

**BEFORE THE NATIONAL GREEN TRIBUNAL
SOUTHERN ZONE, CHENNAI**

Application No.79 of 2016 (SZ)

&

Appeal No.120 of 2016 (SZ)

APPLICATION NO.79 OF 2016

IN THE MATTER OF

S. Kasinathan

33, Jayaraman Nagar, Saram

Puducherry

... Applicant

AND

1. The Ministry of Environment & Forest

Rep. by its Joint Secretary, Regional Office

Nungambakkam, Chennai

2. The Union Territory of Puducherry

Rep. by its Chief Secretary

Puducherry

3. The Member Secretary

Puducherry Pollution Control Committee

Puducherry

4. The Member Secretary

Puducherry Planning Authority

Puducherry

5. The Secretary

State Ground Water & Soil Conservation

Puducherry

6. The Hydro Geologist – II

Puducherry

7. The District Collector,

Puducherry

8. K. Premaraja

Counsel for the applicant:

M/s. D. Ravichander, P. Saritha & P. Dinesh Kumar

Counsel for the respondents:

Mr. M.R. Gokul Krishnan for Respondent No.1, Mr.K.R. Harin for Respondent No.2, Respondent No.4 to 7, Mrs.A. Sathyabama for Respondent No.3, Mr.P. Satish Parasaran for Mr. C. Sakthimanikandan & R. Baskaran for Respondent No.8

APPEAL NO.120 OF 2016 (SZ)

IN THE MATTER OF:

K. Premaraja

86, Canteen Street

Puducherry

... Appellant

AND

1. The Director-cum-Member Secretary, SEIAA

Puducherry

2. The Member Secretary

Puducherry Pollution Control Committee

Puducherry

3. The Member Secretary

Puducherry Planning Authority, Puducherry

4. S. Kasinathan

33. Jayaraman Nagar, Puducherry

... Respondents

Counsel for the appellant:

Mr.P. Satish Parasaran for M/s. E. Vijay Anand, G.V. Seetha Lekshmi & R. Baskaran

Counsel for the respondents:

Mr.K.R. Harin for Respondent No.1 & 3, Smt. Sathyabama for Respondent No.2, Mr.. T. Mohan for Respondent No.4

ORDER

CORAM: Hon'ble Shri Justice Dr. P. Jyothimani, Judicial Member

Hon'ble Shri P.S. Rao, Expert Member

Delivered by Justice Dr.P. Jyothimani, Judicial Member dated 5th July, 2016

Whether the judgment is allowed to be published on the internet Yes/No

Whether the judgment is to be published in the All India NGT Reporter Yes/No

APPLICATION No.79 of 2016:

1. The applicant, who is stated to be a resident of Puducherry, having aggrieved by the construction made by the eighth respondent as against law, has filed the above application for a direction against the eighth respondent to demolish the construction in R.S.No.283/2, T.S.No.15, 16,17, 18, 19, 20, 22 (part) and 23 of Ward – F, Block – 1 at Old Puducherry Road of Puducherry Revenue Village and direct the first respondent - MoEF & CC to initiate prosecution against the eighth respondent for violation of Environment (Protection) Act, 1986 and also to restore the environmental damage stated to have been caused by the illegal construction by the eighth respondent.

2. According to the applicant, the eighth respondent in order to develop a commercial property situated in the above survey numbers, has initially obtained a planning permit from the fourth respondent – Puducherry Planning Authority for construction of five floors and thereafter by way of revised plan, sought for modification for construction of seven floors with double basement floors, which was granted by the fourth respondent Planning Authority on 17.8.2015. The said respondent also applied for “Consent to Establish” for the proposed construction and the third respondent – Pudhucherry Pollution Control Committee has issued

Consent to Establish as “No Objection Certificate from Pollution Angle” on 17.11.2014. It is stated that the eighth respondent has approached the State Ground Water Unit and Soil Conservation for construction of basement floors to establish a car parking facility which was recommended.

3. The illegalities which are pointed out by the applicant are that the eighth respondent has obtained permission for the building project with two basements for car parking and seven floors, including ground floor and the total construction of the area is 22,106.35 sqm. Since such extent goes beyond 20,000 sqm, the eighth respondent ought to have obtained prior Environmental Clearance (EC), which according to the applicant, has not been obtained. The mere obtaining of “Consent to Establish” from the third respondent Pollution Control Committee under the Air (Prevention and Control of Pollution) Act, 1981 (Air Act) and the Water (Prevention and Control of Pollution) Act, 1974 (Water Act) for construction of seven storied building and the permission granted by the fourth respondent Planning Authority is not sufficient to make the construction as valid in law. By virtue of the construction having been completed without obtaining prior EC, the purpose of making an Impact Study by SEAC is thwarted and a *fait accompli* situation is created. The construction is in a prime area, located opposite to Puducherry Court, known for traffic congestion and the last two upper floors are meant for theatre complex and therefore, according to the applicant, the construction is in violation of EIA Notification, 2006

4. The third respondent Pollution Control Committee in the reply has stated that by virtue of the interim order passed by this Tribunal on 1.4.2016 injuncting the eighth respondent from carrying on further construction, the third respondent Committee has issued “Stop Work” notice to the eighth respondent who has informed that on 11.4.2016 he has stopped further construction activities and the

site was inspected by the officials of the third respondent Committee on 13.4.2016 and observed that the construction work was stopped. It is also stated that the building construction work was completed apart from completion of 90% of the interior work. It is also stated by the third respondent Committee that the eighth respondent has applied for “Consent to Establish” under Water Act and Air Act on 11.9.2014 for construction of seven storied shopping complex with multiplex at No.7, Venkata Subha Reddiar Salai, Puducherry. In the application the total built up area of construction was mentioned by the eighth respondent as 19,388.73 sq m and the said extent was assured by the eighth respondent before the third respondent Committee and therefore “Consent to Establish” was granted by the third respondent Committee on 17.11.2014 without insisting for EC. It is stated that the eighth respondent has obtained a revised building plan from the fourth respondent Authority on 17.08.2015 for total built up area of 22,106.35 sq m and this fact was not informed to the third respondent Committee by the project proponent and the said fact was known to the third respondent Committee only after the present application came to be filed before this Tribunal. The SEIAA of Puducherry has issued direction to the fourth respondent Authority on 8.4.2016 not to issue building permission for any construction projects with total built up area of above 20,000 sq m without prior approval from SEIAA. It is also stated by the third respondent Committee that even in the “Consent to Establish” a specific clause has been included that the eighth respondent shall not undertake any expansion, modification or change of location without prior clearance from the third respondent Committee. It is also stated that now the eighth respondent has made an on-line application for EC to the SEIAA on 12.4.2016 and has also applied to the third respondent Committee on 21.4.2016 for a revised “Consent to Establish” for enhanced built up area of 22,106.35 sq m.

5. The fourth respondent Authority in the reply has stated that the eighth respondent has applied for planning permission for construction of five storied commercial building (shopping mall-cum- multiplex) with double basement floors on 10.10.2007 and the site was inspected and the extent was found to be 5,179.95 sq m. The site lies in the existing developed area and land use of the site earmarked is a Residential and Commercial existing, in the statutory Master Plan for Puducherry. The proposal was examined by the fourth respondent Authority on 26.3.2008 and constituted a Sub-Committee consisting of the Chief Town Planner, Divisional Fire Officer, Superintendent of Police (Traffic), District Collector, Superintending Engineer - I, PWD and the Member Secretary of the fourth respondent Authority to examine the proposal of multiplex building and submit a report. In the mean time, the proposal was forwarded to various authorities and clearances were obtained. Subsequently, the proposal was placed in the meeting of the fourth respondent Authority on 26.06.2008 and the building plan was approved for five storied commercial building with double basement floors on 06.08.2008. The approved building parameter states that the plot extent is 5,179.95 sq m, thereby indicating the total built up area, including the double basements and service areas is 16,643.69 sq m. It is stated that the eighth respondent has submitted a revised building plan application on 10.07.2013, seeking approval for seven storied shopping mall-cum-multiplex with double basement floors. The site was inspected and found that the sixth and seventh floors have been constructed unauthorisedly, violating the building plan approved by the fourth respondent Authority and a deviation-cum-stop work notice was issued on 22.08.2014, apart from a show cause notice on 30.10.2014. The revised proposal sent by the eighth respondent with NOC from various authorities, including the third respondent Committee, was placed before the fourth respondent Authority on 11.02.2015 and the fourth respondent Authority has decided to issue planning permit on payment

of compounding charges for the unauthorised construction in the sixth and seventh floors and set back violations. The building plan approval issued on 17.8.2015 was based on the inspection and finding that the built up area as per the bye-law was 13,884.36 sq m. The parameters show that if the double basement area and service area of 8,222 sq m are included, the total built up area will become 22,106.36 sq m. Subsequently, a notice was issued to the eighth respondent not to carry on the construction activity and therefore the building plan authority has not given permission to built up area more than 20,000 sq m.

6. The eighth respondent in his reply has stated that originally he desired to build a multi storied commercial building in the said survey numbers with the total construction area of 15,257.45 sq m in the year 2007-2008 and the permit period was extended by another two years by the Planning Authority on 07.07.2011. A revised plan was submitted based on The Puducherry Building By-laws and Zoning Regulations, 2012 by which certain norms were sought to be relaxed regarding construction and the said revised plan was for a total area of 19,388.73 sqm. The approval in Puducherry is on the single window system and the revised plan was applied on 10.7.2013 which was granted “in principle approval” as per the communication of the Planning Authority dated 25.07.2014 which resulted in the final approval on 17.08.2015. It is stated that in respect of the revised plan originally the built up area was 19,388.73 sq m and that was less than 20,000 sqm and the “Consent to Establish” was obtained from the third respondent Committee on 17.11.2014. It is also stated that at the time when the original proposal was given in 2008, the proposed built up area was only 15,257.45 sq m for which EC was not required as per the EIA Notification, 2006. But as per the revised plan approved on 17.8.2015, the total built up area has become 22,106.35 sq m. However, the eighth respondent has given revised planning approval only for the built up area for 19,388.73 sq m. But as the non FSI areas were included for the

purpose of approval of the plan, the built up area has increased beyond 20,000 sq m. Immediately thereafter the eighth respondent has taken steps to file application for EC on 8.4.2016 by making on-line application. It is stated that the building work is completed and 90% of interior work has also been completed and the eighth respondent has completed the construction after obtaining loan running to several lakhs of rupees. It is also stated that the eighth respondent has obtained No Objection from all other departments concerned. The eighth respondent was under the *bonafide* impression that the built up area of the entire building is 19,388.73 sq m. It is stated that the application is filed at the instance of few of the cinema theatre owners to see that the multiplex of the eighth respondent does not come up. The eighth respondent has no intention of deviating or evading EIA Notification, 2006. Generally, the non FSI area will not be included in the total built up area and that the eighth respondent was under the impression that the total built up area is only 19,388.73 sq m. As it was less than 20,000 sq m, the eighth respondent has obtained "Consent to Establish" from the third respondent Committee on 17.11.2014. The eighth respondent has prayed for vacating the interim order passed by this Tribunal dated 1.4.2016

APPEAL No.120 of 2016

7. The eighth respondent in Application No.79 of 2016 viz., project proponent, has filed the above appeal against the order of the Pollution Control Committee dated 19.4.2016 by which the Pollution Control Committee, taking note of the fact that the total built up area of the appellant is 22,106.35 sqm and without obtaining prior EC, "Consent to Establish" has been obtained, by invoking the powers under Section 33A of the Water Act and Section 31 A of the Air Act, has cancelled the "Consent to Establish" granted on 17.11.2014. The appellant has chosen to challenge the said impugned order of the Pollution Control Committee on the

ground that the Pollution Control Committee has passed the impugned order without giving any opportunity to the appellant. The appellant would have explained to the Committee that it was without non FSI area, the total built up area comes to 19,388.73 sqm and therefore there was no wilful deception played by the appellant. Such an opportunity having not been given to the appellant, it is stated that the impugned order of cancellation of “Consent to Establish” is arbitrary and illegal.

8. Mr. T. Mohan, learned counsel appearing for the applicant in Application No.79 of 2016, who is the fourth respondent having been impleaded in the Appeal No.120 of 2016 has submitted that the project proponent has deliberately suppressed the actual extent of the built up area and obtained “Consent to Establish” from the third respondent Committee and therefore there is no question of any principle of natural justice to be complied with. He would submit that since the total extent is more than 20,000 sqm, it is obligatory on the part of the project proponent to obtain prior EC and therefore the entire construction of two basements and seven floors are illegal and the construction of sixth and seventh floors are liable to be demolished if the project proponent wants the authority under the EIA Notification, 2006 to consider the application for EC. According to him, the project proponent has deliberately violated the provisions of EIA Notification 2006 and by putting up the entire construction, he has virtually thwarted the authority under the EIA Notification, 2006 viz., SEAC to make a study on the impact of the proposed construction.

9. On the other hand, Mr. Satish Parasaran, learned counsel appearing for the project proponent has submitted that the act of the third respondent Committee in abruptly cancelling the “Consent to Establish” already granted in 2014 by exercising the powers under the Air Act and Water Act, is illegal and arbitrary. By

virtue of the “Consent” granted in 2014, certain right has accrued on the project proponent and if that right is sought to be interfered with, the same has to be in compliance with natural justice. He would also submit that the project originally submitted in 2007-2008 was only to the extent of built up area of 15,257.45 sq m and therefore at that time there was no requirement of obtaining prior EC. However, when an application was made for a revised plan to the Authority under the Single Window System on 10.7.2013, the actual built up area was worked out at 19,388.73 sqm and it was based on that the planning permit was given on 17.08.2015. However, according to the learned counsel, the project proponent was actually not aware of adding of non FSI area and therefore non obtaining of prior EC is not deliberate and in fact immediately after it was realised an application was made on-line for EC on 08.04.2016. Therefore, he submits that for such an unintentional violation of EIA Notification, 2006 drastic action like pulling down of the entire built up structure will result in causing gross injustice to the project proponent, apart from causing heavy financial loss. Therefore, he submits that the SEIAA may be permitted to process the application for EC and pass orders.

10. After hearing the learned counsel on both sides in application and appeal and having gone through the pleadings in both the matters, apart from perusing the documents, the issue to be decided is as to whether the project proponent is entitled for processing of the application for EC dated 8.4.2016 or he should be delisted for violation of EIA Notification, 2006; and to what other reliefs the parties are entitled to?

DISCUSSION AND DECISION:

11. On the factual matrix of this case, it is clear and not in dispute that the project proponent has originally applied for planning permit on 10.10.2007 for construction of a five storied commercial building (Shopping Mall-cum-Multiplex)

with double basement floors at Re-Survey No.283/2 in T.S.No.15, 16, 17, 18, 19, 20, 22 (part) and 23 in Ward – F, Block -1, Pondy – Cuddalore Road, Puducherry for which planning permission was given by Puducherry Planning Authority on 06.08.2008 valid up to 05.08.2011. On an application made by the project proponent on 06.08.2008, the permit period was further extended by another two years viz., upto 05.08.2013. At the time when the project proponent has applied for planning permit, the extent was admittedly much less than 20,000 sqm and therefore there was no necessity or obligation on the part of the project proponent to apply for prior EC. However, when he made a revised proposal to the Planning Authority on 10.7.2013 based on which the Planning Authority on 17.08.2015 has given revised permit, the project proponent is stated to have excluded the non FSI area and shown the built up area as 19,388.73 sq m and therefore the Planning Authority has issued a revised plan on 17.08.2015. It is the case of the project proponent that at the time when the revised plan was applied for, he was not aware that non FSI area should be included with built up area and he came to know of the same for the first time in April, 2016, after filing of the present Application No.79 of 2016 before this Tribunal and immediately thereafter he made an on-line application to SEIAA for EC on 8.4.2016. Therefore, it is not in dispute that the actual built up area as per the revised plan submitted by the project proponent ought to have been arrived at 22,106.35 sqm and in that event prior EC ought to have been obtained. It is also not in dispute that even though it is stated by the project proponent that the two basement areas which are stated to be in the extent of 2835.72 sq m and 3046.07 sq m respectively, were not included in the revised plan, since it was considered to be a non FSI area, it is true that in respect of the same, there has been some discrepancies in calculation of the total extent of the built up area. But it remains a fact that if the areas of two basements are excluded, the total extent comes to 16,224.56 sq m. Even though the basement area is to be

necessarily included with the built up area, as per the EIA Notification 2006, there is every possibility for the project proponent to have believed that the basement should be excluded; especially when it is considered that the original proposal was in the year 2007 -2008 and as per the Building Regulation of Puducherry, there may be a provision for regularisation, we cannot come to an abrupt conclusion that it is an intentional violation of EIA Notification, 2006. It is not as if while applying to the Planning Authority, the project proponent has not disclosed about the two basements and other floors. In such circumstances, as it has been repeatedly held by the Hon'ble Apex Court, demolition of building is not a remedy. In fact Section 15 of the Environment (Protection) Act, 1986 contemplates prosecution for violation, which includes violation of EIA Notification, 2006. There is certainly no bar for the authorities to take note of this and prosecute the project proponent for violation of EIA Notification, 2006. This being a case where the extent has exceeded marginally to the extent of 2,106.35 sq m, we are of the considered view that certainly the remedy is not either demolition of the entire building structure or the demolition of the last two upper floors.

12. It is true that by virtue of the violation of EIA Notification, 2006 the project proponent has virtually thwarted the statutory rights to be exercised by the authority concerned in making proper impact assessment. But it is nobody's case that the property is either situated in a water body or on marshy land or encroached upon the forest land or located in a ecologically sensitive area, involving cutting of trees etc. Therefore, even if the SEIAA through its SEAC is to make environment impact assessment there may not be any impediment. But then we are of the considered view that the project proponent shall not be allowed to put in use the last two upper floors, till the authority competent under the EIA Notification 2006 takes a final decision.

13. It is true that the Pollution Control Committee has given its "Consent to Establish" on 17.11.2014 and the fact remains that while such "Consent to Establish" was granted by the Pollution Control Committee it was based on the Committee visiting the place, there was no impediment at that time for the Committee to find out the actual extent of the built up area. Therefore, in our considered view and to meet the ends of justice, the application and appeal can be disposed of with some directions.

14. Accordingly, Application No.79 of 2016 and Appeal No.120 of 2016 stand disposed of with the following directions:

(1) The project proponent shall not occupy or put in use of any portion of the fifth and sixth floors as per the building plan approved by the Puducherry Planning Authority dated 17.8.2015 until the authority competent under the EIA Notification, 2006 issues EC in respect of the entire building.

(2) Till such EC is issued, the fifth and sixth floors as per the building plan dated 17.8.2015 shall be sealed and the same shall be ensured by both the Planning Authority as well as Pollution Control Committee.

(3) On such sealing of the said floors, the SEIAA shall take necessary steps for the purpose of processing the application made by the project proponent dated 8.4.2016 claiming EC for the entire built up area and after making necessary visit through SEAC and obtaining its recommendations, the SEIAA shall pass appropriate orders in the manner known to law.

(4) Only after the SEIAA passes such order under the EIA Notification, 2006, the project proponent shall be entitled to use or disuse the said fifth

and sixth floors as per the plan approved dated 17.8.2015 and as per the orders of SEIAA and the same shall be ensured by the said respondent.

(5) Thereafter it will be open to the applicant to file necessary application for “Consent” before the Pollution Control Committee which shall be considered by the said Committee on merits and in accordance with law and pass appropriate orders.

(6) There is no impediment for the authorities to proceed with prosecution for violation as per Section 15 of the Environment (Protection) Act, 1986.

With the above directions, the above application and the appeal stand disposed of. No cost

Justice Dr. P. Jyothimani
(Judicial Member)

Shri. P.S.Rao
(Expert Member)

Chennai
Date: 05.07.2016

NGT