

Item No. 1

(Pune Bench)

**BEFORE THE NATIONAL GREEN TRIBUNAL  
WESTERN ZONE BENCH, PUNE**

(By Video Conferencing)

Appeal No. 12/2017(WZ)  
I.A. No. 20/2019 (WZ) & I.A. No.197/2022(WZ)

Dileep B. Nevatia

.....Appellant

Versus

Union of India & Ors.

....Respondent(s)

Reserved for Order: 12.01.2023  
Pronouncement on: 25.01.2023

**CORAM: HON'BLE MR. JUSTICE DINESH KUMAR SINGH, JUDICIAL MEMBER  
HON'BLE DR. VIJAY KULKARNI, EXPERT MEMBER**

Appellant : Appellant-In-person  
Respondent(s) : Mr. Rahul Garg, Advocate for R-1/MoEF&CC  
Mr. Raghunath B. Mahabal, Advocate for R-2, 4 & 8  
Ms. Manasi Joshi, Advocate for R-3/MPCB  
Mr. Saket Mone, Advocate for R-5/MSRDC

**ORDER**

**I.A. No. 197/2022(WZ)**

1. This application has been moved by the Respondent No. 5/Maharashtra State Road Development Corporation Ltd., praying for dismissing the Appeal No. 12/2017 (WZ) because of being barred by *constructive res-judicata*.

2. In the body of the application, it has been stated that the present application has been filed pursuant to the liberty granted to Respondent No. 5/MSRDC by this Tribunal vide order dated 22.11.2022. In the present appeal, the environmental clearance dated 02.02.2017 has been challenged, issued by the Respondent No. 2/Environment Department, State of Maharashtra to Respondent No. 5/MSRDC for construction of

"Versova Bandra Sea-Link Project (VBSL). The reliefs sought in the present Appeal are identical to the reliefs sought in Appeal No. 14/2017 and Original Application No. 39/2021 filed before this Tribunal earlier, which have been adjudicated vide order dated 22.08.2022, where-by this Tribunal disposed of the said Appeal and the Original Application, in view of the orders of the Hon'ble Bombay High Court dated 08<sup>th</sup> February, 2019 passed in Chamber Summons (L) No. 70 of 2019 in Writ Petition No. 535 of 2019 and order dated 16<sup>th</sup> December 2020 passed in Notice of Motion No. 190 of 2019 in Writ Petition 535 of 2019. The said order records that no case is made out to interfere with the impugned Environment Clearance.

3. The paragraph 1 of the Judgment, which has disposed of the Appeal No. 14/2017 and Original Application No. 39/2021, is as follows:-

*"1. The order will deal with Appeal No. 14/2017(WZ) and OA No. 39/2021(WZ) as both the matters involve common question relating to legality of Versova Bandra Sea Link (VBSL) Project in Mumbai. In Appeal No. 14/2017(WZ) challenge is to Environment Clearance (EC) granted by SEIAA, Maharashtra on 02.02.2017 for the said project. In O.A. No. 39/2021(WZ) also, grievance is against the said EC as well as against violation of EC conditions norms to the execution of the project."*

4. In view of the order of this Tribunal in above matters, the legality of the environment clearance is no longer *res- integra*, therefore, the question of any challenge to the environment clearance at the instance of a third party does not arise. Hence, the present appeal is barred by the principle of *Constructive Res Judicata* or the *principles akin to Constructive Res Judicata*, since the entire issue raised in present appeal has already been decided by this Tribunal in Appeal No. 14/2019 and Original Application No. 39/2021, hence the above prayer.

5. Opposing the case of the Respondent No. 5/MSRDC, the Appellant-in-person states that Respondent No. 5 while relying upon the various

orders passed by the Hon'ble High Court and by this Tribunal in various proceedings, is taking plea of *constructive res-judicata* while in those proceedings, the parties were not the same and thus he has deliberately mislead the Tribunal. After receipt of the record of those litigations pursuant to the order passed by this Tribunal dated 22.11.2022, the present reply has been filed. During the hearing of Appeal No. 14/2017 and Original Application No. 39/2021 before this Tribunal, the Respondent No. 5 remained completely silent with respect to the grounds raised in Writ Petition No. 535/2019 and the connected Chamber Summons and Notice of Motion. It is apparent from the perusal of Writ Petition No. 535/2019 and connected matters that the grounds set up there-in, were totally different from the grounds and pleas set up in Appeal No. 14/2017 and Original Application No. 39/2021 and yet the Respondent No. 5 managed to mislead the Tribunal and obtained fraudulent order of dismissal of the Appeal No. 14/2017 and Original Application No. 39/2021.

6. Now the Appellant is trying to get the present appeal dismissed, alleging that the grounds raised in Appeal No. 14/2017 and Original Application No. 39/2021 and the present Appeal are similar. Therefore, the legality of Environmental Clearance (EC) being no longer *res integra* a challenge to the same, cannot be made.

7. The parties in Writ Petition No. 535/2019, Appeal No. 14/2017 and the present Appeal were as follows:-

“

| <u>WP No. 535 of 2019</u>  | <u>Appeal No. 14 of 2017</u>                                                                                                     | <u>Appeal No. 12 of 2017</u>          |
|----------------------------|----------------------------------------------------------------------------------------------------------------------------------|---------------------------------------|
| <u>Petitioner</u><br>MSRDC | 1. Juhu Moragaon<br>Machhimar Vividh<br>Karyakari Sahkari<br>Sanstha Ltd.<br>2. Dinesh Suresh<br>Mangela<br>3. Vanashakti Public | <u>Appellant</u><br>Dileep B. Nevatia |

|                                                                                                            |                                                                                                                                                                                      |                                                                                                                                                                                                                           |
|------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                                                                                            | Trust<br>4. Dayanand Stalin<br>5. Bandra (West) Residents' Associate.<br>6. Darryl D' Monte<br>7. Juhu Tara Koli Jamat<br>8. Arvind Sane                                             |                                                                                                                                                                                                                           |
| <u>Respondents</u><br>1. MoEF&CC<br>2. State of Maharashtra<br>3. MCZMA<br>4. Chief Conservator of Forests | <u>Respondents</u><br>1. State of Maharashtra<br>2. MoEF&CC<br>3. MCZMA<br>4. MPCB<br>5. MSRDC<br>6. Fine Envirotech Engineers<br>7. Department of Fisheries<br>8. Forest Department | <u>Respondents</u><br>1. MoEF&CC<br>2. State of Maharashtra<br>3. MPCB<br>4. MCZMA<br>5. MSRDC<br>6. Director General of Police<br>7. Fine Envirotech Engineers<br>8. State Level Environment Impact Assessment Authority |

”

8. The above would show that the Petitioners/Appellants were totally different in Writ Petition No. 535/2019 and Appeal No. 14/2017 as there were 4 Respondents in Writ Petition No. 535/2019 while in Appeal No. 14/2017, there were 8 Respondents while in the present Appeal No. 12/2017, there are 8 Respondents. The MoEF&CC, State of Maharashtra and MCZMA are only 3 common Respondents in all the three proceedings.

9. Similarly, in High Court Chamber Summons (L) No. 24/2019 and Chamber Summons (L) No. 63/2019 in Writ Petition (L) No. 17/2019/ Writ Petition No. 535/2019 and Original Application No. 39/2021, following were the parties:-

“

|                                           |                                       |                                                                      |
|-------------------------------------------|---------------------------------------|----------------------------------------------------------------------|
| Chamber Summons<br>(L) No. 24 of 2019     | Chamber Summons<br>(L) No. 63 of 2019 | O.A. No. 39 of 2021                                                  |
| <u>Applicant:</u><br>Zoru Darayus Bathena | <u>Applicant:</u><br>Geeta sheshu     | <u>Applicant:</u><br>1. Juhu Tara Koli Samaj Sajakari Sangh Maryadit |

|                                                                                                                       |                                                                                                                        |                                                                                                                                                                       |
|-----------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                                                                                                       |                                                                                                                        | 2. Juhu Tara Koli Zamat Seemakan Samiti<br>3. Khardanda Koliwada Gaothan Sangh<br>4. Danda Koli Masemari Vyavasayik Sahakari Sanstha Maryadit<br>5. Danda Koli Samaj  |
| <u>Respondents</u><br>1. MoEFCC<br>2. State of Maharashtra<br>3. MCZMA<br>4. Chief Conservator of Forests<br>5. MSRDC | <u>Respondents</u><br>1. MoEF&CC<br>2. State of Maharashtra<br>3. MCZMA<br>4. Chief Conservator of Forests<br>5. MSRDC | <u>Respondents</u><br>1. MSRDC<br>2. Environment Dept., Maharashtra<br>3. MoEFCC<br>4. MCZMA<br>5. District Collector<br>6. Fisheries Dept.<br>7. Reliance Astaldi JV |

”

10. This would show that in these proceedings, there were no common parties. The Applicants are completely different in each case. Thus proceedings being relied upon by the Respondent No. 5 are clearly not inter parties and a decision not inter parties, cannot operate as *res judicata* in subsequent proceedings as per the general principles of *res judicata*.

11. A perusal of records submitted by the Applicant would further show that even the issues raised in High Court in Writ Petition No. 535 of 2019 and its connected Chamber Summons and Notice of Motion were not the same as in Appeal No. 14 of 2017, O.A. No. 39 of 2021 and the present Appeal.

12. The rest of the contents of the reply affidavit of the Appellant are as follows:-

“16. That in paras (6) and (7) of Writ Petition No. 535 of 2019, the Petitioner MSRDC has stated that:-

“6. Further, the present petition is filed in the teeth of the condition imposed by the Respondent No.3 in the CRZ Clearance dated 9th January, 2013 being condition No. (iii) and the Clause 4 and General Condition No. (iv) of the Environment Clearance

*imposed by the Respondent No.2, both upon the Petitioner to obtain prior leave of this Hon'ble Court before executing the proposed project.”*

*“7. The intervention of this Hon'ble Court is necessary and expedient as the Petitioner has been granted the CRZ Clearance dated 9<sup>th</sup> January, 2013 with specific conditions being condition No. (iii) of the CRZ Clearance and Clause 4 & General Conditions for preconstruction phase no. (4) of the Environment Clearance **that the Petitioner must apply to the Hon'ble High Court prior to cutting of any mangroves.**”*

17. *That in para (10) of Writ Petition No. 535 of 2019, MSRDC has further stated that:-*

*“10. Further, the Petitioner is approaching this Hon'ble Court, invoking its extra ordinal jurisdiction under Article 226 of the Constitution of India, seeking a direction to the Respondent Authorities to permit the Petitioner to execute the said project by granting leave as contemplated in condition No. (iii) of the CRZ Clearance dated 9<sup>th</sup> January, 2013 as extended on 6<sup>th</sup> December, 2018 and the Clause 4 and General Condition No. (iv) of the Environment Clearance dated 2<sup>nd</sup> February, 2017, and in light of the finding given by this Hon'ble Court at paragraph 83(viii) of the Judgment and Order dated 17<sup>th</sup> September, 2018 in PIL No. 87 of 2006 and the leave granted by this Hon'ble Court in the Order dated 2<sup>nd</sup> November, 2018 in Notice of Motion No. 278 of 2018. **In view of the limited relief sought by the Petitioner in the form of direction to the Respondent statutory authorities, the Original Petitioner in PIL No. 87 of 2006, which is a private Non-Governmental Organization (NGO) is not impleaded as a party to the present proceedings.**”*

18. ***That in Paras (44) to (53) Writ Petition No. 535 of 2019, the MSRDC has set out the requirements of approaching the Hon'ble High Court for obtaining permission as required under condition No. (iii) of the CRZ Clearance dated 9<sup>th</sup> January, 2013 and Clause 4 and General Condition No. (iv) of the Environment Clearance dated 2<sup>nd</sup> February, 2017, and nothing more.***

19. ***That the main prayer (a) of Writ Petition No. 535 of 2019, is limited to granting leave as contemplated in specific condition No. (iii) of the CRZ Clearance and Clause 4 and General Condition No. (iv) of the Environment Clearance.***

20. *That Specific Condition No. F. of the CRZ Clearance dated 9<sup>th</sup> January, 2013 states that:-*

***“(iii) The project proponent should take appropriate clearance from the authorities such as Forest Department and/or Hon'ble High Court as the case may be for cutting of mangroves.”***

21. *That general condition No.(iv) and (4) of the EC dated 13.2.2017 is also in respect of the Judgments/orders issued by Hon'ble High Court, which would evidently be the permission required to cut the mangrove, namely:-*

*“(iv) This environmental clearance is issued subject to use verification. Local authority/ planning authority should ensure this with respect to Rules, Regulations, Notifications, Government Resolutions, Circulars, etc. issued if any. Judgments/orders issued by Hon'ble High Court, Hon'ble NGT, Hon'ble Supreme Court regarding DCR provisions, environmental issues applicable in this matter should be verified. PP should submit exactly the same plans appraised by concern SEAC and SEIAA. If any discrepancy found in the plan submitted or details provided in the above para may be reported to environment department. This environmental clearance issued with respect to the environmental consideration and it does not mean that State Level Impact Assessment Authority (SEIAA) approved the proposed land use.”*

22. *That para (1) of the Order dated 8.2.2019 passed by Hon'ble High Court in Writ Petition No. 535 of 2019 and its connected applications reveals that the said Writ Petition was not filed challenging any Order or direction, but MSRDC had approached the Hon'ble High Court seeking permission to cut mangroves in the path of the proposed VBSL project in furtherance of the statutory permissions granted to them and to grant leave as contemplated in the specific condition No.(iii) of the CRZ Clearance and under general condition No.(iv) and (4) of the EC.*

*It is further recorded that the permission was sought by the Petitioner, since 1585 number of mangrove trees would be required to be removed for the execution of the VBSL project in view of the directions judgment and order passed by the High Court in PIL No.87 of 2006 decided on 29<sup>th</sup> June 2018, namely:-*

*“(iii) The project proponent should take appropriate clearance from the authorities such as Forest Department and/or Hon'ble High Court as the case may be for cutting of mangroves.”*

23. *That it is indisputably clear that MSRDC had approached the Hon'ble High Court only for a limited relief and for grant of permission contemplated in specific condition No. (iii) of the CRZ Clearance and Clause 4 and General Condition No. (iv) of the Environment Clearance i.e. to cut and remove 1585 number of mangrove trees in the path of VBSL project and nothing more. **At no point of time, did MSRDC ever plead or prayed before the Hon'ble High Court to adjudicate the legality of the Versova Bandra Sea Link, being constructed pursuant to the CRZ Clearance dated 9th January, 2013 or the Environment Clearance dated 2<sup>nd</sup> February, 2017.***
24. *That other observations made in the passing were neither in issue before the Hon'ble High Court nor were they decided on merit or part of ratio decidendi.*
25. *That Annexure A-2 shows that the Chamber Summons (L) No. 24 of 2019 in Writ Petition No. 535 of 2019 was filed by Zoru Darayus Bathena only to implead him as a party Respondent in the main Petition and for limited relief in respect of Juhu Koliwada Beach.*
26. *That Annexure A-3 shows that the Chamber Summons (L) No. 63 of 2019 in Writ Petition No. 535 of 2019 was filed by Geeta Sheshu only to implead her as a party Respondent in the main Petition.*
27. *That Annexure A-4 shows that the Notice of Motion No. 190 of 2019 in Writ Petition No. 535 of 2019 was filed by Zoru Darayus Bathena only for limited purpose of directing the Petitioner to stop destruction of mangroves.*

28. *That Annexure A-5 shows that Appeal No. 14 of 2017 was filed challenging the EC granted for the VBSL project on various grounds, none of which were before the Hon'ble High Court. Though there are some grounds taken in Appeal No. 14 of 2017 which are similar to the grounds taken in the present Appeal, a decision in Appeal No. 14 of 2017, which is not inter parties certainly cannot operate as res judicata in the present Appeal.*
29. *That Annexure A-6 shows that O.A. No. 39 of 2021 was filed by local fishermen expressing their concern on the impact of their fishing activities by the access roads of the VBSL project, none of which were before the Hon'ble High Court. Besides, there are also no common grounds taken in O.A. No. 39 of 2021 which are similar to Appeal No. 14 of 2017 or the present Appeal.*
30. *That it is therefore indisputably clear that:-*
- (a) *The parties in High Court Writ Petition No. 535 of 2019 and the connected Chamber Summons and Notice of Motion, NGT Appeal No. 14 of 2017 and O.A. No. 39 of 2021 and the present Appeal are not the same and identical.*
- (b) *The issues involved in High Court Writ Petition No. 535 of 2019 and the connected Chamber Summons and Notice of Motion, NGT Appeal No. 14 of 2017 and O.A. No. 39 of 2021 and the present Appeal are not the same or identical.*
31. *That in para (5) of the present I.A. the Applicant MSRDC has falsely alleged that the grounds raised in the present Appeal are allegedly similar / identical to the grounds raised in Appeal No. 14 of 2017 and O.A. No. 39 of 2021. It is the further false case of the Applicant that the issue in the present Appeal is allegedly dealt with and that the legality of the Environment Clearance is allegedly no longer res integra.*
32. *That in para (6) of the present I.A. the Applicant MSRDC has further alleged that in light of the common Order dated 22.8.2022 passed in Appeal No. 14 of 2017 and O.A. No. 39 of 2021, the present Appeal is allegedly barred by the principle of Constructive Res Judicata, since the entire issue raising similar grounds have allegedly been decided by the said Order.*

33. That Appeal No. 14 of 2017 and O.A. No. 39 of 2021 were dismissed by this Hon'ble Tribunal, without hearing them on merit as this Hon'ble Tribunal was made to believe the deliberate and false misrepresentation made by the Applicant MSRDC, whereby claiming that order of the Hon'ble High Court records that no case is made out to interfere with the impugned Environment Clearance, when in fact the Hon'ble High Court had only granted the limited permission contemplated in specific condition No. (iii) of the CRZ Clearance and Clause 4 and General Condition No. (iv) of the Environment Clearance i.e. to cut and remove 1585 number of mangrove trees in the path of VBSL project and nothing more.

34. That the Hon'ble Supreme Court in its judgment, as reported in AIR 2011 Supreme Court 9 "Alka Gupta v. Narender Kumar Gupta", the copy thereof is annexed and marked as Annexure A-7, has held in para (14) of the judgment that Section 11 of the CPC requires the following essential requirements to be fulfilled, to apply the bar of res judicata to any suit or issue:-

**“(i) The matter must be directly and substantially in issue in the former suit and in the latter suit.**

**(ii) The prior suit should be between the same parties or persons claiming under them.**

(iii) Parties should have litigated under the same title in the earlier suit.

(iv) The matter in issue in the subsequent suit must have been heard and finally decided in the first suit.”

That none of the above requirements have been fulfilled in the four proceedings where under the Applicant is attempting to apply the bar of res judicata, namely High Court Writ Petition No. 535 of 2019, NGT Appeal No. 14 of 2017 and O.A. No. 39 of 2021 and the present Appeal.

35. That in the above authority, the Hon'ble Supreme Court has further held in para (15) that:-

“Explanation IV provides that where any matter which might and ought to have been made a ground of defence or attack in

*the former suit, even if it was not actually set up as a ground of attack or defence, shall be deemed and regarded as having been constructively in issue directly and substantially in the earlier suit. Therefore, even though a particular ground of defence or attack was not actually taken in the earlier suit, if it was capable of being taken in the earlier suit, it became a bar in regard to the said issue being taken in the second suit in view of the principle of constructive res judicata.*”

36. That moreover, the Applicant has not even stated what was the ground of attack that the Appellant herein ought to have raised in the Writ Petition but had failed to raise, which the Appellant has raised in the present Appeal No. 12 of 2017, to attract the principle of constructive res judicata, due to simple reason that the Appellant herein was not even a party in the Writ Petition or in Appeal No. 12 of 2017 or O.A. No. 39 of 2021. Under the circumstances, it is clear that the present Appeal is also not barred by constructive res judicata, as alleged by the Applicant.
37. That in O.A. No. 222 of 2014 "The Forward Foundation and others v. The State of Karnataka" the Full Bench of this Hon'ble Tribunal was seized with the issue of bar of res judicata on grounds that in Writ Petition filed in the Karnataka High Court the issues raised and the reliefs sought are the same as in O.A. No. 222 of 2014. **By Judgment dated 4.5.2016, this Hon'ble Tribunal dismissed the said objections by holding that the parties are not common and also the issues in application and the writ petitions are not directly and substantially the same. After examination of the pleadings, this Hon'ble Tribunal has recorded a finding of fact that there is no commonality of a cause of action or likelihood of a conflict between the judgments and that the prayers and the geneses of the respective proceedings are entirely distinct and different in their scope and relief.**
38. That the said Order was challenged before the Hon'ble Supreme Court and by its judgment, as reported in **AIR 2019 (SC) 365** "Mantri Techzone Pvt. Ltd. v. Forward Foundation and others", the copy thereof is annexed and marked as **Annexure A-8**. The

Hon'ble Supreme Court, after recording in Para (58) of the judgment the conclusion of this Hon'ble Tribunal, upheld the same at para (59) of the judgment, namely:-

**“59. We do not find any error in the aforesaid conclusion of the Tribunal. We are of the view that the Tribunal was justified in holding that the objections taken by the respondent Nos. 9 and 10 do not satisfy the basic ingredients to attract the application of res judicata or constructive res judicata.”**

39. Moreover, any Judgment or Order that is not between the same parties cannot be looked into for any purpose, for it is irrelevant in the present proceedings. That the Hon'ble Bombay High Court in its judgment, as reported in **AIR 2008 Bombay 155** "Smt. Shamlata wd/o Manohar Raut and Ors v. Vishweshwara Tukaram Giripunje and Anr", the copy thereof is annexed and marked as Annexure A-9, while dealing with the judgment which was not inter partes has held in para (5) that:-

**“5. The question is whether this judgment is at all relevant. The learned counsel for the appellant submitted that this judgment does not fall within the scope of Sections 40 to 44 (of the Evidence Act). The judgment does not fall within the scope of Section 11 of Code of Civil Procedure since the present defendant was not party to that suit. Obviously, therefore, that judgment does not fall within the scope of Section 40 of the Evidence Act. It is not relevant under Section 41 because it is not a judgment delivered in exercise of probate, matrimonial, admiralty, or insolvency jurisdiction. It is no relevant because it does not relate to matter of public nature. It also does not fall within the scope of Section 43 since existence of such judgment is not fact in issue. The learned Judge of the first appellate Court as well as the trial Court could not have, therefore, looked into this judgment for any purpose, for they are irrelevant.”**

40. That it is evidently clear that the Applicant has approached this Hon'ble Tribunal by deliberately suppressing the records and proceedings of High Court Writ Petition No. 535 of 2019 and the

*connected Chamber Summons and Notice of Motion, NGT Appeal No. 14 of 2017 and O.A. No. 39 of 2021, and thereby it is seeking to dismiss the present Appeal, which was the same ploy adopted by the Applicant MSRDC to dismiss Appeal No. 14 of 2017 and O.A. No. 39 of 2021.”*

13. The learned Counsel for the **Respondent No. 5/MSRDC** has argued that the Appeal No. 14 of 2017 and Original Application No. 39 of 2021, both were decided by this Tribunal vide order dated 22.08.2022, where-in EC granted by the SEIAA to the Respondent No. 5/PP relating to Versova Bandra Sea Link (VBSL) Project in Mumbai was challenged and the Tribunal while disposing of that matter, cited the order dated 08.02.2019 passed by Hon’ble Bombay High Court in Chamber Summons (L) No. 70 of 2019 in W.P. (L) No. 17 of 2019, *Maharashtra State Road Development Corporation Ltd. vs. Union of India & Ors.*, which was as follows:-

*“xxx .....xxx.....xxx*

*10] It could thus be seen that **all necessary statutory approvals have been granted in favour of the project by various authorities of the State Government as well as the Union of India.** It will further be relevant to refer to para 4 of the affidavit filed by Shri. Vikas Ramchandra Jagtap, Divisional Forest Officer, Mumbai, Mangrove Conservation Unit, Kamgar Nagar, Kurla (East), Mumbai 400 024, dated 6th February 2019:-*

*4. I say that the proposal required 1585 mangrove trees to be felled for construction of Versova-Bandra Sea Link Project. **In lieu of destruction of 1585 mangrove trees and diversion of 2.9907 hector Mangrove forest land, the Petitioner herein (user agency) has given an undertaking that they will provide 2.9907 hector of non-forest land suitable for compensatory afforestation of mangrove plantation.***

*I further say that on **non-forest land which will be transferred to Forest Department, the Forest Department will plant 13332 mangrove trees (4444 plants per hector).**”*

14. Further, in Order of Hon’ble Bombay High Court dated 16.12.2020 in Notice of Motion No. 190 of 2019 in W.P. No. 535 of 2019, following was held:-

***“1. The prayers made in this notice of motion, which was filed on 2<sup>nd</sup> May 2019 availing the leave granted by the Supreme Court by its order dated 1<sup>st</sup> April, 2019, do not survive in view of the letter dated 28<sup>th</sup> January 2020 issued by the Ministry of Environment, Forest and Climate Change, Government of India Department modifying the earlier permission granted by letter dated 9<sup>th</sup> January 2013. Confronted with such a situation, Ms. Bhattacharya, learned Advocate for the applicant seeks withdrawal of this notice of motion with liberty to institute appropriate proceedings in accordance with law.***

*2. The notice of motion stands disposed of as withdrawn, without costs. Interim order, if any, stands vacated.*

*3. This order shall, however, not preclude the applicant to initiate appropriate proceedings in accordance with law before the appropriate forum.”*

15. Thereafter, in the same order of this Tribunal, order of Hon’ble Supreme Court dated 01.04.2019 in SLP (Civil) Diary No(s). 8449/2019, *Zoru Darayus Bhathena vs. Maharashtra State Road Development Corporation Ltd. & Ors.*, was quoted as below:-

*“xxx .....xxx.....xxx*

*The petitioner who was not a party to the Writ Petition (L) 17 of 2019 filed chamber summons for being impleaded as respondent. The petitioner also submitted that no relief shall be granted with reference to areas of Juhu Koliwada bridge. By the impugned judgment, the High Court directed the Maharashtra State Road Development Corporation to file an undertaking within a period of one week that it shall strictly comply with the conditions as imposed in the permissions granted by various authorities i.e. MCZMA, Environmental Clearance and the Forest Clearance. In view of the said order passed by the High Court, the chamber summons was disposed of.*

*Mr. Shyam Divan, learned senior counsel appearing on behalf of the petitioner submitted that the CRZ clearance of the MoEF initially granted on 9th January, 2013 for a period of five years was extended on 7th February, 2019. According to Special Condition No. 8(i) thereof only road on stilt in the mangrove area can be constructed. It was further mentioned in the said CRZ clearance that there would be permanent loss of about 150 sq.m. mangroves and 50 sq.m. temporary loss during construction in Versova and Carter connector. He also referred to the State Environment Impact Assessment Authority (SEIAA) and Environmental Clearance dated 02nd February, 2017 to submit that according to the said clearance no mangrove shall be disturbed. He further relied upon the ‘inprinciple approval’ granted by the MoEF Forest Department on 20th December,*

*2018 pertaining to the diversion of 2.9907 hectares of forest land at Village Versova, Juhu and Bandra.*

*Mr. Divan submits that the undertaking that was directed to be filed by the petitioner must have been filed by Respondent No.1. **As the High Court is in seisin of the matter pertaining to the undertaking that was to be filed before the Court, we grant liberty to the petitioner to approach the High Court and make submissions regarding the points urged before us.***

16. Based on above orders, it was held that no case was made out to interfere with the impugned EC as the project already stood approved by the Hon'ble High Court. The PP had filed an undertaking before the Hon'ble High Court to follow the EC and CRZ clearance conditions. Therefore, if any issue arises out of breach of such conditions, the same can be raised only before the Hon'ble High Court and making this observation, the Appeal was disposed of.

17. Based on the above order of this Tribunal, it is argued that since the legality of EC was challenged in Appeal No. 14 of 2017 and Original Application No. 39 of 2021, which have already been disposed of as mentioned above, the legality of the EC is no longer *res integra* and that the present Appeal No. 12/2017 stands barred by *res judicata*. Accordingly, it should be dismissed at the very outset being barred by *res judicata*.

18. The main reliance has been placed by the learned Counsel for the Respondent No. 5 upon *Forward Construction Company and Ors. vs. Prabhat Mandal (Regd.), Andheri & Ors.* [(1986) 1 Supreme Court Cases 100], where-in reliance is placed on paras, which have been quoted here-in below:-

*“12. It appears that soon after one Subhash Vasant Thakkar on 20th April, 1982 filed a petition in his capacity as a rate-payer in the High Court of Judicature at Bombay under [Article 226](#) of the Constitution, being writ petition No.921 of 1982. He challenged the right of the BEST to use the land for a purpose*

different from one for which it had been reserved and designated under the development plan as well as the town planning scheme and that it had no right to use it for commercial purpose. He also challenged the right of the BEST to enter into a contract with the builder. The petition was dismissed by a learned Single Judge on 28th May, 1982 after having heard all parties concerned and after giving opportunity to file replies. The learned Judge found that the substantial portion of the acquired plot was being utilised for a purpose for which it was acquired and the commercial use to which the small portion was being put would substantially argument the coffers of the Corporation for the benefit of the public at large. The learned Judge also rejected the contention that the value charged by the BEST for allowing use of its property was grossly inadequate and that no sufficient publicity was given before inviting offers. The court after having rejected the various pleas taken by the petitioner in the case also observed that the petitioner was not an independent-minded citizen solely inspired by the laudable motive of protecting public interest but the allegations in the petition indicated that he had been set up by a disgruntled builder who purchased the tender document but did not give an offer. The matter was taken up in appeal but the Division Bench dismissed the same after hearing all the parties.

13. After the dismissal of the appeal the present respondents 1 to 6 in civil appeal no. 2311 filed a similar petition under [Article 226](#) of the Constitution in the Bombay High Court which gives rise to the present appeals and the special leave petition seeking almost the same relief as was claimed in the earlier petition filed by Thakkar. The learned Single Judge summarily dismissed the writ petition by his order dated 23rd November, 1982.

19. The second question for consideration is whether the present writ petition is barred by res judicata. This plea has been negatived by the High Court for two reasons: (1) that in the earlier writ petition the validity of the permission granted under Rule 4(a) (i) of the Development Control Rules was not in issue; and (2) that the earlier writ petition filed by Shri Thakkar was not a bona fide one in as much as he was put up by some disgruntled builder, namely, of M/s. Western Builders.

20. So far as the first reason is concerned, the High Court in our opinion was not right in holding that the earlier judgment would not operate as res judicata as one of the grounds taken in the present petition was conspicuous by its absence in the earlier petition. Explanation IV to s.11 C.P.C. provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the

*matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided. The first reason, therefore, has absolutely no force.*

*21. The second reason given by the High Court however, holds good. Explanation VI to s.11 provides :*

*“Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section be deemed to claim under the persons so litigating.”*

*But it is only when the conditions of Explanation VI are satisfied that a decision in the litigation will bind all persons interested in the right litigated and the onus of proving the want of bona fides in respect of the previous litigation is on the party seeking to avoid the decision. The words "public right" have been added in Explanation VI in view of the new s.91 C.P.C. and to prevent multiplicity of litigation in respect of public right. In view of Explanation VI it cannot be disputed that s. 11 applies to public interest litigation as well but it must be proved that the previous litigation was the public interest litigation not by way of a private grievance. It has to be a bonafide litigation in respect of a right which is common and is agitated in common with others.*

*22. The High Court in the earlier writ petition had recorded a finding that it was not a bona fide litigation and that Shri Thakkar, the petitioner in that case, had been put up by M/s. Western Builders. This finding excludes the application of s.11 C.P.C. in the present case. The possibility of litigation to foreclose any further enquiry into a matter in which an enquiry is necessary in the interest of public cannot be overruled. In view of the finding of the High Court that the previous writ petition was not a bona fide one, the present writ petition would not be barred by s.11 of the C.P.C. and the High Court was justified in so holding but not because of the first reason but because of the second reason.”*

19. Based on above ruling, it is argued by the learned Counsel for the Respondent No. 5 that for invocation of the principle of *res judicata*, the parties need not to be the same as it is held in the above-mentioned case that the principle of *res judicata* would be applicable even in public interest litigation. Although we do not find specifically mentioned in this case by the Hon'ble Apex Court that parties of the cases need not be the

same. When enquired from the learned Counsel for the Respondent No. 5 as to where the same is recorded, he could not show that, rather he stressed that this Judgment would be treated as a Judgment in rem and is binding on all. But we, for want of specific mention that the parties in the two cases may not be identical for invocation of principle of *res judicata* not having been mentioned clearly in this ruling, are of the view that learned Counsel for the Respondent No. 5 does not appear to have made correct interpretation of this Judgment. Moreover the earlier case was also not a public interest litigation. Therefore, how he can be granted any benefit of this ruling, is not clear.

20. Per contra, the Appellant-in-person has argued that the parties in Writ Petition No. 535 of 2019 and Appeal No. 14 of 2017 are different from the parties in the present appeal as has been stated above. Similarly, the parties in Chamber Summons (L) No. 24 of 2019, Chamber Summons (L) No. 63 of 2019 and Original Application No. 39 of 2021 were different as stated above in para no. 9 of this order. Therefore, the main ingredient for the invocation of the principle of *res judicata* is not satisfied here as the parties were required to be the same in both the matters.

21. Further, it is argued by the Appellant-in-person that the main prayer in the Writ Petition No. 535 of 2019 was relating to granting leave as contemplated in specific condition no. (iii) of CRZ Clearance and clause (iv) & General Condition of (iv) of Environmental Clearance (EC), details of which have already been referred above in the reply affidavit of the Appellant. It is apparent that specific condition no. (iii) of the CRZ Clearance said that the Project Proponent (PP) should take appropriate clearance from authorities such as Forest Department and/or Hon'ble High Court for cutting of the mangroves. The General Condition no. (iv)

(4) of the EC dated 13.02.2017 required permission to be obtained for cutting of the mangroves. Further, it is argued that the order dated 08.02.2019 of the Hon'ble High Court in Writ Petition No. 2538 of 2019 and connected applications reveals that the said Petition was not filed, challenging any order or the direction rather the Respondent No. 5 had approached the Hon'ble High Court seeking permission to cut the mangroves in the path of the proposed BSNL Project in furtherance of its statutory permissions granted to them. Therefore, it is very clear that the Respondent No. 5 had approached the Hon'ble High Court for limited relief as stated above and not for seeking the quashing of the EC dated 02.02.2019. It is further argued by him that the Hon'ble Supreme Court has clearly laid down in *Alka Gupta Case* (supra) that for applying the principle of *res judicata*, following requirements are essential:-

- (i). *The matter must be directly and substantially in issue in the former suit and in the latter suit.*
- (ii). *The prior suit should be between the same parties or persons claiming under them.*
- (iii). *Parties should have litigated under the same title in the earlier suit.*
- (iv). *The matter in issue in the subsequent suit must have been heard and finally decided in the first suit.*

22. It is apparent that none of these conditions stands fulfilled as it has been specifically made clear above that the parties in all these cases were different and the relief also claimed before the Hon'ble High Court was different. It is vehemently argued that the order which has been passed by this Tribunal earlier on 22.08.2022, has been passed on the basis of the Judgment of Hon'ble Bombay High Court passed in above-mentioned Writ Petition as well as connected applications, therefore, the

said Judgment should not be treated to have been passed on merit by this Tribunal.

23. After having heard both the sides, we are of the view that principle of *res judicata* would not be applicable in this matter, particularly, because in the earlier Appeal No. 14/2017, there were 8 Appellants and 8 Respondents and in Original Application No. 39/2021, there were 5 Applicants and 7 Respondents, while in the present appeal, the party/Appellant is different i.e. Dileep B. Nevatia, who was not a party in earlier proceedings while there are 8 Respondents. The Appellant in the present appeal was also not party before the Hon'ble High Court nor in earlier Appeal No. 14/2017 and Original Application No. 39/2017. Therefore, he cannot be deprived of right of hearing in the present appeal. In our opinion, the parties being different in the earlier filed two matters i.e. Appeal and Original Application, from the parties in the present case, therefore, the principle of *res judicata* would not be applicable. Hence, it would be appropriate for us to decide this matter on merits afresh. Although at that stage, the Judgment passed by this Tribunal in Appeal and Original Application could be certainly taken into consideration.

Accordingly, I.A. No. 197/2022(WZ) stands dismissed.

24. Put up this appeal along-with other connected application on 15.03.2023.

Dinesh Kumar Singh, JM

Dr. Vijay Kulkarni, EM

January 25, 2023  
Appeal No. 12/2017(WZ)  
I.A. No. 20/2019 (WZ) &  
I.A. No.197/2022(WZ)  
P.Kr