(2014) 09 DEL CK 0137

Delhi High Court

Case No: LPA No. 547/2014

The Haryana State Environmental Impact Assessment Authority	APPELLANT
Vs	
Maruti Suzuki India Ltd.	RESPONDENT

Date of Decision: Sept. 22, 2014

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 141, 96(3)
- Constitution of India, 1950 - Article 226
- Environment (Protection) Act, 1986 - Section 15, 16, 19, 24(2)

Hon'ble Judges: G. Rohini, C.J; Rajiv Sahai Endlaw, J

Bench: Division Bench

Advocate: Anubha Agarwal, Advocate for the Appellant; Arvind Nigam, Sr. Adv., Ruchi Agnihotri, Nikhil Rohatgi and Shanta Chirravuri, Advocate for the Respondent

Final Decision: Dismissed

Judgement

Rajiv Sahai Endlaw, J.

This intra-court appeal impugns the order dated 26th May, 2014 of the learned Single Judge of this Court in W.P. (C) No. 2066/2014 filed by the respondent no. 1/writ petitioner Maruti Suzuki India Ltd.

2. The respondent no. 1/writ petitioner, being on caveat, also appeared and considering the nature of the controversy, need was not felt to issue notice to the respondent no. 2, the Ministry of Environment & Forests, Government of India and we finally heard the counsel for the appellants and the senior counsel for the respondent no. 1 at the stage of admission.

3. The respondent no. 1 filed the writ petition from which this appeal arises, pleading:

(a) that the respondent no. 1 was carrying on activity of manufacturing of automobiles at its factory at Gurgaon & Manesar and has a Research and Development Facility and test track at Rohtak, Haryana, within the jurisdiction of the appellant no. 1 the Haryana State Environmental Impact Assessment Authority;

(b) that the respondent no. 1 had made numerous representations to the respondent no. 2, seeking clarification on the applicability of the Environment Impact Assessment (EIA) Notification dated 14th September, 2006 issued by the respondent no. 2, but to no avail;

(c) that the need for seeking such clarification arose because the appellant no. 1 had been taking a stand that prior environmental clearance was necessary even for projects and activities not enumerated in the Schedule to the EIA Notification dated 14th September, 2006, relying on a circular titled "Environment Clearance to Special Economic Zone (SEZ) Projects-Reg." dated 21st October, 2009 providing that all activities and projects, whether or not listed or specified in the Schedule to the EIA Notification dated 14th September, 2006, if having built up area in excess of 20000 sq. mtrs. would require prior environmental clearance;

(d) that the respondent no. 1 however, being of the opinion that since its activities were not mentioned in the Schedule to the EIA Notification dated 14th September, 2006, no prior environmental clearance was required, had not taken the said clearance; and,

(e) that the appellant no. 1 was however taking adverse view of the respondent no. 1 having not taken the prior environment clearance.

Accordingly, in the writ petition, the reliefs of, i) direction to the respondent no. 2 to act on the representations of the respondent no. 1, and ii) inter alia direction to the appellant no. 1 not to proceed against the respondent no. 1 for having not obtained the prior environmental clearance, were claimed.

4. Notice of the writ petition was issued and a reply was filed by the appellant no. 1.

5. The writ petition was disposed of vide judgment dated 26th May, 2014, recording the contentions.

(i) of the respondent no. 1

(a) that in accordance with the EIA Notification dated 14th September, 2006 only those projects and activities clearly and specifically listed in the Schedule to the said Notification require prior environment clearance and projects and activities not listed in the Schedule were exempt from the regulatory ambit of the said Notification;

(b) that though the activity of the respondent no. 1 was specifically included in the draft EIA Notification dated 15th September, 2005 but was omitted from the Schedule to the Notification ultimately issued on 14th September, 2006; that this

omission clearly showed that the respondent no. 1''s activity was not covered by the EIA Notification dated 14th September, 2006;

(c) that notwithstanding so, since the appellant no. 1 was of the view that the projects of the respondent no. 1 require environmental clearance, the respondent no. 1, without prejudice to its rights and contentions, had sought such environmental clearance;

(d) that the appellant no. 1 was however seeking to prosecute the respondent no. 1 under Sections 15 and 19 of the Environment (Protection) Act, 1986 for failure to obtain prior environmental clearance;

(ii) of the respondent no. 2 that the respondent no. 2 had vide Circular dated 21st October, 2009 (supra) clarified that in case the built up area of the project or activity was in excess of 20000 sq. mtrs., then irrespective of the nature of the project or activity, the project or activity would require environmental clearance under Items 8(a) and 8(b) of the Schedule to the EIA Notification dated 14th September, 2006 i.e. under the heading "Building and Construction Projects" and "Township and Area Development Projects";

(iii) of the Additional Advocate General of the State of Haryana on behalf of the appellant no. 1 herein that though the appellant no. 1 had in its reply to the writ petition raised preliminary objection to the maintainability of the writ petition, yet it supported an amicable resolution of the dispute and that if the legality and validity of the EIA Notification dated 14th September, 2006 was upheld and the respondent no. 1 and its Directors undertook to obtain ex post facto environmental clearance and complied with the terms and conditions stipulated for the environmental clearance and undertook to obtain environmental clearance for all their future projects in Haryana, the appellant no. 1 would consider not initiating any criminal action against the respondent no. 1 or its Board Members/officials for not procuring prior environmental clearance with regard to the projects being executed by the respondent no. 1 in the State of Haryana;

(iv) of the respondent no. 1 in rejoinder that the Circular dated 21st October, 2009 (supra) pertained to SEZ and did not in any way support the view that all projects and activities having built up area in excess of 20000 sq. mtrs., irrespective of the nature of the project or activity, would require prior environmental clearance.

6. On the basis of the aforesaid contentions, the learned Single Judge found/held/directed:-

(A) that the EIA Notification dated 14th September, 2006 applies to all projects in excess of 20000 sq. mtrs., irrespective of the nature of the project or activity; omission of some words/expressions, which are superfluous, from the draft EIA Notification would not assist the respondent no. 1; moreover deletion of words/expressions from the draft Notification is not equivalent to deletion of

words/expressions from an existing Statute/Notification; similarly internal notings of the Government officials cannot be a guide to interpretation when the Notification is otherwise free from ambiguity;

(B) that the respondent no. 1 could not be said to have acted with mala fide intent in not applying for prior environmental clearance as, firstly, there was no authoritative judgment on the said issue and secondly, upon the respondent no. 1 being asked to seek environmental clearance, it, without prejudice to its rights and contentions immediately, even before filing the writ petition, applied therefor;

(C) however the undertaking of the respondent no. 1 to obtain ex post facto environmental clearance and to comply with all the terms and conditions stipulated therein was accepted and the respondent no. 1 and its Board of Directors were ordered to be bound by the same;

(D) accordingly, the appellant no. 1 was directed to consider the respondent no. 1''s application for grant of ex post facto environmental clearance for its projects in Haryana;

(E) that the appellant no. 1 in its meeting held on 2nd July, 2010 under similar facts and circumstances had taken a decision not to recommend prosecution;

(F) consequently, the appellant no. 1 was directed not to initiate any criminal action against the respondent no. 1 and/or its Board Members/officials; and,

(G) it was clarified that the order having been passed in the peculiar facts and circumstances of the case, shall not be considered as a precedent.

7. As the aforesaid would show, the order impugned in this appeal is in the nature of a consent order. However this appeal along with an application for condonation of 55 days delay in filing thereof has been filed.

8. The only grievance agitated by the counsel for the appellants before us is with respect to the part of the order of the learned Single Judge directing the appellant no. 1 not to initiate criminal action against the respondent no. 1 and/or its Board Members/officials.

9. Upon our pointing out to the counsel for the appellants that the said direction of the learned Single Judge is based on the consent of the appellants, the counsel for the appellants states that the said consent given by the advocate appearing for the appellants before the learned Single Judge, was without instructions and is contrary to the Statute i.e. Section 15 of the Environment (Protection) Act which mandates criminal action and does not vest any discretion. Reliance in this regard is placed on Union of India (UOI) and Others Vs. Mohanlal Likumal Punjabi and Others, . It is further argued that the case considered by the appellant no. 1 in its meeting on 2nd July, 2010 and with respect whereto decision not to launch criminal action was taken, was on entirely different facts. It is yet further argued that in fact this Court

did not even have territorial jurisdiction to entertain the present petition and that against the order impugned in this writ petition, appeal lies to the National Green Tribunal (NGT) and the writ petition was thus in any case not maintainable before this Court, notwithstanding the consent of the advocate of the appellants. Reliance in this regard is placed on Kusum Ingots and Alloys Ltd. Vs. Union of India (UOI) and Another, . It is yet further argued that the writ petition was also not maintainable because the remedy of appeal before the NGT was available.

10. The senior counsel for the respondent no. 1 has contended, i) that the order impugned in this appeal is a consent/agreed order; ii) that the writ petition was filed bona fide, seeking clarification from the respondent no. 2 which is situated at Delhi; iii) that though in the Schedule to the draft Notification dated 15th September, 2005 project or activity of automobile manufacturing was mentioned but in the final Notification dated 14th September, 2006, the project or activity of automobile manufacturing units was deleted and which led the respondent no. 1 to believe that it was not required to obtain prior environmental clearance; iv) that though an amendment to the Notification dated 14th September, 2006 was carried out on 1st December, 2009, amending the activity listed in Item Nos. 8(a) and 8(b) of the Schedule to the Notification dated 14th September, 2006 but only by adding a note thereto and the respondent no. 1 again bona fide believed that the said note providing that projects/building in excess of 20000 sq. mtrs. would be covered would relate to projects or constructions relating to the activity at Item Nos. 8(a) and 8(b) of the Schedule to the Notification dated 14th September, 2006 only and which did not include the activity of the respondent no. 1 writ petitioner; v) that there was thus no certainty in this respect and no mala fides can be attributed to the respondent no. 1 for not obtaining the prior environmental clearance; and, vi) that the contention of the appellant that the writ petition was not maintainable as an appeal lies to the NGT is incorrect; the NGT (Western Zone) Bench in its order dated 26th September, 2013 in appeal No. 72/2013 titled Virani Construction Company Vs. The State Level Environmental Impact Assessment Committee (SEAC), Maharashtra has held such an appeal to be not maintainable.

11. As far as the contention of the counsel for the appellants, of the consent given on behalf of the appellants before the learned Single Judge being without instructions is concerned, we find the consent in the present case to have been given by the Additional Advocate General for the State of Haryana who was appearing on behalf of the appellants and who had also filed the reply to the writ petition. The senior counsel for the respondent no. 1/writ petitioner on instructions states that in fact such consent was given by the Additional Advocate General after obtaining telephonic instructions and for which purpose the matter was passed over by the learned Single Judge. In our view, a consent given by the Additional Advocate General cannot be so lightly withdrawn by the State. The appellant in this regard merely relies on a letter dated 23rd June, 2014 written by the appellant No. 1 to the Advocate General of the State of Haryana contending that the consent was

wrongfully given by the Additional Advocate General. There is nothing to indicate that such a letter was in fact delivered to the Advocate General or what action was taken thereon. The counsel for the appellant who has filed this appeal, on our enquiry informed that she is an empanelled counsel for the State of Haryana. The Supreme Court in Periyar and Pareekanni Rubbers Ltd. Vs. State of Kerala, though observing that any concession made by government pleader in the Trial Court cannot bind the Government, nevertheless held that the same yardstick cannot be applied when the Advocate General makes the statement across the Bar since the Advocate General makes the statement with all responsibility. In fact, there is no plea also in the memorandum of appeal, and no officer who may have been instructing the Additional Advocate General in the case has filed an affidavit, that there was no instruction for what was stated by the Additional Advocate General before the learned Single Judge. No steps have been taken to elicit the comments of the Additional Advocate General who would have been in a position to inform on whose instructions he had made the statement before the learned Single Judge. We are therefore unable to accept the said contention and which we are constrained to observe, has been taken in a very casual manner and not befitting to the office of Additional Advocate General.

12. The counsel for the appellant has not controverted that the order impugned in this appeal, to the extent challenged, is a consent order. The first question which thus arises is whether appeal against consent order is at all maintainable.

13. Section 96(3) of the Code of Civil Procedure, 1908 (CPC) bars an appeal from a decree passed in Court with consent of the parties. However vide Section 141 of CPC, the procedure provided therein with regard to a suit though has been prescribed to be followed as far as applicable in all proceedings in any Court of civil jurisdiction but explains that the word "proceedings" therein does not include any proceeding under Article 226 of the Constitution of India. However we find that the rule of ''no appeal against consent order'' though codified in Section 96(3) of CPC, is essentially a rule of common law, having its roots in the principle of estoppel. That being the position, we fail to see as to why the same, notwithstanding the non-applicability of CPC to writ proceedings, would not extend to writ proceedings. Of course, the same would be subject to the exceptions as admissible to a plea of estoppel i.e. of there being no estoppel against the statue and which leads to the other contention of the appellant i.e. of the statue not permitting the appellant no. 1 to waive prosecution.

14. As far as Mohanlal Likumal Punjabi (supra), relied upon by the counsel for the appellants is concerned, the concession made by the counsel in that case was on a point of interpretation of statutory provision and it was in the said context held that a wrong interpretation of a statutory provision on the basis of concession, cannot bind even the party on whose behalf concession was made and has no precedential value. However the present case is not concerned with any concession made by the

counsel on an interpretation of statutory provision. The counsel appearing for the appellant before the learned Single Judge on the contrary, though highlighting that the appellant had raised preliminary objections to the very maintainability of the writ petition, supported an amicable resolution of the dispute. The respondent no. 1, in the writ petition had inter alia challenged the interpretation being placed by the appellants on the provisions of the EIA Notification dated 14th September, 2006. The counsel for the appellants proposed before the learned Single Judge that if the respondent no. 1 did not challenge the interpretation of the appellants and undertook to obtain ex post facto environmental clearance, the appellant would not initiate criminal action. The judgment cited by the counsel for the appellants is thus not applicable.

15. Section 15 of the Environment (Protection) Act to which reference in the regard is made, or the Rules made or orders or directions issued thereunder do not mandate the State or the appellants to prosecute the violators of the said Act. All that Section 15 provides is that the said violators shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to one lakh rupees or with both; it also provides for further fine and imprisonment for continued violations. Section 16 of the Act provides that where the offence is committed by a company, every person who at the relevant time was directly in charge of and responsible to the company as well as the company shall be deemed to be guilty. The proviso thereto carves out an exception, on proof inter alia of exercise of all due diligence to prevent the commission of the offence. Section 19 of the Act titled "Cognizance of Offences" inter alia provides for the Court to take cognizance only on a complaint made by the Central Government or by any authority or officer authorised by that Government. The same also does not mandate the Central Government or its delegatee to file such complaint. Notice may also be taken of Section 24(2) of the Act which provides that where any act or omission constitutes an offence punishable thereunder and also under any other statute, then the offender shall be liable to be punished under the other statute and not under the Environment (Protection) Act. We do not find anything in the Rules framed under the Act also mandating the filing of the complaint of any offence committed under the Act.

16. We are thus unable to comprehend the argument of the counsel for the appellants that the consent earlier given on behalf of the appellant no. 1, of not prosecuting the respondent no. 1, is contrary to the statute. The counsel for the appellants has failed to elaborate on the said aspect.

17. Else, the decision to initiate a prosecution has long been regarded as a classic discretionary function; though of course such discretion has to be exercised bona fide and within well-defined parameters. The Constitution Bench of the Supreme Court also in Sheonandan Paswan Vs. State of Bihar and Others, , in relation to withdrawal of prosecution, held that the Court could interfere in the said executive

function only upon being satisfied that such withdrawal was mala fide or motivated by improper considerations. The same is again indicative of, whether, when and against whom to initiate prosecution being quintessential example of governmental discretion. Similarly in Mansukhlal Vithaldas Chauhan Vs. State of Gujarat, also, with respect to the sanction required under the Prevention of Corruption Act, 1947 for prosecution, it was held that the concerned Government has the right to consider the facts of each case and to decide whether the public servant is to be prosecuted or not. A useful discussion on the subject can also be found in the judgment of the Full Bench of the Bombay High Court in Abasaheb Yadav Honmane and Ashwini Abasaheb Honmane Vs. The State of Maharashtra, , also concerned with the power of withdrawal of prosecution and where the Full Bench speaking through Chief Justice Swatanter Kumar (as his Lordship then was) also observed that the scheme of the Code of Criminal Procedure, 1973 vests a Public Prosecutor with the power to withdraw from prosecution of all or any of the accused involved in any crime including serious crimes and of consequential acquittal of the accused without trial. Thus, we are unable to interpret Sections 15 and 19 of the Environment (Protection) Act as preventing the appellant from giving the consent from which it is now purporting to renege.

18. Rather we find the stand taken by the Additional Advocate General before the learned Single Judge to be a very fair and a correct one. It appears that the State of Haryana at that time was more interested in the Notification dated 14th September, 2006 as interpreted and enforced by it, being not challenged and the dispute being amicably settled. It is for this reason only that even though the respondent no. 1/writ petitioner without prejudice to its rights and contentions had agreed to apply for and obtain ex post facto environmental clearance, the learned Single Judge in accordance with the settlement proposed by the learned Additional Advocate General proceeded to render a judicial finding on the challenge by the respondent no. 1/writ petitioner to the interpretation of the Notification though without any detailed discussion.

19. We are also of the view that no case for allowing the appellant to withdraw the consent given before the learned Single Judge is made out, for the reason that the respondent no. 1/writ petitioner also acted on the said consent. Though the respondent no. 1/writ petitioner, even prior to filing the writ petition and without prejudice to its rights and contentions had applied for ex post facto environmental clearance but the respondent no. 1/writ petitioner in light of the consent given by the advocate for the appellants changed its position by not pressing its challenge to the interpretation by the appellants of the Notification dated 14th September, 2006. As aforesaid, though the learned Single Judge, by a judicial declaration has negated the challenge raising which the writ petition was filed but merely to comply with the condition on which the consent was given by the advocate for the appellant. There is nothing to show that the respondent no. 1/writ petitioner pressed the challenge. If the challenge had been pressed and arguments on that been made, the same would

have found mention in the order and which is quiet in that respect. The respondent no. 1/writ petitioner having changed its position and by which change the appellant has also benefited, the appellant now cannot be permitted to withdraw the same.

20. We may further add that the challenge, making which the writ petition was filed, cannot be said to be totally bogus. It is not as if the writ petition was dismissed in limine. Notice of the writ petition was issued and reply was filed by the appellant. It was only at the stage of hearing that the writ petition was disposed of in terms of the consent order.

21. It cannot also be lost sight of that the appellants even before us admit having in the meeting held on 2nd July, 2010 taken a decision not to launch prosecution against another violator of the provisions of the Environment (Protection) Act. It matters not whether the grounds for doing so were different from the facts of the present case. The said conduct of appellant no. 1 belies the argument raised before us of that the consent given by the Additional Advocate General appearing for the appellants before the learned Single Judge could not have been given being contrary to law.

22. As far as the argument urged by the counsel for the appellants of this Court not having territorial jurisdiction to entertain the writ petition and the order inter alia impugned in the writ petition being appealable before NGT, is concerned, though the appellants undoubtedly in the reply filed to the writ petition had taken the said plea but did not press the same at the time of hearing. Counsels invariably, during the hearing do not press/urge all that is pleaded. Whatever plea is not argued, is deemed to have been waived/given up. Rather the Additional Advocate General appearing on behalf of appellants before the learned Single Judge adopted a conciliatory approach and which we have herein above held, he was entitled to and which approach we have found to be apposite to the dispute. The objection to the territorial jurisdiction and to the maintainability of the writ petition was thus clearly waived/given up. Also, it was not a case of inherent lack of territorial jurisdiction of this Court. The main relief claimed in the writ petition was of mandamus to the respondent no. 2 herein situated within the territorial jurisdiction of this Court to act on the representation of the respondent no. 1/writ petitioner. Also the rule of not entertaining a petition under Article 226 when alternative remedy is available is not an absolute but discretionary one. Thus it cannot be said the learned Single Judge then did not have the jurisdiction to act on the consent of the parties and to dispose of the petition in terms thereof. We fail to see as to how Kusum Ingots and Alloys Ltd. Vs. Union of India (UOI) and Another, assists the appellants. All that has been held in the said judgment is that a writ Court may refuse to exercise the jurisdiction if issue raised in the writ petition can be adjudicated more conveniently by another High Court i.e. if the High Court which is approached feels that it is not the forum conveniens.

23. We thus do not find any merit in the appeal which is dismissed. We refrain from imposing any costs on the appellants and its officers who have filed this appeal in the hope that the appellants will not press the matter further which appears to being pursued to satisfy the ego of some officers of the appellants.