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PER INCURIAM REVERSAL: CONFEDERATION OF REAL ESTATE DEVELOPERS OF INDIA (CREDAI) V. VANASHAKTI AND ANOTHER

~Prathamesh Wagh

“ We learned that economic growth and environmental protection can and should go hand in hand.”

- Christopher Dodd

INTRODUCTION:

This commentary is to analyse the Supreme Court’s decision in *Confederation of Real Estate Developers of India (CREDAI) v. Vanashakti and Another*¹. This case represents a significant turning point in India’s environmental jurisprudence; it represents significant judicial intervention especially concerning the soundness of ex post facto environmental clearance (ECs). Delivered on November 18, 2025, by a three-judge bench led by Chief Justice B.R. Gavai (with Justice K.V. Chandran concurring and Justice Ujjal Bhuyan dissenting in part), the judgement recalls its earlier ruling in *Vanashakti v. Union of India*² (hereinafter “JUR”), dated May 16, 2025. The JUR consisting of Justice A.S. Oka and Justice Ujjal Bhuyan struck down the Ministry of Environment, Forest and Climate Change’s (MoEF&CC) 2017 Notification³ and 2021 Office Memorandum (OM)⁴ as unconstitutional, holding that ex post facto

¹ Confed'n of Real Estate Developers of India (CREDAI) v. Vanashakti, 2025 INSC 1326 (India).

² Vanashakti v. Union of India, 2025 SCC OnLine SC 1139 (India).

³ Ministry of Env't, Forest & Climate Change, Gov't of India, Notification S.O. 804(E) (Mar. 14, 2017), Gazette of India, Extraordinary, pt. II, sec. 3(ii).

⁴ Ministry of Env't, Forest & Climate Change, Gov't of India, Standard Operating Procedure (SoP) for Identification and Handling of Violation Cases under EIA Notification 2006, Office Memorandum F. No. 22-21/2020-IA.III (July 7, 2021).

environmental clearances (ECs) violate the inhibitory character of Environment Assessment (EIA) Notification, 2006⁵.

This review petition, filed under Article 137 of the Constitution⁶, sought to recall *Jur* on the grounds of overlooking binding judicial precedents and for its failure to balance environmental protection with public interest consideration. The review was allowed by the majority, upholding retrospective ECs for “permissible activities” subject to penalties, while stressing on avoidance of economic disruptions and protection of public interest⁷. Critics have also put forward an argument that this decision undermines the foundational legal principles, and demotes environmental law to a suggestion by elevating monetary penalties over mandatory prior compliance⁸.

The Indian environmental jurisprudence has long ingrained the right to clean environment in Article 21 right to live. In the landmark of *Vellore Citizen's Welfare Forum v. Union of India*⁹, the Hon'ble Supreme Court embedded the precautionary principle, polluter pays and sustainable development. The EIA framework mandates prior ECs through a four-stage process, which will be discussed in detail further in this commentary.

FACTS OF THE CASE:

1. The factual matrix revolves around the regulatory framework for environmental clearances under the Environment (Protection) Act, 1986¹⁰ (EP Act) and the Environment (Protection) Rules, 1986¹¹ (EP Rules). The 2006 EIA Notification mandated prior ECs for specified projects categorized as 'A' (handled by MoEF&CC) or 'B' (handled by State Environment Impact Assessment Authorities, SEIAAs).

⁵ Ministry of Env't & Forests, Gov't of India, Env't Impact Assessment Notification S.O. 1533(E) (Sept. 14, 2006), Gazette of India, Extraordinary, pt. II, sec. 3(ii).

⁶ India Const. art. 137.

⁷ Gulnar A. Mistry, *Vanashakti Review: Demoting the Law to a Suggestion*, Sup. Ct. Observer (Dec. 3, 2025), <https://www.scobserver.in/journal/vanashakti-review-demoting-the-law-to-a-suggestion/>.

⁸ Mistry, *supra* note 7.

⁹ *Vellore Citizens' Welfare Forum v. Union of India*, (1996) 5 SCC 647 (India).

¹⁰ The Environment (Protection) Act, No. 29 of 1986, India Code (1986).

¹¹ The Environment (Protection) Rules, 1986, Gazette of India, Extraordinary, pt. II, sec. 3(ii) (Nov. 19, 1986).

2. In 2017, the MoEF&CC issued a notification allowing ex post facto ECs for projects that had commenced without prior approval, subject to penalties, remediation plans, and sustainability assessments by Sector Expert Appraisal Committees (SEACs). This was positioned as a one-time measure, with a six-month application window. Subsequently, the NGT vide order dated 24th May 2021 in the case of Tanaji B. Gambhire directed that,
*“a proper SOP be laid down for grant of EC in such cases so as to address the gaps in binding law and practice being currently followed”*¹².
3. JUR arose from multiple writ petitions challenging these instruments, including *Writ Petition (C) No. 1394 of 2023* (quashing the 2021 OM), *Writ Petition (C) No. 118 of 2019* (challenging the 2017 Notification), and *Writ Petition (C) No. 115 of 2024* (challenging both). Relying on precedents like *Common Cause v. Union of India*¹³, the Court in JUR held that ex post facto ECs contravened the EP Act, emphasizing that penalties under Section 15 did not regularize violations and required demolition of non-compliant projects.
4. The present review petition, filed by CREDAI, along with applications from the Union of India and others, argued that JUR overlooked key paragraphs from prior judgments and ignored subsequent rulings, leading to an inconsistent interpretation

ISSUES RAISED

The primary issues in the review were:

1. Whether JUR correctly interpreted precedents such as **Common Cause, Alembic Pharmaceuticals Limited v Rohit Prajapati**¹⁴, and **Electrosteel Steels Limited v Union of India**¹⁵, particularly regarding the permissibility of ex post facto ECs.

¹² Tanaji B. Gambhire v. Chief Sec'y, Gov't of Maharashtra, Appeal No. 34/2020 (WZ) (Nat'l Green Trib. May 24, 2021).

¹³ *Common Cause v. Union of India*, (2017) 9 SCC 499 (India)

¹⁴ *Alembic Pharm. Ltd. v. Rohit Prajapati*, (2020) 17 SCC 157 (India).

¹⁵ *Electrosteel Steels Ltd. v. Union of India*, (2023) 6 SCC 615 (India).

1. Whether the Court in JUR failed to consider judgments in **D Swamy v Karnataka State Pollution Control Board**¹⁶ and **Pahwa Plastics Private Limited v Dastak NGO**¹⁷, rendering JUR per incuriam.
2. The balance between environmental protection and public interest, including the economic and social implications of demolishing completed projects.
3. Principles of judicial discipline, propriety, and the scope of review under Article 137 of the Constitution of India¹⁸.

MAIN ISSUES REGARDING EX POST FACTO ENVIRONMENTAL CLEARANCE

By recalling the judgement under review (JUR), the court in *Confederation of Real Estate Developers of India (CREDAI) v. Vanashakti and Another*¹⁹ sought to address two major questions. First, did the court in earlier judgement of *Vanshakti v. Union of India* fail to consider the rulings of ***D Swamy v Karnataka State Pollution Control Board*** and ***Pahwa Plastics Private Limited v Dastak NGO***? Second, would JUR's directive for demolition of completed projects cause more harm to public interest or vice versa?

The Court in the instance of the first question answered affirmatively. It was held that the JUR in ***Vanashakti v. Union of India*** overlooked many crucial judgements such as ***D swamy v. Karnataka State Pollution Control Board***²⁰ and ***Pahwa Plastics Private Limited v. Dastak NGO***²¹. The judgement criticised JUR for selectively quoting precedents and ignoring binding coordinate bench precedents like *D Swamy*, which upheld post facto consents under pollution laws and *Pahwa Plastics*. This undermines judicial

¹⁶ *D. Swamy v. Karnataka State Pollution Control Bd.*, (2023) 20 SCC 469 (India).

¹⁷ *Pahwa Plastics Pvt. Ltd. v. Dastak NGO*, (2023) 12 SCC 774 (India).

¹⁸ India Const. art. 137.

¹⁹ *Confed'n of Real Estate Developers of India (CREDAI) v. Vanashakti*, 2025 INSC 1326 (India).

²⁰ *D. Swamy v. Karnataka State Pollution Control Bd.*, (2023) 20 SCC 469 (India).

²¹ *Pahwa Plastics Pvt. Ltd. v. Dastak NGO*, (2023) 12 SCC 774 (India).

discipline and the binding nature of precedents under **Article 141²² of the Constitution of India**.

The court as an answer to second question concluded that rigid demolition would inflict greater harm, squandering public resources, disrupting livelihood and jeopardising essential infrastructure (e.g., hospital and airport). However, emerging discussion highlight the different side of the coin. **With 83 of the world's 100 most polluted cities in India**, the country faces a severe environmental and public health crisis²³. Critics, however, argue that this dilutes the preventive ethos of the EIA notification 2006. The court allowing post facto approvals, sidelines communities, especially those in pollution affected regions. State level mechanisms become redundant of industries secure clearances retrospectively. The ruling navigates a pragmatic balance, but undermines the need for robust SOPs to prevent abuse.

The recalling of JUR reflects a positive but still a troubling shift in environmental jurisprudence. While the ruling identifies the per incuriam nature of the JUR by effectively restoring judicial consistency and preventing wasteful demolition, it unknowingly legitimises a regime of retrospective environmental clearances that undermines the EIA framework.

Ultimately, the ruling may avert immediate economic disruption, but it highlights the urgent need for stronger legislative and regulatory safeguards. Without corrective measures, this decision may indeed set India's environmental jurisprudence back by decades at a time when the country can least afford it.

The Supreme Court dismissed recent attempts to overturn the CREDAI verdict, including a petition by Congress MP and former Environment Minister Jairam Ramesh. The court described the plea as being made for "media publicity" and threatened exemplary costs, which caused it to be withdrawn.²⁴

²² India Const. art. 141.

²³ Civildaily, *SC Ruling on Post-Facto Clearances Sets Environmental Law Back by Decades* (Dec. 2, 2026), <https://www.civildaily.com/news/sc-ruling-on-post-facto-clearances-sets-environmental-law-back-by-decades/>.

²⁴ Abraham Thomas, *SC Slams Jairam Ramesh, Rejects Plea on Post-Facto Green Clearances*, Hindustan Times (Feb. 12, 2026), <https://www.hindustantimes.com/india-news/sc-slams-jairam-ramesh-rejects-plea-on-post-facto-green-clearances-101770848920302.html>.

CONCLUSION

In *CREDAI v Vanashakti and another*, the Supreme Court recalled its earlier judgement that struck down the 2017 Notification and 2021 OM for allowing ex post facto environmental clearance. BY finding. By finding the earlier ruling per incuriam for not considering binding precedents that permitted conditional post violation regularisations. The Court restored the original writ petitions for fresh adjudication, avoiding immediate demolition of completed or near complete projects and protecting public investments, livelihoods and essential infrastructure.

Amid India's severe pollution crisis, critics rightly warn that endorsing retrospective clearance could encourage violation, sideline affected communities and most important of all it undermines the constitutional right to a clean environment under Article 21.

The ruling journeys through the hurdles of balancing environmental safeguards and developmental realities. This ruling highlighted the need for stronger legislative clarity, transparent and deterrent Standard Operation Procedures and rigorous enforcement to prevent abuse. Without these safeguards, the decision may normalise non-compliance at a time when prior assessment is essential for long term ecological and public interest protection.