BEFORE THE NATIONAL GREEN TRIBUNAL
(WESTERN ZONE) BENCH, PUNE

REVIEW APPLICATION NO. 35 OF 2016

IN

ORIGINAL APPLICATION NO. 184 OF 2015

CORAM:

HON'BLE MR. JUSTICE U.D. SALVI
(JUDICIAL MEMBER)

HON'BLE DR. NAGIN NANDA
(EXPERT MEMBER)

MR. TANAJI BALASAHEB GAMBHIRE,
Age : Adult, Occupation : Service,
R/o. Flat No.16, Cts. 296, Laxmi Apartment,
Near Shivaji Maratha High School,
White House Lane, ShukrawarPeth,
Pune 411 002.

Review Applicant

VERSUS

1. **UNION OF INDIA**
   Through: Secretary,
   Ministry of Environment and Forest
   Paryavaran Bhavan, CGO Complex,
   Lodhi Road, New Delhi 110 001

2. **THE PRINCIPAL SECRETARY,**
   ENVIRONMENT DEPARTMENT,
   Govt. of Maharashtra, 15th floor,
   New Administrative Building,
   Mantralaya, Mumbai 400 032

3. **STATE LEVEL ENVIRONMENT IMPACT ASSESSMENT AUTHORITY,**
   Through : Member Secretary,
   15th floor, New Administrative Building,
   Mantralaya, Mumbai 400 032.

4. **MAHARASHTRA POLLUTION CONTROL BOARD**
   Through Member Secretary,
   Kalpataru Point, 3rd floor, Near Sion Circle,
   Opp. Cine Planet, Cinema Sion (e), Mumbai

5. **MAHARASHTRA POLLUTION CONTROL BOARD,**
   Through Regional Officer, Sro-1
   Jog Centre, 3rd floor, Mumbai-Pune Road,
   Wakadewadi, Pune 411 003.

6. **PUNE MUNICIPAL COMMISSIONEER,**
   PMC Building, Shivajinagar,
   Pune 411 005.

7. **CITY ENGINEER,**
   Pune Municipal Corporation,
   PMC Building, Shivajinagar,
   Pune 411 005.

8. **DISTRICT COLLECTOR, PUNE**
   President District Environment Committee,
   Pune.

9. **M/S. GOEL GANGA DEVELOPERS INDIA PVT LTD**.
   3rd Floor, San Mahu Complex,
   Opp. Poona Club, 5, Bund Garden,
   Pune 411 001.

.....**RESPONDENTS**

Counsel for Applicant(s):
Mrs. Rashmi ShriramPingle, Advocate

Counsel for Respondent(s):
Mr. Milind M. Mahajan for Respondent No.1
Mr. D.M. Gupte, Mr. R.B.Mahabal, Ms. SupriyaDangare for Respondent Nos.2 and 3.
Mr. S.K. Jain, Sr. Advocate a/w Ms. S.P. Kinkar, Mr. R.N. Umarani and Mr. Rishub Mehta for Respondent No.9

Date – 8th January, 2018

JUDGMENT / ORDER

1.One Tanaji Gambhire, Applicant in Original Application No.184/2015 is seeking Review of the Judgment and Order dated 27th September 2016 passed in the said Application.

2.Original Application No.184/2015 was moved for seeking directions to the Respondents therein to demolish the illegal structures constructed by the Respondent No.9 M/s. Goel Ganga Developers India Pvt. Ltd. therein at Survey No.35 to 40 of village Wadgaon Bk. Sinhagad Road, Pune on account of several infractions of Law including Environment Clearance Regulations, 2006, and inter-alia for payment of damages/environmental compensation.

3. After hearing the parties, this Tribunal declined to demolish the structures in question but taking cognizance of its adverse impact on the environment directed the Respondent No.9- M/s. Goel Ganga

Developers India Pvt. Ltd. to pay environmental compensation of Rs.100 Crores or 5 % (five percent) of the total cost of the project to be assessed by SEAC, whichever being less, for restoration and restitution of environment damage and degradation caused by the construction activities carried out by the project proponent, and in addition to pay sum of Rs.5 Crores for contravening several environmental laws in carrying out the construction activities including exceeding the limits of available Environment Clearance without obtaining the consent from the both. It is this decision which the Review Applicant implores us to revisit and review the same for the reason of the error apparent on the face of record having crept in the said decision.

4. The Review Applicant submits that this Tribunal failed to consider:

1. Illegal Reduction in Cultural Centre Reservation Area due to encroachment of Tower Buildings A & B on Reserved Plot admeasuring 2250 sq.mts.

2. Construction of three basements without obtaining EC.

3. Utilization of excess FSI.

4. Suppression of Reservation for primary school in the lay out.

5.Violation of EC conditions dated 4th April 2008.

6. Illegal construction of shops and commercial premises.

and erroneously declined to direct demolition of the illegal constructions. The Review Applicant further submits that the Tribunal erred in imposing trivial amount of environmental compensation totally ignoring the unrebutted affidavit dated 18th May 2016 of the Applicant giving scientific basis for proper quantification of the environmental compensation due in the present case.

5.Perusal of the Judgment and order in question reveals that this Tribunal after having noticed misleading statements of Respondent No.9 M/s. Goel Ganga Developers Pvt. Ltd. and Dy. Engineer of Pune Municipal Corporation devised to paint wrong picture of the project-- firstly, to suppress deviation and secondly, to create ambiguity of FSI and BUA to help the Respondent No.9 M/s.Goel Ganga Developers to obtain convenient orders from other authorities clearly recorded its observations in following words :

> ***38.*** *We are, therefore clear in our mind that Applicant has substantiated that the original project conceived by Respondent No.9-PP had to confine to what was sanctioned under the EC dated 4th April,2008 and any extra construction or increase in building, plinth commercial structures, shops and flats should have support of modified EC. As of now, since no modified*

EC has been granted, the extent of project activity cannot increase beyond the limit circumscribed by EC dated 4th April, 2008. Any such activity or construction beyond permissible limits cannot be saved by jugglery of words, misinterpreting against the statutory definition of F.S.I. and BUA.

6. This Tribunal further held that the construction activity of Respondent No.9-project proponent to the extent it exceeds the permissible limits as per Environment Clearance cannot be saved and shall stop subject to the grant of modified EC by the Competent Authority; and the consequence of such contravention and illegal construction would be adverse on the environment and it would ultimately lead to several incidental causes of action, if the Respondent No.9 was allowed to continue the illegal activity. In this backdrop, however, this Tribunal declined to demolish the structures in question for the reasons recorded in para Nos.46 and 51 in the judgment and quoted herein below for ready reference:

"46. *It is now a matter of record that the construction of the project in question is near completion and even the occupancy certificate is granted partially. We need to consider the fact that the project in question is primarily a residential project and many individuals have invested their money in the project for meeting need for residential accommodation by having a house in city like Pune. Any order to demolish structure would also adversely*

affect them. The Respondent-9 has already created 3rd party rights. Though the Respondent-9 has blatantly violated the conditions of EC, we also note the total lack of supervision and enforcement at PMC level has resulted in such illegal activity.

51. *We are also inclined to adopt the approach taken by the Bench in the interest of justice and fair play and based on the facts and circumstances of the case. The construction activity is not a prohibited activity in the subject, but a regulated activity. We also take a judicial note of the fact that the demolition of structures in question would also result in further environmental damage and generation of construction waste. Other option which could have been explored is asking the government to take over the additional construction and use it for public purpose but as noted above, already third party rights have been created, may be partially."*

7. Mindful of the provision in Section 20 of the National Green Tribunal Act, 2010 guiding the course of decision making with the application of Principles of Sustainable Development, Precautionary Principle and Polluter Pays Principle and conscious of the care necessary to avoid misconstruction of 'Polluter Pays Principle' as 'Pay and Pollute Principle', the Tribunal found the imposition of exemplary and deterrent environmental compensation to be just and necessary to pass "a clear message that environmental compliance is supreme and the party which is non-complying the

environmental standards shall be at economic disadvantage". (para 47 of the Judgment).

8. Both the Review Applicant and the Respondent Nos.2, 3 and 9 have filed written submissions countering each other on the merits and demerits of the Review Application. Learned counsel appearing on behalf of the Respondent No.2-Environment Department, Govt. of Maharashtra and Respondent No.3 SEIAA questioned the mode of quantification of environmental compensation through computation of Carbon Foot Print on the premise that it nowhere finds place in EIA Manual, Terms Reference, Environment Clearance Regulations, 2006 and amendments thereto, Environment (Protection) Act, 1986, National Green Tribunal, 2010 or Rules framed thereunder and it is not scientifically tenable. Citing common judgment dated 2nd August, 2017 delivered by Hon'ble Supreme Court of India in ***"Writ Petition (Civil) No.114/2014; Common Cause Vrs. Union of India and Ors"., and "Writ Petition (Civil) No.194/201; Prafulla Samantra Vrs. Union of India and Ors"*** discussing the issue of damages on environment, learned counsel Mr. R.B. Mahabal, appearing on behalf of Respondent Nos.2 and 3 submitted that nowhere the concept of Carbon Foot Print has been mentioned. Learned counsel appearing on behalf of Respondent No.3 M/s. Goel Ganga Developers,

besides questioning the propriety of applying concept of Carbon Foot Print to the quantification of environmental compensation in the matter of construction carried out beyond what have been permissible under the environmental clearance on the identical grounds as those propounded by the Respondent Nos.2 and 3,reminded us of the limitations of Review jurisdiction and the procedural lapses the Review Applicant had committed in raising the plea for the application of concept of 'Carbon Foot Print' in the matter of quantification of environmental compensation in the present case.

9. Learned counsel appearing on behalf of Respondent No.9 pointed out that the Tribunal had declined to pass the directions for demolition of construction for the reasons, more particularly stated in para Nos.46 and 51 of the judgment dated 27th September 2016,after giving due consideration to all facts and application on record. Reading of the judgment dated 27th September 2016 reveals that the Tribunal took into consideration the fact situation and considered the comparative harm, both to the individuals seeking residential accommodation in the said project and to the environment in terms of multiple compounding of the environmental damage due to generation of construction waste upon the demolition of the construction in

question, and the fact that the construction activity is not prohibited activity but regulated activity. In our considered opinion, there is no mistake or error apparent on the face of the record nor any other sufficient reason to depart from the view expressed by the Bench for declining the plea for issuance of directions to demolish the structures in question. To take a view in favour of the plea for demolition, one will have to exceed the limitations of Order 47 Rule 1 of Code of Civil Procedure, 1908 read with Section 94(f) of the National Green Tribunal Act, 2010. However, as regards quantification of Environmental Compensation, the judgment dated 27th September 2016 has left enough room to raise a contention that certain material and relevant facts on record were not at all considered resulting in the mistake or error apparent on the face of the record. No wherein the Judgment under review we find mention of the affidavit dated 18th May 2016 voicing the concept of Carbon Foot Print. Straightaway, despite favourably considering the need for imposing exemplary and deterrent environmental compensation, the Tribunal without bothering to consider the concept of the 'Carbon Foot Print' proceeded to toe line of the judgment passed by the Principal Bench of this Tribunal in "***O.A. No. 24/2011, Sameer Mehta vrs. Union of India and Ors***"

giving goby to computation of damages with some amount of exactitude.

10. It appears from the reading of the said judgment delivered in 'Samir Mehta's case' and the parent judgment delivered in "***Sterlite Industries India Ltd." Case (Sterlite Industries India Ltd. Vrs. Union of India; 2013(4) SCC. 575*****)** generating thesis of notional damages based on 5 % of capital cost that there was no enough material on record to enable computation of environmental damages with exactitude. However, in the instant case the record does show affidavit dated 18th May 2016, which remained un-rebutted in its contents and unnoticed by the Bench, giving view of the mode of computation of environmental compensation with some exactitude on the basis of available data and upon application of the concept of Carbon Foot Print. We are, therefore, obliged to examine its worth in order to assess whether any mistake or error apparent on the face of record has crept in the judgment under Review on account of such affidavit dated 18th May 2016 having been left unnoticed.

11. One of the exception taken to the affidavit dated 18th May 2016 is that it cannot be taken into consideration as there are no substantial pleadings in the Orig. Application and there is non-compliance of Rules 8(1) and 12 of the National Green Tribunal (Practice and

Procedure) Rules 2011. These Rules have been framed by the Central Government in exercise of powers conferred by Section 4 read with Section 35 of the National Green Tribunal Act, 2010 for carrying out the provisions of the said Act enacted for effective and expeditious disposal of cases relating to Environmental Protection and Conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and properties. Rule 8(1) of the National Green Tribunal Rules, 2011, requires the Application for relief and compensation to be made in Form No.II and Rule 12 prescribes fee of equivalent to 1 (one) per cent of amount of compensation claimed subject to minimum of Rs.1000/-. Perusal of O.A. No. 184/2015 reveals that the Applicant without quoting the amount of environmental compensation simply prayed for the following directions:

> **"E.** Having regard to the damage to the public health, property and environment, principles of sustainable development and polluter pays principles and direct the Respondent No.9 to deposit a heavy amount of compensation to the environment relief fund."

and exhaustively quoted the violations of Law including the violation of enactments specified in Schedule 1 of the National Green Tribunal Act, 2010.

The unspecified claim for environmental compensation was made vis-a-vis the injury sustained by the environment on account of the various violations of Law as quoted in the Application. Substantially, therefore, we find facts needed to be pleaded in the Application as per Form II prescribed under National Green Tribunal Rules 2011 in the Application. No Court fees on the unspecified environmental compensation claimed, in our considered view, are payable, more so as the Applicant is not claiming any compensation for himself. Moreover, Section 19 of the National Green Tribunal Act, 2010 gives freedom to the Tribunal to regulate its own procedure subject, however, to the observance of the Principles of Natural Justice. In the instant case, the record reveals that the exhaustive affidavit dated 18th May 2016 was placed on record with opportunity to the contending parties to rebut it. However, the contending parties including the Respondent no.9 did not rebut it with any cogent material and through their submissions made before the Tribunal.

12. It can therefore be clearly seen that the Tribunal ignored the vital material on record and proceeded to pass the following direction:

> *"1. The Respondent No.9-PP shall pay environmental compensation cost of Rs.100 crores or 5 % (Five percent) of the total cost of project to be assessed by SEAC whichever is less for restoration and restitution of environment damages and degradation caused by the*

project proponent by carrying out the construction activities without the necessary prior environmental clearance within a period of one month. In addition to this, it shall also pay a sum of Rs. 5 crores for contravening mandatory provision of several Environment Laws in carrying out the construction activities in addition to and exceeding limit of the available environment clearance and for not obtaining the consent from the Board."

This direction, with respect, is patently erroneous for two reasons. Firstly, the Tribunal having come to the conclusion that the project proponent needs to be saddled with exemplary and deterrent compensation (paragraph No.47 of the Judgment) yet had leaned towards soft approach in imposing the compensation either amounting to Rs.100 Crores or 5% of the total cost of the project to be assessed by SEAC whichever is less. To say the least, if the amount assessed is less than Rs.100 Crores then it will amount to taking a soft approach contrary to the judicially accepted view to impose exemplary and deterrent environmental compensation which has to be more than the estimated one. Secondly, the word of the Hon'ble Supreme Court of India is Law of the Land and if 5% of the total cost of the project happens to be assessed more than Rs.100 Crores by SEAC, even then by virtue of the direction passed by the Tribunal the compensation of Rs.100 Crores being lower than the one as computed in terms of the Judgment of the Hon'ble Supreme Court of India will be payable. This is undermining the rigour of Law of the Land.

13. Commentary on the Law of Tort by Ratanlal and Dhirajlal 27th Edition classifies the damage for the wrong done in four kinds – (i) Contemptuous (ii) Nominal (iii) Ordinary and (iv) Exemplary. Page 205 of the said Commentary sheds light on the concept of "Exemplary Damages" in following terms:

> **EXEMPLARY DAMAGES** are awarded not to compensate the plaintiff but to punish the defendant and to deter him from similar conduct in future. The House of Lords has ruled that exemplary damages can be allowed in three categories of cases. The first category is oppressive, arbitrary or unconstitutional action of the Government or its servants. Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. Third category consists of cases in which exemplary damages are expressly authorized by statute.

14. In this backdrop, it would have been prudent to consider the approach of quantifying the environmental compensation as suggested in the Affidavit dated 18th May, 2016 filed by the Applicant, particularly when the amount of Rs.100crs.compensation suffers from vice of arbitrariness.

15. It is true that the concept of "Carbon Foot Print" does not find place in EIA Manual, MoEF/SEIAA Guidelines for presentation of standard terms of reference, Environment (Protection) Act, 1986 and Rules framed thereunder, Environment Clearance Regulations, 2006 and amendments thereto and National Green

Tribunal Act, 2010 and Rules framed thereunder, but this does not *per se* lessen its importance in computation of environmental compensation without giving thought to its scientific merits. Admittedly it is equivalent to Carbon-di-oxide units which are added to the environment in the process of releasing the energy necessary for production of the material used in development. In the instant case, the Tribunal came to the conclusion while passing the Judgment dated 27th September, 2016 that the project proponent raised illegal construction beyond the permissible limits circumscribed by the EC dated 4th April, 2008. Evidently the energy was spent with a corresponding burden on the environment in form of CO_2 emissions for raising illegal construction beyond the permissible limits prescribed by law besides putting burden on natural resources. This, therefore, could have been a just measure for quantifying the loss sustained by the environment in terms of undue burden cast upon it due to CO_2 emissions. Scientifically, this concept therefore cannot be faulted and can be one of the measures for quantifying the environmental compensation/damages eschewing the ignorance cast upon everybody due to its absence from legal texts.

16. Affidavit dated 18th May, 2016 deals with the project in question phase-wise and makes reference to the construction on Plot Nos.1 and 2 respectively. It gives

total damages with reference to these phases in following terms:

Total Damages

Plot No.1 Damages	**149.17 Crores**
Plot No.2 Damages	**40.86 Crores**
Total Damages	**190.03 Crores**

17. Learned Counsel appearing on behalf of Respondent No.9 – Project Proponent could not point out any mathematical mistake/error either in computation of the quantities of the material used for construction for Phase-I and/or in arriving at the quantum of damages therefrom as revealed in the Affidavit dated 18th May, 2016. He contends that the Review Applicant resorted to method of computation of the damages as suggested by the Hon'ble Supreme Court of India i.e. 5% of the value of the construction/project as regards the development of Plot No.2 and did not adopt the same approach while computing the damages as regards the construction of Plot No.1.

18. Learned Counsel appearing on behalf of Review Applicant countered these submissions. He submitted that exception in application of concept of Carbon Foot Print as regards the development on Plot No.2 was made as the development of Plot No.2 is/was not complete and is/was in "intermediate stage" and, therefore the

Applicant had no sufficient data to calculate the carbon emission/footprint. The record justifies his explanation and, therefore, it does not lie in the mouth of the Respondent No.9 – Project Proponent that the Applicant has not explained the computation of damages as regards Phase-II with application of the concept of 5% of the project cost and not the concept of 'Carbon Foot Print'.

19. As observed hereinabove, nothing concrete has been put forth to demonstrate any flaw in the application of concept of 'Carbon Foot Print' for calculating the environmental compensation with reasonable amount of exactitude. If choice has to be made between notional and reasonable in order to give what is due to the environment and be just, the choice must fall in favour of reasonable and not notional.

20. Learned Counsel appearing on behalf of Respondent No.9 – M/s Goel Ganga Construction cited Judgment of the Hon'ble Supreme Court of India reported in ***AIR 1960 Supreme Court 137; Satyanarayan Vs. Mallikarjun*** and of the Hon'ble Bombay High Court reported in ***2009(4) Bom CR 653; The Executive Engineer, Lower Wana Project Division Vs Vasant Nattuji Kosare and The Member, Industrial Court*** and of our Principal Bench in ***Review Application No.32/2015 arising in O.A. No.179/2014 Social Action for Forest and Environment (SAFE) Vs. Union of India and 5 Ors.*** All

these Judgments singularly guide Reviewing Courts to limit the exercise of review powers to correct the error/mistake apparent on the face of the record and not simply to correct the erroneous judgment. There can be no two opinions about this *Rationale* expounding the law spelt out in Order XLVII Rule 1 of the Code of Civil Procedure, 1908 which governs the Tribunal like any other Civil Court in view of Section 19(4)(f) of the National Green Tribunal Act, 2010. However, the aforesaid discussion clearly reveals that the error apparent on the face of the record did creep in the judgment and there is need to correct it. We, therefore, pass the following order:

The Direction No.1in the Judgement dt.27th September 2016 passed inO.A.no.184 of 2015 is modified, other directions remaining the same, and shall be read as:

> "1. The Respondent No.9-PP shall pay environmental compensation cost of Rs.190 crores or 5 % (Five percent) of the total cost of project to be assessed by SEAC, whichever is more, for restoration and restitution of environment damage and degradation caused by the project proponent by carrying out the construction activities without the necessary prior environmental clearance within a period of one month. In addition to this, it shall also pay a sum of Rs. 5 crores for contravening mandatory provision of several Environment Laws in carrying out the construction activities in addition to and exceeding limit of the available environment clearance and for not obtaining the consent from the Board."

Review Application No.35/2016 stands disposed off accordingly.

---------- JM
(Justice U.D. Salvi)

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(Dr. Nagin Nanda)

Date : 8th January, 2018.
ajp