

Serial No. 01
Supplementary List

HIGH COURT OF MEGHALAYA
AT SHILLONG

WP(C) No. 259 of 2022

Date of Decision: 07.03.2023

M/S East Jaintia Coke

Vs.

State of Meghalaya & Anr.

Coram:

Hon'ble Mr. Justice H. S. Thangkhiew, Judge

Appearance:

For the Petitioner : Ms. B. Dikshit, Adv. with
Mr. M. Lyngdoh, Adv.

For the Respondent(s) : Mr. A. Kumar, AG with
Mr. A.H. Kharwanlang, GA
Ms. S. Laloo, GA (For R 1)
Dr. A. Todi, Adv. (For R 2).

- i) Whether approved for reporting in Law journals etc.: Yes/No
- ii) Whether approved for publication in press: Yes/No

JUDGMENT AND ORDER

1. The petitioner being aggrieved with the notification dated 23.12.2020, issued by the respondent No. 2, State Pollution Control Board under Section 17(1)(n) under the Water (Prevention and Control of Pollution) Act, 1974 and Section 17(1)(h) of the Air (Prevention and

Control of Pollution) Act, 1981, whereby norms/criteria have been prescribed for siting of Coke plants of various capacities, which it is alleged is without jurisdiction and ultra vires the Air and Water Pollution Acts, is before this Court by way of the instant writ petition.

2. This Court on the challenge to the maintainability that had been made by the respondents by order dated 26.10.2022, had held this writ petition to be maintainable as the National Green Tribunal does not possess the power of judicial review, apart from the fact that nothing in the NGT Act, ousts the jurisdiction of the High Court

3. I have heard learned counsels for the parties.

4. Ms. B. Dikshit, with Mr. M. Lyngdoh, learned counsels for the petitioner, has submitted that the petitioner has approached this Court under Article 226 of the Constitution, as the impugned notification is patently without jurisdiction, and has been passed with total disregard to the statutory provisions of the Air and Water Pollution Acts. The attention of this Court, has been drawn to Section 17(1)(n) of the Water Pollution Act, which the learned counsel submits, specifically stipulates that one of the functions of the State Pollution Control Board, with regard to siting, is to advise the State Government with respect to the location of any industry, the carrying on of which is likely to pollute a stream or a well. It is contended that, a plain reading of the said provision, thus indicate that, the impugned notification issued by the State Pollution Control Board which

is patently not advisory, but a prescription of norms is clearly ultra vires the statute, and without any jurisdiction.

5. The learned counsel submits that the point in issue therefore is limited only to the legality of the impugned notification and that the provisions as contained in Section 17 (1) (n) of the Water (Prevention and Control of Pollution) Act, 1974 and Section 17 (1) (h) of the Air (Prevention and Control of Pollution) Act, 1981 being specific and clear, the impugned notification not being advisory but prescribing siting norms is clearly in violation of the Water and Air Acts. Reliance has been placed on the judgments of *J.K. Industries Limited & Anr. vs. Union of India & Ors. (2007) 13 SCC 673* and *St. Johns Teachers Training Institute vs. Regional Director, National Council for Teacher Education & Anr. (2003) 3 SCC 321*, to substantiate the arguments that an authority upon whom a specific power is conferred, is to act within the limits of such powers as prescribed in the Act.

6. Mr. A. Kumar, learned Advocate General assisted by Mr. A.H. Kharwanlang, learned counsel for the respondent submits that even though the impugned notification has been issued under Section 17(1)(n) and 17(1)(h) of the Water and Air Pollution Acts respectively, the same is well within the powers of the State Pollution Control Board, as stipulated by the Act, by the application of Sections 21 and 25 thereof, which has cloaked the Boards with ample power to prohibit and restrict the setting up of any

activity, that may cause pollution. The learned Advocate General has contended that Section 21 (5) (v) of the Air (Prevention and Control of Pollution) Act, 1981 also empowers the State Pollution Control Board to specify such conditions necessary to prevent air pollution, as also the granting of the Consent to Establish and Consent to Operate, and submits that the source of power in issuing the impugned notification flows from these provisions.

7. Dr. A. Todi, learned counsel for the respondent No. 2, (State Pollution Control Board) has placed reliance on the affidavit filed on its behalf, and submits that on the question of the vires of the impugned notification, the respondent will initiate a review of the same in accordance with the interpretation of Section 17, but in view of the pendency of the matter before this Court, the matter has not been taken forward. Learned counsel however, has voiced strong exceptions to the conduct of the petitioner and has submitted that the petitioner had applied for Consent to Establish (CTE) on 30.05.2021, under Section 25 and 26 of the Water (Prevention and Control of Pollution) Act, 1974 and under Section 21 of the Air (Prevention and Control of Pollution) Act, 1981 but without obtaining the said permission, it was found on inspection, had constructed the Unit which was a clear violation of the provisions of Section 21 of the Air Act and Section 25 of the Water Act. He further submits that closure notice was then issued to the petitioner under Section 33A of the Water

Act and 31A of the Air Act, and after re-inspection, an order of refusal of Consent to Establish, was issued vide letter dated 06.01.2022 and lastly, on these infractions the respondent No. 2, imposed Environmental compensation upon the petitioner, in exercise of powers under Section 33A of the Water Act and Section 31A of the Air Act. Learned counsel in support of his submissions, has taken this Court to the Annexures detailing the action taken and orders passed by the respondent No. 2.

8. Learned counsel for the petitioner, in reply firstly to the submissions of the Advocate General, has contended that general provisions cannot override the specific provisions as provided in the Act, and that further Section 25 of the Air (Prevention and Control of Pollution) Act, 1981 and Section 21 of the Water (Prevention and Control of Pollution) Act, 1974 deals only with the part of application for consent and does not in any manner vest power upon the respondent No. 2, general or otherwise, to issue the impugned notification. On another limb, the learned counsel reiterates her submissions that the instant writ petition will be confined only on the point of law, that is the legality of the impugned notification, and that the other prayer set out in the writ petition, to declare the Refusal of Consent as non-est and void, will not be pressed.

9. Having heard learned counsels for the parties, as observed earlier, the only point in contention is on a point of law, which is whether the impugned notification is ultra vires, the Air and Water Pollution Acts.

To answer the question as to whether the State Pollution Control Board has acted without jurisdiction in issuing the impugned notification dated 23.12.2020, the relevant provisions of the Water and Air Pollution Control Acts, as given in Section 17(1)(n) and 17(1)(h) respectively need to be examined, and for the sake of convenience are reproduced hereinbelow:-

Section 17 (1) (n) of the Water (Prevention and Control of Pollution) Act, 1974 is as follows:-

17. Functions of State Board – (1) Subject to the provisions of this Act, the functions of the State Board shall be –

(a).....

(b).....

(c).....

(d)

(e)

(f)

(g)

(h)

(i).....

(j)

(k)....

(l).....

(m)....

(n) to advise the State Government with respect to the location of any industry the carrying on of which is likely to pollute a stream or well;



Section 17 (1) (h) of the Air (Prevention and Control of Pollution) Act, 1981 is as under:-

17. Functions of State Boards.—(1) Subject to the provisions of this Act, and without prejudice to the performance of its functions, if any, under the Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974), the functions of a State Board shall be—

- (a)
- (b).....
- (c).....
- (d)
- (e)
- (f)
- (g)
- (h) *to advise the State Government with respect to the suitability of any premises or location for carrying on any industry which is likely to cause air pollution;”*

A plain reading of the afore quoted provisions, reflects that the respondent No. 2, is to act in an advisory capacity to the State Government with respect to the suitability of any premises or location for setting up and carrying on any industry, which may be likely to pollute air or water. The impugned notification it is noted, has been issued by the respondent No. 2 prescribing norms/criteria for siting of Coke Plants, ostensibly in exercise of functions vested under clause 17 (1)(n) of the Water Act and 17 (1) (h) of the Air Act. In discerning as to whether, read with the other provisions the said notification can be sustained as advocated by the State respondents, a perusal of Section 25 of the Water Act as also Section 21 of the Air Act, however, shows that these provisions deal with the factum of application for Consent before the State Pollution Control Board and to the conditions that may be imposed, when setting up such industrial units.

Extracts of Sections 25 of the Water (Prevention and Control of Pollution) Act, 1974 and Section 21 of Air (Prevention and Control of Pollution) Act, 1981 which are relevant are reproduced hereunder:-

Section 25 in the Water (Prevention and Control of Pollution) Act, 1974

“25. Restrictions on new outlets and new discharges.—

[(1) Subject to the provisions of this section, no person shall, without the previous consent of the State Board,—

(a) establish or take any steps to establish any industry, operation or process, or any treatment and disposal system or any extension or addition thereto, which is likely to discharge sewage or trade effluent into a stream or well or sewer or on land (such discharge being hereafter in this section referred to as discharge of sewage); or

(b) bring into use any new or altered outlet for the discharge of sewage; or

(c) begin to make any new discharge of sewage:

Provided that a person in the process of taking any steps to establish any industry, operation or process immediately before the commencement of the Water (Prevention and Control of Pollution) Amendment Act, 1988, for which no consent was necessary prior to such commencement, may continue to do so for a period of three months from such commencement or, if he has made an application for such consent, within the said period of three months, till the disposal of such application.

(3) The State Board may make such inquiry as it may deem fit in respect of the application for consent referred to in sub-section (1) and in making any such inquiry shall follow such procedure as may be prescribed. 2[(4) The State Board may—

(a) grant its consent referred to in sub-section (1), subject to such conditions as it may impose, being—

(i) in cases referred to in clauses (a) and (b) of sub-section (1) of section 25, conditions as to the point of discharge of sewage or as to the use of that outlet or any other outlet for discharge of sewage;

(ii) in the case of a new discharge, conditions as to the nature and composition, temperature, volume or rate of discharge of the effluent from the land or premises from which the discharge or new discharge is to be made; and
(iii) that the consent will be valid only for such period as may be specified in the order,
and any such conditions imposed shall be binding on any person establishing or taking any steps to establish any industry, operation or process, or treatment and disposal system of extension or addition thereto, or using the new or altered outlet, or discharging the effluent from the land or premises aforesaid; or
(b) refuse such consent for reasons to be recorded in writing.”

Section of the Air (Prevention and Control of Pollution) Act,

1981



“21. Restrictions on use of certain industrial plants.—¹⁵ [
(1) Subject to the provisions of this section, no person shall, without the previous consent of the State Board, establish or operate any industrial plant in an air pollution control area:

(5) Every person to whom consent has been granted by the State Board under sub-section (4), shall comply with the following conditions, namely:—

(vi) the conditions referred to in clauses (i), (ii) and (iv) shall be complied with within such period as the State Board may specify in this behalf:

*Provided that in the case of a person operating any industrial plant ¹⁹ [***] in an air pollution control area immediately before the date of declaration of such area as an air pollution control area, the period so specified shall not be less than six months: Provided further that—*

(a) after the installation of any control equipment in accordance with the specifications under clause (i), or

(b) after the alteration or replacement of any control equipment in accordance with the directions of the State Board under clause (ii), or

(c) after the erection or re-erection of any chimney under clause (iv), no control equipment or chimney shall be altered or replaced or, as the case may be, erected or re-erected except with the previous approval of the State Board.”

These provisions therefore, cannot be read to be general and empowering provisions that will cloak the respondent No. 2, with powers for issuance of norms and criteria under Section 17(1)(h) and 17 (1) (n) of the Water and Air Acts, which would make the impugned notification sustainable in law.

10. On the other aspect that is, the disposal by the NGT of a similar matter, wherein, the instant impugned notification, has met with its approval, the learned counsel for the petitioner has apprised the Court, that the said order has since been assailed before the Hon'ble Supreme Court, and that interim orders are operating staying the impugned notification. Orders passed by the Hon'ble Supreme Court in the said matter, dated 07.11.2022 and 14.12.2022, have been produced before this Court by the learned counsel. It is noted that it is a fact, that the matter has been taken on appeal before the Hon'ble Supreme Court, but however, apart from an undertaking from the counsel for the Meghalaya State Pollution Control Board, not to take further action against the appellant therein, there are no orders specifically staying the operation of the impugned notification.

11. Be that as it may, the fact that the respondent No. 2 had no statutory authority to issue the impugned notification, however, is established by the

discussions made hereinabove. In this context, the judgment placed by the learned counsel for the petitioner, that is *St. Johns Teacher Training Institute vs. Regional Director, National Council for Teacher Education & Anr.* (supra) being relevant for this case, paragraphs 10 and 12 thereof, on this point of law with regard to delegation of powers is quoted hereinbelow: -

10. A regulation is a rule or order prescribed by a superior for the management of some business and implies a rule for general course of action. Rules and regulations are all comprised in delegated legislations. The power to make subordinate legislation is derived from the enabling Act and it is fundamental that the delegate on whom such a power is conferred has to act within the limits of authority conferred by the Act. Rules cannot be made to supplant the provisions of the enabling Act but to supplement it. What is permitted is the delegation of ancillary or subordinate legislative functions, or, what is fictionally called, a power to fill up details. The legislature may, after laying down the legislative policy confer discretion on an administrative agency as to the execution of the policy and leave it to the agency to work out the details within the framework of policy. The need for delegated legislation is that they are framed with care and minuteness when the statutory authority making the rule, after coming into force of the Act, is in a better position to adapt the Act to special circumstances. Delegated legislation permits utilisation of experience and consultation with interests affected by the practical operation of statutes. Rules and regulations made by reason of the specific power conferred by the statutes to make rules and regulations establish the pattern of conduct to be followed. Regulations are in aid of enforcement of the provisions of the statute. The process of legislation by departmental regulations saves time and is intended to deal with local variations and the power to legislate by statutory instrument in the form of rules and regulations is conferred by Parliament. The main justification for delegated legislation is that the legislature

being overburdened and the needs of the modern-day society being complex, it cannot possibly foresee every administrative difficulty that may arise after the statute has begun to operate. Delegated legislation fills those needs. The regulations made under power conferred by the statute are supporting legislation and have the force and effect, if validly made, as an Act passed by the competent legislature. (See Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi.)

12. The question whether any particular legislation suffers from excessive delegation has to be decided having regard to the subject-matter, the scheme, the provisions of the statute including its preamble and the facts and circumstances in the background of which the statute is enacted. (See Registrar of Coop. Societies v. K. Kunjabmu and State of Nagaland v. Ratan Singh.) It is also well settled that in considering the vires of subordinate legislation one should start with the presumption that it is intra vires and if it is open to two constructions, one of which would make it valid and the other invalid, the courts must adopt that construction which makes it valid and the legislation can also be read down to avoid its being declared ultra vires.”

12. Though the impugned notification in view of the stated position of law is liable to be declared invalid, this Court however cannot lose sight of the fact that the main subject matter and the larger picture, concerns the preservation of the environment, for which the norms or criteria, had been issued prescribing the conditions for location of polluting industries, such as the instant Coke Plant. What has alarmed this Court, is the fact that as submitted by the learned counsel for the respondent No. 2, and evidenced by the annexures on affidavit, the petitioner without obtaining even the Consent to Establish, had proceeded with setting up the Coke Plant for which thereafter, consent to Establish was refused under Section 27 (1) of

the Water Act and 21 (4) of the Air Act, by the respondent No. 2 who also levied a penalty under Section 33A and 31A of the Water and Air Acts respectively, upon the petitioner. In this backdrop therefore, though the impugned notification is invalid, the same is only on a technical ground which should not be taken to be a license to proposed Coke Plants to be oblivious to the stipulations of the Water and Air Acts, as also the valid concerns of environmental protection.

13. In conclusion therefore, looking into the totality of the circumstances, especially the public interest and policy involved, while setting aside the impugned notification dated 23.12.2020, the statement that the respondent No. 2 is in the process of review of the same, is taken into consideration by this Court, and the Respondent No.2 is accorded 8(eight) weeks' time from the date of this order to complete the same. It is further provided that during this period, there shall be a status quo on all operations of the petitioner at its project site, who nonetheless also, is not in possession of any valid permissions to re-start the project, as per the materials on record.

14. With the aforementioned directions, this writ petition is allowed to the extent indicated above and is accordingly disposed of.

15. There shall be no order as to costs.

Meghalaya
07.03.2023
"V. Lyndem-PS"

