

NATIONAL GREEN TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

Appeal No. 8/2011

Friday, the 30th day of March, 2012

Quorum:

1. Hon'ble Justice Shri C.V. Ramulu
(Judicial Member)
2. Hon'ble Dr. Devendra Kumar Agrawal
(Expert Member)

BETWEEN:

1. **PRAFULLA SAMANTRAY**
Lohiya Academy, A/3, Unit – 9
Bhubaneshwar, Orissa – 751022
 2. **BIRANCHI SAMANTRAY**
Village Dinkia, Kujang
Jagatsingpur, Orissa – 754141
-Appellants

A N D

1. **UNION OF INDIA**
Through the Secretary
Ministry of Environment & Forests
Paryavaran Bhawan
CGO Complex, New Delhi – 110 003

2. ORISSA STATE POLLUTION CONTROL BOARD

Through the Member Secretary
Paribesh Bhawan, A/118, Nilakantha Nagar
Unit-VIII, Bhubaneshwar – 751012, Orissa

3. M/S POSCO INDIA PVT. LTD.

Through the General Manager
Room No. 445, Ashok Hotel
50 B, Chanakyapuri, New Delhi - 110034

....Respondents

(Advocates appeared: Mr. Raj Panjwani, Senior Counsel with Mr. Ritwick Dutta and Ms Srilekha Sridhar for Appellant, Ms Neelam Rathore for Respondent No. 1, Mr. Ashok Kumar Panda with Snehasish Mukherjee for Respondent No. 2, Mr. Sanjit Mohanty, Senior Counsel with Mr. Satyajit Mohanty for Respondent No. 3).

JUDGMENT

(Judgment delivered by the Bench)

1. This appeal is filed against the final order dated 31.1.2011 of the Ministry of Environment & Forests, imposing additional conditions to the Environmental Clearances (for short ECs) in respect of (i) steel cum captive power plant project and (ii) captive minor port project of M/s POSCO India (for short POSCO), the Respondent No. 1, during the year 2007.

1.1 Originally, the EC to these two projects were granted vide order No. 10 – 9/2006-IA-III dated 15.5.2007 and No. J-11011/285/2007-IA II (I) dated 19.7.2007. Subsequently, after review the final order was issued on 31.01.2011.

1.2 The Forest Clearance granted for the project by the MOEF appears to be under challenge in a WP(C) No. 14885 of 2011 before the Hon'ble High Court of Orissa, Cuttack and the same is pending. However, we are not aware of the scope of the said writ petition challenging the forest clearance. We have not dealt with issues regarding the allotment of vast forest land for the purpose of the project, etc. except examining the allotment of land disproportionate to that of project proposed to be taken up in the first phase.

1.3 According to the Appellant No. 1, he is a social and environmental activist from Orissa State and has been instrumental in drawing attention of the State as well as the country to the environmental and social problems in Orissa. The Appellant has been in the fore front of many environmental struggles and brought it to the notice of the concerned agencies both at the State and Central Government level. With regard to the present project i.e. POSCO, the appellant had sent detailed objections in writing to the Orissa State Pollution Control Board (for short OSPCB) even prior to the Public Hearing (for short PH) held on 15.4.2007.

1.4 The Appellant No. 2 is a resident of Dhinkia in Kujang District and a marginal farmer and also a priest in a village temple. He is directly affected by the proposed project as the same will require a takeover of his land on which he and his family carry out paddy cultivation and also 'paan-kheti' (betel vine cultivation). He has been protesting against the proposed POSCO project and apprehends loss of livelihood and adverse impact on environment and agriculture and water resources as a result of setting up of the project.

1.5 According to the Appellants, the main components of the project, for which a Memorandum of Understanding (for short MOU) for setting up an integrated steel plant with captive port with the total capacity of 12 million tons per annum at Paradip in Jagatsinhpur district of Orissa wherein an estimated investment of Rs. 51,000/-crore (approximately 12 million US Dollars), are as under:

- (i) The integrated steel plant with captive power plant project at Kujang, near Paradip in Jagatsinhpur district of Orissa
- (ii) Captive Port at Jatadhar in Jagatsinhpur district of Orissa
- (iii) Mining project
- (iv) Integrated township and water supply infrastructure.

1.6 As per the MOU, the Government of Orissa agreed to facilitate and use its best efforts to enable the Project Proponent (POSCO) to obtain a 'No Objection' through the State Pollution Control Board in the minimum time possible. It is also mentioned that the Project Proponent will conduct a rapid Environment Impact Assessment (for short EIA) and prepare a detailed EIA report and an environment management plan for the project. Further, it is stated that the Government of Orissa agreed to use its best efforts to procure the grant of all environmental approvals and forest clearance from the Central Government within the minimum possible time.

1.7 It is the case of the Appellant that the manner in which the entire appraisal starting from preparation of EIA report to conduct of PH to examination by the respective Expert Appraisal Committee (for short EAC) of Ministry of Environment and Forests (for short MOEF) for Industries and Infrastructure respectively was done, including the

reappraisal in the year 2010 based on the findings of Review Committee constituted for the purpose and subsequently the issuance of final order regarding ECs shows that the provisions of EIA Notification 2006 were not followed in letter and spirit. The MOEF and particularly the respective EACs failed to consider the environmental and social implications of such a large project and relied mainly on the assurances given by the project proponent. Clarifications were though sought by EACs, but there was limited follow up action and consideration to the points raised during PH. The manner in which the rapid EIA Report and subsequent detailed EIA report were prepared for a project of such dimensions and grant of approvals in the background of the objections raised right from the very initial stages, casts severe doubts in the manner in which the EACs and the MOEF acted upon.

1.8 According to the provisions of the EIA Notification 2006, the procedure for grant of EC is as under:

- (a) Preparation of an EIA Report after stipulation of Terms of Reference (for short TORs) for the project by the EAC (Scoping);
- (b) Notice by the State Pollution Control Board for a mandatory PH to be published in at least two local newspapers (Public Consultation);
- (c) Access to the Executive Summary and EIA Report at designated places (Public Consultation);
- (d) Conducting the PH in a manner which ensures the widest possible participation of the affected people (Public Consultation);

- (e) Detailed Scrutiny of the EIA report and the proceedings of the Public Consultation by the MOEF and specifically the EAC (Appraisal); and
- (f) Grant of approval or rejection of application by the MOEF.

1.9 None of these procedures were followed as required under the law. The Committee appointed for the review of the original ECs granted, had submitted a fractured report. The majority members gave report holding that the PH was not properly conducted and other aspects of TOR was not properly evaluated in the EIA and EACs at the time of grant of original ECs. The EACs had considered only the minority report of Ms. Meena Gupta. Further, Ms. Meena Gupta was the Secretary to the Government of India, MOEF at the relevant point of time when the original ECs were granted. In fact, she ought not to have been a Member of the Committee constituted for reviewing the original ECs granted. Thus, the whole process of issuing of the ECs for the proposed project components is vitiated under the law and as such the ECs granted requires to be set aside as arbitrary and illegal.

2. Respondents No. 1 to 3 have filed their detailed replies denying the allegations made by the Appellant. It is their case that the MOEF and the OSPCB has followed the procedure as prescribed in the EIA Notification 2006 and 1994 in its letter and spirit as per prevailing norms at that point of time. The Appellant has picked up one or two technicalities here and there and is making a hue and cry of the same projecting them to be a bolt from the blue. The PH was properly conducted after giving the opportunity to each and every participant in the vicinity of the project site. The representations made by the people were taken into

consideration and a summary of the PH was made available to the people at the end of the process of PH. The rapid EIA report was prepared as per the guidelines and the EACs examined the same meticulously and recommended for grant of ECs. The Committee constituted for the purpose of review, does not vitiate since Ms. Meena Gupta was a party to it. The majority report of the Committee has exceeded its brief; therefore, the report of Ms. Meena Gupta was rightly relied upon by the MOEF. The objections filed by the Appellant as well as others at various stages did not reflect any issue worth the name for consideration. The ECs granted by the MOEF or the final order, does not suffer from any legal infirmities requiring interference of this Tribunal.

3. Counsel on either side argued the matter at length. We have given our earnest consideration to the respective submissions made by Learned Senior Counsel on either sides and the following issues arise for consideration in this appeal:

- i) Whether the Appeal has been filed within the period of limitation in so far as challenging the ECs granted in May/June, 2007 and whether appeal can be entertained to that extent?***
- ii) Whether the PH was properly conducted following the prescribed procedure applicable at the relevant point of time and same is valid?***
- iii) Whether the MOEF was right in accepting the review report submitted by Ms. Meena Gupta who participated in the issue of grant of original ECs since she was the Secretary to the Government of India, MOEF and whether the Government was***

right in rejecting the majority report of the review committee. And whether the apprehensions/issues raised by the Review Committee are properly addressed while issuance of the final order under challenge?

4. Issue No. (i)

Whether the Appeal has been filed within the period of limitation in so far as challenging the ECs granted in May/June, 2007 and whether appeal can be entertained to that extent?

4.1 It is the case of the respondents that the appeal is not filed within the period of limitations as required under the NGT Act. The original ECs for the projects were granted on 15/05/2007 in respect of steel-cum-captive power plant and on 19/07/2007 in respect of captive minor port. Based on the complaints and various representations against the project, the Respondent No. 1 constituted a four member review committee under the Chairmanship of Ms. Meena Gupta on 8/7/2010 and subsequently modified its TOR on 27/8/2010. The members of the Committee could not reach a consensus. In the result, two separate reports, one by Ms. Meena Gupta and the other by three members Committee were submitted to the MOEF on 18.10.2010. The final order was issued only on 31/01/2011. However, the appellant had not chosen to challenge the original ECs granted on 15/05/2007 in respect of steel-cum-captive power plant and on 19/07/2007 in respect of captive minor port. Now, after issuance of the final order of 31/01/2011, it is not permissible under the law to challenge the original ECs issued in 2007.

4.2 Whereas it is the contention of the Learned Senior Counsel Shri Raj Panjwani, for the appellant, that the original ECs granted on 15/05/2007 in respect of steel-cum-captive power plant and on 19/07/2007 in respect of

captive minor port were never given effect to, since other clearances were pending and upon receipt of number of objections/complaints after the original ECs by the authorities, a four member committee was constituted and ultimately, while accepting the minority report of Ms. Meena Gupta, the final order was granted on 31/1/2011. Therefore, it cannot be said that the appeal is time barred or is not maintainable. Once, the original ECs granted on 15/05/2007 in respect of steel-cum-captive power plant and on 19/07/2007 in respect of captive minor port were under review and finally the order was issued on 31/1/2011, it must be deemed that the original ECs culminated in the issuance of the final order on 31/1/2011. Review order of any order passed earlier would merge in the final one. The existence of the original order loses its identity and merges in the review order and therefore as per settled principle of law, the limitation period for filing an appeal would start from the date of review and not from the date of original order. Therefore, appeal is also maintainable against original ECs granted in May/July, 2007.

4.4 On an examination of the dates of events, it is revealed that the original ECs were granted in the year 2007 and a Review Committee was constituted in July 2010 and the final order was issued on 31st January 2011 and the present appeal is filed under section 18(1) read with Section 14(1) and Section 16 (h) of the NGT Act, 2010, challenging the final order dated 31/1/2011 of the MOEF imposing additional conditions to the original ECs granted in respect of steel-cum-captive power plant project (No. 10-9/2006-IA-III dated 15.5.2007) and captive minor port project (No. J-11011/285/2007-IA II (I) dated 19.7.2007) of M/s POSCO India (Respondent No. 3 herein). Ultimately, even according to the appellant, the final order was issued on 31.1.2011 with certain additional conditions. Thus, the entire review has resulted only in adding certain additional conditions as

precautionary measures. The review, etc. was not of immediate one to the grant of original ECs. The Review Committee itself was constituted after three years of the original ECs, which resulted in adding further conditions. Therefore, it may not be proper on the part of the appellant to say that he is entitled even to challenge the original ECs and the conditions attached thereto. There was no merger of the original ECs in the so called final order. Though, the appellant appears to have filed certain objections even prior to the PH and at other subsequent stages of the proceedings, no reason is forthcoming as to why the original ECs could not be challenged for more than three years and what made them to wait till the final order was issued on 31.1.2011. The final order is nothing but inclusion of some more conditions by way of precautionary measures. Therefore, we are of the opinion that the original ECs granted in July 2007 does not merge in the final order issued on 31.01.2011. They are independent of each other. It is also the submission of the Respondent No. 3 that the very application under section 14 (1) of NGT Act is not maintainable since section 14 does not contemplate filing an appeal against orders granting EC. The NGT Act 2010 came into force with affect from 18.10.2010 and an EC granted on 15.05.2007 for the port and 19.07.2007 for the steel plant, were granted prior to the commencement of NGT Act 2010. The legality or otherwise of such an order dated 15.05.2007 cannot be challenged by way of an appeal under section 16(h) of the NGT Act 2010. Further no substantial question relating to environment as defined under Section 2(m) had arisen, for invoking Section 14. Thus, on either counts, the appeal is not maintainable. The order dated 31.01.2011 cannot be treated as grant/ reissue of the order dated 15.05.2007 (port) and 19.07.2007 (steel plant and CPP). Granting of original ECs to the project cannot be challenged in the guise of challenging the order dated 31.01.2011 which is only an order imposing additional conditions. It is true that Section 14 of NGT Act, 2010 has no application to the facts of the present case, since

no substantial environmental issue had arisen after the issuance of the original ECs nor it is the case of the appellant. Further, under Section 16 of the NGT Act, 2010, the ECs issued in May/July, 2007, cannot be challenged as the Section 16 contemplates challenging of the order passed on or after the commencement of the Act i.e., 18th October, 2010. Broadly, we are in agreement with the submission made by the learned Senior Counsel Shri Sanjit Mohanty for respondent No. 3.

4.5 Therefore, we are of the considered opinion that what can be challenged by the appellant is only the final order issued on 31.01.2011 if there is any threat to the environment and ecology in spite of the additional conditions imposed, and not otherwise.

4.6 A review of an administrative order and a judicial order has to be seen with different perspective. The administrative review cannot be equated to that of a judicial review to say that the original order merged with the final order. Here, it may be necessary to notice that mainly the TOR are to examine the conditions already attached and the effect, the compliances with the statutory provisions and ascertainment of status of implementation of the rehabilitation and resettlement provisions in respect of the projects compliance with environmental (EIA), Coastal Regulation Zone (CRZ) and other clearances/ approvals granted by the MOEF and other Central, State and Local authorities. This was in the nature of a legal audit vis-à-vis, the applicability of EIA Notification of 1994 & 2006 and other instructions issued from time to time. Thus, this appeal can be entertained only to the extent of challenging the final order and its immediate background i.e. the review committee reports and not the appeal in respect of the original ECs granted in May/July, 2007. Thus the appeal is hopelessly barred by limitation and is not maintainable in respect of challenging the ECs granted in May/July, 2007.

This appeal is maintainable only in respect of the final order dated 31.01.2011 and the conditions attached thereto.

5. Issue No. (ii)

Whether the PH was properly conducted following the prescribed procedure applicable at the relevant point of time and same is valid?

5.1 Here, at the outset, it may be noticed that we have already concluded in the Issue No. (i) to say that this appeal to the extent of challenging ECs granted in May/July, 2007 is not maintainable. However, since both the parties have advanced arguments elaborately, the issue is being answered accordingly.

5.2 According to the Appellant, the PH for both the components of the project took place when respondent No. 1 was yet to examine the rapid EIA Report for the project for accuracy and completeness as on 16.4.2007 while the PH took place on 15.4.2007. The EAC waived of the need to conduct site visit before the PH, despite the scope and magnitude of the project without giving any reasons. The PH dated 15.4.2007 conducted by the OSPCB was held far away from the site which resulted in low public participation. This issue was raised in the PH meeting and recorded in the Minutes of the meeting but no credence was given by the EACs. Public raised issues with respect to likely adverse impact due to the proposed project, impact on their livelihood and the fact that rapid EIA is deficient and not available to the people in advance. Though there were two projects i.e. the steel plant of 4 MTPA and captive minor port with two separate EC applications and EACs, only one PH was held by combining the projects. The 17th meeting of EAC (Industry) held during 13th and 14th of December 2010 wrongly concluded

that multiple hearing at different locations is not in consonance with the statute.

5.3 None of these issues raised in the public consultation were given due consideration or deliberation despite the requirement under EIA Notification 2006. In the EACs meetings held on 5.6.2007, 19 to 21.5.2007, 19.4.2007, 21.4.2007, no detailed scrutiny was undertaken. The conclusions drawn by the District Magistrate in the PH, which was contrary to the views expressed by the public, were also not taken into consideration by the EACs. The majority report of the review committee had, in fact, recommended for a fresh PH. This was also ignored.

5.4 Whereas, it is the case of the respondent No. 1 that the allegation that the PH was conducted without a letter from the MOEF to OSPCB, is incorrect. The EIA Notification, 1994 was superseded by the EIA Notification 2006. Pursuant to EIA Notification 2006, the MOEF issued interim operational guidelines vide circular dated 13.10.2006 in respect of applications made under EIA Notification 1994 till September 13, 2007. On new applications for EIA appraisal received on or after 14.9.2006, and upto 30.6.2007, it was clarified vide para 2.2.1 (i) (a) of the circular which reads as under:

“In case, public hearing has been conducted as per the procedure of EIA 1994 it would be considered along with EIA by the EAC which would provide its recommendations “

5.5 In the instant case, the project proponent submitted schedule-II application, questionnaire and rapid EIA/EMP Report for consideration of proposals as per the provisions of the EIA Notifications 1994. PH for the project was also held on 15.4.2007. After submission of PH report, the proposal for steel plant with captive power plant was placed before the EAC

(Industry) in its 67th Meeting held on 5th June 2007 to assess the adequacy and completeness of EIA and EMP Report and for award of additional TOR, if any. In its meeting, the EAC decided that the Chairman, OSPCB and the representative of the State Government be invited in the meeting to enlighten the EAC on various relevant aspects. The video recording of the PH should also be made available to the EAC so that the members may have a clear appreciation of the issues involved. Thereafter, the EAC will be in a position to finalize its recommendations regarding the further terms and conditions, if any, for approval of the project. It may be noted that, the EAC (Industry), in its 67th meeting held on 5th June 2007, has taken cognizance of the various issues raised during the PH and has even sought the video recording of the PH. The EAC (Industry) after reconsideration of the project in its 68th meeting held on 20th June 2007, recommended the project for EC subject to stipulation of environmental safeguards. The committee saw the video recording of the PH. The issues raised in the PH and the clarifications provided by Respondent No. 3 were gone through and the EAC was satisfied with these. The EAC (Industry) after evaluating the EIA report and PH proceedings did not specify any additional TORs, which implies that, it has found the EIA report adequate and the issues raised in PH have been duly addressed.

5.6 The proposal for establishment of a Captive Minor Port at Jagatsighpur District, Orissa was examined by the EAC (Infrastructure) in its meeting held on 16.11.2006 and finalized the TORs including the conduct of PH. The proponent submitted rapid EIA report after conduct of the PH on 15.04.2007 at Bana Bihari School Ground, Kujanga. The appraisal for the project was done by the EAC (Infrastructure) in its meeting on 19th – 21st April, 2007 and proponent presented the rapid EIA report including the response to the issues raised during the PH. A copy of the minutes of the EAC (Infrastructure)

meetings dated 16.11.2006 and 19th - 20th April, 2007 reveals that after deliberations, the proposal was recommended for EC subject to stipulation of environmental safeguards.

5.7 A perusal of the submissions would indicate that there was no flaw in the PH. The PH started under the Notification of 1994 and the entire procedure as required therein was followed. The contention of the appellant that the MOEF was not consulted before taking up the PH process by the OSPCB was not contemplated in the EIA Notification 1994. In the transit of the period between EIA Notification of 1994 and EIA Notification of 2006, all the PH conducted was governed by the Circular issued by the Government of India as noticed above. Even though, the majority Members of the Review Committee had recommended for fresh public hearing but they have not taken the fact as to saving of all the PH conducted under EIA Notifications, 1994 between the relevant dates PH for the project was also held on 15.4.2007. After submission of PH report, the proposal was placed before the EAC (Industry) in its 67th Meeting held on 5th June 2007. Pursuant to the EIA Notification, 2006, the MOEF issued interim operational guidelines vide circular dated 13.10.2006 in respect of applications made under EIA Notification 1994 till September 13, 2007. It is stated that on new applications for EIA appraisal received on or after 14.9.2006, and upto 30.6.2007, it was clarified vide para 2.2.1 (i) (a) of the circular as noted above.

5.8 The project proponent submitted schedule-II application, questionnaire and rapid EIA/EMP Report for consideration of proposals as per the provisions of the EIA Notifications 1994 and 2006. PH for the project was also held on 15.4.2007 as per the prescribed procedure at the relevant point of time. The District Magistrate appears to have drawn the summary at the end

of the PH proceedings and made it known to the public. Thus, it is clear that procedural wise, there is no substantial error committed by the authority in conducting the PH. Therefore, the allegation of the Appellant that the PH was not conducted in accordance with the law cannot be countenanced, though; it does not fall within the ambit of challenge of this appeal, as discussed at Issue No. (i) above.

6. Issue No. (iii)

Whether the MOEF was right in accepting the review report submitted by Ms. Meena Gupta who participated in the issue of grant of original ECs since she was the Secretary to the Government of India, MOEF and whether the Government was right in rejecting the majority report of the Review Committee. And whether the apprehensions/issues by the Review Committee are properly addressed while issuance of the final order under challenge?

6.1 It appears that based on certain complaints and representations against the project, the Respondent No. 1 constituted four member committee under the Chairmanship of Ms. Meena Gupta to review the Environment, CRZ and other clearances given by Respondent No. 1, State and local authorities in connection with the project of Respondent No. 3. The members of the Committee could not reach a consensus. In the result, two separate reports, one by Ms. Meena Gupta and the other by remaining three members of the Committee were submitted to the MOEF on 18.10.2010. According to the Appellant, firstly the reports submitted by Ms. Meena Gupta ought not to have been considered ignoring the majority (three) members report. The report of Ms. Meena Gupta was one sided and an eye wash. Secondly, Ms. Meena Gupta as Secretary of the MOEF at the time of grant of original ECs sought not to have been included in the Committee for reviewing the original ECs as she was a party to it. Thus, the report of Ms.

Meena Gupta which was accepted by the MOEF is hit by official / personal / departmental bias. The fact that Ms. Meena Gupta was party to the earlier proceedings and she herself expressed reservation to participate in the review proceedings, is clear from the letter dated 18.10.2010 addressed to the MOEF at the time of submission of her report.

6.2 The TOR entrusted to the committee initially on 28th July, 2010 was as under:

- “9. The terms of reference made to the committee*
- (i) Investigation and ascertainment of the status of the implementation of the Scheduled Tribes and Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 in and around the said forest land;*
 - (ii) Investigation and ascertainment of the status of the implementation of the Rehabilitations and Resettlement provisions in respect of the said project; and*
 - (iii) Any other matter in furtherance of the above objectives”*

6.3 Thereafter, by the order dated 28th July, 2010, the same was amended for investigation into the proposal submitted by POSCO India Private Limited for establishment of integrated Steel Plant and Captive Port in Jagatsinghpur District, in partial modification of Clause 9, and the TOR for the committee were set as follows:

- “(i) Investigation and ascertainment of the status of the implementation of the Scheduled Tribes and Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 in and around the said forest land;*
- (ii) Investigation and ascertainment of the status of the implementation of the Rehabilitations and Resettlement provisions in respect of the said project; and*

(iii) Review compliances with Environmental (EIA), Coastal Regulation Zone (CRZ) & other Clearances / approvals granted by the Ministry of Environment and Forests and other Central, State and local authorities;

(iv) Review compliance with statutory provisions, approvals clearances and permissions under various statutes, rules, notifications, etc.

(v) Review compliance with pari-passu conditionalities imposed in item in item (iii) and (iv) above;

(vi) Any other matter with pari-passu furtherance of the above objectives."

6.4 The date for submission of report by the committee was revised from 28th August 2010 to 30th September, 2010.

6.5 As noticed above, the executive summary submitted by Ms. Meena Gupta was not endorsed by the majority members. Of course, the report submitted by majority members was also not endorsed by Ms. Meena Gupta. The report submitted by Ms. Meena Gupta was a minority one and the report submitted by other members was majority i.e. 1:3. In the reports submitted by Ms. Meena Gupta and the one by the majority, though all the points of TOR made to the committee have been complied with, however, the report submitted by Ms. Meena Gupta was accepted almost in totality whereas the report submitted by the majority members was mostly ignored by the EAC. Ms. Meena Gupta's report resulted ultimately in issuance of final order on 31st January, 2011, with additional conditions to the original ECs granted in May/July, 2007.

6.6 In the executive summary of the report, Ms. Meena Gupta stated that

"POSCO's plant, on the other hand is to be located in a coastal district, in the more developed eastern part of Orissa; the area is

not a Scheduled Area and has virtually no Scheduled Tribe people. The people to be displaced are mostly agricultural and fishermen families (about 700 families); several are Scheduled Castes. Though POSCO is also to be located on forest land (for which clearance under the Forest Conservation Act is necessary), the area recorded as forest is mainly sandy waste, with some scrub forest, apart from the casuarina plantations in the area. A very important difference also is that while the construction of the Vedanta project is almost complete (including unauthorized construction of the expanded portion for which no environment clearance had been taken), construction on the POSCO project is yet to start, the land not having been handed over to the company by the State Government, so far.

On the issue of implementation of the Scheduled Tribe and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, (henceforth referred to as the Forest Rights Act or FRA), it was felt that the efforts made to implement the FRA in the POSCO project area, in 2008 and 2009, suffered from some shortcoming and inadequacies. This, as well as the circumstances prevailing in the area at the time, with many of the villages opposed to POSCO, might have resulted in the people of the area not submitting their claims for recognition of forest rights. To debar such people, permanently, from filing their claims and getting their forest rights recognized, seems to be a violation of natural justice. It is therefore recommended that the exercise of recognition of forest rights be undertaken in the project villages afresh: Gram Sabhas be convened again, the Forest Rights Committees of the Gram Sabhas/PalliSabhas be re-formed, claims be re-invited by them, and a resolution passed within the time limit specified under the rules. The Sub Divisional Level Committee (SDLC) and the District Level Committee (DLC) should thereafter meet and complete the exercise. Since this exercise is being done for the second time and also because the handing over of the forest land earmarked for the POSCO project cannot proceed until a final decision is taken on the claims, a time limit should be specified and adhered to. There was broad

agreement in the Committee that the procedure to recognize forest rights should be re-done in the project villages.

The other committee members disagreed to some extent. They felt that higher compensation should be paid for the paan plots, but basically they felt that the forest land should not be diverted at all.

On the issue of compliance with the environment and CRZ clearances, it was found that the work to establish either POSCO's steel plant or the captive port had not yet started. In fact the required land had also not been handed over to the company as several essential statutory clearances had not yet been obtained by the State Government. Therefore the issue of assessing compliance at this point of time was premature.

The other members of the Committee did not agree with this. Their view was that the EC granted for the steel plant and EC and CRZ clearance granted to the captive port should be cancelled forthwith, because of flaws in the studies, and shortcomings in the clearances granted."

6.7 Whereas the majority report says that the PH was not conducted properly and there were many other short comings in compliance of the provisions of EIA report, therefore the EC granted should be annulled and fresh proceedings to be initiated. The reasons furnished in respect of PH are as under:

"The committee is of the view that the Public Hearing held on 15.04.2007 was not in compliance with the rules. The authorities failed to provide copies of the EIA to Panchayat; all the project affected persons were not given opportunity to be heard. It was held in Kujanga about 15 km away from the affected villages. During the hearing, many people complained that because of the prohibitive distance, many villagers could not travel to participate

in the Public Hearing. The committee was informed that there was presence of a strong police force at the venue of the public hearing a day prior to the hearing itself. This served as a deterrent to free participation by local villagers, who were opposing the project. Other project affected people like traditional fishing community and farmers were not covered by the public hearing. The social impact of the project was also not discussed. Project proponent has failed to answer all the objections raised during the public hearing. The EAC has failed to apply its mind to the objections raised by various authorities and the public and have also failed to consider the available material on record. The EAC has also failed to record any reasons in respect of accepting or rejecting the objections raised but instead gave clearance. Such mechanical clearance makes a mockery of rule of law and procedural safeguards."

6.8 No doubt, the TOR to the Committee contemplated a wide range of review but it never said that the ECs already granted may be examined for cancellation also. What the TOR speak is that an administrative review of the clearances granted earlier and measures to be taken for strengthening the already issued ECs, environmental wise and otherwise. The report of the majority members no doubt indicates that a major shift in reviewing the ECs granted. Nowhere, it was indicated that the committee can go into the legality or otherwise of the PH conducted earlier. It cannot also be said that they were appointed to suggest the cancellation of ECs etc. Here it appears that the majority had though highlighted many deficiencies, but have exceeded in recommending cancellation of the ECs on the ground of PH and otherwise. The only task entrusted to the committee was to review the grant made earlier with reference to certain compliances as per the original ECs granted in May/July, 2007.

6.9 Though the report of Ms. Meena Gupta appears to be balanced one, even this was not taken into consideration in totality by the EACs. Further,

it is also seen that she was the Secretary, MOEF at the time of issuance of clearances earlier which are sought to be reviewed through the TOR. Here, there is a clear bias to defend her previous acts as Secretary, MOEF. Apart from this, there is a major shift in the approach made by her in defending the ECs. It is her argument that since the ECs have already been granted, there is no necessity of going into all the details except suggesting additional precautionary measures. Whether the act of Ms. Meena Gupta is fair or not, they are definitely hit by personal / official / departmental bias, in other words, she supported the decision made by her earlier. This is in gross violation of principles of natural justice. Therefore, the entire process of review is vitiated under the law.

However, we have kept in mind the need for industrial development, employment opportunities created by such projects that involve huge foreign investment, but at the same time we are conscious that any development should be within the parameters of environmental and ecological concerns and satisfying the principles of sustainable development and precautionary measures.

7. Study of the Records:

A close scrutiny of the entire scheme of the process of issuing final order in the light of the facts placed before us and material placed on record together with the observations made by the review committee though in two separate volumes; reveals that a project of this magnitude particularly in partnership with a foreign country has been dealt with casually, without there being any comprehensive scientific data regarding the possible environmental impacts. No meticulous scientific study was made on each and every aspect of the matter leaving lingering and threatening environmental and ecological doubts un-answered. We have dealt with some of these issues on the basis

of records placed before us by the MOEF and argued by the Appellant – however for the purpose of cancellation of original ECs granted in 2007. We are extremely conscious that we are dealing with only the review and post review proceedings in granting final order of 31.01.2011.

7.1 Need for Comprehensive and integrated EIA report of various project components

The majority members of the Review Committee have pointed out that for a project of this magnitude, a Comprehensive and integrated EIA report was required based on atleast one full year base line data at the time of conduct of PH and subsequent appraisal by the EACs and the same argument has been put forward by the appellant. Whereas, the Respondents have submitted that at relevant point of time and as per the procedure, Comprehensive and integrated EIA report was not mandatory, it was only that as a part of own responsibility that Respondent No. 3 prepared a Comprehensive and integrated EIA report engaging agencies of repute at a later date. The issue of integrated EIA report for various components of the project raised by the Review Committee and the appellants needs a consideration. Of course, as per the provisions, the proponent was required to approach different EACs for steel plant and captive minor port and accordingly, separate rapid EIAs were furnished. The available records also indicate that respective EACs were well aware of the other component. We have gone through the various provisions in the EIA requirement procedure and the material placed on record, undoubtedly, at the time of PH and subsequent appraisal by the EACs, Comprehensive and integrated EIA report was not warranted, however, it would have been prudent to have this report at the very beginning stage itself to avoid all the confusion and delays especially considering the magnitude of the project and its likely impact on various environmental attributes in the ecologically sensitive area. In this

direction, it would be prudent to note that a similar observation has also been made by Ms. Meena Gupta in her review report. Similar apprehensions have also been raised by the majority members of the Review Committee that considering the nature and extent of project, it was necessary to have a comprehensive and integrated EIA rather than rapid fragmented EIA. In this context, we find it necessary that **MOEF establishes clear guidelines/directives that project developers need to apply for a single EC alone if it involves components that are essential part to the main industry such as the present case where main industry is the Steel plant, but it involves major components of port, captive power plant, residential complex, water supply, etc.**

7.2 Grant EC for 4 MTPA capacity steel plant when all the other components i.e. captive port, captive power plant and other infrastructural needs including land requirement are for the 12 MTPA steel plant with proposed expansion every few years is justifiable

As per the MOU, the production capacity of the steel plant is envisaged to be 12 MTPA whereas the EC for the steel plant in the instant case has been sought for 4MTPA and it is stated that subsequent capacity augmentation shall be taken up in phases. The issue is critical when it is seen that entire infrastructural needs i.e. township, port, captive power plant, etc. have been planned for 12 MTPA only including the land requirement for the components. The majority members of the Review Committee had also considered the issue and observed that the project would be financially viable at 12 MTPA only. Even according to the submissions of the Respondent No.3, the project is viable at 12 MTPA. The respondents have submitted that they have never given an impression that the project is going to be 4 MTPA and not 12 MTPA, this fact has been known from the very beginning and they shall approach the

EC granting authority as and when such capacity upgradation is proposed to be taken up. According to Respondent No. 3, since they are constantly trying to develop new clean technologies and their product mix would be dependent on market potential and therefore, the product mix as well as technological configuration cannot be decided at this stage. Henceforth, they have carried out EIA study for 4 MTPA only and as and when subsequent upgradation is planned, they shall undertake fresh EIA study and obtain fresh EC. As far as other infrastructural needs of port, captive power plant, residential area together with land requirement is concerned; the entire project has been planned for ultimate capacity of 12 MTPA considering the logistic requirements. Apparently, the argument has its own merits, however, a large uncertainty remains over the entire proposal – as to what would be the scenario if EC is not granted to propose future expansion for certain reasons – how the additional infrastructure created is proposed to be utilized. It is also not clear whether these aspects have been considered in the MOU or while granting the ECs. In this context, the Respondent No. 3 was asked to furnish phase wise land requirement and from the proposal it is noted that out of total land requirement of 4004 acres (3566 acres government land and 438 acres private land), for the initial phase, the land requirement for steel plant is 3097 acres of forest land at once as forest diversion in piece meal is not desirable though the requirement is for 2500 acres.

In this context, Ms. Meena Gupta in her conclusions of the review report points out that:

“MOEF should take a policy decision that in large projects like POSCO where MOUs are signed for large capacities and up-scaling is to be done within a few years, the EIA right

from the beginning, should be assessed for the full capacity and EC granted on this basis."

Given the facts, we are also of the considered opinion that MOEF should immediately take a policy decision accordingly apart from giving a due thought to the question of optimizing the land requirement in the instant case where the land requirement for residential complex, steel plant and other infrastructural needs would be less, when the initial phase is contemplated to be 4 MTPA only.

7.3 EIA report should include combined impact of other project components and other existing projects in the vicinity

The project envisages other components in addition to steel plant and port such as railways, road transport, township, mining, water transport pipeline, etc. apart from its being located in ecologically sensitive area where already development is undergoing. Accordingly, in the absence of comprehensive and integrated EIA, the combined impact of proposed development including its infrastructural needs in ecologically sensitive area would cause additional impacts. The issue has also been apprehended by the majority members of the review committee. From the records, it is seen that the only clarification offered is limited to non-applicability of the Comprehensive Environmental Pollution Index at the relevant point of time. In this context, we are not in full agreement with the justification offered because environmental issues cannot and should not be ignored taking such stance and it would have been fair to examine the issue more elaborately duly applying principle of sustainable development and precautionary principles. In this regard, the review committee also noted number of factors, such as siting of the project, present pollution levels, proximity to CRZ and other ecologically sensitive

habitat, sourcing of water from a distance of 87 km or so that too under competing uses, etc. From the material on record, it is also evident that at the time of appraisal by EAC in the light of the Committee's Report, extensive discussion focused on the matter and necessary stipulations have been made in the ECs through additional conditions. It is, however, felt that, since considerable time has elapsed ever since the grant of original ECs and even after the stipulations of additional conditions to the ECs, wherein, the project proponent was asked to furnish additional reports/ documents/ plans, etc. by the MOEF; however, the response from the proponent during proceedings of the matter regarding progress on these matters was surprising that since they are not able to go to project area, no significant progress could be made, is little surprising and raises doubt about implementation/ compliance of various stipulations to the conditions imposed in ECs. We are therefore of the opinion that MOEF should consider defining timelines for compliance of the conditions in the ECs and considering the nature and extent of the project, MOEF should establish a special committee to monitor the progress and compliance on regular basis.

7.4 Environmental and ecological aspects raised by the review committee members, experts and EAC members were properly considered in the EIA Report and the ECs have properly appraised the same and recommended for issuance of final order.

Apart from the foregone issues, in so far as this issue is concerned we may have to consider only the EIA reports and their evaluation by EACs after submission of the report by Ms. Meena Gupta on one hand and the majority members on the other hand. This appears to have been done to some extent as evidenced from the records placed before us, ***though not put forward explicitly by the Respondents especially the Project Proponent and MOEF.*** It

would not be out of place to mention that this Tribunal being specialized one comprising of Expert Member as well and having option for inviting additional technical opinion, the Tribunal could have appreciated more the technical issues being raised in a very effective and fruitful manner as required under the law. The matter being pursued otherwise, from the material placed on record, we can only infer that a holistic appreciation of the objections/ views raised and its due consideration in the EACs was only reasonable. On receipt of the fractured report from the Review Committee, it simply asked the Project Proponent to furnish written replies and make presentation before the EACs. To illustrate the point, it may be seen that in the majority members report of the Review Committee, several environmental issues that were even raised at the time of PH, have been enumerated on page 185 to 193. Similarly, Ms. Meena Gupta made certain observations on page 26-29 of her report. In this context, the proponent furnished Comprehensive EIA report that partially incorporated certain additional TOR awarded and objections raised earlier by engaging expert institutions such as NIO, DHI, etc. However, the completeness and veracity of the responses was ascertained in what manner in view of non-availability of certain reports, as earlier sought by EACs and again pointed out by the members of the Review Committee, leaves certain issues unanswered. In totality, it appears that MOEF has mostly accepted the minority report of Ms. Gupta that too in pieces and proceeded with the matter for issuance of final order imposing additional conditions to the original ECs in view of some of the objections/issues raised. There was lot of scope for making scientific study in the matter which is briefly indicated here under:

- **Impact of source of water requirement under competing scenario:** The issue has been highlighted by Ms. Meena Gupta as well in her report wherein it is stressed that issue of water supply from Jobra barrage i.e. the water supply

source to Cuttack town is facing a great deal of opposition and finally it is mentioned that the issue needs to be looked into by the EAC with a view to suggest altered or additional conditions relating to water supply. Despite it being so, the final order only incorporates a condition stating that "*Source suitability study of water requirement shall be carried out by an institute of repute*". The study was to be completed within six months. It is in this background, need for Compliance Monitoring Team is essential.

We are all aware that in the country, the drinking water is becoming scarce commodity and at every level precaution needs to be taken for protecting the drinking water supply to human habitation and preventing from utilizing such water for industrial use. It is always better to insist upon the project proponent /industry to create its own source of water supply particularly, when it can afford to do so. It appears, the alternative water source for the present project, like creating/ constructing a small barrage or augmenting any other existing source at the cost of project proponent to avoid the utilizing the water meant for Cuttack city, particularly in the nature and magnitude of the proposed project conceived could be examined.

- **Evaluation of proposed zero discharge proposal:** According to project proponent, the project is a zero discharge proposal, however, a closer look into the proposal, reveals that something like 47 cubic meter per hour of wastewater is to be discharged into the sea. Of course, as compared to the total quantum of water required, this figure is only 3 percent. It is not that, these figures are not mentioned; but what is striking is the fact that these figures have been well accepted from environment and ecological impacts that may be associated to its discharge. More so over, although in the EIA report it is mentioned that a Common Effluent Treatment Plant (CETP) complying to Central Pollution Control Board specifications shall be designed at the time of Detailed Engineering Report; however, at the time of appraisal

by the EAC after submission of Review Committee Reports, the project proponent submitted that since the plant is based on zero discharge proposal, they do require to install a CETP; however, they would seek relevant CRZ approval at a later stage on completion of Detailed Engineering Report. Being a serious environmental concern, how such issue can be left to be decided in future, puts a serious question mark from all angles especially when almost all the clearances are in place and project is ready for implementation. This should have been, in fact, incorporated at the time of EIA report itself – otherwise it is in all probability likely to cause great environmental threat.

- **Impact on surrounding wetlands and mangroves and their biodiversity, etc. and Risk Assessment with respect to the proposed Port Project:** Subsequent to submission of Review Committee report and appraisal by the EACs, additional conditions to the ECs have been imposed on these aspects based on reply furnished by the project proponent. It is, however, noted that the conditions mostly seek formulation of appropriate management plan/s without specific timelines and modus operandi for evaluation, implementation and monitoring of such proposals.

In this context, it may be appropriate to highlight that the Review Committee also pointed out these aspects and suggested that considering the large number of port projects coming up in the area, it would be appropriate to conduct Strategic Environmental Assessment with regards to location of projects taking into consideration the future requirement, proneness of the area to cyclones/ flood and erosion, etc.

It would be desirable to note that while examining these records, we have not looked into the issue related to Resettlement and Rehabilitation (R&R) as these aspects are mostly relevant in case of Forest Clearance, which is under challenge before the Hon'ble High Court of Orissa, Cuttack.

8. For all the above discussion and deliberation on the issues and the study of records made by us and keeping in view the need for industrial development, employment opportunities, etc. but not compromising with the environmental and ecological concerns, we propose to dispose of this Appeal with the following directions:

- 8.1 The MOEF shall make a fresh review of the Project with specific reference to the observations/ apprehensions raised by the Review Committee in both the reports i.e. the one given by Ms. Meena Gupta and the other by the Majority Members apart from consideration to the views of the EACs and also with reference to the observations made in this Judgment by issuing fresh TOR accordingly.
- 8.2 However, the final order dated 31.01.2011 made by the MOEF shall stand suspended till such fresh review, appraisal by the EACs and final decision by MOEF is completed, since some study might have already been initiated in view of the final order dated 31.1.2011.
- 8.3 The MOEF shall constitute the said fresh review committee by engaging subject matter specialists for better appreciation of environmental issues. The project proponent shall be asked to furnish relevant details required for the said review by the newly constituted committee to recommend specific conditions to be attached/ revised in the ECs granted by MOEF.
- 8.4 The MOEF shall define timelines for compliance of the conditions in the ECs and considering the nature and extent of the project, MOEF should establish a special committee to monitor the progress and compliance on regular basis.
- 8.5 The MOEF shall consider optimizing the total land requirement for 4 MTPA Steel plant proportionately instead of allotting entire land required for 12 MTPA steel plant which is an uncertain contingency.

- 8.6 The MOEF shall consider feasibility of insisting upon every major industry that requires large quantity of water to have creation of its own water resource facility rather than using/ diverting the water that is being meant for drinking/ irrigation purposes.
- 8.7 It is desirable that the MOEF shall establish clear guidelines/directives for project developers that they need to apply for a single EC alone if it involves components that are essential part to the main industry such as the present case where main industry is the Steel plant, but it involves major components of port, captive power plant, residential complex, water supply, etc.
- 8.8 It is desirable that MOEF shall undertake a study on Strategic Environmental Assessment for establishment of number of ports all along the coastline of Orissa with due consideration to the issues related to biodiversity, risks associated, etc.
- 8.9 It is also desirable that MOEF shall take a policy decision that in large projects like POSCO where MOUs are signed for large capacities and up-scaling is to be done within a few years, the EIA right from the beginning, should be assessed for the full capacity and EC granted on this basis.

The appeal accordingly stands disposed of. No costs.

(Dr. Devendra Kumar Agrawal)
Expert Member

(Justice C.V. Ramulu)
Judicial Member