

National Green Tribunal
National Green Tribunal
T. Murugandam And Others vs Moef And Others on 23 May, 2012
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BEFORE THE NATIONAL GREEN TRIBUNAL

NEW DELHI,

(PRINCIPAL BENCH)

APPEAL No. 17 OF 2011(T)

NEAA NO. 20 OF 2010

1. T. Murugandam,

S.o M. Thangarasn,

No.22, Old Colony Street,

Killai Village & Post Chidambaram Taluk,

Cuddalore, District,

Tamil Nadu.

2. T. Arulsevm,

S/o G. Thirunavukkarasu,

No.6, Nainarpet Street, Naduverpattu Post, Cuddalore Taluk & District, Tamil Nadu.

3. S. Ramanathan,

S/o P. Subramaniyan,

No.74, South Street, Semmankuppam Village, SIPCOTY Post, Cuddalore Taluk & District, Tamil Nadu.

Appellant(s)

Versus

1. Ministry of Environment & Forests,

Through the Secretary,

Paryavran Bhawan, CGO Complex,

Lodhi Road, New Delhi-110003.

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2. Tamil Nadu Pollution Control Board,

Through the Member Secretary,

76-Mount Salai, Guindy,

Chennai-600 032.

3. M/s IL&FS Tamil Nadu Power Company Ltd., B-Block, Navins Presidium, 4th Floor,

103, Nelsom Manickam Road, Aminjikarai,

Chennai-600 029.

Respondents

Counsel for Appllent:

Shri Ritwick Dutta, Advocate alongwith

Mr.Rahul Choudhary

Counsel for Respondents:

Ms. Neelam Rathore, Advocate for R.1 (MoEF) Mr.Piyush Joshi for R-3 (IL&FS Tamil Nadu Power Co. Ltd.)

JUDGMENT

PRESENT:

Justice A.S. Naidu (Acting Chairperson)

Dr. G.K. Pandey (Expert Member)

..... Dated 23rd May, 2012

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JUDGMENT BY THE BENCH

The Appellants seek to assail the Environmental Clearance (EC) granted by the Ministry of Environment and Forests (MoEF) for the proposed Coal Based Thermal Power Plant (2 x 600 MW 3

+ 3 x 800 MW) by M/s IL&FS Tamil Nadu Power Company Ltd., at Chidambaram Taluk, Cuddalore District, Tamil Nadu. According to the Appellants the project has been granted EC despite serious objections concerning environment raised during the public hearing. According to Appellants the objections / concerns raised related to adverse impact on marine environment and fishermen community anticipated, environmental pollution problems due to proximity to SIPCOT Chemical Complex of Cuddalore, inadequate EIA report, increase in sea water temperature due to discharge of cooling water from the power plant and its impact on marine life, coral reefs, impact on air quality and consequential health implications, lack of cumulative impact analysis, likely adverse impact on Pichavaram Mangroves etc.

2. It is alleged that though the above issues and many others were raised during public hearing, they were not given due consideration by the Expert Appraisal Committee (EAC) and MoEF and assessment was done in spite of incomplete data and inadequate EIA report.

3. It is averred in the Memorandum of Appeal that the project violates the siting guidelines framed for Thermal Power Plants by the MoEF especially with regard to the location which is falling within 25 kms of the ecological sensitive areas. Ecological sensitive areas include coastal areas rich in corals, mangroves, breeding grounds in estuaries etc.

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Perusal of the records reveal that the project is located at a distance of about 8 kms from Pichavaram mangroves, as such location of site is in violation of MoEF's Siting Criteria for Thermal Power Plant. On the basis of above facts, and circumstances, the Appellants pray to quash the EC granted on 31st May, 2010 to the Project in question

4. After serving notice a detailed reply was filed on behalf of Respondent No.5 the Project Proponent. The averments made and allegations leveled in different paragraphs of the Memorandum of Appeal were strongly repudiated in the Reply. According to the Project Proponent, the site on which the proposed project is coming up, satisfies the siting criteria and the guidelines prescribed by MoEF for setting up of Thermal Power Plant. Further, it is submitted that EAC as well as MoEF have sacrosanctly followed the provisions of law and the provisions of EIA Notification, 2006 and on being satisfied that no harm will be caused to the environment and or ecology rightly granted EC. In support of its statements several documents were filed and were marked as Annexures.

5. On behalf of MoEF, Respondent No.1, a detailed reply was also filed more or less on the same grounds as that of the Project Proponent. It was emphatically stated that the Authorities had acted bonafidely and allegations to the contrary are not correct. According to the MoEF all steps which are required before granting EC were mandatory followed, and only thereafter EC was granted.

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6. On behalf of the Appellant a rejoinder affidavit has been filed further elucidating the facts averred in Memorandum of Appeal and repudiating some of the facts made in the replies filed by Respondent No. 1 & 3. Respondent No. 2 Tamil Nadu Pollution Control Board also filed a reply supporting the decision of MoEF in granting the EC to the Project.

7. Expanding his arguments, Shri Ritwick Dutta, Learned Counsel for Appellants, submitted that the project has been approved despite serious concerns being raised by the public against the project. MoEF & EAC have failed to consider the "relevant factors" which should have been taken into account while taking the final decision regarding grant of EC. According to Shri Dutta without proper study no effective mitigation plan can be drawn, so also without any detailed study the decision to grant EC cannot be taken in accordance with the precautionary principle and principles of sustainable development. It is also submitted that the EC granted is in violation of the principles of environmental law, and hence the decision is illegal and cannot be sustained in view of following reasons:-

a) No cumulative impact assessment was done despite the mandatory requirement under Para 9 of Form-1 of Appendix 1 of the EIA Notification, 2006. b) The critical issues raised during the public hearing were not addressed in the EIA report, added to it the public consultation was only an empty formality and was neither properly conducted nor the views expressed were considered.

c) The Project is contrary to the siting guidelines for Thermal Power Plants framed by the MoEF, in as much as since the project is located within a distance of 8 kms of the Pichavaram Mangrooves which is spread over an area of 11 sq. km. and is an ecologically sensitive area. The protection of ecologically sensitive areas is a part of Doctrine of Public Trust as has been held in the Apex Court in the case of M.C.Mehta Vs Kamalnath 1997 (1) SCC

388. further submitted the following:-

d) The EAC also failed to carry out a detailed scrutiny of the public hearing.

e) The RTI response obtained by the Appellant from the MoEF has revealed that only the Draft EIA report was with the MoEF and the same was considered by the EAC, as would be evident from the fact that there is no difference in the final EIA and the draft EIA report.

8. Mr. Dutta further, forcefully submitted that during the public hearing the issues raised pertaining to the carrying capacity and related matters were not considered while granting EC. The need for carrying capacity and cumulative impact assessment study was raised during the public hearing but the same was not carried out by the Project Proponent and the EC was granted by MoEF. Further, the Project Proponent though admitted that "the cumulative impact due to the proposed refinery on the North of the project was not included, due to non-availability of 7

data," consequently the cumulative assessment was not considered by the EIA.

Following judgments were relied upon by the Appellants for highlighting the need for cumulative impact assessment.

A P Pollution Control Board Vs Prof. M.V. Nayudu (1999) 2 SCC 718

Karnataka Industrial Areas Development Board Vs C. Kenchappa (2006) 5 SCC 371.

Decisions of Foreign Courts on Cumulative Impact Assessment

Fritiofson Vs Alexander, US Court of Appeal for the Firth Circuit,1995 (772 F.2d 1225)

Natural Resources Defense Council, Inc. Vs. Hodel, US Court of Appeals for the District of Columbia, 865 F.2d 288.

Friends of the Earth, Inc. Vs. United States Army Corps of Engineers, United States District Court, District of Columbia, (109 F.Supp.2d 30 (2000).

European Commission Vs Kingdom of Spain

(2011)EC) C-404/09 (24 November, 2011): In the said case the kingdom of Spain attempted to remedy the defects in the EIA by producing a report prepared after 8

the litigation had commenced, and several years after the mines had been authorized, that evaluated the combined impacts of the coal mines. The Court rejected this approach, stating that the defective EIAs could not be remedied by the post hoc report because a cumulative impacts analysis must be conducted before a project is authorized - not after the fact (see para 83 of the judgment.)

9. Advancing his submission Mr. Dutta emphasized that EAC has not done detailed scrutiny while considering the project especially with regard to the requirement of carrying capacity study in spite of the fact

that the said issue was raised during the public hearing. Also, no reason has been assigned in the minutes of EAC for lack of such study.

10. The draft EIA report and the final EIA report it is submitted, are virtually identical, which reveals that none of the concerns raised and discussed in the public hearing, have been taken into consideration, especially concerns' regarding carrying capacity, effect on fishing, marine life, air pollution etc. As such, the entire process of the public hearing has been treated as mere formality and thus rendered nugatory. In support of the said arguments, Mr. Dutta relied upon the judgment of the Hon'ble High Court of Delhi in the case of "Utkarsh Mandal Vs. Union of India (W.P. (Civil) No.9340 of 2009). In the said decision Hon'ble High Court of Delhi observed that the duty of EAC is to 9

indicate as to how the objections raised in the public hearing was dealt with and the response of the Project Proponent, to the said objections. The report should also reveal that the objections were considered and the reasons why any or all of such objections were accepted or negatived. The Hon'ble High Court further held that "failure to give such reasons would render the decision vulnerable to attack on the ground of being vitiated due to non- application of mind to relevant materials and therefore arbitrary". From the materials placed on record, it is submitted indicating that no such process was adopted by the EAC and the MoEF, while granting EC to the Project. Also, the issues raised with regard to carrying capacity have also not been fully dealt by EAC. No negative impacts due to the desalination plant has been mentioned in the EIA report and the same has not been shared with the public.

11. In short, according to the Appellants the following main issues were not properly considered by EAC and MoEF before granting EC to the Power Project and as such the order is liable to be quashed:

(a) Power Plant location is violating the siting criteria for Thermal Power Plants, being within 25km of the ecologically sensitive area e.g. Pichavaram Mangroves.

(b) Lack of cumulative impact assessment. 10

(c) Lack of consideration of the views and objections raised during public hearing by EAC and MoEF.

(d) Non-publication of all the materials, studies and reports, thirty days before public hearing.

12. In response the Learned Counsel for Respondent No.1 (MoEF), submitted that the proposed Thermal Power Project, Desalination plant and a Captive port at Cuddalore do not fall in any of the critically polluted areas. The project is located more than 13.5 km. away from SIPCOT industrial area. Further, the EAC had prescribed the Terms of Reference (TOR) after a site visit was made by a Sub-Committee of EAC. The Project Proponent submitted a final EIA report after the public hearing was held on 5th February, 2010 alongwith the proceedings of the public hearing. EAC considered the project based on the final EIA report and the proceedings of the public hearing during its 67th meeting held on 19-20th March, 2010. The addendum to the EIA report inter alia included marine impact assessment and action plan for regeneration / conservation of Pichavaram Mangroves. EAC discussed the issues raised in the public hearing and objections received against the project and decided that the Project Proponent shall submit the revised Form-1 and revised EIA/EMP report incorporating the details specified therein, for reconsideration of the project proposal by EAC. Accordingly, Respondent No.3 submitted the Revised Form-1 on 16th April, 2010 and the addendum to the EIA Report containing the informations / documents sought by the EAC in its 67th Meeting 11

by letter dated 19th April, 2010 which was received in MoEF on 20th April, 2010. The Project Proponent also requested in the 67th meeting of the EAC for consideration of their proposal in an integrated way covering Power plant, Captive Port and Desalination Plant from environmental angle in the next meeting of the EAC as stated in Para-5 of the additional affidavit filed by R-1 on 16th January, 2012. The documents furnished by the Project Proponent were placed before the EAC for its consideration in its 69th meeting held during April 30 to

May 1, 2010 keeping in view the requirements as per the decision taken in 67th meeting of the EAC. The EAC in this meeting recommended the project for grant of EC after detailed consideration and appraisal of the project from environmental angle. Accordingly, the Respondent No.1 granted EC to the Project on 31st May, 2010 based on the recommendations of the EAC and after following the due process as laid down in the EIA notification, 2006 subject to the compliance of the various stipulated conditions for environmental safeguards.

13. Ms. Neelam Rathore, Learned Counsel for Respondent No. 1 further submitted that the TORs given to Project Proponent (R-3) included the cumulative impact on the environment (Air, Water, Noise, Soil, Socio-economic aspects etc.) inclusive of the impact of the existing units located within 10 kms radius on the recommendations of the EAC for the preparation of the EIA report and Environment Management Plan. The environmental issues such as, likely adverse impact due to discharge of brine from the desalination plant on the marine ecology were also considered by 12

the EAC during appraisal of the project and appropriate and specific conditions Nos. (x) and (xiii) have been inserted in the EC. Further, keeping in view the importance of marine biology following specific conditions in the EC have been stipulated by MoEF:-

"a) The Project Proponent shall develop a monitoring mechanism for marine / coastal water at its own expenses by an independent Government organization location in the region such as Annamalai University. A comprehensive marine biological quality monitoring programme and mitigation measures shall be prepared and submitted within six months to the Ministry.

b) Suitable screens (in stages) shall be placed across in take channel to prevent entrainment of life forms including eggs, larvae, juvenile fish, plankton etc. during extraction of sea water.

c) The Project Proponent shall submit a time bound implementation plan for re-generation / preservation of Pichavaram Mangroves and others, if any, and the fund earmarked and committed for the same amounting to Rs. 6.0 Crores shall not be diverted for any other activity. Road map for implementation shall be submitted within six months to the Ministry."

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14. According to Ms. Rathore the conditions stipulated in the EC adequately address the necessity for regeneration and protection of the existing fragile ecosystem such as Pichavaram Mangroves, marine flora and fauna, discharge of water containing brine etc. Learned Counsel for R-1, further submitted that there is no illegality done in according the EC by the Respondent No.1, and the submissions to the contrary are baseless.

15. Mr. Joshi, Learned Counsel for Respondent No.3, Project Proponent, relied upon several documents and submitted that the project area and the order does not fall within scope of Section 11(1) of the NEAA Act, 1997 and therefore, NGT cannot entertain the Appeal, the Appeal is time barred under Section 11 of NEAA Act, 1997, the Appellant do not qualify as a 'Person' competent to file an Appeal under Section 11 of NEAA, 1997, validity of EC granted to the project cannot be challenged on grounds other than that which had been specified in Section 11(1) of NEAA Act, 1997 (which is also reflected in Section 16 (h) of NGT Act, 2010.

16. Further, it is submitted that there is no mandatory legal requirement under EIA Notification 2006 or other applicable Indian law for carrying out "cumulative impact assessment" of projects, MoEF while granting EC has applied its mind and took into account the concerns raised during the public hearing etc.

17. Mr. Joshi in course of arguments referring to the affidavits and counter affidavits filed submitted that the project site of Power Plant is falling outside 10 km radius of the proposed Coal Based 14

Thermal Power Plant (2x 660 MW) being developed by Cuddalore Company Pvt. Ltd. and the Nagarjuna Oil Refinery being developed in SIPCOT area, thus there is no question of cumulative impact. According to Mr. Joshi, there is no mandate to either undertake a cumulative impact assessment prior to filing of Form-1 or thereafter and it would be an unreasonable requirement to expect an Applicant developer to obtain information on all similar projects that may be considered by the State Govt., District Administration or Union Govt. and in respect of which there would be no information or very limited information available publically. He has, further, stated that a "Form" cannot override the substantive content of the Statute. He has cited following decision in support of his submissions e.g. Life Insurance Corporation of India Vs Escorts Ltd., and Others. AIR 1986 SC 1370, The Commissioner of Income Tax Vs Apar Industries Ltd., (2010) 231 CTR (Bona) 313 etc.

18. Mr. Joshi reiterated the stand of EAC and submitted that the MoEF had taken into account concerns raised during the Public Hearing and has applied its mind and stipulated a number of environmental conditions while granting EC to the project based on the recommendations of EAC.

19. After duly considering the affidavits, additional affidavits, counter affidavits, submissions made by the petitioner, respondents and the notes submitted by them before us, we do not agree with the approach of the Project Proponent to the extent that cumulative impact assessment cannot be worked out 15

in the absence of data from other units. It is quite possible to assess likely impacts from the proposed Coal based Power Plant (2x660 MW) of Cuddalore Power Company Ltd., the Nagarjuna Oil Refinery, Desalination Plants and Captive Ports operating in the region. Even though, while filling the Form-1, Column 9.4, it has been clearly stated by the Project Proponent that there will be cumulative effects due to proximity to other existing or proposed projects with similar effects and a clear cut mention has also been made in the said column that the cumulative effects could be due to other Power Plants, Desalination Plant and Captive Ports operating near the coast in the region but in fact, while preparing the EIA report, no cumulative effect has been worked out by the Consultant / Project Proponent.

20. In course of hearing, it was submitted by the Learned Counsel R-3 that due to non-availability of adequate data in respect of the proposed / existing industrial activities, cumulative impact assessment could not be done. We, however, do not subscribe to the submission of Learned Counsel as it is quite possible to work out likely cumulative impacts based on the capacity of the Coal based Power Plant (2x660 MW), Nagarjuna Refinery etc., theoretically by applying mathematical models. The cumulative impact assessment exercise is considered necessary in this particular case, as Pichavaram Mangroves are located at a distance of 8 km from the Southern boundary of the proposed Power Plant, added to it the issues pertaining to the cumulative impacts were raised during the public hearing. As such, we strongly feel keeping in view the precautionary principle and 16

sustainable development approach, cumulative impact assessment studies are required to be done in order to suggest adequate mitigative measures and environmental safeguards to avoid any adverse impacts on ecologically fragile eco-system of Pichavaram Mangroves and to the biological marine environment in the vicinity. We, therefore, direct that cumulative impact assessment studies be carried out by the Project Proponent especially with regard to the proposed Coal Based Power Plant (2x660 MW) of Cuddalore Power Company Ltd. and the Nagarjuna Oil Refinery and other industrial activities within a radius of 25 km from the Power Project of M/s. IL&FS Tamil Nadu Power Co. Ltd. (3600 MW) and be submitted to MoEF for review of Environmental Clearance accorded on 31st May, 2010 in order to stipulate any additional environmental conditions and safeguards required for the protection and preservation of Pichavaram Mangroves and Marine environment.

21. It appears number of major projects have been proposed in the close proximity of Cuddalore Industrial Area (SIPCOT) and Pichavaram Mangroves, we direct MoEF to initiate a Carrying Capacity Study taking into account the assimilating and supportive capacity of the region. This study would go a long way in taking

appropriate measures and environmental safeguards right from the beginning to avoid irreparable damages to the fragile ecosystem of Pichavaram Mangroves and marine environment. This study may be completed within a period of maximum of 3 years.

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22. We also feel that there is need to have more transparency in the EIA process and as such, whatever relevant information regarding the projects are used during the time of the appraisal of the project from environmental angle by the EAC and MoEF should also be made available in public domain including the executive summary of specific studies. Therefore, we direct MoEF to make available the relevant information other than EIA report and report of the public hearing considered during the appraisal of the project through its website. Similarly, the concerned State Pollution Control Board (SPCB) should also make available in their website the pertinent information regarding the public hearing proceedings, "Consent to Establish" and "Consent to Operate", compliance status etc. The MoEF should also upload from time to time the compliance status of the various stipulated conditions during the grant of EC to projects so as to bring compliance status in public domain in case of all the projects granted EC under EIA Notification, 2006. The project proponent must also upload the compliance status of EC conditions including the Executive Summary of the specific studies done in respect of the project and update the same periodically.

23. As we are convinced that EC to the proposed project was granted by and large in consonance with the EIA process as required under EIA Notification, 2006, we do not feel any necessity to quash the EC granted by MoEF. However, we direct MoEF to review the EC based on the cumulative impact assessment study and stipulate any additional environmental 18

conditions, if required. Updated EIA report may be shared with the Appellants and they may be invited in the EAC meeting and may be heard before a decision is taken by EAC/MoEF, till then the EC shall remain suspended.

The Appeal is partly allowed. Parties to bear their own costs.

Dr. G.K. Pandey Justice A.S. Naidu Expert Member Acting Chairperson

Durga Malhotra

23rd May, 2012