = 66 spaces

Parking required for Sale Building:

Considered flats having carpet area exceeding 70 sqm

For residential facility = 53 no of flats = 53 spaces

For Shops considering 25 sqm area

shops = 25x8= 200sqm

Parking required = 200/40= 5 spaces

Total parking required in Sale building = 53+5 = 58 spaces

For Municipal Office:

Parking required = 866/37.5 = 23 spaces

Total Parking required (Rehab +Sale Building) = 73+58= 131 spaces

Total Parking required = 73+58+23 = 154 spaces or 66+58+23 = 147 spaces

41. A town or a city is not static but is an evolving or developing entity. It is for this reason that amendments to the Development Control Regulations are effected from time to time to meet the challenges concerning grant of EC to the project in question. A modest and rational view of the facts and circumstances discussed above persuades us to hold that the project proponent ought to have provided 147 car spaces in the project to avoid congestion with corresponding increase in pollution level.

42. Consequences of commencing construction before the grant of EC are thus self-evident and multi-fold. First and the foremost, it is the denial of realistic base-line data in respect of the Environmental parameters namely land, air, water and the living components of the environment i.e. humans, living creatures, plants and properties. Secondly, the construction activity in such cases also proceeds in un-regulated manner without the environmental safeguards in the place. This can be perceived from various terms and conditions stipulated in para 3 of the EC dated 25th March, 2014 as well as the Environmental Management Plan referred to in the said EC. A look at the EC conditions reveals that the project proponent was required to keep in place all required sanitary hygienic measures before starting construction activities. Arrangements for safe disposal of waste water and solid waste generated during construction phase, disposal of muck without creating any adverse effects on the neighbouring properties and only at the approved sites, disposal of hazardous waste generated during construction phase, proper use of the diesel generators sets and maintenance of noise emission standards, effluent management and sagacious use of water including ground water during construction phase are some of the things which were expected to be properly regulated during construction phase. Minutes of the 18th Meeting of the SEAC reveal, as informed by the project proponent, the construction of rehabilitation component was carried out to the extent of 13,734 sq. meters and yet the STEP for rehab portion was not done and solar PV panel for energy generation were not in place. Lastly but importantly, there is little space left for making necessary changes in the construction plan for effecting such measures necessary to safeguard the environment from the adverse impacts of the projects so undertaken. The very purpose of regulating the development/construction with certain safeguards in place as envisaged under section 3(2)(v) of the Environment (Protection), 1986 in exercise of which the EC Regulations 2006 have come into being, is frustrated or is likely to be frustrated.

43. In the instant case, it is evidently clear that the project proponent violated the EC Regulations, 2006 by undertaking construction before the EC was granted and thereby denied the realistic environmental safeguard to be in place. It is also seen that inadequate recreational space and parking space is proposed in the said project. This begs a pertinent question as to whether EC in question needs to be set aside and the construction which includes rehabilitation component/building comprising of 263 flats, 61 shops, 4 tenements of welfare centre, 4 tenements of Balwadi, society office and Municipal office should be exposed to its logical consequence. In our considered opinion when there is some space left for providing certain safeguards and seek recompense for the violation of EC Regulations, it would be rather harsh to set aside the EC and instead the project proponent needs to be saddled with appropriate measure of compensation and directed to make certain amends in the construction of sale component building, the construction of which has been stopped vide order dated 30th April 2014 to maintain status quo so as to provide adequate parking spaces as required, to avoid spilling over of the vehicles on the

public streets and cause congestion of traffic leading to adverse impact on the environment.

44. We are aware that it may not be possible to determine compensation on account of violations of EC Regulations with consequential untold damage to the environment and with some exactitude, but that should not be the reason for the project proponent to avoid their liability in that regard.

45. The Hon'ble Supreme Court in the case of M/s. Sterlite Industries (India) Ltd. V. Tamil Nadu PCB & Ors., MANU/SC/0284/2013 : JT 2013 (4) SC 388 had provided payment of Rs. 100 crores by the company which operated without consent of the Board, though M/s. Sterlite Industries possessed the consent of the Board prior as well as subsequent to the period for which the compensation was imposed. In the case of Goa Foundation vs. Union of India & Ors., MANU/SC/0388/2014 : (2014) 6 SCC 590 the Hon'ble Apex Court directed compensation at the rate of 10 per cent of the project cost to be deposited at the instance. These cases justify imposition of compensation at the modest rate of 5 per cent of estimated cost of the project i.e. 64.18 crores in the present case, which works out to roughly 3 crores. In addition thereto, the project proponent needs to be saddled with the compensation amount computed at the rate of market value of the land/recreational area as on March, 2014 (date of grant of EC) falling deficient than the required area for the project i.e. Rs. 40,000/- per sq. meter- circle rate as published by Department of Registration and Stamps, Government of Maharashtra for the area in question for the year 2014 multiplied by 81.59 which works out to Rs. 32,63,600/-.

46. As regards the deficient parking spaces, it is just and necessary not to allow construction of the sale building to proceed unless the project proponent makes necessary amends in construction plan of the sale building and makes available adequate number of additional floors of the building for making provision for adequate parking spaces available to both sale and rehabilitation buildings. In our opinion three floors shall be made available from 7th floor onwards, from the area available for construction of residential flats. This will ensure adequate parking spaces in relation to the number of occupants in both rehab building and sale building and ensure that vehicles do not spill out on the public streets resulting in congestion and prevent adverse impacts on the environment as the consequence thereof. We, therefore, dispose of this appeal with following directions:

1. The respondent No. 5 shall pay and remit a sum of Rs. 3 crores to the Authority, specified under sub-section (3) of section 7(A) of the Public Liability Insurance Act, 1991 to be credited to the Environmental Relief Fund within a fortnight.

2. The respondent No. 5 the project proponent shall pay an amount of Rs. 32,63,600/- being market price of the deficient recreational area as on March, 2014 to the Maharashtra Pollution Control Board for incurring expenses on Environmental and ecological rehabilitation within a fortnight.

3. The respondent No. 5 shall make necessary amends in the construction plan of the sale building, get it approved as per law and make available additional parking spaces on adequate number of floors in sale building commencing from 7th floor upwards and within 32 floors so as to make parking space available for both rehab building and sale building by utilising the floors which otherwise would have been made available to the sale building.

4. Construction of the sale building shall not proceed and no third party interest by way of sale, transfer, assignment, lease or parting with possession of any portion of sale building/component in any manner whatsoever shall be made unless the amounts as directed hereinabove are paid and necessary amends to comply with the directions to provide additional parking spaces as aforesaid are made.

5. The appeal thus stand disposed of with cost of Rs. 1,00,000/- (one Lakh).