THE PENDULUM OF ENVIRONMENTAL PRAGMATISM: A CRITICAL APPRAISAL OF CONFEDERATION OF REAL ESTATE DEVELOPERS OF INDIA (CREDAI) V. VANASHAKTI

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ABSTRACT

This case commentary delves into the Hon'ble Supreme Court of India's judgement in Confederation of Real Estate Developers of India v. Vanashakti & Ors[1]. The judgement rendered by a three-judge bench in a 2:1 majority on November 18, 2025 recalled the Court's prior ruling in Vanashakti v. Union of India[2] delivered on May 16, 2025. The initial ruling had invalidated the regulatory framework for granting retrospective environmental clearances to projects which had commenced without prior authorization. This commentary analyses the significant jurisprudential shift from the Precautionary Principle to a Principle of Proportionality grounded in economic pragmatism. It questions how the majority applied the per incuriam doctrine to override established environmental regulations. Furthermore, the commentary devotes significant attention to the dissenting opinion of Hon'ble Justice Ujjal Bhuyan, which articulates the hazards of regularizing environmental violations under the umbrella of sunk costs. The commentary also highlights how the judgement formalises the fait accompli doctrine, creating a legal paradox that hollows out prior environmental clearances and safeguards.

[1] *Confederation of Real Estate Developers of India (CREDAI) v Vanashakti & Ors* [2025] INSC 1326.
[2] *Vanashakti v Union of India* [2025] INSC 718.

I. Introduction:

The Indian environmental law jurisprudence has been characterized as a constant tension between the rigid enforcement of ecological safeguards and the demands of national infrastructure. For decades, the Indian judiciary has been celebrated for its transformative role in elevating environmental protection to the status of a fundamental right under Article 21[3] of the Constitution of India. However, the judgment in Confederation of Real Estate Developers of India v. Vanashakti & Ors[4] represents an important moment in environmental jurisprudence where the judicial pendulum has swung towards a balanced approach that prioritizes economic assets over procedural compliance. On November 18, 2025, a three-judge bench of the Hon'ble Supreme Court recalled its own ruling from May 16, 2025. The earlier judgement in Vanashakti v Union of India[5] had specifically denounced ex post facto Environmental Clearances as an anathema to the law, holding that the requirement for prior environmental clearance under the Environmental Impact Assessment Notification 2006[6] was a non-negotiable prerequisite. This case commentary explores the implications of this recall, questioning whether this move facilitates a de facto license to vitiate the law for large scale projects and whether the sanctity of the Rule of Law is being bent to economic considerations in the face of massive private and public investments.

II. Factual Matrix and Statutory Framework:

The legal conflict begins from the regulatory evolution of the Environment (Protection) Act 1986. Under Section 3[7] of the Act, the Central Government released the EIA Notification[8] on 14 September 2006, mandating prior environmental clearance for projects specified in the Schedule of the Act[9]. This Notification served to formalise the Precautionary Principle, guaranteeing environment impact assessments before irreversible physical alterations occur to the environment. Nevertheless, the executive aimed to manage a breach situation where projects started without the environment clearance. To address this, the Ministry of Environment, Forest and Climate Change issued Notification SO 804(E)[10] on 14 March 2017

[3] The Constitution of India 1950, art 21.
[4] *Confederation of Real Estate Developers of India (CREDAI)* (n 1).
[5] *Vanashakti* (n 2).
[6] Environmental Impact Assessment Notification, S.O. 1533(E) [2006].
[7] Environment (Protection) Act 1986, s 3.
[8] S.O. 1533(E) [2006] (n 6).
[9] Environment (Protection) Act 1986
[10] Ministry of Environment, Forest and Climate Change, Appraisal of proposal of violation of EIA Notification,

under the Environment Protection Act, followed by an Office Memorandum[11] dated 7 July 2021, which established a Standard Operating Procedure for retrospective regularisation of environmental clearances. On May 16, 2025, a two-judge bench of the Hon'ble Supreme Court of India struck down the Notification and the Officer Memorandum as ultra vires the Environment Protection Act, asserting that the executive instructions cannot surpass the statutory mandate of prior assessment of projects.[12] This led to a crisis for large-scale projects, such as hospitals and airports, which were abruptly declared illegal and at the risk of demolition. The ensuing review petition resulted in the present decision which recalled the earlier verdict and reinstated the legitimacy of retrospective clearances, indicating that executive comfort may supersede statutory compliance.

III. The Majority Verdict:

The majority ruling, authored by Hon'ble Chief Justice of India BR Gavai (Retd.) and Hon'ble Justice K Vinod Chandran, based its verdict on a precise application of the doctrine of per incuriam. The Supreme Court held that the May 2025 bench made a mistake by disregarding precedents from coordinate benches, notably Pahwa Plastics Pvt Ltd v Purushottam Dass[13] and Electrosteel Steels Ltd v Union of India[14]. These cases established that retrospective clearances could be issued in exceptional circumstances when a project otherwise met with environmental standards. The majority opined that judicial discipline requires adherence to established coordinate bench rulings unless a case is officially referred to a larger bench. This reliance on the doctrine of per incuriam granted the procedural basis for the Court to pivot from the statutory mandate of the EIA Notification to a more adaptable interpretation of the Central Government's powers under Section 3[15] of the Environment (Protection) Act 1986. Aside from technical matters, the majority embraced a philosophy of economic pragmatism. The Court noted that tearing down projects that offer substantial public utility would be detrimental to the national interest. Hon'ble Chief Justice Gavai (Retd.), who authored the main judgement remarked that "demolition of the projects already completed would rather than being in public interest would result in throwing the valuable public resources in dustbin"[16]. Applying the

2006 (India, 2017) S.O. 804(E).

[11] Ministry of Environment, Forest and Climate Change, Standard Operating Procedure (SOP) for Identification and handling of violation cases under EIA Notification 2006 (India, 2021)

[12] *Vanashakti* (n 2).

[13] *Pahwa Plastics Pvt Ltd v Purushottam Dass* [2022] INSC 123.

[14] *Electrosteel Steels Ltd v Union of India* [2021] INSC 321.

[15] Environment (Protection) Act 1986, s 3.

[16] *Confederation of Real Estate Developers of India (CREDAI)* (n 1) 83.

Principle of Proportionality, the majority determined that financial penalties under the Polluter Pays Principle provide a more sensible solution than demolition.

IV. The Dissenting Perspective:

In his dissenting opinion in Confederation of Real Estate Developers of India v. Vanashakti, Justice Ujjal Bhuyan sharply criticized the majority's decision to recall the earlier ban on retrospective environmental clearances, characterizing the review judgment as an innocent expression of opinion that overlooks the very fundamentals of environmental jurisprudence. He also asserted that the precautionary principle is the cornerstone of environmental jurisprudence, whereas the polluter pays principle is only a principle of reparation,[17] and cautioned that the former cannot be given a short shrift by relying on the latter. Citing his disagreement based on the constitutional responsibility to protect the environment per Article 21[18], he determined that the majority's ruling was a step in retrogression and remarked that the deadly Delhi smog reminds us every day about the hazards of environmental pollution[19]. Justice Bhuyan emphasized that the Supreme Court should not appear to be regressing on the robust environmental jurisprudence that has developed in India. He ultimately noted that ecology and development are not opposing forces but essential elements of the foundational framework for sustainable development.

V. The Fait Accompli Trap

The ruling in CREDAI v Vanashakti effectively solidifies the doctrine of fait accompli by recognizing sunk costs and physical completion as legitimate reasons for regularisation. This establishes a distorted incentive, prompting developers to hasten construction, knowing that upon hitting an investment benchmark the courts will be hesitant to order demolition. This culture of build first, apologize late weakens the deterrent effectiveness of the 1986 Act[20], turning a required prior step into a negotiable procedural obstacle. When the judiciary acknowledges that the presence of a structure legitimizes its legality, it falls into a trap in which the offender's investment serves as their strongest legal argument. This incentivizes rapid illegal construction, since as a project advances, the more disproportionate demolition appears. For projects valued in thousands of crores, a financial penalty serves not as a deterrent but

[17] *Confederation of Real Estate Developers of India (CREDAI)* (n 1) 181.
[18] The Constitution of India 1950, art 21
[19] *Confederation of Real Estate Developers of India (CREDAI)* (n 1) 180.
[20] Environment (Protection) Act 1986

rather as a manageable transaction fee. By the time a case reaches the court, the environment has been permanently affected, and the court must decide between strict environmental principles and significant financial losses. The choice of the majority to prefer the latter endorses the tactics of offenders who deliberately evade the EIA process.

VI. The Demolition Paradox

A highly debated aspect of the majority's argument is the Demolition Paradox. They argued that demolishing a large, unlawfully built structure constitutes an environmental risk, producing significant dust, debris, and soil contamination. Though factually correct, this establishes a precarious legal dilemma that the environment is employed as a safeguard for an unlawful venture since its removal would lead to additional environmental damage. If implemented broadly, it makes nearly all significant environmental infractions permanent after they are physically built. After a structure is erected, its demolition will consistently have environmental expenses. This logic essentially establishes a lasting immunity for any project substantial enough to assert that its destruction poses an environmental disadvantage. This paradox weakens the environmental rule of law by employing the costs of correction to rationalize the perpetuation of the wrong. By embracing this paradox, it is indicated that prior approval is not mandatory for projects substantial enough to claim that removal would cause ecological strain. This informs developers that after achieving a specific level of construction, the law is no longer able to affect them. The Demolition Paradox functions as a means of deregulation, guaranteeing that once harm is inflicted by construction, it can never be reversed by court rulings

VII. Weaponisation of the Polluter Pays Principle

The CREDAI ruling signifies an important change in the Polluter Pays Principle, transitioning it from a remedial approach to a means of regularization. Traditionally, this principle mandates that those responsible for damage must cover the costs of restoration. Nonetheless, it has now been mobilized to offer an avenue for ex post facto approvals. For projects worth billions of rupees, a financial penalty is insignificant and is a trivial cost of doing business. When it is less expensive to break the law than to follow it, the law loses its authoritative power. This weaponization enables the executive and judiciary to circumvent the stringent prior requirement of the EIA Notification by merely assigning a monetary value to the infringement, transforming environmental law into a system of purchasable permits instead of mandatory

standards that need to be fulfilled. This enables the acquisition of legality, where legality is treated as a commodity attained retroactively. When financial sanctions are employed to address procedural circumventions, they fail to alleviate the overall environmental burden on delicate ecosystems. The weaponization of this principle guarantees that if a project has the funds to cover the penalty, it can disregard laws intended to safeguard the environment. The outcome of this ruling will create a regulatory framework that prioritizes economic growth over environmental concerns.

VIII. Conclusion

The annulment of the Vanashakti verdict in November 2025 has offered prompt relief to projects, but it has also plunged the Rule of Law into significant uncertainty. Although the emphasis on economic pragmatism by most may avoid wasting national resources, it achieves this by undermining the essence of mandatory prior compliance. The extended ecological consequences, reflected in the weakening of deterrence and the normalization of breaches, could significantly surpass the short-term monetary gains from salvaging projects from demolition. This situation reveals a significant disparity between executive policies and legal requirements. While the government persists in utilizing ad-hoc Office Memoranda to circumvent the stringent stipulations of the 1986 Act, the judiciary has now endorsed this approach under the pretence of proportionality. Nevertheless, protecting sunk costs must not infringe upon the constitutional right to a healthy environment. The recall of the Vanashakti ruling does not resolve the matter. To ensure environmental laws do not turn into simple administrative recommendations, the previous requirement must be reinstated as a compulsory protection. Until a resolution is reached, the environment will continue to be a lesser priority than development, indicating a major setback in India’s pursuit of a sustainable future.