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W.P.(MD)Nos.8866 and 11757 of 2021
and W.P.No.18829 of 2021 and Cont.P.No.56 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.06.2024

DATE OF DECISION : 30.08.2024

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR
AND
THE HON'BLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI

W.P.(MD)Nos.8866 and 11757 of 2021
and
W.P.No.18829 of 2021
and

W.M.P.(MD)Nos.6666 and 12052 of 2021
in W.P.(MD)No.8866 of 2021

W.M.P.(MD)No.9241 of 2021 and W.M.P.No.6193 of 2022
in W.P.(MD)No.11757 of 2021

W.M.P.Nos.20128 and 20130 of 2021
in W.P.No.18829 of 2021

AND

Contempt Petition No.56 of 2022
and

Sub Application No.629 of 2023 in Cont.P.No.56 of 2022

W.P.(MD)No.8866 of 2021 :

Fatima

.. Petitioner

Vs.

The Union of India,
rep by its Secretary to the Government,



W.P.(MD)Nos.8866 and 11757 of 2021
and W.P.No.18829 of 2021 and Cont.P.No.56 of 2022

Ministry of Environment, Forest and Climate Change,
Paryavaran Bhawan,
Jor Bagh, New Delhi-110 003.

.. Respondent

W.P.(MD)No.11757 of 2021 :

Fatima

.. Petitioner

Vs.

The Union of India,
rep by its Secretary to the Government,
Ministry of Environment, Forest and Climate Change,
Paryavaran Bhawan,
Jor Bagh, New Delhi-110 003.

.. Respondent

W.P.No.18829 of 2021 :

K.Bharathi

.. Petitioner

Vs.

- 1.The Union of India,
rep by Joint Secretary to the Government of India,
Ministry of Forest, Environment and Climate Change,
Paryavaran Bhawan, Jor Bagh,
New Delhi-110 003.
- 2.State of Tamil Nadu,
rep by the Principal Secretary,
Department of Environment, Climate Change and Forests,
No.1, Jeenis Road,
Panagal Building,
Ground Floor, Saidapet,
Chennai-600 015.

.. Respondents



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Contempt Petition No.56 of 2022 :

Puduchery Environment Protection Association,
Reg. No.98/2007,
rep by its Honorary President, R.Kothandaraman
No.18, S.V.Koil Street,
Koodapakkam and Post,
Puducherry – 605 502.

.. Petitioner

Vs.

Shri Rameshwar P.Gupta,
Secretary,
Ministry of Environment, Forest and Climate Change,
Paryavaran Bhavan,
Jor Bagh, New Delhi.

.. Respondent

W.P.(MD) No.8866 of 2021 has been filed under Article 226 of the Constitution of India for issuance of Writ of Certiorari calling for the records of the respondent culminating in Office Memorandum dated 19.02.2021 bearing number F.No.19-27/2015-IA.III, quash the same and pass such further order or orders as may be fit, proper and necessary in the facts and circumstances of the case and thus render justice.

W.P.(MD) No.11757 of 2021 has been filed under Article 226 of the Constitution of India for issuance of Writ of Certiorari calling for the



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records of the respondent culminating in Office Memorandum dated 07.07.2021 bearing number F.No.22-21/2020-IA.III, quash the same and pass such further order or orders as may be fit, proper and necessary in the facts and circumstances of the case and thus render justice.

W.P.No.18829 of 2021 has been filed under Article 226 of the Constitution of India for issuance of Writ of Certiorari calling for the records of the first respondent culminating in Office Memorandum dated 19.02.2021 bearing number F.No.19-27/2015-IA.III, quash the same and pass such further order or orders as may be fit, proper and necessary in the facts and circumstances of the case and thus render justice.

Contempt Petition No.56 of 2022 has been filed under Section 11 of the Contempt of Court Act, 1971 seeking to punish the respondent under the Contempt of Courts Act, 1971 for wilful disobedience and non compliance of the order of this Hon'ble High Court dated 13.10.2017 in W.P.No.11189 of 2017 and pass such further order or orders as may be fit, proper and necessary in the facts and circumstances of the case and thus render justice.



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For Petitioner in Cont.P.No.56/2022 W.P.(MD)Nos.8866 and 11757 of 2021	Mr.A.Yogeshwaran Ms.B.Poongkhulali along with Mr.Nagesh Nakhul Mr.Iraiyambu Prasad
For Petitioner in W.P.No.18829 of 2021	Mr.M.V.Swaroop
For Respondent in Cont.P.No.56 of 2022 W.P.(MD)Nos.8866 and 11757 of 2021 and for 1 st respondent in W.P.No.18829 of 2021	Mr.AR.L.Sundaresan, Addl.Solicitor General of India assisted by Dr.G.Babu, Senior Panel Counsel Mr.V.Chandrasekaran, Senior Panel Counsel
For 2 nd respondent in W.P.No.18829 of 2021	Mr.R.Shunmugasundaram then Advocate General instructed by Mr.P.Muthukumar, State Government Pleader assisted by Ms.A.G.Shakeena Ms.Sona Sathish Kumar Mr.J.Ravindran, Additional Advocate General instructed by Dr.T.Seenivasan, Spl.G.P.
For Intervenors	Mr.P.S.Raman, Senior Counsel and Mr.Satish Parasaran, Senior Counsel for Mr.Karthik Sundaram along with Ms.Deepika Murali Mr.P.Wilson, Senior Counsel for Mr.M.Pradeep Shankar Mr.Naveen Kumar Murthi along with Ms.M.Mahamani



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COMMON ORDER

M.SUNDAR, J.

This common order will govern the captioned three 'Writ Petitions' ('W.Ps' in plural and 'W.P.' in singular for the sake of brevity), captioned 'writ miscellaneous petitions' thereat ('W.M.Ps' in plural and 'W.M.P' in singular for the sake of brevity), captioned Contempt Petition and Sub Application thereat.

2.In 'captioned W.P.(MD)No.8866 of 2021' (hereinafter 'I Fatima WP' for the sake of convenience) inter-alia a 'Office Memorandum' [hereinafter 'OM' in singular and 'OMs' in plural, though plural of 'memorandum' is 'memoranda' for the sake of brevity] dated 19.02.2021 issued by the sole respondent thereat ['Ministry of Environment, Forest and Climate Change' (hereinafter 'MoEF' for the sake of brevity)] has been assailed. This 19.02.2021 OM issued by MoEF shall hereinafter be referred to as 'I impugned OM' for the sake of convenience. In this I Fatima WP, vide an interim order dated 30.04.2021 made in W.M.P.(MD)No.6666 of 2021, another Hon'ble



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Division Bench has stayed this I impugned OM prospectively, this interim order has been assailed in Hon'ble Supreme Court by 'Union of India' {hereinafter 'UOI' for the sake of brevity} vide S.L.P.(C)Diary No.33840 of 2023, notice has been issued and interim stay {interim stay qua interim stay order of Madras High Court Division Bench, i.e., in effect suspending the interim stay granted by another Division Bench of Madras High Court} had been granted by Hon'ble Supreme Court vide order dated 04.09.2023 which is operating and Hon'ble Supreme Court is in seizin of the SLP.

3.In 'captioned W.P.(MD)No.11757 of 2021' (hereinafter 'II Fatima WP' for the sake of convenience), inter-alia a OM dated 07.07.2021 issued by the sole respondent thereat, i.e., MoEF has been assailed and an interim order dated 15.07.2021 made in W.M.P.(MD)No.9241 of 2021 in this II Fatima WP reported in **2021 SCC OnLine Mad 12936** staying the operation of this 07.07.2021 OM issued by MoEF {hereinafter 'II impugned OM' for the sake of convenience and clarity} is operating.



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4.The aforementioned II impugned OM along with a notification dated 28.01.2022 issued by MoEF has been assailed in Hon'ble Supreme Court by way of a writ petition under Article 32 of the Constitution by a 'Non Governmental Organization' ('NGO' for the sake of brevity) which goes by the name 'Vanashakti', Hon'ble Supreme Court has issued notice, granted an interim order (subsequently clarified the interim order saying that the same will not come in the way of the competent authorities considering proposals for modifications / alterations in Environmental Clearances) and therefore, Hon'ble Supreme Court is in seizin of challenge to aforementioned II impugned OM.

5.In 'captioned W.P.No.18829 of 2021' (hereinafter 'III WP' and/or 'Bharathi WP' for the sake of convenience) inter-alia aforesaid I impugned OM (dated 19.02.2021) issued by first respondent thereat, i.e., MoEF has been assailed. In other words, the prayer is same as in I Fatima WP and III WP.

6.Captioned Contempt Petition No.56 of 2022 has been filed complaining of violation of an order dated 13.10.2017 made by a



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Division Bench of the Madras High Court in 'W.P.No.11189 of 2017'

(hereinafter 'Puducherry WP' for the sake of convenience) wherein inter-alia a notification dated 14.03.2017 issued by MoEF was called in question. To be noted, in this Puducherry WP, an undertaking given by the Union of India represented by the then learned Solicitor that ex post facto clearance shall be a one time measure was recorded.

7. When the pendency of the aforementioned matters in Hon'ble Supreme Court were brought to the notice of this Court, this Court as a matter of judicial discipline in the hierarchy of Courts, made it clear that it would be appropriate to adjourn the captioned matters *sine die* and await the verdict of Hon'ble Supreme Court.

8. However, the parties in the matters on hand approached Hon'ble Supreme Court and sought clarification as to whether this Court can hear the main matters when the aforementioned matters are pending in Hon'ble Supreme Court, i.e., when Hon'ble Supreme Court is in seisin of aforementioned matters. To state with specificity, parties to the captioned matters approached Hon'ble Supreme Court vide



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IA.No.195200 of 2023 in SLP (C) No.20061 of 2023, applications in

W.P.(Civil) No.1394 of 2023 and sought clarification about whether this

Court can proceed with the hearing of captioned main W.Ps. In these

clarification applications, Hon'ble Supreme Court made two separate

orders, one in the aforementioned S.L.P. (SLP(C)No.20061 of 2023)

against the interim order made by another Hon'ble Division Bench of this

Court and the other in the Vanashakti W.P. (W.P.(Civil)No.1394 of

2023 being Article 32 Writ Petition), clarifying that Hon'ble Supreme

Court being in seizin and/or granting interim orders which are operating

will not come in the way of High Court hearing out main W.Ps. These

clarificatory orders of Hon'ble Supreme Court have been captured in

proceedings made in earlier listings of captioned matters (vide

proceedings dated / made in the listings on 16.10.2023 and 15.02.2024).

It is on this basis that captioned main W.Ps and the captioned contempt

petition (together with WMPs and sub application thereat) were heard

out.

9.Before we proceed further, we scan and/or reproduce the

prayers in aforementioned clarification applications and clarificatory



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orders of Hon'ble Supreme Court and the same are as follows:

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Prayer in I.A.No.195200 of 2023 in SLP (C)No.20061 of 2023 :

'PRAYER

In the light of the above, it is prayed that this
Hon'ble Court may be pleased to:

- a)Clarify that the Order dated 04.09.2023 passed by this Hon'ble Court in Special Leave Petition (Civil) No.20061 of 2023 is limited to a stay of the Interim Order dated 30.04.2021 passed by the High Court of Judicature at Madras at Madurai in WMP(MD)No.6666 of 2021 in WP(MD)No.8866 of 2021, and does not prevent the Hon'ble High Court from proceeding with the final arguments in WP(MD)No.8866 of 2021 and connected matters, and to pass its final judgment in the said matters; and
- b)Pass such other order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.'

Clarificatory order of Hon'ble Supreme Court (dated 13.10.2023) in



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aforementioned I.A.:

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ITEM NO.62 COURT NO.7 SECTION XII
SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

Petitioner(s) for Special Leave to Appeal (C) No. 20861/2023
(Arising out of impugned final judgment and order dated 13-04-2021
in WMP(MD) No. 8866/2021 passed by the High Court of Judicature at
Madras at Madurai)

UNION OF INDIA Petitioner(s)

VERSUS

FATINA Respondent(s)

[IA No. 195208/2023 - CLARIFICATION/DIRECTION]

Date : 13-10-2023 These matters were called on for hearing today.

CORAM : HON'BLE MR. JUSTICE A.S. BOPANNA
HON'BLE MR. JUSTICE M.V. SUNDRESH

For Petitioner(s) Mr. Tushar Mehta, Solicitor General
Mr. K N Nataraaj, A.S.G.
Mr. Gurmeet Singh Makker, AOR
Mr. Dgivijay Das, Adv.
Mr. Sharath Nambiar, Adv.
Ms. Ruchi Kohli, Adv.
Ms. Swarupana Chaturvedi, Adv.

For Respondent(s) Mr. T. V. S. Raghavendra Sreyas, AOR
Mr. Naveen Hegde, Adv.
Mr. Siddharth Vasudev, Adv.

UPON hearing the counsel the Court made the following
O R D E R

IA No. 195208/2023 is filed seeking clarification of the
order dated 04.09.2023.

Having perused the same, we make it clear that the order
passed by this Court on 04.09.2023 staying the interim order passed
by the High Court would not be an impediment for the High Court to
consider and dispose of the writ petition on its own merits and in
accordance with law.

In that regard, all contentions are left open to be
considered by the High Court.

IA No. 195208/2023 is disposed of accordingly.

{RAJNI YUKHI}
COURT MASTER (SH)

{DIPTI KHURANA}
ASSISTANT REGISTRAR



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Prayer in the I.A. filed in W.P.(Civil) No.1394 of 2023 :

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'PRAYER

In the light of the above, it is prayed that this Hon'ble Court may be pleased to:

a)Clarify that the Order dated 02.01.2024 passed by this Hon'ble Court in Writ Petition (Civil) No.1394 of 2023 would not be an impediment for the Hon'ble High Court from proceeding with the final arguments in Contempt petition No.56 of 2022 and connected matters (including WP(MD)No.8866 of 2021, WP(MD)No.11757 of 2021 and WP No.18829 of 2021), and to pass its final judgment in the said matters; and

b)Pass such other order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.'



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**Clarificatory order of Hon'ble Supreme Court dated 02.02.2024 in
aforementioned I.A. :**

ITEM NO.56 COURT NO.3 SECTION PIL-W REVISED
SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS
Writ Petition(s)(Civil) No(s). 1394/2023
VANASHAKTI Petitioner(s)
VERSUS
UNION OF INDIA Respondent(s)
(IA No. 257416/2023 - APPROPRIATE ORDERS/DIRECTIONS)
Date : 02-02-2024 These matters were called on for hearing today.
CORAM :
HON'BLE MR. JUSTICE B.R. GAVAI
HON'BLE MR. JUSTICE SANDEEP MEHTA
For Petitioner(s)
Mr. Gopal Sankaranarayanan, Sr. Adv.
Mr. Vanshdeep Dalmia, AOR
Ms. Anisha Jain, Adv.
Mr. Sarthak Dora, Adv.
Ms. Trisha Chandran, Adv.
For Respondent(s)
Mr. Tushar Mehta, Solicitor General
Ms. Aishwarya Bhatia, A.S.G.
Mr. Gurmeet Singh Makker, AOR
Mr. Ketan Paul, Adv.
Ms. Ruchi Kohli, Adv.
Ms. Swarupana Chaturvedi, Adv.
Mr. Rajat Nair, Adv.
Mr. Punnet Bali, Sr. Adv.
Mr. Akhil Anand, Adv.
Mr. Sumit Shukla, Adv.
Mr. Himanshu Vij, Adv.
Ms. Saakshi Saboo, Adv.
Mr. Anuj Salva, Adv.
M/S. D.S.K. Legal, AOR
Mr. T. V. S. Raghavendra Sreyas, AOR
Mr. Naveen Hegde, Adv.
Mr. A Yogeswaran, Adv.
Ms. B Poongkulali, Adv.
Mr. Siddharth Vasudev, Adv.
Mr. Vanshdeep Dalmia, AOR

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Mr. Anisha Jain, Adv.
Mr. Sarthak Dosa, Adv.

Mr. Guru Krishna Kumar, Sr. Adv.
Mr. Saket Mone, Adv.
Ms. Anshula Vijay Kumar Brover, AOR
Mr. Abhishek Salian, Adv.
Ms. Mitika Brover, Adv.
Mr. Devansh, Adv.

Mr. Atmaran Nadkarni, Sr. Adv.
Mr. Kunal Niranji, AOR
Mr. Samit Shukla, Adv.
Mr. Kunal Vajani, Adv.
Ms. Sakshi Saboo, Adv.
Mr. Anuj Savla, Adv.
Mr. Shubhang Tandon, Adv.
Ms. Shraddha Chirania, Adv.

UPON hearing the counsel the Court made the following
O R D E R

I.A. Nos. 25197, 25309 and 25150 of 2024

1. The application (IA No. 25150 of 2024) for intervention is allowed.
2. The applicant(s) approached this Court seeking modifications/alterations of the order dated 02nd January, 2024.
3. Vide order dated 2nd January, 2024, we had granted stay of operation of the Office Memoranda dated 07th July, 2021 and 28th January, 2022 issued by the Ministry of Environment, Forest and Climate Change.
4. Mr. A.N.S. Nadkarni and Mr. Puneet Bali, learned senior counsels appearing for the applicant(s) submit that though their projects had acquired environmental clearances much prior to the Office Memoranda dated 07th July, 2021 and only certain modifications/alterations are required therein, the



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same cannot be considered in view of the order dated 2nd January, 2024.

5. We clarify that our orders dated 02nd January, 2024 would not come in the way of the competent authorities in considering the proposals for modifications/alterations in the Environmental Clearances if area of such projects had any valid environmental clearances prior to 07th July, 2021.

6. Needless to state that such applications for modification/alteration would be considered by the competent authorities strictly in accordance with law as it existed prior to 07th July, 2021.

7. We further clarify that our order should not be construed as having stayed any proceedings before any High Courts touching the subject matter of the Office Memoranda, referred to above.

8. The applications are, accordingly, disposed of.

I.A. Nos. 13975, 16527, 21877, 21878 and 24981 of 2024

1. Mr. Gopal Sankaranarayanan, learned senior counsel appearing for the petitioner-Vanashakti seeks four weeks' time to file reply affidavit to these applications.

2. List these applications alongwith main matter after four weeks.

(DEEPAK SINGH)
COURT MASTER (SH)

(ANJU KAPOOR)
COURT MASTER (NSH)



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10.Adverting to aforementioned clarificatory orders of Hon'ble Supreme Court, learned Advocate General, learned Solicitor, learned Additional Advocate General, learned senior counsel and all learned counsel requested nay urged this Court in unison, in one voice to hear out captioned three writ petitions, one contempt petition, writ miscellaneous petitions and sub application thereat and dispose of the same. In deference to aforementioned clarificatory orders of Hon'ble Supreme Court, this common request was acceded to. This takes this matter to the hearing out of captioned matters.

11.Reverting to the legal drill at hand qua captioned matters, the kernel of the issue is whether 'Environmental Clearances' [hereinafter 'ECs' in plural and 'EC' in singular for the sake of brevity] which are imperative for certain projects / activities can be given ex post facto, i.e., post project or post commencement of project?

12.In Puducherry WP, i.e., WP.No.11189 of 2017 when a notification of MoEF dated 14.03.2017 providing for ex post facto EC was assailed, learned Solicitor representing UOI, on instructions,



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submitted that it is a one time measure. Puducherry WP was disposed of by a Hon'ble Division Bench of this Court vide order dated 13.10.2017 by recording the stated position of UOI. Thereafter, when II impugned OM providing for ex post facto EC was issued, captioned contempt petition was filed.

13.In the hearing, though a plethora of case laws were pressed into service and elaborate arguments were advanced by senior counsel and counsel for various parties (including three intervenors), we find that the crux and gravamen of the issue at hand i.e., the question as to whether ex post facto EC can be made permissible by way of instruments (to be noted, notifications, OMs, circulars, Standing Orders (SOs), General Statutory Rules (GSRs), etc., are being collectively referred to as 'instruments') and a search for an answer to this question, primarily perambulates (as it unfurls from the submissions made before us) inside the jurisprudential perimeter sketched by *rationes decidendi* qua six case laws of Hon'ble Supreme Court and an adumbration of these six case laws in chronological order is as follows:



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(i)Lafarge [*Lafarge Umiam Mining Private Limited Vs. T.N.Godavarman Thirumulpad* reported in (2011) 7 SCC 338] rendered by a three member Bench on 06.07.2011;

(ii)Common Cause [*Common Cause Vs. Union of India* reported in (2017) 9 SCC 499] rendered by a two member Bench on 02.08.2017;

(iii)Alembic [*Alembic Pharmaceuticals Limited Vs. Rohit Prajapati* reported in (2020) 17 SCC 157 rendered by a two member bench on 01.04.2020;

(iv)Electrosteel [*Electrosteel Steels Limited Vs. Union of India and others* reported in (2023) 6 SCC 615] rendered by a two member bench on 09.12.2021;

(v)Pahwa Plastics [*Pahwa Plastics Pvt. Ltd. Vs. Dastak NGO and others* reported in 2022 SCC OnLine SC 362] rendered by a two member bench on 25.03.2022; and

(vi)D.Swamy [*D.Swamy Vs. Karnataka State*



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Pollution Control Board reported in ***2022 SCC OnLine***

SC 1278] rendered by a two member Bench on
22.09.2022.

14. Therefore, while we would be alluding to other case laws, as sheet anchor submissions on either side were qua jurisprudential perimeter sketched by *rationes decidendi* vide aforementioned six case laws, we deem it appropriate to set out, tersely though, the facts and what is the *ratio decidendi* of these six case laws. We do so infra and this adumbration is as follows:

(i) In ***Lafarge***, a company (Lafarge Umiam Mining Private Limited, i.e., '***Lafarge***' for the sake of brevity) was carrying on limestone mining activities in Meghalaya and for this purpose, it had obtained necessary ECs from MoEF but issues arose when it came to light that mining activities are being carried out in an area surrounded by thick natural vegetation cover with sizeable number of tall trees and further when it surfaced that Lafarge has misrepresented as regards nature of the land



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and therefore it should have obtained forest clearance, Lafarge contended that there was no diversion of forest land for non-forestry purposes. Hon'ble Supreme Court, after extensively examining the issue, acceded to plea of **Lafarge** but issued a set of guidelines to be followed in future cases.

(ii) In **Common Cause**, which was rendered in a Article 32 writ petition, there was a complaint of rapacious mining (in State of Odisha) to the detriment of environment and tribal inhabitants. In this writ petition, Hon'ble Supreme Court made it clear that it is unable to agree with the submission / argument of mining lease holders that the possibility of getting ex post facto EC was a signal that (a) EC is not mandatory and (b) the default is retrospectively condonable.

(iii) **Alembic** arose out of an order made by the National Green Tribunal (NGT), Western Zone, wherein it quashed a MoEF circular envisaging ex post facto EC. NGT, Western Zone on quashing the circular of MoEF



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also ordered revocation of EC besides closure and to be noted, when review of this order was sought, the review application was also dismissed by NGT, Western Zone. Three industrial units were affected by this order, the matter was carried in appeal to Hon'ble Supreme Court and Hon'ble Supreme Court while setting aside the order of NGT, Western Zone made it clear that on the facts of that case, revocation of ECs, direction for closure was not warranted and dismissal of review application was also set aside but the three industries were directed to deposit Rs.10 Crores each as penalties for environmental degradation caused by the three industries and made it clear that this is a facet of preserving the environment in accordance with precautionary principle.

(iv)*Electrosteel* is an appeal against an order of a learned Single Judge of Jharkhand High Court discontinuing interim orders which permitted operation of a steel plant under the supervision of 'Jharkhand State Pollution Control Board' (JSPCB). Hon'ble Supreme Court



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set aside the order of Jharkhand High Court primarily on the ground that about 1000 workmen (permanent and on contractual), would be affected if the steel plant which is being run under the supervision of JSPCB is shut.

(v)***Pahwa Plastics*** is a statutory appeal to Hon'ble Supreme Court under Section 22 of 'the National Green Tribunal Act, 2010' [hereinafter 'NGT Act' for the sake of brevity and convenience] assailing an order made by NGT, Principal Bench (New Delhi) holding that industrial units without prior ECs cannot operate. In this appeal, Hon'ble Supreme Court set aside the order of NGT Principal Bench holding that ex post facto EC is not prohibited under 'the Environment (Protection) Act, 1986' [hereinafter '1986 Act' for the sake of brevity and convenience] but made it clear that ex post facto EC should ordinarily not be given and that it should be given only in exceptional circumstances.

(vi)***D.Swamy*** is also a statutory appeal under Section 22 of NGT Act. In this appeal, an order made by



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NGT, Southern Zone, Chennai (dismissing an application under Section 18(1) of NGT Act seeking closure of a Bio-medical waste treatment facility) was assailed. Hon'ble Supreme Court sustained the NGT order and reiterated that ex post facto EC should ordinarily not be given and that it should be resorted to only in exceptional circumstances. In ***D.Swamy***, it was pointed out that in ***Alembic***, though closure was not warranted on the facts of that case, ex post facto EC was deprecated and penalty for environmental degradation was imposed as a facet of precautionary principle.

15.Before we proceed further, we remind ourselves of Lord Morris and the declaration of law by a Constitution Bench of Hon'ble Supreme Court in ***Padma Sundara Rao Vs. State of Tamil Nadu*** reported in ***(2002) 3 SCC 533*** as regards how case laws have to be relied on and how a citation should be adverted to. Lord Morris said that judicial utterances are in the fact setting of particular case (in ***Herrington***) and this was reiterated by Hon'ble Supreme Court in ***Padma***



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Sundara Rao, wherein the factual matrix is, a notification issued under Section 6 of the Land Acquisition Act, 1894 was assailed in Madras High Court and the High Court relying on N.Narasimhaiah case reported in (1996) 3 SCC 88 held that the same was validly issued. The matter was carried to Hon'ble Supreme Court on the question of law as to whether after quashing of a notification under section 6, a fresh period of one year is available to the State Government to issue another notification under section 6. It is in this context, i.e., while deciding this legal question, a Constitution Bench of Hon'ble Supreme Court declared the law as regards how courts should place reliance on case laws / precedents. Relevant paragraph in **Padma Sundara Rao** is paragraph 9 and the same reads as follows :

'9.Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in *Herrington v. British Railways Board* [(1972) 2 WLR 537 : 1972 AC 877 (HL) [Sub nom *British Railways Board v. Herrington*, (1972) 1 All ER 749 (HL)]]. Circumstantial flexibility, one additional or different fact may make a world of difference between



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conclusions in two cases.'

16.It is in the light of aforesaid ***Padma Sundara Rao*** principle that we have deemed it appropriate to capture a thumbnail sketch of facts of each case law while setting out the significant findings supra, we now summarise the *rationes decidendi* / observations in the aforementioned six case laws together with most relevant codified statutory principles and the same are as follows:

(i)Ex post facto EC has not been explicitly prohibited by 1986 Act but there is no enabling provision providing for ex post facto clearance;

(ii)EIA notification, 2006 and the CRZ notification, 2011 clearly mandate that prior EC before commencement of any project activity at site is imperative;

(iii)The eco system of hierarchy qua codification and instruments is (a) parent statute, (b) rules {subordinate legislation}, (c) any other instruments, notifications made under Rules, i.e., OMs, circulars, SOs,



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GSRs, etc.,;

(iv)As already alluded to, there is neither a bar nor a enabling provision in the 1986 Act but notifications say prior EC is imperative;

(v)Rule 5 of the Environment (Protection) Rules, 1986 sets out the manner in which notification could be made;

(vi)Law is well settled that when legal requirement is 'prior', it cannot be post facto and this is vide *Life Insurance Corporation of India Vs. Escorts Ltd. and others* reported in (1986) 1 SCC 264;

(vii)Possibility of getting ex post facto EC put in place by way of instruments of different kind [notifications, OMs, circulars, SOs, GSRs, etc.,] does not directly mean that EC is not mandatory and therefore, the commencement of project or commencement of activity without EC is retrospectively condonable;

(viii)It has been repeatedly held that ex post facto EC should not ordinarily be given and that it should



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be given only in exceptional circumstances;

(ix) Ex post facto EC has been deprecated but a window has been provided saying it is one which can be resorted to only in exceptional circumstances.

17. Primary contention of the protagonist of captioned WPs is that when aforementioned EIA/CRZ notifications (2006 and 2011) make it clear that EC should be 'prior', ex post facto EC is impermissible; the UOI having given a categorical and unambiguous undertaking that the 14.03.2017 notification providing for ex post facto EC assailed in Puducherry WP is a one time measure cannot now issue a barrage of instructions vide a slew of instruments [notifications, OMs, circulars, SOs, GSRs, etc.,] and permit ex post facto EC as a routine; ex post facto clearance affects public hearings as project proponents commence activity without any public hearing banking on ex post facto ECs. It was emphasized that ex post facto EC is a device to derail and ultimately detonate the environmental protection mechanism. It was emphatically argued that the sanctity of Rio declaration on Environment and Development, 1992 is being diluted; it has a irreversible detriment on the



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environment, the local populace / citizenry is further emphatic say of PIL protagonists. It was inter-alia set out in the Rio declaration that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations, that in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. This was pointed out and it was submitted that the environmental issues are best handled with the participation of all concerned citizens at the relevant level and at the national level, each individual shall have appropriate access to information concerning environment that is available with public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available, besides providing effective access to judicial and administrative proceedings, including redressal and remedy is ingrained thereat is further pointed say of protagonist of PIL



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18.Learned Solicitor submitted to the contrary by saying that instruments [notifications, OMs, circulars, SOs, GSRs, etc.,] are effectively notifications and State has powers to issue such notifications under Sections 3 and 5 of 1986 Act more particularly Sections 3(2)(iv), 3(2)(v) and 3(2)(xiv). It was emphasized that Hon'ble Supreme Court in ***Pahwa Plastics*** has also made an observation about the interim order granted by predecessor Division Bench in II Fatima WP. It was submitted that the one time measure as recorded in Puducherry WP does not mean not more than once as long as the power to modify / relax exists and it was also argued that a statement by a counsel cannot denude the authority of MoEF.

19.Learned counsel for intervenors, namely Federation of Indian Mineral Industries and Tamil Nadu Small Mine Owners Federation, submitted that in the light of ***Electrosteel*** and ***Pahwa Plastics*** supra, both of which have referred to ***Alembic***, it cannot be gainsaid that ex post facto EC is impermissible. Interestingly and intriguingly, two of the intervenors, i.e., Federation of Indian Mineral Industry and ELCOT defended the making of impugned OMs, i.e., I



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impugned OM dated 19.02.2021 and II impugned OM 07.07.2021. In this regard, we deem it relevant to record that then learned Advocate General appearing for State of Tamil Nadu (R2 in W.P.No.18829 of 2021) very fairly submitted that the State will also be in the shoes of a project proponent. Likewise, Mr.Naveen Kumar Murthi, learned counsel appearing for another intervenor, namely, Tamil Nadu Small Mine Owners Federation, limited his submissions to what according to him are difficulties of intervenor he represents. We are of the view that it is for learned Solicitor to defend impugned OMs made by MoEF and as regards the manner / procedure adopted for making impugned OMs, project proponents should not have had any role in making of OMs. We are also conscious that there is a subtle but certain distinction between defending OMs and defending 'making of OMs'.

20.ELCOT, a company wholly owned by Government of Tamil Nadu entered the fray at the eleventh hour nay fifty ninth minute of eleventh hour (when all oral arguments had concluded and when the captioned matter was listed for parties to bring on board written submissions if any) {vide W.M.P.No.18099 of 2024} and intriguingly



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ELCOT also defended the impugned OMs and making of impugned OMs {we are writing intriguingly because then learned Advocate General for State of Tamil Nadu had fairly and in our view rightly too submitted that State of Tamil Nadu is also in the shoes of project proponent as far as this case is concerned} by making the following submissions:

i) *Electrosteel, Pahwa Plastics, D.Swamy and Vedanta [Vedanta Limited Vs. State of Tamil Nadu and others* reported in **2024 SCC OnLine SC 230**] principles were reiterated. Adverting to these case laws and drawing the attention of this Court to *Barak Upatyaka* case law [***State Of Assam vs Barak Upatyaka D.U. Karmachari Sanstha*** reported in **(2009) 5 SCC 694**] and more particularly paragraph 21 thereat, it was submitted that these case laws would serve as judicial decisions containing a principle. Attention of this court was also drawn to *M.R.Apparao* case [***Director of Settlements, A.P and others Vs. M.R.Apparao and another*** reported in **(2002) 4 SCC 638**] more particularly paragraph 7 thereat, to say that on a reading of



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case laws as a whole in the light of the questions before the Court, if there is a ratio, that would be declared law;

ii) Adverting to 09.10.2017 G.O.(Ms)No.18, Information Technology (B3) Department, it was submitted that it is a executive fiat as regards the clearance for putting up IT towers;

iii) Multiple projects remain stalled;

iv) Attention was drawn to S.O.804E to say that 07.07.2021 is more in the nature of SOP qua an earlier standing order;

v) With regard to Sholinganallur and Vilankurichi IT Towers, there is employment potential for about 6000 workmen {to be noted, as regards IT Towers, then learned Advocate General already made submissions well within the perimeter of a project proponent about which there is allusion infra and we shall consider elsewhere infra submissions of then learned Advocate General reiterated by learned Additional Advocate General}.



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21.Learned counsel for one of the intervenors submitted that the validity of the impugned OM cannot be tested against EIA notification of the year 2006 which is also one issued under Section 3 of 1986 Act. It is well settled law that the vires of a delegated legislation cannot be tested against another delegated legislation and that it can only be tested using the provisions of Parent Act (besides Constitutionality and manifest arbitrariness) as touch stones. The presumption of constitutionality will equally apply to the impugned OM is further say. It is also submitted and argued that it cannot be said that the Government does not have the power to bring the concept of ex post facto EC merely because there is no provision specifically providing for the same; that the Government being the protector of State's interest has powers to plug in laches and lacunae in the legislations considering the changing needs and situations of the society; that the concept of public hearing can also be read into the OM. The directions issued in *Alembic* qua compensation is traceable to Article 142 of the Constitution and that it is well settled law that directions issued under Article 142 cannot be contrary to substantive law.



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22.It is submitted by one of the writ petitioners that Article 142 directions cannot be construed as across the board directions in all cases as Article 142 is used to do complete justice in any cause or matter pending before Supreme Court. Administrative orders such as OM's cannot be issued contrary to the EIA and CRZ notifications which mandate prior EC was the extension of this argument.

23.Submission of learned counsel for petitioner in captioned contempt petition is that a clear undertaking was given in Court that it was certainly a one time measure but the MoEF has willfully disobeyed its undertaking given before this Court and had issued OM dated 07.07.2021 providing for ex post facto EC under EIA notification, 2006. The information obtained under the RTI Act shows that the impugned OM dated 07.07.2021 was issued much before the orders of NGT and it was not because of the orders of NGT.

24.As regards State of Tamil Nadu, learned Advocate General submitted that IT Towers have been put up and but for prior EC, constructions are compliant; they are lying idle though they have been



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built at huge costs incurred by ploughing in public money.

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25.By way of reply, learned counsel for writ petitioners submitted that when project proponents commence construction or commence operation, questions such as livelihood of workmen are brought up and in all the cases where ex post facto EC has been condoned, the same has been done only by taking into account such interest of workmen and money that has been sunk but with a caveat that it should not ordinarily be resorted to and that it should be resorted to only in exceptional circumstances. Sanctity of India's commitment to Rio declaration was emphasised.

26.We have carefully considered the rival submissions, i.e., bipolar opposite stated positions of parties, case laws, the scheme of 1986 statute, Rules thereunder, notifications, instructions, etc., and we find that the impugned OMs {to be noted, I impugned OM and II impugned OM shall be collectively referred to as 'impugned OMs' for the sake of convenience} do not pass muster in the instant legal drill. However, we would be moulding the relief taking into account various



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attendant circumstances. Reasons for us to write that impugned OMs do not pass muster qua legal drill at hand as well as reasons for moulding of relief shall be set out infra one after the other. In the adumbration infra, we shall be rolling into one, the point, discussion on the same and dispositive reasoning qua each point and set out each such bundle one after the other for convenience and ease for appreciating this order. The adumbration is as follows:

(i) There can be no doubt or two opinions that 1986 Act does not prohibit ex post facto EC but what is of significance is that there is no enabling provision for giving ex post facto EC. We put it to learned Solicitor that if the law makers, i.e., Parliamentary wisdom is to the effect that ex post facto EC is permissible nay a norm and not an exception, an enabling provision in this regard could have been brought into 1986 Act by way of an amendment. Learned Solicitor fairly submitted that there has been no attempt in this direction. This means that we have to look into the hierarchy of codification / instructions which has already been set out supra, namely, Parent Act, Rules thereunder and instruments [notifications,



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OMs, circulars, SOs, GSRs, etc.,]. In this hierarchy, impugned OMs are executive instructions. There is no difficulty in accepting the argument of learned Solicitor that power to issue notifications is available under Sections 3(2)(iv), 3(2)(v) and 3(2)(xiv) and 5 of 1986 Act but the point is three fold. (a)One is, it should be for environment protection and (b)two is earlier EIA notification of the year 2006, i.e., EIA notification, 2006 and CRZ notification, 2011 mandate 'prior EC' and impugned OMs proceed on the basis that project proponents commencing work without EC is clearly a violation / breach and it provides for certain Standard Operating Procedures [SoPs] and grounds for ex post facto EC. The third facet is (c) it is not a case of one or two instrument/s but it is a case of a slew of instruments making ex post facto the norm and prior clearance an exception while Hon'ble Supreme Court has repeatedly held that ex post facto clearance should be resorted to as an exception. Be that as it may, the underpinning philosophy is, this power can be used only for protecting the environment and abating environmental pollution. It is axiomatic that it cannot be used



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for nullifying the 2006 EIA notification which makes prior consent imperative.

(ii) We deem it appropriate to deal with the sheet anchor argument of learned Solicitor that ex post facto EC is given only to those projects which are 'otherwise permissible'. This argument though attractive at first blush, on a closer scrutiny is clearly an argument which defies logic and is clearly self defeating. The reason is, there can be only two kinds of projects / industries, i.e., those which are 'prohibited' and those which are 'permissible'. To put it differently, the other option when we talk of options qua 'otherwise permissible', is a mirage as the options are binary, i.e., either prohibited or permissible. The logic is, if it is prohibited, the question of applying for prior EC does not arise at all. To be noted, in the prior EC being mandatory scenario also prohibited industries cannot apply, only industries which are permissible can apply for prior EC. Therefore, otherwise permissible is not a third category. The categories remain binary. When prior EC is mandatory and when some projects / industries commence operation or



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commence the projects without applying for prior EC that creates an illusion that there is a third category, i.e., a mirage that it creates a category where but for applying for prior EC, the projects / industries is permissible. This is nothing but permissible category or in other words, this is nothing but a category which is not prohibited. In this regard, the arguments of petitioners are convincing and they persuade us to conclude that not applying for prior EC is clearly a violation as crucial determinants such as distance from habitats, forest, wild life corridor, ground water table, transport route, etc., would have been altered by the time ex post facto EC application is taken up. This is akin to taking blood samples or doing other tests on a patient after commencing the course of medication for the disease / ailment. The test result / values would obviously get altered as the medication would have started working. For an illustration, if the diagnosis is gravitating towards disease 'X', if test samples are drawn after putting the patient on medication for some time qua disease 'X', the values would be altered, i.e, skewed as they would have been altered by the medication.



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Therefore, by taking this illustrative approach, we find the argument of petitioners that prior EC is imperative and ex post facto EC is a case of putting the cart before the horse is convincing.

(iii) We find from the counter, written submissions and submissions made before us that MoEF / UOI has not given any reason much less a convincing reason as to why ex post facto EC should be permitted and as to why the impugned OMs were made. To be noted, sheet anchor argument was hinged on the point that MoEF has powers under Section 3 read with Section 5 of 1986 Act to make notifications. There are two facets of this matter. The power is only for protecting environment and for abating environmental pollution. Therefore, MoEF while defending impugned OMs should set out (a) the reason for / objective behind making impugned OMs, (b) demonstrate that reason / objective is such that it is for abating environment pollution and for protection. We find both have not been done. No reason much less convincing reason as to why impugned OMs were made has been given.



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As the first facet itself has not been met, the second facet of demonstrating that the reason / objective is for abating environmental pollution / for environment protection does not arise at all. In this regard, we deem it appropriate to write that one of the important point of challenge to impugned OMs is that it neither protects environment nor abates environmental pollution and therefore, in defending impugned OMs, it is imperative to set out the reason and demonstrate that the reason is for environment protection / abating environmental pollution. Both have not been done and therefore, this is another reason for us to say without any hesitation that impugned OMs deserve to be set side.

(iv) We also further resort to this illustrative approach and take a illustration of a area which is prone to land slides. If mining activity to a prohibited extent or if any other activity which is prohibited in that area is commenced, parameters / determinants for grant of EC would have no doubt got altered, as in the earlier illustration, the more significant point is the damage would have been done and in the illustration which we



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are examining, the land would have become completely prone and susceptible to land slides making the same imminent. If ex post facto EC applications are thereafter taken up, even if the EC is not given, i.e., even if ex post facto EC applications are rejected, the damage to environment would have happened and many a times, it can be a irreversible damage which can lead to human catastrophes and environmental / natural disaster.

(v)Therefore, the scheme of the statute, subordinate legislation, i.e., rules thereunder and instruments read in its entirety and in the light of the unambiguous view of Hon'ble Supreme Court in *Pahwa Plastics* as well as *Alembic* that ex post facto EC should not ordinarily be resorted to and that it should be resorted to only in exceptional circumstances, this court by respectfully following Hon'ble Supreme Court has no hesitation in writing that impugned OMs making ex post facto EC a routine across the board affair, i.e., a norm, clearly do not pass muster qua legal drill on hand. To put it differently, when a particular procedure can be resorted to, only as a matter of exception if it is extended across the board for all project



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proponents who have commenced or completed projects without EC and made a norm (besides providing a window for project proponents to commence projects without EC under the assumption that ex post facto EC can in anyway be resorted to) by issuing a slew of instruments, it tantamounts to making the exception a rule/norm. If what Hon'ble Supreme Court says should be an exception is made a rule/norm, we have no hesitation in writing that it does not pass muster and this is more so as making this exception a rule/norm is not owing to a one time affair but it is a product of a barrage / slew of instructions which have been issued one after the other in succession making it a 'new normal', more so after giving undertaking to the Court in Puducherry WP that it will be a one time measure. We are acutely conscious that Hon'ble Supreme Court in *Pahwa Plastics* (paragraph 46) has adverted to Puducherry WP, it has also adverted to Puducherry WP in *D.Swamy* (paragraphs 35 and 36) and said that one time measure does not mean not more than once as long as the power to modify / relax exists and that the statement made by



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the counsel cannot denude this authority. Therefore, it shall not be construed that we are saying that impugned OMs do not pass muster owing to undertaking given by learned Solicitor in Puducherry WP but we are saying this by placing strong reliance on the ratio in ***Pahwa Plastics*** [Paragraph 66] as well as ***D.Swamy*** [Paragraphs 40, 41, 47 to 49], wherein Hon'ble Supreme Court has said in no uncertain terms that ex post facto EC should not ordinarily be resorted to and that it should be resorted to only in exceptional cases. In this regard, we would also be applying Wambaugh inversion test in ***Pahwa Plastics*** and ***D.Swamy*** as regards narratives qua Puducherry WP as well as the observation of Hon'ble Supreme Court regarding interim order in W.M.P.(MD)No.9241 of 2021 in II Fatima WP (interim stay dated 15.07.2021) vide paragraph 85 of ***Electrosteel*** case.

(vi)Before we proceed further, we need to set out what the Wambaugh inversion test. In very simple terms, in a judgment, to test whether a particular observation or a particular part of a judgment forms part of the ratio or not, that



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particular portion or observation should be removed and thereafter, the judgment should be read to find out whether the conclusion changes. Those portions / observations in a judgment which even if removed do not in any manner impact the conclusion, do not form part of the ratio. This inversion test / Wambaugh test was elucidatively explained by Hon'ble Supreme Court in *State of Gujarat Vs. Utility Users' Welfare Association and others* reported in **(2018) 6 SCC 21**. On facts, *Utility Users'* is a case where the Electricity Act which provided for Central and State Regulatory Commissions said that Chairpersons of such Commissions may be a Judge of a High Court for State Commission and a Judge of Supreme Court or Chief Justice of a High Court for Central Commission and there were divergent views taken by Hon'ble Division Benches of different High Courts as to whether this 'may' should be read as 'shall' and it is imperative that such Chairman / Chairpersons should be a Judge and persons with judicial mind presiding over these Commissions is imperative. The relevant paragraphs in *Utility Users' Welfare Association* are



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paragraphs 113 and 114 and the same read as follows:

'113. In order to determine this aspect, one of the well-established tests is “the Inversion Test” propounded inter alia by Eugene Wambaugh, a Professor at The Harvard Law School, who published a classic text book called *The Study of Cases* [Eugene Wambaugh, *The Study of Cases* (Boston : Little, Brown & Co., 1892).] in the year 1892. This textbook propounded inter alia what is known as the “Wambaugh Test” or “the Inversion Test” as the means of judicial interpretation. “the Inversion Test” is used to identify the *ratio decidendi* in any judgment. The central idea, in the words of Professor Wambaugh, is as under:

“In order to make the test, let him first frame carefully the supposed proposition of law. Let him then insert in the proposition a word reversing its meaning. Let him then inquire whether, if the court had conceived this new proposition to be good, and had it in mind, the decision could have been the same. If the answer be affirmative, then, however excellent the original proposition may be, the case is not a precedent for that proposition, but if the answer be negative the case is a precedent for the original proposition and possibly for other propositions also. [Eugene Wambaugh, *The Study of Cases* (Boston : Little, Brown & Co., 1892) at p. 17.] ”

114. In order to test whether a particular proposition of law is



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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. This test has been followed to imply that the *ratio decidendi* is what is absolutely necessary for the decision of the case. “In order that an opinion may have the weight of a precedent”, according to John Chipman Grey [Another distinguished jurist who served as a Professor of Law at Harvard Law School.] , “it must be an opinion, the formation of which, is necessary for the decision of a particular case”. '

(vii)We now resort to Wambaugh inversion test. In the case on hand, the relevant paragraph where Wambaugh test has to be applied in ***Pahwa Plastics*** is observation relating to one time measure granted in Puducherry WP (paragraph 46) and in ***D.Swamy*** case, relevant paragraphs are paragraphs 35 and 36. Even if these relevant paragraphs in ***Pahwa Plastics*** and ***D.Swamy*** are removed, it does not change the conclusion, i.e., the outcome does not change. Even when the aforesaid Wambaugh inversion test is applied to paragraph 85 of ***Electrosteel*** case, wherein Hon'ble Supreme Court made an



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observation about the interim order granted by the Madras High Court, we find that it does not change the conclusion in *Electrosteel*.

(viii)It is useful to extract relevant paragraphs in *Pahwa Plastics, D.Swamy and Electrosteel* qua which Wambaugh test has to be applied and the conclusion arrived at. Relevant paragraph in *Pahwa Plastics* qua which Wambaugh inversion test has to be applied is paragraph 46 (as alluded to supra) and the same reads as follows:

'46. It is true that in the case of *Puducherry Environment Protection Association v. Union of India*, the Division Bench of Madras High Court took note of and recorded the submission made on behalf of the Union of India that the relaxation was a one time relaxation. In view of such submission, this Court held that a one time relaxation was permissible. '

Conclusion in paragraph 67 :

'67. Accordingly, the appeal is allowed. The impugned order is set aside in so far as the same is applicable to the units of the Appellants established and operated pursuant to CTE and CTO from the HSPCB in respect of which applications for *ex post facto* EC have been



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filed. The Respondent shall take a decision on the applications of the Appellants for EC in accordance with law within one month from date. Pending decision, the operation of the Pahwa Yamuna Nagar Unit and the Apcolite Yamuna Nagar Unit, in respect of which consents have been granted and even public hearing held in connection with grant of EC, shall not be interfered with. '

(ix) Relevant paragraphs in *D.Swamy's* case (for applying Wambaugh inversion test) are paragraphs 35 and 36 and the same read as follows:

'35. It is true that in the case of *Puducherry Environment Protection Association v. Union of India*⁴, the Division Bench of Madras High Court took note of and recorded the submission made on behalf of the Union of India that the relaxation was a one time relaxation. In view of such submission, this Court held that a one time relaxation was permissible.

36. 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



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amended and/or modified as many times, as may be necessary. A statement made by 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.'

Conclusion in paragraphs 47 and 50 :

'47. *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 regularization 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.

50. In our considered view, the NGT rightly found that when the Bio-Medical Waste Treatment facility of the Appellant was being operated with the requisite consent to operate, it could not be closed on the ground of want



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of prior Environmental Clearance. The issues raised/involved in this appeal are squarely covered by the judgment of this Court in *Electrosteel Steels Limited* (supra) and *Pahwa Plastics Pvt. Ltd.* (supra). This Court cannot lose sight of the fact that the operation of a Bio-Medical Waste Treatment Facility is in the interest of prevention of environmental pollution. The closure of the facility only on the ground of want of prior Environmental Clearance would be against public interest. There are no grounds to interfere with the judgment and order of the NGT in appeal as rightly argued by KSPCB and the Respondent No. 3. The appeal is barred by delay. In any case, the appeal does not raise any substantial question of law. The appeal is therefore dismissed.'

(x) Paragraph 85 in *Electrosteel* case to which

Wambaugh inversion test has to be applied is as follows :

'85. The interim order [*Fatima v. Union of India*, 2021 SCC OnLine Mad 12936] passed by the Madras High Court appears to be misconceived. However, this Court is not hearing an appeal from that interim order. The interim stay passed by the Madras High Court can have no application to operation of the standard operating procedure to projects in territories beyond the territorial jurisdiction of the Madras High Court. Moreover, final decision may have been taken in



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accordance with the Orders/Rules prevailing prior to 7-7-2021.'

Conclusion in paragraph Nos.86 and 87:

'86. In passing the impugned order [*Electrosteel Steels Ltd. v. Jharkhand State Pollution Control Board*, 2020 SCC OnLine Jhar 796] , the High Court overlooked the consequences of closure of an integrated steel plant with a workforce of 300 regular and 700 contractual workers. The High Court also failed to appreciate that the judgment of this Court in *Alembic Pharmaceuticals [Alembic Pharmaceuticals Ltd. v. Rohit Prajapati, (2020) 17 SCC 157]* was distinguishable on facts. Furthermore, continuance of the interim orders allowing operation of an industrial establishment or even the grant of revised EC to the industrial establishment cannot stand in the way of action against that establishment for contraventions, including the imposition of penalty, on the principle "polluter pays". The scope and effect of Section 32-A IBC is a different issue. This Court need not examine into the question of whether penal action can be initiated against the appellant or, whether compensation can be recovered from the appellant, at this stage. The issue may be decided by the appropriate authority at the appropriate stage when it adjudicates an action for penalisation of the appellant or recovery of



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compensation from the appellant. The application of the appellant for revised EC, CTO, etc. shall be considered strictly in accordance with environmental norms.

87. The appeals are allowed. The impugned order [*Electrosteel Steels Ltd. v. Jharkhand State Pollution Control Board*, 2020 SCC OnLine Jhar 796] is set aside. Respondent 1 shall take a decision on the application of the appellant for revised EC in accordance with law, within three months from date. Pending such decision, the operation of the steel plant shall not be interfered with on the ground of want of EC, FC, CTE or CTO. '

(xi) By applying Wambaugh test, if aforementioned paragraphs in *Pahwa Plastics*, *D.Swamy* and *Electrosteel* (extracted and reproduced supra) are removed, it does not change the conclusion in aforesaid decisions of Hon'ble Supreme Court. As an illustration, in *Electrosteel* vide paragraph 85, Hon'ble Supreme Court has made a mention about interim order and it does not in any way change the conclusion that the operation of the steel plant was not interfered with on the ground of want of EC, FC, CTE or CTO. In this regard, it is of immense significance to note that in



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Electrosteel in paragraph 85 itself, Hon'ble Supreme Court has made it unambiguously clear that it is not hearing an appeal against the interim order of Division Bench of Madras High Court.

(xii)We respectfully place strong reliance on ***Common Cause*** which dealt with rapacious mining in State of Odisha, wherein the principle that that possibility of getting ex post facto EC does not signal (a) EC is not mandatory and (b) the default is retrospectively condonable was laid down by Hon'ble Supreme Court vide paragraph 108 which reads as follows:

'108.It was submitted on behalf of the mining leaseholders that the possibility of getting an ex post facto EC was a signal to the mining leaseholders that obtaining an EC was not mandatory or that if it was not obtained, the default was retrospectively condonable. We do not agree. We have referred to various provisions of the MMDR Act and the Rules framed thereunder to indicate the statutory importance given to the protection and preservation of the environment. This was also emphasised in *M.C. Mehta* [*M.C. Mehta v. Union of India*, (2004) 12 SCC 118] in which it was also stated that: (SCC p. 161, para



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37)

“37. ... It does not appear that MoEF intended to legalise the commencement or continuance of mining activity without compliance of stipulations of the notification.”

It appears to us that the MoEF was, in a sense, cajoling the mining leaseholders to comply with the law and EIA 1994 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 the MoEF took a soft approach cannot be an escapist excuse for non-compliance with the law or EIA 1994.'

(xiii) We make it clear that we are not applying case laws of Hon'ble Supreme Court to the captioned matter solely by applying Wambaugh inversion test. In the earlier part of this order, we have set out the principles that have been respectfully deduced from the case laws, i.e., judgments rendered by Hon'ble Supreme Court. We are only respectfully following the principles laid down by Hon'ble Supreme Court, particularly



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the principle that ex post facto EC should be an exception. To put it differently, Wambaugh inversion test is applied only for three case laws solely as a buttressing factor to support what we have respectfully followed as rationes decidendi of Hon'ble Supreme Court qua case laws. We have also respectfully followed the declaration of law made by the Constitution Bench of Hon'ble Supreme Court in ***Padma Sundara Rao***, about which there is allusion elsewhere in this order.

(xiv)In ***D.Swamy***, larger public interest of Bio-medical waste treatment facility was considered by Hon'ble Supreme Court and it was held that the Court cannot lose sight of the fact that the operation of a Bio-Medical Waste Treatment Facility is in the interest of prevention of environmental pollution and the closure of the facility only on the ground of want of prior Environmental Clearance would be against (larger) public interest.

(xv)In ***Electrosteel***, interest of 300 regular and 700 contractual workmen was taken into account in refusing closure of a running steel plant which in any case was being



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operated under supervision of jurisdictional State Pollution Control Board (JSPCB). In *Alembic*, three industrial units were mulcted with penalty. All this [In *Alembic* - three industrial units, in *Electrosteel* – steel plant in Jharkhand which was being operated under supervision of JSPCB and *D.Swamy* – Bio-medical waste treatment facility] would go to show that Hon'ble Supreme Court has taken into account the interest of workmen as well as the larger public interest qua industries such as bio-medical waste treatment facility which is in the interest of prevention of environmental pollution, as they have already been put in place and had been made operational and made an exception which emphatically and unambiguously laying down the principle that ex post facto EC should not ordinarily be resorted to and that it should be resorted to only in exceptional circumstances.

(xvi)As intervenors, namely Federation of Indian Mineral Industries, Tamil Nadu Small Mine Owners Federation and ELCOT stand to benefit, we have heard them only as project proponents as it is for learned Solicitor to support the



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impugned OMs and / or making of the same. Nonetheless we have considered those arguments also but that does not lead to a situation of giving relief to intervenors in captioned W.Ps which have been brought to this court by protagonists of public interest. In any event, legal position is clear that an intervenor (unlike an impleaded party) can neither seek relief nor prefer an appeal and intervenor will only get audience. The decisions relied on by learned Senior Advocate for ELCOT at the time of hearing as intervenor and with regard to Article 141 of the Constitution qua declared law, do not come to the aid of ELCOT, as aforesaid decisions of Hon'ble Supreme Court were rendered in different contexts, considering the plight of the workmen and also taking into account the interest relating to prevention of environmental pollution with regard to operation of a bio-medical waste treatment facility as it was categorically and unambiguously held in no uncertain terms in these very decisions that ex post facto EC should ordinarily not be given and that it should be resorted to only in exceptional circumstances. Hon'ble Supreme Court in *Padma Sundara Rao*



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case (supra) has declared the law qua precedents that each case should be relied on considering the fact situation of that particular case. Therefore, the decisions relied on by learned Senior counsel for ELCOT do not come to his aid. *Vedanta* is a case where the industrial unit was directed to be closed for serious violations of environmental norms and *Vedanta* is entirely in a different factual canvass and therefore, reliance on *Vedanta* also does not aid the arguments of learned senior counsel for ELCOT.

(xvii)As regards State of Tamil Nadu, regarding ongoing projects, learned Advocate General made a fervent plea to consider larger public interest. We took into account the factum that IT Towers have been put up using public money. Considering the huge amount of public money that has been sunk, we make it clear that it is open to State of Tamil Nadu to apply for ex post facto EC for the three projects mentioned in the affidavit filed by the Managing Director of ELCOT on 28.11.2023 alone, if not already done.

(xviii)A barrage of successive instructions, i.e., a



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slew of instruments means that all project proponents would be emboldened to start projects as a matter of routine and apply later. The biggest casualty would be public hearing. The file obtained inter-alia through RTI showing the manner in which impugned OMs were made was placed before us. When 1986 Act is a statute which has been made in Parliamentary wisdom and rules made thereunder is a subordinate legislation vide rule making power do not provide for ex post facto EC and when 2006 and 2011 EIA/CRZ notifications make 'prior' EC mandatory, such OMs cannot be made by taking recourse to there being no bar more so when the EIA notification in the year 2006 and CRZ notification in the year 2011 mandate 'prior' EC. The expression 'prior consent' has been elucidatively explained by the Constitution Bench of Hon'ble Supreme Court in *Life Insurance Corporation of India* which is holding the field.

(xix)As alluded to supra, the file obtained inter-alia through RTI showing the manner in which impugned OMs were made was placed before us and a perusal of the same



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brings to light that it is clearly contrary to and an anathema to subordinate legislation making in its evolved form. When we say subordinate legislation making in its evolved form, we mean that subordinate legislation making as explained over the years starting from corpus juris secundum, i.e., that it cannot be made merely at the bureaucratic level. In other words, subordinate legislation making in its evolved form as it obtains today is such that subordinate legislation made pursuant to rule making power in a primary or parent statute by a authority vested with such rule making power should have all trappings of parent / primary legislation making. In the case on hand, the slew of instruments, in this view of the matter can be no substitute to subordinate legislation when the parent statute provides for such powers / rule making.

(xx)The other sheet anchor argument of learned Solicitor is, when ex post facto EC is resorted to, the clearance would be given only if all conditions are satisfied. To put it otherwise, it is the specific and emphatic say of learned Solicitor that such of those project proponents who would have



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got clearance if they had sought prior approval alone would be allowed to continue. In our considered view, this argument does not cut ice as one made to support the impugned OMs. The reason is, the challenge to impugned OMs are predicated on the question as to whether ex post facto EC should be resorted to at all and response to this by saying that those of the project proponents who would have otherwise got clearances if they had sought prior EC alone will be able to get benefit of EC is a clear case of putting the cart before the horse and / or begging the question.

(xxi)Reverting to the five points raised by learned senior counsel for ELCOT which have been captured and set out elsewhere supra in this order, we write the following points to enhance clarity and add specificity:

(a)As regards *Vedanta*, the fact situation is distinguishable from the captioned matters as it does not pertain to notifications issued by MoEF and therefore, it really does not come to the aid of ELCOT as a case law precedent in the legal drill on hand. As



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regards ***Barak Upatyaka*** and ***M.R.Apparao***, we have respectfully adverted to ***Lafarge, Common Cause, Alembic, Electrosteel, Pahwa Plastics*** and ***D.Swamy*** (inter-alia by applying Wambaugh Inversion test) and in this view of the matter, ***Barak Upatyaka*** and ***M.R.Apparao*** arguments of learned Senior counsel stand addressed and the sequitur is, they become non starters as regards aiding ELCOT in the case on hand;

(b)As regards, G.O.Ms.No.18, we have made it clear that with regard to IT Towers put up by the Government of Tamil Nadu, as the same have been done sinking huge public money, considering the larger public interest, it is open to Government of Tamil Nadu to apply for ex post facto EC (if not already been done). Such application for ex post facto EC shall be considered by MoEF on its own merits and in accordance with legal obtaining position by construing as if impugned OMs are operating. In any event, we are interfering with impugned instruments



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only prospectively and therefore, this would only tantamount to stating the obvious and as a specific point has been raised qua G.O.Ms.No.18, we are setting out this.

(c)As regards multiple projects, we are interfering with instruments prospectively and therefore, if applications for ex post facto EC have already been made, the same shall be carried to its logical end untrammelled by this order.

(d)As regards the argument that 07.07.2021 OM is more in the nature of a SOP, we have dealt with all instruments and that drops the curtains on this argument.

(e)The last point pertaining to employment potential for about 6000 workmen in Sholinganallur and Vilankurichi IT Towers, they are not running industries like Electrosteel and it is not as if the livelihood of workmen who are now in employment is going to be affected. It is only a case of future potential



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but in any event, even with regard to this, as already alluded to supra, based on the submissions of learned Advocate General of State of Tamil Nadu, we have provided a window for Government of Tamil Nadu to make ex post facto EC application (if not already made) and also made it clear that, if so made / if already made, the same shall be considered on its own merits untrammelled by this order and we have also made it clear that this window is provided factoring in the point that substantial public money has been sunk in putting up these IT Towers and it is only appropriate that citizenry get the benefit. In other words, we have provided this window by taking into account larger public interest.

27.As regards contempt petition, we have already noticed that Hon'ble Supreme Court has referred to the undertaking given by learned Solicitor in Puducherry WP case. We have also noticed that Hon'ble Supreme Court in ***Pahwa Plastics*** and ***D.Swamy*** has explained the same



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by saying that it does not mean that it is only once and as we have decided the writ petitions on the basis of the ratio of Hon'ble Supreme Court that ex post facto EC should be resorted to only as exception and not as a norm, we deem it appropriate to close the contempt purging the respondent of the contempt as the Rule of contempt has been issued.

28. We are resorting to the doctrine of prospective overruling in the captioned matter. While initially the doctrine was confined to matters arising under the Constitution, later on it has been applied to other areas of law as well. The reason of applying the doctrine of prospective overruling in the case on hand is, projects / industries which are already functioning are in the anvil of commencing operations or for that matter, projects / industries which are awaiting ex post facto EC will be in putting the clock back situation. Besides putting the clock in the clock back situation, as regards projects / industries which are in the anvil of being operationalized, the same may result in deleterious situation after being lulled into the belief that ex post facto EC is available. There is another reason as to why we are resorting to prospective overruling and that is, it is quite possible that ex post facto EC applications of project



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proponents who are not before this Court are under active consideration.

We make it clear that prospective overruling is resorted to with regard to statutory provisions and when a future date is fixed. We are not fixing a future date and we are dealing with executive fiats in the case on hand and therefore, we are mentioning about prospective overruling legal mechanism only as a buttressing factor.

29.Ergo, the sequitur is,

(i)captioned three W.P.s, namely W.P.(MD)Nos.8866 of 2021, 11757 of 2021 and W.P.No.18829 of 2021 are allowed in the aforesaid manner, impugned OMs dated 19.02.2021 and 07.07.2021 issued by MoEF are quashed / set aside but prospectively albeit with a window to three ongoing / completed projects as set out elsewhere supra in this order. Consequently, connected Writ Miscellaneous Petitions thereat are closed. There shall be no order as to costs;

(ii)Contempt Petition No.56 of 2022 is closed and the respondent is purged of contempt vide Rule of contempt issued on 08.03.2022. Consequently, connected Sub application is closed.



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(M.S., J.) (K.G.T., J.)
30.08.2024

Speaking order: Yes
Index: Yes
Neutral Citation : Yes
vvk

To

- 1.The Secretary to the Government,
Ministry of Environment, Forest and Climate Change,
Paryavaran Bhawan,
Jor Bagh, New Delhi-110 003.
- 2.Joint Secretary to the Government of India,
Ministry of Forest, Environment and Climate Change,
Paryavaran Bhawan, Jor Bagh,
New Delhi-110 003.
- 3.The Principal Secretary,
State of Tamil Nadu,
Department of Environment, Climate Change and Forests,
No.1, Jeenis Road,
Panagal Building,
Ground Floor, Saidapet,
Chennai-600 015.

M.SUNDAR.J.
and
K.GOVINDARAJAN THILAKAVADI, J.

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common order in
W.P.(MD)Nos.8866 and 11757 of 2021
and W.P.No.18829 of 2021
and
W.M.P.(MD)Nos.6666 and 12052 of 2021
in W.P.(MD)No.8866 of 2021
W.M.P.(MD)No.9241 of 2021 and W.M.P.No.6193 of 2022
in W.P.(MD)No.11757 of 2021
W.M.P.Nos.20128 and 20130 of 2021
in W.P.No.18829 of 2021
AND
Contempt Petition No.56 of 2022
and
Sub Application No.629 of 2023 in Cont.P.No.56 of 2022

30.08.2024

ADDENDA

in
W.P.(MD)Nos.8866 and 11757 of 2021
and
W.P.No.18829 of 2021
and
W.M.P.(MD)Nos.6666 and 12052 of 2021
in W.P.(MD)No.8866 of 2021



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in W.P.(MD)No.11757 of 2021

W.M.P.Nos.20128 and 20130 of 2021
in W.P.No.18829 of 2021

AND

Contempt Petition No.56 of 2022

and

Sub Application No.629 of 2023 in Cont.P.No.56 of 2022

M.SUNDAR, J.

and

K.GOVINDARAJAN THILAKAVADI, J.

(Order of the Court was made by M.SUNDAR, J.)

Captioned matters are listed under the cause list caption 'FOR
PRONOUNCING ORDERS'.

2.After the order was pronounced in the open Court,
'Mr.AR.L.Sundaresan, learned Additional Solicitor General of India,
Madras High Court' (hereinafter 'learned Solicitor' for the sake of
convenience and brevity) made an oral application seeking Certificate for
appeal to Hon'ble Supreme Court.

3.Aforementioned oral application is obviously an application
under Article 134-A(b) of the Constitution of India. An oral application



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under Article 134-A(b) can be acceded to in cases falling under clause (1) of Article 132, Clause (1) of Article 133 or sub-clause (a) of Clause (1) of Article 134.

4.In the case on hand, learned Solicitor sought leave on the ground that the matter involves a substantial question of law of general importance. This means that the oral application falls under Clause (1) of Article 133 and to state with greater specificity under sub-clause (a) of Clause (1) of Article 133.

5.We carefully considered the request made by learned Solicitor in the light of the language in which Article 134-A(b) is couched and the parameters, ingredients and determinants which govern such request.

6.In the order pronounced in the captioned matters, we have respectfully followed *rationes decidendi* of Hon'ble Supreme Court in a long line of authorities and therefore, though the matter is of general importance, substantial question of law issue may not arise as we have respectfully followed *rationes decidendi* of Hon'ble Supreme Court and therefore, we are of the view that the oral request does not pass muster vide Article 134-A(b).



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7.As the order was being dictated, learned Solicitor added that the leave is being sought on the ground that the case involves a substantial question of law as to the interpretation of the Constitution, that the question needs to be decided under Article 132(1) also. This means that the Certificate for appeal is being sought on Article 132(1) ground also. As regards, this second ground on which the oral request was buttressed (as this order was being pronounced), we are of the considered view that this also does not pass muster for three reasons and they are as follows:

(a)We have heard the captioned matters pursuant to clarificatory orders dated 13.10.2023 and 02.02.2024 made by Hon'ble Supreme Court in I.A.No.195200 of 2023 in SLP(C)No.20061 of 2023 and in the I.A. filed in W.P.(Civil)No.1394 of 2023;

(b)The matter turns largely on statutory provisions and executive fiats; and

(c)On substantial question of law as to the interpretation of the Constitution limb, we have only respectfully followed *rationes decidendi* of Hon'ble



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Supreme Court in a long line of authorities on this aspect of the matter as already alluded to supra in dealing with first ground.

8.In the light of the narrative thus far, the oral application made by learned Solicitor seeking Certificate for appeal to Hon'ble Supreme Court is not acceded to.

9.This order made in open Court will now be uploaded along with the common order in captioned matters as addenda to the common order pronounced in the Court today.

(M.S., J.) (K.G.T., J.)
30.08.2024

vvk

M.SUNDAR.J.
and
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