* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on: 22.10.2013
Date of Decision: 07.11.2013

\+ WP(C) No.3141 of 2012 CM No.6753 of 2012 (Stay)

MAHENDRA PANDEY & ANR. ....Petitioners
Through: Ms. Ruchi Kohli, Ms. Vidushi & Mr. Yash Mishra, Advs.

Versus

SECRETARY, MINISTRY OF ENVIRONMENT & FORESTS AND ORS. ....Respondents
Through: Mr. Rajeeve Mehra, ASG with Mr. Sachin Datta, CGSC & Mr. Vineet, Adv. for the UOI.
Mr. Sandeeep Prabhakar, Mr. Amit Kumar & Mr. Pratap Behra, Advs. for R-3, 4 & 5.

\+ WP(C) No.7034 of 2012

RANI GUPTA ....Petitioner
Through: Ms. Ruchi Kohli, Ms. Vidushi & Mr. Yash Mishra, Advs.

Versus

SECRETARY, MINISTRY OF ENVIRONMENT & FORESTS AND ORS. ....Respondents
Through: Mr. Rajeeve Mehra, ASG with Mr. Sachin Datta, CGSC & Mr. Vineet, Adv. for the UOI.

Mr. Sandeeep Prabhakar, Mr. Amit Kumar & Mr. Pratap Behra, Advs. for R-3, 4 & 5.

\+ WP(C) No.103 of 2013

MIN MEC CONSULTANCY PVT. LTD. ....Petitioner

Through: Ms. Ruchi Kohli, Ms. Vidushi & Mr. Yash Mishra, Advs.

Versus

SECRETARY, MINISTRY OF ENVIRONMENT & FORESTS AND ORS. ....Respondents

Through: Mr. Rajeeve Mehra, ASG with Mr. Sachin Datta, CGSC & Mr. Vineet, Adv. for the UOI.
Mr. Sandeeep Prabhakar, Mr. Amit Kumar & Mr. Pratap Behra, Advs. for R-3, 4 & 5.

\+ WP(C) No.2765 of 2013

EPSILON PROJECTS PVT. LTD. ....Petitioner

Through: Ms. Ruchi Kohli, Ms. Vidushi & Mr. Yash Mishra, Advs.

Versus

MINISTRY OF ENVIRONMENT & FORESTS AND ORS. ....Respondents

Through: Mr. Rajeeve Mehra, ASG with Mr. Sachin Datta, CGSC & Mr. Vineet, Adv. for the UOI.

Mr. Sandeeep Prabhakar, Mr. Amit Kumar & Mr. Pratap Behra, Advs. for R-3, 4 & 5.

\+ WP(C) No.3648 of 2013

DR. YASH PAUL SHARMA ....Petitioner
Through: Ms. Ruchi Kohli, Ms. Vidushi & Mr. Yash Mishra, Advs.

Versus

MINISTRY OF ENVIRONMENT & FORESTS AND ORS. ....Respondents
Through: Mr. Rajeeve Mehra, ASG with Mr. Sachin Datta, CGSC & Mr. Vineet, Adv. for the UOI.
Mr. Sandeeep Prabhakar, Mr. Amit Kumar & Mr. Pratap Behra, Advs. for R-3, 4 & 5.

CORAM:
HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT

V.K.JAIN, J.

The Environment (Protection) Act, 1986 was enacted by the Parliament with a view to provide protection and improvement of environment and matters connected thereto. Pursuant to the National Environment Policy of the Government of India and in exercise of the powers conferred upon it by sub-section (1), clause (v) of sub-section (2) of Section 3 of the Act read with clause (d) of sub-rule (3) of Rule 5 of the Environment (Protection) Rules, 1986, the Government of India

issued a notification dated 14.09.2006 *inter alia* directing that from the date of publication of the said notice, the required construction of new projects or activities or the expansion or modernization of existing projects or activities listed in the Schedule to the notification entailing capacity addition with change in process and/or technology shall be undertaken only after prior environmental clearance is taken from the Central Government or as the case may be from the State Level Environment Impact Assessment Authority duly constituted by the Central Government under sub-section (3) of Section 3 of the said Act in accordance with the procedure specified in the said notification. The Environment Impact Assessment (EIA), therefore, is now a statutory requirement for a large number of developmental and industrial activities. The person seeking to set up or expand a project, which needs prior environmental clearance from the Central Government or State or Union Territory Level Environment Impact Assessment Authority, is required to submit an EIA report which it may prepare itself or it may engage an EIA consultant for the purpose.

2. It was found by Government of India that EIA being submitted for the purpose of obtaining Environmental Clearance were not up to the mark and suffered several deficiencies such as (a) Improper/inadequate scoping for the EIA (b) Consultants not having adequate understanding for developing EIAs. (c) Poor quality of inputs to EIAs (d) No checks on the competence of EIA Consultants (e) No liability of EIA Consultants. A need, therefore, was felt for accreditation of consultants so as to ensure submission of Quality EIA reports. An OM dated 02.12.2009 was, therefore, issued by the Government of India, Ministry of Environment and Forests requiring for accreditation of EIA

consultant with Quality Council of India (QCI) or National Accreditation Board of Education and Training (NABET), so as to ensure that good quality EIA reports are prepared by experts possessing requisite facilities such as laboratories for testing of samples, qualified staff etc. All the consultants/public sector undertakings working in the area of Environment Impact Assessment were required to get themselves registered under the scheme of accreditation and registration of the NABET/QCI. It was further directed that QCI would put in place a detailed procedure for registration of consultants, maintaining full transparency in the procedure followed for accreditation**.** It was also decided that no EIA/EMP report prepared by the consultants who are not registered with NABET/QCI shall be considered by the Government after 30.06.2010.

Vide OM dated 18.03.2010, the Government emphasized upon all the individuals/firms and organizations, including Government Associations, Universities and PSUs working in the area of EIA to apply and get registered under the above-referred scheme. They were also intimated that the detailed procedure in this regard was available on the website of NABET/QCI. Vide OM dated 28.06.2010, 157 consultants, who had applied to QCI for accreditation/registration, were permitted to appear before the State Level Expert Appraisal Committee/State Environmental Impact Assessment Authority (SLEAC/SEIAA) for category 'B' projects and Expert Appraisal Committee (EAC) for category 'A' projects, up to 31.12.2010. This was followed by OM dated 01.11.2010 permitting 265 consultants to appear before the aforesaid Committee/Authority. Vide OM dated 31.12.2010, the Scheme was further extended till 30.06.2011 for those who had already

applied up to 30.09.2010 and those who had not applied up to 30.09.2010 were debarred from appearing before the EAC/SLEAC. The final Scheme for accreditation was prepared vide OMs dated 30.06.2011 and 30.09.2011.

3. The petitioners before this Court claim to be EIA Consultants, who have not been accredited/registered with QCI/NABET. They are challenging the validity of the OMs dated 02.12.2009, 18.03.2010, 28.06.2010, 01.11.2010, 31.12.2010, 30.06.2011 and 30.09.2011 primarily on the following grounds:

(i) an Authority in terms of Section 3(3) of the Act for the purpose of exercising and performing the powers and functions of the Central Government and for taking measures with respect to the matters referred to in sub-section (2) of Section 3 can be constituted only by way of an order published in the Official Gazette, whereas the OM dated 02.12.2009 has not been published in the Official Gazette;

(ii) the power to constitute the aforesaid authority cannot be delegated;

(iii) the powers of the Central Government cannot be delegated, except by way of notification published in the Official Gazette;

(iv) even the rules to regulate environmental pollution in terms of Section 6 of the Act can be made only by way of notification published in the official gazette, whereas none of the impugned OMs has been notified in the Gazette; and

(v) though the rule making power of the Act under Section 25 of the Act cannot be delegated, the impugned OMs have the effect of delegating such powers to QCI/NABET.

4. The NABET/QCI in the meeting of the Accreditation Committee held on 7.10.2012 *inter alia* rejected the application of Min Mec

Consultancy Pvt. Ltd., petitioner in WP (C) No.103/2013, for empanelment. The Committee also decided that a fresh application will not be entertained for a period of one (1) year from the date of the decision. The aforesaid petitioner, therefore, is also challenging the decision of the Accreditation Committee rejecting its application for empanelment and debarring it from submitting a fresh application for a period of one (1) year from the date of the decision.

5. In its meeting held on 10.1.2012, the Accreditation Committee rejected the application of Shri Environmental Technology Institute, a proprietorship concern of Rani Gupta, petitioner in WP (C) No.7034/2012, for accreditation on the ground that only one in-house expert was recommended by the assessors and, therefore, the organization does not meet the requirement of the Scheme which stipulates having three in-house experts. The petitioner in the aforesaid writ petition is assailing the aforesaid decision of the Accreditation Committee.

6. M/s. Epsilon Projects Pvt. Ltd., petitioner in WP (C) No.2765/2013, applied for accreditation on 12.7.2010. It appears that the aforesaid application was found to be incomplete and certain information/clarification was sought from the applicant, from time to time and the reply furnished by it was considered. The application, however, still remained incomplete in certain aspects and, therefore, vide communication dated 27.12.2011, processing of the said application was suspended, to be taken up as and when necessary information/clarifications were submitted by the applicant, meeting all the requirements of the Scheme. A mail in this regard was also sent to the aforesaid petitioner on 29.12.2011. This was followed by a final

opportunity notice dated 1.6.2012 requiring the said petitioner to submit the requisite information by 16.6.2012. The petitioner responded to the aforesaid communication vide e-mail dated 14.6.2012. The said e-mail, however, landed in the junk mail box of the NABET.

7. Sections 3, 6, 23 & 25 of the Environment (Protection) Act, 1986 to the extent they are relevant read as under:

> "**GENERAL POWERS OF THE CENTRAL GOVERNMENT**
>
> **3. Power of Central Government to take measures to protect and improve environment. –** (1) Subject to the provisions of this Act, 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.
>
> (2) In particular, and without prejudice to the generality of the provisions of sub-section (1), such measures may include measures with respect to all or any of the following matters, namely:--
>
> .... …. …. …. ….
>
> (xiv) such other matters as the Central Government deems necessary or expedient for the purpose of securing the effective implementation of the provisions of this Act.
>
> 3) The Central Government may, if it considers it necessary or expedient so to do for the purpose of this Act, by order, published in the Official Gazette, constitute an authority or authorities by such name or names as may be specified in the order for the purpose of exercising and performing such of the powers and functions (including the power to issue directions under section 5) of the Central Government under this Act and for taking measures with respect to such of the matters referred to in sub-section (2) as may be mentioned in the order and

subject to the supervision and control of the Central Government and the provisions of such order, such authority or authorities may exercise and powers or perform the functions or take the measures so mentioned in the order as if such authority or authorities had been empowered by this Act to exercise those powers or perform those functions or take such measures.

.... …. …. …. ….

6. Rules to regulate environmental pollution. – (1) The Central Government may, by notification in the Official Gazette, make rules in respect of all or any of the matters referred to in section 3.

.... …. …. …. ….

23. Power to delegate. – Without prejudice to the provisions of sub-section (3) of section 3, the Central Government may, by notification in the Official Gazette, delegate, subject to such conditions and limitations as may be specified in the notifications, such of its powers and functions under this Act [except the powers to constitute an authority under sub-section (3) of section 3 and to make rules under section 25] as it may deem necessary or expedient, to any officer, State Government or other authority.

.... …. …. …. ….

25. Power to make rules. – (1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act."

8. A conjoint reading of the aforesaid provisions would show that an authority to exercise the powers and perform the functions of the Central Government under the provisions of the Act can be constituted only by way of a notification published in the Official Gazette, such an authority is required to function subject to the supervision and control of the Central Government and the power to set up such an authority cannot be delegated by the Central Government to anyone including any officer,

State Government or other authority. Another statutory requirement is that the Rules in terms of Section 6 and/or Section 25 can be made by the Government only by way of a notification in the Official Gazette and the rule making power of the Government cannot be delegated.

9. The first contention of the petitioner was that by directing empanelment with NABET/QCI the Central Government has set up an Authority in terms of Section 3 (3) of the Act and this having been done without issuing a notification and publishing the same in the Official Gazette, is illegal. The learned ASG, on the other hand, contended that the Central Government has not at all set up an Authority to exercise its powers and perform its functions under the Act and, therefore, the question of issuing a notification and publishing it in the Official Gazette does not arise.

A perusal of the Scheme for accreditation would show that NABET, a Constituent Board of the QCI developed a voluntary accreditation scheme with inputs from various stakeholders, including experts in the field and launched it in August, 2007. The said Scheme was reviewed by the Ministry of Environment and Forests in the year 2009, which desired its updation, incorporating the learnings since launching of the scheme. The same was done and an updated version of the scheme was uploaded on the website of QCI in January, 2010.

In their counter affidavit the respondents have categorically stated that the aforesaid Scheme was prepared by the Union of India along with QCI/NABET pursuant to the provisions contained in the Environment (Protection) Act, 1986 and the Rules framed thereunder and the Notification dated 14.9.2006. Though initially the Scheme was prepared by NABET, once it was reviewed by the Government was

updated as per its requirement and then adopted by the Government, by way of directing empanelment in its terms, the said scheme, in my view, became the Scheme of the Government. It is the OM dated 2.12.2009 issued by the Government of India and not any direction issued by NABET/QCI which has made accreditation/registration with NABET/QCI mandatory. It is a decision of the Government and not of QCI/NABET that no EIA/EMP report prepared by the consultants who are not registered with NABET/QCI shall be considered after 30.6.2010. Therefore, the Scheme, though prepared by QCI/NABET, is now a Scheme of the Government. It is not necessary for the Government to itself prepare a Scheme; it can very well adopt a Scheme, framed by another agency, if found to be suitable for its purposes, and in that event, the Scheme would be of the Government and not of the agency by which it was initially prepared.

In any case, it is only an order constituting an Authority for the purpose of exercising and performing the powers and functions of the Central Government which is required to be published in the Official Gazette but neither the OM dated 2.12.2009 nor the subsequent as OMs impunged in these writ petitions constitutes such an authority nor has the Central Government delegated its powers and functions under the Act to QCI/NABET. The challenge to the aforesaid OMs on the ground of contravention of Sections 3 (3) and 23 of the Act is, therefore, wholly misplaced.

10. Though Section 6 of the Act empowers the Central Government to make Rules in respect of all or any of the matters referred to in Section 3 and Section 25 of the Act empowers the Central Government to make Rules for carrying out the purposes of the Act and the Rules can

be made only by way of notification published in the Official Gazette, none of the OMs impugned in these petitions have been issued in exercise of the Rule making power of the Central Government. Sub-section (1) of Section 3 of the Act empowers the Central Government to take all measures which it deems necessary or expedient for the purpose of protecting and improving the quality of environment and preventing controlling and abating environmental pollution. As rightly contended by the learned ASG, it is in exercise of the aforesaid statutory power of the Central Government that the OM dated 2.12.2009 and subsequent OMs making it mandatory for EIA consultants to be empanelled with QCI/NABET have been issued. It is only the statutory rules made in terms of Section 6 of the Act in respect of the matters referred to in Section 3 of the Act which are required to be published in the Official Gazette. The Central Government may, if it so decides, make statutory rules in respect of any of the matters referred to in Section 3 of the Act but, it is not obligatory for the Central Government to exercise all those powers only by way of statutory rules. If the Government decides to make rules in respect of any of the matters referred to in Section 3 of the Act, that can be done only by way of a notification published in the Official Gazette but if the Government does not want to give the status of statutory rules to its decisions, it would not be obligatory for it to notify such decisions in the Official Gazette. The use of the expression "may" in Section 6 of the Act makes it quite clear that the option lies with the Central Government either to make rule or to issue executive instructions with respect to the measures taken by it for the purpose of protecting and improving the quality of environment and preventing controlling and abating environmental pollution.

11. I also do not find any merit in the contention that by directing empanelment with QCI/NABET in terms of the Scheme framed by the said organization, the Central Government has delegated its statutory powers to the said organization. While empanelling/registering a consultant or rejecting its application seeking empanelment/registration, QCI/NABET acts as an agency of the Central Government. Considering that the application for empanelment/registration has to be considered strictly in terms of the Scheme approved by the Central Government, it cannot be said that entrusting the task of empanelment/registration to QCI/NABET amounts to delegating the powers and functions of the Government under the Act to the said organization. It is very much open to the Central Government to withdraw the impugned OMs at any point of time and entrust the work of empanelment to some other agency or to undertake the task itself.

12. The objective of the Scheme is to ensure that the EIA reports submitted to the Experts Appraisal Committees (EACs) are of the desired quality and standard and are prepared by persons who are duly qualified to prepare such reports and have access to the infrastructure required for the purpose. In WP (C) No.202/1995 titled T.N. Godavarman Thirumulpad Vs. Union of India & Ors., the Hon'ble Supreme Court vide its order dated 6.7.2011 noticed various deficiencies in the reports submitted by the experts undertaking environmental impact assessment and emphasized on the need to put in place a regulatory mechanism in this regard. It was directed that till the time such mechanism is in place, the Government should prepare a panel of accredited institutions from which alone the project proponent should obtain the rapid EIA, and that too on the terms of reference to be

formulated by the Government. It is for this purpose that the impugned OMs have been issued for accreditation of ETA experts. Considering the objective behind such empanelment, no exception to the aforesaid mechanism devised by the Central Government can be taken.

I, therefore, find no merit in the challenge to the impugned OMs issued by the Central Government from time to time.

13. The Scheme of empanelment has been assailed by the petitioner on the ground that it debars individuals from being empanelled with QCI/NABET. Clause 3.1 of the Scheme is relevant and reads as under:

> "**3.1 Eligibility**
>
> *Only organizations will be considered for accreditation.*
>
> These can be government, public sector or private organizations which could be proprietary firms, partnership firms or companies (Pvt. & Public Limited), bodies registered under Society Acts, under Section 25 of Companies Act, Research Institutes and the like.
>
> Universities including IITs, CSIR labs, other labs and/or research based organizations conducting EIA studies can also apply for accreditation.
>
> Accreditation will not be applicable for individuals as EIA consultants."

It would, thus, be seen that while providing for accreditation of proprietorship firms the Scheme also excludes the individual consultants from its ambit. A proprietorship firm is nothing but a trade name/professional name adopted by an individual. In fact, a proprietorship firm is not a legal entity and it is the individual, whose proprietorship concern it is who can sue and be sued as a legal person.

Since the intention of the Scheme is not to exclude proprietorship firms, clause 3.1 to the extent it excludes individuals as EIA consultants needs to be struck down being in conflict with the main clause which enables accreditation of proprietary firms.

14. A perusal of the decision taken by the Accreditation Committee in its meeting held on 17.10.2012 would show that the application of M/s. Min Mec Consultancy Private Limited, petitioner in WP (C) No.103/2013 was rejected on the grounds that (i) it had taken up more assignments than it could handle with the resources available with it and (ii) in case of EIA of Nirma Cement Plant it had omitted to take into consideration important factors such as existing wetland and other environmental issues. The Committee felt that taking up more EIA assignment than capacity of the organization could result in compromising site activities relating to collection of primary data and omissions in reflecting the critical environmental issues correctly in the EIA reports and the omission in case of EIA of Nirma Cement Plant was too serious to allow a consultant to operate in the field of EIA preparation. The petitioner has failed to show how the aforesaid decision of the Accreditation Committee can be said to be arbitrary or unreasonable so as to warrant interference by the Court in exercise of writ jurisdiction under Article 226 of the Constitution of India. It is for the experts and not for the Court to decide whether a particular consultant is suitable for being empanelled with QCI/NABET or not. The Court cannot interfere with such a decision taken by an expert body, unless it is shown that such decision is wholly arbitrary, perverse or without jurisdiction. No such case has, however, been made out by the petitioner. It is for the experts and not for the Court to take a view as to

whether the resources available with a particular applicant are sufficient to handle the assignments taken by it or not. Similarly, it is for the expert body to take a view as to the nature of an omission by the consultant while preparing a report on environment impact assessment. This is not the case of the petitioner that the aforesaid decision of the Accreditation Committee is in violation of the Scheme approved by the Central Government. Therefore, no interference with the aforesaid decision of the Accreditation Committee is called for.

15. During the course of arguments it was pointed out by the learned counsel for the petitioners that while rejecting the application of M/s. Min Mec Consultancy Private Limited, the Accreditation Committee also directed that a fresh application will not be entertained for a period of one (1) year from the date of its decision. It is not the case of the respondents that the Scheme of accreditation prepared by QCI/NABET and approved by the Central Government provides for a cooling off period of one (1) year before a fresh application seeking accreditation is made. Therefore, in my view, it was not open to the Accreditation Committee to direct, while rejecting the application of M/s. Min Mec Consultancy Private Limited, that no fresh application of the said consultant would be entertained for a period of one (1) year from the date of its decision. Therefore, though the earlier application submitted by M/s. Min Mec Consultancy Private Limited for accreditation with QCI/NABET stands rejected, it is open to the said petitioner to file a fresh application seeking accreditation in terms of the Scheme approved by the Central Government.

16. As regards rejection of the application of Shri Environmental Technology Institute, clause 7.1 of the Scheme provides that the

applicant must have, at least, three in-house experts – one eligible EIA Coordinator who together with another two eligible FAEs should cover the core functional areas. The Scheme also prescribes the qualifications and experience of the experts in Appendix-1 to the Scheme. The decision of the Accreditation Committee would show that only one in-house expert was recommended by the assessor meaning thereby that only one of them fulfilled the norms prescribed in the Scheme. Since it was obligatory for the applicant to have, at least, three in-house experts, the applicant in this case was clearly ineligible for empanelment under the Scheme. However, before rejecting the application, an opportunity ought to have been given to the applicant to engage experts in prescribed number, and only in the event of her failure to do so, the application could have been rejected. In my view, rejecting an application, without giving an opportunity to the applicant to remove the deficiency/meet the shortfall, if any, will not be a fair approach to the matter on the part of the State.

17. As regards the case of M/s. Epsilon Projects Pvt. Ltd., admittedly, the response by the aforesaid Company to the last notice dated 1.6.2012 was not considered by the Accreditation Committee, the same having landed up in the junk mail box. The aforesaid petitioner cannot be penalized for its e-mail landing in the junk mail box of the respondents. The respondents, therefore, are required to consider the application of the petitioner afresh after giving an opportunity to it to submit the deficient documents in a time bound manner.

Conclusion:

18. For the reasons stated hereinabove WP (C) Nos.3141/2012, 103/2013 and 3648/2013 are hereby dismissed with no orders as to costs.

WP (C) No.2765/2013 is disposed of with a direction to the respondents to give an opportunity to the said petitioner to submit the deficient information/documents in a time bound manner and then decide its application within four (4) weeks of submission of the deficient documents/information.

WP (C) No.7034/2013 is disposed of with a direction that the petitioner shall be given an opportunity to meet the shortfall in the number of in-house experts, in a time bound manner and if this is done, her application would be considered in accordance with the provisions of the Scheme and an appropriate decision shall be taken within four (4) weeks of meeting the shortfall.

It is directed that henceforth no application for empanelment on account of any shortfall/deficiency shall be rejected without giving an opportunity to the applicant to remove the deficiency/meet the shortfall as the case may be, in a time-bound manner.

It is also directed that it shall be open to a person whose application for accreditation is rejected by the Accreditation Committee to apply afresh after complying with all the requirements laid down in the Scheme and there shall be no cooling off period for this purpose.

It is further directed that an application submitted by an individual seeking empanelment even in his personal name, shall not be rejected on the ground that the applicant is an individual.

NOVEMBER 07, 2013 V.K. JAIN, J.
BG/*b'nesh*