

**BEFORE THE NATIONAL GREEN TRIBUNAL
EASTERN ZONE BENCH, KOLKATA**

.....

ORIGINAL APPLICATION No.151/2016/EZ

IN THE MATTER OF:

1. Non Violence Again
Represented by its Managing Trustee Ms Puspa Sahani,
HIG-B/41, Kalinga Vihar,
Phase-III, Chhend colony,
Rourkela, Sundargarh,
Odisha-769015
2. Jagannat Bhoi,
Son of late Sitaram Bhoi
At Dalaki, PO Kalimandir Road,
Dist. Jharsuguda, Odisha, PIN 768202.

.....Applicants

V e r s u s

1. Vedanta Limited,
(Formerly Vedanta Aluminium Ltd.)
1st Floor, Module C/2, Fortune Tower,
Bhubaneswar- 751023, Odisha
2. State of Odisha
Represented by Principal
Secretary, Forest and Environment
Deptt. Secretariat Building,
Bhubaneswar-751001
3. Union of India,
Through the Secretary,
M/o Environment & Forest, Climate Change,
Indira Paryabaran Bhawan, Jorbag
New Delhi-110 003
4. The District Collector, Jharsuguda,
Odisha-768201
5. The Principal Chief Conservator of Forests,
Forest Deptt. Govt. of Odisha,
Aranya Bhawan, Bhubaneswar,
Odisha-751923
6. The Divisional Forest Officer,
Jharsuguda, PO Jharsuguda

7. The Member Secretary,
Odisha State Pollution Control Board,
A-118, Nilakantha Nagar,
Bhubaneswar-751012

.....Respondents

COUNSEL FOR APPLICANTS:

Mr. Sankar Prasad Pani, Advocate

COUNSEL FOR RESPONDENTS:

Mr. Siddhartha Mitra, Senior Advocate for Respondent No. 1

Mr. Deepan Kumar Sarkar, Advocate

Mr. Souvik Kundu, Advocate

Mr. Deepak Kumar Pani, Advocate, Respondents No. 2,4 & 6

Mr. Gora Chand Roy Chowdhury, Advocate, Respondent No. 3

Ms. S. Roy, Advocate

Mrs. Papiya Banerjee Bihani, Advocate, Respondent No. 7

JUDGMENT

PRESENT:

Hon'ble Mr. Justice S.P.Wangdi, Judicial Member

Hon'ble Prof. (Dr.) P. C. Mishra, Expert Member

Reserved On: 01 .11.2017
Pronounced On: 13 .11.2017

1. Whether the Judgment is allowed to be published on the net? Yes
2. Whether the Judgment is allowed to be published in the NGT Reporter? Yes

Prof. (Dr) P.C. Mishra (EXPERT MEMBER)

1. The Application was preferred, under Section 18 (1) read with Section 14 (1) and 15 of the National Green Tribunal Act, 2010 (in short, NGT Act) by two Applicants, one registered Non-Profit Organization (in short, NGO) named “Non-Violence Again” represented by its Managing Trustee, Ms. Puspa Sahani, and other Sri Jagannat Bhoi. The NGO Applicant works for affected communities who are facing crises and challenges from environmental threats where as Sri Jagannat Bhoi, the 2nd Applicant is a local tribal who has brought to the notice of the State and Union Government the alleged illegal and unauthorized use of forest land in Jharsuguda by the Respondent No.1, Vedanta Limited.

2. The Applicant would state that the Respondent No.1, Vedanta Ltd. formerly known as Vedanta Alumina Ltd. used 246.74 acres of forest land in Khata No. 108 illegally for its ash pond in Burrkhamunda village in Jharsuguda district without approval from the Central Govt. under Forest (Conservation) Act, 1980 (in short, FC Act). They further contended that Environmental Clearance (in short, EC) was obtained for expansion of their existing Aluminium Smelter and Captive Power Plant on 11th June, 2008, suppressing the fact on forest land and

mentioning that no forest land is involved. It is also their case that the Divisional Forest Officer (in short, DFO) of Jharsuguda, the Respondent No.6 has confirmed in his reply to one RTI application that no forest land in Khata No. 108 has been allotted/given to Vedanta Ltd. for construction of ash pond or any other purpose.

3. It is further stated that in response to the representation of the Applicant No.2 and other villagers to the Secretary, Forest and Environment Department, Govt. of Odisha alleging encroachment of forest land for the ash pond of Respondent No.1, the DFO, Jharsuguda directed Vedanta to vacate the forest land of 246.74 acres which is illegally occupied by Vedanta Ltd. vide letter dated 20.01.2014. The DFO also requested the Collector and District Magistrate, Jharsuguda, Respondent No.4 for appropriate direction to Tahasildar, Jharsuguda to initiate eviction of encroachment by Vedanta Ltd. vide letter dated 20.01.2014 and one Encroachment Case No. 158/13 was instituted by Tahasildar, Jharsuguda against Vedanta Ltd. for encroachment of 108.29 acres of forest land (Gramya Jungle Kisam Category) in Khata No. 108 in Bherkhamunda Mouza.

4. In the light of the above-stated facts and circumstances and that the non-forest use of forest land without prior approval of the Union Government is a violation of Forest (Conservation) Act

and order of the Hon'ble Supreme Court in Godavarman case in WP (b) 202 of 1995, the Applicants would make the following prayer for adjudication :

A) Direct the Respondent No. 2 and 3 to take necessary legal action against the respondent No. 1 including the criminal proceeding for wilfully violating the provision of Forest Conservation Act, 1980.

B) Direct the forest department, Respondent No. 2 and 3 to take necessary action against the Respondent No. 1 for unauthorised use of forest land for Ash Pond and other purposes;

C) Hold and declare that the construction activities carried out by the Respondent No. 1 is illegal.

D) Suspend the environment clearance letter dated 11/06/2008 for obtaining the same by suppression of facts and illegally using forest land for Ash Pond.

E) Impose heavy penalty on private respondent and direct the private respondent to restore the land to its original condition.

F) Hon'ble Tribunal may grant any other relief as his lordship deem proper in the interest of justice.

5. The State Pollution Control Board, Odisha, Respondent No. 7 in their reply affidavit in opposition would state that the matter relating to forest land and approval thereof under FC act does not come under their purview. However, the Respondent No. 1 industry has obtained necessary consent to operate valid till

31.3.2017 for operation of its Aluminium Smelter Plant and Captive Power Plant under Section 25 of the Water(Prevention and Control of Pollution) Act, 1974 and Section 21 of the Air (Prevention and Control of Pollution) Act, 1981.

6. The DFO, Jharsuguda in the affidavit filed on behalf of the Respondents No. 2,4,5 & 6 would reveal that the Respondent No. 1 Industry dumped fly ash at Kureboga Ash Pond spread over an area of 143.00 acres and the ash pond encircles a patch of Gramya Jungle of Ac 48.68 in Plot No. 188 in which the industry encroached and amalgamated with their ash pond on the plea that the Collector, Jharsuguda permitted for filling the low lying area in plot No. 188 without resorting to Forest diversion Proposal. Later the industry has been permitted by the State Pollution Control Board, Odisha to dispose of fly ash in ash ponds at Katikela over an area of Ac 192.00 and filling of low lying area at Bhagipali near Banjari gate and near Urja setu.

7. It is further stated in the affidavit that the Tahasildar, Jharsuguda booked an encroachment case bearing No.158/2013 against the Respondent No. 1 on the allegation made by the villagers for encroachment of Gramya Jungle in Mouza Burkhamunda, Khata No. 108 for an area of AC 108.29. However after field enquiry it was found that an area of Ac 48.68 in plot

No.188 has been encroached by the industry and eviction order was passed. The industry has filed an appeal against the order of the Tahasildar and that matter is now *sub-judice*.

8. Vedanta Ltd. Respondent No. 1 in their affidavit filed on 4th January 2017 raised the issue of maintainability as there exist no cause of action or grounds to make the application maintainable. According to them, the contents of the said application are frivolous, capricious, misconceived containing insufficient and mutually inconsistent particulars and suffers from gross suppression of material facts and that the Applicants have approached the Tribunal with mala fide motive and with unclean hand to harass the Respondent No. 1. They would further state inter alia that the application is barred by the principles of *res judicata* as the content of the application have been the subject matter of other proceedings including the one before the Hon'ble High Court of Odisha.

9. On the allegation of the Applicants on use of forest land to dump fly ash, the Respondent No. 1 would further contend that on 27th May 2011, the Vedanta Ltd. sought for permission for filling of low lying area adjacent to the ash pond of answering Respondent in terms of MOEF Notification dt. 3rd November, 2009, i.e., Plot No. 188 of Khata No. 108 in village Burkhamunda

which was totally barren land giving an undertaking to take all measures to control fugitive emission, compact the dyke with 500 mm soil followed by forestation. The District Collector granted permission to Vedanta Ltd. vide letter dated 21st July, 2011 to fill up in the said low lying area with fly ash. On the expert advice of the Asst. Director of Horticulture, Jharsuguda, the low lying area of size 130'x127' at a depth of 5' was filled up with fly ash followed by watering, compaction and top soil covering and by aforestation and the completion of such work including plantation in 48.68 acres of land was informed to the District Magistrate and Collector on 21st November, 2015.

10. It is also stated in the affidavit that a Public Interest Litigation being WP (C) (PIL) No. 2660 of 2015 was filed before the High Court of Orissa, Cuttack by one Mr. Digamber Bag and Dr. Subash Mohapatra, both from Jharsuguda, purportedly verified on 13th February 2015 against, ,inter alia, the Respondent No. 1 on the self-same cause of action as in the instant application. At the time of hearing, the Applicants prayed for a direction to the Additional Chief Secretary, Revenue and Disaster Management Department, Govt. of Odisha to consider the representation of local peoples submitted before him. By its order dated 11.3.2015, the Hon'ble High Court was pleased to dispose of the writ petition

by asking the concerned authorities to consider the same, without going into the merits of the matter. Thus, it is further stated that the instant proceedings are not maintainable.

11. On the issue of encroachment case and Eviction order dt. 3rd September, 2013, the Respondent No. 1 would state that an appeal was preferred before the Sub-collector of Jharsuguda, being Encroachment Appeal case No. 03/2014 and an order of stay on the eviction order was passed on 4th March, 2014 which was vacated by the order dated 7th May, 2015. Following the vacation of the stay, the Tahasildar, Jharsuguda was directed to act as per the provision of law and the matter was posted for further hearing on 26th May, 2015.

12. The Collector, Jharsuguda, Respondent No. 4, would state that considering the application of Vedanta Ltd. to permit for filling up low lying area in Plot No. 188, Khata No. 108, Kisam Gramya Jungle located adjacent to their ash pond the Tahasildar was asked vide letter dated 13.6.2011 to conduct an enquiry regarding detailed status of the land and its suitability to be filled up by fly ash. On the report of the Tahasildar that there is no forest growth over plot No. 188, the plot is low due to lifting of earths and it is suitable for plantation after being filled up, the Collector permitted the Vedanta Ltd. to fill up ash adhering to the

guidelines of MOEF notification dated 3.11.2009 strictly. From a Joint enquiry conducted by (i) Revenue Supervisor, Jharsuguda, (ii) ACF, Jharsuguda and (iii) Tahasildar, Jharsuguda, it was revealed that all the plots contiguous to plot No. 188 with an area of 48.68 acre are acquired by the Respondent No. 1 through IDCO for their ash pond and this lone plot of 188 was filled with fly ash making a heap of ash of approximately 25 m. During enquiry it was found that earth capping and plantation was being taken up. The district Collector has stated in the affidavit that by permitting filling up the low lying area by fly ash for the purpose of plantation does not violate the provisions of Forest (Conservation) Act, 1980 and he has never passed any order directing the use of forest land or any portion thereof for any non-forest purpose.

13. The State Pollution Control Board, in the additional affidavit filed on 27.4.2017 have categorically stated that no consent to operate has been granted to the Respondent No. 1 for dumping of fly ash over plot No. 188 in village Bhurkhamunda.

14. The MOEF & CC, the respondent No. 3 have dealt with the provisions of Forest (Conservation) Act, 1980 in their affidavit and would state that Principal Secretary, Forest & Environment Department, Govt. of Odisha, Respondent No. 2, has been requested to furnish an inspection report on the allegation of the

petitioners regarding use of forest land by Vedanta Ltd. for non-forest purpose without approval from the competent authority under section 2 of the Forest (Conservation) Act, 1980 and the report is awaited. MOEF & CC would further state that so far as the records available with the answering respondent no such proposal has been received with respect to the diversion of 246.74 acres of forest land and no such permission has been granted under the Forest (Conservation) Act, 1980.

15. The Respondent No. 1, the Vedanta Ltd. filed a further affidavit which was taken on record on 4th July, 2017 which summarises the affidavits filed by the Respondent No. 4, the District Magistrate and Collector and of MOEF, the Respondent No. 3 & 5. The other contents in the affidavits are the repetitions of what has already been stated above in respect to the affidavits filed by the respondents. However, in our order dated 27.4.2017, considering the statement of the MOEF & CC we directed that no unauthorised use of forest land for disposal of fly ash in the area in question shall be carried out further by the Respondent No. 1 until further order. The Respondent No. 1 was further directed to file show cause as to why this order should not be made absolute. Mr. Siddhartha Mitra, Ld. Sr. Counsel appearing for the Respondent No. 1 would submit on 4th July 2017 that as no action

as alleged is being undertaken by the respondent No. 1 on plot No. 188 measuring about 48.6 acres, the order of prohibition dated 27.4.2017 has become redundant and inchoate. He would also state that the work for which permission was granted by the District Magistrate and Collector has been completed way back on 21.11.2015.

16. We have also examined the rejoinder affidavit filed on behalf of the applicants which are nothing but reiteration of earlier submissions and some additional information on ash pond breach in Katikela resulting in revocation of consent to operate which are not connected to the issues raised in this Original Application.

17. After hearing the Applicants and the respondents, perusing the pleadings carefully and examining the documents annexed to the affidavits of the parties, we now frame the following questions to find out the answers.

1. Whether the application is barred by limitation in terms of Section 14(3) of the NGT Act ?
2. Whether the application is not maintainable because of *res-judicata* ?
3. Whether the Plot No. 188 in Khata 108 of 48.68 acre area is a recorded forest land?

4. Whether the permission granted by the District Magistrate and Collector, Jharsuguda to the Vedanta Ltd. to fill up the low-lying area in Plot No. 188 stated above with fly-ash and subsequent plantation over it without the approval of the Union Government is a violation of the Forest (Conservation) Act, 1980?

18. The discussion on question No. 2 depends upon the answer to question No. 1 and any discussion on question number 3 & 4 depends upon the answer to question No. 2. In other words, if the answer to question No. 1 is yes, then it is not required to traverse to question No. 2. Similarly, when answer to question No. 1 is no and answer to question No. 2 is yes, then we need not attempt to discuss on question No. 3 and 4 and the application will stand dismissed. Thus, only after the Applicants succeed to cross the first two hurdles, i.e., question No. 1 & 2, then only the matter will be adjudicated on merit.

19. So far as limitation is concerned, we may refer to the provision of the N.G.T. Act, 2010 on point of limitation.

Sec 14(3) of the NGT Act, 2010 reads as under :-

“ (3) No application for adjudication of dispute under this section shall be entertained by the Tribunal unless it is made within a period of six months from the date on which the cause of action for such dispute first arose;

Provided that the Tribunal may, if it is satisfied that the applicant was prevented by sufficient cause from filing the application within the said period, allow it to be filed within a further period not exceeding sixty days. “

20. Thus, in terms of Section 14(3) of the NGT Act, the application has to be filed within a period of six months from the date when the cause of action for a dispute first arose. The Tribunal is vested with the power to condone the delay by another 60 days in terms of proviso to Section 14 if application is filed beyond six months. At this stage, it may be relevant to refer to the following portion of the judgement of the Principal Bench of NGT dated 10.12.2015 passed in OA 61 of 2012 in **Dr. Arvind Gupta –vs- UOI & Ors. and batch of other OAs** in which identical issues of cause of action and continued cause of action were raised.

“..... It is true that the application has to be filed within a period of 6 months from the date when the Cause of Action first arose. The Tribunal is vested with the power to condone the delay in terms of proviso to Section 14 if the application is filed beyond 6 months. This power can be exercised for condoning the delay but under and not in excess of 60 days. The term ‘cause of action’ has been used in contra distinction to continuing cause of action. In case of a continuing cause of action, ‘cause of action first arose’ has completely a distinct and different role while computing period of limitation. However, it is not equally applicable and does not have the same consequences in a case where the cause of action is recurring complete cause of action. In other words, whenever subsequent act or subsequent breach is a complete cause in itself and its consequences are different, then such cause of action would enable an applicant to bring action before the

Tribunal on the strength of the subsequent act. The limitation would be computed from the date of the subsequent breach or act. In this regard, we may refer to the judgment of the Tribunal in the case of *The Forward Foundation V. State of Karnataka*, 2015 ALL (I) NGT Reporter (2) (DELHI) 81 where the similar question of adherence arose. After hearing the law in detail the Tribunal held as under:

23.'Cause of Action' as understood in legal parlance is a bundle of essential facts, which it is necessary for the plaintiff to prove before he can succeed. It is the foundation of a suit or an action. 'Cause of Action' is stated to be entire set of facts that give rise to an enforceable claim; the phrase comprises every fact, which, if traversed, the plaintiff must prove in order to obtain judgment. In other words, it is a bundle of facts which when taken with the law applicable to them gives the plaintiff, the right to relief against defendants. It must contain facts or acts done by the defendants to prove 'cause of action'. While construing or understanding the cause of action, it must be kept in mind that the pleadings must be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or passage and to read it out of the context, in isolation. Although, it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words, or change of its apparent grammatical sense. The intention of the party concerned is to be gathered, from the pleading taken as a whole. [Ref. Shri Udhav Singh v. Madhav Rao Scindia, (1977) 1 SCC 511, A.B.C Laminart Pvt. Ltd. v. A.P. Agencies, [AIR 1989 SC 1239].

27. Whenever a wrong or offence is committed and ingredients are satisfied and repeated, it evidently would be a case of 'continuing wrong or offence'. For instance, using the factory without registration and licence was an offence committed every time the premises were used as a factory. The Hon'ble Supreme Court in the case of *Maya Rani Punj v. Commissioner of Income Tax, Delhi*, (1986) 1 SCC 445, was considering, if

not filing return within prescribed time and without reasonable cause, was a continuing wrong or not, the Court held that continued default is obviously on the footing that non-compliance with the obligation of making a return is an infraction as long as the default continued. The penalty is imposable as long as the default continues and as long as the assessee does not comply with the requirements of law he continues to be guilty of the infraction and exposes himself to the penalty provided by law. Hon'ble High Court of Delhi in the case of Mahavir Spinning Mills Ltd. v. Hb Leasing And Finances Co. Ltd., 199 (2013) DLT 227, while explaining Section 22 of the Limitation Act took the view that in the case of a continuing breach, or of a continuing tort, a fresh period of limitation begins to run at every moment of time during which the breach or the tort, as the case may be, continues. Therefore, continuing the breach, act or wrong would culminate into the 'continuing cause of action' once all the ingredients are satisfied. Continuing cause of action thus, becomes relevant for even the determination of period of limitation with reference to the facts and circumstances of a given case. The very essence of continuous cause of action is continuing source of injury which renders the doer of the act responsible and liable for consequence in law."

21. The Applicants had filed the Application in the Tribunal on 3.10.2016. The documents annexed to the application reveals that some of the villagers led by one of the Applicants, Jagannat Bhoi made a representation to the Secretary, Forest and Environment Department, Govt. of Odisha on 26.08.2013 regarding encroachment of 108.00 acre of Gramya Jungle, in the site in question, the information of which was obtained through Right to

Information Act on 16.08.2013 from DFO, Jharsuguda that no forest land has been allotted to Vedanta Limited. Thus, by his own admission the 2nd Applicant became aware of the cause of action first arose with effect from 16.8.2015. Similarly, one of the Applicants in the writ petition No. WP (C) (PIL) No. 2660 of 2015 filed before the Hon'ble High Court of Orissa raising identical issues is Digamber Bag, who is also a co-applicant in the representation dt. 26.8.2013 along with Jagannat Bhoi. Thus, the cause of action first arose was known to the Applicants on 16.08.2013 and the application was filed in the Tribunal after 3 years, which is much beyond the prescribed time limit. Therefore, the present Application is barred by limitation on this count.

22. However, the Applicants have pleaded under 'limitation' that there is a subsisting cause of action because of the ongoing encroachment of forest land without approval of the competent authority. From our discussion on the affidavits filed by the respondents, it is evidently clear that felling as well as plantation/afforestation work had already been completed by the Respondent No. 1 by 21st November, 2015, i.e., much before the application was filed before the NGT i.e. on 3.10.2016. Therefore, the contention of the Applicants that there is subsisting cause of action or continuing cause of action is not acceptable to us when

the application was filed. From the affidavit of the District Magistrate and Collector, Jharsuguda, it is revealed that Plot No. 188 of Area – Ac 48.66 is surrounded by Ash Pond of Vedanta Ltd. All the plots contiguous to plot No. 188 have been acquired by the company through IDCO for their ash pond. The Respondent No. 1 has also stated that after the filling of Plot No. 188 and completion of plantation work, no work is undertaken by them and the plot in question is a free land from any form of encroachment.

23. Since at the time of filing the OA, there was no subsisting cause of action, the answer to question No. 1 is 'yes' i.e., the application is barred by limitation. Therefore, it is not now necessary to traverse to the other questions for their answers. It is made clear that we have not decided the matter on merit. The Applicants are at liberty to approach the appropriate forum to redress their grievance.

24. Thus, the application No. 151/2016/EZ stands dismissed.

No order as to costs.

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Mr. Justice S.P. Wangdi , JM

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Prof.(Dr.) P.C. Mishra , EM

Kolkata,
Dated: 13th November, 2017.



NGT