
(2022) 03 KL CK 0271

In the High Court Of Kerala

Case No : Writ Petition (C) No. 32652 Of 2018

N.P. Padmanabhan

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 31-03-2022

Acts Referred:

Kerala Panchayat Raj Act, 1994 — Section 236(3)

Citation : (2022) 03 KL CK 0271

Hon'ble Judges : T.R. Ravi, J

Bench : Single Bench

Advocate : Santhosh Mathew, Arun Thomas, Jennis Stephen, Vijay V. Paul, Anil Sebastian Pulickel, Divya Sara George, Jaisy Elza Joe, Rajeev Jyothish George, S.Manu, Asgi M.P.Sreekrishnan

Final Decision : Allowed

Judgement

T.R. Ravi, J.

1. On 30.5.2018, the petitioner applied to the 5th respondent for the purpose of environmental clearance for establishing a quarry over an extent of 2.32 hectares in Kayakodi Village, Vadakara Taluk of Kozhikode District. The application was forwarded to the 6th respondent on 28.6.2018 and was accepted by the 6th respondent on 4.7.2018. On 7.9.2018, the 6th respondent after completing the screening, scoping and public consultation recommended the issuance of the environmental clearance. The petitioner was however not issued with an environmental clearance despite the passage of 105 days of submission of application, as stipulated in the Environment Impact Assessment Notification (EIA notification for short) issued by the Ministry of Environment and Forest (MoEF for short). The petitioner has hence approached this Court seeking a declaration that the petitioner is entitled to have a deemed environmental clearance and a direction to respondents 5 and 6 to issue an environmental clearance in paper/physical form in lieu of the deemed environmental clearance which is already enjoyed by the petitioner in terms of the EIA notification.

2. Ext.P2 is the timeline details pertaining to the petitioner's application, which is uploaded on the website of the respondents. It can be seen from Ext.P2 that the petitioner had submitted the application on 30.5.2018, that it was accepted by the DEIAA and forwarded to the DEAC on 28.6.2018 and that the DEAC had received it on 4.7.2018. These facts are not in dispute. Ext.P4 is the EIA notification dated 14.9.2006 issued by the MoEF, which is relevant for the purpose of this case. The writ petition was filed on 5.10.2018. The National Green Tribunal (NGT for short) had in Original Application No.186 of 2016 and connected cases, in which Ext.P4 notification was challenged, held that the procedure envisaged in the EIA notification was inconsistent with the directions contained in the judgment of the Hon'ble Supreme Court in Deepak Kumar v. State of Haryana & Ors. reported in [(2012) 4 SCC 629]. The NGT took note of the provision in the EIA notification which exempted mining areas between 5 hectares and 25 hectares from the purview of the notification and public consultation and said that clearance was made only subject to a separate procedure of preparing a District Survey Report. The NGT found that these provisions are mine centric and are not intended to strike a balance between mining and environment, especially regarding Form-1M which needs to be made more elaborate incorporating environment related aspects also. The NGT further held that dispensing with the requirement of public hearing which forms a part of the public consultation under Stage III of the environmental clearance under the EIA notification for areas measuring 0 to 25 hectares for individual mine areas and in cluster situations where public hearing has been provided, has resulted in gross dilution of EIA notification dated 14.9.2006. The NGT also found that these are aspects which must be considered by the additional 8th respondent rather than respondents 5 and 6. The order of the NGT was issued on 13.9.2018. The additional 8th respondent held a view that since the operation of Ext.P3 notification was not stayed by the NGT in its order dated 13.9.2018, the procedure prescribed in Ext.P3 can be followed till a new notification in terms of the order of the NGT was issued by the MoEF. A direction in this regard was issued by the Additional 8th respondent to the DEIAA. The stand of the additional 8th respondent was considered by the NGT and by order dated 11.12.2018, it was held that the direction issued by the SEIAA was in violation of the order of the NGT. It was further ordered that the direction will stand suspended till a fresh notification is issued by the MoEF.

3. There is no dispute regarding the fact that the 105 days from the date of submission of the application was over on 11.9.2018. It was two days later, on 13.9.2018, that the NGT passed the order finding that DEAC cannot decide the issue regarding EC. The question therefore is whether the order of the NGT whereby the 5th and 6th respondents were found to be having no expertise or scientific knowledge to assess environmental implications and they cannot be the authorities to give any recommendations regarding these aspects, will apply to cases like that of the petitioner, where the period prescribed was already over on the day the NGT passed its order.

4. For the purpose of deciding the issue, it is necessary to extract the provision in the EIA notification, 2006, whereby the deeming clauses were brought in.

"8. Grant or Rejection of Prior Environmental Clearance (EC): (i) The regulatory authority shall consider the recommendations of the EAC or SEAC concerned and convey its decision to the applicant within forty five days of the receipt of the recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned or in other words within one hundred and five days of the receipt of the final Environment Impact Assessment Report, and where Environment Impact Assessment is not required, within one hundred and five days of the receipt of the complete application with requisite documents, except as provided below.

(ii) The regulatory authority shall normally accept the recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned. In cases where it disagrees with the recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned, the regulatory authority shall request reconsideration by the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned within forty five days of the receipt of the recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned while stating the reasons for the disagreement. An intimation of this decision shall be simultaneously conveyed to the applicant. The Expert Appraisal Committee or State Level Expert Appraisal Committee concerned, in turn, shall consider the observations of the regulatory authority and furnish its views on the same within a further period of sixty days. The decision of the regulatory authority after considering the views of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned shall be final and conveyed to the applicant by the regulatory authority concerned within the next thirty days.

(iii) In the event that the decision of the regulatory authority is not communicated to the applicant within the period specified in sub-paragraphs (i) or (ii) above, as applicable, the applicant may proceed as if the environment clearance sought for has been granted or denied by the regulatory authority in terms of the final recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned.

(iv) On expiry of the period specified for decision by the regulatory authority under paragraph (i) and (ii) above, as applicable, the decision of the regulatory authority, and the final recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned shall be public documents.

(v) Clearances from other regulatory bodies or authorities shall not be required prior to receipt of applications for prior environmental clearance of projects or activities, or screening, or scoping, or appraisal, or decision by the regulatory authority concerned, unless any of these is sequentially dependent on such clearance either due to a requirement of law, or for necessary technical reasons.

(vi) Deliberate concealment and/or submission of false or misleading information or data which is material to screening or scoping or appraisal or decision on the application shall make the application liable for rejection, and cancellation of prior environmental clearance granted on that basis. Rejection of an application or cancellation of a prior environmental clearance already granted, on such ground, shall be decided by the regulatory authority, after giving a personal hearing to the applicant, and following the principles of natural justice.”

5. Heard Sri Santhosh Mathew, counsel for the petitioner Sri Rajeev Jyothish George, Government Pleader on behalf of respondents 1 to 6, Sri S.Manu, ASGI on behalf of the 7th respondent and Sri M.P.Sreekrishnan, counsel for the 8th respondent.

6. The counsel for the petitioner points out that there are four stages in the consideration of an application for environmental clearance as can be seen from clause 7 of Ext.P4. The first stage is regarding screening, the second stage is scoping, the third stage is public consultation, and the fourth stage is appraisal. As per Ext.P3, public consultation is required only for areas more than 5 hectares and in the case of the petitioner, the area is only 2.32 hectares. It is submitted that there is no requirement of the public consultation in such cases. The projects have been categorized into Categories A and B and Category B has been further classified as B1 and B2. Going by the categorisation, B2 categories do not require environment impact assessment report. The categorisation is based on spacial extent of potential impacts and potential impacts on human health and natural and man-made resources.

7. The counsel points out that there are three situations which are contemplated in paragraph 8 of the EIA notification. As per Clause 8(i), the Regulatory Authority is to consider the recommendations of the EAC or SEAC concerned and convey its decisions to the applicant within 45 days of the receipt of the recommendations of the EAC or State Level Expert Appraisal Committee concerned, or in other words within 105 days from the receipt of the final EIA report and in cases where such report is not required, within 105 days of the receipt of the complete application with the requisite documents. Certain exceptions are provided in Clause 8(ii) with regard to cases where the regulatory authority seeks reconsideration of the recommendation by the EAC. In Clause 8(iii) it is categorically stated that where the decision of the regulatory authority is not communicated to the applicant within the period specified in Clause 8(i), the applicant may proceed as if the environment clearance sought for has been granted or denied by the regulatory authority in terms of the final recommendations of the EAC.

8. The counsel for the petitioner submits that the 105th day will be over on 11.9.2018, if the date of submission of the application is also included and on 12.9.2018, if the date is excluded. As such, it is submitted that the petitioner had become entitled to a deemed licence even before the order was issued by the NGT on 13.9.2018. It is submitted that the effect of the order of the NGT is

not to dissolve the 5th and 6th respondents, who have been validly created by an order issued by the competent authority. It is contended that the role of the NGT is recommendatory and the NGT has directed the Government to make necessary changes to the EIA notification in accordance with the judgment of the Hon'ble Supreme Court in Deepak Kumar (supra).

9. The EAC in the case of the petitioner had made a positive recommendation on 7.9.2018. As such, it cannot be treated as a case of denial by the EAC, in which case, the petitioner cannot claim a deemed EC. According to the counsel for the additional 8th respondent, a further period of 45 days is available going by Clause 8(i) and within six days of the recommendation of the DEAC, the NGT had already held that the DEAC cannot be treated as an authority which can deal with such applications. The counsel hence submits that it is a case where further steps on the recommendation of the DEAC was interdicted and hence the petitioner cannot claim any benefit of the deemed EC. The counsel for the petitioner on the other hand contends that Clause 8(i) and (iii) do not deal with only deemed grant of EC, but they also state about deemed denial of EC and as such the deeming provision/fiction must be taken to its logical end. It is submitted that the respondents cannot have a case that the application was not complete with all requisite documents, since DEAC had given a positive recommendation, and hence they are bound to follow the 105 days deadline particularly since it is a case where an EIA report is not required. It is hence submitted that the respondents cannot rely on the NGT order to say that they are interdicted from considering the recommendations, since even with the recommendation, the total number of days available for the deeming provision to become operational was only 105 days.

10. The legal principles that have to be applied while considering a deeming provision are well settled. The oft quoted observations of Lord Asquith in the decision of the House of Lords in *East End Dwellings Co. Ltd. v. Finsbury Borough Council* reported in [1952 AC 109] while dealing with the provisions of the Town and County Planning Act, 1947, is extracted below:

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it ... The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

11. The above passage has been relied on in several judgments of the Hon'ble Supreme Court and this Court. [See *State of Bombay v. Pandurang Vinayak Chaphalkar* reported in (AIR 1953 SC 244)]. The Hon'ble Supreme Court has made a detailed analysis of the principles governing the interpretation of legal fictions employed by the legislature in the decision in *New Okhla Industrial Development Authority (Noida) v. Yunus* reported in [2022 SCC OnLine SC 138].

The principles stated are in short, as follows: The purpose for which the fiction was created has to be borne in mind and the fiction should not be construed in such a way as to extend the meaning beyond the purpose for which it was enacted. It cannot also be extended beyond the language of the section by which it is created. The court has to give full effect to the statutory fiction and it has to be carried to its logical conclusion. A Division Bench of this Court had occasion to consider Clause 8 of the EIA Notification in *DEIAA v. Manikkampara Granites Pvt.Ltd* reported in [2018 SCC OnLine Ker. 19474]. The judgment of a learned Single Judge that by virtue of Clause 8(i), (ii) and (iii), where there is a failure on the part of the authority to communicate its decision to the applicant within the prescribed time, the deeming provision will take effect, was upheld by the Division Bench. The facts of the case decided by the Division Bench are substantially similar to the case on hand. That was also a case where the EAC had recommended the grant of EC and the regulatory authority had not issued any orders or communication within the prescribed time. As a matter of fact, the regulatory authority decided to reject the application after the prescribed period was over. The dictum laid down in the above case is applicable to the facts of this case. A deeming provision under the Panchayat Raj Act, 1994 contained in Section 236(3), was considered by a Full Bench of this Court in *Abdul Kharim v. Pazhayakunummel Grama Panchayat* reported in [2018 (4) KLT 1086 (FB)]. The Full Bench held that a deeming provision is based on a legal fiction for attaining a desired legal consequence and hence it should be strictly interpreted and that it will become operational only if the factors stated in the statutory provision which creates it is existing. The Court further held that if no decision is taken within the time prescribed, the law will assume that the application was in order. In the case on hand also, the respondents do not have a case that any communication was sent either rejecting or granting permit or informing that the application was complete or that all necessary documents have been submitted. Applying the dictum laid down by the Full Bench, in the case of the petitioner, the law has necessarily to assume that the application was complete, and all necessary documents had been produced. There can be no fallacy in such a conclusion since as a matter of fact, the request of the petitioner was recommended by the DEAC.

12. Two other decisions of the Hon'ble Supreme Court need mention, though they may not have a bearing on the decision in this case. In *Kerala State Coastal Management Authority v. DLF Universal Ltd.* reported in [(2018) 2 SCC 203], the Hon'ble Supreme Court while considering a case where a construction was effected without obtaining prior environmental clearance and later sought to be justified under the deeming provision, considered the deeming provision contained in Clause 8 of EIA Notification, and observed that henceforth a prior clearance and necessary clarifications should be issued by the authorities concerned in a time bound manner obviate such situations arising in future. In *Pahwa Plastics Pvt.Ltd & Anr. v. Dastak NGO & Ors.* reported in [2022 SCC OnLine SC 362] the Hon'ble Supreme Court held that the Environment

(Protection) Act, 1986 does not prohibit Ex post facto Environmental Clearance. The former decision alerts the authorities to act within the prescribed time limit and issue prior clearance and avoid cases where the proponents go ahead on the basis of a deemed EC and the latter judgment says that post facto clearance is also possible in certain circumstances.

13. In the result, the writ petition is allowed. It is declared that the petitioner is entitled to a deemed environmental clearance on the completion of 105 days on 11.9.2018, onwards. The Additional 8th respondent is directed to issue the EC in paper/physical form in lieu of the deemed EC to which the petitioner is found entitled, within three weeks from the date of receipt of a certified copy of this judgment. It is made clear that the entitlement to a deemed EC alone has been considered in this writ petition and the declaration made above will not stand in the way of the concerned authorities scrutinizing the requests for the quarrying/mining permit etc. in accordance with law or any action being taken in terms of clause 8(vi) of the EIA Notification 2016, if warranted.