

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

WRIT PETITION (PIL) No. 194 of 2011

For Approval and Signature:

HONOURABLE THE ACTING CHIEF JUSTICE MR.BHASKAR BHATTACHARYA

HONOURABLE MR.JUSTICE J.B.PARDIWALA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RANUBHA RAJMALJI JADEJA & 5 - PETITIONER

Versus

UNION OF INDIA THRO JOINT SECRETARY & 10 - RESPONDENT

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Appearance :

MR AJ YAGNIK for PETITIONER : 1 - 6.

MR PS CHAMPANERI, ASSISTANT SOLICITOR GENERAL OF INDIA for RESPONDENT : 1 -4.

NOTICE SERVED BY DS for RESPONDENT : 2 - 6,9 - 11.

MR RITURAJ M MEENA for RESPONDENT : 7,

MR MIHIR THAKORE for SINGHI & CO for RESPONDENT : 8,

MR MIHIR JOSHI, SR.ADVOCATE with MS RADHIKA ARORA, MR.HEMANG H PARIKH AND MR RASESH H PARIKH for RESPONDENT : 10 - 11.,

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CORAM : HONOURABLE THE ACTING CHIEF JUSTICE MR.BHASKAR BHATTACHARYA

and

HONOURABLE MR.JUSTICE J.B.PARDIWALA

Date : 9/05/2012

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

By way of this petition under Article 226 of the Constitution of India, in the nature of a Public Interest Litigation, the petitioners, residents of village Navinal, Taluka Mundra, District Kutch, have prayed for the following reliefs :

"12.

(A) To direct respondents and respondent nos.10 and 11 in particularly to immediately stop developing the land in question allotted to them within the revenue limits of village Navinal and Shiracha, Taluka Mundra, District Kutch, falling within Mundra Port and Special Economic Zone being developed and owned by respondent – Mundra Port and Special Economic Zone Ltd. till prior environmental clearance is granted to Mundra Port and Special Economic Zone by respondent – Ministry of Environment and Forests, Government of India and till all other clearances and permissions are granted to respondent nos.10 and 11 as per the law of the land;

(B) To direct the respondent nos.1, 5, 6 and 7 to restrain respondent nos.10 and 11 from developing the land in question allotted to them within the revenue limits of village Navinal and Shiracha, Taluka Mundra, District Kutch, falling within Mundra Port and Special Economic Zone being developed and owned by respondent – Mundra Port and Special Economic Zone Ltd. till prior environmental clearance is granted to Mundra Port and Special Economic Zone by respondent – Ministry of Environment and Forests, Government of India and till all other clearances

and permissions are granted to respondent nos.10 and 11 as per the law of the land;

(C) To direct the respondent nos.1 and 2 to take all civil, criminal and corrective action against respondent nos.8, 10 and 11 for violating Environmental Impact Assessment Notification, 2006;

(D) To direct respondent nos.1 and 2 to constitute a Team to decide the extent of collusion and involvement of statutory, public and Government authorities in assisting respondent nos.8, 10 and 11 in violating the Environmental Impact Assessment Notification, 2006 and thereby develop the land in question and put up construction thereupon and be further pleased to direct taking of civil, criminal and departmental action against erring officers;

(E) To direct the respondents and particularly respondent nos.5, 7 and 9 to prepare panchnama of the land allotted to respondent nos.10 and 11 and extent of development of the very land and construction thereupon so far put up by respondent nos.10 and 11 and place the same on record;

(F) During pendency and/or final disposal of the present petition be pleased to direct the respondents and particularly respondent nos.5, 7 and 9 to prepare panchnama of the land allotted to respondent nos.10 and 11 and extent of development of the very land and construction thereupon so far put up by respondent nos.10 and 11 and place the same on record;

(G) During pendency and/or final disposal of the present petition be pleased to direct respondent nos.10 and 11 to

immediately stop developing the land in question and putting up construction thereupon of any nature whatsoever on the land allotted to them within the Mundra Port and Special Economic Zone, at Mundra, District Kutch owned and developed by respondent no.8 – Mundra Port and Special Economic Zone Ltd.;

(H) To award the costs of this petition;

(I) To pass such other and further prayer/s in the interest of justice be granted.”

Facts relevant for the purpose of deciding this petition may be summarised as under :

- (1) The petitioners are the residents of village Navinal, Taluka Mundra, District Kutch, within whose revenue limits respondent nos.10 and 11 have undertaken developmental activities on the land so allotted to them within the Mundra Port and Special Economic Zone Limited (for short, '**MPSEZ**').
- (2) All the petitioners are farmers and have brought to the notice of this Court by way of this petition that respondent nos.10 and 11 have started developing the land and putting up construction of the proposed plant situated within the MPSEZ knowing fully well that till this date the MPSEZ has not been granted prior environmental clearance by the Ministry of Environment and Forests, Government of India, as required as per the Notification dated 14th September 2006.
- (3) In short, the case of the petitioners is that without mandatory prior environmental clearance under the Environmental Impact Assessment Notification, 2006 (for short, '**the EIA Notification**') issued under Rule 5 of the Environment (Protection) Rules, 1986 (for short, '**the Rules**') read with

Section 3 of the Environment (Protection) Act, 1986 (for short, '**the Act**') granted to respondent – MPSEZ, the respondent - Alstom Bharat Forge Power Limited has started construction of its factory for the manufacturing of power plant equipments within the very SEZ.

- (4) It is also the case of the petitioners that there is another collective venture in the form of Kalyani Alstom Power Limited belonging to the same respective groups to whom the land is allotted adjacent to the land allotted to respondent – Alstom Bharat Forge Power Limited.
- (5) According to the petitioners, as the boundaries are common, it is difficult for the petitioners to make out which joint venture is doing what and to what an extent. However, the fact of the matter is that the construction and development activities of the land so allotted within the MPSEZ is going on at a time when the MPSEZ itself does not have environmental clearance and, therefore, the question of any unit therein starting construction and development does not arise at all.
- (6) It is the say of the petitioners that, if the respective units to come within the SEZ also fall within Schedule-A or B industry, then they also independently require environmental clearance once the SEZ is granted clearance.
- (7) It is the case of the petitioners that respondent – MPSEZ at Mundra, which is owned by the Adani Group headed by Mr. Gautam Adani is one of the largest multi-product Special Economic Zone in India. MPSEZ is still waiting for prior Environmental Clearance by the Ministry of Environment and Forests, Government of India. Public hearing for environment clearance of respondent – MPSEZ was held on 5th September 2010. Till date prior environment clearance has not been granted to the respondent – MPSEZ.

- (8) It is also the case of the petitioners that respondent no.1 – Ministry of Environment and Forests has issued a detailed show-cause notice to respondent no.8 – Mundra Port and Special Economic Zone Limited for violation of provisions of CRZ Notification, 1991 under Section 5 of the Act. However, till date the mandatory prior clearance has not been granted by respondent – Ministry of Environment and Forests under the EIA Notification. Therefore, no developmental activities can take place within the SEZ at all either by the Developer of SEZ or an enterprise which is seeking to establish its unit within the SEZ.
- (9) It is also the case of the petitioners that respondent no.1 – Ministry of Environment and Forests, Government of India, issued another Notification dated 7th July 2011 constituting a committee to inquire into and place report on the specific reference. The Committee so constituted is looking into the matter. The order passed by Hon'ble High Court of Gujarat dated 12th July 2011 collectively in PILs and other environment related matter contains the entire Notification.
- (10) It is also the case of the petitioners that notice was issued upon the respondents by the petitioners on 27th August 2011 by registered post AD seeking immediate stoppage of all the construction activities, but of no avail. Thereafter, a reminder was sent on 13th September 2011, but same has also not been attended to by the respondents including respondent – Ministry of Environment and Forests, the Gujarat Pollution Control Board and the Development Commissioner of respondent – MPSEZ. Hence the present petition for enforcement of law in order to ensure adherence to the rule of law in the interest of environmental protection and to prevent a situation of fiat accompli being created for grant of environmental clearance to

MPSEZ by respondent - MPSEZ and respondent - Alstom Bharat Forge Power Limited.

(11) It is the say of the petitioners that respondent nos.10 and 11 have started developing the land and putting up construction of the proposed plant situated within the respondent – Mundra Port and Special Economic Zone knowing fully well that till date respondent – MPSEZ has not been granted prior environmental clearance. After receiving notice and the reminder from the petitioner, they cannot say that they are not aware about the issue of environmental clearance. However, the development of the land and the construction of the plant is going on unabated even after the reminder. The extent of construction is not known as petitioners cannot enter in the lands in question which are now cordoned off. However, from the photographs taken over a period of four months clearly suggest that apart from putting up the boundary, much more development and construction of the proposed plant is going on in utter violation of EIA Notification.

(12) It is also the say of the petitioners that without prior environmental clearance granted to respondent – MPSEZ, no unit within the same can develop the land allotted to it and put up construction thereupon towards setting up the manufacturing plant. However, respondent nos.10 and 11, more particularly respondent no.10 has started developing the land so allotted within the respondent – MPSEZ and put up construction thereupon in addition to putting up boundary wall and kachha construction for guards. The photographs taken by the petitioners from the outside are evidenced of the fact that developmental and construction activities with the help of workers and machines of different nature and type are going on at the proposed plant site. The development of the land and

construction of the plant at the site by respondent nos.10 and 11 and more particularly by respondent no.10 is in violation of EIA Notification, 2006 and therefore, same is absolutely illegal and unlawful.

(13)It is the say of the petitioners that the respondents – Government of India, Government of Gujarat, Gujarat Pollution Control Board, Collector and more particularly the Development Commissioner of respondent – MPSEZ have also been served with the notice dated 27th August 2011 followed by reminder dated 13th September 2011 along with necessary details and photographs bringing to their notice illegal and unlawful development of land and construction of the plant at the plant site by respondent no.10, but of no avail. This shows failure to perform statutory and constitutional obligation by the respondent – State and its respective authorities besides the Department and the Ministry who are under obligation to ensure that the law of the land is implemented upon. However, their failure to perform their obligation followed by stark failure to prevent respondent nos.10 and 11 and more particularly respondent no.10 from developing the land in question and putting up construction thereupon shows a collusion between the private industries and public authorities of worst nature, where a multinational company is encouraged by none other than the State within the territory of India to setup a plant along with Indian Partner in utter violation of environmental laws and other laws related to SEZ. This is an example of misrule of law, where the respondents are active contributors. Same is, therefore, discriminatory, arbitrary, irrational and malafide and hence, it is violative of Article 14 of the Constitution of India and therefore unconstitutional.

(14) Lastly, it is also the case of the petitioners that respondent no.8 is consciously encouraging respondent nos.10 and 11 for developing a land and putting up construction thereupon in absence of mandatory prior environmental clearance and this is nothing but an act which is in violation of assurance given to respondent – Ministry of Environment and Forests at the time of making application for environmental clearance for respondent – MPSEZ. Therefore, the terms of reference of respondent – MPSEZ are liable to be cancelled.

Notices were issued to the respondents and in response to the same, the respondents have appeared through their respective counsel, and respondent nos.10 and 11 have filed affidavit-in-reply. The stand taken in the affidavit-in-reply by respondent nos.10 and 11 is as under :-

- (1) The petition filed by the petitioners is not maintainable and deserves to be rejected at the threshold. The allegations purportedly made are completely vague and without any particulars and have no substance whatsoever. The petition is bereft of any acceptable data or admissible evidence to substantiate the allegations made in the petition.
- (2) The contents of the petitioner clearly show that it is merely an attempt to make a roving inquiry into the ongoing project without any basis whatsoever. The stand of respondent nos.10 and 11 is that the petition is a motivated attempt on the part of the petitioners in the guise of Public Interest Litigation for spurious causes and publicity and is a tool to harass and defame respondent nos.10 and 11.
- (3) The defence of respondent nos.10 and 11 is that the activities to be carried out by them would not in any way expose or

have an impact on human health; natural or man-made resources so as to attract the provisions of the Environment Impact Assessment Notification, 2006 which is not applicable to the project of the respondents. As the EIA Notification does not apply to the project of the respondents, the respondents are under no obligation to obtain a prior Environment Clearance (for short, 'EC') as per the requirement of EIA Notification for carrying out any construction/developmental activity on site. According to respondent nos.10 and 11, they have been granted the necessary approvals required for its project including the consent to establish its factory. Therefore, the question of violation of any statutory obligations on the part of respondent no.11 as alleged by the petitioners does not arise let alone the violation of the provisions of the EIA Notification.

- (4) The stand of respondent nos.10 and 11 is that respondent no.11 is a joint venture company of Asltom Power Holding, S.A. and Asltom Bharat Forge Limited in India. Respondent no.11 has acquired leasehold rights from Mundra Port Special Economic Zone Limited, the lessor/owner, in land situated at Mundra Port Special Economic Zone, part of Revenue Survey No.295/1 and part of Revenue Survey No.225 of Mouje Village Siracha and Navinal, Taluka Mundra, District Kutch, Gujarat vide Lease Deed dated 25th June 2010.
- (5) It is the stand of respondent nos.10 and 11 that both are sister concern companies (being joint venture companies of Alstom Power Holding, S.A. and Bharat Forge Limited) and would be undertaking similar manufacturing activities. In fact, the activity to be carried out by respondent no.11, though of a similar nature, would be on a much smaller scale as compared to respondent no.10 and would support the manufacturing activities of respondent no.10.

(6) It is the stand of respondent no.11 that it is in the process of setting up a manufacturing unit for carrying out fabrication and assembling of heat exchangers, pressure vessels, fabricated items of steam turbine, generators and other miscellaneous equipments on the land. This activity would involve designing, engineering, manufacturing, assembling, supplying, erecting and commissioning of Heat Exchangers, Condensers and deaerator etc. Respondent no.11 would be making an investment of approximately Rs.321 crore in this venture. It would manufacture equipment, which would include Heat Exchangers, Condensers and deaerator etc. to support generation of 5000 MW power per annum, with super critical steam parameters. As a matter of fact, these equipments are globally proven for reducing CO₂ emissions from power plants and allow much superior combustion capabilities reducing coal consumption. As per the manufacturing process, this plant would not involve any primary or secondary metallurgical processes like melting of steel or making of forgings or castings etc. Respondent no.11 would instead get castings and forgings in semi-finished conditions from various vendors within an outside India. The only key processes involved in manufacturing of these heat exchangers, pressure vessels and fabrication for turbines and generators would be welding, machining and stress relieving, other than designing, engineering and procurement etc. Respondent no.11 would be carrying out stress relieving operation for the fabricated assemblies/ sub-assemblies, wherever applicable as per standards for the purposes of which respondent no.11 would be utilizing a Bogie Hearth Type Heat Treatment Furnace.

(7) It is also the stand of respondent nos.10 and 11 that on 3rd February 2010, respondent no.11 received its Letter of Approval

under the SEZ Act from the Development Commissioner bearing No.F.MPSEZ/IUA/07/2009-10. Respondent no.11, for the purposes of commencing construction of the plant besides taking other regulatory approvals, had applied to the Gujarat Pollution Control Board in December 2010 seeking consent to establish (NOC) under the relevant provisions of the Air Act, 1981 and Water Act, 1974. Pursuant to such application, the GPCB was pleased to grant to respondent no.11 its NOC dated 30th April 2011.

- (8) It is the defence of respondent nos.10 and 11 that inspite of the aforesaid being in place and the EIA Notification not being applicable to the project, in view of the petitioners' allegations in a notice issued to Bharat Forge Limited, of which the answering respondent was informed, as a matter of precaution, respondent no.10, vide its letter dated 12th October 2011, sought a clarification from the MoEF regarding the need of obtaining EC for its project in terms of the EIA Notification giving out a detailed description of the type of activity to be carried out along with other relevant facts.
- (9) It is also the case of the respondents that since respondent nos.10 and 11 are sister concern companies and would be carrying out similar activities wherein respondent no.11's activity is to be carried out on a much smaller scale, it was felt that a clarification received from MoEF for respondent no.10's activity would equally serve the purpose for respondent no.11's activity as well. Respondent no.10 received the MoEF's reply dated 25th October 2011 which clearly stated that the activity proposed to be carried out by respondent no.10 did not attract the provisions of the EIA Notification and thus prior EC was not required in respondent no.10's case.

(10)As per the say of respondent no.11, it has completed fencing, ground-levelling and piling work at the project site. Though the land in question of respondent no.11 falls within the MPSEZ, the activity to be undertaken by it does not attract the EIA Notification or violate any of the environmental laws. Therefore, the question of stalling/delaying the construction and developmental activities in any way does not arise. In so far as any approvals or permissions that may be required by MPSEZ are concerned, the answering respondent denies the same for want of knowledge.

(11)According to the respondent, without prejudice to the above, the pendency of any approvals to be obtained by MPSEZ, however, cannot in any manner be a reason for stalling/delaying the construction and developmental activities undertaken by respondent no.11 especially when the fact remains that the activity to be undertaken by it does not attract or violate any of the environmental laws or norms including the EIA Notification.

(12)It is the say of the respondents that as long as the individual units falling within the SEZ have the requisite independent approvals/permissions/clearances from the competent authorities and do not attract the provisions of the EIA Notification, an overall EC is not a condition precedent for the answering respondent to commence its activities. As respondent no.11 has the necessary approvals/permissions (NOC) in place from the GPCB and Letter of Approval and the activity undertaken by it does not attract EIA Notification or violate any of the environmental laws, even if Mundra SEZ does not currently have an overall EC, the same cannot be a hindrance or obstruction in any of the

construction/developmental activities being undertaken by respondent no.11 at site.

(13)It is also the stand of respondent no.10 that it did seek clarification from the Ministry of Environment and Forests regarding the issue at hand giving details of the relevant factual matrix. Since the activities of both respondent no.10 and 11 are similar wherein respondent no.11's activity would be carried on a smaller scale, the clarification received from MoEF to the effect that an EC would not be required by respondent no.10 would squarely apply to respondent no.11's case as well.

(14)It is also the stand of respondent no.11 that it has come to its knowledge that the petitioners are well aware of the past litigation in relation to the same issues, some of which are still pending before this High Court or other authorities. According to respondent nos.10 and 11, in the garb of public interest litigation, identical issues are being agitated before the Court, either by using different party names or addressing to issues in piecemeal in order to give a new colour to the same issues. According to the respondents, all the purported issues raised by the petitioners herein have been dealt with in the past and, therefore, the petition in the present form is not maintainable.

I. Contentions on behalf of the petitioners :

Mr.Anand Yagnik, learned advocate appearing for the petitioners vehemently submitted that in the absence of mandatory prior environmental clearance under the Environmental Impact Assessment Notification, 2006 issued under Rule 5 of the Environment (Protection) Rules, 1986 read with Section 3 of the Environment (Protection) Act, 1986 granted to respondent no.8 - Mundra Port Special Economic Zone Limited, respondent no.10 - Alstom Bharat Forge Power Limited

could not have started construction of its factory for the manufacturing of power plant equipments within the very MPSEZ.

Mr.Yagnik further submitted that there is another collective venture in the form of Kalyani Alstom Power Limited (respondent no.11) of the same group to whom land is allotted adjacent to the land allotted to respondent no.10. According to Mr.Yagnik, the construction and developmental activities of the land so allotted within the MPSEZ is going on at a time when the MPSEZ itself does not have environmental clearance and, therefore, the question of any unit therein starting construction and development does not arise at all.

According to Mr.Yagnik, if the respective units to come within the SEZ also fall within Schedule A or B industry as per the notification, then such industry also is obliged to obtain environmental clearance independently after the SEZ is granted the clearance.

Mr.Yagnik further submitted that the Environment (Protection) Act, 1986 is a Central Act. Respondent – Union of India has framed Environment (Protection) Rules, 1986. Under Section 3 of the Act and Rule 5 of the Rules, first Environmental Impact Assessment Notification, 1994 and thereafter Environmental Impact Assessment Notification, 2006 was brought about for imposing certain restrictions and prohibition on new projects and activities or on the expansion or modernization of existing projects or activities based on their potential environmental impact as indicated in the Schedule to the Notification.

According to Mr.Yagnik, the Schedule of EIA Notification provides category A and B industries. Category A industries require prior environmental clearance from the Ministry of Environment and Forests, Government of India, whereas Category B industries require

prior environmental clearance from the State Environmental Impact Assessment authority constituted by the State Pollution Control Board. According to Mr.Yagnik, as per the Schedule the unit in question falls within Item No.5(k) and all projects relating to Item No.5(k) would require prior environmental clearance.

Mr.Yagnik, learned advocate appearing for the petitioners invited our attention to a letter dated 19th August 2010 (Annexure-C to the petition) issued by the Government of India, Ministry of Environment and Forests, which reads as under :

*“No.J-11013/41/2006-IA.II(I)
Government of India
Ministry of Environment & Forests*

*Paryavaran Bhavan,
C.G.O. Complex, Lodi Road,
New Delhi-110003.*

Dated 19th August 2010

Office Memorandum

Sub : Activities which can be undertaken without prior Environmental Clearance – Clarification regarding.

Instances have come to the notice of this Ministry where the project proponents have undertaken construction activities relating to the project at site without obtaining the requisite prior environmental clearance as is mandated under the EIA Notification, 2006. It is to reiterate that the EIA Notification, 2006 mandates prior environment clearance to be obtained in respect of all the activities listed therein following the prescribed procedure. No activity relating to any project covered under this Notification including civil construction, can be undertaken at site without obtaining prior environmental clearance

except fencing of the site to protect it from getting encroached and construction of temporary shed(s) for the guard(s).

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

This issues with the approval of the Competent Authority.

*sd/-
(S.K.Aggarwal)
Director”*

Relying on the contents of the letter referred to above, Mr.Yagnik submitted that no activity relating to any project including civil construction can be undertaken at the site without obtaining prior environmental clearance. According to Mr.Yagnik, in spite of this, respondent nos.10 and 11 have admitted in their reply that they have completed fencing, ground-levelling and pilling work at the project site. Mr.Yagnik invited our attention to a letter dated 30th July 2010 issued by the Government of India, Ministry of Commerce and Industries, under the Right to Information Act, on the basis of which Mr.Yagnik submitted that respondent nos.10 and 11 are the units within the Mundra Port and Special Economic Zone. According to Mr.Yagnik, before grant of environmental clearance public hearing is mandatory and so far as objection to the grant of environmental clearance to the MPSEZ is concerned, they have already been lodged and the final decision in this regard is still awaited, meaning to say

that till this date the MPSEZ itself has not been granted any environmental clearance certificate. Thus, according to Mr.Yagnik, learned advocate for the petitioners, this is a fit case where this Court must issue appropriate writ, order or direction upon respondent nos.10 and 11 to immediately stop developing the land in question allotted to them within the revenue limits of village Navinal falling within the Mundra Port and Special Economic Zone, in public interest.

II. Contentions on behalf of respondent no.8 (Mundra Port and Special Economic Zone) :

Learned senior counsel Mr.Mihir Thakore appearing for respondent no.8 – Mundra Port and Special Economic Zone Limited submitted that the MPSEZ has been incorporated in 2003 under the provisions of the Companies Act, 1956 for the development, operation and maintenance of the Mundra Port SEZ, this project has also been approved in principle for setting up of Special Economic Zone from the Ministry of Commerce, Government of India. Mr.Thakore giving us more than fair idea about MPSEZ, submitted that only the infrastructure in the SEZ has to be provided, operated and maintained by MPSEZ, while the remaining area shall be laid out into plots for various purposes like industrial, commercial, residential, recreational, etc. and will be sold/leased for development. According to Mr.Thakore, the MPSEZ need to obtain environmental clearance considering the impact due to all the pollution loads from the infrastructure facilities to be provided by Mundra Port SEZ Limited in the Special Economic Zone.

According to Mr.Thakore, facilities like treatment of sewage from the SEZ, common sewage treatment plants (CSTPs) to meet the water waste disposal standards, construction of common effluent treatment plants (CETPs) facilities, facilities for recycling and non-recycling materials, a full-fledged fire station with all the necessary fire-fighting

equipments, etc. are the few infrastructural facilities which will be provided by the MPSEZ. According to Mr.Thakore, the SEZ is specified as Project/Activity – 7(C), Category – A, in Notification vide S.O. 1533 dated 14th September 2006 issued by the Ministry of Environment and Forests and, therefore, the MPSEZ is required to obtain prior environmental clearance from the Ministry of Environment and Forests, Government of India. For this purpose, a Rapid Environmental Impact Statement has also been prepared and submitted for perusal of the Ministry of Environment and Forests. Thus, according to Mr.Thakore, so far as the MPSEZ is concerned, the environmental clearance is necessary only so far as the infrastructural facilities which are to be provided by the MPSEZ is concerned.

Mr.Thakore further submitted that if the industries to be setup in the Mundra SEZ generate any kind of environmental pollution in the form of air, water and/or hazardous waste, they shall have to appropriately manage and handle the same in compliance with the prevailing environmental norms of the Gujarat State Pollution Control Board and all applicable local authorities. This responsibility shall entirely lie with the corresponding industries.

According to Mr.Thakore, there may be many such industries which may not be falling within Schedule A of the Notification and once an industry does not fall within Schedule A category, then prior environmental clearance need not be obtained by such an industry. If such an industry has been set-up within the MPSEZ and if such industry is not obliged to obtain prior environmental clearance from the appropriate authority, then in that case, it cannot be said that such industry can not undertake its operations until environmental clearance certificate is being accorded in favour of the MPSEZ.

Mr.Thakore further invited our attention to the Notification dated 14th September 2006 issued by the Ministry of Environment and

Forests and more particularly a specific condition being attached with the Schedule providing for list of projects for activities requiring prior environmental clearance. The specific condition which has been relied upon and brought to our notice reads as under :

“If any Industrial Estate/Complex/Export Processing Zones/Special Economic Zones/Biotech Parks/Leather Complex with homogeneous type of industries such as Items 4(d), 4(f), 5(e), 5(f) or those Industrial estates with pre-defined set of activities not necessarily homogeneous, obtains prior environmental clearance, individual industries including proposed industrial housing within such estates/complexes will not be required to take prior environmental clearance, so long as the Terms and Conditions for the industrial estate/complex are complied with (such estates/complexes must have a clearly identified management with the legal responsibility of ensuring adherence to the Terms and Conditions of prior environmental clearance, who may be held responsible for violation of the same throughout the life of the complex/estate.”

According to Mr.Thakore, on plain reading of specific condition, an Economic Zone with homogeneous type of industries such as 4(d), 4(f), 5(e), 5(f) as mentioned in the Schedule or those industrial estates with pre-defined set of activities not necessarily homogeneous, obtains prior environmental clearance, individual industries will not be required to take prior environmental clearance, so long as the terms and conditions for the economic zone are complied with. According to Mr.Thakore, the plain reading of the specific condition would suggest that any industry other than mentioned in Item nos.4(d), 4(f), 5(e), 5(f) will have to obtain environmental clearance if at all the unit is such which is covered under the Schedule.

III. Contentions on behalf of respondent nos.10 and 11 :

Mr.Mihir Joshi, learned senior counsel appearing for respondent nos.10 and 11 vehemently submitted that the Notification dated 14th September 2006 relied upon by the petitioners is not applicable so far as respondent nos.10 and 11 are concerned. According to Mr.Joshi, there is a serious misconception in the mind of the petitioners that the unit which has been set-up by respondent no.10 is a unit of a type as specified in Item No.5(k) of the Schedule appended to the Notification. According to Mr.Joshi, the unit is not induction/arc furnaces/cupola furnaces 5TPH or more. In short, the contention of Mr.Joshi is that it is not a power plant but it is an engineering unit. Mr.Joshi explained to us that respondent no.10 is in the process of setting up a manufacturing unit for carrying out fabrication and assembling of steam turbines, generators and other equipments on the land. This activity would involve designing, engineering, manufacturing, assembling, supplying, erecting and commissioning of environmentally most advanced turbines and generators for both super-critical (800/600 MW) and sub-critical (600/500/300 MW) power plants. According to Mr.Joshi, respondent no.10 has invested around Rs.2000 crore in this venture and would manufacture 5000 MW of equipments per annum, including super-critical technology with possibilities of joint forays into turbines and generators for nuclear applications in due course of time. According to Mr.Joshi, these equipments are globally proven for reducing CO₂ emissions from power plants and allow much superior combustion capabilities reducing coal consumption. According to Mr.Joshi, this plant would not involve any primary or secondary metallurgical processes like melting of steel or making of forgings or casting, etc. Respondent no.10 would instead get castings and forgings in semi-finished conditions from various vendors within and outside India.

Mr.Joshi submitted that as a matter of fact, his client addressed a detailed letter dated 12th October 2011 to the Special Secretary, Ministry of Environment and Forests, Government of India, requesting to clarify as to whether there is any need to obtain environmental clearance for the project they proposed to setup within the MPSEZ in terms of the provisions of the Gazette of India Notification No.16071 dated 14th September 2006. Mr.Joshi submitted that in response to the said letter his client received a reply dated 24th October 2011, wherein in clear terms it has been informed that the proposal as put up does not attract the provision of EIA Notification, 2006. However, the proponent shall obtain a clearance under the CRZ Notification, 2011, Wildlife (Protection) Act, 1972, Forest (Conservation) Act, 1980, if applicable in the case of his client.

According to Mr.Joshi, when the Ministry of Environment and Forests itself has clarified that there is no need of any clearance certificate to be obtained in terms of Notification, 2006, then only because environmental clearance has not been granted to the MPSEZ by itself cannot be a ground to stop the project of his client.

IV. Contentions on behalf of respondent no.1 – Union of India :

Mr.P.S.Champaneri, learned Assistant Solicitor General of India appearing for the Union of India submitted that the issue as regards the need to obtain environmental clearance in terms of the provisions of EIA Notification, 2006 has been well explained by the department in its letter dated 25th October 2011 (Annexure-G to the petition at p.213). Mr.Champaneri confirms the contents of the letter dated 25th October 2011 and submitted that he has nothing more to say in the matter.

V. Reply by the petitioners :

In reply to the contentions of the respondents, learned advocate Mr.Yagnik submitted that, whether the unit proposed to be setup within the MPSEZ needs to obtain an independent environmental clearance certificate or not, is not an important question in the present petition but, according to Mr.Yagnik, if the MPSEZ itself has not been granted environmental clearance under the Notification of 2006, then in that case, any other unit setup within the MPSEZ whether requires environmental clearance or not, cannot proceed with the construction of the work. The sum and substance of the contention of Mr.Yagnik is that, so long as the MPSEZ does not get the environmental clearance, no other unit who has been allotted plots within the MPSEZ can proceed with the work of construction irrespective of the fact that whether individually they need to obtain any environmental clearance or not.

VI. Analysis :

Having heard learned counsel for the respective parties and having perused the materials on record, the short question for our consideration in this petition is as to whether in the absence of any environmental clearance certificate granted in favour of the MPSEZ in terms of the Notification dated 14th September 2006 issued by the Ministry of Environment and Forests, Government of India, whether the unit proposed to be setup by respondent no.10 within the MPSEZ can proceed with the construction work or not irrespective of the fact as to whether respondent no.10 is obliged to obtain any independent environmental clearance for the project or not.

Before we answer this question, we need to first address ourselves as to whether respondent no.10 who proposes to setup a manufacturing unit for carrying out fabrication and assembling of

turbines, generators and other equipments on the land is obliged to obtain environmental clearance or not.

We have a direct answer to this question in the form of a letter dated 25th October 2001 addressed by the Ministry of Environment and Forests, Government of India, to respondent no.10, wherein the Union of India has informed as under :

*“M/s.ALSTOM Bharat Forge Power Limited (ABFPL)
14th Floor, Antariksh Bhawan,
22, Kasturba Gandhi Marg,
New Delhi – 110 001*

Fax : 0120-4731200

Sub: Clarification regarding the need of environmental clearance in terms of the provisions of EIA Notification, 2006.

Sir,

The undersigned is directed to refer to your letter no. nil dated 12.10.2011 regarding applicability of Environment Impact Assessment (EIA) Notification, 2006 for fabrication and assembling for steam turbine, generators and associated equipments.

2. The matter has been examined. It is noted that M/s ALSTOM Bharat Forge Power Limited (ABFPL) would design, engineer, manufacture, assemble, supply, erect and commission turbine and generators for both super critical and sub critical power plants at Mundra in District Kutch in Gujarat. 'Consent to Establishment' under the provisions of Air and Water Acts and authorization under the Hazardous Waste (Management, Handling and Transboundary Movement) Rules, 2008 has been obtained. The cost of the project is Rs.2,000 crores.

3. *It is also noted that the process of manufacturing of turbines and generators involves welding, machining and stress relieving on forging or castings etc. For this purpose, a pit type annealing furnace would be installed which would operate at a temperature of 750° C. The company would obtain casting and forgings in semi finished conditions from various suppliers within and outside the country. No melting or primary and secondary metallurgical process is involved.*

4. *Under the EIA Notification, 2006, the new projects or expansion or modernization of existing projects regarding primary and secondary metallurgical industry require prior environmental clearance from the Ministry. As per the EIA Notification amended on 1st December, 2009, in case of secondary metallurgical process industrial units, involving operation of furnaces only such as induction and electric arc furnace, submerged arc furnace and cupola with capacity more than 30,000 TPA would require environmental clearance.*

5. *In view of the above, the instant proposal does not attract the provisions of EIA Notification, 2006. The proponent shall obtain clearance under the CRZ Notification, 2011, Wildlife (Protection) Act, 1972, Forest (Conservation) Act, 1980, if applicable in this case.*

This issues with the approval of the Competent Authority.”

Independently of the letter too, we have examined the issue as to whether there is any need for respondent no.10 to obtain any environmental clearance or not. We have noticed that the Ministry of Environment and Forests, Government of India, in exercise of the

powers conferred by sub-section (1) and clause (5) of sub-section (2) of Section 3 of the Environment (Protection) Act, 1986 (29 of 1986), published Notification dated 1st December 2009, thereby making necessary amendments in the Environmental Impact Assessment Notification, 2006 dated 14th September 2006. We have noticed that Item 5(k) as it appeared in the Notification dated 14th September 2006 has been omitted. Item 5(k) in the Notification reads as under :

*“SCHEDULE
(See paragraph 2 and 7)*

*LIST OF PROJECTS OR ACTIVITIES REQUIRING PRIOR ENVIRONMENTAL
CLEARANCE*

<i>Project or Activity</i>		<i>Category with threshold limit</i>		<i>Conditions if any</i>
		<i>A</i>	<i>B</i>	
<i>1</i>		<i>Mining, extraction of natural resources and power generation (for a specified production capacity)</i>		
<i>(1)</i>	<i>(2)</i>	<i>(3)</i>	<i>(4)</i>	<i>(5)</i>
<i>1(d)</i>	<i>Thermal Power Plants</i>	<i>xxxx</i>	<i>xxxx</i>	<i>xxxx</i>
<i>xxx</i>	<i>xxxx</i>	<i>xxxx</i>	<i>xxxx</i>	<i>xxxx</i>
<i>5</i>	<i>Manufacturing/Fabrication</i>			
<i>5(k)</i>	<i>Induction/arc furnaces/cupola furnaces 5TPH or more</i>		<i>All projects</i>	<i>General condition shall apply</i>

The amendment as it stands now as per the Notification dated 1st December 2009 reads as under :

“(xi) item 5(k) and the entries relating thereto shall be omitted.”

As against that, we have also noticed that even if it is believed that the project of respondent no.10 involves operation of furnaces, even then, environmental clearance would not be necessary because the company would utilize a pit type annealing furnace. The capacity of this furnace is to handle Rotors weighing upto 120 tonnes with a cycle time of approximately 4 days. The maximum temperature of this furnace is 750^o C and the monthly load of stress relieving would be maximum 120 tonnes. On the other hand, as per the Notification of 2009 what would be the position in case of secondary metallurgical processing industrial unit involving operation of furnaces has been made clear. As per Notification of 1st December 2009, the position would be as under :

“General condition shall apply.

Note :

(i) The recycling industrial units registered under the HSM Rules, are exempted.

(ii) In case of secondary metallurgical processing industrial units, those projects involving operation of furnaces only such as induction and electric arc furnace, submerged arc furnace, and cupola with capacity more than 30,000 tonnes per annum (TPA) would require environment clearance.

(iii) Plant/units other than power plants (given against entry no.1(d) of the schedule), based on municipal solid waste (non-hazardous) are exempted.”

Thus, it is now made abundantly clear by the Notification of 2009 that only those projects involving operation of furnaces such as induction and electric arc furnace, submerged arc furnace, and cupola with capacity of more than 30,000 tonnes per annum would require

environmental clearance. The case of respondent no.10 definitely does not fall within this category and we have no hesitation in coming to the conclusion that respondent no.10 independently is not obliged to obtain environmental clearance from the authority concerned so far as their project is concerned.

The second question and the most important question which we shall now proceed to answer is as to whether respondent no.10 can proceed further with the construction work in the absence of any environmental clearance being given to the MPSEZ. This has been the principal contention of Mr.Yagnik, learned advocate appearing for the petitioners.

A specific query in this regard was raised by us and in reply to the same, Mr.Thakore, learned senior counsel appearing for the MPSEZ submitted that assuming for the moment that environmental clearance is not being given to the MPSEZ, then in that case, all infrastructural facilities which the MPSEZ was to provide in general to all the units within the MPSEZ will have to be provided by individual units within the MPSEZ. In the first brush, the reply appeared to be quite attractive and convincing but if this reply of Mr.Thakore is accepted then, in our view, the whole object behind seeking environmental clearance would be frustrated. Not only this, but it will amount to doing violence with the Notification dated 14th September 2006 issued by the Ministry of Environment and Forests, in this regard.

The question, thus, remains to be decided is about environmental clearance. It is not the stand of respondent no.8 – MPSEZ that environmental clearance is not necessary before commencement of the construction for the purpose of providing infrastructural facilities. This fact is very much evident from the executive summary prepared by the MPSEZ and placed before the

Ministry of Environment and Forests, for the purpose of obtaining environmental clearance. In the executive summary in so many words it has been stated as under :-

“Purpose of Rapid Environment Impact Assessment

The Special Economic Zone is specified as : Project/Activity-7(C), Category – A, in Notification vide S.O. 1533 dated 14th September, 2006 issued by the Ministry of Environment and Forests therefore is required to obtain prior Environmental Clearance from the Ministry of Environment and Forests, Govt. of India. The present Rapid Environmental Impact Statement has been prepared for the perusal of the MoEF.

This Rapid Environmental Impact Assessment Report has been prepared based on the study of impacts due to all the possible pollution loads from the infrastructure facilities to be provided by Mundra SEZ Ltd. in the SEZ. The report has been prepared based on the guidelines recommended by the Ministry of Environment and Forests (MoEF).”

Before we proceed further to decide this question, it would be necessary to set out the relevant statutory provisions and the Notifications. Relevant portion of Section 3 of the Environment (Protection) Act, 1986 reads as under :-

"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 :-

"(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."

The Central Government has also framed statutory rules under this Act which are known as Environment (Protection) Rules, 1986. The relevant rules being sub-rules (2) and (3) (d) of Rule 5 read as under :-

"5(2) While prohibiting or restricting the location of industries and carrying on the processes and operations in an area, the Central Government shall follow the procedure hereinafter laid down.

... ..

(3) (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 three hundred and sixty five days from such date of publication, impose prohibition or restrictions on location of such industries and the carrying on of any process or operation in an area."

In exercise of the powers conferred by the aforesaid statutory provisions in the Act and the Rules, the Central Government, in the Ministry of Environment and Forests, issued Notification dated 14th September 2006. The Notification reads as under :

“S.O. 1533 Whereas, a draft notification under sub-rule (3) of Rule 5 of the Environment (Protection) Rules, 1986 for imposing certain restrictions and prohibitions on new projects or activities, or on the expansion or modernization of existing projects or activities based on their potential environmental impacts as indicated in the Schedule to the notification, being undertaken in any part of India, unless prior environmental clearance has been accorded in accordance with the objectives of National Environment Policy as approved by the Union Cabinet on 18th May, 2006 and the procedure specified in the notification, by the Central Government or the State or Union territory Level Environment Impact Assessment Authority (SEIAA), to be constituted by the Central Government in consultation with the State Government or the Union territory Administration concerned under sub-section (3) of Section 3 of the Environment (Protection) Act, 1986 for the purpose of this notification, was published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (ii) vide number S.O. 1324 (E) dated the 15th September, 2005 inviting objections and suggestions from all persons likely to be affected thereby within a period of sixty days from the date on which copies of Gazette containing the said notification were made available to the public;

And whereas, copies of the said notification were made available to the public on 15th September, 2005;

And whereas, all objections and suggestions received in response to the above mentioned draft notification have been duly considered by the Central Government;

Now, therefore, in exercise of the 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 and in supersession of the notification number S.O. 60(E) dated the 27th January, 1994, except in respect of things done or omitted to be done before such supersession, the Central Government hereby directs that on and from the date of its publication the required construction of new projects or activities or the expansion or modernization of existing projects or activities listed in the Schedule to this notification entailing capacity addition with change in process and or technology shall be undertaken in any part of India only after the prior environmental clearance from the Central Government or as the case may be, by the State Level Environment Impact Assessment Authority, duly constituted by the Central Government under sub-section (3) of section 3 of the said Act, in accordance with the procedure specified hereinafter in this notification.”

In the above referred part of the Notification, the following words assume much importance :

“On and from the date of its publication, the required construction of new projects or activities or the expansion or modernization of existing projects or activities listed in the Schedule to this Notification entailing capacity addition with change in process and or technology shall be undertaken in any part of the India only after the prior environmental clearance from the Central Government or as the case may be, by the State Level Environment Impact Assessment Authority.”

Clause (2) of the Notification is with regard to requirement of prior environmental clearance. Clause (2) reads as under :

“2. Requirement of prior Environmental Clearance (EC) :-

The following projects or activities shall require environmental clearance from the concerned regulatory authority, which shall hereinafter referred to be as the Central Government in the Ministry of Environment and Forests for matters falling under Category 'A' in the Schedule and at State level the State Environment Impact Assessment Authority (SEIAA) for matters falling under Category 'B' in the said Schedule, before any construction work, or preparation of land by the project management except for securing the land, is started on the project or activity :

- (i) All new projects or activities listed in the Schedule to this notification;*
- (ii) Expansion and modernization of existing projects or activities listed in the Schedule to this notification with addition of capacity beyond the limits specified for the concerned sector, that is, projects or activities which cross the threshold limits given in the Schedule, after expansion or modernization;*
- (iii) Any change in product – mix in an existing manufacturing unit included in Schedule beyond the specified range.”*

Clause (4) categorizes projects and activities. It reads as under :

“4. Categorization of projects and activities :-

- (i) All projects and activities are broadly categorized into two categories – Category A and Category B, based on the spatial extent of potential impacts and potential impacts on human health and natural and man made resources.*

(ii) All projects or activities included as Category 'A' in the Schedule, including expansion and modernization of existing projects or activities and change in product mix, shall require prior environmental clearance from the Central Government in the Ministry of Environment and Forests (MoEF) on the recommendations of an Expert Appraisal Committee (EAC) to be constituted by the Central Government for the purposes of this notification;

(iii) All projects or activities included as Category 'B' in the Schedule, including expansion and modernization of existing projects or activities as specified in sub paragraph (ii) of paragraph 2, or change in product mix as specified in sub paragraph (iii) of paragraph 2, but excluding those which fulfill the General Conditions (GC) stipulated in the Schedule, will require prior environmental clearance from the State/Union territory Environment Impact Assessment Authority (SEIAA). The SEIAA shall base its decision on the recommendations of a State or Union territory level Expert Appraisal Committee (SEAC) as to be constituted for in this notification. In the absence of a duly constituted SEIAA or SEAC, a Category 'B' project shall be treated as a Category 'A' project."

As per the Schedule appended to the Notification, Column 7 is with regard to physical infrastructure including environmental services. Clause 7(c) is relevant for our purpose, which reads as under:

7		Physical Infrastructure including Environmental Services		
7(a)	xxx	xxx	-	-
7(b)	xxx	xxx	-	-

7(c)	<i>Industrial estates/ parks/ complexes/ areas, export processing zones (EPZs), Special Economic Zones (SEZs), Biotech Parks, Leather Complexes.</i>	<i>If at least one industry in the proposed industrial estate falls under the Category A, entire industrial area shall be treated as Category A, irrespective of the area.</i> <i>Industrial estates with area greater than 500 ha. and housing at least one Category B industry.</i>	<i>Industrial estates housing at least one Category B industry and area <500 ha.</i> <i>Industrial estates of area >500 ha. and not housing any industry belonging to Category A or B.</i>	<i>Special condition shall apply</i> <i>Note : Industrial Estate of area below 500 ha. and not housing any industry of Category A or B does not require clearance.</i>
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Considering the mandatory nature of the environmental clearance, procedure has to be meticulously followed. Only on environmental clearance, any construction - preliminary or otherwise, relating to setting up of the project, can be undertaken. There is an express prohibition that “no construction work, preliminary or otherwise, relating to the setting up of the project, may be undertaken till the environmental and/or site clearance is obtained”.

Having regard to the mandatory nature of the environmental clearance and the object behind the Notification dated 14th September 2006, we have no doubt in our mind that respondent nos.10 and 11 could not have proceeded ahead with their projects. At the best, respondent no.8 – MPSEZ could have allotted the plots to the companies desirous of putting up their own units. In any case, the allottee of a plot (i.e. the lessee) cannot proceed ahead with the construction of the unit without the MPSEZ obtaining environmental clearance from the Ministry of Environment and Forests.

We are unable to fathom the idea that all the infrastructural facilities which the MPSEZ is obliged to provide will have to be taken care of by the individual allottees in the event if for any reason the

authority concerned refuses to grant environmental clearance in favour of the MPSEZ. The MPSEZ has acquired approximately 18000 hectares of land from the Government for the purpose of developing a port, which is going to be one of the Asia's biggest port. The Government has allotted approximately 18000 hectares of land for the purpose of developing a port. If the MPSEZ itself is not accorded environmental clearance, then the question will be as to who will develop the port and whether the port can be developed by the allottees who have been allotted land by the MPSEZ. This area of 18000 hectares includes 14 villages of Mundra Taluka and the MPSEZ has to provide for infrastructural facilities on a large scale, which include gardens, playgrounds, dwelling units, hospitals, clinics, dispensaries, schools, colleges, market places, hostels, hotels, restaurants, cafeterias, theaters, auditoriums, libraries, public entertainments, clubs, public utilities, service building and such other facilities, conveyances and amenities as the MPSEZ may deem it necessary or expedient for carrying out the objects of the MPSEZ and/or Mundra SEZ. For any reason, if the environmental clearance is not granted in favour of the MPSEZ, then how will the allottees be able to provide for such infrastructural facilities or infrastructure on their own, which the MPSEZ has agreed to provide as per the terms of the agreement. One cannot forget or overlook the fact that environmental clearance is required to be obtained by the MPSEZ because it has the obligation of providing the infrastructural facilities as referred to above and while providing such infrastructure, it will definitely have some impact on the environment and that is the reason why, after extensive study of the entire project, the authority has to decide as to whether environmental clearance must be granted or not. Under such circumstances, it is very difficult for us to accept the submission of Mr.Thakore that the individual allottees will take care of the infrastructural facilities. However, taking into consideration the infrastructural facilities which are required on a

port, it is humanly impossible for an individual allottee or a unit holder to provide all such facilities on its own.

Over and above this, we are also of the view that if the MPSEZ has already allotted plots to different companies for setting up of the industrial plants and if such allottees have proceeded ahead with construction of their individual plants in the absence of any infrastructural facilities available at the port, then that by itself will lead to a very disastrous situation.

When law requires a thing to be done in a particular manner, the same must be done in the same manner or not done at all. The law envisages that no construction, preliminary or otherwise, can be undertaken without environmental clearance and the judgment of the Supreme Court in the case of T.N.Govindavarman Thirumulkpad v/s. Union of India, reported in (2002) 10 SCC 606, also holds that it is impermissible to undertake construction of project before such a clearance, therefore, there is no reason why we should permit respondent nos.10 and 11 to go ahead with their project.

It appears to us that respondent nos.10 and 11 have taken this issue very lightly. No doubt, being allottees they would be more interested in going ahead with their venture. But, the question is, at what cost. We cannot overlook the fact that public hearing precedes environmental clearance. Law envisages that before the environmental clearance is granted, the objections in this regard must be considered by giving public hearing. One cannot lose the sight of the fact that the persons who lodge their objections or make suggestions before the committee are not only entitled to get copies of the minutes of the meeting at the public hearing, but ultimately if the Central Government grants the environmental clearance, under S.11 of the National Environmental Appellate Authority Act, 1997, they also have a right to prefer an appeal to the Appellate Authority

against the order granting environmental clearance. Section 11(2) of the said Act also defines "person" as any person who is likely to be affected by the grant of environmental clearance or any association of persons (whether incorporated or not) likely to be affected by such order and functioning in the field of environment. Therefore, grant of environmental clearance is not just an empty formality but the authority has to threadbare consider each and every aspect relating to the environment. We have noticed that in the present case also, public hearing had taken place and series of objections have been raised by various people. We have also noticed that the objections are of a very serious nature and cannot be brushed aside lightly.

Our attention has been drawn to the objections placed in writing in this regard, which we would like to incorporate thus :

- "1. The project for which the public hearing is going on has already completed 75% of the construction activities. The venue for the public hearing has been selected away from the project location such that the public hearing committee does not see the construction that has taken place. I am ready to show you the location where the construction activities are taking place without permission. The videography of the construction must be taken before the end of the public hearing and only then the public hearing must be concluded.*
- 2. The company has constructed parts of West port and laid a railway line on forest land without getting the necessary permissions. If the clearance has been obtained, then the company may produce the documents by the end of the public hearing.*
- 3. If the SEZ is given clearance, then the company will construct a boundary wall thereby blocking the fishermen's access to their*

traditional settlements. Also, there are several creeks which are important for fishermen, these will be rendered unusable. Nearly 10,000 fishermen depend on traditional fishing and if their occupation is affected, then it will have a direct impact on their families. Why should the company be allowed to establish at the cost of the fishing community.

- 4. The company is in possession of Government land meant for rehabilitation of displaced persons. The company has also taken possession of Gauchar lands. In Luni village there is no Gauchar land left at all. Nearly 5000 cattle depend on the Gauchar land and if the project is allowed then the animal husbandry in the area will be severely affected. What steps will the company take in this regard ?*
- 5. The company has taken possession of nearly 18,000 Ha. of land in the Mundra area. However, as per the central government notification, only 6472.8684 Ha. of land has been notified as SEZ. All the excess land in the possession of the company has to be given back to the Government and the lease must be cancelled. Why has the company acquired excess land ? Is the company ready to give the land back to the Government ?*
- 6. There are several temples and mosques within the SEZ area. If the SEZ is allowed then these monuments will be destroyed and also the access road to these areas of religious importance will be blocked. What steps will the company take in this regard ?*
- 7. The company has defrauded the public as well as the Government authorities. The company acquired forest land for the purpose of the Mundra Port and Special Economic Zone and destroyed mangroves in the area. As per rules, the company is supposed to do compensatory afforestation in another area. But*

the company has given land near Kori Creek, which is under the control of the BSF and also it is an area which already has dense mangroves. No new mangroves are grown. What is the company's response to this ?

- 8. The company says that it is being established so that industrial development can take place. For this, the annual tax subsidy given by the government to the Mundra SEZ amounts to nearly 1765.65 Cr. However, consider the fact that the Central and State Government announced a package of Rs.8,500 Cr. After Kutch earthquake. In just five years, so much development has taken place in Kutch. When the company is getting so many subsidies from the Government and there is no benefit for the public, how can this be called as development ?*
- 9. The Mundra coast has a vast intertidal zone. This area falls under CRZ I as per Government records. The company is filling such area with soil and using it for port backup/SEZ area and establishing industries over it. The hydrology of the area will be affected and the water that is blocked in this area will enter into other areas. What steps are being taken by the company to mitigate this ?*
- 10. Nearly 20 companies have already been established in the Mundra SEZ. Because of this, already the marine pollution is increasing. If the SEZ is permitted then more industries will be allowed and there will be significant impact on agriculture and animal husbandry. What is the response of the company to this issue ?*
- 11. The company has acquired land at a price of Rs.2 to Rs.10 from the state government and then sold it back to Government companies like IOC, IPCL at exorbitant rates of around Rs.600/-.*

This is misuse of taxpayers' money and only the company is making profits. The Mundra SEZ should not be allowed.

12.The Waterfront development project of the company was given environment clearance inspite of people's opposition and it is causing great damage to the environment. The workers employed by the company are cutting mangroves and using it as fuel wood. The mangrove cover is reducing day by day. This will affect marine life in a significant way. What does the company say in this regard ?

13.The forest department has done afforestation and mangrove plantation at a cost of nearly 50 lakhs and now this area has been given to the Mundra SEZ. This is not acceptable. The Mundra SEZ must not be given clearance.

14.There is significant horticulture in the area, which will be affected if the Mundra SEZ is allowed, therefore the Mundra SEZ should not be given Environmental Clearance.

15.The company has not enclosed any ToR given by the MoEF for the EIA of the Mundra SEZ. No ToR compliance report has been submitted. It is not clear whether the EIA is complete or not.

16.The EIA is based on data collected between 2006 and 2008. However, several changes have taken place in the meantime. Why has the EIA report containing latest data not been submitted for the public hearing ?

17.Eight CFS terminals are under operation without permission in the Mundra SEZ. The Kandla SEZ has also raised this issue. This is a violation of environmental laws. Now the public hearing is

being held so that the violations can be regularized. Will the company clarify in this matter ?

In view of the above objections, I demand that :

- 1. The Adani Mundra SEZ must not be given Environment Clearance.*
- 2. Construction has already taken place in the area notified for the SEZ. The environment public hearing committee may visit these areas and take videography of the construction that has taken place and submit it to the authorities.*
- 3. The construction that is going in the SEZ area must be stopped immediately and heavy fine imposed on the Adani group for the violations.”*

If respondent nos.10 and 11 are permitted to go ahead with the construction so far as their units are concerned on the assumption or hope that environmental clearance would be granted to the MPSEZ in recent future, and in the same manner if other units also identically situated like respondent nos.10 and 11 proceed ahead, then practically the right of appeal which has been provided under the Act against grant of environmental clearance to any aggrieved person would also stand frustrated.

In view of what has been discussed above holding that action of respondent nos.10 and 11 in implementation of the project without environmental clearance being accorded in favour of the MPSEZ under the provisions of the Environment (Protection) Act, 1986, the rules framed thereunder and the Notification, is illegal, it is not permissible for respondent nos.10 and 11 to proceed ahead with the

implementation of their project till the MPSEZ obtains the environmental clearance.

We dispose of this writ-petition with a direction to respondent nos.10 and 11 not to proceed ahead in implementation of their project and not to undertake any further construction work, whether preliminary or otherwise, till the MPSEZ is granted environmental clearance. The writ-petition to that extent is allowed.

Per: Shri. Bhaskar Bhattacharya, Acting C.J.

I had the advantage of going through the judgment just delivered by my Brother Pardiwala, J. in advance. I fully agree with the detailed discussion of the facts, lucid analysis of the law and the relief granted by His Lordship to the petitioner. However, in view of importance of the question involved, I propose to add a few words of my own.

The moot question that falls for determination in this Public Interest Litigation is, if the MPSEZ itself has not been granted environmental clearance under the Notification of 2006 by the Central Government, whether any unit setup within the MPSEZ, as a Lessee of the MPSEZ, can proceed with the construction work irrespective of the fact whether such individual unit is required to obtain separate environmental clearance or not.

Mr Thakore and Mr Joshi, the learned Senior Counsel appearing on behalf of MPSEZ and respondent No.10 respectively, submitted that even if, ultimately, the environmental clearance is not given to the MPSEZ, the infrastructural facilities which the MPSEZ is required to provide to all the units within the same, will have to be arranged by the individual unit itself within the MPSEZ, after obtaining direct permission from the Central Government.

There is no dispute that although MPSEZ has applied for environmental clearance as required under the law, till date, the same has not been conferred and notwithstanding such fact, MPSEZ has already executed separate lease deeds in favour of different units like respondent No.10.

It appears from the Lease Deed executed between MPSEZ and respondent No.10 that there is clear mention of the fact that the Government of India has permitted MPSEZ, the Lessor, *vide* a Letter of Approval dated April 12, 2006 to establish a Multi-Product Special Economic Zone at Mundra and the Lessee, i.e., the respondent No.10, was desirous to take on lease a plot of land in the processing area of the MPSEZ for setting up a unit for manufacture of Turbine, Generator and other spares and auxiliaries related to those products and also for providing services of erection and commissioning of above mentioned products. According to the terms of the lease-deed, the Lessee is required to pay Annual Lease Rent at the rate of Rs.20 a square meter payable annually in advance and the same shall be escalated every five (5) years at the rate of twenty percent (20%) and the first escalation of Annual Lease Rent shall be made in the year 2015-16 with effect from 1st April 2015. According to the terms of the lease, in addition to the Annual Rent indicated above, the Lessee is also required to pay SEZ maintenance charges at the rate of Rs.18/- a square meter per annum for the maintenance and upkeep of all the infrastructural facilities provided to the Land and the determination of such amount of Maintenance charges shall be done in an open and transparent manner and would be reviewed by the Development Commissioner of Mundra SEZ. According to the said term, any upward revision of the Maintenance Charges with a maximum frequency of once a year can be made unless a requirement of refurbishment due to damages to infrastructure caused by natural or man made factor arises. The said deed further provides that the Lessor shall have right

to charge fifteen percent (15%) towards management and coordination of Mundra SEZ maintenance and refurbishment as above. The deed further mentions that in case of failure of the Lessee to pay the above Annual Lease Rent or SEZ Maintenance Charge would make the Lessee a defaulter and will give right to the Lessor to terminate the Lease before expiry of the period mentioned therein.

In the Lease Deed, the Lessor covenants that it would comply with all the terms and conditions from time to time which have been mentioned in Letter of Approval under which it has been permitted by the Government to establish Mundra SEZ. In clause 3.4, it has been further asserted by the Lessor that it has obtained all the required permissions and the Governmental Approvals as required in the name of Lessor for granting lease of the land to the Lessee and shall be responsible to comply with all the required terms and conditions and such permissions and approvals received from the Government and shall keep such approvals and permissions in force (to the extent necessary under applicable Laws) and shall make all its statutory compliances to keep the Lease in full force and effect during the entire term.

From the above clause of the Lease Deed, it is clear that the Lease has been executed not only for enjoyment of the land under the SEZ, but also for the purpose of giving infrastructural facilities provided to the land for which separate maintenance charge has been provided. It further appears that the Lessor was conscious that it was required to comply with all the terms and conditions from time to time which has been mentioned in the Letter of Approval and it further asserted that it has obtained all the required permissions and Governmental Approvals as required in the name of Lessor and is also responsible to comply with all the permissions and approvals received from the Government and shall keep such approvals and permissions

in force to keep the lease in full force and effect during the entire term.

It is an admitted fact that environmental clearance required to be taken by the Lessor has been applied for but has not yet been granted. Nevertheless, the Lessor has asserted the above fact of getting permission and keeping such permission alive during the subsistence of lease in favour of the respondent no. 10. Over and above, it has also decided to accept not only rent for land but also the maintenance charges for giving infrastructural facilities in advance as mentioned in the Deed.

I, therefore, find no substance in the contention of Mr Thakore or Mr Joshi, the learned senior counsel appearing on behalf of the respondent nos. 8 and 10 respectively that if in the long run, no environmental clearance is given by the Central Government, the separate unit holders would be to make independent arrangements for infrastructural facilities by taking separate permission of their own from the Central Government because such provision is not indicated in the lease deed. On the other hand, the Lease Deed casts a duty upon the Lessor to provide for such facilities in lieu of rent and maintenance charge.

I have already pointed out that the Lease is executed not only for the enjoyment of the possession in the land but also for enjoyment of infrastructural facilities to be arranged by the Lessor and if required permission for such infrastructural facilities has not yet been given by the Central Government, the Lessor, in my opinion, was not even competent to create a Lease for the above purpose.

I, thus, find substance in the contention of the petitioner that so long the Lessor itself is not vested with the right to have establishment of various infrastructural facilities by taking

environmental clearance, it cannot confer the right of enjoyment of such facilities to its Lessee.

It is now well known that Lease is a doctrine of separation of title from actual enjoyment of the subject matter. Before execution of a Lease in favour of a Lessee, the Lessor retains both the title and the right of enjoyment of the property. Once a Lease is executed, the Lessor retains only the title to the property but loses its right of enjoyment thereof by conferring the same in favour of its Lessee. According to the 2006 Notification, in order to have such right of creation of infrastructural facilities over the land allotted, prior approval of the Central Government is necessary before making any construction and thus, without having acquired such right, the MPSEZ, the allottee from the Government, could not convey such right to its Lessee. In other words, a Lessee cannot have better right than that of his Lessor in the property. Law is also well settled that there cannot any valid Lease for enjoyment of a property, which is not in existence and not capable of being put into possession of the Lessee at the time of execution of the Lease.

I, thus, find that so long the environmental clearance is not granted by the Central Government in favour of MPSEZ for creation of infrastructural facilities on the land so allotted and consequent to such permission, such facilities have been actually created by the allottee, the latter cannot lawfully lease out the right of enjoyment of the infrastructural facilities to its Lessee.

I, consequently, agree with my learned Brother as regards the relief granted to the petitioner in this application ordered by His Lordship.

(Bhaskar Bhattacharya, Acting C.J.)

(J.B.Pardiwala, J.)

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FURTHER ORDER

After this judgment is pronounced, Mr. Mihir Thakore, the learned Senior Counsel appearing on behalf of the respondent No.8 and Mr. Parikh, learned Advocate appearing on behalf of respondents Nos. 10 and 11 pray for stay of operation of our above order.

In view of what have been stated above, we do not find any reason to stay our order. The prayer, therefore, is rejected.

We, however, make it clear that we have not gone into the question whether in the facts of the present case the respondent No.9 is entitled to get environmental clearance within the narrow scope of this petition.

(Bhaskar Bhattacharya, Acting C.J.)

(J.B.Pardiwala, J.)

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