2025 INSC 1326

REPORTABLE

IN THE SUPREME COURT OF INDIA
INHERENT/ORIGINAL JURISDICTION

REVIEW PETITION (C) NO. OF 2025
DIARY NO. 41929 OF 2025

IN

WRIT PETITION (C) NO.1394 OF 2023

CONFEDERATION OF REAL ESTATE DEVELOPERS OF INDIA (CREDAI) ...PETITIONER

VERSUS

VANASHAKTI AND ANOTHER ...RESPONDENTS

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J U D G M E N T

B.R. GAVAI, CJI

I. INTRODUCTION

1. By way of the present review petition, the petitioner seeks recall of the judgment and final order dated 16th May 2025 passed by this Court in the case of ***Vanashakti v. Union of India***[1].

2. Though certain other review petitions, including the one filed by the Union of India, and various Interlocutory Applications (IAs) for modification/clarification of **JUR** are pending, it was decided that the lead review petition *i.e.*, the present one would be heard first and that after the outcome of this review petition, rest of the applications would be considered. We have, however, also heard learned counsel for the other review petitioners and the learned counsel for those who have filed applications for modification/clarification of the **JUR**.

3. Vide **JUR,** this Court has directed thus:

> "**35.** We are, however, conscious of the fact that *ex post facto* EC may have been granted in certain cases both under the 2017 notification and the 2021 OM.

[1] **2025 SCC OnLine SC 1139, (Hereinafter, "JUR").**

ECs already granted under 2017 notification and the 2021 OM, at this stage, should not be disturbed.

36. Hence, we pass the following order:

a) We hold that the 2017 notification and the 2021 OM as well as all circulars/orders/OMs/notifications issued for giving effect to these notifications are illegal and are hereby struck down;

b) We restrain the Central Government from issuing circulars/orders/OMs/notifications providing for grant of *ex post* facto EC in any form or manner or for regularising the acts done in contravention of the EIA notification;

c) We clarify that the ECs already granted till date under the 2017 notification and the 2021 OM shall, however, remain unaffected."

4. The facts giving rise to the present review petition are as under:

5. In pursuance of the powers conferred by sub-section (1) and clause (v) of sub-section (2) of Section 3 of the *Environment (Protection) Act, 1986*[2], read with clause (d) of sub-rule (3) of Rule 5 of the *Environment (Protection) Rules, 1986*[3], the Central Government through the erstwhile Ministry of Environment and Forest (now the Ministry of Environment, Forest and Climate Change[4]) issued a notification dated 14th September 2006 being the *Environment Impact Assessment*

[2] **Hereinafter, "EP Act".**
[3] **Hereinafter, "EP Rules".**
[4] **Hereinafter, "MoEF&CC".**

Notification 2006[5]. Vide the said notification, it was provided that the regulatory authority in respect of the matters falling under Category 'A' would be MoEF&CC and in respect of the matters falling under Category 'B', the State Government through the State Environment Impact Assessment Authority[6] would be the regulatory authority. In the Schedule to the 2006 Notification, Categories 'A' and 'B' listed out various projects.

6. On 14th March 2017, another notification came to be issued by the MoEF&CC[7]. The said notification was issued in order to provide a process for grant of Environmental Clearance[8] in respect of the projects, which had started the work on site, expanded the production beyond the limit of EC or changed the product mix without obtaining prior EC under the 2006 Notification.

7. The 2017 Notification, *in a nutshell*, enabled the regulatory authorities to grant EC in respect of the projects which did not have prior EC. The said notification provided that in cases of violation, an action would be taken against the project proponent(s) by the respective Central or State

[5] **Hereinafter, "2006 Notification".**
[6] **Hereinafter, "SEIAA".**
[7] **Hereinafter, "2017 Notification".**
[8] **Hereinafter, "EC".**

Pollution Control Board under Section 19 of the EP Act and that no consent to operate or occupancy certificate would be issued till the project is granted the EC. It provided that the cases of violation would be appraised by the respective Sector Expert Appraisal Committees[9] constituted by the Central Government under sub-section (3) of Section 3 of the EP Act. It further provided that the SEACs would examine as to whether under the prevailing laws, the project is permissible and expansion which has been done, can be run sustainably under compliance of environmental norms with adequate environmental safeguards. The said notification also clearly provided that where the findings of the SEACs are negative, closure of the project would be recommended along with other actions under law.

8. The 2017 Notification further provided that where the findings of the SEACs was in the affirmative, the projects would be prescribed the appropriate Terms of Reference for undertaking Environment Impact Assessment[10] and preparation of Environment Management Plan. It also

[9] **Hereinafter, "SEAC".**
[10] **Hereinafter, "EIA".**

provided that the SEACs would stipulate the implementation of Environmental Management Plan, comprising remediation plan and natural and community resource augmentation plan corresponding to the ecological damage assessed and economic benefit derived due to violation as a condition for the EC. It further provided that the projects or activities which were in violation as on the date of the said notification would only be eligible to apply for EC under the said notification. A window of six months from the date of the notification was also provided to make an application for EC under the said notification.

9. It appears that the National Green Tribunal[11], Principal Seat, New Delhi, in the case of ***Tanaji B. Gambhire v. Chief Secretary, Government of Maharashtra and Others[12],*** vide order dated 24th May 2021, *inter-alia* directed the MoEF&CC to prepare a proper Standard Operating Procedure[13] for grant of EC in cases of violation of environment norms. In pursuance to the said direction of the NGT, an Office Memorandum dated 7th July 2021[14] came to be issued by the MoEF&CC, whereby

[11] **Hereinafter, "NGT".**
[12] **Appeal No.34/2020 (WZ).**
[13] **Hereinafter, "SOP".**
[14] **Hereinafter, "2021 OM".**

the SOP for identification and handling of violation cases under the 2006 Notification was formulated.

10. It further appears that the 2017 Notification was challenged by way of a writ petition before the High Court of Judicature at Madras being WP No. 11189 of 2017 titled "***Puducherry Environment Protection Association v. Union of India***" which was decided vide judgment and final order dated 13th October 2017. It appears that in the said case a statement was made on behalf of the Union of India that the 2017 Notification was only a one-time measure. After recording the same, the High Court disposed of the said writ petition. It further appears that vide order dated 14th March 2018 passed by the High Court of Judicature at Madras in ***Appaswamy Real Estates Limited v. Puducherry Environment Protection Association and Another***[15], the time period under the 2017 Notification for submission of proposals by project proponents was extended by a further period of thirty days.

11. Thereafter, three writ petitions were filed before this Court. The first one being Writ Petition (C) No.1394 of 2023 for

[15] **2018 SCC OnLine Mad 1283**

quashing of the 2021 OM. A prayer was also made for issuing a writ of mandamus directing the MoEF&CC and SEIAA/SEACs not to process and entertain any application for *ex-post facto* EC after 13th May 2018.

12. The second writ petition being Writ Petition (C) No.118 of 2019 challenged the validity of the 2017 Notification issued by the MoEF&CC.

13. The third writ petition being Writ Petition (C) No.115 of 2024 challenged the validity of 2017 Notification and the 2021 OM.

14. In the meantime, the Madras High Court by a judgment and order dated 30th August 2024 in the case of ***Fatima v. Union of India***[16] quashed the 2021 OM and another OM dated 19th February 2021. By way of Civil Appeals No.381-382 of 2025, the said judgment was challenged before this Court by the original writ petitioner(s) on the ground that the High Court erred in holding that the said judgment would be applicable prospectively.

[16] **2024 SCC OnLine Mad 4514**

15. This Court, in **JUR**, after relying on the judgments of this Court in the cases of ***Common Cause v. Union of India and Others***[17], ***Alembic Pharmaceuticals Limited v. Rohit Prajapati and Others***[18] and ***Electrosteel Steels Limited v. Union of India and Others***[19], observed as under:

> "**27.** ……Perusal of the provisions of Section 15 shows that even if the penalty is paid by the project proponent, it will not regularise the project. **Therefore, even after the payment of penalty, if the project is under construction, the same has to be stopped and demolished and even if operation has already commenced, the same has to be stopped and demolished. Therefore, the construction work has to be demolished.**"
>
> [Emphasis supplied]

16. This Court, in **JUR**, in its ultimate conclusion, held that the 2017 Notification which permitted grant of ex-post facto EC and the 2021 OM were bad in law and therefore were quashed and set aside.

II. SUBMISSIONS

17. We have heard Shri Tushar Mehta, learned Solicitor General for the Union of India appearing for applicant-Steel Authority of India Limited (SAIL), Shri Kapil Sibal, learned Senior Counsel appearing for applicant-State of Karnataka

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[17] **(2017) 9 SCC 499**
[18] **(2020) 17 SCC 157**
[19] **(2023) 6 SCC 615**

and Shri Mukul Rohatgi appearing for Review Petitioner (CREDAI).

18. It is the contention of the learned Senior Counsel supporting the review petition that certain relevant paragraphs from the judgments in the cases of ***Common Cause*** (supra), ***Alembic Pharmaceuticals Limited*** (supra) and ***Electrosteel Steels Limited*** (supra) were not brought to the notice of this Court when the proceedings leading to **JUR** were heard. It is further submitted that in any case, the judgment in the cases of ***D. Swamy v. Karnataka State Pollution Control Board and Others***[20] and ***Pahwa Plastics Private Limited and Another v. Dastak NGO and Others***[21], were not brought to the notice of this Court. It is therefore submitted that the result is that **JUR** has taken a view which is not consistent with the judgments in the cases of ***Common Cause*** (supra), ***Alembic Pharmaceuticals Limited*** (supra) and ***Electrosteel Steels Limited*** (supra) and in any case, in ignorance of the judgment in the cases of ***D. Swamy*** (supra) and ***Pahwa Plastics Private Limited*** (supra).

[20] **(2023) 20 SCC 469**
[21] **(2023) 12 SCC 774**

19. It is submitted that even if two-Judges Bench while deciding the **JUR** was of the view that ***D. Swamy*** (supra) and ***Pahwa Plastics Private Limited*** (supra) do not lay down the correct position of law, then the only option available to the Bench was to refer the matter to a larger Bench.

20. Shri Tushar Mehta submitted that the project of SAIL, which was started on the basis of the 2021 OM had almost reached finality after complying with all the procedural requirements including the conduct of the EIA. It is submitted that the project was at the stage of grant of EC but on account of **JUR**, EC cannot be granted, thereby resulting in a huge loss to the public exchequer.

21. Shri Tushar Mehta further submitted that one of the other projects that would be affected by **JUR** is the construction of an AIIMS hospital building in the State of Orissa comprising of 962 beds. He submitted that in case of AIIMS the construction of the building is complete and all the procedural requirements including the conduct of EIAs have been completed and the project is at the final stage of grant of EC.

22. Shri Tushar Mehta further submitted that in any case though reliance is placed on the cases of ***Common Cause*** (supra), ***Alembic Pharmaceuticals Limited*** (supra) and ***Electrosteel Steels Limited*** (supra), if these judgments are read in entirety, the ratio of these judgments is otherwise than what has been held in the **JUR**. He therefore submitted that the error apparent on the face of the record warrants invocation of the inherent jurisdiction.

23. In support of the case of the review petitioner, Shri Kapil Sibal gave an example of a greenfield Airport at Vijayanagar in the State of Karnataka. He submitted that the construction of the entire Airport is completed; but on account of **JUR**, now the entire Airport will have to be demolished.

24. Shri Mukul Rohatgi submitted that in many cases, where the building and construction project was initially started, EC was not required inasmuch as the project was below the 20,000 sq. m. above which an EC is required. However, on account of subsequent developments, such as, the building regulations being amended allowing the project proponent additional built up area, the projects came in the category of projects which require an EC. It is submitted that,

in any event all such projects are otherwise permissible in law. It is therefore submitted that the effect of the **JUR** would be that the entirely completed project would be first demolished, thereafter the project proponent would apply for the EC and once EC is obtained, the project would be reconstructed all over again.

25. Shri Gopal Sankaranarayanan, Shri Sanjay Parikh and Shri Raju Ramachandran, Shri Anand Grover and Ms. Anitha Shenoy, learned Senior Counsel opposing the review petition submitted that the review petition itself is not maintainable. It is submitted that the review is almost in the nature of an appeal which is not permissible in law.

26. On merits, it is submitted that the 2017 Notification which provided for grant of ex-post facto EC was totally illegal and contrary to the environmental jurisprudence. It is submitted that, under the 2017 Notification, a one-time window of six months was granted and as such, after a period of six months from the date of the said notification had expired, no application for ex-post facto EC could have been granted. It is further submitted that the 2021 OM does not record source of power and as such, is not sustainable in law.

It is further submitted that if the project proponents knowing very well that they required ECs prior to the initiation of the project, have undertaken the projects without an EC, then they should suffer for such illegalities. It is further submitted that a party cannot be permitted to take advantage of the wrong committed by it. It is, therefore, submitted that the review deserves to be dismissed.

III. DISCUSSION AND ANALYSIS

27. It cannot be in dispute that under the powers conferred by clause (v) of sub-section (2) of Section 3 of the EP Act, the Central Government is empowered to issue notifications for restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards.

28. Undisputedly, 2006 Notification provided for imposing certain restrictions and prohibitions on new projects or activities, or on the expansion or modernization of existing projects or activities based on their potential environmental impacts as indicated in the Schedule to the notification, being undertaken in any part of India, unless prior EC has been

accorded in accordance with the objectives of National Environment Policy as approved by the Union Cabinet on 18th May 2006 and the procedure specified in the notification by the Central Government or the State or Union Territory Level Environment Impact Assessment Authority to be constituted by the Central Government in consultation with the State Government or the Union Territory Administration concerned complied with. The said notification was issued after a draft notification dated 15th September 2005 was made available to the public and objections and suggestions from all persons likely to be affected were invited. Only after the consideration of all the objections and suggestions received by the Central Government, was the 2006 Notification issued. The 2006 notification inter alia provided for requirement of a prior EC for new projects or activities as categorized in the Schedule to the said notification from the Central Government or as the case may be the SEIAA duly constituted by the Central Government, in accordance with the procedure specified in the said notification.

29. The 2017 Notification was again issued by exercising powers conferred by sub-section (1) and clause (v) of sub-

section (2) of Section 3 of the EP Act, read with sub-rule (3) of Rule 5 of the EP Rules. Prior to the said notification also, a draft notification was published on 10th May 2016. The said notification was made available to the public on 10th May 2016 and after considering all objections and suggestions received in response to the said draft notification, the final notification was issued on 14th March 2017.

30. The 2017 Notification noticed that the MoEF&CC had issued Office Memoranda dated 12th December 2012 and 27th June 2013 to establish a process for grant of EC in cases of violation of environmental norms. However, the conditions laid down under the OM dated 12th December 2012, in paragraph No. 5(i) and 5(ii) were held to be illegal by the judgment and order of the High Court of Jharkhand dated 28th November 2014 in the case of ***Hindustan Copper Limited v. Union of India***[22]**.** Similarly, the NGT vide its order dated 7th July 2015 in ***S.P. Muthuraman v. Union of India and Another***[23] had also held that the OMs dated 12th December 2012 and 27th

[22] **2014 SCC OnLine Jhar 2157**
[23] **2015 SCC OnLine NGT 169**

June 2013 could not alter or amend the provisions of the 2006 Notification and quashed the same.

31. The position being thus, the MoEF&CC deemed it necessary for the purpose of protecting and improving the quality of the environment and abating environmental pollution that all entities not complying with environmental regulation under the 2006 Notification be brought under compliance within the environmental laws.

32. The 2017 Notification, therefore, provided for establishing a process for appraisal of such cases of violation for prescribing adequate environmental safeguards to entities. It also provided that the process should be such that it deters violation of provisions of 2006 Notification and the pecuniary benefit of violation and damage to environment is adequately compensated for.

33. The 2017 Notification also noted the judgment and order of this Court in the case of ***Indian Council for Enviro-Legal Action and Others v. Union of India and Others***[24]

[24] **(1996) 3 SCC 212**

wherein it was held that damages may be recovered under the provisions of the EP Act.

34. The 2017 notification also provided that in cases of violation, action would be taken against the project proponent by the respective State or State Pollution Control Board under the provisions of Section 19 of the EP Act. It further provided that no consent to operate or occupancy certificate would be issued till the project is granted the EC. It further also provided that in cases where the project is not permissible under the prevailing laws or expansion has been done which is not permissible in law, such project will have to be closed. Only in such cases where the SEIAAs find the project to be permissible, the procedure for grant of EC would be undertaken.

35. It is further to be noted that subsequently the NGT vide order dated 24th May 2021 in the case of ***Tanaji B. Gambhire*** (supra) directed that "***a proper SOP be laid down for grant of EC in such cases so as to address the gaps in binding law and practice being currently followed***". The NGT also observed that the MoEF&CC may also consider circulating such SOPs to all SEIAAs in the country.

36. The 2021 OM specifically refers to the aforesaid direction of the NGT. It also considered various pronouncements of this Court as well as the High Courts of Jharkhand and Madras and provides for a SOP dealing with the violation cases.

37. The 2021 OM also provided that if a project is not permissible under the prevalent laws like "a red industry functioning in a CRZ-I area" it will have to be closed and demolished. It further provided that in case of a project which is otherwise permissible, such cases of violation shall be subject to appropriate - (a) Damage Assessment; (b) Remedial Plan; and (c) Community Augmentation Plan by Central level SEACs or SEIAAs, as the case may be. It further provided that after examining, if it is found that though the project may be permissible but not environmentally sustainable in its present form/configuration/features, then the project shall be required to be modified so that the project would be environmentally sustainable. However, if such a modification is not possible, the project would have to be demolished/closed. It further provided that if such a proposal was a case for expansion, the project would be directed to

revert back to the extent of activity for which EC had been granted earlier or to revert to the extent of activity for which EC was not required (as the case may be). It can also be seen that Clause 12 of the 2021 OM provides for huge penalties in cases of violation.

38. Having referred to the 2017 Notification and 2021 OM, let me consider the judgments on which the **JUR** relies.

a. Common Cause v. Union of India and Others

39. In the case of ***Common Cause*** (supra), the issue involved concerned mining leases in certain districts of Keonjhar, Sundergarh and Mayurbhanj in the State of Odisha. In that respect, the lessees had rapaciously mined iron ore and manganese ore thereby destroying the environment, forests and caused misery to the tribals in the area.

40. In the said case, it is recorded that an IA came to be filed in the pending writ petition of ***T.N. Godavarman Thirumulpad v. Union of India***[25] by one Rabi Das, the editor of a daily newspaper called *Ama Rajdhani*. This Court had issued notice on 6th November 2009 and the Central

[25] **I.A. Nos.2746-48 of 2009 in WP(C) No.202 of 1995.**

Empowered Committee[26] was directed to file its report within six weeks. Various orders came to be passed in the said application from time to time. The final report of the CEC was submitted on 25th April 2014 wherein one of the findings was with regard to production of iron ore and manganese ore without/in excess of the environmental clearance/mining plan/consent to operate. From the said case, it can be seen that independent to the proceedings before this Court, the Central Government had issued a notification on 22nd November 2010, whereby Justice M.B. Shah, a retired judge of this Cout was appointed to conduct an inquiry on various aspects of illegal mining. On the basis of the report filed by Justice M.B. Shah, a writ petition being WP(C) No. 114 of 2014 came to be filed by Common Cause seeking various reliefs.

41. This Court in ***Common Cause*** (supra) considered the effect of EIA Notification dated 27th January 1994[27] in paragraphs 85 to 108, wherein this Court categorically held that the said notification was mandatory in character and that it was applicable to all mining operations and expansion of

[26] **Hereinafter, "CEC".**
[27] **Hereinafter, "1994 Notification".**

production or even increase in lease area, modernisation of the extraction process, new mining projects and renewal of mining leases. Thereafter, this Court considered the effect of 2006 Notification in paragraphs 109 to 125.

42. Relying on paragraph 125 of ***Common Cause*** (supra), the **JUR** held that the concept of an ex post facto or a retrospective EC is completely alien to environmental jurisprudence including 1994 Notification and 2006 Notification.

43. In the case of ***Common Cause*** (supra), an argument was advanced by the learned counsel for the mining leaseholders that since many of them had been granted the first deemed statutory renewal of the mining lease under Rule 24-A of the Mineral Concession Rules, 1960, the requirements of 1994 Notification would not be applicable to them. The said contention was rejected by this Court holding that in view of the 1994 Notification, it was quite clear that the renewal of mining lease would require a prior EC. It will be relevant to refer to the following observations of this Court in ***Common Cause*** (supra):

"**123.** We may also draw attention in this regard to a Circular dated 28-10-2004 issued by the MoEF wherein it was stated that in view of the decision in *M.C. Mehta* [*M.C. Mehta* v. *Union of India*, (2004) 12 SCC 118] all mining projects of major minerals of more than 5 ha lease area that had not yet obtained an EC would have to do so at the time of renewal of the lease.

124. Finally, it was submitted that whenever an EC is granted, it would have retrospective effect from the date of the application for grant of an EC. In this context, it was pointed out that there were enormous delays in granting an EC and that the Hoda Committee had noted with reference to EIA 2006 that if all goes well, the grant of an EC takes about 232 days whereas the international norm is that an EC is granted within six months or 180 days. According to the additional affidavit filed by some mining leaseholders, the period of 232 days mentioned by the Hoda Committee was actually a conservative estimate and that in fact it takes anything up to 390 days for the grant of an EC. It was submitted that the position was even worse under EIA 1994 since the MoEF rarely showed any urgency in the grant of an EC. Examples were cited before us to show that in some instances the grant of an EC took more than two years. Taking all this into consideration it was submitted that it would be more appropriate that the EC is given retrospective effect from the date of the application.

125. We are not in agreement with the learned counsel for the mining leaseholders. There is no doubt that the grant of an EC cannot be taken as a mechanical exercise. It can only be granted after due diligence and reasonable care since damage to the environment can have a long-term impact. EIA 1994 is therefore very clear that if expansion or modernisation of any mining activity exceeds the existing pollution load, a prior EC is necessary and as already held by this Court in *M.C. Mehta* [*M.C. Mehta* v. *Union of India*, (2004) 12 SCC 118] even for

> the renewal of a mining lease where there is no expansion or modernisation of any activity, a prior EC is necessary. Such importance having been given to an EC, the grant of an ex post facto environmental clearance would be detrimental to the environment and could lead to irreparable degradation of the environment. The concept of an ex post facto or a retrospective EC is completely alien to environmental jurisprudence including EIA 1994 and EIA 2006. We make it clear that an EC will come into force not earlier than the date of its grant."

44. As rightly observed by this Court in **JUR**, this Court in ***Common Cause*** (supra) specifically rejected the contention that whenever an EC was granted, it would have retrospective effect from the date of the application for grant of an EC. It is thus clear that the argument that irrespective of the date of grant of EC, it will have an effect from the date of its application has specifically been rejected. The argument that, since the grant of EC takes enormous time, it would be more appropriate that the EC is given retrospective effect from the date of application, also came to be rejected by this Court. This Court observed that EC could be granted only after due diligence and reasonable care since damage to the environment could have a long-term impact. In this background, this Court observed that the grant of an ex-post facto EC would be detrimental to the environment and could

lead to irreparable degradation of the environment. This Court therefore held that the EC would come into force not earlier than the date of its grant.

45. It is recorded in the case of ***Common Cause*** (supra) that after the report of the CEC dated 25th April 2014 was considered, this Court in the case of ***Common Cause v. Union of India***[28] passed a detailed interim order dated 16th May 2014. Vide the said order, it was directed that mining operations in respect of 102 leaseholders which did not have requisite EC shall remain suspended. However, it was clarified that it was open to such leaseholders to move the authorities concerned for necessary clearances, approval or consents. It was further directed that as and when the mining lessees were able to obtain all the clearances, approval or consents, they may move this Court for modification of the said interim order. This Court, in paragraph 188(5) of ***Common Cause*** (supra), clarified that any iron ore or manganese ore extracted contrary to the 1994 Notification or 2006 Notification would constitute illegal or unlawful mining and compensation at 100% of the

[28] **(2014) 14 SCC 155**

price of the mineral should be recovered from 2000-2001 onwards if the extracted mineral has been disposed of.

46. From paragraph 227 of ***Common Cause*** (supra), it would be clear that this Court directed that the amounts determined as due from all the mining leaseholders should be deposited by them on or before 31st December 2017, and subject to and only after compliance with statutory requirements and full payment of compensation and other dues, the mining leaseholders could restart their mining operations.

47. It can thus be seen that in ***Common Cause*** (supra) itself, though this Court directed the mining leaseholders who did not have the EC initially to suspend the mining operations; it permitted them to restart mining operations only after statutory compliances were made and all dues were paid.

b. Alembic Pharmaceuticals Limited v. Rohit Prajapati and Others

48. The next judgment on which **JUR** relies is ***Alembic Pharmaceuticals Limited*** (supra).

49. In the said case, this Court was considering the judgment and order dated 8th January 2016 passed by the

NGT for the Western Zone, whereby a circular issued by the Ministry of Environment & Forests[29] dated 14th May 2002 was quashed and set aside.

50. This Court in the said case noted that the 1994 Notification mandated prior ECs for setting up and expansion of industrial projects falling within thirty categories. The deadline for obtaining an EC under the 1994 Notification was extended from time to time. As per circular dated 14th May 2002, challenged by the applicant before the Tribunal, the period was further extended by MoEF till 31st March 2003. The impugned circular, therefore, enabled the industrial units which had gone into production without obtaining an EC under the 1994 Notification to apply for and obtain an ex-post facto EC. As such, the NGT quashed and set aside the said circular.

51. The **JUR** refers to paragraphs 20, 21 and 23 of the judgment in ***Alembic Pharmaceuticals Limited*** (supra), which read thus:

> "**20.** Section 3(1) is an enabling provision for the Central Government to undertake all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the

[29] **Hereinafter, "MoEF".**

environment and preventing, controlling and abating environmental pollution. This limb of the submission of the Additional Solicitor General is crucial to the issue as to whether NGT has exceeded its jurisdiction since the decision in *Sterlite* [*T.N. Pollution Control Board* v. *Sterlite Industries (India) Ltd.*, (2019) 19 SCC 479] holds that NGT, while exercising its appellate jurisdiction, "cannot strike down rules or regulations made *under this Act*". In the present case, to demonstrate that NGT did not have the jurisdiction to strike down the Circular dated 14-5-2002, it was urged that the circular was issued by the MoEF pursuant to its powers under Section 3 of the Environment (Protection) Act, 1986. There is an inherent difficulty in accepting the submission. Before this Court, the Union of India has not pleaded the case that the Circular dated 14-5-2002 is a measure which is traceable to the provisions of Section 3. On the contrary, in its pleadings the Union of India construed it as a "purely administrative decision". Ground (*iii*) in Para 3 of the memo of appeal states the position of the Union Government:

> "Because the Hon'ble Tribunal failed to appreciate that after the EIA Notification 1994 the opportunity to seek ex post facto environmental clearance was given to industries in background of far-reaching impact in terms of direct loss of livelihood of the employees working in the units which also supply inputs to other units and their indirect employment. *It was submitted to the Hon'ble High Court of Gujarat that issuance of Circular dated 14-5-2002, based on which environmental clearance was given, was purely an administrative decision before taking stringent action.*"
>
> (emphasis supplied)

21. The omission in the appeal to make any attempt to sustain the Circular dated 14-5-2002 with reference to the provisions of Section 3 of the

Environment (Protection) Act, 1986 is significant. For an action of the Central Government to be treated as a measure referable to Section 3 it must satisfy the statutory requirement of being necessary or expedient "for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environment pollution". The Circular dated 14-5-2002 in fact does quite the contrary. It purported to allow an extension of time for industrial units to comply with the requirement of an EC. The EIA Notification dated 27-1-1994 mandated that an EC has to be obtained before embarking on a new project or expanding or modernising an existing one. The EIA Notification of 1994 has been issued under the provisions of the Environment (Protection) Act, 1986 and the Environment Protection Rules, 1986, with the object of imposing restrictions and prohibitions on setting up of new projects or expansion or modernisation of existing project. The measures are based on the precautionary principle and aim to protect the interests of the environment. The Circular dated 14-5-2002 allowed defaulting industrial units which had commenced activities without an EC to cure the default by an ex post facto clearance. Being an administrative decision, it is beyond the scope of Section 3 and cannot be said to be a measure for the purpose of protecting and improving the quality of the environment. The circular notes that there were defaulting units which had failed to comply with the requirement of obtaining an EC as mandated. The circular provided for an extension of time and inexplicably introduced the notion of an ex post facto clearance. In effect, it impacted the obligation of the industrial units to be in compliance with the law. The concept of ex post facto clearance is fundamentally at odds with the EIA Notification dated 27-1-1994. The EIA Notification of 1994 contained a stipulation that any expansion or modernisation of an activity or setting up of a new project listed in Schedule I "shall not be undertaken in any part of India unless it has been accorded environmental clearance". The

language of the notification is as clear as it can be to indicate that the requirement is of a prior EC. A mandatory provision requires complete compliance. The words "shall not be undertaken" read in conjunction with the expression "unless" can only have one meaning : before undertaking a new project or expanding or modernising an existing one, an EC must be obtained. When the EIA Notification of 1994 mandates a prior EC, it proscribes a post activity approval or an ex post facto permission. What is sought to be achieved by the administrative Circular dated 14-5-2002 is contrary to the statutory Notification dated 27-1-1994. The Circular dated 14-5-2002 does not stipulate how the detrimental effects on the environment would be taken care of if the project proponent is granted an ex post facto EC. The EIA Notification of 1994 mandates a prior environmental clearance. The circular substantially amends or alters the application of the EIA Notification of 1994. The mandate of not commencing a new project or expanding or modernising an existing one unless an environmental clearance has been obtained stands diluted and is rendered ineffective by the issuance of the administrative Circular dated 14-5-2002. This discussion leads us to the conclusion that the administrative circular is not a measure protected by Section 3. Hence there was no jurisdictional bar on NGT to enquire into its legitimacy or vires. Moreover, the administrative circular is contrary to the EIA Notification 1994 which has a statutory character. The circular is unsustainable in law.

....

23. The concept of an ex post facto EC is in derogation of the fundamental principles of environmental jurisprudence and is an anathema to the EIA Notification dated 27-1-1994. It is, as the judgment in *Common Cause* [*Common Cause* v. *Union of India*, (2017) 9 SCC 499] holds, detrimental to the environment and could lead to irreparable degradation. The reason why a

> retrospective EC or an ex post facto clearance is alien to environmental jurisprudence is that before the issuance of an EC, the statutory notification warrants a careful application of mind, besides a study into the likely consequences of a proposed activity on the environment. An EC can be issued only after various stages of the decision-making process have been completed. Requirements such as conducting a public hearing, screening, scoping and appraisal are components of the decision-making process which ensure that the likely impacts of the industrial activity or the expansion of an existing industrial activity are considered in the decision-making calculus. Allowing for an ex post facto clearance would essentially condone the operation of industrial activities without the grant of an EC. In the absence of an EC, there would be no conditions that would safeguard the environment. Moreover, if the EC was to be ultimately refused, irreparable harm would have been caused to the environment. In either view of the matter, environment law cannot countenance the notion of an ex post facto clearance. This would be contrary to both the precautionary principle as well as the need for sustainable development."

52. It can thus be seen that this Court, in paragraph 21 of ***Alembic Pharmaceuticals Limited*** (supra), came to a conclusion that the administrative circular was not a measure protected by Section 3 of the EP Act and as such, there was no jurisdictional bar on NGT to enquire into its legitimacy or vires. This Court further held that the administrative circular was contrary to the 1994 Notification which has a statutory character.

53. This Court, therefore, in paragraph 23 of ***Alembic Pharmaceuticals Limited*** (supra), rightly held that the environment law could not countenance the notion of an ex-post facto clearance inasmuch as the same would be contrary to both the precautionary principle as well as the need for sustainable development. However, thereafter from paragraph 24 onwards, this Court considered the individual cases.

54. After considering the individual cases in ***Alembic Pharmaceuticals Limited*** (supra), this Court, in paragraph 37, posed a question for its consideration as under:

> "**37. The issue which must now concern the Court is the consequence which will emanate from the failure of the three industries to obtain their ECs until 14-5-2003 in the case of Alembic Pharmaceuticals Ltd., 17-7-2003 in the case of United Phosphorous Ltd., and 23-12-2002 in the case of Unique Chemicals Ltd. The functioning of the factories of all three industries without a valid EC would have had an adverse impact on the environment, ecology and biodiversity in the area where they are located**....."
>
> [Emphasis supplied]

55. Thereafter, from paragraph 38 onwards in ***Alembic Pharmaceuticals Limited*** (supra), this Court observed that though it was not possible to individually determine the exact extent of the damage caused to the environment by the three

industries, several circumstances must weigh with the Court in determining the appropriate measure of restitution. This Court recorded that it was not in dispute that all the three industries did obtain ECs, though after several years of the 1994 Notification and commencement of production. It also noticed that subsequent to the grant of the ECs, the manufacturing units of all the three industries have also obtained ECs for an expansion of capacity from time to time. It noticed various circulars issued by MoEF extending time for obtaining ECs. This Court also noted that this Court in the cases of ***Goa Foundation (1) v. Union of India***[30] and ***Lafarge Umiam Mining (P) Ltd. v. Union of India***[31] had upheld the grant of ex-post facto EC. This Court also referred to the case of ***Lafarge Umiam Mining (P) Ltd.*** (supra) and thereafter observed thus:

> "**42. In this backdrop, this Court must take a balanced approach which holds the industries to account for having operated without environmental clearances in the past without ordering a closure of operations. The directions of NGT for the revocation of the ECs and for closure of the units do not accord with the principle of proportionality.** At the same time, the Court cannot be oblivious to the environmental degradation caused by all three industries units that operated

[30] **(2005) 11 SCC 559**
[31] **(2011) 7 SCC 338**

without valid ECs. The three industries have evaded the legally binding regime of obtaining ECs. **They cannot escape the liability incurred on account of such non-compliance. Penalties must be imposed for the disobedience with a binding legal regime. The breach by the industries cannot be left unattended by legal consequences. The amount should be used for the purpose of restitution and restoration of the environment.** Instead and in place of the directions issued by NGT, we are of the view that it would be in the interests of justice to direct the three industries to deposit compensation quantified at Rs 10 crores each. The amount shall be deposited with GPCB and it shall be duly utilised for restoration and remedial measures to improve the quality of the environment in the industrial area in which the industries operate."

[Emphasis supplied]

56. This Court, therefore, adopted a balanced approach by holding the industries to account for having operated without ECs in the past but without ordering a closure of operations. The Court held that the directions of the Tribunal for revocation of the ECs and for closure of the units did not accord with the principle of proportionality. This Court, however, observed that, at the same time it cannot be oblivious to the environmental degradation caused by all the three industries that operated without valid ECs. The Court lastly held that penalties may be imposed for disobedience with a binding legal regime. In the result, to balance the damage done

to the environment, this Court imposed a cost of Rs.10 crore each.

57. From the **JUR**, it appears that paragraphs 24 to 43 of the judgment in ***Alembic Pharmaceuticals Limited*** (supra) were not brought to the notice of this Court.

c. Electrosteel Steels Limited v. Union of India and Others

58. Insofar as the judgment and order in the case of ***Electrosteel Steels Limited*** (supra) is concerned, this Court was considering an order dated 16th September 2020 passed by a learned Single Judge of the High Court of Jharkhand whereby it discontinued the interim orders earlier passed by the High Court. By the earlier orders, the appellant therein was allowed to operate its unit under the supervisory regulatory control of the Jharkhand State Pollution Control Board and the said orders had been in force for over two years.

59. The **JUR** rightly relied on paragraph 72 of the judgment in ***Electrosteel Steels Limited*** (supra) to hold that the need to comply with the requirement of obtaining EC is non-negotiable. However, it appears that paragraphs 73 to 87 thereof were not brought to the notice of this Court.

60. Immediately after paragraph 72, this Court observed thus:

> "**73. The question is whether an establishment contributing to the economy of the country and providing livelihood to hundreds of people should be closed down for the technical irregularity of shifting its site without prior environmental clearance, without opportunity to the establishment to regularise its operation by obtaining the requisite clearances and permissions, even though the establishment may not otherwise be violating pollution laws, or the pollution, if any, can conveniently and effectively be checked. The answer has to be in the negative**.
>
> **74.** The Central Government is well within the scope of its powers under Section 3 of the 1986 Act to issue directions to control and/or prevent pollution including directions for prior environmental clearance before a project is commenced. Such prior environmental clearance is necessarily granted upon examining the impact of the project on the environment. **Ex post facto environmental clearance should not ordinarily be granted, and certainly not for the asking. At the same time, ex post facto clearances and/or approvals and/or removal of technical irregularities in terms of notifications under the 1986 Act cannot be declined with pedantic rigidity, oblivious of the consequences of stopping the operation of a running steel plant.**
>
> **75. The 1986 Act does not prohibit ex post facto environmental clearance. Some relaxations and even grant of ex post facto EC in accordance with law, in strict compliance with rules, regulations notifications and/or applicable orders, in appropriate cases, where the projects are in compliance with, or can be made to comply with environment norms, is in over (sic) view not impermissible. The court cannot be oblivious to**

the economy or the need to protect the livelihood of hundreds of employees and others employed in the project and others dependent on the project, if such projects comply with environmental norms."

[Emphasis supplied]

61. It can thus be seen that this Court clearly put a question to itself as to whether an establishment contributing to the economy of the country and providing livelihood to hundreds of people should be closed down on the ground of technical irregularity of shifting its site without prior environmental clearance, without opportunity to the establishment to regularise its operation by obtaining the requisite clearances and permissions, even though the establishment may not otherwise be violating pollution laws; or the pollution, if any, can conveniently and effectively be checked. This Court answered the aforesaid question in the negative.

62. In paragraph 74, this Court though held that ex-post facto EC should not ordinarily be granted, and certainly not for the asking, at the same time, this Court held ex-post facto clearances and/or approvals and/or removal of technical irregularities in terms of notifications under the EP Act cannot

be declined with pedantic rigidity, oblivious of the consequences of stopping the operation of a running steel plant.

63. Paragraph 75 of ***Electrosteel Steels Limited*** (supra) clearly held that the EP Act does not prohibit ex-post facto EC. It was held by this Court that some relaxations and even grant of ex-post facto EC in accordance with law, in strict compliance with rules, regulations, notifications etc., in appropriate cases, where the projects are in compliance with, or can be made to comply with environment norms, is not impermissible. This Court held that the Court cannot be oblivious to the economy or the need to protect the livelihood of hundreds of employees and others employed in the project and others dependent on the project, if such projects comply with environmental norms.

64. The Court thereafter referred to the case of ***Lafarge Umiam Mining (P) Ltd.*** (supra) and ***Electrotherm (India) Ltd. v. Patel Vipulkumar Ramjibhai***[32], and observed thus:

> "**79.** The Notification being S.O. 804(E) dated 14-3-2017 was not an issue in *Alembic Pharmaceuticals* [*Alembic Pharmaceuticals Ltd.* v. *Rohit Prajapati*, (2020) 17 SCC 157] . This

[32] **(2016) 9 SCC 300**

Court was examining the propriety and/or legality of a 2002 Circular which was inconsistent with the EIA Notification dated 27-1-1994, which was statutory. Ex post facto environmental clearance should not however be granted routinely, but in exceptional circumstances taking into account all relevant environmental factors. **Where the adverse consequences of ex post facto approval outweigh the consequences of regularisation of operation of an industry by grant of ex post facto approval and the industry or establishment concerned otherwise conforms to the requisite pollution norms, ex post facto approval should be given in accordance with law, in strict conformity with the applicable rules, regulations and/or notifications. Ex post facto approval should not be withheld only as a penal measure. The deviant industry may be penalised by an imposition of heavy penalty on the principle of "polluter pays" and the cost of restoration of environment may be recovered from it**."

[emphasis supplied]

65. It can thus be seen that this Court clearly held that where the adverse consequences of ex-post facto approval outweigh the consequences of regularisation of operation of an industry by grant of ex-post facto approval and the industry or establishment concerned otherwise conforms to the requisite pollution norms, ex post facto approval should be given in accordance with law, in strict conformity with the applicable rules, regulations and/or notifications.

d. D. Swamy v. Karnataka State Pollution Control Board and Others

66. It will also be relevant to note that two other judgments of this Court in the cases of ***D. Swamy*** (supra) were also not brought to the notice of this Court when **JUR** was heard.

67. In the said case, this Court was examining the final order dated 10th May 2017 passed by the NGT, Southern Zone, Chennai whereby the application filed by the appellant therein praying for a direction for closure of the common bio-medical waste treatment facility run by respondent No.3 therein, on the ground of alleged non-compliance of the 2006 Notification was dismissed.

68. It will be relevant to refer to the following observations of this Court in the said case:

> "**21.** In exercise of power under Section 3(1) and Section 3(2)(*v*) of the EP Act read with Rule 5(3)(*d*) of the EP Rules, the Central Government issued a Notification being S.O. 804(E) dated 14-3-2017 which provides for grant of ex post facto EC for project proponents who had commenced, continued or completed a project without obtaining EC under the EP Act/EP Rules or the Environmental Impact Notification issued thereunder. Paras 3, 4 and 5 of the said notification, read as hereunder:
>
> > "(3) In cases of violation, action will be taken against the project proponent by the respective State or State Pollution Control Board under the provisions of Section 19

of the Environment (Protection) Act, 1986 and further, no consent to operate or occupancy certificate will be issued till the project is granted the environmental clearance.

(4) The cases of violation will be appraised by respective sector Expert Appraisal Committees constituted under sub-section (3) of Section 3 of the Environment (Protection) Act, 1986 with a view to assess that the project has been constructed at a site which under prevailing laws is permissible and expansion has been done which can be run sustainably under compliance of environmental norms with adequate environmental safeguards; and in case, where the finding of the Expert Appraisal Committee is negative, closure of the project will be recommended along with other actions under the law.

(5) In case, where the findings of the Expert Appraisal Committee on point at sub-para (4) above are affirmative, the projects under this category will be prescribed the appropriate Terms of Reference for undertaking Environment Impact Assessment and preparation of Environment Management Plan. Further, the Expert Appraisal Committee will prescribe a specific Terms of Reference for the project on assessment of ecological damage, remediation plan and natural and community resource augmentation plan and it shall be prepared as an independent chapter in the environment impact assessment report by the accredited consultants. The collection and analysis of data for assessment of ecological damage, preparation of remediation plan and natural and community resource augmentation plan

shall be done by an environmental laboratory duly notified under the Environment (Protection) Act, 1986, or an environmental laboratory accredited by National Accreditation Board for Testing and Calibration Laboratories, or a laboratory of a Council of Scientific and Industrial Research institution working in the field of environment."

22. The Notification of 2017 is a valid statutory notification issued by the Central Government in exercise of power under Sections 3(1) and 3(2)(*v*) of the EP Act read with Rule 5(3)(*d*) of the EP Rules in the same manner as the EIA Notification dated 27-1-1994 and the Notification dated 14-9-2006.

23. Section 21 of the General Clauses Act, 1897 provides that where any Central Act or Regulations confer a power to issue notifications, orders, rules or bye-laws, that power includes the power, exercisable in the like manner, and subject to like sanction and conditions, if any, to add to, amend, vary or rescind any notification, order, rule or bye-law so issued. The authority, which had the power to issue Notifications dated 27-1-1994 and 14-9-2006 undoubtedly had, and still has the power to rescind or modify or amend those notifications in like manner. As held by this Court in *Shree Sidhbali Steels Ltd.* v. *State of U.P.* [*Shree Sidhbali Steels Ltd.* v. *State of U.P.*, (2011) 3 SCC 193] , power under Section 21 of the General Clauses Act to amend, vary or rescind notifications, orders, rules or bye-laws can be exercised from time to time having regard to the exigency."

[Emphasis supplied]

69. It can thus clearly be seen that this Court, in unequivocal terms, held that the 2017 Notification was a valid

statutory notification issued by the Central Government in exercise of power under Sections 3(1) and 3(2)(*v*) of the EP Act read with Rule 5(3)(*d*) of the EP Rules.

70. It has been held by this Court that the said notification was issued in the same manner as the 1994 Notification and 2006 Notification were issued. This Court in the said case while referring to Section 21 of the General Clauses Act, 1897 held that the authority, which had the power to issue 1994 Notification and 2006 Notification undoubtedly had, and still has the power to rescind or modify or amend those notifications in like manner.

71. It will also be relevant to refer to the following observations of this Court in the said case:

> "**30.** By an Office Memorandum, being F. No. 22-21/2020-1A III, dated 7-7-2021, the MoEF&CC issued Standard Operating Procedure (SOP) for identification and handling of violation cases under the 2006 EIA Notification. The said Office Memorandum, inter alia, reads:
>
> > "The Ministry had issued a Notification number S.O. 804(E), dated the 14-3-2017 detailing the process for grant of Terms of Reference and environmental clearance in respect of projects or activities which have started the work on site and/or expanded the production beyond the limit of prior EC or changed the product mix without

obtaining prior EC under the EIA Notification, 2006.

2. This Notification was applicable for six months from the date of publication i.e. 14-3-2017 to 13-9-2017 and further based on court direction from 14-3-2018 to 13-4-2018.

3. Hon'ble NGT in Original Application No. 287 of 2020 in the matter of *Dastak N.G.O.* v. *Synochem Organics (P) Ltd.* [*Dastak N.G.O.* v. *Synochem Organics (P) Ltd.*, 2021 SCC OnLine NGT 131] and in applications pertaining to same subject-matter in *Vineet Nagar* v. *Central Ground Water Authority* [*Vineet Nagar* v. *Central Ground Water Authority*, 2021 SCC OnLine NGT 139] , vide order dated 3-6-2021 held that "(...) for past violations, the authorities concerned are free to take appropriate action in accordance with polluter pays principle, following due process".

4. Further, the Hon'ble National Green Tribunal in OA No. 34 of 2020 (WZ) in *Tanaji B. Gambhire* v. *State of Maharashtra* [*Tanaji B. Gambhire* v. *State of Maharashtra*, 2021 SCC OnLine NGT 961] , vide order dated 24-5-2021 has directed that "…. *a proper SOP be laid down for grant of EC in such cases so as to address the gaps in binding law and practice being currently followed. The MoEF may also consider circulating such SOP to all SEIAAs in the country*".

5. Therefore, in compliance of the directions of the Hon'ble NGT a Standard Operating Procedure (SOP) for dealing with violation cases is required to be drawn. The Ministry is also seized of different categories of "violation" cases

which have been pending for want of an approved structural/procedural framework based on "Polluter Pays Principle" and "Principle of Proportionality". It is undoubtedly important that action under statutory provisions is taken against the defaulters/violators and a decision on the closure of the project or activity or otherwise is taken expeditiously.

6. In the light of the above directions of the Hon'ble Tribunal and the issues involved, the matter has accordingly been examined in detail in the Ministry. A detailed SOP has accordingly been framed and is outlined herein. The SOP is also guided by the observations/decisions of the Hon'ble Courts wherein principles of proportionality and polluters pay have been outlined."

31. The SOP formulated by the said Office Memorandum dated 7-7-2021 refers to and gives effect to various judicial pronouncements including the judgment of this Court in *Alembic Pharmaceuticals Ltd.* v. *Rohit Prajapati* [*Alembic Pharmaceuticals Ltd.* v. *Rohit Prajapati*, (2020) 17 SCC 157] .

32. In terms of the SOP, the proposal for grant of EC in cases of violation are to be considered on merits, with prospective effect, applying principles of proportionality and the principle that the polluter pays and is liable for costs of remedial measures."

[Emphasis supplied]

72. It can thus clearly be seen that the 2021 OM which was quashed in **JUR** had also been considered and approved by this Court in ***D. Swamy*** (supra).

73. This Court held that the SOP formulated by the 2021 OM refers to and gives effect to various judicial pronouncements including the judgment of this Court in the case of ***Alembic Pharmaceuticals Ltd.*** (supra). This Court also held that in terms of the SOP, proposal for grant of EC in cases of violation are to be considered on merits, with prospective effect, applying principles of proportionality and the principle that the polluter pays and is liable for costs of remedial measures.

74. It will further be relevant to refer to the following observations of this Court in ***D. Swamy*** (supra):

> "**35.** It is, however, well settled that words and phrases and/or sentences in a judgment cannot be read in the manner of a statute, and that too out of context. **The observation of the Division Bench that a one-time relaxation was permissible, is not to be construed as a finding that relaxation cannot be made more than once. If power to amend or modify or relax a notification and/or order exists, the notification and/or order may be amended and/or modified as many times, as may be necessary.** A statement made by the counsel in court would not prevent the authority concerned from making amendments and/or modifications provided such amendments and/or modifications were as per the procedure prescribed by law."
>
> [Emphasis supplied]

75. It can be seen that this Court in the said case specifically observed that the observations of the Division Bench of the Madras High Court that a one-time relaxation was permissible, was not to be construed as a finding that relaxation cannot be made more than once. It was held that if power to amend or modify or relax a notification and/or order exists, the notification and/or order may be amended and/or modified as many times, as may be necessary. It has therefore been held that a statement made by the counsel in court would not prevent the authority concerned from making amendments and/or modifications provided such amendments and/or modifications were as per the procedure prescribed by law.

76. It will also be relevant to refer to the following observations of this Court in ***D. Swamy*** (supra):

> "**46. Ex post facto environmental clearance should ordinarily not be granted routinely, but in exceptional circumstances taking into account all relevant environmental factors. Where the adverse consequences of denial of ex post facto approval outweigh the consequences of regularisation of operations by grant of ex post facto approval, and the establishment concerned otherwise conforms to the requisite pollution norms, ex post facto approval should be given in accordance with law, in strict conformity with the applicable Rules, Regulations and/or**

notifications. In a given case, the deviant industry may be penalised by an imposition of heavy penalty on the principle of "polluter pays" and the cost of restoration of environment may be recovered from it.

47. It is reiterated that the EP Act does not prohibit ex post facto EC. Some relaxations and even grant of ex post facto EC in accordance with law, in strict compliance with Rules, Regulations, notifications and/or applicable orders, in appropriate cases, where the projects are in compliance with environment norms, is not impermissible. As observed by this Court in *Electrosteel Steels* [*Electrosteel Steels Ltd.* v. *Union of India*, (2023) 6 SCC 615], **this Court cannot be oblivious to the economy or the need to protect the livelihood of hundreds of employees and others employed in the units and dependent on the units for their survival.**

48. Ex post facto EC should not ordinarily be granted, and certainly not for the asking. At the same time ex post facto clearances and/or approvals cannot be declined with pedantic rigidity, regardless of the consequences of stopping the operations."

[Emphasis supplied]

77. It is thus clear that though this Court held that ex-post facto EC should not ordinarily be granted, but in exceptional circumstances they can be granted. It was held that where the adverse consequences of denial of ex-post facto approval outweigh the consequences of regularisation of operations by grant of ex-post facto approval, and the establishment concerned otherwise conforms to the requisite pollution

norms, ex-post facto approval should be granted. It has been categorically held that the EP Act does not prohibit ex post facto EC.

e. Pahwa Plastics Private Limited and Another v. Dastak NGO and Others

78. In the case of ***Pahwa Plastics Private Limited*** (supra), also this Court was considering an appeal against an order dated 3rd June 2021 passed by the NGT which held that the manufacturing unit of the appellants therein which did not have prior EC could not be allowed to operate.

79. In the said case, this Court reiterated the law as laid down in the case of ***D. Swamy*** (supra). In order to avoid making the judgment lengthy, I am avoiding the reproduction of the paragraphs in ***Pahwa Plastics Private Limited*** (supra) inasmuch as they are *pari materia* to the law laid down in the case of ***D. Swamy*** (supra).

f. Judicial Discipline and Judicial Propriety

80. Having taken into consideration the judgments pressed into service by the parties supporting and opposing recall of the **JUR**, I may look at another aspect in the present matter.

The law with regard to judicial discipline and judicial propriety needs no reiteration.

81. This Court in the case of ***Official Liquidator v. Dayanand and Others***[33] has observed thus:

> "**89.** It is interesting to note that in *Coir Board* v. *Indira Devi P.S.* [(1998) 3 SCC 259 : 1998 SCC (L&S) 806] , a two-Judge Bench doubted the correctness of the seven-Judge Bench judgment in *Bangalore Water Supply & Sewerage Board* v. *A. Rajappa* [(1978) 2 SCC 213 : 1978 SCC (L&S) 215] and directed the matter to be placed before Hon'ble the Chief Justice of India for constituting a larger Bench. However, a three-Judge Bench headed by Dr. A.S. Anand, C.J., refused to entertain the reference and observed that the two-Judge Bench is bound by the judgment of the larger Bench—*Coir Board* v. *Indira Devai P.S.* [(2000) 1 SCC 224 : 2000 SCC (L&S) 120]
>
> **90.** We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to the constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in the last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system inasmuch as the

[33] **(2008) 10 SCC 1**

courts at the grass roots will not be able to decide as to which of the judgments lay down the correct law and which one should be followed.

91. We may add that in our constitutional set-up every citizen is under a duty to abide by the Constitution and respect its ideals and institutions. Those who have been entrusted with the task of administering the system and operating various constituents of the State and who take oath to act in accordance with the Constitution and uphold the same, have to set an example by exhibiting total commitment to the constitutional ideals. This principle is required to be observed with greater rigour by the members of judicial fraternity who have been bestowed with the power to adjudicate upon important constitutional and legal issues and protect and preserve rights of the individuals and society as a whole. Discipline is sine qua non for effective and efficient functioning of the judicial system. If the courts command others to act in accordance with the provisions of the Constitution and rule of law, it is not possible to countenance violation of the constitutional principle by those who are required to lay down the law."

82. It is trite law that a Bench of two-Judges is bound by an earlier view taken by the other two-Judge Benches. If, however, a subsequent Bench of two Judges considers the law laid down earlier by another two-Judges Bench requires reconsideration, the only option available to it is to refer the matter to a larger Bench. A Bench of two-Judges cannot take a view contrary to the view taken by a Bench of co-equal strength.

83. Equally settled is the position of law that the judgment delivered by a subsequent Bench of two Judges in ignorance of the earlier judgment of a Bench of co-equal strength is *per incuriam* in law.

84. In this respect, it will be apt to refer to the following observations of the Constitution Bench of this Court in the case of ***Dr. Shah Faesal and Others v. Union of India and Others***[34], to which I (Gavai, J. as I then was) was a member:

> "**31.** Therefore, the pertinent question before us is regarding the application of the rule of per incuriam. This Court while deciding *Pranay Sethi case* [*National Insurance Co. Ltd.* v. *Pranay Sethi*, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] , referred to an earlier decision rendered by a two-Judge Bench in *Sundeep Kumar Bafna* v. *State of Maharashtra* [*Sundeep Kumar Bafna* v. *State of Maharashtra*, (2014) 16 SCC 623 : (2015) 3 SCC (Cri) 558] , wherein this Court emphasised upon the relevance and the applicability of the aforesaid rule : (*Sundeep Kumar Bafna case* [*Sundeep Kumar Bafna* v. *State of Maharashtra*, (2014) 16 SCC 623 : (2015) 3 SCC (Cri) 558] , SCC p. 642, para 19)
>
> > "*19*. It cannot be overemphasised that the discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute,

[34] **(2020) 4 SCC 1**

rule or regulation, which was not brought to the notice of the court. *A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co-equal or larger Bench; or if the decision of a High Court is not in consonance with the views of this Court. It must immediately be clarified that the per incuriam rule is strictly and correctly applicable to the ratio decidendi and not to obiter dicta*."

(emphasis supplied)

32. The view that the subsequent decision shall be declared per incuriam only if there exists a conflict in the ratio decidendi of the pertinent judgments was also taken by a five-Judge Bench decision of this Court in *Punjab Land Development & Reclamation Corpn. Ltd.* v. *Labour Court* [*Punjab Land Development & Reclamation Corpn. Ltd.* v. *Labour Court*, (1990) 3 SCC 682 : 1991 SCC (L&S) 71] : (SCC pp. 706-07, para 43)

"*43*. As regards the judgments of the Supreme Court allegedly rendered in ignorance of a relevant constitutional provision or other statutory provisions on the subjects covered by them, it is true that the Supreme Court may not be said to "declare the law" on those subjects if the relevant provisions were not really present to its mind. But in this case Sections 25-G and 25-H were not directly attracted and even if they could be said to have been attracted in laying down the major premise, they were to be interpreted consistently with the subject or context. *The problem of judgment per incuriam when actually arises, should present no difficulty as this Court can lay down the law afresh, if two or more of its earlier judgments cannot stand together*."

85. It will also be relevant to refer to a recent judgment of this Court in the case of ***Bajaj Alliance General Insurance Company Limited v. Rambha Devi and Others***[35] as under:

> "**148.** The term per incuriam is a Latin term which means "by inadvertence" or "lack of care". English courts have developed this principle in relaxation of the rule of stare decisis. In *Halsbury's Laws of England* [*Halsbury's Laws of England* (4th Edn.) Vol. 26 : *Judgment and Orders* : *Judicial Decisions as Authorities* (pp. 297-98, Para 578).] , the concept of per incuriam was explained as under:
>
> > "A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow [*Young* v. *Bristol Aeroplane Co. Ltd.*, 1944 KB 718 at p. 729 : (1944) 2 All ER 293 at p. 300 (CA)] ; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force [*Lancaster Motor Co. (London) Ltd.* v. *Bremith Ltd.*, (1941) 1 KB 675 (CA)] . A decision should not be treated as given per incuriam, however, simply because of a deficiency of parties [*Morelle Ltd.* v. *Wakeling*, (1955) 2 QB 379 : (1955) 2 WLR 672 (CA)] , or because the court had not the benefit of the best argument [*Bryers* v. *Canadian Pacific Steamships Ltd.*, (1957) 1 QB 134 (CA) Per Singleton, L.J., affirmed in *Canadian Pacific Steamships Ltd.* v. *Bryers*, 1958 AC 485 (HL)] , and, as a general rule, the only

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> cases in which decisions should be held to be given per incuriam are those given in *ignorance of some inconsistent statute or binding authority* [*A. & J. Mucklow Ltd.* v. *IRC*, 1954 Ch 615 (CA), *Morelle Ld.* v. *Wakeling*, (1955) 2 QB 379 (CA), See also *Bonsor* v. *Musicians' Union*, 1954 Ch 479 (CA)] . Even if a decision of the Court of Appeal has misinterpreted a previous decision of the House of Lords, the Court of Appeal must follow its previous decision and leave the House of Lords to rectify the mistake."
>
> (emphasis supplied)

149. Lord Evershed in *Morelle Ld.* v. *Wakeling* [*Morelle Ltd.* v. *Wakeling*, (1955) 2 QB 379 : (1955) 2 WLR 672 (CA)] (for short "*Morelle*") explained the concept as under : (QB p. 406)

> "... As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some *inconsistent statutory provision* or of some authority binding on the court concerned; so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong."
>
> (emphasis supplied)

150. A few months after the decision in *Morelle* [*Morelle Ltd.* v. *Wakeling*, (1955) 2 QB 379 : (1955) 2 WLR 672 (CA)] , the Constitution Bench of this Court in *Bengal Immunity Co. Ltd.* v. *State of Bihar* [*Bengal Immunity Co. Ltd.* v. *State of Bihar*, (1955) 6 STC 446 : 1955 SCC OnLine SC 2 : AIR 1955 SC 661] adopted the per incuriam principle. It held that while Article 141 states that the Supreme Court's decisions are "binding on all courts within the territory of India", this does not extend to binding

the Supreme Court itself, which remains free to reconsider its judgments in appropriate cases.

151. In *Mamleshwar Prasad* v. *Kanhaiya Lal* [*Mamleshwar Prasad* v. *Kanhaiya Lal*, (1975) 2 SCC 232] , reflecting on the principle of per incuriam, this Court speaking through Krishna Iyer, J. held thus : (SCC p. 235, para 7)

> "*7.* Certainty of the law, consistency of rulings and comity of courts—all flowering from the same principle—converge to the conclusion that a decision once rendered must later bind like cases. We do not intend to detract from the rule that, in exceptional instances, where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have the sway of binding precedents. *It should be a glaring case, an obtrusive omission*. No such situation presents itself here and we do not embark on the principle of *judgment per incuriam*."
>
> (emphasis supplied)

152. In *A.R. Antulay* v. *R.S. Nayak* [*A.R. Antulay* v. *R.S. Nayak*, (1988) 2 SCC 602 : 1988 SCC (Cri) 372] , the Constitution Bench of this Court made the following observations : (SCC p. 652, para 42)

> "*42*. It appears that when this Court gave the aforesaid directions on 16-2-1984, for the disposal of the case against the appellant by the High Court, the directions were given oblivious of the relevant provisions of law and the decision in *Anwar Ali Sarkar case* [*State of W.B.* v. *Anwar Ali Sarkar*, (1952) 1 SCC 1 : AIR 1952 SC 75] . See *Halsbury's Laws of England*, 4th Edn., Vol. 26, p. 297, para 578 and p. 300, the relevant Notes 8, 11 and 15; *Dias on Jurisprudence*, 5th Edn.,

pp. 128 and 130; *Young* v. *Bristol Aeroplane Co. Ltd.* [*Young* v. *Bristol Aeroplane Co. Ltd.*, 1944 KB 718 (CA)] Also see the observations of Lord Goddard in *Moore* v. *Hewitt* [*Moore* v. *Hewitt*, 1947 KB 831] and *Nicholas* v. *Penny* [*Nicholas* v. *Penny*, (1950) 2 KB 466] . "Per incuriam" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong. See *Morelle Ltd.* v. *Wakeling* [*Morelle Ltd.* v. *Wakeling*, (1955) 2 QB 379 : (1955) 2 WLR 672 (CA)] . Also see *State of Orissa* v. *Titaghur Paper Mills Co. Ltd.* [*State of Orissa* v. *Titaghur Paper Mills Co. Ltd.*, 1985 Supp SCC 280 : (1985) 60 STC 213] We are of the opinion that in view of the clear provisions of Section 7(2) of the Criminal Law Amendment Act, 1952 and Articles 14 and 21 of the Constitution, these directions were legally wrong."

153. In *MCD* v. *Gurnam Kaur* [*MCD* v. *Gurnam Kaur*, (1989) 1 SCC 101] , a three-Judge Bench of this Court held that : (SCC p. 110, para 11)

> "*11*. ... A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute."

154. In *Punjab Land Development & Reclamation Corpn. Ltd.* v. *Labour Commr.* [*Punjab Land Development & Reclamation Corpn. Ltd.* v. *Labour Commr.*, (1990) 3 SCC 682 : 1991 SCC (L&S) 71] , a five-Judge Bench of this Court said the following in the context of the principle of per incuriam for

ignoring statutory provisions : (SCC pp. 706-07, para 43)

> "*43*. As regards the judgments of the Supreme Court allegedly rendered in ignorance of a relevant constitutional provision or other statutory provisions on the subjects covered by them, it is true that the Supreme Court may not be said to "declare the law" on those subjects if the relevant provisions were not really present to its mind. But in this case Sections 25-G and 25-H were not directly attracted and even if they could be said to have been attracted in laying down the major premise, they were to be interpreted consistently with the subject or context. *The problem of judgment per incuriam when actually arises, should present no difficulty as this Court can lay down the law afresh, if two or more of its earlier judgments cannot stand together*."
>
> (emphasis supplied)

155. In *N. Bhargavan Pillai* v. *State of Kerala* [*N. Bhargavan Pillai* v. *State of Kerala*, (2004) 13 SCC 217 : 2005 SCC (Cri) 142] , a two-Judge Bench speaking through Arijit Pasayat, J. noted that a judgment cannot be treated as a binding precedent, if it fails to notice a specific statutory bar : (SCC pp. 223-24, para 14)

> "*14*. Coming to the plea relating to benefits under the Probation Act, it is to be noted that Section 18 of the said Act clearly rules out application of the Probation Act to a case covered under Section 5(2) of the Act. Therefore, there is no substance in the accused-appellant's plea relating to grant of benefit under the Probation Act. The decision in *Bore Gowda case* [*Bore Gowda* v. *State of Karnataka*, (2000) 10 SCC 260 : 2000 SCC (Cri) 1244] does not even indicate that Section 18 of the

Probation Act was taken note of. In view of the specific statutory bar the view, if any, expressed without analysing the statutory provision cannot in our view be treated as a binding precedent and at the most is to be considered as having been rendered per incuriam. Looked at from any angle, the appeal is sans merit and deserves dismissal which we direct."

156. In *State of M.P.* v. *Narmada Bachao Andolan* [*State of M.P.* v. *Narmada Bachao Andolan*, (2011) 7 SCC 639 : (2011) 3 SCC (Civ) 875] , this Court reiterated : (SCC p. 680, para 67)

> "*67.* Thus, "per incuriam" are those decisions given in ignorance or forgetfulness of some statutory provision or authority binding on the court concerned, or a statement of law caused by inadvertence or conclusion that has been arrived at without application of mind or proceeded without any reason so that in such a case some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong."

157. Subsequently, in *Fuerst Day Lawson Ltd.* v. *Jindal Exports Ltd.* [*Fuerst Day Lawson Ltd.* v. *Jindal Exports Ltd.*, (2001) 6 SCC 356] this Court observed : (SCC p. 357)

> "A prior decision of the Supreme Court on identical facts and law binds the Court on the same points of law in a latter case. In exceptional instances, where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority *running counter to the reasoning and result reached*, the principle of per incuriam may apply. *Unless it is a glaring case of obtrusive omission*, it is not desirable to depend on the principle of

judgment "per incuriam". It has to be shown that some part of the decision was based on a reasoning which was demonstrably wrong, for applying the principle of per incuriam."

158. In *State of Bihar* v. *Kalika Kuer* [*State of Bihar* v. *Kalika Kuer*, (2003) 5 SCC 448] , the legal dilemma was noted as under : (SCC p. 454, para 10)

> "*10*. … Easy course of saying that earlier decision was rendered per incuriam is not permissible and the matter will have to be resolved only in two ways — either to follow the earlier decision or refer the matter to a larger Bench to examine the issue, in case it is felt that earlier decision is not correct on merits."

159. In *Sundeep Kumar Bafna* v. *State of Maharashtra* [*Sundeep Kumar Bafna* v. *State of Maharashtra*, (2014) 16 SCC 623 : (2015) 3 SCC (Cri) 558] , the Court expanded the definition of per incuriam in the Indian context and noted that : (SCC p. 642, para 19)

> "*19*. … A decision or judgment can also be *per incuriam* if it is not possible to reconcile its *ratio* with that of a previously pronounced judgment of a co-equal or larger Bench; or if the decision of a High Court is not in consonance with the views of this Court. It must immediately be clarified that the *per incuriam* rule is strictly and correctly applicable to the *ratio decidendi* and not to *obiter dicta*."
>
> (emphasis in original)

160. In a recent decision in *Shah Faesal* v. *Union of India* [*Shah Faesal* v. *Union of India*, (2020) 4 SCC 1], a five-Judge Bench of this Court reiterated that the principle of per incuriam only applies on the ratio of the case.

161. After having examined the above decisions, when dealing with the ignorance of a statutory provision, we may bear in mind the following principles. These may not however be exhaustive:

161.1. A decision is per incuriam only when the overlooked statutory provision or legal precedent is central to the legal issue in question and might have led to a different outcome if those overlooked provisions were considered. It must be an inconsistent provision and a glaring case of obtrusive omission.

161.2. The doctrine of per incuriam applies strictly to the ratio decidendi and does not apply to obiter dicta.

161.3. If a court doubts the correctness of a precedent, the appropriate step is to either follow the decision or refer it to a larger Bench for reconsideration.

161.4. It has to be shown that some part of the decision was based on a reasoning which was demonstrably wrong, for applying the principle of per incuriam. In exceptional instances, where by obvious inadvertence or oversight, a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, the principle of per incuriam may apply."

86. Applying the aforesaid principles, let me examine the present case.

87. This Court passed **JUR** on the ground that in view of the law laid down in the cases of ***Common Cause*** (supra), ***Alembic Pharmaceuticals Limited*** (supra) and ***Electrosteel Steels Limited*** (supra), ex-post facto EC is not at all

permissible and therefore 2017 Notification and 2021 OM are not sustainable in law.

88. As already discussed hereinabove, though this Court in **JUR** has rightly referred to paragraph 125 of ***Common Cause*** (supra) to hold that prior EC is necessary even for the renewal of a mining lease and that the concept of an ex-post facto or retrospective EC is completely alien to environmental jurisprudence including 1994 Notification and 2006 Notification, it appears that paragraph 10, sub-para (5) of paragraph 188 and paragraph 227 of the ***Common Cause*** (supra), were not brought to the notice of this Court.

89. A perusal of the aforesaid paragraphs, not brought to the notice of this Court, would clearly reveal that in the said case though after the CEC Report, the mining activities were suspended, the leaseholders were permitted to apply for statutory clearances and thereafter move the Court for modification and the Court had directed the compensation to be paid for illegal or unlawful mining. Specifically in paragraph 227, this Court had permitted the leaseholders to restart their mining operations only after compliance with the statutory

requirements and full payment of compensation and other dues under the relevant rules.

90. It is thus clear that the Court, in case of mining leaseholders who had no EC, had suspended the mining operations, and permitted them to apply for EC and only upon obtaining the EC and payment of compensation, they were permitted to restart mining operations. The contention that the EC would be valid from the date on which the application made by the leaseholders was, however, rejected. In that view of the matter, I have no hesitation in holding that the judgment of this Court in the case of ***Common Cause*** (supra) cannot be considered a precedent to hold that no ex-post facto EC can be granted.

91. Insofar as the judgment in the case of ***Alembic Pharmaceuticals Limited*** (supra) is concerned, this Court, in **JUR**, rightly relied on paragraphs 12, 21 and 23 of the ***Alembic Pharmaceuticals Limited*** (supra), however, paragraphs 24 to 43 thereof were not brought to the notice of this Court.

92. As already discussed hereinabove, after considering various aspects of the matter and the judgment of this Court

in the case of ***Lafarge Umiam Mining (P) Ltd.*** (supra), this Court in ***Alembic Pharmaceuticals Limited*** (supra) adopted a balanced approach and set aside the directions of NGT for revocation of ECs. Needless to state that in the said case also, ECs were granted after the projects were completed and became operational.

93. Insofar as the judgment in the case of ***Electrosteel Steels Limited*** (supra) is concerned, this Court, in **JUR**, rightly referred to paragraph 72 of ***Electrosteel Steels Limited*** (supra), however, paragraphs 73 to 87 thereof were not brought to the notice of this Court.

94. In the said case, this Court specifically in paragraph 75 held that the EP Act does not prohibit the ex-post facto EC. If the Court that delivered the **JUR** was of the view that the said finding in paragraphs 74 and 75 of ***Electrosteel Steels Limited*** (supra) does not lay down the correct position of law, the only option available to the Court was to refer the matter to a larger Bench.

95. Further, the judgments of this Court in the cases of ***D. Swamy*** (supra) and ***Pahwa Plastics Private Limited*** (supra) were not brought to the notice of this Court.

96. In the said two cases, this Court has clearly upheld the 2017 Notification and 2021 OM. The view taken in **JUR**, however, is totally contrary to the view taken in ***D. Swamy*** (supra) and ***Pahwa Plastics Private Limited*** (supra). As such, I am of the considered view that the **JUR** is *per incuriam* to the decisions of this Court in ***D. Swamy*** (supra) and ***Pahwa Plastics Private Limited*** (supra).

97. At this stage, it is also pertinent to note the observations made in **JUR**, in paragraph 27, which have already been reproduced by me in paragraph 15.

98. It can be seen that this Court, relying on the provisions of Section 15 of the EP Act held that even if the penalty was paid by the project proponent, it would not regularise the project.

99. It will be relevant to refer to Section 15 of the EP Act, which reads thus:

> "**15. Penalty for contravention of provisions of Act, rules, orders and directions**.—(1) Where any person contravenes or does not comply with any of the provisions of this Act or the rules made or orders or directions issued thereunder for which no penalty is provided, he shall be liable to penalty in respect of each such contravention which shall not be less than ten thousand rupees but which may extend to fifteen lakh rupees.

(2) Where any person continues contravention under sub-section (1), he shall be liable to additional penalty of ten thousand rupees for every day during which such contravention continues."

100. A bare perusal of Section 15 of the EP Act would reveal that it deals with the aspect of penalty alone. Neither does it permit nor prohibit the regularization of the underlying project. Thus, the observations of the two-Judges Bench in **JUR** that perusal of the provisions contained in Section 15 of the EP Act, shows that even after the payment of penalty if the project is under construction, the same has to be stopped and demolished, and even if the operation has already commenced, the same has to be stopped and demolished, does not correctly interpret the provisions of Section 15 of the EP Act.

101. Further, since the **JUR** has not correctly followed the judgments in the cases of ***Common Cause*** (supra), ***Alembic Pharmaceuticals Limited*** (supra) and ***Electrosteel Steels Limited*** (supra), and has not noticed various paragraphs in the aforesaid judgments which could have persuaded it to take a different view and since the **JUR** has not taken note of the judgments in the cases of ***D. Swamy*** (supra) and ***Pahwa Plastics Private Limited*** (supra), the present review petition

could have been allowed on these very grounds, however, I deem it fit to also examine the effects of **JUR**, if it is not recalled.

g. Effects of JUR

102. In paragraph 27 of **JUR**, this Court observed that even after the payment of penalty, if the project is under construction, the same has to be stopped and demolished and even if operation has already commenced, the same has to be stopped and demolished.

103. As already observed by me hereinabove, the 2017 Notification and 2021 OM permit grant of EC only where the projects are otherwise permissible in law. They specifically provide that wherever the project is not permissible in law, the same will have to be demolished or closed. It further provides that during appraisal after examination if it is found that even though the project may be permissible but not environmentally sustainable in its present form/configuration/features, then the project shall be directed to be modified so that the project could be environmentally sustainable. However, if it is not considered appropriate to

issue EC, the project will have to be directed to be demolished/closed.

104. Huge penalties have also been provided in case of violation. It will not be out of place to mention that the 2021 OM was issued on the directions issued by the NGT in the case of ***Tanaji B. Gambhire*** (supra).

105. The Union of India has placed before the Bench a list of the projects undertaken by the Central Government, State Government, Public Undertakings which are pending consideration before the Government at the Central as well as State Level. At the Central Government level, 24 projects involving the expenditure to the tune of Rs.8,293 crore are pending. At the State level, 29 projects worth Rs.11,168 crore are pending.

106. It is contended by the learned counsel supporting the recall of the judgment that in view of the 2021 OM, various projects had been started. It is submitted that in most of the projects, the requisite formalities including EIAs were also complete and many of the projects were waiting for final EC. However, on account of the interim order of stay passed by this Court in the present proceedings dated 2nd January 2024, EC

could not be granted. It is, therefore, submitted that if the **JUR** is not recalled, it will have devastating effects inasmuch as various completed/near-completion projects will have to be demolished.

107. A perusal of the list produced would reveal that out of the projects which will be adversely affected by the **JUR**, some of the projects are concerning construction of hospitals/medical colleges/airports and some are with regard to common effluent treatment plants.

108. It can thus be seen that if the **JUR** is not recalled, it will result in demolition of various buildings/projects constructed out of public exchequer to the tune of nearly Rs. 20,000 crore. I may give only three instances of the same.

109. The first one is with regard to AIIMS Medical College and Hospital constructed in the State of Odisha. The college and the hospital buildings constructed there are having a capacity of approximately 962 beds which will have to be demolished on account of the **JUR**.

110. The second one is with regard to a greenfield airport constructed in Vijayanagar in the State of Karnataka.

111. The third one is with regard to common effluent treatment plants. The purpose of an effluent treatment plant is to remove the pollutants from the sewage water and throw clean water into the streams. The question is whether demolition of such effluent treatment plants, constructed using huge public exchequer, would be conducive to the protection of environment or against it?

112. I, therefore, ask a question to myself as to whether it would be in the public interest to demolish all such projects and permit the money spent from the pocket of public exchequer to go in the dustbin?

113. I clarify that I am only considering the effect of the **JUR** on the projects being undertaken by the Central Government, State Government, Public Undertakings etc. Needless to state that the effect on the projects undertaken by the private individuals/entities may be manifold.

114. As submitted by Shri Rohatgi for the review petitioner-CREDAI, in certain cases, when the projects commenced, EC was not necessary taking into consideration the size of the project. However, subsequently, EC became necessary on account of change in municipal regulations etc., which

permitted higher FSR thereby bringing a project in the category of the ones included in the Schedule and requiring an EC. The effect of **JUR** in such cases would also be devastating.

115. At the cost of repetition, I state that even in accordance with the 2017 Notification and 2021 OM, an EC can be granted only in respect of the projects which are otherwise permissible in law.

116. As already discussed hereinabove, even these notifications do not permit an EC to be granted in respect of the projects which are not permissible under law. As such, if the project proponents apply for an EC in respect of projects which are permissible in law, they would be entitled to get the EC. However, such projects will now have to be first demolished since they did not have the EC initially, but since these projects are otherwise permissible in law, the project proponents would be entitled to apply for an EC and upon obtaining such an EC, they would have to again construct the said project. The question, therefore, is whether such a *modus operandi* of demolition and re-construction would be in the larger public interest or would in fact be counter-productive to the public interest?

117. I am, therefore, of the considered view that the effect of **JUR** would be that though projects, such as the ones referred to hereinabove, which are otherwise permissible in law, and for which the project proponents would be entitled to apply for an EC, they would have to be demolished and only thereafter, upon obtaining the EC, the project proponents can be permitted to construct the project again.

118. No doubt that the argument on behalf of the original writ petitioners that if the Government/PSU and the private individuals have acted contrary to law, then they should face the consequences thereof is very attractive at the first blush. However, it is to be noted that the 2021 OM came to be issued on the directions passed by the NGT. If the Government, public undertakings and the private individuals on the basis of 2021 OM have taken steps for obtaining EC, can they now be deprived of the benefits under the said OM? The answer surely has to be in the negative.

119. Another anomalous situation that has arisen is that for all such ECs which have been granted prior to the date of **JUR,** the underlying projects will be protected whereas all such projects wherein though all requirements in terms of 2021 OM

were complete, but only EC was on the verge of being granted, but could not be granted on account of the interim order passed by this Court dated 2nd January 2024, they will have to suffer the consequences of demolition.

120. I may gainfully refer to the following observations of this Court in the case of ***S. Nagaraj and Others v. State of Karnataka and Another***[36]:

> "**36.** It is true that the Government is mainly responsible for the above unfortunate state of affairs but that should not desist this Court from revising and reviewing the said orders which have such serious consequences. It is one thing to punish the person who furnished false particulars and altogether a different thing to refuse to revise and review the orders when the correct situation and its likely consequences are brought to the notice of court. **It is the duty of the court to rectify, revise and re-call its orders as and when it is brought to its notice that certain of its orders were passed on a wrong or mistaken assumption of facts and that implementation of those orders would have serious consequences. An act of Court should prejudice none. "Of all these things respecting which learned men dispute", said Cicero, "there is none more important than clearly to understand that we are born for justice and that right is founded not in opinion but in nature.**" This very idea was echoed by James Madison (*The Federalist*, No. 51, page 352). He said:
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> > "Justice is the end of government. It is the end of the civil society. It ever has been and ever will be pursued, until it be

[36] **1993 Supp (4) SCC 595**

obtained or until liberty be lost in the pursuit.""

[Emphasis supplied]

121. As already discussed hereinabove, the **JUR** though considers some of the paragraphs of ***Common Cause*** (supra), ***Alembic Pharmaceuticals Limited*** (supra) and ***Electrosteel Steels Limited*** (supra), various relevant paragraphs of these judgments which would have had a direct bearing on the **JUR** had not been brought to the notice of this Court and accordingly not considered by this Court. Apart from that, the law laid down in **JUR** is totally in conflict with the law laid down in ***D. Swamy*** (supra) and ***Pahwa Plastics Private Limited*** (supra).

122. At the cost of repetition, I reiterate that a two-Judges Bench is bound by an earlier judgment of another two-Judges Bench, and if the Bench is not in agreement with the same, the *only* option available to it is to refer it to a larger Bench.

123. Not only that, as stated hereinabove, if the **JUR** is not recalled, it will have serious consequences in terms of demolition of projects which are either completed or about to be completed in the near future and which are of vital public importance constructed out of the public exchequer.

124. As already observed hereinabove, if **JUR** is continued to operate, thousands of crores of rupees would go in waste.

125. In any case, both the 2017 Notification and 2021 OM provide for imposition of huge penalties. As such, the penalties have a deterrent effect and the same takes care of heavily penalising the errant builder/developer while allowing operation of several projects which are otherwise permissible in law.

126. In fact, if the **JUR** is permitted to operate rather than protecting the environment, it would result in creating even more pollution. I say so because if such large number of buildings/projects which have been completed or are near completion are demolished and they could be reconstructed shortly thereafter after obtaining EC as they were otherwise permissible; it would result in nothing but creating more pollution which could not have been the intention of the **JUR**.

127. I, therefore, find that in the present case, a balanced approach as was adopted by this Court in the cases of ***Lafarge Umiam Mining (P) Ltd.*** (supra), ***Alembic Pharmaceuticals Limited*** (supra) and ***Electrosteel Steels Limited*** (supra), to

which I have already referred to hereinabove, needs to be taken.

128. In this respect, I may also gainfully refer to two of the recent judgments of this Court in the cases of ***Municipal Corporation of Greater Mumbai and Others v. Pankaj Babulal Kotecha and Others***[37] and ***Bindu Kapurea v. Subhashish Panda and Others***[38].

h. Municipal Corporation of Greater Mumbai and Others v. Pankaj Babulal Kotecha and Others

129. In the case of ***Municipal Corporation of Greater Mumbai*** (supra), a water body known as the Khajuria Lake situated in Kandivali (West), Mumbai which was in existence for over 100 years, was obliterated for the redevelopment of a theme park.

130. It was the contention of the Municipal Corporation of Greater Mumbai (appellant therein) that the lake was in an unused and bad condition, so much so that it was treated as a garbage disposal area. The Municipal Corporation, therefore, thought it appropriate to use it for beautification and conversion into a recreational space. The project was,

[37] **2025 SCC OnLine SC 1263**
[38] **2025 INSC 784**

accordingly, completed transforming the same into recreational space comprising the planned green cover, musical water fountain and recreational amenities and it was inaugurated for public use in December 2011. On publication of a news report about it, public-spirited individuals filed a writ petition on 29th November 2012 before the Bombay High Court.

131. During the pendency of the said petition, the concerned Collector had issued post-facto sanction on 10th February 2014 approving the project. The High Court vide judgment and order dated 3rd August 2018 allowed the writ petition. Aggrieved thereby, the Municipal Corporation filed an appeal by way of special leave before this Court.

132. It will be relevant to refer to the following observations of this Court in the said case:

> "**15.** As regards the current ecological value, the photographic evidence placed before us vividly illustrates the Subject Property as a verdant, well-maintained urban oasis replete with numerous mature trees and recreational facilities actively utilized by the community across all demographic segments. It bears particular emphasis that we are adjudicating this appeal in 2025, nearly fifteen years after the park became functional. During this extended temporal span, an entire generation of children has grown up with this green space as an

integral component of their daily existence, whilst the trees planted during the initial beautification have themselves matured into substantial specimens that now contribute significantly to the local ecosystem. The park serves as a vital recreational nucleus for children, offering safe spaces for play and physical activity; for senior citizens, providing dedicated areas for walking and social interaction; and for families, creating opportunities for community engagement and leisure.

16. The recreational park presently delivers substantial public benefits that cannot be overlooked. It provides an essential green space in an increasingly concretized urban environment, with trees and other foliage contributing significantly to oxygen generation, air purification, and microclimate regulation. The ornamental water features, such as the fountain, though admittedly not equivalent to a natural water body, nonetheless contribute to biodiversity.

17. Be that as it may, the implementation of the High Court's direction at this juncture would engender consequences that contravene the very environmental principles it seeks to uphold. The demolition would necessitate the removal of numerous trees, causing immediate environmental degradation requiring decades to remediate. Additionally, the expenditure of approximately Rs. 5 crores of public funds would be rendered nugatory, with further substantial public expenditure required for the proposed restoration. Such an outcome would create a paradox wherein environmental restoration results in greater ecological harm than the original transformation—a classic case of counterproductive remedial intervention. Most importantly, given the absence of any natural catchment area as aforenoted, we are constrained to observe that even if a pond were to be recreated, its sustainability and maintenance would remain highly questionable, with the distinct possibility of such

stagnant water body becoming health hazards for the local populace, particularly during the monsoon seasons when such properties are prone to becoming breeding grounds for disease-carrying vectors.

18. Beyond these substantive aspects, the Collector's *post facto* sanction of 2014 merits separate consideration. The High Court found this sanction to be procedurally deficient and contradictory— attempting to validate an unauthorized construction yet simultaneously prohibiting the very land use change that had occurred. **In this specific context, we observe that the larger question for adjudication before us transcends the validity of this belated approval. Even assuming the sanction's invalidity, the fundamental issue remains whether restoration is feasible or desirable, given the passage of considerable time and the establishment of a functioning public amenity.** The legal status of the 2014 sanction, therefore, though relevant to the question of initial authorization, cannot be determinative of the appropriate remedy at this stage. More significantly, even if there existed some irregularity or perceived illegality in the *post facto* sanction, such concerns have been reasonably addressed and balanced by the specific rider imposed therein restricting any change in land use. The sanction, as it stands, thus ensures that the Subject Property shall remain dedicated exclusively to recreational purposes in perpetuity. This rider provides the necessary legal safeguard and permanency to guarantee that the land may not be diverted for any other purpose, commercial or otherwise."

[Emphasis supplied]

133. It can thus be seen that this Court has observed that the demolition of the recreational park would necessitate the removal of numerous trees, causing immediate environmental

degradation requiring decades to remediate. It was further observed that the expenditure of approximately Rs. 5 crore of public funds would be rendered nugatory, with further substantial public expenditure required for the proposed restoration. This Court observed that such an outcome would create a paradox wherein "environmental restoration" results in greater ecological harm than the original transformation. This Court, thereafter, considered it a classic case of counterproductive remedial intervention.

134. This Court further observed that even if there existed some irregularity or perceived illegality in the *post facto* sanction by the concerned Collector, such concerns have been reasonably addressed and balanced by the specific rider imposed therein restricting any change in land use. As a result, the sanction in such terms ensured that the subject property shall remain dedicated exclusively to recreational purposes in perpetuity.

135. I am, therefore, of the considered view that the aforesaid observations in the said case are aptly applicable to the facts of the present case as well.

i. Bindu Kapurea v. Subhashish Panda and Others

136. Recently, a coordinate Bench of this Court in the case of ***Bindu Kapurea*** (supra) had found the conduct of some of the officials of the Delhi Development Authority in clear and flagrant violation of this Court's order dated 9th May 1996 passed in WP(C) No.4677 of 1985.

137. It will be relevant to refer to some of the observations made by this Court in the said case, which read thus:

> "**19.** Having said that, it must be emphasised that while the misadventure undertaken by the errant officials of the DDA was in clear and flagrant contravention of this Court's orders, the underlying objective—namely, to facilitate improved access through broader approach roads for CAPFIMS and other public institutions—appears, does not seem to be in bad faith and certainly not to defy the authority of this Court. The Court is conscious of the distinction between mala fide abuse of power and genuine administrative misjudgement, and we are inclined to deem that the present instance falls within the latter category.
>
> **20.** We say so because, as a Constitutional Court, it often becomes our solemn duty to incline towards decisions that, in the long run, subserve the larger public interest. In a scenario such as the present, where competing claims of public interest are at play— some capable of being fulfilled and others falling short of expectations—this Court is guided in its adjudication by the principles of constitutional morality. Our decision in such circumstances ought to be grounded in the constitutional values of equality, social justice, and economic justice, which lie at the very nucleus of our Constitution.
>
> ……..

23. Given these noble objectives, it is imperative to recognise the significance of an institution like CAPFIMS, particularly in the lives of families of personnel belonging to the lower ranks of the paramilitary forces. These are the kith and kin of individuals who routinely place themselves at risk to protect the nation and defend its borders under extremely harsh conditions. We are of the considered view that such individuals, who remain largely voiceless and without representation in proceedings such as the present one, stand to benefit directly from the construction of an improved approach road to CAPFIMS. Better road access would enable emergency vehicles, including ambulances, to reach the facility swiftly, thereby potentially saving the lives of those who routinely safeguard ours. In the discharge of our judicial function, this overarching public interest weighs heavily upon the conscience of this Court.

.....

26. That being so, having holistically considered the matter from multiple dimensions, this Court finds itself confronted with a difficult juxtaposition—between the imperative of much-needed development and improved access to medical facilities on the one hand and the undeniable and pervasive harm caused to the environment on the other. In this vein, we must remain mindful that the establishment of CAPFIMS, the felling of trees, and the construction of approach roads are now fait accompli. While it may be theoretically possible to contemplate a reversal of these actions, such a course is practically untenable. In our view, the die is cast, and what is done cannot now be undone—any refusal to put institutions like CAPFIMS to optimal use or to undo road construction at this stage risks not only undermining public interest but also squandering significant public resources."

[Emphasis supplied]

138. It can thus be seen that though in the said case this Court found that the officers of the DDA were in flagrant contempt of this Court, it rather than choosing to direct demolition of the project already undertaken/constructed adopted a balanced approach in the larger public interest.

139. Finally, in the said case, this Court directed remedial measures to be taken to ensure compensatory afforestation on 185 acres of land identified and proposed to be used towards compensatory afforestation.

140. I am in complete agreement with the aforesaid observations of this Court in the case of ***Bindu Kapurea*** (supra), to the effect that demolition of the projects already completed would rather than being in public interest would result in throwing the valuable public resources in dustbin.

IV. CONCLUSION

141. Taking into consideration all these aspects of the matter, I am inclined to allow the review petition.

142. The judgment and order dated 16th May 2025 (**JUR**) is recalled. The writ petitions and the appeal are restored to file.

143. The Registry is directed to place the matter before the Chief Justice of India on the administrative side for obtaining the necessary orders.

.....CJI
(B.R. GAVAI)

NEW DELHI;
NOVEMBER 18, 2025.

REPORTABLE

IN THE SUPREME COURT OF INDIA
INHERENT JURISDICTION

REVIEW PETITION (CIVIL) No. OF 2025
(Arising out of R.P. (C) Diary No. 41929 of 2025)
IN
WRIT PETITION (CIVIL) NO. 1394 OF 2023

CONFEDERATION OF REAL ESTATE DEVELOPERS OF INDIA (CREDAI) PETITIONER(S)

VERSUS

VANASHAKTI & ANR. RESPONDENT(S)

J U D G M E N T

UJJAL BHUYAN, J.

I have carefully gone through the judgment penned by the learned Chief Justice (referred to hereinafter as the review judgment) whereby he has allowed the review petition and has recalled the judgment and order dated 16.05.2025 passed by this Court in Writ Petition (Civil) No. 1394 of 2023 (*Vanashakti Vs. Union of India*), Writ Petition

(Civil) No. 118 of 2019, Writ Petition (Civil) No. 115 of 2024 and Civil Appeal Nos. 381-382 of 2025 (collectively referred to hereinafter as the '*Vanashakti* judgment'). With respect I am unable to persuade myself to agree to the line of reasoning and conclusions reached by the learned Chief Justice. According to me, no case for review has been made out and, therefore, the review petition is liable to be dismissed.

2. The review petition is being allowed on two grounds. Firstly, according to the review judgment, *Vanashakti* has not correctly followed and has also not noticed various paragraphs of the following judgments which could have persuaded the Bench to take a different view: *Common Cause Vs. Union of India*[1], *Alembic Pharmaceuticals Limited Vs. Rohit Prajapati*[2] and *Electrosteel Steels Limited Vs. Union of India*[3]. The review judgment also says that *Vanashakti* has not taken note of the judgments passed by a co-ordinate Bench of this Court in *D. Swamy Vs. Karnataka State Pollution Control Board*[4] and *Pahwa Plastics Private*

[1] (2017) 9 SCC 499
[2] (2020) 17 SCC 157
[3] (2023) 6 SCC 615
[4] (2023) 20 SCC 469

Limited Vs. Dastak NGO[5] where the 2017 Notification and the 2021 OM have been upheld. Therefore, the judgment in *Vanshakti* is *per incuriam* the decisions in *D. Swamy* and *Pahwa*. The second ground on which *Vanashakti* is being reviewed is that impact of the said judgment would entail enormous economic cost to the country and that it would create more pollution due to demolition of projects if the *Vanashakti* judgment is given effect to.

3. I am afraid both these grounds are not at all tenable and certainly cannot form the basis for recalling of the judgment in *Vanashakti*.

4. I say so for the reasons mentioned hereunder.

5. Confederation of Real Estate Developers of India has filed Review Petition (Civil) Diary No. 41929 of 2025 in Writ Petition (Civil) No. 1394 of 2023. Be it stated that the Confederation of Real Estate Developers of India (briefly 'CREDAI' hereinafter) had filed an interlocutory application in Writ Petition (Civil) No. 1394 of 2023, being I.A. No. 24981 of 2024, seeking impleadment in the hearing of the aforesaid

[5] (2023) 12 SCC 774

writ petition. The prayer for impleadment was allowed *vide* order dated 02.02.2024. Aggrieved by the *Vanashakti* judgment, CREDAI has filed the instant review petition seeking the following reliefs:

(a) pass an order allowing the present review petition seeking review of the judgment and order dated May 16, 2025 passed by this Court in Writ Petition (C) No. 1394 of 2023;

(b) pass such other order or orders as this Hon'ble Court may deem fit and proper in the interest of justice.

6. I will advert to the grounds of review at a subsequent stage.

7. It may be mentioned that a number of miscellaneous applications have been filed in Writ Petition (Civil) No. 1394 of 2023. But there is only one review petition i.e. the review petition filed by CREDAI. In para 2 of the review judgment, it has been mentioned that though certain other review petitions including one filed by Union of India and various interlocutory applications for modification/clarification of the *Vanashakti*

judgment are pending but the review petition filed by CREDAI would be heard and decided first, I have checked the record made available to me and I find that the review petition filed by CREDAI is the only review petition filed for review of the *Vanashakti* judgment. Though Ms. Aishwarya Bhati, learned Additional Solicitor General of India had briefly appeared during the hearing and had supported the review petitioner and the other applicants, Union of India has not filed any review petition for review of the *Vanashakti* judgment.

8. Since Mr. Tushar Mehta, learned Solicitor General of India and Mr. Kapil Sibal, learned Senior Counsel had addressed the Court supporting the review of *Vanashakti* judgment, it would be appropriate to refer to their miscellaneous applications. Mr. Mehta has appeared on behalf of M/s. Sail Refractory Company Limited, a subsidiary company of Steel Authority of India Limited, which has filed Miscellaneous Application (Diary) No. 46855 of 2025 in Writ Petition (Civil) No. 1394 of 2023. Prayer made in this miscellaneous application is as under:

(a) clarify and declare that the benefit of protection extended to Environmental Clearances already granted under the 2017 Notification in the judgment dated 16.05.2025 in *Vanashakti Vs. Union of India* (2025 INSC 718), includes and applies to the applicant's project, wherein the Environmental Clearance stood deemed to have been granted under Paragraph 8 of the EIA Notification, 2006;

(b) in the alternative, and without prejudice to the foregoing, direct that the said protection be extended to the applicant, who has completed all obligations from its end and whose proposal, the Expert Appraisal Committee (EAC), has already recommended for grant of Environmental Clearance and only a formal communication was pending from the end of the regulatory authority;

(c) pass such other or further orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case and in the

interest of justice, equity and to prevent irreparable harm to the applicant.

8.1. Similarly, Mr. Sibal has appeared on behalf of the applicant Karnataka State Industrial Infrastructure Development Corporation which has filed Miscellaneous Application (Diary) No. 52650 of 2025 in Writ Petition (Civil) No. 1394 of 2023 seeking the following reliefs:

(a) clarify the judgment dated 16.05.2025 passed by this Court in W.P. (C) No. 1394/2023, titled *Vanashakti vs. Union of India*, to the extent that it does not apply to the facts and circumstances of the present case;

(b) modify and/ or clarify the judgment dated May 16, 2025 passed by this Court in W.P. (C) No. 1394/2023, titled *Vanashakti vs. Union of India*, to the extent of granting an exemption/ permitting a carve out, to the subject project of the applicant, on terms and conditions as this Court may deem fit and proper, in the peculiar facts and circumstances of the present case;

(c) direct the Ministry of Environment, Forest and Climate Change (M0EF&CC) to process and decide the application of the applicant concerning the grant of environmental clearance to the subject project, given the special nature and public welfare objective of the subject project.

9. Since the review judgment has already recorded the rival submissions made at the Bar, it is considered not necessary to restate the same here.

10. However, I may briefly refer to the prayers made in the different writ petitions and civil appeals which were adjudicated by this Court in *Vanashakti*. Writ Petition (Civil) No. 1394 of 2023 was filed by *Vanashakti* for quashing the 2021 office memorandum (OM). It also sought for a direction to the MOEF&CC as well as to the State Environment Impact Assessment Authorities and Sector Expert Appraisal Committees not to process and entertain any application for grant of *ex post facto* EC after 13.05.2018.

10.1. Writ Petition (Civil) No. 118 of 2019 was filed by Shri Ajay S. Jajodia challenging the 2017 Notification and seeking a direction to the respondents to produce a list of real estate projects and project proponents who have undertaken real estate development projects without obtaining EC under the 2006 EIA Notification.

10.2. One Earth One Life filed Writ Petition (Civil) No. 115 of 2024 assailing the legality and validity of the 2017 Notification as well as the 2021 OM. A further direction was sought for to restrain MOEF&CC from issuing any notification or office memorandum permitting *ex post facto* EC.

10.3. Fatima and K. Bharti had filed amongst themselves three writ petitions before the Madras High Court assailing the 2021 OM. A Division Bench of the Madras High Court quashed the 2021 OM but held that its decision would be applicable prospectively. This decision of the Madras High Court declaring that quashing of the 2021 OM would operate prospectively has been challenged in Civil Appeal Nos. 381-382 of 2025 by Fatima.

11. Before dealing with the review petition and the aforesaid two connected miscellaneous applications, it would be appropriate to briefly delineate the legislative and judicial progression in the field of environmental jurisprudence leading to the *Vanashakti* judgment.

12. To implement the decisions taken in the United Nations Conference on the Human Environment held at Stockholm in June, 1972 and to take appropriate measures in terms of such decisions for the protection and improvement of the environment as well as for prevention of hazards to human beings, other living creatures, plants and property, Parliament enacted the Environment (Protection) Act, 1986 (briefly, 'the Environment Protection Act' hereinafter). Section 3 deals with power of the Central Government to take measures to protect and improve the environment. Sub-section (1) says that subject to the provisions of the Environment Protection Act, Central Government shall have the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and

abating environmental pollution. Sub-section (2) indicates the measures in respect of which Central Government may take steps for the aforesaid purpose. This includes clause (v) of sub-section (2) which speaks of restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards.

13. In exercise of the powers conferred by Sections 6 and 25 of the Environment Protection Act, Central Government has made a set of rules called the Environment (Protection) Rules, 1986 (briefly 'the Environment Protection Rules' hereinafter). Rule 5 deals with prohibition and restriction on the location of industries and the carrying on of processes and operations in different areas. This rule lays down several factors which may be taken into consideration by the Central Government while prohibiting or restricting the location of industries and carrying on of processes and operations in different areas.

14. This Court had expressed its concern for environment even prior to enactment of the Environment

Protection Act. Through its judgments, in cases after cases, a consistent line of jurisprudence has been developed by this Court to protect the environment by arresting ecological degradation. Principles, such as, precautionary principle, polluter pays principle, sustainable development and inter-generational equity are now firmly ensconced in our constitutional law. Not only it is the fundamental duty of every citizen to protect the environment under Article 51A(g) of the Constitution of India, right to have a safe environment is now a facet of Article 21. This Court through its repeated judicial interventions has declared that right to clean air and a pollution free environment is a fundamental right of every person living in India which is traceable to Article 21 of the Constitution of India. It is not necessary to refer to the entire gamut of case laws on the strength of which environmental jurisprudence has evolved in our country.

15. Such has been the impact of these judgments that citizens cutting across all stratas and regions are now active stakeholders in environmental discourse and in the mission

to protect the environment all over the country, not confined to the academia and policy makers.

16. After inviting objections from the public and after considering such objections, Government of India in the Ministry of Environment and Forests issued Environment Impact Assessment Notification dated 27.01.1994. This notification was issued in exercise of the powers conferred by sub-section (1) and clause (v) of sub-section (2) of Section 3 of the Environment Protection Act read with clause (d) of sub-rule (3) of Rule 5 of the Environment Protection Rules. By way of the Environment Impact Assessment Notification dated 27.01.1994 (briefly, the 1994 EIA Notification' hereinafter), Central Government directed that on and from the date of publication of the said notification in the official gazette, expansion or modernization of any activity or new project listed in Schedule I to the notification should not be undertaken in any part of India unless it had been accorded environmental clearance (EC) by the Central Government in accordance with the procedure specified in the 1994 EIA Notification. The requirements and procedure for seeking EC

of projects were laid down in paragraph 2 of the said notification. List of projects requiring EC from the Central Government was provided in Schedule I.

17. After more than a decade, a fresh Environment Impact Assessment Notification was issued by the M0EF&CC, Government of India on 14.09.2006. Like the 1994 notification, here also a draft notification was first issued which was made available to the public. Objections and suggestions were called for from the members of the public. All such objections and suggestions received in response to the draft notification were duly considered by the Central Government. Thereafter, in exercise of the powers conferred by sub-section (1) and clause (v) of sub-section (2) of Section 3 of the Environment Protection Act read with clause (d) of sub-rule (3) of Rule 5 of the Environment Protection Rules, central government issued the Environment Impact Assessment Notification dated 14.09.2006 (briefly 'the 2006 EIA Notification' hereinafter). This notification was issued in supersession of the 1994 EIA Notification. As per the 2006 EIA Notification, on and from the date of its publication, the

required consideration of new projects or activities or the expansion or modernization of existing projects or activities listed in the schedule to the notification entailing capacity addition with change in process and/or technology shall be undertaken in any part of India only after prior EC from the Central Government or by the State Level Environment Impact Assessment Authority duly constituted by the Central Government under sub-section (3) of Section 3 of the Environment Protection Act in accordance with the procedure specified in the 2006 EIA Notification.

17.1. Paragraph 2 of the 2006 EIA Notification speaks of prior EC. This provision being relevant is extracted hereunder:

> **2. Requirements of prior Environmental Clearance (EC):** The following projects or activities shall require prior environmental clearance from the concerned regulatory authority, which shall hereinafter be referred to as the Central Government in the Ministry of Environment and Forests for matters falling under Category 'A' in the Schedule and at State level the State Environment Impact Assessment Authority (SEIAA) for matters falling under Category 'B' in the said Schedule and at District level, the District Environment Impact Assessment Authority (DEIAA) for matters falling under category 'B2' for mining of minor minerals in the

said Schedule, before any construction work, or preparation of land by the project management except for securing the land, is started on the project or activity:

(i) All new projects or activities listed in the Schedule to this notification;

(ii) Expansion, modernization or any change in the product mix or raw material mix in existing projects or activities, listed in the Schedule to this notification, resulting in capacity beyond the threshold limits specified for the concerned sector in the said Schedule, subject to conditions and procedure provided in sub-paragraph (ii) of paragraph 7.

18. The *Vanashakti* judgment noticed that in the 1994 EIA Notification, the word 'prior' was not used. However, the said notification provided that on and from the date of publication of the said notification in the official gazette, expansion or modernization of any activity, if pollution load was to exceed the existing one, or a new project listed in Schedule I to the said notification should not be undertaken in any part of India unless it had been accorded EC by the Central Government. Therefore, notwithstanding the absence of the word 'prior' in the 1994 EIA Notification, the intention was very clear in that there should be no expansion or

modernization of any activity or starting of any new project without obtaining EC from the Central Government. However, in the 2006 EIA Notification, which has been issued in supersession of the 1994 EIA Notification and continues to hold the field, it is categorically mandated that on and from the date of its publication in the official gazette, no new project or activities or expansion or modernization of existing projects or activities listed in the Schedule to the said notification shall be undertaken in any part of India without obtaining prior EC from the Central Government. Thus, what was implicit in the 1994 EIA Notification has been made explicit in the 2006 EIA Notification. Therefore, the 2006 EIA Notification can be said to be an improvement over the 1994 EIA Notification.

19. In *Common Cause*, a two-Judge Bench of this Court was considering a batch of writ petitions filed under Article 32 of the Constitution of India which highlighted mining scandal of enormous proportions in the State of Odisha. It was noticed that lessees in the districts of Keonjhar, Sundergarh and Mayurbhanj in Odisha had

rapaciously mined iron ore and manganese ore because of which there was considerable destruction of forests and environment causing untold misery to the tribal people of the area. The cause of action was triggered when an editor of a newspaper from Odisha filed interlocutory applications in *T.N. Godavarman Thirumulpad Vs. Union of India* (W.P. (C) No. 202 of 1995) highlighting the above issues and seeking appropriate directions. This Court issued notice to the Central Empowered Committee (CEC) which submitted several reports to this Court. This Court noted the interplay between the Environment Protection Act and the 1994 EIA Notification on the one hand and the Mines and Minerals (Development and Regulation) Act, 1957 on the other hand and in the facts of that case posed two questions:

(i) What was the base year for considering the pollution load while proposing any expansion activity?

(ii) What was the duration for which an EC was not necessary for an ongoing project which did not propose any expansion? Or to put it differently,

what was the validity period for a no-objection certificate from the State Pollution Control Board?

19.1. In so far the first question was concerned, this Court on a reading of the 1994 EIA Notification was of the view that the immediately preceding year i.e. 1993-94 would be the base year for considering any proposal of expansion. In so far the second question was concerned, this Court observed that in respect of a project that had commenced prior to 27.01.1994 i.e. the date of the 1994 EIA Notification, an exemption from the requirement of obtaining an EC was granted if there was no expansion and the existing pollution load was not exceeded. But a no objection certificate was necessary from the State Pollution Control Board for continuing with the mining operation. In other words, in such type of projects (including expansion of mining operations), the activity could continue even in the absence of an EC but that was subject to a no objection certificate from the State Pollution Control Board.

19.2. However, this Court specifically rejected the contention of the mining lease holders that in the absence of

the word 'prior' in the 1994 EIA notification, there was a possibility of getting an *ex post facto* EC which was a signal to the mining lease holders that obtaining an EC was not mandatory or that if it was not obtained, the default was retrospectively condonable. This Court after referring to its previous decision in the case of *M.C. Mehta Vs. Union of India*[6], observed that the Ministry of Environment and Forests did not intend to legalise the commencement or continuance of mining activity without compliance to the stipulations of the 1994 EIA Notification and thereafter held as follows:

> 108. .....It appears to us that the MoEF was, in a sense, cajoling the the mining leaseholders to comply with the law and the 1994 EIA Notification rather than use the stick. That the mining leaseholders chose to misconstrue the soft implementation as a licence to not abide by the requirements of the law is unfortunate and was an act of omission or commission by them at their own peril. We cannot attribute insensitivity to the MoEF or even to the mining leaseholders to environment protection and preservation, but at the same time we cannot overlook the obligation of everyone to abide by the law. That

[6] (2004) 12 SCC 118

the MoEF took a soft approach cannot be an escapist excuse for non-compliance with the law or EIA 1994.

19.3. On behalf of the mining lease holders, it was argued that lot of circulars were issued in connection with the 1994 EIA Notification which created confusion, vagueness and uncertainty. These circulars provided for interim operational guidelines. This was followed by the 2006 EIA Notification. That apart, it was contended that for grant of EC, a lot of time was required, much more than the international norm. In such circumstances, it was argued that when an EC is granted, it should have retrospective effect from the date of application for grant of EC. This Court rejected the said contention of the mining lease holders in the following manner:

> **125.** We are not in agreement with the learned counsel for the mining leaseholders. There is no doubt that the grant of an EC cannot be taken as a mechanical exercise. It can only be granted after due diligence and reasonable care since damage to the environment can have a long-term impact. EIA 1994 is therefore very clear that if expansion or modernisation of any mining activity exceeds the existing pollution load, a prior EC is necessary and as already held by this Court in *M.C. Mehta* even for the

> renewal of a mining lease where there is no expansion or modernisation of any activity, a prior EC is necessary. Such importance having been given to an EC, the grant of an ex post facto environmental clearance would be detrimental to the environment and could lead to irreparable degradation of the environment. The concept of an ex post facto or a retrospective EC is completely alien to environmental jurisprudence including EIA 1994 and EIA 2006. We make it clear that an EC will come into force not earlier than the date of its grant.

19.4. Thus, this Court declared in no uncertain terms that a prior EC is necessary. Grant of *ex post facto* EC would be detrimental to the environment as it could lead to irreparable degradation of the environment. Concept of *ex post facto* or retrospective EC is completely alien to environmental jurisprudence.

19.5. In the facts of that case, this Court noted the permissions granted by the State Government to the mining lease holders to carry on mining as well as the no-objection certificate issued by the State Pollution Control Board and, thereafter, was of the view that the mining lease holders would be entitled to the benefit of any temporary working

permission granted but for the illegal and unlawful mining, compensation at the rate of 100% of the price of the mineral was directed to be recovered from 2000-2001 onwards in terms of Section 21(5) of the Mines and Minerals (Development and Regulation) Act, 1957.

20. Thus, from an analysis of the decision of this Court in *Common Cause*, the ratio that can be culled out is that a prior EC is necessary. Grant of *ex post facto* EC would be detrimental to the environment. Concept of *ex post facto* EC is completely alien to environmental jurisprudence including the 1994 EIA Notification and the 2006 EIA Notification. This is the ratio. The fact that in the operative portion of the judgment, as noticed supra, this Court had allowed the mining lease holders to continue the mining during the temporary permission period granted by the state authority on payment of compensation at the rate of 100% of the price of the mineral is not the ratio in *Common Cause*. That was a relief granted to the mining lease holders in the peculiar facts of that case which cannot be construed to be the ratio of that decision.

21. Let me now turn to the 2017 Notification. It is dated 14.03.2017. The notification opens with a set of prefatory recitals invoking statutory powers and prior administrative and judicial history. There is no doubt that this notification is a statutory one drawing its legitimacy from Section 3 of the Environment Protection Act and Rule 5 of the Environment Protection Rules. In paragraph 9 it says that MOEF&CC and State Environment Impact Assessment Authorities were receiving certain proposals under the 2006 EIA Notification for grant of terms of reference and EC for projects which had started the work on site, expanded the production beyond the limit of environmental clearance or changed the product mix without obtaining prior EC. With a view to protecting and improving the quality of the environment and abating environmental pollution, MOEF&CC was of the view that all entities which were not in compliance with the 2006 EIA Notification should be brought under compliance in an expedient manner. Therefore, Government of India deemed it essential to establish a process for appraisal of such cases, noting that the process should be such that it deterred violation of the provisions of the 2006 EIA Notification and

that the pecuniary benefit of violation and damage to environment was adequately compensated for. Keeping the above in view, the Central Government issued seven directions which may be summarized as under:

(1) Projects or activities including expansion or modernization of existing projects or activities requiring prior EC under the 2006 EIA Notification undertaken in any part of India without obtaining prior EC from the competent authority shall be considered as a case of violation of the 2006 EIA Notification.

(2) If such projects were brought for EC after construction had started or after expansion/ modernization/change in product mix without prior clearance, these projects shall be treated as cases of violation and even Category B projects which are granted EC by the State Environment Impact Assessment Authority shall be appraised for grant of EC only by the Expert Appraisal Committee and EC, if any, will be granted at the central level.

(3) In cases of violation, action will be taken against the project proponent by the respective State or by the State Pollution Control Board under Section 19 of the Environment Protection Act. No consent to operate or occupancy certificate will be issued till the project is granted EC.

(4) Expert Appraisal Committee shall appraise such cases to assess, (a) whether the project site is permissible under the prevailing law, and (b) whether the expansion/work can be run sustainably under compliance with the environmental norms with adequate environmental safeguards. If the findings of the Expert Appraisal Committee are negative, closure of the project will be recommended along with other legal actions.

(5) Where the findings of the Expert Appraisal Committee are in the affirmative, the project will be prescribed appropriate terms of reference for undertaking an environment impact assessment and preparation of environment management plan. Usually, the Expert Appraisal Committee

will prescribe specific terms of reference on the assessment of ecological damage, a remediation plan, and natural and community resource augmentation plan, which shall be prepared by an environmental laboratory as provided under the Environment Protection Act.

(6) Expert Appraisal Committee shall stipulate implementation of environmental management plan comprising remediation plan and natural and community resource augmentation plan corresponding to the ecological damage assessed and the economic benefit derived due to violation as a condition of EC.

(7) The project proponent would be required to submit a bank guarantee equivalent to the amount of the remediation plan and natural and community resource augmentation plan with the State Pollution Control Board. The quantification was to be recommended by the Expert Appraisal Committee and finalized by the regulatory authority. The bank guarantee was required to be

deposited prior to grant of EC. It was stated that the same would be released after successful implementation of the remediation plan and natural and community resource augmentation plan.

21.1. Paragraph 14 of the 2017 Notification is relevant. It says that projects or activities which were in violation as on the date of the said notification, would only be eligible to apply for EC under the 2017 Notification and for this a window of only six months period from the date of the said notification was granted. Paragraph 14 reads thus:

> 14. The projects or activities which are in violation as on the date of this notification only will be eligible to apply for environmental clearance under this notification and the project proponents can apply for environmental clearance under this notification only within six months from the date of this notification.

21.2. Date of the 2017 Notification is 14.03.2017. The six months window period was therefore valid till 13.09.2017.

22. Validity of the 2017 Notification was put to challenge before the Madras High Court in *Puducherry Environment Protection Association Vs. Union of India*[7]. In the course of the hearing, learned Additional Solicitor General appeared on behalf of the Central Government and made a statement before the Court which is recorded in the judgment and order dated 13.10.2017. Paragraph 4(i) of the judgment reads thus:

> 4(i) With regard to precautionary principle, faced with the situation that ex post facto clearance and regularization dates have been repeatedly extended time and again by series of notifications, learned Additional Solicitor General at the bar, on instructions, submits that this impugned notification shall clearly and certainly be only a one time measure. We record this submission also.....

22.1. Thus, it is evident from the above that it was on instructions that learned Additional Solicitor General submitted before the Madras High Court that the 2017 Notification was a one-time measure only. Madras High Court

[7] 2017 SCC OnLine Mad 7056

accepted this undertaking of the Central Government and held as under:

> 4(n) We are convinced that paragraphs 3,4 and 5 of the impugned notification alluded to supra coupled with the two undertakings made on instructions by learned Additional Solicitor General that (a) public hearing can be read into paragraph 5 of the impugned notification and (b) this shall certainly and clearly be a one time measure, this writ petition can be closed and disposed of recording the above submissions. We do so.

23. Therefore, Madras High Court disposed of the writ petition and closed the challenge to the 2017 Notification on the undertaking given by the Central Government that the 2017 Notification was a one-time measure only.

24. In *Appaswamy Real Estates Limited Vs. Puducherry Environment Protection Association*[8], request of the MOEF&CC for extending the time provided in the 2017 Notification was accepted by the Madras High Court.

[8] 2018 SCC OnLine Mad 1283

25. Consequently, Office Memorandum dated 16.03.2018 was issued by the Central Government which permitted the project proponents to apply under the 2017 Notification within 30 days from the date of the High Court order. The High Court order is dated 14.03.2018. Therefore, the 30 days further time period was till 13.04.2018.

26. The issue of *ex post facto* EC again confronted this Court in *Alembic Pharmaceuticals Limited* (also referred to hereinafter as *'Alembic')*. Government of India in the Ministry of Environment and Forests had issued a circular on 14.05.2002 providing for *ex post facto* EC to industrial units. National Green Tribunal (NGT), Western Zone *vide* judgment and order dated 08.01.2016[9] declared the said circular to be contrary to law and quashed ECs granted pursuant thereto. Further directions were issued for closing down industrial units which were operating without valid consent.

26.1. The issue which was adjudicated in *Alembic* was whether in view of the requirement of a prior EC under the 1994 EIA Notification, a provision for an *ex post facto* EC to

[9] OA No.66 of 2015, *Rohit Prajapati Vs. Union of India*

industrial units could be validly made by means of the circular dated 14.05.2002 (please see paragraph 12 of *Alembic*). The two-Judge Bench in *Alembic* examined the 1994 EIA Notification and held that there was no manner of doubt that a prior EC was mandatory before a new project was commenced or before undertaking any expansion or modernization of an existing project. Absence of the expression 'prior' in the 1994 EIA Notification did not make any difference since the body of the said notification clearly made it mandatory that no new project as per the Schedule should be undertaken without obtaining EC. Thereafter, the Bench declared in no uncertain terms that concept of an *ex post facto* EC is in derogation of the fundamental principles of environmental jurisprudence and is an anathema to the 1994 EIA Notification. This Court held as under:

> 23. The concept of an ex post facto EC is in derogation of the fundamental principles of environmental jurisprudence and is an anathema to the EIA Notification dated 27-1-1994. It is, as the judgment in *Common Cause* holds, detrimental to the environment and could lead to irreparable degradation. The reason why a retrospective EC or an ex post facto clearance is alien to environmental jurisprudence is that before

the issuance of an EC, the statutory notification warrants a careful application of mind, besides a study into the likely consequences of a proposed activity on the environment. An EC can be issued only after various stages of the decision-making process have been completed. Requirements such as conducting a public hearing, screening, scoping and appraisal are components of the decision-making process which ensure that the likely impacts of the industrial activity or the expansion of an existing industrial activity are considered in the decision-making calculus. Allowing for an ex post facto clearance would essentially condone the operation of industrial activities without the grant of an EC. In the absence of an EC, there would be no conditions that would safeguard the environment. Moreover, if the EC was to be ultimately refused, irreparable harm would have been caused to the environment. In either view of the matter, environment law cannot countenance the notion of an ex post facto clearance. This would be contrary to both the precautionary principle as well as the need for sustainable development.

26.2. This Court made a wholesome analysis of the 1994 EIA Notification and observed that the detailed process listed therein for obtaining an EC allows for minimizing the adverse environmental impact by any industrial activity and for improving the quality of the environment. One must

adopt a rationally ecological outlook towards development. Environmental compliance should not be seen as an obstacle to development but as a measure towards achieving sustainable development and inter-generational equity. Relevant portion of the said judgment is extracted hereunder:

> 35. .....The detailed process listed out in the EIA Notification of 1994 for obtaining an EC allows for minimising the adverse environmental impact of any industrial activity and improving the quality of the environment. One must adopt an ecologically rational outlook towards development. Given the social and environmental impacts of an industrial activity, environment compliance must not be seen as an obstacle to development but as a measure towards achieving sustainable development and inter-generational equity.

26.3. Thereafter, the Bench in *Alembic* addressed the issue as to the consequences that the three industries in *Alembic* faced upon their failure to obtain EC. This Court took note of the fact that though the three industries operated without an EC for several years after the 1994 EIA Notification came into effect, each of them had subsequently

received EC including amended EC for expansion of existing capacities. The subsequent ECs were in operation since 2002/2003. Therefore, keeping the above backdrop in mind, this Court adopted a balanced approach and interfered with the revocation of ECs by the NGT as well as with the direction for closure of the industrial units. However, in view of the fact that the three industries had evaded the legally binding regime of obtaining EC, penalty of rupees ten crores was imposed upon each of the three industries. In the concluding paragraph of the judgment in *Alembic,* i.e. in paragraph 43, the two-Judge Bench was categorical in declaring that the above directions for allowing the three industries to continue their industrial operations upon payment of compensation was issued under Article 142 of the Constitution of India. This portion of the judgment being relevant is extracted hereunder for further clarity:

> 43. .....These directions are issued under Article 142 of the Constitution. Alembic Pharmaceuticals Ltd., United Phosphorous Ltd. and Unique Chemicals Ltd. shall deposit the amount of compensation with GPCB within a period of four months from the date of receipt of the certified copy of

this judgment. This deposit shall be in addition to the amount directed by NGT……

27. The ratio of the judgment in *Alembic* is that concept of an *ex post facto* EC is in derogation of the fundamental principles of environmental jurisprudence. It is detrimental to the environment and could lead to irreparable degradation. *Ex post facto* EC is an anathema to the 1994 EIA Notification. Environment law cannot countenance the notion of an *ex post facto* clearance. This is contrary to both the precautionary principle as well as the need for sustainable development. The directions issued by the Bench under Article 142 of the Constitution of India imposing penalty on the three defaulting industries and thereafter permitting them to continue their industrial operation was in the peculiar facts and circumstances of the case as noticed supra. Directions issued under Article 142 of the Constitution of India are not and cannot be the ratio of any judgment.

28. In fact, so much has turned on *ratio decidendi* of a case that it would be appropriate to briefly dilate on this

aspect as well. Let me go back to the basics. But before I do that, let me dwell on the two expressions used so explicitly in *Alembic*. One is 'derogation' and the other is 'anathema'. 'Derogation' means disparagement or belittling someone or something or the lessening or weakening of a law, authority or power. It can also refer to a formal exemption from a law. On a comparison of the meaning ascribed to the word 'derogation' in various dictionaries it can be summed up that derogation means partial repeal or abolishing of a law; limiting its scope or impairing its utility; it means when a rule or a law is allowed to be ignored; something which is considered to have no worth; an act of officially stating that a law or a rule no longer needs to be obeyed.

28.1. In Concise Oxford English Dictionary, the word 'anathema' has been defined as something that one vehemently dislikes. The word has its origin in Greek in which language it meant 'thing devoted to evil'. Black's Law Dictionary, 9th Edition, defines 'anathema' as an ecclesiastical curse that prohibits a person from receiving communion (as an ex-communication) and bars the person from contact with

members of the church. Therefore, the *dicta* in *Alembic* is crystal clear: there is no concept of *ex post facto* EC in environmental jurisprudence. Environment law cannot countenance the notion of *ex post facto* clearance. It is simply not acceptable.

29. A three-Judge Bench of this Court in *Union of India Vs. Dhanwanti Devi*[10], was adjudicating the question as to whether the respondents were entitled to solatium and interest under the Jammu and Kashmir Requisitioning and Acquisition of Immovable Property Act, 1968. In that case, an argument was advanced on behalf of the appellant that a prior decision of this Court in *Union of India Vs. Hari Krishan Khosla*[11] did not provide for solatium and interest. In that case, a three-Judge Bench had held that the arbitrator and the court had no power to award solatium and interest on the enhanced compensation under the Act. This was vehemently opposed by the respondents. In addition to the other grounds, it was contended that in

[10] (1996) 6 SCC 44
[11] 1993 Supp (2) SCC 149

Satinder Singh Vs. Amrao Singh[12], a three-Judge Bench of this Court had held that from the date of dispossession till the date of receipt of compensation it is an implied agreement to pay interest on the value of the property. Unless the statute specifically and expressly excluded payment of interest and solatium, land holder would be entitled to the interest and solatium. The three-Judge Bench in *Hari Krishan Khosla* did not consider the ratio in *Satinder Singh* which was also a decision of co-ordinate Bench of three Judges. It was contended that there was no ratio in *Hari Krishan Khosla*; it was only a conclusion.

29.1. It was in that context that this Court examined the objection that *Hari Krishan Khosla* was neither a binding precedent nor did it operate as a *ratio decidendi* to be followed as a precedent and was *per incuriam*.

29.2. This Court held that it is not everything said by a judge while giving judgment that constitute a precedent. The only thing in a judge's decision binding a party is the principle upon which the case is decided. It is for this reason

[12] AIR 1961 SC 908

that it is important to analyse a decision and isolate from it the *ratio decidendi*. According to the theory of precedents, every decision contains three basic postulates:

(i) findings of material facts, direct and inferential;

(ii) statement of the principles of law applicable to the legal problems disclosed by the facts; and

(iii) judgment based on the combined effect of the above.

29.3. This Court held that a decision (including judgment) is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. The concrete decision alone is binding between the parties but it is the abstract *ratio decidendi*, ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding. It is only the principle laid

down in the judgment that is binding law under Article 141 of the Constitution of India. A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case or is an issue constitutes the ratio. A precedent by long recognition may mature into a *stare decisis*. It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its *ratio decidendi.*

29.4. This Court explained that in order to understand and appreciate the binding force of a decision, it is always necessary to see what were the facts in the case in which the decision was given and what was the point which had to be decided. No judgment can be read as if it is a statute.

29.5. In the facts of that case, the Bench found that there was no conflict in the ratio laid down in *Satinder Singh* and in *Hari Krishan Khosla. Hari Krishan Khosla* was neither *per incuriam* nor had the effect of overruling *Satinder Singh.*

30. In *Jayant Verma Vs. Union of India*[13], a two-Judge Bench of this Court was examining a challenge to the

[13] (2018) 4 SCC 743

constitutional validity of Section 21-A of the Banking Regulation Act, 1949 which interdicted reopening by courts of a debt between a banking company and its debtor on the ground that the rate of interest charged by the banking company in respect of a loan transaction is excessive. On behalf of the petitioner, one of the submissions advanced was that this issue was decided by a learned Single Judge of the Andhra Pradesh High Court and should be accepted. However, it was pointed out that the aforesaid Single Judge judgment was set aside by a two-Judge Bench of this Court in *SBI Vs. Yasangi Venkateswara Rao*[14]. It was argued that the above decision of this Court in *Yasangi Venkateswara Rao* was *per incuriam* as it did not refer to any of the judgments relied upon by the learned Single Judge of the Andhra Pradesh High Court. No *ratio decidendi* was forthcoming in the decision in *Yasangi Venkateswara Rao.*

30.1. It was in that context, that the two-Judge Bench of this Court in *Jayant Verma* after an elaborate analysis of the legal provisions, posed the question as to whether the

[14] (1999) 2 SCC 375

judgment in *Yasangi Venkateswara Rao* was binding on it since both the Benches were of equal strength i.e. two-Judge Bench.

30.2. While the learned Single Bench of the Andhra Pradesh High Court after an elaborate analysis held that Section 21-A of the Banking Regulation Act, 1949 was arbitrary and violative of Article 14 of the Constitution of India besides not being a law referable to List I Entry 45 of the Seventh Schedule to the Constitution of India, *Yasangi Venkateswara Rao* without much deliberation held that Section 21A was validly enacted. The two-Judge Bench in *Jayant Verma* observed that there was no reasoning worth the name for coming to such a conclusion. Though a very large number of judgments were referred to and discussed by the learned Single Judge, not a single judgment was adverted to or discussed in *Yasangi Venkateswara Rao.* The Bench thereafter posed the question as to whether the judgment in *Yasangi Venkateswara Rao* was a declaration of the law under Article 141 of the Constitution which as a

matter of practice, the latter Bench could not differ being a Bench of co-ordinate strength.

30.3. It was in that context that the two-Judge Bench in *Jayant Verma* referred to the authority *Precedent in English Law* by Cross and Harris (4th Edition) in which *ratio decidendi* was described as under:

> The *ratio decidendi* of a case is any rule of law expressly or impliedly treated by the Judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury.

30.4. The Bench also discussed the principle of *per incuriam* and referred to *State of M.P. Vs. Narmada Bachao Andolan*[15] wherein it was stated:

> 65. "Incuria" literally means "carelessness". In practice *per incuriam* is taken to mean per ignoratium. The courts have developed this principle in relaxation of the rule of stare decisis. Thus, the "quotable in law" is avoided and ignored if it is rendered in ignorance of a statute or other binding authority.
>
> * * * * *
>
> 67. Thus, "*per incuriam*" are those decisions given in ignorance or forgetfulness of some statutory provision or authority binding on the court concerned, or a

[15] (2011) 7 SCC 639

> statement of law caused by inadvertence or conclusion that has been arrived at without application of mind or proceeded without any reason so that in such a case some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong.

30.5. It was thereafter that this Court in *Jayant Verma* held that when there is a detailed judgment of the High Court dealing with several authorities and it is reversed in a cryptic fashion without dealing with any of them, the *per incuriam* doctrine kicks in and the judgment loses binding force because of the manner in which it deals with the proposition of law in question. This Court declared that *ratio decidendi* of a judgment is the principle of law adopted having regard to the line of reasoning of the Judge which alone binds in future cases. In the circumstances, the co-ordinate Bench in *Jayant Verma* opined that the judgment in *Yasangi Venkateswara Rao* could not deter them from laying down the law on the subject.

30.6. It is another matter that in the facts of that case and upon consideration of the legal provisions and

judgments, the Bench came to the same conclusion that Section 21-A was validly enacted.

31. The next judgment is *Career Institute Educational Society Vs. Om Shree Thakurji Educational Society*[16]. In this case, a two-Judge Bench of this Court examined the distinction between *obiter dicta* and *ratio decidendi* in a judgment. The Bench referred to the decision of this Court in *Jayant Verma* and held that it is the statement of the principle of law applicable to the legal problems disclosed by the facts which is the vital element in the decision and operates as a precedent. The conclusion does not operate as a precedent. The only thing in a judge's decision which is binding as a legal precedent is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the *obiter dicta*.

31.1. The Bench also referred to an another decision of this Court in *State of Gujarat Vs. Utility Users' Welfare*

[16] (2023) 16 SCC 458

Association[17] in which case the 'inversion test' was implied to identify what is *ratio decidendi* in a judgment. To test whether a particular proposition of law is to be treated as the *ratio decidendi* of the case, the proposition is to be inversed i.e. to remove from the text of the judgment as if it did not exist. If the conclusion of the case would still have been the same even without examining the proposition, then it cannot be regarded as the *ratio decidendi* of the case.

32. A five-Judge Constitution Bench of this Court in *Dr. Shah Faesal Vs. Union of India*[18] was examining the challenge to two constitution orders issued by the President of India under Article 370 of the Constitution of India. It is not necessary to delve into the factual controversy of that case but confine to the principle of *ratio decidendi* and *per incuriam* as deliberated therein. The Bench highlighted the importance of a binding decision and noted that usually courts do not overrule the established precedents unless there is a social, constitutional or

[17] (2018) 6 SCC 21
[18] (2020) 4 SCC 1

economic change mandating such a development. Doctrines of precedents and *stare decisis* are the core values of our legal system. They form the tools which further the goal of certainty, stability and continuity in our legal system. Arguably, judges owe a duty to the concept of certainty of law. Therefore, they often justify their holdings by relying upon the established tenets of law. The doctrine of binding precedent is of utmost importance in the administration of our judicial system. It promotes certainty and consistency in judicial decisions. Judicial consistency promotes confidence in the system. Therefore, there is the need for consistency in the annunciation of legal principles in the decisions of this Court.

32.1. The Bench then considered as to whether a ruling of a co-ordinate Bench binds subsequent co-ordinate Benches. Referring to the decision of this Court in *National Insurance Company Limited Vs. Pranay Sethi*[19], it has been held that a decision rendered by a co-ordinate Bench is binding on the subsequent Benches of equal or lesser

[19] (2017) 16 SCC 680

strength. Thereafter, the Bench proceeded to examine further, to what extent does a ruling of a co-ordinate Bench binds the subsequent Bench. In that context, the Bench referred to the earlier decision in *Dhanwanti Devi* and held that a judgment can be distinguished into two parts: *ratio decidendi* and *obiter dictum*. Ratio is the basic essence of the judgment and the same must be understood in the context of the relevant facts of the case. The only thing in a judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the *ratio decidendi.* A decision is only an authority for what it actually decides. The concrete decision alone is binding between the parties to the case but it is the abstract *ratio decidendi* ascertained on a consideration of the judgment in relation to the subject matter of the decision which alone has the force of law which, when it is clear what it was, is binding.

32.2. The Constitution Bench further delved into the rule of *per incuriam* and observed that the same has been developed as an exception to the doctrine of judicial

precedent. Literally, it means a judgment passed in ignorance of the relevant statute or any other binding authority. A decision is given *per incuriam* when the court has acted in ignorance of a previous decision of its own or of a court of a co-ordinate jurisdiction which covered the case before it.

32.3. In the context of precedential value of a judgment rendered *per incuriam*, the opinion of Justice Venkatachaliah in the seven-Judge Bench decision of *A.R. Antulay Vs. R.S. Nayak*[20] was referred to. A decision rendered *per incuriam* denudes the decision of precedential value. Such a decision would not be binding as a judicial precedent. A co-ordinate Bench can disagree with it and decline to follow it. A larger Bench can overrule such decision.

32.4. Following the same, the Constitutional Bench in *Dr. Shah Faesal* again referred to *Pranay Sethi* which in turn had referred to an earlier decision to hold that a decision or judgment can also be *per incuriam* if it is not possible to reconcile its ratio with that of the previously pronounced

[20] (1988) 2 SCC 602

judgment of a co-equal or larger Bench. The *per incuriam* rule is strictly and correctly applicable to the *ratio decidendi* and not to *obiter dicta*. The subsequent decision shall be declared *per incuriam* only if there exists a conflict in the *ratio decidendi* of the pertinent judgments.

33. Let me now turn to the case of *Bilkis Yakub Rasool Vs. Union of India*[21], in which I was also a member of the Bench. It is not necessary to discuss the details of the aforesaid case but to confine to the deliberations on *per incuriam* and the impact of a *per incuriam* judgment. To be more specific, how this judgment dealt with the issue as to whether a subsequent co-ordinate Bench is bound by a previous judgment rendered *per incuriam*?

33.1. Tersely put, the facts in *Bilkis Yakub Rasool* was the grant of remission by the Government of Gujarat and the early release of eleven convicts who were all convicted and sentenced to life imprisonment having been found guilty of committing heinous crimes during the large-scale riots in Gujarat on 28.02.2002 and a few days thereafter. This

[21] (2024) 5 SCC 481

included the brutal gang rape of the petitioner who was pregnant at that time. A number of her close relatives were murdered; her mother and her cousin were also gang raped and murdered. On 10.08.2022, these convicts were granted remission by the State of Gujarat. As pointed out above, it was the orders of remission which was the subject of challenge in a bunch of writ petitions in *Bilkis Yakub Rasool.*

33.2. On an appreciation of Section 432 of the Code of Criminal Procedure, 1973 (Cr.P.C.), more particularly sub-section (7) thereof, and various judgments of this Court, the Bench was of the view that it was the State of Maharashtra which had the jurisdiction to consider the application for remission of the convicts as they were tried, convicted and sentenced by the Special Court at Mumbai. Government of Gujarat was not the appropriate government within the meaning of the aforesaid provision. Government of Gujarat therefore lacked jurisdiction to pass the impugned orders of remission.

33.3. However, on behalf of the respondents, strong reliance was placed on an order of this Court dated

13.05.2022 passed in *Radheshyam Bhagwandas Shah Vs. State of Gujarat*[22]. In that case, a two-Judge Bench of this Court had directed the State of Gujarat to consider the application for remission filed by the convicts in terms of the 1992 policy of remission of the State of Gujarat which was the policy prevalent on the date of conviction. The appropriate government in the case of the convicts was the Government of Gujarat in terms of the order of this Court dated 13.05.2022. Therefore, the State of Gujarat had no option but to consider the application filed by the convicts and thereafter passed the orders of remission dated 10.08.2022.

33.4. The Bench thereafter examined the pleadings and the decision in *Radheshyam Bhagwandas Shah.* Interestingly, in *Radheshyam Bhagwandas Shah,* a two-Judge Bench of this Court set aside an earlier judgment of the Gujarat High Court dated 17.07.2019, that too without a challenge, by which the Gujarat High Court held that since the convict was tried in the State of Maharashtra, his case

[22] (2022) 8 SCC 552

for premature release was required to be considered by the State of Maharashtra and not by the State of Gujarat. The Bench in *Radheshyam Bhagwandas Shah* was of the view that it was the Government of Gujarat which was the appropriate government and therefore the order dated 17.07.2019 was set aside. Government of Gujarat was directed to consider the application for premature release as per its policy dated 09.07.1992.

33.5. In *Bilkis Yakub Rasool,* it was noted that though the crime was committed in the State of Gujarat, this Court had transferred the corresponding sessions case from Dahod, Ahmedabad to Mumbai. Special Court at Mumbai on completion of the trial convicted the accused persons and sentenced them to undergo rigorous imprisonment for life.

33.6. The Bench in *Bilkis Yakub Rasool* held that the order of the Gujarat High Court dated 17.07.2019 could not have been challenged and set aside in a proceeding under Article 32 of the Constitution of India. That apart, the Bench was of the further view that the earlier order of this Court dated 13.05.2022 i.e. *Radheshyam Bhagwandas Shah* was

per incuriam for the reason that it failed to follow the earlier binding judgments of this Court including that of a Constitution Bench in *Union of India Vs. V. Sriharan*[23], vis-à-vis the appropriate government which is vested with the power to consider an application for remission as per sub-section (7) of Section 432 Cr.P.C. and that of the nine-Judge Bench decision in *Naresh Shridhar Mirajkar Vs. State of Maharashtra*[24] that an order of a High Court cannot be set aside in a proceeding under Article 32 of the Constitution.

33.7. It was in that context that the Bench in *Bilkis Yakub Rasool* analysed the concepts of *ratio decidendi, per incuriam* and *sub silentio,* though here the principle of *sub silentio* may not be applicable. *Incuria* legally means carelessness and *per incuriam* may be equated with *per ignoratium.* If a judgment is rendered *ignoratium* of a statute or a binding authority, it becomes a decision *per incuriam*. Such a *per incuriam* decision would not have a precedential value and the decision rendered *per incuriam* is not binding.

[23] (2016) 7 SCC 1
[24] AIR 1967 SC 1

Relevant portion of the judgment in *Bilkis Yakub Rasool* is extracted as under:

> **153.** Thus, although it is the *ratio decidendi* which is a precedent and not the final order in the judgment, however, there are certain exceptions to the rule of precedents which are expressed by the doctrines of *per incuriam* and *sub silentio*. *Incuria* legally means carelessness and *per incuriam* may be equated with *per ignoratium*. If a judgment is rendered in *ignoratium* of a statute or a binding authority, it becomes a decision *per incuriam*. Thus, a decision rendered by ignorance of a previous binding decision of its own or of a court of coordinate or higher jurisdiction or in ignorance of the terms of a statute or of a rule having the force of law is *per incuriam*. Such a *per incuriam* decision would not have a precedential value. If a decision has been rendered *per incuriam*, it cannot be said that it lays down good law, even if it has not been expressly overruled vide *Mukesh K. Tripathi* Vs. *LIC*[25], para 23. Thus, a decision *per incuriam* is not binding.

33.8. Therefore, the Bench held that the earlier decision in *Radheshyam Bhagwandas Shah* was *per incuriam.* Government of Gujarat had no jurisdiction to entertain applications for remission of the convicts as it was

[25] (2004) 8 SCC 387

not the appropriate government within the meaning of sub-section (7) of Section 432 Cr.P.C. Thus the orders of remission were without jurisdiction and hence void, in addition to various other grounds.

34. In summation, what is binding in a judgment is the principle upon which the case is decided. The enunciation of the reason or principle on which the question before a court is decided is alone binding as a precedent. The final outcome or decision is binding between the parties only but it is the abstract *ratio decidendi* ascertained on a consideration of the judgment in relation to the subject matter of the decision which alone has the force of law and constitutes a binding precedent under Article 141 of the Constitution of India. To be precise, it is the rule deductible from the application of the law to the facts and circumstances of the case which constitutes its *ratio decidendi.* Not everything said in the judgment or any observation made by the judge, can be said to be binding. Thus, *ratio decidendi* of a case is the rule of law expressly or impliedly treated by the judge as a necessary step in

reaching his conclusion, having regard to the line of reasoning adopted by him. It is the ratio which is binding on subsequent Benches, coordinate or smaller. The conclusion does not operate as a *ratio decidendi.*

34.1. The principle of *per incuriam* would be attracted only when a decision is rendered in ignorance of some statutory provision(s) or a precedent binding on the court. Ordinarily, a ruling of a coordinate Bench is binding on subsequent coordinate Benches or on Benches of lesser strength. However, there is an exception to this rule. A decision which is rendered *per incuriam* has no precedential value. Such a decision would not be binding as a judicial precedent. A coordinate Bench can disagree with it and decline to follow it. The *per incuriam* rule is applicable to the *ratio decidendi* only and not to *obiter dicta.* The subsequent decision shall be declared *per incuriam* only if there exists a conflict in the *ratio decidendi* of the pertinent judgments.

35. MOEF&CC issued Office Memorandum (OM) dated 07.07.2021 purportedly for laying down standard operating procedure for identification and handling of

violation cases under the 2006 EIA Notification. At the outset, the OM referred to the 2017 Notification and mentioned that the said notification was applicable for six months from the date of publication i.e. from 14.03.2017 to 13.09.2017. It was also mentioned that on the basis of court direction, the window period of six months was extended again from 14.03.2018 to 13.04.2018.

35.1. Thereafter, the OM referred to two decisions of NGT in *Dastak NGO Vs. Synochem Organics Private Limited* and *Tanaji Gambhire Vs. Chief Secretary, State of Maharashtra.* While the former gave discretion to the authorities to take appropriate action in accordance with the polluter pays principle following due process for past violations, the latter directed laying down a proper standard operating procedure for grant of EC in such cases so as to address the gaps in binding law and practice being currently followed.

35.2. The OM noted that MOEF&CC was seized of different categories of violation case which were pending for action to be taken based on the polluter pays principle and

on the principle of proportionality. The OM also takes note of the statutory framework provided under the Environment Protection Act and goes on to define violation and non-compliance.

35.3. Para 10 of the OM is relevant. It lays down five guiding principles for implementation of the standard operating procedure. The guidelines are as under:

(i) Action has to be initiated under Section 15 read with Section 19 of the Environment Protection Act against all violations.

(ii) Projects not allowable/permissible for grant of EC as per extant regulations are to be demolished.

(iii) Projects allowable/permissible, if prior EC had been taken as per extant regulations, to be closed until EC is granted, if no prior EC had been taken, or to revert to permitted production level, in case prior EC had been granted.

(iv) Violators will have to pay for the violation period which would be proportionate to the scale of the

project and extent of commercial transactions on the principle of polluter pays.

(v) Setting up a mechanism for reporting violation cases to the regulatory authority.

35.4. Paragraph 11 of the OM lays down the operational framework of the standard operating procedure. It provides for three steps. Step 1 is for closure or revision; step 2 is for action under the Environment Protection Act; and step 3 is for appraisal under the 2006 EIA Notification. Step 1 has been explained as under:

Step 1: Closure or Revision

SI No.	**Status of EC**	**Action**
1.	If no prior EC has been taken	Order to close its operation
2.	If prior EC is available for existing/old unit	Order to revert the activity/production to permissible limits.
3.	If prior EC was not required for earlier production level but is now required	Restrict the activity/ production to the extent to which prior EC was not required.

35.5. As pointed out above, step 2 deals with action under Section 15 read with Section 19 of the Environment

Protection Act against the violators. Step 3 provides for examining permissibility of a project as to whether such a project was at all eligible for grant of prior EC under the 2006 EIA Notification. It lays down two tests: if not permissible and if permissible. If a project is not permissible, it shall be ordered for demolition/closure after issuing show cause notice and providing an opportunity of hearing. If it is permissible, terms of reference shall be issued with directions to complete the impact assessment study and thereafter to submit environmental impact assessment report and environmental management plan in a time bound manner. Such cases of violation shall be subject to appropriate damage assessment, remedial plan and community augmentation plan. Further, the competent authority shall issue directions to the project proponent to make payment of such amount as may be determined based on the polluter pays principle and undertaking of activities in terms of the remedial plan and community augmentation plan to restore environmental damage caused including its social aspects. Upon submission of such report and upon appraisal by the appropriate committees as if it was a new

proposal, EC shall be issued which will be effective from the date of issue. Besides the above, other provisions have also been laid down to deal with such cases including penalty provisions for violation cases.

36. The 2021 OM is purportedly issued in terms of certain directions of NGT for laying down standard operating procedure for grant of EC in cases of violation of environmental guidelines including non-obtaining EC, ostensibly to bridge the gap in binding law and practice. I have already referred to and discussed about the 2017 Notification including paragraph 14 thereof. The 14.03.2017 Notification made it very clear in paragraph 14 that projects or activities which were in violation of the 2006 EIA Notification as on the date of the said 2017 Notification would only be eligible to apply for EC. Project proponents could apply for EC under the 2017 Notification within six months from the date of the said notification. The six months period was from 14.03.2017 to 13.09.2017. Additionally, following an order of the Madras High Court, the window period was extended for a further period of one

month from 14.03.2018 to 13.04.2018. A solemn statement was made before the Madras High Court by the learned Additional Solicitor General on instructions that the 2017 Notification was only a one-time measure. What the 2017 Notification contemplated was giving a window period to all the project proponents whose projects or activities were without EC etc. as on the date of the said notification to apply for EC. Such project proponents were only eligible to apply for EC within the window period of six months which was extended by another one month. A view may be taken that the 2017 Notification has worked itself out. Neither has it been extended nor any further window period granted in paragraph 14 thereof. The 2017 Notification has neither been repealed nor replaced. As pointed out above, paragraph 14 of the 2017 Notification has also not been amended. In such a scenario, the 2021 OM was really not warranted. Unfortunately, it seeks to grant EC to such project proponents who had started their projects without EC either after the window period granted by the 2017 Notification or had failed to apply during the window period provided by the 2017 Notification. In terms of the 2017 Notification, no new

project without EC or expansion/modernization without EC would be permissible or could be regularized after 13.04.2018. Thus, laying down of standard operating procedure more than 3 years after expiry of the window period in terms of the 2017 Notification did not make any sense. Viewed from that perspective, the 2021 OM is superfluous. As long as the 2017 Notification remained in force, there is no question of regularization of projects without EC after 13.04.2018. The 2021 OM goes against the very grain of, rather is contrary to the statutory 2017 Notification, and therefore has no legal force. The 2021 OM is *per se* illegal and invalid and was rightly set aside in *Vanashakti.*

36.1. Even if a more charitable view is taken, the 2021 OM can at best be construed to be laying down standard operating procedure for consideration of the applications filed by project proponents for grant of EC under the 2017 Notification only and not thereafter. There is no other way one can justify issuance of the 2021 OM.

37. A two-Judge Bench of this Court in *Electrosteel* was examining a challenge to an order passed by a Single Bench of Jharkhand High Court discontinuing previous interim orders passed by the High Court. By the earlier interim orders, the appellant was allowed to operate its steel plant in Bokaro District in the State of Jharkhand under the supervisory regulatory control of the Jharkhand State Pollution Control Board. The interim orders were in force for over two years.

37.1. On or about 08.01.2007, appellant had applied to the MOEF&CC for grant of EC to establish three NTPA integrated steel plants at Bokaro. On 21.02.2008 appellant was granted EC. After obtaining EC, appellant applied to Jharkhand State Pollution Control Board and other authorities for grant of consent to establish which was also granted. However, the appellant established the steel plant at a site which was 5.3 kilometers away from the site for which the EC and consent to establish were granted.

37.2. Later on, it was also noticed that appellant had encroached upon forest land while setting up the steel plant.

Accordingly, notices were issued and consent to operate was withheld. This compelled the appellant to approach the High Court seeking a direction to the Jharkhand State Pollution Control Board to grant consent to operate. The writ petition was disposed of by directing the authority to grant opportunity of hearing to the appellant and thereafter to take a decision *qua* consent to operate.

37.3. However, consent to operate was refused. This compelled the appellant to approach the High Court again. Jharkhand State Pollution Control Board directed the appellant to close down the plant. This was assailed before the Jharkhand High Court which set aside the order of closure with liberty to the Jharkhand State Pollution Control Board to pass fresh order(s) in accordance with law after affording an opportunity of hearing to the appellant.

37.4. It was thereafter that Jharkhand State Pollution Control Board granted consent to operate to the appellant which was valid till 03.12.2017. On or about 20.08.2017, appellant applied for consent to operate for five years. Pointing out that appellant had contravened provisions of

earlier consent to operate, show cause notice was issued to the appellant. As the matter was pending, appellant moved the High Court again. Jharkhand State Pollution Control Board was directed by the High Court to take a decision on the application for renewal of consent to operate.

37.5. On 21.08.2018, Jharkhand State Pollution Control Board rejected the request of the appellant for consent to operate. Appellant again filed a writ petition before the High Court. Interim order was passed staying the order of the Jharkhand State Pollution Control Board.

37.6. On 20.09.2018, MOEF&CC revoked the EC of the appellant on the ground that it had encroached upon forest land and that it had shifted the location of its plant thereby violating conditions stipulated in the EC.

37.7. This led the appellant to approach the High Court which passed an interim order staying the operation of the order dated 20.09.2018. Thereafter appellant applied for *ex post facto* forest clearance which was granted by MOEF&CC. On 27.11.2019 appellant applied for a revised EC. High Court clarified that pendency of the writ petitions would not

come in the way of MOEF&CC to consider grant or refusal of restoration of EC. While the process of appraisal was on, High Court passed the impugned order discontinuing the earlier interim orders.

37.8. The two-Judge Bench in *Electrosteel* noted the 2017 Notification and the 2021 OM and also the fact that by an interim order passed on 15.07.2021 in *Fatima Vs. Union of India*[26], Madurai Bench of the Madras High Court had stayed operation of the standard operating procedure i.e. the 2021 OM.

37.9. By order dated 25.08.2021, MOEF&CC rejected the application of the appellant for the time being; in fact, the application was kept in abeyance possibly in view of the stay order passed by the Madurai Bench of the Madras High Court.

37.10. It was in that context that the Bench observed in *Electrosteel* that there can be no doubt about the need to comply with the requirement to obtain EC which is non-negotiable. To protect future generations, it is imperative

[26] (2021) SCC Online Madras 12936

that pollution laws have to be strictly enforced. Under no circumstances, can industries which pollute be allowed to operate unchecked and degrade the environment. Thereafter the Bench posed the question as to whether an establishment contributing to the economy of the country and providing livelihood to hundreds of people should be closed down for the technical irregularity of shifting its site without prior EC, without opportunity to the establishment to regularise its operation by obtaining requisite clearances and permissions, even though the establishment may not otherwise be violating pollution laws or the pollution, if any, can conveniently and effectively be checked. The Bench answered this question in the negative and went on to hold that *ex post facto* EC should not ordinarily be granted and certainly not for the asking. At the same time, *ex post facto* EC in terms of the Environment Protection Act cannot be declined with pedantic rigidity oblivious of the consequences of stopping the operations of a running steel plant. Thereafter the Bench further observed that Environment Protection Act does not prohibit *ex post facto* EC. Some relaxations and even grant of *ex post facto* EC in accordance

with law in appropriate cases where the projects are in compliance with or can be made to comply with environment norms is not impermissible.

37.11. This view was reiterated in paragraph 79 where the Bench declared that *ex post facto* EC should not be granted routinely but in exceptional circumstances taking into account relevant environmental factors. *Ex post facto* approval should not be withheld as a penal measure. The deviant industry may be penalised by imposition of heavy penalty on the principle of polluter pays and the cost of restoration of environment may be recovered from it.

37.12. Adverting to *Alembic*, the coordinate Bench observed that while this Court deprecated *ex post facto* EC, no order for closure of the three industries was passed.

37.13. In that context, the Bench took the view that Jharkhand High Court was not justified in passing the impugned order vacating the earlier interim orders thereby leading to virtual closure of the industry which employed 3,000 regular employees and 7,000 contractual employees producing steel worth Rs. 4,200 crores. Accordingly, the civil

appeal was allowed. Impugned order of the High Court was set aside with direction to MOEF&CC to take a decision on the application of the appellant for revised EC and pending such decision directed that operation of the steel plant should not be interfered with on the ground of want of EC etc.

38. From the above, what can be culled out is that according to the co-ordinate Bench in *Electrosteel,* the Environment Protection Act does not prohibit *ex post facto* EC. *Ex post facto* EC though should not ordinarily be granted and certainly not for asking, but can be granted in appropriate cases where the projects are in compliance with or can be made to comply with environmental norms. Therefore, grant of *ex post facto* EC is not impermissible. Court must take a balanced approach which holds the industries to account for having operated without EC in the past but without ordering a closure of operations.

39. A two-Judge Bench in *Pahwa* was examining a challenge to an order of NGT holding that establishments such as the manufacturing units of the appellants which did

not have prior EC could not be allowed to operate. The Bench posed the question as to whether an establishment employing about 8,000 workers which had been set up pursuant to consent to establish and consent to operate from the statutory authority and had applied for *ex post facto* EC could be closed down pending issuance of EC, even though it may not cause pollution and/or may be found to comply with the required pollution norms. The Bench followed the same line of reasoning as in *Electrosteel* and declared that *ex post facto* EC though should not ordinarily be granted but could be granted in appropriate cases. The Environment Protection Act does not prohibit *ex post facto* EC. While allowing the appeal, the Bench set aside the impugned order and directed the authority to take a decision on the applications of the appellants for EC in accordance with law. Till such decision was taken, it was ordered that the appellants should be allowed to operate their units.

39.1. The Bench laboured to explain that words and phrases in a judgment should not be read like a statute, that too out of context. Observations of the Division Bench of the

Madras High Court that a one-time relaxation was permissible is not to be construed as a finding that relaxation cannot be made more than once. If the power to amend or modify a notification exists, same may be amended or modified as many times as may be necessary. A statement made by the counsel in court would not prevent the authority concerned from making amendments and/or modifications provided those were as per the procedure prescribed by law.

40. The two-Judge Bench again in *D. Swamy* was hearing an appeal under Section 22 of the National Green Tribunal Act, 2010 against the final order passed by the NGT, Southern Zone dismissing an application filed by the appellant seeking a direction for closure of the common bio-medical waste treatment facility run by the third respondent on the ground of alleged non-compliance of the provisions of the 2006 EIA Notification. The Bench referred to the 2017 Notification and the 2021 OM. After referring to certain paragraphs of the 2017 Notification, the Bench held that the said notification was a valid statutory notification issued by

the Central Government under Sections 3(1) and 3(2)(v) of the Environment Protection Act read with Rule 5(3)(d) of the Environment Protection Rules in the same manner as the 1994 EIA Notification and the 2006 EIA Notification were issued.

40.1. Thereafter the Bench referred to the order passed by the Division Bench of the Madras High Court in *Puducherry Environment Protection Association Vs. Union of India*[27] and noted the submission made on behalf of the Union of India by the learned Additional Solicitor General of India that the relaxation under the 2017 Notification was a one-time measure and that such a one-time relaxation was permissible.

40.2. The Bench applied the same reasonings as in *Electrosteel* and *Pahwa* to hold that there is no prohibition for granting *ex post facto* EC. The Bench further held that issue raised in the said appeal was squarely covered by *Electrosteel* and *Pahwa* and went on to declare that closure

[27] (2017) SCC Online Madras 7056

of facility only on ground of want of prior EC would be against public interest.

41. Before I sum up the ratio laid down by the two-Judge Bench in *Electrosteel, Pahwa* and *D. Swamy* and analyse the same *qua* the ratio laid down in *Common Cause* and *Alembic,* it would be appropriate to first cull out the ratio from a conjoint reading of *Common Cause* and *Alembic. Common Cause* has built on the jurisprudence developed by this Court thus far and thereafter the two-Judge Bench made a declaration of law that those projects where ECs are required, prior EC is necessary. Grant of *ex post facto* EC would be detrimental to the environment. Concept of *ex post facto* EC is completely alien to environmental jurisprudence including the 1994 EIA Notification and the 2006 EIA Notification. This ratio was further crystalized by a subsequent coordinate Bench of two Judges in *Alembic* which declared that concept of *ex post facto* EC is in derogation of the fundamental principles of environmental jurisprudence. *Ex post facto* EC is an anathema to the 1994 EIA Notification. Environmental law cannot countenance

the notion of an *ex post facto* EC because it is contrary to both the precautionary principle as well as the need for sustainable development.

41.1. It has already been noticed that the 2006 EIA Notification is an improvement over the 1994 EIA Notification inasmuch as what was implicit in 1994 was made explicit in 2006 by emphasizing on the word 'prior'. Even in the absence thereof, the ratio laid down is that *ex post facto* EC is an anathema to the 1994 EIA Notification. 'Derogation' means disparagement; weakening of a law, authority or power; it can also mean formal exemption from a law; something which is considered to have no worth; an act of officially stating that a rule no longer needs to be obeyed. On the other hand, 'anathema' means something one vehemently dislikes. It is a thing which is devoted to evil; it is an ecclesiastical curse that prohibits a person from receiving communion and bars such a person from contact with members of the church. Thus, from a combined reading of *Common Cause* and *Alembic* the ratio is crystal clear: there is no concept called *ex post facto* EC in environmental

jurisprudence. It cannot be countenanced. It is an anathema. This is because it is detrimental to the environment and could lead to irreparable ecological degradation.

41.2. The fact that in the concluding portions in *Common Cause* as well as in *Alembic,* the Bench had allowed the defaulting projects to continue in the peculiar facts of the first case and also by issuing directions under Article 142 of the Constitution in the latter is not the ratio of the two judgments and therefore do not form any binding precedent.

42. The trilogy of *Electrosteel, Pahwa* and *D. Swamy* came about in quick succession. In a span of about ten months, the three judgments were delivered by a two-Judge Bench of this Court: *Electrosteel* on 09.12.2021, *Pahwa* on 25.03.2022 and *D. Swamy* on 22.09.2022. The line of reasoning adopted in all the three judgments is the same. Referring to *Alembic,* the Bench after asserting that the requirement to obtain EC is non-negotiable and that industries which pollute the environment should not be

allowed to operate unchecked and degrade the environment, however posed the question as to whether an establishment contributing to the economy of the country and providing livelihood to hundreds of people should be closed down for functioning without prior EC. After answering the question in the negative, the Bench went on to hold that while *ex post facto* EC should not be granted ordinarily and certainly not for the asking, it cannot also be declined with pedantic rigidity. Environment Protection Act does not prohibit *ex post facto* EC. Some relaxations and even grant of *ex post facto* EC in appropriate cases is not impermissible. The Bench observed that while *Alembic* deprecated *ex post facto* EC, no order for closure of the concerned three industries was passed. A balanced approach should be taken which holds the industries to account for having operated without EC but without ordering a closure of operations.

42.1. Though the subject matter in *D. Swamy* was the legality and validity of an order passed by the NGT dismissing an application filed by the appellant seeking a direction for closure of the common bio-medical waste

treatment facility run by the third respondent on the ground of alleged non-compliance to the provisions of the 2006 EIA Notification, the two-Judge Bench went on to hold the 2017 Notification and the 2021 OM as being valid; the 2017 Notification was issued in the same manner as the 1994 EIA Notification and the 2006 EIA Notification were issued. This declaration of validity was *de hors* any challenge and adjudication.

43. A comparison of the earlier two-Judge Bench decisions in *Common Cause* and *Alembic* on the one hand and *Electrosteel*, *Pahwa* and *D. Swamy* on the other hand would clearly indicate that the latter trilogy of judgments went on a tangent and completely contrary to the ratio laid down by the previous two-Judge Bench in *Common Cause* and *Alembic.* While *Common Cause* and *Alembic* clearly laid down the principle following evolution of the environmental jurisprudence in the country and declared as a principle of law based on the pleadings, other materials on record and arguments of the parties including the issues adjudicated that those projects where ECs are required, prior EC is necessary;

grant of *ex post facto* EC would be detrimental to the environment. Concept of *ex post facto* EC is in derogation of the fundamental principles of environmental jurisprudence; rather, it is completely alien to environmental jurisprudence. In fact, *ex post facto* EC is an anathema to environmental jurisprudence which cannot countenance such a notion or concept. We have noticed the meaning of the word 'derogation' which means formal exemption from the law. On the other hand, 'anathema' means a thing which is devoted to evil; an ecclesiastical curse that prohibits a person from receiving communion and bars such a person from contact with members of the church. Thus, the ratio is crystal clear: there is no concept of *ex post facto* EC in environmental jurisprudence. In contrast, the subsequent two-Judge coordinate Bench declared in *Electrosteel, Pahwa* and *D. Swamy* that there is no absolute prohibition under the Environmental Protection Act to grant *ex post facto* EC, rather grant of *ex post facto* EC is not impermissible. In appropriate cases, *ex post facto* EC can be granted. It is thus clear that the subsequent coordinate Bench in *Electrosteel, Pahwa* and *D. Swamy* has not followed the binding precedent of the

previous two-Judge Bench declared in *Common Cause* and *Alembic*. It is not possible to reconcile the two sets of judgments. The latter set of judgments in *Electrosteel, Pahwa* and *D. Swamy* is clearly in conflict with the ratio laid down in *Common Cause* and *Alembic*. Therefore, the latter judgments in *Electrosteel, Pahwa* and *D. Swamy* are clearly hit by the principle of *per incuriam*. A *per incuriam* judgment is not binding on a subsequent coordinate Bench. A coordinate Bench can disagree with it and decline to follow it. As held in *A.R. Antulay* and *Bilkis Yakub Rasool*, a *per incuriam* decision has no precedential value and the decision rendered *per incuriam* is not binding. Therefore, the two-Judge Bench in *Vanashakti* rightly followed the correct ratio laid down in *Common Cause* and *Alembic* which is in complete alignment with the environmental jurisprudence developed in our country and has build upon it, rather than following the *per incuriam* decisions in *Electrosteel, Pahwa* and *D. Swamy*. The fact that certain paragraphs in *Electrosteel* were not discussed in *Vanashakti* or that the judgments in *Pahwa* and *D. Swamy* were not mentioned and discussed would not make an iota of difference in as much

as the two-Judge Bench in *Vanashakti* was not bound to follow the *per incuriam* decisions of a coordinate Bench in *Electrosteel, Pahwa* and *D. Swamy*. On the contrary, the *Vanashakti* judgment is a further development on the jurisprudence carried forward by *Common Cause* and *Alembic* and has rightly followed the ratio laid down in *Common Cause* and *Alembic.*

43.1. The fact that the two-Judge Bench in *D. Swamy* had declared the 2017 Notification and the 2021 OM as being valid would also not make any difference to the declaration made by the subsequent coordinate Bench in *Vanashakti* where the 2017 Notification and the 2021 OM have been declared as illegal and invalid. As already noticed above, the legality and validity of the aforesaid notification and OM was not the subject matter in *D. Swamy*; there was no adjudication on the said notification and OM. Just by the way and as a justification for its decision dismissing the application of the appellant, the two-Judge Bench came to an abrupt conclusion about the validity of the 2017

Notification and the 2021 OM. No adjudication and reasoning on this aspect are discernible.

43.2. In *Jayant Verma,* the subsequent coordinate Bench considering constitutional validity of Section 21-A of the Banking Regulation Act, 1949 noticed that an earlier two-Judge Bench in *Yasangi Venkateswara Rao* had held the said provision to be valid. After declaring that the decision in *Yasangi Venkateswara Rao* was *per incuriam* as it failed to discuss any law and precedent and that no *ratio decidendi* was forthcoming in the decision in *Yasangi Venkateswara Rao,* the subsequent two-Judge coordinate Bench posed the question as to whether the judgment in *Yasangi Venkateswara Rao* was binding on it since both the Benches were of equal strength i.e. two-Judge Bench. The two-Judge Bench in *Jayant Verma* declared that the principle of *per incuriam* would kick in and that the judgment in *Yasangi Venkateswara Rao* could not deter it from laying down the correct law on the subject. Therefore and following the above principle, no fault can be found in *Vanashakti* when the two-judge Bench declared the 2017

Notification and the 2021 OM as being invalid and legally unsustainable, ignoring the declaration made in *D. Swamy*.

44. By not following the binding precedent laid down in *Common Cause* and *Alembic*, the latter coordinate Bench took a completely divergent view in *Electrosteel*, *Pahwa* and *D. Swamy* though the ratio laid down in the former judgments were clearly binding on the latter. In the process, judicial discipline and judicial propriety have been breached.

45. The United Nations Conference on Environment and Development, also known as the Rio Conference or the Earth Summit, was held at Rio De Janeiro, Brazil in June, 1992. This was followed by the United Nations Conference on Sustainable Development, also known as the Rio+20 Conference, again held in Rio De Janeiro, Brazil in June, 2012. The 2012 Conference built up upon the 1992 Conference and made a declaration recognising climate change as a pervasive crisis, calling for urgent action to arrest the same, aligning with the United Nations Framework Convention on Climate Change.

45.1. The Paris Agreement, 2015 is a legally binding international treaty on climate change. As of today, 195 nation states have joined the Paris Agreement, committed to combat climate change. In India, the union cabinet gave its approval to ratify the Paris Agreement on climate change in October, 2016 though India had signed the agreement earlier in April, 2016.

45.2. The consistent theme in all the three conferences and agreement was the acknowledgement that there are areas of insufficient progress and setbacks in the march towards achieving sustainable development, aggravated by economic, food and energy crisis. In this scenario, it was reiterated that nation states should not backtrack from their commitment to the outcome of the United Nations Conference on Environment and Development.

45.3. The expression 'do not backtrack' implies that nation states should always be guided by non-regressive thinking and that they do not go back on the commitments made at Rio. The seeds of non-regression is traceable to the above Rio declaration. Non-regression is an essential

component of sustainable development, which as a principle and goal of environmental jurisprudence has been endorsed by this Court. In fact, non-regression is not solely about progressive sustainable development objectives, rather it aims at preventing measures which roll-back the existing levels of environmental protection.

46. The principle of non-regression has been endorsed by the NGT as an accepted norm of environmental jurisprudence in India. In *Society for Protection of Environment and Biodiversity Vs. Union of India*[28], it has been observed that non-regression is based on the idea that environmental law should not be modified to the detriment of environmental protection. The precautionary principle as propounded by this Court is the cornerstone of environmental jurisprudence in our country. Therefore, the principle of non-regression needs to be brought into play because today environmental law is facing a number of threats, such as, deregulation, movement to simplify and at the same time attempting to diminish environmental control

[28] (2017) SCC Online NGT 981

projecting environmental legislation as being too complex and an economic climate which favours 'development' at the expense of protection of environment.

47. In *Navtej Singh Johar Vs. Union of India*[29], a Constitution Bench of this Court emphasized that the State, which includes all three organs i.e. the legislature, the executive as well as the judiciary, has an obligation to take appropriate measures for the progressive realisation of economic, social and cultural rights. This Court held thus:

> **201.** The doctrine of progressive realisation of rights, as a natural corollary, gives birth to the doctrine of non-retrogression. As per this doctrine, there must not be any regression of rights. In a progressive and an ever-improving society, there is no place for retreat. The society has to march ahead.
>
> **202.** The doctrine of non-retrogression sets forth that the State should not take measures or steps that deliberately lead to retrogression on the enjoyment of rights either under the Constitution or otherwise.

[29] (2018) 10 SCC 1

48. The principle of non-regression prohibits the State from reversing or weakening the existing standards of environmental protection in the country.

49. Based on the above analysis, it is clear that the trilogy of *Electrosteel, Pahwa* and *D. Swamy* which are being followed by the review judgment are not only hit by the principle of *per incuriam,* those are also in complete conflict with the principle of non-regression. *Electrosteel, Pahwa* and *D. Swamy* and the review judgment take a complete u-turn from the trajectory of environmental jurisprudence which has evolved over the years and consistently followed a pattern of progression to prevent environmental degradation and protection of the environment.

50. It is unfortunate that a false narrative is being created pitting environment against development. It is a completely untenable binary in as much as ecology and development are not adversaries. Both are part of the constitutional construct of sustainable development. At the cost of repetition, it is reiterated that there is no antinomy between development and environment. Unfortunately,

Electrosteel, Pahwa and *D. Swamy* on which reliance is being placed by the review judgment only seeks to reinforce the above stereotype.

51. Let me now deal with the review petition. Order XLVII of the Supreme Court Rules, 2013 deals with the review jurisdiction. As per Rule 1, this Court may review its judgment or order but no application for review will be entertained in a civil proceeding except on the ground mentioned in Order XLVII Rule 1 of the Civil Procedure Code. The rest of the provisions deal with the procedural aspect of review.

52. The review petition has been filed by an entity called Confederation of Real Estate Developers of India. In other words, it is a body of real estate developers. In para 3 of the review petition, it is stated that the review petition has been filed in the interest of hundreds of the members of the confederation who had applied for EC under the 2021 OM. Thus, from this statement itself, it is evident that members of the confederation are builders and developers who had started their projects without EC but had applied under the

2021 OM for EC. Beyond this, no other particulars are available: as to when the members had started their respective projects; whether each project required prior EC; or whether expansion of the projects required EC. The dates of application for EC under the 2021 OM have also not been mentioned. But from the above averment, it is evident that the applications for EC were made after 07.07.2021 i.e. the date of the 2021 OM.

52.1. I am afraid, on the aforestated ground itself, the review petition is liable to be dismissed. It has already been noticed supra that on the part of the MOEF&CC, the 2017 Notification has not been withdrawn, though in *Vanashakti* the same has been declared invalid and illegal by this Court. Even if we ignore *Vanashakti* for the time being, para 14 of the 2017 Notification is staring at our face. Para 14 has already been extracted above and analysed. Even at the cost of repetition, it is reiterated that as per para 14 of the 2017 Notification, only those projects or activities which were in violation of the 2006 EIA Notification as on the date of the 2017 Notification i.e. 14.03.2017, were only eligible to apply

for EC. The time period for making such application was six months from the date of the said notification i.e. up to 13.09.2017. Following intervention of the Madras High Court, MOEF&CC had extended this window period for 30 days more from 14.03.2018 to 13.04.2018. If that be the position, there is no question of any project proponent applying for EC after 13.04.2018. Even if a more charitable view is taken, the standard operating procedure introduced through the 2021 OM sought to streamline the procedure for grant of EC to only this category of project proponents. Therefore, members of the review petitioner are not entitled to any benefit under the 2021 OM, even if the same is assumed to be valid.

53. In the course of the hearing, learned senior counsel Mr. Rohatgi advanced a very novel submission on behalf of the review petitioner. Though at the first blush, the argument appears to be attractive, it really has no merit at all. The argument is that if the illegal projects have to be demolished in terms of the *Vanashakti* judgment and have to be rebuilt again after obtaining EC, the demolition will

generate more dust and more pollution. That apart, such a construct is against any logic, economic or otherwise.

53.1. This argument has been noted only to be rejected. Since the review petitioner itself has said that its members had applied for EC under the 2021 OM, at the first instance, such EC cannot be granted in terms of the 2017 Notification after 13.04.2018. Therefore, the question of consideration of such projects for EC does not arise at all. More particularly, it does not lie in the mouth of law violators to advance such a kind of justification to sustain the illegality which goes to the root.

54. At this stage, I may mention that the author of the 2017 Notification and 2021 OM i.e. MOEF&CC has not filed any review petition for review of the *Vanashakti* judgment. MOEF&CC has accepted the verdict of this Court in *Vanashakti*. It may also be mentioned that a solemn assurance was given by the learned Additional Solicitor General on instructions that the 2017 Notification is only a one-time measure. This only reinforces the position that the 2021 OM is only a follow up measure of the 2017

Notification. It only seeks to lay down standard operating procedure streamlining the process for consideration of EC of those project proponents who had availed the benefit of the 2017 Notification. Even assuming the 2021 OM to be valid, it has not extended the window period provided under the 2017 Notification or had not said that it would accept newer applications for grant of EC. Central Government has not said anywhere that the learned Additional Solicitor General had given the solemn assurance before the Madras High Court without its consent or that it would like to resile from that position. The Central Government has not made a single statement disowning such an assurance. Therefore, it is quite perplexing why the latter coordinate Bench in *Pahwa* and thereafter in *D. Swamy* should take pains in observing that a statement made by the counsel in court would not prevent the authority concerned from making amendments and/or modifications provided such amendments and/or modifications are as per the procedure prescribed by law.

54.1. The review judgment also proceeds on this line of reasoning and makes similar observations. A solemn

assurance given by one of the highest law officers of the country that too after obtaining instructions from the Central Government is certainly binding on the Central Government and it is clearly discernible that Central Government has accepted this position.

54.2. Question is when the Central Government or the MOEF&CC have themselves not come forward to seek relaxation of this assurance and have not sought for review of *Vanashakti,* then why the coordinate Bench in *Electrosteel, Pahwa* and *D. Swamy* and now the review judgment should be seen so keen virtually prodding the Central Government or the MOEF&CC to grant *ex post facto* EC to all the law violators.

55. The applicant in Miscellaneous Application (Diary) No. 46855 of 2025 represented by the learned Solicitor General of India, Mr. Tushar Mehta, only seeks a clarification and a declaration that the benefit of protection extended to the ECs already granted under the 2017 Notification in *Vanashakti* should apply to the project of the applicant also. It has been pointed out that had it not been

for the *Vanashakti* judgment being delivered at that point of time, the applicant would have obtained the EC under the 2017 Notification. Similar is the prayer made by the applicant in Miscellaneous Application (Diary) No. 52650 of 2025 where the applicant seeks identical relief. Besides the above two, lot many miscellaneous applications have been filed seeking similar clarification and declaration. I am of the considered opinion that the concerns of the individual applicants are capable of being accommodated by way of appropriate clarification and/or modification of paragraph 35 of the *Vanashakti* judgment. For that, the entire judgment in *Vanashakti* is not required to be recalled.

55.1. In the above context, the very positing of the question, as posed in the review judgment, whether it would be in the public interest to demolish all such projects and permitting the money spent from the pocket of public exchequer to go in the dustbin, is itself erroneous. Such a question does not arise at all.

56. Before parting with the record, I would like to painfully observe that the deadly Delhi smog reminds us

everyday about the hazards of environmental pollution. Supreme Court as the highest constitutional court of the country has the duty and obligation under the Constitution of India and the laws framed thereunder to safeguard the environment. It cannot be seen backtracking on the sound environmental jurisprudence that has evolved in this country, that too, on a review petition filed by persons who have shown scant regard for the rule of law.

57. The review judgment is an innocent expression of opinion. It overlooks the very fundamentals of environmental jurisprudence. Precautionary principle is the cornerstone of environmental jurisprudence. Polluter pays is only a principle of reparation. Precautionary principle cannot be given a short shrift by relying on polluter pays principle. The review judgment is a step in retrogression.

58. For all the aforesaid reasons, review petition is dismissed.

.....J.
[UJJAL BHUYAN]

NEW DELHI;
NOVEMBER 18, 2025.

Reportable

IN THE SUPREME COURT OF INDIA
INHERENT JURISDICTION

Review Petition (C) @ Diary No.41929 of 2025
In
Writ Petition (C) No.1394 of 2023

Confederation of Real Estate Developers of India (CREDAI).

...Petitioner

Versus

Vanashakti and Anr.

...Respondents

J U D G E M E N T

K. VINOD CHANDRAN, J.

1. This review petition has given rise to two opinions, placed before me, one allowing the review and the other rejecting it. Having gone through the two opinions; both insightful, profound and thought-provoking, I agree with the one allowing the review, restoring the proceedings in the writ petitions and the civil appeal, the common judgment under review having considered an identical challenge, against a Notification and an Office Memorandum. As a

necessary corollary, with all the respect at my command, I have to record my disagreement with the one rejecting the review, maintaining the judgment dated 16.05.2025.

2. I pen this only since I owe a duty to give reasons for my concurrence and since the opinion rejecting the review denounces the one permitting it. Liberty to dissent is the hall mark of a robust judicial system, distancing itself from an overbearing allegiance to one's own beliefs of right and wrong.

3. The facts giving rise to the controversy are more than evident from the two opinions. Suffice it to notice that under the Environment (Protection) Act, 1986, the Environmental Impact Assessment Notification, 1994 (EIA Not.1994; *the abbreviations in brackets, here and henceforth, used for brevity*) was brought in as a regulatory regime in furtherance of protection of environment, requiring Environmental Clearance (EC) for certain projects. Later, on 14.09.2006, the Environmental Impact Assessment Notification, 2006 (EIA Not.2006) was brought out wherein the activities coming under the regulatory regime were

divided into two categories, one requiring prior EC from the Ministry of Environment, Forest and Climate Change (formerly MoEF, now designated as MoEF&CC) on the recommendations and assessment of the Expert Appraisal Committee (EAC), while the projects falling in the other category were to be assessed by the State Environmental Impact Assessment Authority (EIAA) on the recommendation of the State Expert Appraisal Committee (SEAC). The controversy arose insofar as another notification dated 14.03.2017 (Not. of 2017) brought out by the MoEF&CC which made a provision for grant of *ex post facto* EC in respect of the projects which have been initiated and continued without prior EC under the EIA Not. 2006.

4. Purportedly, on the strength of the directions issued by the National Green Tribunal (NGT), Principal Bench, New Delhi in ***Tanaji B. Gambhire v. Chief Secretary, Government of Maharashtra and Ors.***[1]**,** the MoEF&CC issued an Office Memorandum dated 07.07.2021 (O.M. of 2021), putting in place a Standard Operating Procedure

[1] Appeal No.34 of 2020

(SOP) for identification and handling of violation cases under the EIA Not. 2006, which provided an open-ended measure of obtaining EC after commencement or even completion of the project.

5. The Not. of 2017 and the O.M. of 2021 were struck down by this Court while sustaining those ECs already granted under the measure stipulated therein. The review was filed and arguments addressed on the ground of the judgement having not looked into the precedents available and when perused, failed to notice certain compelling aspects, the observations on which have the effect of a binding precedent by Co-ordinate Benches. *Inter alia,* the hardship caused insofar as the projects which had proceeded on the basis of the Not. of 2017 and O.M. of 2021, were pointed out, many of which were only short of the issuance of EC when the decision came, i.e.: short of an *ex post facto* EC in hand.

6. As mentioned at the outset, I am in respectful concurrence with the opinion allowing the review and the reasoning in the divergent opinion are the following: -

I. ***Common Cause v. Union of India***[2] rejected the contention that the absence of word "prior" in the EIA Not. 1994, made available a window for obtaining an *ex post facto* EC. It was held that considering the damage to the environment which also would have a long-term impact, especially in cases of mining, a prior EC was mandatory even in the event of expansion or modernization of existing mining activities and also in the case of renewal without any such expansion or modernization. It was categorically held that an *ex post facto* EC would be detrimental to the environment, resulting in irreparable degradation of the environment. It was also found that the concept of an *ex post facto* or a retrospective EC is completely alien to environmental jurisprudence including the EIA Not.1994 and EIA Not. 2006.

[2] (2017) 9 SCC 499

II. ***Alembic Pharmaceuticals Ltd. v. Rohit Prajapati & Ors.***[3] considered the issue of a provision for an *ex post facto* EC to industrial units, made possible by a circular dated 14.05.2002, diluting the requirement for a prior EC, even under the EIA Notification, 1994. The two Judge Bench in ***Alembic*** examined the notifications and held that *ex post facto* EC is in derogation of the fundamental principles of environmental jurisprudence and is anathema to the EIA Not. 1994, even when the word "prior" was not employed therein.

III. The validity of the Not. of 2017 was put to challenge before the Madras High Court in ***Puducherry Environment Protection Association v. Union of India***[4] in which the learned Additional Solicitor General appearing for the Government of India, across the Bar, submitted on instructions that the impugned Notification clearly and certainly would

[3] (2020) 7 SCC 157
[4] 2017 SCC OnLine Mad 7056

be only a one-time measure. The Not. of 2017 provided such measure of *ex post facto* EC only between 14.03.2017 to 13.09.2017 which stood extended by the High Court for a further 30 days: till 13.04.2018, and not thereafter.

IV. ***Electrosteel Steels Limited v. Union of India and Ors.***[5] though noticed the Not. of 2017 and O.M. of 2021 as also the stay operating against the O.M. in ***Fatima v. Union of India Rep. by its Secretary to the Government***[6] held that the requirement to obtain EC is non-negotiable and it is imperative for the protection of future generations that the pollution laws are strictly enforced. The Bench, on the peculiar facts, posed to itself a question as to whether a technical irregularity of shifting a unit without prior EC would determinately affect the employment prospects and the economy of the country. A relaxation was made but at the same time

[5] (2023) 6 SCC 615
[6] (2021) SCC Online Mad 12936

emphasizing the requirement of a prior EC and asserting that *ex post facto* EC should not orderly be granted and certainly not for the asking. Only in exceptional circumstances; therein of a virtual closure of the industry, resulting in large scale loss of employment and stoppage of huge revenue, an *ex post facto* approval was directed to be considered.

V. ***Pawha Plastics Private Limited and Anr. v. Dastak NGO and Ors.***[7] and ***D. Swamy v. Karnataka State Pollution Control Board and Ors.***[8] followed ***Electrosteel*** and found that closure of an industry solely on the ground of want of prior EC would be against public interest. **Electrosteel, *Pahwa Plastics*** and ***D. Swamy*** adopted the same reasoning which was contrary to that laid down in ***Alembic*** and ***Common Cause***. The three later judgments having not followed the binding

[7] (2023) 12 SCC 774
[8] (2023) 20 SCC 469

precedent in the former two; of Co-ordinate Benches, there is no reconciliation possible of the two sets of judgments. The later decisions are clearly in conflict with the ratio in the earlier decisions and hence *per incuriam,* which would not bind a Coordinate Bench as has been held in ***National Insurance Co. Ltd. v. Pranay Sethi***[9].

VI. The Not. of 2017 and O.M. of 2021 would result in a back tracking of the fundamental principles of environmental protection, which should always be guided by a non-regressive thinking, which would work against the commitments made at the Rio Conference; the Earth Summit held in June 1992. A false narrative pitting environment against development is untenable, and the principle of sustained development is reinforced by a plethora of judgments of this Court.

VII. The argument raised that demolition of those projects, which were completed on the strength of

[9] (2017) 16 SCC 680

the O.M. of 2021, albeit illegally, would result in further pollution especially if an EC was possible before initiation cannot be entertained since it emanates from the violator, as a recourse to justify the blatant illegality. Especially, when there is no review filed by the author of the notification, the Central Government who has also given an assurance through one of the highest Law Officers of the Country, after obtaining instructions, which binds the Central Government.

7. My reasoning is confined to whether the review is warranted. I forbear from considering the validity of the Not. of 2017 or the O.M. of 2021, which, if the review is allowed will have to be considered by the Bench before which it is posted, which consideration cannot be preempted.

I. ***Common Cause*** considered the EIA Not. 1994 and EIA Not. 2006 to hold that *ex-post facto* EC is completely alien to environment jurisprudence and the said notifications. However, 102 lease holders who did not have EC was permitted to move the authorities for

necessary clearances, approval and consents after depositing the remaining dues and full payment of compensation and the penalties levied. In the event of *ex-post facto* EC being granted the mining lease was directed to be renewed.

II. ***Alembic*** followed ***Common Cause*** and held that environment law cannot countenance the notion of *ex-post facto* EC. But, finding the appellant industries to have obtained EC, though after several years of the Not. of 1994, permitted the industries to continue operations subject to the environment degradation being evaluated and penalty imposed for disobedience with the regulatory regime. This Court hence in both these decisions despite finding that *ex-post facto* EC is not permissible at all, on facts allowed continued operations subject to conditions, adopting a balanced approach, while not totally condoning the disobedience by enabling punitive reparations.

III. Needless to emphasize that requirement of an EC was brought in by an EIA notification under the

Environment Protection Act. When the requirement of a prior EC itself was brought about under the statutory regime, invoking the power conferred on the Government can it be said that the rigor of the regulation cannot be relaxed. The answer to this would primarily rest upon the principle that a power to bring in a particular regulation would also encompass within itself the power to cancel it. This would have to be tested herein on the anvil of the principles regulating environmental jurisprudence. However, the power to relax the requirement cannot be found to be totally absent and, in that circumstance, whether the undertaking made would be a blanket restriction is the moot question. This again, would have to be tested on the principle of whether there can be an estoppel against a statute, which issue, looming large, obviously has not been dealt with in the judgment under review.

IV. ***Electrosteel, Pahwa*** & ***D. Swamy*** cannot *per se* be held to take a divergent view from ***Common Cause***

and ***Alembic***, since both these former decisions were noticed in the later decisions and while reaffirming the principle a balanced approach undertaken as in the earlier cases. This was in consonance with the relaxation, permitting an *ex-post facto* EC to be obtained, as adopted in the earlier decisions. There was a possibility of reconciliation, especially since the Not. of 2017 was not in the contemplation of the earlier decisions. Hence if a contrary view had to be taken necessarily there should have been a reference to a larger Bench, especially when the Not. of 2017 was referred to and upheld in ***D. Swamy*** placing reliance on Section 21 of the General Clauses Act, 1897 which affirms the power to do something, enabling the addition, amendment, variation or rescinding of anything so done. The principle in ***Pranay Sethi*** would have been rendered more alluring and eloquent, achieving further illumination, if such a reference was made; especially after noticing the decision in

Electrosteel in its entirety and the validation of the Not. of 2017 in ***D. Swamy***.

V. The Not. of 2017 and O.M. of 2021, without holding on its validity, was brought in, not as a regressive measure but reckoning the ground realities. The regulatory regime falters oftener than ever, for multiple reasons, not possible of compartmentalization as due to one or the other malady; all of which an evolving society would attempt to rectify in the long run. As has been held in ***Navtej Singh Johar and Ors. v. Union of India***[10], the State, which includes all the three organs, has an obligation to take appropriate measures in progressive realization of economic, social and cultural rights. The Legislature, the Courts and the Executive, hence, has to reckon the changing times stark realities and the gross consequences of a strict, straitjacket implementation of a regulatory regime, which also could turn counterproductive as in the present case.

[10] (2018) 10 SCC 1

VI. This Court under Article 142 of the Constitution of India is empowered to pass orders to secure ends of justice, which has been rightly invoked in the decisions cited, concerning environment itself. Can it be said that when the State is found to be conferred with a power to regulate, it is totally denuded of the power to relax the rigor brought in, merely because it concerns the environment. It could be held circumscribed in its invocation, in certain matters, still, the power cannot be found to be totally absent.

VII. As far as narratives are concerned, those cannot be categorized as total lies, half-truths or full truths, none, possible of reliance in adjudication. Neither Court nor Judge would proceed on mere narratives to roll back a measure provided by law or to enforce one not laid down by a statute or a legal instrument.

VIII. As is discernible from the records, the writ petitions challenging the Not. of 2017 and O.M. of 2021 were initiated with considerable delay though the petition leading to the Civil Appeal before the Madras High

Court was in 2017 itself. The relaxation in the regulatory regime was kept alive for long years when the matters were pending. Two examples, one of a green field airport and the other of a full-fledged hospital and medical college having been constructed and completed when the regulatory regime was in a fluid state cannot be ignored. It has been rightly argued that demolition of the structures raised, merely for the purpose of applying for a prior EC to construct afresh, would not only cause undue hardship but also result in further depredation of the environment by the debris generated, which will not be possible of reuse leading to abject waste of resources and massive loss of revenue. Hence a rigid application of the regulation would be counterproductive especially for those who adjusted their affairs on the strength of the relaxation.

IX. *Prima facie* the notification enables assessment of whether a prior EC was permissible or not, in the perspective of the facts existing at the time of commencement of the project. The consideration is

possible, only on condition of closure of operation while the assessment is carried out. It also enables sufficient safeguards for determination & payment of penalties proportionate to the scale of the project and the extent of commercialization during the violation period, furnishing of bank guarantee equivalent to the amount for implementation of Remediation/Natural & Community Resource Augmentation Plan and eventually if EC is not possible, demolition or closure of the project, which eventuality also attracts the deterrent and penal provisions under the Environment Protection Act. A rigid, pedantic approach first directing demolition and then enabling an application for EC for commencing the very same project would be akin to setting the clock back to save time.

X. The records reveal that the NMDC, the State of Telangana and the Karnataka Industrial and Infrastructure Development Corporation Limited; State and its instrumentalities have filed separate review petitions against the very same judgment. The

observation that the judgments in ***Electrosteel, Pahwa*** & ***D. Swamy*** as also the opinion allowing the review, display a *'keen virtual prodding of the Government of India or the MoEF&CC, to grant ex post facto EC to all violators' (sic),* ignores and disregards, the provisions of the Not. of 2017 read with the O.M. of 2021, the identical measure adopted by ***Common Cause*** & ***Alembic*** and the validity conferred to like violators who fortuitously obtained the *ex post facto* EC before the judgment was delivered, while denying it to similarly placed who were on the verge of being issued with an EC. In my humble opinion, it also lowers the majesty of this Court.

8. The balanced approach, in the wake of admitted violations, taken in ***Common Cause*** & ***Alembic,*** have been completely lost sight of, by the judgment under review. The judgment under review, with due respect did not look into the aspects of the power conferred under the Environment Protection Act and the legal principles regarding an undertaking given in derogation of the statutory provisions.

The judgment under review failed to notice the decision in ***Electrosteel*** in its entirety and its attention was not drawn to ***Pahwa*** and ***D. Swamy.*** It is one thing to find ***Electrosteel, Pahwa*** and ***D. Swamy*** *per-incuriam* in the original proceeding, which would have restrained a review on that ground; but quite another to reject the prayer for review on the ground that though not noticed or referred to, those decisions are *per incuriam;* which still is a valid ground for review for not having been considered. I fully concur with the opinion of the Learned Chief Justice of India and find the review to be not only warranted, but imperative and expedient.

..... J.
(K. Vinod Chandran)

New Delhi;
November 18, 2025.