REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 1526 of 2016

Alembic Pharmaceuticals Ltd. **...Appellant**

Versus

Rohit Prajapati & Ors. **...Respondents**

With

Civil Appeal No 3175 of 2016

With

Civil Appeal Nos 6604-6605 of 2016

And With

Civil Appeal No 1555 of 2017

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

1. By a judgment dated 8 January 2016, the Bench of the National Green Tribunal[1] for the Western Zone held that a circular issued by the Union Ministry of Environment and Forests[2] on 14 May 2002 is contrary to law. The circular envisaged the grant of *ex post facto* environmental clearances. The NGT issued a slew of directions including the revocation of environmental clearances and for closing down industrial units operating without valid consents. On 17 May 2016, the NGT dismissed an application for review filed by one of the affected industrial units. The industrial units and MoEF are in appeal[3].

2. The Environmental Impact Assessment[4] notification of 27 January 1994 mandated prior Environmental Clearances[5] for setting up and expansion of industrial projects falling within thirty categories. The deadline for obtaining an EC under the EIA notification of 1994 was extended by various circulars to 31 March 1999 and thereafter to 30 June 2001. By the circular of 14 May 2002, which was quashed by the NGT, MoEF extended the period till 31 March 2003 for those industrial units which had gone into production without obtaining an EC under the EIA notification of 1994 to apply for and obtain an *ex post facto* EC. The circular indicated that it had been decided:

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1 "NGT"
2 "MoEF"
3 Civil Appeal no 1526 of 2016 (Alembic Pharmaceuticals Limited); Civil Appeal no 3175 of 2016 (United Phosphorus Limited); Civil Appeal nos 6604-6605 of 2016 (Unique Chemicals); and Civil Appeal no 42756 of 2016 (Union of India)
4 "EIA"
5 "EC"

> "... to extend the deadline upto 31 March 2003 so that defaulting units could avail of this last and final opportunity to obtain ex-post-facto environmental clearance..."

3. The circular of 14 May 2002, allowed for *ex post facto* ECs, subject to a graded contribution into an earmarked fund based on the investment cost of the project. The first and the second respondents challenged the circular of 14 May 2002 before the High Court of Gujarat. The proceedings were subsequently transferred to the NGT. The NGT by its decision dated 8 January 2016 held that the law did not permit the grant of an *ex pos*t *facto* clearances and that the circular of 14 May 2002 was an internal communication and did not override the provisions of the EIA notification dated 27 January 1994 which had been issued in exercise of statutory powers conferred by Section 3 of the Environment (Protection) Act 1986[6].

4. Having held that the concept of an "*ex post facto* environmental clearance" was not sustainable with reference to any provision of law, the NGT issued the following directions:

(i) The authorities of the Union of India, including the MoEF, State of Gujarat, Gujarat Pollution Control Board[7] and District Collectors shall not grant consent for an industrial activity covered by the EIA notification of 1994 without the steps mandated by the notification such as screening, scoping, public hearing and decision being fulfilled;

(ii) The ECs granted to the industrial units of the sixth to ninth respondents shall be revoked;

(iii) All the industrial activities which were being operated without a valid EC and consent to operate shall be closed down within one month;

6 "Environment Protection Act 1986"
7 "GPCB"

(iv) Each of the units shall deposit a compensation of ₹ 10 lakhs for having caused environmental degradation; and

(v) The amount deposited shall be used for the restoration of the environment in and around the industrial area of Ankleshwar in the State of Gujarat.

5. The private respondents before the NGT who were affected by the above directions are:

(i) United Phosphorous Ltd - the sixth respondent;

(ii) Unique Chemicals - the seventh respondent;

(iii) Darshak Private Limited - the eight respondent; and

(iv) Nirayu Private Limited - the ninth respondent.

The private respondents are engaged in the manufacture of pharmaceuticals and bulk drugs at the industrial area of Ankleshwar in the State of Gujarat. Alembic Pharmaceuticals Limited is the appellant in the lead appeal before this Court. Darshak Private Limited merged with the appellant in 2002 pursuant to a scheme of amalgamation sanctioned by the High Court of Gujarat. Nirayu Private Limited was acquired by the appellant under a slump sale on 1 January 2008. Following this exercise, the manufacturing units of erstwhile Darshak Private Limited and Nirayu Private Limited have come to be known as API – I and API – II, respectively.

EIA Notification of 1994

6. The EIA notification was issued by the MoEF on 27 January 1994, in exercise of its powers under Section 3(1) and clause (v) of Section 3(2) of the Environment Protection Act 1986 read with Rule 5(3)(d) of the Environment (Protection) Rules 1986[8]. The EIA notification stipulated that:

> "…on and form the date of publication of this notification in the Official Gazette, expansion or modernization of any activity (if pollution load is to exceed the existing one) or new project listed in Schedule I to this notification, shall not be undertaken in any part of India unless it has been accorded environmental clearance by the Central Government in accordance with the procedure hereinafter specified in this notification."

7. The EIA notification stipulated that any person who desired to undertake a new project, or the expansion or modernisation of an existing industry, listed in Schedule-I shall submit an application to the Secretary, MoEF. Entry 8 of Schedule - I includes industries engaged in manufacturing bulk drugs and pharmaceuticals. The application had to be accompanied by a project report including, *inter alia*, an EIA report and an environmental management plan prepared in accordance with the guidelines issued by the Union Government through the MoEF from time to time. The notification spelt out the procedure to be followed upon the submission of the application including an evaluation and assessment by a stipulated agency. Clause 3(a)[9] provided that:

> "...no construction work primarily or otherwise relating to the setting up of the project may be undertaken till the environmental and site clearances is obtained."

8. On 10 April 1997, the EIA notification of 1994 was amended by making a public hearing mandatory for thirty categories of activities which required an EC. On 5 November 1998, the MoEF issued a circular recording that though the EIA

8 "Environment Protection Rules"
9 Which was (substituted on 4 May 1994)

notification of 1994 was in effect since 27 January 1994, units covered by the notification had been set up without obtaining prior ECs. The GPCB had despite the advice of the MoEF allowed units to operate without valid ECs. In this backdrop, the circular of 5 November 1998 provided that:

> "Since number of such proposals are large in number and many of the units have not applied for environmental clearance genuinely out of ignorance it has been decided to consider their case for environmental clearance on merits. This will apply only to those proposals which are received in the Ministry till 31st March 1999. Simultaneously State Pollution Control Boards have also been advised to issue requisite notices to the units to apply for environmental clearance. In case of those units which have already started production, we may consider the proposals on merits and if necessary suggest additional mitigative measures. A formal environmental clearance will be issued in these cases after approval by the competent authority."

9. By a circular dated 27 December 2000, the MoEF directed all state pollution control boards to issue fresh notices to all defaulting units and extended the deadline to obtain ECs from 31 March 1999 to 30 June 2001. Inspite of this, there were delinquent units which had either failed to apply for an EC or had failed to complete the requirement of a public hearing before the extended date. By the circular of 14 May 2002, the deadline was extended to 31 March 2003. The circular stated that:

> "Keeping the foregoing in view, it has been decided to extend the deadline upto 31 March 2003 so that defaulting units could avail of this last and final opportunity to obtain ex-post-facto environmental clearance. This would apply to all such units, which had commenced construction activities/operations without obtaining prior environmental clearance in violation of the EIA Notification of 27 January 1994."

10. In terms of the circular, those defaulting units seeking an expansion were to earmark a separate fund for “eco-development measures including community development measures in Indian projects areas” on a graded scale linked to the investment in the project. This was indicated in a tabulated form which read thus:

A	Projects with investment upto ₹ 100 crores	1 % of the project cost with a minimum of ₹ 50,000
B	Projects with investment beyond ₹ 100 crores and upto ₹ 1,000 crores	0.5% of the project cost subject to a minimum of ₹ 1 crore and a maximum of ₹ 2.5 crores
C	Projects with investment exceeding ₹ 1000 crores	0.25 % of the project cost subject to a maximum of ₹ 5 crores

Units which failed to comply with the extended deadline were to be proceeded against.

The challenge to the *ex post facto* circular dated 14 May 2002

11. A petition was instituted under Article 226 of the Constitution by the first and second respondents in the present lead appeal before the High Court of Gujarat challenging the circular dated 14 May 2002 and seeking the revocation of the clearances which were granted to the industrial units in question. The case was transferred to the Western Zonal Bench of the NGT by the High Court of Gujarat on 21 April 2015. The NGT by its judgment dated 8 January 2016 set aside the circular dated 14 May 2002 and issued consequential directions which have been noted in the earlier part of this judgment. Unique Chemicals Limited, the seventh respondent before the NGT, preferred a review petition against the

judgment of the NGT which was dismissed. The affected industrial units and the MoEF are in appeal before this Court.

12. The issue to be adjudicated is whether in view of the requirement of a prior EC under the EIA notification of 1994, a provision for an *ex post facto* EC to industrial units could be validly made by means of the circular dated 14 May 2002.

13. During the course of the submissions, Mr Kapil Sibal, learned Senior Counsel appearing on behalf of Alembic Pharmaceuticals Limited has urged the following submissions:

(i) The issue is academic as both the units of the appellant have been granted an EC for subsequent expansion to a much higher capacity after conducting a public hearing and upon consideration of all material factors. The relevant details in support of the submission are thus:

Darshak Private Limited (API - I)

(a) An EC was granted on 14 May 2003 for a capacity of 15 MT per month;

(b) An EC was granted on 16 April 2008 for expansion of capacity from 15 MT per month to 25 MT per month; and

(c) An EC was granted on 31 January 2017 for a further expansion of capacity from 25 to 75 MT per month.

Nirayu Private Limited (API – II)

(a) An EC was granted on 14 May 2003 for a capacity of 47 MT per month; and

(b) An EC was granted on 20 December 2016 for an expanded capacity of 300 MT per month.

(ii) The EIA notification of 1994 omits the expression "prior". This is contrasted with the EIA notification dated 14 September 2006 which stipulates the requirement of a "prior" EC. While a prior EC is mandatory under the notification dated 14 September 2006, it was not under the earlier notification dated 27 January 1994;

(iii) Once an EC has been granted for a much larger capacity after conducting a prior public hearing, the question as to whether the first EC for a lesser capacity was valid, is of no significance. Since both the units have an EC for a larger capacity, the satisfaction for granting an EC for a lesser capacity would be subsumed;

(iv) The EIA notification of 1994 did not apply to the two units of the appellant (API – I and API – II). Clause 8 of the explanatory note to the EIA notification of 1994 provides that where a no objection certificate[10] from GPCB has been obtained before 27 January 1994, an EC is not required. In this context it has been submitted that:

(a) On 17 July 1992, GPCB granted an NOC to establish and manufacture to the manufacturing unit of API - I;

(b) On 29 May 1997 and 27 July 1998, GPCB granted an authorisation to operate under the Air (Prevention and Control of Pollution) Act 1981[11]to API - I;

(c) On 11 October 1999, GPCB granted API – I an authorisation to operate under the Water (Prevention & Control of Pollution) Act 1974[12];

(d) On 24 May 1985,GPCB granted API - II a consent order under the Water Act;

10 "NOC"
11 "Air Act"
12 "Water Act"

(e) On 9 October 1991, GPCB granted a site clearance certificate to API – II;
(f) On 12 May 1993,GPCB granted an NOC to API - II to establish and for the manufacture drugs;
(g) On 23 September 1993 and 13 November 1999, GPCB granted a consent under the Water Act to API - II;
(h) On 14 December 2001, GPCB granted an authorisation to API - II to operate under the Hazardous Waste (Management and Handling) Rules 1989[13]; and
(i) On 1 September 1999, 14 December 2001 and 7 March 2008, GPCB granted a consolidated consent and authorisation to API - II.

(v) A public hearing was not mandatory under the EIA notification of 1994. Clause 4 of the explanatory note confers a discretion to call for a hearing in case of projects that may cause large scale displacement or with severe environmental ramifications;
(vi) If the order of the NGT prevails, the appellant would be prejudiced and suffer an irreparable loss. The appellant has made an investment of over ₹ 293 crores and employed a labour force of over 1000 workers; and
(vii) The first respondent who was the petitioner before the NGT chose to target only the appellant and two others out of over ninety different entities which were granted similar clearances. This cherry picking of certain select units demonstrates the *mala fide* nature of the proceedings.

14. During the course of his submissions, Mr C U Singh, learned Senior Counsel appearing on behalf of United Phosphorus Limited has urged the following submissions:
(i) The circular dated 5 November 1998, by which the deadline for obtaining ECs under the EIA notification of 1994 was extended to 30 June 2001 was

13 "Hazardous Waste Rules"

not challenged. The circular dated 5 November 1998 specifically noted that the State Pollution Control Board had despite the advice of the MoEF allowed units to operate without valid ECs;

(ii) United Phosphorus Limited had all requisite ECs that were granted by GPCB for the existing and expanded capacity. In this context it has been submitted:

(a) An EC was granted on 17 July 2003 for manufacturing Phorate and Terbuphose (300 MT per month combined) and Acephate (80 MT per month);

(b) An EC was granted on 15 April 2008 for the expansion of capacity for manufacturing pesticides and intermediate products. Production of Phorate and Terbuphose was increased from 300 MT per month to 500 MT per month, and production of Acephate was increased to 1000 MT per month;

(c) An EC was granted on 10 January 2020 for an enhanced capacity of 9546 MT per month;

(iii) The complainant, the first respondent in the lead appeal, attended the public hearing held on 16 January 2002 prior to the grant of an EC on 17 July 2003 and raised no objections;

(iv) If the order of the NGT prevails, the appellant would be prejudiced and suffer an irreparable loss. The appellant has employed approximately 400 permanent and contract workers at its manufacturing unit; and

(v) The challenge by the first and second respondents was to the EIA notification 1994 which did not apply to the manufacturing unit of the appellant. At the relevant time, the appellant was exempted from obtaining an EC since it had all requisite permissions. In this context it has been submitted:

(a) On 3 October 1992, GPCB granted an NOC to the appellant for setting up a manufacturing unit;
(b) On 17 November 1995 and 2 April 1996, GPCB granted NOCs for expansion and manufacturing additional products;
(c) On 27 August 2009, GPCB granted a consolidated consent and authorisation to the appellant's manufacturing unit;
(d) On 25 July 2012, GPCB issued an NOC for the expansion of the appellant's manufacturing unit; and
(e) On 11 May 2015 and 27 May 2017,GPCB granted a consolidated consent and authorisation for expanded operations.

15. Appearing for Unique Chemicals Limited, Dr Abhishek Singhvi, learned Senior Counsel urged the following submissions:

(i) The NGT did not have the jurisdiction to entertain the petition filed by the first and second respondents in view of the decision of this Court in **Techi Tagi Tara** v **Rajendra Singh Bhandari & Ors**[14];

(ii) The EC granted in 2007 superseded the earlier EC granted in 2002. Therefore, the question of validity of the earlier EC does not arise. In this context it has been submitted:

(a) An EC was granted on 23 December 2002 for a capacity of 78.02 MT per month for manufacturing bulk drugs and intermediates;

(b) An EC was granted on 8 August 2007 for an increase in manufacturing capacity from 78.02 MT per month to 116.12 MT per month; and

(c) An EC was granted on 30 June 2018 for an increase in the manufacturing capacity to 290 MT per month. On 10 April 2019, the

14 2018 (11) SCC 734

above EC was amended allowing an increase in the number of products permitted to be manufactured by the appellant.

(iii) The *ex post facto* clearance granted to the appellant cannot be set aside by the order of the NGT in terms of the decision of this Court in **Goa Foundation** v **Union of India**[15], where 95 industrial projects were accorded *ex post facto* clearances in terms of the circular dated 14 May 2002. Accordingly, no question of closing down the manufacturing units of the appellants can arise;

(iv) The requirement of an *ex post facto* public hearing was introduced by an amendment in 1997 to the EIA notification of 1994. The legality of an *ex post facto* public hearing has been upheld by this Court in **Lafarge Umiam Mining Pvt Ltd** v **Union of India**[16];

(v) In various cases where there has been a violation of law, this court has not ordered the closure considering the significant investment and expansion undertaken by the industry. In **Electrotherm Ltd** v **Patel**[17], this Court did not order closure of the plant since a significant expansion had already taken place and the industry was functioning;

(vi) If the order of the NGT prevails, the appellant would be prejudiced and suffer an irreparable loss. The appellant has employed approximately 400 employees at its manufacturing unit;

15 (2005) 11 SCC 559
16 (2011) 7 SCC 338
17 (2016) 9 SCC 300

(vii) The EIA notification 1994 did not apply to the manufacturing unit of the appellant. The manufacturing unit of the appellant was exempt from obtaining an EC as it had all the requisite permissions. In this context it has been submitted:

(a) On 30 September 1995, GPCB issued an 'air consent order' under the Air Act;
(b) On 9 January 1996 GPCB issued an authorisation under the Hazardous Waste Rules;
(c) On 16 April 1996 GPCB issued a 'water consent order' under the Water Act;
(d) On 15 April 2009 GPCB granted a consolidated consent and authorisation to the manufacturing unit of the appellant;
(e) On 11 June 2010 and 26 June 2012, GPCB amended the consolidated consent and authorisation granted to the appellant on 13 April 2009;
(f) On 30 May 2011, GPCB granted consent to set up a gas-based power generation plant having a capacity of 400 KW at the manufacturing unit of the appellant;
(g) On 2 November 2013, GPCB granted a fresh consolidated consent and authorisation to the manufacturing unit of the appellant; and
(h) On 25 January 2019 and 25 October 2019, GPCB granted a fresh and revised consolidated consent and authorisation, respectively for an increase in the number of products permitted to be manufactured at the manufacturing unit of the appellant.

16. Appearing for the first and second respondents, Mr Siddharth Seem, learned counsel has urged the following submissions before this Court:

(i) The circular dated 14 May 2002 is illegal because environmental jurisprudence does not recognise any concept of *ex post facto* clearances. Any *ex post facto* approval is void and the benefit of the circular cannot be

given to such an industry. In this regard, reliance was placed upon the decision of this Court in **Common Cause** v **Union of India**[18];

(ii) The circular dated 14 May 2002 does not mention its source or authority of law. The source of the circular is not traceable to Section 3 of the Environment Protection Act 1986 because the circular does not protect or improve the quality of the environment. The circular allows defaulters to get *ex post facto* clearances and does not encourage compliance with the law;

(iii) The Comprehensive Environmental Pollution Index report by the Central Pollution Control Board indicates that the air, water and soil parameters in and around the industrial area of Ankleshwar in the State of Gujarat, where the three industrial units are located, are among the most critical in India: and

(iv) Even if this court were to hold that the closure of the industries should not be ordered, compensation should be directed to be paid by them for restoration of the environment. These industries have brazenly operated for years without environmental clearances.

17. The rival submissions fall for our consideration.

18. We first address the challenge to the jurisdiction of the NGT to strike down rules or regulations made under the Environment Protection Act 1986. In **Tamil Nadu Pollution Control Board v Sterlite Industries (I) Ltd**[19] ("**Sterlite**") this Court analysed the adjudicatory functions which have been entrusted to the NGT under the National Green Tribunal Act 2010[20]. Justice R F Nariman, speaking for a two judge Bench held that while exercising its jurisdiction under Section 16, the NGT cannot strike down rules or regulations made under the Environment

18 (2017) 9 SCC 499
19 2019 SCC Online SC 221 / Civil Appeal nos 4763-4764 of 2013
20 "NGT Act"

Protection Act 1986. In coming to this conclusion, the Court relied on the decision in **Bharat Sanchar Nigam Limited** v **Telecom Regulatory Authority of India**[21], where the appellate power contained in Section 14 of the Telecom Regulatory Authority of India Act[22] 1997 was interpreted. After adverting to this decision, Justice R F Nariman concluded that:

> "53…the NGT has no general power of judicial review akin to that vested under Article 226 of the Constitution of India possessed by the High Courts of this country."

19. While placing reliance on the above decision, Mr ANS Nadkarni, learned Additional Solicitor General made an attempt to demonstrate that the power to issue the circular dated 14 May 2002 that extended the deadline for defaulting units to avail of an *ex post facto* clearance until 30 March 2003 could well be traceable to Section 3 of the Environment Protection Act 1986. Section 3, to the extent relevant, provides thus:

> "Section 3. Power of central government to take measures to protect and improve environment.- (1) Subject to the provisions of this Act, the Central Government, shall have the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing controlling and abating environmental pollution."

20. Section 3(1) is an enabling provision for the Central Government to undertake all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution. This limb of the submission of the

21 (2014) 3 SCC 222
22 "TRAI Act"

Additional Solicitor General is crucial to the issue as to whether the NGT has exceeded its jurisdiction since the decision in **Sterlite** holds that the NGT, while exercising its appellate jurisdiction, "cannot strike down rules or regulations made **under this Act**". In the present case, to demonstrate that the NGT did not have the jurisdiction to strike down the circular dated 14 May 2002, it was urged that the circular was issued by the MoEF pursuant to its powers under Section 3 of the Environment Protection Act 1986. There is an inherent difficulty in accepting the submission. Before this Court, the Union of India has not pleaded the case that the circular dated 14 May 2002 is a measure which is traceable to the provisions of Section 3. On the contrary, in its pleadings the Union of India construed it as a "purely administrative decision". Ground (iii) in paragraph 3 of the memo of appeal states the position of the Union government:

> "Because the Hon'ble Tribunal failed to appreciate that after the EIA, Notification 1994 the opportunity to seek ex-post facto environmental clearance was given to industries in background of far reaching impact in terms of direct loss of livelihood in the employees working in the units which also supply inputs to other units and their indirect employment. **It was submitted to the Hon'ble High Court of Gujarat that issuance of circular dated 14/05/2002, based on which environmental clearance was given, was purely an administrative decision before taking stringent action.**"
>
> (Emphasis supplied)

21. The omission in the appeal to make any attempt to sustain the circular dated 14 May 2002 with reference to the provisions of Section 3 of the Environment Protection Act 1986 is significant. For an action of the Central government to be treated as a measure referable to Section 3 it must satisfy the statutory requirement of being necessary or expedient "for the purpose of protecting and improving the quality of the environment and preventing,

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

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

22. Mr Kapil Sibal, learned Senior Counsel appearing on behalf of Alembic Pharmaceuticals Limited sought to urge that the EIA notification dated 27 January 1994 contains an omission of the expression “prior” and contrasted this with the EIA notification dated 14 September 2006 which stipulates the requirement of a

"prior" EC. This, in his submission is an indicator that a prior EC is mandatory under the notification dated 14 September 2006 but was not so under the earlier notification dated 27 January 1994. This interpretation was not supported by Mr ANS Nadkarni, learned Additional Solicitor General who categorically submitted that the requirement under the notification dated 27 January 1994 was of a prior EC. We are unable to accept the submission of Mr Kapil Sibal. The terms of the EIA notification dated 27 January 1994 leave no manner of doubt that a prior EC was mandated before a new project was commenced or before undertaking any expansion or modernisation of an existing project. The absence of the expression "prior" in the EIA notification dated 27 January 1994 makes no difference since the words "shall not be undertaken…unless" postulate the requirement of a prior EC. Speaking for a two judge Bench of this Court in **Common Cause** v **Union of India**[23] ("**Common Cause**"), Justice Madan B Lokur rejected the submission which was urged on behalf of mining leaseholders that:

> "108… 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 it if was not obtained, the default was retrospectively condonable."

Disagreeing with the submission, the Court held:

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

23 (2017) 9 SCC 499

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

23. The concept of an *ex post facto* EC is in derogation of the fundamental principles of environmental jurisprudence and is an anathema to the EIA notification dated 27 January 1994. It is, as the judgment in **Common Cause** holds, detrimental to the environment and could lead to irreparable degradation. The reason why a retrospective EC or an *ex post facto* clearance is alien to environmental jurisprudence is that before the issuance of an EC, the statutory notification warrants a careful application of mind, besides a study into the likely consequences of a proposed activity on the environment. An EC can be issued only after various stages of the decision-making process have been completed. Requirements such as conducting a public hearing, screening, scoping and appraisal are components of the decision-making process which ensure that the likely impacts of the industrial activity or the expansion of an existing industrial activity are considered in the decision-making calculus. Allowing for an *ex post facto* clearance would essentially condone the operation of industrial activities without the grant of an EC. In the absence of an EC, there would be no conditions that would safeguard the environment. Moreover, if the EC was to be ultimately refused, irreparable harm would have been caused to the environment. In either view of the matter, environment law cannot countenance the notion of an

ex post facto clearance. This would be contrary to both the precautionary principle as well as the need for sustainable development.

24. In order to enable the Court to assess the status of compliance, the material which has been produced on the record by (i) Alembic Pharmaceuticals Limited; (ii) United Phosphorous Limited; and (iii) Unique Chemicals Limited has been compiled in a tabulated form for each of the three industries. For Alembic Pharmaceuticals Limited, the data for its two industrial units - Darshak Private Limited (API – I) and Nirayu Private Limited (API – II) - has been analysed separately. For each of the three industries, Table A below consists of the list of permissions, consents and authorisations obtained by the industry from various authorities. Table B contains a list of ECs which were granted from time to time to each industrial unit. The position as tabulated below is based on the material which has been disclosed on the record of these proceedings :

Table A: List of permissions, consents and authorisations granted to Alembic Pharmaceuticals Limited	
Darshak (API–I)	
Date	**Permission/Consent/Authorisation Granted**
17 July 1992	GPCB issued a no objection certificate to establish an industrial unit for the manufacture of the following items at API–I: (i) Ciprofloxacin (1.25 MT pm); and (ii) Norfloxacin (2.5 MT pm)
11June 1997	GPCB granted no objection certificate for manufacturing additional items at API–I
29 May 1997	GPCB issued air consent order authorising to operate API–I
11 July 1997, 12 July 1997 and 27 July 1998	GPCB granted no objection certificate for manufacturing of additional items at API–I
31 March 1999	GPCB issued air consent order authorising to operate API–I
11 October 1999	GPCB issued water consent order authorising to operate AP–I

Between 27 September 2002 – 23 December 2011	GPCB issued various consents under the Air Act, Water Act and Hazardous Waste Rules.

Nirayu Private Limited (API–II)	
Date	**Permission/Consent/Authorisation Granted**
12 July 1984	Factory license was issued in favour of Nirayu Private Limited
24 May 1985	GPCB issued water consent order authorising to operate API–II
9 October 1991	GPCB issued a site clearance certificate to establish an industrial unit and manufacture the following items at API–II: (i) CIMC chloride (2000 kgs pm); and (ii) Cloxacillin sodium (500 kgs pm)
12 May 1993	GPCB granted a no objection certificate to establish an industrial unit and manufacture the following items: (i) Acetone thiosemicarbazone (2 MT pm); (ii) 2 Mercapta (5 MT pm); (iii) Methoxy orthoxymethyl chloride (0.3 MT pm); and (iv) Solvent ether (7 MT pm)
1 September 1993	GPCB issued authorisation to operate API–II under the Hazardous Waste Rules
23 September 1993	GPCB issued water consent order authorising to operate API–II
4 December 1995	GPCB granted no objection certificate for manufacturing additional items at API–II
4 October 1996 and 17 April 1998	GPCB issued air consent order to operate API–II
1 September 1999	GPCB granted consolidated consent and authorisation to operate API–II
12 November 1999	GPCB issued water consent order to operate API–II
14 December 2001	GPCB issued authorisation to operate API–II under the Hazardous Waste Rules
Between 27 September 2002 – 6 January 2015	GPCB issued various consents under the Air Act, Water Act and Hazardous Waste Rules.

Table B: List of environmental clearances granted to Alembic Pharmaceuticals Limited			
Darshak (API–I)			
Date of Application	**Date of Public Hearing**	**EC for Expansion (Quantity)**	**Date EC Granted**
21 July 2001	30 January 2002	Manufacturing of various bulk drugs and intermediate	14 May 2003 as per the 1994 EIA

		products with a total capacity of 15 MT pm	notification
8 December 2006	9 October 2007	Expansion of total capacity of bulk drugs from 15 to 25 MT pm	16 April 2008 as per the 2006 EIA notification
16 September 2015	12 June 2015	Expansion of total capacity of active pharmaceutical ingredients from 25 to 75 MT pm	31 January 2017 as per the 2006 EIA notification
Nirayu Private Limited (API–II)			
Date of Application	**Date of Public Hearing**	**EC for Expansion (Quantity)**	**Date EC Granted**
20 July 2001	30 January 2002	Manufacturing of various bulk drugs and intermediate products with a total capacity of 47 MT pm	14 May 2003 as per the 1994 EIA notification
28 March 2016	12 June 2015	Expansion of total capacity of active pharmaceutical ingredients and intermediates from 47 to 300 MT pm	20 December 2016 as per the 2006 EIA notification

Table A: List of permissions, consents and authorisations granted to United Phosphorus Limited	
Unit no 2 - Plot no 3405 and 3406	
Date	**Permission/Consent/Authorisation Granted**
31 January 1992	Gujarat Industrial Development Corporation granted land to the appellant to establish and run unit no 2
9 March 1992	GPCB issued no objection certificate for operation of unit no 2 in relation to manufacturing of various products
3 October 1992	GPCB issued no objection certificate to set up a unit to manufacture the following items at unit no 2: (i) Carbendazim; (ii) Quinalphos; and (iii) Paraquat
1993	Unit no 2 commenced manufacturing activities
17 November 1995	GPCB granted no objection certificate for expansion of unit no 2 for manufacturing of two additional products – Phorate and Terbuphose (300 MT pm combined)
2 April 1996	GPCB granted no objection certificate for expansion of unit no 2 for the manufacture of Acephate (80 MT per month)
27 August 2009	GPCB granted a consolidated consent and authorisation to unit no 2
25 July 2012	GPCB issued consent to establish (NOC) for expansion of unit no 2

11 May 2015 and 27 April 2017	GPCB granted a consolidated consent and authorisation for the expanded operations

Table B: List of environmental clearances granted to United Phosphorus Limited Unit no 2 - Plot no 3405 and 3406			
Date of Application	**Date of Public Hearing**	**EC for Expansion (Quantity)**	**Date EC Granted**
21 August 2002	16 January 2002	Manufacturing of Phorate and Terbuphose (300 MT pm combined) and Acephate (80 MT per month)	17 July 2003 as per EIA notification of 1994
20 October 2007	-	Expansion of pesticides and intermediate products. - Production of Phorate and Terbuphose to be increased to 500 MT pm combined - Production of Acephate to be increased to 1000 MT pm	April 15 2008 as per EIA notification of 2006
-	-	Enhanced capacity of 9546 MT per month (as per written submissions)	10 January 2020 as per EIA notification of 2006

Table A: List of permissions, consents and authorisations granted to Unique Chemicals Limited Unit at plot no 5	
Date	**Permission/Consent/Authorisation Granted**
14 August 1995	GPCB issued a no objection certificate to establish and run a unit (site clearance) at plot no 5
30 September 1995	GPCB issued air consent order authorising to operate unit at plot no 5
25 December 1995	GPCB issued a no objection certificate to set up and manufacture the following items at the unit at plot no 5: (i) Dichlotofenance sodium (6 MT pm); (ii) Nifedipine (2 MT pm); (iii) Indolinone (6.9 MT pm); and (iv) Pefloxacin (3 MT pm)
9 January 1996	GPCB issued authorisation under the Hazardous Waste Rules
16 April 1996	GPCB issued water consent order authorising to operate unit at plot no 5
24 April 1996	Unit at plot no 5 commenced manufacturing activities
15 April 2009	GPCB granted a consolidated consent and authorisation to the unit at plot no 5
11 June 2010 and 26 June 2012	GPCB amended the consolidated consent and authorisation to the unit at plot no 5 granted on 15 April 2009
30 May 2011	GPCB granted no objection certificate to set up a gas-based power

	generation plant of a capacity of 400 KW at the unit at plot no 5
2 November 2013	GPCB granted a fresh consolidated consent and authorisation to the unit at plot no 5 for manufacturing of bulk drugs and intermediates
1 July 2016	The appellant was certified as a zero liquid discharge unit
25 January 2019	GPCB granted a new consolidated consent and authorisation to the unit at plot no 5
25 October 2019	GPCB issued a revised consolidated consent and authorisation for increase in the number of products that were permitted to be manufactured at the unit at plot no 5

Table B: List of environmental clearances granted to Unique Chemicals Limited Unit at plot no 5			
Date of Application	**Date of Public Hearing**	**EC for Expansion (Quantity)**	**Date EC Granted**
30 June 2001	25 January 2002	Total capacity 78.02 MT pm of bulk drugs and intermediates. Manufacturing of (i) Diclofenac sodium intermediates and derivates (40 MT pm); (ii) Nifedipine and its intermediates (2 MT pm); (iii) Indelinone (7 MT pm); (iv) Pefloxacin and its intermediates (3 MT pm); (v) 2 methyl imldazole (15 MT pm); (vi) Phentolamine HCL (10 MT pm); (vii) Diltazem HCL (1 MT pm); and (viii) other co-products	23 December 2002 as per EIA notification 1994
12 January 2007	Exempt – proposed project located in notified industrial area	For an increase in manufacturing of bulk drugs and intermediates from a total capacity from 78.02 MT pm to 116.12 MT pm For an increase in manufacturing of co-products from a total capacity of 103 MT pm to 297 MT pm For setting up a captive power plant with 1.3 MW capacity	8 August 2007 as per EIA notification 2006
16 March 2018	Exempt – proposed project located in notified industrial area	For an increase in manufacturing of bulk drugs and intermediates from a total capacity from 78.02 MT pm to 290 MT pm by setting up of synthetic organic chemicals manufacturing plant	30 June 2018 as per EIA notification 2006
		Amendment to the EC dated 30	10 April 2019

	June 2018 increasing the number of products permitted to be manufactured by the appellant at the unit at plot no 5	as per the 2006 EIA notification

25. The position that emerges from the record is that in the case of all the three industries, ECs were applied for nearly a decade after the introduction of the EIA notification 1994. In the meantime, the industries had been set up and had commenced production. GPCB issued a notice to United Phosphorus Limited on 30 April 2001 directing them to apply for an EC. On 9 December 2000, GPCB issued a notice to Darshak Private Limited (API – I) and Nirayu Private Limited (API – II) directing them to apply for and obtain an EC in accordance with the EIA notification of 1994. Darshak Private Limited (API – I) of Alembic Pharmaceuticals Limited, applied for an EC on 21 July 2001 which it was granted on 14 May 2003. Subsequent applications for expansion of capacity were submitted on 8 December 2006 and 16 September 2015 for which ECs were granted on 16 April 2008 and 31 January 2017, respectively. Nirayu Private Limited (API – II), initially applied for an EC on 20 July 2001 and the EC was granted on 14 May 2003. The application for the grant of an EC for an extended capacity was submitted on 28 March 2016 and the EC was granted on 20 December 2016. In the case of United Phosphorous Limited, the initial EC was sought on 21 August 2002 and it was granted on 17 July 2003. An application for expansion of capacity was submitted on 20 October 2007 and it was granted on 15 April 2008. An EC for the further expansion of capacity was granted on 10 January 2020. In the case of Unique Chemicals Limited, the initial application for an EC was submitted on 30 June 2001 and it was granted on 23 December 2002. Subsequent applications for expansion in capacity were submitted on 12 January 2007 and 16 March 2018

for which ECs were granted on 8 August 2017 and 30 June 2018, respectively. An amendment to the EC dated 30 June 2018 was granted on 10 April 2019. The documents disclosed by the three industries demonstrate that no ECs as mandated by the EIA notification of 1994 were sought before the commencement or expansion of operations. The terms of the EIA notification of 1994 envisage that expansion or modernisation of any activity (if the pollution load is to exceed the existing one) or a new project listed in Schedule – I shall not be undertaken unless it has been granted an EC. In the present case, all the three industries continued to operate in the teeth of the EIA notification 1994.

26. Learned counsel appearing for the three industries have relied on a range of additional measures adopted, such as the installation of latest pollution capturing technologies, recent consents from GPCB and certification of "zero discharge" units. These measures adopted subsequently will not cure the failure to obtain ECs before the projects commenced operation. These measures are simply to ensure compliance with the pollution standards and requirements of law that exist as of date. These submissions have no bearing on determining whether the industrial units were in the past operating in compliance with the requisite environmental standards. These measures cannot act as correctives for historical wrongs and cannot compensate for the damage already caused to the environment as a result of manufacturing activities which were carried on without ECs.

27. Learned counsel for the three industries urged that the EIA notification of 1994 did not apply to their manufacturing units as they were covered by the exemption in terms of Clause 8 of the explanatory note. The issue which needs to be considered is whether the industries were covered by the exemption and were

not required to obtain ECs. Clause 8 to the explanatory note to the EIA notification of 1994 states thus:

> "8. Exemption for projects already initiated
>
> For projects listed in Schedule – I to the notification in respect of which the required land has been acquired and all relevant clearances of the State Government including NOC from the respective State Pollution Control Board have been obtained before 27th January 1994, a project proponent will not be required to seek environmental clearance from the IAA. However, those units who have not as yet commenced production will inform the IAA"

28. Before the exemption contained in Clause 8 applies, it was necessary for projects listed in Schedule - I to obtain all relevant clearances from the State government including an NOC from the State Pollution Control Board. It was in other words not sufficient to merely obtain an NOC from the State Pollution Control Board. The exemption which was carved out in the explanatory note was to ensure that activities which had received all required clearances at the state level, following the acquisition of land should be protected. In fact, many of them would also involve the commencement of production prior to 27 January 1994. The explanatory note stated that where production had not yet commenced, the IAA would have to be intimated. In order to be covered within the scope of the exemption, the burden is on the industry to demonstrate before this Court that they fulfilled conditions spelt out in Clause 8 of the explanatory note. The EIA notification 1994 is a significant instrument in effectuating the implementation of the precautionary principle. The burden lies on the project proponent who seeks to alter the state of the environment or to impact on the environment to demonstrate that the terms on which an exemption has been granted have been fulfilled. An exemption must be construed in its strict sense according to its plain

terms. None of the three industries before the Court have furnished an exhaustive catalogue of what were the “relevant clearances from the State government” that had to be obtained under the provisions of the law as it then stood.

29. With this background, we will now assess individually whether the industries in question qualified for the exemption provided by Clause 8 to the explanatory note.

30. **Alembic Pharmaceuticals Limited**

(i) Darshak Private Limited (API - I)

The material produced on the record indicates that on 17 July 1992, GPCB had issued an NOC to establish an industrial unit and manufacture two pharmaceuticals products. However, the NOC for manufacturing additional items was issued only on 11 June 1997 subsequent to the EIA notification dated 27 January 1994. The NOC dated 17 July 1992 issued by GPCB clearly states:

> “We would like to inform you that the proposed location for this industrial plant is acceptable to us **provided that you will implement the following measure for the prevention and control of environmental pollution**:-
>
> (A)
>
> (B)
>
> (C)
>
> (D) Adequate arrangement for the management and handling of hazardous waste shall be made:
>
> **IMPORTANT NOTE**
>
> (1)
>
> (2)

> (3) The applicant/entrepreneur **shall be required to obtain the following from the Board prior to commencement of production**:
>
> (a) Consent under the Water (Prevention and Control of Pollution) Act 1974.
>
> (b) Consent under the Air (Prevention and Control of Pollution) Act 1981.
>
> (c) Authorisation under the Hazardous Waste (Management and Handling) Rules 1989 under the Environment (Protection) Act 1986."
>
> (Emphasis supplied)

GPCB while granting the NOC to establish an industrial unit required the project proponent to undertake certain measures for the prevention and control of environmental pollution including installation of treatment plants, discharge of effluents within prescribed limits and the creation of a green belt around the industrial unit. One of the points under the "Important Note" states that the project proponent "shall be required to obtain" from the board "prior to commencement of production" requisite consents and authorisations under the Air Act, Water Act and Hazardous Waste Rules. The language used in the NOC makes it clear that obtaining consents and authorisations under various environment related legislations was a mandatory pre-condition and not merely directory. In the present case, the authorisation under the Air Act was issued only on 29 May 1997 and 31 March 1999. The authorisation under the Water Act was issued on 11 October 1999. Clause 8 of the explanatory note states that for the exemption to apply, it was necessary for projects listed in Schedule - I to have obtained all relevant clearances from the State government including an NOC from the State Pollution Control Board. The evidence produced on the record by Darshak Private Limited indicates that it did not have the requisite consents and

authorisations under the Air Act, Water Act and Hazardous Waste Rules prior to the EIA notification 1994. Many of the consents and permissions were obtained subsequently and not prior to the EIA notification of 1994. Accordingly, the manufacturing unit of Darshak Private Limited (API – I) is not covered under the exemption under Clause 8 to the explanatory note of the EIA notification of 1994.

(ii) Nirayu Private Limited (API – II)

A factory license was issued on 12 July 1984 to API – II. On 24 May 1985, GPCB issued a water consent order under the Water Act. This was valid only for the manufacture of anaesthetic Ether. GPCB issued a site clearance certificate on 9 October 1991 for the manufacture of CIMC Chloride and Cloxacillin Sodium. An NOC to establish an industrial unit and to manufacture products was issued on 12 May 1993 and one for expansion on 4 December 1995. It is relevant to note that the NOC dated 12 May 1993 issued by GPCB to Nirayu Private Limited (API – II) is worded in exactly the same manner as the NOC dated 17 July 1992 issued to Darshak Private Limited (API – I). The NOC dated 12 May 1993 issued to Nirayu Private Limited (API – II) also mandates that the project proponent “shall be required to obtain” from the board “prior to commencement of production” requisite consents and authorisations under the Air Act, Water Act and Hazardous Waste Rules from GPCB. In the case of Nirayu Private Limited (API – II), authorisation under the Hazardous Waste Rules was issued on 1 September 1993. Consent to operate API – II under the Water Act was issued on

12 November 1999. GPCB issued consolidate consent and authorisation to operate API – II on 14 December 2010. From the above narration which is based on the disclosures made by Nirayu Private Limited, it is evident that all consents and permissions had not been obtained prior to the EIA notification of 1994. Accordingly, the manufacturing unit of Nirayu Private Limited (API – II) is not covered under the exemption under Clause 8 to the explanatory note of the EIA notification of 1994.

31. **United Phosphorous Limited**

On 31 January 1992, Gujarat Industrial Development Corporation granted land to the appellant to establish and run its unit. On 9 March 1992 and 3 October 1992, GPCB issued an NOC for the operation of the unit. The unit commenced manufacturing in 1993. It is relevant to note that the NOC dated 3 October 1993 also mandates that the project proponent “shall be required to obtain” from the GPCB “prior to commencement of production” requisite consents and authorisations under the Air Act, Water Act and Hazardous Waste Rules. United Phosphorous Limited has not disclosed the dates on which it received authorisations under the relevant environmental legislation. It has placed on record a consolidated consent and authorisation that was issued much later on 27 August 2009 under the Air Act, Water Act and Hazardous Waste (Management, Handling and Trans boundary Movement) Rules 2008. The disclosures which have been made are patently incomplete. No material has been produced to indicate that all relevant clearances from the State government

including the NOC from GPCB had been obtained prior to the EIA notification 1994. Accordingly, they cannot be granted the benefit of the exemption under Clause 8 to the explanatory note of the EIA notification of 1994.

32. **Unique Chemicals Limited**

The material produced on the record indicates that GPCB issued an NOC to establish and run the manufacturing unit on 14 August 1995. It is evident from the table enlisting the list of relevant permissions, consents and authorisations that all permissions were received after the EIA notification 1994 was issued. Clearly, Unique Chemicals Limited is not entitled to the benefit of the exemption contained in Clause 8 of the explanatory note to the EIA notification 1994.

33. From the material placed on the record by the industries, it becomes evident that there has been a gross abdication of responsibility by all the three industries in terms of obtaining timely consents and authorisations from the GPCB. There exists a distinction between obtaining relevant clearances and consents from the State Pollution Control Board and obtaining an environmental clearance in accordance with the procedure laid down under the EIA notification of 1994. A consent order issued by the State Pollution Control Board allows an industry to operate within the prescribed emission norms. However, the consent orders do not account for the social cost and impact of undertaking an industrial activity on the environment and its surroundings. A holistic analysis of the environmental impact of an industrial activity is only accounted for once all the steps listed out in EIA notification of 1994 are followed. The purpose of setting in place specific requirements such as public hearing, screening, scoping and

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

34. We have therefore come to the conclusion that none of the three industries were entitled to the benefit of the exemption contained in Clause 8 of the explanatory note to the EIA notification of 1994.

35. The issue which must now concern the Court is the consequence which will emanate from the failure of the three industries to obtain their ECs until 14 May 2003 in the case of Alembic Pharmaceuticals Limited, 17 July 2003 in the case of United Phosphorous Limited, and 23 December 2002 in the case of Unique Chemicals Limited. The functioning of the factories of all three industries without a valid EC would have had an adverse impact on the environment, ecology and biodiversity in the area where they are located. The Comprehensive Environmental Pollution Index[24] report issued by the Central Pollution Control Board for 2009-2010 describes the environmental quality at 88 locations across the country. Ankleshwar in the State of Gujarat, where the three industries are located showed critical levels of pollution[25]. In the Interim Assessment of CEPI for 2011, the report indicates similar critical figures[26] of pollution in the Ankleshwar

24 "CEPI"
25 CEPI score - 88.50
26 CEPI score - 85.75

area. The CEPI scores for 2013[27] and 2018[28] were also significantly high. This is an indication that industrial units have been operating in an unregulated manner and in defiance of the law. Some of the environmental damage caused by the operation of the industrial units would be irreversible. However, to the extent possible some of the damage can be corrected by undertaking measures to protect and conserve the environment.

36. Even though it is not possible to individually determine the exact extent of the damage caused to the environment by the three industries, several circumstances must weigh with the Court in determining the appropriate measure of restitution. First, it is not in dispute that all the three industries did obtain ECs, though this was several years after the EIA notification of 1994 and the commencement of production. Second, subsequent to the grant of the ECs, the manufacturing units of all the three industries have also obtained ECs for an expansion of capacity from time to time. Third, the MoEF had issued a circular on 5 November 1998 permitting applications for ECs to be filed by 31 March 1999, which was extended subsequently to 30 June 2001. On 14 May 2002, the deadline was extended until 31 March 2003 subject to a deposit commensurate to the investment made. The circulars issued by the MoEF extending time for obtaining ECs came to the notice of this Court in **Goa Foundation (I)** v **Union of India**[29]. Fourth, though in the context of the facts of the case, this Court in **Lafarge Umiam Mining Private Limited** v **Union of India**[30] ("**Lafarge**") has upheld the decision to grant *ex post facto* clearances with respect to limestone

27 CEPI score - 80.93
28 CEPI score - 80.21
29 (2005) 11 SCC 559
30 (2011) 7 SCC 338

mining projects in the State of Meghalaya. In **Lafarge**, the Court dealt with the question of whether *ex post facto* clearances stood vitiated by alleged suppression of the nature of the land by the project proponent and whether there was non-application of mind by the MoEF while granting the clearances. While upholding the *ex post facto* clearances, the Court held that the native tribals were involved in the decision-making process and that the MoEF had adopted a due diligence approach in reassuring itself through reports regarding the environmental impact of the project. Chief Justice SH Kapadia speaking for the three judge Bench observed:

> "119. **The time has come for us to apply the constitutional "doctrine of proportionality" to the matters concerning environment as a part of the process of judicial review in contradistinction to merit review. It cannot be gainsaid that utilization of the environment and its natural resources has to be in a way that is consistent with principles of sustainable development and intergenerational equity, but balancing of these equities may entail policy choices.** In the circumstances, barring exceptions, decisions relating to utilization of natural resources have to be tested on the anvil of the well-recognized principles of judicial review. Have all the relevant factors been taken into account? Have any extraneous factors influenced the decision? Is the decision strictly in accordance with the legislative policy underlying the law (if any) that governs the field? Is the decision consistent with the principles of sustainable development in the sense that has the decision-maker taken into account the said principle and, on the basis of relevant considerations, arrived at a balanced decision? Thus, the Court should review the decision-making process to ensure that the decision of MoEF is fair and fully informed, based on the correct principles, and free from any bias or restraint. Once this is ensured, then the doctrine of "margin of appreciation" in favour of the decision-maker would come into play."
>
> (Emphasis supplied)

37. After adverting to the decision in **Lafarge**, another Bench of three learned judges of this Court in **Electrotherm (India) Limited** v **Patel Vipulkumar Ramjibhai**[31], dealt with the issue of whether an EC granted for expansion to the appellant without holding a public hearing was valid in law. Justice Uday Umesh Lalit speaking for the Bench held thus:

> "19…the decision-making process in doing away with or in granting exemption from public consultation/public hearing, was not based on correct principles and as such the decision was invalid and improper."

The Court while deciding the consequence of granting an EC without public hearing did not direct closure of the appellant's unit and instead held thus:

> "20. At the same time, we cannot lose sight of the fact that in pursuance of environmental clearance dated 27-1-2010, the expansion of the project has been undertaken and as reported by CPCB in its affidavit filed on 7-7-2014, most of the recommendations made by CPCB are complied with. In our considered view, the interest of justice would be subserved if that part of the decision exempting public consultation/public hearing is set aside and the matter is relegated back to the authorities concerned to effectuate public consultation/public hearing. **However, since the expansion has been undertaken and the industry has been functioning, we do not deem it appropriate to order closure of the entire plant as directed by the High Court.** If the public consultation/public hearing results in a negative mandate against the expansion of the project, the authorities would do well to direct and ensure scaling down of the activities to the level that was permitted by environmental clearance dated 20-2-2008. If public consultation/public hearing reflects in favour of the expansion of the project, environmental clearance dated 27-1-2010 would hold good and be fully operative. **In other words, at this length of time when the expansion has already been undertaken, in the peculiar facts of this case and in order to meet ends of justice, we deem it appropriate to change the nature of requirement of public consultation/public hearing from pre-decisional to post-decisional. The public**

31 (2016) 9 SCC 300

consultation/public hearing shall be organised by the authorities concerned in three months from today."

(Emphasis supplied)

38. Guided by the precepts that emerge from the above decisions, this Court has taken note of the fact that though the three industries operated without an EC for several years after the EIA notification of 1994, each of them had subsequently received ECs including amended ECs for expansion of existing capacities. These ECs have been operational since 14 May 2003 (in the case of Alembic Pharmaceuticals Limited), 17 July 2003 (in the case of United Phosphorous Limited), and 23 December 2002 (in the case of Unique Chemicals Limited). In addition, all the three units have made infrastructural investments and employed significant numbers of workers in their industrial units.

39. In this backdrop, this Court must take a balanced approach which holds the industries to account for having operated without environmental clearances in the past without ordering a closure of operations. The directions of the NGT for the revocation of the ECs and for closure of the units do not accord with the principle of proportionality. At the same time, the Court cannot be oblivious to the environmental degradation caused by all three industries units that operated without valid ECs. The three industries have evaded the legally binding regime of obtaining ECs. They cannot escape the liability incurred on account of such non-compliance. Penalties must be imposed for the disobedience with a binding legal regime. The breach by the industries cannot be left unattended by legal consequences. The amount should be used for the purpose of restitution and restoration of the environment. Instead and in place of the directions issued by

the NGT, we are of the view that it would be in the interests of justice to direct the three industries to deposit compensation quantified at ₹ 10 crores each. The amount shall be deposited with GPCB and it shall be duly utilised for restoration and remedial measures to improve the quality of the environment in the industrial area in which the industries operate. Though we have come to the conclusion, for the reasons indicated, that the direction for the revocation of the ECs and the closure of the industries was not warranted, we have issued the order for payment of compensation as a facet of preserving the environment in accordance with the precautionary principle. These directions are issued under Article 142 of the Constitution. Alembic Pharmaceuticals Limited, United Phosphorous Limited and Unique Chemicals Limited shall deposit the amount of compensation with GPCB within a period of four months from the date of receipt of the certified copy of this judgment. This deposit shall be in addition to the amount directed by the NGT. Subject to the deposit of the aforesaid amount and for the reasons indicated, we allow the appeals and set aside the impugned judgment of the NGT dated 8 January 2016 in so far as it directed the revocation of the ECs and closure of the industries as well as the order in review dated 17 May 2016.

Pending application(s), if any, shall stand disposed of.

……J.
[Dr Dhananjaya Y Chandrachud]

……J.
[Ajay Rastogi]

New Delhi;
April 01, 2020.