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Development And Clean Air Are Not Binary Choices



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Last week, the Supreme Court of India handed developers a surprising reprieve in *Confederation of Real Estate Developers of India (CREDAI) v. Vanashakti & Ors. 2025*. In a 2:1 verdict authored by former Chief Justice of India BR Gavai and Justice K Vinod Chandran (with Justice Ujjal Bhuyan dissenting), the Court reopened the door to *ex post facto* environmental clearances (ECs), i.e., approvals granted to a project after construction has already begun, without the mandatory prior environmental scrutiny.

The move is controversial not just because of what it allows, but because of what it overturns — a hard-hitting judgment from May that categorically banned the practice. In this original *Vanashakti v. Union of India* ruling, a two-judge bench (comprising retired Justice Abhay S Oka and Justice Bhuyan) had struck down the Union environment, forest, and climate change ministry's 2017 Notification and 2021 Office Memorandum allowing *ex post facto* ECs under strict conditions, calling the practice contrary to the principles of environmental protection.

The ruling was hailed as a progressive milestone in environmental jurisprudence, reinforcing the principle that environmental protection must come before economic gain. But shortly after, CREDAI (India's largest association of real estate developers) filed for review with support from Union and state governments. They argued that the judgment had failed to consider precedents where the Supreme Court had approved *ex post facto* clearances in exceptional situations.

The Court has now reopened that door.

So what's the real impact of this ruling? Real estate companies and developers can now initiate projects even in ecologically sensitive zones, proceed with construction, and later seek regularisation with fines or remediation conditions they can budget for. The earlier deterrents of demolition, legal challenge, and reputational harm are now softened. It also sends a dangerous signal: In the tug-of-war between profit and planet, short-term convenience can trump long-term survival.

Over time, more projects will likely begin without prior clearances, especially in areas where delay is likely. Proponents argue the judgment is pragmatic.

Demolishing half-built projects or halting ongoing infrastructure would cause massive economic losses, waste public funds, and ironically, generate more pollution and debris. Workers and communities that rely on these projects would bear the brunt. In many cases, procedural delays, not deliberate violations, are the reason projects start without prior clearance.

Yet this pragmatism comes at a steep cost. By allowing retroactive approvals once again, the Supreme Court has effectively signalled that rules can be negotiated after the fact. Developers know that demolition is politically unpalatable and economically costly.

If violating environmental norms can be regularised later, why not proceed first and negotiate later?

Many may calculate that paying fines works out cheaper than following the law. Over time, this threatens to erode the precautionary principle, the cornerstone of environmental law that holds that damage must be prevented before it happens. Because once rivers are diverted, wetlands filled, forests cleared, or groundwater depleted, no penalty can undo the damage.

Justice Bhuyan dissented strongly. In his dissenting opinion, he slammed the decision, arguing that environmental protections cannot be reduced to a financial transaction by giving a free pass to rule-breakers who are willing to “pay to pollute.” Bhuyan called ex post facto ECs against the spirit of environmental law, highlighting that they betray Article 21 (right to a clean environment) and Article 51A (duty to protect environment).

Decisions that have a retrospective impact like this tend to create perverse incentives which end up worsening the problem; a dynamic famously known as the cobra effect. In colonial Delhi, the British introduced a bounty on dead cobras to reduce their numbers. Instead, it became a perverse incentive for people to breed cobras to collect the reward, ultimately increasing the population of snakes. It’s entirely reasonable to fear that the same pattern could play out — with more violations, not fewer.

India needs infrastructure. It also needs clean air to breathe and clean water to drink. Pretending these goals are mutually exclusive is lazy political thinking. The recall judgement avoids the spectacle of blasting apart half-built towers, but risks setting off a quieter, slower crisis; a slow, legalised erosion of environmental safeguards. And the environment won’t wait for a larger bench.

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