

Item No. 07

Court No. 1

**BEFORE THE NATIONAL GREEN TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Original Application No.341/2023
(I.A. No. 730/2023)

Vipin Kumar

Versus

Applicant

Uttarakhand Pollution Control Board & Ors.

Respondent(s)

Date of completion of hearing and reserving of order: 22.09.2023

Date of Pronouncement of order: 12.10.2023

**CORAM: HON'BLE MR. JUSTICE PRAKASH SHRIVASTAVA, CHAIRPERSON
HON'BLE MR. JUSTICE SUDHIR AGARWAL, JUDICIAL MEMBER
HON'BLE DR. A. SENTHIL VEL, EXPERT MEMBER
HON'BLE DR. AFROZ AHMAD, EXPERT MEMBER**

Applicant(s): Mr. Rohan Thawani & Ms. Aakriti Vikas, Adv. for Applicant

Respondent(s): Mr. Upender Thakur & Ms. Vishakha U Thakur, Advs. for MoEF & CC (R - 4)
Mr. Neeraj V. Sharma, Ms. Nidhi Agarwal & Mr. Harsh Basoya, Advs. for R - 5 & 6
Mr. Rahul Verma, AAG for the State of Uttarakhand (Through VC)
Mr. Mukesh Verma, Adv. for UKPCB (Through VC)

ORDER

1. This Original Application has been filed seeking a direction to the official respondents to shut down the operation of Respondent Nos. 5 and 6 Brick Kilns on the ground that they are operating illegally in violation of the siting criteria set out in the MoEF&CC Notification dated 22.02.2022.

2. The case of the Applicant is that Respondent No.5, Jai Mata Brick Field and Respondent No. 6, Gagan Brick Field are operating in Roorkee, Uttarakhand in violation of the conditions laid down in the Environment (Protection) Rules, 1986 as amended by notification of MoEF&CC dated 22.02.2022. The Notification G.S.R.143 (E) dated 22.02.2022 provides for a siting criteria for establishing the brick kilns.

3. The allegation of the Applicant is that Respondent No.5, Jai Mata Brick Field is located within 651.178 mtrs from the existing brick kiln i.e. Balaji Brick Field and within 228.219 mtrs of Chaudhary Bharat Singh Junior High School.

4. Further allegation is that Respondent No.6, Gagan Brick Field is located within 500.852 mtrs from Bharat Brick Field, within 555.386 mtrs of Sarkari Aam Ka Bagh, within 707.441 mtrs of Sureshi Devi Public School, within 780.165 mtrs from Nirmala Devi Inter College, within 774.548 meters from Budhpur Jatt Village and within 890.753 mtrs from Chaudhary Sukbhir Singh Adarsh Junior High School.

5. Further, case of the Application is that Consent to Operate has been granted to Respondent Nos. 5 and 6 brick kilns on 13.01.2023 and 30.01.2023 respectively which is after issuance of the notification dated 22.02.2022, hence, consent has been granted in violation of the notification. Therefore, Respondent Nos. 5 and 6 cannot be allowed to operate in violation of the notification.

6. The Tribunal by order dated 19.05.2023 had constituted an independent committee comprising of State PCB and District Magistrate, Haridwar. The State PCB was the nodal agency for coordination and compliance. There was a direction to the committee to furnish the report within two months.

7. The committee had submitted the report disclosing location of the brick kilns and further disclosing that the Consolidated Consent and Authorization (CCA) was issued by the Uttarakhand Pollution Control Board valid upto 31.03.2024 and that no siting criteria of the State Government was fixed prior to issuance of the notification dated

22.02.2022. The report further discloses that for past violations, authority has initiated action.

8. The Tribunal by order dated 18.08.2023 had formulated the following questions involved in the original application:-

“4. The question involved in this application is applicability of the siting criteria for the units which were in operation prior to the issuance of the notification. It is further for consideration as to whether this notification is effective from retrospective effect or from prospective effect and as to whether the conditions of EC are complied with by the unit.”

9. Submission of the Learned Counsel for the Applicant is that the notification dated 22.02.2022 provides for the siting criteria and that in view of the order of the Hon'ble Supreme Court passed in Civil Appeal Diary No. 18213/2021; *NCR Brick Kiln Association v. Central Pollution Control Boards & Ors.*, the said siting criteria is required to be followed. Therefore, in violation of the conditions of the notification dated 22.02.2022, Respondent Nos. 5 and 6 cannot be allowed to operate. He has further submitted that notification dated 22.02.2022 was attracted when CCA dated 13.01.2023 and 30.01.2023 was granted to Respondent Nos. 5 and 6. He submits that this issue is already covered by the earlier judgment of the Tribunal.

10. The Learned Counsel for Respondent Nos. 5 and 6 opposing the original application has submitted that Respondent Nos. 5 and 6 were established in 2020 and 2021, therefore, the subsequent notification dated 22.02.2022 will not be applicable to Respondent Nos. 5 and 6. In support of his submission, he has placed reliance upon the judgment of the Tribunal in *O.A. No. 783/2022; Ajay Kumar v. Uttarakhand Pollution Control Board & Ors.* He has also disputed that the existence of the Junior High School within the prohibited limits near Respondent No.5. Further, submission is that the notification dated 22.02.2022 is a piece

of delegated legislation, therefore, it will always be prospective in nature. It is also submitted that the Applicant is a competitor brick kiln which itself is violating the siting criteria prescribed in the notification dated 22.02.2022.

11. The Learned Counsel for Respondent No.1 has referred to the report dated 14.08.2023 submitted by the Respondent No.1 but has not advanced any argument on the questions formulated by the Tribunal.

12. We have heard the Learned Counsels for the parties and perused the records.

13. As per the stand of the Respondent No.5, it had established the brick kiln in the year 2020 and as per the stand of the Respondent No.6, it had established the brick kiln in the year 2021. In the course of the argument it has not been disputed by the Counsel for Respondent Nos. 5 and 6 that no consent to establish and consent to operate was obtained from the competent authority under Air (Prevention and Control of Pollution) Act, 1981 and Water (Prevention and Control of Pollution) Act, 1974, when brick kilns were said to be set up by Respondent Nos. 5 and 6 in the year 2020 and 2021.

14. Hence, Respondent Nos. 5 and 6 brick kilns were operating illegally till they obtained the CCA on 13.01.2023 and 30.01.2023.

15. The notification dated 22.02.2022 was issued in exercise of the powers conferred by Section 6 and 25 of the Environment (Protection) Act, 1986 by the Central Government amending the Environment (Protection) Rules, 1986. The notification provides for the siting criteria for establishing the brick kiln to the following effect:-

“6. Brick Kilns should be established at a minimum distance of 0.8 kilometer from habitation and fruit orchards, State Pollution Control

Boards/Pollution Control Committees may make siting criteria stringent considering proximity to habitation, population density, water bodies, sensitive receptors, etc.

7. Brick Kilns should be established at a minimum distance of one kilometer from an existing brick kiln to avoid clustering of kilns in an area.”

16. The issue relating to implementation of the notification came up before the Hon’ble Supreme Court in Civil Appeal Diary No. 18213/2021 in the matter of *NCR Brick Kiln Association v. Central Pollution Control Boards & Ors.*, the Hon’ble Supreme Court by the order dated 08.04.2022 had taken note of the notification dated 22.02.2022 and had directed the concerned authorities to ensure that production is carried out in terms of the said notification. The direction of the Hon’ble Supreme Court contained in the above order dated 08.04.2022 in this regard is as under:-

“(2) The Officers of both Central Pollution Control Board and the State Pollution Control Boards shall conduct surprise inspections without any notice and warning to the persons running the units from time to time to ensure that the production is being carried out in terms of the aforesaid notification.”

17. In the present case, the Respondent No.5, Jai Mata Brick Field located at Khasra No. 208, Village Harchandpur, Manglaur, Tehsil Roorkee District Haridwar have been granted Consolidated Consent and Authorization (CCA) by the Uttarakhand Pollution Control Board by order dated 13.01.2023 and the Respondent No. 6, Gagan Brick Field located at Khasra No. 138 & 139 Village Mohammadpur Jat, Pargana Narsan, Roorkee, Tehsil Roorkee District Haridwar has been granted CCA by the Uttarakhand Pollution Control Board by order dated 30.01.2023 in terms of provisions of Water (Prevention and Control of Pollution) Act, 1974, Air (Prevention and Control of Pollution) Act, 1981 and Hazardous Waste (Management, Handling and Transboundary Movement) Rules, 2016.

18. So far as the issue of fulfilling the citation criteria as prescribed by the notification dated 22.02.2022 by Respondent Nos. 5 and 6, the reports filed before the Tribunal indicate that these units do not fulfill the requisite siting criteria. The report of joint committee in pursuance to the order of the Tribunal dated 19.05.2023 clearly mentions that from Respondent No.5, Jai Mata Brick Field, Khasra No. 208, nearest brick kiln M/s. Balaji Brick Field is at the distance of 650 mtrs and Chaudhary Bharat Singh Junior High School at the distance of 228 mtrs. Similarly, Respondent No.6, Gagan Brick Field located at Khasra No. 138 & 139 is located at a distance of 500 mtrs from M/s. Bharat Brick Field, 555 mtrs from Sarkari Aam Ka Bagh, 750 mtrs from the school and village. Thus, Respondent Nos. 5 and 6 do not fulfill the siting criteria prescribed in the notification dated 22.02.2022.

19. It is undisputed before the Tribunal that Respondent Nos. 5 and 6 were operating since 2020 and 2021 without obtaining Consent to Operate (CTO) and Consent to Establish (CTE) or Consolidated Consent and Authorization (CCA). Hence, undisputedly, Respondent Nos. 5 and 6 were set up in 2020 and 2021 illegally and were also operating illegally till they had obtained the CCA vide orders dated 13.01.2023 and 30.01.2023. Therefore, these units cannot be given the benefit of their illegal operation at the stage of consideration of their application for CCA. Such an illegal operation has no recognition in law.

20. That apart, Respondent Nos. 5 and 6 had no vested right to obtain the CCA, therefore, the law which was prevailing on the date of consideration of their applications for CCA will be attracted. It is not open to the Respondent Nos. 5 and 6 to contend that the law which was prevailing on the date they had illegally set up the brick kiln should be applied for consideration of their applications whereas their applications

were considered much after coming into force of the amended environment protection rules in terms of the notification dated 22.02.2022. Hence, we do not find any merit in the argument of Counsel for Respondent Nos. 5 and 6 that notification dated 22.02.2022 is being attracted retrospectively. In fact, the notification effective on the date of consideration of their applications in 2023 will apply as that was the law prevailing on that date.

21. The records further reflect that notices have been issued by Uttarakhand Pollution Control Board dated 18.09.2023 and 19.09.2023 on the ground that Respondent Nos. 5 and 6 were earlier operating without valid CCA and proposing imposition of the environmental compensation. These notices will not have effect on the present controversy and they will not legalize the past illegal operation of the Respondent Nos. 5 and 6.

22. It is also worth noting that even in the CCA dated 13.01.2023 and 30.01.2023 issued to the Respondent Nos.5 and 6, the condition in respect of compliance of the notification dated 22.02.2022 has been clearly incorporated as under:-

“10. Unit shall ensure to comply the Notification of MoEF & Climate Change (Government of India) on dated 22.02.2022 under EP Act, 1986.”

23. Somewhat similar issues had come up before the Tribunal in the matter of *M/s. Jai Hanuman Ent Udyog v. UP Pollution Control Board & Anr. in Appeal No. 74/2014*, wherein the case of the Appellant was that the brick kiln was in existence since 2010, therefore, U.P. Brick Kilns (Siting Criteria for Establishment) Rules, 2012 will not be applicable. In that case UPPCB had granted consent on 06.09.2013, the said consent was set aside by the Appellate Authority taking the view that while

issuing the consent order dated 06.09.2013, the Board ought to have been guided by the Rules of 2012. The Tribunal by order dated 07.05.2015 passed in Appeal No. 74/2014 upholding the order of the Appellate Authority dated 06.09.2013 had held as under:-

“5. The sole contention raised before us, while challenging the correctness of the impugned order, is that the unit was established in the year 2010 after taking clearance from the Zila Parishad and since then it is in operation. The Rules of 2012 had been promulgated on 27th June, 2012, therefore, the Rules of 2012 cannot be applied to the case of the appellant and the site criteria provided under these Rules of 2012 is inconsequential to the Unit. Therefore, the impugned order is liable to be set aside. It is clear from the records that when the brick kiln was established in 2010, it had taken an NOC from the Zila Parishad but it had not obtained the consent of the UPPCB under Section 21 of the Air Act. The Air Act had been promulgated on 29th March, 1981. In terms of Section 21 of the Air Act, no person shall, without the previous consent of the UPPCB, establish or operate any industrial plant in an air pollution control area. Even the units which were operative at the time of commencement of the Act were granted period of three months from the date of commencement of the Air Act, within which they were required to take the consent of the Board. Thus, there was a statutory obligation on the part of the appellant to seek consent of UPPCB for establishing and operationalizing its unit. Admittedly, the appellant did not take consent of the Board till the show cause notice dated 19th January, 2013 was issued to it. It is only after issuance of this show cause notice that the appellant had filed an application for grant of consent which admittedly has been granted on 6th September, 2013. Thus, for the first time when the unit applied for obtaining consent of the UPPCB was in August, 2013, that is, when the Air Act and all the laws framed thereunder, including the Rules of 2012, were in force. The application for grant of consent ought to have been considered by the UPPCB in accordance with the laws in force, when the application was moved and not when the unit claims to have been established or the time since when it was running. Admittedly, the unit of the appellant had come into existence without complying with the laws in force, particularly the environmental legislations. Before the appellant can claim any advantage on the strength of beneficial interpretation of the relevant provisions in order to contend that it being an existing unit and is covered only by the Rules in force in 2010 and not by the Rules of 2012 as these are prospective in nature, the unit must show that it came into existence upon entirely complying with the laws in force at that time and after obtaining the consent of the Board under the provisions of the Air Act. If a unit is established in violation of the laws in force and in an illegal manner, then it would be estopped from claiming any benefit on the ground of the laws being prospective. Such unit cannot be permitted to exist in violation of the laws in existence, i.e. the Rules of 2012 and the prescribed standards under the Air Act. This shall be the position of law, independent of the contention that such procedural laws which are mandatory and only add additional obligation, but does not take away any existing rights, would have to

be treated retroactively. Another aspect of this case is that upon field inspection and also in terms of the orders under appeal, the unit falls within the prohibited distance in terms of Rules of 2012. Compliance to these Rules being mandatory, the unit cannot be permitted to operate in any violation thereof.

6. Once it is undisputable on record that the unit of the appellant came into existence and started operating in the year 2010, without obtaining consent of the UPPCB in terms of the Air Act, then the consequences of it being an illegal unit and carrying out an unlawful activity would necessarily follow. A unit, which is established contrary to law and which pollutes the environment, cannot claim any advantage at a subsequent stage on the strength of the NOC from the Zila Parishad, which had no jurisdiction to deal with any of the matters, particularly of environment, as contemplated under the provisions of the Air Act. It is not a case of lack of jurisdiction but that of no jurisdiction of the Zila Parishad. It was mandatory for the appellant to establish its units only upon grant of Consent to Establish and the Consent to Operate from the UPPCB. Having failed to comply with its statutory obligation, the appellant is estopped from claiming the benefit of law under the Rules in force in 2010, as opposed to the applicability of Rules of 2012.

7. Even otherwise, the environmental laws including the provisions of the Air Act and the Rules of 2012 are social beneficial legislation, intended to provide and serve greater cause of public health and environment. The purpose is to ensure that because of the emission from the brick kiln, the people residing in vicinity do not suffer on account of air pollution resulting from such activity. The purpose of providing a mandatory statutory distance of the brick kiln from the residential areas is to ensure that the people carrying on activity, particularly like schools and residential areas, are not adversely affected by carrying on of such activity. The fact that the unit of the appellant had so far been operating without obtaining consent of the UPPCB and in violation of the prescribed standards, would not vest in him a right to continue with such unlawful activity. Admittedly, the unit applied for obtaining consent of the UPPCB for the first time in the year 2013, thus, that will be the point of time to determine the application of the laws. This Tribunal had the occasion to deliberate upon and decide a somewhat similar plea in the case of Himmat Singh Shekhawat v. State of Rajasthan and Ors., 2015 All (I) NGT Reporter (1) (Delhi) 44. The plea raised therein was that since the Project Proponents had been carrying on the mining activity for a considerable time, therefore, the preventive and precautionary steps directed to be taken under subsequent laws were not applicable upon them, including the judgment of the Supreme Court prohibiting mining activity in an area of less than five hectares without prior Environmental Clearances. The Tribunal took the view that such activities and restrictions, imposed in the interest of the environment, are not stricto sensu retrospective but are retroactive, as they do not take away the vested rights but only permit continuation thereof, subject to further restrictions.”

24. The above order makes it clear that an illegally operating unit cannot take the benefits of its illegal operation and such a unit has no

vested right and laws governing the field on the date of consideration of application will apply. Thus, the issue which has been raised before the Tribunal in this original application is already concluded by the aforesaid order of the Tribunal.

25. The Learned Counsel for the Applicant has placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of *State of Tamil Nadu v. Hind Stone & Ors.*, reported in (1981) Vol.2SCC 205 wherein it has been held that no one has a vested right to grant or renewal of a lease and none can claim a vested right to have an application for the grant or renewal of a lease dealt with in a particular way, by applying particular provisions. This judgment clearly supports the contention that the law prevailing on the date of grant of CCA will be applicable.

26. He has also placed reliance upon the judgment of the Supreme Court in the matter of *M.C. Mehta v. Union of India & Ors.*, reported in (2017) 7SCC 243 wherein the Hon'ble Supreme Court has taken note of the effect of the air pollution on the public health and has held that various notifications issued and amendments made to the rules must be read cumulatively in a purposive manner with the objective of enhancing or protecting further deterioration of the quality of the air we breathe from a continuing and continuous onslaught of pollutants.

27. As against this Learned Counsel for the Respondent Nos. 5 and 6 has placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of *Union of India and Others v. G.S. Chatha Rice Mills and Another* reported in (2021) 2 SCC 209 in support of the submission that the notification dated 22.02.2022 being a subordinate legislation will have prospective effect. We need not go into that issue because the notification in question is being applied prospectively and the issue is

about its applicability on the date of consideration of the application for CCA, which in this case is much after issuance of the notification.

28. The Learned Counsel for the Respondent Nos. 5 and 6 has also placed reliance upon the order of the Tribunal dated 18.07.2023 passed in OA No. 783/2022 in the matter of *Ajay Kumar v. Uttarakhand Pollution Control Board & Ors.* but the issue therein was about operation of brick kiln by using zig zag technology and the Tribunal had concluded that in severe air quality condition, coal fired brick kilns cannot be allowed to operate even using the technology unless there is a switch over to the PNG. Hence, the said order of the Tribunal is of no help to the Respondent Nos. 5 and 6.

29. Having regard to the aforesaid, we are of the considered opinion that the CCA dated 13.01.2023 and 30.01.2023 have been issued to the Respondent Nos. 5 and 6 without considering the siting criteria prescribed in the notification dated 22.02.2022, therefore, the CCA dated 13.01.2023 and 30.01.2023 cannot be sustained and are hereby set aside with a direction to the competent authority to reconsider the application for grant of CCA filed by the Respondent Nos. 5 and 6 after duly considering the siting criteria prescribed in the notification dated 22.02.2022.

30. During the course of arguments Learned Counsel for Respondent Nos. 5 and 6 has made the allegation that the Applicant is also operating the brick kilns in violation of the siting criteria of 22.02.2022 notification. The competent authority will duly consider this issue also and if found to be correct, take action in accordance with law.

31. The O.A. and I.A. are disposed of accordingly.

Prakash Shrivastava, CP

Sudhir Agarwal, JM

Dr. A. Senthil Vel, EM

Dr. Afroz Ahmad, EM

September 22, 2023
Original Application No.341/2023
(I.A. No. 730/2023)
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