
INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

**EX POST FACTO ENVIRONMENTAL CLEARANCES IN INDIA: A
CRITICAL ANALYSIS OF THE SUPREME COURT'S EVOLVING
JURISPRUDENCE**- Pooja¹**Introduction**

The right to a healthy environment and the right to development are recognized as third-generation rights as per Karel Vasak's classification of human rights. Unlike civil and political rights, which are primarily enforceable at the individual level, the third generation rights require collective action, cooperation, and shared responsibility for effective realization. Their enjoyment depends upon the coordinated efforts of States, international organizations, communities, and individuals. The right to a healthy environment can be effectively realized only through collective measures aimed at the conservation, protection, and sustainable management of natural resources. Consequently, States have a duty to formulate and implement environmental policies², while citizens and communities share the responsibility of promoting environmental stewardship³. Similarly, the right to development is a collective human right that seeks to ensure the continuous improvement of the well-being and standard of living of all people through their active, free, and meaningful participation in the development process. The *United Nations Declaration on the Right to Development (1986)* recognizes development as a comprehensive economic, social, cultural, and political process aimed at the realization of all human rights and fundamental freedoms

To achieve developmental objectives, numerous infrastructure projects are approved by the competent authorities. Their implementation often necessitates deforestation, blasting of mountains, alteration of river courses, and extensive exploitation of natural resources.

¹Assistant Professor, Swami Devi Dyal Law College, Swami Devi Dyal Group of Professional Institutions, Panchkula, Haryana.

²The Constitution of India, 1950, art. 48 A.

³*Id.* at art. 51-A (g)

For general queries or to submit your research for publication, kindly email us at ijalr.editorial@gmail.com

Although these activities are undertaken in the name of economic growth and public welfare, they frequently result in significant environmental degradation and ecological imbalance.

This raises a fundamental question: can development be pursued at the cost of environmental protection? Contemporary environmental jurisprudence answers this question in the negative by emphasizing that development and environmental conservation are not mutually exclusive but must be harmonized through the principle of sustainable development.

1. Legal provisions with respect to Environmental Clearances

1.1. Concept of Environmental Clearance

Environmental clearance (EC) was introduced as a preventive tool for environmental management. The concept of environmental clearances is stated under various international environmental declarations. The Stockholm Declaration⁴, Rio Declaration⁵, Convention on Biological Diversity⁶, Forest Principles⁷, Basel Convention⁸ etc includes different provisions related to environment impact assessment.

. Environment Impact Assessment or EIA is a systematic process which aims at identifying, predicting, and evaluating the potential environmental consequences of a proposed project or developmental activity before its implementation. The assessment not only considers the environmental aspects but also examines the interconnected social, economic, cultural, and human life aspects.⁹ According to the United Nations Environment Programme, EIA is a tool that facilitates the identification and evaluation of the environmental, social, and economic implications of proposed projects prior to their approval. It assists in adapting projects to local environmental conditions and provides decision-makers with scientifically informed alternatives and recommendations.¹⁰

1.2. Legal framework for Environmental Clearance

⁴ Stockholm Declaration, 1972, Principle 14, 17 and 18.

⁵ Rio Declaration, 1992, Principle 17

⁶ The Convention on Biological Diversity, 1992, Principle 14.

⁷ Principles For a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, 1992, Principle 8.

⁸ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989, Article 4(2)(f).

⁹ Convention on Biological Diversity. *What is impact assessment*. Retrieved July 18, 2026, from <https://www.cbd.int/impact/whatis.shtml>

¹⁰ *Ibid*.

For general queries or to submit your research for publication, kindly email us at ijalr.editorial@gmail.com

The origin of Environment Impact Assessment or EIA in India can be traced back to 1970s. However, the first ever Environment Impact Assessment Notification was enacted under the Environment Protection Act in the year 1994.¹¹ Currently, the EIA notification of the year 2006 is enforceable. A draft EIA notification was also proposed in year 2020 but it has not come into force as of now. Objections were raised by environment experts and groups therefore it is kept under review.

The EIA notification of 2006 is a detailed regulation that lays down the procedure and requirements to get prior EC for different kinds of development projects as specified under the notification like mining projects, thermal power plants, river valley projects, oil & gas transportation pipelines projects, highway construction projects, hazardous waste treatment plants etc. The notification applies to all new projects or activities; expansion and modernization of existing projects or activities and any change in product - mix in an existing manufacturing unit as per the list provided in the Schedule. The process of getting prior environmental clearance includes four main stages- Screening, Scoping, Public Consultation, and Appraisal.¹²

2. Vanashakti v. Union of India: Reaffirming Prior Environmental Clearance

2.1. Facts of the case

On 14 March 2017, the Ministry of Environment, Forest and Climate Change (MoEFCC) issued a notification under Section 3 of the Environment (Protection) Act, 1986 and Rule 5 of the Environment (Protection) Rules, 1986. Under this notification, projects that had commenced or were being executed without obtaining the required EC were permitted to apply for ex post facto environmental clearance within six months from the date of the notification. This mechanism allowed such projects to seek regularization and continue their operations, subject to appraisal by the competent authority.

The Union of India contended that the notification was prospective in nature and was intended to operate only as a one-time measure for a period of six months. It further argued that, as a corrective mechanism, project proponents who had commenced projects without obtaining prior EC would be required to pay compensation in accordance with the polluter pays principle for the period during which EC had not been obtained. In addition, they would

¹¹Mittal, Sunil. *Introduction to Environmental Impact Assessment (EIA)*, Retrieved July 15, 2026, from <https://ebooks.inflibnet.ac.in/esp12/chapter/introduction-to-environmental-impact-assessment-eia/>

¹² Environment Impact Assessment Notification, 2006, Para 7.

For general queries or to submit your research for publication, kindly email us at ijalr.editorial@gmail.com

be required to undertake remedial measures for environmental restoration and the rehabilitation of affected communities. The Union also submitted that the grant of EC at a later stage was necessary to protect the interests of project proponents and to avoid the wastage of substantial investments already made in the construction and implementation of the project.

2.2.Observations and decision

The Supreme Court observed that the Central Government had represented that the notification was a one-time measure intended to remain in force only for a period of six months. However, contrary to this assertion, it was extended by an additional thirty days, giving rise to criticism that the Government had departed from its original position. It was also observed that merely requiring project proponents to pay monetary compensation cannot undo the environmental harm that may already have been caused. Where a project is undertaken without obtaining prior EC and such clearance is granted only at a later stage, the very purpose of the EIA process is defeated. Such an approach dilutes the mandatory requirement of prior environmental appraisal and leads to gross violations of the Environment (Protection) Act, 1986. The Court observed that, instead of granting ex post facto environmental clearance, the project proponent is liable to penal action under Section 15 of the Environment (Protection) Act, 1986 for undertaking activities in contravention of the statutory requirements.

The Court further held that notifications permitting ex post facto environmental clearance cannot be regarded as purely prospective in nature. By granting environmental clearance after a project has already commenced or been completed, such notifications regularize the activities that were actually illegal at the time they were undertaken.

The Court relied on the *Electrosteel Steels Ltd. v. Union of India and Ors.*¹³ case and held that ex post facto environmental clearances are completely alien to environmental jurisprudence. The requirement of prior EC is an integral part of the right to a healthy environment under Article 21 of the Constitution of India. When environmental clearance is granted before the commencement of a project, the project proponent is required to comply with various environmental safeguards and conditions, including measures to prevent air and water pollution. However, where ex post facto environmental clearance is granted after the

¹³ (2023) 6 SCC 615.

For general queries or to submit your research for publication, kindly email us at ijalr.editorial@gmail.com

<https://www.ijalr.in/>

project has already commenced or become operational, these conditions cannot effectively serve their preventive purpose, as environmental damage may already have occurred. The Court therefore held that such one-time measures undermine the objective of environmental regulation and are likely to result in increased environmental pollution.

The Court declared the 2017 Notification, the Office Memorandum dated 7 July 2021, and all consequential circulars, orders, office memoranda, and notifications issued to implement them as illegal and unconstitutional. It further prohibited the Central Government from issuing any future circulars, orders, office memoranda, or notifications that permit the grant of ex post facto Environmental Clearance. However, in order to avoid uncertainty and administrative disruption, the Court clarified that Environmental Clearances already granted under the 2017 Notification and the 2021 Office Memorandum would continue to remain valid and would not be disturbed by its decision.

The judgment reinforces the principle that prior EC is a mandatory statutory requirement and cannot ordinarily be substituted by ex post facto approval. By striking down executive measures that sought to regularize environmental violations, the Court reaffirmed the preventive nature of the EIA regime and the constitutional commitment to environmental protection under Article 21.

3. Confederation of Real Estate Developers of India (CREDAI) v. Vanashakti and Another: A Shift in Judicial Approach

3.1.Facts of the case

The review petition was filed on the ground that certain specific paragraphs from the cited judgments, which supported the grant of ex post facto environmental clearances, were not brought to the attention of the Court. Reliance was placed on *S. Nagaraj and Others v. State of Karnataka and Another*,¹⁴ wherein the Court held that it has an inherent duty to rectify, revise, or recall its orders whenever it is demonstrated that they were passed on an erroneous or mistaken assumption of facts.

It was submitted in support of the review petition that several projects, including the construction of the AIIMS Hospital in Odisha, a project undertaken by SAIL, and the Greenfield Airport in Karnataka, had been initiated pursuant to the 2021 Office Memorandum and had progressed to an advanced stage after complying with the prescribed

¹⁴1993 Supp (4) SCC 595.

For general queries or to submit your research for publication, kindly email us at ijalr.editorial@gmail.com

procedural requirements. It was further submitted that these projects were in the final stages of obtaining EC. Consequently, if the Vanashakti judgment was to be implemented at that stage, it would result in substantial financial losses. The demolition of partially or substantially completed structures and their subsequent reconstruction would require significant additional expenditure and would constitute an unjustifiable waste of public funds and resources.

On the other hand, counsel opposing the review of the Vanashakti judgment contended that the review petition was not maintainable. It was argued that the grant of ex post facto environmental clearance is illegal and contrary to the principles of environmental jurisprudence. The project proponents were fully aware of the statutory requirement to obtain prior EC before commencing their projects. Therefore, having knowingly failed to comply with the provisions of the EIA framework, they must bear the consequences of their unlawful actions. It was further submitted that no party should be permitted to derive any benefit from its own illegal act.

3.2.Judgments supporting Ex Post Facto ECs-

In *Common Cause v. Union of India*¹⁵, court made it clear that mining could resume only after full compliance with environmental laws and all legal requirements with respect to ECs. Although mining without prior EC was not accepted, the Court allowed mining operations to continue once the legal violations had been rectified.

The Court also observed that its earlier decisions in *Goa Foundation v. Union of India*¹⁶ and *Lafarge Umiam Mining (P) Ltd. v. Union of India*¹⁷ had recognized the grant of ex post facto environmental clearances in appropriate cases. In these cases the Court held that revoking ECs and directing closure of industrial units would be disproportionate so the Court imposed environmental compensation of ₹10 crore on each project to balance the environmental damage.¹⁸

The Court concluded that where the adverse consequences of shutting down an industry outweigh those of regularising its operations, and the industry otherwise complies with

¹⁵(2018) 5 SCC 1.

¹⁶2005) 11 SCC 559.

¹⁷(2011) 7 SCC 338.

¹⁸*Ibid.*

For general queries or to submit your research for publication, kindly email us at ijalr.editorial@gmail.com

<https://www.ijalr.in/>

applicable environmental standards, ex post facto environmental clearance may be granted in accordance with law and the relevant statutory framework.

Similarly, in *Electrosteel Steels Limited v. Union of India and Others*¹⁹ the Court held that an industrial establishment contributing to the economy and providing employment should not be closed merely because it had shifted its site without obtaining prior EC, provided that it otherwise complied with pollution control norms and could regularise its operations.

3.3.Observations and decision of the Court

The Court observed that implementing the *Vanashakti* judgment would require the demolition of projects such as hospitals, medical colleges, airports, and effluent treatment plants, leading to the loss of crores of public funds. The Court questioned whether demolishing projects that could be legally regularised would promote environmental protection or merely result in unnecessary waste of public resources, with even greater consequences for private sector projects.

The Court recalled the *Vanashakti* judgment because it was based on mistaken factual assumptions and would have serious adverse consequences. It was held that enforcing the judgment would require loss of public funds, environmental harm, and waste of resources. The Court also noted that the 2017 Notification and the 2021 Office Memorandum already provide adequate penalties and regularisation mechanisms, allowing legally permissible projects to continue after compliance.

4. Critical Analysis of the judgments

The Court adopted contrasting approaches in the two judgments. In *Vanashakti*, it completely prohibited ex post facto environmental clearances (ECs), whereas in the review judgment, it allowed them subject to compliance. However, the consequence of this flexible approach is that violators may once again exploit loopholes in the existing regulatory framework to escape liability, just as they previously ignored the provisions of the EIA notification despite being fully aware of the legal requirements. It is a well-established principle that *ignorance of law is no excuse*. Notifications permitting ex post facto

¹⁹(2023) 6 SCC 615.

For general queries or to submit your research for publication, kindly email us at ijalr.editorial@gmail.com

<https://www.ijalr.in/>

environmental clearances merely provide an indirect means of protecting lawbreakers while sidelining environmental concerns in the name of development.

The implementation of the principles of environmental law is of utmost significance in ensuring environmental justice. However, it can be observed that the review judgment has clearly overlooked the precautionary principle. By upholding the validity of the 2006 Notification and the 2021 Office Memorandum, the review judgment has substantially undermined the precautionary principle. Granting EC after projects have already commenced defeats the very purpose of precaution. The essence of the principle lies in preventing environmental damage before it occurs, not in legitimising activities after the damage has already been inflicted. Consequently, the review decision appears to be inconsistent with the precautionary principle which is one of the foundational principles of environmental jurisprudence.

The *Vanashakti* judgment effectively applies both the polluter pays principle and the precautionary principle by imposing monetary compensation on project proponents and by taking action against those who deliberately failed to comply with the provisions of the EIA Notification without any valid justification. The judgment adopts a preventive approach aimed at avoiding further environmental degradation by recognizing that once environmental laws are violated, the resulting damage often cannot be fully remedied. It therefore prioritizes environmental protection over developmental interests, acknowledging that such an approach is the need of the hour in light of the growing environmental crisis.

Although various judicial decisions have been cited in support of granting ex post facto environmental clearances, environmental conditions are continuously deteriorating, and legal responses must evolve accordingly. The Environmental Performance Index (EPI), published by the Yale Center for Environmental Law & Policy, ranked India 176th out of 177 countries, reflecting the serious state of environmental governance and serving as a strong warning that stricter enforcement of environmental laws is urgently required.²⁰

Undoubtedly, substantial investments may have been made in projects undertaken without obtaining prior environmental clearance. However, granting ex post facto environmental clearances in the name of public interest or for the purpose of regularising

²⁰Environmental Performance Index, *Environmental Performance Index*. Retrieved July 25, 2026, from <https://epi.yale.edu/indicator/2026/EPI>

statutory violations would effectively legitimise unlawful conduct. Such an approach is likely to promote a "pollute and pay" culture, creating a dangerous precedent for developers. Project proponents may proceed with environmentally harmful activities without obtaining prior clearance, secure in the knowledge that they can subsequently seek regularisation by paying monetary compensation.

There is, therefore, a pressing need to create a strong deterrent through judicial decisions such as *Vanashakti*, ensuring that future projects are undertaken only after a prior environmental clearance has been obtained. In the long run, refusing to grant ex post facto environmental clearances better serves the public interest by promoting compliance with environmental laws, preventing irreversible environmental harm, and strengthening the rule of law in environmental governance.

5. Conclusion

The analysis of the Supreme Court's decisions reveals a significant change in India's environmental jurisprudence. While the *Vanashakti* judgment adopted a strict approach by rejecting ex post facto environmental clearances and reinforcing the precautionary and polluter pays principles, the review judgment introduced a more flexible approach by permitting such clearances under certain conditions. Although this shift seeks to balance developmental interests with environmental protection, it raises serious concerns regarding the effectiveness of environmental governance and the enforcement of the EIA framework.

References

- The Constitution of India, 1950.
- The Environment (Protection) Act, 1986
- The Environment (Protection) Rules, 1986
- The Environment Impact Assessment Notification, 2006

For general queries or to submit your research for publication, kindly email us at ijalr.editorial@gmail.com

<https://www.ijalr.in/>

- Venkat, Aruna. (2011). *Environmental Law and Policy*. Prentice Hall India Learning Private Limited.
- Dube, Indrajit. (2007). *Environmental Jurisprudence Polluter's Liability*. Lexis Nexis.
- Convention on Biological Diversity. *What is impact assessment*. Retrieved July 18, 2026, from <https://www.cbd.int/impact/whatis.shtml>
- Mittal, Sunil. *Introduction to Environmental Impact Assessment (EIA)*, Retrieved July 15, 2026, from <https://ebooks.inflibnet.ac.in/esp12/chapter/introduction-to-environmental-impact-assessment-eia/>
- Bhardwaj, Prachi. *Ex-Post Environmental Clearances: What the Supreme Court's 2:1 Verdict Says – Majority v Dissent*. Retrieved July 19 2026, from <https://www.scconline.com/blog/post/2025/11/19/ex-post-environmental-clearances-sc-2025-review-vanashakti/>

Environmental Performance Index, *Environmental Performance Index*. Retrieved July 25, 2026, from <https://epi.yale.edu/indicator/2026/EPI>

For general queries or to submit your research for publication, kindly email us at ijalr.editorial@gmail.com

<https://www.ijalr.in/>