

SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (Civil) No(s).14698/2010

(From the judgement and order dated 26/04/2010 in SCA No.3477/2009 of The HIGH COURT OF GUJARAT AT AHMEDABAD)

KHIMJIBHAI LAKHABAI BARAIYA

Petitioner(s)

VERSUS

UNION OF INDIA & ORS.

Respondent(s)

(With appln(s) for permission to file additional documents, prayer for interim relief and office report)

With S.L.P. (C) No.15016 of 2010 (With appln(s) for permission to file additional documents, prayer for interim relief and office report)

S.L.P. (C) No.32414 of 2010
(With prayer for interim relief and office report)

S.L.P. (C) No.32615 of 2010
(With prayer for interim relief and office report)
[For Directions]

Date: 09/09/2011 These Petitions were called on for hearing today.

CORAM :

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE K.S. RADHAKRISHNAN
HON'BLE MR. JUSTICE SWATANTER KUMAR

For Petitioner(s)	Mr. Harish N. Salve, Sr. Adv.
In SLP 14698/2010	Mr. Anand Yagnik, Adv.
and SLP 32414/2010:	Mr. Sanjay R. Hegde, Adv.
	Mr. Nitin, Adv.
	Mr. Anil Kumar Mishra-I, Adv.

In SLP 15016/2010	Ms. Kamini Jaiswal, Adv.
and SLP 32615/2010:	Mr. Divyesh Pratap Singh, Adv.

For Respondent(s)	Mr. Nikhil Goel, Adv.
	Ms. Sheela Goel, Adv.

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Ms. Hemantika Wahi,Adv.
Ms. Ashwini Kunur,Adv.
Ms. Suveni Banerjee,Adv.

Mr. Gourab Banerjee,ASG.
Ms. Padmalakshmi Nigam,Adv.
Mr. Anand Verma,Adv.
Mr. Haris Beeran,Adv.
Mr. S.N. Terdal,Adv.

Mr. T.R. Andhyarujina,Sr.Adv.
Mr. Ramesh Singh,Adv.
Mr. Nikhil Goel,Adv.
Ms. Naveen Goel,Adv.
Mr. Marsook Bafaki,Adv.
Ms. Sheela Goel,Adv.
Mr. A. Venayagam Balan,Adv.

UPON hearing counsel the Court made the following

O R D E R

On 18th March, 2011, this Court passed the following Order:

"Learned Solicitor General, with his usual fairness, stated that he would like to re-visit the environment clearance in respect of the project undertaken by Respondent No.4, particularly, in view of the conflicting stand taken in the affidavits from time to time.

After hearing learned senior counsel on both sides, we are of the view that Expert Appraisal Committee of the Ministry of Environment and Forest will call for the Report of an Expert Body consisting of five independent reputed Scientists who will visit the site and answer the following issues:

- (a) Whether the lands in question were wet lands/water bodies;
- (b) Whether the project could come up on such wet lands/water bodies and if so, what would be its impact on environment? Would it lead to environmental degradation?
- (c) If at all the project could come up, what steps the user agency should take in the interest of environment protection; and
- (d) The precise current status of the project may also be indicated by the Expert body.

The Expert body will give hearing to Respondent No.4-user agency as well as to all objectors and shall submit its Report. This exercise will be completed by the Expert body within six weeks. The Report will be then submitted to the Ministry of Environment and Forest which will then take its decision within two weeks. We make it clear that we express no opinion on the merits of the case and all contentions on the merits of the case are kept open. We may clarify that the Expert

body will give its Report and Ministry of Environment and Forest will also take its decision uninfluenced by any observations made in the pending proceedings.

Mr. Dave, learned senior counsel appearing for the user agency fairly states that, on 7th April, 2011, they will move the High Court and withdraw the pending writ petition in view of this Order.

Place these petitions on 10th May, 2011." The Project Proponent ('Nirma Ltd." for short) proposed to set up a cement plant at Village

Padhiyarka, Taluka Mahuva, District Bhavnagar, Gujarat. On 8th December, 2008 environmental clearance was granted. This was on the basis that the land on which the cement plant was to be constructed is waste land. It is on that basis the clearance stood granted. The narrow issue which arises for determination in these special leave petitions is whether environment clearance has been obtained by suppressing the material fact. It is the case of the petitioners that there existed water bodies, which fact has been suppressed by the Project Proponent who obtained environmental clearance by misleading the Competent Authorities. That, the Project Proponent knew that there existed water bodies which they suppressed, consequently, the environment clearance dated 8th December, 2008 stood granted on the basis that the impugned Project is located on waste land. Therefore, the petitioners have prayed that the environmental clearance dated 8th December, 2008 should be revoked by MoEF. Thus, the narrow issue before MoEF is whether its decision dated 8th December, 2008 should be recalled as it is based on the footing that the cement plant would be constructed on the waste land. On 5th May, 2011 the Expert Appraisal Committee ("EAC") submitted its Report. The said Report refers to findings and conclusions given by eminent scientists headed by Professor C.R. Babu. These findings indicate that the site/land allotted to Nirma Ltd. lies within the Bandhara (a freshwater reservoir). However, before EAC the Gujarat Government vehemently argued that the status of the land was a "waste land". The copy of the EAC has now been given to Nirma Ltd. The EAC in its Report dated 5th May, 2011 has concurred with the view expressed by the eminent scientists saying that the site has been appropriately reclassified as water bodies. Accordingly, a show cause notice was issued by MoEF on 11th May, 2011 to Nirma Ltd. Therefore, MoEF has now to decide whether clearance dated 8th December, 2008 should or should not be revoked?

On 25th August, 2011, however, surprisingly MoEF calls upon Nirma Ltd. in the course of the hearing to undertake a study on flora and fauna in the area of the site and to ascertain whether the project area is a wet land or a water body. There are two aspects on which we would like to comment. In our order dated 18th March, 2011, quoted above, a specific question was framed by this Court and referred to the Expert Body of Scientists, namely, whether the site allotted to Nirma Ltd. to locate its Project lay on the water bodies?

As stated above, this question was specifically raised because in the special leave petitions it is the case of the petitioners that the clearance dated 8th December, 2008 is based on misrepresentation. That, though there existed water bodies, the clearance was on the basis that there existed waste land. Despite the issue being a narrow issue, we fail to understand as to why MoEF has decided to go into the question of flora and fauna vide its letter dated 25th August, 2011. If MoEF comes to the conclusion that the site allotted to Nirma Ltd. consisted of water bodies and not waste lands then the environment clearance dated 8th December, 2008 cannot survive. It has to be revoked. In such an eventuality, the question of examining whether project area is a wet land or a water body does not arise. What MoEF has to decide is whether there existed a waste land, as represented by the Project Proponent while obtaining environmental clearance on 8th December, 2008. The second aspect which this Court

wants to mention is that vide letter dated 25th August, 2011, MoEF calls upon Nirma Ltd. To undertake a three-month study on flora and fauna. By the said letter, the MoEF agrees to the request made by Nirma Ltd. to submit its report on flora and fauna in the area on the basis that the information is not fully available and to ascertain whether the project area is a wet land or a water body. In our view, the issue which arises for determination is whether the clearance dated 8th December, 2008 was on the footing that the site allotted to Nirma Ltd. was a waste land and not as to whether the project area is a wet land or a water body. We accordingly direct Nirma Ltd. To give its objections/reply to the Report dated 5th May, 2011 of EAC as also to the show cause notice dated 11th May, 2011. On receipt of the objections/reply the MoEF will take its decision on the revocation of the clearance dated 8th December, 2008. The entire exercise should be completed within three months from today. Matter to be placed before this Court on 9th December, 2011 for direction.

Before concluding, we seek to invite the attention of the MoEF to our judgment in the case Of Lafarge Umiam Mining Private Limited reported in 2011 (7) SCC 338. In the said judgment, we have directed MoEF specifically to frame questions in appropriate cases wherever MoEF so deems fit and refer those questions to the Experts (Institutions) from its panel. In the past, MoEF has been obtaining such reports from Institutions (Experts nominated by the Project Proponents). Even questions were framed by the Project Proponents who managed to get answers accordingly. This approach has been criticised in our judgment in the case of Lafarge (supra). We are informed by the learned Additional Solicitor General that MoEF has set up a Panel of Experts following our judgment in Lafarge.

We are surprised that despite our judgment in Lafarge, MoEF, in the present case, has directed Nirma Ltd. to undertake its own study on flora and fauna. This is clearly contrary to our directions in Lafarge. According to the letter dated 25th August, 2011 such a direction has been issued with the approval of the Competent Authority. In our view, asking the Project Proponent to undertake a study on its own is clear violation of our judgment in Lafarge. In the circumstances, we direct the Competent Authority to submit its affidavit as to why the judgment of this Court in Lafarge is not being followed by MoEF.

A copy of this order is directed to be sent by the Supreme Court Registry to the Hon'ble Minister for Environment and Forests for information and doing the needful.

[T.I. Rajput]
A.R.-cum-P.S.

[Madhu Saxena]
Assistant Registrar

