

A T.N. GODAVARMAN THIRUMULPAD

v.

UNION OF INDIA & ORS.

I.A. NOs.1868, 2091, 2225-2227, 2380, 2568 AND 2937

IN

B WRIT PETITION (CIVIL) No. 202 OF 1995

JANUARY 06, 2014.

**[A.K. PATNAIK, SURINDER SINGH NIJJAR AND
FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]**

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ENVIRONMENT (PROTECTION) ACT, 1986:

s. 3(3) — *National Regulator – Order of Supreme Court dated 6.7.2011 directing for appointment of National Regulator –Held: In Lafarge Umiam Mining’s case, on an interpretation of s. 3 (3), the Court took a view that it confers a power coupled with duty to appoint an appropriate authority in the form of a Regulator at the State and at the Central level for appraising projects, enforcing environmental conditions for approvals and to impose penalties on polluters and accordingly directed the Central Government to appoint a National Regulator under the said provision, as the Court did not find the mechanism of making the EIA appraisals of projects by MoEF to be satisfactory — The mechanism under EIA Notification dated 14.09.2006, issued by Government with regard to processing, appraisals and approval of the projects for environmental clearance is deficient in many respects and what is required is a Regulator at the national level having its offices in all the States which can carry out an independent, objective and transparent appraisal and approval of the projects for environmental clearances and which can also monitor the implementation of the conditions laid down in the Environmental Clearances — The Regulator so appointed u/ s 3(3) can exercise only such powers and functions of Central*

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Government under the Act as are entrusted to it and obviously cannot exercise powers of Central Government u/s 2 of Forest (Conservation) Act, 1980, but while exercising such powers under Environment Protection Act, he will ensure that the National Forest Policy, 1988 is duly implemented as held in the order dated 06.07.2011 in the case of Lafarge Umiam Mining — Union of India is directed to appoint a Regulator with offices in as many States as possible under sub-s. (3) of s. 3 of the Environment (Protection) Act as directed in the order in the case of Lafarge Umiam Mining and file an affidavit along with the notification appointing the Regulator in compliance of this direction — Forest (Conservation) Act, 1980 — National Forest Policy, 1988 — EIA Notification dated 14.09.2006.

Lafarge Umiam Mining Private Limited v. Union of India & Ors. 2011 (7) SCR 954 = (2011) 7 SCC 338 – referred to.

Case Law Reference:

2011 (7) SCR 954 referred to **para 1**

CIVIL ORIGINAL JURISDICTION I.A. NOs.1868, 2091, 2225-2227, 2380, 2568 AND 2937

IN

Writ Petition (Civil) No. 202 OF 1995.

Harish N. Salve, Uday U. Lalit, Vivek Tankha, R.K. Raizada, Mahaveer Singh, A.D.N. Rao, Siddharth Chowdhury, P.K. Manohar, Group Capt. Karan Singh Bhati, Dr. Prikshayat Singh, Karmendra Singh, Prashant Kumar, Joseph Pookkatt (for APJ Chambers), Rajiv Tyagi (for Rajiv Tyagi Associates), Vivek Gupta, S.S. Shamsbery, Bhakti Vardhan Singh, Bharat Sood, Dr. Kailash Chand, Arvind Kumar Shukla, Amit Shukla, Nihal Ahmad, Alok Shukla, R.C. Kohli, Yash Pal Dhingra, Himanshu Shekhar, Sanchit Guru, Gunwant Dara, D.K. Thakur, Sukhbeer Kaur Baiwa, Shreekant N. Terdal, Gopal Prasad, C.D. Singh, Hemantika Wahi, Preeti Bhardwaj, Parul Kumari,

A Gopal Prasad, Anitha Shenoy, Mishra Saurabh, Vanshja Shukla and Abhishek Chowdhury for the appearing parties.

The following Order of the Court was delivered

B O R D E R

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1. In the case of *Lafarge Umiam Mining Private Limited v. Union of India & Ors.* [(2011) 7 SCC 338], this Court, while refusing to interfere with the decisions of the Ministry of Environment and Forests (MoEF) granting site clearance, EIA clearance read with revised environmental clearance and Stage I forest clearance to the mining project of Lafarge Umiam Mining Private Limited, laid down some guidelines to be followed in future cases in Part-II of its order dated 06.07.2011. These guidelines have been stated in Para 122

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of the said order and sub-para (i.1.) of Para 122, this Court called upon the Central Government to appoint a National Regulator under Section 3(3) of the Environment (Protection) Act, 1986 for appraising projects, enforcing environmental conditions for approvals and to impose penalties on polluters.

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Despite the order dated 06.07.2011 of this Court, the Central Government did not appoint a National Regulator under Section 3(3) of the Environment (Protection) Act, 1986. On 09.09.2013, this Court therefore requested Mr. Mohan Parasaran, learned Solicitor General, to obtain instructions and

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apprise this Court as to when the direction of this Court will be complied with.

2. When the matter was taken up on 18.11.2013 again, Mr. Mohan Parasaran, learned Solicitor General, relying on the affidavit filed on behalf of the MoEF, submitted that in the case of *Lafarge Umiam Mining Private Limited*, this Court was really concerned with the National Forest Policy, 1988. He submitted that so far as the National Forest Policy, 1988 is concerned, the same relates to forests and under Section 2 of the Forest (Conservation) Act, 1980 the duty of a Regulator has been cast

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upon the Central Government. He submitted that the responsibility to appraise proposals seeking prior approval of the Central Government under Section 2 of the Forest (Conservation) Act, 1980 lies with the Forest Advisory Committee constituted by the Central Government under Section 3 of the Forest (Conservation) Act, 1980. He argued that these statutory duties of the Central Government under Section 2 of the Forest (Conservation) Act, 1980 cannot be delegated to any other authority.

3. Mr. Parasaran next submitted that sub-section (1) of Section 3 of the Environment (Protection) Act, 1986 similarly confers powers on the Central Government to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution and the Central Government in exercise of its powers under sub-section (1) and clause (v)(b) of sub-section (2) of Section 3 Environment (Protection) Act, 1986 had issued the EIA Notification dated 14.09.2006. He explained that the EIA Notification dated 14.09.2006 provides that the prior environmental clearance from the Central Government, or as the case may be, from the State Level Environment Impact Assessment Authority, shall be taken for construction of new projects or activities or the expansion or modernization of existing projects or activities mentioned in the Schedule to this Notification. He submitted that the Central Government through MoEF is, thus, undertaking appraisals of projects in accordance with the Notification dated 14.09.2006. He submitted that compliance of the conditions stipulated in the environmental clearance granted to the projects are being monitored and enforced six Regional Offices of the MoEF are functioning at Bangalore, Bhopal, Bhubaneswar, Chandigarh, Lucknow and Shillong. He submitted that as an appropriate mechanism for appraising projects as well as monitoring and enforcing compliance of environmental conditions that govern

- A Environmental Clearances is already in place, it is not necessary for the Central Government to appoint a National Regulator under sub-section (3) of Section 3 of the Environment (Protection) Act, 1986. Mr. Parasaran finally submitted that Part II of the order dated 06.07.2011 of this Court in the case of
- B Lafarge Umiam Mining Private Limited is titled "Guidelines to be followed in future cases" and hence the observations of this Court in Part II were in the nature of suggestions of this Court and the Central Government is considering these suggestions and has not taken a decision to appoint a National Regulator
- C under sub-section (3) of Section 3 of the Environment (Protection) Act, 1986.

4. Mr. Harish N. Salve, learned Amicus Curiae, on the other hand, submitted that it will be clear, on a reading of Para 122

D of the order dated 06.07.2011 of this Court in the case of Lafarge Umiam Mining Private Limited, that this Court held that Section 3 of the Environment (Protection) Act, 1986 confers a power coupled with duty and it is incumbent on the Central Government, to appoint a Regulator. He submitted that the order

E of this Court was therefore in the nature of a mandamus to the Central Government to appoint a National Regulator and the plea taken on behalf of the Union of India that the order to appoint a National Regulator was in the nature of a suggestion is misconceived. He argued that the order in the case of

F *Lafarge Umiam Mining Private Limited* was passed on 06.07.2011, and no review petition was filed in response of the order dated 06.07.2011, and after two years of the passing of the order, the Union of India cannot refuse to comply with the order of this Court. Mr. Salve referred to notifications issued

G by the Central Government under Section 3(3) of the Environment (Protection) Act, 1986 constituting authorities, such as the Notification dated 17.09.1998 constituting the Arunachal Pradesh Forest Protection Authority.

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5. We have considered the submissions of Mr. Parasaran and Mr. Salve and the main question that we have to decide is whether the order of this Court in *Lafarge Umiam Mining Private Limited* for appointing a National Regulator under Section 3(3) of the Environment (Protection) Act, 1986 was merely a suggestion or a mandamus to the Central Government. Sub-paragraphs (i.1), (i.2.), (i.3.), (i.4.) and (i.5.) of paragraph 122 of the order of this Court in the case of *Lafarge Umiam Mining Private Limited* are extracted hereinbelow:

“(i.1.) The time has come for this Court to declare and we hereby declare that the National Forest Policy, 1988 which lays down far-reaching principles must necessarily govern the grant of permissions under Section 2 of the Forest (Conservation) Act, 1980 as the same provides the road map to ecological protection and improvement under the Environment (Protection) Act, 1986. The principles/guidelines mentioned in the National Forest Policy, 1988 should be read as part of the provisions of the Environment (Protection) Act, 1986 read together with the Forest (Conservation) Act, 1980. This direction is required to be given because there is no machinery even today established for implementation of the said National Forest Policy, 1988 read with the Forest (Conservation) Act, 1980. Section 3 of the Environment (Protection) Act, 1986 confers a power coupled with duty and, thus, it is incumbent on the Central Government, as hereinafter indicated, to appoint an appropriate authority, preferably in the form of regulator, at the State and at the Central level for ensuring implementation of the National Forest Policy, 1988.

(i.2.) The difference between a regulator and a court must be kept in mind. The court/tribunal is basically an authority which reacts to a given situation brought to its notice whereas a regulator is a proactive body with the power conferred upon it to frame statutory rules and

A regulations. The regulatory mechanism warrants open discussion, public participation and circulation of the draft paper inviting suggestions.

B (i.3.) The basic objectives of the National Forest Policy, 1988 include positive and proactive steps to be taken. These include maintenance of environmental stability through preservation, restoration of ecological balance that has been adversely disturbed by serious depletion of forests, conservation of natural heritage of the country by preserving the remaining natural forests with the vast variety of flora and fauna, checking soil erosion and denudation in the catchment areas, checking the extension of sand dunes, increasing the forest/tree cover in the country and encouraging efficient utilisation of forest produce and maximising substitution of wood.

D (i.4.) Thus, we are of the view that under Section 3(3) of the Environment (Protection) Act, 1986, the Central Government should appoint a National Regulator for appraising projects, enforcing environmental conditions for approvals and to impose penalties on polluters.

E (i.5.) There is one more reason for having a regulatory mechanism in place. Identification of an area as forest area is solely based on the declaration to be filed by the user agency (project proponent). The project proponent under the existing dispensation is required to undertake EIA by an expert body/institution. In many cases, the court is not made aware of the terms of reference. In several cases, the court is not made aware of the study area undertaken by the expert body. Consequently, MoEF/ State Government acts on the report (Rapid EIA) undertaken by the institutions who though accredited submit answers according to the terms of reference propounded by the project proponent. We do not wish to

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cast any doubt on the credibility of these institutions. However, at times the court is faced with conflicting reports. Similarly, the Government is also faced with a fait accompli kind of situation which in the ultimate analysis leads to grant of ex post facto clearance. To obviate these difficulties, we are of the view that a regulatory mechanism should be put in place and till the time such mechanism is put in place, MoEF should prepare a panel of accredited institutions from which alone the project proponent should obtain the Rapid EIA and that too on the terms of reference to be formulated by MoEF.”

It will be clear from the underlined portions of the order of this Court in *Lafarge Umiam Mining Private Limited* extracted above that this Court on an interpretation of Section 3 (3) of the Environment (Protection) Act, 1986 has taken a view that it confers a power coupled with duty to appoint an appropriate authority in the form of a Regulator at the State and at the Central level for appraising projects, enforcing environmental conditions for approvals and to impose penalties on polluters and has accordingly directed the Central Government to appoint a National Regulator under the said provision of the Act. Mr. Parasaran is, therefore, not right in arguing that in the case of *Lafarge Umiam Mining Private Limited*, this Court has merely suggested that a National Regulator should be appointed and has not issued any mandamus to appoint a National Regulator.

6. We further find on reading of sub-paragraphs (i.2), (i.3) and (i.5) of Paragraph 122 of the order in the case of *Lafarge Umiam Mining Private Limited* extracted above that this Court has not found the mechanism of making the EIA appraisals of projects by the MoEF to be satisfactory. As a matter of fact, we also find that the Department of Management Studies, Indian Institute of Technology, Delhi, has prepared report on ‘Scope, Structure and Processes of National Environment

A *Assessment and Monitoring Authority (NEAMA)* for the
Ministry of Environment and Forest, Government of India, and
the Executive Summary of the Report points out the problems
with regard to the implementation of EIA 2006 Notification.
Paragraph 4 from Section I of the Executive Summary under
B the heading '*Major Findings & Recommendations*', is
extracted hereinbelow:

C "4. We analysed the implementation of EIA 2006
notification and the proposed CZM notification 2010 in
terms of policy, structure and process level issues. Almost
all the problems in implementing these notifications relate
to structure and processes. Key issues are mentioned
below

D a. The presence of MoEF in both the appraisal and
approval processes leads to a perception of conflict of
interest. The Member Secretary (who, according to the
2006 notification, was supposed to be the Secretary) is
involved in the processing, appraisal and approval of the
EIA applications.

E b. Lack of permanence in the Expert Appraisal
Committees leads to lack of continuity and institutional
memory leading to poor knowledge management.

F c. Current EIA and CRZ clearances rely predominantly on
the data provided by the project proponent and the
absence of authenticated and reliable data and lack of
mechanisms to validate the data provided by the project
proponent might lead to subjectivity, inconsistency and
inferior quality of EIA reports.

G d. Though the EIA notification requires several documents
like ToRs (for every project), minutes of public hearing
meetings (for each project), EIA report (with clearance
conditions) and self-monitoring reports to be put in public
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domain (predominantly on the website), this has not been done for lack of institutional mechanisms. This leads to a perception of lack of transparency in the processes.

e. Several studies have pointed toward the poor monitoring of the clearance conditions. Huge gaps in monitoring and enforcement of clearance conditions actually defeats the very purpose of grant of conditional environmental clearance.” (See moef.nic.in/downloads/public-information/exec-summm-NEMA.pdf)

7. Hence, the present mechanism under the EIA Notification dated 14.09.2006, issued by the Government with regard to processing, appraisals and approval of the projects for environmental clearance is deficient in many respects and what is required is a Regulator at the national level having its offices in all the States which can carry out an independent, objective and transparent appraisal and approval of the projects for environmental clearances and which can also monitor the implementation of the conditions laid down in the Environmental Clearances. The Regulator so appointed under Section 3(3) of the Environment (Protection) Act, 1986 can exercise only such powers and functions of the Central Government under the Environment (Protection) Act as are entrusted to it and obviously cannot exercise the powers of the Central Government under Section 2 of the Forest (Conservation) Act, 1980, but while exercising such powers under the Environment Protection Act will ensure that the National Forest Policy, 1988 is duly implemented as held in the order dated 06.07.2011 of this Court in the case of *Lafarge Umiam Mining Private Limited*. Hence, we also do not find any force in the submission of Mr. Parasaran that as under Section 2 of the Forest (Conservation) Act, 1980 the Central Government alone is the Regulator, no one else can be appointed as a Regulator as directed in the case of *Lafarge Umiam Mining Private Limited*.

- A 8. We, therefore, direct the Union of India to appoint a Regulator with offices in as many States as possible under subsection (3) of Section 3 of the Environment (Protection) Act, 1986 as directed in the order in the case of *Lafarge Umiam Mining Private Limited* and file an affidavit along with the
- B notification appointing the Regulator in compliance of this direction by 31st March, 2014.

9. The I.As. will stand disposed of accordingly.

R.P.

I.As disposed of.