

The Law Comes Full Circle on the Issue of Ex Post Facto Environmental Clearance

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Introduction

In *Vanashakti v Union of India*, 2026 INSC 761 a three-judge bench of the Supreme Court pursuant to review proceedings settled the long-contested issue of *ex post facto* Environmental Clearance (EC) granted under the Environment Impact Assessment Notification, 2006 (EIA Notification, 2006). The Court held that the prior EC regime is mandatory in nature and upheld the validity of the 2017 Notification issued by the Ministry of Environment, Forest and Climate Change (MoEFCC) as a time bound amnesty scheme, and struck down the 2021 Office Memorandum (2021 OM) as an impermissible administrative action with prospective effect. The Court passed a common judgment and order in a group of petitions.

The judgment is significant as it clears the ambiguity around the grant of EC on **ex post facto** basis pursuant to the recall of the earlier two-judge Bench decision in *Vanashakti v Union of India*, 2025 SCC OnLine SC 1139 (*Vanashakti I*). See our ERGO updates of [May 2025](#) and [November 2025](#) on **Vanashakti I** and the Supreme Court's decision in review to recall **Vanashakti I**. The decision brings much needed clarity for project proponents, regulatory bodies and environmental protection organisations.

Background

The EIA Notification, 2006, issued under the Environment (Protection) Act, 1986 (EPA, 1986), requires a project proponent to obtain a prior EC before the commencement of any construction work for a project or the expansion or modernisation of an existing project. Despite the mandatory character of the prior EC regime under the EIA Notification 2006, several projects were operating without obtaining a prior EC. These widespread violations were regularised by the Government by way of Notifications or Office Memorandums over the years. In 2017, the MoEFCC introduced an amnesty scheme by way of a one-time six-month window for projects which were in breach on the date of the notification to apply for grant of *ex post facto* EC after fulfilling stringent conditions of damage assessment and remediation (2017 Notification). Subsequently in 2021, the MoEFCC issued an Office Memorandum (2021 OM) which prescribed a Standard Operating Procedure for MoEFCC to identify and deal with violation cases, purportedly in compliance with the National Green Tribunal's directions in *Tanaji B. Gambhire v Chief Secretary, Government of Maharashtra*, 2021 SCC OnLine NGT 961.

The validity of both the 2017 Notification and 2021 OM were challenged before the Supreme Court in *Vanashakti I* and a two-judge bench of the Supreme Court struck down both the 2017 Notification and the 2021 OM, holding that the concept of an **ex post facto** EC is completely alien to environmental jurisprudence.

In a review petition, a three-judge bench by a 2:1 majority recalled *Vanashakti I* on the ground that the judgment was rendered without considering the coordinate Bench decisions in *Pahwa Plastics (P) Ltd. v Dastak NGO*, (2023) 12 SCC 774 and *D. Swamy v Karnataka State Pollution Control Board*, (2023) 20 SCC 469. The three-judge bench in Review did not decide on the validity of 2017 Notification or the 2021 OM; rather the bench in Review restored *Vanashakti I* for a fresh hearing before a three-judge bench. The validity of the 2017 Notification and the 2021 OM were left to be determined afresh by a three-judge Bench pursuant to the review proceedings.

The Supreme Court's Decision Pursuant to the Review Proceedings

The three-judge Bench held that the prior EC regime under the EIA Notification, 2006 is mandatory. The Court clarified that in its previous rulings of *Common Cause* and *Alembic Pharmaceuticals*, it had described *ex post facto* EC as "alien" to environmental jurisprudence. However, this does not mean that there is an absolute bar on the Centre's power to institute a narrowly drawn amnesty scheme in appropriate cases; this must be read in the background of the 2006 EIA Notification as in force.

The Court while upholding the 2017 Notification held that the Central Government has sufficient power under Section 3 of Environment (Protection) Act, 1986 (EPA) read with Section 21 of the General Clauses Act, 1897 to enact an amnesty scheme for certain identified projects or for specific categories of projects which are essential for furthering a larger public interest, as was done in the case of the decriminalisation of regulatory contraventions under the EPA, 1986 through the Jan Vishwas (Amendment of Provisions) Act, 2023.

However, the Court prospectively struck down the 2021 OM as *ultra vires*, holding that the 2021 OM was an administrative decision that went beyond its ambit to establish a permanent policy of granting ECs to projects commenced without first obtaining an EC. The Court was of the view that the OM also failed to lay down intelligible criteria on how the MoEFCC would determine which projects qualify for **ex post facto** EC and did not establish any rational connection between such determination and a supervening public interest.

The Court further held that while the Central Government can decide to grant EC on a **post facto** basis, this may only be done through a valid statutory notification issued under Section 3 of EPA, 1986, and not by a mere administrative order. The Court also found that the 2021 OM failed the tests of proportionality and reasonableness and was thus inconsistent with Articles 14 and 21 of the Constitution.

In this context, the Court expressly disapproved the reasoning in *Electrosteel Steels Ltd v Union of India*, (2023) 6 SCC 615 to the extent it suggested that the EPA, 1986 and the EIA Notification, 2006 allow for the grant of EC on a **post facto** basis. It held that this approach overlooked the mandatory nature of the prior EC requirement and was incorrect in law.

Operative Directions

The Supreme Court prospectively set aside the 2021 OM. Notably, the Court has safeguarded the grant of an EC already issued under the 2017 Notification or the 2021 OM, unless the grant of the EC is otherwise challenged on merits. An EC granted either under the 2017 Notification or the 2021 OM is not automatically affected by the judgment.

Further, an application for EC which is currently pending or contemplated under the 2017 Notification or the 2021 OM shall be taken to its logical conclusion in accordance with law. No further applications for grant of EC under the 2017 Notification or the 2021 OM are to be considered by MoEFCC. An EC already granted under the 2017 Notification read with the 2021 OM remains valid unless individually challenged.

The Central Government has also been restrained from granting an EC on *ex post facto* basis by way of an administrative order for a project that was started in contravention of the provisions of the EIA Notification, 2006. Any subsequent amnesty scheme must be introduced by way of a proper notification under Section 3 of the EPA, 1986.

The Court has further made it clear that these directions do not limit its own powers under Article 142 of the Constitution to grant EC on *ex post facto* basis in appropriate cases where such relief is necessary to effect complete justice.

Comments

With the Supreme Court's judgment the law has come full circle: the Court reiterated fundamental and well-established principles that **ex-post facto** clearance finds no place in the EIA Notification and prior environmental clearance remains the norm. The Court also recognised that the Government, in the interest of balancing environmental protection and ensuring sustainable development, has in the past introduced limited amnesty schemes, and it still retains the power to do so again in future, but only in limited situations and through proper statutory process. This is consistent with the Supreme Court's own approach in the

past where the Court while invoking its powers under Article 142 has permitted projects to continue to operate subject to conditions, including payment of environmental compensation and pursue their applications for environmental clearance to ensure sustainable development.

A project proponent whose application is pending for grant of EC can apply to MoEFCC and SEIAA and request for an expeditious disposal of its application. If the project proponent is in violation of the EIA Notification, 2006 and the project has not received a prior EC, the applicant could approach the Hon'ble Supreme Court requesting the Court to exercise its powers under Article 142 to grant EC on *ex post facto* basis.

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