

(2011) 11 UK CK 0166

In the Uttarakhand High Court

Case No : Writ Petition P.I.L. No. 68 of 2011

Anuj Joshi and another

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 03-11-2011

Acts Referred:

Electricity (Supply) Act, 1948 — Section 29
Environment (Protection) Rules, 1986 — Rule 5

Citation : AIR 2012 Utt 24 : (2012) ELR 100

Hon'ble Judges : Barin Ghosh, C.J;Umesh Chandra Dhyani, J

Bench : Division Bench

Judgement

Barin Ghosh, C.J.—In this writ petition, we are concerned with a hydro electric power project on river Alaknanda situated at Srinagar. The proposal to undertake the project was mooted by the Uttar Pradesh State Electricity Board. Initially when they approached the Central Electricity Authority u/s 29 of the Electricity Supply Act, 1948, they held out that the capacity of the project will be 200 Megawatts. At the same time, the Ministry of Environment and Forest, Government of India, was also approached by the Uttar Pradesh State Electricity Board for obtaining environmental clearance in respect of the said project. The Ministry of Environment and Forest accorded such clearance on 3rd May, 1985. When the Detailed Project Report was prepared by the Uttar Pradesh State Electricity Board for obtaining statutory sanction of the Central Electricity Authority, in terms of the Electricity Supply Act, 1948, it was represented in the Detailed Project Report that the capacity of the project would be 330 Megawatts. On 18th December, 1987, Central Electricity Authority accorded clearance to the Uttar Pradesh State Electricity Board for undertaking the said project having capacity of 330 Megawatts, with a rider that it will comply with all the directions of the Ministry of Environment and Forest contained in its clearance dated 3rd May, 1985. It does not appear that the Uttar Pradesh State Electricity Board informed the Ministry of Environment and Forest that it has obtained clearance from the Central Electricity Authority to commission the said project with a

capacity of 330 Megawatts. The Uttar Pradesh State Electricity Board, after obtaining such clearance, however, did not take necessary steps to implement the project. The project was transferred by the Uttar Pradesh State Electricity Board to the predecessor in interest of respondent No. 3. Whereupon, environmental clearance was transferred by the Ministry of Environment and Forest to the predecessor in interest of respondent No. 3 on 27th July, 1999. Subsequently, respondent No. 3 came into the picture in the year 2005 and, thereafter, it started the construction work of the project.

2. Since then, a number of litigations have been filed by the petitioner. One of them has been dealt with by this Court by a judgment and order dated 19th April, 2011. By that judgment, respondent No. 3 was given liberty to approach the Ministry of Environment and Forest for a specific decision as to the clearance for increased capacity of generation and increased height of dam, with a direction upon the Ministry of Environment and Forest to take decision within three months of making representation by respondent No. 3. The judgment and order further made it clear that construction of the dam up to the height of 63 meters from the riverbed, enabling generation of 200 Megawatts of electricity, will continue; but construction beyond that limit may be proceeded after further clearance from the Ministry of Environment and Forest is received. Accordingly, an approach was made to the Ministry of Environment and Forest by respondent No. 3. The same was disposed of on 3rd August, 2011. In the order / letter dated 3rd August, 2011, the Ministry of Environment and Forest held out as follows:

3. The matter has been reviewed by the Ministry and it is to clarify that while transferring the environment clearance dated 3rd May, 1985 to the Project in the name of Uttar Pradesh State Electricity Board (UPSEB) to M/s Duncans North Hydro Power Company Limited vide this Ministry's letter No. 12011/6/96-IA-I dated 27.7.1999 (copy enclosed), the Ministry had duly reviewed the increased capacity from 200 MW (4x50 MW) to 330 MW (5x66 MW) and associated parameters like change in dam height from 73 m to 90 m from the deepest foundation and FRL from EL 604.0 m to 605.5 m. The Ministry also noted that there was a change in the submergence from 300 ha to 324.074 ha, however Forestland remained the same i.e. 338.96 ha. The Project has a valid Forest clearance for 338.36 ha dated 15th April, 1987 which will be the final Forest Land for the project. Therefore, the final parameters for the project are as follows:

- (i) Submergence area - 324.074 ha
- (ii) Forest land for diversion - 338.86 ha
- (iii) Capacity - 330 MW (4x82.5 MW)
- (iv) Dam height from the deepest foundation - 90 m
- (v) Dam height from the river bed level - 66 m
- (vi) FRL - EL 605.5 m

(vii) MDDL - EL 603.0 m

(viii) Dam top Road level - 611.0 m

4. In view of the above, I am directed to clarify that the transfer of environment clearance from DHPCL to Alaknanda Hydro Power Company Limited (AHPCL) vides this Ministry's letter no. I-12011/6/96-IA-I dated 27th March, 2006 is for 330 MW capacity with the above mentioned parameters. The Ministry has further noted the change in the units from 6x55 MW to 4x82.5 MW as approved by CEA.

5. This has approval of the Competent Authority.

3. In the previous round of litigation as well as in the present litigation, petitioner has not questioned undertaking of the project for generation of 200 Megawatts of electricity by raising the height of the dam up to 63 meters from the riverbed. The contention of the petitioner had, all throughout, been that the Ministry of Environment and Forest has not given clearance in respect of the enhanced capacity.

4. The fact remains that environmental clearance of the project was transferred from the Uttar Pradesh State Electricity Board to the predecessor in interest of respondent No. 3 by the Ministry itself. The Ministry has stated in the order impugned in the writ petition that it reviewed the entire matter at the time of transferring the environmental clearance dated 3rd May, 1985 and that it duly reviewed the increased capacity from 200 Megawatts to 330 Megawatts and associated parameters like change in the dam height etc., including submergence of land for the dam to be constructed. In the present writ petition, it is the contention of the petitioner that the Ministry of Environment and Forest has not applied its mind in respect of clearance for construction of the dam having enhanced capacity.

5. It is the contention of the petitioner that since the Ministry applied its mind subsequent to 27th January, 1994, it was obligatory on the part of the Ministry to apply its mind on the basis of the notification published by the Central Government on 27th January, 1994 in exercise of power granted to it under Rule 5 of the Environment (Protection) Rules, 1986. It is the contention of the petitioner that while applying its mind, as has been held out in the order dated 3rd August, 2011, the Ministry did not take into account any of the parameters set forth in the said notification. The fact remains that until before 27th January, 1994, there was no statutory requirement of obtaining environmental clearance for the purpose of setting up a hydro electric project. The 1985 clearance, obtained by the Uttar Pradesh State Electricity Board, was not a statutory clearance. With effect from 27th January, 1994, it became obligatory to obtain environmental clearance for constructing any hydro electric project. Therefore, the one and the only question is whether the expansion of the project was made before or after 27th January, 1994. From the records made available to the Court, which were not available before the Court in the previous round of litigation, it is clear that the then only statutory authority, namely, the Central

Electricity Authority, granted sanction to construct the project with the capacity of 330 Megawatts on 18th December, 1987. In the circumstances, the project in question cannot be said to be requiring a statutory mandate of obtaining clearance on the norms set down in the notification dated 27th January, 1994.

6. It appears that on 7th July, 2004, an amendment was incorporated to the notification dated 27th January, 1994, whereby and under, it was held out that new construction projects, which were undertaken without obtaining the clearance required under the notification dated 27th January, 1994 and where construction work has not come up to the plinth level, shall require clearance under the notification dated 27th January, 1994 as modified from time to time until 7th July, 2004 w.e.f. 7th July, 2004. It is the contention of the petitioner that, since the construction of the project in question did not come up to the plinth level on or before 7th July, 2004, the project required clearance on the parameters set forth in the said notification dated 27th January, 1994, read with all subsequent amendments made therein. Petitioner contends that, therefore, the project requires a clearance on the parameters of the requirements contained in the notification dated 27th January, 1994, as amended from time to time, which is absent.

7. That contention may be correct. But that contention addresses to the whole of the project and not only to the enhanced part. As aforesaid, petitioner has not evinced any grievance, at any stage of the litigation, in relation to the project, which was envisaged originally to be of 200 Megawatts.

8. At the same time, from the affidavits filed by the Ministry of Environment and Forest, Government of India, it is clear that, insofar as the Ministry of Environment and Forest is concerned, it is of the view that all necessary things required to be done by them as well as by respondent No. 3, in the matter of obtaining environmental clearance, have been granted and obtained, as the case may be, for the project.

9. However, since after 27th January, 1994, i.e. after publication of the said notification under Rule 5 of the Environment (Protection) Rules, 1986, the matter of environmental clearance is not limited only to the technical aspects of the matter; the same encompasses also the social aspects of the matter and, accordingly, there is a requirement that a public hearing is to be given. There is no doubt that insofar as the project with which we are concerned, the same is squarely governed by the provisions of the said notification. The learned counsel for respondent No. 3, however, submitted that the project undertaken by his client is exempted from explanation (i) of sub-clause (II) of clause (2) of the said notification on the strength of clause (8) of the Explanatory Note dated 27th January, 1994. Before we deal with the aspect, it would be appropriate on our part to set out the explanation in question, which is as follows:

New construction projects which were undertaken without obtaining the clearance required under this notification, and where construction work has not

come up to the plinth level, shall require clearance under this notification with effect from the 7th day of July, 2004.

10. As aforesaid, the said explanation was inserted in the notification dated 27th January, 1994 by an amendment thereto effected on 7th July, 2004. In terms of the said explanation, projects requiring clearance w.e.f. 7th July, 2004 would be such construction projects, which have been undertaken without obtaining clearance under the said notification dated 27th January, 1994 and where the construction work has not come up to the plinth level. In the instant case, there is nothing on record from where it would be evidenced that construction work had come up to the plinth level on or before 7th July, 2004. There are reports and file notings to the effect that certain constructions of infrastructural facilities have been made. But that has got no equation with construction up to the plinth level. The fact remains, the construction work of the project commenced only after 7th July, 2004 when respondent No. 3 came into the picture. Therefore, in terms of the explanation, thus inserted, it was obligatory on the part of respondent No. 3 to obtain a fresh clearance under the notification dated 27th January, 1994 as amended upto 7th July, 2004, since the project did not get any clearance, admittedly, under the said notification dated 27th January, 1994. It would be seen that the Explanatory Note, upon which reliance has been placed by respondent No. 3, is dated 27th January, 1994 when there was no concept of anything which was inserted in the notification on 7th July, 2004. In the Explanatory Note dated 27th January, 1994, it was clarified that where all relevant clearances have already been granted before the notification dated 27th January, 1994, such a project will not be required to obtain any clearance under the said notification dated 27th January, 1994. The said Explanatory Note, therefore, clarified, by repeating, that the notification dated 27th January, 1994 is prospective. Therefore, inasmuch as the necessary clearances were already given in respect of the project with the capacity of 330 Megawatts much prior to 27th January, 1994, there was no requirement of obtaining clearance for the said project under the notification dated 27th January, 1994. The requirement to obtain such clearance accrued only on 7th July, 2004, when the said explanation was inserted in the notification dated 27th January, 1994. Respondent No. 3 or its predecessors in interest, therefore, became obliged to obtain such a clearance only after 7th July, 2004, inasmuch as, prior thereto, neither any clearance under the notification dated 27th January, 1994 was obtained nor the construction work of the project had come up to the plinth level.

11. From the standpoint of the Ministry of Environment and Forest, as depicted in various pleadings and affidavits filed, it is clear that the project, according to the technical standards prescribed by the Ministry, is entitled to a clearance. The Ministry has repeated the same many a times, including in the last order, which has been impugned in the writ petition. However, while doing so, the Ministry, as required in terms of the notification dated 27th January, 1994, has not looked into the social impact of the project, which can only be gathered through a public hearing, as envisaged in the notification dated 27th January, 1994.

12. We, accordingly, dispose of the writ petition by directing respondent No. 3 to submit, with the Ministry of Environment and Forest as quickly as possible, the documents mentioned in Schedule IV to the notification dated 27th January, 1994. The Ministry shall take steps for holding the public hearing as envisaged in the notification dated 27th January, 1994 and ensure that the notice, inviting such public hearing, is published within 30 days from the date of receipt of the documents from respondent No. 3. In the notice, it shall be mentioned that the public hearing shall be given at Dhari Devi Temple premises, Srinagar, district Pauri Garhwal. Mr. Vinay Kumar, learned Standing Counsel for the State of Uttarakhand is present in Court. Through him, we are requesting the Commissioner, Pauri Garhwal, to be present at the public hearing with all necessary infrastructure along with police in order to assist the authority concerned, who shall give the public hearing, to ensure that the public hearing is a success. The consensus at the public hearing shall be made available to the Ministry as quickly as possible by the authority concerned. We hope and expect that the Ministry concerned shall receive the same within 15 days from the date of conclusion of the public hearing. Within 45 days therefrom, it shall be open to the Ministry to affirm its decision communicated by the letter dated 3rd August, 2011, to rescind the same, to modify the same by addition or by deletion and to communicate the same to respondent No. 3 with a copy to petitioner No. 1 at his residence situated at Upper Bazar, Srinagar, district Pauri. For all practical purposes, the decision, thus, to be rendered, should be deemed to be grant or non grant of clearance by the Ministry in accordance with the said notification dated 27th January, 1994. It is made clear that, taking into account the fact that the construction work has progressed to a great extent and also that, at no stage, there was any objection to the construction of the project having a capacity of 200 Megawatts, we refuse to interfere with the work of construction, but, at the same time, make it clear that, in the event, in terms of the order of this Court, the Ministry rescinds the clearance; respondent No. 3 will face the consequence thereof as is applicable in law.

13. This disposes of the writ petition.