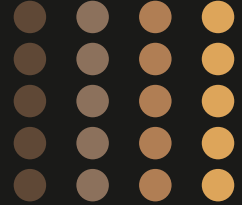


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B.V. Nagarathna*

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Case Comment on *Vanashakti v. Union of India: Ex Post Facto
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Nikita Samarnath

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**CASE COMMENT ON *VANASHAKTI v. UNION OF INDIA*:
EX POST FACTO ENVIRONMENTAL CLEARANCES AS
DE FACTO PRACTICE?**

*Nikita Samarnath**

Abstract

The case comment discusses the current status of clearances – prior and ex-post facto, in environment law in India, as held by Vanashakti v. Union of India. By holding that in the interest of a supervening public interest, the requirement of a prior environment clearance can be dispensed with, the judgment marks one of the most significant environmental setbacks in recent times. By allowing for a broad exception in the form of a public interest, a project proponent has two options, either to apply for an environmental clearance or to start the project as is and apply for an ex post facto clearance later. This coexistence, the case comment argues, amounts to abdication of responsibility towards the environment.

Keywords: *Clearance, Ex Post Facto, Review Petition, Environment Regime*

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I. INTRODUCTION

On July 29, 2026, the Supreme Court (SC) delivered its judgment in *Vanashakti v. Union of India* holding that prior environment clearance for development and infrastructure projects is mandatory as per a notification issued by the Ministry of Environment and Forests in 2006 (2006 notification).¹ However, it also held that for projects that have been initiated without seeking prior clearance but involve supervening public interest, an exception can be made.² This case comment traces the history of this judgment since May 2025 and the judicial precedents it relies on, to highlight the shift in the judiciary to deal with prior environment clearance (EC) and ex-post facto clearance (EPFC). It argues that *Vanashakti v. Union of India* is a case of abdication of responsibility by the Supreme Court in environmental jurisprudence and a low point in India's environmental regulation, one that is difficult to recover from.

The case comment proceeds as follows. In the second section below, it explains how and why this case came before the Supreme Court; and what were the issues formulated. As will be explained below, *Vanashakti v. Union of India* delivered on 29th July, 2026 (*Vanashakti* – 3) reached the court on account of the SC judgment in *Vanashakti v. Union of India*³ (*Vanashakti* – 1) in May 2025 and its review judgment, *Confederation of Real Estate Developers of India (CREDAI) v. Vanashakti and Anr.* (*Vanashakti* – 2). The third section therefore analyses the reasoning adopted in all these three judgments. This is followed by a brief description of two technical issues relating to the validity of the review and adherence to the principle of stare decisis, in the fourth section. The fifth section traces the journey of EPFC through the judicial precedents that *Vanashakti* - 3 relies on. The sixth section concludes the case comment.

II. HOW DID *VANASHAKTI* – 3 COME TO THE SUPREME COURT?

The core issue dealt with by *Vanashakti* - 3 is the statutory validity of EPFC in light of the 2006 notification, which mandates *prior* EC for

¹ Ministry of Environment and Forests, Environment Impact Assessment Notification 2006, SO 1533(E) (14 September 2006).

² *Vanashakti v Union of India* (2026) SCC OnLine SC 1404 [80].

³ *Vanashakti v Union of India* (2025) INSC 718.

development and infrastructure projects. The existence and relevance of this judgment cannot be comprehended without taking into consideration *Vanashakti – 1*, delivered by a 2-judge bench and *Vanashakti – 2* delivered by a 3-judge bench. The legal framework around EPFC comprises the Environment (Protection) Act, 1986 (EPA); notifications issued in 1994⁴, 2005⁵ and 2017⁶ under the EPA and Environment (Protection) Rules; and an Official Memorandum issued in 2021 pursuant to the directions of the National Green Tribunal (NGT).⁷

Section 3(2) of the EPA empowers the Central Government to undertake measures for protecting and improving the quality of environment. The Environment Impact Assessment Notification was released in 1994 by virtue of the enabling sections under the EPA and Environment (Protection) Rules, 1986.⁸ It mandated that an application be made by a person or public/private sector entity that undertakes any new project or expansion or modification of an existing project as listed down in its schedule followed by due assessment by the State authorities. This notification introduced an EC regime that required a prior approval for the above-mentioned projects before they could commence operations. This followed a process of environmental assessment, consultation with stakeholders and local communities, and a plan for anticipating and mitigating adverse environmental impacts. The next important notification in the series was issued in September 2006 which superseded the earlier notification issued in 1994. Rather than putting all projects under one head, it classified them under Project A and Project B categories. It required all new projects or activities in the schedule therein; projects or activities that require an expansion or modernisation beyond prescribed limits; and any change in the

⁴ Ministry of Environment and Forests, Environment Impact Assessment Notification 1994, SO 60(E) (27 January 1994).

⁵ The Environment Impact Assessment Notification 2006 (n 1).

⁶ Ministry of Environment, Forest and Climate Change, Environment Impact Assessment Notification 2017, SO 804(E) (14 March 2017).

⁷ Standard Operating Procedure (SoP) for Identification and handling of violation cases under EIA Notification 2006 in compliance to order of Hon'ble National Green Tribunal in OA No 34/2020 WZ 2021, F No 22-21 / 2020 – IA III.

⁸ The Environment (Protection) Act 1986, S 3(1), S 3(2)(v) and The Environment (Protection) Rules, R 5(3).

product mix in an existing manufacturing unit to obtain a prior environment clearance. The validity of this environment clearance was different for different categories of projects.⁹ It was the notification issued in 2017 that has remained controversial as it created a one-time mechanism clause of an EPFC regime (the 2017 notification). Here, the projects or activities that were in violation of the 2006 notification as on the date of its issue (i.e., 14 March 2017), i.e. those projects which had initiated constructions or operations without obtaining the prior EC, were eligible to apply for an EPFC within a period of six months from the issue. Finally, in 2021, an Official Memorandum was issued by the Ministry of Environment, Forests and Climate Change pursuant to directions of the NGT (2021 OM). This OM further advanced this exceptional regime of EPFC dealing with those cases where prior EC had not been obtained. If a project was not permissible at all under the 2006 notification in the first place, it directed its demolition or closure. However, if a project was permissible under 2006 notification with the requisite clearances, but had been initiated without clearance, it created the provision for seeking and granting EC after pursuing the steps mentioned in the 2021 OM.¹⁰ Therefore, the 2021 OM continued the trend of providing for an EPFC.

Vanashakti - 1 disposed of two writ petitions and a civil appeal. The two writ petitions prayed for the quashing of 2021 OM, issuing a writ of mandamus that directed the concerned authorities to not process and entertain any application for EPFC, and quashing of 2017 notification.¹¹ The civil appeal was preferred against a Madras High Court judgment which, *inter alia*, quashed the 2021 OM.¹² *Vanashakti* - 1 held that the 2017 notification and 2021 OM, were illegal as per India's environmental regulatory framework and struck them down.¹³ It restrained the Central Government from issuing any further executive order in the nature of circulars, orders, OMs, notifications that granted EPFC in any form. This celebrated judgment however had a short life. A review petition

⁹ (n 1) reg 2.

¹⁰ (n 7) reg 11.

¹¹ *Vanashakti v Union of India*, 2025 SCC OnLine SC 1139 [9-11].

¹² *ibid* [12].

¹³ *ibid* [36].

was filed before the Supreme Court to recall the judgment of *Vanashakti* - 1. Within six months of *Vanashakti* 1, *Vanashakti* 2 was delivered which in effect recalled the former.¹⁴ It consisted of a majority judgment by 2 judges and dissenting judgment by one of the same judges who was on the *Vanashakti* - 1 bench. The majority judgment argued that various interlocutory applications were pending for modification/clarification of *Vanashakti* - 1. It finally ordered that 'the judgment and order dated 16th May 2025 is recalled. The writ petitions and the appeal are restored to file.' In other words, it held that the 2017 Notification and 2021 OM grant EC only in respect of those projects which are permissible in law, i.e., the ones that are eligible for consideration under the 2006 notification. Therefore, the two executive orders are valid. *Vanashakti* - 3 is a culmination of these two judgments and was heard afresh.

Vanashakti - 3 identified six issues for consideration,¹⁵ including (i) the mandatory status of prior EC; (ii) status of the judicial precedents mentioned in *Vanashakti* - 1 and *Vanashakti* - 2 vis-à-vis each other; (iii) validity of 2017 notification and 2021 OM; (iv) fate of the ECs already granted and pending applications under the 2017 Notification and the 2021 OM. While delivering the judgment, it held that although prior clearance is mandatory and as such the 2006 notification does not accommodate grant of EPFC, an exception can be made for the projects in the interest of supervening public interest.

III. REASONING OF *VANASHAKTI* – 1, 2 AND 3

This section shall delineate the reasoning for and against EPFC in the three judgments.

Vanashakti – 1 elaborately explained the meaning and purport of an EPFC. It held that:

“Therefore, what is done by the 2021 OM is something which was completely prohibited by this Court in the cases of Common Cause and Alembic Pharmaceuticals. It is an attempt to bring in an ex-

¹⁴ *Confederation of Real Estate Developers of India (CREDAI) v Vanashakti*, (2026) 5 SCC 201 [142] (B R Gavai, CJI), and [8] (Chandran, J).

¹⁵ (n 2) [22].

post facto or retrospective regime by craftily drafting the SOP. The grant of EC under the 2021 OM in substance and in effect amounts to ex post facto grant of EC. The Court must come down very heavily on the attempt of the Central Government to do something which is completely prohibited under the law. Cleverly, the words ex post facto have not been used, but without using those words, there is a provision to effectively grant ex post facto EC.”¹⁶

It further held that the 2021 OM protects entities who didn't apply for an EC with “full knowledge of consequences of violating the EIA notification.”¹⁷ Secondly, this bench engaged with the concept of protecting the environment and pursuing development. It emphatically condemned the issue of such notifications and official memoranda that “go out the way”¹⁸ to cause harm to the environment in the name of development by allowing the projects to initiate without any scientific assessment of potential ecological harm, whatsoever. Lastly, it held that these executive orders violate Articles 14 and 21 of the Constitution as they “show scant respect to the law and their duty to protect the environment...and are completely arbitrary” and the EPA.¹⁹

Vanashakti – 2 held that 2017 notification and 2021 OM considered only those projects that are eligible in law once they are given the approval to commence operations. Their legality is further strengthened as they provided for hefty fines. The bench relied on *Common Cause v. Union of India*²⁰ (*Common Cause*) and *Alembic Pharmaceuticals Ltd. v. Rohit Prajapati & Ors.*²¹ (*Alembic Pharmaceuticals*). It agreed that both the judgments observed that EPFC is detrimental to the environment and could lead to irreparable damage to the environment. However, *Vanashakti* - 2 held that the operative parts of both the judgments indicate otherwise. The judgment in *Common Cause* ordered for cancellation of mining lease without clearance; imposed a penalty; and directed

¹⁶ (n 11) [29].

¹⁷ *ibid* [31].

¹⁸ *ibid* [34]

¹⁹ *ibid* [34].

²⁰ *Common Cause v Union of India* (2017) 9 SCC 499.

²¹ *Alembic Pharmaceuticals Ltd v Rohit Prajapati* (2020) 17 SCC 157.

the leaseholders to apply for the clearance. They could resume operations if they obtained the EC. Similarly, in *Alembic Pharmaceuticals*, while denouncing the notion of EPFC, the court accepted that closure of units does not align with doctrine of proportionality. The industries, in this case too were therefore ordered to deposit a hefty compensation and continue with the operations. The bench in *Vanashakti - 2* pointed out that these paragraphs were not brought to the notice of the Court in *Vanashakti - 1*. In other words, in the view of *Vanashakti - 2*, it does not matter that through these judgments, the SC spoke about EPFC not being a part of the environment regime because this intention does not translate into the final orders for the parties involved. Therefore, *Vanashakti - 2* held that the SC in the past adopted a balanced approach and allowed industries to seek EPFC and continue their operations even if they did not have a prior EC. Further, relying on *Electrosteel Steels Limited v. Union of India and Ors.*²² etc. (*Electrosteel*), the bench in *Vanashakti - 2* again held that the relief granted to the parties was one that would continue the functioning of the erring establishment. It was believed that the establishment contributes to the economy of the country and provides livelihoods to many people. The bench held that the stand of the Supreme Court in *Common Cause*, *Alembic Pharmaceuticals*, and *Electrosteel* acknowledged that the adverse consequences arising out of an EPFC are less grave than the adverse consequences of regularisation of operations, and therefore EPFC prevails. Further, *Vanashakti - 2* also considered the judgments in *M/s Pahwa Plastics Pvt. Ltd. and Anr. v. Dastak NGO and Ors.*²³ (*Pahwa Plastics*) and *D. Swamy v. Karnataka State Pollution Control Board and Ors.*,²⁴ (*D. Swamy*) which whilst condemning EPFC, upheld 2017 notification and 2021 OM. These were not brought before the bench in *Vanashakti - 1*. So, as per *Vanashakti - 2*, *Vanashakti - 1* was *per incurium* as it did not follow the ratio of the judicial precedents laid down in *Common Cause*, *Alembic Pharmaceutical*, and *Electrosteel*.

Furthermore, as per a list submitted by one of the counsels of the petitioners in *Vanashakti - 2*, the bench learnt that projects amounting to

²² *Electrosteel Steels Ltd v Union of India* (2023) 6 SCC 615.

²³ *M/s Pahwa Plastics Pvt Ltd v Dastak NGO* (2023) 12 SCC 774.

²⁴ *D Swamy v Karnataka State Pollution Control Board* (2023) 12 SCC 337.

approximately Rs. 20,000 crores are pending final EC in view of the 2021 OM. In its opinion, demolition of these projects would lead to a huge loss to the public exchequer. More so, because some of these projects were hospitals, medical colleges, and airports. Therefore, it was held in view of the larger public interest, that it would not be conducive to demolish the projects.

Vanashakti - 3 admits that prior EC is the norm and that it grounds itself in the precautionary principle. The bench ventured into determination of the scope and ambit of the consequences of its breach. The following reasons support this ratio. Firstly, it engaged with the scope and ambit of the words 'control' and 'abate' in Section 3 of EPA which reads as “....., *the Central Government, shall have the power 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*”. The bench read these terms, i.e., protection, improvement, control, abatement, as not just prevention of pollution but also repair of the mischief caused. By doing so, it also relies on the polluter pays principle. This repair, it asserted, need not always result in “dismantling, demolition or closure but may instead be addressed through penalty, remediation, restitution and future compliance”.²⁵ In a similar but more expansive manner than *Vanashakti - 2*, the bench detailed a series of judgments to show how in different situations despite the presence of no clearance or defective clearance, the benefits accruing to the larger public interests at hand were considered while delivering the judgments.²⁶ Lastly, the 2017 notification and 2021 OM were tested on the anvil of reasonable classification under Article 14 of the Constitution of India and proportionality. It first evaluated the 2017 notification to hold that the classification which the notification creates, is an *intelligible differentia* between the kinds of violators, one that serves an overriding public interest including “*protects innocent third-party interests, maintains an essential public utility or itself advances an environmental object may be placed in a class different from a violator whose project serves only private commercial gain*”; and the other that serves only

²⁵ (n 2) [40].

²⁶ *ibid* [41]–[49].

private commercial gain. This classification therefore ties well with the aim of control and abatement of pollution as envisaged under Section 3 of EPA.²⁷ As far as the proportionality reasoning of the Bench is considered, it held that insofar as the project fulfilled the aim of serving a larger public interest, the narrow amnesty so created in the 2017 notification, “justifies the inversion of rule of law”. For 2021 OM, it held that it fails the proportionality test.

In short, *Vanashakti* – 1 struck down both these executive orders; *Vanashakti* – 2 upheld both the executive orders; and *Vanashakti* – 3 upheld the 2017 notification and struck down 2021 OM.

IV. SILENCE AROUND TECHNICALITIES

Vanashakti – 1 was decided by a 2-judge bench; and *Vanashakti* - 2 was its review petition decided by a 3-judge bench. On a combined reading of the Constitution of India, Supreme Court Rules, 2013, and Code of Civil Procedure, 1908, it is clear that a review petition ought to be heard by the same bench or the same bench strength, if the same bench is not available.²⁸ In this case, the original bench comprised of Justice Abhay S. Oka and Justice Ujjal Bhuyan. The former judge retired; therefore, the original bench could not be formed. Ideally, Justice Ujjal Bhuyan along with another sitting judge of the SC should have reviewed the judgment, if at all it was constitutionally allowed. But various miscellaneous applications to the same petition, were taken up by another bench and in the course of events, a 3-judge bench was formed to review the petition.²⁹ It is this bench that eventually recalled the judgment and restored the original writ petitions and civil appeal to file. Since it was recalled, a new bench was formed. The submissions of the appellant, i.e., *Vanashakti*, an NGO in *Vanashakti* 2 include that the review petition is tantamount to an appeal, which is impermissible in law. The bench neither in *Vanashakti* - 2 nor in *Vanashakti* – 3

²⁷ To this extent *Pahwa Plastics* and *D. Swamy* were incorrectly decided, as laid down in *Vanashakti* (n 1).

²⁸ The Constitution of India 1950, art 137; Code of Civil Procedure 1908, O XLVII; Supreme Court Rules 2013, O XLVII.

²⁹ Saurav Das, 'Chief Justice Gavai and the question of judicial propriety' (Frontline, 5 August 2025) <<https://frontline.thehindu.com/columns/cji-b-r-gavai-roster-controversy-vanashakti-judgment-supreme-court/article69897117.ece>> accessed 06 August, 2026.

gives any reason for the permissibility of the review.

The Supreme Court in *Vanashakti - 2* fails to answer if absence of furnishing judicial precedents amounts to “discovery of new and important matter or evidence” or “mistake or error apparent on the face of the record” or “for any other sufficient reason”, the criteria that qualifies a decree to a review.³⁰ Further, the factual anomaly between one of the authors of the majority judgment and the dissenting judge on the exact number of petitions before the Court pursuant to *Vanashakti 1* also remains unanswered.³¹ These two reasons surely cast a doubt on the intention of the Court in accepting the review petition when *Vanashakti - 1* was clear in its ratio and orders.

One of the core issues running across the three judgments is how a particular judgment is deployed as a precedent. It was the majority judgment in *Vanashakti - 2*, that held that *Common Cause* and *Alembic Pharmaceuticals* were misappropriately quoted. The minority judgment held otherwise. For *Common Cause*, it went on to explain that, that EPFC is detrimental to the environment is the ratio and not the directions for the individual parties to the litigation. Similarly, even in *Alembic Pharmaceuticals*, the ratio decidendi is that EPFC is in derogation of the principles of environment jurisprudence. The judgment also discusses what qualifies as a ratio.³² The minority bench explained that it is only the principle upon which the case is decided that is binding for the subsequent cases. Doctrines of judicial precedents and *stare decisis* are the core values of our legal system and ought to be followed.³³

In arguendo, even if *Common Cause*, by virtue of what it eventually directs, supports EPFC, this case comment notes that there were enough reasons for the SC not only in *Vanashakti - 2* but also *Vanashakti - 3* to not strictly follow

³⁰ Code of Civil Procedure 1908, O XLVII.

³¹ It therefore took the lead review petition, i.e., the one filed by the confederation of real estate developers, after which the remaining applications would be considered. However, the dissenting judgment notes that on perusing the records personally, there is only one review petition, which coincidentally is the same petition pursuant to which *Confederation of Real Estate Developers of India (CREDAI) v Vanashakti*. (2026) 5 SCC 201[7] (Bhuyan J).

³² (n 14)[28] (Bhuyan J).

³³ *ibid*[32] (Bhuyan J).

the principle of *stare decisis*. The importance of *stare decisis* has been acknowledged and appreciated by the Courts for the stability it envisages to provide on the concerned issue.³⁴ *Vanashakti - 2* and *Vanashakti - 3* both have relied on this principle. However, *stare decisis* itself is not a water tight infallible doctrine. The jurisprudence developed thus far, itself recognizes situations where the same can be deviated from.³⁵ “Stare decisis is merely a wise rule of action and is not a universal, inexorable command”.³⁶ In fact, *Corpus Juris Secundum* observes “previous decisions should not be followed to the extent that grievous wrong may result”.³⁷ Considering, that from 2008 – 2023 approximately 3,00,000 hectares of forest has been diverted for non-forest purpose,³⁸ with no corresponding afforestation/regrowth of forests; 2015 – 2024 decade happened to be the warmest decade in the 175-year observational record,³⁹ and that India scored a position at 176 out of 177 countries in the Environmental Performance Index (EPI), there are enough reasons to support why the rule of allowing for EPFC should be discontinued. These facts demonstrate the necessity to follow the environmental rule of law in letter and spirit⁴⁰ i.e., to follow the regime of obtaining a prior EC, thereby justifying why the principle of *stare decisis* is not followed.

V. WHAT DOES *EX POST FACTO* CLEARANCE MEAN?

The judgment traced the origin of the journey of EPFC to *Lafarge Umiam Mining Pvt. Ltd. v. Union of India*⁴¹ (*Lafarge*) as “one of the earliest relevant decisions”. Subsequently it relied on *Common Cause, Alembic*

³⁴ *Mishri Lal (Dead) by Lrs v Dhirendre Nath (Dead) by Lrs*, 1999 4 SCC 11 [15].

³⁵ *Bengal Immunity Company Limited v. State of Bihar and Others* 1955 1 SCC 763; *Sita Soren v Union of India*, 2024 3 SCC 786 [188].

³⁶ *Waman Rao v Union of India* (1981) 2 SCC 362 [42].

³⁷ *Mishri Lal* (n 34).

³⁸ Ministry of Environment, Forest and Climate Change, Government of India (LS 2023) <<https://sansad.in/getFile/loksabhaquestions/annex/1712/AS257.pdf?source=pqals>> accessed 06 August 2026.

³⁹ Kiran Pandey, 'State of India's Environment 2025' (Down to Earth, 2025). <https://cdn.cseindia.org/attachments/0.56537300_1744007189_kiran-pandey.pdf> accessed 06 August 2026

⁴⁰ *Hanuman Laxman Aroskar v Union of India*, 2019 15 SCC 401 [128].

⁴¹ *Lafarge Umiam Mining Pvt Ltd v Union of India* (2011) 7 SCC 338.

Pharmaceuticals, Electrosteel, Pahwa Plastics and *D. Swamy*. The Supreme Court across *Vanashakti* – 1, 2 and 3, in no uncertain terms *upheld* the importance of having a prior EC and an approach otherwise would be antithetical to the environment. However, *Vanashakti* – 2 and *Vanashakti* – 3 both held that incisions could be made to the broad rule of obtaining a prior EC, by allowing for EPFC.

These judgments mark the first phase roughly from 2011 to 2022, where EPFC was negotiated. While the merits of such negotiations are outside the scope of this case comment, what is important to note is whether a case qualifies to apply for an EPFC was decided on a case-by-case basis. The decisions in these judicial precedents were based on (i) scope of the Environment (Protection) Act, 1986' and (ii) public interest, which was further understood as the welfare of people in employment, mining activity being a part of their culture, etc.

However, what started with rejection of EPFC in *Vanashakti* 1 and now ended with upholding of the same as valid as long as it serves a public interest in *Vanashakti* - 3, is a termination of an almost decadal journey of negotiations to give way to a new phase - where EPFC is not merely allowed in exceptional cases but is accepted as being lawful in a broad category of cases that conform to an exhaustive list of “supervening public interest”.⁴² In its operative part, the Court clearly stated that “EPA and 2006 notification do not place a clog on the power of the Central Government to issue an appropriate narrowly tailored amnesty notification in supervening public interest as an exception to the 2006 notification”.⁴³ In fact, the breadth of public interest can be determined where the Court in *Vanashakti* – 3 gives its own examples of what may qualify as public interest, namely, “homebuyers who have invested their savings in the project, workmen whose livelihood depends upon it, or the public at large where the activity performs an essential public, environmental or infrastructural function”.⁴⁴ *Vanashakti* - 1 expressed it clearly that EPFC does not deserve to be a

⁴² Public interest could be building of a dam was held in *Narmada Bachao Andolan v Union of India and Others*, 2000 10 SCC 664.; mining as was held in *State of AP v Obulapuram Mining Co. (P) Ltd*, 2013 8 SCC 213; construction of a nuclear plan as was held in *G Sundarrajan v Union of India*, 2013 6 SCC 620..

⁴³ (n2)[80].

⁴⁴ *ibid* [58].

part of the environmental framework; *Vanashakti* - 2 and *Vanashakti* - 3 have created a judicial space where EPFC is made to co-exist with mandatory prior clearance. This has serious implications for environmental regulation as project proponents can now weigh the merits and demerits of not seeking clearance at the initiation stage (as per the 2006 notification) and seek clearance later. There are no checks and balances in the environment regulatory system that stands updated with *Vanashakti* - 3, i.e., to prevent a project proponent from undertaking a project without any EC. A prior EC is integral for environment regulation as the process behind it takes into account site assessment (including possibility of alternate sites), impacts on biodiversity, ecosystems, noise pollution, and various other factors before the Expert Appraisal Committee decides to give *conditional* clearance to projects based on their commitment to take appropriate steps for addressing and mitigating environmental harm.⁴⁵ The judicial space for EPFC forecloses the possibility of prior assessment and anticipating environmental harm, sheltering behind the argument of public interest. Therefore, it is integral for a prior EC to stand with no exception for an EPFC, as was upheld clearly in *Vanashakti* - 1.

What *Vanashakti* - 3 does is, it effectively gives an option between having a prior clearance and then commencing the operations or asking for an EPFC if the project subscribes to the wide requirements of public interests. It amply holds that it is public interest that answers whether the operations of the project should continue.⁴⁶ Interestingly, by further relying on the judicial precedents, the SC states that “none of them holds that a proponent may build first and then claim regularisation upon the strength of completed construction”.⁴⁷ However, the subsequent paragraphs of *Vanashakti* - 3, do not match this intention. It deploys 'measured regularisation'⁴⁸ to carve a reconciliatory path between precautionary principle⁴⁹ and polluter pays

⁴⁵ (n 1).

⁴⁶ (n 2) [58].

⁴⁷ *ibid* [60].

⁴⁸ *ibid* [61].

⁴⁹ This principle requires that the government must anticipate, prevent and attack the causes of environmental degradation as held in *Vellore Citizens Welfare Forum v Union of India & Ors*, 1996 5 SCC 647.

principle.⁵⁰ This path is a “narrow, time bound, reasoned and supervised window governed by public interest”.⁵¹ A combined reading of these explanations means that as long as the project/business/operation seeks shelter under public interest, measured regularisation is activated to make the polluter pays principle take precedence over precautionary principle. The only consequence of this approach is an exception in the garb of public interest which gives an option to the applicant to commence operations without a prior EC. The narrow amnesty that the bench in *Vanashakti* – 3 appears to give is, therefore, a smokescreen which makes the exception bigger than the norm itself.

This journey of EPFC as laid down in *Vanashakti* – 3 is misleading for two reasons. Firstly, in *Lafarge*, it was learnt that the mining project did not have the requisite forest clearance and had a defective EC. The SC in *Lafarge* upheld the grant of fresh EC and the ex post facto forest clearance. Similarly, even in *Common Cause*, one of the landmark judgments that has consistently been relied on in *Vanashakti* 1, 2 and 3 judgments also involved a lack of forest clearance along with lack of an EC. By considering these judgments as integral judicial precedents to the issue at hand, *Vanashakti* – 3 gives out a vague message: though the essence of the judgment is the validity of 2017 notification and 2021 OM, and therefore it is the EC under EPA in adjudication; but for the purpose of adjudication, the term clearance could include forest clearance which is obtained under an entirely different regime. The ratio and the directions given in *Lafarge* and *Common Cause* cannot keep EC and forest clearance apart. This definitely does not augur well for the environment regulatory framework in India.

Finally, *Vanashakti* – 3 seals the journey thus far in two disappointing ways by softening the stand on violators of environment law. Firstly, by creating an intelligible differentia under Article 14 of the Constitution on the basis of the kinds of violators. Its reason for upholding 2017 notification rests on permitting violation of law if it serves the larger public interest, as against the second category of violators that work towards personal gains. Such is the magnanimity

⁵⁰ This principle requires that the polluter bears the remedial or clean-up costs and compensate the victims of pollution as held in *Indian Council for Enviro Legal Action v Union of India*, AIR 1996 SC 1446.

⁵¹ (n 2)[61].

of the term public interest that it answers the tests under Article 14 and doctrine of proportionality in one stroke. Secondly, by framing one of the issues as 'fate of the environment clearances already granted and applications pending under the 2017 notification and 2021 OM', the judgment makes a mockery of environment law practice. 'Fate' necessarily means something beyond one's own power and control. *Ignorantia juris non excusat*, i.e., ignorance of law is no excuse is a well-established principle of law where, once law including statutory law and subordinated legislation, is published in the official gazette, no one can plead ignorance of the same. Clearly, if 2006 notification exists, the conduct of not availing it fails to qualify as something beyond one's control. Therefore, by titling an issue in this form and passing one of the orders under this head as "*All pending applications made by project proponents under the 2017 Notification or the 2021 OM shall be taken to their logical conclusion in accordance with law.*", makes the intention of the bench to hold EC as mandatory, dubious. It is worth wondering if this so-called narrow amnesty is for the wider public interest or in its facade, is the order working in the interests of the violators themselves.

VI. CONCLUSION

This case comment though primarily focussed on *Vanashakti* - 3, extensively discussed *Vanashakti* - 1 and *Vanashakti* - 2. This was integral to comprehending and reflecting on *Vanashakti* 3, as its very existence depends upon *Vanashakti* - 2 recalling the judgment in *Vanashakti* - 1. EPFC was an executive creation and the judicial contribution towards its nurturing and stabilising as a permanent provision in law, as has been shown above, is questionable. It relies on the intelligible differentia between different kinds of violators and advocates for a balance through 'measured regularisation'⁵² between the precautionary principle and polluter pays principle. By creating a broad category of public interest as a 'narrow' amnesty through which EPFC can be granted, the judgment hides behind the revered curtains of environment principles thereby doing disservice to environment law practice. It is therefore, safe to say that *Vanashakti* – 3 demonstrates a low point in environment adjudication by the Supreme Court of India, one that is difficult to recover from.

⁵² (n 2) [61].



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