

production capacity of 3000 tonnes per annum. The cement plant was privatized in the year 1992 when the petitioner company purchased the same. The production capacity of the plant at that time of the purchase of the plant by the petitioner was 4000 tonnes per annum. Later on the production capacity of the cement plant was enhanced by the petitioner and Line-II of the plant was added in the year 2007 with an additional production capacity of 7,000 tonnes per annum. Now, further expansion of 7300 tonnes per annum in the production capacity through Line-III has been proposed. For this, additional land measuring 1499-kanals has been duly acquired by the petitioner company.

2. Prior to the setting up of Line-III, an Environmental Impact Assessment (“EIA”) has been filed by the petitioner with the Punjab Environmental Protection Agency (“Agency”) on 25.06.2016 and the requisite fee deposited on 27.07.2016. After carrying out preliminary scrutiny the Agency under Regulation 9 (1) (a) of the *Pakistan Environmental Protection Agency (Review of IEE and EIA) Regulations, 2000* (“Regulations”) confirmed on 09.09.2016 that the EIA submitted by the petitioner was complete for initiation of the review process. Thereafter public hearing under Regulation 10 was scheduled for 28.01.2017 at the site in Mianwali. Assistant Director, EPA, District Officer Environment, Mianwali in his report submitted after the public hearing recommended the project in public interest. The Public Hearing Report, as well as, EIA came up for consideration before the Committee of Experts on 21.02.2017. The Committee recommended that modified EIA be submitted by the petitioner company. The petitioner submitted modified/revised EIA on 30.03.2017. The revised EIA came up for consideration before the Committee of Directors constituted vide order dated 15.03.2010 of the Agency, who recommended the project in following manner on 19.04.2017:-

“The Committee examined the case and recommended the case for issuance of Environmental Approval subject to the following conditions:

- The proponent shall install Ambient Air Quality Monitoring Station already advised in an earlier Environmental Approval at the same site within 60 days.
- The proponent shall submit cumulative Environmental Impact Assessment including inter alia dispersion modeling, impacts on water quality, mass balance and Ambient Air Quality from an international firm having experience in relevant field within six months.
- The proponent shall adopt dry process.
- The proponent shall install state of the art and latest in development cycle machinery.
- The proponent shall submit costed Environmental Mitigation and Management Plan.
- The proponent shall submit a detailed closure plan for closing of mining sites.
- The proponent shall plant at least 10,000 trees.

It was also decided by the committee that the all the previous commitments regarding plantation shall be fulfilled”

3. The aforesaid recommendations were placed before the Director General, Environmental Protection Agency for approval but the same kept pending and no order was passed within the statutory period provided under section 12 (4) of the Act. After the lapse of the statutory period, the petitioner considered it to be a deemed approval of the EIA and commenced the project by starting the construction of Line-III.

4. The project was stopped through impugned order dated 03.12.2017 (“**impugned order**”) passed by the Environmental Protection Agency on the ground that the petitioner company had started construction without obtaining a written environmental

approval from the Agency under section 12(4) of the Act. Through this petition, the petitioner challenges the impugned order passed by the Agency.

Arguments:

5. The contention of the learned counsel for the petitioner is that by virtue of lapse of time under section 12 (4) of the Act read with Regulations 11 (1) and 15, EIA was deemed to have been approved, therefore, the petitioner was free to proceed with construction of the project. He additionally relied on letter dated 11.10.2017 issued by the Assistant Director, EPA, Mianwali, which states that as per clause 4 of section 12 of the Act, petitioner company had completed four months after the issuance of completion letter dated 09.09.2016, therefore, EIA was deemed to have been approved and the petitioner company had legally started construction of the new project.

6. Learned counsel submits that letter dated 17.05.2017 issued by the office of Mines and Mineral Department, Government of the Punjab, states that on the direction of the Chief Minister, Nespak has been hired as a consultant for delineating negative and positive mining areas for installation of a cement plant and no further environment approval be granted till the study is completed.

7. On the other hand, learned law officer namely Ms. Asma Hamid, has raised preliminary objection that the petitioner has not made the Province of Punjab a party to the petition, besides the Department of Mines and Minerals is also not party to the instant petition, hence the instant petition is not correct in its present form and thus not maintainable. She further submitted that the matter in hand is pending before the august Supreme Court of Pakistan regarding *“Drying up of the Shiri Katas Raj Temple Pond”* and it is best that the petitioner were to approach the august Supreme Court of Pakistan. She also argued that study regarding **Criteria for the Delineation of Negative and Positive Areas for the Installation of**

New or Enhanced Existing Cement Plant is underway by the local and international consultants, engaged by the Mines and Minerals Department, Punjab and report of the consultants will be submitted before the august Supreme Court of Pakistan by mid January, 2018.

8. She further submitted that notices have been issued to the present petitioner regarding earlier leases granted by the Mines and Minerals Department, as well as, regarding environmental violations in the existing plant. Regarding the time frame under section 12 (4) of the Act, learned law officer submits that under Regulation 10 (4), the Federal Agency is free to solicit comments from other departments and in the present case the matter has been withheld because findings of the consultants engaged by the Mines and Minerals Department regarding the Salt Range are awaited. She submits that in these circumstances section 12 (4) of the Act does not apply and even otherwise it is directory in nature. In support of this contention learned law officer placed reliance on “Mehreen Zaibun Nisa v. Land Commissioner, Multan and others” (PLD 1975 SC 397) and “The Collector of Sales Tax, Gujranwala and others v. Messrs Super Asia Mohammad Din and Sons and others” (2017 SCMR 1427).

9. Mr. Anwaar Hussain, learned law officer submitted that deeming clause is to be construed separately given the nature of the statute and the circumstances of the case. He referred to studies conducted on the subject in India and Australia which have been placed on the record.

10. I have heard the arguments of the parties and gone through the record of the case.

Preliminary objections:

11. Taking up the preliminary objections raised by the learned law officer, first. Perusal of the petition reveals that Government of the Punjab is arrayed as respondent No.3. As far as, Mines and Minerals

Department, Government of the Punjab is concerned, relevance of the Department surfaced during the course of arguments. As no prayer has been sought against the said Department by the petitioner, the same was not arrayed as a respondent. Realizing the importance of the Department, it has been put on notice during the proceedings by the Court and is now being duly represented by its Secretary. As far as approaching the august Supreme Court of Pakistan is concerned, vide order dated 13.12.2017 passed in Human Rights Case No.25598-G of 2017, the august Supreme Court of Pakistan directed that the instant case be placed before the High Court and be decided within a week. Therefore, the petitioner is once before this Court on the direction of the august Supreme Court of Pakistan. Therefore, the preliminary objections have no force and are **overruled**. As far as other environmental violations or violations pertaining to the existing mining concessions by the petitioner as alleged by the learned law officer are concerned, they are not the subject matter of this case and have no bearing on the legal question raised in this petition. The concerned Departments are free to deal with them in accordance with law.

Opinion of the Court:

12. The legal question that surfaces in this case is the scope and extent of the **deemed approval** granted to IEE or EIA under section 12 (4) of the Act. In order to answer the above question, it is important to review the salient provisions of the Act and the Regulations, which are reproduced hereunder:

Act

Preamble:

“An Act to provide for the protection, conservation, rehabilitation and improvement of the environment, for the prevention and control of pollution, and promotion of sustainable development.

WHEREAS, it is expedient to provide for the protection, conservation, rehabilitation and improvement of the environment, prevention and

control of pollution, promotion of sustainable development, and for matters connected therewith and incidental thereto;”

“Section 12. Initial environmental examination and environmental impact assessment.—

- (1) No proponent of a project shall commence construction or operation unless he has filed with the Provincial Agency an Initial Environmental Examination or where the project is likely to cause an adverse environmental effect, an environmental impact assessment, and has obtained from the Provincial Agency approval in respect thereof.
- (2) The Provincial Agency shall-
 - (a) review the initial environmental examination and accord its approval, or require submission of an environmental impact assessment by the proponent; or
 - (b) review the environmental impact assessment and accord its approval subject to such conditions as it may deem fit to impose, or require that the environmental impact assessment be re-submitted after such modifications as may be stipulated, or reject the project as being contrary to environmental objectives.
- (3) Every review of an environmental impact assessment shall be carried out with public participation and no information will be disclosed during the course of such public participation which relates to—
 - (i) trade, manufacturing or business activities, processes or techniques of a proprietary nature, or financial, commercial, scientific or technical matters which the proponent has requested should remain confidential, unless for reasons to be recorded in writing, the Director General of the Provincial Agency is of the opinion that the request for confidentiality is not well-founded or the public interest in the disclosure outweighs the possible prejudice to the competitive position of the project or its proponent; or
 - (ii) international relations, national security or maintenance of law and order, except with the consent of the Government; or
 - (iii) matters covered by legal professional privilege.
- (4) The Provincial Agency shall communicate its approval or otherwise within a period of four months from the date the initial environmental examination or environmental impact assessment is

filed complete in all respects in accordance with the prescribed procedure, failing which the initial environmental examination or, as the case may be, the environmental impact assessment shall be deemed to have been approved, to the extent to which it does not contravene the provisions of this Act and the rules and regulations made thereunder.

- (5) Subject to sub-section (4) the Government may in a particular case extend the aforementioned period of four months if the nature of the project so warrants.
- (6) The provisions of sub-sections (1), (2), (3), (4) and (5) shall apply to such categories of projects and in such manner as may be prescribed.

Regulations:

9. Preliminary scrutiny

- (1) Within 10 working days of filing of the IEE or EIA, the Federal Agency shall –
 - (a) confirm that the IEE or EIA is complete for purposes of initiation of the review process; or

11. Review

- (1) The Federal Agency shall make every effort to carry out its review of the IEE within 45 days, and of the EIA within 90 days, of issue of confirmation of completeness under Regulation 9.

15. Deemed approval

The four-month period for communication of decision stipulated in sub-section (4) of section 12 shall commence from the date of filing of an IEE or EIA in respect of which confirmation of completeness is issued by the Federal Agency under clause (a) of sub-regulation (1) of Regulation 9.

16. Extension in review period

Where the Federal Government in a particular case extends the four-month period for communication of approval prescribed in sub-section (5) of

section 12, it shall, in consultation with the Federal Agency, indicate the various steps of the review process to be taken during the extended period, and the estimated time required for each step.

Sustainable Development and its interpretative role:

The preambular purpose of the Act is the *protection of the environment and promotion of sustainable development*. “Sustainable development” means, development that meets the needs of the present generation without compromising the ability of future generation to meet their needs². The idea of sustainability or sustainable development is hinged on four legal elements: “First, the need to preserve natural resources for the benefit of future generations (the principle of intergenerational equity). Second, the aim of exploiting natural resources in a manner which is ‘sustainable’, or ‘prudent’, or ‘rational’, or ‘wise’, or ‘appropriate’ (the principle of sustainable use). Third, the ‘equitable’ use of natural resources, which implies that use by one state must take account of the needs of other states (the principle of equitable use, or intergenerational equity). And fourth, the need to ensure that environmental considerations are integrated into economic and other development plans, programmes and projects, and that development needs are taken into account in applying the environmental objectives (the principle of integration).”³

“The fourth element of sustainable development is the commitment to integrate environmental considerations into economic and other development and to take into account the needs of economic and other social development in crafting, applying and interpreting environmental obligations.”⁴ Sustainable Development creates a balance between development and environmental protection and conservation. This also forms the central policy and purpose of the Act. “The aim of interpretation in law is to realize the purpose of the

² *section 2(xlii) of the Act*

³ *Philippe Sands- Principles of International Environmental law – frameworks, standards and implementation. @1995. p.199. emphasis supplied*

⁴ *ibid. p.205*

law. Law is thus a tool designed to realize a social goal. It is intended to ensure the social life of the community, on the one hand, and human rights, equality, and justice on the other. The history of law is a search for the proper balance between these goals, and the interpretation of the legal text must express this balance. Indeed, if a statute is a tool for realizing a social objective, then interpretation of the statute must be done in a way that realizes this social objective”⁵.

The central theme of sustainable development is, therefore, the best interpretative tool for the actualization of the provisions of the Act or the Regulations.

13. With this interpretative approach, I venture to examine the above provisions. Section 12 requires that a proponent of a project cannot commence the construction or operation of the project unless it has filed with the Agency, IEE or EIA, as the case may be, and has obtained from the Agency approval in respect thereof. Nature of the projects requiring IEE or EIA are provided in Regulation 5 read with Schedules I & II of the Regulations. Considering that construction or operation of the project cannot commence unless environmental approval is granted by the Agency, section 12(4) of the Act and Regulations 11(1), 15 & 16 provide a strict timeline to be followed by the Agency. This timeline supports both; the importance and value of economic development and environmental protection. The statutory timelines in section 12(4), plays a balancing act between the interest of the proponent, who is in the process of setting up the project and has undertaken financial and other business obligations, which have a recurring financial implication and that of the Agency, which under the law is designed to safeguard public interest by protecting the environment and therefore enjoys a period of four months [unless extended under section 12(5)] to assess the project against any adverse environmental effects by initiating the statutory review process under the Act and the Regulations. Regulation 11(1) mandates that the

⁵ Aharon Barak – The Judge in a Democracy. p.124

Agency shall make every effort to carry out its review of the IEE within 45 days and of EIA within 90 days, of issue of confirmation of completeness under Regulation 9. Regulation 15 prescribes that four months period for communication of decision stipulated in section 12(4) shall commence from the date of filing of an IEE or EIA in respect of which confirmation of completeness is issued by the Agency under Regulation 9(1)(a). During this period of review and assessment, the project is on a hold and the proponent cannot commence the construction or operation of the project. The recurring cost of the financial and business investment of the proponent prior to the commencement of the project continues while the project is put on a hold as the proponent awaits the approval of the IEE or EIA by the Agency. The proponent is expected to internalize the financial cost for a period of four months as provided under the law but overshooting this period by the Agency and failure to complete the review process within the statutory timeline offends section 12(4) and with it the environmental principle of sustainability and sustainable development. It is for this reason that under section 12(4) of the Act, failure of the Agency to meet the statutory timeline, results in a deemed approval of the IEE or EIA.

Deemed Approval – meaning:

14. What is then the scope and ambit of this deemed approval? Deeming provisions are mandatory and have to be taken to their logical conclusion. It is now settled that “where the legislature says that ‘something should be deemed to have been done’ which in truth has not been done, it creates a legal fiction and in that case, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its legal conclusion.”⁶ “The Court must follow the consequences that flow

⁶ *Interpretation of Statutes by N S Bindra. Pp 267-268 (emphasis supplied)*

from or be ancillary to a deeming provision and is required to recognize and give effect to the same.”⁷ Reliance is also placed on “Muhammad Mubeen-us-Salam and others v. Federation of Pakistan through Secretary, Ministry of Defence and others” (PLD 2006 SC 602), “Mehreen Zaibun Nisa v. Land Commissioner, Multan and others” (PLD 1975 SC 397) and “All Pakistan Newspapers Society and others v. Federation of Pakistan and others” (PLD 2012 SC 1). In addition, non-compliance of section 12(4) attracts penalty under section 17 of the Act, reaffirming the compulsoriness of the provision.

15. The only exception is under section 12(5) where the Government in an appropriate case can seek an extension for a maximum of another four months. This extension is to be sought before the expiry of the first four months under section 12(4). Here the timeline can be extended by the Government in any particular case if the nature of the project so warrants. The said extension as per Regulation 16 must be in consultation with the Agency, indicating the various steps of the review process to be undertaken during the extended period, and the estimated time required for each step. However, the statutory nature of the deeming provision is equally effective even after the expiry of the extended period as subsection 5 is subject to section 12(4).

16. The deemed approval under section 12(4) is, however, not absolute and is limited to the extent where it does not contravene the provisions of this Act, the Rules and the Regulations made thereunder. Once the IEE or EIA receives deemed approval, the Agency is empowered to stop the project if it can establish that there has been violation of any provision of the Act or the Rules or Regulations thereunder. This could be through an Environmental Protection Order under Section 16 which empowers the Agency to pass a restraining order if any act or omission is likely to occur in violation of the Act,

⁷ *Understanding Statutes by S.M.Zafar - 4th Edition. Pp 92-93 also see PLD 2007 Lahore 1*

Rules or Regulations or is likely to cause an Adverse Environmental Effect. This power enjoyed by the Agency is in the public interest and safeguards the fundamental rights, in particular, right to life, of third parties that might be affected by the project. It is underlined that deemed approval cannot, however, be interfered with by the Agency on the sole ground that written environmental approval was not granted under section 12(4) inspite of the lapse of the statutory period. The very deeming clause deprives the Agency of this power.

17. In the present case, admittedly, the period of four months from the date of completion under Regulation 9(1)(a) have long passed. The Agency has failed to complete the review process and pass an order on the EIA filed by the petitioner. As a result, under section 12(4) of the Act, the EIA is deemed to have been approved and the proponent is free to proceed with the construction and operation of the project. The impugned order dated 03.12.2017 passed by the Agency, stopping the project on the ground that no written environmental approval, is not sustainable in law. Infact, the deeming clause substitutes the absence of the written environmental approval of IEE or EIA beyond the statutory period. No other ground showing the violation of the Act, Rules or Regulations by the project has been mentioned in the impugned order. The impugned order is, therefore, in violation of section 12(4) and is therefore, set aside.

Precautionary Principle and In Dubio Pro Natura:

18. The additional facts placed before me reveal that through letter 17.05.2017 of the Mines & Minerals Department, Government of the Punjab, an extensive survey is being conducted of the Salt Range in Punjab in order to delineate positive and negative areas for the grant of mining concessions. The project of the petitioner falls in the Salt Range and may or may not fall within the negative area. The august Supreme Court of Pakistan has also taken notice in the matter, which has been referred to earlier in the judgment. According to the learned

law officer, the Director General of the Agency was awaiting the survey report of the Mines and Minerals Department before passing a final order on the EIA filed by the petitioner. The survey report of the Mines and Minerals Department, according to the law officer, is to be filed before the august Supreme Court of Pakistan by mid January, 2018.

19. While the EIA filed by the petitioner is deemed to have been approved, however, in the light of the survey being carried out by the Mines and Minerals Department, further grant of mining concessions to the petitioner in the Salt Range may have an adverse environmental effect. The survey is underway and the matter is being overseen by the august Supreme Court of Pakistan. These facts attract the *Precautionary Principle* reflected in Principle 10 of the Rio Declaration, 1992. The principle provides that “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” Another emerging environmental principle and perhaps more appropriate in this case, declared as Principle 5 of the IUCN World Declaration on the Environmental Rule of Law (2016) is *In Dubio Pro Natura* i.e., “in cases of doubt, all matters before courts, administrative agencies, and other decision-makers shall be resolved in a way most likely to favour the protection and conservation of the environment, with preference to be given to alternatives that are least harmful to the environment. Actions shall not be undertaken when their potential adverse impacts on the environment are disproportionate or excessive in relation to the benefits derived therefrom.” Taking a precautionary approach and relying on the principle of *In Dubio Pro Natura*, as it is uncertain what the survey of the Salt Range might hold, the courts must favour nature and environmental protection. This approach is also constitutionally compliant as the courts are to protect the fundamental rights of the public and in this case right to life and dignity of the

community surrounding the project remains paramount till such time that the Agency is of the view that the project has no adverse environmental effects. At this stage, without awaiting the survey report, the issue of future mining concessions in Salt Range remain in doubt and uncertain, it is therefore, prudent and wise to adopt a precautionary approach and direct the petitioner to maintain status quo till the survey report is shared with the Agency by the Mines and Mineral Department and till such time that the Agency after reviewing the survey report passes a speaking order regarding the status of the deemed approval of the EIA under section 12(4) of the Act. The Agency once seized of the survey report shall pass appropriate orders within a fortnight thereof, under the Act, considering that the EIA already stands approved under the deeming provision. The petitioner shall maintain status quo till such time. However, before passing the final order the Agency will confirm if there is any restraining order in this regard passed by the august Supreme Court of Pakistan in the abovementioned case.

20. This petition is **allowed** in the above terms.

*Iqbal/**

(Syed Mansoor Ali Shah)
Chief Justice

APPROVED FOR REPORTING