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# Supreme Court recalls Vanashakti judgement on the validity of ex post facto environmental clearance

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## Introduction

In a landmark decision with major implications for the real estate and infrastructure sectors, a three-judge bench of the Supreme Court of India by a majority view allowed the Review Petition filed by the Confederation of Real Estate Developers of India (CREDAI) seeking review of the earlier judgment of the Court in *Vanashakti v Union of India, 2025 SCC OnLine SC 1139 (Judgment Under Review/ JUR)*, which held that the mechanism for granting *ex post facto* Environmental Clearance (EC) is invalid. The Supreme Court by a 2:1 majority set aside the JUR and restored the original petitions for fresh hearing, thereby temporarily lifting the imminent threat of demolition or closure of projects that were completed or near-completion, but lacked a prior EC.

## Requirement of prior EC

The foundation of India's Environmental Regulatory Framework is the Environment Impact Assessment Notification 2006 (EIA Notification, 2006) which provides that the expansion or modernization of certain existing project or industrial activity which results in an addition of capacity beyond the limits specified or a change in product mix in an existing manufacturing unit beyond the specified range would require a prior EC.

Recognizing that many projects had commenced or expanded operations without the requisite EC, in 2017, the Ministry of Environment, Forest & Climate Change (MoEFCC) issued a notification providing that *ex-post facto* EC may be granted to projects which were operating without an EC upon fulfilment of conditions (2017 Notification).

All projects which were in breach on the date of issuance of the 2017 Notification were eligible to apply for EC within six months from the date of Notification subject to stringent conditions including payment of huge penalties, execution of a remedial plan and community augmentation plan, and mandatory closure and demolition if the project was not permissible under prevailing laws or not environmentally sustainable.

Subsequently, in 2021 MoEF&CC issued an Office Memorandum (2021 OM) containing Standard Operating Procedure (SOP) for Identification and handling of violation cases under EIA Notification, 2006 in compliance with the order of the Hon'ble National Green Tribunal in *Tanaji B. Gambhire v Chief Secretary, Government of Maharashtra & Ors. O.A. No. 34/2020 WZ*. The SOP for processing the applications was issued in January 2022.

## The Vanshakti judgment of May 2025

Meanwhile, in 2023, the validity of the 2017 Notification and 2021 OM was challenged in the Supreme Court by an environmental NGO Vanashakti and other parties.

The Hon'ble Supreme Court in *Vanashakti v Union of India*, 2025 SCC OnLine SC 1399 struck down the 2017 Notification and 2021 OM holding that concept of *ex post facto* or retrospective EC is completely alien to environmental jurisprudence. See here our ERGO Update on *Vanashakti v Union of India*. The two Judge Bench in *Vanashakti* was of the view that grant of EC after a project has commenced its activity in violation of environmental protection laws defeats the purpose of environmental protection, which necessitates a precautionary approach to prevent damage to the environment.

It also held that illegal activities commenced after the period provided in 2017 notification were not protected. The Court, however, protected the projects which have already been granted *ex-post facto* EC as it held that such projects would not be disturbed. The Court further restrained the Central Government from issuing Circulars/Orders/OMs/Notifications providing for grant of *ex post facto* EC in any form or manner or for regularizing the acts done in contravention of the EIA Notification, 2006.

## The review judgment

A Review Petition was filed against the *Vanashakti* Judgment, led by CREDAI and strongly supported by the Union of India and state governments on the ground inter alia that coordinate benches of the Hon'ble Supreme Court had earlier held that *ex post facto* EC can be granted in exceptional cases which had not been considered by the JUR and that there will be irreversible economic and public interest damage resulting from the JUR.

It was argued in the Review Petition that the JUR failed to consider or follow the coordinate bench rulings of the Supreme Court in the matter of *D Swamy v Karnataka State Pollution Control Board (2023) 20 SCC 469, Electrosteel Steels Limited v Union of India 2021 SCC OnLine SC 1247, Pahwa Plastics Pvt Limited and Another (2023) 12 SCC 774,* where benches of equal strength had already examined and effectively upheld the legality of *ex post facto* EC framework.

The Supreme Court by a 2:1 majority allowed the review petition, recalling the *Vanashakti* Judgment noting that the *Vanashakti* Judgment was rendered without taking notice of the judgments of coordinate benches of the Court and is hence *per incuriam*.

The Chief Justice of India (CJI) also observed that in the *Common Cause Case (2017) 9 SCC 499*, the Supreme Court permitted mining leaseholders to start mining operations only after statutory compliances were made and all dues were paid.

The CJI observed that a two judge bench in *Alembic Pharmaceuticals Ltd.,* even while holding that *post facto* EC should not normally be granted, regularised the *ex post facto* ECs with a direction to pay monetary penalties. It was also observed by CJI that in cases like *D Swamy v Karnataka State Pollution Control Board, Electrosteel Steels Limited v Union of India and Others and Pahwa Plastics Private Limited and Another v Dastak NGO* it was held that EC can be granted in exceptional cases on *post facto* basis.

The CJI further opined that if EC is held to be invalid, the only course available is to demolish the construction and then to apply for fresh EC which would add to the pollution and will not be in the public interest. Drawing on precedents like *Bindu Kapurea v Subhashish Panda* (2025 INSC 784), the CJI emphasized that in cases of flagrant violations, the Court should nonetheless adopt a balanced approach in larger public interest rather than choosing to direct the demolition of a completed project. The CJI observed that even in accordance with 2017 Notification and 2021 OM, an EC can be granted only in respect of the projects which are otherwise permissible in law. The 2017 Notification and OM 2021 in any case have provision for imposition of huge penalties on an errant builder/developer while allowing operation of a project which is otherwise permissible.

In view of the same, the CJI decided to recall the *Vanashakti* judgment and directed it to be placed before the appropriate bench. It may be noted that Justice Ujjal Bhuyan disagreed with CJI as according to him, no case for review has been made out.

Justice K. Vinod Chandran agreeing with CJI observed that review is not only warranted but imperative and expedient. He also observed that when prior requirement of EC was mandated by the Government itself, the Government also has the power to relax it.

The *Vanashakti v Union of India* judgment dated 16 May 2025 now stands recalled and the matters will be placed before the CJI on the administrative side for seeking necessary orders, suggesting the possibility of the matter being heard by a larger bench for definitive adjudication on the issue of *ex-post facto* EC.

## Conclusion

The Review Judgment comes as a respite for the real estate industry as it removes the imminent threat of mandatory demolition or closure of a project that was operating without EC. The legal basis for the quashing of 2017 Notification and 2021 OM has been recalled, which means that the process for evaluating applications under the 2021 OM can potentially resume, subject to the final outcome of the restored petitions. The projects which were stalled at the final stage of EC approval now have a window to request for formal issuance of the EC.

It is however noted that the Review Judgment did not uphold the validity of 2017 Notification and 2021 OM and has simply restored the case to the file, postponing the final decision. It is therefore advisable that all new projects must strictly adhere to the requirement of obtaining prior EC under the EIA Notification, 2006 and existing projects must continue to focus on demonstrating environmental sustainability and pursue their applications with regulatory authorities to finalize the grant of EC.

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