BEFORE THE NATIONAL GREEN TRIBUNAL

SOUTHERN ZONE, CHENNAI

Application No.35 of 2015 (SZ)

In the matter of

1. Yasoraminfra Developers Pvt. Ltd.
   Ernakulam, Cochin 682 035
   rep. by its Managing Director A.R.S Vadhyar

.....Applicant

VS

1. Kerala Coastal Zone Management Authority,
   Represented by its Chairman,
   Thiruvananthapuram

2. Union of India represented by its Director,
   Ministry of Environment and Forests,
   New Delhi

.. Respondents

Counsel appearing for the applicant:

M/s.P.B.Sahasranaman, Kamalesh Kannan,

Subramanian and S.Sai Sathya Jith

Counsel appearing for the Respondents:

Mr.T.N.C.Kaushik for R1

Mr.M.R.Gokul Krishnan for R2

ORDER

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

12th , May, 2016

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

2. Whether judgment is to be published in the All India NGT Report .. Yes/No

The applicant is a company, taking up development projects and they have formulated a project to construct two flyovers over the Chilavanoor backwaters in Cochin Corporation, State of Kerala. The flyovers will have a length of approximately 4 km and at the middle of the bridge, the applicant has been

permitted to construct a building in an extent of 1,58,142.5 sq.m to realise the project cost. The project is stated to have been approved by the Government of Kerala at a cost of Rs.467 Crores and the Government has also issued an order to that effect. It is stated that the Corporation of Cochin has granted permission for such construction on 24.10.2005 and the applicant has applied for prior Environmental Clearance (EC) for that project and after the appraisal by the Expert Appraisal Committee (EAC) and on consideration of its recommendations, the 2nd respondent – Government of India came to a conclusion that there must be an alignment of the project, so as to shift the same to the non CRZ area and it was also suggested that the project to start from NH-47 from the bridge south of the existing proposed site at Wyte Fort and terminated at Sahodaran Ayyappan (SA) Road. It was, thereafter, the applicant has changed the landing place and resubmitted the project report. However, the 2nd respondent felt that it must be in the form of a new project, indicating all procedural formalities once again, in its communication dated 20.10.2009.

2. Challenging the said order, the applicant has approached the Hon'ble High Court of Kerala by filing W.P.(C).No.34311 of 2009 and in the final order dated 5.8.2010 the High Court has directed the applicant to submit revised proposal in the prescribed format to the 1st respondent for its recommendation and forwarding it to the 2nd respondent, taking into consideration that all the other authorities have cleared the project, except as regards the question of the place of landing at one end of the bridge.

3. Accordingly, the applicant has submitted a revised proposal on 26.8.2010 in the prescribed Form - I and I A along with a sketch. Certain additional information was sought for by the 1st respondent regarding the coastal eco system, mangroves, filteration pond etc., which, according to the applicant, is not relevant for the consideration of the project to the landing place and to that effect the applicant has addressed a letter to the 1st respondent on 29.11.2010. However, the 1st respondent has requested more information.

4. In the mean time, the 1st respondent has filed a review in R.P.No.1136/2010 against the judgment of the High Court in the above said writ petition, stating that the Government of Kerala has not approved the project. It was in those circumstances, the review petition came to be disposed of on 21.12.2010, directing the 1st respondent to consider all the aspects, including the opinion of the Government of Kerala. Inspite of the same, the 1st respondent has not taken up the application and it was in the mean time, the Government of India has issued a new CRZ Notification, 2011 on 6.1.2011. It was, after one year, the 1st respondent issued a letter dated 1.1.2012, directing the applicant to file a fresh application, as envisaged under the new CRZ Notification, 2011. The said communication was replied by the applicant on 25.3.2012, stating that there is no CRZ area involved in the present site and there is no reclamation and no violation of CRZ Notification, 2011, since a major portion of the project was cleared prior to 6.1.2011.

5. The applicant has again approached the High Court of Kerala by filing W.P.(C).No.6382 of 2014, seeking implementation of the judgment of the High Court dated 21.12.2010 passed in the Review Application No.1136 of 2010. The said writ petition came to be allowed by the High Court on 31.7.2014., directing the 1st respondent herein to take a decision, after hearing the applicant herein. It was, thereafter, the applicant was called for a personal hearing by the 1st respondent on 30.9.2014. However, there was no decision taken, which resulted in the initiation of the contempt proceedings against the 1st respondent. However, by the impugned order dated 19.12.2014, the 1st respondent has informed the applicant that the CRZ clearance is declined, since the project is not permissible as per the provisions of the CRZ Notification, 2011. The impugned order is based on the Office Memorandum of MoEF & CC dated 8.2.2011 which refers to the clarification that the projects attracting CRZ Notification 1991 which have been submitted to the concerned CZMA, shall be considered in accordance with CRZ Notification 2011.

6.Contending that CRZ Notification 2011 is not applicable in respect of the things done or omitted to be done before supersession and that when CRZ Notification 2011 is a Statutory Notification, that cannot be modified or clarified or interpreted by an executive order which has no force of law, as laid down by the

Hon'ble Supreme Court in GULF OF GOANS HOTELS V. UNION OF INDIA (2014) 10 SCC 673, the applicant preferred the above application, challenging the impugned order of the 1st respondent dated 19.12.2014. and also for the issue of appropriate direction to the 1st respondent for issuance of CRZ Clearance.

7. The 1st respondent in its reply, has reiterated that the project in question is not a permissible activity as per the CRZ Notification, 2011 and that the Office Memorandum issued by the 2nd respondent is only a direction to the 1st respondent to take action and streamline the Clearance based on CRZ Notification, 2011. It is stated that the proposed activity includes construction of bridge, building complex-housing, commercial as well as residential apartments, helipad, parking lots etc., which are not permitted under CRZ Notification, 2011, since the same is above backwaters, declared as CRZ – IV Zone. Further, the project is commercial in nature. The permission issued by the Cochin Corporation is by overlooking the provisions of CRZ Notification, 1991 and there was no Environmental Clearance (EC) by the MoEF & CC till date The proposal for construction of the Skycity project was rejected by the MoEF & CC in December, 2007, taking a stand that the bridge falls under CRZ, attracting CRZ Notification, 1991, by referring to para 2 (viii). As per the said para, reclamation, bunding or disturbing the natural course of sea water is permissible for the construction of port, harbours, jetties and maintenance of waterways. However, reclamation for commercial purposes like shopping, housing complexes, hotels and entertainment activities are not permissible.

8. It is also stated that the High Court of Kerala has directed the project proponent to submit a revised proposal. In fact, the application filed by the applicant was considered by a Sub Committee, which has filed a Report, after obtaining necessary information that prior to 2011 the MoEF & CC has rejected the proposal and therefore the application submitted based on the direction of the High Court was examined as per the provisions of CRZ Notification, 2011 and Office Memorandum dated 8.2.2011. It was found that the project will have an adverse environmental impact, as it covers a major portion of the wetland. The area in question, which is a part of Vembanad , is declared as wetland of international importance and any construction in the wetland will have an adverse effect on environment. The

allegation that the Chairman, Kerala CZMA has accepted the proposal is denied and in fact after hearing, a direction was given that final decision can be arrived after getting technical advice and the same should be placed before the 1st respondent and the High Court may be moved to obtain extension of time. It is reiterated that the project attracts CRZ Notification, 2011 and the original proposal itself has been rejected by the MoEF & CC and therefore the 2nd application can be at the most treated as a fresh application.

9. The 2nd respondent MoEF & CC in the reply has stated that the Ministry has issued CRZ Notification, 1991 to regulate various activities and as per the said Notification, for regulating the developmental activities, the coastal stretches within 500m of High Tide Line (HTL) on the landward side were classified into four categories. All these developmental activities, under the said Notification, were required to be regulated in accordance with the Coastal Zone Management Plan (CZMP) approved by the 2nd respondent. It is stated that the 2nd respondent MoEF & CC has received a proposal on 26.3.2007 for the construction of Yasoram Skycity Project at Cochin, submitted by the applicant for the EC under the EIA Notification, 2006. The said proposal involved construction of residential apartments, commercial complex over a flyover along the Cochin backwaters and the length of the flyover is 4 km which extends from Kundanoor NH – 47 bypass in the Southeast to Sahodaran Ayyappan Road in the Northeast. The project passes through Chilavannur backwaters and the flyover would have 14m wide buildings in the centre with 2m wide footpath, parking space and two lane roads on north side. The total built up area, as per the proposal was 1,58,142 sq.m and it includes three bedroom residential apartments (100 in numbers), commercial complex having shopping centres, entertainment and multiplexes, office areas, 500 room hotel, 50 bed hospital, amusement and water parks and all the above said facilities were proposed to be located on the proposed flyover.

10. The proposal was referred to the 44th meeting of the Expert Appraisal Committee (EAC) which held its meeting during 26th – 28th June, 2007 and also to the 49th meeting which held during 25th – 27th September, 2007 and again to the 52nd meeting during 19th and 22nd November, 2007. The EAC has also visited the

site and observed that the project falls under the CRZ and that the reclamation for commercial purposes like shopping, housing complexes, hotels and entertainment activities are not permissible, even though the State CZMA has recommended the project. It was based on the report of the EAC, the 2nd respondent has rejected the original proposal on 20.12.2007, holding that the recommendations of the Kerala State CZMA are incorrect.

11. It is further stated that the representation made by the applicant on 25.4.2008 to the MoEF & CC was placed before the 17th meeting of the National CZMA which in its meeting held on 2.6.2008 decided that the project, which is commercial in nature, cannot be constructed on sea links and bridges under the CRZ Notification, 1991. In the mean time, based on the representation of the applicant, the 2nd respondent constituted an Expert Committee to re-examine the proposal. Accordingly, the Expert Committee, consisting of four members, visited the site on 9.4.2009, which has made certain recommendations, based on which, the applicant was directed to modify the alignment of the project, to avoid CRZ area. A legal opinion was also sought for on the claim of the project proponent that the project does not attract CRZ Notification, 1991. The Ministry of Law and Justice, after examination of the matter, advised the project proponent to submit a revised proposal for EC in the light of the recommendations of the Expert Committee with a further direction that during the examination of the modified proposal, if the MoEF & CC feels necessary to have another opinion, the same may be referred to. Accordingly, the 2nd respondent, in the letter dated 20.10.2009 directed the project proponent to submit a revised proposal in the prescribed format under CRZ Notification, 1991/ EIA Notification, 2006 for obtaining CRZ Clearance/prior EC and the CRZ Clearance proposal was required to be forwarded for the recommendation of the State CZMA.

12. However, in the mean time, CRZ Notification, 2011 came into existence on 6.1.2011, in supersession of CRZ Notification, 1991. In the revised notification, the coastal stretches have been classified into four zones viz., CRZ – I, CRZ – II, CRZ – III and CRZ – IV for conserving and protecting the coastal areas and marine waters. As far as CRZ – I, CRZ – II and CRZ – III, as contained in CRZ Notification, 1991,

are retained in CRZ Notification 2011 wherein CRZ – I is classified as ecologically sensitive areas; CRZ – II as the area developed upto or close to the shoreline; and CRZ – III as relatively undisturbed which do not belong to CRZ – I or CRZ – II which include coastal zone in the rural areas (developed and undeveloped). CRZ – IV is classified as water area from the Low Tide Line to 12 nautical miles on the seaward side. The Notification also provides for special consideration for protecting critical coastal environment, including CRZ area, falling within the Municipal limits of Greater Mumbai, the CRZ areas of Kerala, including the backwaters and backwater islands and the CRZ areas of Goa. The CRZ Notification, 2011 validates the Coastal Zone Management Plan (CZMP) already approved under CRZ Notification, 1991 for a period of 24 months and by a Statutory Notification, the CRZ Notification, 2011 came to be amended on 22.3.2016, extending the validity of CZMP, including State of Kerala, approved under CRZ Notification 1991, upto 31.1.2017. It is also stated that the Official Memorandum issued by the Government of India on 8.2.2011 pertains to the consideration of the projects in pipeline, attracting CRZ Notification, 1991/CRZ Notification 2011 which were then pending for CRZ Clearance at various stages. In the said Official Memorandum, the 2nd respondent has clarified that the CZMA shall examine the projects pending with them in accordance with the provisions of CRZ Notification, 2011 and any recommendation or rejection shall be as per the provisions of CRZ Notification, 2011. It is further stated that para 3(ix) of the CRZ Notification, 2011 prohibits reclamation for commercial purposes such as shopping and housing complexes, hotels and entertainment activities and therefore the proposed project cannot be accepted.

13. In so far as it relates to the case of the applicant that the CZMPs under CRZ Notification, 2011, which classifies the area as CRZ – IV are not yet prepared, it is stated that the CZMPs, as per the CRZ Notification, 2011, are being prepared by the coastal states. Till such time the CZMPs are prepared, in case of any variation between the CZMP and the CRZ Notification, 2011, it is CRZ Notification, 2011 which should be considered for the approval of CZMP. The approval for CZMP under the CRZ Notification, 1991 must be considered in consonance with CRZ

Notification 2011 and not in isolation and therefore the proposed development or the project of the applicant is not permissible under the CRZ Notification, 2011.

14. Mr. P.B. Sahasranaman, the learned counsel appearing for the applicant would submit that in so far as the point relating to the other portion of the project, including construction of hotels etc., the same have already become final, as it is seen from the various directions issued by the Hon'ble High Court of Kerala and the only issue which remains to be considered is in respect of the landing place and in as much as the project proponent has revised its plan in accordance with the direction that the landing place should be accommodating the National Highway, there is no question of reclamation and therefore it was the duty of the 1st respondent to consider only in respect of that aspect and the 1st respondent is debarred from reopening the case already decided under CRZ Notification, 1991. It is his further submission that by a clarification in the form of an Official Memorandum, the 2nd respondent cannot go ahead with the settled position as per the CRZ Notification, 1991 and in effect, the Official Memorandum relied upon by the 1st respondent dated 8.2.2011 is contrary to the statutory regulation and such Official Memorandum cannot have any authority of law. To support the said proposition, the learned counsel would rely upon the judgment of the Supreme Court reported in GULF OFGOANS HOTELS CO. LTD., V.UNION OF INDIA (2014) 10 SCC 673.

15. *Per contra*, it is the contention of the learned counsel appearing for the 1st and 2nd respondents that by reading the CRZ Notification, 2011, which superseded the CRZ Notification, 1991, the law is very clear that those projects which are already approved fully under CRZ Notification 1991, cannot be reopened under the CRZ Notification, 2011. But in the present case, there was no approval for the project either under CRZ Notification, 1991 or under CRZ Notification, 2011 and even as on date the project has not been approved and no EC has been granted and therefore, according to the learned counsel, the application as such is not maintainable. They would also submit that the Official Memorandum has only clarified the legal position and has not changed the statutory regulations and therefore what is reiterated in the Official Memorandum is already available by a

combined reading of the CRZ Notification, 1991 and CRZ Notification, 2011.Therefore, according to the learned counsel, the judgment of the Supreme Court relied upon by the learned counsel is not applicable to the facts of the present case.

16. We have heard the learned counsel appearing for the applicant as well as the respondents at length, perused the pleadings and given our anxious thought to the issue involved in this case viz., as to whether the impugned order of the 1st respondent is valid in law and in accordance with the CRZ Notification issued by the Government of India and consequently whether the applicant is entitled to proceed with the project.

17. Admittedly, the project submitted by the applicant originally relates to a flyover Skycity along the Cochin backwaters with the total built up area proposed at 1,58,142.5 sq.m, which includes 100 three bed room residential apartments, commercial area, including, shopping, office area and hotel etc., and the water requirement during construction phase is 25 KLD, operation phase is 1,000 KLD. That apart the STP is for 1,000 KLD and the power requirement will be 8 MW and the parking provided is for 5,000 cars. The said proposal for EC was considered by the EAC in its various meetings and ultimately recommended in the meeting held during 19th – 22nd November, 2007 that the EC is subject to the following conditions:

> "Multiple measures including absorption and deflection of sound and double glazing on windows facing road shall be provided.
>
> Necessary provisions shall be made for collection and disposal of oil and grease at the storm water disposal exit point.
>
> Care will have to be taken in the alignment of the bridge over Back Bay waters as the water way may be fully exploited for navigation in future."

The above conditions are proposed to be incorporated in the EC for strict compliance by the project proponent. But the fact remains that EC has not been granted by the 2nd respondent for the proposal. It is true that in the communication of the MoEF & CC dated 11.6.2009, the project proponent viz, the applicant was directed to start from NH – 47 and terminate at bridge on Sahodaran Ayyappan Road, so as to avoid the attraction of CRZ Notification and advised the project

proponent to submit a revised proposal for EC. The operative portion of the above said letter is as follows:

> "The Expert Appraisal Committee has inter alia recommended that the project alignment may be slightly modified to shift into non CRZ area. It is suggested, therefore, that the project may start from NH47 from the bridge south of the existing proposed site at Wyte Fort, by taking suitable permissions from NHAI. The project may be terminated at the bridge on SA road. This project, thereafter, may not attract consideration under CRZ."

18. Subsequent to the above said letter of the 2nd respondent, it appears that there have been some communication between the appellant and the 2nd respondent on 25.9.2009 and 12.10.2009, informing that the applicant has identified a bridge called "Irrigation Bund Bridge" to the immediate west of present termination point of the project at NH – 47 stating that it is feasible to terminate the project and requested issuance of EC/CRZ Clearance, in view of the new termination point at "Irrigation Bund Bridge". It was, considering the said proposal, the 2nd respondent in the letter dated 20.10.2009, has directed the applicant to submit the above said revised proposal under CRZ Notification, 1991/EIA Notification, 2006 for prior EC/CRZ Clearance specifically stating that in so far as it relates to CRZ Clearance, the proposal must be recommended by the State CZMA.

19. It was that letter of the 2nd respondent dated 20.10.2009 which was the subject matter of challenge by the applicant before the High Court of Kerala in W.P.(C).No.34311 of 2009. The High Court of Kerala, while disposing of the writ petition, has passed an order on 5.8.2010 with the following operative portion:

> "In view of what is stated above, this writ petition is ordered directing that if the petitioner places the revised proposal in the prescribed format, the State Coastal Zone Management Authority will consider that proposal, make its recommendations and forward it to the competent authority in the Central Government, taking into consideration that all the other authorities have already cleared the project except as regards the question of the place of landing at one end of the bridge The said Authority and the Central Government will expedite consideration since there is no reason why the matter should be held back further, having regard to the larger public interest involved in the issue. The writ petition is ordered accordingly."

It is true that the High Court has made a reference that the issue was regarding the site for the landing of the bridge at one end, but it remains the fact that there was no CRZ Clearance issued by the Government of India, as per the CRZ Notification,

1991 in respect of the bridge even though the communication shows that the project proponent must alter the landing place and submit a fresh proposal for EC.

20. It is equally true that for the project, the applicant has not obtained prior EC. The mere fact that the dispute was relating to the landing place, which may or may not require reclamation, does not mean that the authority either under EIA Notification, 2006/CRZ Notification, 1991 have issued Clearance. The direction issued by the High Court was only to expedite the matter and the Hon'ble High Court has never said that either the EC or CRZ Clearance has been issued in respect of the other portion, except the landing place. In our considered view, there can be no partial CRZ Clearance to any project.

21. It is further relevant to note that after the judgment was delivered by the High Court on 5.8.2010 as extracted supra, the applicant has made a revised proposal on 26.8.2010 and on a reference to Form – I of the revised proposal sent by the applicant, while stating about the name of the project, the applicant has chosen to state "Landing of the proposed Yasoram Skycity project at existing bridges". In the column relating to the expected cost of the project, the applicant has stated "Project under consideration is landing/connection of proposed Yasoram Flyover Skycity project to existing bridges. The consolidated cost of Yasoram Flyover Skycity project along with connecting bridges is Rs.467 Crores." Nowhere in Form – I, the applicant has chosen to state that a portion of the bridge etc., has been approved by CRZ authority or granted EC. The applicant has not stated that the original proposal was either accepted by the authority by granting EC even for the partial project, except the landing/connection of proposed flyover Skycity or CRZ Clearance either fully or partially, except the above said landing/connection of proposed Yasoram Flyover Skycity project. Therefore, a reading of the revised Form – I submitted as per the direction of the High Court of Kerala, stated supra, shows that the applicant has assumed that he has already obtained permission from all the authorities which requires the mandatory prior EC and CRZ Clearance. Mere obtaining of "consent" from the State Government and even recommendation of EAC, as stated above, subject to the imposition of certain conditions, does not mean that the project proponent has obtained all Clearances, except in respect of the landing place.

22. In fact, in the subsequent review filed by the Kerala CZMA against the above said order in Review Petition No.1136 of 2010, the High Court of Kerala in the order dated 21.12.2010 has made the following observation which is pertinent to note:

> "It is beyond challenge that a decision of the nature that the State Coastal Zone Management Authority has to take, would necessarily involve many managerial and technical issues and when this court said that it will be taken that the other authorities have granted clearance, all that is meant is that clearances of the authorities have to be taken as granted wherever clearance has been given This does not mean that the review petitioner would be tied down to any particular opinion placed before it."

The above said observation makes very clear about the intention of the High Court in passing the earlier judgment dated 5.8.2010. The Hon'ble High Court, in the concluding paragraph of the judgment in the Review Petition has made very clear that the 1st respondent is free to consider all relevant facts regarding the project. The operative portion is as follows:

> "Under the aforesaid circumstances, all that is necessary for this court is to clarify that the State Coastal Zone Management Authority, while deciding on the issue following the judgment sought to be reviewed, would consider all materials that are place before it. However, would not be confined to any particular aspect reflected in the said judgment and would be free to consider all relevant facts, including the opinion of the Government. This, obviously, has to be done within the limits of its jurisdiction in terms of law. The submission on behalf of the writ petitioner that the review petitioner may decide the matter in a time bound manner is recorded. Though the authorities would notice this request of the writ petitioner, it is not feasible to fix a time limit by a judicial order since different aspects of the matter may have to be considered by the competent authority, as also the Government."

By the said clarification, the High Court has made it very clear that the respondents should consider the entire aspect of the project, not confine to any particular aspect, reflected in the judgment dated 5.8.2010. Therefore, in our considered view, it is not correct for the applicant, as submitted by the learned counsel, to assume, as if clearance has been granted in respect of the other aspect of the project under CRZ Notification, 1991 and the dispute is only in respect of the landing place. The order of the High Court of Kerala in the Review Petition dated 21.12.2010 is a clear answer to such assumption, with which the applicant appears to have been guided. Even otherwise, unless and until prior EC and CRZ Clearance is granted, simply by taking into consideration of various communications between the parties, one cannot presume that there is already a Clearance and therefore, the claim of the applicant in respect of the landing place

alone should be considered. Such a view will be anti thesis and to the environmental law, as liberty is to be given to the authority to decide the issue with independent and free mind.

23. The formulation of the CRZ Notification, 2011 from 6th January, 2011 has no doubt superseded the CRZ Notification, 1991, except in respect of things done or omitted to be done before such supersession. The operative portion of such exercise of powers by the Government of India as per the provisions of the Environment (Protection) Act 1986 states as follows:

> "In exercise of powers also conferred by clause (d) and sub rule (3) of rule 5 of Environment (Protection) Act 1986 and in supersession of the notification of the Government of India in the Ministry of Environment and Forests, number S.O. 114 (E) dated the 19th February, 1991 except as respects things done or omitted to be done before such supersession, the Central Government hereby declares the following areas as CRZ and imposes with effect from the date of the notification the following restrictions on the setting up and expansion of industries, operations or processes and the like in the CRZ."

It means, in our considered view in respect of the CRZ Clearance already granted under CRZ Notification, 1991 cannot be reopened and set aside by virtue of the CRZ Notification, 2011 and in cases where CRZ Clearance was rejected under CRZ Notification, 1991 cannot be reopened and considered as per the CRZ Notification, 2011. The applicant's case is not covered under either of these categories. Merely because an application filed under CRZ Notification, 1991 was in existence, there is no enabling provision under CRZ Notification, 2011 that such pending applications should be either continued and treated as applications filed under CRZ Notification, 2011. The revised proposal given by the applicant on 26.8.2010 restricting it to the landing/connection of proposed Yasoram Flyover Skycity was no doubt before the CRZ Notification, 2011 came into existence and the High Court in the subsequent order dated 31.7.2014 in W.P.(C). No.6382 of 2014 filed by the applicant herein, has directed the authority to consider the said application in the form of a revised proposal and not as an application under CRZ Notification, 2011, even though that was the specific case of the applicant, as seen in paragraph 3 of the judgement in WP.(C).No.6382 of 2014 which reads as follows:

> "On behalf of the first respondent, a counter affidavit has been filed. It is stated in the counter affidavit that the petitioner has to make a fresh

> application in terms of the Coastal Zone Regulations (CRZ) Notification 2011. However, the petitioner points out that the application that is pending before the first respondent, is filed before the CRZ Notification, 2011 came into force and, therefore, his application has to be considered in terms of the regulations that were existing at the time of filing of the application."

24. The Hon'ble High Court in the latest writ petition filed by the applicant, without any reference to the contention made on behalf of the present applicant that the revised proposal should be treated as a proposal under CRZ Notification, 1991, has only directed the 1st respondent to consider the said proposal dated 26.8.2010 in the light of the judgments of the High Court dated 5.8.2010 in W.P.(C).No.34311 of 2009 and the order dated 21.12.2010 passed in R.P.1136 of 2010 in W.P.(C).No.34311 of 2009 and pass appropriate orders. As we have already extracted the operative portion of the judgments/orders passed by the High Court of Kerala earlier, there is absolutely no order of the Hon'ble High Court directing the 1st respondent to consider the proposal made by the applicant on 26.8.2010 in accordance with CRZ Notification, 1991. Even otherwise, in the absence of any such enabling provision in the CRZ Notification, 2011, directing the authorities to consider the application filed before 6.2.2011 under the provisions of the superseded CRZ Notification, 1991, there cannot be any such direction against the statutory provision. It is relevant to extract the operative portion of the judgment of the Hon'ble High Court in W.P.(C).No.6382 of 2014 which states as follows:

> "I am a of the view, since Ext.P5 application is pending, necessarily, the authority which has to deal with Ext.P5 has to take a decision on such application with reference to the directions of this court in Exts.P4 and P9. It is open to such appropriate authority to take a decision as per law. Therefore, there will be a direction to the first respondent to consider Ext.P5 application in the light of Exts.P4 and P9 and pass appropriate orders within a period of two months after affording an opportunity of hearing to the petitioner."

25. Therefore, in our considered view, it cannot be presumed that a major portion of the project has been approved under CRZ Notification, 1991, in the absence of any clearance granted by the authority to that effect. It is also not in dispute that admittedly prior EC has not been granted by the MoEF & CC for the project so far. In such circumstances, the contention raised by the learned counsel appearing for the applicant that the impugned order of the first respondent dated 19.12.2014 is liable to be set aside on the ground that the proposal was not

considered under CRZ Notification, 1991, is not sustainable. Therefore, in our view, the application or proposal of the applicant, even if it was made before the CRZ Notification, 2011 came into existence, after supersession of the CRZ Notification, 1991 cannot be considered under CRZ Notification, 1991 and the applicant has to make a fresh application, as per CRZ Notification, 2011.

26. CRZ Notification, 2011 makes certain activities as prohibited within Coastal Regulation Zone. Clause 3 of the CRZ Notification, 2011 which is as follows:

> 3. Prohibited activities within CRZ: The following are declared as prohibited activities within the CRZ:
>
> i) Setting up of new industries and expansion of existing industries except:
>
> a) those directly related to waterfront or directly needing foreshore facilities;
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> Explanation: The expression "foreshore facilities means those activities permissible under this notification and they require waterfront for their operations such as ports and harbours, jetties, quays, wharves, erosion control measures, breakwaters, pipelines, lighthouses, navigational safety facilities, coastal police stations and the like
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> b) projects of Department of Atomic Energy;
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> c) facilities for generating power by non-conventional energy sources and setting up of desalination plants in the areas not classified as CRZ –I (i) based on an impact assessment study including social impacts:
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> d) development of green field Airport already permitted only at Navi Mumbai:
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> e) reconstruction, repair works of dwelling units of local communities especially fisher folk in accordance with local town and country planning regulations.
>
> ii) manufacture or handling oil storage or disposal of hazardous substance as specified in the notification of Ministry of Environment and Forests, No.S.O.594 (E) dated the 28th July, 1989, S.O.No.966 (E) dated the 27th November 1989 and GSR 1037 (E) dated the 5th December, 1989 except:-
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> a) Transfer of hazardous substances from ships to ports, terminals and refineries and vice versa;
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> b) Facilities for receipt and storage of petroleum products and liquefied natural gas as specified in Annexure II appended to this notification and facilities for reclassification of Liquefied Natural Gas (hereinafter referred to as the LNG) in the areas not classified as CRZ-I (i) subject to implementation of safety regulations including guidelines issued by the Oil Industry Safety Directorate in the Ministry of Petroleum and Natural Gas and guidelines issued by MoEF and subject to further terms and conditions for implementation of ameliorative and restorative measures in relation to environment as may be stipulated by in MoEF.
>
> Provided that facilities for receipt and storage of fertilizers and raw materials required for manufacture of fertilizers like ammonia, phosphoric acid, sulphuric acid, nitric acid and the like, shall be permitted within the said zone in the areas not classified as CRZ-I (A).
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> (iii) Setting up and expansion of fish processing units including warehousing except hatchery and natural fish drying in permitted areas:

(iv) Land reclamation, bunding or disturbing the natural course of seawater except those:-

(a) Required for setting up, construction or modernisation or expansion of foreshore facilities like ports, harbours, jetties, wharves, quays, slipways, bridges, sealink, road on stilts, and such as meant for defence and security purpose and for other facilities that are essential for activities permissible under the notification;

(b) Measures for control of erosion, based on scientific including Environmental Impact Assessment (hereinafter referred to as the EIA) studies;

(c) Maintenance or clearing of waterways, channels and ports, based on EIA studies;

(d) Measures to prevent sand bars, installation of tidal regulators, laying of storm water drains or for structures for prevention of salinity ingress and freshwater recharge based on carried out by any agency to be specified by MoEF.

(v) Setting up and expansion of units or mechanism for disposal of wastes and effluents except facilities required for:-

(a) discharging treated effluents into the water course with approval under the Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974);

(b) storm water drains and ancillary structures for pumping.

(c) treatment of waste and effluents arising from hotels, beach resorts and human settlements located in CRZ areas other than CRZ-I and disposal of treated wastes and effluents.

(vi) Discharge of untreated waste and effluents from industries, cities or towns and other human settlements. The concerned authorities shall implement schemes for phasing out existing discharge of this nature, if any, within a time period not exceeding two years from the date of issue of this notification.

(vii) Dumping of city or town wastes including construction debris, industrial solid wastes, fly ash for the purpose of land filling and the like and the concerned authority shall implement schemes for phasing out any existing practice, (and collection of dead shells by the traditional communities for poultry and animal feed supplements) within a period of one year from date of commencement of this notification.

Note:- The MoEF will issue a separate instruction to the State Governments and Union Territory Administration in respect of preparation of Action Plans and their implementation as also monitoring including the time schedule thereof, in respect of paras (v), (vi) and (vii).

(viii) Port and harbour projects in high eroding stretches of the coast, except those projects classified as strategic and defence related in terms of EIA notification, 2006 identified by MoEF based on scientific studies and in consultation with the State Government or the Union territory Administration.

(ix) *Reclamation for commercial purposes such as shopping and housing complexes, hotels and entertainment activities.*

(x) Mining of Sand, rocks and other sub-strata materials except,

(a) those rare minerals not available outside the CRZ area,

(b) exploration and exploitation of Oil and Natural Gas.

(xi) Drawl of ground water and construction related thereto, within 200 mts of HTL; except the following:

(a) In the areas which are inhabited by the local communities and only for their use.

(b) In the area between 200 mts – 500 mts zone the drawl of ground water shall be permitted only when done manually through ordinary wells for drinking, horticulture, agriculture and fisheries and where no other source of water is available.

Note: Restrictions for such drawl may be imposed by the Authority designated by the State Government and Union territory Administration in the areas affected by sea water intrusion.

(xii) Construction activities in CRZ-I except those specified in para 8 of this notification.

(xiii) Dressing or altering the sand dunes, hills, natural features including landscape changes for beautification, recreation and other such purpose.

(xiv) Except facilities required for patrolling and vigilance activities of marine/coastal police stations.

(Emphasis ours)

Among the said prohibited activities, reclamation for commercial purposes such as shopping and housing complexes, hotel and entertainment activities are prohibited in the Coastal Regulation Zone. The mere submission of CZMP by the respective States to the Government of India, as it is seen in Clause 5 of the CRZ Notification, 2011, even if such submission was made by the State to the Government of India before CRZ Notification, 2011, does not, in our considered view, confer any right on the part of the applicant, whose activities are prohibited under the CRZ Notification, 2011.

27. Even though it is stated that the proposal of the applicant as a whole falls under the CRZ – IV category and that the commercial activity is prohibited, it is true that the impugned order of the 1st respondent has not dealt with that aspect. In the impugned order, which is cryptic in nature and not in detail, it appears that the 1st respondent , in order to comply with the direction issued by the High Court in W.P.(C).No.6382 of 2014, has passed a hurried order, taking note of Clause 3 of the CRZ Notification, 2011 alone. It is true that the impugned order do not relate to the original proposal made by the applicant in accordance with the order of Government of Kerala, passed in G.O.(Ms).No.228/228/2011/1D Industries (B) Department, dated 9.12.2011 and as it is revealed in the 52nd meeting of EAC dated 19th to 22nd November, 2007 wherein a recommendation for the issuance of EC, subject to compliance of certain conditions, have not been dealt with by the 1st respondent.

But that itself does not, in our considered view, make the impugned order invalid in the light of the prohibitive clause in the CRZ Notification, 2011 viz., Clause 3(ix).

28. In so far as it relates to the contention pertaining to the Official Memorandum dated 8.2.2011, the Official Memorandum only explains the legal position, as we have already stated. On the facts of the present case, the proposal of the applicant, either it is the original proposal or revised proposal dated 26.8.2010, after the judgment of the High Court of Kerala on 5.8.2010, can be considered only as a proposal under CRZ Notification, 2011, on a proper application. In the absence of any CRZ Clearance granted earlier, in our view, the Official Memorandum cannot be said to be in derogation or over reaching the statutory provisions of the CRZ Notification, 2011. Further, the said Official Memorandum only states the legal position that after the decision taken by CRZ Authorities under the CRZ Notification, 2011 the matter will be referred to the MoEF & CC for EC, after following the provisions of the EIA Notification, 2006. Therefore, there is no necessity to declare that the said Official Memorandum is against the statutory regulation. In such view of the matter, the law laid down by the Hon'ble Apex Court in GULF OF GOONS HOTELS V. UNION OF INDIA (2014) 10 SCC 673 is not applicable to the facts of the present case.

For the reasons stated above and looking into the issue in all angles, we are of the considered view that the relief claimed in the applicantion cannot be granted. Accordingly, the application fails and the same stands dismissed. There is no order as to cost.

12.5.2016

Justice Dr.P. Jyothimani
Judicial Member

Shri. P.S. Rao
Expert Member