# IN THE HIGH COURT OF JUDICATURE AT BOMBAY
# ORDINARY ORIGINAL CIVIL JURISDICTION

## PUBLIC INTEREST LITIGATION NO.7 OF 2023



Vanashakti & Anr. ....Petitioners

V/S

Union Of India & Ors. ....Respondents

**WITH**
**INTERIM APPLICATION NO. 1320 OF 2021**
**IN**
**PUBLIC INTEREST LITIGATION 7 OF 2023**

National Real Estate
Development Council (NAREDCO) ….Applicant

**In the matter between:**

Vanashakti & Anr. ....Petitioners

V/S

Union of India & Ors. ....Respondents

**WITH**
**INTERIM APPLICATION (L) NO. 35241 OF 2023**
**IN**
**PUBLIC INTEREST LITIGATION 7 OF 2023**

Government of Nagaland
Through Chief Engineer ....Applicant

**In the matter between:**

Vanashakti & Anr. ....Petitioners

V/S

Union of India & Ors. ....Respondents

**WITH**
**INTERIM APPLICATION (L) NO. 4411 OF 2023**
**IN**
**PUBLIC INTEREST LITIGATION 7 OF 2023**

Patel and Associates
Through Its Partner Manji Karashi Patel ....Applicant

V/S

**In the matter between:**

Vanashakti & Anr. ....Petitioners

V/S

Union of India & Ors. ....Respondents

**WITH**
**INTERIM APPLICATION (L) NO. 35236 OF 2023**
**IN**
**PUBLIC INTEREST LITIGATION 7 OF 2023**

Government of Nagaland
Through The Chief Engineer ....Applicant

**In the matter between:**

Vanashakti & Anr. ....Petitioners

V/S

Union of India & Ors. ....Respondents

**WITH**
**INTERIM APPLICATION (L) NO. 4408 OF 2023**
**IN**
**PUBLIC INTEREST LITIGATION 7 OF 2023**

Patel and Associates ....Applicant

**In the matter between:**

Vanashakti & Anr. ....Petitioners

V/S

Union of India & Ors. ....Respondents

Shri Akash Rebello a/w Shri Zaman Ali a/w Ms. Karishma Rao and Shri Yogesh Pandey for the Petitioners.

Shri Saurabh Butala a/w Ms. Nikita Mandaniyan i/b Shri Harshad Bhadbhade for the Applicant (NAREDCO).

Shri Saket Mone a/w Ms. Anchita Nair and Shri Abhishek Salian i/b Vidhi Partners for Interveners in IA/4408/2023 and IA/4411/2023, IA/35241/2023 and IA/35236/2023.

Shri Y.R.Mishra with Shri Dashrath A Dube and Shri Upendra Lokegoankar for Respondent No.1/ Union of India.
Smt. Jyoti Chavan, Additional Government Pleader for State of Maharashtra.

Ms. Jaya Bagwe for Respondent No.3 (MCZMA)

**CORAM: DEVENDRA KUMAR UPADHYAYA, CJ. &**
**AMIT BORKAR, J.**

**RESERVED ON : JULY 10, 2024**
**PRONOUNCED ON : SEPTEMBER 24, 2024**

**JUDGMENT (PER : CHIEF JUSTICE)**

**1.** Heard Shri Akash Rebello, learned Counsel representing the petitioner – organization, Shri Y. R. Mishra, learned Counsel representing respondent No.1- Union of India, Shri Saket Mone, learned Counsel representing the Interveners – State of

Nagaland and Patel and Associates and Shri Saurabh Butala representing the intervenor - National Real Estate Development Council (NAREDCO). We have perused the records available before us on this PIL petition.

## (A) Challenge:

**2.** This PIL petition invokes our jurisdiction under Article 226 of the Constitution of India, to assail the validity of Office Memorandum dated 19th February 2021, issued by the Government of India in the Ministry of Environment, Forest and Climate Change which prescribes a procedure for dealing with violations arising on account of not obtaining a prior Costal Regulation Zone (hereinafter referred to as the **CRZ**) clearance for permissible activities. The impugned Notification permits a project proponent operating in CRZ areas to seek *post facto* clearance as required under the CRZ Notification(s).

## (B) Relevant statutory prescriptions:

### - The Environment (Protection) Act, 1986

> ***Section 3. Power of Central Government to take measures to protect and improve environment.—***
>
> *(1) Subject to the provisions of this Act, the Central Government shall have the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality*

*of the environment and preventing, controlling and abating environmental pollution.*

*(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), such measures may include measures with respect to all or any of the following matters, namely:—*

*(i) co-ordination of actions by the State Governments, officers and other authorities—*

*(a) under this Act, or the rules made thereunder; or*

*(b) under any other law for the time being in force which is relatable to the objects of this Act;*

*(ii) planning and execution of a nation-wide programme for the prevention, control and abatement of environmental pollution;*

*(iii) laying down standards for the quality of environment in its various aspects;*

*(iv) laying down standards for emission or discharge of environmental pollutants from various sources whatsoever:*

*Provided that different standards for emission or discharge may be laid down under this clause from different sources having regard to the quality or composition of the emission or discharge of environmental pollutants from such sources;*

*(v) 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;*

*(vi) laying down procedures and safeguards for the prevention of accidents which may cause environmental pollution and remedial measures for such accidents;*

*(vii) laying down procedures and safeguards for the handling of hazardous substances;*

*(viii) examination of such manufacturing processes, materials and substances as are likely to cause environmental pollution;*

*(ix) carrying out and sponsoring investigations and research relating to problems of environmental pollution;*

*(x) inspection of any premises, plant, equipment, machinery, manufacturing or other processes, materials or substances and giving, by order, of such directions to such authorities, officers or persons as it may consider necessary to take steps for the prevention, control and abatement of environmental pollution;*

*(xi) establishment or recognition of environmental laboratories and institutes to carry out the functions entrusted to such environmental laboratories and institutes under this Act;*

*(xii) collection and dissemination of information in respect of matters relating to environmental pollution;*

*(xiii) preparation of manuals, codes or guides relating to the prevention, control and abatement of environmental pollution;*

*(xiv) such other matters as the Central Government deems necessary or expedient for the purpose of securing the effective implementation of the provisions of this Act.*

*(3) The Central Government may, if it considers it necessary or expedient so to do for the purposes of this Act, by order, published in the Official Gazette, constitute an authority or authorities by such name or names as may be specified in the order for the purpose of exercising and performing such of the powers and functions (including the power to issue directions under section 5) of the Central Government under this Act and for taking measures with respect to such of the matters referred to in sub-section (2) as may be mentioned in the order and subject to the supervision and control of the Central Government and the provisions of such order, such authority or authorities may exercise the powers or perform the functions or take the measures so mentioned in the order as if such authority or authorities had been empowered by this Act to exercise those powers or perform those functions or take such measures.*

***Section 5. Power to give directions**.—*

*Notwithstanding anything contained in any other law but subject to the provisions of this Act, the Central Government may, in the exercise of its powers and performance of its functions under this Act, issue directions in writing to any person, officer or any authority and such person, officer or authority shall be bound to comply with such directions.*

*Explanation.—For the avoidance of doubts, it is hereby declared that the power to issue directions under this section includes the power to direct—*

*(a) the closure, prohibition or regulation of any industry, operation or process; or*

*(b) stoppage or regulation of the supply of electricity or water or any other service.*

***Section 6. Rules to regulate environmental pollution —***

*(1) The Central Government may, by notification in the Official Gazette, make rules in respect of all or any of the matters referred to in section 3.*

*(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—*

*(a) the standards of quality of air, water or soil for various areas and purposes;*

*(b) the maximum allowable limits of concentration of various environmental pollutants (including noise) for different areas;*

*(c) the procedures and safeguards for the handling of hazardous substances;*

*(d) the prohibition and restrictions on the handling of hazardous substances in different areas;*

*(e) the prohibition and restrictions on the location of industries and the carrying on of processes and operations in different areas;*

*(f) the procedures and safeguards for the prevention of accidents which may cause environmental pollution and for providing for remedial measures for such accidents.*

***Section 25. Power to make rules**.—*

*(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.*

*(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—*

*(a) the standards in excess of which environmental pollutants shall not be discharged or emitted under section 7;*

*(b) the procedure in accordance with and the safeguards in compliance with which hazardous substances shall be handled or cause to be handled under section 8;*

*(c) the authorities or agencies to which intimation of the fact of occurrence or apprehension of occurrence of the discharge of any environmental pollutant in excess of the prescribed standards shall be given and to whom all assistance shall be bound to be rendered under sub-section (1) of section 9;*

*(d) the manner in which samples of air, water, soil or other substance for the purpose of analysis shall be taken under sub-section (1) of section 11;*

*(e) the form in which notice of intention to have a sample analysed shall be served under clause (a) of sub-section (3) of section 11;*

*(f) the functions of the environmental laboratories, the procedure for the submission to such laboratories of samples of air, water, soil and other substances for analysis or test; the form of laboratory report; the fees payable for such report and other matters to enable such laboratories to carry out their functions under sub-section (2) of section 12;*

*(g) the qualifications of Government Analyst appointed or recognised for the purpose of analysis of samples of air, water, soil or other substances under section 13;*

*(ga) the manner of holding inquiry and imposing penalty by the adjudicating officer under sub-section (1) and other factors for determining quantum of penalty under clause (f) of sub-section (4) of section 15C;*

*(gb) the other amount under clause (c) of sub-section (2) of section 16;*

*(gc) the other purposes under clause (c) of sub-section (3) of section 16;*

*(gd) the manner of administration of Fund under sub-section (4) of section 16;*

*(ge) form for maintenance of accounts of the Fund and for preparation of annual statement of accounts under sub-section (1) of section 16A;*

*(gf) form for preparing annual report of the Fund under section 16B;*

*(h) the manner in which notice of the offence and of the intention to make a complaint to the Central Government shall be given under clause (b) of section 19;*

*(i) the authority or officer to whom any reports, returns, statistics accounts and other information shall be furnished under section 20;*

*(j) any other matter which is required to be, or may be, prescribed.*

## - The Environment (Protection) Rules, 1986

***Rule 5. Prohibition and restriction on the location of industries and the carrying on processes and operations in different areas-***

*(1) The Central Government may take into consideration the following factors while prohibiting or restricting the location of industries and carrying on of processes and operations in different areas:-*

*(i) Standards for quality of environment in its various aspects laid down for an area.*

*(ii) The maximum allowable limits of concentration of various environmental pollutants (including noise) for an area.*

*(iii) The likely emission or discharge of environmental pollutants from an industry, process or operation proposed to be prohibited or restricted.*

*(iv) The topographic and climatic features of an area.*

*(v) The biological diversity of the area which, in the opinion of the Central Government needs to be preserved.*

*(vi) Environmentally compatible land use.*

*(vii) Net adverse environmental impact likely to be caused by an industry, process or operation proposed to be prohibited or restricted.*

*(viii) Proximity to a protected area under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 or a sanctuary, National Park, game reserve or closed area notified as such under the Wild Life (Protection) Act, 1972 or places protected under any treaty, agreement or convention with any other country or countries or in pursuance of any*

*decision made in any international conference, association or other body.*

*(ix) Proximity to human settlements.*

*(x) Any other factor as may be considered by the Central Government to be relevant to the protection of the environment in an area.*

*(2) While prohibiting or restricting the location of industries and carrying on of processes and operations in an area, the Central Government shall follow the procedure hereinafter laid down.*

*(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 processes 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 within sixty days from the date of publication of the notification in the Official Gazette.*

*(d) The Central Government shall within 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 seven hundred and twenty five days and in respect of the States of Assam, Meghalaya, Arunachal Pradesh, Mizoram, Manipur, Nagaland, Tripura, Sikkim and Jammu and Kashmir in exceptional circumstance and for sufficient reasons within a further period of 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.*

*Provided that on account of COVID-19 pandemic, for the purpose of this clause, the period of validity of the notification expiring in the financial year 2020-2021 and 2021-22 shall be extended up to 30th June 2022 or six months from the end of*

*the month when the relevant notification would have expired without any extension, whichever is later.*

*(4) Notwithstanding anything contained in sub-rule (3), whenever it appears to the Central Government that it is in public interest to do so, it may dispense with the requirement of notice under clause (a) of sub-rule (3).*

## Coastal Regulation Zone Notifications:

## - Notification dated 6th January 2011

***4.*** *Regulation of permissible activities in CRZ area.-*

*The following activities shall be regulated except those prohibited in para 3 above,-*

*(i) (a) clearance shall be given for any activity within the CRZ only if it requires waterfront and foreshore facilities;*

*(b) for those projects which are listed under this notification and also attract EIA notification, 2006 (S.O.1533 (E), dated the 14th September, 2006), for such projects clearance under EIA notification only shall be required subject to being recommended by the concerned State or Union territory Coastal Zone Management Authority (hereinafter referred to as the CZMA).*

*(c) Housing schemes in CRZ as specified in paragraph 8 of this notification;*

*(d) Construction involving more than 20,000 sq mts built-up area in CRZ-II shall be considered in accordance with EIA notification, 2006 and in case of projects less than 20,000 sq mts built-up area shall be approved by the concerned State or Union territory Planning authorities in accordance with this notification after obtaining recommendations from the concerned CZMA and prior recommendations of the concern CZMA shall be essential for considering the grant of environmental clearance under EIA notification, 2006 or grant of approval by the relevant planning authority.*

*(e) MoEF may under a specific or general order specify projects which require prior public hearing of project affected people.*

*(f) construction and operation for ports and harbours, jetties, wharves, quays, slipways, ship construction yards, breakwaters, groynes, erosion control measures;*

*(ii) the following activities shall require clearance from MoEF, namely:-*

*(a) those activities not listed in the EIA notification, 2006.*

*(b) construction activities relating to projects of Department of Atomic Energy or Defence requirements for which foreshore facilities are essential such as, slipways, jetties, wharves, quays; except for classified operational component of defence projects. Residential buildings, office buildings, hospital complexes, workshops of strategic and defence projects in terms of EIA notification, 2006.;*

*(c) construction, operation of lighthouses;*

*(d) laying of pipelines, conveying systems, transmission line;*

*(e) exploration and extraction of oil and natural gas and all associated activities and facilities thereto;*

*(f) Foreshore requiring facilities for transport of raw materials, facilities for intake of cooling water and outfall for discharge of treated wastewater or cooling water from thermal power plants. MoEF may specify for category of projects such as at (f), (g) and (h) of para 4;*

*(g) Mining of rare minerals as listed by the Department of Atomic Energy;*

*(h) Facilities for generating power by non-conventional energy resources, desalination plants and weather radars;*

*(i) Demolition and reconstruction of (a) buildings of archaeological and historical importance, (ii) heritage buildings; and buildings under public use which means buildings such as for the purposes of worship, education, medical care and cultural activities;*

***4.2*** *Procedure for clearance of permissible activities.- All projects attracting this notification shall be considered for CRZ clearance as per the following procedure, namely:-*

*(i) The project proponents shall apply with the following documents seeking prior clearance under CRZ notification to the concerned State or the Union territory Coastal Zone Management Authority,-*

*(a) Form-1 (Annexure-IV of the notification);*

*(b) Rapid EIA Report including marine and terrestrial component except for construction projects listed under 4(c) and (d)*

*(c) Comprehensive EIA with cumulative studies for projects in the stretches classified as low and medium eroding by MoEF based on scientific studies and in consultation with the State Governments and Union territory Administration;*

*(d) Disaster Management Report, Risk Assessment Report and Management Plan;*

*(e) CRZ map indicating HTL and LTL demarcated by one of the authorized agency (as indicated in para 2) in 1:4000 scale;*

*(f) Project layout superimposed on the above map indicated at (e) above;*

*(g) The CRZ map normally covering 7km radius around the project site.*

*(h) The CRZ map indicating the CRZ-I, II, III and IV areas including other notified ecologically sensitive areas;*

*(i) No Objection Certificate from the concerned State Pollution Control Boards or Union territory Pollution Control Committees for the projects involving discharge of effluents, solid wastes, sewage and the like.;*

*(ii) The concerned CZMA shall examine the above documents in accordance with the approved CZMP and in compliance with CRZ notification and make recommendations within a period of sixty days from date of receipt of complete application,-*

*(a) MoEF or State Environmental Impact Assessment Authority (hereinafter referred to as the SEIAA) as the case may be for the project attracting EIA notification, 2006;*

*(b) MoEF for the projects not covered in the EIA notification, 2006 but attracting para 4(ii) of the CRZ notification;*

*(iii) MoEF or SEIAA shall consider such projects for clearance based on the recommendations of the concerned CZMA within a period of sixty days.*

*(vi) The clearance accorded to the projects under the CRZ notification shall be valid for the period of five years from the date of issue of the clearance for commencement of construction and operation.*

*(v) For Post clearance monitoring – (a) it shall be mandatory for the project proponent to submit half-yearly compliance reports in respect of the stipulated terms and conditions of the environmental clearance in hard and soft copies to the regulatory authority(s) concerned, on 1st June and 31st December of each calendar year and all such compliance reports submitted by the project proponent shall be published in public domain and its copies shall be given to any person on application to the concerned CZMA. (b) the compliance report shall also be displayed on the website of the concerned regulatory authority.*

*(vi) To maintain transparency in the working of the CZMAs it shall be the responsibility of the CZMA to create a dedicated website and post the agenda, minutes, decisions taken, clearance letters, violations, action taken on the violations and court matters including the Orders of the Hon'ble Court as also the approved CZMPs of the respective State Government or Union territory.*

## - Notification dated 6th March 2018

*2. after sub-paragraph 4.2, the following sub-para shall be inserted, namely: -*

*"**4.3 Post facto clearance for permissible activities.-***

(i) *all activities, which are otherwise permissible under the provisions of this notification, but have commenced construction without prior clearance, would be considered for regularisation only in such cases wherein the project applied for regularization in the specified time and the projects which are in violation of CRZ norms would not be regularised;*

(ii) *the concerned Coastal Zone Management Authority shall give specific recommendations regarding regularisation of such proposals and shall certify that there have been no violations of the CRZ regulations, while making such recommendations;*

(iii) *such cases where the construction have been commenced before the date of this notification without the requisite CRZ clearance, shall be considered only by Ministry of Environment, Forest and Climate Change, provided that the request for such regularisation is received in the said Ministry by 30th June, 2018.*

## - Notification dated 18th January 2019

***8. Procedure for CRZ clearance for permissible and regulated activities:***

*(i) The project proponents shall apply with the following documents to the concerned State or the Union territory Coastal Zone Management Authority for seeking prior clearance under this notification:-*

*(a) Project summary details as per Annexure-V to this notification.*

*(b) Rapid Environment Impact Assessment (EIA) Report including marine and terrestrial component, as applicable, except for building construction projects or housing schemes.*

*(c) Comprehensive EIA with cumulative studies for projects, (except for building construction projects or housing schemes with built-up area less than the threshold limit stipulated for attracting the provisions of the EIA Notification, 2006 number S.O 1533(E), dated 14th September, 2006) if located in low and medium eroding stretches, as per the CZMP to this notification.*

*(d) Risk Assessment Report and Disaster Management Plan, except for building construction projects or housing schemes with built-up area less than the threshold limit stipulated for attracting the provisions of the EIA Notification, 2006 number S.O. 1533(E), dated 14th September, 2006).*

*(e) CRZ map in 1:4000 scale, drawn up by any of the agencies identified by the Ministry of Environment, Forest and Climate Change vide its Office Order number J-17011/8/92-IAIII, dated the 14th March, 2014 using the demarcation of the HTL or LTL, as carried out by NCSCM.*

*(f) Project layout superimposed on the CRZ map duly indicating the project boundaries and the CRZ category of the project location as per the approved Coastal Zone Management Plan under this notification.*

*(g) The CRZ map normally covering 7 kilometre radius around the project site also indicating the CRZ-I, II, III and IV areas including other notified ecologically sensitive areas.*

*(h) "Consent to establish" or No Objection Certificate from the concerned State Pollution Control Board or Union territory Pollution Control Committee for the projects involving treated discharge of industrial effluents and sewage, and in case prior consent of Pollution Control Board or Pollution Control*

*Committee is not obtained, the same shall be ensured by the proponent before the start of the construction activity of the project, following the clearance under this notification.*

*(ii) The concerned Coastal Zone Management Authority shall examine the documents in clause (i) above, in accordance with the approved Coastal Zone Management Plan and in compliance with this notification and make recommendations within a period of sixty days from date of receipt of complete application as under:-*

*(a) For the projects or activities also attracting the EIA Notification, 2006 number S.O. 1533(E), dated 14th September, 2006, the Coastal Zone Management Authority shall forward its recommendations to Ministry of Environment, Forest and Climate Change or SEIAA for category 'A' and category 'B' projects respectively, to enable a composite clearance under the EIA Notification, 2006 number S.O. 1533(E), dated 14th September, 2006, however, even for such Category 'B' projects located in CRZ-I or CRZ-IV areas, final recommendation for CRZ clearance shall be made only by the Ministry of Environment, Forest and Climate Change to the concerned SEIAA to enable it to accord a composite Environmental Clearance and CRZ clearance to the proposal.*

*(b) Coastal Zone Management Authority shall forward its recommendations to the Ministry of Environment, Forest and Climate Change for the projects or activities not covered in the EIA notification, 2006, but attracting this notification and located in CRZ-I or CRZ-IV areas.*

*(c) Projects or activities not covered in the aforesaid EIA Notification, 2006, but attracting this notification and located in CRZ-II or CRZ-III areas shall be considered for clearance by the concerned Coastal Zone Management Authority within sixty days of the receipt of the complete proposal from the proponent.*

*(d) In case of construction projects attracting this notification but with built-up area less than the threshold limit stipulated for attracting the provisions of the aforesaid EIA Notification 2006, Coastal Zone Management Authority shall forward their recommendations to the concerned State or Union territory planning authorities, to facilitate granting approval by such authorities.*

*(iii) The Ministry of Environment, Forest and Climate Change shall consider complete project proposals for clearance under this notification, based on the recommendations of the Coastal Zone Management Authority, within a period of sixty days.*

*(iv) In case the Coastal Zone Management Authorities are not in operation due to their reconstitution or any other reasons, then it shall be responsibility of the Department of Environment in the State Government or Union territory Administration, who are the custodian of the CZMP of respective States or Union territories, to provide comments and recommend the proposals in terms of the provisions of the said notification.*

*(v) The clearance accorded to the projects under this notification shall be valid for a period of seven years, provided that the construction activities are completed and the operations commence within seven years from the date of issue of such clearance. The validity may be further extended for a maximum period of three years, provided an application is made to the concerned authority by the applicant within the validity period, along with recommendation for extension of validity of the clearance by the concerned State or Union territory Coastal Zone Management Authority.*

*(vi) Post clearance monitoring:*

*(a) It shall be mandatory for the project proponent to submit half-yearly compliance reports in respect of the stipulated terms and conditions of the environmental clearance in hard and soft copies to the regulatory authority(s) concerned, on the 1st June and 31st December of each calendar year and all such compliance reports submitted by the project proponent shall be published in public domain and its copies shall be given to any person on application to the concerned Coastal Zone Management Authority.*

*(b) The compliance report shall also be displayed on the website of the concerned regulatory authority.*

*(vii) To maintain transparency in the working of the Coastal Zone Management Authority, it shall be the responsibility of the Coastal Zone Management Authority to create a dedicated website and post the agenda, minutes, decisions taken, clearance letters, violations, action taken on the violations and court matters including the Orders of the Hon'ble Court as also the approved CZMP of the respective State Government or Union territory.*

## (C) Submissions on behalf of the petitioners :

**3.** Impeaching the impugned Office Memorandum, it has been argued by Shri Akash Rebello, learned Counsel representing the petitioner – organization that the Office Memorandum is an

administrative circular whereby a frame-work for granting *post facto* approval has been set up for the projects that have come up without grant of prior CRZ clearance as required under the relevant CRZ Notification which cannot over-ride the CRZ Notifications having been framed in exercise of powers vested with the Central Government under Section 3(1) and Section 3(2)(v) of the Environment (Protection) Act, 1986 (hereinafter referred to as the **Act of 1986**) read with Rule 5(3)(d) of the Environment (Protection) Rules, 1986 (hereinafter referred to as the **Rules of 1986**) which has statutory force and, thus, is binding. His submission is that the Office Memorandum takes departure from the relevant CRZ Notification which could not have been done by the Central Government without amending the relevant CRZ Notification by taking recourse to the provisions contained in Section 3(1) and 3(2)(v) of the Act of 1986 read with Rule 5(3)(d) of the Rules of 1986.

**4.** Further argument made by Shri Rebello is that the relevant CRZ Regulation clearly requires that prior CRZ clearance is mandatory, whereas the impugned Office Memorandum permits seeking *post facto* CRZ clearance, hence, it is contrary to the statutory CRZ Notification.

**5.** In this regard his further submission is that an administrative circular, like the impugned Office Memorandum, cannot provide for something which, otherwise, is not provided for in the statutory CRZ Notification and accordingly, the impugned Office Memorandum is *ultra vires* the provisions of the CRZ Notification dated 18th January 2019 (hereinafter referred to as the **CRZ Notification, 2019**) for the reason that the CRZ Notification, 2019 does not permit any *post facto* clearance; rather it requires prior clearance for all projects within the CRZ area.

**6.** It has also been contended on behalf of the petitioner – organization that CRZ Notification dated 6th January, 2011 (**hereinafter referred to as "CRZ Notification, 2011"**) also required clearance prior to commencement of the project and by Notification dated 6th March 2018 an amendment was introduced in CRZ Notification 2011 permitting grant of *post facto* clearance to regularize the otherwise permissible activities, however, the provisions permitting *post facto* clearance vide Notification dated 6th March 2018 was a one-time measure with a cut-of-date. It has been submitted that by Notification dated 6th March 2018, the CRZ Notification, 2011 was amended and clause 4.3 was

added which provided the procedure for *post facto* clearance for permissible activities, however, a perusal of the provisions contained in Clause 4.3 added vide Notification dated 6th March 2018 clearly reveals that such *post facto* clearance was permissible only in case where the construction had commenced before the date of the said Notification i.e. 6th March 2018 without the requisite CRZ clearance with a further caveat that only those requests in this regard shall be considered for grant of *post facto* clearance which were received in the Ministry of Environment, Forest and Climate Change by 30th June 2018. Thus, his submission is that the very language in which clause 4.3 added vide Notification dated 6th March 2018 in the CRZ Notification 2011 is couched manifestly reveals that it was provided for only as a one-time measure.

**7.** Our attention has also been drawn to the CRZ Notification, 2019 which clearly provides that the said CRZ Notification was issued in supersession of CRZ Notification, 2011. Accordingly, his submission is that even the one-time measure which was available under CRZ Notification, 2011 by way of insertion of clause 4.3 vide Notification dated 6th March 2018, which provided the procedure for seeking *post facto* CRZ clearance, will have no

application on issuance of CRZ Notification, 2019 w.e.f. 18th January 2019 for the simple reason that CRZ Notification, 2019 was issued by the Ministry concerned of the Central Government in supersession of earlier CRZ Notification viz. CRZ Notification, 2011.

**8.** Next submission of Shri Rebello, learned Counsel representing the petitioner–organization is that CRZ Notification, 2011 and CRZ Notification, 2019 were issued by following the procedure prescribed under Rule 5(3) of the Rules, 1986 which requires that before issuing any such final Notification, the Central Government needs to give notice of its intention to impose prohibition or restriction on the location of an industry and the carrying on processes and operations in an area which shall contain brief description of the area or industries, operations, processes and shall also specify the reason of intended imposition of prohibition/restriction. He has also stated that Rule 5 (3)(c) of the Rules, 1986 further provides that any person interested in filing an objection against the imposition of such intended prohibition/restriction on carrying on processes or operations, may do so in writing to the Central Government which has to be considered by the Central Government and

accordingly, it is only thereafter that a final Notification regarding prohibition/restriction etc. can be issued. Shri Rebello has stated that, however, contrary to the provision contained in Rule 5(3) of the Rules 1986, no such procedure as prescribed was followed while issuing the impugned Office Memorandum and thus, the Office Memorandum is not referable to any provision either in the Act of 1986 or in the Rules of 1986. Basis this, it has been contended that the impugned Office Memorandum cannot be permitted to provide for any measure or processes or procedure for grant of *post facto* CRZ clearance in absence of any such provision in the relevant statutory Notification viz. CRZ Notification, 2019.

**9.** Shri Rebello has further stated that the impugned Office Memorandum is arbitrary as it is purportedly issued in furtherance of CRZ Notification, 2011 which stood superseded by CRZ Notification, 2019 on 18th January 2019 itself and hence, reference of CRZ Notification, 2011 in the impugned Office Memorandum manifests complete lack of application of mind.

**10.** Additionally, it has also been contended on behalf of the petitioner – organization that the impugned Office Memorandum

is contrary to the settled law laid down by the Hon'ble Supreme Court including in its decision in the case of ***Alembic Pharmaceuticals Ltd. Vs. Rohit Prajapati & Ors.[1].*** He has argued that for justifying issuance of the impugned Office Memorandum reference of ***Alembic Pharmaceuticals Ltd. (supra)*** has been given in the Office Memorandum however, reliance on the said judgment by the Central Government is highly misplaced inasmuch that if we closely read the said judgment it is clear that certain directions given in the said judgments are referable to Article 142 of the Constitution of India which are, thus, to be confined to the facts of the said case and said directions cannot be applied in general. It is his further submission that reference of the judgment of the Jharkhand High Court in the case of ***Hindustan Copper Vs. Union of India[2]*** is also misplaced and is irrelevant for the reason that the said judgment dealt with CRZ clearance regime prior to the issuance of CRZ Notification, 2019.

## (D) <u>Submissions on behalf Union of India</u>:

**11.** The PIL petition has been opposed by the Union of India by filing an affidavit in reply. Shri Y. R. Mishra, learned Counsel

[1] **2020 SCC OnLine SC 347**

[2] **2014 SCC OnLine Jhar 2157**

appearing for the Union of India has argued that the concept of *post facto* clearance for permissible activities was introduced vide CRZ Notification dated 6th March 2018 whereby CRZ Notification, 2011 was amended and a provision for *post facto* clearance was inserted therein. He has also stated that the amendment brought in CRZ Notification, 2011 permitted *post facto* CRZ clearance only in case request of such *post facto* clearance was received in the Ministry concerned by 30th June 2018 and since after expiry of the aforesaid cut-of-date the Ministry of Environment, Forest and Climate Change received serval requests from various State Governments for considering the *post facto* CRZ clearance in respect of the permissible activities that had commenced without prior CRZ clearance on account of inadequate knowledge/information of the regulatory regime and other factors and accordingly, the Government of India issued the impugned Office Memorandum prescribing a procedure for dealing with such violations arising on account of not obtaining prior CRZ clearance for permissible activities. It is his further submission that the impugned Office Memorandum has been issued to make such projects and activities compliant with environmental laws at the earliest point of time which was

essential, rather than leaving them unregulated and unchecked which would have caused more damage to the environment.

**12.** Shri Mishra has further argued that the impugned Office Memorandum has been issued considering the order dated 12th November 2014 passed by the Jharkhand High Court in the case of ***Hindustan Copper Ltd. (supra)*** where it was held, *inter alia;* that action for violation would be an independent and separate procedure and therefore, consideration of proposal for environmental clearance could not await initiation of action against the project proponent. According to Shri Mishra, Jharkhand High Court further held in the said case that the proposal for environmental clearance must be examined on its merits, independent of proposed action for alleged violation of the environmental laws.

**13.** On behalf of Union of India, it has also been argued that the impugned Office Memorandum has been issued keeping in view certain observations made and directions given by the Hon'ble Supreme Court in ***Alembic Pharmaceuticals Ltd. (supra),*** wherein it has been observed that the closure of industries is not warranted. By the said judgment, payment of compensation as a facet of preserving the environment in

accordance with precautionary principle has been recognized. Shri Mishra stated further that in ***Alembic Pharmaceuticals Ltd. (supra)*** Hon'ble Supreme Court had directed that the proposal for environment clearance must be examined on its merits independent of any proposed action for alleged violation of any environmental laws. He has relied upon certain judgments viz. (i) ***Lafarge Umiam Mining Pvt. Ltd. Vs. Union of India***[3]***,*** (ii) ***Electrotherm Vs. Patel Vipulkumar Ramjibhai***[4]***,*** (iii) ***Gajubha Jadeja Jesar Vs. Union of India & Ors.***[5]***,*** (iv) ***D. Swamy Vs. Karnataka State Pollution Control Board and Ors.***[6]***,*** (v) ***Pahwa Plastics Pvt. Ltd. & Anr. Vs. Dastak NGO & Ors.***[7]***,*** (vi) ***K.T.V. Health Food Pvt. Ltd. Vs. Union of India***[8] ***and*** (vii) ***Electrosteel Steels Ltd. Vs. Union of India***[9] and has stated that in the said judgments grant of *post facto* environmental clearance has been recognized by the Supreme Court which is in a strict compliance of the rules and regulations and therefore, *post facto* clearance is permissible under law.

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3 ***(2011) 7 SCC 38***

4 ***(2016) 9 SCC 300***

5 ***2022 SCC OnLine SC 993***

6 ***2022 SCC OnLine SC 1278***

7 ***2022 SCC OnLine SC 362***

8 ***(2023) 5 SCC 440***

9 ***(2023) 6 SCC 615***

**14.** On the aforesaid counts, it has been urged by Shri Mishra that the impugned Office Memorandum does not suffer from any illegality and hence, no interference in the said Office Memorandum is called for in the instant PIL petition.

**(E) <u>Submissions on behalf of Interveners:</u>**

**15.** On behalf of the Intervener viz. Government of Nagaland, Shri Saket Mone, the learned Counsel has argued that the Government of Nagaland has constructed Nagaland State Guest House cum Emporium at Plot No.2B, Sector-30A, at Vashi, Navi Mumbai and that post completion of the construction of the said project at the time of applying for Occupation Certificate (OC), the Navi Mumbai Municipal Corporation has imposed a condition to obtain CRZ clearance and thereafter the Government of Nagaland has, on various occasions, applied for grant of *post facto* CRZ clearance but the same has not been processed by the Maharashtra Coastal Zone Management Authority (MCZMA) on account of the interim order passed by this Court on 7th May 2021. It has been stated that the land where construction of State Guest House cum Emporium has been made lies in a non-CRZ area and therefore, construction activity is permitted in the said land and hence, there is no requirement of obtaining CRZ

clearance. He has also argued that as per the CRZ Notification, 2011 construction of the project is a permissible activity. It is his further submission that the MCZMA, in its meeting dated 11-12th April 2022 observed that application for *post facto* CRZ clearance cannot be processed in the light of the ad-interim order passed by this Court in this PIL petition and since the project lies in non-CRZ area, the interim order, so far as intervenor is concerned, may be vacated. It has, thus, been prayed, in the alternative, that the interim order passed by this Court on 7th May 2021 may be clarified and it be provided that it shall not come in the way of decision on the applicant's application for grant of *post facto* CRZ clearance as per applicable law. Another prayer made by Shri Saket Mone is that the MCZMA be directed to process the application for grant of *post facto* CRZ clearance as per law.

**16.** On behalf of another intervenor viz. Patel and Associates, Shri Saket Mone has stated that the applicant is a project proponent of a project known as Trishul Goldfield for construction of a residential cum commercial building on land bearing Plot No.34 in Sector No.11 at CBD Belapur and that the Navi Mumbai Municipal Corporation, at the time of applying for

Occupation Certification (OC), has imposed a condition that the applicant needs to obtain CRZ clearance. He has further stated that in furtherance of said condition, the applicant, at various occasions applied for grant of *post facto* clearance however, the MCZMA has not processed the same on account of the interim orders passed by this Court. The prayers in this application of Patel and Associates are similar to the prayers made by Shri Mone, appearing on behalf of State of Nagaland.

**17.** Intervention in this PIL petition has also been sought by National Real Estate Development Council, which describes itself as an autonomous self-regulatory body formed under the aegis of Ministry of Housing and Urban Affairs, Government of India. On its behalf, it has been stated in the interim application that the impugned notification dated 19th February 2021 has been issued by the Government of India in exercise of its powers available to it under section 3(2)(v) of the Act of 1986 read with Rule 5(3) of the Rules of 1986. It is further stated on its behalf that the Government of India has permitted regularization of activities which are strictly in compliance with CRZ Notification, 2011 and under the impugned Office Memorandum, it is only on specific recommendation and certification of the Coastal Zone

Management Authority that there is no illegality or contravention of any CRZ norms, that such projects shall be considered for regularization on fulfillment of conditions set out in the impugned Office Memorandum. It is, thus, the submission on behalf of this applicant that the impugned Office Memorandum does not violate any provisions, either of the Act of 1986 or the Rules made thereunder and therefore, the same cannot be termed to be illegal.

## (F) Issues:

**18.** On the basis of submissions made by the learned Counsel for the respective parties and the pleadings available on record, the issues which emerge for our consideration and decision are;

(a) as to whether the impugned Office Memorandum dated 19th February 2021 issued by respondent No.1 is in contravention of the provisions of the CRZ Notification, 2019?

(b) as to whether the impugned Office Memorandum supplements or supplants the CRZ Notification, 2019 ?

(c) as to whether reliance on the judgment of the Hon'ble Supreme Court in ***Alembic Pharmaceuticals Ltd. (supra)*** and that of the order dated 12th November 2014 passed by the Jharkhand High Court in the case of ***Hindustan Copper Ltd. (supra)*** is misplaced or such reference can be taken aid of by the Union of India to justify the impugned Office Memorandum?

## (G) Discussion:

**19.** The impugned Office Memorandum is an administrative circular, which has been issued by the Government of India without reference to any provisions, either of the Act of 1986 or the Rules of 1986. As a matter of fact, the CRZ Notifications, 2011, the one issued on 6th March 2018 amending the CRZ Notification, 2011 and the CRZ Notification, 2019 were all issued by the Central Government by following the procedure prescribed under Rule 5(3) of the Rules of 1986 and only after prior publication inviting objections from general public and thereafter finalizing it. However, while issuing the impugned Office Memorandum dated 19th February 2021, no such procedure has been followed; neither is there any averment in the affidavit filed by the Government of India to the said effect. Accordingly, the impugned Office Memorandum is not referable to either the Act of 1986 or the Rules of 1986 and hence, we conclude that the same is merely an executive instruction having no statutory force.

**20.** Thus, there is no doubt while we observe that the impugned Office Memorandum dated 19th February 2021 is not statutory in nature as are the other CRZ Notifications such as

CRZ Notification, 2011, the notification dated 6th March 2018 and CRZ Notification, 2019.

**21.** Having concluded as above, we now need to examine, for appropriate decision on the issue (a) as culled out above, as to whether the impugned Office Memorandum is in contravention with CRZ Notification, 2019.

**22.** We have already noted above that at the time of issuance of the impugned Office Memorandum dated 19th February 2021, it is the CRZ Notification, 2019 which was in vogue for the reason that the CRZ Notification, 2019 clearly states that it has been issued in supersession of the earlier CRZ Notification, namely, CRZ Notification, 2011. It is also undisputable that CRZ Notification, 2019 does not contain any provision for any kind of *post facto* CRZ clearance. To the contrary, paragraph (8) of CRZ Notification, 2019 clearly provides that "***the project proponents shall apply with certain documents to the concerned State or Union Territory Coastal Zone Management Authority for seeking prior clearance under this notification***". Accordingly, the CRZ Notification, 2019 does not prescribe any provision permitting *post facto* clearance,

whereas by the impugned Office Memorandum, a procedure has been prescribed permitting project proponents to obtain *post facto* CRZ clearance in respect of the projects which were started without seeking prior CRZ clearance. One of the reasons indicated in the Office Memorandum dated 19th February 2021 for making a provision for obtaining *post facto* clearance is that the Government of India received several requests from the State Governments for considering the CRZ clearance of the projects in respect of permissible activities which have commenced work without prior CRZ clearance due to inadequate knowledge of the regulatory regime and other factors. The Government of India, in the Office Memorandum, thus, observes that to bring such projects and activities in compliance with the environmental laws at the earliest point of time it is essential, rather than leaving them unregulated and unchecked, which will be more damaging to the environment. The Government of India, while issuing the impugned Office Memorandum, has also noted the order dated 28th November 2014 of the Hob'ble High Court of Jharkhand in the matter of ***Hindustan Copper (supra)***. It has also noted the judgment of Hon'ble Supreme Court in the case of ***Alembic Pharmaceuticals Ltd. (supra)***,

however, in absence of any provision for *post facto* CRZ clearance under the CRZ Notification, 2019, in our considered opinion, the provision prescribing procedure for obtaining *post facto* clearance is not permissible on the basis of the observations made by Hon'ble High Court of Jharkhand in ***Hindustan Copper (supra)*** and those made by Hon'ble Supreme Court in ***Alembic Pharmaceuticals Ltd. (supra)***.

**23.** So far as reliance placed by the Government of India while issuing the impugned Office Memorandum on ***Alembic Pharmaceuticals Ltd. (supra)*** is concerned, we may note that in paragraph 27 of the said judgment, the Hon'ble Supreme Court has clearly observed that the concept of *ex-post facto* environment clearance is in derogation of the fundamental principles of environmental jurisprudence and is an anathema to the EIA notification dated 27th January 1994. The Hon'ble Supreme Court in the said judgment has further observed that in absence of EC, there would be no condition that would safeguard the environment and further that if the EC was to be ultimately refused, irreparable harm would have been caused to the environment. The Hon'ble Supreme Court also stated in the said judgment that in either view of the matter, environment law

cannot countenance the notion of an *ex post facto* clearance and that it would be contrary to both the precautionary principle as well as the need for sustainable development. Para 27 of the ***Alembic Pharmaceuticals Ltd. (supra)*** is extracted hereinbelow: -

> *"**27.** The concept of an ex post facto EC is in derogation of the fundamental principles of environmental jurisprudence and is an anathema to the EIA notification dated 27 January 1994. It is, as the judgment is **Common Cause** holds, detrimental to the environment and could lead to irreparable degradation. The reason why a retrospective EC or an ex post facto clearance is alien to environmental jurisprudence is that before the issuance of an EC, the statutory notification warrants a careful application of mind, besides a study into the likely consequences of a proposed activity on the environment. An EC can be issued only after various stages of the decision-making process have been completed. Requirements such as conducting a public hearing, screening, scoping and appraisal are components of the decision-making process which ensure that the likely impacts of the industrial activity or the expansion of an existing industrial activity are considered in the decision-making calculus. Allowing for an ex post facto clearance would essentially condone the operation of industrial activities without the grant of an EC. In the absence of an EC, there would be no conditions that would safeguard the environment. Moreover, if the EC was to be ultimately refused, irreparable harm would have been caused to the environment. In either view of the matter, environment law cannot countenance the notion of an ex post facto clearance. This would be contrary to both the precautionary principle as well as the need for sustainable development."*

**24.** It is only in para 49 of ***Alembic Pharmaceuticals Ltd. (supra)*** that we find that certain observations have been made and directions have been issued to the project proponents for deposit of the amount of compensation with the Pollution Control

Board of the State concerned, where revocation of environment clearance and closure of industries was provided, however, it is to be noticed that the Hon'ble Supreme Court in para 49 itself goes on to observes that, "***these directions are issued under Article 142 of the Constitution***". Para 49 of ***Alembic Pharmaceuticals Ltd. (supra)*** is quoted hereinbelow:

> *"**49.** In this backdrop, this Court must take a balanced approach which holds the industries to account for having operated without environmental clearances in the past without ordering a closure of operations. The directions of the NGT for the revocation of the ECs and for closure of the units do not accord with the principle of proportionality. At the same time, the Court cannot be oblivious to the environmental degradation caused by all three industries units that operated without valid ECs. The three industries have evaded the legally binding regime of obtaining ECs. They cannot escape the liability incurred on account of such noncompliance. Penalties must be imposed for the disobedience with a binding legal regime. The breach by the industries cannot be left unattended by legal consequences. The amount should be used for the purpose of restitution and restoration of the environment. Instead and in place of the directions issued by the NGT, we are of the view that it would be in the interests of justice to direct the three industries to deposit compensation quantified at ^10 crores each. The amount shall be deposited with GPCB and it shall be duly utilized for restoration and remedial measures to improve the quality of the environment in the industrial area in which the industries operate. Though we have come to the conclusion, for the reasons indicated, that the direction for the revocation of the ECs and the closure of the industries was not warranted, we have issued the order for payment of compensation as a facet of preserving the environment in accordance with the precautionary principle. These directions are issued under Article 142 of the Constitution. Alembic Pharmaceuticals Limited, United Phosphorous Limited and Unique Chemicals Limited shall deposit the amount of compensation with GPCB within a period of four months from the date of receipt of the certified copy of this judgment. This deposit shall be in addition to the amount directed by the NGT. Subject to the deposit of*

*the aforesaid amount and for the reasons indicated, we allow the appeals and set aside the impugned judgment of the NGT dated 8 January 2016 in so far as it directed the revocation of the ECs and closure of the industries as well as the order in review dated 17 May 2016."*

**25.** In view of the aforesaid, it is abundantly clear that the observations made and directions issued by the Hon'ble Supreme Court in ***Alembic Pharmaceuticals Ltd. (supra)*** are to be read in terms of Article 142 of the Constitution of India and therefore, such observations and directions of Hon'ble Supreme Court are to be confined to the facts of the said case which cannot have general application. Accordingly, we are of the considered opinion that reference to the observations made and directions issued by Hon'ble Supreme Court in ***Alembic Pharmaceuticals Ltd. (supra)*** in the impugned Office Memorandum is highly misplaced and the same cannot be relied upon for justifying issuance of the impugned Office Memorandum in contravention of the provisions contained in CRC Notification, 2019, which, as concluded above, is statutory in nature having been issued by the Government of India under section 3(2)(v) of the Act of 1986 read with Rule 5(3)(d) of the Rules of 1986. Similarly, reference made in the impugned Office Memorandum to the order dated 28th November 2014 of Hon'ble High Court of

Jharkhand in the case of ***Hindustan Copper Limited (supra)*** also does not justify the said Office Memorandum. The order in ***Hindustan Copper Limited (supra)*** pertained to a matter not in relation to CRZ areas. It was a case relating to mining lease which was issued prior to Environment Impact Assessment (EIA) Notification and the question in the said case was as to whether the EIA Notification would be applicable to renewal of mining lease and it is in this context that the Hon'ble Jharkhand High Court observed that application seeking environmental clearance must be examined on merits independent of the proposed action of the alleged violation of CRZ laws. Accordingly, the reference of this order of Hon'ble Jharkhand High Court in the impugned Office Memorandum does not in any manner help the respondent no. 1 for justifying the same as it is clearly in derogation and violation of the CRZ Notification, 2019.

**26.** It is also to be noticed that the impugned Office Memorandum mentions that the Government of India had received several requests under CRZ Notification, 2011 for considering CRZ clearances in respect of permissible activities which had commenced work without prior CRZ clearance due to inadequate knowledge of the regulatory regime and other

factors. Reference to CRZ Notification, 2011 in the impugned order and that of the requests made by project proponents for *post facto* CRZ clearance are also misplaced for the reason that CRZ Notification, 2019 was issued in supersession of CRZ Notification, 2011 and accordingly, clause 4.3 in CRZ Notification, 2011, which permitted *post facto* clearance, which was inserted by notification dated 6th March 2018, cannot be said to be in operation on the date of issuance of the impugned Office Memorandum. The regulatory CRZ regime which was in operation is the one notified by CRZ Notification, 2019 which does not contain any provision for grant of *post facto* CRZ clearance.

**27.** It is well settled law that whenever a law is repealed, it must be construed as if it never existed. Such proposition can be found propounded by Hon'ble Supreme Court in the case of ***State of Uttar Pradesh and Ors. vs. Hirendra Pal Singh and Ors.***[10]. Para 22 of the said report is relevant to be quoted here, which runs as under: -

> *"**22.** It is a settled legal proposition that whenever an Act is repealed, it must be considered as if it had never existed. The object of repeal is to obliterate the Act from the statutory books, except for certain purposes as provided under section 6*

[10] **(2011) 5 SCC 305**

*of the General Clauses Act, 1897. Repeal sis not a matter of mere form but is of substance. Therefore, on repeal, the earlier provisions stand obliterated/abrogated/wiped out wholly i.e. pro tanto repeal."*

**28.** Thus, as a result of supersession of CRZ Notification, 2011 by promulgating and notifying CRZ Notification, 2019, it may be noted that at the time of issuance of the Office Memorandum dated 19th February 2021, the CRZ Notification, 2011 did not exist and accordingly, any reference to CRZ Notification, 2011 in the impugned Office Memorandum does not justify the issuance of it.

**29.** In the light of the aforesaid discussion, we are of the unambiguous view that the impugned Office Memorandum dated 19th February 2021 issued by the Government of India is in contravention and derogation of the provisions of CRZ Notification, 2019.

**30.** Coming to the next issue, namely, issue (b), we may first examine the law as declared by Hon'ble Supreme Court in relation to operation of executive circular/orders/decision in the wake of a statutory notification or any other statutory provision.

**31.** Jurisprudence in our country recognizes hierarchy of laws

according to which on the topmost pedestal of such hierarchy stand the provisions of the Constitution of India, where after stand the provisions of any legislation made by the Parliament or the State legislatures. Thereafter comes statutory provisions/rules/ instruments made by the competent authority in exercise of its powers vested in it under some legislation and it is only thereafter that in the said hierarchy, the executive instructions/orders/ decisions of the Government stand.

**32.** We may refer to a judgment of Hon'ble Supreme Court in the case of ***Union of India and Ors. vs. Somasundaram Viswanath and Ors.***[11] where the subject matter related to a service dispute in respect of promotion and seniority of certain Government servants. In the said context, it has been held by Hon'ble Supreme Court that "***if there is a conflict between the executive instructions and the rules made under the proviso to Article 309 of the Constitution of India, the rules made under proviso to Article 309 of the Constitution of India prevail, and if there is a conflict between the rules made under the proviso to Article 309 of the Constitution of India and the law made by the***

[11] **(1989) 1 SCC 175**

***appropriate legislature the law made by the appropriate legislature prevails***".

**33.** In the case of ***Rajasthan State Industrial Development and Investment Corporation vs. Subhash Sindhi Cooperative Housing Society, Jaipur and Ors.***[12] the Hon'ble Supreme Court has again emphasized that executive instructions cannot override the law and therefore, any notice/circular/ guidelines, etc., which are contrary to statutory provisions, cannot be enforced. Para 27 of the said report is extracted below: -

> *"**27.** Executive instructions which have no statutory force, cannot override the law. Therefore, any notice, circular, guidelines, etc. which run contrary to statutory laws cannot be enforced."*

**34.** The Hon'ble Supreme Court in yet another judgment in the case of ***Union of India and Anr. Vs. Ashok Kumar Aggarwal***[13] has reiterated the aforesaid proposition of law that an authority cannot issue orders/office memorandums/executive instructions in contravention of the statutory rules. The Hon'ble Supreme Court has further observed, in no uncertain terms, that such executive instructions can be issued only to supplement the

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12 **(2013) 5 SCC 427**

13 **(2013) 16 SCC 147**

statutory rules but not to supplant and that the executive instructions should be subservient to the statutory provisions. Para 59 in the judgment of ***Ashok Kumar Aggarwal (supra)*** is quoted hereinbelow: -

> *"**59.** The law laid down above has consistently been followed and it is a settled proposition of law that an authority cannot issue orders/office memorandum/ executive instructions in contravention of the statutory rules. However, instructions can be issued only to supplement the statutory rules but not to supplant it. Such instructions should be subservient to the statutory provisions."*

**35.** Reiterating the principle an administrative instruction can only supplement the statutory rules in the manner that it does not lead to any inconsistency, Hon'ble Supreme Court in the case of ***SK Naushad Rahman and Ors. vs. Union of India and Ors.***[14] has held that executive instructions may fill up the gaps in the rules, but supplementing the exercise of the rule-making power with the aid of administrative or executive instructions is distinct from taking the aid of administrative instructions contrary to the express provision or the necessary intendment of the rules. Paragraph 33 of this judgment is extracted hereinbelow: -

> *"**33.** There is a fundamental fallacy in the submission which has been urged on behalf of the appellants. Administrative instructions, it is well-settled, can supplement Rules which are framed under the proviso to Article 309 of the Constitution in a*

[14] **(2022) 12 SCC 1**

*manner which does not lead to any inconsistencies. Executive instructions may fill up the gaps in the rules. But supplementing the exercise of the rule-making power with the aid of administrative or executive instructions is distinct from taking the aid of administrative instructions contrary to the express provision or the necessary intendment of the Rules which have been framed under Article 309. The 2016 RR have been framed under the proviso to Article 309. Rule 5 of the 2016 RR contains a specific prescription that each CCA shall have its own separate cadre. The absence of a provision for filling up a post in the Commissionerate by absorption of persons belonging to the cadre of another Commissionerate clearly indicates that the cadre is treated as a posting unit and there is no occasion to absorb a person from outside the cadre who holds a similar or comparable post".*

**36.** Thus, in view of the aforesaid proposition of law propounded by Hon'ble Supreme Court, it is more than clear that any executive instruction can only supplement the rules and if such executive instruction tends to supplant the rules, the same cannot be permitted to be sustained in the eyes of law.

**37.** In the instant case, the CRZ Notification, 2019 has been issued by the Central Government in exercise of its powers vested in it under section 3(2)(v) of the Act of 1986 read with Rule 5(3)(d) of the Rules of 1986 and hence, they are statutory in nature. It is also to be seen that the impugned Office Memorandum has been issued without following the procedure as prescribed under Rule 5(3) of the Rules of 1986 and hence, the impugned Office Memorandum is not referable to the said

rules. Accordingly, the impugned Office Memorandum cannot be said to be statutory in nature; rather it only falls in the category of an instrument which has been issued by the Central Government in exercise of its general administrative/executive powers.

**38.** We may also note that CRZ Notification, 2019 does not contain any provision which permits *post facto* clearance, whereas the impugned Office Memorandum prescribes a procedure for obtaining *post facto* CRZ clearance. Accordingly, the Office Memorandum provides something which is not provided for in the statutory notification and hence, it cannot be said that the impugned Office Memorandum in any manner is supplemental to the CRZ Notification, 2019; rather it supplants the same, which, in view of the afore-discussed proposition of law propounded by Hon'ble Supreme Court in various judgments, is legally impermissible.

**39.** Considering the issue (c) framed above, we may note that in our discussion in preceding paragraphs we have already held that reference of the judgment of Hon'ble Supreme Court in ***Alembic Pharmaceuticals Ltd. (supra)*** and the order dated

28th November 2014 of Hon'ble Jharkhand High Court in the matter of ***Hindustan Copper Ltd. (supra)*** is misplaced and hence, it is not open for the respondent no. 1 to take aid of the said judgments to justify the impugned Office Memorandum.

**40.** It may also be emphasized that the provisions contained in Rule 5 of the Rules of 1986 are mandatory in nature as held by the Full Bench of our Court in ***Ajay Marathe vs. Union of India & Ors.***[15]. In this judgment, it has been held that provisions of Rule 5(3)(a)(b) and (c) or the Rules of 1986 are mandatory, inasmuch as, whenever it is intended to impose prohibition or restrictions as contemplated by Rule 5, the Central Government is under a mandate to notify its intention to do so in *Official Gazette* and in such manner as it may deem fit. The Full Bench has further held that it is only when the Central Government is satisfied that it is in public interest to do so, it may dispense with the requirement of prior publication of notice under Rule 5(3)(a) of the Rules of 1986, however, no such argument has been raised on behalf of the Union of India-respondent no. 1 that the impugned Office Memorandum was issued dispensing with the requirement of prior publication of its

[15] **2018(4) Mh. L.J. 770**

intention as required by Rule 5(3)(a) of the Rules of 1986. Even otherwise, what we find is that the impugned Office Memorandum does not refer to any statutory provision, either of the Act of 1986 or the Rules of 1986. Accordingly, the Impugned Office Memorandum cannot be justified for this reason as well.

**41.** A Division Bench of this Court in its judgment dated 27th August 2001 in the case of ***Mr. Kashhinath Jairam Shetye and Ors. vs. Union of India and Anr.***[16] has observed that requirement of issuance of public notice under Rule 5(3)(a) of the Rules of 1986 is a statutory embodiment of the rule of *audi alteram partem* and in absence of any public interest involved in the dispensation of such public notice, the Central Government could not have, in casual manner, dispensed with such requirement and deprived the public of an opportunity to object to the activities proposed in the eco-sensitive zone. Though the argument based on dispensing with such requirement in public interest has not been made by the learned Counsel representing the respondent no. 1, however, we may observe that in case any provision, as contained in the impugned Office Memorandum, was intended by the Central Government to be made, CRZ

[16] **PIL Writ Petition No. 43 of 2019**

Notification, 2019 was required to be amended by following the statutory requirements contained in Rule 5 of the Rules of 1986. Since before issuance of the impugned Office Memorandum such statutory prescriptions have not been followed, that itself makes the impugned Office Memorandum vulnerable and susceptible due to which it cannot withstand judicial scrutiny.

**42.** Reliance placed by learned Counsel on behalf of respondent no. 1 on various judgments is of no avail to justify the impugned Office Memorandum. In this regard, we may note that heavy reliance has been placed by learned Counsel for respondent no. 1 on the judgment in the case of ***Pahwa Plastics Pvt. Ltd. (supra)***, however, it was a case where the Hon'ble Supreme Court held that *ex post facto* approval can be granted in certain rare circumstances, but, as is apparent from a perusal of the judgment, what we find is that it was a case where the relevant notification was issued by following the procedure under Rule 5(3) of the Rules of 1986, whereas in the instant case, the impugned Office Memorandum is not referable to any of the statutory prescriptions as discussed above.

**43.** Learned counsel for respondent no. 1 has also relied upon

the judgment in the case of ***D. Swamy (supra)***, ***Lafarge Umiam Mining Pvt. Ltd. (supra)***, ***Electrotherm (supra)*** and ***Electrosteel Steels Ltd. (supra)*** where the question was as to whether *ex post facto* environmental clearance maybe granted.

**44.** In the case of ***D. Swamy (supra)***, the Notification dated 14th March 2017 provided for grant of *ex post facto* environmental clearance for the project proponent who had commenced, continued or completed project without obtaining environmental clearance, which was issued by the Central Government in exercise of its power under section 3(1) and section 3(2)(v) of the Act of 1986 read with Rule 5(3)(d) of the Rules of 1986. Thus, the notification, which provided grant of *ex post facto* environmental clearance in ***D. Swamy (supra)***, was statutory in nature, whereas in the instant case, the impugned Office Memorandum is not referable to any of the provisions of the Act of 1986 or the Rules framed thereunder. Thus, in our opinion, the judgment in ***D. Swamy (supra)*** and other judgments will have no application to the facts of the present case.

**45.** So far as ***Electrosteel Steels Ltd. (supra)*** is concerned,

it was a case where environmental clearance was granted to the project proponent for a particular site on the basis of which consent to establish under the Air (Prevention and Control of Pollution) Act, 1981 and Water (Prevention and control of Pollution) Act, 1974 was accorded on the basis of environmental clearance issued by the Central Government, however, the consent to operate was rejected on the ground that the project proponent had shifted the site of its plant and had encroached upon some forest land in contravention of the Forest (Conservation) Act, 1980. It is in these circumstances, specially that the project proponent had shifted the site for establishing its plant which was at some distance away from the site for which environmental clearance was granted and the project proponent was seeking issuance of revised environmental clearance, that the Hon'ble Supreme Court directed the Union of India to take decision on the application of the project proponent for revised environmental clearance. In this judgment, Hon'ble Supreme Court has noticed ***Alembic Pharmaceuticals Ltd. (supra)*** wherein the Hon'ble Supreme Court has deprecated *ex post facto* clearances. The Hon'ble Supreme Court further noticed in ***Electrosteel Steels Ltd. (supra)*** that in ***Alembic***

***Pharmaceuticals Ltd. (supra)*** the notification dated 14th March 2017 was not an issue and that the Court was examining the propriety and legality of the 2002 circular which was inconsistent with the EIA Notification dated 27th January 1994 which was a statutory one. The Hon'ble Supreme Court in ***Electrosteel Steels Ltd. (supra)*** has, thus, referred to the notification dated 14th March 2017 which is a statutory notification unlike the Office Memorandum dated 19th February 2021 which is under challenge in this PIL petition which is merely an executive circular/decision. Accordingly, the judgment in ***Electrosteel Steels Ltd. (supra)*** does not help the respondent no. 1 in any manner for justifying the impugned Office Memorandum.

**46.** As far as the judgment in the case of ***K.T.V. Health Food Pvt. Ltd. (supra)*** is concerned, it was a case where *post facto* clearance was held to be permissible based on para 4.3 of CRZ Notification, 2011 which was inserted vide notification dated 6th March 2018. The notification dated 6th March 2018, as already observed, was statutorily issued by the Government of India exercising its powers conferred under section 3(2)(v) of the Act of 1986 read with Rule 5(3)(d) of the Rules of 1986. Hence, the

judgment in ***K.T.V. Health Food Pvt. Ltd. (supra)*** does not help the respondent no. 1.

**47.** On these counts, the other judgments referred to by learned Counsel representing the Union of India also do not persuade us to uphold the validity of the impugned Office Memorandum dated 19th February 2021.

## (H) Conclusion:

**48.** In the light of the discussion made and reasons given above, this Court is of a considered opinion that after issuance of CRZ Notification, 2019, in absence of any amendment in this notification or issuance of any other statutory notification permitting *post facto* CRZ clearance, by issuing the impugned Office Memorandum dated 19th February 2021, which is clearly non-statutory in nature, *post facto* CRZ clearance is legally not permissible. We also conclude that the impugned Office Memorandum dated 19th February 2021 being merely in the nature of an executive circular/order issued by the Union of India runs contrary to and in derogation of the statutory provisions embodied in CRZ Notification, 2019 and hence, is liable to be struck down.

## Order:

(a) PIL petition is, thus, allowed and the impugned Office Memorandum dated 19th February 2021 issued by the Government of India in the Ministry of Forest and Climate Change as contained in Exhibit 'A' appended to the PIL petition is hereby quashed.

(b) The applications seeking CRZ clearance made by interveners, namely, the State of Nagaland and M/s. Patel and Associates shall be considered by the competent authority on their own merits and appropriate decision thereon shall be taken in accordance with law, with expedition.

(c) All other interim application(s), if any, stand disposed of.

(d) Costs made easy.

**(AMIT BORKAR, J.)** **(CHIEF JUSTICE)**